Rethinking American Education Policy:
The View From The Founding

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Introduction

Shortly after his inauguration, President Clinton announced that his administration was launching a visionary national education strategy. Its purpose was to reinvent American education for the year 2000 and beyond. The President announced that he would seek Congressional passage of his "Goals 2000" legislation which was designed to meet newly instituted national educational New World Order Standards. The time seemed right for thousands of local communities to join the Goals 2000 crusade.

But President Clinton was not the first to push a global 2000 agenda in education. Former President Bush had already appointed Thomas H. Kean, former Governor of New Jersey to chair the newly created New American Schools Development Corporation. The Corporation was created to provide financial grants to individuals and organizations which showed promise in finding solutions to our nation's education crisis. Mr. Kean also expressed the compelling need to chart a new course in education. He challenged lawmakers and policymakers to "break the mold," to think in different and new ways about solving our nation's education crisis.

Let us take these challenges seriously. What must be done to meet the educational needs of this country? What must be done to "break the mold," to think in different and new ways about solving our nation's education crisis?

A "new" and "mold-busting" strategy of reviving American education must first recognize education's present disorders. American education suffers from three underlying ailments:

1) unconstitutional expansion of federal power;

2) failure to recognize parental rights; and

3) enforcement of state laws that undermine and contravene parental rights.

The solution is equally rudimentary. First, the federal government must disentangle itself from education altogether. The exercise of federal jurisdiction over education is contrary to the Constitution, the opinion of numerous Presidential Administrations and Congresses, as well as the natural and unalienable rights of parents. Second, state governments must recognize that parents have the unalienable right to direct the education and upbringing of their own children. The Declaration of Independence articulates this pre-existing right and establishes that civil governments are subsequently created to respect and guarantee it. Third and consequently, state governments must adopt laws which are designed to secure the unalienable rights of parents and repeal those laws which subvert parental rights.

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✓ Key Idea:

☞ "BREAKING THE MOLD" IN EDUCATION MEANS BREAKING EDUCATION FREE OF CIVIL GOVERNMENT'S POWER.

This article will examine these rudimentary ideas in the form of three LESSON PLANS. LESSON 1 covers limited Constitutional government. This mini-seminar is open to all members of Congress and their staffs. It examines the doctrine of enumerated powers – the idea that the Constitution gives Congress its power, not Congress itself. This doctrine is a brilliant Constitutional mechanism intended to shield the people from legislative subjugation. The assertion of an ever-expanding universe of federal jurisdiction over education is but one of many significant instances of a pattern of Congressional self-expansion of its own power.

LESSON 2 is a Presidential refresher course and geared for the executive branch. It focuses on what past Presidents thought about limited power and federal jurisdiction over education. This refresher course contains plenty of action-packed messages and speeches. President Clinton is fond of quoting President Jefferson. What quotations might he have missed on the subject of education? Political appointees and speechwriters are especially encouraged to attend.

And finally, LESSON 3 presents a continuing legal education (CLE) primer on parental rights and the Declaration of Independence. This course is a must for the media, state officials, lobbyists, and unions. The course focuses on the obvious idea that parents and not the federal or any state government, have the unalienable right to direct the education and upbringing of their own children.

Withdrawing federal jurisdiction, guaranteeing parental rights and reorienting state education laws is not a new approach to reform. Many of the Republic's early lawmakers and leaders built a *novus ordo seclorum* – a "new order of the ages" in which the federal government was denied jurisdiction over education. The new order was infused with the principles of the Declaration. The new order was invigorated by a Constitution designed to permit the people to conform it to the Declaration's principles over time.

President Clinton, however, envisions a "new covenant" quite alien to the framer's outlook of limited government or the Declaration's reliance on unalienable rights. He seeks to create a new regime in which federal regulation, certification, testing and control paves the road to educational serfdom. If today's lawmakers and leaders are to resist these encroachments and advance the mandate of unalienable rights and limited government, then they must begin by recognizing the danger inherent in the ever-expanding behemoth of state and federal power, and its necessary reciprocal and radical derogation of parental rights.

LESSON 1.
A MINI-SEMINAR ON A CONSTITUTION TO RULE THE FEDERAL GOVERNMENT

That power which is not given by the Constitution, which the Convention refused to give, and which has been taken or recommended to be taken in contempt of it, is the offspring of rank usurpation.[1]

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[1] T. COOPER, TWO ESSAYS: ON THE FOUNDATION OF CIVIL GOVERNMENT AND ON THE CONSTITUTION OF THE UNITED STATES (Columbia: D & J.M. Faust, 1826; reprint ed., New York: Da Capo Press, 1970) 32.

The focus of this mini-seminar is on education and federal jurisdiction, but education is only one of many examples of belligerent Congressional usurpation of power. When the federal government exercises power that the People through the Constitutional Convention refused to give either to Congress or the Executive branch, the federal government acts by usurpation, not law. Consequently, *every* extra-constitutional expansion of federal jurisdiction is an act of usurpation taken in contempt of the American people and their unified Constitutional voice.

Of course, it is not in our way of thinking to discern that former President Bush's "America 2000" program, President Clinton's nearly identical"Goals 2000" approach, the Federal Department of Education Act, and other federal education efforts owe their philosophic pedigree to the spirit of contempt and rank usurpation. After all, the promotional literature always looks good and the rationale sounds right. Perhaps, the most common rationale for federal jurisdiction over education is that education is crucial to the preservation and progress of a free people and a free republic.

But what is implied by this rationale (and implied quite wrongly) is that a federal strategy or a federal system of education is a constitutionally authorized means to preserve our freedom and form of government. Federal intermeddling is not a permissible means. The key to preservation of a free people and a free republic cannot be achieved by federal rejection of the limitations on power found in the fundamental legal document that created the federal government. Breaking the mold that saps the vitality of education will only be achieved through an honest adherence to the Constitution itself. So what does the Constitution say about federal jurisdiction over education?

The Constitution takes it as a given that the federal government is a government of limited and enumerated power. Power not delegated to the federal government by the written Constitution is reserved to the States or to the people respectively.[2] This is the clear meaning of the text and historical context. Only an amendment can change this meaning. Congress cannot change this meaning by passing a statute. The President cannot change this meaning by an executive order. The courts cannot change this meaning by a judicial opinion. Opinion polls are of no amending effect.

Applying the theory of limited government to the subject of education is a straightforward task. We examine the Constitution for clauses that give Congress power and ask if the provision of education is among those enumerated powers, or the provision of education is an appropriate means plainly adapted to carry out an object contemplated by an enumerated power – *i.e.*, both necessary and proper.

When the Constitution is examined, education is not found to be listed among the enumerated powers of Congress. Article I does not authorize Congress to entangle itself in education. It does not authorize Congress to establish a Department of Education. It does not grant jurisdiction to encourage the education of the people in the several States or establish a national education strategy.[3]

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[2] U.S. CONST., amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[3] U.S. CONST., art. I, § 8, states in part:
(1) The Congress shall have 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; but all Duties, Imposts and
(continued...)

Moreover, federal involvement in education is not an appropriate means plainly adapted to carry out an object contemplated by an enumerated power. There are only two exceptions to this rule. First, Congress may maintain educational facilities and academies if those means are plainly adopted to raising and supporting the militia or military.[4] Second, Congress may promote science and the arts as provided for in Article I, Section 8, Clause 8.

The second exception focuses upon patents and copyrights. The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This Constitutional provision, however, does not extend to Congress a *general* power to promote science and the arts. The promotion of science and the *useful* arts is strictly controlled by the indicated means. The means Congress may employ in the promotion of science and useful arts is constitutionally declared. The text is plain. Congress may only promote science and useful arts "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Apart from this limited power, Congress may not appropriate monies for the support of science

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[3] (...continued)
Excises shall be uniform throughout the United States;
(3) to regulate Commerce with foreign Nations, and among several States, and with Indian Tribes;
(5) To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
(8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
(12) To raise and support Armies, but no Appropriations of Money to that Use shall be for a longer Term than two Years;
(13) To provide and maintain a Navy;
(14) To make Rules for the Government and Regulation of the land and naval Forces;
(15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
(16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
(17) To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; -And
(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vest by this Constitution in the Government of the United States, or in any Department of Officer thereof.

Article 4, section 3, clause 2 states: "The Congress shall have Power to dispose of and make all needful Rules. and Regulations respecting the Territory or other Property belonging to the United States."

See also McCulloch v. Maryland 17 U.S. (4 Wheat) 316 (1819). "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (Marshall, C.J.) *Id.*

[4] See U.S. CONST., art. I, § 8, cls. 12 & 16.

or art, directly or indirectly. Congress may not Constitutionally award educational grants to fund research for the promotion of knowledge or discoveries. It may not Constitutionally award grants to fund science or useful arts, let alone endow the *useless* arts of *nouveau riche* pretenders. This limited power is plain for all to read, except for those members of Congress who have perfected the art of picking the pocket of the Treasury and fencing the proceeds to special interests in exchange for votes and campaign lucre.

While Congress is prohibited from entangling itself with the education of the people in the several States, it may concern itself with those objects enumerated in Article I, Section 8, Clause 17.[5] This clause grants Congress exclusive *legislative* authority over the District of Columbia. With respect to the District of Columbia, Congress has legislative authority *pro-tanto*. In other words, it has legislative power as far as District jurisdiction extends, and that is less than 10 square miles.

