

1 **A BREACH IN THE WALL: SEPARATION OF CHURCH AND STATE IN NEW YORK**
2 **A Background Paper written for Interfaith Impact of New York State**
3 Richard S. Gilbert – December 2015
4

5 **A Brief History of Church and State Separation in the United States**
6

7 *Congress shall make no law respecting an establishment of religion, or prohibiting the free*
8 *exercise thereof....* (Amendment 1, U. S. Constitution)
9

10 During the colonial period the European practice of established churches was followed - the
11 established religion depended on the dominant religion of the colony. In Massachusetts, for
12 example, the school headmaster had to be approved by the local minister who was a Calvinist
13 Congregationalist. Death was the penalty for idolatry and blasphemy; no Jesuits or Quakers were
14 allowed. At the time of the American Revolution only two states had complete religious
15 freedom, the Rhode Island of Roger Williams and the Virginia of Jefferson and Madison. Of the
16 other states, six established Protestantism, two Christianity, four required assent to divine
17 inspiration of the Bible, two a belief in heaven and hell, one belief in the trinity.
18

19 From the Revolutionary period to about 1840 the churches were gradually disestablished, but
20 most public schools retained a Protestant flavor. It was the influence of people like Jefferson and
21 Madison and other religious liberals, which was decisive in this dis-establishment. Madison and
22 Jefferson combined their talents to defeat a bill to pay teachers of the Christian religion in
23 Virginia. Madison set down his basic philosophy in the *Memorial and Remonstrance*, and is
24 generally thought to have authored the First Amendment. Jefferson's *Act for Establishing*
25 *Religious Freedom* was adopted in 1736. Both were advocates of the addition of the Bill of
26 Rights to the Constitution.
27

28 Two things are especially interesting to note in this connection. The first is that there are two
29 clauses in the First Amendment - one having to do with the establishment of religion and the
30 other to do with the free exercise thereof. The establishment clause was very carefully phrased -
31 constructions that would prohibit only preferential establishment or support were defeated. The
32 First Amendment speaks of prohibiting any law respecting an establishment of any religion -
33 thus being a far more sweeping statement. It is the tension between the establishment clause and
34 the free exercise clause which is generating so much controversy today.
35

36 The second point to note is the use of the term "wall of separation between church and state." It
37 is said the *wall* is merely a casual metaphor and has no real judicial standing. But history
38 indicates that Jefferson, who used the phrase in a letter to Danbury Baptists in 1802, did so only
39 after conferring with his lawyer and after thoughtful consideration. The Supreme Court has seen
40 fit to regard it with some significance and has quoted it extensively since the last quarter of the
41 19th century.
42

43 Massachusetts in 1833 became the last state to disestablish the church. The state then proceeded
44 to establish a state board of education for free public schools in 1837. A leader in this movement
45 was Horace Mann, who is rightly called the father of the public school system in the U.S.
46 American patterns in religion were beginning to change dramatically as waves of Catholics and

47 Jews immigrated. They naturally resented the predominantly Protestant form of public education
48 and were instrumental in having Congress in 1876 require new states to write into their
49 constitutions provision for the creation of a non-sectarian public school system.

50
51 The 20th century has seen a flurry of activity in the church-state field. As the Roman Catholic
52 Church grew from the smallest to the largest and richest single church in the country, as it moved
53 through strong anti-Catholic and Know-Nothing sentiment to take a respected place in a
54 pluralistic society, it created its own school system. Its right to do so was upheld by the Supreme
55 Court in *Pierce vs. Society of Sisters* in 1925 which overturned an Oregon law requiring all
56 parents to send their children to state public schools.

57
58 After World War II the parochial school system grew rapidly, though now it is experiencing a
59 decline. In a 1930 case, *Cochran vs. Louisiana*, the court held valid a state law authorizing use of
60 public funds to supply school books to both public and parochial school children under the so-
61 called “child benefit” theory, though that rationale is regularly challenged by advocates of the
62 separation of church and state. In the *Everson* case of 1947 the Court, while upholding the right
63 of parochial school children to reimbursement for bus transportation in New Jersey, unanimously
64 affirmed the wall of separation between church and state, though dividing on its application here
65 5-4. In the *McCullum* and *Zorach* cases the Court forbade religious education in the public
66 schools and upheld the right to so-called “released time” education off school premises. In two
67 controversial decisions, *Engel* (1962) and *Abington* (1963) the Court struck down state
68 supported prayers and Bible reading in the public schools as an establishment of religion.

69
70 In 1964 Congress passed the Economic Opportunity Act and in 1965 the Elementary and
71 Secondary Education Act providing millions of dollars for parochial schools. Finally, in 1971 the
72 Court struck down state aid programs in Pennsylvania and Rhode Island that supplemented
73 salaries of teachers of secular subjects, as an “excessive entanglement between government and
74 religion.” That ruling was decisive in the 1972 decision of a three-judge federal court in New
75 York which struck down a provision in New York State that would have provided tuition grants
76 to parents of non-public school children – commonly called Parochial aid.

