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ABSTRACT

The roots of the American doctrine of separation between church and state are examined in this historical analysis. Factors for the exclusion of private schools from public funding include: (1) anti-Catholic sentiment; (2) reactions against rapid Irish immigration; (3) Catholic distrust of private schools; and (4) the view of publicly funded religious schools as a threat to individual religious expression. The paper presents an argument that the move away from spiritual values in a quest for neutrality has resulted in a constitutional leveling of all religions and a secularized school system. The Canadian educational system, which is perceived by Americans as more protective of religious expression, is more effective in the prevention of social problems than is the American system. (35 references) (LMI)

A CANADIAN AND AMERICAN COMPARISON: CHURCH-STATE CONSTITUTIONAL ISSUES IN PUBLIC SCHOOLING

Part II - An American Perspective

Richard Daugherty

European Heritage

A study of the American educational system may be readily traced to the Reformation period in Europe. Martin Luther drew up compulsory education plans for state supported schools that were begun in many German cities. The stated purpose for such schools was to protect against evil with Biblical literacy just as compulsory armed conscription protected against earthly enemies. In Wurttemberg detailed attendance records were kept and parents of truants fined (Blumenfeld, 1985). In Switzerland under Calvin, organized schooling was under church control. Teachers were viewed as divinely appointed and curriculum consisted of studies in the Old and New Testaments along with languages and science (Calvin, 1972).

Colonial Education: Bible Commonwealth

The Puritans carried such reformation related educational ideas with them to the Massachusetts Bay Colony which they founded in 1630. A Bible Commonwealth was instituted, creating a partnership between church and civil authority, free of old-world Anglican domination, and where "a public form of religion may exist among Christians" enhancing "the external worship of God" (Calvin, 1972).

Roger Williams, an early member of the colony, stated that the path to heaven was so straight and narrow that no community could possibly be made up of true believers. Williams originated the phrase "A Wall of Separation between Church and State" which, along with other related views resulted in his banishment in 1636 and subsequent founding of Rhode Island (Hart, 1988).

In 1642 the Massachusetts legislature (then called the General Court) enacted educational measures for the following purposes: "The good education of children is of singular behoof and benefit to any commonwealth; and whereas parents and masters are too indulgent and negligent of their duty in this kind...." The legislature further mandated that "selectmen" be appointed to keep a "vigilant eye over their brethren and neighbors" that townspeople either

teach their children themselves or hire someone to furnish instruction. The curriculum was to include at least the reading of English, civics, and principles of religion. Fines could be levied if these duties were not carried out (Blumenfeld, 1985).

Five years later Massachusetts passed what has been referred to as the "Old Deluder Satan Act" which was principally designed to insure adequate knowledge in reading and language to interpret the Bible. The Act also included a fairly sophisticated set of guidelines for required educational services. Townships of 100 householders, for example, were to set up a grammar school. If they failed to accomplish the task, the law obliged the township to pay the nearest township school for their services.

While Massachusetts, due to an exclusively Calvinist population, successfully operated regligiously-oriented public schools for over 60 years, other colonies generally left education to parents, individual religious sects, philanthropists, and private entrepreneurs (Ravitch, 1974).

Catholicism and Intolerance

In colonies with religious diversity, education became an arena where social, economic and cultural differences battled for control.

Maryland became a haven for Catholics fleeing protestant England. The Colony's proprietor, Lord Baltimore, permitted unusual freedom of worship to insure toleration for his own denomination. With a heavy influx of Protestants threatening to dominate the Colony, Catholics supported the Act of Toleration in 1649 to ensure their continued right to practice their faith as well as to focus attention on others. But the Act was not completely "tolerant" as it decreed the death penalty for those not believing in the diety of Christ. It has been noted that more toleration existed before the passage of the Act (Bailey, 1975).

In Georgia, founded in 1733, religious toleration was extended to all Christian worshippers except Catholics.