The Constitution also extends Congress *proprietary* authority over federal territories and property under Article IV, Section 3, Clause 2. This Clause grants Congress power to dispose of and make all needful rules and regulations respecting the territories or other property belonging to the United States. This provision empowers Congress to adopt rules intended to facilitate settlement of federal territories for the ultimate purpose of converting those territories into states. Thus, Congress may encourage education in federal territories as long as it is a *bona fide* means to effect settlement and eventually statehood. As a matter of fact, this approach was followed for settlement of lands under the Northwest Ordinance of 1787. But once such states entered the Union, each stands on equal footing with all the others. After a state enters the Union, federal reliance on Article IV, Section 3, Clause 2 as a means of federal involvement in education comes to an end.

A brief overview of the plain terms of the Constitution indicates no general Congressional power to entangle itself in education. If Congress exercises any power other than that constitutionally extended to it, it would be pernicious both to the States and the people. It would make Congress, and not the Constitution, the Supreme Law of the Land .

✓ Key Idea:

☞ THE CONSTITUTION EXTENDS NO GENERAL POWER TO CONGRESS TO PROMOTE OR FUND EDUCATION.

In the words of Thomas Cooper quoted at the beginning of this section, the exercise of such power is the "offspring of rank usurpation." When President Clinton calls upon Congress to reinvent American Education for the year 2000 and beyond, he calls upon Congress to exercise a power it does not possess. Though Goals 2000's promotional literature looks pretty slick, this does not change the fact that it advocates the use of power taken in rank usurpation of the Constitution and in contempt of the American people who ratified it.

Such a straight-forward construction of the Constitution suggests that it was written for the people – so they could understand it. This view stands in direct conflict with the modern view that

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[5] "The Congress shall have power ... to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

the Constitution is a difficult and complex document and only a few legally trained cerebral types can divine or discern its changing meaning. While the Constitution has its complex aspects, federal jurisdiction over education is not one of them.

An examination of the messages and papers of the early Presidents, men who were close to the formation of the document and its early administration, indicates they had no difficulty with the Constitution's meaning on the topic of federal jurisdiction and education.

LESSON 2.
A PRESIDENTIAL REFRESHER COURSE: HONESTY IN CONSTITUTIONAL OBSERVANCE

> *When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere ... and the degrading truth that man is unfit for self-government [will be] admitted. And this will be the case if expediency be made a rule of construction in interpreting the Constitution. Power in no government could desire a better shield for the insidious advances which it is ever ready to make upon the checks that are designed to restrain its action.*[6]

The previous lesson indicated that construction of the Constitution was a relatively straight-forward task. The Constitution's meaning is clear – it is not subject to ambiguity when it comes to federal jurisdiction and education. Now in lesson two, it is important to focus on the responsibility of that knowledge. That is why this section, while discussing the various messages and papers of the early presidents and Congresses, accentuates the quality of honesty – "the honest observance of constitutional compacts."

This refresher course in Presidential and executive branch honesty begins with the First President – George Washington. Might the President also find in George Washington an example of a Constitutionally uncluttered and honest approach to education that he and Congress could pattern?

A. President George Washington and Congress

During his First Annual Address on January 8, 1790, George Washington advanced his goals for that new order of the ages – The United States. He encouraged Congress to undertake certain projects and advance them by the proper constitutional means. Noting the many advantages of knowledge and its desirability, he requested Congress to consider how this end may be properly encouraged.

Washington stated: "Whether this desirable object will be best promoted by affording aids to seminaries of learning already established, by the institution of a national university, or by any other

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[6] J. RICHARDSON, ED., COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 (Washington, D.C.: Government Printing Office, 1896) 2:491. Veto Messages of Andrew Jackson, May 27, 1830. Jackson also noted: "In no government are appeals to the source of power in cases of real doubt more suitable than in ours. No good motive can be assigned for the exercise of power by the constituted authorities, while those for whose benefit it is to be exercised have not conferred it and may not be willing to confer it." *Id.* at 492.

expedients, will be well worthy of a place in the deliberations of the Legislature."[7] On May 3, Mr. Smith of South Carolina moved that the President's request, which specifically encouraged science and literature, be referred to a selected House committee. This was objected to by Mr. Stone who (as staggering as it may seem to his modem contemporaries) "inquired what part of the Constitution authorized Congress to take any steps in a business of this kind? For his part, he knew of none."[8] An accurate scenario of what then took place has been preserved in the Annals of Congress. It notes that Mr. Stone continued:

> We have already done as much as we can with propriety; we have encouraged learning by giving to authors an exclusive privilege of vending their works; this is going as far as we have the power to go by the Constitution.
>
> Mr. Sherman said, that a proposition to vest Congress with power to establish a National University was made in the General Convention, but it was negatived. It was thought sufficient that this power should be exercised by the States in their separate capacity.
>
> Mr. Page observed, that he was in favor of the motion. He wished to have the matter determined, whether Congress has, or has not, a right to do any thing for the promotion of science and literature. He rather supposed that they had such a right; but if, on investigation of the subject, it shall appear they have not, he should consider the circumstance as a very essential defect in the Constitution, and should be for proposing an amendment....[9]

These debates acknowledged the Constitutional limitations preventing Congress from assuming jurisdiction over education. While they reflect three distinct points of view, Mr. Stone, Mr. Sherman and Mr. Page all understood that the Constitution did not authorize Congress to establish a National University or "do any thing for the promotion of science and literature." None of these Congressmen suggested that the Constitution was uncertain or unclear. None suggested that the intention of the framers was ambiguous. None implied that the ends of education justified an expansion of Congressional power. None accused the other of being "anti-education." None of these Congressmen shamelessly considered pork barreling or log rolling.

✓ Key Idea:

☞ CONGRESS HAS RECOGNIZED THAT THE CONSTITUTION BARS IT FROM LEGISLATING IN THE FIELD OF EDUCATION.

Moreover, there was no Minority Committee Report blandly suggesting that the Constitution was an evolving document, one which must adapt to changing circumstances. These Congressmen did not suggest a legal subterfuge to accommodate their objections as is unexceptionably common today. There was only the recognition that the Constitution did not provide for Congressional authority in this area and that if Congress wanted to proceed in that direction it had the power of

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[7] *Id.* at 1:66, First Annual Address of George Washington, January 8, 1790.

[8] U.S., Congress, House, Representative Stone noted the unconstitutionality of the President's proposal regarding the promotion of science and literature, 1st Cong., 3 May 1790, 2 ANNALS OF THE CONG. (J. Gales ed. 1834) 1550-51.

[9] *Id.* at 2:1551.

proposing an amendment. No amendment, however, was proposed and Congress took no action whatsoever. This is a far cry from any business that has transpired in any Congress of recent years.

B. President Thomas Jefferson and Constitutional Limitations

President Thomas Jefferson, also a friend to education, expressed his educational ideas in his Second Inaugural Address delivered on March 4, 1805. With pride, he first reiterated the ability of the United States of America to meet its fiscal obligations by inquiring: "It may be the pleasure and the pride of an American to ask, what farmer, what mechanic, what laborer ever sees a tax gatherer of the United States?"[10] Can you imagine any modem politician saying this in a televised Inaugural Address? Referring to revenue contributions on the conscription of foreign articles, he continued:

> These contributions enable us to support the current expenses of the government ... and to apply such a surplus to our public debts ... and that redemption once effected the revenue thereby liberated may, by a just repartition of it among the States and a corresponding amendment of the Constitution, be applied in time of peace to rivers, canals, roads, arts, manufacturers, education, and other great objects within each State.[11]

In other words, once the public debt was redeemed, the United States would have a surplus of money in the federal Treasury. The question, then became: "What will be done with the surplus money?" Jefferson suggested that these funds could be divided up among the States and the States could then apply the monies to education and other matters. This idea, however, was only viable if military and other express Constitutional expenses were first met, and provided that the Constitution was amended to extend Congressional authority to take money out of the federal Treasury for the purpose of partitioning it among the States.

So often the modem disciples of federal education stop at this point and erroneously idolize Jefferson as a champion of state-controlled secular education. They fail to acknowledge, however, his disdain for rank usurpation. Perhaps adherence to the Constitution is not really what interests them?

Referring to federal intervention in education assuming a surplus of federal revenues, President Jefferson initially stated:

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[10] RICHARDSON, *supra* note 6, at 1:379. Second Inaugural Address of Thomas Jefferson, March 4, 1805. Jefferson also notes that "the suppression of unnecessary offices, of needless establishments and expenses, enabled us to discontinue our internal taxes." *Id*. He added that the government should only increase revenue in proportion to increased population and warned that the government should "meet within the year, all the expenses of the year without an encroachment on the rights of future generations by bur[d]ening them with the debts of the past." *Id*. If Congress were to observe this simple rule of thumb, the United States would not be running its present deficit.

[11] RICHARDSON, *supra* note 6 at 1:379 (emphasis in original). Second Inaugural Address of Thomas Jefferson, March 4, 1805. Jefferson stated: "[T]here will still ere long be an accumulation of moneys in the Treasury beyond the installments of public debt which we are permitted by contract to pay .... Nor, if our peace continues, will they be wanting for any other existing purpose. The question therefore now comes forward, to what other objects shall these surpluses be appropriated ... during those intervals when the purposes of war shall not call for them?" *Id.* at 409.

> The subject is now proposed for consideration of Congress, because if approved by the time the State legislatures shall have deliberated on this extension of the federal trusts, and the laws shall be passed and other arrangements made for their execution, the necessary funds will be on hand and without employment.[12]

His reference to "this extension of the federal trusts" means an extension of Constitutional power in accordance with Article V of the Constitution. He made this meaning clear when he concluded: "I suppose an amendment to the Constitution, by consent of the States, necessary, because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied."[13] Without an amendment, Congress had no power to assist the States with education. Without an amendment, Congress had no power to take money from the treasury in order to "assist" (which is to say, "control") the States and education.

