

The present crisis in American education may be attributed in part to the reform which abrogated religion, autonomy and diversity in favor of uniformity, government bureaucracy and secularism.

Religion, Education And the First Amendment

By JOHN J. COUGHLIN

JUST OVER TWO CENTURIES AGO, the United States Constitution was amended to require that "Congress shall . . . make no law respecting an establishment of religion or prohibiting the free exercise thereof." During the second half of this century, the meaning of the 16 words of the First Amendment's establishment and free exercise clauses, and in particular their import with regard to education, has proven to be a source of continuing controversy.

On Feb. 24, 1993, James Zobrest, a deaf high school student from Arizona, sat in the courtroom of the Supreme Court of the United States and attentively watched a sign-language interpreter translate the oral argument in the case of *Zobrest v. Catalina Foothills School District* [see *AM.* 1/30/93, p. 16-18].

What occasioned this heretofore unknown event in Supreme Court proceedings was the school district's refusal to provide an interpreter for James while he attended a Catholic high school. In dispute was the determination of two lower Federal courts upholding the school district's claim that to use government funds for an interpreter in the Catholic school would constitute an impermissible establishment of religion. A light moment occurred during the course of the oral argument when several of the Justices frankly acknowledged the inconsistent and contradictory outcomes in the Court's decisions about various forms of parochial school aid. Perhaps the mirthful disposition of the several Justices indicates a willingness to revisit the meaning of the original intent of the religion clauses and their impact on U.S. education for a calm and reasonable second look. Significant evidence indicates that such a review is overdue.

The historian David B. Tyack has noted that for at least the first 100 years of the new republic's existence, a pro-

found religious purpose permeated American education (*The One Best System*, 1974). Education without Christian prayer, the exposition and memorization of the Decalogue as well as explicitly religious study of biblical stories would have been unthinkable to most Americans. In 1789, the same Congress that drafted the First Amendment re-enacted the Northwest Ordinance, which provided in part that "[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall ever be encouraged." In mid-19th century New England, Horace Mann, one of the great advocates of public education, said: "Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible." After touring the westward expansion, Alexis de Tocqueville observed that in the new states and territories "almost all education is entrusted to the clergy." From the new republic's inception through the close of the 19th century, U.S. education reflected an understanding of the student as a profoundly spiritual being for whom religious education served to enhance intellectual and moral development.

The framers never intended the Constitution to defile the religious understanding of the human person that prevailed in U.S. education. The Federalist James Madison, one of the central architects of the Bill of Rights, envisioned a social order composed of a "multiplicity of interests and sects" (*The Federalist*, No. 51). A prime purpose of the Bill of Rights was to insure a government of limited powers, whose parameters and influence were dependent on the consent of the citizens. Culture was to be shaped and formed by subsidiary structures, and not, in the words of John Courtney Murray, S.J., by an "omni-competent society-state."

THE FEDERALIST VIEW of society held implications for education. Local, non-governmental stewardship over the schools insured that no central government would be the determinative factor in what students learned and valued. As Father Murray eloquently observed, there was "the distinction between the order of politics and the order of culture, or, in the language of the

JOHN J. COUGHLIN, O.F.M., recently completed a clerkship to the Hon. Frank X. Altamari, of the United States Court of Appeals for the Second Circuit, and presently serves as general counsel and assistant professor at St. Bonaventure University, Olean, N.Y.

time, the distinction between the *studium* and *imperium*" (*We Hold These Truths*, 1960). A citizenry educated thus was considered the sine qua non of the independent, intelligent and respectful exchange of ideas in society.

Starting at the conclusion of the 19th century, a nationwide reform movement dramatically changed the nature of U.S. education. A primary tenet of the reform held that the optimal educational setting was neutral and secular, free from the prejudices associated with religion. John Dewey, a leading theorist of the reform movement, urged that the bond between "art, science and good citizenship . . . and the creeds and cults of religions must be dissolved" (*A Common Faith*, 1934). To this end, education was to be placed in the hands of impartial administrators and teachers who were to create a rational system of schools for the nation as a whole, triumphing over the narrow piety and superstition of the past.

Now viewed with the chastened perspective of hindsight, the reform has been roundly criticized by those like Brookings Institution fellows John E. Chubb and Terry M. Moe, who do not agree that it resulted in the "one best system" (*Politics, Markets and America's Schools*, 1990). In the critics' view, the real winners of the reform were not the "the less powerful segments of the American population: the lower classes, ethnic and religious minorities, and citizens of rural communities." These groups were disenfranchised by the reformers and "control over local schools was . . . largely transferred to the new system's political and administrative authorities—who, according to what soon became official doctrine, knew best what kind of education people needed and how it could be provided most effectively." The present crisis in U.S. education may be attributed in part to the reform that abrogated religion, autonomy and diversity in favor of uniformity, government bureaucracy and secularism.

