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## ESSAY

# NATIVISM AND NONPREFERENTIALISM: A HISTORICAL CRITIQUE OF THE CURRENT CHURCH AND STATE THEME

Stephen C. Veltri\*

Inconsistent decisions of the United States Supreme Court concerning financial aid to sectarian schools have bedeviled judges, scholars, lawyers, and law students for a generation. The Court's first foray into this area exemplifies this painful inconsistency. Justice Black's majority opinion in *Everson v. Board of Education*<sup>1</sup> championed the rigid separation of church and state, yet permitted New Jersey to spend tax revenues busing parochial school children to and from school.<sup>2</sup>

A bewildering array of case law has followed that inauspicious beginning. We have "learned" that while the first amendment permits state funding for transportation to and from a parochial school, it absolutely prohibits a state from busing parochial school children for a field trip.<sup>3</sup> States may constitutionally furnish textbooks, but not maps or other equipment, to parochial schools.<sup>4</sup> Church-run schools may be reimbursed from public funds for state-required tests if those tests are prepared by the state; however, if the tests are prepared by the teachers, the Constitution prohibits any reimbursement.<sup>5</sup> The Constitution

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1. 330 U.S. 1 (1947).

2. *Id.* at 15–18. In his dissenting opinion, Justice Jackson compared the inconsistency of the majority to Byron's Julia who, "whispering 'I will ne'er consent'—consented." *Id.* at 19 (Jackson, J., dissenting) (quoting G. BYRON, *DON JUAN* canto I, stanza 117 (T. Seffan & W. Pratt ed. 1957)).

3. *Wolman v. Walter*, 433 U.S. 229, 252–55 (1977).

4. *Compare* *Board of Educ. v. Allen*, 392 U.S. 236, 248–49 (1968) (statute authorizing the loan of textbooks to parochial school children does not violate the establishment or free exercise clauses of the first amendment) *with* *Meek v. Pittenger*, 421 U.S. 349, 362–66 (1975) (providing neutral secular instructional material and equipment to parochial schools is an impermissible establishment of religion).

5. *Compare* *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (law granting all private schools payment for administration of tests mandated by the state constituted impermissi-

forbids a state from remitting income taxes in the form of tax credits to defray the cost of parochial school tuition, but permits tax deductions for the same purpose.<sup>6</sup>

These hair-splitting distinctions without any meaningful differences disturb our sense of a Constitution interpreted in light of precedent. Prior to his elevation to the Supreme Court, Justice Antonin Scalia commented, "I envision these [decisions] not as engraved upon tablets of stone but as scribbled on one of those funny pads that children use, with a plastic sheet on top that can be pulled up to erase everything and start anew."<sup>7</sup>

The three-part test of *Lemon v. Kurtzman*<sup>8</sup> that spawned these decisions has understandably been criticized by scholars and judges.<sup>9</sup> Many critics have sought to replace this slippery test with a unified principle of decision. In recent years, a particular favorite in the search for a replacement has been the "nonpreferentialist" approach to the establishment clause. This approach would permit far more aid to parochial schools than that permitted under decisions applying the existing three-part test.

Under the nonpreferentialist approach, the establishment clause would be interpreted to permit public funding of the secular activities of religious groups, such as education, provided the government did not

ble aid to religion) with *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980) (law granting reimbursement to church-sponsored and secular nonpublic schools for state-mandated services does not violate establishment clause when auditing assures only secular services are reimbursed).

6. Compare *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (system providing income tax benefits to parents of students attending nonpublic schools may advance sectarian activities and therefore violates establishment clause) with *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction for expenses of tuition, textbooks, and transportation has secular purpose and does not have the primary effect of advancing religion).

7. *Tuition Tax Credits: Hearings on S. 550 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 97th Cong., 1st Sess. 565 (1981) (statement of Circuit Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia Circuit).

8. 403 U.S. 602 (1971). In *Lemon*, the Court held that a state statute that would aid religious schools must: (1) have a "secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) avoid "excessive government entanglement with religion." *Id.* at 612-13 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

9. For scholarly critiques of the *Lemon* test, see Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-85 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17-20 (1978-1979); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-88 (1981); Nichol, *Religion and the State*, 27 WM. & MARY L. REV. 833, 835-36 (1985-1986).

Judicial dissatisfaction with the test has been noted in *Aguilar v. Felton*, 473 U.S. 402 (1985) (O'Connor, J., dissenting) (disputing the majority's entanglement analysis), and *Nyquist*, 413 U.S. at 820-22 (White, J. dissenting).

show preference to the activities of any particular sect or denomination. Proponents of nonpreferentialism include William J. Bennett, the former Secretary of Education;<sup>10</sup> Edwin Meese, the former Attorney General;<sup>11</sup> the Chief Justice of the Supreme Court;<sup>12</sup> numerous scholars;<sup>13</sup> and thoughtful students.<sup>14</sup> At the core of the nonpreferentialist thesis lies an historical understanding of the original intent of the establishment clause; nonpreferentialists invariably cite historical examples from the early national period when both state and federal governments aided the activities of various religious denominations.<sup>15</sup>

This essay questions the nonpreferentialist reading of history. Other scholars have criticized nonpreferentialism as a mischaracterization of the framers' ideals.<sup>16</sup> But this essay looks beyond the framers. While history can undoubtedly enhance our understanding of the Constitution, too much constitutional history focuses exclusively on the intentions of the framers. This can distort history and cloud the insight we might otherwise gain. Constitutional principles evolve and change; often, the development of these principles can only be understood when a broader span of time is considered, beyond the few years surrounding the founding of the Republic in the late eighteenth century.<sup>17</sup>

10. See, e.g., *Bennett Vows Aid to Church Schools: Asserts Court Ruling Fails to Recognize Importance of Religion to Democracy*, N.Y. Times, Aug. 8, 1985, at A18, col. 2.

