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EDUCATION IN THE FEDERAL-STATE STRUCTURE OF GOVERNMENT

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The most important contribution of the United States to political theory and practice has been its development and implementation of the concept of "federalism." By its very nature sovereignty is indivisible, to divide it would be to destroy it. A state cannot be part sovereign and part not sovereign. But the powers of government can be divided and some be bestowed on one level of government and some upon another This is the essence of federalism. It had its origin in the practices of the old British Empire before 1760. Before that date both Crown and Parliament concerned themselves, in the main, with matters of imperial concern; the colonies had been permitted large measure of freedom in regulating their own purely local affairs. But when British statesmen abandoned the practices of the Old Empire and asserted the sovereignty of Parliament over the colonies in matters of local as well as imperial concern, the colonists revolted and the American Revolution was fought in large measure to preserve the principles of federalism. After the Revolution was won, a constitution was finally adopted which preserved the concept of federalism by bestowing certain powers on the central government and by reserving to the states all powers not conferred. Education has, and always has had, an important place in this federal-state structure of government.

THE IMPLIED POWERS OF THE FEDERAL GOVERNMENT TO SUPPORT AND CONTROL EDUCATION

Our federal government is one of delegated rather than inherent powers. Not only are its powers delegated they are expressly enumerated. As the Supreme Court of the United States has put it: "The federal union is a government of delegated powers. It has

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only such as are expressly conferred upon it and such as are reasonably to be implied from those granted."[1] It follows that the Congress at all times is under the necessity of finding in some clause or combination of clauses of the Constitution express or implied authority for all of its legislation.

The Constitution of the United States makes no mention of education. Such positive powers over education as the federal government has are, therefore, implied powers. The only clause in the Constitution from which positive powers with respect to education can be implied is the general welfare clause. This clause confers upon the Congress the power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[2] Just what powers this clause conferred upon the federal government was long a matter of debate. James Madison maintained that the phrase had been borrowed from the Articles of Confederation, that it had been adopted by the constitutional convention without debate, that it had not been regarded by the framers of the Constitution as a phrase that would extend the area of federal authority, that it referred merely to later enumerated powers, that it conferred no substantive powers upon the Congress.[3] Alexander Hamilton maintained, on the other hand, that the general welfare clause conferred upon Congress the power to tax and spend for purposes separate from those later enumerated, that it conferred upon Congress a substantive power to tax and spend for any purpose that would promote the general welfare.[4]

It was not until 1936 that the Supreme Court was called upon to decide between the Madisonian and the Hamiltonian interpretations of the general welfare clause. The Court adopted the Hamiltonian interpretation through *dicta* saying that the power of Congress to spend public moneys for public purposes "is not limited by the direct grants of legislative power found in the Constitution."[5] Somewhat later the Supreme Court in *Halvering v Davis*[6] brought to a close the long debate over the power of Congress to tax and spend under the general welfare clause. The Court upheld the Social Security Act and for the first time upheld the use of the proceeds of taxation as an exercise of authority under the general welfare clause.

While no case involving the power of Congress to tax and spend for the support of education appears to be on record, the reasoning of the court in the cases we have cited and in others make it clear

1. United States v. Butler, 297 U.S. 1, 63 (1936).
2. U.S. CONST. art. 1, § 8.
3. 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 167.
4. 3 HAMILTON'S WORKS 250.
5. United States v. Butler, *supra* note 1, at 66.
6. 301 U.S. 619 (1937).

that the Supreme Court would sustain the authority of Congress to make any reasonable appropriation for the support of education.[7]

The constitutional authority of Congress to exercise control over education is a matter not so easily determined. It seems certain, however, that the national government may enforce whatever control measures that are incidental but essential in the accomplishment of the purposes for which federal funds are appropriated and spent; it may enter into voluntary agreements with the states for the mutual support of education; it may not spend funds for the primary purpose of regulating the educational policies of the states.

FEDERAL POWERS GROWING OUT OF CONSTITUTIONAL LIMITATIONS ON THE POWERS OF THE STATES

Through the general welfarre clause the Constitution confers certain powers with respect to education on the national government; the Constitution also places certain restrictions on the power of the states and these restrictions when enforced by the Supreme Court may profoundly affect the policies the states may adopt with respect to education.

