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School Privatization and Student Rights: A Comparison of Canadian and American Law Regarding Searches and Seizures Conducted in Privatized Schools

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COMMENT

SCHOOL PRIVATIZATION AND STUDENT RIGHTS: A COMPARISON OF CANADIAN AND AMERICAN LAW REGARDING SEARCHES AND SEIZURES CONDUCTED IN PRIVATIZED SCHOOLS

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I. INTRODUCTION

America's advancement toward school privatization has not been without controversy and uncertainty. The United States

Supreme Court's decision in *Zelman v. Harris*¹ provides one fairly recent example of the broad legal ramifications manifested by school privatization. Although the *Zelman* Court's analysis focused primarily upon potential Establishment Clause violations generated by an Ohio school voucher scheme, the Court's ultimate endorsement of the scheme provides renewed vigor for proponents of various types of school privatization, but more so for those who support voucher programs in particular. With this renewal comes a need to critically assess the responsibilities and privileges conferred to personnel who will work in such privatized schools. Are such employees considered state actors or private actors? What will this distinction mean to policy-makers, parents, and students? Of chief importance to this comment, will it be necessary to modify existing standards which guide school administrators and school police officers in lawfully conducting student searches in America's K-12 education systems? That is, what standards must be followed in "voucher-participating" schools and school districts? Finally, what legal and educational principles underlie such standards?

In order to avoid mistakes in fashioning such standards, American policy-makers might look to their northern neighbors to consider how other countries have dealt with such difficulties. Since the enactment of its Charter of Rights and Freedoms (hereinafter "Canada's Charter" or "Charter"), Canada has considered standards imposed on teachers and administrators in carrying out searches and seizures in private school settings. The purpose of this comment is to compare and contrast how the two countries address the issue in light of their respective constitutions and to determine the legitimacy of the attendant policy decisions. Although there is a glut of literature discussing school vouchers in general, there is a peculiar lack of literature directly confronting the search and seizure issue specifically.

This comment provides an overview of Canada's approach toward school privatization and its treatment of teachers and administrators in privatized public schools as either "government agents/state actors" or "private actors" within the meaning of its Charter. It then details implications which subsequently flow from such a characterization with respect to search and seizure issues under the Charter. Focus will then turn to American school privatization to determine if a similar approach and characteriza-

1. *Zelman v. Simmons-Harris*, 122 S. Ct., 2460 (2001) (Ohio voucher program did not violate parents' rights under the First Amendment's Establishment Clause).

tion would be prudent on this side of the border, considering those legal and educational principles grounding the choices made in the United States and Canada.

II. RIGHTS OF CANADIAN AND AMERICAN STUDENTS AGAINST UNREASONABLE SEARCHES AND SEIZURES

American and Canadian courts are charged with striking the incredibly delicate balance of protecting the rights of students while lending school officials the discretionary authority to operate schools "with as little external judicial interference as possible."² Courts have generally acknowledged that teachers and school administrators require substantial latitude in maintaining an orderly and productive learning atmosphere.³ Though various explanations may be advanced to support this unique authority, one of the most powerful and lasting foundations of support was established in a Wisconsin Supreme Court opinion in 1878.⁴ At that time, the Court in *Burpee v. Burton* stated:

[A] principal or teacher . . . does not derive all of his power . . . over his pupils from . . . the board. He stands for the time being *in loco parentis* to his pupils, and because of that relation, he must . . . exercise authority over them . . . in things concerning which the board may have remained silent.⁵

The doctrine of *in loco parentis* (translated as "in place of the parent")⁶ emanated from English common law that earlier governed England's private schools and granted schoolmasters' "extraordinary, and sometimes unconscionable, powers over pupil conduct."⁷ Though echoes of the hallowed doctrine⁸ reverberate

2. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 339 (5th ed. 2001) (citing *Freeman v. Pitts*, 503 U.S. 966 (1982)).

3. *Id.* at 340.

4. *See* State ex. rel. *Burpee v. Burton*, 45 Wis. 150, 30 Am. Rep. 706 (1878).

5. *Id.* at 707.

6. In *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557 (1933), the Nebraska Supreme Court further refined the *in loco parentis* powers to extend teacher control to the health, proper surroundings, necessary discipline, and other wholesome influences while the parental authority is temporarily superseded.

7. ALEXANDER & ALEXANDER, *supra* note 2, at 342. It should be noted that at common law teachers and schoolmasters had the right to impose corporal punishment. Many states have passed laws which permit corporal punishment, although school board rules regularly prohibit such conduct.

8. Some Canadian academics argue that the *in loco parentis* doctrine is an outdated basis for the school authority to search. *See* A. Wayne MacKay, *Students as Second Class Citizens Under the Charter*, 54 C.R. (3d) 390 (2002).

through contemporary American and Canadian judicial opinions, such administrative power over students does not go unchecked by constitutional mandates. School officials on both sides of the border are continuing to learn that, unlike parents, they must abide by those mandates⁹ and tailor their interactions with students accordingly.¹⁰

Students' rights, however, may be subject to reduction once they walk through the schoolhouse door. Like citizens in any given civilized and orderly society, individual freedom must sometimes surrender to the pressing needs of the greater community. It should be understood that this "surrender" simply amounts to a contract of mutual benefit "formed by individuals consenting to submit their wills for the unity of the whole or common good."¹¹

When put into the contexts of a schoolhouse, the foregoing contract of mutual benefit necessarily contemplates and balances the needs of the student with the needs of the school. Accordingly, one should recognize from the outset of the search and seizure analysis that students' freedom from unreasonable searches and seizures may be subordinated to school officials' needs to maintain order and discipline and the overall imperative of protecting the health and welfare of all the students.¹² In a period when the "influx of drugs, weapons, and other contraband into schools has spurred equally dramatic increases in school searches and a perceptible shift in the law governing school searches,"¹³ it is important to understand how such change impacts advances in various school reform efforts like privatization and voucher programs. The general thrust of this comment, then, is to analyze the terms and conditions of this "contract of mutual benefit" vis-à-vis the U.S. Constitution and Canada's Charter in an effort to determine the constitutional boundaries of searches and seizures conducted in privatized schools of the present and future.

At this juncture, it is appropriate to define charter schools and voucher programs within the context of this comment. Since they vary among American states and Canadian provinces according to their respective laws and policies, such definitions must sweep broadly enough to apply to most school systems. Accordingly, a charter school is any school serving students between kin-

9. ALEXANDER & ALEXANDER, *supra* note 2, at 339.

10. *Id.*

11. *Id.* at 341.

