Notre Dame Law Review

Volume 37 | Issue 3 Article 3

3-1-1962

Federal Funds for Parochial Schools - No

Leo Pfeffer

FEDERAL FUNDS FOR PAROCHIAL SCHOOLS? NO.

*Leo Pfeffer**

1. *Church-State Separation*

It is unfortunate that the issue of federal aid to education should become engulfed in religious controversy. This is not a new development. As long ago as 1888 a leading proponent of federal aid attributed to "Jesuit" influence the opposition which led to the defeat of his bill. In 1919 another Senator quoted a baccalaureate sermon delivered at Georgetown University by a faculty member of Loyola College in which he labelled a federal aid bill as "the most dangerous and viciously audacious bill ever introduced into our halls of legislation, having lurking within it a most damnable plot to drive Jesus Christ out of the land" and as aiming "at banishing God from every schoolroom, whether public or private, in the United States."[1] The opposition of these and other persons generally assumed to be spokesmen of the Catholic Church was based on the belief that federal financing meant federal control.

The presence of the religious issue in the earlier debates was attributable to the widely held view, whether correct or incorrect, that the Catholic Church was opposed as a matter of principle to any federal aid to education legislation. Beginning with the introduction of the Harrison-Black-Fletcher bill in 1937 the statements of spokesmen of the Catholic Church indicated a change in position. The Church apparently no longer opposed federal aid to education if private and parochial schools were included in any program for federal aid. The unwillingness of Congress to include such schools and its inability to enact legislation which did not, lead to the successive defeat of such measures as the Harrison-Black-Fletcher bill in 1937, the Harrison-Thomas bill in 1941, the Thomas-Hill and Mead-Aiken bills in 1945, the Taft bill in 1946, the Barden bill in 1949 and the bills sponsored by President Kennedy in 1961.[2]

During the controversy surrounding the Barden bill in 1949 Francis Cardinal Spellman attributed to anti-Catholic bigotry the motivation for proposals seeking to limit federal aid to public schools,[3] and this cry is frequently heard in the current controversy. In effect, this is a charge that the majority of the American public is guilty of anti-Catholic bigotry, for every test of public opinion discloses that a substantial majority oppose federal aid to parochial schools.[4] At a time when the three most powerful persons in the government — the President, the Majority Leader of the Senate and the Speaker of the House of

* B.S.S., J.D.; General Counsel, American Jewish Congress; Member New York and United States Supreme Court Bars.

1 Mitchell, *Religion and Federal Aid to Education*, 14 LAW & CONTEMP. PROB. 113 (1949); Quattlebaum, *Federal Educational Activities and Educational Issues Before Congress, Legislative Reference Service Report of the Library of Congress* (1951).

2 *Ibid.* See also, PFEFFER, CHURCH, STATE AND FREEDOM 483-494 (1953).

3 PFEFFER, CHURCH, STATE AND FREEDOM 487 (1953).

4 See N.Y. Herald Tribune, March 29, 1961; Religious News Service Reports, Aug. 8, 1961, Aug. 9, 1961, Oct. 2, 1961, Oct. 5, 1961.

Representatives — are all Catholic, such a charge seems particularly lacking in validity.

The bishops of the Catholic Church in the United States, speaking through the National Catholic Welfare Conference, have made it unequivocally clear that they will oppose any proposed legislation for federal aid to education which does not include provision for parochial schools.[5] This represents the most determined effort in this direction that the nation has faced in the century and three quarters of its political existence. Even if the effort succeeds, the amount of federal funds that can be obtained for church schools is comparatively small and is not likely to increase substantially in the near future. In this country, the main financial responsibility for public education rests with the states and municipalities and the percentage obtainable from the federal government will be relatively small. However, should the campaign to open the federal treasury to church schools succeed, it will inevitably be followed by similar campaigns aimed at state and municipal treasuries, with the ultimate goal of making public and church schools equal partners in the American educational system. This represents the most serious threat to the principle of separation of church and state in the history of our nation.

