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# CONSTITUTIONAL AND GENERAL WELFARE CONSIDERATIONS IN EFFORTS TO ZONE OUT PRIVATE SCHOOLS\*

REYNOLDS C. SEITZ\*\*

Recent litigation in state courts involving efforts on the part of governmental bodies to zone out private schools<sup>1</sup> raises questions of importance for both private schools and for parents who wish to select the type of institution their children attend.

This article will discuss the zoning regulations from the viewpoint of the due process and equal protection of the laws provisions of the United States Constitution. The fact that a zoning out of a private school case, on appeal from the Supreme Court of Wisconsin, was dismissed by per curiam decision<sup>2</sup> by the Supreme Court in 1955 as not involving a federal question is not a bar to such treatment. In the Wisconsin litigation, it appears that the favorable outcome at the trial stage and the strong precedent in other states<sup>3</sup> induced those interested in the private school rights not to present in the state court, the strongest possible arguments to establish that there was a federal question. There do seem to exist reasons which could convince the Supreme Court that there is a real fourteenth amendment issue raised by efforts to zone out private schools.

The importance of testing state or municipal zoning efforts against the Federal Constitution is spotlighted by McQuillin's comment that "in investigating the constitutional validity of zoning laws, in view of the provisions of the United States Constitution, it should be said . . . that it is not important whether the power to enact them emanates from the state constitution, or state statutes, or the municipal charter, because the state cannot violate the United States Constitution by its own constitution, hence it

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\*This article deals only with efforts to zone out elementary and secondary schools.

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1. Wisconsin *ex rel.* Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43 (1954); Roman Catholic Welfare Corp. v. City of Piedmont, 45 Cal.2d 325, 289 P.2d 438 (1955); Great Neck Community School v. Dick, 140 N.Y.S.2d 221 (Sup. Ct. 1955); Diocese of Rochester v. Planning Board of Town of Brighton, 207 Misc. 1021, 141 N.Y.S.2d 487 (Sup. Ct. 1955). (The New York cases are on appeal to the Appellate Division). In the latter part of 1955 the court in Montgomery County, Pennsylvania, upheld a zoning ban against a private high school.

2. 349 U.S. 913 (1954).

3. References are made to the cases later in this article.

cannot by its constitution repeal, modify or suspend the due process of law clauses or the guarantees of personal and property rights contained in the . . . fourteenth amendment."<sup>4</sup>

In considering the impact of due process on zoning legislation directed against private schools, it appears that the liberties involved are these: (1) that of parents to select the type of education they desire for their children and (2) that of a private school corporation to use property which it owns for educational purposes.

A decision of the United States Supreme Court clearly indicates the concern which the Court has for the liberties just mentioned. Justice McReynolds, speaking for the court in *Pierce v. Society of Sisters*,<sup>5</sup> said of the parents' right, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the 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 obligation." On the matter of the safeguarding of the property interest, McReynolds answered the contention that the Society of Sisters was a corporation and could not claim for itself the liberty which the fourteenth amendment guarantees by the blunt statement that appellees "have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action."<sup>6</sup>

So emphatic is the language of the *Society of Sisters* case on the matter of rights of parents that it might almost induce the belief that it gives the answer, without need of further discussion, to the extent of the power of government to zone out private schools. Actually it does not. The court was faced with an Oregon statute which attempted to force all children to attend the public schools of the state. Zoning ordinances relating to private schools do not directly make such effort.

Discussion will, therefore, later return to the effect which the zoning ordinances have on rights of parents to select private school education for their children.

In respect to the protection of property rights, *Pierce v. Society of Sisters* need not stand alone as precedent. The United States Supreme Court has shown its respect for due process in zoning by pointing out that "the governmental power to interfere by zoning regulation with the general rights

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4. McQuillin, *Constitutional Validity of Zoning Under the Police Power*, 11 Sr. Louis L. Rev. 76, 77 (1926).

5. 268 U.S. 510, 535 (1925).

6. *Id.* at 535.

of the landowner by restricting the character of his use is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare."<sup>7</sup>

The Court, while recognizing that zoning power is grounded upon the police power of the state, showed awareness that there must be a balancing against property rights whenever the police power is exercised.

