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Article Summary: Arthur Mullen crusaded against the limiting of personal freedoms in the post World War I era. In the 1923 Supreme Court case *Meyer v. Nebraska* he successfully defended Meyer's right to teach German in a Lutheran school.

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Photographs / Images: Arthur F Mullen; Mullen, Mrs Emily Newell Blair and Charles W Bryan attending ceremony honoring William Jennings Bryan



*Arthur F. Mullen, from a portrait by Henry L. Wolff
presented to the Society in 1944 by friends of Mr. Mullen.*

A WESTERN DEMOCRAT'S QUARREL WITH THE LANGUAGE LAWS

By THOMAS O'BRIEN HANLEY

Arthur F. Mullen is best known as Franklin D. Roosevelt's floor leader at the 1932 Democratic National Convention. He played a role in arranging for John Nance Garner as vice-presidential nominee, which brought the crucial support of Texas to Roosevelt. Roosevelt relied on Mullen to mobilize Midwest progressive support. Before and after the convention year Mullen led the Democratic Party in Nebraska. He came to this position of prominence through his legal profession.

Mullen, a graduate of the University of Michigan School of Law, soon held the office of county attorney in Holt County and later served in an appointive capacity as attorney general of Nebraska. In his own mind he at-

Father Hanley is the author of "Their Rights and Liberties," cited by the Supreme Court of the United States against religious tests for office (Torcaso v. Watkins) and "Charles Carroll of Carrollton: The Making of a Revolutionary Gentleman," to be published later this year. A professor in the Department of History at Marquette University since 1956, he will soon take up editorship of the John Carroll Papers in Washington, D.C.

tached greater importance to his court crusading against what he called the "illiberal forces" of the era before 1925. The most notable instance of this was his legal role as an Omaha lawyer in the case, *Meyer v. Nebraska*. Before the Supreme Court of Oliver Wendell Holmes in 1923, he successfully defended the right of Meyer to teach German in a Lutheran parochial school in Nebraska.

The record Mullen left, both published and manuscript, adds up to an enlightening commentary on the Post-World War I Era and the challenge it held to the liberal tradition in America. He was an observer of the scene from a promising vantage point. He played a part in asserting liberal views, as well as giving them new direction and application both in law and in politics. While judgment on the full extent of his influence awaits a biography, he is valuable in understanding the times. This is so because he is an example as well as a force of the Midwest Populist and Progressive element that survived during the 1920's. The nature of its survival and the object of its thrust stand revealed in Mullen's career.¹

Mullen's precise point of liberal impact was in turning back a restriction on freedom of speech of a teacher in a private school. This question was organically and chronologically related to the *Gitlow Case* with its rule of "clear and present danger" in restricting free speech.² But the court was in the 1920's seeking out the meaning of freedom as included in the Fourteenth Amendment and Mullen's whole approach to the courts and politics was in the spirit of this quest. These legal endeavors ultimately closed the inroads which illiberal trends in governmental policy were making, often with the force of Nativism behind them. Mullen was *avant garde* in this expanding climate of liberal thought.³

Mullen often boasted that while Holt County, Nebraska, may not have been equal to growing good crops, it did grow hardy men. Growing up in the immigrant Irish settlement of O'Neill in this county gave Mullen a taste for the strong drink of social reform. His environment

was clearly frontier—as Walter Prescott Webb described the frontier of the Great Plains. Conflict with cattlemen and railroads was familiar to Mullen. Agrarian frontier experiences made him a reader of Populist writers in his early years. His far-flung reading to the left was from a Canadian publication, *The Tory*, William Cowper Brann's *Iconoclast* of Waco, Texas, as well as other closer to home.⁴

He early found his way into Populist and Progressive politics. He read the Omaha Platform of 1892 with devotion and attended the People's Independent Convention in 1897. In 1908 he became a Bryan volunteer, but a more enduring political relationship developed with Champ Clark of Missouri. It would seem in general that Bryan's liberalism was not cast in the mold of the true Western Democrat, which was a very special term for Mullen's abstract political ideal.⁵ The Bryan relationship, Mullen indicated, suffered from the intolerant environment of Lincoln, Nebraska, where they had early associations. Mullen's political alliance with "Cowboy Jim" Dahlman of Omaha strained the Bryan friendship when Bryan denied Mayor Dahlman support.⁶

