Buffalo Law Review

Volume 8 | Number 2 Article 2

1-1-1959

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RELIGION AND RACE IN PUBLIC EDUCATION*

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THIS is not, I am sure, the first occasion on which a lecturer has regretted that he chose a title for reflections before he had even held a mirror to his mind. If others in this audience have had the same experience they will surely remember the struggle between commitment and spontaneity. I trust that they, at least, will forgive me if I do not let the title of my remarks set rigid limits to my inquiry.

I told my hosts that I would talk of Religion and Race in Public Education. To many of you, I suspect, this will suggest that my concern will be with educational policy in a time of crisis. Others, remembering that I have been a teacher of law, will realize that I am not qualified to talk of such momentous problems and they will take it that I shall have something to say of recent constitutional decisions which have dealt with religious activities and racial segregation in public schools. Their discernment is, in a sense, justified. But I suspect that they also will find that I have violated in some degree their expectations. For what I mean to do is to consider the problems of religion and race in our educational system, not in order that I may increase your understanding of these problems, but in order that I may encourage you to consider the role of the Supreme Court in American society.

Perhaps I might lead you one further step towards an understanding of my objective if I say that my basic concern is with the problem of the role of history and the value of moderation in the resolution of constitutional questions. All of us, I assume, are respectful of history and each of us, I am sure, believes that moderation is a virtue—at least in judges. I have become persuaded that the Court's decisions concerning the relationship of religion to public education, and concerning racial segregation in schools and colleges may teach us important lessons concerning the role of history in constitutional law. I like to believe that if we take that lesson to heart we may better be able to measure our standards of moderation.

Religion

It is a surprising and I believe significant fact, that before the 1920's scarcely any cases came before the Supreme Court in which the Justices were called upon to consider either the meaning of the First Amendment's promise that Congress should adopt no law respecting an establishment of religion or

*This paper was used as the basis for the Fenton Lecture delivered at the University of Buffalo, April 14, 1958.

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abridging the free exercise thereof, or defining the extent to which the Fourteenth Amendment set limits to the powers of the States as they might touch upon religious interests. I take it that few Americans would question the wisdom of the first of the significant holdings—the decision that the States could not validly deny parents their right to have their children educated in parochial schools which meet the standards prescribed for education in secular matters.[1] Some Americans may feel that Justice Frankfurter was right, some eighteen years later, in dissenting from the decision of the majority of the Court that the conscience of a school child must be secured from compulsory participation in ceremonials having religious significance to the child and his parents.[2] I should suppose, however, that most of us would agree with the majority of the Court that the State's power is abused when it compels the children of conscientious parents daily to salute the flag.

The cases to which I have referred dealt with the liberties of believers and the infringement of those liberties by government. Perhaps because they safeguarded the individual conscience the decisions caused no great turmoil in American opinion. It would be hard for a people reared in the tradition—however legendary—that Roger Williams was the father of the First Amendment and grandfather of the Fourteenth to deny that history gave support to the Court's decisions in *Pierce v. Society of Sisters* and *Board of Education v. Barnette.*

The controversial issues came to the Court after these principles had been settled and it is with these later decisions that I shall be most concerned. The issues which have aroused the tempers and occasionally the passions of Americans turned not upon the scope of governmental authority to control the religious conscience, but upon the measure of state power to support the enterprise of religion. Here, as you all realize, the question of law has not been framed entirely in terms of personal liberty. It has chiefly concerned the meaning of the prohibition that Congress shall adopt no laws "respecting an establishment of religion." I need not set forth in detail the Court's doctrine as it was formulated in the three principal cases concerning the policy of non-establishment. It will be enough, I think, to remind you that in the *Everson* case the Court allowed public funds to be applied to the transportation of children to parochial schools,[3] that in *McCollum* it condemned a voluntary program of religious instruction when the teaching occurs in the school buildings,[4] and in *Zorach* it sustained a similar program when the religious classes meet elsewhere than in the school building.[5]

If one were fairly to consider the criticism which followed the announcement

1. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
2. West Virginia State Board of Education v. Barnett, 319 U.S. 624, 646 (1943).
3. Everson v. Board of Education, 330 U.S. 1 (1947).
4. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).
5. Zorach v. Clauson, 343 U.S. 306 (1952).