The attitude suggests that before the private school can be zoned out there must be found values of major importance to general welfare when compared with those that inhere in the use of property for a private school. Obvious values which come to mind are aesthetic and property ones. That the protection of such values comes within the police power of the state can be implied from the United States Supreme Court's acknowledgment that "the police power of the state embraces regulation designed to promote public convenience or general prosperity as well as regulation designed to promote the health, the public morals or the public safety."<sup>8</sup> Professor Sayre of the University of Iowa Law School forcefully contends that aesthetics goes toward maintaining property values and that the advantage of property values should be considered an instance of public welfare."<sup>9</sup> "Property," he points out, "is one way in which we measure the general well being of the entire city or neighborhood. . . . Without wealth in this sense . . . from which taxes may come," he continues, "the city cannot maintain the obvious public welfare through sewers and other sanitation equipment, public parks, public schools, protection against epidemics and the control of lawlessness, all of which directly contribute to health, morals and safety."<sup>10</sup> A number of courts have construed "general welfare" to include the preservation of property values.<sup>11</sup>

The recognition that the police power of state and municipal governments can be exerted to guard aesthetic and property values in no way resolves the question as to whether those values are significant enough to be protected ahead of the value which results from the use of property for a private school and the value which arises out of such use. An answer will come only after the most careful balancing. Professor Sayre argues that "the real test is whether the police power is justly used to protect the public interest in private property and not merely the selfish advantage of the

7. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199, 200 (1955) comments that the *Nectow* case has never been overruled or disapproved and could lead to future decisions adverse to planning.

8. *Chicago, B. & Q. Ry. v. Illinois*, 200 U.S. 561, 592 (1906).

9. Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A.J. 471 (1949).

10. *Id.* at 472.

11. See cases cited by Radda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 SO. CALIF. L. REV. 149, 153, n. 30 (1954).

individual owner.”<sup>12</sup> Significantly, he thinks in terms of benefit to the whole community “though the individual owner may lose.”<sup>13</sup> The United States Supreme Court warns that “the validity of a police regulation, whether established directly by the state, or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or unreasonable and whether really designed to accomplish a legitimate public purpose.”<sup>14</sup> In the course of such evaluation, cognizance can also be taken of the fact that in many instances the existence of private schools in a community have increased property values as a whole.

No court has undertaken the task of doing the evaluation suggested. The one court of last resort which has upheld a zoning ordinance directed at private schools does talk about the contribution which such schools make to general welfare, but it does so for the purpose of establishing no violation of the equal protection of the laws principle. Faced with an ordinance which permitted public schools but zoned out private schools, the Wisconsin court in the *Lutheran High School*<sup>15</sup> case discussed the contribution of a private high school to general welfare in order to support its finding that there was a reasonable classification<sup>16</sup> and that the ordinance was valid. In answer to the assertion of the Wisconsin Lutheran High School Conference that discrimination was involved in the provision which permitted the erection of a public high school in Residence Area A<sup>17</sup> of Wauwatosa but banned the building of a private high school, the court turned the argument and informed the Lutheran group that the zoning ordinance was based on a valid classification. In spelling out its position the court pointed out that the private school discriminates in its admission policies and, therefore, does not serve the public welfare to the same degree as the public school.

This attitude on the part of the court warrants rather lengthy analysis. It seems to indicate a rather unrealistic approach to a determination of the contribution of private schools to general welfare. The analysis should indicate that any ordinance which discriminates between public and private schools can properly be attacked on the ground of violation of equal protection of the laws for want of reasonable classification.<sup>18</sup> Argument which

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12. Sayre, *supra* note 9, at 474.

13. Sayre, *supra* note 9, at 529.

14. *Chicago, B. & Q. Ry. v. Illinois*, 200 U.S. 561, 592 (1906).

15. *Wisconsin ex rel. Lutheran High School Conference v. Sinar*, 267 Wis. 91, 65 N.W.2d 43 (1954).

16. The significance of legislative classification is brought out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). See also Johnson, *supra* note 7, at 199.

17. The most select residence area in Wauwatosa, a suburb immediately adjacent to Milwaukee.

18. ROTTSCHAEFER, *CONSTITUTIONAL LAW*, 551 (1939) draws attention to the general rule that equal protection of the laws requires states to make reasonable classifications in enacting and enforcing regulatory legislation and that the reasonableness

portrays the importance of the contribution of the private school should also help to spotlight the difficulty of any direct determination that specific aesthetic and property value are greatly important to general welfare when compared with the contribution made by the private school.

Turning to the decision of the Wisconsin Supreme Court,<sup>19</sup> it appears that the court introduced a test for "general welfare" which might be called a numerical test. It was a test especially designed for the problem at hand. The court stated that since the private school discriminates in its admission policies, it does not serve the public welfare to the same degree as the public school.<sup>20</sup>

A reaction to this test requires thoughtful analysis of the court's accusation that the private school is guilty of discrimination.

