

A. RELIGION AND EDUCATION

Volume I of this work discussed the autonomy of religious bodies with respect to their internal affairs. Volume II considered the outreach activities of religious bodies in evangelism, solicitation, service and advocacy. This volume will treat the concerns of religious bodies as they seek to inculcate their faith and nurture its practice in the lives of the faithful—and sometimes to prevent the inculcation of antithetical teachings. One major focus will be on the work of elementary and secondary schools of general education founded and maintained by religious bodies primarily for the purpose of educating the children of the faithful in an environment and curriculum in which the precepts and practice of the faith are integrated with the learning of academic subjects and of the skills necessary for earning a livelihood in the “world outside.”

In many cases, this is done through day schools related to the parish (“parochial” schools), though in others it may be through larger institutions, such as diocesan high schools or boarding schools. Many of these are not limited to the children of the faithful, but may accept children of nonmembers as well. Thus they have both an “internal” and an “outreach” aspect. Even if no outsiders are admitted, such schools still have a dimension that is broader than the purely internal affairs of the religious group: they prepare their pupils for life in the larger society, and thus the larger society has an interest in ensuring that their preparation does not leave them disabled for that eventuality.

One category of case law has emerged around the delicate question of how much regulation the state should devote to the work of such schools without unduly restricting the religious inculcation for which they are primarily intended.

Another category, which has generated a disproportionately large and tangled array of law, deals with various arrangements for state aid to such schools. The U.S. Supreme Court has devoted hundreds of pages of increasingly confusing opinions to this subject over the past two decades, and so the sheer volume of material to be covered on this topic argues for a separate treatment.

A second major focus will be on the interface between religion and the secular common schools of general education—the public schools—where questions of religious instruction, prayer, devotional reading of the Bible and exposure of pupils to teachings and practices thought inimical to their religious nurture will be treated. At the end of this volume is a section dealing with the claims of groups of students for opportunity to pursue their religious practices in noninstructional time in public schools—the “equal access for religion” discussion. This section was originally

planned to be part of the next volume on religious practices in various environments, and serves as a transition to that theme.

In the Western world (and elsewhere) religion has been the patron and fosterer of learning (and occasionally, when it seemed to threaten orthodoxy, its critic and opponent). In Judaism a strong tradition of study of the Torah developed, carried on by professional lay teachers (as distinguished from the priesthood) known as rabbis, who have assumed the role of religious leaders of the congregation after the destruction of the Temple and the end of the priesthood. Jewish learning, however, was not limited to the rabbinate but was considered a personal duty of all (male) Jews.

There were various kinds of schools under nonreligious auspices in the classic period of Greece and Rome, but like most schools before and since, they were primarily for the elite and wealthy. The great bulk of humankind had to rely on nonacademic sources of knowledge: family tutelage, apprenticeship, and cultural osmosis.

With the barbarian incursions, culture and knowledge in Europe were virtually demolished except for that which was preserved by the Christian church, especially in the monasteries. In the Middle Ages schools were formed at the seats of bishops to train clergy and the civil servants of government. There was a major school at the court of Charlemagne conducted by clergy. Various monastic orders, convents and some large churches maintained schools as well. The Reformation—with its emphasis upon a literate laity—added new impetus to the advance of schooling and enlargement of its clientele. During the Counter-Reformation the Roman Catholic school systems for inculcating and safeguarding the faith of the children of the faithful was brought into being by the Jesuits and other teaching orders. In many areas the churches remained responsible for whatever general education there was, and only in the eighteenth century did the idea of educating the public at large begin to take hold, and schooling start to come under state control.

Prior to a concern for general education, however, the religious enterprise has a vital concern for inculcating the faith in its adherents and their offspring. Of course, there is a “learning” aspect to all religion, as there is to any human activity, but in some times and places it has been more systematic and intentional than in others. Throughout much of its early history, Christianity relied mainly upon catechetical instruction of adult converts, and centers for catechetics grew up at Alexandria, Antioch, Edessa, etc. Manuals were developed for catechetical instruction, and these were often used to instruct young people who were “born into” the church. But there was no concept of providing a generalized education for everyone until the time of the Protestant Reformation. Martin Luther translated the Bible into the vernacular so that ordinary laypersons could read it for themselves, and John Calvin laid great stress on a well-schooled clergy.

