Journal of the Minnesota Academy of Science

Volume 31 | Number 2 Article 19

1964

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This paper examines two concepts in American constitutional history: the child-benefit theory and the doctrine of separation of church and state. Both concepts concern the position of the private school in American society. Neither expression is found in the original Constitution nor in any of its twenty-three amendments. Nowhere in that august document are found the following words: schools, educations, federal aid, compulsory education, textbooks, transportation, etc. Thus the present controversy concerning education has been caused by an omission, intended or otherwise, on the part of the framers of the Constitution and has been developed due to judicial interpretation. Here, as in so many other areas, judges have made the law. That the judges were only slightly more careful than those ignoring the question brings the student of constitutional law to the position of not knowing exactly what the judge-made law is today, and what it will be tomorrow or the day after tomorrow. Judicial activism seems necessary if the muddy waters are to be cleared, but the loss of one of the concepts appears inevitable if activism is carried to an extreme. Perhaps clarification less drastic but equally clear can be effected by piecemeal judicial interpretation. After all, this is how the confusion began in the first place. Thus it is best to begin with our silent Constitution and trace its metamorphosis to the present state in which we have conflicting concepts with apparent circumvention of one concept by the use of the other.

The original Constitution of the United States did not mention separation of church and state; however, religion was mentioned in the First Amendment and liberty was mentioned in the Fourteenth Amendment. Both of these, as will be shown, came to have special meaning as to education; and the concept of separation of church and state has been contained within this meaning. Neither is the phrase child-benefit found in the Constitution, although it was read into Article One of the Constitution as part of the general welfare clause. Before facing the problem directly, we shall examine the words 'religion' and 'liberty' to see how they have evolved to mean elimination of church schools from state benefits and how general welfare has come to mean child-benefit.

Originally the First Amendment to the Constitution pertained not to the state governments but only to the federal government. Congress has never been directly accused before the Supreme Court of establishing a religion and has been accused of preventing the free exercise of religion only in the 1879 case, *Reynolds v. U.S.*, in which the right of Congress to forbid polygamy in the territories was sustained. Far more important than the immediate effect of discouraging polygamy, at least to monogamous non-Mormons, was the use of a figure of speech by Chief Justice Waite in the Supreme Court's opinion. This figure of speech was used seventy-seven years earlier by Thomas Jefferson in a letter which he wrote to a group of Baptists in Danbury, Connecticut. Jefferson, in the letter, said:

"Believing with you that religion is a matter which lies between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law representing an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between Church and State" (Padover 1943:518-519).

Prior to the adoption of the Fourteenth Amendment, the religion clause of the First Amendment and thus this 'wall of separation' did not apply to state action, the Supreme Court having ruled that:

"The Constitution makes no provision for protecting the citizens of the prospective States in their religious liberties; that is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States" *Permoli v. New Orleans,* 5 Howard 589 (1845).

The Fourteenth Amendment was first proposed 16 June 1866, and was ratified slightly more than two years later on 28 July, 1868. The Amendment was an antebellum attempt to define the position of the Negroes of the Southern states by granting to them citizenship; and through its first clause the federal courts have gained the power to oversee state violation of fundamental liberties such as freedom of speech, press, religion, etc. The word 'liberty' has come to include education through interpretation by the Supreme Court.

In 1919 Nebraska passed a statute which prohibited the teaching of any subject in any language other than English. The avowed purpose of the statute was to make English the mother tongue of all children reared in the state of Nebraska and to teach them to think in English so that they would not imbibe the foreign ideas and sentiments of their parents. A Mr. Meyer taught in a Lutheran parochial school and used a German Bible History as a text for reading, the teaching thus serving a double purpose: teaching the German language and giv-

ing religious instruction. In the resulting Supreme Court case, the Court held that the statute unreasonably infringed upon both the liberty to teach and the liberty of parents to secure instructions for their children in a language other than English, both liberties being among those protected by the due process clause of the Fourteenth Amendment. Justice McReynolds' opinion stated:

" Plaintiff's right . . . to teach and the right of parents to engage him so to instruct their children, we think are within the liberty of the Amendment *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The *Meyer* case was the first time in the history of the Supreme Court in which the parental right to educate was associated even obliquely with religious freedom.

In November, 1922, the state of Oregon passed a Compulsory Education Act requiring every child from the age of eight to the age of sixteen to attend public schools and, in effect, practically forbade their attending private schools. Parents or guardians who refused would be guilty of a misdemeanor. The Society of the Holy Names of Jesus and Mary conducted a group of private schools according to the tenets of the Roman Catholic Church. They brought suit challenging that the statute conflicted with the rights of parents to choose schools where their children would receive appropriate moral and religious training, and the right of schools and teachers to engage in a useful business or profession. Justice McReynolds used the doctrine of the *Meyer* case to support the Court's unanimous decision, pointing out that:

"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" *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Thus the Court added the right of parents to establish private schools and forbade the states to pass legislation denying attendance at them.