Since the record did not reveal any indication that the Lutheran High School would practice any technique of exclusion which could be characterized as bigotted, arbitrary or unreasonable, it is apparent that the Wisconsin Supreme Court must have had in mind another test for discrimination. Perhaps it presumed that the school would limit its enrollment to Lutherans. More clearly it was merely thinking in terms of total numbers. Because the court may have thought that most private schools could not physically accommodate the numbers which a public school could accept, the court apparently felt it did not need to worry about lack of concrete evidence of discrimination. It saw in the existing situation an attitude which it referred to as one of discrimination.

A holding that private schools generally would not admit all comers, cannot be challenged. This might be for a number of reasons.

Since the private school does not have access to the tax dollar, it is forced to charge tuition and to select most of its students on the basis of ability to pay. Also, lack of tax support so limits the capacity to build a plant that space facilities force registration curtailment.

Since space is limited the private school must as a practical matter give preference to the group that contributes major support. In the case of the religious private school this usually means a particular faith.

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of a classification can be determined only by considering its purpose, the policy to be promoted thereby, and the relation of the resulting differences in treatment to those factors.

In thinking of the impact of equal protection of the laws upon the problem at hand it is proper to think of Frank's comment at page 405 of his *Constitutional Law* (1952) that "... if the same amount of ingenuity and determination that went into the judicial expansion of the due process clause had been focused on the equal protection clause, many of the same results could have been reached." It would seem that many of the arguments in this article which question due process can also be used in testing for equal protection of the laws.

19. 267 Wis. 91, 65 N.W.2d 43 (1954).

20. The court admitted that there was no difference between a public school and a private school in respect to the affect on health, safety, or morals. *Id* at 96, 65 N.W.2d at 47.

It must be admitted, also, that the private school has more power than the public school to select enrollment on the basis of mental qualification, character qualification and conformity with the ideals of the school.

Do these facts support a conclusion of discrimination? Yes, in the sense that all acts involving a selection are acts of discrimination. But do the facts constitute a policy of unjustifiable selection which is based upon an arbitrary, unreasonable or an otherwise undesirable standard? No, seems the logical answer.

A decision upon admission policies which is dictated by financial resources certainly involves no conduct which should be censured. A private school cannot be blamed for not using tax money which the law of the state denies it.

Does enrollment policy become more vulnerable to the charge of discrimination if students are chosen on the basis of academic qualifications, character qualifications and conformity with the ideals of the school? It would seem the answer should be in the negative unless there is no reasonable justification for such determination.

It is submitted that there is a reasonable justification. Certainly the nation has an interest in any efforts at providing a good atmosphere for the education of students who have the capacity to absorb training in future leadership. Decisions on the part of a private school to set up scholastic standards can reasonably be justified as a technique for creating a favorable climate for the efficient development of leadership qualities in those pupils with the requisite mental abilities. Decisions so made represent an educational philosophy and not a philosophy of discrimination. That there is an educational philosophy which indicates that good results can be expected from homogeneous grouping is clearly evident in the writing of Ward Reeder in his book, *The Fundamentals of Public School Administration*. It is there stated that "the aim of teachers and school officials should be to group together those pupils who have nearly similar abilities. Such grouping makes it much easier for the teacher to adapt his material and methods to the group."<sup>21</sup> Leonard Koos, in his volume *The American Secondary School*, indicates that "homogeneous grouping is one means of adapting the curriculum toward keeping the better-than-average pupil working at full level of ability."<sup>22</sup> While it is true that some educators believe that the teacher can enrich the curriculum for the above-average child without the need of homogeneous grouping,<sup>23</sup> the belief does not destroy the fact

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21. Pages 340-41. On the same pages the author refers to experiments which indicate that pupils do their best work when grouped with other pupils of similar ability.

22. Page 544.

23. Paul Witty, Professor of Education at the School of Education, Northwestern University, has been one of the most forceful proponents of such thinking as his numerous books and articles reveal.

that such grouping can be reasonably used as a technique to serve the above-average pupil. And since the private school can in no event, as has previously been shown in this article, admit unlimited numbers, any decision to think primarily of the training of the youths who will most likely develop qualities for future leadership is a reasonable decision free from motives of discrimination. In this connection it is interesting to note the comment of Professor Arch O. Heck, College of Education, Ohio State University.

The danger of universal public education is leveling of a nation's leadership. The task of providing it is so great that children are handled *en masse*. Instruction lacks individualization because the course of study is developed to fit the average child. The more nearly education is made universal the lower is that average.<sup>24</sup>

If there is something unreasonable about setting up mental ability qualifications as a criterion for admission then many of our law, medical, dental, engineering, journalism, commerce and other university schools have been guilty of acts of discrimination which can be censured. The censure, however, has not been administered. Rather a sizable and responsible portion of the public feels that the schools are performing a useful service in creating an educational climate which is not affected by the presence of the inept.

