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in the
American Law

CARL ZOLLMANN

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BY

CARL ZOLLMANN
Member of the Chicago Bar, Author of "American Civil Church Law"

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The public school system of the United States can be traced back to the first settlement in Massachusetts. Judge Shaw of the Massachusetts Supreme Court in 1845 said: "The establishment of schools for the education, to some extent at least, of all the children of the whole people, is not the result of any recent enactment; it is not the growth even of our present constitutional government or the provincial government which preceded it, but extends back two hundred years, to the early settlement of the colony." [1] It is recorded that as early as 1650 a certain town in Massachusetts made a grant to certain individuals at a general town-meeting "for the use of the school." [2] Grants to newly founded towns for public grammar schools and public education in general for the ministry and for the first settled minister,[3] or grants for a glebe, for the first settled minister and for a school,[4] were common in those days. State and church, town and parish, secular and religious matters, of course, were not kept separate. The towns acted not only as towns, but also as parishes, performing with the same organization and by the same officers both municipal and parochial duties. Hence it frequently became difficult to determine when they acted in the one capacity and when in the other. Very often the only criterion was the character of the act done. If it fell within the province of the town, it was deemed municipal; if within the province of the parish, it was deemed parochial. There was frequently only one set of records, in which were indiscriminately blended acts and votes of both characters.[5] When such towns made provision for religious instruction, they were as beneficially interested as when they voted and assessed money for the support of schools.[6] Not infrequently the settled

1) 1845, Cushing *v.* Newburyport, 51 Mass. (10 Met.), 508. 511; quoted in 1867, Jenkins *v.* Andover, 103 Mass., 94. 98.

2) 1844, Grammar School *v.* Andrews, 49 Mass. (8 Met.), 584.

3) 1839, State *v.* Cutler, 16 Me., 349.

4) 1815, Pawlet *v.* Clark, 13 U. S. (9 Cranch), 292, 3 L. Ed., 735.

5) 1837, Ludlow *v.* Sikes, 36 Mass. (19 Pick.), 317. 322. 323.

6) 1824, Alna *v.* Plummer, 3 Me., 88.

minister of a town would act also as teacher, being thus engaged by the town in both of its capacities. The same officials also would frequently administer both the ministerial and the school-funds.[7] That such funds under such circumstances would not be kept separate was but a natural consequence. This is strikingly illustrated by Connecticut, which for a long time carried on its schools through the agencies of "societies." Under a statute of 1795 money belonging to such a society for school purposes could, on a two-thirds vote of it, be appropriated "for the support of the Christian ministry or the public worship of God." [8] Under such an arrangement such a society clearly had the right to such funds and their interest, "to be applied to the support of schooling, or of the ministry in said society, at their discretion and pleasure." [9] That legal difficulties should arise out of such a fusion of interests, particularly at the time when town and parish parted company, was to be expected.[10] Even Congress, after the Declaration of Independence, in the case of Ohio, made a grant partly for school and partly for religious purposes.[11]

These faint beginnings of a public school system, however, did not satisfy the needs of our forefathers. Accordingly, private schools connected with dissenting churches, or secular organizations, or founded by charitable donations, or conducted as downright business ventures, came into existence, and flourished and decayed according to circumstances. In some cases such schools received a subsidy from the town or city in which they were located, and thus assumed somewhat like a semi-official character.[12] With the advent of the public school system under the leadership of Horace Mann, during the two decades preceding the Civil War, such schools, so far as they were business ventures, were generally crushed out of existence, and, so far as they were connected with secular organizations, were voluntarily given up, having served their purpose. So far as they were charities, they were generally

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7) 1835, Dutton *v.* Kendrick, 12 Me. (3 Fairf.), 381. 384.

8) 1896, Cargel *v.* Grosvenor, 2 Root 458 (Conn.).

9) 1794, Sage *v.* White, 2 Root 111 (Conn.).

10) 1837, Ludlow *v.* Sikes, 36 Mass. (19 Pick.), 317. 326. 327. 1838, Medford *v.* Medford, 38 Mass. (21 Pick.), 199. 1851, First Parish in Sudbury *v.* Jones, 62 Mass., 184.

11) 1841, State *v.* Trustees of Section 29, 11 Ohio, 24. Section 1, Article 6, Ohio Constitution of 1851, speaks of property entrusted to the State "for educational and religious purposes."

12) 1885, Busby *v.* Mitchell, 23 S. C., 472.

absorbed into the public school system. The so-called *cy pres* doctrine was applied to them to save the gift and adapt it to the changed conditions.[13] Nothing generally was nearer to the presumed intentions of the donors than was the public school system.[14] The courts, therefore, were delighted to carry out the general intentions of donors by appointing the public school authorities as trustees of such property [15] by authorizing long-time leases of such property to them,[16] by merging charities created for the purpose of educating certain children in agricultural and mechanical arts with the public school system,[17] by applying a gift to establish a female academy in a certain place to the support of the local public school established for the education of both sexes,[18] and even by establishing a library with the funds provided by the gift.[19] When Maine became a State, a great variety of acts and resolves of Massachusetts passed in pursuance of the policy of appropriating land for public purposes were found to be applicable to its territory. It was deemed impracticable and inexpedient to carry all these purposes into literal effect. While the charities were upheld, they were turned as much as possible into the channels of the public schools.[20]

Nor did denominational schools generally fare better in this regard. While church institutions of higher education generally retained their hold, denominational primary schools in most cases voluntarily yielded themselves up to the public schools and were merged into them. The means by which these changes were effected were, of course, as various as the circumstances which surrounded them. The public authorities in many cases simply

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13) 1896, *In re* John's Will, 30 Oreg., 494. 509; 47 Pac., 341; 50 Pac., 226; 36 L. R. A., 242. 1895, Attorney General *v.* Briggs, 164 Mass., 561; 42 N. E., 118. 1896, Green *v.* Blackwell, 35 Atl., 375. 376 (N. J.).

14) 1849, Klinkener *v.* School Directors, 11 Pa., 444. 447.

15) 1915, Lakatong Lodge *v.* Franklin Township, 84 N. J. Eq., 112. 116; 92 Atl., 870.

16) 1894, Madison Academy *v.* Richmond, 16 Ky. Law Rep., 51; 26 S. W., 187.

17) 1912, Mars *v.* Gibert, 93 S. C., 455. 467; 77 S. E., 131.

18) 1889, Adams Female Academy *v.* Adams, 65 N. H., 225; 18 Atl., 777. See 1906, Inglish *v.* Johnson, 42 Tex. Civ. App., 118. 123; 95 S. W., 558; *contra* 1910, Allen *v.* Nasson Institute, 107 Me., 120. 123; 77 Atl., 638.

19) 1880, *In re* Lower Dublin Academy, 8 Weekly Notes Cases, 564 (Pa.).

20) 1883, Union Parish Society *v.* Upton, 74 Me., 545.

took over the buildings, the school facilities, the pupils, and the teachers with or without any formal contract,[21]) and for a while at least conducted them in very much the same manner in which they had been conducted before the change. Among other customs the saying of Protestant prayers, the singing of Protestant hymns, and the reading of the Bible was continued in many of these schools, just as if nothing at all had happened. In other instances, particularly in the newer States, the public schools were completely secularized, and the reading of the Bible, the saying of prayers, and the singing of religious hymns was discontinued completely.

It was this feature which is primarily responsible for the fact that one church — the Roman Catholic — staunchly retained its parochial school system built up during the time when there were no public schools in the present-day acceptation of that term. Such schools, whether they retained the reading of the Bible, the saying of prayers, and the singing of religious hymns, or whether they abolished these customs, were about equally objectionable to the Church of Rome. In the first case it was the Protestant Bible that was read, it was Protestant hymns that were sung, and it was Protestant prayers that were uttered. In the second case it was felt that a godless school could not but produce a godless generation of men and women. With great determination the Catholics therefore now assumed the double burden of supporting not only their own schools, but also the public school system, which was rapidly growing in size.

It was but natural, however, that great dissatisfaction with this situation should be felt. Attempts to bring about some modification of it were therefore to be expected. These, while they scored some local successes, could not assume national importance during the long-drawn-out debate which preceded the Civil War, during the four years of that conflict, and during the Reconstruction Period which followed immediately after. It was not till President Grant's second administration that such attempts were made on a grand scale. The matter was taken up by Catholic journals, and the Catholic side of it was presented with great ability by many writers.[22]) In a number of the larger cities changes of one kind or another were actually effected. The Democratic party was used as the silent instrument of this propaganda. This made the question a national political issue, and as such it was

21) 1862, Pott *v.* Pottsville, 42 Pa. (6 Wright), 132.