For Jefferson, federal involvement in state educational matters was not a matter of "how much" or the most "expedient means." It was not an issue of a "federal education strategy," new schools for the new republic, or getting reelected. It was an issue of Constitutional jurisdiction. Neither did he reason: "Well, I know the power isn't there, but let's just construe the general welfare clause or the commerce clause to fit our ends. After all, isn't education worth it?" No, Jefferson did not commence to run helter-skelter through the text of the Constitution looking for a section here or a clause there to justify his domestic policy program.[14] He didn't even argue that the power was implied in some word that should have been in the Constitution. If he were alive today, he certainly would never be nominated to the Supreme Court or the federal bench by any political party.

✓ Key Idea:

☞ PRESIDENT JEFFERSON WAS HONEST ABOUT THE CONSTITUTION – IT DID NOT AUTHORIZE FEDERAL JURISDICTION OVER EDUCATION.

An honest observance of the Constitution revealed that Congress should apply its revenue to specified Constitutional objects. If money was left over and the Constitution amended, then revenue could be applied to other matters. But as matters then stood it simply had no Constitutionally delegated power to establish or encourage education. Nor had Congress recourse to the federal

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[12] RICHARDSON, *supra* note 6, at 1:109-10. Sixth Annual Message of Thomas Jefferson, December 2, 1806.

[13] RICHARDSON, *supra* note 6, at 1:410. Sixth Annual Message of Thomas Jefferson, December 2, 1806. Jefferson also added "that if Congress, approving the proposition, shall yet think it more eligible to found (a national establishment for education) on a donation of lands, they have it now in their power ...." *Id.*

[14] For instance, Jefferson's approach has been thoroughly misrepresented by the Republican National Committee among others. Its 1991 Chairman's Report entitled "Republican Values-American Values" is a case in point. The Report solemnly invoked "Thomas Jefferson and the founders of our country" and portrays them as early visionaries of educational reform. The report then characterized President Bush as the embodiment of Jefferson's educational philosophy and commitment to "an environment where the federal government works in partnership with communities to foster learning." *Id.* at page 14-15. The Report goes well beyond the facts since Jefferson expressly disavowed any federal educational jurisdiction or limited partnership with the states or local communities. The Republican approach, however, is child's play when compared with the Democratic fraud of marketing William *Jefferson* Clinton as the modem day reincarnation of Thomas Jefferson.

treasury for any general educational object.[15]

All this, however, is now turned upside down. The federal government not only has no surplus revenue but is running an iniquitous deficit. It poured over 32 billion dollars into education in fiscal year 1993, but has no amendment or authority upon which to tender such bribes. It also continues to play off expenditures for unconstitutional objects against constitutionally enumerated ones such as defense. Congress does what it may not do with what it does not have, and neglects to do what it ought with what it is authorized to do. Yet, in spite of all this, the faithless servant proudly maintains "I am innocent," "I have not sinned."

C. President James Madison and Constitutional Means

When James Madison became President, he was also keenly aware of the Constitutional limitations on the federal government and particularly Congress. Madison had been instrumental in presenting a measure at the Constitutional Convention to establish a national university, which was rejected on at least two separate occasions. He had also transmitted to the House two items: Washington's request that Congress consider establishing a national university, and the Commissioners' Memorial to establish a local university in the District of Columbia. Both of these items were postponed indefinitely. To say the least, Madison was also well acquainted with the Constitution.[16]

In his First Inaugural Address, delivered March 4, 1809, he reiterated certain Constitutional duties of his office. He pledged to support the Constitution. He said that the Constitution is the cement of the Union and should be respected in its limitations, as well as in its authority. He promised to respect the Ninth and Tenth amendments by referring to the rights and authorities reserved to the States and to the people as equally incorporated with and essential to the success of the general system.[17]

Madison was not parroting the language of expediency as is common in State of the Union

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[15] His loyalty to the Constitution as a fixed and uniform document was made evident by the fact that Jefferson took no opportunity as President to utilize improperly and unconstitutionally the power of the federal Government to achieve these educational objectives for the sake of political popularity. This is demonstrated by recurrence to his 1779 and his 1816 proposals to the Commonwealth of Virginia.

In 1779 he proposed a Bill for the More General Diffusion of Knowledge which was rejected. In 1816 he again proposed to establish a university within Virginia's exclusive jurisdiction, by upgrading "The Central College" already in existence at Charlottesville, Virginia. The 1816 proposal was accepted and the University of Virginia eventually began operation in 1822.

Thus, Jefferson's educational objective, having been rejected by the Commonwealth in 1779 could have easily influenced him to misuse his office of President from 1801-1809, in order to establish a university of greater magnitude and with greater resources than any state government could bring to bear. He resisted, however, this political appeal to undermine the Constitution, preferring instead to preserve, protect and defend that document. H. RANDALL, 3 THE LIFE OF THOMAS JEFFERSON (New York: Derby & Jackson, 1858) 461-71.

[16] *See generally*, G. HUNT ED., THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES AS RECORDED BY JAMES MADISON (New York: G.P. Putnam's Sons, 1908).

[17] RICHARDSON, *supra* note 6, at 1:468. First Inaugural Address of James Madison, March 4, 1809.

addresses today. He was not indicating that the same power was shared by the federal and state governments, and the People. Contrary to the populist approach of Presidents Carter, Bush and Clinton, President Madison did not market or position himself as "the education president." Madison simply affirmed the Constitution as it was intended, not supposing or pretending that the federal government could act beyond the scope of its enumerated powers.

Turning specifically to education, he expressed his desire that the federal government should observe proper Constitutional restraint. He encouraged Congress "to promote by authorized means [certain internal improvements]; to favor in like manner, the advancement of science and the diffusion of information."[18] In 1815, he clarified what he meant by "authorized means" by calling for a Constitutional amendment in order for the federal government to obtain "national jurisdiction and national means" to implement a series of internal improvements.[19] He then proceeded to urge Congress, "in like manner," to establish a "national seminary of learning within the District of Columbia, and with the means drawn from the property therein, subject to the authority of the General Government."[20]

Madison arrived at this Constitutional solution in 1815, partly based on Congress' view of the subject expressed in 1811.[21] The 1811 House Committee notes are worth reviewing in detail, for

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[18] RICHARDSON, *supra* note 6, at 1:468. First Inaugural Address of James Madison, March 4, 1809 (emphasis added).

[19] RICHARDSON, *supra* note 6, at 1:567-68. Seventh Annual Message of James Madison, December 5, 1815.

[20] RICHARDSON, *supra* note 6, at 1:568. Seventh Annual Message of James Madison, December 5, 1815. Just three months earlier, Madison had proposed to add to the means of education provided by the several states a seminary of learning instituted by the National Legislature within the limits of their exclusive jurisdiction, the expense of which might be defrayed or reimbursed out of the [sale of] vacant grounds which had accrued to the nation within those limits. *Id.* at 485. Special Session Message of James Madison, September 1, 1815.

In 1796, Madison noted that a university at the seat of government would hinge on "whether Congress will encourage an establishment which is to be supported entirely independent of them." He made it clear that it would not "ask a single farthing from [Congress], nor that it would pledge Congress to endow the establishment with any support," and believed that sale of federal lands within the District might properly support such a local university. 6 ANNALS OF CONG., *supra* note 8, at 1702.

Therefore, when Madison proposed a national seminary of learning, he meant that Congress may act pursuant to its exclusive jurisdiction over the District of Columbia granted in Article I, Section 8, Clause 17. This plan in no way involved education of the people in the several states as in the earlier "national university" plan. As it turned out, this later proposal drew no attention from the House whatsoever.

[21] U.S., Congress, House, Representative Mitchill delivered the report on President Madison's March 4, 1809 proposal for the establishment of a seminary of learning, 11th Cong., 3rd sess., 18 February 1811, 22 ANNALS OF CONG., *supra* note 8, at 976-77.

U.S., Congress, House, Representative Wilde delivered the report on President Madison's September 1 and December 5, 1815 proposal which related to the subject of a national seminary of learning, 14th Cong., 2nd sess., 11 December 1816. *Id.* at 30:257-60.

See also U.S., Congress, House, Representative Atherton, offered for consideration an amendment to the Constitution granting Congress power to establish a national university which was rejected, 12 December

(continued...)

they summarize much of what has been articulated:

> [I]t was necessary to consider whether Congress possessed the power to found and endow a national university. It is argued, from the total silence of the Constitution, that such a power has not been granted to Congress, inasmuch as the only means by which it is therein contemplated to promote the progress of science and the useful arts, is, by securing to authors and inventors the exclusive right to their respective writings and discoveries for limited times.[22]

The Committee concluded that:

> The erection of a university, upon the enlarged and magnificent plan which would become the nation, is not within the powers confided by the Constitution to Congress .... If, nevertheless, at any time legislative aid should be asked to incorporate a district university for the local benefit of the inhabitants of Columbia, and of funds of their own raising, there can be no doubt that it would be considered with kindness, as in other cases; but it must be remembered that this is a function totally distinct from the endowment of a national university, out of the treasury of the United States, destined, in its legitimate application, to other and very different purposes.[23]

What could be clearer? It is Constitutionally acceptable to "incorporate a district university for the local benefit of the inhabitants of Columbia, and of funds of their own raising." This is the outer limit of Congressional power. It is not, however, constitutionally acceptable to establish a national university or fund it out of the federal treasury.