The legal phases of erupting Populism and Progressivism embroiled the mind of young Mullen upon his return from Ann Arbor. He was deeply involved in the issues of the Pullman Strike. His idealism was elaborated in terms of the careers of Peter Altgeld and Eugene V. Debs. He had long followed the railroad cases in Nebraska and now became a militant reformer in the face of court corruption. By 1918 lawmaking was improving in Nebraska, so Mullen thought, thanks to the resurgence of American liberalism in the West. Certainly educational life was free. "Western Democrats" had driven the "illiberals" from control of the three branches of the Nebraska State Government. But Bryan had sold out to Wilson and betrayed the Western Democrat, Champ Clark. The Anglophile President brought on the War. The War ushered in the language laws. In 1918 Mullen heard a call to battle for the liberal cause, now entrusted to true Western Democrats.⁷

The Nebraska language legislation in 1918 was in the pattern of lawmaking in Ohio, and other states. A new phase of Americanization enthusiasm amid the martial fervor of that year gave this lawmaking momentum. The United States Department of Interior through its Bureau of Education provided direction in its publication, *Proceedings of Americanization Conference*, the following year. The Nebraska State Council of Defense was a counterpart of the national effort and published its own report in 1918. Population records of foreign-born, particularly of Germans, were publicized.

The first target of the growing drive on potential sources of sedition was the Mockett Law, passed in 1913 to protect the right to teach a foreign language. The first attempts at legislation were only partially successful since they forbade teaching a foreign language to grammar school children only during the time taken up with essentials as defined by compulsory education laws. This limitation was brought out in the court action of *Lutheran Synod v. McKelvie* in 1919. The Siman Bill was introduced and passed that same year and successfully closed the loophole discovered by the court.⁸

Mullen had his own explanation of these events. "In 1918," he wrote in his brief manuscript *History*, "there was a political revolution in Nebraska." While he admitted a major cause of affairs was the entrance of the country into World War I, the presence in the state senate of thirty Republican senators to three Democrats and eighty-five Republicans to fifteen Democrats in the lower house became an equally decisive factor. "This unexpected political change," Mullen believed, "placed in the legislature a large number of members that had no former legislative experience. The currents and cross-currents of the World War had created bad feeling and fostered all kinds of prejudice."⁹

It is evident that Mullen believed this condition penetrated to the lawmakers. "When the legislature met in 1919," he explained, "it quickly became apparent that it

intended to pursue a policy of repression.”¹⁰ Mullen here saw enemies of his liberal principles, as he later explained. He welcomed the challenge because, he said, “it gave me ample opportunity to pay my respects to the illiberals and bigots.”¹¹ The passage of the Siman Bill with an emergency clause providing immediate application “discloses the animos [sic] of the legislature.” Mullen’s harsh charges, it is true, did not always directly rest on the lawmakers. Often they did and they were also directed against the Nebraska Supreme Court under Justice Aldrich, recently packed, as Mullen believed, for the upholding of the language laws against his client Meyer.¹²

Before the Supreme Court of the United States he went beyond his charge that the laws were “a species of Chauvinistic hysteria.” “About the time,” he said in his oral argument, “that the nations who used prohibitions [sic] laws and verboten signs to limit and deny the rights of their citizens passed out of existence the most odious form of prohibition appeared in the United States under the guise of “language prohibition.” His final remark to the highest court reached a climax when he said: “This intolerant act grew out of the hatred, national bigotry and racial prejudice engendered by World War.” “For more than four years before the decision,” Mullen later brooded in an after-battle speech, “I battled against intolerance, bigotry and prejudice . . .”¹⁴ One writer of the time who tended to agree with the general tenor of Mullen’s commentary would not go so far. He was content to speak of these matters as “quixotical consequence” and a “form of Bolshevism” in the wake of war.¹⁵ But then this scholar-commentator was not a Western Democrat from the sod house frontier.

Later historical scholarship gives substance to Mullen’s harsh judgment, even if in more exact terms. The “Red Scare,” Nativism in the face of strangers in the land, World War I ghosts of the Alien and Sedition Laws, these seem to be the symbols of the pathological condition of post-War society.¹⁶ Incidental aspects of Mullen’s charges, it is true, tend to detract from his case. The bigotry of

which he speaks may have been somewhat more to the surface as hysteria, as he himself implies in one place. Certainly in the broad base of the citizenry before the War, he said, "there was no agitation in favor of a radical change in our school system."¹⁷ It was clearly not found in the liberals who were turned out in 1918.¹⁸ In this, however, he overlooked Keith Neville, a staunch Americanizing Democrat, who lent weight to the movement of language legislation.¹⁹

