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PARENTAL RIGHTS AND THE FOURTEENTH AMENDMENT

By Carl Zollmann*

This subject has recently been considered by the United States Supreme Court in a decision handed down on June 4, 1923, and known as the school language case.1 Robert T. Meyer, a teacher at a Lutheran parochial school in Nebraska was convicted of teaching the subject of reading in the German language to a ten-year-old boy in contravention of a state statute which forbade the teaching in any school of any subject in any other than the English language to any person who had not completed the eighth grade. The Nebraska Supreme Court had affirmed the conviction on the ground that the statute “comes reasonably within the police power of the state” (Meyer vs. State, 107 Neb. 657, 187 N. W. 100). The United States Supreme Court reverses this decision and declares that the statute is in conflict with the fourteenth amendment.

There can be no question concerning the forces which brought about the enactment of this statute. Every great war brings in its train quixotical consequences. The World War was no exception. Though entered by the United States to liberate European nationalities it was used by a curious combination of social forces to restrict the constitutional liberties of American citizens. Ever since about 1830 the public school system under the leadership of Horace Mann had begun its glacierlike advance many persons in and out of public stations had publicly and privately advocated the complete eradication in the United States of all private primary schools. Some of these merely placed their argument on the theory of manifest destiny. Others were actuated by the strength or weakness of the private schools with which they were coming into contact. The most radical, however, argued that the work of Americanizing our population of foreign birth was not proceeding fast enough and that the parochial schools (many of which were partially conducted in a foreign language) were responsible for this situation. The war naturally played into the hands of this last group. The draft act brought into the

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military training camps a small percentage of selected men who were without sufficient knowledge of the English language to understand commands. What was more natural than to lay the blame for this result at the doors of the parochial schools. A great hue and cry arose which swept nearly half of the state legislatures off their feet. Legislation has resulted some of which is directed in terms against the teaching of the German language. Other statutes included all languages but English. One state, Oregon, in 1923, adopted a statute to go into effect in 1926 which attempts simply to wipe out all private schools. (Section 5259, Oregon Laws.) There can be no question that the decision vitally affects all these statutes in whatever form they may be couched. A substantial barrier has thus been placed in the path of that spurious super Americanism which is responsible for their enactment. For after all the term Americanism must find its definition in the federal constitution and not in the vagaries of self-appointed propagandists. It is not without significance that Constitution Week has recently universally been observed throughout the United States.

The outstanding feature of the decision is that it squarely bases the natural rights of parents to control the education of their children upon the fourteenth amendment and thus secures it, as long as that amendment remains a part of the Constitution, against all adverse action by state legislatures. The court expressly lays it down that it is the natural duty of parents to give their children an education suitable to their station in life, that their right to engage a teacher to instruct them in the German language is within the liberty of the amendment, that the Nebraska statute materially interferes with this parental prerogative and exceeds the limitations upon the powers of the state in times of peace and domestic tranquillity. As an example of the extremes to which such a movement inevitably leads the court cites Sparta which ancient city “assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians.”

On the same day on which this Nebraska case was decided the court disposed of similar cases arising from Ohio and Iowa (43 Supreme Court Reporter 628). The Ohio statute, however, directly prohibited the teaching of German to pupils under the eighth grade. Justice Holmes filed a separate opinion (in which Justice Sutherland concurred) stating that he was unable to say
that the Federal Constitution prevents the experiment attempted by the Nebraska and Iowa statutes from being tried but that he agreed with the court as to the special proviso against the German language contained in the Ohio statute. The Supreme Court therefore is unanimous in regard to statutes which select the German language as a target while two of its nine members are merely doubtful in regard to statutes which take a wider scope. Even the separate opinion therefore denies to the state the right arbitrarily to control the education of parochial school pupils.

This result is the more gratifying when it is contrasted with the action of the Supreme Court after the Civil War. In 1871, six years after the close of that conflict Watson vs. Jones 80 U. S. 679, came before the court. The case involved a controversy between the Northern and Southern sympathizers in a Louisville, Ky., Presbyterian Church. Though the Southern faction was clearly in the right the court decided in favor of the Northern faction. Its argument though wholly unjustifiable was so specious that it has bastardized to this day the law in the United States on the question of the decisiveness of church decisions and has converted it into a mere wilderness of cases. (See the chapter on Church Decisions in the author's American Civil Church Law.) Comparing the two situations the country has every reason to congratulate itself upon the sanity shown by its Supreme Court in the school matter less than five years after the close of hostilities.