12. *Id.* at 410.

13. WILLIAM D. VALENTE & CHRISTINA M. VALENTE, *LAW IN THE SCHOOLS*, 182 (4th ed., Prentice Hall Publishing 1998).

dergarten and senior high school levels controlled by a private board of directors. This board creates a charter (or contract) with a public school board or other publicly-elected body (such as the state legislature or a state/province board of education) to carry-out various school system objectives through the operation of the charter school itself. If progress toward those objectives is not made, the charter is then nullified and the school either closes or is absorbed by the school district or state. By contrast, a voucher program allows parents to use the money it costs the state to educate their children in its public schools toward the cost of private tuition at any participating private school, including those having religious affiliation.

With this clarification settled, attention now turns to an overview of current Canadian and American law dealing with search and seizure in public schools. The comment will then discuss implications such case law may have on administrators and educators within private voucher-participating schools and charter schools.

A. *Canadian Law*

Canada's Charter necessitates a "drastic change in educators' thinking in regard to student search and seizure."¹⁴ Teachers and administrators alike must understand that the Charter protects students from unreasonable searches and seizures conducted by those school officials.¹⁵ In particular, Section 8 ensures that all citizens have the right to be secure against unreasonable search or seizure,¹⁶ while Section 24 specifically equips a court with the power to exclude evidence acquired in derogation of the Charter:¹⁷

- (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is estab-

14. E.L. HURLBERT & M.A. HURLBERT, *SCHOOL LAW UNDER THE CHARTER OF RIGHTS & FREEDOMS* 95 (2d ed., University Calgary Press 1992).

15. MacKay, *supra* note 8, at 390.

16. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) cl. 11, § 8.

17. DON STUART & RONALD JOSEPH DELISLE, *LEARNING CANADIAN CRIMINAL LAW* 115 (7th ed., Carswell Publishing 1999).

lished that, having regard to all the circumstances the admission of it in the proceedings would bring the administration of justice into disrepute.¹⁸

Hence, where a school official obtains criminal evidence through an unreasonable search of a student, that evidence may be excluded from a subsequent criminal trial against that student.

*R. v. Wray*¹⁹ provides a suitable account of Canada's initial approach to search and seizure standards under the Charter. In *Wray*, a murder suspect who took a polygraph at the direction of police, confessed to the murder and brought police to the spot where he disposed of the murder weapon. Throughout the ordeal, Wray was not allowed to consult with his lawyer. Seeking to introduce the murder weapon and the suspect's involvement of its discovery, the prosecution relied on the *St. Lawrence Rule*, maintaining, "[W]here the discovery of the fact confirms the confession . . . then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible."²⁰

Excluding the confession, the lower court found that the strict legal rule should not be applied in light of all of the circumstances²¹ and the Court of Appeal agreed.²² The Supreme Court of Canada, however, reversed on the ground that the trial judge abused his discretion in rejecting the evidence:

[T]he exercise of a discretion by the trial Judge arises only if the admission of the evidence would operate unfairly It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.²³

Up until 1982, the Canadian Supreme Court's ruling in *Wray* essentially advised the country's judges to disregard how evidence was obtained.²⁴ Section 24 of the Charter changed this outlook.²⁵

18. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 24.

19. [1971] S.C.R. 272, 11 C.R.N.S. 235, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673.

20. STUART & DELISLE, *supra* note 17, at 115 (citing *R. v. St. Lawrence*, [1949] O.R. 215, 228, 7 C.R. 464, 93 C.C.C. 376 (H.C.)).

21. *Id.*

22. *Id.* at 119.

23. *Id.* (citing *R. v. Wray*, [1971] S.C.R. 272, 11 C.R.N.S. 235, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673.

24. *Id.*

25. STUART & DELISLE, *supra* note 17, at 120.

In *R. v. Therens*, the court considered a case where a police officer demanded an alleged drunk driver to accompany him to the station to take a breathalyzer without informing the driver of his right to retain counsel.²⁶ The breathalyzer evidence was excluded by the trial court. In support of the trial court, Canada's Supreme Court "signaled to the country" the new meaning of law under the Charter by finding the police officer's conduct to be a flagrant violation of the defendant's rights.²⁷

The Court fortified the strength of the Charter in subsequent cases. In *R. v. Collins*²⁸ a police officer who participated in surveillance of a tavern obtained a balloon of heroine from the defendant's hand after seizing her in a tavern. The trial judge concluded that the search was based only on suspicion rather than upon reasonable grounds and therefore amounted to a violation of Section 8 of the Charter.²⁹ However, the judge was not satisfied that the evidence should be excluded under Section 24, and the Court of Appeal affirmed.

In reversing the decision, the Supreme Court of Canada acknowledged the Section 8 violation which rendered the search unreasonable and then addressed whether Section 24 required exclusion based on a determination whether admission of the evidence would bring the "administration of justice into disrepute."³⁰ A three-justice concurrence determined that this disrepute would result from "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies."³¹ The concurrence then considered the following factors used to determine whether the admission of evidence would bring the administration of justice into disrepute:

What kind of evidence was obtained? What *Charter* right was infringed? Was the *Charter* violation serious or was it of a merely technical nature? Was it deliberate, willful or flagrant, or was it inadvertent or committed in good faith? Did it occur in circumstances of urgency or necessity? Were there other investigatory techniques available? Would the evidence have been obtained in any event? Is the offense serious? Is the evidence essential to substantiate the

26. *Id.* at 120-121.

27. *Id.* at 121.

28. [1987] 1 S.C.R. 265, [1987] 3 W.W.R. 699, 56 C.R. (3d) 193.

29. STUART & DELISLE, *supra* note 17, at 122 (citing *R. v. Collins*, [1987] 1 S.C.R. 265, [1987] 3 W.W.R. 699, 56 C.R. (3d) 193).

30. *Id.* at 125.