The struggle for religious liberty and the separation of church and state in America is largely a history of the struggle against compulsory taxation for religious purposes. Because of the great diversity of sects and denominations which even from the early colonial days settled in the various colonies, compulsory adherence to the faith, dogma or worship of an established church existed for comparatively short periods in scattered areas in America. Long before our Constitution was adopted in 1788 the established churches in Virginia and in New England had given up as futile the effort to proscribe dissenting forms of worship.[6]

But the struggle against use of tax funds for religious purposes continued up to and beyond the adoption of the Constitution.[7] At the time of the Revolutionary War almost every colony exacted some kind of tax for church support. In New England many dissenting Protestants were jailed for refusing to pay the tax levied to support the established Congregational Church. In the South, Patrick Henry soared to fame and embarked on his brilliant career as a result of his speech in "The Parson's Case," which crystallized the common people's resistance to taxation for church purposes. Perhaps the most dramatic and critical battle took place in Virginia in 1786, the year before our federal constitution was written. A bill was introduced in the legislature of that state whose purpose it was to provide tax funds for the teaching of religion. The bill pro-

5 N.Y. Times, March 3, 1961, p. 1.

6 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 444 (1950); PFEFFER, CHURCH, STATE AND FREEDOM 106 (1953).

7 The history is summarized in both the majority and dissenting opinions in Everson v. Board of Education, 330 U.S. 1 (1937). More detailed accounts are to be found in STOKES, CHURCH AND STATE IN THE UNITED STATES (1950) and PFEFFER, CHURCH, STATE AND FREEDOM (1953). See also Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U.L. REV. 1274 (1961).

vided that every taxpayer could designate the sect or denomination that would be the beneficiary of his payment. After a bitter struggle the bill was defeated, largely as a result of the efforts of James Madison, the father of our Constitution, and the author of our Bill of Rights.

The major factor in the defeat of the measure was Madison's monumental *Memorial and Remonstrance,* one of the great documents in the history of American freedom.[8] In it, Madison set forth 15 arguments against government support of religion, arguments that are as valid today as they were in 1786. Basically they fall into two classes; those predicated on the concept of voluntariness in matters of conscience, and those predicated on the concept that religion is outside the jurisdiction of political government — the two aspects of what five years later were to become the opening words of the Bill of Rights, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." It is for this reason that the Supreme Court has held that Madison's struggle against the Virginia bill is an important part of the legislative history of the first amendment.[9]

The defeat of the Virginia bill in 1786 was followed by the enactment of Jefferson's great Virginia Statute Establishing Religious Freedom.[10] This law, too, reflected the dual aspect of what was later to be the religion clause of the first amendment — voluntariness and separation. The Act forbade the use of tax funds for religious purposes, and prohibited such use even if a taxpayer's money were to be paid exclusively to the religion of his own choice.

When, therefore, shortly after the Virginia statute was enacted, the constitutional delegates met in Philadelphia, so decisive had been the victory of Jefferson and Madison, that no one proposed that the new government should have the power to intervene in religious affairs or to use tax funds for religious purposes. But, as is well known, the people were not satisfied merely with the omission from the Constitution of any delegation of power to the government to concern itself with religious matters; they insisted upon a specific and express Bill of Rights, and made their ratification of the Constitution conditional upon the promises of the promoters of the Constitution to add a Bill of Rights after adoption of the Constitution.

It is of great significance that in the Bill of Rights which was finally adopted, the very first right named is the right to a government in which church and state are separated. "Congress," the Bill of Rights opens, "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The first amendment was added to the Constitution in 1791, but it was not until 1947 that the Supreme Court found it necessary to provide a definitive interpretation of the amendment's ban on laws respecting an establishment of

8 Set forth in full as an Appendix in Everson v. Board of Education, 330 U.S. 1, 63 (1937).

9 Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 164 (1878).