Anti-Catholic sentiment grew with the passage of the Quebec Act of 1774. This Act extended the boundary of the Catholic Province of Quebec to the confluence of the Ohio and Mississippi Rivers--an area roughly the size of all 13 colonies. Until this time, England's repressive measures had been confined mainly to Massachusetts, but the Quebec Act was seen as a geographic invasion from the North administered by England, and carried out by French Catholics. Outside of Maryland, Catholics were discriminated against, but

by 1775, they still comprised only 1% of the American population. Although Catholics were excluded from holding public office, anti-papist laws were not yet seriously enforced (Bailey, 1975).

The theme of religious intolerance will be addressed later in this paper as the effects of massive Catholic immigration continued to escalate tensions as seen particularly in school funding issues of the nineteenth century.

Constitutional Period and Church-State Separation

Nine Colonies had established tax-supported churches by 1775. They did not start becoming officially disestablished until 1776, a process which lasted until 1833.

The only reference in the American Constitution to religion is found in the First Amendment which reads: "Congress shall make no law regarding an establishment of religion or prohibiting the free exercise thereof...". The "establishment clause" has been the standard used in recent years to separate government sponsored activity from any influence that could even remotely be considered religious.

But is such a restriction on the mixture of public funds and religious influence what the framers of the Constitution and Bill of Rights had in mind? A

study of the drafts of the First Amendment by Congress in 1789 and a look at proposed language for the Amendment by State ratification conventions are instructive. For example, Maryland's ratifying convention proposed that the First Amendment read "that there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty." Virginia's ratifying convention adopted the following language in 1788:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others (p. 7).

James Madison's original wording of the establishment of religion clause stated that "the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established." The U.S. House of Representatives "Committee of the Whole" altered Madison's draft to

read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." A U.S. Senate draft read: "Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience" (Cord, 1982). The idea was not to vacuum religion from public life, but rather to prevent a national church (like the Anglican) from thwarting individual religious liberty.

That was the backdrop for Thomas Jefferson's "Wall of Separation" quote. He was about the task of disestablishing the Anglican Church in Virginia. Jefferson was known to have expurgated all references to the supernatural out of his own Bible (Brodie, 1974), but claimed to be "a Christian" opposed not to Christianity, but only to its corruptions (Peterson, 1986).

The Call for Common Schools

Following national independence and the War of 1812 schooling was still in its formative stages. Experiments in free school education included public funding for private schools and/or teachers. Some state legislatures even borrowed from school funds (Swift, 1911). In a well-publicized case, the Bethel

Baptist Church in New York opened a school for poor children of all faiths in 1820, and obtained part of the common school fund the following year. In 1823, the legislature allowed the school to use surplus funds for building projects. Later the Church abused its liberties by underpaying teachers and overstating expenses. Eventually, the Free School Society called for repeal of the private school funding portion of the State's education law. In 1825 the "Common Council" of New York passed an ordinance denying common school funds to any religious organization (Ravitch, 1974).

During the early 1800s there were also at least 15 publically funded missionary societies serving the educational needs of Native Americans (Cord, 1982).

The campaign for common schools in the 1830s and 1840s was, according to Nassaw ('9), in reality a campaign for public taxation as funding had been sporadic and subject to ever-changing political tides. The obvious source of large and state revenues was property taxation. School taxes, according to proponents, rather than being an infringement on property rights were the best investment in its security money could buy. Opponents argued that proposed property taxation was an attack on the sanctity of the private property system. All

citizens, it was further argued, need police and fire protection, but not schools, as all people do not have children (Nassaw, 1979).

Horace Mann devoted almost his entire tenth annual report to answering such arguments. His major thesis, according to Nassaw (1979), could be reduced to the theory that mankind had no absolute right to property. He/she was merely the steward of the property and had to rely on the cooperation of nature, past generations, and God, in allowing monetary accumulation to occur.

The taxation issue in America was fought at many levels, and was not really won until the early 1870s when the famous Kalamazoo Case (Stuart v Michigan) won the right to tax the public for secondary education.