WHEN THE REFORM movement's influence reached its summit, the Supreme Court first disseminated a strict-separationist interpretation of the First Amendment. In 1947, the Court held in *Everson v. Board of Education* that it did not violate the establishment clause for New Jersey to dispense public funds to provide for the cost of transporting children to and from parochial schools. Writing for the majority, Justice Hugo Black penned dicta that would have two far-reaching consequences for the Court's First Amendment jurisprudence. First, Black effectively bifurcated the religion clauses by implying that cases brought pursuant to the establishment clause could be considered without reference to the free exercise clause. Second, somewhat at odds with the actual holding of the case, Black concluded that "a review of the background and the environment of the period" in which the First Amendment was fashioned required a "wall of separation between church and state." The metaphor of the wall quickly captured the popular imagination.

To reach these conclusions about the original intent,

Justice Black focused principally on the writings of Thomas Jefferson. Several years prior to the foundation of the republic, Jefferson had led a successful effort to defeat the renewal of Virginia's tax in support of the established Anglican Church. In 1791, however, when the Continental Congress framed the First Amendment, Jefferson was living in Paris serving as the Ambassador to France. He did not, in fact, coin his metaphor of the wall of separation until 1802, when as President, he included the metaphor in a private letter to a friend expressing his opposition to Connecticut's established Congregationalist Church. Despite Jefferson's misgivings, the Connecticut establishment, like those of several other states, lasted well into the 19th century. Black was correct that Madison shared Jefferson's views. Such information, however, seems less probative of the original intent behind the religion clauses than a thorough investigation of the history and background in which the language was fashioned and included in the Constitution.

MSGR. THOMAS CURRY'S acclaimed and meticulous study of the history of the religion clauses belies the conventional account (*The First Freedoms*, 1986). The process itself was considerably more complex than can be captured by the views of an individual participant, even a prominent one like Madison. Among the state conventions that originally ratified the Constitution, Massachusetts, where publicly supported religion flourished, called for the adoption of a Federal bill of rights to guarantee against Federal encroachment on state power. In response, Congress framed the first 10 amendments, but the congressional record of the discussion surrounding the religion clauses is surprisingly brief. The legislatures of the several states were then required to ratify the amendments. Juxtaposing the facts that the Bill of Rights was intended to protect state interests from the Federal Government and that public education at the time of the adoption of the First Amendment was characterized by religion, it seems highly unlikely that the framers intended the Establishment Clause to declare public aid to religious schools a violation of the Federal Constitution.

The historical evidence is equally discrediting of a constitutional calculus that considers the establishment clause to the exclusion of free-exercise concerns. In a recent Harvard Law Review article, Prof. Michael McConnell has persuasively argued that the Supreme Court's mode of analysis neglects the reality that intensity of religious belief afforded the most significant political impetus behind the adoption of the religion clauses. During the great religious revival that coincided with the founding of the new republic, evangelical sects, including Baptists, Quakers and some wings of the Lutherans and Presbyterians, sought freedom to exercise their religious beliefs without government attempts to enforce conformity with the established Protestant religious doctrine. Free exercise of religion was so highly valued that it justified

exemptions from the positive law. To suggest that either the evangelical or mainstream Protestant churches sought to eliminate religion from education is plainly spurious. For most Americans of the 1780's, the free exercise of religion required quite the contrary.

The review of this evidence has led many constitutional historians to concur with Monsignor Curry's observation about the First Amendment that "to see the clauses as separate, balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more

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than was really there." Thus, both the bifurcation of the First Amendment and the usefulness of the Jeffersonian metaphor are in considerable question.

Nonetheless, the dicta of *Everson* became law in 1972 when the Court held in *Lemon v. Kurtzman* that Pennsylvania and Rhode Island programs that provided direct aid to parochial schools breached the "high and impregnable wall of separation." Two years later, in the pivotal case of *Committee for Public Education & Religious Liberty v. Nyquist*, the Court relied on the metaphor of the wall to invalidate a New York statute that granted, among other things, modest tuition reimbursements to low-income families and tax deductions for middle-income families.

After finding that direct aid to parochial schools and assistance to parents with children in such schools violated the original intent of the framers, the Court pursued a pollinating pattern of strict-separationist interpretation of the First Amendment in the parochial school aid cases. The Court has determined that it fails to comport with the original intent of the framers for the state to pay for the transportation for field trips of parochial school students, to reimburse parochial schools for the cost of administering examinations in state-mandated courses, to supply certain educational materials such as maps and charts and hardware such as projectors, and to permit public school employees to teach certain remedial courses to educationally disadvantaged children in parochial schools.