11. Attorney General Edwin Meese stated that first-amendment guarantees were never intended to "preclude Federal aid to religious groups, so long as that aid did not favor one group over another." *Id.*

12. *Wallace v. Jaffree*, 472 U.S. 38, 106-14 (1985) (Rehnquist, J., dissenting).

13. See, e.g., R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); M. MALBIN, *RELIGION AND POLITICS—THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986); Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

14. E.g., Comment, *Mueller v. Allen: Tuition Tax Relief and the Original Intent*, 7 HARV. J.L. & PUB. POL'Y 551, 566-77 (1984).

15. See R. CORD, *supra* note 13, at 49-82; Smith, *supra* note 13, at 579-634; Comment, *supra* note 14, at 566-77.

16. L. LEVY, *THE ESTABLISHMENT CLAUSE—RELIGION AND THE FIRST AMENDMENT* (1986); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1985-1986).

17. For example, the proper relationship of the citizen to the state may be the central question of political philosophy. The framers generally approached this question as whig republicans. They looked for their models back to antiquity as it was understood in the Renaissance. See H. ARENDT, *ON REVOLUTION* 179-215 (1965); J. POCOCK, *THE MACHIAVELLIAN MOMENT* 506-45 (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 48-75 (1969). The framers certainly were not democrats or liberals in the nineteenth-century sense of those terms, nor could they have imagined the modern administrative state. Yet, the state the framers created was required to adapt, albeit imperfectly, to the changes the nineteenth and twentieth centuries wrought in the relationship between citizen and state. See Ackerman, *The Storrs Lectures: Dis-*

This is particularly true when one considers the modern constitutional prohibition on governmental aid to sectarian schools. This stricture developed in the nineteenth century as a result of changes in American society, education, and religion that the framers could never have envisioned. America changed in the nineteenth century from a predominantly British, Protestant society with few facilities for public education to an ethnically and religiously diverse nation that increasingly relied upon the public schools to pass on a shared culture.

After bitter political battles, the states—and not the federal government—adopted the view that the separation of church and state prohibited aid to sectarian schools. While some combatants in the battle were motivated by liberal or secular principles, many were simply nativists.<sup>18</sup> Opponents of immigration and Catholicism, nativists were a potent political force in the nineteenth century. They believed that the waves of Catholic immigrants reaching American shores would eventually undermine the Republic's institutions. They sought to stem the tide by prohibiting aid to parochial schools and, at the same time, requiring nondenominational Protestant exercises in the public schools.

Seen in light of this nineteenth-century experience, the nonpreferentialist thesis is untenable. The prohibition on aid to sectarian schools developed in large part because Americans clearly preferred Protestantism. This paper will review the roles nativism and anti-Catholicism played in the development of the constitutional prohibition against financial aid to church schools. This review demonstrates that not only is nonpreferentialism faulty history, it is undoubtedly also an unwise social policy in a nation as diverse as the United States.

## I. THE COLONIAL EXPERIENCE

The tension that nineteenth-century immigration created in America cannot be understood without a brief description of anti-Catholicism in the colonies. The free population of the colonies was homogeneous to a high degree in both ethnic background and religion. As much as eighty-five percent of the population in 1765 was British. The remainder was mostly German and Dutch, with a small proportion of Irish.<sup>19</sup> Virtually everyone was Protestant.<sup>20</sup>

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covering the Constitution, 93 YALE L.J. 1013 (1984). These changes have, of course, profoundly affected our view of constitutional rights as we now understand them in light of ideas so foreign to the framers.

18. The term "nativism" entered the language to describe the nineteenth century "feud . . . between American-born and foreign-born citizens" and refers "to the practice or policy of protecting the interests of native residents against those of immigrants." 7 THE OXFORD ENGLISH DICTIONARY 34 (1933).

19. C. ROSSITER, THE FIRST AMERICAN REVOLUTION 18 (1956).

20. *Id.* at 26, 68.

The colonists, to whom the Reformation was both recent and important, believed the Catholic Church to be dangerous, unscriptural, and corrupt. England and her colonies were often at war with France or Spain, two Catholic powers; English colonists—sandwiched between French and Spanish possessions—understandably questioned the political reliability of their Catholic neighbors. In this, they followed the most enlightened English thinkers of their era. Even John Locke's admirable letters urging religious toleration cautioned that state security prevented tolerance of Catholicism.<sup>21</sup>

Nowhere was the colonial distrust of Catholics more evident than in law. Although there were very few Catholics in the colonies, all of the colonial assemblies enacted a great deal of anti-Catholic legislation. In many instances, anti-Catholic measures were part of the fundamental law of the colonies. Thus, the Royal Charters for Virginia and New England recited: "[W]e should be loath that any Person should be permitted to pass [into the colonies] that we suspected to affect the Superstitions of the Church of Rome."<sup>22</sup>

Laws granting religious freedom in the colonies specifically excluded Catholicism. New York's Toleration Act of 1691<sup>23</sup> provided:

That no p[er]son or p[er]sons which profess faith in God by Jesus Christ his onely son shall at any time be any wayes molested[,] punished[,] disturbed[,] disquieted[,] or called in question for any difference in opinion, or matter of Conscience in Religeous Concernment . . . . Allwayes provided that noething herein mentioned or Contained shall extend to give Liberty for any persons of the Romish Religion.<sup>24</sup>

