AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

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Separation of Church and State:

Is the Wall Crumbling? Edd Doerr's column in America

"The 'establishment of religion' clause of the First Amendment," the Supreme Court ruled in 1947 in *Everson v Board of Education* "means at least this: ***Neither a state nor the Federal Government can … pass laws which aid one religion, aid all religions, or prefer one religion over another. … No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. … In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and s***tate'. … That wall must be kept high and impregnable. We would not approve the slightest breach."

The First Amendment owes much to James Madison's magnificent, seminal 1785 Memorial and Remonstrance Against Religious Assessments, which among a list of 15 arguments for church-state separation made this important point, "Who does not see that the same authority which can … can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

Benjamin Franklin put it even more sharply years earlier. "When a religion is good," he wrote, "I conceive it will support itself; and when it does not support itself, and God does not take care to support it so that its professors [adherents] are obliged to call for help of the civil power, 'tis a sign, I apprehend, of its being a bad one."

Our courts generally stuck to the Jefferson/Madison/Everson position for many years, though the situation heated up when Congress in 1965 passed the Elementary and Secondary Education Act (ESEA), which quite unnecessarily, according to Leo Pfeffer, included some tax aid to sectarian private schools. Legal challenges were not immediately forthcoming, however, because of a 1924 Supreme Court precedent that blocked "mere" taxpayers from having "standing" to bring lawsuits. The "standing" question was settled by the Supreme Court in 1968 in the *Flast v Cohen* case challenging New York State tax aid to faith-based schools. The Court approved taxpayer standing but upheld the state law. It was not until 1971 in *Lemon v Kurtzman* that the Supreme Court ruled against state aid to church schools in Pennsylvania and Rhode Island.

As late as 1991 in a joint ARL/ACLU lawsuit, *Lamont v Woods* the US Second Circuit Court of Appeals in New York unanimously found unconstitutional a Reagan-era law that provided US funding for faith-based schools in other countries. The George H. W. Bush administration declined to appeal to the Supreme Court, so the ruling was left standing.

But change was in the wind. After Reagan's election in 1980 the Supreme Court began drifting away from Everson [italics], until today, when a slim majority of the justices have not only eviscerated both *Everson* and *Flast* but thumbed their noses at Madison, Jefferson, Franklin and the majority of our constitutional founders. The whole story is told in an extraordinary new book by two law professors ----

God, Schools, and Government Funding by Laurence H. Winer and Nina J. Crimm. Ashgate, 2015, 281 pp, $119.95.

Winer and Crimm trace in meticulous detail, with over a thousand footnotes, the evolution (or devolution) of the Supreme Court's rulings on every conceivable angle for diverting public funds to special interest faith-based private schools, a very gradual process at first but one that has accelerated in recent years to the point where today the financial wall of separation may be crumbling to pieces. While this book was written by law professors for law professors and law students (hence the high list price), the basic text is readily accessible to all readers. The authors analyze school vouchers, various forms of tax credit aid, and the latest gimmick, Educational Savings Accounts (ESAs) and their variants, and then disect how the High Court has not only whittled away at separation but also undermined the "standing" rights of citizens and taxpayers to even bring challenges to church-state separation violation in the courthouse door.

(Interesting, at least for me, is that the very first page quotes Justice William Brennan's dissent in the *Valley Forge Christian College v Americans United* ruling in 1982**:** "Plainly hostile to the Framers' understanding of the Establishment Clause, and *Flast's* enforcement of that understanding, the Court vents that hostility under the guise of standing, 'to slam the courthouse door against plaintiffs who [as the Framers intended] are entitled to full consideration of their [Establishment Clause] claims on the merits'."; I was one of the plaintiffs in that case.)

Also interesting is the authors' single reference to the neglected 1973 Supreme Court ruling in 1973 in *Norwood v Harrison* a Mississippi textbook loan case in which *Everson* was not dispositive. The Court ruled that since textbook loans "are a form of tangible financial assistance benefitting the schools themselves", "A state's constitutional obligation requires it to steer clear not only of operating the old dual system of racially segregated schools but also of giving significant aid to institutions that practice racial *OR OTHER* invidious discrimination." (Cited in my 1975 article in the *Valparaiso University Law Review*.) As most sectarian private schools do practice some forms of "invidious discrimination", too complex to detail in this article, it's too bad that *Norwood* remained unused.

The book has its heroes, justices like William Brennan and Hugo Black, and villains, like Antonin Scalia and Clarence Thomas, not to mention the presidents who nominated the last two.

This book easily merits five stars and demands the widest possible readership. Nonetheless it is not without an occasional minor glitch. The authors, lawyers but not educators, occasionally allude to a certain "dissatisfaction" with public schools, largely the result of incessant propaganda by those who would sabotage public education for private gain, but do not discuss what many leading educators say our public schools need to improve: more adequate and more equitably distributed funding, smaller classes, wraparound social and medical services, protection of teacher rights, less emphasis on testing, an end to the diversion of public funds to special interest private and charter schools, and serious efforts to alleviate the poverty that afflicts one quarter of our school population.

So, with the federal and state courts no longer the staunch defenders of church-state separation, religious liberty and public education they once were, what's to be done? With 90% of our nation's kids in local public schools, which the annual Gallup/PDK education polls show that the vast majority of Americans give an A or B rating to – despite the endless sniping at public schools by conservative and Religious Right media and corporate special interests – all Americans who value our heritage of democratic public education, religious freedom and church-state separation need to make their voices heard loud and clear. They need to revitalize their interest in our schools and basic freedoms. They need to be active politically, to elect federal and state legislators and presidents and governors and judges who support those values. They need to stand behind our beleaguered public schools and dedicated teachers.

It cannot be reiterated too often that every time Americans have had the chance to vote in referenda on various plans to divert public funds to private schools, from Florida to Alaska and from Massachusetts to California between 1966 and 2014 in 28 state elections, many millions have voted against such misuse of public funds by an average two to one margin. (Details on the referenda may be found in my essay "The Great School Voucher Fraud" at arlinc.org.) The most recent defeats for tax aid to sectarian schools were in Florida in 2012, where Jeb Bush's school voucher plan was shot down by voters by 55% to 45%, and in Hawaii in 2014, where a similar plan was knocked out by the same margin. And four decades of Gallup/PDK polls have shown the same levels of opposition.

This fight, along with the struggles to advance reproductive choice and deal with climate change and overpopulation, is one that should involve not only humanists but also Catholics, Protestants, Jews, "nones" and others who share these concerns. We are all in this together.

For more from Edd Doerr see

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