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*An address delivered under the title of "The Natural Law and Private and Religious Schools" at the Fourth Annual Conference on the Natural Law, held by the Guild of Catholic Lawyers of New York, December 15, 1956, in the Auditorium of the Association of the Bar of the City of New York.*

# LAW AND THE PAROCHIAL SCHOOL: A FORMULATION OF CONFLICTING POSITIONS

JOHN C. HAYES\*

THE PROPER LEGAL RELATIONSHIP of the American States to sectarian religious instruction (whether afforded on the periphery of the public school curriculum at the elementary and secondary levels, or as the core of the total instruction in parochial schools at the same levels) is the subject of disagreement. In fact, there are few topics today of which so much has been said by so many from such divergent points of view.

The popular expression of the current status of federal constitutional law on this topic represents the State as saying to all sectarian religious groups: "I am a neutral, and my attitude is *hands off*. So I won't take any part in sectarian religious instruction. But if your group wants to give such instruction, go ahead. I won't hinder you, but I won't help you either." The basic reason for this neutrality is a keen awareness of the utter absence of competence on the part of the State in the field of religion.

It is, moreover, the popular impression that this American constitutional position, thus popularly expressed, is a very acceptable and reasonable compromise or resultant between two conflicting extremist positions, which in turn are popularly expressed as follows: (a) a Natural Law position, purportedly based on reason, that the relationship should be, not neutralist, but one of positive, though non-preferential, support; and (b) an Absolute Separatist position, purportedly based on a Jeffersonian figure of speech (the wall of separation between Church and State), that the relationship should be, not neutralist, but one of mutual non-recognition. For ease of reference, I shall designate the Separatist position

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as the POAU position, because that organization (Protestants and Other Americans United for the Separation of Church and State) has been most prominently identified with that position in the public eye.

Let me restate the three positions in



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terms of the basic attitude of the State toward the Church and toward religious activities such as sectarian religious instruction:

I. *Natural Law*: relationship of non-preferential support: we recognize your existence

and we support your sectarian educational activities without preference or discrimination.

II. *Constitutional Law*: relationship of neutrality: we recognize your existence, and we neither hinder nor help your sectarian educational activities. We won't support you, but we won't get in your way either.

III. *POAU*: no relationship: we ignore your existence, and therefore we ignore your sectarian educational activities. Naturally, we won't support you, and we will act without any recognition of, or regard for, any adverse effect of our action on your activity.

My purpose in this article is to examine those three positions and to formulate them as accurately and as professionally as I can in the hope that, once so formulated in parallel structure, analytical comparison and contrast may enable us, if not to compose, then at least to explain the differences in the three positions. For uniform specificity, I shall use the parochial school of

elementary and secondary level (whether Catholic, Lutheran, Episcopalian, or Jewish) as the embodiment of sectarian religious instruction by the Church. This parochial school offers its pupils sectarian instruction within a curriculum of secular subjects of study, all of which are in some sense permeated by the particular sectarian belief. And this parochial school exists as the selected agent of the parents of its pupils to achieve the total formal education of these pupils on the elementary and secondary levels. I shall examine two legal aspects of the parochial school: (a) its right (if any) to exist in the State; and (b) its right (if any) to State tax support. Hence, I propose to formulate the three positions (Natural Law, Constitutional Law, POAU) on the right (if any) of parochial schools to exist in the State, and on the right (if any) of the parochial schools to State tax support.

I should add that by natural law, I mean the very simple concept of the Creator legislatively saying to His physically-free human creatures: "Be what your reason tells you that you are. Hence, be what I made you. Be yourself, as your own reason discovers and discloses yourself to you." Natural law, then, is essentially composed of the dictates of reason establishing what in a given case conforms or does not conform to man's human nature (considered not only in itself, but also in its essential relationship to its Creator, to its fellow man, and to subordinate creatures) and obliging each man to do some of those things which conform and to avoid doing all of those things which do not conform.<sup>1</sup> And by the State, I simply mean society politically organized and therefore pos-

<sup>1</sup> Encyclical Letter of Leo XIII, *Libertas Praestantissimum* (1888).

essed of civil authority, to be wielded by the power arm of government in such a way as to achieve the end for which the State exists, namely, the common good in the temporal order to the extent permitted by subsidiarity.<sup>2</sup>

### A. The Right of the Parochial School to Exist in the State

The three positions on this topic are substantially the same. While approaches and points of emphasis differ, the common acceptance of the legal right of the parochial school to exist in the State is based upon a substantial acceptance of the view that the child does not belong to the State; rather, the State must serve the child and must do so under the direction and control of the parent. On the other hand, both parent and child have the obligation of seeing to it that the special interest of the State in the education of the child is properly served.