D. President James Monroe and the People as Sovereigns

During the Presidency of Madison's successor, James Monroe, the issue of a seminary for education was once again raised. Outlining his Constitutional perspective, he noted in the context of internal improvements that "the result is a settled conviction in my mind that Congress do[es] not possess the right."[24] He also observed the established rule that:

> In cases of doubtful construction, especially of such vital interest, it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of power. We may confidently rely that if it appears to their satisfaction that the power is necessary, it will always be granted.[25]

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[21] (...continued)
1816. *Id.* at 30:268; U.S., Congress, House, Representative Wilde moved successfully to discharge indefinitely the Committee considering the bill for establishing a national university on the basis that such a bill was not intended for Congress but only for the people, 3 March 1817. *Id.* at 30:1063-64.

[22] 22 ANNALS OF CONG., *supra* note 8, at 976.

[23] 22 ANNALS OF CONG., *supra* note 8, at 977.

[24] RICHARDSON, *supra* note 6, at 2:18. First Annual Message of James Monroe, December 2, 1817.

[25] RICHARDSON, *supra* note 6, at 2:18. First Annual Message of James Monroe, December 2, 1817. For (continued...)

What is President Monroe saying? Is he saying that we cannot know the intention of the Constitution? Is he saying that since the intent may be unclear, that the best course of conduct is for Congress to do what it thinks it can get away with, make up the interpretation as it goes along, or "let the Courts handle this one." Or did he call for a "bipartisan effort" to work this one out? No, no, no. President Monroe had character – real character – not the sound-bite variety. He didn't wade into the political slop head first. He said the right thing to do in such limited instances is to "to apply to our constituents for an explicit grant." That means, ask the people to amend the Constitution. Apparently, he trusted the People and respected the law. Can the same be said of the present generation of educational Presidents and their federally-bribed swarm of vigilante "reformers?" And they say "character" doesn't matter.

When it came to a seminary of learning, however, Monroe did not consider the Constitution to be unclear, uncertain or subject to a bipartisan boondoggle. He believed that Congress did not have the power to intervene in educational affairs or fund educational ventures from the national treasury. The prior debate about a national university and seminaries of learning amply demonstrated that much. Referring to internal improvement measures he stated: "I think proper to suggest also, in case this measure is adopted, that it be recommended to the States to include in the amendment sought a right in Congress to institute likewise seminaries of learning ...."[26] This proposal was broader than the one calling for the establishment of a district university. This called upon Congress to establish more than one institution of learning without geographical limitation (or so it seems). When this matter was brought before the House, the proposition to consider the resolution was rejected.[27]

E. President Andrew Jackson and Honest Constitutional Interpretation

The principle of limited and enumerated Constitutional authority in Congress was also recognized by President Andrew Jackson. In the context of Congressional appropriations from the federal treasury for roads and canals (an early trend toward the not so great "Great Society") without first resorting to an amendment,[28] Jackson stated:

> [i]f it be the wish of the people that the construction of roads and canals should be conducted by the Federal Government, it is not only highly expedient, but indispensably necessary, that a previous amendment of the Constitution, delegating the necessary

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[25] (...continued)
an excellent overview of Article V, *see* Scott M. Robe, *The Objects, Authority and Limits of an Article V Constitutional Convention*, Masters Thesis, Regent University (1986).

[26] RICHARDSON, *supra* note 6, at 2:18. First Annual Message of James Monroe, December 7, 1817.

[27] U.S., Congress, House, Representative Hill submitted for consideration a resolution (which was rejected) to establish a national university within the District of Columbia, but if that was thought objectionable, to then apply to the people to be constitutionally vested with said authority, 16th Cong., 1st sess., 23 December 1819, 35 ANNALS OF CONG., *supra* note 8, at 780-81.

[28] President Madison had vetoed a similar bill pledging certain funds for internal improvements such as construction of roads and canals, as unconstitutional and beyond the power of Congress to regulate commerce among the several States, or provide for the common defense and general welfare. RICHARDSON, *supra* note 6, at 1:584-85. Veto Messages of James Madison, March 3, 1817.

> power and defining and restricting its exercise with reference to the sovereignty of the States, should be made.[29]

There is little doubt that Jackson considered a Constitutional amendment as an essential prerequisite to granting the federal government jurisdiction in disputed contexts. But if that course were not taken, the enduring principle that Jackson articulated remains. Here again Jackson view deserves reiteration in more detail:

> When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere, and the cause in which there has been so much martyrdom, and from which so much was expected by the friends of liberty, may be abandoned, and the degrading truth that man is unfit for self-government admitted. And this will be the case if expediency be made a rule of construction in interpreting the Constitution. Power in no government could desire a better shield for the insidious advances which it is ever ready to make upon the checks that are designed to restrain its action.[30]

President Jackson put his finger on one of the key issues of Constitutional construction – would the government act honestly or insidiously? Many other Presidents touched upon other important points such as the intention of the framers and the clarity of the text. Jackson, however, addresses one of the central points when he says: "When an honest observance of constitutional compacts cannot be obtained from communities like ours .... " What does he mean? He means that when the intention and meaning are clear and the text is plain and certain, then interpretation of the Constitution boils down to whether our elected leaders are going to be honest and trustworthy or whether they are going to be corrupt and dishonorable.

Many public officials, bureaucrats, lawyers, judges, educators and scholars do not think that construing the Constitution against its clear intent or plain meaning is really corrupt or dishonorable. They are all too happy to pursue "insidious advances ... upon the checks that are designed to restrain" the federal government's power. For Congress the philosophy of insidious advances, that is to say, an expansion of federal power and corresponding expansion of programs to which the federal treasury may be applied, has the short term political advantage of delivering the vote of those constituents purportedly benefitted. Transferring money from the federal treasury to constituents transforms a public servant into a mere politician and an incumbent. Continuation in office, however, should be the reward for those whose character honors American martyrs and friends of liberty, not the reward of faithless Congressional dupes.

✓ Key Idea:

☞ PRESIDENT JACKSON RECOGNIZED THAT FEDERAL INTERVENTION INTO EDUCATION IS CONSTITUTIONALLY DISHONEST.

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[29] RICHARDSON, *supra* note 6, at 2:491-92. Veto Message of Andrew Jackson, May 27, 1830. President Monroe's objections were also noted by Jackson in his Veto Message. *Id.* at 486.

[30] RICHARDSON, *supra* note 6, at 2:491. Veto Messages of Andrew Jackson, May 27, 1830. Jackson also noted: "In no government are appeals to the source of power in cases of real doubt more suitable than in ours. No good motive can be assigned for the exercise of power by the constituted authorities, while those for whose benefit it is to be exercised have not conferred it and may not be willing to confer it." *Id.* at 492.

Moreover, almost all Constitutional usurpations are deceptively undertaken. Many are accompanied by self-serving Madison Avenue utterances like "It's an idea whose time has come" or the ever self-serving Political National Anthem – "We did it for our children's sake" – which actually is like saying that Constitutional lawlessness is really in their best interest. Marketing and promotional maneuvering, however, do not a Constitutional power make. Congress has made expediency its "rule of construction in interpreting the Constitution." The limits of Congressional power are no longer held "sacred and indispensable." The usurpation of power not granted has become the *sine qua non* of official Congressional and Executive acts. Unfortunately, the people have also become infected with this attitude. They have fulfilled President Jackson's prophecy, that honesty in construing the Constitution "need not be anticipated elsewhere ... and the degrading truth that man is unfit for self-government admitted."

Thus, few people realize that the federal exercise of Constitutional powers not given by the People, teaches children to disrespect the Constitution and the government it created – the federal government. Duplicity has that effect. Base character has that effect. We have federalized education, ostensibly to prepare the people for self-government. But the opposite effect has been produced. Because Congress usurped power to prepare the people for self-government, the people hold Congress in contempt *and* moreover, the people are rendered unfit to govern themselves in the process. It is hard to really recognize this perverse correlation especially when the drum beat of federal education policy such as Goals 2000 boasts dramatic improvements in education. But as President Jackson recognized and predicted, the consequences of federal disrespect for the Constitution's limitations produces an inevitable decline in self-government itself. Who can fail to see this?

F. President James Buchanan and Land-Grant Legislation

In 1859 President James Buchanan vetoed an Act originally introduced by Justin Morrill that would have granted public land for the maintenance of agricultural colleges within the several States already admitted to the Union. This was something new. Previous proposals that had been rejected only suggested that Congress set aside land in federal territories before that territory became a state. Now Congress was proposing to give land to States already admitted to the Union. This proposal is no different than reaching into the Treasury and giving money to the States for educational purposes.

Buchanan's veto was based upon the fact that the Act was "both inexpedient and unconstitutional."[31] It was inexpedient because it was "passed at a period when we can with great difficulty raise sufficient revenue to sustain the expenses of the Government."[32] Note this President's sense of fiscal restraint – no budget deal here! No false statements about how things are getting better. Buchanan said that Congress shouldn't be taking money from the Treasury for education when the other expenses could not be met. Did anyone ever hear of the deficit?

He then went on to address the unconstitutionality of the matter. He explained to Congress that the "Constitution is a grant to Congress of a few enumerated but most important powers.... All other powers are reserved to the States and to the people." He reiterated for Congress that the

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[31] RICHARDSON, *supra* note 6, at 5:544. Veto Messages of James Buchanan, February 24, 1859.

[32] RICHARDSON, *supra* note 6, at 5:544. Veto Messages of James Buchanan, February 24, 1859.