22) See Hecker, *Catholics and Education*, published in 1875.

taken up by the Republican party. At a convention of the Army of the Tennessee, assembled at Des Moines, Iowa, on September 29, 1875, President Grant countered to the agitation by saying: —

> The centennial year of our national existence, I believe, is a good time to begin the work of strengthening the foundations of the structure commenced by our patriotic forefathers one hundred years ago at Lexington. Let us all labor to add all needful guarantees for the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men, irrespective of nationality, color, or religion. Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. 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. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the Church and the State forever separate. With these safeguards, I believe the battles which created the Army of the Tennessee will not have been fought in vain.[23])

This blow at the movement the President appropriately followed up in his seventh annual message delivered to Congress, December 7, 1875, in which to "oppose a successful resistance to tyranny and oppression from the educated few, . . . whether directed by the demagog or by priestcraft," he suggested, and most earnestly recommended, as the primary step to our advancement in all that has marked our progress in the past century,

> that a constitutional amendment be submitted to the legislatures of the several States for ratification, making it the duty of each of the several States to establish and forever maintain free public schools adequate to the education of all the children in the rudimentary branches within their respective limits, irrespective of sex, color, birthplace, or religions; forbidding the teaching in said schools of religious, atheistic, or pagan tenets, and prohibiting the granting of any school-funds, or school-taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination.[24])

This message brought another great national figure into the controversy. James G. Blaine was then the leader of the House, and was soon to become known on account of his magnificent personality as the "plumed knight." The famous alliteration, "Rum, Romanism, and Rebellion," through which he was defeated by

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23) Hecker, *Catholics and Education*, 180; Sevett, *American Public Schools*, 72.

24) *Congressional Record*, Vol. 4, Part 1, p. 175.

Grover Cleveland for the Presidency in 1884, has come echoing down the corridors of time. Exactly a week after President Grant had submitted his message, he introduced before the House of Representatives a joint resolution to amend the Constitution of the United States by adding thereto the following provision: —

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[25])

The question was now before the country for discussion. The famous Tilden-Hayes campaign of 1876, which was to bring the country to the verge of another Civil War, was coming on, and the controversy now became one of its issues. While the Democratic platforms of 1876, both State and national, contained no allusion to it, a number of Republican State platforms referred to it in no uncertain terms, while the Republican National Convention of that year, assembled at Cincinnati, adopted the following plank as part of its platform: —

The public school system of the several States is the bulwark of the American Republic; and with a view to its security and permanence, we recommend an amendment to the Constitution of the United States forbidding the application of any public funds or property for the benefit of any school or institution under sectarian control.[26])

It was under these circumstances, while the political canvass of 1876 was in progress, that the Blaine resolution came to a vote in the House on August 4th. As voted on, it was not identically the same as submitted, the principal change being the addition of a clause to the effect that the provision was not to "vest, enlarge, or diminish legislative powers in the Congress."[27]) It was passed by an overwhelming majority, one hundred and eighty members voting for and only seven against it, while ninety-eight members abstained from voting. When, however, it reached the Senate three days later, it was at once pointed out that it lacked either honesty or intelligence, because it left the National Government free to act as it pleased, and only prohibited, after a fund had been

25) *Ibid.*, p. 205.

26) Paragraph 7, Platform of the Republican National Convention of 1876.

27) *Congressional Record*, Vol, 4, Part 6, p. 5190.

raised for, or land donated to, public school purposes, the diversion of such fund or land to sectarian purposes,[28] leaving the States free to devote other public funds or other public lands to church purposes. Accordingly, the resolution was referred to the Committee on the Judiciary, which promptly reported it back on August 11th in an amended form, which in part reads as follows: —

No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution under the control of any religious or antireligious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or antireligious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit, and no such appropriation or loan of credit shall be made to any religious or antireligious sect, organization, or denomination, or to promote its interests or tenets.[29]

It is entirely clear that this amendment had bristles, horns, teeth, and claws, while the resolution as voted on in the House was very largely in the nature of political *camouflage,* quite unobjectionable to the one side, but having the appearance of satisfying the demands of the other. It resulted on August 14, 1876, in a partisan vote, twenty-seven Republican senators and one "anti-monopolist" voting for it, and sixteen Democratic senators voting against it, while twenty-seven senators were absent, and was lost because a two-third majority is required for the passage of such resolutions.[30] With it the agitation for a Federal amendment in regard to this matter has come to an end, though President Grant, in his eighth and last message to Congress in the following December, repeated his recommendation for such an amendment.

But while no amendment to the Federal Constitution has resulted from the agitation, it must not be supposed that it has had no definite consequences. On the contrary, its results have been of the most far-reaching character. As a sequel of this movement nine of the ten States since admitted into the Union have been required, as a condition of admission, to provide by an ordinance irrevocable, without the consent of the United States and the people of the new State, that provision shall be made "for the establishment and maintenance of systems of public schools, which shall be open to all children of said State and free from sectarian control," and eight of these States have literally complied with this

28) *Ibid.*, pp. 5245. 5246. 29) *Ibid.*, p. 5453. 30) *Ibid.*, p. 5595.

condition.[31]) This compact more effectually protects the public school system from sectarian inroads than do the few scattered constitutional provisions which antedate the controversy, and are similar in their general scope to it, substantially providing that no religious sect shall ever control any part of the State school-funds.[32]) The word "sectarian" in such and similar provisions, of course, is used in its popular sense, and covers every denomination, and forbids the use of public funds, directly or indirectly, for the support or building up of any church.[33]) Under such provisions Church and State are effectually separated. The former must pursue its mission without aid from the latter. "Any scheme, even though hallowed by the blessing of the Church, that surges against the will of the people as crystallized into their organic law, must break in pieces, as breaks the foam of the sea against the rock on the shore." [34])

The reason why sectarian control of the public schools has thus been prohibited is not far to seek. Such control will inevitably result in the use of public money for sectarian purposes, either by inculcating sectarian tenets in the public schools, or by using the public school funds for the support of sectarian schools. Both these specific results of sectarian control have therefore been specifically interdicted by a number of State constitutions.

Only two States before 1875 had provisions specifically forbidding sectarian instruction in the public schools. The Wisconsin constitution, adopted in 1848, made it obligatory on the legislature

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31) Such condition has been incorporated into the various enabling acts. The following are the names of the States that have been affected by this policy, and a reference to the place in their constitution in which they have accepted such proposition: Arizona (1912), Art. 20; Montana (1889), Ordinance attached to Constitution; New Mexico (1912), Art. 21, Sec. 4; Oklahoma (1907), Schedule attached to Constitution; see Art. 1, Sec. 5; South Dakota (1889), Art. 22; Art. 26, Sec. 18; Utah (1895), Art. 3; see Art. 10, Sec. 1; Washington (1889), Art. 26; see Art. 9, Sec. 4; Wyoming (1889), Art. 21, Ordinance, Sec. 5. The same condition was imposed on North Dakota, and was fulfilled by its constitution of 1889, though not in the form of a compact. Art. 8, Sec. 147. The constitution of Idaho (1889) does not contain this provision; see Art. 21, Sec. 19.

32) Kansas (1859), Art. 6, Sec. 8; Nebraska (1866), Art. 2, Title: Education, Sec. 1; Ohio (1851), Art. 6, Sec. 2; readopted in 1912, Art. 6, Sec. 2; Mississippi (1868), Art. 8, Sec. 9; substantially readopted in the constitution of 1890, Sec. 208.

33) 1882, State *v.* Hallock, 16 Nev., 373. 385. 387.

34) 1888, Cook County *v.* Industrial School for Girls, 125 Ill., 540. 563; 18 N. E., 183; 8 Am. St. Rep., 386; 1 L. R. A., 437.

to provide by law for the establishment of District Schools, and laid it down that "no sectarian instruction shall be allowed therein." [35] The Nevada constitution, adopted during the Civil War, provided that "no sectarian instruction shall be imparted or tolerated in any school or university that may be established under this constitution." [36] As a direct result of the agitation such provisions have now become more numerous. It will, however, not be profitable to set them out in full as they vary only in phraseology. They are substantially copies from the Nevada provision above cited. Their shorter form is exemplified by the Colorado constitution, adopted in 1876, which is as follows: "No sectarian tenets or doctrines shall ever be taught in the public schools," [37] and has been substantially copied by the Montana [38] and Idaho [39] constitutions. A somewhat longer form is in force in South Dakota, California, Arizona,[40] and Nebraska. The latter is fairly representative of the others and reads as follows: "No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes." [41] The Wyoming constitution is the most explicit, providing, as it does, that no sectarian instruction shall be imposed, exacted, applied, or in any manner tolerated in the schools of any grade or character controlled by the State, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under the constitution.[42]

Turning now to the other side of the question, it must be admitted that constitutional provisions forbidding the granting of public funds for sectarian schools were comparatively more numerous before 1875. The Massachusetts constitution, as amended in 1855, provided that

> all moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authori-

35) Wisconsin (1848), Art. 10, Sec. 3.