10 12. *Hening, Statutes of Virginia* (1823) 84. Set forth as Appendix in Everson v. Board of Education, 330 U.S. 1, 63 (1947).

religion. In that year, in the case of *Everson v. Board of Education*[11] the Court specifically interpreted the amendment as barring all government aid to religion and as erecting a wall of separation between church and state. In both cases the Court interpreted the amendment (made applicable to the states by the 14th) in the following comprehensive language:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretely, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'[12]

The first amendment so interpreted clearly precludes governmental financing of church schools. This was not generally recognized immediately after the *Everson* decision, for that decision did allow the use of tax-raised funds for transportation of children to parochial schools. However, after the interpretation was applied in the *McCollum* case to bar the use of publicly owned property for religious instruction the full significance of the interpretation became clear. This recognition gave rise to intense criticism of and attack on the *McCollum* decision and the *Everson-McCollum* interpretation of the establishment clause of the first amendment.[13]

The burden of the attack was that the Court had misread history and distorted the intent of the framers of the amendment. It was not, the critics contended, the purpose of the first amendment to divorce religion from government or to impose neutrality between believers and non-believers, but only to meet in a practical way the problems raised by the existence of a multiplicity of sects. This was done by requiring the government to be neutral as among these competing sects and forbidding it to favor one at the expense of the others. The amendment was not intended to bar the government from aiding or supporting religion and religious institutions so long as the aid and support are granted equally and without preference to some faiths or discrimination against others. In effect, the amendment was intended as a sort of "equal protection" clause among religious groups.

---

11 330 U.S. 1, 15-16 (1947).
12 333 U.S. 203, 210-211 (1948).
13 See, *e.g.*, O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION *passim* (1949); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949); Murray, *Law or Prepossession?* 14 LAW & CONTEMP. PROB. 23 (1949); Statement of National Catholic Welfare Conference, N.Y. Times, Nov. 21, 1948, p. 63; BRADY, CONFUSION TWICE CONFOUNDED *passim* (1955).

If the establishment clause is so interpreted it appears to present no barrier to governmental aid to church schools so long as all religious groups are treated equally without preference or discrimination. The proponents of such aid were greatly encouraged by the Court's decision in *Zorach v. Clauson*[14] wherein it not only upheld a system of released time for religious education off public school premises but apparently deliberately refrained from reiterating the *Everson-McCollum* paragraph interpreting the amendment.

There were many who interpreted *Zorach* to be not merely a retreat from *McCollum* but a repudiation of it.[15] *Zorach* was therefore widely used to support the claim that non-preferential government aid to religion was not barred by the first amendment — this though the Court in *Zorach* expressly stated, "We follow the McCollum case," and stated further "Government may not finance religious groups nor undertake religious instruction . . . "

In any event, whatever doubts may have been created by *Zorach* have now been fully dissipated. In its 1960-61 Term the Supreme Court handed down two decisions, *McGowan v. Maryland*[16] and *Torcaso v. Watkins*,[17] in each of which it reiterated verbatim the definitive paragraph interpreting the establishment clause in *Everson* and *McCollum*. In the *Torcaso* case, the Court, referring specifically to the court below but undoubtedly having many others in mind, stated:

> The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in *Zorach v. Clauson*, 343 U.S. 306, had in part repudiated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCollum*. But the Court's opinion in *Zorach* specifically stated: "We follow the McCollum case." . . .

It is therefore clear today that the first amendment bars federal aid to churches and church schools whether such aid is preferential or not. This bar is not motivated by hostility to religion, but on the contrary by a recognition that government helps religion best by leaving it strictly alone. America has always been friendly to religion but it has always barred governmental involvement in religious affairs or the use of governmental funds for religious purposes, and has never considered the bar a manifestation of unfriendliness.

Our Constitution and Bill of Rights were adopted before the development of our public school system, and the application of the first amendment to public education was therefore not clear. But by 1875 our public school system had become firmly established, and the application to it of the principle of separation of church and state was eloquently stated by President Grant in his address that year to the Grand Army of the Tennessee:

---

14 343 U.S. 306 (1954).

15 See, *e.g.*, Kauper, *Church, State and Freedom, A Review*, 52 MICH. LAW REV. 829 (1954): "All students of this subject may well agree that Zorach for all practical purposes overruled McCollum."

16 366 U.S. 420 (1961) (upholding Sunday laws).

17 367 U.S. 488 (1961) (invalidating state requirement of belief in God for holding public office).

> Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated for the support of any sectarian schools. Resolve that neither the state nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and state forever separated.[18]

These words are as relevant today as they were when they were uttered, four score and seven years ago. That they reflected the universal feeling of the American people is evidenced by the fact that in the century and three quarters that have passed since our Constitution was adopted, Congress has never enacted a single measure for the support of church schools. It is evidenced further by the fact that although there are 50 state constitutions and 50 state legislatures, each completely independent of the others, in every one of the states without exception it is unlawful to grant tax-raised funds for the support of church or parochial schools.