Carolina's Toleration Act of 1697<sup>25</sup> declared that "all Christians which now are, or hereafter may be in this Province (Papists only excepted) shall enjoy the fully free and undisturbed liberty of their conscience."<sup>26</sup> A New Jersey law of 1699 granted religious liberty to all Christians except "any of the Romish Religion."<sup>27</sup> In 1715, North Carolina

21. J. LOCKE, *Letters on Toleration*, in *THE LOCKE READER* 247–69 (J. Yolton ed. 1977). For an example of the influence of Locke's views on the founders, see S. ADAMS, *The Rights of the Colonists*, in 2 *THE WRITINGS OF SAMUEL ADAMS* 352–53 (H. Cushing ed. 1904–1908), reprinted in 5 *THE FOUNDERS' CONSTITUTION* 60 (P. Kurland & R. Lerner ed. 1987).

22. Second Charter of Virginia (1609), reprinted in 7 *THE FEDERAL AND STATE CONSTITUTIONS* 3790, 3802 (F. Thorpe ed. 1909) [hereinafter F. THORPE]; Charter of New England (1620), reprinted in 1 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 921, 930 (B. Poore ed. 1877).

23. Act of May 13, 1691, 1 N.Y. Col. Laws 248.

24. *Id.*

25. 1 S.C. Stat. 131–33.

26. *Id.*

27. GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 372 (1758).

granted religious liberty to "all Protestant Dissenters."<sup>28</sup> The last colonial charter issued to Georgia in 1732 granted full religious liberty to everyone but Catholics:

[T]here shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of their religion . . . .<sup>29</sup>

Even those colonies founded upon the principle of religious liberty came to enact laws against Catholics. In 1633, Maryland was settled by English Catholics under the protection of their co-religionist George Calvert, first Lord Baltimore. At that time, Maryland granted religious liberty to all Christians. However, when in 1654 Parliament moved against Calvert as a Royalist, the parliamentary commissioner sent to Maryland held an election for the Colonial Assembly in which all Catholics were disenfranchised.<sup>30</sup> The Assembly repealed Maryland's Toleration Act and specifically denied Catholics the free practice of their religion:

[N]one who profess and Exe[r]cise the Popish Religion Commonly known by the Name of the Roman Catholick Religion can be protected in this Province by the Lawes of England formerly Established and yet unrepealed . . . but are to be restrained from the Exercise thereof.<sup>31</sup>

William Penn, a Quaker, granted full religious liberty to all persons believing in God, when he founded Pennsylvania in 1682.<sup>32</sup> However, by 1706, members of the Pennsylvania legislature were required to take the following oath obviously acceptable only to Protestants:

And I A.B. do solemnly and sincerely in the presence of God profess, testify and declare, that I do believe that in the sacrament of the Lord's Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary or any other saint, and the sacrifice of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous.<sup>33</sup>

Rhode Island, founded by Roger Williams as a haven for religious dissenters, may never have permitted Catholics to vote or hold office.

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28. 23 N.C. Rec. 11.

29. Charter granted June 9, 1732 (Ga.), *reprinted in* 2 F. THORPE, *supra* note 22, at 773.

30. 3 Md. Archives 313.

31. Act of October 20, 1654, 1 Md. Archives 341.

32. Laws Agreed upon in England, April 25, 1682, art. XXXV (Pa.), *reprinted in* 5 F. THORPE, *supra* note 22, at 3063.

33. Act of January 12, 1706, § VI, 2 Pa. Stat. 219.

The first compilation of the Colony's laws in 1719 contains the following undated measure:

[T]hat all men professing Christianity, and of competent estates, and of civil conversation, who acknowledge, and are obedient to the civil magistrate, though of different judgments in religious affairs (Roman Catholics only excepted), shall be admitted freemen, and shall have liberty to chuse and be chosen off[i]cers in the Colony.<sup>34</sup>

Catholics were denied not only religious liberty, but also citizenship<sup>35</sup> and the rights to vote<sup>36</sup> and to hold office<sup>37</sup> in most of the colonies. They could not serve as lawyers,<sup>38</sup> witnesses,<sup>39</sup> or guardians.<sup>40</sup> Some colonial laws threatened Roman Catholic clergy with banishment and even death;<sup>41</sup> fear of a popish plot led a New York mob to hang a man alleged to have been a priest.<sup>42</sup>

The colonial assemblies enacted a great deal of legislation to restrict Catholic immigration. South Carolina required ship owners to certify under oath that they had not imported "native Irish, or persons of known scandalous character or Roman Catholics."<sup>43</sup> The Act stipu-

34. 2 R.I. Col. Rec. 36.

35. See, e.g., Naturalization Act, 1 N.Y. Col. Laws 862 (1715) ("all persons of fforeign Birth, being Protestants . . . are declared to be his Majestyes Naturall Subjects"); Act of February 3, 1743, ch. CCCLIX, 4 Pa. Stat. 391-94 ("An act for naturalizing such foreign Protestants as are settled or shall settle with in this province").

36. See, e.g., 2 R.I. Rec. 36; Act of April 7, 1759, 4 S.C. Stat. 98-101 (enfranchising "every free white man . . . professing the Protestant religion"); Supplementary Act to the Act of —, 1718, 33 Md. Archives 287, 288 (authorizing the Sheriff or other election officials to "tender and administer Oaths and Subscriptions" vowing support of the Protestant interest to "persons suspected to be Papists, or Popishly inclined"); Act of April —, 1699, 3 Va. Stat. 172 ("no woman . . . infant[] . . . or recusant convict . . . shall be enabled to give a vote").