36) Nevada (1864), Art. 11, Sec. 9.

37) Colorado (1876), Art. 9, Sec. 8.

38) Montana (1889), Art. 11, Sec. 9.

39) Idaho (1889), Art. 9, Sec. 6.

40) South Dakota (1899), Art. 8, Sec. 16; see Art. 6, Sec. 3; California (1879), Art. 9, Sec. 8; Arizona (1912), Art. 11, Sec. 7.

41) Nebraska (1875), Art. 8, Sec. 11.

42) Wyoming (1889), Art. 7, Sec. 12.

ties of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school.[43])

This amendment was adopted because of a deep-seated conviction of the impressive necessity of preserving the public school system in its integrity and of guarding it from attack or change by explicit mandate, but does not refer to colleges and universities.[44]) Under it a privately endowed high school, whose trustees are three clergymen and five members of such clergymen's congregations (to be chosen by the town), in which no sectarian influence is to be used, but in which the Bible is to be in daily use, and in which the Lord's Prayer is to be audibly uttered each morning by teachers and pupils, has been held not to be a public school, so as to be in a position to be aided by taxation.[45]) Similarly the constitutions of five western or middle western States provided that no money was to be drawn from the public treasury for the benefit of any religious or theological institution,[46]) or any religious societies, or religious or theological seminaries,[47]) or any religious sect or society, theological or religious seminary.[48])

What existed in the nature of such constitutional provisions before the school agitation, however, was slight as compared with what was produced in consequence of it. Three States, New Hampshire, Minnesota, and Nevada, the first two in 1877, the last in 1880, accomplished the desired results by a constitutional amendment. Illinois, Pennsylvania, and Missouri acted as early as 1870, 1873, and 1875, respectively, accomplishing their purpose through new constitutions. Texas, Colorado, and California had acted before 1880. Florida followed in 1885, and Idaho, Montana, North Dakota, Washington, and Wyoming took the same action in 1889. Mississippi ushered in the last decade of the last century by falling in line in 1890, and was joined by Kentucky, New York, South Carolina, Utah, and Delaware before the dawn of the new century. Alabama was the first to act in the twentieth century, and found worthy successors in Oklahoma, New Mexico, New Hampshire, and

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43) Massachusetts Constitution, 18th Amendment.

44) 1913, *In re* Opinion of Justices, 214 Mass., 599. 601. 102 N. E., 464.

45) 1869, Jenkins *v.* Andover, 103 Mass., 94.

46) Indiana (1851), Art. 1, Sec. 6; Oregon (1857), Art. 1, Sec. 5.

47) Wisconsin (1848), Art. 1, Sec. 18; Minnesota (1857), Art. 1, Sec. 16.

48) Michigan (1850), Art. 4, Sec. 40. This provision was readopted in the constitution of 1908, Art. 2, Sec. 3.

Louisiana. Only one of the States which acted during these many years favored the opposing view. The constitution of Georgia, adopted in 1877 and still in force, provides that nothing contained in its public school provisions shall be construed to deprive schools of the State not common schools "from participation in the educational fund of the State, as to all pupils therein taught in the elementary branches of an English education." [49] Georgia therefore, outside of Maine, whose constitution was adopted in 1819, and which makes it the duty of the legislature "to encourage and suitably endow from time to time, as the circumstances of the people may authorize, all academies, colleges, and seminaries of learning within the State," [50] is now the only State which by its fundamental law in terms permits the use of public funds for sectarian purposes. It has therefore been said with complete truth that "the policy of prohibiting the use of funds belonging to all for the benefit of one or more religious sects has been adopted in most of the States." [51]

The very first State to take action in this matter was Illinois. The school agitation was in its early infancy when the State adopted a new constitution in 1870. In it it was provided that

> neither the general assembly nor any county, city, town, township, school, district, or other public corporation shall ever make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State or any such public corporation to any church or for any sectarian purpose.[52]

This provision proved to be so popular that it was copied with immaterial variations by Missouri in 1875,[53] by Colorado in 1876,[54]

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49) Georgia (1877), Art. 8, Sec. 5. But see Art. 1, Sec. 1, Par. 14, which provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution." See also 1909, Wilson *v.* Stanford, 133 Ga., 483; 66 S. E., 258.

50) Maine (1819), Art. 8.

51) 1891, Synod of Dakota *v.* State, 2 S. D., 366. 373; 50 N. W., 632; 14 L. R. A., 418.

52) Illinois (1870), Art. 8, Sec. 3.

53) Missouri (1875), Art. 11, Sec. 11.

54) Colorado (1876), Art. 9, Sec. 7.

by California in 1879,[55] by Montana [56] and Idaho [57] in 1889, and by Utah in 1895.[58] In view of this fact the construction which it has received at the hands of the Illinois court is of the greatest interest.

It is perfectly apparent that this provision is a check on the public financial officers of the State and its subdivisions, which is self-executing, and which, therefore, requires no legislation to make it effective.[59] It is equally clear that it applies only to funds belonging to public corporations, and is intended to prohibit the use, for sectarian or religious purposes, of funds which form a part of the public revenues of the State.[60] Since its second part refers to "grants or donations," the provisions of the first part against any appropriation or payment "from any public fund whatever" is not intended to refer merely to gratuities, but to cover cases where a *quid pro quo* is given. The court says that if denominational institutions "are entitled to be paid out of the public funds, even though they are under the control of sectarian denominations, simply because they relieve the State of a burden which it would otherwise be itself required to bear, then there is nothing to prevent all public education from becoming subjected, by hasty and unwise legislation, to sectarian influences." [61] It has therefore been held that Catholic asylums in which there are morning and evening prayers according to the Catholic religion, in which the familiar Catholic images are in evidence on every hand, and in which all inmates, Catholic or otherwise, are required to kneel at certain times and places, are schools controlled by a church within the provision, that a contract by a county to pay money out of the public funds "in aid" of them, or to "help support or sustain" them, is absolutely void, since the constitutional prohibition against *paying* money is equally a prohibition against a *contract* for such payment, and that the mere fact that the payment is made to an "industrial school," a separate corporation, controlled, however, by

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55) California (1879), Art. 4, Sec. 30.

56) Montana (1889), Art. 11, Sec. 8.

57) Idaho (1889), Art. 9, Sec. 5.

58) Utah (1895), Art. 10, Sec. 13.

59) 1888, Cook County *v.* Industrial School for Girls, 125 Ill., 540; 18 N. E., 183; 8 Am. St. Rep., 386; 1 L. R. A., 437.

60) 1910, Stead *v.* Commons of Kaskaskia, 243 Ill., 239. 263; 90 N. E., 654.

61) 1888, Cook County *v.* Industrial School for Girls, 125 Ill., 540. 570. 571; 18 N. E., 183; 8 Am. St. Rep., 386; 1 L. R. A., 437.

the same persons as are the asylums, is immaterial, since such school is acting as the mere disbursing agent of the asylums.[62] The same holding has been made in regard to a Catholic training-school, the facts being substantially the same, the school being in part a proselyting agency, accepting both Catholic and non-Catholic inmates, and strongly tending toward graduating its non-Catholic protégés into the Catholic Church.[63] A far closer question has recently been presented in connection with an industrial school which accepted only Catholic children. The court in this case has held that the religious liberty of such inmates would be violated if they were not allowed to receive the same denominational education in the institution which they would have received at home. Hence it has held that an appropriation of $15 per month for each inmate, while $28.88 is required for the same purpose at a similar State institution, is not void as being given "in aid of any church or sectarian purpose or to help support or sustain any school," and that it is the State, and not the industrial school, which is benefited by the payment of less than the cost of food, clothing, medical care, attention, education, and training bestowed upon such inmates.[64]

The other provisions can be more or less readily disposed of, being all identical in purpose, though varying considerably in form. In four States — Pennsylvania, Texas, Florida, and South Dakota — there are separate provisions, one forbidding all appropriations for the benefit of any sectarian or religious society or institution,[65] or any sect or religious society, theological or religious seminary,[66] or any denominational or sectarian institution, corporation, or association,[67] or in aid of any church, sect, or religious denomination, or sectarian institution,[68] while the more specific provisions forbid the appropriation of money raised for the support of the public schools of the Commonwealth [69] or the permanent or available school-fund,[70] as well as the County or

62) 1888, Cook County *v.* Industrial School for Girls, 125 Ill., 540. 558. 565; 18 N. E., 183; 8 Am. St. Rep., 386; 1 L. R. A., 437.

63) 1893, Stevens *v.* St. Mary's Training-school, 144 Ill., 336; 32 N. E., 962; 18 L. R. A., 832; 36 Am. St. Rep., 438.

64) 1917, Dunn *v.* Chicago Industrial School, 280 Ill., 613; 117 N. E., 735.

65) South Dakota (1899), Art. 6, Sec. 3.