At the same time, as the Justices acknowledged during the *Zobrest* oral argument, other parochial school aid

decisions seem incongruous with the strict-separationist perspective. The Court considers it consonant with the original intent for the state to distribute funds for the transportation of parochial school students to and from school, to reimburse parochial schools for the cost of administering state-created examinations, to supply textbooks in secular subjects and to employ a remedial teacher to offer instruction in a permanent trailer located in the parking lot immediately outside the parochial school door. Perhaps such casuistical distinctions help to explain why the Court's First Amendment jurisprudence has so often fractured into plurality opinions. It would serve the national interests for the Court to find in *Zobrest* the opportunity to jettison the erroneous historical perspective of *Everson* and its strict-separationist progeny.

The Court's espousal of the strict-separationist position was not limited to the parochial school aid cases, but it also curtailed the role of religion in the public schools. The extent of the diminution was evident during the Supreme Court's proceedings of Feb. 24th. On the same day that it entertained the *Zobrest* case, the Court also heard oral argument in *Lamb's Chapel v. Center Moriches School District*. In this case, an evangelical church challenged a Long Island school district's ban on the use of its facilities during after-school hours by religious groups when virtually all other citizens groups are permitted use of the facilities. Responding to an inquiry from the bench, the school district's attorney admitted that under the policy a group of avowed atheists would be permitted access to the public school. The ban on religious organizations, counsel for the church argued, is not required by the establishment clause and violates the free exercise clause.

SINCE THE *EVERSON* DECISION, the Court has attempted to protect the sensibilities of those public school students who object to moments of prayer, recitations of biblical verse, the posting of the Ten Commandments in classrooms, moments of silence for meditation and most recently the offering of prayer by a rabbi at a high school commencement. Each of these decisions can be attributed at least in part to the Court's legitimate concern for the interests of children and parents who object to such religious elements in the public school environment. Considered as a whole, these decisions reflect the conception that American society is best served by the exclusion of any recognition of a transcendent being from the formal education of the vast majority of American children. Consistent with the tenets of the reform, religion has been almost entirely eradicated from public education.

If it is not required by the original intent, one must wonder on what authority the strict-separationist decisions of the last half of the 20th century rest. To be sure, the secularization of the public schools may have been a necessary response to the increasingly pluralistic constitu-

tion of American society. Just as some parents insist that their children be educated in a thoroughly secular environment, however, many others believe that such an educational environment places a grave burden on the right to the free exercise of religion. For these parents, the religious education of their children remains an integral aspect of the formation of the whole person and is best conducted as part of the entire school curriculum.

SUCH A pedagogical preference is expressed both by the Second Vatican Council and the 1983 Code of Canon Law. Indeed, the Supreme Court has on numerous occasions held that parents enjoy a right as the primary educators of their children pursuant to the due process and free exercise clauses. But, under the strict-separationist regime, the Court has decreed that tax-supported education must be free of any religious instruction. Such an arrangement leaves those who believe that religious formation is an indispensable and inseparable part of a child's education at a distinct disadvantage. Thus, the parents of James Zobrest paid public taxes, high school tuition and the cost of their deaf son's translator. The absence of some kind of remuneration amounts to a penalty levied against parents who elect to send children to nonpublic schools.

The ideal of public education should not be confused with the institutional reforms that were dedicated to

building a uniform system of schools for the nation as a whole to replace the diversity and autonomy that preceded the reform movement. It is sometimes objected that government aid to religious schools might be manipulated to defeat equal educational opportunity. The objection overlooks the legal reality that any program of government aid normally is designed to insure that participating schools fulfill various state and Federal requirements among which are those against racial discrimination. More importantly, it flies in the face of existing social reality. As is well documented by the sociologist James S. Coleman and others, inner-city parochial schools have generally provided a more beneficial education to minority students than the public system (*Equality and Achievement in Education*, 1990). Coleman attributes the parochial school advantage to the fact that the schools' relative independence from the government allows for the creation of a sense of community among students, teachers and parents. As the nexus between public education and the original Federalist vision seems to have disintegrated, it is not without irony that parochial schools continue to exemplify the value of subsidiary structures. The pending cases of Zobrest and Lamb's Chapel afford the vehicle for the Supreme Court to re-examine its assumptions about education and the First Amendment, and to retrieve the principle that the *studium* and *imperium* are best served when they remain relatively distinct. ■

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