31. *Id.* at 125-126.

charge? Are other remedies available?³²

In review of these factors, the Court concluded such disrepute would arise if the court did not exclude the balloon of heroine where a police officer obtained the evidence merely out of suspicion rather than reasonable grounds.³³

R. v. Duguay extended another opportunity for the Court to consider search and seizure violations under the Charter.³⁴ In that case, three youths suspected of a home robbery were asked by a detective, "You guys want to have a seat in our car? We want to talk to you."³⁵ He then asked, "You guys save me a trip back and tell me where the stereo is?"³⁶ One of the youths made an inculpatory statement and all three were then placed under formal arrest and read their rights under the Charter.³⁷ The Supreme Court sided with the trial court in finding that the arrest or detention was "arbitrary, being for quite an improper purpose – namely to assist in the investigation. [The police did not have] reasonable and probable grounds for arresting the accused."³⁸ As to the applicability of Section 24 going toward the exclusion of the "confession" and subsequent discovery of the stereo, the court reviewed the factors discussed in *Collins* and determined that the trial judge was correct in holding that admission of the evidence would bring the administration of justice into disrepute since it was clear that the youth were arbitrarily detained based on a detective's unreasonable "hunch."³⁹ The Court considered its holding to be an "affirmation of fundamental values" and a "means of ensuring that the individual's *Charter* rights are not illusory."⁴⁰

Two Canadian cases dealing with searches conducted in schools extend the rationale of the previous cases, but also present two important constructs: (1) the Charter applies to school offi-

32. *Id.* at 127.

33. *Id.* at 129.

34. (1985), 50 O.R. (2d) 375, 45 C.R. (3d) 140, 18 C.C.C. (3d) 289.

35. STUART & DELISLE, *supra* note 17, at 132 (citing *R. v. Duguay*, (1985), 50 O.R. (2d) 375, 45 C.R. (3d) 140, 18 C.C.C. (3d) 289).

36. *Id.*

37. *Id.*

38. *Id.* at 133.

39. *Id.* "Such a hunch must, however, have some reasonable basis. It cannot be used as a defense and explanation without examination, for irrational and high-handed actions." See also *id.* at 135 (stating that "Under the Charter, if to the average citizen interested in the administration of justice and the protection of the *Charter* rights, the admission of the objected-to evidence, *under all circumstances*, would bring the administration of justice into disrepute then it must be excluded.").

40. *Id.* at 133.

cials; and (2) a search conducted by school officials need only be based on reason and common sense rather than the higher standard of probable cause since students' rights may be subordinated to the greater interest of maintaining a productive learning environment. In *R v. L.L.*,⁴¹ a student search by a principal and several teachers resulted in a charge for unlawful possession of narcotics. The day after it was discovered that money had been stolen from a teacher, three teachers and the principal questioned the student. During the interview, a box of cigarettes was found when the student was asked to empty his pockets. The student admitted stealing the money to buy marijuana, and after searching the cigarette container, marijuana was found inside. The lower court excluded the evidence under Section 24 of the Charter, finding that where a school matter may result in criminal charges, a stricter standard (than reasonable suspicion and common sense) for a reasonable search applies to teachers. The appellate court disagreed, finding that because the possession of cigarettes was a breach of school rules and because good reason existed to justify the detainment and questioning, their seizure was lawful – more so due to the fact that they were voluntarily offered.⁴²

In *R. v. J.M.G.*,⁴³ a principal's search of a seventh-grade student was constitutional under Section 8. There, a student who witnessed the defendant put drugs in his sock informed a teacher who in turn informed the principal. The principal called the student to his office and, in the presence of the assistant principal, he told the student of his suspicion that the student was carrying marijuana in his sock. The principal asked the student to remove his shoes and socks and marijuana was found. Interestingly, the court did not directly and explicitly deal with the issue of whether the Charter applied to school principals, but rather merely "assumed" it did.⁴⁴ Citing American case law, the court determined that the search was reasonably related to the objective of maintaining order and discipline in schools, and it further specified that "reason and common sense, not probable cause, must govern teachers and school administrators."⁴⁵

With some understanding of Canadian case law on the issue

41. HURLBERT, *supra* note 14, at 114. See also School Law Commentary, vol.1, no. 3, Nov. 1986, file no. 1-3-4.

42. HURLBERT, *supra* note 14, at 107.

43. (1986) 56 O.R. (2d) 705. Leave to appeal to S.C.C. dismissed (1987) 59 O.R. (2d) 286.

44. HURLBERT, *supra* note 14, at 115.

45. *Id.*

of search and seizure at schools, we shall now turn to an overview of American case law.

B. American Case Law

Like Sections 8 and 24 of Canada's Charter, the Fourth, Fifth and Fourteenth Amendments of the United States Constitution offer comparable,⁴⁶ if not broadened, protections to American students. However, as suggested earlier, these protections regarding student searches and seizures do not go unqualified.⁴⁷ As reaffirmed in *New Jersey v. T.L.O.*, the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.⁴⁸

In *T.L.O.*, a reliable teacher informed the school's assistant principal that she witnessed the student smoking in the girl's bathroom.⁴⁹ Upon his search of the student's purse for cigarettes, the vice principal found the cigarettes, rolling paper, marijuana, a list of student names who owed T.L.O. money, and other materials which would suggest that she was selling marijuana.⁵⁰ Police were called and T.L.O. was arrested. T.L.O. later moved to suppress the evidence as violative of her Fourth Amendment rights.⁵¹ Finding that the Fourth Amendment governs school officials, the Court allowed the admission of the evidence.⁵² It held that a search of a student's personal belongings is constitutional if:

- a. – the school superiors have “reasonable suspicion” that the searched student engaged in illegal activity or violated school rules, and that the search would produce evidence of that infraction; and
- b. – the means and scope of the search “are reasonably related” to the objectives of the search and not excessively intrusive in light of the suspected infraction and of the age and sex of the student and the nature of the infraction.⁵³

In *Cornfield v. School District No. 230*,⁵⁴ the Supreme Court

46. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials).

47. VALENTE & VALENTE, *supra* note 13, at 173.

48. *T.L.O.*, 469 U.S. at 340-342.

49. *Id.* at 328.

50. *Id.*

51. *Id.* at 329.