66) Texas (1876), Art. 1, Sec. 7.

67) Pennsylvania (1873), Art. 3, Sec. 18.

68) Florida (1885), *Declaration of Rights*, Sec. 6.

69) Pennsylvania (1873), Art. 10, Sec. 2.

70) Texas (1876), Art. 7, Sec. 5.

District school-funds,[71]) or more generally, any lands, money, or other property or credits,[72]) for the support or in aid of any sectarian school.

The limitation of the operation of some of these provisions to school-funds or money raised for school purposes is practically rendered innocuous by the other more general provisions in the same instruments. This, however, cannot be said of some other States whose constitutions merely forbid the appropriation of money raised by taxation[73]) or for the support of the public schools[74]) for the use of sectarian schools, leaving other funds not raised by taxation, or even money raised by taxation, but not specifically for the support of the public schools, to be disposed of according to an unlimited discretion. The same holds good in regard to the constitutions of Delaware and New Mexico, which, respectively, are as follows: —

No portion of any fund now existing, or which may hereafter be appropriated or raised by tax for educational purposes, shall be appropriated to, or used by, or in aid of, any sectarian, church, or denominational school.[75])

No part of the proceeds arising from the sale or disposal of any lands granted to the State by Congress, or any other funds appropriated, levied, or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college, or university.[76])

The remaining provisions are clear and comprehensive, though using different expressions, such as money,[77]) public money,[78]) public money or property,[79]) money of the State,[80]) any funds,[81]) public funds of any kind or character whatever, State, county, or munic-

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71) Florida (1885), Art. 12, Sec. 13.

72) South Dakota (1899), Art. 8, Sec. 16.

73) New Hampshire (1912), Art. 82. This is merely a readoption of the amendment of 1877.

74) Alabama (1901,), Sec. 263; North Dakota, Art. 8, Sec. 152; Louisiana (1913), Art. 253. But see Art. 53.

75) Delaware (1897), Art. 10, Sec. 3.

76) New Mexico (1911), Art. 12, Sec. 3.

77) Missouri (1875), Art. 2, Sec. 7.

78) California (1879), Art. 9, Sec. 8.

79) Arizona (1912), Art. 2, Sec. 12; Minnesota (1857), Art. 8, Sec. 3; Oklahoma (1907), Art. 2, Sec. 5; Utah (1895), Art. 1, Sec. 4; Washington (1889), Art. 1, Sec. 11.

80) Wyoming (1889), Art. 1, Sec. 19.

81) Mississippi (1890), Sec. 208.

ipal,[82]) and forbidding their appropriation for sectarian purposes [83]) for the use, benefit, or support of any sectarian institution as such [84]) to any denominational or sectarian institution or association,[85]) to any sectarian or religious society or institution,[86]) to any religious worship, exercise, or instruction, or for the support of any religious establishment [87]) in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof as such,[88]) toward the support of any sectarian school,[89]) for the support of any sectarian or denominational school,[90]) or for the support of schools wherein the distinctive doctrines, creeds, or tenets of any particular Christian or other religious sect are promulgated or taught.[91]) Their spirit is reflected by the New York, South Carolina, and Oklahoma constitutional provisions, which, respectively, are as follows: —

Neither the State nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.[92])

The property or credit of the State of South Carolina, or of any county, city, town, township, school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society, or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society, or organization.[93])

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support

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82) Nevada (1864), Art. 11, Sec. 10. This amendment was adopted in 1880.

83) Nevada (1864), Art. 11, Sec. 10. This amendment was adopted in 1880.

84) Oklahoma (1907), Art. 2, Sec. 5.

85) Colorado (1876), Art. 5, Sec. 34.

86) Wyoming (1889), Art. 1, Sec. 19.

87) Arizona (1912), Art. 2, Sec. 12; Utah (1895), Art. 1, Sec. 4; Washington (1889), Art. 1, Sec. 11.

88) Missouri (1875), Art. 2, Sec. 7.

89) Mississippi (1890), Sec. 208.

90) California (1879), Art. 9, Sec. 8; Kentucky (1891), par. 189.

91) Minnesota (1857), Art. 8, Sec. 3. Amendment adopted 1877.

92) New York (1894), Art. 9, Sec. 4.

93) South Carolina (1895), Art. 11, Sec. 9.

of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.[94])

Three of these constitutional provisions have been construed by the courts. It hardly need be mentioned that they are self-executing, and therefore require no legislation to make them operative. Under the Nevada provision an orphan asylum which received Catholics and Protestants, and in which Catholic exercises were held, at which all the inmates were required to be present, has been held not to be entitled to take any contribution from the State.[95]) Similarly a university in South Dakota which maintained and promulgated the doctrines of the Presbyterian Church has been disqualified from receiving payments from the State for the tuition of students at its normal department, on the ground that it was a sectarian school. The court, in rendering this decision, pointed out that any other holding would enable one leading denomination to get control of the school institutions and funds of the State under the guise of receiving pay for its services.[96]) In construing the Kentucky provision, the Kentucky Supreme Court says:

> The constitution not only forbids the appropriation for any purpose or in any manner of the common school-funds to sectarian or denominational institutions, but it contemplates that the separation between the common school and the sectarian or denominational school or institution shall be so open, notorious, and complete that there can be no room for reasonable doubt that the common school is absolutely free from the influence, control, or domination of the sectarian institution or school.[97])

A provision levied expressly against sectarian schools, however, is not absolutely necessary to accomplish the desired result. Not a few of the constitutions have provisions laying it down that certain funds shall be "inviolably appropriated to,"[98]) or kept inviolate[99]) for, the purpose of sustaining a system of common schools, or shall "be faithfully used and applied each year for the

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94) Oklahoma (1907), Art. 2, Sec. 5.

95) 1882, State *v.* Hallock, 16 Nev., 373. 378.

96) 1891, Synod of South Dakota *v.* State, 2 S. D., 366. 373; 50 N. W., 632; 14 L. R. A., 418.

97) 1917, Williams *v.* Stanton Common School District. 173 Ky., 708. 725; 191 S. W.. 507; L. R. A., 1917, D. 453, withdrawing 172 Ky., 133; 188 S. W., 1058, on rehearing.

98) Connecticut (1818), Art. 8, Sec. 2; Indiana (1851), Art. 8, Sec. 3; Iowa (1857), Art. 9, Title 2, Sec. 3; Kansas (1859), Art. 6, Sec. 3.

99) Maryland (1867), Art. 8, Sec. 3.

benefit of the common schools of the State." [100] It is clear that under such a provision such funds cannot be appropriated to any school which is not a public school, no matter how undenominational and unsectarian it may be.[101] Much less can it be appropriated to a denominational school. Under a constitutional provision by which the revenue of the school-fund is to be applied to the support of the common schools, the legislature cannot appropriate to a religious orphan asylum a part of such revenue. Religious faith is not to be propagated at the public expense.[102] Even an orphan house conducted by a city is not a "free public school" within the meaning of the South Carolina constitution, not being open to all.[103] Such a fund, therefore, must be applied to such schools only as come within the uniform system devised, and under the general supervision of the State superintendent are free from all sectarian religious control, and ever open to all children of the proper age within the proper district. To hold that the common school-fund can be diverted to the building up of private educational enterprises of this character, would be plainly violative of the fundamental purpose of its creation and the constitutional safeguards thrown around it.[104]

A number of Western States have had especial reasons, on account of the presence of the Mormon Church, to be watchful to retain their liberty of conscience. Accordingly, the constitution of Wyoming requires that no sectarian qualification or test shall be imposed, exacted, applied, or in any manner tolerated in the schools of any grade or character controlled by the State.[105] Similarly the constitutions of Arizona, Colorado, Idaho, Montana, and Utah provide that no religious test or qualification shall ever be required of any person as a condition of admission into any educational institution of the State, either as teacher or student.[106] The Idaho constitution further stipulates that no books, papers,

100) North Dakota (1889), Sec. 154.

101) 1872, Halbert *v.* Sparks, 72 Ky. (9 Bush.), 259; 1892, Underwood *v.* Wood, 93 Ky., 177; 19 S. W., 405; 15 L. R. A., 825; 1874, Collins *v.* Henderson, 74 Ky. (11 Bush.), 74; 1870, People *v.* Allen, 42 N. Y., 404; 1872, Gordon *v.* Cornes, 47 N. Y., 608.

102) 1851, People *v.* Board of Education, 13 Barb., 400.

103) 1884, *Ex parte* Malone, 21 S. C., 435. 411.

104) 1879, Otken *v.* Lamkin, 56 Miss., 758. 764. 765.

105) Wyoming (1889), Art. 7, Sec. 12.