"several spheres of government action should be kept distinct from each other."[33] He also knew that the "Federal Government, which makes the donation [of money], has confessedly no Constitutional power to follow it into the States and enforce the application of the funds to the intended objects. As donors we shall possess no control over our own gift after it shall have passed from our hands."[34] Can you imagine any modem federal official saying such a thing? Devotees of the centralized federal regulatory state cringe with horror at this legal rule. If this lacked clarity, he concluded in no uncertain terms:

> I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes on the people of the United States, for the purpose of educating the people of the respective States. It will not be pretended that any such power is to be found among the specific powers granted to Congress nor that "it is necessary and proper for carrying into execution" any one of these powers.[35]

Don't look for Buchanan's portrait in the federally furnished offices of any land grant university, because with these words Buchanan vetoed the Land Grant Act in 1859.[36]

G. The Constitutional Legacy Is Rejected

Thus, between 1787 and 1859, an honest consideration of the Constitution was demonstrated. The Constitutional limitations on the authority of the federal government were duly observed. Though a variety of factual rationales for federal intervention into education were asserted, they were always rejected in light of the Constitutional enumeration of powers and the Tenth

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[33] RICHARDSON, *supra* note 6, at 5:545. Veto Messages of James Buchanan, February 24, 1859.

[34] RICHARDSON, *supra* note 6, at 5:546. Veto Messages of James Buchanan, February 24, 1859.

[35] RICHARDSON, *supra* note 6, at 5:547. Veto Messages of James Buchanan, February 24, 1859. The President added: "Should Congress exercise such a power, this would be to break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority." *Id.*

[36] The President declared:

> Should the time ever arrive when State governments shall look to the Federal Treasury for the means of supporting themselves and maintaining their systems of education and internal policy, the character of both Governments will be greatly deteriorated. The representatives of the States and of the people, feeling a more immediate interest in obtaining money to lighten the burden of their constituents than for the promotion of the more distant objects intrusted to the Federal Government, will naturally incline to obtain means from the Federal Government for State purposes. If a question shall arise between an appropriation of land or money to carry into effect the objects of the Federal Government and those of the States, their feelings will be enlisted in favor of the latter. This is human nature; and hence the necessity of keeping the two Governments entirely distinct. The preponderance of this home feeling has been manifested by the passage of the present bill. The establishment of these colleges has prevailed over the pressing wants of the common Treasury.

RICHARDSON, *supra* note 6, at 5:545. Veto Messages of James Buchanan, February 24, 1859. Buchanan correctly articulated the tendency to unconstitutionally balance federal funds between that which was enumerated and that which was expedient. A present day application is clearly visible as defense purposes are played off against the Department of Education "needs."

Amendment.

The first significant Congressional usurpation pertaining to education occurred in 1862. Congress employed the land-grant approach to bootstrap itself into the educational arena. The most definitive Congressional usurpation, however, outside the Article IV, Section 3, Clause 2 land grant debate, came in 1867 with the formation of the Federal Bureau of Education.[37] During debate on this Bureau of Education bill, Congressman Rogers of New Jersey, hit the proverbial nail on the Constitutional head when he declared:

> [N]o man can find anywhere in the letter or spirit of the Constitution one word that will authorize the Congress of the United States to establish an Education Bureau. If Congress has the right to establish an Educational Bureau, ... for the purpose of collecting statistics and controlling the schools of the country, then by the same parity of reason, *a fortiori*, Congress has the right to establish a bureau to supervise the education of all the children that are to be found in ... this country. You will not stop at simply establishing a bureau for the purpose of paying officers to collect and diffuse statistics in reference to education.[38]

Apparently, quite a bit has changed in the Constitutional outlook of New Jersey's Congressional delegation. Federal money has that effect. Unlimited power has that effect. Together they corrode principles. Together they corrupt character and eat away at self-government.

✓ Key Idea:

☞ CONGRESS IGNORED WARNINGS NOT TO ASSUME JURISDICTION OR INTERFERE WITH EDUCATION IN ANY MANNER, *DIRECTLY OR INDIRECTLY*.

An examination of the present Department of Education and Goals 2000 reveals that Mr. Rogers was right. Neither Congress nor Presidents have stopped and they will not stop. Their obsession with unlimited power has become pathological. The jurisdictional issue, having been waylaid, Congress began to steadily expand its unconstitutional reach into education in the late nineteenth century.

We need not examine every federal statute to understand that the trend in American political thought during the so called "progressive era" was toward expansion of federal power. The idea that the people were capable of self-government was eroded and replaced with the notion that the federal

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[37] The original rationale for the bureau was founded upon the census power. "What is this Bureau to do? Simply to collect information, nothing more. It will be but an extension of the census of the people." U.S., Congress, House, Representative Moulton commenting on the Bureau of Education. CONG. GLOBE, 39th Cong., 2nd sess. 3045 (5 June 1866). Mr. Rogers, however, warned that the bill:

> proposes to put under the supervision of a bureau established at Washington all the schools and educational institutions of the different States of the Union by collecting such facts and statistics as will warrant them by amendments hereafter to the law now attempted to be passed, to control and regulate the educational system of the whole country.

Id. at 2968.

[38] *Id.* at 2969. He also observed that "[T]here is no authority under the Constitution of the United States to authorize Congress to interfere with education of children of the different states in any manner, *directly or indirectly*." *Id.* at 2968.

government governed best when it governed most. A few educational laws will serve to illustrate this trend. In 1890 a second Morrill Act, which provided federal funds for land-grant colleges and universities was approved. In 1907 the Nelson Amendment to the Morrill Acts increased aid to land grant institutions. In 1917 the Smith-Hughes Act provided federal aid to states for vocational education. The Bankhead-Jones Act of 1935 increased federal funds for land-grant institutions.

More recently, in 1954 Congress authorized the appointment of a National Advisory Committee on Education charged with the responsibility of advising the Secretary of Health, Education and Welfare on problems of national concern in education. In order to keep up with the now defunct Soviet Union, the National Defense Education Act of 1958 authorized federal aid to all levels and several categories of education. In 1963 Congress authorized financial assistance for construction and rehabilitation of facilities in higher education. This action was completely contrary to findings of the House Committee Report of 1811.[39] Congress had come to a full Constitutional reversal.

This downward trend was accelerated precipitously in 1979 with the Federal Department of Education Act.[40] The Act simply asserted that the federal government "shares" jurisdiction with the states. The Constitution, however, provides for the only cases of shared or concurrent jurisdiction. A simple review of the Constitution does not reveal any leeway for a "significant, but carefully restrained Federal role in education."[41] The Constitution does not provide that "education is and should be of concern to Federal, State and local governments."[42] It does not support other fictitious statements such as, "In all cases, Congress has been careful to stick to the Constitutionally-backed principle that the Federal role is limited to supplementing, not supplanting, State and local prerogatives and rights."[43] These statements are certainly Constitutional gibberish – words without knowledge. But they are more – they are smooth words of Constitutional betrayal.

Congress also introduced false distinctions between private and public rights and further suppressed the meaningful exercise of parental rights. The 1979 Federal Department of Education Act stated that in the private sphere, "parents have the primary responsibility for education of their

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[39] For a listing of these and other Acts, *see* H. KURSH, THE UNITED STATES OFFICE OF EDUCATION (1965), Appendix A & B. For an inside look at the Office of Education within the Department of Health, Education and Welfare and the same predictable rationales of expediency utilized by the federal government to set the educational policy and agendas of the people and states, *see*, F. KEPPEL, THE NECESSARY REVOLUTION IN AMERICAN EDUCATION (1966).

Joseph Califano exhibited greater awareness of the dangers of federal control than did Francis Keppel or any Secretary of the Department of Education, though all have failed to clearly understand any substantive jurisdictional claims. Califano warned that "in its most extreme form, national control of curriculum is a form of national control of ideas." J. CALIFANO, JR., GOVERNING AMERICA 297 (1981).

[40] The Act declares "the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the State." U.S., Congress, Senate, Committee on Governmental Affairs, 1 LEGISLATIVE HISTORY OF PUBLIC LAW 96-98, DEPARTMENT OF EDUCATION ORGANIZATION ACT, 96TH CONG., 2D SESS. (1980) 2.

[41] *Id.* at 1.

[42] *Id.* at 2.

[43] *Id.* at 15.

children, and states, localities, and private institutions have the primary responsibility for supporting that parental role." Congress limited parental rights to the private sphere.[44] But in "our Federal system, the *primary public* responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the State."[45]

Congress would have us believe that in the public sphere, the states, rather than parents, are awarded educational custody of children. But the important point here is that in both instances, Congress made an intentional effort to assume by *usurpation* in the private sphere, educational custody with the states and parents, and in the public sphere, educational custody with the state and its instrumentalities.[46] The public/private distinction un-tracks the thoughtful citizen from asking whether Congress has *any* power in education, and forces parents on the defense, begging their newly proclaimed lords and benefactors for some influence over their child's mind in their own *private* home.

"America 2000" continues the downward spiral when it "affirms states and localities as the senior partners" in education. President Bush's mixture of federal and state jurisdiction is essentially identical to former President Carter's jurisdictional approach. Both assume a "limited role" for the federal government and emphasize state and local control of education. The only limited role, however, is the one the Constitution assigns – the patent and copyright clause and military/militia training. President Clinton's "Goals 2000" and "Improving America's Schools Act" passed in the 103rd Congress are more of the same – rank usurpation, dishonest observance and insidious advances in federal power, not the friend or mother tongue of liberty.[47]

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[44] *Id.* at 2.