I. The Natural Law position was admirably expressed (together, incidentally, with the Constitutional Law position) by the Catholic Bishops of the United States in their 1955 Annual Statement, which observed that the primary right of the parent to educate his child was established in American law and was basic to the very definition of freedom. That right was, moreover, antecedent to any human law, vested in the very nature of a parent, demanded as a fulfillment of his parenthood, and reflective of the inviolability of his human person and of his dignity and freedom under God. The conclusion was that religious (and private) education in the United

States rests upon the law of nature as well as upon the law of the land. This same conclusion had been expressed by Pope Pius XI in his Encyclical on the Christian Education of Youth; and the same Pontiff had reaffirmed the Natural Law position a year later in his Encyclical on Christian Marriage.<sup>3</sup> Additional authority for the same conclusion is forcefully presented by LeBuffe and Hayes.<sup>4</sup>

On December 1, 1955, the Report of the Committee for the White House Conference on Education, discussing Topic V, recognized the right of parochial schools to exist to implement the primary right of parents to educate their children in such schools. As the basis for these rights, the report referred to "The American Tradition of Education." On December 6, 1955, the *Wall Street Journal* editorially expressed concern over the designated basis, and stated that it would have been more reassuring if the Conference had reasserted the right "for what it is, a right fundamental to liberty and not merely one graciously extended by sufferance."<sup>5</sup> The *Journal* thought that there were not a few educators who had their own private reasons for wishing to reduce the basis of the right from one of law to one of currently tolerated social custom. But this minority effort of some educators, plus some persistent sniping about the "divisiveness" of parochial schools,<sup>6</sup> is the extent of the slight opposition to the legal position, both in

<sup>2</sup> Encyclical Letter of Pius XII, *Summi Pontificatus* (1939). For a very helpful collection of Papal excerpts, see *PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER* (Powers ed. 1952).

<sup>3</sup> Encyclical Letters of Pius XI, *Rappresentanti in Terra* (1929) and *Casti Connubii* (1930).

<sup>4</sup> LEBUFFE & HAYES, *THE AMERICAN PHILOSOPHY OF LAW* 284-94 (4th ed. 1947). See also 2 CRONIN, *THE SCIENCE OF ETHICS* 394-97 (1917).

<sup>5</sup> Editorial, *The Wall Street Journal*, Dec. 6, 1955, p. 14, cols. 1-2.

<sup>6</sup> For the opposed view, see the 1955 Annual Statement of the Catholic Bishops of the United States.

Natural Law and in Constitutional Law, on the right of parochial schools to exist in the American State.

But what one does notice is an undue emphasis on the limitations which attach to this right of parochial schools to exist for the purpose of implementing the primary parental right to direct and control the education of the child. That both rights are limited is again the common legal position, both in Natural Law and in Constitutional Law. The qualification was carefully expressed in the 1919 Annual Statement of the Catholic Bishops of the United States, which reminded the nation that the basic right involved was the right of the child itself, who, owing to his nature and his end, needed education in order to fulfill the Divine Plan for him; hence, the best welfare of the child qualifies the parental right. And so does the independent right of the State to have the child so educated as to be a citizen capable of performing his civic duties and of living in the cultural milieu of his times. In addition, the ordinary State police power controls parents, teachers, and pupils; and the State owes the child the duty of protecting the child's right to an education against any default or neglect on the part of the parent, and also owes child and parent and itself the duty of checking on the parochial school to see that the child is actually receiving there the necessary education to enable it to discharge its civic duties and to attain the immediate end for which it was created.<sup>7</sup>

II. The Constitutional Law position on the right of parochial schools to exist in

<sup>7</sup> Woelfl & O'Shaughnessy, *A Double Revolution?*, 25 HARV. EDUC. REV. 1 (1955). See also Woelfl & Forkins, *The Federal Government and Public School Desegregation: An Inquiry Into Principles*, 18 U. DET. L. J. 393 (1954-55).