52. *Id.*

53. VALENTE & VALENTE, *supra* note 13, at 182-183.

54. 991 F. 2d. 1316, 1323 (7th Cir. 1993).

had the occasion to analyze the reasonableness of a strip search conducted by school officials. In that case, two teacher's aids and a teacher reported to the school's dean that Cornfield appeared to be "too well endowed" after spotting some unusual bulge in his crotch area.⁵⁵ Upon noting the bulge the following day as Cornfield prepared to enter his bus, Cornfield's teacher and the dean asked him to accompany them, believing that the sixteen-year-old was "crotching" drugs.⁵⁶ The officials made a failed attempt to gain consent over the phone from Cornfield's mother.⁵⁷ The student's teacher and dean then took him to an empty locker room, locked the door, and standing fifteen feet away from the youth, visually inspected his naked body as he changed from his clothing into a gym uniform.⁵⁸ The search revealed nothing, and Cornfield later sued the teachers, the aids and the dean for violation of his Fourth, Fifth, and Fourteenth Amendment rights.⁵⁹

Applying the two-prong test set out in *T.L.O.*, the court found that Cornfield's rights were not violated. The officials' suspicions were informed not only by what they observed minutes before the search, but also by a cumulation of experiences with and reports about Cornfield suggesting his status as a drug-dealer. Secondly, the search itself was reasonable in both scope and nature. With the prongs satisfied, the Court emphasized the need to leave the determination of whether or not to search to the sound discretion of school personnel.⁶⁰

Searches of school-supplied enclosures such as lockers and desks have also been considered by U.S. courts. Finding that students have no expectation of privacy in such enclosures, the Supreme Court decisions in *O'Connor v. Ortega*⁶¹ and *T.L.O.* upheld searches based on reasonable suspicion. School announcements informing students of school officials' control over and access to school-supplied equipment further reduces students' expectation of privacy in the equipment.⁶² As to body searches, exploratory dog sniffs of closed containers are distinguished from canine sniffing of a student's body, which would be excessive and

55. *Id.* at 1319.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1323.

61. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

62. VALENTE & VALENTE, *supra* note 13, at 183.

invalid in the absence of individualized suspicion.⁶³ Though courts have "expressed serious concern" about strip searches (as suggested in *Cornfield*, above), factors have emerged which may justify such an intrusive probe such as the gravity of the suspected misconduct, the conduct of searches by school staff of the same sex as the searched student, and the limit of intrusion being no greater than reasonably required to uncover evidence of misconduct.⁶⁴

Having reviewed Canadian and American case law relating to student searches and seizures, it is important to now consider the implication such cases have on determining whether school officials in privatized schools should also be considered government agents, thereby subjecting them to constitutional restraints similar to those restraints imposed upon traditional public school officials.

C. The Importance of the Private Person / Government Agent Distinction

It is apparent that American and Canadian courts stand ready to offer school officials generous latitude in conducting student searches and seizures. Indeed, the courts have determined that these officials need only abide by the lower standard of "reasonable suspicion" rather than "probable cause" to conduct a legal search.⁶⁵ The case law has shown that this type of suspicion merely implies a belief or opinion based upon facts or circumstances that do not amount to proof.⁶⁶ Further, *reasonable* suspicion has been generally defined as a clear articulation of facts, with rational inferences drawn from those facts, in order to warrant the conclusion of reasonable suspicion.⁶⁷ These are the judicially-drawn lines beyond which school officials must not stray.

In any event, American case law is well-settled that public school teachers and administrators are subject to constitutional restraints since they are agents of the state. In Canada, teachers and administrators are at least "assumed" to be government agents "most likely" subject to Charter principles.⁶⁸ What lines, if any, govern officials in privatized schools? The answer to this

63. *Id.* at 184 (citing *Cornfield*, 991 F. 2d. at 1321).

64. VALENTE & VALENTE, *supra* note 13, at 184.

65. ALEXANDER & ALEXANDER, *supra* note 2, at 410.

66. *Id.*

67. *Id.* at 411.

68. HURLBERT, *supra* note 14, at 116.

question requires us to consider whether these teachers and administrators will likewise be characterized as state actors/government agents. If so, case law dealing with regular public school officials likely applies. If not, neither the U.S. Constitution nor the Canadian Charter of Rights and Freedoms even require consideration, since neither of these documents applies to acts of private individuals.⁶⁹ Before engaging this issue, we should first consider current movements toward school privatization on both sides of the border to determine how the motives and policies underlying these movements affect, both intentionally and unintentionally, the legal status of school officials.

III. THE MOVEMENT TOWARD PUBLIC SCHOOL PRIVATIZATION IN CANADA AND AMERICA

Facing the risks of privatization, liberals have heralded public schools on four major platforms: (1) public education embodies the ideals of democracy, unity and social progress; (2) public education presents the greatest hope for equity and equal educational opportunity; (3) private schools have insufficient capacity and quality to adequately educate the masses of students currently in public schools; and (4) public funding of private schools is repugnant to the Constitution.⁷⁰ At the core of such beliefs is the concept that schools are public entities which should be controlled by the public and that various devices to foster control by private interests run counter to such ideals.⁷¹

School privatization has been debated, developed, and experimented with on both sides of the border. Proponents believe that transforming public schools from democratically-regulated institutions to market-driven ones will improve the status quo.⁷² Some contend that notwithstanding the waves of "reform" steadily

69. "The almost total immunity of private schools from the constitutional restraints that have plagued public institutions is the result of the general inapplicability of the Fourteenth Amendment to private schools. The most frequently used instrumentality in attempting to bring private schools within the aegis of constitutional protections is section 1983 of the Civil Rights Act." RALPH D. MAWDSLEY & STEVEN P. PERMUTH, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 42 (National Organization on Legal Problems of Education 1983).

70. HEINZ-DIETER MEYER & WILLIAM LOWE BOYD, *EDUCATION BETWEEN STATE, MARKETS, AND CIVIL SOCIETY: COMPARATIVE PERSPECTIVES* 139 (Lawrence Erlbaum Associates, Publishers 2001).

71. ALEXANDER & ALEXANDER, *supra* note 2, at 31 (citing B. Cooper & E. Randall (2001) *Vouchers: Still Largely Untested and Why*).

72. ART MUST JR., *WHY WE STILL NEED PUBLIC SCHOOLS* 245 (Prometheus Books 1992).

increasing in both depth and breadth, such measures have not resulted in test score gains or improved graduation rates.⁷³ They explain that governmental bureaucracy "so hampers schools' ability to focus on academic achievement that improvement efforts are doomed."⁷⁴

The various models of privatization have two underlying concepts in common: choice and competition. Free-market advocates believe that these concepts, which "free schools from democratic control," will ultimately render improvements.⁷⁵ Through "scholarship" funds, students and parents may choose from any public or private school. States and districts would be prohibited from enforcing general and homogenized curriculum standards. Schools would be permitted to establish selective admission criteria. Ultimately, the concept of choice would boost quality through the glory of market forces.⁷⁶ It is also important to consider that advocates desire to "keep accountability regulation as close to the market approach as possible."⁷⁷ This objective will presumably impact whether such proponents might support the notion that privatized school administrators are government agents, for just as these proponents reject "homogenized curriculum," they may very well reject homogenized discipline which may encompass regulations placed on school officials who may conduct searches and seizures.