37. Act of March 12, 1643, 1 Va. Stat. 268 (disqualifying Popish recusants from holding any offices); see also Act of —, 1734, 1 Del. Laws 154-55 (requiring the English Supremacy Oath); Act of May 6, 1704, 2 S.C. Stat. 232 (requiring legislators to "conforme to the religious worship . . . according to the Church of England"); 2 R.I. Col. Rec. 36; Act of January 12, 1706, § VI, 2 Pa. Stat. 219.

38. See, e.g., Act of —, 1692, 8 Md. Archives 448 (no Roman Catholic shall "practice as an attorney or counsellor at law either in public pleading or otherwise soliciting any cause"); Act About Attornies and Solicitors, § 1, 1 Del. Laws 56 (1797) (requiring an oath of supremacy upon admission).

39. See, e.g., Act of October —, 1705, art. XXXI, 3 Va. Stat. 298 ("popish recusants . . . shall be deemed and taken to be persons incapable in law, to be witnesses in any cases whatsoever").

40. Act of —, 1762, 23 N.C. Rec. 577 (wills may direct that minor children be raised by anyone "other than the people called Quakers and Popish Recusants"); Act of May —, 1730, art. XV, 4 Va. Stat. 285 (anyone "other than Popish recusants").

41. See, e.g., Act of March 2, 1643, 1 Va. Stat. 268, 269 (forbidding any "popish priest" to remain within the province for more than five days); Act of August 9, 1700, 1 N.Y. Col. Laws 428.

42. R. BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860*, at 14 (1938).

43. Act of June 30, 1716, 2 S.C. Stat. 193.



lated, however, that "Irish servants, being Protestant, may be lawfully imported here."<sup>44</sup> Maryland taxed ship owners "importing Irish servants, being Papists," forty shillings per head.<sup>45</sup> Virginia was more inclusive and adopted a tariff of "fifteen shillings per poll for every servant not born in England or Wales."<sup>46</sup>

Where Catholic schools had been established, notably in Maryland, they were ordered closed. Maryland adopted the following statute in 1704:

If any persons professing to be of the Church of Rome should keep school, or take upon themselves the education, Government, or boarding of youth, at any place in the province, upon conviction such offenders should be transported to England to undergo the penalties provided these by Statutes 11 and 13, William III "for the further preventing [of] the growth of Popery."<sup>47</sup>

Apart from law, anti-Catholicism was also very much a part of the popular culture in the colonies. Sermons warning of Romanism as well as books and pamphlets revealing Catholic conspiracies were popular. Children in New England played a game called "Break the Pope's Neck."<sup>48</sup> Annually on "Pope Day," November 5, the colonists would hold parades, explode firecrackers, and burn effigies of the Pope.<sup>49</sup>

Anti-Catholicism probably reached its peak in the colonies during the mid-eighteenth century when Britain and France battled for control of North America. According to a modern historian, Catholics during this period were treated much like Communists during the 1950's.<sup>50</sup> Catholics were the "enemy within"; colonial assemblies enacted legislation prohibiting them from owning firearms, gunpowder, and horses.<sup>51</sup> Even with the expulsion of the French from Canada, the colonists' political distrust of Catholicism did not end. The British North American Act of 1774,<sup>52</sup> which recognized the position of the Catholic Church in previously French-held areas of Canada, was a major stumbling block to improved British-American relations on the eve of the Revolutionary War.<sup>53</sup>

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44. *Id.*

45. Act of \_\_\_, 1717, 33 Md. Archives 109-10.

46. Act of \_\_\_, 1699, 3 Va. Stat. 193.

47. Act of \_\_\_, 1704 (Md.), *quoted in* J. BURNS & B. KOHLBRENNER, A HISTORY OF CATHOLIC EDUCATION IN THE UNITED STATES 48 (1937).

48. R. BILLINGTON, *supra* note 42, at 16.

49. *Id.* at 18.

50. C. ROSSITER, *supra* note 19, at 88-89.

51. *See, e.g.,* Act of March \_\_\_, 1756, arts. III, VIII, 7 Va. Stat. 35, 36-39; Act of March 29, 1757, 3 Pa. Archives 120-36.

52. 14 Geo. 3, ch. 83.

53. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 83, 87-88 (W. Ford ed. <https://ecommons.udayton.edu/udlr/vol13/iss2/4>)

Colonial attitudes toward Catholics softened considerably during the Revolutionary War. There were virtually no Tories among the nation's Catholics.<sup>54</sup> More importantly, the alliance with France was crucial to the success of the Revolution; colonial leaders stopped many anti-Catholic practices to avoid offending America's allies. For example, Washington ordered the army to cease celebrations of Pope Day, expressing amazement that his officers could be "so void of common sense as not to see the unpropriety of such a step at this juncture."<sup>55</sup>

The new state constitutions adopted during the Revolution generally granted a greater measure of religious freedom than had their colonial predecessors. However, they still contained anti-Catholic provisions. Seven of the states—Massachusetts, New Hampshire, New Jersey, Connecticut, North Carolina, South Carolina, and Georgia—prohibited Catholics from holding public office.<sup>56</sup> Other states restricted Catholic citizenship. For example, New York's Constitution of 1777 required a person seeking citizenship to renounce under oath "all allegiance . . . to all and every foreign king, prince, potentate, and State in all matters, ecclesiastical as well as civil."<sup>57</sup> Only in the four middle states—Maryland, Pennsylvania, Delaware, and Virginia—were Catholics given equality of rights under the law.<sup>58</sup>

## II. AID TO RELIGIOUS EDUCATION IN THE COLONIAL AND EARLY NATIONAL PERIOD

The firm Protestant character of the colonies was evident in their approach to education. Every colonial legislature gave aid to the education programs of Protestant denominations. Statutes enacted by the colonial assemblies reflected the colonial view that education served primarily a religious purpose.