In the cases reviewed thus far, Chief Justice Waite's use of Jefferson's figure of speech was accepted by the Court as the intent of the framers of the Constitution. Waite's precedent remained unchallenged until the last forty years when new and varied services and benefits have been offered by the various states to pupils in public and private schools. These include free textbooks, free bus transportation, free lunches, and free medical services. Some state courts have argued that these services and benefits aid the child and not the school which he attends. This has come to be known as the 'child-benefit' theory and is opposed to the theory that to provide these benefits not only violates the constitutional clauses which forbid the use of public money in aid of religion or religious education, but also violates Jefferson's wall of separation of church and state.

In the 1920's Louisiana used tax money to furnish textbooks free to school children of the state regardless of the school attended. The law was attacked as constituting a taking of private property for a private purpose. The Supreme Court of Louisiana upheld the law stating that the school children and the state alone, not the schools, were the beneficiaries of the appropriations. The United States Supreme Court upheld the decision of the Louisiana court and then said:

". . . we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly its method, comprehensive. Individual interests are aided only as the common interest is safeguarded" *(Cochrane v. La. State Brd. of Ed.,* 281 U.S. 370 (1929).

Thus for the first time in history the Supreme Court accepted the child-benefit theory.

Thirty-seven years after *Cochrane* the child-benefit theory again reached the Supreme Court. Ewing Township in New Jersey had no public high schools; and its pupils attended high schools in Trenton and Pennington, New Jersey, to which they were conducted by bus. Everson, a taxpayer, challenged the right of the school board to reimburse parents of parochial school students for money expended by them for bus transportation of their children on regular busses operated by the public transportation system. He contended that the statute authorizing reimbursement violated the First Amendment in constituting support of a religion by a state and violated the Fourteenth Amendment by authorizing a state to take by taxation the private property of some and bestow it upon others to be used by them for their own private purposes.

After reviewing the previous cases by which the prohibitions of the First Amendment were made applicable by the Fourteenth to state action abridging religious freedom, Justice Hugo Black said that, in the Court's opinion, there was every reason to give the same application and broad interpretation to the establishment of religion clause. He then defined the clause as meaning (1) that neither a state nor the federal government can set up a church and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another; (2) that neither a state nor the federal government can force or influence a person to go to or to remain away from church against his will, or force him to profess a belief in any religion; (3) that no tax in any amount can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt or practice religion. He then quoted Jefferson's wall of separation.

However, Black looks at both sides of the problem and finds that, although the Amendment forbids the support of an institution with the tenets of any church, it also commands that government not hamper its citizens in the free exercise of their religion; and, as a consequence, New Jersey could not exclude individual Catholics or the members of any other faith because of their faith or lack of it from receiving the benefits of public welfare legislation. He states further that it is obviously not the purpose of the First Amendment to make it difficult for religious schools to operate. Justice Black notes:

"State power is no more to be used so as to handicap religions than it is to favor them . . . The State contrib-

utes no money to the schools. It does not support them. Its legislation as applied does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools" *(Everson v. Brd. of Ed.,* 330 U.S. 1 (1947).

The fundamental objection of the minority, Justices Frankfurter, Jackson, Rutledge, and Burton, was that the public welfare concept was completely inappropriate to a determination of the establishment of religion question; that, whenever legislation in fact aids or promotes religious teaching or observances, it falls within the area forbidden by the establishment clause, notwithstanding that it might be sustained under the Fourteenth Amendment if the religious element were absent. For the minority matters pertaining to religion could never be made a public purpose; the parochial schools were an integral part of a religious structure and the transportation an important element in making the parochial schools effective for their primary purpose, which is the teaching of religion.

The implementation of the child-benefit theory in the *Cochrane* case had provoked only tacit disapproval. However, when this theory was used in *Everson,* impassioned objections erupted. P. F. Westbrook in the *Michigan Law Review* wrote:

"It seems to the writer that substantial and persuasive arguments support the minority position. No argument advanced by the majority meets the fundamental objection that legislation which in fact aids religion or religious instruction directly or indirectly, is an establshment of religion. The public welfare argument, introduced in connection with the non-religious due process question served but to obscure the underlying issues so clearly pointed out by Justice Rutledge" (Westbrook 1947: 1018-1019).