Another refinement on the nature of the illiberalism, which gave rise to bigotry as an odious by-product, was the context of private education. In places it would seem that any attack on private schools was a major symptom of the disease, as Mullen viewed matters. "The recent history of Nebraska discloses," he believed, "that the liberty of the parent in the matter of educating his children won out over the united opposition . . . of the enemies of private education."²⁰ He had consistently characterized these enemies as bigoted.²¹ He likewise did not deny that his fervor was in no small measure fanned by zeal for Catholic private education. "The Catholics were kept in the background," he admitted, "but their rights were clearly set forth in the pleadings and their claims were presented in briefs and arguments."²² This revelation takes on meaning against the background of his own personal feeling as a member of a Catholic religious minority. In his autobiography he alludes to this meaningfully in connection with his residence in Lincoln. He was preoccupied with it in the National Democratic Convention politics in 1924 and 1928.²³

Mullen did not take clear account of an equal zeal for public education during this era. He was more aware of its alliance (coincidental or otherwise) with the malevolent element of change in the language lawmaking. It was no secret that the alliance was bent on destruction of private schools and Mullen took full account of it in judging the stakes in his battle. "The effect of this legislation," he said in reference to certain unsuccessful attempts at amendments to the language laws, "was the same as that

attempted in the so-called Oregon School Law, that was passed in that state in 1920 and has since been declared invalid in the Supreme Court of the United States. . . ." He said of the Nebraska amendment, "It was aimed directly at the Lutheran and Catholic parochial schools." He was distressed that a narrow 17-16 decision in the Nebraska Senate forced a conference with the Lower House on the general bill preliminary to the Siman Law, in which the odious amendment was removed.²⁴ Mullen was vexed by the margin of one vote and did not advert to the fact that a substantial number who voted for the language law were in agreement with him in his attachment to the rights of private education.

Confronted with Judge Aldrich of the Supreme Court of Nebraska, Mullen did not attend to these nuances in his charge of bigotry. When asked the reasonable intent of the language laws he made concessions. "I don't know what was in the mind of the legislature," he confessed, "but from examination of the act my thought is that it may possibly have had in mind the stopping of propaganda."²⁵ Yet he stood his ground and made his own analysis of the complex psychological conditions so much involved in great social conflicts over civil liberties. "The dodge," he remarked to the court, "of trying to justify an invasion of the rights of our citizens on the grounds of patriotism is not a new one. There never has been a tyrant since the days of Nero that has not attempted to justify his acts of tyranny on patriotic grounds." He dared to single out the offenders. "If this law is unconstitutional," he declared, "it should be declared unconstitutional, irrespective of the wishes of the American Legion and without regard to the number of states that have been seized with 'war psychology.'"²⁶

Mullen's commentary penetrated beyond political and social history to the strata of American intellectual life. He made much of the philosophical implications of the language laws and liberal principles which were being overturned when the Nebraska Court upheld the conviction of Meyer. Reading the intellectual climate in terms

of Holmes' reactions to this case and related ones, it appears that Mullen was striking into ground not yet recognized, let alone won by the liberals, and Holmes' Court. Mullen had no Holmesian legal precision in his rhetorical forays, which were more characterized by the manner of a Populist orator. His diffuse discussions, however, led him to present a substantial array of fundamental liberal principles, even though he was taking risks with his client before the highest tribunal. As for the court, he was compelling it to scrutinize the Fourteenth and First Amendments in the context of post-War society. Holmes and McReynolds were led by the Western Democrat to confront their own consciences and liberal American consensus as it was evolving in Mullen.

Mullen's Populist and Progressive environment accustomed him to view matters from the pillars of society upward to the particular issue under debate. Often to the distraction of closer legal reasoning, he persisted in lining up the pillars for the court. It is interesting that some of this unsophisticated manner left the court under its spell. It even resorted to the rhetorical style of the Western Democrat and could not resist asides on the fundamentals of freedom, which the Western Democrat had declaimed. Resurrecting comparisons from Greek Classical Times in the grand manner of Populists, Mullen compared the plight of Sparta to the impending tyranny in Nebraska. He saw the architects of Sparta at work in these language laws. "There is a school of thought," he said, "that believes that the first consideration of all government is the state. This school now and all times past contends that the king can do no wrong; that the State is omnipotent. In this country, this school contends that the majority can do no wrong."²⁷

There was no doubt that this was a disturbing question of the times and the new school of jurisprudence, which Holmes was leading, was also not at home with Mullen's emphasis on inalienable rights. Moreover the Western Democrat uttered his professions as one who with the Founding Fathers held little faith in the State. The



Arthur F. Mullen, Mrs. Emily Newell Blair and Charles W. Bryan, former Nebraska governor, attending ceremony honoring William Jennings Bryan.

agrarian had little sympathy with twentieth century justice in an industrialized society, where the state increasingly emerged as a principle of needed order. The eighteenth century concept of the nature of man was not as valid for Holmes as it was for Mullen. Yet in a sense Mullen confronted the court with a formative current of twentieth century American consensus, whose strong assertion of individualism eventually won the attention of the court and moderated the logical positivist's bid for the role of state authority in the balance of society.²⁸

Mullen was thus in the formative mainstream that ultimately led the court progressively to broaden the Fourteenth Amendment's meaning of liberty. Sociologists were showing how spurious Americanization was inspired by the concept of the state as "over-person" and seemingly making it distinct from the human relationships between individuals. In such terms did Floyd Allport analyze the condition of culture.²⁹ In the longer reach of the late nineteenth and twentieth century totalitarian forces, also, Mullen was responsive to history.