Parochial Schooling and the Common School Fund

An ever-increasing Catholic population had been gradually gaining political clout and requesting shares of public funds. Further, public schools, conceded by many to be all too secular, were still perceived by many Catholics to be overtly Protestant. In many schools, students read daily from the King James version of the Bible (favored by Protestants).

Public fund-sharing for private schools had largely come to an end by 1825, and many catholic

neighborhoods had their own schools. By the 1840s, the Irish/Catholic populations of the east coast had mushroomed. Ugly race riots erupted in several cities and strategies for defending Catholic churches against attack were formulated. It was in this climate of fear and bigotry that Catholics attempted to again get a portion of public tax monies for support of their own schools. Such requests were soundly defeated (Bailey, 1975).

Church-State Issues Move to the Judicial Arena

The beginning of the twentieth century brought not only continued failure of private schools to share in the benefits of school taxation, but a battle for their very survival. Following the conclusion of World War I, a curious collection of educational reforms were proposed generally aimed at protecting America from foreign influence. In the state of Nebraska, for example, the teaching of German was forbidden and in Hawaii Japanese was excluded. However, the most noteworthy case of this era was Pierce v Society of Sisters (268 US 510), in which the state of Oregon volunteered to be the best state in a national scheme bent on the prohibition of private schooling. A compulsory education law was passed that mandated public school attendance by all children in

the State. The U.S. Supreme Court in unanimously rejecting the law, found that it would have inhibited the rights of parents and private corporations, and had no legitimate State purpose.

In the 1930 Cochran v Louisiana case (281 US 370), the High Court provided a benefit to private schools by unanimously approving a state directive that secular textbooks be given to all students in private schools. The court reasoned that the child is benefitted by public textbooks just as churches and all schools benefit from publically supported police and fire services.

Developing a "Historical" Doctrine

In 1947, bussing was added to private school benefits as the U.S. Supreme Court decided that a state may constitutionally pass a law that provides for the bussing of public as well as (in this case not-for-profit) private schools (Everson v Board of Education, 330 US 1). More importantly, however, was the fact that in the High Court's far ranging majority opinion, Thomas Jefferson's "Wall of Separation" phrase was revived (arguably out-of-context) and used to help support the contention that the framers of the Constitution desired a "High and impregnable wall" between religion and government. This relatively new wall of separation doctrine has been referred to

repeatedly and today enjoys the status of a long-established precedent. Many scholars look to the influence of this decision as the catalyst that began a chilling domino effect on religious expression in the United States, and has given the secular worldview an unopposed and legally protected monopoly in the American public school system.

Since the Everson case, the U.S. Supreme Court has found religious teaching on the public school site unconstitutional (McCollum v Bd, 333 US 203), an hour or two of voluntary religious instruction off the school site to be permissible (Zorach v Clauson, 343 US 306), and school sponsored morning prayer and/or Bible reading to be unconsititutional (Engle v Vitale, 370 US 421 in 1962, then Abington v Schempp, 374 US 203 in 1963). It was these last two cases that clearly sent the message that the "establishment clause" of the First Amendment was now to be interpreted to mean that Christianity could no longer be openly preferred in one's public life. The Schempp majority opinion carefully pointed out that while the Bible was suitable as an example of English literature and for use in historical contexts, it was not to be used devotionally. The decision, it was argued, neither promoted nor inhibited religion. Despite

these assurances, many a "Good Book" found its way home from teachers' desks and classroom libraries.

With a clear secular direction established, and with public opinion blurred by the narcotic abuses of the late 1960's, an activist Court fashioned quidelines to protect against religious influence. "Tests" were developed to ensure non-establishment. They stated that public laws must (1), have a secular legislative purpose and (2), have a principal effect that neither advances nor inhibits religion. In the 1971 Lemon v Kurtzman (403 US 602) case, the two existing standards were added to an additional standard, and formalized in American law as the "Lemon Test", the "tripartite test", or the three-pronged test". In Lemon v Kurtzman, two states had passed legislation aimed at improving the quality of secular education classes in non-public schools by supplementing private school teachers salaries. The state laws were invalidated because it was determined that they would require excessive governmental oversight, which the new standard forbade as "entanglement" with religion.