Critics of privatization point to choice that already exists in some school districts by virtue of their magnet school, charter school, and open-enrollment plans.⁷⁸ They also contend that privatization creates a "risk [of] creating elite academies for the few and second-rate schools for the many."⁷⁹ They fear that privatization will create "cult schools" which will function to segment groups and work to divide the country.⁸⁰ Still other concerns arise over the effects privatization might have on keeping public funds out of private schools.⁸¹ Finally, some claim only the government can be trusted "to guarantee every child an equal educational

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. F.R. Kemerer & C. Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed. L. Rep. 589, 590 (2001).

78. *Id.*

79. *Id.* at 249.

80. *Id.*

81. *Id.* at 250.

opportunity.”⁸²

In principle, free public education promises every child an equal opportunity. The promise has been violated repeatedly, but not because the ideal is flawed. It has been violated because, in a highly stratified society, schools have limited capacity to bring about greater social equity. If the public school system were to lose its authority . . . it would wither and collapse . . . leaving . . . an educational wasteland, not an educational wonderland as the free market advocates claim.⁸³

With these competing principles underlying the privatization movement, we now turn to the developing forms of privatization embraced by Canada and America. The text then considers how such a movement may collide with the present law of search and seizure in schools.

A. *Canadian Schools – A Historical Perspective*

In order to thoughtfully consider privatization in Canada, it is prudent to develop an understanding of education’s trajectory in that country. Canada is a federal state of thirty-million people populating its ten provinces and three territories.⁸⁴ Though other languages exist throughout the country, it is officially bilingual (English and French) with a multicultural population.⁸⁵ The 1867 Confederation of Nova Scotia, New Brunswick, Ontario, and Quebec that led to the creation of Canada involved compromises including guarantees of religious freedom in schooling for Christians but not other religious minorities.⁸⁶ Although each province maintains a public school system, many also maintain a publicly-funded system of separate schools catering to the religious minority.⁸⁷ Also in contrast to America, many provinces offer public support for private or independent schools which may have a religious focus.⁸⁸ Hence, there may be four or five publicly-funded schools systems within one province which makes “the boundaries between state or public schools and private or independent schools

82. ALEXANDER & ALEXANDER, *supra* note 2, at 31 (citing B. Cooper & E. Randall (2001) *Vouchers: Still Largely Untested and Why*).

83. *Id.*

84. BENJAMIN LEVIN, *REFORMING EDUCATION: FROM ORIGINS TO OUTCOMES* 51 (Routledge Falmer 2001).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

complex and often blurred.”⁸⁹

The responsibility for education is delegated under Canada’s constitution to the provinces.⁹⁰ The Council of Ministers of Education, Canada (CMEC), plays a coordinating role between the provinces, but has no substantive power over any one.⁹¹ The creation of the Charter, along with heated debates about the official language of schools and the influence of religion on schools have called for judicial intervention in ruling on various aspects of education policy.⁹²

B. Canadian Schools – Developments in Privatization

Canadian education systems like their American counterparts are not lacking in their development of education reform programs. Although many reform movements have been unique, trends have also emerged. One of these trends is the “economic rationale for education reform” which attempts to create alignments between job market preparedness and the job market itself.⁹³ This approach is associated with the free-market approach to schools which views education as a market and students as consumers. In such an approach, choice drives competition and competition increases quality. Where charters, open-enrollment and vouchers are captured under this choice umbrella, some Canadian commentators suggest that each may vary in degree, but vary little in kind.⁹⁴

The Fraser Institute and the Atlantic Institute for Market Studies are among several proponents of school choice in Canada.⁹⁵ Despite the support of these think-tanks, charter schools in Alberta and New Brunswick have experienced a number of problems dealing primarily with school funding-related problems involving administrators and charter school board members.⁹⁶ Some researchers have concluded that market-based approaches to public schools in Canada “do not lead to innovation

89. *Id.*

90. *Id.*

91. *Id.* at 52.

92. *Id.*

93. Bernie Frosse-Germain, *What We Know About School Choice*, EDUCATION CANADA, 1998, at 22.

94. *Id.*

95. *Id.* at 24.

96. *Id.* The principal of Calgary’s largest charter was suspended and a trustee was appointed by Education Minister Gary Mar when irregularities in finance operations emerged. At the time Frosse-Germain’s article was published, a report of a forensic audit was still pending. Financial problems were also behind the closure of

or better schools.”⁹⁷ “While some students are fortunate to enter the school of their choice, the educational market is not an equal playing field.”⁹⁸

It is fair to say that Canada is preparing itself for privatization of schools through a kind of corporate take-over. In the June 1999 issue of *Phi Delta Kappan*, author Heather-Jane Robertson reported that Canada is poised for such privatization: “[a]s yet, no Canadian elementary school has been named for a fast-food chain or for an American President, but times are changing as budgets are cut. Spending in these sectors, as measured by per-pupil calculations, has declined steadily since 1991.”⁹⁹ The CMEC recently invited the editor of *The Globe and Mail* to address a national conference on the health of schools. There, they listened to Editor William Thorsell warn that, “standards of Canada’s schools would be scandalous and bankrupting if applied to the design and manufacture of auto parts.” The conference was told to “find private solutions to public problems . . . education will not improve until it genuflects to the market.”¹⁰⁰

Although the country already has a good deal of privatized/independent school systems within each province as compared to America, it is clear that Canada is moving toward greater privatization of schools via charters, vouchers, and even privately and publicly-held, for-profit corporations. Indeed, the Charter itself has increased the pressure to reform Canadian education by virtue of the fact that parents, students, and educators alike are learning about and subsequently asserting their rights under the Charter in school-related fora.¹⁰¹ Such changes, which are already in the works, will likely effect and be affected by the Charter of Rights and Freedoms and its application to searches and seizures conducted in those schools.

the Mundare Community Charter School, this time due to transportation-related issues.

97. *Id.* Citing research conducted by Kari Dehli at the Ontario Institute for Studies in Education, Dehli suggests that some schools may indeed meet the needs of some students, but the market approach will also create disparity in quality among all schools.