106) Arizona (1912), Art. 11, Sec. 7; Colorado (1876), Art. 9, Sec. 8; Idaho (1890), Art. 9, Sec. 6; Montana (1889), Art. 11, Sec. 9; Utah (1895), Art. 10, Sec. 12.

tracts, or documents of a sectarian or denominational character shall be used or introduced in any public school,[107] while Wyoming forbids any requirement to attend any religious services "therein." [108] This last provision is broadened by the Idaho and Colorado constitutions to read: "No teacher or student of any such institution shall ever be required to attend, or participate in, any religious services whatever"; [109] and this latter provision is substantially copied by Montana.[110] In Nebraska and South Dakota the State has even been prohibited from accepting "any grant, conveyance, or bequest of money, lands, or other property to be used for sectarian purposes." [111]

There can be no question but that this solution of the difficulty, no matter what hardships it implies to those who retain their parochial schools, is the only solution which will keep Church and State apart. Any arrangement by which parochial schools are allowed to participate in the public school-funds cannot but result in denominational political pressure. Contribution of public funds to denominational institutions must inevitably result in a close public control over them. This, in turn, has the further inevitable consequence of bringing these denominations into the smirched arena of practical politics with a view of shaping such control to suit their own purposes. Where any one denomination or a combination of them is strong enough, it will further inevitably lead to a shifting of such control from the State to these denominations. Instead of the denominational schools being controlled by the public authorities, the spectacle will be presented of the public schools being controlled by the denominations. Such a result bids defiance to all the conceptions of religious liberty by which the American people have been guided. The utter impolicy of any such arrangement has been vividly illustrated by a Michigan case of fairly recent date. In this case the limits of a school district and those of a Catholic parish appear to have been substantially identical. Land was bought and title taken in the name of the bishop. A school-building was built thereon partly by church subscription, partly by public taxes. A teacher was installed who was satisfactory to the Church, who taught the

107) Idaho (1890), Art. 9, Sec. 6.

108) Wyoming (1889), Art. 7, Sec. 12.

109) Idaho (1890), Art. 9, Sec. 6; Colorado (1876), Art. 9, Sec. 8.

110) Montana (1889), Art. 11, Sec. 9.

111) Nebraska (1875), Art. 8, Sec. 11; South Dakota (1889), Art. 8, Sec. 16.

Catholic religion in the school, and whose salary was made up partly from church-contributions, partly from tuition-money, and partly from public school-funds. Finally, the school officers became dissatisfied with the teacher and sought to remove him. When the bishop resisted this move, they took possession of the building and held it by stationing one of their members there, who remained on his post day and night. This led the priest in charge of the parish on the following Sunday to organize his congregation into a procession, which made its way to the schoolhouse with a view of ousting the school trustee. His resistance to this process brought the matter into the court. The Supreme Court refused to hold that the bishop and the priest "were guilty of receiving public funds in an illegal and unconstitutional manner," though that was the gist of their own contention, and unscrambled the weird situation presented to it by holding that the building was a public school, and that the bishop was merely a trustee for the school district.[112] In view of the facts of this case, the truth of the following extract from an opinion of the Tennessee court is perfectly apparent: —

> It is contrary to law and to public policy to allow the public school-money to be invested in property in which any religious denomination or society or any other person has any interest or rights. Constant contention and friction is sure to arise while the building is being so used; and when it is desired to sell it, the respective rights of the parties would inevitably draw them into litigation.[113]

The situation in connection with the National Government is of great interest. There is plainly nothing in the Federal Constitution which forbids a contract by the Government with an institution controlled by a Church. Such a contract made by authorized Federal agents with a hospital controlled by a Church for the rendition of actual services in nursing the sick or preventing contagion, has therefore been upheld by the United States Supreme Court in a case arising in the District of Columbia as not being in conflict with the First Amendment of the United States Constitution.[114] Nor has Congress absolutely abstained from making even out-and-out contributions to sectarian institutions of various kinds at various periods of our national existence.[115] In the case of Ohio not only has Section 16 of each township been reserved by

112) 1894, Richter *v.* Cordes. 100 Mich., 278. 284; 58 N. W., 1110.

113) 1896, Swadley *v.* Haynes, 41 S. W., 1066. 1068 (Tenn.).

114) 1898, Robert *v.* Bradfield, 12 App. D. C., 453. 472; affirmed, 175 U. S., 291; 44 L. Ed., 168; 20 S. C., 121.

115) See instances cited in 1898, Robert *v.* Bradfield, *supra.*

Congress for the use of the schools, but Section 29 of each township has similarly been reserved for the use of religion within each township.[116] In view of this situation the following declaration of Congress made in 1897, in an act making appropriations for the District of Columbia, while it does not and cannot control any subsequent legislation, is of special interest: —

> It is hereby declared to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding, by payment for services, expenses or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control; and it is hereby enacted that, from and after the thirtieth day of June, 1898, no money appropriated for charitable purposes in the District of Columbia shall be paid to any church or religious denomination, or to any institution or society which is under sectarian or denominational control.[117]

The policy of this statutory declaration has been illustrated particularly by the action of Congress toward the Indians. Before 1894 the Government regularly appropriated public funds for the sectarian education of the Indians. Opposition to this practise developing in 1894, it was declared in the appropriation act of 1895 to be "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." Such appropriations were thereupon gradually decreased, till they ceased altogether in 1899, "the final appropriation for sectarian schools" having been made in that year. Such declarations, however, did not make a contract for sectarian instruction void where trust- or treaty-funds are involved. These are the property of the Indians, and may be spent for them by the Government for their sectarian education.[118]

Before taking up the parochial school situation in particular, it will be well to dispose of a number of specific religious or semi-religious questions that have arisen in connection with the public school system. Where State and Church are united as they are in most European countries, and as they were at one time in most of the thirteen colonies, there is no occasion for a separation of secular and religious education. Both are under the same authority, and can most conveniently be given in the same building. Where,

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116) 1841, State *v.* Trustees of Section 29, 11 Ohio, 24. 26. See Sec. 1, Art. 6, of the Ohio constitution of 1851 and 1912, which speaks of property entrusted to the State "for educational and religious purposes."

117) 29 Statutes at Large, 683.

118) 1908, Quick Bear *v.* Leupp, 210 U. S., 50; 28 S. C., 690.

however, there is a separation of Church and State, as is the case now in the United States, a great difficulty presents itself. The boundary between religious and secular education is not clearly defined, and is, in fact, a broad zone rather than a line. The State needs the softening influence of religion to round out the education of its future citizens, while the churches cannot but recognize the great advantage of secular knowledge to their members. While attempts on the part of the churches to impart secular knowledge in conjunction with their religious instruction are unobjectionable, since the State does not claim any monopoly in the educational field, attempts by the State to teach religion in addition to reading, writing, arithmetic, and other secular subjects, all constitutional questions entirely aside, at once lead to very serious practical difficulties. While there is no disagreement in regard to the elements of secular knowledge, there is a very decided difference of opinion concerning the relation of God to man. While arrangements satisfactory to all can occasionally be made for the teaching of religion in the public schools where all the inhabitants of a district are of the same faith, such a situation, far from being the rule, is rather a rare exception. Ordinarily any arrangement by which any form of religious instruction is given in a public school must in its very nature come into conflict with the religious convictions of a part of its patrons. That interesting questions of religious liberty have grown out of this situation cannot be cause for any surprise.

In dealing with this question, the historical background must not be disregarded. Our public schools have developed very largely from the scattered schools which at one time existed in connection with the various established churches, and from schools founded by religious devotees as charitable institutions. In view of this history it is not surprising that prayers should have been recited in the public schools, that religious hymns should have been sung, and that the Bible should have been read. This custom has not only prevailed quite generally in the public schools particularly of the older States, but prevails to some extent to-day and has gone unchallenged in most instances. So well is the practise recognized that the constitution of Mississippi provides that its religious freedom provision shall not be construed "to exclude the Holy Bible from use in any public school of this State." [119] As a part of the stringent resolution for an amendment of the United

119) Mississippi (1890), Art. 3, Sec. 18.

States Constitution, which was the result of the school agitation of 1875, and which was defeated by the Senate on August 14, 1876, it was expressly declared that such provision "shall not be construed to prohibit the reading of the Bible in any school or institution." [120] The value of Bible-instruction has also been recognized by a Federal statute enacted in 1888, which provides that at day- or industrial schools, sustained wholly or in part by appropriations from the Government, at which schools church organizations are assisting in the educational work, "the Christian Bible may be taught in the native language of the Indians, if in the judgment of the persons in charge of the schools it may be deemed conducive to the moral welfare and instruction of the pupils in such schools." [121]

When, however, the decisions concerning the question of Bible-reading in the public schools are examined, a conflict is at once discovered. Such reading has been proscribed in Louisiana on the complaint of Jews and Catholics as being a preference toward some and a discrimination against other religions.[122] It has been held in Wisconsin, Nebraska, and Illinois that such reading is "sectarian instruction" and "public worship," and as such is forbidden by the constitutions of those States.[123] In the Nebraska case, however, the court, on rehearing, eliminates the contention that Bible-reading is an act of public worship. In the Wisconsin case one of the judges even went so far as to hold that by such reading the common schools were converted into "theological seminaries." [124] The Illinois court, though its previous decisions seemed to point to a recognition of Bible-reading in the public schools,[125] has excluded the Bible entirely, while the Nebraska and Wisconsin courts bar it only so far as it is sectarian, and not so far as it teaches "the fundamental principle of moral ethics." They have, however, not laid down any definite tests as to just

120) *Congressional Record*, Vol. 4, Part 6, p. 5453.