True, it is possible to feel that selection policies at the university level should be stricter than at the secondary school level. But it still seems that the private school is not acting unreasonably if it makes certain admission decisions by using a yardstick which measures ability. And if it does not act unreasonably, it is difficult to understand why it should be accused of an act of discrimination.

It is often true that the public school provides for differences in mental capacity by means of homogeneous grouping and setting up of varied programs. This would seem to confirm the conclusion that any effort of the private school at selection on the basis of capacity to absorb is educationally justified and not in any way a manifestation of an improper preference.

As respects the private elementary school there is much less likelihood that many of them will do much choosing on the basis of scholastic standards. In actual practice it will probably reject only the hopelessly incompetent. A particular public school may do the same.

Since private schools often give attention to character qualifications and insist upon a degree of conformity with the ideals of the school, it becomes pertinent to analyze the reasonableness of such attitude.

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24. HECK, *THE EDUCATION OF EXCEPTIONAL CHILDREN* 374 (1953).



Certainly the efforts of universities to inquire into character as part of admission practice are generally approved. Why then should a somewhat similar approach be labeled as in any way wrong if it is used by the private secondary or elementary school? Reputable educators believe that the presence of students with some clearly recognized character deficiencies can have a marked effect upon the morale of a school with the result that an atmosphere is created which is not the most conducive to best educational results.<sup>25</sup> The attitude of these professional people has nothing to do with a desire to discriminate.

The attention which a private school gives to conformity with ideals of the school would seem to be discriminatory only if the ideals set up are in some way unlawful or undemocratic.

It would appear perfectly proper for a private school to refuse admission to one whose weakness of character was evidenced by a record of acts of dishonesty or moral turpitude. Even public schools often take recognition of such conduct. Pupils who have transgressed civil and moral laws frequently are rejected by one public school and required to transfer to another school. Under certain circumstances pupils are sent to a school of correction. No one looks upon rejection under such conditions as indicating any kind of bias. Rather it is thought of as a procedure necessary to safeguard the morale of the individual school and the educational welfare of those who attend.

Many private schools are operated by religious denominations. On occasion a school of such type may reject a student who is openly antagonistic to the faith represented by the school administration. It might possibly be contended that such action is biased. Reflection, however, leads to the thought that such open defiance on the part of a student would have a

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25. The writer is not able to allude to published statements which directly support the assertion, and he is not authorized to use names in connection with quotations. From personal experience he is able to testify that many highly respected public school administrators have voiced the opinion indicated. Recently the Dean of the School of Education at one of the country's great universities (non-denominational) gave the opinion that compulsory attendance laws should be revised so that many persons with certain character deficiencies would not need to be retained in the public schools. The same opinion was expressed openly by a secondary school principal at the Secondary School Principals meeting held in Chicago in the late winter of 1956. The fact already exists that students are by administrative action often shifted from one public school to another because character deficiencies have created a morale problem which endangers educational results. Professor Arch O. Heck at page 59 of his book *The Education of Exceptional Children*, *supra* note 24, makes a comment which has some pertinence. He says,

"Give youth a chance" is a modern slogan in dealing with the socially handicapped; there comes a time, however, when we have to say "Give society a chance." When all fails to change the individual's mode of response and when that mode of response begins to have a decidedly detrimental effect upon other individuals, society must demand for its own sake that the youth be incarcerated.

Professor Heck goes on to indicate that he is using the term "socially handicapped" to mean delinquent. He also explains that he is not using "incarcerated" to mean jailed, but placement in a specific kind of school.

disturbing effect upon the atmosphere within a school and that it would be educationally sound to reject those who are responsible for such disturbance.

As long as the school does not hold to ideals which are undemocratic or unlawful, rejection of students openly antagonistic to its ideals is certainly not discriminatory. It is merely a frank recognition that education cannot flourish best in a climate of disharmony. As a matter of fact, if pupils within a public school openly attacked and ridiculed the religious beliefs of other pupils, the offenders could be silenced and expelled if they persisted in such tactics. No school, public or private, should be a forum for such endeavor.

The impression may exist that private schools run by a religious denomination refuse to admit all who do not belong to the faith of the group that administers the institution. This may seem to be a proper deduction from observing that the largest segment of enrollment belongs to the faith of the group in control of operation.

Actually, the situation does not connote discrimination. The result does not come about from a desire not to accept members of other faiths. It exists because of the practical facts which confront the private school. As already noted the private school does not have access to the tax dollar and, consequently, is limited in respect to the physical plant it can build and staff with teachers. It is only logical that private schools give preference to members of those groups who contribute the support which insures operation.