the State is the same position as that of the Natural Law, and is based on the same grounds. Contrary to popular belief, the basic case establishing the constitutional position (basic because it first establishes the fundamental proposition of primary parental rights) is not *Pierce v. Society of Sisters*,<sup>8</sup> but *Meyer v. Nebraska*,<sup>9</sup> in which Mr. Justice McReynolds expressed the decision of the Court that a Nebraska state criminal statute (forbidding the teaching in any school in Nebraska of any modern language other than English to any child who had not successfully passed the eighth grade) violated the Fourteenth Amendment in that it constituted state action depriving the plaintiff German teacher (who was teaching reading in German in a parochial elementary school operated by the Zion Evangelical Lutheran Congregation) of his liberty without due process of law.

Mr. Justice McReynolds, still speaking for the Court, then held that the *Meyer* case controlled four cognate cases dealing with similar state statutes and collectively reported under the title of *Bartels v. Iowa*.<sup>10</sup> In three of these four cases the plaintiffs in error were foreign language teachers in parochial schools, while in the fourth case the plaintiff was a school operator. Two Justices (Holmes and Sutherland) dissented on the ground that the statutes were not so unreasonable a restraint on the liberty of teachers or scholars as to violate the Fourteenth Amendment when one regarded the several states as sociological experimental laboratories.

Two years later in the more famous *Pierce* case, Mr. Justice McReynolds, speaking for an unanimous Court, held

<sup>8</sup> 268 U.S. 510 (1925).

<sup>9</sup> 262 U.S. 390 (1923).

<sup>10</sup> 262 U.S. 404 (1923).

that, under the *Meyer* doctrine, an Oregon statute (in effect compelling attendance of normal children at public elementary schools only) violated the Fourteenth Amendment because it constituted an unreasonable interference with the liberty of parents to direct the education of their children, which offense, when the parents were regarded as patrons of the private and parochial schools operated by the plaintiff corporations, in turn constituted an unreasonable deprivation of the property of the plaintiffs.

After another two years, Mr. Justice McReynolds, once again speaking for an unanimous Court in *Farrington v. Tokushige*,<sup>11</sup> held that the fundamental rights of owners, parents, and children, which had been held under the *Meyer-Pierce* doctrine to be protected against adverse state action by the due process clause of the Fourteenth Amendment, were equally protected against adverse federal territorial action by the due process clause of the Fifth Amendment.

In all these cases, the basic doctrine of the *Meyer* case controlled: private and parochial schools have the right to exist in the State and the property rights of their owners and of their teachers are entitled to protection, because of the primarily protected rights of the child to an education and of the parent to direct and control that education for his own child. Mr. Meyer's right to teach reading in German "and the right of parents to engage him so to instruct their children . . . are within the liberty of the Fourteenth Amendment."<sup>12</sup> It was evident that "the legislature has attempted materially to interfere with the calling of modern language teach-

ers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."<sup>13</sup> In the *Farrington* case, the enforcement of the Territorial Act would probably have destroyed most, if not all, of the private foreign language schools; "and, certainly, it would deprive parents of a fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."<sup>14</sup>

In the *Pierce* case, the Oregon statute, under the *Meyer* doctrine, unreasonably interfered with the liberty of parents and guardians to direct the education of the children under their control. The fundamental theory of liberty in the United States excludes any general power in a state to standardize its children by forcing them to accept instruction from public teachers only. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>15</sup> As a simple consequence, the property rights of the plaintiff corporations are entitled to be protected against the unreasonable compulsion exercised by the state over their present and future patrons. The plaintiffs ask, and must be accorded, protection against an arbitrary, unreasonable, and unlawful interference with their patrons by the state, for the reason that such interference results in equally arbitrary, unrea-

<sup>11</sup> *Id.* at 401.

<sup>12</sup> 273 U.S. at 298.

<sup>13</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>11</sup> 273 U.S. 284 (1927).

<sup>12</sup> 262 U.S. at 400.

sonable, and unlawful damage to the plaintiffs' property.