But most of the population could neither read nor write in the sixteenth century. The despised Anabaptists, who did not have the luxury of clergy, were probably the first group to set about trying to teach *every* member of their movement to read so that all could study the scriptures and thus participate as equally informed members of the congregation, where decisions were made collectively, and all had an equal voice. Thus they were pioneers of the idea of universal general education centuries before compulsory public schooling took hold.¹ Although theirs was education for a specifically religious purpose, it was not limited to religious uses. A person who had learned to read could read many things besides the Bible.

1. Robert Raikes Invents the “Sunday School”

One of the typical assertions of Christian interest in education occurred in England in the 1780s. Robert Raikes was an evangelical publisher of the Gloucester *Journal*, who became concerned about the plight of the uneducated children of the poor.

Like most cities in Georgian England, Gloucester was a pit of misery, flooded by people from the countryside and exposing the children of the growing urban proletariat to constant abuse, both casual and entrenched. Few, if any schools existed for these youngsters since most of their “betters” believed education of the poor was economically unsound and socially destructive.... [M]ost children of the poor worked long hours in factories for six days of the week. Sunday was the day when bands of wandering, unsupervised and often lawless children inflicted damage on the outlying areas.

* * *

He started [a] Sunday charity school in 1780 or 1781 by hiring a teacher to set up shop in Gloucester's Sooty Alley. A few years later he wrote of pleasure received in “discovering genius and innate good dispositions among this little multitude.... Since the establishment of Sunday schools... they are not the ignorant creatures they were before. They are also become more tractable and obedient, and less quarrelsome and revengeful.”

* * *

Conditions in almost all English cities called for something like the Sunday school. When others heard the reports, they picked up the idea. A movement was in the making. William Fox, a London draper and pious Baptist, was particularly enthusiastic. The Sunday school seemed to be the method for realizing his dream of a systematic, universal, scriptural education for the poor.... Fox made a personal pledge to the goal of teaching all poor Englishmen to read.... In 1785, along with several other influential men, Fox formed the first organization promoting Sunday schools.

* * *

1. Littell, F.H., “Sectarian Protestantism and the Pursuit of Wisdom,” in Erickson, Donald A., ed., *Public Control for Non-Public Education* (Chicago: Univ. of Chicago Press, 1969).

The growth of the Sunday charity schools was phenomenal in the 1780s. Enrollment was about 250,000 by 1787.... For the poor, schools on Sunday represented a start toward a better life.²

The Sunday School movement spread to America, where with the eventual development of public schools for all children, the Sunday School became a Protestant means of specifically *religious*, rather than general, education. Several notable features of this episode should be registered:

1. It was essentially a *lay* movement in its inception and early development, inspired by pious purposes, but outside the ecclesiastical structures of the time; in fact many clergy, particularly in the antievangelical wing of the Anglican Church, were hostile to it because of their general antipathy to change in the status quo.

2. It was initially a humanitarian undertaking, aimed at helping the needy outside the church rather than at benefiting those inside the fold; it was evangelistic in its aim of assisting the poor to be conversant with scripture and to improve their morals, but not particularly proselytizing in the sense of getting them into the church (since they were all already nominally “in” the Established Church, but no one particularly wanted them to participate actively in the church's work—least of all the clergy!).

3. It also had elements of social control: to subdue the rowdy youths on Sundays and—in the words of the charter of Fox's Society—“to bring men cheerfully to submit to their stations.” Thus it was not the first or last time that religion contributed—with the best of intentions—to pacification of the turbulent elements of society.³ And that may not be altogether a bad thing. Certainly the young lads who learned to read in Raikes' school may have been helped to find more satisfying lives than might otherwise have been their lot and no longer needed to vent their hostilities in senseless vandalism on their one day off in seven.