Certainly the vast majority of religious schools would like to accept students of all faiths (as long as they are not openly antagonistic to the faith of the administration). The writer knows of no religiously controlled institution which has a rule that requires it to reject students simply on the grounds of religious belief.

The fact that religiously dominated private schools want to, and do, accept students of all faiths becomes apparent when we look at college and university operations as they have existed to the present time. At such level in a great many private institutions space is not at the same premium as it is in the elementary and secondary field. As a result Protestants and Jews in considerable numbers are found on Catholic school campuses. Episcopalians, Lutherans and Jews are found on campuses operated by Methodists. Almost any combination of religious sects are found at a large number of religiously controlled private institutions of higher learning.

Indeed, to the extent that space limitations permit, students of varied faiths are found at elementary and secondary schools operated by religious bodies. There is, in short, no fixed policy of discrimination. Certainly no improper preference can be deduced from the fact that a religious school

will almost always draw the heaviest proportion of its enrollment from the faith in control of operations.

The entire discussion bearing upon the question of whether admission policies of private schools constitute discrimination should focus attention upon the fact that discrimination is a word which bears watching. The only important consideration is whether there is unreasonable exclusion. It would seem that selection policies should not be censored unless admission practices constitute unfair, bigotted or undemocratic acts.

The accuracy of this concept of discrimination will become even more apparent after brief analysis. Certainly those who have worked in the interests of fair employment practices have been keenly conscious of problems of improper preference. And yet in none of the fifteen states where the legislature has passed fair employment practice acts is there a condemnation of employers on any kind of a number employed basis. The legislators clearly avoided requiring an employer to hire on a percentage basis equal to the ratio of a particular race, color or creed found in the community. The fair employment practice acts recognize that a failure to hire based upon such reasonable grounds as lack of skill, temperament, personality and character is reasonable. They strike out at failure to hire which is based upon an attitude of prejudice. Congress in connection with its passage of the anti-discrimination features of the Robinson-Patman Act showed clearly a desire to protect free competition. And yet it did not halt the seller from granting price differentials if it was necessary to meet the price of a competitor or if it was based upon a cost difference. In other words action taken which is reasonable was distinguished from that which is clearly discriminatory. The United States Supreme Court in 1945 refused to use a numbers test in considering a question of discrimination. In *Adkins v. Texas*<sup>26</sup> the court specifically stated that there was no wrongful selection of a grand jury on the ground of mere inequality in the number of persons selected from the different races. The court commented that discrimination is unlawful only if it is purposeful and systematic.

But even if such is the conclusion as respects the meaning of discrimination the fact remains that the public school will frequently serve more pupils than the private school. Is it possible, therefore, to conclude that the public school serves the general welfare to a greater extent than the private school? Is it sound to evaluate "general welfare" by a mere counting of numbers test? It is submitted that the answer should be in the negative.

Fundamentally and essentially the test of the value of education in serving the general welfare must be on the basis of success with each individual product. If comparison is made between individuals of equal men-

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26. 325 U.S. 398 (1944).

tal capacity, personality and character attending schools of equal rating, it is utterly impossible to conclude that boys and girls educated in a public school would make a greater contribution to general welfare than those educated in a private school. Both groups should make a tremendous contribution—one so significant that it is impossible to weigh with any human yardstick. Government should not put any obstacle in the path of an institution capable of doing so much good. In their book<sup>27</sup> Johnson and Yost remind us that from the private schools “have come many of the leaders in educational reform and many of our greatest statesmen. . . . It can hardly be said,” they say, “that these institutions have been a detriment; rather they have been an asset.”<sup>28</sup>

The court should not determine that because the public schools can turn out more products than the private schools they, therefore, do more good.

The only valid test of educational results is one that is qualitative. One will not be attempted in this article, and it probably may be that as a practical matter none could be universally or generally applied. It would be difficult to make allowances for variations due to differing lawful objectives. It would be very undesirable to force all schools into a completely standardized mold.

Evaluation under a qualitative standard would actually require comparison on an individual school basis—perhaps on an individual teacher basis. The critic would be rash, indeed, who would claim either that all public education is better than private or that all private education is better than public.

At any rate the courts are not competent or equipped to make a comparison between public and private schools.