Two recent state court decisions reflect this universal tradition against use of tax-raised funds to finance church schools. In *Swart v. South Burlington Town School District,*[19] the Supreme Court of Vermont ruled violative of the first amendment the expenditure of public funds to pay the tuition of students attending Catholic parochial high schools in communities which do not maintain public high schools. In *Dickman v. School District,*[20] the Oregon Supreme Court ruled unconstitutional the expenditure of tax-raised funds to provide textbooks for use at parochial schools. Pointing out that "the purpose of the Catholic church in operating . . . schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion,"[21] the court rejected the contention that a Catholic parochial school is simply a public school with religion as an added subject in the curriculum. It is for that reason that the grant of secular textbooks and non-denominational supplies to such schools is as unconstitutional as the grant of funds.

2. *Religious Liberty*

Perhaps because of the United States Supreme Court's reiteration of the *Everson-McCollum* definitive interpretation of the establishment clause, the emphasis on the part of the proponents of federal aid to parochial schools has shifted from the establishment clause to the free exercise clause. The claim is that the exclusion of parochial schools from a program of federal aid to public schools infringes upon religious liberty. The argument in support of this claim runs something like the following.

In 1925, in the case of *Pierce v. Society of Sisters,*[22] the Supreme Court

18 Quoted in McCollum v. Board of Education, 333 U.S. 203, 218 (1948).
19 122 Vt. 177, 167 A.2d 514, *cert. denied,* 366 U.S. 925 (1961).
20 366 P.2d 533 (Ore. 1961).
21 *Id.* at 536.
22 268 U.S. 510 (1925).

ruled that it would be an infringement upon the religious liberty of Catholic parents to compel them to send their children to public schools in violation of their conscience. However, many Catholic parents cannot afford to pay the tuition required to keep their children in parochial schools in addition to the taxes they pay to maintain the public schools. Hence, unless the government, by granting financial aid to the parochial schools, makes it economically feasible for the parents to send their children to such schools, the guaranty of religious liberty declared in the *Pierce* case becomes a vain and empty promise. Exercise of religion which is financially prohibitive, it is asserted, cannot be called the free exercise of religion.

Before considering the merits of this claim, a word should be said regarding its implications. By virtue of the 14th Amendment the free exercise clause is as applicable to the states as it is to the federal government.[23] Moreover, compulsory school attendance laws are not federal but state laws, and it is the states that finance public education. It follows from this that the support of parochial schools out of tax-raised funds is not merely a right of the states but a constitutional obligation, at least so long as the states retain their compulsory school attendance laws and maintain public schools out of tax-raised funds.

The religious liberty claim rests on a premise often asserted by many who contested the broad interpretation of the establishment clause expressed in *Everson* and *McCollum*. The premise is that the establishment and free exercise commands are not mandates of equal value. The principal intent of the fathers of the Bill of Rights was to secure religious freedom, and the prohibition of establishment was inserted merely as a means to assure that freedom.[24] Accordingly, should there be an occasion where strict adherence to separation would infringe upon religious freedom, the former must yield to the latter, else the end would be sacrificed for the means. It follows from this that even if federal aid to parochial schools would not be consistent with the establishment clause, at least as interpreted in *Everson-McCollum,* it is constitutionally permitted if not required.

I find nothing in American constitutional history or tradition to justify an apportionment of values between separation of church and state and religious liberty or indeed the dichotomy itself. The struggle for religious freedom and for disestablishment were parts of the same single evolutionary process that culminated in the first amendment. Long before *Everson* and *McCollum,* Professor Ruffini noted that "Religious liberty and separation have become in America two terms which, ideally, historically and practically, are inseparable."[25] In his dissent in *Everson,* Justice Rutledge expressed the same thought:

23 Torcaso v. Watkins, 367 U.S. 488 (1961); Marsh v. Alabama, 326 U.S. 501 (1946); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

24 Murray, *Law or Prepossession?* 14 LAW & CONTEMP. PROB. 23, 32 (1949); PERSON, THE FIRST FREEDOM 28-29 (1948); Reed, *Separation of Church and State—Its Real Meaning,* Catholic Action, March 1949, p. 9; Katz, *The Case for Religious Liberty,* in RELIGION IN AMERICA 95 (Cogley ed. 1958).