Hence, while the State may within limits regulate parochial schools, it may not destroy them, because their owners and their teachers have property rights which cannot be taken away by statutes which accomplish that result through an unlawful interference with the primary natural right and duty of the parent to direct and control the education of his child.<sup>16</sup> The basic illegality, therefore, is the unreasonable interference with the primary rights of parent and of child in and to education; where that illegal interference produces a property loss to school owners and to school teachers, such property loss is equally illegal. The parochial school has an immunity from destruction by the State, because the rights of parent and of child in education are paramount.

This *Meyer-Pierce* doctrine has not been directly attacked; there is no formal dissenting POAU position. But the basis of the doctrine (*i.e.*, the primary right of parent and child in education) has been persistently sniped at. The chief method has been to insist that the legal primacy of the parental educational duty and right is mere dictum; hence, the doctrine has no firmly established basis in federal Constitutional Law and may be represented merely as an American tradition or as a social custom currently in vogue. It is submitted, however, that the parental primacy is not dictum but rather the most fundamental holding in the *Meyer-Pierce* line of cases, because the proposition is the essential basis of the specific holding. The *specific*

holding was that the property rights of the plaintiff school owners and school teachers were illegally taken without due process of law by governmental action; but the sole *reason* why the plaintiffs' property rights were *illegally* taken was that the statutes first infringed the primary rights of parent and of child in education. And because that statutory interference with the primary rights of parent and child violated due process, the consequential interference with the property rights of the plaintiffs also violated due process. Except for the former holding, the latter cannot be made. It follows that the former is not mere dictum nor a mere added ground of decision, but is rather itself the basis of decision. It is true, of course, that neither parents nor children were parties to any of these cases and that the plaintiffs as property owners had no status to represent or to litigate the different personal interests of the parents and the children; but the only conclusion from that observation is that the holding, though binding as precedent, is not itself *res judicata* as to the rights of parents or children.

More subtly, the effort to identify the substantive scope of the due process clause of the Fourteenth Amendment with those rights *only* which are guaranteed in and by the First Amendment would tend to undermine the *Meyer-Pierce* doctrine. In the *Meyer* case, the Court said that the term "liberty" in the Fourteenth Amendment denoted not merely the individual's freedom from bodily restraint but also his right to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long

<sup>16</sup> For a very effective judicial formulation of the parental right and its limitations, see *People ex rel. Vollmar v. Stanley*, 81 Colo. App. 276, 255 Pac. 610 (1927).

recognized at common law as essential to the orderly pursuit of happiness by free men. Few of the freedoms in that stirring litany are *expressly* included in the First Amendment.

It has also been suggested, as noted, that the rights of the State in education must be accorded a larger scope under modern conditions, to the necessary impairment of the parental rights;<sup>17</sup> and again, that the meticulous observance of parental rights has entailed consequences (such as "divisiveness") of more serious detriment to the State. Neither of these suggestions is likely to be taken seriously.

One further observation is important owing to the stature of the observer. John Courtney Murray, S.J.,<sup>18</sup> has thought that the *Meyer-Pierce* doctrine of parental primacy was seriously undermined by having been ignored by the United States Supreme Court in the decision of *McCullum v. Board of Education*.<sup>19</sup> The thought is that, if the *Meyer-Pierce* doctrine meant what it said about parental control of the education of the child, the *McCullum* decision ought to have gone the other way. Mrs. McCollum had the parental right to control the education of her son Terry, but not the education of the children of all the other parents in the school district; on the contrary, those other parents had the right to control the education of their own children (without, of course, attempting to control Terry McCollum).

But the *McCullum* case was not treated from the approach of parental control; it was treated as a parental request for a type

of state aid which the state lacked the power to extend. It is clear, of course, that the failure of the state to use tax money to assist the parochial school in its functioning as the selected agent of some parents necessarily impairs the significance of the recognition by the same state of the primary right of those parents to direct and control the education of their children, especially when the same state offers full tax assistance to the public school in its functioning as the selected agent of other parents. But the justification advanced is that, under the "no establishment" clause of the First Amendment, the State is powerless to respond to the request of the former parents, whereas it may and therefore must respond to the request of the latter parents. In short, the State's recognition of the primacy of parental control of the education of children cannot fairly be regarded as compromised by the simple inability of the State to respond to the type of assistance requested. If I love you and then you say, "Because you love me, come to me," I do not love you the less for not responding if I am paralyzed. The real flaw, of course, lies in having held that such a response is *ultra vires* the State.