Taking no adequate account of the philosophy of Holmes, Mullen plunged ahead on his own grounds. "If the State has the power to socialize and control the entire subject of education," he told the Chief Justice and his associates, "it can do the same thing over the home life of the citizen."³⁰ Sparta under plea of security expropriated the child's family life and its voice in his education. Nebraska would do as much. Mullen had his own way of telling Holmes what the absolute state was and that the Court was in danger of revealing its nature by the Court's formulation in the language case. The parochial schools of poor immigrants and their children, he reasoned, were necessary devices since these parents individually had not the means at home of providing the teaching desired.³¹ He thus joined the appeal of warm compassion for the benighted with the loftier philosophical direction of liberal crusading against state thought control.

Some scholars were taking account of Mullen's approach and measuring it against the prevailing mind of the Court. Mullen was not pressing property rights as a foremost consideration. Hence the dissent of Holmes and Sutherland in the *Meyer Case* was not surprising. Both justices were not yet prepared to stand on Mullen's new ground circumscribing their view of the state as opposed to the freedom of the individual. Even Justice McReynolds failed to follow Mullen's argument at one point as he strove to gather understanding for his majority opinion. In his exchange with Mullen he adverted to the overriding interest of the state as simply conceived and apart from the logical positivist's or Mullen's abstractions. He wanted to know what might be the best solution in the case if it were in the "best interest of the people of the State not to have Polish or German spoken."

Mullen saw the crucial turn to inalienable rights which his system required at this point, but he failed to state his view with clarity. A self-evident infringement of legitimate freedom would result from such a language restriction, it seemed to Mullen. "If we ever reach a point," he said, "in this country where a majority of the legislature

can say that you cannot speak or study German in a private school, for the same reason you can get another legislature . . . to forbid teaching private property rights. . . ." The language law was an unjust penetration of an inner sanctum. Any state invasion would thereafter be justified in the light of such a precedent, were it established in the *Meyer Case*. It is clear that the McReynolds-Mullen exchange was seeking to apply the rule of "clear and present danger" of the *Schenck Case* (1919) in an effort to maximize personal freedom. Liberty to teach, study, conduct a private school, should not be curtailed merely for state policy. There must be a justifying danger of subverting the state policy. The *Gitlow Case* shortly after *Meyer* would establish this line of reasoning in support of most situations, particularly that of free speech.

Mullen in his court discussions described what was a reasonable role of the state in education. A lower court had even responded in acknowledging the dangers of passing beyond such limitations. If the language laws were enforced, said the lower court in *Lutheran Synod v. McKelvie*, "it would be discriminatory as being an unreasonable exercise of the police power, and interfering with individual liberty,"³⁴ Mullen was educating the courts in what was reasonable. Distortion was behind the justifying pleas in support of language laws. Compulsory education statutes did not require language regulation of the Siman Law type. The needs of civic education were minimal and this understanding was leaving public education open to a broad scope of studies.³⁵ "To require all citizens to study the English language," he explained in summary fashion, "is to do constructive work in a broad and comprehensive way. To prohibit the use or study of any other language is unwise, illiberal and retards the work of Americanization."³⁶

All of this limited the state in the role of education and enlarged the citizen's freedom. It was a stand against the "illiberal." He saw that control of language put a barrier between the immigrant parent and his child in the transmission of religious faith and belief. In a case pre-

liminary to *Meyer* he urged this consideration and explained the difficulties immigrants had in communicating religious ideas in English. He made direct reference to the constitutional right of religious freedom. Mullen described the Spartan condition in which the state had a monopoly in education and clearly saw its implication for his case, and other attempts at eliminating private schools. In a somewhat desultory fashion, then, Mullen was arousing in the court and press a general discussion of a whole range of liberal issues which were concerned with freedom of the individual in the face of state power.

