TESTIMONY OF FRANK BROWN, CHAIRMAN, NATIONAL ASSOCIATION FOR PERSONAL RIGHTS IN EDUCATION

Mr. BROWN. The National Association for Personal Rights in Education, a parental group dedicated to the personal civil, and consitutional rights of families and students to academic freedom and religious liberty in education, appreciates the opportunity to speak here today.

The confirmation of any new Justice to the U.S. Supreme Court is a fateful step in the process of American Government, for it gives a specific citizen a sweeping and lifelong judgment over the rights and property of the citizens of this country, a power that can be used beneficially in the light of the Constitution, but a power that can be used harmfully in the light of the background and personal values of the justice.

Today the National Association for Personal Rights in Education [NAPRE], a parental group dedicated to the personal civil and constitutional rights of families and students to academic freedom and religious liberty in education, appreciates the opportunity to speak on the occasion of the hearings on Judge Sandra Day O'Connor.

We are a parental group. We do not speak for any church or school, nor does any church or school speak for us. In our 22-year history we have struggled, mainly in Illinois, for types of parental and student grants—for example, the voucher—through which families and students would have an equitable share of the education tax to attend the schools, public or private, of their choice. We have also at times supported tuition tax credit bills that contain negative income or refundability provisions through which low-income families having a tax credit of $500 and a tax indebtedness of $200 would receive a refund of $300.

Judge O'Connor does not in this matter have an ascertainable record as a legislator and none as a judge. However, when an Arizona senator, she was quoted in the Phoenix magazine—February 1971—during a period when tuition tax credit legislation—for example, senate bill 1161—was an issue as saying that State aid to private schools is "clearly unconstitutional." The New York Times, June 12, 1981, reports that in the senate she opposed public aid to parochial and private schools.

In view of these reports we address three main lines of concern. First, we are concerned that families seeking tax benefits for children in church-related elementary and secondary schools are told by the Supreme Court that such benefits are as violative of the establishment clause as are benefits to church schools. But the personal rights of parents and children stand on their own constitutional merits and may not be denied by reason of any relationship between the State and any church or school.

Such families are accused of subterfuge, of trying to attain indirectly an unconstitutional goal that cannot be achieved directly, namely, aid to religion, but the reverse is the case, with those who cannot directly refute the personal rights of parents and students doing so indirectly by invoking church-State controversies.

Unfortunately some justices, in their absorption with church-State matters, have lost sight of parental and child rights, but fortunately three present justices, Chief Justice Burger and Jus-

tices Rehnquist and White, are aware of these rights, with Burger saying, in his dissent in *Lemon* v. *Sloan* (1973):

> The essence of all these decisions (*Everson, Allen*), I suggest, is that Government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions . . . But, at least where the state law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences . . . the Establishment Clause no longer has a prohibitive effect.

In his dissent in *Meek* v. *Pittenger* (1975), a decision denying tax benefits to handicapped children in church-related schools, Burger condemned the economic pressure put on parents in a moving and disturbing statement,

> The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able po cope with this denial of equal protection, which is, for me a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance.

Our second concern is that the determination of education tax benefits for children, including those in church-related schools, is a public policy matter under the control of the legislature rather than of the judiciary.

The State legislatures established the State public schools with a monopoly of the education tax in the mid-19th century. Many families, especially in some sections of the country, did not accept these schools on grounds of academic preference and religious conviction, but, with the dominant Protestant churches throwing their political strength behind them, these schools have done much good educational work in this country.

However in recent years many parents and citizens have become disenchanted with them. Many hold that the academic quality has gone down, that the schools are not developing character, that the concept of the child as a person capable of developing independent intellectual habits has been widely displaced by a behaviorism which seeks to manipulate the student—Lance Klass, "The Leipzig Connection"—that many are not prepared for possible defense of the country, that many are unemployable, and that, with the accreditation process overloaded with teaching methods rather than academic content, the intellectual level of the teachers has declined.

To heal old wounds and meet new needs State legislatures have in recent years enacted many laws to provide tax benefits for children in alternative schools, but almost all their efforts have been struck down by the Court as though the legislators are children without any sense of the public policy needs of their constituents. As a group which has in the past 12 years in Illinois sponsored eight parental grant bills, four of which passed the House, we can attest that the most effective opponent of parental freedom of choice in education is the U.S. Supreme Court.

As a group active in the innercity, we have struggled to obtain some form of tax-supported alternative schooling for minorities and have argued that for the minorities the voucher would be a long

step forward to first-class status in this society, for it would give them economic control over the schooling of their children. In this respect incidentally on our last parental grant House floor vote, of 14 minority Representatives, 12 voted yes, with 1 present and 1 absent.

Our third concern is that the relevant court decisions are based on misinterpretation by Justice Hugo Black in the *Everson* (1947) case of the meaning of the establishment clause.

In building up his interpretation of the establishment clause, Black relied almost exclusively on the successful struggle of Madison and Jefferson in Virginia to outlaw any church or religion being given preferential tax status.