Another feature of the decision is its complete silence regarding property rights. Where private schools are established large amounts of money are naturally invested in them. If through unreasonable regulation these schools can legally be forced to close their doors this property can generally only at a great loss be turned to other uses. It will hardly admit of a doubt that such regulation deprives the owners of such schools of their property without due process of law. Yet the proposition that such a law abridges the inherent privileges, immunities and liberties of such owners presented itself so strongly to the court that it paid no attention to the property argument and placed its decision squarely on the basis of inherent rights. Though Justice Holmes in his private writings seems to have taken the position that there is no such thing as inherent rights the situation presented by the Ohio statute (which singled out the German language in terms) was so strong that he expressly agreed with the majority opinion.
in holding this statute to be unconstitutional and merely expressed
his doubt (but did not dissent) in regard to statutes which pro-
hibit the teaching of all foreign languages to children who have
not completed the eighth grade.

As a necessary result it is now established that the power of the
state over its own schools and over the private schools within its
borders is of a different nature. Of course the state has com-
plete and arbitrary power over its own public schools and may
therefor freely prescribe what may and may not be taught there-

in. As to private schools maintained by private funds an entirely
different situation exists. The state may supervise the physical
equipment and the moral and hygienic surroundings of such
schools and prescribe a minimum of instruction. But it has no
right to prescribe a maximum and thus prevent the teaching of
religion, foreign languages, foreign history and other similar sub-
jects of study. It may force private schools to achieve and main-
tain a reasonable degree of efficiency in teaching such subjects as
reading, writing, arithmetic, geography, English language and
American history but it has no power to prevent them from ex-
ceeding such degree. It may help to nurse them to staunch health
but cannot limit the amount of good health which they shall
enjoy.

The effect of the decision is to check a form of Bolshevism
which is the more dangerous because it seeks to accomplish its
purpose by masquerading as staunch Americanism. The Wis-
consin constitution lays it down that “the blessings of a free gov-
ernment can only be maintained by a firm adherence to justice,
moderation, temperance, frugality and virtue, and by frequent
recurrence to fundamental principles.” (Art. I, Sec. 22.) No
better illustration of this statement could be found than is pre-
sented by the Nebraska case. The fourteenth amendment is the
greatest contribution which the Civil War made to our constitu-
tional system. The World War has now produced what will
probably soon be recognized as the most important decision
arising under that amendment.

The decision is in strict accord with the prevailing opinion in
Lacher vs. Venus, 177 Wis. 558, 569 decided by the Wisconsin
Supreme Court almost a year before the United State's Supreme
Court acted and in which Eschweiler J. says that the natural
affection between parent and child “has always been recognized
as an inherent, natural right, for the protection of which, just as
much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed.” It carries into effect the contention advanced by Dean Max Schoetz two months before the decision of the United States Supreme Court in *Meyer v. Nebraska* was handed down in an article in the April, 1923 number of *The Marquette Law Review* which is entitled “Natural and inherent rights protected by the fourteenth and fifth amendments of the United States Constitution.” Its effects will be felt far beyond the confines of parochial and private schoolrooms. For some years past ill advised theorists have by one means or another extended the activities of the state to the very verge if not into the very heart of private rights. The result of the decision will unquestionably be a series of cases in which the boundary between private rights and state prerogatives will be more definitely defined.

Another feature of the decision must be specially noted. The court states that the fourteenth amendment without doubt denotes among other things the right of the individual to worship God according to the dictates of his own conscience. In other words it bottoms the American doctrine of religious liberty upon the fourteenth amendment. This is of the most far reaching importance. The first amendment passed practically simultaneously with the Constitution itself merely provided that “Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof.” Its purpose was clearly to restrain Congress, not the states, as is apparent from its very language, from the fact that it was placed among the first ten amendments and from the construction which the United States Supreme Court has placed upon it. ([*Permoli vs. First Munici- pality*, 44 U. S. 589, 609.]) In consequence the important states of Connecticut and Massachusetts did not completely rid themselves of their pre-Revolutionary state church until 1818 and 1833 respectively while New Hampshire to the present day retains a provision in its constitution authorizing its legislature to establish Protestant worship with state funds. The nearest approach to national control of religious liberty as against state action heretofore had been by federal compact by which twelve Western states accepted into the Union since the Civil War days have agreed by an ordinance irrevocable without the consent of the United States and the people of the new state that “perfect toleration of religious sentiment shall be secured and no inhabitant of the state
shall ever be molested in person or property on account of his or her mode of religious worship.” (See an article of the author in 17 Michigan Law Review, 358, 359.) Now the Supreme Court by its declaration in this matter has further strengthened the American doctrine concerning the separation of state and church. The only similar dictum heretofore existing has been in a case decided by Field, Circuit Justice in 1879 in which he stated that the fourteenth amendment effectually prevents “hostile and discriminating legislation by a state against persons, of any class, sect, creed or nation, in whatever form it may be expressed.” (Ho Ah Kow vs. Nunan, Fed. Cas. No. 6546 p. 256.)