The United States Supreme Court after attending to Mullen's lessons on the pillars of a free American society was constrained to bring him to assist it in adjusting the superstructure. The court was in the throes of dealing with the meaning of freedom in the Fourteenth Amendment. At the very time of the *Meyer Case*, one court decision stated that it was not clear that free speech in a state must be protected by the Federal Government by force of that Amendment.³⁹ In an exchange with Justice Holmes, Mullen advocated the broadest meaning of liberty. He insisted the meaning of freedom in the First Amendment was coextensive with that term's use in the Fourteenth. With great significance for subsequent developments Holmes asked if Mullen would include free speech also. "And free speech also," he answered, "and the right to use the human intellect as a man sees fit. . . . I think mental liberty is more important than the right to be physically free."³⁹ Holmes brought Mullen's commentary to focus on free speech. He was not ready to include this in the Fourteenth Amendment and few justices would go as far as Mullen.

Mullen was willing to reason apart from the First Amendment and turn to the fundamental nature of freedom itself as it stood alone in the Fourteenth Amendment. "It is difficult to conceive of a right more inherent or more inalienable," he told Holmes and his fellow justices, "than the right to study . . ." He called attention to *Allegeyer v. Louisiana*: "The court more than once said," Mullen

explained, "that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizens to be free in the enjoyment of all his faculties, and to be free in the use of them in all lawful ways.'"⁴⁰ According to Charles Warren, writing in the wake of the *Meyer* decision, Mullen's discussion of freedom became only a secondary point in the majority opinion.⁴¹ This was an understatement upon reading McReynolds' decision. The justice noted that the state might go quite far in the education and improvement of its citizens, "but the individual has *certain fundamental rights* which must be respected." Mullen was evidently appealing to one of these rights and McReynolds was justifying his restrictions of state power by such an appeal himself. The methods of the language laws were in "conflict with the Constitution . . ."⁴²

Holmes did not choose to confront Mullen directly on a discussion of freedom. Turning from an attempt at defining inalienable individual right, Holmes asked him to "draw the line" between government action and the freedom of the individual in terms of what is "necessary to the safety of the community" as a rule of legality. He asked, in effect, how far the individual can go in the face of the state's responsibility and legitimate purpose. There seemed to be the agreement that the citizen may not demand removal of what was "necessary to the safety of the community," as Holmes phrased it. Holmes also spoke of "a mere pretense of evil," and "a real basis" for restraint on personal liberty.⁴³

Mullen had noted these aspects of his argument on freedom. There was pretense and no real basis of danger to the safety of the community, he maintained, in foreign language education. If there was doubt on this point, as there was in Holmes' dissenting opinion, Mullen thus compelled the Court to think of enlarging the meaning of personal liberty. This had an indirect effect on the dissenting Holmes and a direct effect on McReynolds. The latter conceded a "fundamental right" was at stake; the Fourteenth Amendment's liberty included and protected it. McReynolds did not go as far as Mullen would have wanted in an

interpretation of freedom, but he moved far in that direction.

There is no doubt that Mullen saw the likelihood of this outcome. He did not fail, therefore, to tie his case to the prevailing interpretation of the Fourteenth Amendment in regard to the protection of property, while he was emphasizing personal freedom in its use. If there were any right "more inherent or more inalienable than the right to study," he said before the Supreme Court of the United States, "it would be the right of parents to maintain a private school at their own expense in which to educate their children in the common branches, and to use this school to assist them in teaching religion and morality to their children."⁴⁴ Use of this two-edged argument may have meant that Mullen was merely hoping for a greater victory for freedom than he probably accomplished.

The role of Mullen's *Meyer Case* has not been clearly assessed in the evolution of liberal court precedent. Perhaps this is because it was not a clear case in itself nor as presented by Mullen, who offered many principles upon which the Court might choose to decide it. Charles Warren, writing at the time of the decision, called attention to the concern of McReynolds with a definition of liberty in the Fourteenth Amendment. At the same time, Warren contended, the court "went no farther than previous decisions upholding the right of a man to engage in a lawful occupation, without arbitrary or unreasonable restraint by the State."⁴⁵

Writing in more recent times, Zecharia Chafee with greater historical perspective attributes much more to the *Meyer Case*. He recalls that a year before *Meyer* the right of free speech was not viewed by Justice Pitney as within the force of the Fourteenth Amendment. "Then in 1923," he explains in reference to *Meyer*, "the Supreme Court held that liberty to teach a foreign language in private schools was within the Fourteenth Amendment. . . ." The *Pierce Case*, which soon followed *Meyer*, noted schools were deprived of property in the form of tuition fees. Connec-

tion of property with a personal right was weaker in *Meyer* than in the reasoning in *Pierce*, it would seem. Yet, Chaffee concludes, these cases "cleared the ground for a decision that liberty of thought without any property is protected under the Fourteenth Amendment." This was the contention of the *Gitlow Case*, decided shortly after *Pierce*.⁴⁶ In other words, *Meyer* clearly involved freedom of speech but with the adjunct of property right involved. Chaffee finds important precedent in this action in favor of liberty. This view would have further pleased Mullen when the author concludes: "In private schools the liberty of teaching is greater."⁴⁷