[45] *Id.*

[46] Centralization of power over education for national purposes is not a new idea. In Mein Kampf, Adolf Hitler stated that:

> National Socialism, as a matter of principle, must claim the right to enforce its doctrines, without regard to present federal boundaries, upon the entire German nation and to educate it in its ideas and its thinking.... The National Socialist doctrine is not the servant of political interests of individual federal states but shall become the ruler of the German nation.

See, 1 NAZI CONSPIRACY AND AGGRESSION, OFFICE OF THE UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY (United States Government Printing Office: Washington 1946) 221.

[47] America 2000 calls for federal emphasis in ensuring "demonstrated competency in English, mathematics, science, history, and geography" through development of new world order standards. This also includes a system of "voluntary" National Examinations to measure competency in these five areas. Congress is slated to collect statistics to see how well the nation's children are conforming to the new standards.

Translated into plain English, this goal means several things. First, it means that the federal government is going to use its financial leverage to induce schools to adopt national curricular standards in the five areas. Though the government denies that it is establishing a national curriculum, it is certainly establishing national standards which it expects the schools to meet. When push comes to shove in federal funding and support, what school will not conform their curriculums to contain the information that the National Examinations will test? And what school will refuse the national exams if the federal government cajoles colleges to utilize them in their admission process?

Second, federal emphasis in ensuring "demonstrated competency" means that compulsion is not far behind. The very idea of ensuring "demonstrated competency" strains any reasonable understanding of the

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By 1994 Congress expanded its jurisdictional claim so that over 300 separate federal education programs did not create a Constitutional whimper from either liberals or conservatives. Strict constructionists and judicial activists alike said nothing about the Constitution. Expenditures for fiscal year 1993 diverted over 32 *billion* dollars to the Department of Education and various education programs. The money is spread out over 40 federal entities. Congressmen brag about this usurpation in their franked newsletters, claiming it is an "accomplishment" and a good reason for being re-elected. Making educational grants, providing services and issuing regulations was business as usual. Both Republicans and Democrats could act as though the Constitution were as malleable as wax – soft enough to recreate in their own policy image. Presidents' Carter, Bush and Clinton could describe themselves as Education Presidents as if education were a natural federal object, rather than the odious criminal enterprise it is, as President John Quincy Adams imputed to all such Constitutional usurpation.

LESSON 3.

A CLE LESSON ON PARENTAL RIGHTS AND THE LAW OF NATURE

> *The law of nature and nature's God, which ordains that it is both the right and duty of parents to educate their children in such manner as they believe will be most for their future happiness, is utterly disregarded and set at naught by the State, which ordains that it is neither the right nor the duty of parents, but of the State, to say when, where, by whom, and in what manner our children shall be educated.*[48]

The preceding discussion of federal jurisdiction over education raises more fundamental and significant issues than simply the Constitutional necessity of observing the doctrine of enumerated powers or honesty in administration. Withdrawal of federal jurisdiction over education should cause us to consider who should provide education if not the federal government. What would an American system of education look like without federal usurpation? Would state governments shoulder the entire responsibility or would parents and their agents be acknowledged as the appropriate provider? What might Congress and the President do?

These are fundamental questions. Fundamental questions necessitate recourse to fundamental principles. A fundamental principle is something that most Americans can understand so this Continuing Legal Education (CLE) lesson should be a breeze for them. As a matter of fact, most Americans understand the fundamental principles of the Declaration of Independence without any federal "assistance" or funding.

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[47] (...continued)
term "voluntary." The promised financial inducements and presidential citations are only the tip of the compulsion iceberg. But even if the Federal emphasis in ensuring "demonstrated competency" were truly voluntary, that which is "voluntary" today will inevitably be made mandatory tomorrow. It is only a matter of time before Congress will herald the statistics it has been collecting under the America 2000 "voluntary" plan, and then declare: "Based on these statistics, America will not reach its goal unless a national curriculum is made mandatory!" This is how Congress works. The development of Social Security law and policy from one based on voluntary inclusion to a virtually universal and mandatory approach, should serve to illuminate. Complete and coerced inclusion is a political result of unbridled power.

[48] Z. MONTGOMERY, COMP., THE SCHOOL QUESTION FROM A PARENTAL AND NON-SECTARIAN STAND POINT, (4th ed. Washington, 1889; reprinted.; New York: Arno Press, 1972) 52.

In the American system of government, the Declaration of Independence articulates our nation's fundamental principles. The Declaration observes that on the basis of "the laws of nature and of nature's God ... all men are created equal, that they are endowed by their Creator with certain unalienable rights." The question now before us is: "Do parents enjoy certain unalienable rights with respect to the education of their own children?"

A. The Parent-Child Relationship

Both "natural law" and the Bible establish the relationship between the parent and child. Both define their rights and duties. The law of nature is self-evident: children are born to their parents. Nature teaches that parents are to care for, feed and educate their children for useful service and future labor. While Presidents often quote the Bible in matters of political necessity, do they fully appreciate its politically unabridged content?

The Bible establishes much the same point as the law of nature, though with greater detail and clarity. It recognizes that God is the source of truth.[49] In order to teach children truth, God entrusts them to their parents.[50] Parents are essentially responsible "to teach their children"[51] the truth about all things, especially the laws of right and wrong.[52] Parents, "[i]mpress [these laws] upon your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up."[53] Moreover, to facilitate this responsibility the frequently quoted sixth commandment exhorts children to "[h]onor your father and your mother."[54]

There is no support in the natural law or the Bible for Congressional blather like "the *primary public* responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the State."[55] Likewise, the President's Goals 2000 challenge to build mold-busting, new world order, government-approved schools won't find these verses politically lucrative.

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[49] *See* Exodus 20:1-17; Isaiah 38:19; Psalm 25:4-5 & 8-9; Psalm 36:9; Psalm 40:11; Psalm 86:11; Psalm 100:5; Psalm 119:142 & 151; John 1:14 & 17; John 8:31-32; John 14:6; John 15:26; John 16:13; John 17:17; 1 John 5:20.

[50] *See* Psalm 22:30-31; Psalm 78:2-8; Psalm 145:4; Proverbs 2:1-6; Proverbs 4:7; Proverbs 22:17-21; 1 Corinthians 1:30; 2 Timothy 2:1-2.

[51] Psalm 78:5, New International Version (NIV). See also Genesis 1:28a; Genesis 33:5; Genesis 48:8-9; 1 Samuel 1:20; Psalm 113:9; Psalm 127:3-4; Isaiah 29:23; Malachi 2:15.

[52] *See* Genesis 18:18-19; Exodus 10:2; Deuteronomy 4:5-10; Deuteronomy 11:18-21; Deuteronomy 32:45-46; Psalms 34:11; Proverbs 2:1-5; Proverbs 3:12; Proverbs 4:20-27; Proverbs 6:20-23; Proverbs 13:1; Isaiah 38:19; Joel 3; 1 Thessalonians 2:11.

[53] Deuteronomy 6:7 (NIV).

[54] Exodus 20:12. *See also* Proverbs 1:8; Proverbs 4:1; Ephesians 6:1-2; Colossians 3:20.

[55] U.S., Congress, Senate, Committee on Governmental Affairs, 1 LEGISLATIVE HISTORY OF PUBLIC LAW 96-98, DEPARTMENT OF EDUCATION ORGANIZATION ACT, 96TH CONG., 2D SESS. (1980) 2.

B. What do Standard Writers on the Subject Say?

Though it is beyond the scope of this paper to fully analyze the right of parents to direct the education and upbringing of their children,[56] several of the preceding ideas about parental rights and responsibilities have been articulated and reiterated by prominent writers on the subject. These celebrated writers have recognized that the laws of nature and of nature's God establish parental rights. It has been observed that, "every standard writer on the subject of either laws or morals proclaims with one voice that parents are bound by the natural law to feed, clothe, and educate their children."[57] James Kent, for example, in his famous Commentaries on American Law, articulated this universal precept:

> The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.[58]

In other words, Kent recognized that parents were required by Providence and the law of creation, to provide for the *individualized* education and instruction of their children until such time as their children were old enough to make their way in life.

The instruction referred to by Kent is not standardized in any way. It is not a uniform or universal program of education that he commends. Not at all. The education that is required by the laws of creation is an education relative to the individual capacity of each child. It is also an education relative to the parent's own situation and station in life. This is not a call for state standardization of our children's minds or a call to perpetuate President Clinton's "Goals 2000" program of mandatory minimum standards. It is quite the opposite position. Kent is calling for the highly individualized and *diverse* education of children.[59] Kent stresses individual diversity. President Clinton, the pedagogic oracle, demands a government-enforced new world order uniformity.

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[56] These ideas are more fully developed in A. HERBERT, THE RIGHT AND WRONG OF COMPULSION BY THE STATE Essays 2 and 4 (1978).

[57] MONTGOMERY, *supra* note 48, at 50.

[58] J. KENT, COMMENTARIES ON AMERICAN LAW, 4 Vols. (New York: O. Halsted, 1826; reprint ed., New York: Da Capo Press, 1971) 2:159.

> The next domestic relation which we are to consider, is that of parent and child. The duties that reciprocally result from this connection, are prescribed, as well as those feelings of parental, home and fetal reverence which Providence has implanted in the human breast, as by the positive precepts of religion and of our municipal law .... The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of Universal law. *Id.*

[59] Parents who wish simply to transmit their religious or their cultural values to their children, or perhaps desire to teach their children in their native tongue, would benefit from such an approach. These parents would not have to spend their valuable time arguing with the local government or its school board over curriculums adverse to their religion, cultural values or language.