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1904–1937) (Congress complained "that a British Parliament should [never have] consent[ed] to establish in [Canada] a religion that [had] deluged [Britain] in blood, and dispersed bigotry, persecution, murder and rebellion through every part of the world"), *reprinted in 5 THE FOUNDERS' CONSTITUTION*, *supra* note 21, at 61; *see also* L. LEVY, *supra* note 16, at 7.

54. A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 38 (1964).

55. R. BILLINGTON, *supra* note 42, at 19 (quoting G. WASHINGTON, *THE WRITINGS OF GEORGE WASHINGTON* 200–01 (W. Ford ed. 1889–1893)).

56. MASS. CONST. of 1780, ch. VI, art. 1, *reprinted in 3 F. THORPE, supra* note 22, at 1889–90; N.H. CONST. of 1784, *reprinted in 4 F. THORPE, supra* note 22, at 2460–62; N.J. CONST. of 1776, art. XIX, *reprinted in 5 F. THORPE, supra* note 22, at 2597–98; N.C. CONST. of 1776, art. XXXII, *reprinted in 5 F. THORPE, supra* note 22, at 2793; S.C. CONST. of 1778, art. XII, *reprinted in 6 F. THORPE, supra* note 22, at 3250; GA. CONST. of 1777, art. VI, *reprinted in 2 F. THORPE, supra* note 22, at 779.

57. N.Y. CONST. of 1777, art. XLII, *reprinted in 5 F. THORPE, supra* note 22, at 2637–38.

58. *See* MD. CONST. of 1776, art. XXVII, *reprinted in 3 F. THORPE, supra* note 22, at 1695–96; PA. CONST. of 1776, § 6, *reprinted in 5 F. THORPE, supra* note 22, at 3084; DEL. CONST. of 1776, arts. 20, 29, *reprinted in 1 F. THORPE, supra* note 22, at 566–67; VA. CONST. of 1776, *reprinted in 7 F. THORPE, supra* note 22, at 3815–16.

The earliest statutes required towns to appoint inspectors to ensure that parents taught their children to read the Bible. Pennsylvania enacted such a statute in 1683: "[A]ll persons in this province and territories thereof, having children, and all the guardians or trustees of orphans, shall cause such to be instructed in reading and writing; so that they may be able to read the scriptures."<sup>59</sup>

When colonial legislatures later established schools, they required religious instruction and often stated that a major purpose for founding schools was the education of future ministers. The General Court of Connecticut, for example, established a grammar school in 1659 with an appropriation of £40 so "that (through the blessing of God) learning [would] be promoted in the jurisdiction as a means for the fitting of instruments for public service in church and commonwealth . . . ."<sup>60</sup> In 1715, the General Court of Connecticut appropriated £500 for Yale College, an institution that served the legislature's purpose of supplying "the churches of this colony with a learned, pious, and orthodox ministry . . . ."<sup>61</sup> Similarly, the Charter for the College of William and Mary was granted so that the "orthodox Christian faith [would] be propagated [among the Western Indians]."<sup>62</sup> Harvard College received from the Massachusetts Colonial Assembly both the regular income of a ferry that held an exclusive license and, after 1654, an annual appropriation of £100.<sup>63</sup> The firmly Protestant character of the latter institution throughout the colonial period can perhaps best be seen in a popular lecture series established at Harvard in 1750. Its course description offered students instruction in "the detecting and convicting and exposing of the idolatry of the Romish church: their tyranny, usurpations, damnable heresies, fatal errors, abominable superstitions, and other crying wickedness in her high places."<sup>64</sup>

Throughout the colonies, Protestant clergyman were given control over educational facilities. In 1701, the Massachusetts legislature required "every grammar school master [to] be approved by the minister of the town, and the ministers of the two next adjacent towns or by any two of them."<sup>65</sup> In 1752, the Borough of Norfolk, Virginia, established

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59. Act of \_\_\_, 1683 (Pa.), *discussed in* S. BROWN, *THE SECULARIZATION OF AMERICAN EDUCATION* 21 (1912).

60. Act of \_\_\_, 1659, New Haven Col. Rec. 301, *discussed in* S. BROWN, *supra* note 59, at 8.

61. Act of \_\_\_, 1715, 10 Conn. Col. Rec. 213, *discussed in* S. BROWN, *supra* note 59, at 11; *see also* S. BROWN, *supra* note 59, at 44.

62. COLLEGE OF WILLIAM AND MARY, *THE HISTORY OF THE COLLEGE OF WILLIAM AND MARY* (1874), *discussed in* S. BROWN, *supra* note 59, at 23.