Although this test has been promoted as a means of attaining neutrality in church-state issues, its results have not been encouraging to those desiring to see the "free exercise" of religion clause of the

First Amendment enforced by our Judiciary. For example, laws that would allow public school students to start the day with a moment of silence, meditation, or contemplation have been ruled to violate church-state separation because of the religious convictions of the bills sponsors (Wallace v Jaffree, 472 US 38). Similarly, a Louisiana law mandating the teaching of creationism along with evolution failed because of lack of secular purpose, despite the fact that the State's legislature passed the law easily in both houses (Edwards v Aquillard, 107 S. Ct. 2573). The continued use of the "Lemon Test" in almost rubber-stamp fashion can be easily seen by a study of American Creationism/Evolution cases (Daugherty, 1988).

Courting Conservatism

The Reagan appointments to the U.S. High Court have brought a conservative majority. However, cracks in the Lemon scrutiny of religion have just begun to appear. In 1988 the newly aligned Court, by a 5-4 margin, permitted funding to religiously-affiliated organizations to counsel teens regarding the secular problem of unwanted pregnancies. The counseling included information on both abstinence and an effort to have teens consider an "adoption option" (Bowen v Kendrick).

The High Court has recently refused to review (thus leaving intact) an Appellate Court decision that permitted a school board to ban social dancing as part of school sponsored events (Clayton v Place, 884 F 2nd 376). There is little doubt that as recently as ten years ago, the plaintiffs' argument of lack of secular intent by the school board would have prevailed.

However, Americans anticipating the return of true "free exercise of religion" may have a long wait. Students at an Omaha, Nebraska, High School were forbidden to organize their own Bible Club and meet on school property during non-academic time. The Supreme Court is scheduled to decide the Mergens v Bd case by June of 1990.

Also on appeal is a case regarding the censorship of a student valedictorian address. The student was not allowed to speak because of the religious nature of its content (Guidry v Calcasieu Parish School Board). The DeKalb County (Atlanta, Georgia) schools recently suspended a student for apparently little more than possession of a note inviting another student to an off-campus Christian meeting. The charge was "possession of Christian material" (Hinton v DeKalb County School Bd.). This case is just in the beginning stages of litigation.

Private School Efforts For Public Funding

In the meantime, the private schools have not been idle in pressing for a share of public tax support. The strict separatist philosophy of the U.S. Supreme Court did not reflect the attitude of the general public or that of Congress. In 1949, a U.S. Senate bill that would have provided increased Federal funding to public schools, and included a share for private schooling, nearly made it successfully through both houses. The Bill was side-tracked, however, by last minute political maneuvering and a public backlash caused by an open controversy between Cardinal Spellman and Mrs. Franklin Roosevelt (Ravitch, 1983).

By 1955, America was behind in space exploration and conservatives, led by economist Milton Friedman, were proposing that a voucher system be used in American Schooling to provide choice for all public and private students. The idea was that schools would significantly improve only if motivated by free enterprize, i.e., if a school does badly parents may take their coupon or voucher and shop elsewhere for educational services. Friedman likened the proposal to the "G.I. Bill", a program whereby American military veterans could attend any college of their

choice (public or private) as long as they were willing to pay for tuition beyond set limits.