Only Mr. Justice Jackson seems aware that the *Meyer-Pierce* doctrine is involved at all; and *he* thinks that the *McCullum* principle is a necessary complement to the full recognition of the *Meyer-Pierce* doctrine. This contradictory approach must amaze Father Murray. Mr. Justice Jackson in effect says to the parochial school parents: "Precisely because you won the *Meyer* and *Pierce* cases, you must lose the *McCullum* case. You cannot have it both ways; and frankly, I think you have nothing to complain about, because you won the greater victory."

<sup>17</sup> Miller, *Racial Discrimination and Private Schools*, 41 MINN. L. REV. 145, 148-57 (1957).

<sup>18</sup> Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23 (1949).

<sup>19</sup> 333 U.S. 203 (1948).

Fully developed, Mr. Justice Jackson's line of thought is as follows:

1. If religion is a private (*i.e.*, non-public) concern, then religion is simply beyond the competence of the State to control; but, for the same reason, it is equally beyond the competence of the State to assist. Whereas,

2. If religion is a public concern, then it is within the competence of the State to assist religion; but, for the same reason, it is equally within the competence of the State to control religion.

3. But the fact is that the *Meyer-Pierce* doctrine constitutes a decision that religion (*i.e.*, parochial schools) is not within the competence of the State to control because it is a private concern.

4. Therefore, it is equally beyond the competence of the State to assist religious instruction, and the *McCullum* decision must so hold.<sup>20</sup>

Once Mr. Justice Jackson's position is thus spelled out in detail, the basic fallacy is easily discerned: the parallel competencies simply do not follow. If, for example, the State's lack of competence to control necessarily involves an equal lack of competence to assist, then our whole Point Four program is unconstitutional, as is our membership in the United Nations.

The distinction may be phrased as follows: the function of the State is to promote the common good in the temporal order within the principle of subsidiarity. It follows that the State has no competence to act in the eternal or supernatural order. But, acting in its own proper temporal order, the State may perform an act which will indirectly have an effect in the eternal order (the area of State incompetence),

<sup>20</sup> *Everson v. Board of Education*, 330 U.S. 1, 25-28 (1947) (dissenting opinion).

because man in the temporal order is still a spiritual being. This indirect effect may either benefit religion or harm it. Whether, in either case, the State may perform the act within its own area of competence depends upon the application of the ethical principle of the double effect.

To conclude, it is submitted that Mr. Justice Jackson's thinking on the interrelationship of the *Meyer-Pierce* doctrine and the *McCullum* doctrine was in error, and that Father Murray's apprehension must be directed to the construction of the "no establishment" clause which makes any assistance to religion *ultra vires* the State.

In summary: (1) the *Meyer-Pierce* doctrine is firmly established both in Natural Law and in federal Constitutional Law; and (2) there is no substantial opposed position, but merely sporadic efforts to undermine the legal authority of the doctrine.

### B. The Right of the Parochial School to State Tax Support

While, then, there is substantial agreement between the federal Constitutional Law and the Natural Law positions in respect of the right of parochial schools to exist in the State by reason of the primary parental right to direct and control the education of the child, and while there is no serious departure from this position on the part of POAU, there *is* a fundamental cleavage among all three positions in respect of the right of the parochial school to state tax support. Since the Constitutional Law position lies somewhere in between the other two positions, it is convenient to begin by formulating that position, and then to continue by formulating each of the other two positions in parallel expression.

The positions will be formulated in ac-

cord with what the writer believes to be the key distinction in the discussion: the difference between the willing state and the unwilling state. Where the state wants to extend tax support to the parochial school, the problem is whether or not it *may* do so. On the other hand, where the state does *not* want to extend tax support to the parochial school, the problem is whether or not it *must* do so. It is obvious that the entire federal constitutional discussion so far has been centered on the legal justification of the willing state; the matter of coercing the unwilling state has received scant attention, and then only in state constitutional discussions. It is impossible to overemphasize the necessity and utility of this basic distinction in the orderly discussion of the several positions.