121) 25 U. S. Statutes at Large, 239.

122) 1915, Herold *v.* Parish Board of School Directors, 136 La., 1034; 68 So., 116; L. R. A., 1915, D., 941.

123) 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; 1910, People *v.* Board of Education, 245 Ill., 334; 92 N. E., 251; 1902, State *ex rel.* Freeman *v.* Scheve, 65 Nebr., 853; 93 N. W., 169; 59 L. R. A., 927.

124) 1890, State *ex rel.* Weiss *v.* Edgerton School District, *supra.*

125) 1879, Nichols *v.* School Directors, 93 Ill., 61; 34 Am. Rep., 160; 1880, McCormick *v.* Burt, 95 Ill., 263; 35 Am. Rep., 163; 1891, North *v.* University of Illinois, 137 Ill., 296; 27 N. E., 54.

where moral instruction ends and sectarian instruction begins, thus leaving school boards who should attempt to authorize Bible-reading in the schools in a difficult and embarrassing position. In all the other States in which the question has been raised the practise has been upheld. In some of these States the constitutional provisions are different, and this may explain the difference in the result.[126] In others, however, they are substantially the same as in Wisconsin, Nebraska, and Illinois; but the courts take a different view of their meaning.[127] The key to these latter decisions is given in a Texas case, where the court says that "Christianity is so interwoven with the web and woof of the State government that to sustain the contention that the constitution prohibits reading the Bible, offering prayers, and singing songs of a religious character in any public building of the Government would produce a condition bordering upon moral anarchy," and "starve the moral and spiritual natures of the many out of deference to the few." [128] The position of the Illinois court, and to a less extent that of the Wisconsin and Nebraska courts, is probably well expressed in the following extract from an Ohio case: —

> To teach the doctrines of infidelity, and thereby teach that Christianity is false is one thing; and to give no instructions on the subject is quite another thing. The only fair and impartial method, where serious objection is made, is to let each sect give its own instructions elsewhere than in the State schools, where of necessity all are to meet.[129]

It has also been a general practise, particularly in new and sparsely settled country districts, to hold religious services and Sunday-schools in the public-school houses at such hours as not to conflict with the conduct of the schools.[130] The question has

126) 1854, Donahue *v.* Richards, 38 Me., 379; 61 Am. Dec., 256; 1866, Spiller *v.* Woburn, 94 Mass., 127; 1894, Nestle *v.* Hun, 1 N. P., 140; 2 Ohio, Dec. 60.

127) 1898, Pfeiffer *v.* Detroit Board of Education, 118 Mich., 560; 77 N. W., 250; 42 L. R. A., 536; 1884, Moore *v.* Monroe, 64 Iowa, 367; 20 N. W., 475; 52 Am. Rep., 444; 1907, Church *v.* Bullock, 100 S. W., 1025; 109 S. W., 115; 16 L. R. A. (N. S.), 860 (Tex.); 1904, Billard *v.* Topeka Board of Education, 69 Kans., 53; 76 Pac., 422; 66 L. R. A., 166; 105 Am. St. Rep., 148; 1905, Hackett *v.* Brookville Graded School District, 120 Ky., 608; 87 S. W., 792; 69 L. R. A., 592; 117 Am. St. Rep., 599. See notes in 16 L. R. A. (N. S.), 860, and 2 Ann. Cas., 522.

128) 1907, Church *v.* Bullock, *supra*, at end of opinion.

129) 1872, Board of Education *v.* Minor, 23 Ohio St., 211. 253.

130) 1856, Sheldon *v.* Center School District, 25 Conn., 224.

arisen whether this is proper. Some courts, in passing on this question, have held that the school authorities have no power to appropriate the school-building to any use not strictly educational, and have therefore enjoined its use for religious services.[131] Other courts have held the determination of the electors or school officials conclusive, whether the same was favorable or unfavorable to such use.[132] In none of these cases was the question discussed whether or not such use was in harmony with the constitution of the State. The Indiana Appellate Court merely has raised the question whether a constitutional provision that "no man shall be compelled to attend, erect, or support any place of worship" is violated by such use.[133] The Kansas court has indicated strongly that such use amounts to taxation for private purposes, and should be enjoined.[134] The Illinois Supreme Court has upheld such use against the objection that it compelled the taxpayers of the district to support a place of worship against their consent, saying: "Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State."[135] The Nebraska Court has held that religious meetings held in a school-house on Sunday four times a year do not constitute it a place of worship.[136] The Iowa Court, after declaring that the propriety of such use "ought not to be questioned in a Christian State,"[137] met the same argument with which the Illinois Court had been confronted, as follows: —

The use of a public school-building for Sabbath-schools, religious meetings . . ., which of necessity must be occasional and temporary, is not so palpably a violation of the fundamental law as to justify the courts in interfering. Especially is this so where, as in the case

131) 1858, Scofield *v.* Eighth School District, 27 Conn., 499; 1905, Baggerly *v.* Lee, 37 Ind. App., 139; 73 N. E., 921; 1878, Dorton *v.* Hearn, 67 Mo., 301; 1897, Bender *v.* Streabish, 182 Pa., 251; 37 Atl., 853; 1900, Spring *v.* Harmar Township, 31 Pitts Legal J., 194.

132) 1901, Boyd *v.* Mitchell, 69 Ark., 202; 62 S. W., 61; 1909, School Directors *v.* Toll, 149 Ill. App., 541; 1874, Hurd *v.* Walters, 48 Ind., 148; 1898, Eckhardt *v.* Darby, 118 Mich., 199; 76 N. W., 761.

133) 1905, Baggerly *v.* Lee, 37 Ind. App., 139; 73 N. E., 921.

134) 1875, Spencer *v.* Joint School District, 15 Kans., 259; 22 Am. Rep., 268.

135) 1879, Nicholls *v.* School Directors, 93 Ill., 61. 64; 34 Am. Rep., 160.

136) 1914, State *v.* Dilley, 95 Nebr., 527; 145 N. W., 999.

137) 1872, Townsend *v.* Hagen, 35 Iowa, 194. 198.

at bar, abundant provision is made for securing any damages which the taxpayers may suffer by reason of the use of the house for the purposes named. With such precaution the amount of taxes any one would be compelled to pay by reason of such use would never amount to any appreciable sum. . . . Such occasional use does not convert the schoolhouse into a building of worship within the meaning of the constitution.[138])

Whether an arrangement by which part of the facilities of a church or denominational school are leased to the public school authorities is valid will depend upon circumstances. That such an arrangement, no matter how honestly made, is dangerous to religious liberty where it is long continued and is with a sectarian school, which does not cease to operate, cannot admit of any doubt, and has therefore received the condemnation of the Kentucky court.[139]) An entirely different situation is presented where no sectarian school is involved, or where the arrangement is but temporary, in order to fill a need which cannot otherwise be supplied. No reason is perceived why school authorities cannot lease a vacant building which has been built for parochial school purposes. No valid grounds appear to exist why they may not similarly lease a church-building for school purposes. No discrimination should be made between such property and property used for commercial purposes. The leasing of a church basement for public school purposes [140]) or of its auditorium for the graduation exercises of a public school,[141]) and even an *advancement* of money by a school district to a church in order to enable it to complete its building in time for the use of the school,[142]) have therefore been upheld by various courts. The Wisconsin Court has even held that rooms in a parochial school-building may be leased for public school purposes.[143]) Says the Illinois Appellate Court: "Religious organizations are not under such legal bans that they may not deal at

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138) Davis *v.* Boget, 50 Iowa, 11. 15. 16. See Notes, 32 Ann. Cas., 303; 31 L. R. A. (N. S.), 593; L. R. A. 1917 D., 462.

139) 1917, Williams *v.* Stanton Common School District, 173 Ky., 708; 191 S. W., 507; L. R. A. 1917 D., 453; withdrawing on rehearing, 172 Ky., 133; 188 S. W., 1058. See Note L. R. A. 1917 D., 462.

140) 1886, Millard *v.* Board of Education, 19 Ill. App., 48; affirmed 121 Ill., 297; 10 N. E., 669.

141) 1916, State *v.* District Board of Joint School District No. 6, 162 Wis., 482; 156 N. W., 477; L. R. A. 1916 D., 399.