25 RUFFINI, RELIGIOUS LIBERTY 16 (1912).

" 'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."[26]

In the first of the Sunday law cases decided in the 1960-1961 term of the Supreme Court, Chief Justice Warren, speaking for the majority of the Court, rejected the contention that "the purpose of the 'establishment' clause is only to insure protection for the 'free exercise' of religion," and has no independent force of its own. "The writings of Madison," he said, "who was the First Amendment's architect, demonstrated that the establishment of religion was equally feared because of its tendencies to political tyranny and subversion of civil authority."[27] This means that government conduct, federal or state, which impairs the separation of church and state is unconstitutional, even if it does not appear to infringe upon the free exercise of religion.

However, completely aside from any supposed conflict between separation and free exercise in respect to federal aid to education, I find it difficult to grasp the reasoning behind the claim that exclusion of parochial schools from the program infringes upon religious freedom. If the right of Catholic parents to send their children to parochial rather than public school is a constitutionally protected exercise of freedom of religion it is so only because the Supreme Court has so held in the *Pierce* case, since under our system of government the Supreme Court is the final authority on constitutional rights. But the same Supreme Court which in 1925 held in the *Pierce* case that the State of Oregon could not compel parents to send their children exclusively to public schools also held in *Everson* in 1947, *McCollum* in 1948, and *Zorach* in 1952, that the government may not finance religious schools or religious education. If the latter three decisions are inconsistent with the former, then it would seem that they have overruled it, not only because they are three decisions against one, but because they are later decisions and therefore supersede earlier inconsistent ones.

Of course, the *Pierce* case has not been overruled or superseded and remains today sound constitutional law. But the reason for this is simply that it is not inconsistent with the *Everson-McCollum-Zorach* principle that the government may not finance church schools. It is one thing to say that religious liberty forbids the government from closing down church schools, as the Oregon legislature sought to do in the *Pierce* case; it is something entirely different to say that religious liberty also requires the government to finance these schools.

In the late 1930's and early 1940's the Supreme Court ruled in a number of cases that the states could not constitutionally ban distribution of literature by the Jehovah's Witnesses even though the literature violently attacked the Catholic Church and the Catholic religion. The Court held that the Witnesses were exercising their religious liberty.[28] But can it be seriously contended that the Jehovah's Witnesses could demand that the government print their literature

26 330 U.S. 1, 40 (1947). For further discussion of this point see Pfeffer, *The Case for Separation*, in RELIGION IN AMERICA 52 (Cogley ed. 1958).

27 McGowan v. Maryland, 366 U.S. 420 (1961).

28 Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. Irvington, 308 U.S. 147 (1939).

— or, to make the analogy even more close, give them money so that they could buy and maintain printing presses because they were not satisfied with the government presses?

True enough there is no compulsion, other than that of conscience, in the Jehovah's Witnesses' distribution of their literature whereas there is compulsion to secure for one's children a minimum secular education.[29] However, this is hardly a critical distinction. During the past decade there has been a growing movement to fluoridate the water supply in order to protect the teeth of our children. Many municipalities have engaged in the program. But drinking fluoridated water violates the conscience of Christian Scientists. A number of suits have been brought to stop the program, but all have proved unsuccessful and the Supreme Court has refused to interfere with these decisions.[30] It would undoubtedly be a great expense for Christian Scientists living in communities with a fluoridated water supply to purchase unfluoridated water as required by their consicence and the demands of life. Compulsion of life is at least as potent as compulsion of law, yet I have not come across a single report of a demand by Christian Scientists that the government give them money so that they can buy such water and thus be economically able to exercise their freedom of religion. I doubt very much that, if such a demand were made, serious consideration would be given to it by the courts.