One other argument which the Wisconsin Court used to bolster its position gives further support to the feeling that the court did not adopt the most realistic attitude toward the evaluation of the contribution which the private school makes to general welfare. This is the argument by analogy to cases which upheld zoning out of privately owned parks and playgrounds, a privately owned golf driving range, and a wholesale and retail milk business.<sup>29</sup>

A number of state courts of final appeal have recognized very clearly the contribution which the private school makes to general welfare. The Illinois court said, “Such a school [private], conducted in accordance with the educational requirements established by the state educational authori-

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27. JOHNSON AND YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* (1948).

28. *Id.* at 140.

29. 267 Wis. 91, 65 N.W.2d 43, 47-48 (1954).

tics, is promotive of the general welfare."<sup>30</sup> The Supreme Court of Oregon commented that "the kind of school [private] to be erected will not interfere with the public health, it cannot affect public peace, it surely will not endanger public safety and by all civilized people an educational institution whose curriculum complies with the state law is considered an aid to the general welfare."<sup>31</sup>

In the most recent case,<sup>32</sup> decided in the latter part of November 1955, the Supreme Court of California reviewed a great number of the cases which involved attempts to zone out private schools (including that of Wauwatosa, Wisconsin) and concluded that the Piedmont ordinance was void because of its arbitrary and unreasonable discrimination against private schools. The court very evidently recognized that the private school did not make any less contribution to general welfare than did the public school.

Enough has perhaps been set forth concerning the contribution of the private school to general welfare. It is submitted that the contribution is significant enough to protect the property rights of the private school against zoning efforts.

It is now further submitted that the right of parents to select the kind of instruction they wish for their children furnishes another strong reason for invalidating zoning ordinances aimed at private schools.

The presentation of this viewpoint will carry the reader back to earlier comments made in this article about due process of law under the Fourteenth Amendment and to the United States Supreme Court statement in *Pierce v. Society of Sisters*.<sup>33</sup>

Previously this article dropped discussion on parent's rights with the reasoning that a zoning ordinance is not likely to keep a private school completely out of a city, village, or county and, therefore, is unlike the Oregon ordinance involved in the *Society of Sisters* case which attempted to outlaw private schools. Now it is pertinent to think about the extent to which zoning ordinances directed at private schools do affect rights of parents.

Basic to any thinking on the problem is the need to understand that a zoning ordinance may endeavor to keep out private schools from 98% of the city as was the situation in the Piedmont, California, effort or it may

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30. *Catholic Bishop v. Kingery*, 371 Ill. 257, 259-60, 20 N.E.2d 584 (1939). This case and *Miami Beach v. State ex rel. Lear*, 128 Fla. 750, 175 So. 537 (1937) are the two cases which the Wisconsin Supreme Court admitted were practically identical with the facts involved in the Lutheran High School zoning controversy. See 36 A.L.R.2d 657-660 for citation to and discussion of other cases holding zoning ordinances directed at private schools invalid.

31. *Roman Catholic Archbishop v. Baker*, 140 Ore. 600, 613, 15 P.2d 391, 395 (1932).

32. *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal.2d 32, 289 P.2d 438 (1955).

33. 268 U.S. 510, 535 (1925).

be aimed at the private school in a much smaller area as was the fact in the Wauwatosa, Wisconsin, situation.

Very clearly there appears to be a due process violation in the 98% attempt. Just as clearly there would seem to be a violation in a 75% ordinance. Indeed facts could plainly show a violation in an ordinance where the percentage was appreciably lower than 75%.

The fault in the 98% and 75% legislation is that the private school can be pushed back to a very undesirable manufacturing, commercial or economic area. Facts might establish that even smaller percentage provisions might induce such results.<sup>34</sup> The result would seriously affect rights of parents. They would be coerced into enrolling their children in a public school in order to avoid sending them into regions where the health, safety and moral hazards may be high.

Various courts have seen the indicated danger when attempts have been made to zone out churches. In *State ex rel United Lutheran Church v. Joseph*<sup>35</sup> the court remarked that "to require that churches be banished to the business district, crowded alongside filling stations and grocery stores, is clearly not to be justified on the score of promoting general welfare." In *City of Sherman v. Sims*<sup>36</sup> the Texas court warned that "to relegate churches to public and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and in some instances in prohibiting altogether the exercise of that right."

The same result can follow if the philosophy of the *Lutheran High School* case is followed.

The fault in an ordinance of the Wauwatosa, Wisconsin, type which is designed to keep private schools out of a relatively small area within a city is that it constitutes a real threat to parents' rights when it is supported by a judicial finding that the private school does not make as much of a contribution to public welfare as does the public school. The threat exists because of the very real pressure which is likely to come from neighboring residence areas to have their legislative bodies give them zoning which restricts the private school. A commentator in a recent issue of the *Harvard Law Review* indicates that the threat is real. "Perhaps," he says, "the most harmful tendency of . . . restrictive ordinances would be to stimulate protective movements on the part of neighboring communities."<sup>37</sup> A court which followed the doctrine of the *Lutheran High School* case could not

34. HORACK AND NOLAN, *LAND USE CONTROLS* (1955) at page 47 brings out the appropriateness of testing the application of a zoning ordinance to specific tracts or uses.