4. Like some other creative and successful lay movements that spanned denominational boundaries in the nineteenth century, it was eventually coopted, absorbed and institutionalized by the denominational church structures. That was neither more nor less “religious,” neither more nor less deserving of respect and consideration. The collective free exercise of religion is entitled to the same degree of constitutional protection whether occurring under the aegis of a “church” or not.

2. Lynn, Robert W., and Elliott Wright, *The Big Little School: Two Hundred Years of the Sunday School* (New York: Harper & Row, 1971), pp. 4-7. See also Baylan, A. M., *Sunday School: Formation of an American Institution* (New Haven: Yale Univ. Press, 1988).

3. Consider the employment by the U.S. government of various church mission agencies in the nineteenth century to educate and “civilize” the American Indians. Cf. Bowden, H.W., *American Indians and Christian Missions: Studies in Cultural Conflict* (Chicago: Univ. of Chicago Press, 1981).

2. Church-Related Education in the United States

A natural outgrowth of the Christian efforts in education was the development of “higher education”—the scholarly institutions that became the universities of Europe in the sixteenth century and spread to other continents. The university that is usually considered to be the oldest, the University of Bologna, however, was not of ecclesiastical origin, but began—around 1088—when a group of students hired a faculty to teach them *law*, and the students controlled the terms of the faculty’s employment! Nearly as venerable is the University of Paris, which developed under the aegis of the chancellor of the Cathedral of Notre Dame in the twelfth century.

In the United States, the earliest institutions of higher education came into being under religious auspices. The first, Harvard College—later University—(1636) and Yale University (1701) were Puritan enterprises, the latter designed to prepare young people “for publick employment, both in church and civil state.” William and Mary College (1693) and King’s College (1755)—later Columbia University—were Anglican. The College of New Jersey (1746)—later Princeton University—was founded by Presbyterians, and one of its presidents, the Rev. John Witherspoon, was a signer of the Declaration of Independence. Brown University in Rhode Island (1764) was the creation of the Baptists, while Rutgers (1766) was instituted by the Dutch Reformed Church. Not until the establishment of the University of Pennsylvania (1751) at the behest of Benjamin Franklin did a major institution of higher education come into being in America *not* under religious aegis.

General education at the elementary and secondary levels in colonial America was likewise largely under church auspices. In New England, the Puritans, who controlled both church and state, were concerned that the citizens be educated. They were determined that children should receive sufficient education to read the Bible and to participate in religious services. In 1642 the legislature of the Massachusetts Bay Colony required the officials of each town to make sure that parents and masters of their town were training the children in their care “in learning and labor and other employments profitable to the Commonwealth... to read and understand the principles of religion and the capital laws of the country.” Those failing to do so could be fined. A further law in 1647 required “that every town having fifty householders should at once appoint a teacher of reading and writing, and provide for his wages in such manner as that town might determine: and that every town having 100 householders must provide a Latin (grammar) school to fit youths for the university, under a penalty of £5 for failure to do so.” This was the first statute in the English-speaking world requiring communities to establish and maintain a minimal school system for all children.

Elsewhere in the American colonies other conditions prevailed. In the middle colonies, what schools there were were run by each denomination without state assistance. In the southern colonies education was considered a form of charity. It was not a concern of the state, and the churches did not devote much effort to it. In

all cases, instruction was dominated by religious purpose. Catechisms were prominent as pedagogical material. Teachers were chosen for their soundness in religious doctrine; the hours of schooling were long and discipline severe. It was only after the Revolution that political motives for insuring an educated citizenry began to supplant the religious motivation and state control to replace the churches' responsibility.

3. A Negative Voice: *Vidal v. Girard's Executors* (1844)

Not all who were interested in the advancement of education saw a necessity for a religious component. Some, indeed, thought *sectarian* religion, at least, a counterproductive contribution. One of these was a wealthy merchant in Philadelphia named Stephen Girard, who provided in his will for the establishment of a college for orphans, where they would be taught reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical and experimental philosophy, French and Spanish languages, as well as “a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions....” But there was one unique proviso in the will:

I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

In making this restriction, I do not mean to cast any reflection upon any person or sect whatsoever.... [M]y desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.⁴

This proviso offered disgruntled heirs an opening to “break” the will, and they employed the redoubtable Daniel Webster to essay that end. The great orator was not at a loss to choose what strings to play upon before the court: “No fault can be found with Girard for wishing a marble college to bear his name forever, but it is not valuable unless it has a fragrance of Christianity about it.... A cruel experiment is to be made upon these orphans, to ascertain whether they cannot be brought up without religion.”