It is important to note that religious liberty was not the only liberty implicit in the *Pierce* case. (Indeed the claim of infringement of religious liberty was not raised by the parties, nor is "religious liberty" or "freedom of religion" or a similar phrase mentioned in the opinion.) What is commonly referred to as the *Pierce* case involved two separate cases concerning two separate schools. One was a Catholic parochial school conducted by the Society of the Sisters of the Holy Names of Jesus and Mary. The other was the Hill Military Academy in which, as far as the record shows, not even the Lord's Prayer was recited. A single judgment was issued in both cases and a single opinion written to cover both cases. The Court quite clearly decided that a parent who is not in the least motivated by religious considerations has an equal constitutional right to send his child to a private secular rather than public school. Can it be said that in such a case he is being deprived of religious liberty if the state does not give him the money he needs to send his child to the private secular school? Obviously not, and the reason is simply that it is no deprivation of religious liberty for the government not to finance a competing educational system, whether it be religious or secular.

There is a religious liberty issue in the question of federal aid for parochial schools, but it is one very much different from that asserted by the proponents of such aid. Rather than religious liberty being infringed upon by the exclusion of parochial schools from federal aid, the reverse is closer to the truth. The

29 People v. Donner, 199 N.Y. Misc. 643 (1950) *aff'd*, 278 App. Div. 705 (1951) *aff'd*, 302 N.Y. (1951) appeal dismissed for want of substantial federal issue 342 U.S. 884 (1951).

30 Birnel v. Town of Fircrest, 361 U.S. 10 (1959) dismissing for want of substantial federal issue 53 Wash. 2d 830, 335 P.2d 819; Kraus v. City of Cleveland, 351 U.S. 935 (1956) dismissing for want of substantial federal issue, 163 Ohio St. 559, 127 N.E. 2d 609.

most serious infringement upon religious liberty before our Bill of Rights was adopted was the use of tax-raised funds for religious purposes. In the great Virginia Statute Establishing Religious Freedom,[31] it was eloquently stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." Is it not a violation of the religious liberty of Catholics to compel them to pay for the propagation of the faith of Jehovah's Witnesses, or for Jehovah's Witnesses to compel them to pay for the propagation of the Catholic faith? And is this not exactly what happens when tax-raised funds are used to finance church schools?

It is not only the religious liberty of non-Catholics whose taxes are used to promote the Catholic religion that is affected by government aid to church schools; the religious liberty of Catholics is also endangered. This was recognized in both recent decisions cited above. In *Swart v. South Burlington Town School District,* the Vermont court said:[32]

> The Bill of Rights secures to those of the Catholic Faith that the State shall not intrude in the affairs of their Church or its institutions. It assures to those of different persuasion that it will not lend assistance to them or those of differing faith in the pursuit of their religious beliefs. Our government is constituted to the end that the schisms of the churches shall not be visited upon the political establishment. Neither shall the conflicts of the political establishment attend the churches.
>
> Considerations of equity and fairness have exerted a strong appeal to temper the severity of this mandate. The price it demands frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training for the child elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected.

In *Dickman v. School District,* the Oregon court stated:[33]

> It is argued that the strict notions of separation in vogue at the time of the adoption of our constitutional provisions no longer exist and that these provisions should be interpreted to reflect this change in attitude. Conceding that such change has occurred, there are still important considerations warranting the resolve that the wall of separation between church and state "must be kept high and impregnable." *Everson v. Board of Education,* supra at p. 18. Among other things, the extension of aid to religious educational institutions could open the door for a dangerous and vicious controversy among the different religious denominations as to who should get the largest share of school funds. More important, perhaps, is the danger that the acceptance of state aid might result in state control over religious instruction. Some religious leaders, including leaders in the Catholic church, have opposed the acceptance

31 12 Hening, Stat. Va. (1823) p. 80.
32 122 Vt. 177 167 A.2d 514, *cert. denied,* 366 U.S. 925 (1961).
33 366 P.2d 533 (Ore. 1961).

> of public funds on this ground.[34] These considerations convince us that the wall of separation in this state must also be kept "high and impregnable" . . .

The danger of government control is a real one. Indeed, it may well be questioned whether the government can constitutionally grant tax-raised funds to private institutions without exercising some control on how those funds are to be used. Education in the United States is traditionally locally controlled, and therefore the federal government may delegate to the state governments major responsibility for the control of the use of federal funds granted to public education, particularly since the major cost of such education is borne by the states. This is what is intended in the disclaimers of federal control contained in the various proposals for federal aid to public education. But some government control there must be if governmental funds are granted to schools.