It wasn't until the Richard Nixon administration, however, that vouchers were seriously considered. But opposition from the nation's largest teachers union, the National Education Association, quickly dashed any hope the program may have had. One school district in California did consent to a three-year federally funded pilot program. However, the project was somewhat invalidated at the onset by the promise that all teachers, regardless of performance, would return to their former classrooms at the conclusion of the test. Interestingly, the results did prove both sides of the controversy correct. Parents waited hours in lines to sign up for the districts better instructors, and by the end of the experiment, marginal teachers had to be reassigned as 'library assistants'. This reinforced the teacher union's stand that voucher systems must be lobbied against as a threat to their policy of protecting even inferior teachers. The experiment also indicated that voucher advocates were correct in assuming that competition would yield better schools and more positive parental involvement. In the end, union lobbying defeated voucher initiatives in Congress.

The Reagan Administration, which promised improved schools and increased parental choice, once again looked to the voucher concept as a method to promote competition and break the monopoly held by the educational establishment. Interestingly, this time the conservatives were not alone. Prior to her 1984 electioneering, vice-presidential candidate Ferarro embraced the voucher system as a kind of "tax rebate" for the numerous parochial parents in her New York congressional district. Liberal attorney Jack Coons of Berkeley, made the point that vouchers were probably the only way academically inferior schools would ever improve. But President Reagan's second term in office, affected by the loss of partisan control in the Senate, spelled the end of such bold initiatives, and the voucher concept again returned to obscurity.

Recently, Catholic leaders have asked to be included in the new "choice" initiatives of the Bush Administration. Rev. Douglas Nowicki of the Diocese of Pittsburg said, in a January 1990 press release, that "For real choice to occur in American Education, the wall between government subsidized schools [public] and the non-government subsidized schools [all private] must be dismantled."

Representatives of the two major U.S. Teachers Unions (NEA and AFT) sit on the President's choice panel. It remains to be seen what meaningful changes, if any, may occur.

Conclusion and Recommendations

The question of why private schools are not significantly funded today in America is certainly a complex question, but would include at least the following historical factors:

a) a prevailing anti-Catholic sentiment (dating back to our European & Colonial heritage), due to real and imagined social, economic, and religious differences.

b) the rapid and feared pace of Irish immigration at a time when our public school system was in its formative stage of development.

c) the common perception by Catholics that the public schools were actually "Protestant" schools bent on proselytizing.

d) popularity of the viewpoint that religious sects should not be publically supported by taxation, as such preference leads to inhibitions on an individual's religious expression.

It is hard to imagine that less than a century ago the U.S. Supreme Court waxed eloquent in yielding a three-page history of our nation's proud Christian foundations (Church of Holy Trinity v U.S., 143 US 457). Justice Story wrote in his Commentaries on the Constitution of the United States, that "the real object of the First Amendment was not to countenance, much less advance, Mohammedanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government". Story also warned that "An attempt to level all religions, and to make a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation".

The American judiciary, an emerging power in the early 1900's, was influenced by successive ground-swells of Darwinism, Progressivism, and Secularism. Beginning with the Everson case in 1947, we have moved steadily further from spiritual values in a quest for an illusory neutrality, and the process has yielded constitutional "leveling" of all religions.

With the current interpretation of separation of Church and State, public institutions have become encapsulated in a wall of secularism. Schooling has remained an environment where only materialistic and humanistic answers are deemed appropriate. Private and parochial parents continue to pay twice for their children's education, while the economically disadvantaged continue to have little or no choice at all.

While pressure mounts in Canada for a system not unlike ours, where only public secular schools are funded, and students share a common value base, it is ironic that many in America have long looked to the Canadian system as more protective of religious expresssion. It could be argued from a comparison in national statistics on divorce, child abandonment, unwanted pregnancies, violent crime, and suicide, which Country's legal system and resultant school curricula are more effective.

References

Bailey, Thomas A. (1975). The American pageant (5th ed.). Lexington, MA: D.C. Heath and Company.

Blumenfeld, Samuel L. (1985). Is public education necessary? (2nd ed.). Boise, I D: The Paradigm Company.

Brodie, Fawn M. (1974). Thomas Jefferson: An intimate history. New York: Norton Company.

Butts, R. Freeman. (1987). A history and civics lesson for all of us. Educational Leadership, 44(8), 21-25.

