THE CONSTITUTIONAL AND LEGAL STATUS OF RELIGION IN PUBLIC EDUCATION

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The principle of separation of church and state in America makes impossible the direct teaching of religion in public schools. By implication anti-religious propaganda is also excluded. The Northwest Ordinance of 1787 declares that religion is to be encouraged.

The common law back of the Constitution recognizes Christianity as a part of the law of the land. This has been expressly stated in a Pennsylvania court decision. Legislation prohibiting teaching contrary to Christianity is thus probably constitutional. The difficulty of such legislation will lie in the definition of terms and the administration of the law.

It is a truism that the public schools of this country are non-sectarian in their very nature and hence cannot impart religious instruction. This situation is the natural result of our American doctrine concerning the relation of church and state. Any attempt by a public school to teach religion must necessarily bring it into conflict with the religious convictions of some citizens. The result is a public system of education confined to secular subjects.

It is clear that such a system is essentially defective. One of the elements of a well-balanced education is lacking. The religious and moral qualities of the pupils are of necessity neglected. The result of this lack of balance, the consequences of this sharpening of the wits without a corresponding deepening of the religious and moral conceptions, can be studied at first hand in any penitentiary or reform school. Great dissatisfaction accordingly is manifested throughout the country. A new form of religious day school which aims to co-operate rather than compete with the public schools is therefore in the process of being created. Through this means it is hoped to restore religious education to public-school pupils.[1]

[1] See an article by the author of this paper entitled, "The Legal Basis," in *Religious Education*, February, 1922, p. 34.

It is quite essential to this new development that the secular teaching in the public schools harmonize as much as possible with the religious culture imparted by the religious schools. Otherwise one school will tear down what the other builds. An approximation to the situation in the old-style parochial school, where physiology, geography, history, and even reading, writing, and arithmetic are taught in the light of religion, is desirable.

The inherent limitations must not be left out of view. The contrariety in the religious beliefs which will be imparted in the parochial schools will make the task of completely harmonizing the secular education with such beliefs an utter impossibility. If the beliefs of every religious sect were to be regarded public schools might in some localities be required to teach that the globe on which we live is flat. All that can be done, therefore, is to keep out of the public schools the worst outcroppings of anti-religious propaganda such as the denial that there is a God or the contention that man is descended from the ape.

This in fact is what is now being attempted through bills introduced into a number of legislatures largely through the efforts of William Jennings Bryan. The proposed Kentucky law probably is typical of others. It would penalize public-school teachers, principals, superintendents, etc., who teach Darwinism, atheism, agnosticism, or the theory of evolution, in so far as it pertains to the origin of man, or who knowingly permit such subjects to be taught.

It is not, however, the first time that the subject has been before the country. When President Grant in an address to the Army of the Tennessee at Des Moines, Iowa, on September 29, 1875, challenged a movement whose aims were to gain public support for parochial schools and to introduce religious instruction into the public schools he said: "Resolve that neither the state nor 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.[1] His annual message of 1875 accordingly recommended an amendment to the federal constitution making it the duty of the various states to establish public schools and forbidding "the teaching in said schools of religious, atheistic, or pagan tenets."[2] When the proposed amendment was finally, on August 11, 1876, voted upon by the Senate it forbade the appropriation of public property or revenue to any school "wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught."[3] The failure of the measure to obtain the necessary two-thirds majority in the Senate closed the agitation so far as this particular phase is concerned without resulting in any tangible legislative enactment or constitutional provision.

This result was to be expected. No organized attempt to introduce anti-religious tenets into the public schools had been made. It is true that the public schools, though they were the direct lineal descendants of the parochial school founded by the early settlers in close connection if not union with the churches which they built, had been secularized by an elimination of their religious aspects. But this was as far as the development had gone. It had never been intended by this elimination to make the public schools the stamping-grounds of anti-religious propaganda. The purpose was to eliminate all discussion of religion, whether friendly or hostile. Either is a disturbing element and should be kept out. Anti-religious zealots are apt to be just as polemic and bigoted as are some religious devotees.

Not much material in the form of constitutional provisions need therefore be expected. While the number of the so-called unchurched in this country is large, the great majority of this

[1] Hecher, *Catholics and Education*, p. 180; Sevett, *American Public Schools*, p. 72.

[2] *Congressional Record*, Vol. 4, Part 1, p. 175. [3] *Ibid.*, p. 5453.

class are unreligious rather than anti-religious and retain some preference toward, if not touch with, some church. The forces of downright agnosticism and atheism are therefore quite small. In addition they stand for a mere negative and have no such organization as is maintained by the various denominations. They therefore have not made themselves felt in public life to any very marked extent. While provisions against sectarian instruction in public schools or public support of sectarian institutions have been inserted in practically all the constitutions adopted since the days of Grant,[1] there has been no occasion to invoke constitutional restraints against the forces of unbelief. The author has examined the constitutions of all the forty-eight states but has failed to find a single provision levied against this particular form of opinion.