of these decisions a volume of commentary would be appropriate. All that I can do this evening is inadequately, but I hope without distortion, to review the direction of criticism. Those who protested against the Court's decision in the *McCollum* case (the case condemning released time for religious instruction in the schoolhouse) gave much attention to the inadequacy, as they saw it, of the judicial reading of history.[6] The critics argued, with some force, that the ambiguities in the political and theological principles of Jefferson and Madison make it impossible to assert with final confidence which dogma of separation they accepted and which they rejected. Furthermore, the critics urged, it is hard to see why the views of two distinguished Virginians, whatever they may have been, should be ascribed to the entire community of Americans by which the First Amendment was ratified. They support this criticism by emphasizing the many ways in which the National government from the first gave recognition to the significance of religion in American society. They conclude their criticism by rejecting as absurd and indefensible the assertion of Mr. Justice Black that our constitutional prohibitions make it impossible for the Federal or State governments to "aid religion." To insist upon the enforcement of any such absolute principle of separation would render invalid such accepted practices as the granting of tax exemptions to Churches, the public support of military chaplains, and the favorable classification, for military purposes, of conscientious objectors. Such radical consequences of a doctrinaire interpretation of the First and Fourteenth Amendments seem indefensible.

The criticisms which I have thus summarized and over-simplified were against the imposition of disabilities on government. They generally came, of course, from those persons who believed and those groups which were persuaded that religion and its institutions served important interests of society. They asked that the government should be empowered, without discriminations and without the infringement of individual rights of conscience, to make itself the ally of religion. Perhaps the vigor of the criticism played its part in the Court's decision in the second of the cases on released time—the case of *Zorach v. Clauson* which was decided by a divided Court in 1952.[7] A majority of the Justices there sustained a program of religious instruction under the auspices of the public schools which seemed to differ from the program condemned four years earlier only in the fact that the classes in religion were not conducted in the public school buildings. It was not surprising that those persons who in 1948 had acclaimed the Court for its decision in *McCollum,* in 1952 protested the decision in *Zorach.*[8] Those who had condemned the *McCollum* case expressed regret that the Court had not explicitly rejected what they considered to be the false history on which

6. See, *e.g.,* BRADY, CONFUSION TWICE CONFOUNDED (1954; CORWIN, *The Supreme Court as a National School Board,* 14 LAW AND CONTEMPORARY PROBLEMS 3 (1949).

7. *Supra* note 5.

8. See *e.g.,* PFEFFER, CHURCH, STATE, AND FREEDOM (1953), p. 353, *et. seq.*

it purported to be based, but rejoiced that a majority of the Court had managed to scale the wall of separation which they themselves had built.

Having over-simplified my description of the criticisms to which the Court decisions on non-establishment have been subjected, may I carry the process a little farther by suggesting that those who criticized the Court in *McCollum* and those who criticized it in *Zorach* have allowed themselves to assume such dogmatic positions that they may fairly, I think, be described as immoderates. The critics who condemn the Court for setting constitutional barriers to governmental aid to religion have at times spoken as if there were an affirmative responsibility on government to assure to each citizen that the state will aid him in the fulfillment of his responsibilities to God. Such critics of the Court have labored with great energy to discover in the Constitution and its history justification for their thesis. They give such ardent attention to the principle of religious liberty that they forget the policies and principles of non-establishment. The supporters of *McCollum* (who are the critics of *Zorach*) have similarly pressed their thesis to extreme. Suspicious of the power of churches, they have sought for historic pronouncements and historical tendencies which would necessitate the condemnation of the *creche* on public property and the observance of Sunday as a day of rest. Passionately concerned to prevent establishment they have been apt to forget that religious liberty is secured by constitutional provisions.

Having thus identified the Court's critics as extremists it might seem that I have put myself in the position of defender of the Court. If I have done so, I have sinned against my profession, for surely no teacher of constitutional law is true to his calling if he does not find fault in his betters. What I should like to suggest is that the critic who fully recognizes the importance both of personal liberty and of the policy against establishment (and who is thus, in my terms, a moderate) may find that the Court has distorted the facts of history and has thus been led to enunciate unsound principles of constitutional law.

What I would emphasize is the obligation of judges and scholars to recognize the differences between the limitations on national authority which are imposed by the First Amendment from those that are imposed upon the states by virtue of the Fourteenth Amendment. The lawyers among you will forgive me, I feel sure, if I endeavor to make my meaning entirely clear. The First Amendment imposed no limits on the states; it asserted, however, that the Congress should adopt no laws respecting the establishment of religion nor prohibiting the free exercise thereof. To me it seems relatively clear that the Framers by these prohibitions sought to achieve two purposes. They wanted to make sure that national authority should not restrict the individual's right of conscience. They wanted to do something more than that, however; they wanted to prohibit legislation which, though it might not invade rights of conscience would lend the support of government to

enterprises of organized religion. What seems to me significant is that the Framers sought to set limits to national power in the area of religion which were imposed not only for the sake of individual liberties but for other reasons as well.