35. 139 Ohio St. 229, 249, 39 N.E.2d 515, 524 (1942). See also *State ex rel. Jehovah's Witnesses v. Tampa*, 48 So.2d 78 (Fla. 1950).

36. 143 Texas 115, 183 S.W.2d 415 (1944).

37. 67 HARV. L. REV. 922 (1954).

halt the trend because its numerical numbers test would be applicable throughout all areas to which zoning might have application.

Often there is a contention which stems from the observation that a private school sometimes draws a number of its pupils from across boundaries allocated to a particular public school district. It is claimed that a specific community is within its rights in prohibiting the erection of a school which is intended to draw a sizable proportion of out-of-area pupils.

A very narrow construction of the law might induce the holding that the community could keep the private school on a plane of exact equality with the public school as respects territory served. If, however, there is validity to the points made earlier in this article—that the private school makes a contribution to general welfare of equal significance to that of the public school and that it is desirable in a democracy to permit both public and private schools to flourish—such will not be the conclusion.

Because of some of the practical considerations mentioned previously in this discussion it cannot be expected that private schools can always be erected to serve the same geographical areas as the public school. Rights of parents who live in a particular district in which there is no private school should not suffer from any rule which would prevent them from selecting a private school in an adjacent region.

In this connection it is of significance to realize that a number of statutes provide for the transfer of public school pupils from one district to another for the purposes of school attendance.<sup>38</sup> This is particularly true where one district has a high school and the other has not. Of course, provision is made for the home district to bear the financial burden of the transfer.

Since so much emphasis has been put upon rights of parents to send their children to private schools it seems appropriate before going on with the article to indicate that there are logical reasons which induce parents to exercise their rights.

One of the most important reasons for selection of a private school is the desire to insure that the child will get proper religious instruction. Millions of parents feel that knowledge of God and of fundamental principles of morals and ethics is more basic and necessary than any other learning.<sup>39</sup> They feel keenly that much of the trouble in the world today stems from an over-emphasis upon secular and purely material goals. They believe with Edward S. Corwin, long time professor of Jurisprudence at Princeton University and one of the foremost constitutional authorities,

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38. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 534-35 (rev. ed. 1955).

39. Even the public school educator is today aware of the need of introducing some religious concepts into the curriculum. As evidence, see the April 1955 issue of *Phi Delta Kappa* (a journal of research, service and leadership in education) devoted to *Religion in Education*.

that "primarily democracy is a system of ethical values, and that this system of values so far as the American people are concerned is grounded in religion."<sup>40</sup> Since the law places restraints upon the public school in respect to teaching religion the parents turn to the religiously controlled private school.

It is important to realize that when parents make this selection they are not thereby choosing a curriculum which does not meet with state approval.<sup>41</sup> In order to operate, private schools should and do meet state standards. They must teach certain subjects plainly essential to good citizenship. Indeed, a strong case can be made for the position that private schools enrich the curriculum in citizenship by adding religion to courses normally taught by the public school.

Other motivations prompting choice of a private school might be the feeling that a small school atmosphere has benefits which cannot be found in a large school—an interest in small classes; a desire that the child be given more personalized, individual attention; a belief that admission policies that take cognizance of mental ability result in a desirable atmosphere; and a preference for an exclusive boys or girls school. None of these motivations are in any way unlawful. Actually, in this country it would seem totally undesirable to unite all children into a standardized democratic mass.<sup>42</sup>

One argument was presented by the dissenters in the *Piedmont* case which is designed to answer the contention that an ordinance which closes 98% of a city to private schools is invalid. They comment that it was not "established as a fact that there are no adequate areas in which private schools may be built which would be reasonably accessible to residents of the city of Piedmont."<sup>43</sup> They go on to indicate that boys and girls in Piedmont could easily go to private schools in the city of Oakland, California.

At first thought this argument appears to have some appeal but it overlooks the fact that private school groups have a right to have their property interests protected. Actually such an attitude makes it most difficult for a private school administrator to do intelligent planning. It would be a hardship to require an administrator to delay the purchase of property or the start of a building program until he was told by a private school in a neighboring community that there is no more room for out-of-area pupils. Since the law frowns on discrimination in zoning ordinances the private school administrator should have the same freedom to buy property with

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40. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 21 (1949). On the same page the author indicates the need for religious instruction in the schools.