All that can therefore be cited are a few constitutional provisions which closely link education and religion together. While the convention which framed the Constitution of the United States was in session, Congress, in 1787 enacted the famous Northwest Ordinance, which stated that "religion, morality, and knowledge being necessary to good government and the happiness of mankind schools and the means of education shall forever be encouraged."[2] This provision was superseded when the various states which now take up the Northwest Territory adopted their constitutions[3] but has been literally copied into the constitutions of Michigan and North Carolina[4] and has with certain changes been adopted by Ohio and Nebraska.[5] Says the Michigan Court in reference to this

[1] See the author's article, "The Legal Basis," in *Religious Education*, February, 1922, p. 34. Also a pamphlet by him, *Church and School in the American Law*, published by the Concordia Publishing House, St. Louis, Mo.

[2] Article 3.

[3] 1890 *State ex rel Weiss* v. *Edgerton School District 76*, Wis. 177, 44 N.W. 967, 7 L.R.A. 330, 20 Am. St. Rep. 41.

[4] Michigan constitution of 1908, Art. 11, Sec. 1. North Carolina constitution of 1876, Art. 9, Sec. 1.

[5] Nebraska constitution of 1875, Art. 2, Sec. 4. Ohio constitution of 1912, Art. 1, Sec. 7.

provision: "It is not to be inferred that, in forming a constitution under the authority of this ordinance, the convention intended to prohibit in the public schools all mention of a subject which the ordinance, in effect, declared that the schools were to be established to foster."[1]

This lack of constitutional restrictions throws us back on the common law which lies back of the constitutions, though it may be evidenced by recent decisions. Two outstanding indications are at hand, one negative, the other positive. The latter deals with the maxim that Christianity is a part of the law of the land. The former involves trusts to anti-religious purposes. We shall dispose of the negative before taking up the positive aspects of the matter.

According to the early English cases any attempt to bring into controversy the truth of any Christian doctrine constituted the crime of blasphemy. Therefore any testamentary disposition of property designed to promote the discussion of the truth of these doctrines was void as being in furtherance of a crime.[2] This doctrine has now been abandoned even in England.[3] The question remains whether a gift to a positively anti-religious purpose will be sustained. On this question the authorities are not as explicit as might be desired. Indeed gifts to a voluntary association of free thinkers and anti-sectarians[4] or to the "Infidel Society" of Philadelphia[5] have been held to be too vague to be executed by the courts. It has been pointed out that it is not easy to see how love to God or man can be promoted by the dissemination of infidelity which robs men of faith and hope if not of charity also. Therefore

[1] 1898 *Pfeiffer* v. *Detroit Board of Education*, 118 Mich. 560, 77 N.W. 250, 42 L.R.A. 536.

[2] See note, "Validity of Testamentary Disposition Subversive of Religion," Ann. Cas. 1917 B 1024.

[3] 1915 In re Bowman 113, L.T. Rep. 1095; cited 25 Yale Law J. 503.

[4] 1909 *Korsstrom* v. *Barnes*, 167, Fed. 216.

[5] 1870 *Zeisweiss* v. *James*, 63 Pa. (13 P. F. Smith), 465, 468; 3 Am. Rep. 558.

the Pennsylvania court has concluded that "a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality or hostility to the existing form of government. A man may do many things while living which the law will not do for him after he is dead. He may deny the existence of a God, and employ his fortune in the dissemination of infidel views. But should he leave his fortune in trust for such purposes, the law will strike down the trust as *contra bonos mores*."[1] Similarly, atheists are by the constitutions, statutes, and decisions of a considerable number of states disqualified from acting as witnesses in the courts or from holding public office. It is one of the purposes of our common schools to help qualify citizens for these important duties. A prohibition levied against the teaching of atheism in the public schools is adapted to prevent in a measure such disqualification and therefore is within the competency of the legislature.

The maxim that Christianity is a part of the law of the land originated in England when church and state were closely linked together. It came with the Pilgrims to America. Though in the course of our history church and state have parted company, though Thomas Jefferson has branded the maxim as a "judicial forgery" which "engulfed Bible, testament and all into the common law,"[2] it remains today as the abstract expression of a very concrete series of facts. The fact that church and state are separated has not done away with the other fact that the Christian religion is and ever has been the religion of the people. "This fact is everywhere prominent in all our civil and political history, and has been, from the first, recognized and acted upon by the people, as

[1] 1880 *Manners* v. *Philadelphia Library Co.*, 93 Pa. 165, 172; 39 Am. Rep. 741.