Kent also acknowledged that "the rights of parents result from their duties."[60] In a clear exposition of these rights, he concluded that as parents "are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust."[61] Kent understood the proper function of the civil government when it came to education. Civil government and civil law should protect parents in the discharge of their parental rights to educate their own children. The law should not interfere with that unalienable right.

As far as this eminent jurist was concerned, "Providence" vested parents with the absolute legal right to direct the education of their own child or children. Kent took the broad principles of the law of nature and, like the framers, applied those principles to education. His conclusion was that the law's function was to protect the natural right of parents. The law was not to be used to regulate the unalienable right of parents to direct the education of their own children. The law was not to subvert that right or permit the civil government to substitute its judgment in the place of parents as to what shall constitute "an appropriate education" or "world class standards."

✓ Key Idea:

☞ PARENTS HAVE A GOD-GIVEN UNALIENABLE RIGHT TO EDUCATE THEIR CHILDREN AS THEY DEEM APPROPRIATE.

Consider the legal precision that Zach Montgomery employed to describe the unalienable right of parents to direct the education and upbringing of their children free from state oversight, regulation and control. Montgomery was a United States Assistant Attorney General with the Justice Department in the 1880's. He published a treatise entitled The School Question from a Parental and Non-Sectarian Stand Point. Montgomery clearly delineated the legal basis for his position on the laws of creation. He wrote:

> The law of nature and nature's God, which ordains that it is both the right and duty of parents to educate their children in such manner as they believe will be most for their future happiness, is utterly disregarded and set at naught by the State, which ordains that it is neither the right nor the duty of parents, but of the State, to say when, where, by whom, and in what manner our children shall be educated.[62]

Montgomery was an attorney. He was also educated in law rather than just being knowledgeable about legal rules. He understood that the law of nature and of nature's God was a legally binding standard. He quotes Kent's opinion, which we have previously examined, as an authoritative construction and interpretation of parental rights. But more significantly, he shows us that his thinking followed that of the framers. He began with the laws of creation, and proceeded to figure out what that law required of parents. He also took the next step and figured out what that law means for parents with respect to the education of their own children. The laws of God expressed in creation are not difficult to understand. There is nothing mystical about them. Montgomery's articulation of this body of law and the duty of parents is quite straightforward. You

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[60] KENT, *supra* note 58, at 2:169.

[61] KENT, *supra* note 58, at 2:169.

[62] MONTGOMERY, *supra* note 48, at 52.

do not have to work for the Justice Department or be an attorney to figure it out. As a matter of fact, you probably have a better than even chance of figuring it out if you don't work for the Justice Department.

The understanding that parents have certain unalienable rights was accepted not only by prominent legal writers such as James Kent and Zach Montgomery, it was also accepted in the Academy. Francis Wayland, a prominent writer and President of Brown University, published The Elements of Moral Science in 1835; and it immediately became a standard university textbook on the subject. His slightly revised second edition published in 1837 sold over 75,000 copies. In the second edition, Wayland wrote about the several duties of a parent. He remarked that parents were responsible to provide their children with a physical, intellectual and moral education. Wayland recognized that some parents were not able to devote their full attention to the sufficient education of their children. He therefore recognized that parents were free to retain an instructor to teach for them and assume some of their responsibilities for education.

The relationship between parent and instructor did not, however, modify or diminish the authority of the parent. It merely recognized that parents were fully empowered by the laws of creation to hire tutors or agents to discharge a portion of their educational obligation. Wayland stated that the parent's "obligation requires that it be done either by a parent himself, or that he procure it to be done by another .... But, let it be remembered it can be done only in part" by the agent of the parent.[63]

Wayland did not say that an instructor could disregard the will of the parent. He recognized that the teacher's authority extended only as far as the parent permitted. A simple idea based on contract. Wayland pointed out that the "teacher is only the agent; the parent is the principal. The teacher does not remove from the parent any of the responsibilities of his relation."[64]

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[63] F. WAYLAND, THE ELEMENTS OF MORAL SCIENCE, (4th ed. Boston: Gould, Kendall and Lincoln, 1841) 318.

[64] *Id.* at 318. Wayland continues:

Several duties devolve upon the [parent], which cannot be rightfully devolved upon the [teacher]. For instance, –

1. He [the father] is bound to inform himself of the peculiar habits, and reflect upon the probable future situation, of his child, and deliberately to consider what sort of education will most conduce to his future happiness and usefulness.
2. He is bound to select such instructors as will best accomplish the results which he believes will be most beneficial.
3. He is bound to devote such time and attention to the subject, as will enable him to ascertain whether the instructor of his child discharges his duty with faithfulness.
4. To encourage his child, by manifesting such interest in his studies as shall give to diligence and assiduity all the assistance and benefit of parental authority and friendship.
5. And, if a parent be under obligation to do this, he is, of course, under obligation to take time to do it, and so to construct the arrangements of his family and business, that it may be done. He has no right to say that he has no time for these duties. If God have required them of him, as is the fact, he has time exactly for them; and the truth is, he has not time for those other occupations which interfere with them. If he neglect them, he does it to the injury of his children, and, as he will ascertain when it shall be too late, to his own disappointment and misery.

(continued...)

Reiterating the original authority (the legal jurisdiction) of parents in general (and a father in particular) Wayland showed how parental *rights* were connected to parental *duties*. A parent has a *duty* to God to direct the education and upbringing of his or her child, and this duty translates into an *unalienable right* to do so, free from external interference by any other person, parent or civil government. Wayland summarized that:

> The right of the parent over his child is, of course, commensurate with his duties. If he be under obligation to educate his child in such manner as he supposes will most conduce to the child's happiness and the welfare of society, he has, from necessity, the right to control the child in everything necessary to the fulfillment of this obligation. The only limits imposed are, that he exert this control no further than is necessary to the fulfillment of his obligation, and that he exert it with the intention for which it is conferred. While he discharges his parental duties within these limits, he is, by the law of God, exempt from interference both from the individual and from society.[65]

When reading extended passages we tend to gloss over the key points. The key point of the preceding passage is that "While he [the father] discharges his parental duties within these limits, he is, by the law of God, exempt from interference both from the individual and from society." Wayland is saying that parents have a right according to the law of God. Parents have real choice and real freedom under the law of God to educate their children.

Note that the extent and content of the instruction are not questioned or limited. The only limits imposed are, that the parent exert control no further than he supposes will be most conducive to secure the child's happiness and not be shown to be contrary to the welfare of society.[66] The state has a heavy burden to justify any interference with a parent's right.

C. Do State Education Laws Secure or Alienate Parental Rights?

What part do state governments play in the education equation? If the federal government lacks jurisdiction over education as a matter of constitutional limitation, and parents are endowed with the right to direct the education and upbringing of their children free from civil interference regulation or control, where does this leave state governments?

Once again, fundamental questions require fundamental principles. The Declaration of Independence tells us that "governments are instituted" for the purpose of securing "these rights." What rights are "these?" The Declaration indicates these rights are the ones endowed by God – the Creator. It also tells us that civil governments are created to secure these unalienable rights.

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[64] (...continued)
Id. at 318-19.

[65] *Id.* at 324.

[66] Sometimes lawyers and public officials see the phrase "welfare of society" and wrongfully conclude that this concept gives the civil government carte blanche or unlimited power to achieve their utopian vision of society. The term has no such meaning. Its meaning may be properly construed only in the context of the security of unalienable rights. It is not a warrant to usurp those rights, for the usurpation or interference with God-given rights is never consistent with the general welfare of any society. Usurpation is always contrary to the welfare of society.

In the context of education this mandate means that civil governments are instituted to secure the unalienable right of a parent to direct the education and upbringing of their children. In the context of federalism and Constitutionally enumerated power, this mandate means that state governments are obliged to secure the unalienable rights of parents and that the federal government has no jurisdiction. To the extent federal legislation exists, it must do so at the expense and trammelling of both the Constitution and the Declaration's principles.

The legitimate task of state governments is to statutorily articulate parental rights. This is the task of the state legislature. The legislature should enact education laws that will secure parental rights. Such laws should principally serve to protect parents in the unmolested exercise of their rights and punish those who interfere with their rights.

Let's take a moment and examine how a state government can best secure the unalienable rights of parents. The focus is on compulsory attendance and education laws. Are these laws consistent with or contrary to the rights of parents? This inquiry requires an examination of the underlying legal rationale and evolution of compulsory attendance laws themselves.

United States Supreme Court Associate Justice James C. McReynolds articulated the modern perception about compulsory attendance laws and a parent's right to control the education of their children. He observed in *Meyer v. Nebraska* that: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted ...."[67] The question is: Who should promote education? The Supreme Court addressed this question, McReynolds writing that, "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life ...." The Court understood that parents have a natural duty and corresponding right to control the education of their children suitable to their station in life.[68]

But the Court then added one more part to the puzzle. To the proposition that, "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life" the court added "and nearly all the States, including Nebraska, enforce this obligation by compulsory laws."[69] So there you have it, the states have tied parental rights to

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[67] 262 U.S. 390, 400 (1922) citing the Ordinance of 1787 that declares: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

[68] The flow of the Court's language should sound familiar. This is the same conceptual approach as Kent, Wayland and Montgomery argued although the word "natural" is used rather than "unalienable." James Kent said that "[t]he duties of parents to their children, as being their natural guardians, consist in maintaining and educating them ... by a situation suited to their habits ...." Recall what Francis Wayland said: "[The parent] is bound to inform himself of the peculiar habits, and reflect upon the probable future situation, of his child, and deliberately to consider what sort of education will most conduce to his future happiness and usefulness." The Court is speaking in the context of the laws of nature and of nature's God and unalienable rights though in more conventional terminology.