Black concluded that the establishment clause meant, among other things, that neither a State nor the Federal Government could pass laws which aid all religions and upon this base the Supreme Court has built up its doctrine outlawing tax aid to parents and children in church-related elementary and secondary schools. As to Black's conclusion, Michael Malbin in his monograph "Religion and Politics: the Intentions of the Authors of the First Amendments" points out that not only was this the first time that the Court outlawed nonpreferential aid to religion but also that the congressional debates on this matter do not uphold the Court's action. As to the new Court doctrine on aid to parents and children, there is no logical explanation as to how the Court has been able to use the defeat of the Virginia establishment to deny tax equity to children in church-related schools.

If Justice Black wanted to find out what the people at the time of the founding of the Government meant establishment to be, why then did he not refer to Elliott's "Debates," which in reporting the debates over ratification of the Constitution in the various States gives abundant proof that the people widely considered establishment to be Government support of one preferred sect or religion. Why did not Black study the "Annals of Congress," which as Malbin points out, reveals quite adequately that Madison—while privately thinking that an establishment clause was unnecessary—urged in the congressional debates on this matter an amendment outlawing the establishment of a national religion.

If Black did not get his ideas on this matter from the struggles against church or religion establishment, where did he get them? Actually his ideas stem from the rationale behind the public school, which justifies a monopoly of the tax for those who conform and denies any taxes, even their own, to heretics.

In a search for the logic of the law, we ask, if an equitable share of the education taxation is denied to students in Catholic, Baptist, Lutheran, and Christian elementary and secondary schools, how come that the State and Federal Governments can provide all sorts of loans and grants to students in Baptist, Methodist, and Catholic colleges?

Can the Court, using stare decisis, continue to hold to its unscholarly and harmful decisions in this matter? Perhaps so, for it has the power to do so, but it is meeting a stiff resistance from within, as the following judicial statements of dissent in *Meek* v. *Pittenger* (1975) demonstrate.

Thus Justice Rehnquist, with White concurring:

The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question, and (a)ny interpretation of (the Establishment Clause) and constitutional values it serves must also take account of the free exercise clause and the values it serves.

Thus Chief Justice Berger:

One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.

In conclusion, we would be distressed to have any more Justices on the Court who in this matter have prejudged our parental rights and the rights of our children.

We therefore respectfully seek to determine whether Judge O'Connor recognizes that parents and children have rights that have a constitutional life independent of church-State confrontations; whether she considers that the determination of educational tax policy is, with due respect for parents, a public policy matter in the hands of the legislators; and whether she would reexamine the scholarship, or rather lack thereof, on which the present Court doctrine in this matter now rests.

The CHAIRMAN. Senator Grassley?

TUITION TAX CREDITS

Senator GRASSLEY. I would like to have you give me your understanding of her position regarding tuition tax credits, where you are quoting from, and the appropriate date of when she said what she said.

Mr. BROWN. Senator, as I said, there is no ascertainable record as a legislator and none as a judge. We went over the journals—the journals were gone over fairly closely. At that time—somebody mentioned here 1970–73—there were no recorded votes in the committees in the Arizona Legislature.

She was quoted in the Phoenix magazine of February 1971, during a period when tuition tax credit legislation, S.B. 1161, was an issue, as saying that State aid to private schools is "clearly unconstitutional."

Senator GRASSLEY. Does the article make it clear whether or not that statement of unconstitutionality was made in regard to her understanding of the Arizona State constitution or the Federal Constitution?

Mr. BROWN. It was not clear.

Senator GRASSLEY. If that was her view relative to the Arizona State constitution, it is one thing; if that is her view of the Federal Constitution, then it is quite a different thing.

Mr. BROWN. It is not there, and it is very difficult to get anything. Our people looked through all the records and everything else.

Senator GRASSLEY. Let me explain to you the difference between language in the first amendment of the U.S. Constitution and similar language in the Iowa constitution—my home State.

The Iowa constitution is more restrictive in regard to that and more explicit than the Federal Constitution.

I am not making any commentary on your position or to whether or not there is any legitimacy to what you say. We ought to make clear for the record when the statement was made, and you have made that very clear.

If you could expand on that statement—not now, because you do not have the information; but if you could get the information, I think that would be significant.

Mr. BROWN. On the Arizona constitution, our main objections still hold—that there are guarantees of individual religious freedom in the Arizona constitution, the Illinois constitution, and others, which prevail as far as the protection of the rights of the family and the rights of the parent, which prevail over any effort to try to deny aid to a church school.

No matter how tightly provisions are drawn, the rights of the individual under the State constitutions—and I know this is so in Illinois—the right of religious freedom is so carefully drawn as to protect the right of the individual. I am sure that is the same in Arizona.

Senator GRASSLEY. I can only suggest this to you: If she was referring to the Arizona State constitution, I am not sure that that can be a basis for determining her views as to whether or not tuition tax credits violate the Federal Constitution.

Mr. BROWN. I understand that.

The CHAIRMAN. Are there any further questions?

[No response.]

The CHAIRMAN. Thank you very much for your presence and your testimony.

Mr. BROWN. Thank you for the opportunity.

The CHAIRMAN. I think the time has come now that we will take a recess until 10 o'clock tomorrow morning. At that time the committee will reconvene, and Judge O'Connor will be back at that time for questioning by the distinguished Senator from Alabama, Senator Denton.

[Whereupon, at 5:45 p.m., the hearing was recessed, to reconvene the following day at 10 a.m.]

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