If this declaration by the Supreme Court is sustained the question whether in a particular case the religious freedom of a citizen has been infringed by state action will have ceased to be a matter exclusively for the respective state courts. Assumption of political control in a particular state by organizations hostile to certain denominations will thus be of far less consequence than has been the case heretofore. The last word on the question whether a particular state statute or constitutional provision violates religious freedom will be with the United States Supreme Court. In view of the present day social unrest and the agitation of an anti-religious or anti-denominational character to which the war has given renewed impetus it is probable that the Supreme Court, peering into the future and divining what may be coming on the wings of the storm, has deliberately uttered this dictum just as the defender of Verdun stated that its assaulters shall not pass. At any rate it is not unreasonable to assume that the court intended to invite appeals in cases involving religious liberty, that therefore such appeals will clear the jurisdictional barriers, and that henceforth the United States Supreme Court, and not the state supreme courts, will be the final arbiters on all question involving liberty of conscience.

The Oregon school law has already been referred to. It has also been pointed out that the Supreme Court is unanimous on the proposition that a statute which prohibits the teaching of German (eo nomine) in parochial schools is unconstitutional. The view which the Supreme Court will adopt in regard to a statute (such as that of Oregon) which goes even farther by wiping out parochial schools instead of merely regulating them is thus clearly foreshadowed. The court hardly will hold that a state may do directly by striking down what it cannot do indirectly by un-
reasonable regulation. If the inherent rights of parents are invaded by a law which prohibits the teaching of German or other foreign languages in their own private schools such rights are even more glaringly poached upon by a statute which prevents them from maintaining any private school at all. Nor was this question outside of the contemplation of the court in this very case. The Iowa and Ohio cases had been argued before submitted to and taken under advisement by the court, and the Oregon law had been adopted on November 7, 1922, and had received extensive newspaper notice, when on February 23, 1923, the Nebraska case came on for argument. Justice McReynolds who later wrote the opinion (and probably had previously been designated to write the opinion in the Iowa and Ohio cases), during the argument asked this question: "What about the power of the State to require the children to attend the public schools?" And Mr. Mullen the attorney for the appellant answered: "If the state has a right to pass that kind of a compulsory school law, it can close all private institutions, because there is no need for them, since all must attend the public schools."

The situation in California where Japanese schools are numerous and the Japanese themselves are unpopular (to say the least) has led to a statute in the Golden State which in effect prescribes that no person shall teach in any private school where instruction is given in whole or part by the medium of a foreign language. While this statute is aimed at the Japanese a goodly number of parochial schools are affected by it. For not a few of them still conduct their instruction in such subjects as religion and church history by the medium of some foreign language. The question therefor arises whether such a statute is constitutional. It is reported that the attorney general of California is of the opinion that the decision of the Supreme Court does not touch this point at all. He concedes, as he must, that the teaching of the Japanese language in any private school by the medium of the English tongue cannot constitutionally be prohibited. But he contends that no matter what efficiency in the use of any foreign language the pupil may achieve, such instruction must at no stage be carried on by the medium of such foreign language. He thus attempts to put a severe hobble on such instruction. For the actual use by a pupil of a language (after overcoming the initial difficulties) is the only means by which he can obtain an absolute or relative mastery of it. A student who learns a foreign lan-
guage by the medium of the English language but is not allowed actually to use such foreign language or to receive instruction by the medium of it is in about the same position as is a carpenter's apprentice who is not allowed to saw a board or drive a nail. The California statute would therefor seem to be unconstitutional as but another attempt to prescribe a maximum of instruction for private schools.