63. S. BROWN, *supra* note 59, at 46 (citing 4 Mass. Col. Rec. pt. I, at 205).

64. R. BILLINGTON, *supra* note 42, at 16.

65. Act of \_\_\_, 1701, 1 Mass. Acts & Resolves 470.

a school and required its teacher to pass an examination "before the masters of the College of William and Mary, and minister of Elizabeth parish . . . ." <sup>66</sup> After 1758, schoolmasters in New Jersey were licensed by the Anglican Bishop of London. <sup>67</sup> In Connecticut, schoolbooks were subject to approval by local ministers. <sup>68</sup>

In 1764, the Rhode Island legislature established a college intended to function as a "liberal and catholic institution." <sup>69</sup> However, what was meant by that phrase is revealing of the colonial attitude toward toleration on the eve of the Revolution: only Protestants were eligible for appointments to the university and its President was required to be a Baptist. <sup>70</sup>

In the colonies, appropriations of public funds to schools were conditioned upon religious orthodoxy. For example, in 1708, Pennsylvania established a public school with the proviso "that there should be forever thereafter fifteen discrete and religious persons of the people called Quakers, overseers of the same public school . . . ." <sup>71</sup> In 1723, the Maryland Assembly provided for the distribution of public funds to schools whose teachers were members of the Church of England. <sup>72</sup>

The Revolution, the enactment of new state constitutions, and the adoption of the federal Constitution had little or no effect on education. The Protestant churches continued to control education and often received public grants to support their work. In 1796, Connecticut law required schoolmasters to teach children the "short orthodox catechism without book" so that they could "answer to the questions that shall be propounded to them out of such catechism, by their parents, masters or ministers . . . ." <sup>73</sup> In 1789, the General Assembly of Pennsylvania granted land to the German Reformed Congregation of Philadelphia for endowing a free school. <sup>74</sup>

In 1801, New York City made appropriations for education to the vestry of the Episcopal Church, the vestry of Christ's Church, the trustees of the First Presbyterian Church, the minister, elder, and deacons of the Reformed Dutch Church, and trustees of the Methodist Episcopal Church, the Scotch Presbyterian Church, the African School, the United German Lutheran Church, the German Reformed Churches, the

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66. *Id.* at 35 (citing 4 HENING 265).

67. *Id.* at 34 (citing 9 N.J. Archives (1st series) 68-69).

68. *Id.* at 39 (citing 1665-1676 Conn. Col. Rec. 281).

69. *Id.* at 38 (citing Act of —, 1764, 6 R.I. Col. Rec. 385-91).

70. *Id.*

71. *Id.* (citing J. WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA 44-48 (1885)).

72. *Id.* at 36 (citing 1723 Bacon's Laws, ch. XIX (Md.)).

73. *Id.* at 24 (citing 1796 Conn. Laws 60).

74. *Id.* at 49 (citing Act of Sept. 23, 1789 (Pa.)).

First Baptist Church, and the United Brethren or Moravian Church.<sup>75</sup>

In 1805, New York State incorporated the Free School Society, which thereafter received annual appropriations. Run by Quakers, the School Society gradually absorbed the Protestant schools with little or no change in their management or curriculum.<sup>76</sup>

Catholic schools occasionally received a portion of these distributions of public funds. For example, in 1818, the Baltimore County Commissioners made appropriations from the school fund to the "Union Board of Delegates Male Sabbath School Society of Baltimore, Female Union Society for the Promotion of Sabbath Schools . . . Orphaline Charity School [a Roman Catholic School] and such other institutions."<sup>77</sup> Throughout the early national period, however, most appropriations for free schools and education went to the Protestant churches or benevolent societies of a distinctly Protestant character.

It should be noted, however, that aid to Protestant education was not limited to the states (which were, of course, not yet subject to the first amendment). Although the federal government had virtually no responsibility for education, it did make appropriations to the Protestant denominations in the area where it had constitutional authority: Indian schools. For example, in 1820 alone, the federal government awarded twenty-one grants totaling over \$16,000 to Protestant mission schools for Native Americans.<sup>78</sup> Among others, federal funds were granted to Baptist and Moravian schools working with the Cherokee, and

to the United Foreign Missionary Society for the Osage Schools; . . . to the New York Missionary Society for Seneca and Tuscarora schools; to McCoy's Baptist Mission School at Fort Wayne; to the Presbyterian Synod of South Carolina and Georgia for a Chicasaw school; and to the Hamilton Baptist Missionary Society for the Oneida school.<sup>79</sup>

This federal support in the face of the first amendment is often cited by nonpreferentialists as evidence to support their position.<sup>80</sup>

Indeed, some small grants were made to aid Catholic education of the Indians, and nonpreferentialists frequently point to the federal money granted to the Catholic mission among the Kaskaskia Indians.<sup>81</sup>

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75. *Id.* at 48 (citing Act of April 8, 1801 (N.Y.)).

76. McCadden, *Bishop Hughes Versus the Public School Society of New York*, 50 CATH. HIST. REV. 188, 188-89 (1964). For a statement of the Free School Society's purpose, see *infra* note 103 and accompanying text.

77. S. BROWN, *supra* note 59, at 44-45 (citing Res. No. 24, (Md. \_\_\_, 1818)).

78. R. BEAVER, CHURCH, STATE AND THE AMERICAN INDIANS 73 (1966)).

79. *Id.*

80. For the most complete treatment, see R. CORD, *supra* note 13, at 47, 57-82.

81. *Id.* at 38.