77

78 Church and State in New York

79
80 *No money shall ever be paid out of the state treasury or any of its funds, or any of the funds*
81 *under its management, except in pursuance of an appropriation by law; nor unless such payment*
82 *be made within two years next after the passage of such appropriation act; and every such law*
83 *making a new appropriation or continuing or reviving an appropriation, shall distinctly specify*
84 *the sum appropriated, and the object or purpose to which it is to be applied; and it shall not be*
85 *sufficient for such law to refer to any other law to fix such sum. (Derived in part from former §21*
86 *of Art. 3. Adopted by Constitutional Convention of 1938 and approved by vote of the people*
87 *November 8, 1938.)*

88
89 In the 1840’s the public schools were Protestant in nature. As Catholics increased in the state,
90 Bishop John Hughes formed the first Roman Catholic party in an endeavor to de-Protestantize
91 the public schools and to obtain state funds for a separate parochial school system. Although the
92 party was overwhelmingly defeated, the schools were formally made public in 1842, and in 1844

93 the legislature prohibited expenditure of public funds for parochial schools. In 1894 the
94 substance of this law was written into the State Constitution under the leadership of eminent
95 jurist Elihu Root. Article II, section 3, reads: “*Neither the state nor any subdivision thereof shall*
96 *use its property or credit or any public money, or authorize or permit either to be used, directly*
97 *or indirectly, in aid or maintenance other than for examination or inspection, of any school or*
98 *institution of learning wholly or in part under the control or direction of any religious*
99 *denomination in which any denominational tenet or doctrine is taught.*”

100
101 In 1938 this article was amended to provide for transportation of children to and from parochial
102 as well as public schools. Then, in 1965, over the objection of State Attorney General Louis
103 Lefkowitz who believed it unconstitutional, Governor Rockefeller signed into law a bill allowing
104 the state to purchase and to loan secular text books to children in public schools and parochial
105 schools on request. After long court battles, this law has been upheld (*Allen*). In 1967 a revised
106 state constitution was soundly defeated largely on grounds of deleting Article II, section 3. Then
107 in 1970, \$28 million more found its way to parochial schools for state-mandated record keeping
108 services. The 1971 legislature voted \$33 million more to private and parochial schools as direct
109 tuition grants. It was that law, similar to those nullified in Pennsylvania and Rhode Island,
110 (Lemon and DiConse) that the U. S. Federal Court struck down. The Fleischmann Commission,
111 which studied financing education in New York State, had recommended against such aid. In
112 2007 Governor Spitzer submitted a plan for give tax deductions to parents of children who attend
113 private and parochial schools. We opposed that policy as we oppose current policies regarding a
114 educational tax credit.

115
116 Arguments for opposing such proposals are three: **public policy, church and state separation**
117 **and freedom of religion.**

118
119 Public Education: A strong public school system (in which academic freedom, diversity and
120 multi-cultural educational opportunities are protected) is fundamental to the democratic form of
121 government and the development of good citizenship. While public education benefits from
122 some measure of local supervision and sensitivity to local needs, its financing needs to assure
123 that all school systems are capable of providing quality education. Schools created by and
124 accountable to private interests should be the subject of careful study before any experimentation
125 or implementation.

126 127 **Public Education**

128 A strong public school system (in which academic freedom, diversity and multi-cultural
129 educational opportunities are protected) is fundamental to the democratic form of government
130 and the development of good citizenship. IINYS supports a transparent and fair funding formula
131 that insures equal access to learning opportunities for all students. Schools seeking public
132 funding, but created by and accountable to private interests, should be the subject of careful
133 study before any experimentation or implementation. IINYS does not support charter schools nor
134 vouchers when they take resources from the already established public schools. The limited
135 experience with vouchers shows that, except for a very small percent, they are used to support
136 parochial education with public tax dollars. (from the “Policy Principles” and Policy Statements)

137

138 **Public policy.** The concept of free universal education is one of America's great contributions to
139 the world. The public school, with all its deficiencies, is a living laboratory in democracy. At
140 their best they teach those democratic values without which our nation could not long survive -
141 freedom, tolerance, the dignity of human personality among others. These values have no
142 denominational labels, and charging the public schools to teach the religion of secular humanism
143 is creating a straw man. It is the task of religious communities to supplement these values, to
144 give them sanction no public school can and to aid persons in their search for ultimate values and
145 life meaning.