98. *Id.*

99. Heather-Jane Robertson, *Shall We Dance?*, PHI DELTA KAPPAN, June 1999, at 730.

100. *Id.*

101. ALISA M. WATKINSON, EDUCATION, STUDENT RIGHTS, AND THE CHARTER 13 (Purich Publishing 1999).

C. *American Schools – A Historical Perspective*

At the outset, it should be noted that concepts of public schooling and the protections of students from various governmental intrusions have a longer history in America than in Canada. This is undoubtedly one reason why Canadian educators look to America for guidance in several areas of education reform and administration models.¹⁰²

The idea of a free system of education in America that would provide for "a general diffusion of knowledge, cultivate learning, and nurture the democratic ideals of government" developed in the 1760s and 1770s.¹⁰³ As R. Freeman Butts observed, "the really important reason for believing in the value of education is that it can be the foundation of freedom. In the first place, a truly democratic society must rest upon the knowledge, intelligence, and wisdom of all people."¹⁰⁴ In this period, universal education was in greater demand and practical studies were of paramount importance, and by 1825 it was common that state taxation would be required to fund public schools.¹⁰⁵

Horace Mann endorsed free secular public schools, and firmly believed that common and universal education was an "absolute" or "natural" right of every citizen.¹⁰⁶ He and Madison considered knowledge and learning as a property right "that man possesses, and each generation has the obligation through education to pass all property on to succeeding generations."¹⁰⁷ Public schools were to provide the means for this passage.

As public schooling progressed, legislatures, much like the Canadian Provinces, began to sanction the idea of common schools through statutes which required school districts within the states to tax themselves in support of public schools.¹⁰⁸ When the first compulsory attendance laws were put in place in 1852, the responsibility for education was placed squarely in the hands of state legislators.¹⁰⁹

One of the particularly relevant earlier developments was

102. LEVIN, *supra* note 84, at 52.

103. ALEXANDER & ALEXANDER, *supra* note 2, at 23.

104. *Id.* at 24 (quoting R. Freeman Butts, *Search for Freedom: The Story of American Education*, NEA JOURNAL, March 1960, at 33-48).

105. *Id.* "The wealth of the State must educate the children of the State" aptly described the principle of taxation for education that would eventually emerge.

106. *Id.* at 25.

107. *Id.*

108. *Id.* at 26.

109. *Id.* at 27.

that of the *Parens Patriae* doctrine. Under the doctrine, the state's authority over the child trumps the parent's since the state, "as a parent to all persons . . . has the inherent prerogative to provide for the commonwealth and general welfare."¹¹⁰ The view held that a child has a right to be protected from an abusive, negligent, or ignorant parent, and in support of that right, the state intervenes.¹¹¹ This doctrine, which survives today, undoubtedly underlies the concept of *in loco parentis* discussed earlier, and plays a role in reducing students' rights regarding search and seizure. At the very least, the doctrine supports the right of a school to seize a child via compulsory attendance laws. The state's interests in providing education for all citizens obviously remains, but the steps it may take to regulate such education is the subject of much debate which will be considered below.

D. American Schools – Developments in Privatization

The landmark case in American jurisprudence regarding parental choice over where their children attend school was the *Pierce*¹¹² decision in 1925. The court held that parents have a constitutional right under the Fourteenth Amendment of the U.S. Constitution to send their children to schools other than those sponsored by the state.¹¹³ Perhaps never before in the history of American public schools have parents been given more reason to exercise such choice. Indeed, American schools have been under an almost "relentless barrage" of criticism and attack from the media to vocal parental groups to various political arenas for "declining test scores, graduates who are functionally illiterate, an upsurge in violence and drugs, lack of public confidence, significant defections to private schools, etc."¹¹⁴

In the last decade, perhaps the largest expansion of choice has come by way of charter schools and voucher programs. By 2000, about two-thirds of all states had established legislation permitting the establishment of charter schools.¹¹⁵ Placing great weight on the importance of competition in improving education, both charter schools and voucher programs are purportedly designed to

110. *Id.* at 241. This doctrine emerged mostly in cases dealing with compulsory attendance laws.

111. *Id.* "There are no delinquent children, only delinquent parents."

112. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

113. *Id.* at 533.

114. E. Vance Randall, *Private Schools and State Regulation*, 24 URB. LAW 341, 376 (1992).

115. ALEXANDER & ALEXANDER, *supra* note 2, at 45.

remain private with public control and accountability.¹¹⁶ In actuality, with state laws varying widely, some programs have the tendency to "lean far more toward being a private, or sectarian, school than a public school."¹¹⁷ That is, according to some commentators, charter schools and voucher programs may have the effect of eluding public control while siphoning public funds. This, of course, is arguable.

E. A Historical Divide Predicting a Disparate Resolution

From the foregoing review, one can easily distill that Canadian and American movements toward privatization are similar in many respects. The central concepts of privatization lie in choice and competition based on a free-market ideal. However, it appears that Canada, with its existing system of independent schools (some of which are religiously-affiliated), already offers greater choice to parents in choosing to send their children to private or public schools. America, on the other hand, is just embarking on privatization by comparison.

Of critical import is the fact that Canada has "assumed" that teachers and administrators in independent schools are subject to the Charter. That is, these school administrators are looked upon no differently than those in non-sectarian schools. Such consideration undoubtedly stems from the historical foundations of Canadian public education which incorporated a system of publicly-funded separate schools catering to the religious minority based on political compromises.

In contrast, the historical foundations of American public education demonstrate a reluctance to mix state functions with religious freedoms. At least on the surface, American courts have rejected the concept of publicly-funded sectarian schools, as violative of the First Amendment's Free Exercise and Establishment

116. *Id.* at 46. Alexander explains the charter school concept succinctly: "They are exempted from state and local regulations that inhibit flexible management, yet they are operated under general public supervision and direction, designed with specific educational objectives as their purpose; they are nonsectarian in their programs, admissions, policies, and employment practices and are not affiliated with a sectarian school or religious institution; they are free of tuition and fees; they must be in compliance with federal civil rights and legislation; they must provide for admission of students by lottery; they must comply with federal and state financial audit requirements as do other elementary and secondary schools; they must meet required federal, state, and local health and safety requirements; and they are required to operate in accordance with state law." *Id.*

117. *Id.*

Clauses.¹¹⁸ Although the thrust of this comment is not exclusively committed to discussing this much broader and equally compelling issue, it is most important to consider how the historical divide predicts separate outcomes in the two countries with respect to the narrower issue to which this work *is* committed: whether school officials in privatized schools are considered government agents and therefore are subject to constitutional restraints. In essence, this is a threshold issue which asks whether the Charter or the U.S. Constitution even applies to the acts of a school official in a privatized school.