This, in any event, has been the uniform lesson of history. Wherever and whenever governmental funds have been used for religious education there has always been some measure of governmental control. This is true even in those communist states, such as Poland and Hungary, whose governments are committed to the Marxian principle that religion is an evil which must be eradicated as quickly as possible.[35] It is also true in those countries in which there is a close relationship between church and state.[36] The measure of control may vary from state to state and from time to time, but nowhere has there been a complete divorcement of state control from state financing.

3. *Discrimination*

It is also argued that exclusion of parochial schools from a program of federal aid constitutes discrimination against Catholic parents and children.

There was a time in American history when the demand by Catholics for equality and non-discrimination was valid. In many states, particularly east of the Mississippi, the earliest public schools were little more than continuations of existing Protestant church schools. When the general community took over these schools, their Protestant bias and their Protestant practices often continued. For example, in New York in the early 1840's Bishop John Hughes complained bitterly but validly that while the public schools of the city purported to be non-sectarian, they were in effect Protestant in their teaching staffs, textbooks, Bible instruction and in the general atmosphere of the classrooms.[37] About the same time in Boston an eleven-year-old Catholic boy named Tom Wall was beaten almost to a pulp by his public school teacher because of his refusal to read from the Protestant Bible.[38]

---

34 Citing 12 CATHOLIC ENCYCLOPEDIA 560 (1912); Note, 50 YALE L.J. 917, 926, n. 58 (1941).

35 GSOVSKI, CHURCH AND STATE BEHIND THE IRON CURTAIN, 92-100, 234-235 (1955).

36 In Denmark for example, religious schools are government supported up to 80% of their expenses, but are under the same supervision as public schools. BRICKMAN & LEHRER, RELIGION, GOVERNMENT AND EDUCATION 198 (1961).

37 PFEFFER, CHURCH, STATE AND FREEDOM 375 (1953).

38 Commonwealth v. Cooke, 7 Am. L. Reg. 417 (Police Ct., Boston, Mass. 1859).

Similar incidents occurred in countless public schools; and these were a major factor in inducing the Catholic community in the United States to establish its own school system, where Catholic children would not be discriminated against because of their religion.[89]

All this, however, is past history. Today the public school welcomes the Catholic child as a full and equal companion of all children. No religious doctrines contrary to his faith are taught in the public schools, and no religious practices unacceptable to him are carried on there. The anti-Catholic bias in the textbooks has long been eliminated, and the entire atmosphere of the public school is such as to assure the Catholic child a feeling and actuality of full equality.

Where, then, is the discrimination? Would it not be more accurate to suggest that here too the converse is more accurate? Public schools are supported by all taxpayers regardless of race or religion and are open to all children regardless of race or religion. But, for the most part, church schools are open only to children of the faith that maintains the schools. Does it not constitute discrimination to tax a Protestant parent to support a Catholic school which his child may not enter, or to tax a Catholic parent to support a Jewish school which is closed to his child? Is not this truly discrimination?

The Congress has recognized the justice and morality of requiring that tax-supported institutions be open to all without discrimination. The Hill-Burton Act expressly provides that federal funds for hospital construction shall be available only to those hospitals which are open to all "without discrimination on account of race, creed or color." The same considerations of justice and morality would require that if federal funds are to be made available to non-public schools, they too must be open to all "without discrimination on account of race, creed or color."

It is obvious that such a requirement is impossible in respect to church schools. It is equally obvious that the granting of federal funds to church schools would constitute an act of discrimination rather than of non-discrimination.

4. *Double Taxation*

Along with the arguments that failure to grant tax-raised funds to parochial schools constitutes an infringement of religious liberty and is discriminatory, the most frequently asserted argument in favor of such grants is that to deny them would subject parents of parochial school children to double taxation. According to this argument the parent is taxed to support the public school which, by reason of conscience, his children cannot attend, and then he is taxed again to support the parochial school that his children do attend.