142) 1897, Swadley *v.* Haynes, 41 S. W., 1066. 1069 (Tenn.).

143) 1908, Dorner *v.* School District No. 5, 137 Wis., 147; 118 N. W., 353; 19 L. R. A. (N. S.), 171.

arm's length with the public in selling or leasing their property, when required for public use, in good faith." [144])

It is no objection to public schoolteachers that they are adherents of any particular denomination. Nor is it an objection to them that they make open profession of their faith at all proper occasions. Whether, however, such profession may take the form of the wearing in the public school-buildings of distinctly religious garbs by teachers, and the display by them of rosaries and crucifixes, is a far closer question. The Pennsylvania Supreme Court in 1894 upheld such a practise, over the dissent of one of its members, remarking that, "in a popular government by the majority, public institutions will be tinged more or less by the religious proclivities of the majority." [145]) This decision proved to be so unpopular that recourse was had to the legislature, which in 1895 passed an act to prevent such practise. The constitutionality of this law has been upheld by the court on the ground that it is directed against acts, and does not interfere with religious sentiment.[146]) In 1906 the same question came before the highest court of New York, which held that a regulation by the State Superintendent forbidding such practise is reasonable and proper on the ground that the wearing of such costumes necessarily inspires respect, if not sympathy, for the religious denomination to which the teacher belongs.[147])

Occasionally school- and church-regulations concerning the conduct of children at certain occasions have come into direct conflict, thus presenting to the children the choice of obeying the will of the State, as crystallized in the school-regulations, or the will of their parents, as expressed by the church-regulations. In the sole case in which this matter has been litigated, the public school authorities have been upheld in their action of excluding Catholic children from the public schools because they had absented themselves in accordance with their church-requirements from such

144) 1886, Millard *v.* Board of Education, 19 Ill. App., 48. 54; affirmed 121 Ill., 297; 10 N. E., 669. See 1864, Perry *v.* McEwen, 22 Ind., 440, and Note L. R. A. 1917 D., 462.

145) 1894, Hysong *v.* School District, 164 Pa., 629. 656; 26 L. R. A., 203; 30 Atl., 482; 44 Am. St. Rep., 632.

146) 1909, Commonwealth *v.* Herr, 39 Pa. Super. Ct., 454; affirmed, designating the opinion as "characteristically well considered," 229 Pa., 132; 78 Atl., 68; Ann. Cas. 1912 A., 422. See Note 42, L. R. A. (N. S.), 33.

147) 1906, O'Connor *v.* Hendrick, 184 N. Y., 421; 77 N. E., 612; 7 L. R. A. (N. S.), 402.

schools on Corpus Christi Day.[148] There can be no question of the correctness of this decision. Any other holding would enable churches to gain a considerable control over the action of the public schools. If the religious convictions of parents are such that they cannot accommodate themselves to the school-regulations, they are at liberty to found and maintain parochial schools, and conduct them in accordance with their church-regulations.

While the public schools have been protected from denominational control, the guarantees of religious liberty contained in the various constitutions require that denominational schools should not be molested. Nor need the search for constitutional protection of parochial schools be confined to the general provisions relating to freedom of conscience. Parochial schools, on the contrary, have received direct recognition in various constitutions, and would unquestionably have received more such recognition had they ever been subjected to a concentrated attack. The famous declaration of the Northwest Territorial Ordinance passed by the Congress of the Confederation in 1787 before the adoption of the Federal Constitution, and before the rise of the public school system, to the effect 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," [149] has been literally copied into the Michigan and North Carolina constitutions,[150] and has been elaborated on by the Nebraska and Ohio constitutions as follows: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." [151] A similar provision is also to be found in the Arkansas constitution.[152] Accordingly, the fundamental law of Delaware exempts from taxation or assessment for public purposes "all real or personal property used for school purposes, where the tuition is

148) 1876, Ferritur *v.* Tyler, 48 Vt., 444. See 12 Can. L. J. (N. S.), 300.

149) Art. 3, Northwest Territorial Ordinance of 1787.

150) Michigan (1908), Art. 11, Sec. 1; North Carolina (1876), Art. 9, Sec. 1.

151) Nebraska (1875), Art. 1, Sec. 4; Ohio (1851 and 1912), Art. 1, Sec. 7.

152) Arkansas (1874), Art. 2, Sec. 25. This provision, however, is not as complete as that of Nebraska and Ohio.

free." [153] The North Carolina constitution in the provision following immediately upon its religious freedom clause says: "The people have the right to the privilege of education, and it is the duty of the State to guard and maintain that right." [154] Similarly the Vermont constitution declares: "All religious societies or bodies of men that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the General Assembly of this State shall direct." [155] The Oklahoma constitution recognizes parochial schools by providing that "the legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the State." [156] The Kentucky constitution is so careful to guard the rights of conscience that it lays it down that no man shall "be compelled to send his child to any school to which he may be conscientiously opposed." [157] The provisions of the Georgia and Maine constitutions have already been referred to.[158] In view of these provisions it cannot admit of any doubt that it is not the "public policy of the State that the children of the State shall not receive any education in any other school than in one of the public schools established by itself." [159]

Nor has this recognition been confined to the constitutions. It has, on the contrary, been bountifully accorded by statutory enactments passed by the various legislatures. These, however, cannot be noticed in detail without expanding this pamphlet into a book. Nor will it be desirable to notice them any farther than they have come before the courts for construction. They are so much subject to every wind of popular favor that nothing permanent can be built up upon them. As well might it be attempted to rear a building on sand dunes. But while statutes come and go, judicial opinions, even though nothing more than constructions of

153) Delaware (1897), Art. 10, Sec. 3.

154) North Carolina (1876), Art. 1, Sec. 27.

155) Vermont (1793 and 1913), Art. 64.

156) Oklahoma (1907), Art. 13, Sec. 4.

157) Kentucky (1890), Sec. 5.

158) See notes 49 and 50 of this pamphlet.

159) 1877, Gilmour *v.* Pelton, 5 Ohio Dec., 447; 2 Weekly Law Bul., 158.

statutes, remain as permanent landmarks, and as such deserve consideration at this place.

Perhaps the largest class of statutes which recognizes parochial schools and has come before the courts relates to the exemption of parochial school property from taxation. While exemptions granted to "public schools" will not be construed to exempt parochial schools, though no charge is made by them for tuition,[160] parochial schools will be included in the exemption where the more general word schoolhouse is used,[161] or where property used for educational purposes [162] or for a seminary of learning [163] is exempted. Where the right to exemption is further qualified, parochial schools, of course, must bring themselves within the law in order to enjoy the benefit. They have under such statutes been denied exemption because they were not owned by some congregation,[164] or because the association which owned them was not incorporated.[165] They have, furthermore, been exempted as charitable institutions or institutions of purely public charity.[166] It has been said that the establishment and maintenance of a school

> out of revenues of the church, and the voluntary contributions of those of its patrons who are able and willing to give, no pecuniary profit being derived therefrom nor expected, the same being open upon equal terms to all children of Catholic parents belonging to the parish, and to all others living therein, of whatever religious belief, who may desire to avail themselves of the same, it being left optional with the latter to receive religious instruction or not, as their parents may choose, is, in the legal sense, not only a charity, but one wholly and entirely of a public nature, and therefore a purely public one.[167]

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160) 1891, People *ex rel.* Pavey *v.* Ryan, 138 Ill., 263; 27 N. E., 1095; 1874, Gerke *v.* Purcell, 25 Ohio St., 229; 1878, St. Joseph's Church *v.* Providence, 12 R. I., 19.

161) 1855, Catholic Society *v.* New Orleans, 10 La. Ann., 73; 1878, First Presbyterian Church *v.* New Orleans, 30 La. Ann., 259; 31 Am. Rep., 224.

162) 1894, United Brethren *v.* Forsyth County, 115 N. C., 489; 20 S. E., 626.

163) 1881, Hennepin County *v.* Grace, 27 Minn., 503; 8 N. W., 761.

164) 1891, People *ex rel.* Pavey *v.* Ryan, *supra.*

165) 1890, Church of St. Monica *v.* New York, 119 N. Y., 91; 23 N. E., 294; 7 L. R. A., 70; reversing 55 Super. Ct. (23 Jones and S.), 160; 13 N. Y. State Rep., 308.

166) 1878, Appeal Tax Court *v.* St. Peter's Academy, 50 Md., 321; 1883, Gilmour *v.* Pelton, 5 Ohio Dec., 447; 2 Weekly Law Bul., 158; 1892, Episcopal Academy *v.* Philadelphia, 150 Pa., 565; 25 Atl., 55. See 1881, Miller's Appeal, 10 Weekly Notes Cas., 168 (Pa.).

167) 1881, Hennepin County *v.* Grace, 27 Minn., 503. 506; 8 N. W., 761.