146
147 Parochial schools tend toward segregation. During the civil rights era of the 1960's and 1970's
148 they were often been used to escape court ordered integration in the public schools. The 1967
149 report of the Civil Rights Commission, "Racial Imbalance in the Public Schools," found that
150 non-public schools contribute to racial imbalance in public schools. It is self-evident that
151 parochial schools are segregated by religion (Catholic schools are 97% Catholic). Parochial
152 schools can select students who enroll in them by their own standards, while public schools must
153 accept all comers.

154
155 In addition there are civil libertarian issues raised. Parochial schools are not subject to regulation
156 by the state (and perhaps should not be) in the guarantees of civil liberties as are the public
157 schools. In public schools all issues of public policy are open to debate without indoctrination. It
158 is hard to believe that on such public issues as abortion, birth control, over-population and others
159 the teaching in parochial schools is or can be objective in this sense.

160
161 There are strong historical arguments for strict separation of church and state. In England, with
162 its established church, religion is admittedly weak, while with the American tradition of church
163 state separation it flourishes. The same pattern exists in much of Europe with state-established
164 churches and relatively small participation.

165
166 State aid to parochial schools will inevitably increase schisms in our pluralistic society at a time
167 of increasing harmony among religious groups. There is danger of a proliferation of religious and
168 other private groups establishing schools if public funds are available. The Fleishman
169 Commission in its reports noted that no studies could be cited to demonstrate the value of free
170 market competition between school systems.

171
172 Finally, there is economics – the allocation of scarce resources. With increased pressure on the
173 state budget, exacerbated by the property tax cap which limits school districts, the public schools
174 are in financial crisis. It stands to reason every dollar given to parochial schools takes a dollar
175 from public schools. The threat of closing parochial schools and “dumping” millions of students
176 on public schools is not only ethically questionable as a tactic but it does not paint an accurate
177 picture.

178
179 **Church/State Separation.** The "child-benefit" theory is often used as justification for increased
180 aid. This position can be summed up as follows: parental rights to educate children are prior to
181 those of the state, therefore parents may create private schools for this purpose. The state has a
182 duty to encourage and assist parents in this education. The state does this without violating the
183 Constitution by aiding the child directly, not the religious school itself. It is this theory which

184 undergirds both fringe benefits like busing and more direct benefits like educational voucher
185 plans.

186
187 First, it is a fiction to say that public funds aid the child but not the school. What public funds do,
188 however indirect, is to free other funds for support of the whole school. The school is an organic
189 whole; aid to one part is aid to all parts. One cannot have it both ways. One cannot say, as one
190 Papal Encyclical says, that all education must be permeated by Christian (meaning Catholic)
191 piety and then say there are secular subjects; one cannot say the public school deals with the
192 three R's while the parochial school deals with the three R' s (for which public money is sought)
193 AND a fourth R, religion, when the admitted purpose of parochial schools is religious education
194 through the curriculum.

195
196 Secondly, the child benefit theory allows indirectly what the federal constitution prohibits
197 directly. New York State's constitution deals specifically and properly with this point prohibiting
198 "direct or indirect" aid. The child benefit theory is obviously designed to circumvent church/state
199 separation.

200
201 Third, by pursuing this theory to its logical conclusion there is a potential "slippery slope" to
202 increased subsidization of parochial schools by the state. In referring to this theory which
203 influenced parts of the federal Elementary and Secondary Act, the Jesuit weekly *America*
204 editorialized: "The child-benefit principle is capable of being extended to every phase of
205 education other than the directly religious ... (this) is a beginning rather than an end." If adopted,
206 this theory would take New York State well along the road of funding two large educational
207 establishments with public monies, one private, one public.

208
209 Some say rejection of the child-benefit theory amounts to double taxation. Parents who wish to
210 send their children to parochial schools, which is their right, must pay taxes to support the public
211 schools which they do not use. They are also required to pay parochial school tuition. This is not
212 double taxation by any stretch of the imagination. Public taxes are compulsory; religious
213 contributions are not. Parents of all children have access to public schools which are supported
214 by all (including those who do not have children in public schools). Citizens pay for many public
215 services which they may never use. Parochial school parents freely choose a religious school just
216 as other parents may choose some other private school. But this does not entitle either to public
217 funds.

218
219 State support for parochial schools compels citizens to pay taxes for the support of parochial
220 schools whose philosophy of education they reject, and yet have no means to influence them. On
221 the other hand, all citizens have the right to influence policy in the public schools. Public grants
222 to parochial schools are nothing short of taxation without representation. This is still tyranny.

223
224 Interfaith Impact contends that children are benefited by a public school system generously
225 supported, integrated by race, religion, educational and economic levels, which teaches
226 democratic values without sectarian label.

227
228 But the question of the establishment of religion has been dealt with by the Supreme Court at
229 length and seems clear in principle. The state cannot aid one church or all churches. This has

230 been the principle which has contributed to the strength and independence of America's religious
231 communities. The establishment clause does not infringe on the free exercise of religion. To say
232 the state will protect free exercise of religion is not to say it must assist that religion by the
233 compulsory machinery of the state.