The problems of our recent past in this area have not primarily concerned the scope of national power as it affects religion. They have concerned the limits on the authority of the States. What we were told by the Supreme Court in *Everson* and in *McCollum* is that the Fourteenth Amendment has imposed upon the states the same limitations which the First Amendment imposed upon the Nation. It would be hard, I think, to contest this assertion in so far as state legislation affecting individual rights of conscience is concerned. Surely it is obvious that if a State is denied by the Fourteenth Amendment the power to deprive persons of liberty without due process of law or to deny them equal protection of the laws, legislation which is restrictive of religious liberty or which discriminates between one faith and another is in violation of the Constitution. History, I feel sure, supports the pronouncement that rights of conscience which were secured against the Nation by the First Amendment were secured against the States by the Fourteenth.

There are many persons who, with justice, find more than this significance in the doctrine of the *McCollum* case. It is the finding of this something more that has brought immoderate attitudes to the surface. The Court's opinion—perhaps even its decision—in the *McCollum* case indicates not only that the First Amendment's protection of personal liberty and equality has been made effective against the States by the Fourteenth Amendment, but that the Congressional disability to lend non-discriminatory support to enterprises of organized religion has been transmitted to the States. This reading of the *McCollum* case contributed to the decision of the New Jersey Court that it was unlawful for Bibles to be distributed without charge by a private agency to public-school children whose parents consented to the gift.[9] It is this reading which has led the American Jewish Congress, and others, to contest the constitutionality of the erection of a *creche* on school property during the Christmas vacation. So far as I can see neither the practice condemned by the New Jersey Court nor that opposed by the American Jewish Congress significantly affects the personal rights, either of liberty or of equality, of any individual. Yet we are told that the Fourteenth Amendment is violated by these laws "respecting an establishment of religion."

So far as I know, there is no significant evidence to support the proposition that those who were responsible for the drafting and adoption of the Fourteenth Amendment intended that the States should lose powers which they had previously possessed when the exercise of those powers did not infringe on personal liberties

9. Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816.

or deny equal protection of the laws. Yet we are told by the dogmatists—and perhaps a majority of the *McCollum* court was among that number—that the States may give no aid to religion, even if the provision of aid infringes no one's liberty or denies no one equality of rights. I question this thesis because I do not believe that history supports it. Lacking that support, its defense must be based either upon dogmatism or on fear. Though fears may be justified by rational argument and dogma sustained by logic or authority, the strength of constitutional law is found in history.

As I look at the Court's recent decisions concerning religion, I am persuaded, therefore that when it enforced the relatively clear mandate of history the whole community of moderate Americans accepted its decisions. We found in our past ample justification for the view that neither the Nation nor the States should be permitted to violate the individual's rights of conscience. Most of us were satisfied that settled principles of American federalism justify a national disability to give aids to religions, even when those aids are not invasions of individual rights. We questioned, however, the legitimacy of suggestions that the Fourteenth Amendment imposed the same disability on the States. It is my hope that if the Court were clearly to repudiate these suggestions and were to insist that the Fourteenth Amendment is a charter of liberty and equality and nothing more we should find less passion and therefore more wisdom in our discussion of constitutional law.

Race

In turning from problems of religion to problems of race in public education, I shall still concern myself, as I indicated at the outset, with problems of moderation and with problems of history. I have already indicated a central article of my faith —that when the Court respects history it shows moderation, and when it shows moderation it is likely to promulgate sound constitutional law.

Were a Southern critic of the Court's decisions in the *Segregation Cases*[10] to hear me formulate this principle he would be quick to assert that I had conceded the validity of his criticism. He would assert—possibly with, but more probably without moderation—that the Court itself has conceded that there is insufficient evidence to support the thesis that those who drafted and those who ratified the Fourteenth Amendment intended to outlaw segregation in public education. He would point out that none of the Congressional Civil Rights legislation of the Reconstruction period condemned segregation in public schools and he would remind me that Congress, which is empowered to make the equal protection clause effective, for nearly a century made specific provision that there should be separate schools for Negroes and white children in the District of Columbia. If he had

10. Brown v. Board of Education, 347 U.S. 483 (1954).

listened to the first part of this paper he might further ask me how one who defends the Court's decision that a parent has a constitutional right to have his child educated with children of his own faith can overlook the parent's claim to have his child educated with children of his own race.