#### I. The Constitutional Law Position:

- a. The State is never under any obligation to extend any public aid whatever to the parochial school (beyond the basic community services, such as police and fire protection and water and sewage services, performed for every legal person in the community); and
- b. Even if the State wants to extend public aid to the parochial school, it still may not do so directly and affirmatively, but it may do so either indirectly or negatively. And the concept of indirect aid involves a dual indirectness: first, the public aid is indirect in the sense that the parochial school itself is not the direct object of the aid, but rather the aid is directly extended for a public purpose to parent and pupil; and second, the public aid is indirect in the sense that it is not directly related to the essential operation of the parochial school as such.

#### II. The POAU Position:

- a. The State is never under any obligation to extend any public aid whatever to the parochial school; and
- b. Even if the State wants to extend public aid to the parochial school, it may not do so, whether the public aid be direct or indirect, affirmative or negative, preferential or non-preferential, or for a public purpose or not.

#### III. The Natural Law Position (aspects inverted for convenience):

- b. If the State wants to extend public aid to the parochial school in any form whatever, it may *always* do so non-preferentially, because such non-preferential aid would always subserve a public purpose; and
  - a. Even if the State does not want to extend any public aid to the parochial school, under certain limited circumstances it is nevertheless obligated to do so.

The POAU position is the unqualified, fully-extended principle of the *McCullum* case; the Constitutional Law position is the principle of the *McCullum* case as qualified up to now by the *Everson* and the *Zorach*<sup>21</sup> decisions. The *McCullum* case not only confirmed the *Everson* case in placing the "religion" clauses of the First Amendment squarely within the "due process" clause of the Fourteenth Amendment so as to make them applicable to all the states, but it also placed a new construction on the "no establishment" clause by picking up a dictum in the *Everson* opinion and making it the holding of the *McCullum* case: the "no establishment" clause means, not only that no state may extend any preferential aid to any one religion, but also that no state

<sup>21</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).

may extend any aid even non-preferentially to all religions. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . aid all religions. . . ." <sup>22</sup> Hence, literally, even if a state wants to achieve an independent public purpose by extending some form of aid to all religions non-preferentially, it may not do so. Specifically, since that is exactly what the state agency did in and under the Champaign plan of released-time religious education for pupils in the Champaign public schools, the plan was unconstitutional. Whether this *McCullum* principle is constitutionally correct or incorrect is not within the scope of this article. <sup>23</sup> The point here is that, correct or incorrect, it is the constitutional law, and that is what is now being formulated.

The ideological basis for the *McCullum* principle is the absolute incompetence of the State to act in the field of religion, so that any State action in that field is ultra vires the State. An action taken by the State within its proper field of competence may indirectly produce an effect, either beneficial or harmful, within the field of competence of the church — and vice versa. If this indirect effect is beneficial to the Church, there would seem to be no objec-

<sup>22</sup> *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), partially quoted in *McCullum v. Board of Education*, 333 U.S. 203, 210 (1948).

<sup>23</sup> That the *McCullum* principle is neither historically correct nor currently practiced by the American people has been fully demonstrated by eminent scholars such as Professor James M. O'Neill; Professor Edward S. Corwin; Wilfrid Parsons, S. J.; Robert C. Hartnett, S. J.; Robert Drinan, S. J.; and Msgr. Joseph H. Brady. For a penetrating analysis suggesting that the fundamental problem is historical confusion over the proper function of a public school in a religiously pluralistic society, see McCluskey, *Spiritual Values in Public Schools*, 95 AMERICA 619 (1956).

tion to the act; but if harmful to the Church, then whether the act may be performed will depend upon the ethical principle of the double effect. The point here is that the State does not lack competence to perform an act within its proper field of competence simply because that act also indirectly produces an effect within a field of incompetence; and this conclusion is especially true when the indirect effect is beneficial. Hence, the ideological basis for the *McCullum* principle is unsound.

The *McCullum* principle, which was a mere dictum in the *Everson* case, was qualified by the holding of that case, because the state aid extended in that case to the parochial school was not an establishment of religion and was not therefore unconstitutional. That aid was *indirect* in the dual sense; It was directly extended to the parent and the pupil for the public purpose of assisting them in their discharge of a state-imposed duty; and the aid was not directly related to the essential operation of the parochial school as such. Moreover, the aid was so clearly citizen-oriented that Mr. Justice Black saw that the withholding of such aid on account of the religion of some of the recipients would itself impair a deeper freedom of parent and pupil: the free exercise of their religion.