The historical divide suggests that Canada is poised to acknowledge private school officials as governmental agents. One very clear example of this acknowledgment is found in the country's condonation of publicly-funded religiously-affiliated schools since the original Confederation of Nova Scotia, New Brunswick, Ontario, and Quebec in 1867.¹¹⁹ This history relieves Canadian courts from separating public administrators from their private counterparts according to the allocation and expenditure of public money. Quite to the contrary, American courts have shown an interest in maintaining a wall of separation which divides private individuals (i.e. sectarian school officials) from government agents (i.e. public school officials) even where voucher programs "indirectly" place government funds in sectarian schools.¹²⁰ In any event, there lies an ancient and antithetical judicial predisposition on both sides of the border – one side considering sectarian as private and the other considering sectarian as quasi-public.

IV. EFFECTS OF PRIVATIZATION ON STUDENT RIGHTS

The instant section reviews how Canadian and American courts distinguish private and public schools. With regard to privatization, it becomes clear that the matter and degree of governmental intervention into private schools will ultimately control whether such courts consider a given school or school system as an extension of the state. If that intervention reaches a certain level, few decisions made by the officials of that school will be made without legal implications relating to constitutional and criminal

118. See *Everson v. Board of Education*, 330 U.S. 1 (1947) (the court approved spending tax funds to pay bus fares for parochial school students, but noted, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").

119. LEVIN, *supra* note 84, at 51.

120. See *Zelman*, 122 S. Ct., 2460.

law.¹²¹ Accordingly, the location of the line dividing private and public spheres of school regulation becomes critical in assessing whether certain forms of public school privatization will render privatized school officials "government agents" under the constitutions at hand. The following discussion converges on this narrower inquiry under Canadian and American legal frameworks.

A. *Governmental Intervention in Canadian Schools*

The fairly recent entrenchment of the Charter has limited provincial supremacy in matters of education by allowing federal judicial intervention in upholding its force and effect.¹²² The Charter governs the actions, policies, and decisions of departments of education, school boards, and school administrators even to the extent of their decisions over school curricula, and pedagogical theories.¹²³ "The Supreme Court has also made it clear that independent or private schools that exercise delegated governmental power or are otherwise responsible for the implementation of government policy, such as providing education, are bound by the Charter."¹²⁴ Therefore, the current reality for both public and private school boards and provincial governments holds the looming prospect of having their rules or policies declared unconstitutional, thereby making them prime targets for law suits lodged by individuals whose rights have been thwarted.¹²⁵

Under this framework, it is likely that educators and administrators in privatized Canadian schools will not be insulated from similar suits. In *Eldridge v. British Columbia*,¹²⁶ the Supreme Court of Canada considered whether a decision concerning health care was subject to judicial scrutiny under the Charter when the decision was made by a subordinate authority as opposed to the legislature. The Court found that in order for the Charter to apply, the entity must be one which implements a specific governmental policy or program. The rationale, the Court said, is obvious: "Governments should not be permitted to evade their Charter

121. HURLBERT, *supra* note 14 at 3.

122. WATKINSON, *supra* note 101, at 9.

123. *Id.* at 27.

124. *Id.*

125. *Id.* at 10. One of the rights extended by the Charter is the right to sue for violation of Charter Rights. See *Doe v. Metropolitan Toronto Commissioners of Police*, [1998] 39 O.R. (3d) 487 (rape victim was awarded \$220,364.22 in suit against police for failing to warn her of serial rapist; determined a violation of Equal Protection of the Law under the Charter).

126. *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624.

responsibilities by implementing policy through the vehicle of private arrangements."¹²⁷

Accordingly, where privatized schools carry out a "specific governmental policy or program" or "exercises delegated governmental power or are otherwise responsible for the implementation of government policy, such as providing education,"¹²⁸ it follows that the school administrators will be considered state actors who are subject to the restraints of the Charter. This, coupled with the fact that Canada "assumes" school personnel in publicly-funded religiously-affiliated schools are government agents for the purposes of the Charter¹²⁹ makes its application that much more certain. Such a calculus is not so clear under American jurisprudence.

B. Governmental Intervention in American Schools

Judicial recognition of a voucher-participating private school official as a government agent may turn on the issue of limitations of government regulation over those schools. "Few issues have been more tortuous for our political system as trying to define the appropriate relation between the state and nonpublic schools."¹³⁰ Nevertheless, as America's affinity toward state voucher programs grows, the matter and degree of governmental regulation of those schools will also undoubtedly expand. It is the matter and degree of such intervention which will ultimately determine whether the actors within the voucher-participating school become agents of the government or simply remain private individuals.

The state has many reasonable bases to justify certain regulations it imposes on private schools which all basically go toward ensuring a minimal or standard level of education. It is common knowledge that private schools, other than providing for private interests, also perform the vital, secular interest of teaching the nation's youth. If non-governmental means are used to educate, the state "has a proper interest in the manner in which those schools perform their secular educational function and where it can be known, by reasonable means, that the required teaching is

127. *Id.* See also WATKINSON, *supra* note 101, at 27.

128. WATKINSON, *supra* note 101, at 27.

129. HURLBERT, *supra* note 14, at 115.

130. Randall, *supra* note 114 (quoting D. RAVITCH, *THE SCHOOLS WE DESERVE* (Basic Books, Inc. 1985)).

being done.”¹³¹ Other state interests include making sure children are attending school in a safe and healthy environment,¹³² to prevent the teaching of anything “manifestly inimical to the public welfare,”¹³³ and to deter racial discrimination.¹³⁴

Such regulations may, at first blush, appear tangential to the issue of whether the voucher-participating school administrators should be considered governmental agents with regard to search and seizure issues. However, the constitutionality of such regulations is a manifestation of the delicate and sometimes baffling judicial balancing act between the state’s control over the child versus the parent’s. In a way, the *in loco parentis* and *parens patriae* doctrines empower schools with child-rearing prerogatives even over parental disapproval.¹³⁵ Nevertheless, public school officials, when acting as the child’s “surrogate” parent at the schoolhouse, must engage in child-rearing that falls within the acceptable boundaries of the student’s constitutional rights.¹³⁶ Under these conditions, school officials may search and seize – even over the objection of the parent – so long as the official does not offend the student’s rights.