234
235 **Freedom of Religion and Voluntarism:** Finally, public support of parochial schools violates a
236 belief in freedom of religion and the principle of voluntarism. It is symbolized in religious
237 communities which support themselves, without government aid. No one compels people of faith
238 to contribute to their chosen house of worship; it is a matter of free will because people believe
239 in certain values which a particular community of faith represents. Under this principle churches
240 in this country have flourished. The state generally has not interfered in the free exercise of
241 religion; people of faith remain free to exercise their liberties without penalty of the state because
242 there are no entangling alliances between them.

243
244 The price for voluntarism is not too high to pay when it provides our citizens freedom to practice
245 religion or not as they choose. Eroding that principle would undermine freedom of religion in
246 America. It was James Madison who warned: "... it is proper to take alarm at the first
247 experiment of our liberties." Such experiments are now underway, and it is vital for citizens to be
248 alert to them and to prevent future damage. Separation of church and state is represented by that
249 valuable wall of which Jefferson spoke - for the good of both communities of faith and the state
250 and the benefit of all.

251 252 **Current Education Tax Credit Proposals**

253
254 The United States has a long history of church and state separation. A series of Supreme Court
255 decisions has traced a course that is somewhere between a bright line and a hazy boundary
256 between government and religious organizations. Nowhere has the issue been more intensely
257 joined than when that distinction relates to education. Section 7 Article 7 of the New York State
258 Constitution requires that all appropriations must be "distinctly specified."

259
260 In the 2015 legislative session Governor Cuomo proposed an Education Tax Credit which could
261 be claimed by individuals who gave to scholarships for private and parochial schools. They
262 would receive a 75% credit rate, with individual credit amounts capped at \$1 million. Any
263 unused credit would be carried over to a subsequent year. Both businesses and individuals would
264 be eligible to receive the credit on personal or corporate income tax returns. Total credits would
265 be capped at \$100 million per year.

266
267 A related bill that passed the NYS Senate January 21 would allow a 90% credit rate and would
268 allow credits totaling \$675 million over the next three years. The Governor's bill limited
269 scholarship recipients to families with incomes under \$300,000, while the Senate bill would
270 increase that amount to \$550,000.

271
272 An alternative bill submitted in June 2015 provided for an Education Expense Deduction of
273 \$3000 per student with a maximum deduction of \$12,000. (The tax credit differs from a tax
274 deduction in that the former decreases tax liability on a dollar for dollar basis, while the latter

275 simply reduces the taxable amount of income). None of these proposed bills was passed into law,
276 though it is expected they will appear in one form or another in the 2016 legislative session.

277
278 IINYS believes this violates church/state separation. The State should focus on adequate funding
279 for public schools. Private individuals and entities may establish their own schools without
280 public funds. This proposal a backdoor voucher program that diverts focus from public schools
281 and subsidizes non-public schools.

282
283 In January of 2015 Comptroller Thomas DiNapoli’s Fiscal Stress Monitoring Program reported
284 that 90 school districts out of 672 (13%) were at least “susceptible” to fiscal stress,” 10 were
285 found to have “significant” stress, not including New York City, Buffalo, Rochester, Syracuse
286 and Yonkers. The 2007 court decision brought by the Alliance for Quality Education still has not
287 been implemented by the state to provide for a “basic, sound education” for every child in the
288 state. An educational tax benefit clouds the fundamental need for equitable funding of New York
289 State public schools. We reject Governor Cuomo’s statement, “They need to do more with less,”
290 even as he proposes policies which will unfairly benefit private persons and entities while
291 depriving public schools of needed resources.

292
293 Private, including parochial, schools are free to discriminate against students they accept on the
294 basis of disability, gender, religion, economic status, or sexual orientation and may refuse to
295 admit students who have a history of poor academic performance or disciplinary issues. They
296 drain the school of public funds while requiring taxpayers to indirectly subsidize schools whose
297 values they do not share and have no means of monitoring. Tax advantages of such a program
298 disproportionately favor the wealthy without benefitting the poor.

299
300 *Policy Recommendation: Interfaith Impact believes that a program of educational tax credits not*
301 *only threatens religious liberty but also potentially diverts money from the public to the private*
302 *sector. Such a program lacks accountability. Citizens are free to establish private, including*
303 *religious, schools, but they must be funded with private funds. Public schools are the great*
304 *leveler, open free to all students and must be the priority of the State.*

305
306 Notes:
307 Ed Doerr – Americans for Religious Liberty
308 Americans United – Rob Boston
309 FFRF.org 608-256-8900
310 Secular.org
311 NYCLU 212-607-3300
312 *One Nation Under God* – Kruze
313 CitizenAction.org – re. charter schools