If we in the North are to exercise that moderation which we ask of others, our first obligation, it seems to me, is to acknowledge that there is considerable force in the Southern point against the Segregation Decisions. The Court was not able to support its conclusions with persuasive evidence that the draftsmen of the Fourteenth Amendment intended its generalities to bring an end to segregated education. The Congress failed over many generations to exercise its undoubted power to abolish segregation. The Court had committed itself to the doctrine that separate facilities, if equal, were constitutionally tolerable. As a consequence of all of these concurring tendencies it is not surprising that Southerners had come to assume that their institutional habits, sanctioned by history, were also sanctified by law.

To say these things in explanation, if not in defense of Southern resentment, is not to say that if we are to be moderate we must acknowledge that the Court's decisions in the *Segregation Cases* were wrong. For there are, I think, a series of important historical tendencies supporting the Court's decisions—tendencies which deserved respect and which the Court, accordingly, felt compelled to recognize.

For so long a time as the common law system and its tradition survive, judges must not merely respect the forces which surround the courts—the legislative will, the prejudices and the aspirations of the people—but they must honor that portion of tradition and history which they themselves have fashioned. The Court's responsibility to history includes in other words, respect for precedents which the judges themselves have established. This does not mean, in my judgment, that because a majority of the Court in 1896 held in *Plessy v. Ferguson* that Negroes might constitutionally be compelled to use separate and equal transportation facilities[11] the Justices in 1954 were compelled to abide by that principle. It means that the Court was called upon to consider the whole series of cases in which the problems of equality had been considered over a span of more than half a century. I shall not endeavor to describe or summarize those cases; it is sufficient, I hope, to say that before the final decision was made in 1954 authoritative decisions had made it abundantly clear that compulsory segregation was doomed.[12] If the Court in 1954 had not decided the *Segregation Cases* as it did

11. 163 U.S. 537 (1896).

12. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Morgan v. Virginia, 328 U.S. 373 (1946); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Henderson v. United States, 339 U.S. 816 (1950).

the Justices would, in my judgment, have been faithless to the obligation to respect that element in American history which their predecessors had given to the Nation.

Furthermore it should not be forgotten that the permission which the Court had given the States in 1896 to compel separation of the races had been conditional. The Court had said that segregation was permissible if, and only if, the separate facilities made available to Negroes were truly equal. In this pronouncement this permission—there was an implied warning that if experience should reveal that equality, for economic or other reasons, should prove illusory, compulsory separation would be condemned. The Court, in other words, had told the people of the South that the measure of their political freedom was dependent upon their own conduct. The Court thus indicated that experience might significantly mold the law—that history would affect adjudication.

To my mind the considerations which I have emphasized suffice to meet the Southern charge that the Court in 1954 exercised an arbitrary power. The South, as a whole, failed for more than half a century to exercise its freedom with responsibility. It became increasingly clear that the authority to compel racial segregation had been abused by the failure of the Southern States to assure that the separate facilities were equal. Perhaps the majority of the Justices in 1896 should have had less hope and confidence than they did that the dominant forces in the South would respect their obligations. The excess of judicial hope and confidence does not, however, excuse the Southern abuse of power. The abuse was a tragic fact of history in 1954 and the Court would not have been faithful to its trust had it not given due weight to the lesson of experience. In this matter, I believe, the Court has shown that respect for history which moderate persons are entitled to demand and which gives effective strength to rules of law.

Is it possible, I wonder, to bring the two problems which I have discussed into a significant relationship? I take it that I would not have spoken of Religion and Race in Public Education merely because we are all interested in education, in religion, and in racial harmony. The significant relationship between the subjects to which I have directed my attention concerns, as I have already indicated, the wise and legitimate exercise of judicial power. Applying the standards of history and of moderation to the problems before me, I have found grounds for criticism of the Court's decisions concerning the constitutional barriers between religion and education. I have sought to formulate a defense of the Court's decisions concerning segregation.

The lessons as I read them have more than academic importance, for it seems to me that they teach us something of the responsibilities which must accompany freedom. I have made two contentions. First, I have urged that the Court has so

formulated its principles of non-establishment as to endanger the liberty of churches. Secondly, I have suggested that the Southern States abused the freedom conferred up them by *Plessy v. Ferguson.* Some of you may feel that the failure of the Court to set strict limits to Southern freedom indicates that the Justices have been wise to confine the liberty of churches by a strict reading of the non-establishing clause. Those who possess freedom, you may urge, are likely to abuse it, and if the thin wedge of religion is pushed under the doorway to the school-house we will soon find our children being educated at public expense in the articles of a particular faith. Possibly the fear is justified, but fear does not seem to me to be a sound basis on which to build constitutional principles. The important things, in my judgment, are two—that courts guard our liberties with vigilance and that we who enjoy them exercise them with responsible moderation. If the South had done that we might be a less divided nation. If the churches will do that we may become a more civilized people.