Expenditure of Public Funds For Sectarian Schools and Religious Exercises

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." At first this prohibition was directed to the Congress and not the states. Before 1940, anyone who felt he was being deprived of religious freedom by a state statute carried his case to his own state supreme court. But in 1940 the Supreme Court of the United States held for the first time that the Fourteenth Amendment made the First Amendment applicable to the states as well as to Congress.[8]

This decision represented, in practice, a fundamental change in the law; now the terrain of the controversy with respect to the relation of state and church to education shifted significantly from state courts to the Supreme Court of the United States.

In 1947, the Court was called upon to decide whether a statute of New Jersey permitting local school boards to reimburse the cost of bus transportation to parents of children attending parochial schools was in violation of the First Amendment.[9] In the opinion of the Court, the First Amendment means the separation of church and state; it requires on the part of the state neutrality among all

7. See Steward Machine Co. v. Davis, 301 U.S. 548 (1937) United States v. Butler, *supra* note 1.
8. Cantwell v. Connecticut, 310 U.S. 296 (1940).
9. Everson v. Board of Education, 330 U.S. 1 (1947).

religions and between religious believers and non-believers; and it prevents the levying of any tax, large or small, for the support of any religious activities or institutions. The First Amendment establishes a "wall of separation" between church and state which must be kept "high and impregnable." In the words of the court:

> The 'establishment of religion clause' of The First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.
>
> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State' The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.[10]

The court went on to hold, nevertheless that the First Amendment did not prohibit New Jersey from spending tax raised funds to pay the bus fares of pupils attending parochial and other schools; it was, rather, to be regarded as aid to children as recipients of benefits of public welfare legislation.

Attention should be called to the vigorous dissent of four of the justices in the New Jersey case.[11] They were quite unwilling to accept the conclusion that the payment of the cost of transportation of pupils to Catholic parochial schools was nothing more than the carrying out of a legitimate social welfare problem on the part of New Jersey They regarded the reasoning of the majority opinion as inconsistent; it established an "impregnable wall of separation" between state and church and then preceeded to breach it. As one dissenting justice put it, the only precedent for such a decision was the case of Byron's Julia who, whispering I'll never consent, consented. If the state could pay the cost of transportation of pupils to parochial schools, it could, by the same logic, pay the cost of other parts of the sectarian educational program. Some critics insist that while the wall of separation may still be there the Court has not made it clear what lies on either side; others insist that the wall has been reduced to the dimension of a picket fence.

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10. *Id.* at 15-6.
11. Everson v. Board of Education, *supra* note 9.

In subsequent cases the Court has passed upon the constitutionality of religious instruction and exercises in the public schools. In 1948, the Court held unconstitutional a plan in force in the schools of Champaign, Illinois, whereby teachers employed by various sectarian groups but at no expense to the public schools were permitted to come into the schools to give sectarian instruction to pupils whose parents requested it. The Court held that the program in force constituted the use of tax-supported property for religious instruction. More than that, it was a close cooperation between public authorities and religious groups in promoting religious education; it found the practice squarely under the ban of the First Amendment.[12] Somewhat later in a New York case, it was held that the practice of releasing public school pupils during a small part of the school week to attend religious instruction in the community did not constitute aid to religion; it was rather an accomodation to religion. The Court went on to say· "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best in our tradition. For it respects the religious nature of our people and accommodates the public service to their spiritual needs" [13]

The New York Board of Regents formulated the following prayer and recommended that it be used in the opening exercises of the public schools. "Almighty God we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country" The state authorities made the prayer optional with local school boards and with the parents of children. Five parents of children attending a school in which the prayer was in use challenged the use of the prayer on the ground that it violated the establishment clause of the First Amendment. The Court sustained their contention saying that "each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those people choose to look to for religious guidance."[14] The following year the Court consolidated two cases, one coming to it from Pennsylvania and the other from Maryland. The Pennsylvania case involved a statute which required that at least ten verses of scripture be read, without comment, at the opening of each school day The Maryland case involved an ordinance of the City of Baltimore which required that a chapter of the Bible be read or the Lord's Prayer be recited each day The Court ruled that both practices—the reading of the Bible and the reciting of the Lord's Prayer—were violative of the establishment clause.[15]

12. McCollum v. Board of Education, 333 U.S. 203 (1948).
13. Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
14. Engel v. Vitale, 370 U.S. 421, 435 (1962).
15. School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

Within recent years Congress has enacted legislation which makes possible the expenditure of federal funds to support education at all levels and especailly at the college or university level. So far the constitutionality of this legislation has not been tested in the Supreme Court. It would appear that the reasoning back of this legislation is that where the main purpose of federal aid is to accomplish some socially desirable secular purpose incidental benefits accruing to religious institutions do not fall under the strictures of the First Amendment.