This latter observation has been exceptionally well developed in a brilliant article by former Dean Wilber G. Katz of the University of Chicago Law School. <sup>24</sup> Dean Katz's thesis is that the State *may* aid religion non-preferentially without thereby creating an establishment of religion whenever *not* so to aid religion would be to impair some person's free exercise of religion. This test provides both a rationale

<sup>24</sup> *The Freedom to Believe*, 192 THE ATLANTIC MONTHLY 66 (1953).

and a rule of thumb, and is based on the common sense principle that every social restraint must be justified by an increase in social freedom.

The *Zorach* decision (that the New York City plan of released-time religious education did not constitute an "establishment of religion") also modifies the *McCullum* principle. True, the modification may be explained on a policy basis as mere compensation for the *McCullum* decision, or the two cases may be easily distinguished. But simply because the *Zorach* fact situation is not identical with the *McCullum* fact situation does not prove that the aid offered by the state to sectarian religious instruction in the *Zorach* case was not improper within the *McCullum* principle. Prescinding from the "pendulum" policy distinction, and searching the *Zorach* opinion for a valid ideological distinction, one can discover the concept that all that the state was actually doing in *Zorach* was electing to stay out of the way of religion. The "aid" in the *Zorach* case can therefore be regarded as negative in character. Essentially, the state was simply electing to take no action, and it is difficult for the state to be ultra vires by doing nothing. While this suggested construction of the *Zorach* decision has been criticized, no other conceptual suggestion explains how *Zorach* and *McCullum* can be true together; and that they are true together is the Court's opinion as expressed by Mr. Justice Douglas when he said for the majority that, despite the *Zorach* decision, the Court adhered to the *McCullum* principle.<sup>25</sup>

The property tax exemption extended by states to parochial schools seems an excellent example of non-preferential state aid

which is negative in character. But it is also indirect in a third sense not heretofore stated. Though direct in the two senses already mentioned (because such aid is extended directly to the parochial school and not directly to parent or pupil, and because aid is also directly related to the operation of the parochial school as such), it is indirect in that such aid is extended to the parochial school, not because it is parochial, but because it is a school. Hence, in Illinois, for example, such state aid to a parochial school has been held constitutional not so much because it is negative as because it is still in some sense indirect.<sup>26</sup> The case which will really test the validity of the "negative" aid construction of the *Zorach* decision will be the case in which there is a federal constitutional objection to a state property tax exemption for church property devoted exclusively to Divine worship.

It was thought that the United States Supreme Court might take the opportunity to rule on the federal constitutionality of a California property tax exemption for parochial schools by accepting for review the case of *Lundberg v. County of Alameda*.<sup>27</sup> But the Court in a per curiam decision dismissed the appeal for want of a substantial federal question.<sup>28</sup> Some think that this ruling means that a state property tax exemption to a parochial school does not constitute an establishment of religion. This conclusion appears unjustified in view of the absence of citation and in view of the fact that the principal issue of the case in

<sup>25</sup> *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

<sup>26</sup> *People ex rel. Marsters v. Rev. Saletyni Missionaries, Inc.*, 409 Ill. 370, 99 N.E. 2d 186 (1951).

<sup>27</sup> 46 Cal. 2d 644, 298 P. 2d 1 (1956).

<sup>28</sup> *Heisey v. County of Alameda*, 352 U.S. 921 (1956).

the California state courts was the construction of a California statute.

At least one more qualification of the *McCullum* principle seems predictable. Just as the State can clearly extend to parochial schools the fire, police, water, and sewage services extended to all legal persons in the community and so deal with such schools on a community basis, so it would seem that the State could also deal with parochial schools on an ordinary business basis, just as it would with any other legal person — for example, by lending money to a parochial school on the same basis as that on which it would lend money to any other legal person. This proposition is the holding in a recent decision of the Supreme Court of Pennsylvania.<sup>29</sup> Should the taxpayer in a comparable case seek and receive review by the United States Supreme Court under the due process clause of the Fourteenth Amendment, the Court would be in a position to make this anticipated qualification of the *McCullum* principle.

In summary, the Constitutional Law position is the *McCullum* principle as modified to permit the State, if it so wishes, to extend either indirect or negative aid to the parochial school, and to sustain the same community and business relationships with the parochial school as it may sustain with any other legal person — all, however, without any *obligation* to extend such aid if it does not wish to do so.