However, these grants were small. The 1822 report of Secretary of War John C. Calhoun to President James Monroe on federal aid to Indian missions, another piece of evidence "favored" by nonpreferentialists, disclosed no aid to Catholic missions.<sup>82</sup> Of the \$7,150 granted in 1827 to church-sponsored Indian schools, only \$400 went to Catholic missions.<sup>83</sup>

The nonpreferentialists misconstrue the import of the Indian education grants. The grant program fit what had become the prevailing view of the church in America. Protestants in the United States had, to some extent, come to see themselves as sharing the values of a common faith, although practicing their religion under different names or denominations. This view, however, did not extend to Catholics or, of course, to non-Christians. Government was only nonpreferential among Protestant denominations in the early national period. Indeed, when Catholics, in keeping with their increasing numbers, began to demand an increased share of school funds, governmental aid to sectarian schools ended in the United States.

### III. THE GROWTH OF NATIVISM

In 1770, there were approximately 20,000 Catholics in a colonial population of over 2,000,000.<sup>84</sup> By 1860, over 3,000,000 Americans were Catholic. The ratio of Catholics to non-Catholics in the United States had grown from less than one in a hundred to nearly one in eight.<sup>85</sup> The growth rate was particularly dramatic from 1830 to 1850, when large numbers of Irish and German Catholics emigrated to the United States.<sup>86</sup> Pressure from this immigration explosion made anti-Catholicism a major political force in the country during the twenty years preceding the Civil War.

By the 1830's, leading Americans had begun to voice fears that Catholic immigration threatened the nation. In 1830, Samuel Morse visited Rome and was shocked by the papacy's authoritarian regime. Upon his return to America, he became convinced that Catholic immigration was part of a papal plot to overthrow democracy in the United States. He published a series of widely printed letters warning that immigrants were under the control of Jesuits who were secretly undermining American liberty.<sup>87</sup>

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82. *Id.* at 66-70.

83. *Id.* at 76-79. Non-Christians, of course, did not receive any of the funds. Indeed, the program by its nature showed a pronounced disrespect for the beliefs of non-Christian Indians.

84. J. BURNS & B. KOHLBRENNER, *supra* note 47, at 38.

85. *Id.* at 99.

86. *Id.* at 97-98.

87. See R. BILLINGTON, *supra* note 42, at 122-25.

In 1835, the Reverend Lyman Beecher, a leading minister of his day, published one of his sermons under the title *A Plea for the West*.<sup>88</sup> In that book, Beecher warned that the Pope aimed to conquer the West largely through the growing number of Catholic schools:

Do they not . . . tax their own people, and supplicate the royal munificence of Catholic Europe to rear schools and colleges for the cheap and even gratuitous education of Protestant children, high and low, — while thousands of Catholic children are utterly neglected and uncared for, and abandoned to vice?<sup>89</sup>

By far the most popular of the anti-Catholic publications was the scandalous *Awful Disclosures of the Hotel Dieu Nunnery of Montreal*<sup>90</sup> published in 1836 and written by Maria Monk, a mentally disturbed woman. The book purported to be a description of life in a convent and was full of scurrilous tales of licentiousness, torture, and murder. The book sold over 300,000 copies; some historians have pointed to the book's success as a major impetus to the growth of anti-Catholicism in the 1840s and 1850s.<sup>91</sup>

Nativist political groups began to appear in the 1830s as did a flourishing anti-Catholic press. The first serious civil disturbance occurred in 1834 when the Ursuline convent and school in Boston were burned to the ground.<sup>92</sup> By the 1840s, nativist societies were numerous. The American Society to Promote the Principles of the Protestant Reformation was formed in 1840 "to arouse Protestants to a proper sense of their duty in reference to the Romanists" because "the influence of Romanism was rapidly extending throughout [the] Republic."<sup>93</sup> The constitution of another group, the American Protestant Society, declared that because "Romanism . . . [was] endangering the freedom and the institutions of our country," the society was needed "to secure the permanency of our free institutions, and through them the liberty of conscience, to maintain and perpetuate 'pure religion' . . . ."<sup>94</sup>

The Native American Party was formed in 1843 to prevent the union of Church and State and to preserve the "right to 'worship the God of our fathers according to the dictates of our own consciences, without the restraints of a Romish priest, or the threats of a Hellish

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88. L. BEECHER, *A PLEA FOR THE WEST* (1835).

89. R. BILLINGTON, *supra* note 42, at 126 (quoting L. BEECHER, *supra* note 88).

90. M. MONK, *AWFUL DISCLOSURES OF THE HOTEL DIEU NUNNERY OF MONTREAL* (1836).

91. R. BILLINGTON, *supra* note 42, at 98–108.

92. *Id.* at 72–76.

93. CONSTITUTION OF THE AMERICAN SOCIETY TO PROMOTE THE PRINCIPLES OF THE PROTESTANT REFORMATION, *reprinted in* American Protestant Vindicator, June 24, 1840, *quoted in* R. BILLINGTON, *supra* note 42, at 437.

94. R. BILLINGTON, *supra* note 42, at 440.

Inquisition.'"<sup>95</sup> The Party won the 1844 elections in Philadelphia and New York City.<sup>96</sup> The year 1848, however, may have been a watershed in the growth of anti-Catholicism in the United States: the Pope's suppression of a republican revolution in Rome heightened American fears that Catholicism was undemocratic, and the famine immigration from Catholic Ireland began.<sup>97</sup>