4. *Vidal v. Girard's Executors*, 2 Howard 205 (1844).

The Supreme Court's opinion was delivered by Justice Joseph Story, who found the bequest valid in all other respects before turning to the religious—or antireligious—proviso.

This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same, and second, because it limits the instruction to be given to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion.

In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which, indeed, we can know nothing)...

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania.⁵ But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that state, as found in its constitution of government... “that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishment or modes of worship.” Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public....

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country; and therefore it must be made out by clear and indisputable proof.... There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught; but that it is to be impugned or repudiated.

5. See a similar assertion in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), discussed at ID1c.

Now, in the present case, there is no pretense to say that any such positive or express provisions exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked; why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects and such diversity of opinion amongst them, I desire to keep the tender minds of the orphans...free from the excitement which clashing doctrines and sectarian controversy are apt to produce." Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not; nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? Suppose he had excluded all lawyers or all physicians, or all merchants from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposition that Christianity is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not a layman instruct in the general principles of Christianity as well as ecclesiastics[?] There is no restriction, as to the religious opinions of the instructors or officers. They may be, and doubtless, under the auspices of the city government, they will always be, men, not only distinguished for learning and talents, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings which such men by their conduct, as well as their instructions, may, nay must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college— its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of

Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that proscribes such studies.

* * *

Looking into the objections, therefore, in a mere juridical [*sic*] view...we are satisfied that there is nothing in the devise...inconsistent with the Christian religion, or...opposed to any known policy of the State of Pennsylvania.⁶

Justice Story's elegant use of the English language, despite the quaint punctuation of the time, effectively set forth an argument rejecting Daniel Webster's objections to the merchant's will and the assumptions on which they were based. But it contained several assumptions of its own that were common at the time and that will be encountered in later decisions in this area: (1) that Christianity is not “sectarian,” but only the subdivisions within Christianity; (2) that non-Christians represent various forms of “infidelity”; (3) that Christianity is part of the common law of the nation; (4) that the city government would employ only teachers of exemplary character and edifying conduct; and (5) that moral example is an effective mode of inculcating virtue even without explicit indoctrination of moral precepts. The first four of these assumptions are of doubtful validity, while the last is certainly true in large part, but has its limits when unprecedented moral dilemmas arise that previous example has not provided lines of moral reasoning from broad principles to help resolve. Justice Story also conjectured for the college a possible program of moral and spiritual nurture that the testator may not have contemplated at all. But one may conclude that the court reached the right conclusion even though it entertained considerations—such as that about the common law—that necessitated wide detours to counter.

It was the right conclusion because it resisted a required linkage between religion—specifically Christianity—and the instructional responsibility of the city government (even if privately funded). It was an early repudiation of the assumptions that underlie the notion of a “Christian America,” viz., that Christianity has a proprietary role and responsibility for the nation that gives it preeminence over various forms of “infidelity.” This notion was consonant with the development of pandenominationalism in nineteenth century America, a forerunner of the ecumenical movement of the twentieth century. That development lent credence to the concept that the public schools should naturally instruct pupils in the Bible and the doctrines supposedly common to all branches of Christianity.

4. Development of Public Schools and Parochial Schools

In the nineteenth century there came an increasing demand for the education of all children. By midcentury most of the northern states had systems of tax-supported general education through at least the elementary grades, though in the South (largely

6. *Vidal v. Girard's Executors*, *supra*.

for racial reasons) there was no statewide system of public education until after the Civil War. When public education did come to the South, it was largely at the behest of religious groups concerned for the acculturation of former slaves. One of the pioneers and formative figures of public education was the New England reformer, Horace Mann, who served as the first state superintendent of public instruction when Massachusetts erected such a post in 1837. He did much to shape the concept of a comprehensive curriculum to be provided for all children at public expense, which was to encourage moral behavior and a generalized piety but to be free of sectarian dominance and ecclesiastical control.