[69] The holding in *Meyer* has been severely distorted by various lower courts. For instance in *Clonlara Inc. v. Runkel*, 722 F.Supp. 1422 (E.D. Mich, 1989) the Magistrate's opinion cited Meyer for the proposition that parental rights are not fundamental, meaning that state regulation of parental rights need not be strictly (continued...)

compulsory attendance laws. The state may use its power to punish non-conforming parents. The Court is saying that the legal object of state compulsory attendance laws is to enforce by coercion the natural right of parents as they discharge their parental duty to educate their own children.[70]

However, may an unalienable right be either *promoted* or *coerced* by civil government? The rule is that where civil coercion of an unalienable right is present, promotion is absent. By definition, an unalienable right is to be freely exercised, not compelled to be exercised. It is illogical to maintain that civil government will promote free speech, religion or self-defense by coercing the speech or the free exercise of religion or the right to keep and bear arms. Compulsion in attendance or education is no different. Coercion defeats the element of freedom – freedom of parents to exercise their unalienable right to direct the education of their own children as they see fit. Civil coercion is contrary to unalienable rights.[71] While the Court in Meyer observed the correct principle – that parents have a natural right to educate – the Court failed to recognize that the state coupled it with an erroneous principle: that a state government has a right to coerce (or punish the failure to discharge) a natural or unalienable right.

✓ Key Idea:

☞ COMPULSORY ATTENDANCE LAWS WRONGLY INTERFERE WITH THE UNALIENABLE RIGHT OF PARENTS TO EDUCATE THEIR CHILDREN.

A Word about Thomas Jefferson and Education

Pause for a moment to consider a parent's right and education from a different point of view – from that of Thomas Jefferson. It is clear that Thomas Jefferson consistently applied the principle of unalienable rights to both religion and education. He asserted that religion was "of the natural rights of mankind." He declared that if the state legislature impaired religion in any way, that such

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[69] (...continued)
scrutinized by the courts. *Id.* at 1456. The court therefore concluded that reasonable regulations on the rights of parents are permissible.

What portion of the *Meyer* opinion led the lower court to this interpretation? The lower court quoted the Supreme Court: "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Id.* citing 262 U.S. at 402. Examination of the context in which the Meyer court made this statement, indicates that the Court was declaring that pervasive regulation was *not at issue* before the Court. The Court was not making the argument that the state's power to compel attendance is settled. The entire quote declares that;

> The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. *Those matters are not within the present controversy.*

262 U.S. at 402 (emphasis added).

[70] The Supreme Court does not have jurisdiction to write the natural right of parents into the United States Constitution. *Meyer* is not being invoked as a weapon in the arsenal of judicial supremacy.

[71] The maxim *Nil Consensui Tam Contrarium Est Quam Vis Atque Metus* is also appropriate. Nothing is so opposed to consent as force and fear. Where the "consent" of the parent is sacrificed on the altar of compulsory school attendance laws, it is done so by reliance on civil force and fear, not the free exercise of an unalienable parental right.

would "be an infringement of natural right."[72] Likewise, he also supported the unalienable rights of parents to direct the *education* of their children free from civil punishment. He asks:

> Is it a right or a duty in society to take care of their infant members, in opposition to the will of their parents? How far does this right and duty extend? [T]o guard the life of the infant, his property, his instruction, his morals? The Roman father was supreme in all these; we draw the line: but where? Public sentiment does not seem to have traced it precisely. Nor is it necessary in the present case. It is better to tolerate the rare instance of a parent refusing to let his child be educated, than to shock the common feelings and ideas by the public asportation and education of the infant against the will of the father.[73]

Thus, to the civil government in general and state governments in particular, Jefferson said that it may not and ought not compel instruction in either religion or education – it is better to tolerate a parent refusing to let his child be educated by the government, than to compel education against the will of the parent.

With respect to *state mandated taxation*, Jefferson held a different view on religion than he did on education. He abhorred and rejected on the principle of intellectual freedom, state financial compulsion in the support of religion and churches. He declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical" and "that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose power he feels [is] most persuasive to righteousness."[74]

But no such equal application of the principle to education is to be found in Jefferson. To compel a man to furnish contributions of money for the state educational propagation of opinions, was not according to Jefferson, sinful, tyrannical or even a deprivation of "comfortable liberty." According to Jefferson, such compulsion was justified, not on any principle, but simply on utility. To the objection that it is unjust to take the property of one man to educate the child of another, Jefferson responded with a circular argument. He observed that the rich will benefit from the education of the poor because the sons and grandsons of the rich themselves may one day be poor (since primogeniture is abolished) and the sons and the grandsons of the poor will one day be rich as a result of *gratis* education they receive, and thus the future poor sons of the present rich will

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[72] An Act for Religious Freedom, adopted by the Virginia General Assembly on January 16, 1786, VA CODE ANN. § 57-1 (1950). For an excellent analysis applying freedom of the mind to endowments for the arts, sciences and public broadcasting *see* Daniel R. Blackford, *The Extent of Civil Authority over Opinions and Ideas*, Masters Thesis, Regent University (1986).

[73] J. RANDOLPH, EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL, (Richmond, VA: C. H. Wynne, Printer, 1856) 97. See also C. ARROWOOD, THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC, (New York: McGraw-Hill Book Co., Inc., 1930) 61-62.

[74] An Act for Religious Freedom, *supra* note 72.

derive an equal advantage of education therefrom throughout the generations.[75] What a feeble argument is this, especially today!

✓ Key Idea:

☞ THOMAS JEFFERSON SAID THAT IT IS BETTER TO TOLERATE THE RARE INSTANCE OF A PARENT REFUSING TO LET HIS CHILD BE EDUCATED BY THE CIVIL GOVERNMENT, THAN TO COMPEL PUBLIC EDUCATION OF THE CHILD AGAINST THE WILL OF THE FATHER.

It is not Jefferson himself to whom is due ultimate deference, but the principles of parental rights he correctly identified. It is those principles, unbounded by time, which *must now be applied to educational establishments with the Jeffersonian intensity which he specially reserved for religious establishments alone*. Thus, when a parent "discharges his parental duties ... he is, by the law of God, exempt from interference both from the individual and from society." To ignore this rule is to ignore the most fundamental ingredient of parental rights.[76]

Conclusion

The ideas presented in these three LESSONS are indisputably "mold-busting." Yet, ideas alone are not enough. It remains to be seen whether the 104th and future Congresses and Presidents, or any state governments for that matter, really seek to break the mold. Will they be as innovative and honest as the founding fathers, along with Presidents Washington, Jefferson, Madison, Monroe, Jackson and Buchanan and members of early Congresses, or will they continue to be unconstitutionally criminal and odious?

President Jackson reminds us that "[n]o good motive can be assigned for the exercise of power by the constituted authorities, while those for whose benefit it is to be exercised have not conferred it and may not be willing to confer it."[77] For the moment, neither President Clinton nor Congress

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[75] RANDOLPH, EARLY HISTORY, *supra* note 73, at 105. See ARROWOOD, *supra* note 73, at 62-63.

[76] In their book "Politics, Markets and America's Schools," authors John E. Chubb and Terry Moe argue that "existing institutions cannot solve the problem, because they are the problem – and that the key to better schools is institutional reform." Instead of turning to the unalienable and natural rights of parents, however, the authors declare that "[t]he fundamental point to be made about parents and students is not that they are politically weak, but that ... the public schools are not meant to be theirs to control and are literally not supposed to provide them with the kind of education they might want. The schools are agencies of society as a whole, and everyone has a right to participate in their governance." Though their analysis of the present institutional situation is perceptive, they fail to consider the unalienable rights of parents and entirely misapprehend the object of civil government.

Their basic approach is a free market theory of education revolving around parental choice. This may sound appealing, but there can be no real choice (or free market) in education until compulsory attendance and compulsory exposure to state-approved and state-regulated curriculums are abolished. Until that happens, the application of a market theory to education is inappropriate, since choice is irrelevant if one may only choose and must support schools within the state's educational monopoly or among schools subject to that monopoly's regulation or control. See J. CHUBB AND T. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS (1990) 3, 32.

[77] RICHARDSON, *supra* note 6, at 2:492.

has shown any good motive or honest adherence to the Constitutional limitations on their power. Cutting the education budget is good, but renouncing federal usurpation of unconstitutional power over education is the minimum requirement. So far Republicans and Democrats do not differ over their desire to safeguard past federal usurpation. If Congress refuses to repudiate its usurpation, then talk of budget-slashing is just more Congressional deceit. Will Congress continue to expand its jurisdiction over education (even if it cuts its budget)? Will it simply maintain its unconstitutional reach? In either case, Congress and the President act in contempt and derogation of the people's aptitude both for self-government and limited Constitutional government.

Observance, however, of the written Constitution and its fundamental animating principles in the Declaration of Independence, will reverse the trend away from centralized government-controlled education. The Declaration's law and principles will move us toward recognition and protection of unalienable parental rights. The result of that recognition will be true *empowerment for parents, reorientation of state power to secure parental rights and confinement of federal power* to its Constitutionally enumerated objects and means.

Other publications by Kerry Lee Morgan:

A Constitutional Presidency

Brief and Manifesto Against A Mandatory State Bar (co-author)

The Constitution and Federal Jurisdiction in American Education

The Federal Government: To Alter or To Abolish?

First We Defend Law, Then We Defend Life: What the Pro-Life Movement Needs After Decades of Failure

God and Country: Reviving the American Republic

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