Equal Protection of the Laws

Another limitation on the powers of the states with respect to education is that clause of the Fourteenth Amendment which provides that no state may deny any person within its jurisdiction the equal protection of the laws. The interpretation given to this clause has governed the cases dealing with racial segregation in the public schools.

In 1896, the Supreme Court ruled in a case involving public transportation facilities that segregation of the races was legal provided equal facilities were provided each race.[16] This was the first appearance of the "separate but equal" doctrine. For the next fifty years or so it was widely applied to the segregation of the races in the public schools. Finally, in 1954 the doctrine was squarely challenged as being in violation of the equal-protection-of-the laws clause of the Fourteenth Amendment. The Supreme Court consolidated cases that had come to it from a number of states and in the first *Brown* decision[17] struck down the "separate but equal" doctrine. In the words of the Court:

> To separate them [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.[18]

The next year in the second *Brown* decision[19] the Court remanded the cases to the federal district courts in which they originated and directed the procedures to be followed in implementing its first decision. It placed upon local school boards the primary responsibility of devising and implementing plans to end segregation; the courts, guided by equitable principles, were to consider whether the

16. Plessy v. Ferguson, 163 U.S. 537 (1896).
17. Brown v. Board of Education of Topeka, 347, U.S. 483 (1954).
18. *Id.* at 494-95.
19. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

action of school authorities constituted implementation of the governing constitutional principles. The Supreme Court realized that it would be undesirable to try to enforce complete integration immediately but it did direct that the school authorities make a "prompt and reasonable"[20] start and then proceed with "all deliberate speed."[21] During the period of transition to a racially nondiscriminatory school system the district courts were to retain jurisdiction.

Since 1954 the federal courts have decided a number of cases involving segregation in the public schools. These cases have dealt with plans for ending segregation and with plans apparently designed to delay action or to circumvent the requirements of the law At first the courts were disposed to accept plans that exhibited good faith and to permit adequate time for implementation. As time has passed, however, the courts indicate that they are out of patience with delay and that the time has passed for "deliberate speed." Now local school authorities must end segregation without delay or face the loss of any federal funds that otherwise they might receive.

The courts are divided upon the constitutionality of *de facto* segregation growing out of housing patterns and with no intent to perpetuate segregation. A number of courts, both state and lower federal courts, have taken the position that the *Brown* decisions do not mean that local boards of education must take steps to reduce racial imbalance and to eliminate *de facto* segregation.[22] The weight of authority is to the effect that the *Brown* decisions prohibit segregation, but that they do not require integration.[23] Negro children, it is said, "have no constitutional right to have white children attend school with them."[24]

A federal district court, in holding that *de facto* segregation was not illegal, followed the reasoning of most courts that take a similar position. It said:

> In this cause of action the plaintiffs are requesting the Court to do what the Constitution forbids, that is, to recognize their color. . . Plaintiffs have a constitutional right not to be objects of racial discrimination but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when

20. *Id.* at 300.
21. *Id.* at 301.
22. Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964) Lynch v. Kenston School District Board of Education, 229 F.Supp. 740 (E.D. Ohio 1964) Monroe v. Board of Commissioners of City of Jackson, Tennessee, 221 F.Supp. 968 (E.D. Tenn. 1963) Bell v. School City of Gary, Indiana, 213 F.Supp. 819, (N.D. Ind. 1963) Jeffers v. Whitley, 197 F.Supp. 84 (M.D. N.C. 1961), Aaron v. Tucker, 186 F.Supp. 913 (E.D. Ark. 1960).
23. See, *e.g.*, McNeese v. Board of Education, etc., 305 F.2d 783 (7th Cir. 1962) Bush v. Orleans Parish School Board, 190 F.Supp. 861 (E.D. La. 1960), Balaban v. Rubin, 248 N.Y.S. 2d 574 (1964).
24. Downs v. Board of Education of Kansas City, *supra* note 22, at 998 *See also* Evers v. Jackson Municipal Separate School District, 232 F.Supp. 241 (S.D. Miss. 1964).