The result was the American public school, controlled by local civil authority, supported by local property taxation, and essentially secular in character, although in most localities permeated by the prevailing Protestant piety of the time. Attendance, at least through the early grades, was made compulsory by law in all states for all children (except those deemed—perhaps too readily—uneducable because of physical or mental disabilities). Daily prayers and oral readings from the (King James) Bible were customary and, indeed, obligatory, as will be seen.⁷

The public school was thus an important civilizing instrument for the development of an educated citizenry and an effective mechanism for the “Americanization” of the waves of European immigrants who began to arrive in the latter half of the nineteenth century. Its very effectiveness as vehicle of cultural assimilation posed problems for non-Protestant religious bodies. The Roman Catholic Church was especially hard-pressed to try to minister to the huge influx of German and Irish Catholic arrivals at midcentury, which it feared would be weaned away from the church by secular schools that were either “godless” or “Protestant” (or both!). The alternative to such schools was the parish school, which had been recommended by the first provincial council of the Roman Catholic Church in the United States in Baltimore in 1829:

Since it is evident that very many of the young, the children of Catholic parents, especially the poor, have been exposed and are still exposed, in many places of this Province, to great danger of the loss of faith or the corruption of morals, on account of the lack of such teachers as could safely be entrusted with so great an office, we judge it absolutely necessary that schools should be established, in which the young may be taught the principles of faith and morality, while being instructed in letters.⁸

At the fourth provincial council “pastors were directed to prevent Catholic pupils in public schools from being made to join in the use of the ‘Protestant Bible’ and hymns and prayers.”⁹ From the viewpoint of many Roman Catholics, the free public schools

7. See § C2a below.

8. Stokes, A.P., *Church and State in the United States* (New York: Harper & Bros., 1950), v. I, p. 824.

9. *Ibid.*

were in effect *Protestant* schools rather than truly nonsectarian. “[They] had ground for complaint, since not only was the King James version of the Bible alone used, but some of the textbooks, especially those in history, were both unfair and disrespectful of their church.”¹⁰ In various parts of the country efforts were made to render the public schools less subversive of minority religious faiths, but with little success. Indeed, such efforts were viewed as themselves subversive of the Protestant hegemony and fueled the fires of anti-Catholic nativism that disgraced the nation during the nineteenth century.

In self-defense, the Roman Catholic Church decided to rely upon its own parochial schools. The Third Plenary Council of Baltimore in 1884 issued a decree to that effect:

- I. Near each church, where it does not yet exist, a parochial school is to be erected within two years... and is to be maintained *in perpetuum*....
- II. A priest who, by his grave negligence, prevents the erection of a school within this time... deserves removal from that church...
- IV. All Catholic parents are bound to send their children to the parochial schools....¹¹

Other minority religious groups followed the same course, including Orthodox Jews, Missouri Synod Lutherans, Seventh-day Adventists, and others. In the mid-twentieth century a new wave of Christian day schools has swept across evangelical and fundamentalist areas in a modern revolt against public schools because of their supposedly “godless” and demoralizing influence. As in earlier eras, the motive power was primarily the strong desire to inculcate the faith in the children of the faithful by permeating their entire formative years with education in all subjects that was imbued with the faith's understanding of human nature, duty and destiny.

Even where church-related schools of general education existed, however, not all of the faithful could utilize them because of financial, cultural or other reasons. Thus there continued a religious concern to safeguard the religious faith and moral rectitude of those children who attended public schools.

The church-state problems arising in the nexus between religion and education, then, are of several kinds:

1. To what degree should the state be able to regulate religious schools?
2. To what degree should the state be able to aid or support such schools?
3. What provision(s) can be made for the inculcation of the faith in children attending public schools?
4. How can the faith of such children be protected from pernicious influences?
5. How can the rights to free exercise of religion by such children be protected in public schools without violating the prohibition against establishment of religion?

Those questions form the content of this volume.

10. *Ibid.*, p. 827.

11. *Ibid.*, vol. II, p. 648.