This paper deals almost entirely with the cases reaching the United States Supreme Court as constitutional issues under the First or Fourteenth Amendments to the United States Constitution. It should be remembered, however, that most state constitutions have provisions dealing with this question and generally they are much more specific in limiting the government than the provisions in the United States Constitution. For example, nine states have passed laws giving textbook aid to private schools and seven of these have been ruled unconstitutional. Transportation aid has also had mixed results before state courts. Tuition grants have never been approved, although tax exemptions for money spent on tuition have been approved by several states, including Minnesota.

This paper has not attempted to cover all cases concerning church-state relations but only those concerned directly with the child-benefit theory. For a more complete treatment of the broader problem of church-state relations and the history of this problem, the reader is referred to two main sources: *Church, State and Freedom* by Leo Pfeffer and *Religion and Education under the Constitution* by James O'Neill. Pfeffer feels that the separation aspect should be conceived to be as absolute as can be achieved whereas O'Neill feels that the freedom aspect should be stressed to its absolute. This paper takes neither approach. Its approach is similar to that of Glenn Abernathy in his treatment of another clause of the First Amendment. Abernathy's viewpoint in *The Right of Assembly and Association* is that of a moderate civil libertarian, rejecting the absolutist approach. He does not believe that any set of constitutional values can be automatically placed above all others irrespective of the particular situation.

The flames of the constitutional issues have been fanned by those objecting to parochial schools, the constitutional issue being a convenient peg on which to hang an unspoken prejudice. At the same time proponents of the child-benefit theory use social justice as their convenient peg. The lack of cogent arguments pro and con increases the suspicion that many approaches are emotional rather than rational. This observation is applicable to articles on both sides of the controversy appearing in the public press as well as in institutional publications.

The Catholic Church will probably continue to fight for child benefits but when the accompanying governmental control threatens control of their institutions, they will be forced to refuse government support even though the individual child may deserve the benefit. Perhaps this built-in safety valve will prevent child benefits from becoming support or establishment of religion. However, most persons involved feel greater assurance can be found in law than in the discretion of Catholic clergy and hierarchy. Indeed it is this quest for legal assurance which has made this question so controversial.

This writer feels that the entire child-benefit controversy is a result of fear on the part of both proponents and opponents of the welfare legislation. The proponents fear that neglecting the children in private schools in disbursement of welfare funds will result in an unequal opportunity for education and health, both opportunities owed the child by the state. Opponents fear the welfare given to students of private schools in general, and Catholic schools in particular, is a step toward public support of religious education and thus constitutes establishment of a religion. This writer does not believe this an 'either-or' proposition. Rather the writer feels that before legislation is formulated, both dangers should be considered. If the community feels that the danger to it brought about by an established religion in the instant case is greater than the danger to the community brought about by depriving its children of the means to health and safety, then the legislation would be unwise. However, if the aid constitutes less a danger to community life than the lack of welfare benefits to the community's children, then the legislation would be wise. The local community thus has an option and, needless to say, the social, economic, educational, and religious background of the individual community will determine how this option is to be used. This weighing of dangers is the 'political decision', 'small subvention', 'people's decision', that legal experts discuss.

Until the people make their will known, this writer believes the courts should proceed with caution, particularly

when constitutionality of an act is questioned, and the courts should be wary of using a figure of speech to undermine an act of the democratic will of the people. It seems that until the people make their will known otherwise and the judiciary can draw lines with greater confidence, the courts should reject the child-benefit theory wherever and whenever they feel that First Amendment restrictions are being circumvented; and the government is doing in fact what it cannot do in law. If in doing so judges make law, it is hoped that the results of their pronouncements will clarify the relationship between the government and the private school, thus bringing about the greatest benefit possible under our Constitution to the school child without threatening our separation of church and state or our right to religiously oriented schools.

CASES CITED

Permoli v. New Orleans, 3 Howard 589 (1845)
Reynolds v. U.S., 98 U.S. 145 (1879)
Meyer v. Nebraska, 262 U.S. 390 (1923)
Pierce v. Society of Sisters, 268 U.S. 510 (1925)
Cochrane v. La. Brd. of Education, 281 U.S. 370 (1929)
Everson v. Board of Education, 330 U.S. 1 (1947)

LITERATURE CITED

ABERNATHY, GLENN. 1961. *The Right of Assembly and Association.* Columbia, S.C. University of South Carolina Press.

O'NEILL, JAMES. 1949. *Religion and Education under the Constitution.* New York. Harper and Brothers.

PADOVER, SAUL. 1943. *The Complete Jefferson.* New York. Duell, Sloane and Pearce Inc.

PFEFFER, LEO. 1953. *Church, State, and Freedom.* New York. Beacon.

WESTBROOK, P. F., JR. 1947. Establishment of Religion: Public Aid to Parochial Schools. *Michigan Law Review.* XLV: 1001-1021.