Zollman, the scholar of civil and church law, gave greater stature to Mullen's estimate of the legal forces with which he was dealing. Writing at the time of the decision, Zollman noted that the justices were undoubtedly aware of the progress of *Pierce* and other judicial controversies turning around the various liberal principles with which Mullen confronted them.⁴⁸ *Meyer* may have been intended as an invitation to bring the *Pierce Case* before the highest court. Mullen would thus seem to be something more than a Don Quixote or a wild Populist multiplying windmills and malefactors in an overheated imagination. He would seem justified in his lack of precision in fixing a single issue in *Meyer*.

All this was true to his character and his Great Plains environment, as it is sketched above. His was a battle on a political and social, as well as on a legal front. The fact was that the Court itself was enmeshed in this interlacing of situations which tied down personal liberty in the Post-War Era. The Court gradually freed itself by pursuing the strands of liberal thought which Mullen presented.

Mullen came into a bizarre controversy with the lawyer for the defendants in the *Pierce Case*, which provides a final chapter in his commentary on social and judicial history. It manifested, unfortunately, Mullen's vanity as well as his legitimate pride in the liberal victory in *Meyer v. Nebraska*. Like his other controversies this one was

imprecise in his treatment in the press and private correspondence. This was partially accounted for by Mullen's ambivalent purpose of enhancing his reputation and arguing for a principle of law which significantly protected personal freedom.

Roosevelt once told Mullen that he reminded him of the roughly hewn Lincoln.⁴⁹ In the presence of William D. Guthrie, lawyer of the schools in *Pierce*, he took on the testiness of a Populist confronted with an urbane lawyer from the East. Guthrie indeed had the breeding of an aristocrat, including an education abroad.⁵⁰ His interest in liberal ideas, which were genuine, derived, however, from academic sources rather than social and political experience. The court was not the place to bring the rhetoric and extravagant invocation of inalienable rights of agrarian harangue. Rather, the profession demanded much precision which rested on the prevailing practice and the current reasoning of the court.

The temper of Guthrie's liberalism was revealed in connection with his volume on the Fourteenth Amendment. As a scholar he propounded that the Fifth Amendment where lacking by force of state legislation applied through the Fourteenth. Reviewed in 1899 by John G. Palfrey, editor of the *Harvard Law Review*, this position stood as radical. In giving such wide meaning to liberty, the reviewer believed, responsibility for just laws was being shifted to the court from the legislative branch. This probably left Guthrie in sympathy with Mullen's inclination to relate the First as well as the Fifth Amendment to the Fourteenth in deriving the meaning of freedom there. He further philosophized, as Mullen, in terms of natural right with its inalienable features.⁵¹ Warren, commenting on Guthrie many years later in the wake of the *Pierce Case*, found his reasoning on constitutional liberty still liberal.⁵²

Guthrie had no delusions about what could be because of his attachment to freedom but was concerned with what was because of the prevailing climate of the court before

which he stood. The courts which he knew from the time he entered on the profession, consistently saw only property rights protected by the Fourteenth Amendment. There was a tendency in the court to go beyond this, particularly at the time of *Pierce*. But he chose to make no crusade of his personal freedom in the *Oregon School Case* at the risk of his clients, whereas Mullen certainly would have. Unlike *Meyer*, a corporation confronted the state in *Pierce*. As Warren explained Guthrie's case, "Liberty includes upbringing of children but no parent was involved in the case, which was decided instead on privation and restraint on property without due process of law."⁵³ This ultimately was a conservative stance by Mullen's standards. Mullen publicly criticized Guthrie for his procedure. "Corporations are not possessed of the rights of citizens under the privilege and immunities clause of the Fourteenth Amendment," he said in a speech in St. Louis. "It would be unfortunate, indeed, if the decision of these cases [on the existence of private parochial schools] should turn on the question of the power of the Oregon corporations to do business in that state." The merit of the case was more profound than this.⁵⁴ Guthrie justified his line of defense in a published article in *Columbia Magazine*.⁵⁵ In a letter to Guthrie, Mullen demanded a correction of Guthrie's published view that the *Meyer Case* had not secured private schools, precisely because it established a personal right rather than a property right. If this was Guthrie's argument in *Pierce*, Mullen tartly responded, "the court did not agree with your conclusions. The reason for this is plain. The court could not reverse the language cases without considering and passing on the constitutional right to maintain private schools."⁵⁶ To Mullen this was a case of personal more than property right.