The recognition of parochial schools as charities is not confined to exemption statutes. If a church is not to pass out of existence, it must educate its younger generation, so that, when the older generation has passed away, there will be men and women to take its place. This purpose has been accomplished in this country, in part, through parochial schools, which therefore are recognized as charities germane to the purposes of a church corporation.[168] Such a school has been held to be clearly within the statute of Elizabeth[169] and to be an unquestionable charity.[170] It follows that it is an institution to which charitable gifts may well be made.[171]

It is indeed impossible to perceive why denominational schools, properly conducted, should not be recognized by the State. The religion which they teach is useful to the State, and the secular knowledge which they impart is certainly no objection to them. Since church-bodies may lawfully establish denominational schools in heathen lands,[172] since they may establish Sunday-schools[173] and cemeteries exclusively denominational,[174] it would follow that they may establish parochial schools in this land of religious liberty. Accordingly, a parochial school has been held to be a private school within the meaning of a statute which makes it the duty of all principals and teachers of schools, public and private, to report to the clerk of the Board of Education.[175] A denominational school

168) 1894, Hanson *v.* Little Sisters of the Poor, 79 Md., 434. 438; 32 Atl., 1052; 32 L. R. A., 293.

169) 1884, Andrews *v.* Andrews, 110 Ill., 223. 231.

170) 1879, De Camp *v.* Dobbins, 31 N. J. Eq. (4 Stew.), 671, affirming 29 N. J. Eq., 36. 53.

171) 1912, Ackerman *v.* Fichter, 179 Ind., 392; 101 N. E., 493; 46 L. R. A. (N. S.), 221; 1845, Newcomb *v.* St. Peter's Church, 2 Sandf. Ch., 636 (N. Y.); 1899, Keith *v.* Scales, 124 N. C., 497. 517; 32 S. E., 809; 1906, Banner *v.* Rolf, 43 Tex. Civ. App., 88. 93; 94 S. W., 1125.

172) 1914, Eaton *v.* Home Missionary Society, 264 Ill., 88; 105 N. E., 746; 1910, Boardman *v.* Hitchcock, 120 N. Y. Supp., 1039.

173) For cases involving Sunday-schools see 1916 Union Sunday-school Association *v.* Christian Church, 171 Ky., 534. 539; 188 S. W., 626; 1909, M. E. Church *v.* Ashbury Sunday-school, 109 Md., 670; 72 Atl., 199; 1899, South Kenton Union Sunday-school Ass'n *v.* Epsy, 17 Ohio Cir. Ct. Rep., 524; 9 Ohio Cir. Dec., 695; 1901, St. Matthew's Church *v.* Schaffer, 25 Pa. C. C., 113; 17 Montg. Co., 122.

174) 1880, People *ex rel.* Coppers *v.* Trustees, 21 Hun., 184. 198.

175) 1891, Quigley *v.* State, 3 Ohio Cir. Dec., 310; 5 Ohio Cir. Ct. Rep., 638. 657.

has been recognized as a private institution, though its funds were raised in part from people outside of the denomination, though it was subsidized by the local government, and though its trustees were non-members.[176] A lease by a village to individuals of its waterworks, which provides that water is to be furnished free to all schoolhouses, has been held to cover the building of a parochial school.[177] Similarly a deed for a parochial school,[178] or a contract to build it,[179] has received judicial recognition. Such schools have with other schools been protected in a measure from the evil influences of a bowling alley [180] or a saloon,[181] by requiring such licensed businesses to remain beyond a certain distance from such school. Their buildings have been held to be occupied exclusively as a schoolhouse within the meaning of such statute, though their upper rooms were occupied by the sisters of charity who taught therein,[182] or even by teachers of the same religious order who did not teach in such building.[183] It has been said that "in view of its obvious policy in protecting the school against the evil influences of the saloon, the statute should be so expounded as to accomplish its benign intent, and to that end be accorded a literal or a liberal interpretation, as may most effectually avert the apprehended mischief." [184] It has been stated that an argument which excludes a private school from the protection of such a statute would exclude colleges, academies, and institutions of instruction of every sort.[185]

It goes without saying, however, that such schools, to a certain extent at least, are subject to the supervision and control of the State. The Arizona constitution, in the very paragraph in which sectarian instruction and religious tests in the public schools are prohibited, provides that "the liberty of conscience hereby secured

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176) 1885, Busby *v.* Mitchell, 23 S. C., 472.

177) 1910, St. Patrick's Church Society *v.* Heermans, 124 N. Y. Supp., 705; 68 Misc. Rep., 487.

178) 1901, St. Paul's Ev. Luth. Church *v.* Gray, 198 Pa., 321; 47 Atl., 976.

179) 1897, Roman Catholic Congregation *v.* O'Leary, 24 Colo., 228; 49 Pac., 422.

180) 1902, Harrison *v.* People, 101 Ill. App., 224.

181) 1910, Greenough *v.* Warwick, 31 R. I., 559; 78 Atl., 262.

182) 1896, People *ex rel.* Cairns *v.* Murray, 148 N. Y., 171; 42 N. E., 584.

183) 1896, People *ex rel.* Claussen *v.* Murray, 38 N. Y. Supp., 609; 16 Misc., 398; affirmed, 39 N. Y. Supp., 1130; 5 App. Div., 441.

184) *Ibid.*

185) 1853, State *v.* Leighton, 35 Me., 195.

shall not be so construed as to justify practises or conduct inconsistent with the good order, peace, morality, or safety of the State, or with the rights of others." [186] Constitutional provisions similar to this are quite frequent. The Massachusetts constitution declares that "all religious sects and denominations demeaning themselves peaceably and as good citizens of the Commonwealth, shall be equally under the protection of the law." [187] The Maryland constitution extends protection to every one of whatever faith, "unless under the color of religion he shall disturb the good order, peace, or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil, or religious rights." [188] The Maine and New Hampshire constitutions extend a similar protection to all, provided that they do not "disturb the public peace nor obstruct (or disturb) others in their religious worship.[189] In its most usual form, however, this provision lays it down that the liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practises inconsistent with the peace and safety (and good order) of the State.[190] In the South Dakota constitution the invasion of the rights of others [191] and in the Montana constitution opposition to State or United States authority [192] are specifically mentioned, while the Idaho, Montana, and Oklahoma provisions are particularly leveled against polygamy.[193] To the honor of the parochial school system it must be said that no question involving it with any of these provisions appears to have been brought into the courts. Nor does any other question concerning their regulation appear ever to

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186) Arizona (1912), Art. 11, Sec. 7.

187) Massachusetts constitution, 11th amendment.

188) Maryland (1867), Declaration of Rights, Art. 36.

189) Maine (1819), Art. 1, Sec. 3; New Hampshire, Part 1, Art. 5.

190) Arizona (1912), Art. 2, Sec. 12; California (1879), Art. 1, Sec. 4; Georgia (1877), Art. 1, Sec. 1, Par. 13; Illinois, Art. 2, Sec. 3; Minnesota (1857), Art. 1, Sec. 16; Nevada (1864), Art. 1, Sec. 4; South Dakota (1889), Art. 6, Sec. 3; Washington (1889), Art. 1, Sec. 11; Wyoming (1889), Art. 1, Sec. 18. The words "and good order" are added by Colorado (1876), Art. 2, Sec. 4; Missouri (1875), Art. 2, Sec. 5; and Montana (1889), Art. 3, Sec. 4. The following provisions are to the same effect, though they differ in form: Florida (1887), Declaration of Rights, Sec. 5; Mississippi (1890), Sec. 18; Idaho (1889), Art. 1, Sec. 4.

191) South Dakota (1889), Art. 6, Sec. 3.

192) Montana (1889), Art. 3, Sec. 4.

193) Idaho (1889), Art. 1, Sec. 4; Montana (1889), Art. 3, Sec. 4; Oklahoma (1907), Art. 1, Sec. 2.

have been adjudicated. While a few cases of State regulation of private schools have been passed upon by the courts,[194] while an attempt to stamp out the foreign languages in the parochial schools of one State has been defeated by political action, which has resulted in the repeal of the statute by which this result was sought to be achieved,[195] no question directly involving any parochial school has found its way into the books. There would seem to be no question, however, that if any parochial school should ever make itself into a handmaid of hostile propaganda, it would be guilty of "practises inconsistent with the peace and safety of the State," and could and should, if it did not desist, be suppressed by the heavy arm of the civil power.

194) See Note 29, L. R. A. (N. S.), 53.

195) This statute was Chapter 519, Laws of Wisconsin of 1889. It put a penalty on parents who did not send their children to school, and declared: "No school shall be regarded as a school, under this act, unless there shall be taught therein, as part of the elementary education of children, reading, writing, arithmetic, and United States history, in the English language." It was repealed by Chapter 4, Laws of Wisconsin, of 1891.

Index to Constitutional Provisions.

(The references are to the footnotes.)

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