Adding to the mix is the fact that parents’ right to child-rearing is also not absolute.¹³⁷ This “ubiquitous dilemma of what the proper relationship should be between the state and the parent (or private school)”¹³⁸ no doubt muddies the waters in determining whether a private school official should be considered a government agent for search and seizure purposes. Such a “dilemma” requires the court to interpolate the student’s constitutional rights within a spectrum whose contrasting poles undergo constant flux.

In light of these considerations, it will be difficult for the Court to deliver an unequivocal opinion should it have an opportu-

131. *Id.* at 344 (citing *State v. Hoyt*, 146 A. 170, 172 (N.H. 1929)).

132. *Fellowship v. Benton*, 620 F. Supp. 308, 313 (D. Iowa 1985).

133. *Pierce*, 268 U.S. at 534.

134. *Runyon v. McCrary*, 427 U.S. 160 (1975), *cert. denied*, 439 U.S. 927 (1978).

135. ALEXANDER & ALEXANDER, *supra* note 2, at 357. In the absence of state statutes to the contrary, teachers may paddle students in spite of parental opposition. See *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *affg* 423 U.S. 907 (1975).

136. *Id.* at 342 (“ . . . the boundaries of the teacher’s authority are marked by requirements of reasonableness and restraint.”). *Id.*

137. *Randall*, *supra* note 114 at 360 (citing *Roe v. Wade*, 410 U.S. at 154) (“The parental authority is never absolute, and has been denied legal protection when its exercise threatens the health or safety of the minor children”); See also *H.L. v. Matheson*, 450 U.S. 398, 449 (1981) (“The well-being of its children is of course a subject within the State’s constitutional power to regulate.”).

138. *Id.*

nity to hear a case challenging a voucher-participating private school official for a violation of a student's Fourth Amendment rights. A question that will surely arise will be whether the imposition of such constitutional constraints creates an unreasonable governmental regulation on those schools and its officials. Recall that private schools may challenge regulations as unreasonable under both *Pierce*¹³⁹ and *Farrington*.¹⁴⁰ Other parents who meet standing requirements may argue under *Pierce* that the imposition of such regulations on these private school officials deprives them of their constitutional rights to choose alternatives to public schools. They may also argue under *Yoder*¹⁴¹ that such regulations violate their free exercise of religion.

As stated by Kemerer and Maloney, "Between the restrictions of the state constitution and those of the federal constitution lies a narrow policymaking channel for wise accountability measures that strike a balance between institutional accountability and autonomy."¹⁴² That is, the court must find a way to preserve the autonomy of parents and private schools while also allowing the state to exercise reasonable regulations over that private school. Whether constitutional restrictions should apply to the acts of voucher-participating private school officials – particularly with respect to search and seizure issues – will undoubtedly require (among other things) a consideration of the voluntary nature of the program,¹⁴³ the nature and authenticity of choices offered to parents, and of course the particular facts of a given case.

V. DESTINATIONS: REACHING GOALS AND FURTHERING EDUCATION POLICY

It should be recognized both in America and Canada that governmental regulation over private schools, although justifiable to

139. *Pierce*, 268 U.S. 510 (1925) (Oregon statute requiring all children to attend public schools violated the property rights of private school operators and interfered with the rights of parents to control their children's upbringing).

140. *Farrington v. Tokushige*, 273 U.S. 284 (1927) (Hawaiian statute declared unconstitutional where it gave the state department of public instruction virtual control over private foreign language schools).

141. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state compulsory attendance law violated Amish parents' First Amendment rights to free exercise of religion).

142. Kemerer & Maloney, *supra* note 77, at 629.

143. *Id.* at 625. "The first argument supporting nonexemption [of government regulations] is that a publicly funded voucher program presumably will be voluntary, and if a school finds the regulatory and accountability provisions excessive, it doesn't have to participate." *Id.*

some degree, also represents an underlying conflict of interests.¹⁴⁴ In essence, one competitor regulates the other. The state competes for students, financial and political support, and an acceptance its own schools' pedagogy. By requiring the state's imprimatur over those actions of privatized school officials, it essentially deprives parents of the choice to have their children disciplined in a manner consistent with their belief system. That is, the principal of a Roman-Catholic voucher-participating school, for example, will at times be forced to abide by constitutional mandates rather than exclusively deferring to the religious or ideological conventions of the school that would control in the absence of a voucher. Such a regime essentially injects empirical state prerogatives into private settings and decision-making processes. Does such a situation go toward the goal of educational pluralism? The question so constructed obviates the answer. Pluralism will be eclipsed by that standardization embraced by state public school systems which follow the same or a substantially similar disciplinary blueprint.

VI. CONCLUSION

It is unclear whether privatization efforts in America such as voucher programs will render officials of those schools as government agents. Should the Supreme Court be convinced that imposition of constitutional constraints creates an unjustifiable regulation of private schools, such restraints may be rejected. Further, the Court may also be faced with determining whether the application of constitutional requirements to private school officials touches on parental rights to free exercise of religion under the First Amendment. Added to this quandary is the question of whether or not the state voucher program directly inserts public funds into the hands of the private school officials, thereby providing a more intimate connection of agency between the state and private school personnel.

While it is unclear whether constitutional restraints will apply to voucher-participating American private school officials, it is likely that the Canadian Charter or Rights and Freedoms will

144. E. Vance Randall made some interesting points on this topic: "Since the individuals employed by the state owe much of their control and influence to claims of expertise and special knowledge, alternative claims present a threat to their position and power. This presents a classic conflict-of-interest case. Self-interest, professional arrogance, and ideological incommensurability can be significant sources of bias and prejudice in the content and enforcement of regulations by state and local officials." See Randall, *supra* note 114, at 351.

apply to otherwise private actors in voucher-participating Canadian “private” schools. Although such a condition essentially corrupts the idea of competition (of various disciplinary models), personnel in these schools will likely be characterized as state actors/government agents if they maintain a practice of carrying out governmental programs and policies. Accordingly, such school officials will then be expected to comply with the “reasonable suspicion” standard when conducting a search and seizure of a student or of that student’s personal possessions where that student maintains a reasonable expectation of privacy.

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