Guthrie's response was faithful to his personal traits as noted above. "I submit that no lawyer filing a brief on behalf of those challenging the constitutionality of the Oregon statute," he wrote to Mullen, "would have been justified in assuming that the Foreign Language statutes and the Oregon statute presented identical questions of

legislative power, nor could such counsel have properly conceded or acquiesced in the contention that this decision, whatever might be its character, would necessarily be decisive in the Oregon cases." He claimed that McReynolds did not refer to the alleged power of the state to compel children to attend public school in the *Meyer Case*, nor was its decision based on a denial of that power.⁵⁷

What escaped both disputants was noted by Warren at the time. Unlike Mullen he felt that the Court in *Meyer* based its reasoning upon the citizen's personal right to use school property and activities proper to it. It was not a case of constitutional personal right as purely as Mullen conceived it. On the other hand, Warren provided foundation for Mullen's claim against Guthrie that the right of private schools to function was rooted in the *Meyer Case*. With Warren, however, it was for reasons of property right more than personal right that schools existed.⁵⁸

Guthrie stood as a good lawyer but no crusader in the light of all of this. That was not Mullen's ideal in these momentous cases. It was not strange that many found it more assuring to think as Mullen did that the schools stood secure on the grounds of personal freedom. Indeed this was a more liberal inspiration and it is still shaping the Supreme Court of the United States. This is brought out in Chafee's broad treatment of the rise of free speech in constitutional thought. He notes that freedom of speech in *Meyer* was no less an issue merely because it was involved naturally in a property situation with its accompanying rights. Within a year of *Meyer*, the *Gitlow Case*, taking account of this fact, followed the pattern of *Meyer's* personal issue of free speech, even if in the *Gitlow* instance it was not connected with the second factor of property.⁵⁹

Zollman felt that much was said in the *Meyer Case* with an eye to *Pierce*. "The court," he reasonably concluded, "hardly will hold that a state may do directly [in *Pierce*] by striking down what it cannot do indirectly [in *Meyer*] by unreasonable regulation." The inherent rights of parents" in both cases were invaded, freedom to

teach in schools in the first instance and to maintain them for that purpose in the second.⁶⁰ Written in the context of Chafee's analysis of free speech, Zollman's view makes good constitutional history. In Mullen's liberal commentary, the meaning of the freedom at issue is even richer.

Mullen understandably was jealous of his role as a Western Democrat in an era of combat with the "illiberals."

NOTES

¹ "In the Great Plains States," writes William E. Leuchtenburg, "the historic home of populism and republican insurgency, progressivism continued to thrive." *The Perils of Prosperity, 1914-1932* (Chicago, Ill.: The Univ. of Chicago Press, 1958), p. 128. See his general treatment of reform and its need as developed from the best monographs. Mullen's *Western Democrat* (New York: W. Funk, Inc., 1940) contains the best published account of his career.

² *Gitlow v. New York* (268 U. S. 652).

³ For a discussion of the survival of reform see Richard Hofstadter, *The Age of Reform* (New York: Alfred A. Knopf, 1955).

⁴ *Western Democrat*, pp. 55-75.

⁵ *Ibid.* pp. 159-174.

⁶ *Ibid.*, pp. 135-158.

⁷ *Ibid.*, pp. 159-174.

⁸ For a clear presentation of the details of language laws, see Jack W. Rogers, "The Foreign Language Issue In Nebraska," *Nebraska History XXXIX* (March, 1958), 1-22.

⁹ Arthur F. Mullen, History, p. 1, Arthur F. Mullen Papers (The Creighton Univ., Omaha, Nebr.), *Meyer v. Nebr.* File. All subsequent reference to manuscript material is to this collection and file.

¹⁰ *Ibid.*

¹¹ Arthur F. Mullen, *Private Schools and the Fourteenth Amendment* (Washington, D.C.: National Catholic Welfare Conference, 1925) p. 14.

¹² Mullen, History, pp. 2, 15-16.

¹³ Mullen, Supreme Court Brief of *Meyer v. Nebraska* (privately printed), pp. 55, 63.

¹⁴ Mullen, National Catholic Welfare Conference (N.C.W.C.) Speech, original draft. *Private Schools and the Fourteenth Amendment*, noted above, was a revision of this speech.

¹⁵ Carl Zollman, "Parental Rights and the Fourteenth Amendment," *Marquette Law Review* VIII (Dec. 1925) 53, 56.

¹⁶ Leuchtenburg, *op. cit.*, ch. 4, and p. 127.

¹⁷ Mullen, *Private Schools and the Fourteenth Amendment*, p. 12.

¹⁸ Mullen, History, p. 1.

¹⁹ Rogers, *Nebraska History*, XXXIX, 1-22.