41. For a discussion of certain state standards see Seitz, *Supervision of Public Elementary and Secondary School Pupils Through State Control Over Curriculum and Textbook Selection*, 20 LAW & CONTEMP. PROB. 104 (1955).

42. For the danger involved see Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. 23, 37 (1947).

43. 45 Cal.2d 325, 338, 289 P.2d 438, 446 (1955).



assurance it can be used as does the public school board of education. The private school administrator should have the right to use that property whenever expediency dictates.

There remains to be analyzed another argument of the dissenters in the *Piedmont* decision. The justices contended that if the city was compelled to allow the petitioner's private school to be built, it must permit all private schools to enter unless the court is prepared to examine and censor or itself prescribe the projected curriculum.<sup>44</sup> To picture the effect of granting such general permission the dissenters refer to the existence of driving, language, mechanical arts, bartending, nursery, secretarial, television, dancing, and culture schools.<sup>45</sup>

Few would assert that all the kinds of schools which the dissenters enumerate have a right of entry into all types of areas. Since all the institutions named by the dissenters on the California court do not purport to offer the broad type of education which is available at public and private elementary and high schools, it surely cannot be claimed that they make an equivalent fundamental and essential contribution to general welfare.<sup>46</sup>

The admission that zoning ordinances may have an impact upon some type of private institution does not force the conclusion that a court will have the responsibility of prescribing a projected curriculum. It is generally recognized that the legislature may determine the types of schools to be established as public schools throughout the state, the content of their curricula and the qualifications of their teachers.<sup>47</sup> The courts, when confronted with a zoning ordinance restriction, would merely have to ascertain if the private school was recognized by the State Department of Instruction as fulfilling the requirements of state law applicable to elementary and high schools. This is nothing more than a court would be required to do in respect to issues which could arise under compulsory attendance law.

The fear expressed by the *Piedmont* case dissenters that all the specially mentioned schools would merely begin to introduce a few subjects which are taught in elementary and high schools and thereby avoid zoning restrictions is quite unrealistic. Many of the schools simply would not want to make such effort. They are commercial institutions that can prosper very well in other than residential areas. Furthermore, the schools could not conform to the law by simply introducing a few subjects. The state legislature has quite extensive power over the control of the curriculum<sup>48</sup> and over

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44. *Id.* at 339, 289 P.2d at 446.

45. *Id.* at 339-40, 289 P.2d at 447.

46. A claim of equivalent contribution would be no more persuasive than the effort in the *Lutheran High School* case to support the decision upon precedent which involved facts concerning privately owned parks and playgrounds, a privately owned golf driving range, and a wholesale and retail milk business.

47. Edwards *op. cit. supra* note 38, at 27-28 and cases cited therein.

48. Seitz, *supra* note 41.

certification of teachers,<sup>49</sup> who can instruct in public schools. The legislature can properly insist upon private schools meeting requirements of such sort which are not unreasonable or arbitrary. The State Department of Public Instruction can assist the courts in evaluating the extent of conformity to the law.

#### Conclusion

In a recent article on zoning, "Constitutional Law and Community Planning,"<sup>50</sup> it was pointed out that "the difficult question of the future may grow out of the official action which . . . has discriminatory effects, such as segregation of economic classes through zoning."

It is submitted that the whole problem of zoning out of the private school is of equal importance in our democracy.

In this country a public school system is one of our most important and necessary institutions. It performs a service of high value. It is something that should be supported and further developed. But the position of the private school must also be made secure.

There must be a proper recognition of the general welfare value of the private school if we are to adequately safeguard the constitutional rights and liberties of parents and of the private schools. There must be an appreciation of the role which the private school plays in checking any possible trend toward standardization in education.<sup>51</sup>

In order to properly safeguard the interests of parents and of the private school there must be a realistic balancing of fundamental rights against the self-interest of some property owners who may object to the erection of a private school in their immediate neighborhood.

The whole problem of the zoning out of the private school is one of utmost importance in our democracy.

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49. On teacher certification generally, see REMMLEIN, SCHOOL LAW 17-24 (1950) and Edwards, *op. cit. supra* note 38, at 440-46.

50. Johnson, *supra* note 7, at 200.

51. JOHNSON AND YOST *op. cit. supra* note 27, at 140, quote P. P. Claxton, former United States Commissioner of Education, as saying, "We believe in the public school system. It is the salvation of our democracy; but the private schools and colleges have been the salvation of the public schools. These private institutions have their place in our educational system. They prevent it from becoming autocratic and arbitrary, and encourage its growth along new lines."