No cases are known to the writer which litigate the element of State obligation — in which, that is, the parochial school or the parent or pupil has attempted to coerce the unwilling State. Presumably, the legal argument employed would be the violation of the equal protection clause of the Four-

teenth Amendment. In detail, the argument would run like this: By using tax money to support an areligious public school system while at the same time refusing non-preferential tax support to all religious schools, the State violates the equal protection of law clause of the Fourteenth Amendment, because the classification is unreasonable. And the classification is unreasonable because it indirectly violates both the primary right of the parent to direct and control the education of his child, and the right of child and parent to the free exercise of their religion.

Discussing, finally, the Natural Law position, we recall that it not only justifies the extension by the State of direct and affirmative aid to the parochial school, but it also requires the State in distributive justice to furnish certain aid under limited circumstances. This obligation of the State in distributive justice, is twice referred to by Pope Pius XI in His Encyclical on the Christian Education of Youth.<sup>30</sup> The concept is well developed by Michael Cronin as follows:<sup>31</sup> The end of the State is to provide for the temporal common good to the extent to which it is not readily attainable by the individual or by the family. While the primary duty of educating the child is on the parent, that duty today will normally be beyond the resources of the parent. Hence, the parent is justified in asking the State for some aid, and the State is under the obligation to respond by providing those facilities for educating the child which, though reasonably necessary, are beyond the command of the parent. It may be that such facilities are *wholly* beyond

<sup>29</sup> *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956).

<sup>30</sup> Encyclical Letter of Pius XI, *Rappresentanti in Terra* (1929).

<sup>31</sup> 2 CRONIN, *THE SCIENCE OF ETHICS* 394-97 (1909).

the reach of the parent so that the State would be obliged to supply them fully; even then, the State is merely responding to the reasonable necessity of child and parent.

Should the State respond by providing facilities which are for good reason unacceptable to parent and child, and assuming that other acceptable responses are possible, the State has no right to insist on making one response only, but is obliged to make the additional response.

In their 1955 Annual Statement, the American Catholic Bishops did not refer to this obligation of the State in distributive justice. They did point out the equal right of the parochial school pupil to the indirect benefits supplied by the states to all pupils generally. And they also pointed out both the need for, and the propriety of, direct aid to the parochial school and its parents and pupils. But they then observed that practical considerations, in view of wide religious differences, almost from the outset prevented American tax-supported schools from following the pattern of similar schools in certain other countries in which the parochial school shares equally and directly with the public school in State educational assistance.<sup>32</sup>

The federal constitutional objection, of course, both to the voluntary extension of *direct* aid to the parochial school and to the recognition of any *obligation* to extend

<sup>32</sup> Of course, such direct aid to a parochial school must always serve an accepted public purpose, viz. the secular education of the pupils in the parochial school. The state, for instance, is not asked to extend such direct aid to a theological institute. See HARTNETT, EQUAL RIGHTS FOR CHILDREN (1947).

such *direct* aid is that such action would constitute a clear establishment of religion in violation of the First and Fourteenth Amendments. The ideological objection is that such action would therefore be ultra vires the state. It would seem therefore that the Natural Law position requires the state to violate the Federal Constitution. Assuming arguendo that this objection to the Natural Law position is valid, how else can even more serious (through indirect) violation of the Constitution be avoided, viz., the violation of the primary parental right to educate the child under the Fourteenth Amendment, and the violation of the right of both parent and child to the free exercise of their religion under the First and Fourteenth Amendments.

Conceivably, this dilemma could be resolved by having the State cease all support of any school, but this suggestion ignores the State's own fundamental interest in having the child educated to the point necessary for the effective discharge of his civic duties. That end, indeed, is concededly essential; but the *means* employed are not. The solution could be for the State to furnish aid, not to any *school* at all, but to the parent and to the child, allowing them to establish whatever schools they wish, providing always that the State's own interest in an educated citizenry is achieved. Such a program of State aid would attain the State's purpose and fulfill the State's obligation without involving any action ultra vires the State. Or the solution could be to apply Dean Katz's test to determine when to subordinate the *McCullum* principle to the more fundamental free exercise of religion.