This assertion, however, is itself predicated upon the fallacy that the education of a child is a matter which concerns only the parents of that child and that they alone are benefited by the fact that their child is educated. Hence,

39 PFEFFER, CHURCH, STATE AND FREEDOM 374-382, 425 (1953); CONNORS, CHURCH-STATE RELATIONSHIPS IN THE STATE OF NEW YORK 68 (1951).

according to this assumption, they should be free to decide whether to buy the education for their child in a public or a parochial school, and if they decide in favor of the latter, they should not be required to pay for the former any more than a customer may not be required to pay to Gimbel's for merchandise he decides to buy at Macy's.

This is a fallacy because it ignores the basic premise of America's educational system; that it is the whole community which is benefited when children are educated and that the whole community is concerned not only with the fact of children's education but also with the type of education the children shall receive.

Thomas Jefferson, the architect of so much of our democratic system, first asserted the community's interest in the education of children and the need for free, universal public education.[40] But it was Thaddeus Stevens who, in the debates in the Pennsylvania legislature in 1835, spelled this out fully. To the claim that it was unjust to tax some people to educate other people's children, Stevens replied:

> It is for their own benefit, inasmuch as it perpetuates the government and ensures the due administration of the laws under which they live, and by which their lives and property are protected. Why do they not urge the same objection against all other taxes? The industrious, thrifty, rich farmer pays a heavy county tax to support criminal courts, build jails, and pay sheriffs and jail keepers, and yet probably he never has and probably never will have any direct personal use for them. . . . He cheerfully pays the burdensome taxes which are necessarily levied to support and punish convicts, but loudly complains of that which goes to prevent his fellow being from becoming a criminal and to obviate the necessity of those humiliating institutions.[41]

To those who conceived of education as exclusively a private obligation, Stevens emphasized the importance of civic intelligence in an elective republic, and the function of the school in educating for citizenship, saying:

> If an elective republic is to endure for any great length of time, every elector must have sufficient information, not only to accumulate wealth and take care of his pecuniary concerns, but to direct wisely the legislature, the Ambassadors, and the Executive of the Nation; for some part of all these things, some agency in approving or disapproving of them, falls to every freeman.[42]

It is for these reasons that education in the United States is compulsory, and that a parent is not permitted to decide that he wants no education for his child. For the same reasons public education is universal and free, and its cost is borne by the entire community, even those who have no children at all or whose children attend non-public schools. And it is for the same reasons that

40 ARROWOOD, THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC 49 (1930); HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON 24 (1931).

41 WOODLEY, THADDEUS STEVENS 153-163 (1934), quoted in THAYER, THE ATTACK UPON THE AMERICAN SECULAR SCHOOL 26 (1951).

42 *Ibid.*

control of the public school is in the hands not of the parents alone but of the entire community. School board members are elected by the vote of all citizens of a school district, not only those who have children in the public schools, and those elected to be members of the school board need not be parents of children in the public schools.

It is in this vital respect that public schools differ from private and parochial schools. The cost of public education is borne by all citizens because all citizens govern and control it. If the citizens of a community are dissatisfied with the way their schools are operated it is within their power to vote in a new school board whose policies will more closely reflect the community's will. No such power exists in respect to private or parochial schools. No matter how deep the dissatisfaction of the general community with a non-public school's policies and methods may be, there is nothing the community can do about it. For the public to be taxed to support an institution over which it has no control and in which it is not represented, is truly taxation without representation.

Those who wrote into our national charter the mandate that church and state must be kept separate and independent of each other were not motivated by any hostility to religion. On the basis of a long and tragic history of the commingling of church and state they reached the conclusion that the cause of religion is best served by separation and independence. Similarly, opposition to public funds for private education is not motivated (at least on the part of this writer, whose children received their elementary education in a private, religious day school) by hostility to private schools. America has room for both public and private schools. But schools can remain private only if they are privately financed. Once compulsory taxation replaces voluntary contributions as the source of support the schools have no moral right to call themselves private. Perhaps more important, the public will sooner or later refuse to consider them private, and will impose upon them the same regulation and control to which other publicly financed agencies are and must be subject in a democratic society.

The premise upon which the first amendment rests is as valid today as it was in 1791. The absolute separation of church and state is best for the church and best for the state and secures freedom for both.