[2] Letter of June 5, 1824, Jefferson's Posthumous Works, Vol. IV. Cited and discussed 1837 *State* v. *Chandler*, 2 Del. 558. For a criticism of this dictum see 9 Am. Jur. 346.

well as by constitutional conventions, by legislatures and by courts of justice."[1] Says the Pennsylvania court:

> The declaration that Christianity is part of the law of the land, is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them, and yet prevent them from entering into and influencing, more or less, all our social institutions, customs, and relations, as well as our individual modes of thinking and acting. It is involved in our social nature, that even those among us who reject Christianity, cannot possibly get clear of its influence, or reject those sentiments, customs, and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life.[2]

In the words of the United States Supreme Court, Christianity is a part of the law of the land in this qualified sense that it is "not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."[3] Lack of space forbids us from citing other significant utterances by various courts.[4]

Christianity being a part of the law of the land the Connecticut court has declared that our school laws are based on the Christian religion.[5] It therefore is just and proper that teachers be required to conform their conduct in and out of the schoolroom to the moral precepts of this religion. They may even be expected to rise above these precepts so far as they have been laid down by the criminal law. It is but a step farther to require them if they entertain agnostic or atheistic notions to refrain from exploiting them in the classroom. Since the ordinary citizen may on pain of punishment

[1] 1861 *Lindenmueller* v. *People*, 33 Barb. 548, 561 (N.Y.).

[2] 1855 *Mohney* v. *Cook*, 26 Pa. 342, 347, 67 Am. Dec. 419.

[3] 1844 *Vidal* v. *Girard*, 43 U.S. (2 How.) 127, 198, 11 L. Ed. 20.

[4] See an article by the author of this article in 17 *Mich. Law Review*, 368–377. See also the author's *American Civil Church Law*, pp. 12–15.

[5] 1854 *First Congregational Society* v. *Atwater*, 23 Conn., 34, 42.

be forbidden from expressing blasphemous sentiments,[1] the teacher who is in the employ of the state may certainly be required to abstain from poisoning the minds of his charges with atheistic or agnostic conceptions.

That the administration of the law will involve grave difficulties is clear. The words used by it will have to be defined. The state of public opinion in the particular locality will influence this definition. Where religious sentiment is strong courts will incline to give a broad definition. Where it is weak the contrary course is probable. The religious leaning of the judge or judges in question will also be important. Where a jury tries the case the prevailing religious opinion of the neighborhood is apt to be decisive.

This difficulty, however, is not peculiar to this situation. It exists in connection with very many statutes. Thus blasphemy laws are on the statute books of many of the states. The term blasphemy is certainly as hard to define as is agnosticism or atheism. Yet the difficulty of defining this term has not prevented the courts from enforcing the statute.[2] Neither will it prevent the statute under consideration from being enforced. Terms which cannot be defined definitely in the abstract will be left for demarkation to the judicial process of inclusion and exclusion. Where the intention of the legislature is reasonably clear and not in contravention of the Constitution the courts will be obliged to enforce it and to meet as best they can the difficulties which are inevitably presented when such laws are applied to concrete situations.

A distinction, of course, exists between agnosticism and atheism on the one side and Darwinism and evolution on the other. The former are inherently, the latter only incidentally, anti-religious. It is even possible to teach Darwinism and

[1] See the cases cited in the next note.

[2] *Specht* v. *Commonwealth*, 8 Pa. 312; *People* v. *Ruggles*, 8 Johns 290 (N.Y.); *State* v. *Chandler*, 2 Harrings 553 (Del.); *Undegraph* v. *Commonwealth*, 11 S. and R. 394 (Pa.); *Mochus* v. *State*, 113 Atl. 39 (Me.) For a short discussion of these cases see the author's *American Civil Church Law*, pp. 15 and 16.

evolution so as not to conflict with religious and even Christian principles. This, however, is entirely a matter of the personal equation of the particular teacher. If he is an infidel he cannot but teach these subjects in such a manner that they will conflict with the teachings of the various denominations into which the American people are divided. An absolute prohibition therefore would seem to be the only effective remedy. Has the legislature the necessary power? There appears to be no constitutional inhibition. There are no constitutional provisions protecting the teaching of these subjects. The question what subjects are to be taught in the public schools therefore is a matter of absolute legislative discretion. Such discretion extends even beyond the public schools. A prohibition of the teaching of one or all foreign languages in parochial schools to pupils under a certain grade has been adopted in recent years in many states and has been upheld by the Iowa, Ohio, and Nebraska courts.[1] If the legislature has power to limit or forbid the teaching in *private* schools of such legitimate subjects of study as foreign languages it certainly can prohibit the teaching of Darwinism and evolution in the *public* schools. Arguments against such a prohibition should therefore be addressed to the legislatures, not to the courts.

[1] 1920 *State* v. *Bartels* —— Iowa 181 N.W. 508; 1921 *Pohl* v. *State* —— Ohio —— 132 N.E. 20; 1919 *Nebraska District* v. *McKelvie* 104 Neb. 93 175 N.W. 531; 1922 *Meyer* v. *State* —— Neb. —— 186 N.W. ——.