> there has been no actual discrimination against them. The law is color blind and, in such cases as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis where there has been no discrimination.[25]

Again it was said by a New York court:

> the desegregation required by the Constitution, as interpreted by the Brown cases, does *not* mean that there *must* be an intermingling of the races in all school districts. It does *not* mean that, regardless of school zones or the residence of Negro or white students, there is an absolute, affirmative duty on the part of every board of education to integrate the races so as to bring about, as nearly as possible, racial balance in *each* of the schools under its supervision. *It does not mean, for example, that white children in non-contiguous or outlying areas must be 'bussed' into a Negro area in order to desegregate a Negro school.*[26]

Other courts, however, take an opposite position, holding that school boards must act to reduce racial imbalance and to eliminate *de facto* segregation.[27] It has been held that a school board may, without violating the constitutional rights of white children, take race into consideration when it changes boundary lines in order to achieve racial balance.[28] In a few instances, however, it has been held that a board may not take race into consideration, when it changes boundary lines of attendance areas, in order to achieve racial balance.[29] As one court put it, "the law is color blind".[30]

Both state and lower federal courts are in wide disagreement on many issues involved in *de facto* segregation and it will take one or more Supreme Court decisions to resolve these differences.

Due Process of Law

Another limitation on the powers of the states in the field of education is that clause in the Fourteenth Amendment which provides that no state may deprive any person within its jurisdiction of life, liberty, or property without due process of law The Supreme Court has not attempted to define with exactness the liberty guaran-

25. Lynch v. Kenston School District Board of Education, *supra* note 22, at 744.
26. Balaban v. Rubin, *supra* note 23, at 581.
27. Barksdale v. Springfield School Committee, 237 F.Supp. 543 (E.D. Mass. 1965), Blocker v. Board of Education of Manhasset, New York, 229 F.Supp. 709 (E.D. N.Y. 1964) Taylor v. Board of Education of City School District, 191 F.Supp. 181 (S.D. N.Y. 1961).
28. Fuller v. Volk, 230 F.Supp. 25 (D.N.J. 1964), Morean v. Board of Education of Montclair, 42 N.J. 237, 200 A.2d 97 (1964).
29. DiSano v. Storandt, 250 N.Y.S. 2d 701 (1964).
30. Lynch v. Kenston School District Board of Education, *supra* note 22, at 18.

teed by due process. Each case is considered in terms of the particular web of facts in which it is embedded. If after a consideration of all the pertinent facts the Court finds that the action of the state complained of was taken for a purpose and exercised in a manner reasonably necessary to protect and insure the public safety and welfare it will hold that due process has not been violated. If, on the other hand, the Court regards the action as unnecessary and an unreasonable restriction upon personal liberty or as an arbitrary interference with property rights, it will rule that due process has been violated.

A few cases will serve to illustrate how the due-process clause may limit the power of the states to formulate and execute their educational policies. In Nebraska, during World War I, the selective draft law revealed that thousands of men born of foreign-language-speaking parents and educated in schools taught in a foreign languate were unable to read, write, or speak the language of their country, or understand words of command given in English. It was revealed, too, that there were local foci of alien enemy sentiment and that this sentiment had been strongest in those communities where instruction in private and parochial schools had been given in a foreign language. Feeling that the state's social integrity was threatened, the legislature passed a statute making it unlawful to teach a foreign language to pupils in private, parochial, or public schools who had not completed the eighth grade. When the case came before the Supreme Court it ruled that the statute was an arbitrary intereference with the liberty of parents to control the education of their children and with the liberty of modern language teachers to pursue a lawful calling.[31] In Oregon a statute required children between the ages of eight and sixteen to attend a public school. Again the court ruled that the statute violated the due-process clause in that it unreasonably interferred with the liberty of parents in the upbringing and education of their children. Said the court: "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."[32]

THE STATE AND THE PUBLIC SCHOOLS

The distribution of power with respect to education in our federal system places on each of the states the primary responsibility for formulating its educational policies and for the support and administration of its schools. The Congress must find express or implied authority for all of its legislation in some clause or combination in the Constitution; with the states the case is different. They do

31. Meyer v. State of Nebraska, 262 U.S. 390 (1923).
32. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

not look to the federal constitution for any grant of powers; their governmental powers are plenary unless the power in question has been delegated to the central government, or unless it has been denied to the states by some provision in the federal constitution. It follows that a state legislature, except where restricted by constitutional limitations, may define the ends to be attained and the means to be employed in the development of an educational system. The legislature may determine the types of schools to be established throughout the state, the means of their support, the organs of their administration, the content of their curricula, and the qualifications of their teachers. All these matters may be determined with or without the consent of the localities, for in education the state is the unit and there are no local rights except such as are safeguarded by the constitution.

Historically the distribution of power with respect to education in our federal system has worked well. It has prevented rigid central control; it has permitted local communities to develop policies and practices suited to their local needs; and it has made possible much experimentation. In recent years, however, there are those who feel that federal influence over education has become far too great.