Butts, R. Freeman. (1978). Public education in the United States. New York: Holt, Rinehart and Winston.

Calvin, John. (1972). Institutes of the Christian religion. Grand Rapids: Eerdmans Publishing Company.

Church, Robert L. (1976). Education in the United States. New York: The Free Press.

Cord, Robert. (1982). Separation of church and state. New York: Lambeth Press.

Cord, Robert. (1987). Church-state separation and the public schools: A re-evaluation. Educational Leadership, 44(8), 26-32.

Cremin, Lawrence A. (1988). American education: The metropolitan experience 1876-1980. New York: Harper & Row.

Cremin, Lawrence A. (1980). American education: The national experience 1783-1876. New York: Harper Colophon Books.

Cubberly, Ellwood P. (1919). Public education in the United States. Boston: Houghton Mifflin Company.

Daugherty, Richard R. (1988). Creationism/Evolution in the Public School: National Policy as shaped through Selected Legal Decisions.ED 300 896 ERIC Clearinghouse on Educational Management. University of Oregon, Eugene, OR 974-03.

Guilliford, Andrew. (1984). America's country schools. Washington, D.C.: The preservation Press.

Handlin, Oscar. (1982). Education and the European immigrant. In Bernard J Weiss (Ed.), American education and the European immigrant: 1840-1940 (pp. 3-17). Chicago: University of Illinois Press.

Hansen, Kenneth H. (1956). Publication education in American society. Englewood Cliffs, NJ: Prentice-Hall, Inc.

Hart, Benjamin. (1988). The wall that Protestantism built. Policy Review, 46, 44-52.

Haynes, Charles C. (1987). Religious freedom: Teach it or lose it. Educational Leadership, 44(8), 18-20.

Healy, Robert M. (1970). Jefferson on religion in public education. Yale University; Archon Books.

Hinsdale, B.A. (1898). Horace Mann and the common school revival in the United States. London: William Heinemann.

Jackson, Sidney L. (1941). America's struggle for free schools. Washington, D.C.: American Council on Public Affairs.

Kastle, Carl F. (1983). Pillars of the republic. New York: Hill and Wang.

Katz, Michael B. (1968). The irony of early school reform. Cambridge,, MA: Harvard University Press.

Levy, Leonard W. (1986). The establishment clause. New York: Macmillan Publishing Company.

McCluskey, Neil G. (1967). The new secularity and the requirements of pluralism. In Theodore R. Sizer (Ed.), Religion and public education (pp. 231-247). Boston: Houghton Mifflin company.

Monroe, Paul. (1940). Founding of the American public school system. New York: The Macmillan Publishing Company.

Nasaw, David. (1979). Schooled to order. New York: Oxford University Press.

Peterson, Merrill D. (1986). Thomas Jefferson: A reference biography. Toronto: Charles Scribner's Sons.

Pratte, Richard. (1973). The public school movement: A critical study. New York: David McKay Company, Inc.

Ravitch, Diane. (1974). The great school wars. New York: Basic Books, Inc.

Ravitch, Diane. (1983). The revisionists revised. New York: Basic Books, Inc.

Ravitch, Diane. (1983). The troubled crusade. New York: Basic Books Inc.

Reisner, Edward H. (1930). The evolution of the common school. New York: The Macmillan Company.

Shumate, T. Daniel. (1985). The first amendment: The legacy of George Mason. Fairfax: The George Mason University Press.

Swett, John. (1900). American public schools. New York: American Book Company.

Swift, Fletcher Harper. (1911). A history of public permanent common school funds in the United States, 1795-1905. New York: Henry Holt and Company.

Thayer, V.T. (1944). American Education under fire. New York; Harper & Brothers Publishers.

Vinson, J. Chal (1967). Thomas Nast Political Cartoonist. Athens Georgia: University of Georgia Press

Weber, Paul J., & Gilbert, Dennis A. (1981). Private churches and public money. Westport, CT: Greenwood Press.