(Statement of Frank Brown, professor of economics, DePaul University, and Chairman, National Association for Personal Rights in Education(NAPRE), speaking on behalf of NAPRE, to the U.S. Senate Judiciary Committee at the hearings on the nomination of Judge Antonin Scalia to the U.S.Supreme Court, Senate Office Building, Washington, D.C. Aug. 6, 1986).

PERSONAL RIGHTS AT THE U.S.SUPREME COURT

I am Frank Brown, an economics professor at DePaul University, and, in speaking here as Chairman of the National Association for Personal Rights in Education(NAPRE) wish first to thank the Senate Judiciary Committee for the opportunity to present our position on and our rationale for the nomination of Judge Antonin Scalia to the U.S.Supreme Court.

NAPRE is a group of parents dedicated to the personal civil and constitutional rights of families, parents, and students to academic freedom and religious liberty in education. We hold that if families are taxed by government for schooling then they should have a right to an equitable share of the taxes, especially their own, to enroll their children in schools of their choice, including those with church-related base.

This is a civil right and civil libertyhonored in all other democracies of the West, but in America it is among the most abused of personal rights. For taxpaying parents are told that they can either accept what a state system considers to be public elementary and secondary schooling or else forfeit their education taxes and seek out private resources to fulfill the public obligation to school their children, a task well-nigh impossible for many parents, especially the low-income. NAPRE points out that many families, including its own, have been hurt by this system.

This state system is not a product of the Founding Fathers. Its prototype was the Massachusetts system developed in the mid-19th century by Horace Mann, an educational statist indifferent to parental choice. Since then state school systems have grown, especially in the earlier days through the political support of leading religious sects, many of whose parents are now questioning the wisdom of their alliance with the state in the matter of schooling.

To heal old wounds and to meet new needs many state legislatures have in recent decades enacted many laws to extend the benefits of the education taxes to all children, including those in church-related and other private schools, but unfortunately the U.S.Supreme Court has blocked almost all these efforts.

The prime source of the Court's argument is the interpretation by Justice Hugo Black (Everson, 1947) of the Establishment Clause of the First Amendment, in which he relied almost exclusively on the successful struggle of Madison and Jefferson in Virginia to outlaw any one church or religion being given preferential tax status.

But, going beyond the condemnation of a government according special privilege to one church or religion, Black concluded that the First Amendment also meant that neither a state nor the Federal government could pass laws which "aid all religions", but there is no historical proof, no constitutional justification, no precedent, no stare decisis for this conclusion.

Black did not research this matter well. He did not refer to the Annals of Congress, which portrays quite adequately the congressional debates out of which the First Amendment evolved. Nor did he refer to Elliott's Debates, which in reporting the debates on the ratification of the constitution in the various states furnishes abundant proof that the people of the time widely considered establishment of religion to be government support of one preferred church or religion.

But, despite its errors or perhaps because of them, the Black doctrine, relying on his substitution of his newly-forged constitutional weapon of "absolute separation of church and and state" for the language of the Constitution, is the foundation for the theory of the separation of the state and religion and for the denial of education tax equity to children in church-related schools.

In thus placing the personal education rights of parents and students under a church-state umbrella, Black and his allies have practically nullified the guarantees of these rights by

the Establishment and Free Exercise clauses of the First Amendment, the liberty and property provisions of the Fifth Amendment, and the liberty and property and equal protection of the laws provisions of the Fourteenth Amendment, but these rights have their own constitutional standing and are in no way contingent on the constitutional status---or lack of status--- of any church or religion.

We do not fear the Constitution. We respect it. But we fear and do not respect justices who have gotten out of hand.

Fortunately the Black doctrine has not been able to obtain full acceptance on the Court, with almost all its decisions on this matter drawing persistent dissent from fellow-justices.

Thus then-Chief Justice Burger(Meek v. Pittenger, 1975) said in dissent:"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."

As citizens and parents we respectfully recommend to your Judiciary Committee a favorable vote on Judge Antonin Scalia.

We recommend him because he is a scholar. We have been severely hurt in recent decades by lack of scholarship on the Court and we welcome him.

We recommend him because he respects the Constitution. Some justices consider the constitution as anachronistic and as little more than a set of noble pronouncements, but we believe that there is great wisdom in this document, certainly in the area of our discussion here today, the personal rights of parents and children.

We recommend him because he believes in the rule of law over that of man. As victims at the Court of the opposite, namely, the rule of men over that of law, we endorse Antonin Scalia's insight into this cornerstone of American jurisprudence. We also note that a Court that can abuse the rights of some citizens can abuse those of others and indeed of all as well.

We recommend him because we believe that he will be a judge and not a legislator. We have suffered too much from a U.S.Supreme Court which has legislated itself into a National School Board, which has placed the educational statism of Horace Mann under the protection of the First Amendment, and which has long been blocking the public policy attempts of many legislatures to provide for the extension of educational benefits to all children.

Finally,we recommend Antonin Scalia to your committee, because we believe that the rights and liberties in education of parents and children will be safe in his judgment.

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