(Statement of Frank Brown, professor of economics, DePaul University, and Chairman, National Association for Personal Rights in Education (NAPRE) to the U.S. Senate Judiciary Committee on the nomination hearings on Judge David Souter to the U.S. Supreme Court, Washington, D.C., September, 1990).

THE SCHOOLING RIGHTS OF FAMILIES

In presenting this statement to the U.S. Senate Judiciary Committee on the confirmation of Judge David Souter to the U.S. Supreme Court, the National Association for Personal Rights in Education (NAPRE), a parental group, wishes to concentrate on its main purpose, namely, the attainment of the personal civil and constitutional rights of parents, guardians, and children to equitable shares of the education taxation to enroll in the elementary and secondary schools, state or private, including church-related, of their choice.

We have not been able to uncover the views of Judge Souter on this matter, but, hearing that he is a scholar willing to listen, we here summarize for his consideration some ways by which the personal rights of millions of parents and children to education tax equity have been denied over the past 150 years by legislatures and courts, including the U.S. Supreme Court. We ask four questions.

A. WHAT PRINCIPLES SHOULD PREVAIL IN THE SCHOOLING OF CHILDREN?

First, the family, as prime educator of its children, has the right to enroll them in schools in accord with their academic and religious convictions and, if taxed for schooling, the right to direct a share to schools of choice. Second, the state may assist parents to elect schools, public or private, through reasonable taxation but may not take control of schooling. Third, other educators, including churches, have the right to conduct schools and to be recipients of the tuition grants provided to families by the state.

B. WHERE DID THE AMERICAN STATE GO WRONG?

All the other democracies of the West have generally respected these principles but the American state has violated them by taking a monopoly of the education taxes for its own schools, by denying shares to parents seeking schooling elsewhere, and by economically undermining private educators, including churches.

The prototype of this new institution was the Massachusetts system engineered in the mid-19th century by Horace Mann and his Unitarian allies. About this time many other state school systems were developed by the dominant Protestants of the time, as in Illinois in 1855, with help from Knownothingism.

Protestants had heretofore largely relied on the church as the schoolteacher of their children, but, having split into many sects, hit upon the scheme of uniting behind a tax-supported Protestant public school, with dissenters being told that they could go elsewhere, but of course without any of the education tax, including their own.

In his The Lively Experiment: The Shaping of Christianity in America Professor Sydney Mead, a champion of the new arrangement, concluded that the public school is the American established church. The church-state tie-ins were presumably avoided by describing the new school as nonsectarian and therefore entitled to a monopoly of the education tax, while Catholic and Lutheran schools were branded as sectarian and therefore ineligible for tax

benefits. Unfortunately this distinction based on political muscle rather than on constitutional logic still prevails in U.S. Supreme Court thinking.

This early public school had many good things---such as the intellectual traditions of the West, formation of moral character rooted in religious principles, and development of the human capital---to offer those who accepted its Protestant orientation.

But this school is not the public school of today, because sweeping educational reversals have undermined its original purposes, with two heading the list, first, the psychological behavioristic teachings of Wundt, Hall, Dewey, Skinner, Watson and others and, second, the expansion of secular humanism. Many observers contend that such changes have contributed greatly to intellectual and moral decline in this society. Still the public school is the established church.

(Readings: Arons, Stephen, Compelling Belief; Blumenfeld, Samuel, Is Public Education Necessary? and NEA: Trojan Horse in American Education; Everhart, Robert B., The Public School Monopoly; Jorgenson, Lloyd P., The State and the Non-Public School; Klass, Lance J., The Leipzig Connection; McCarthy et al., Society, State and Schools; Ravitch, Diane, The Great School Wars; and Schlafly, Phyllis, Child Abuse in the Classrooms.)

C. WHERE DID THE U.S. SUPREME COURT GO WRONG?

The U.S. Supreme Court has done some laudable things in defense of parental choice, with two examples being the Pierce case (1925), which struck down an Oregon law designed to coerce all children into the state public schools and Mueller v. Allen (1983), which upheld an income tax deduction applicable to families in both public and private schools, In addition, Justices Rehnquist, White, and Burger have struck many blows for parental choice.

But in general the Court record has been disastrous, starting with the "obiter dictum" of Justice Hugo Black in the Everson case (1947) in which he said, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can aid. . . all religions. . . "

Through this statement, which effectively outlawed state nonpreferential aid to religion, Black created new constitutional doctrine to block education tax equity to children in church-related schools and more broadly to justify separation of state and religion, both goals rooted in his personal belief that the state should not aid religion in any way.

He did not consult two crucial First Amendment sources that would have destroyed his interpretation, first, the Annals which reported on the congressional hearings on the Bill of Rights, and, second, Elliot's Debates, which gave the reports of the various state conventions on the adoption of the Federal constitution and which demonstrated that establishment means government preference for one church or religion.

We are outraged that the U.S. Supreme Court has honored the First Amendment distortions of Hugo Black, a man who joined the Ku Klux Klan as a thirty-seven year old lawyer and profited politically from its and his religious intolerance. We are outraged that before the question of tax equity for all children could come to the Court for a hearing Justice Black was lobbying in the U.S. Senate for federal aid to education only for public schools and citing a leading principle of the Masonic order upholding "the

American school, non-partisan, non-sectarian, efficient, democratic, for all of the children of all the people." (Fisher, Paul A., Behind the Lodge Door).

(Readings: Hugo Black, Jr., My Father, A Remembrance; Brady, Joseph H., Confusion Twice Confounded; Cord, Robert L., Separation of Church and State; Hamilton, Virginia Van der Veer, Hugo Black; Malbin, Michael J., Religion and Politics; and O'Neil, J.M., Religion and Education Under the Constitution.)

D. WHERE DO WE GO FROM HERE?

We respectfully submit the following thoughts:

A. The respective schooling rights of families, the state, and private educators, including churches, must be clarified and asserted.

B. The concept of one state public school was not an outgrowth of American democracy, which had rather given great impetus to private education, but was imported from the Prussian state system by Horace Mann.

There is no neutral state public school. Every school, whether called public or private, is both public and private, public in teaching academic content and private in offering its own educational environment.

It is not necessary to have one state public school for all children. The goal of public education can be achieved through a combination of state and private schools, with families allowed choice through parental grants (tuition vouchers, tuition reimbursements, tuition tax credits with refundability provisions, etc.).

C. The First Amendment should be thoroughly reexamined, expecially by the U.S. Supreme Court. Hugo Black should not be allowed to get away with his distortions of this national asset.

Keep in mind that when the state moves into the field of schooling it moves into the field of religion, because for many families schooling is an integral part of their religious beliefs.

Distinctions must be made between a tax to support a private matter like the building of a church and a tax to pursue a public purpose such as schooling, which for many citizens through conscience can be achieved only within a religious environment.

The personal civil and constitutional rights of parents and children to academic freedom, religious liberty, property, and equal protection of the laws stand on their own constitutional merits and may not be diminished or destroyed by reason of any relationship between the state and any church or school.

NAPRE
Box 1806,
Chicago, Ill. 60690

1-708-333-2019

Frank Brown,
Professor of Economics,
DePaul University,
and
Chairman, NAPRE