²⁰ Mullen, N.C.W.C. Speech, pp. 16-17.

²¹ Mullen, *Private Schools and the Fourteenth Amendment*, p. 12.

²² Mullen, History, p. 10.

²³ Mullen, *Western Democrat*, Bk. II, Ch. V; Bk. III, Ch. V.

²⁴ Mullen, History, p. 2.

²⁵ *Ibid.*, p. 14.

²⁶ *Ibid.*, p. 17.

²⁷ *Ibid.*, p. 21.

²⁸ Oliver Wendell Holmes, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions*, ed. by Max Lerner (Garden City, N. J.: Halcyon House, 1948), pp. 44, 148, 414-15; Dorsey Richardson, *Constitutional Doctrines of Justice Oliver Wendell Holmes* (Baltimore: The Johns Hopkins Press), p. 70; Samuel J. Konefsky, *The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas* (New York: The Macmillan Co., 1956), pp. 258-61.

²⁹ Merle Curti, *The Roots of American Loyalty* (New York: Columbia University Press, 1926), pp. 241-2.

³⁰ Mullen, Supreme Court Brief of *Meyer v. Nebraska*, p. 18.

³¹ Mullen, History, p. 19.

³² Zechariah Chafee, *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1948), p. 321n.

³³ Mullen, Supreme Court Transcript of *Meyer v. Nebraska* (privately printed), p. 14.

³⁴ *Nebraska District of the Evangelical Lutheran Synod of Mo. et al v. Samuel R. McKelvie, Governor et al.*, 104 (Nebr.) 93, 21, 53; and Mullen, History, Appendix VI.

³⁵ Mullen, *Private Schools and the Fourteenth Amendment*, p. 16.

³⁶ Mullen, History, pp. 21-22, 52.

³⁷ *Ibid.*, pp. 10-11.

³⁸ Chafee, *Free Speech in the United States*, pp. 321-332.

³⁹ Mullen, Supreme Court Transcript, p. 13.

⁴⁰ Mullen, Supreme Court Brief, pp. 17, 26.

⁴¹ Chares Warren, "The New Liberty Under the Fourteenth Amendment," *Harvard Law Review*, XXXIX (Feb. 1926), 454.

⁴² Mullen, Supreme Court Transcript, pp. 14-15.

⁴³ *Ibid.*

⁴⁴ Mullen, Supreme Court Brief, p. 17.

⁴⁵ Warren, *Harvard Law Review*, XXXIX, 454.

⁴⁶ Chafee, *Free Speech in the United States*, pp. 321-322.

⁴⁷ *Ibid.*, p. 552.

⁴⁸ Zolman, *Marquette Law Review*, VIII, 57.

⁴⁹ Mullen, *Western Democrat*, Bk. IV, Ch. I.

⁵⁰ *The American Catholic Who's Who* (Detroit; Walter Romis and Co., 1936).

⁵¹ Palfrey review of William D. Guthrie, *Lectures on the Fourteenth Article of The Amendment to the Constitution of the United States* (Boston, 1898), *Harvard Law Review*, XII (Jan. 25, 1899), 439-440.

⁵² Warren, *Harvard Law Review*, XXXIX, 446.

⁵³ *Ibid.*, 454-455.

⁵⁴ Mullen, N.C.W.C. Speech, pp. 13-14.

⁵⁵ June, 1924.

⁵⁶ Guthrie to Mullen, July 1, 1925. Mullen was advised by Patrick J. Hanley of Portland, Ore., regarding developments of the *Pierce Case*; Mullen to Hanley, April 11, 1924. Hanley's brother, James H., was an associate of Mullen in Omaha.

⁵⁷ Guthrie to Mullen, July 1, 1925.

⁵⁸ Warren, *Harvard Law Review*, XXXIX, p. 454.

⁵⁹ Chafee, *Free Speech in the United States*, p. 35.

⁶⁰ Zollman, *Marquette Law Review*, VIII, 58-59; "The Fourteenth Amendment and the Part-Time Religious Day School," *Marquette Law Review*, X (Fall, 1926), 94-95; *American Church Law* (St. Paul, Minn.: West Publishing Co., 1933), p. 11.

Shortly before going to press for this article, a useful related study was published by David B. Tyack: "The Perils of Pluralism; The Background of the *Pierce Case*," *American Historical Review*. LXXIV (Oct., 1968), 74-98. His broader interpretation of nativism in the 1920's agrees with the Nebraska picture. In addition, the involvement of the Lutheran Schools Committee in the Oregon School Case (Papers at the Oregon Historical Society) suggests the sociological connection of this case with the Meyer Case, which Mullen found on the legal level. See pp. 75-6.