In 1849, a group of nativists formed the Order of the Star-Spangled Banner in New York City. The organization was a secret society whose members were pledged to vote only for native-born Americans. Because members of the Society answered, "I don't know," to any questions from outsiders, the group came to be called "Know-Nothings." The Know-Nothings were for "Anti-Romanism . . . light, liberty, education and absolute freedom of conscience, with a strong devotion to one's native soil."<sup>98</sup> They became the dominant political party in the Northeast by the mid-1850s; Massachusetts, Rhode Island, New Hampshire, Connecticut, Pennsylvania, and New York returned Know-Nothing majorities to their legislatures in either 1854 or 1855.<sup>99</sup> The Know-Nothing victory in Massachusetts was particularly dramatic. The governor, all the state officers, and all but two of the state legislators elected in 1854 were Know-Nothings. The Know-Nothings passed legislation that prohibited all but the native born from holding office and required twenty-one years of residency for the right to vote. The influence of Maria Monk<sup>100</sup> upon the legislative assembly was apparent when it established a notorious "Nunnery Committee" to inspect convents throughout Massachusetts.<sup>101</sup>

The Know-Nothings and other nativist groups were, of course, vehemently opposed to the funding of parochial schools. Controversy over the schools first arose in the cities where nativism was the strongest: New York, Philadelphia, and Boston.

#### IV. THE PUBLIC-SCHOOL CONTROVERSY

In 1824, the New York City Council ceased direct payments from its School Fund to religious schools and began paying most of the fund to the Public School Society of New York.<sup>102</sup> The Public School Society was the new name for the Free School Society, which had been

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95. R. BILLINGTON, *supra* note 42, at 203 (quoting AN HONEST APPEAL TO EVERY VOTER: THE BIBLE IN THE SCHOOLS 16).

96. See A. STOKES, *supra* note 54, at 233.

97. *Id.* at 228.

98. *Id.* at 236 (quoting E. CLINCHY, ALL IN THE NAME OF GOD 69-70 (1934)).

99. R. BILLINGTON, *supra* note 42, at 396.

100. See *supra* notes 90-91 and accompanying text.

101. A. STOKES, *supra* note 54, at 237; see also R. BILLINGTON, *supra* note 42, at 99-108.

102. J. BURNS & B. KOHLBRENNER, *supra* note 47, at 158.



formed in 1805 by Quakers seeking "to inculcate the sublime truths of religion and morality contained in the Holy Scriptures."<sup>103</sup> Schools run by the Society were ostensibly nondenominational, but were clearly Protestant in character.

The textbooks used in these schools were remarkably anti-Catholic. For example, one reading lesson consisted of an imaginary dialogue between William Penn and Hernando Cortes. When Cortes appealed to reason at one point in the debate, Penn responded: "Though what thou sayest should be true, it does not come well from thy mouth. *A Papist talk of reason!* Go to the inquisition and tell them of reason and the great laws of nature."<sup>104</sup> Another reading lesson, openly anti-Semitic, implied Catholic services were idolatrous. In the lesson, one character asks, "What is frankincense? it was burned in the Catholic church the day I was there . . . ?" In response, the second character describes the physical properties of frankincense and then notes, "It was formerly burnt in all temples of worship, and many Christians were put to death by the idolatrous Jews and Romans, for refusing to burn it before idols."<sup>105</sup> A reference work used in the schools described John Huss as

a zealous reformer from Popery, who lived in Bohemia, towards the close of the fourteenth, and beginning of the fifteenth centuries. He was bold and persevering; but at length, trusting himself to the deceitful Catholics, he was by them brought to trial, condemned as a heretic, and burnt at the stake.<sup>106</sup>

Apart from these textbooks, the Public School Society had even more objectionable volumes in the libraries of its schools. One library book, *An Irish Heart*,<sup>107</sup> described intemperance as "a part of the papal system,"<sup>108</sup> stating:

For, when drunkenness shall have been done away, and with it, that just relative proportion of all indolence, ignorance, crime, misery, and superstition, of which it is the putative parent; then truly a much smaller portion of mankind may be expected to follow the dark lantern of the Romish religion.

That religion is most likely to find professors among the frivolous and the wicked, which by a species of ecclesiastical legerdemain can persuade the sinner that he is going to heaven, when he is going directly to

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103. A. STOKES, *supra* note 54, at 231 (citing R. BILLINGTON, *supra* note 42, at 143); see also *supra* note 76 and accompanying text.

104. 1 J. HUGHES, COMPLETE WORKS OF THE MOST REVEREND JOHN HUGHES, D.D. 116 (L. Kehoe ed. 1866).

105. *Id.* at 120 (quoting CONVERSATIONS ON COMMON THINGS).

106. *Id.* at 105 (quoting PUTNAM'S SEQUEL 266).

107. L. SARGENT, AN IRISH HEART.

108. 1 J. HUGHES, *supra* note 104, at 145 (quoting L. SARGENT, *supra* note 107, at 120).

hell. By a refined and complicated system of Jesuitry, and prelatical juggling, the papal see has obtained its present extensive influence through the world.<sup>109</sup>

A major clash between Catholics and Protestants erupted in New York City in 1840 when Catholics, led by Bishop John Hughes, petitioned the New York City Council for a share of the School Fund,<sup>110</sup> contending that the Public School Society operated sectarian schools and used sectarian textbooks.<sup>111</sup> Catholics achieved only a mixed result from public debates and hearings held by the city council. While the trustees of the Public School Society agreed to review and remove offensive texts from the schools,<sup>112</sup> the committee formed to investigate and report on all Public School Society schools found the Catholics' claims to be unsubstantiated.<sup>113</sup> Even more detrimental to Catholics than the committee's report was the unfavorable publicity.<sup>114</sup> Protestants were alerted to future "papist schemes," since it seemed quite clear that the report would not satisfy Bishop Hughes and his followers.<sup>115</sup>

Aside from Catholic resentment over the school fund issue, there was a generally-held belief among Catholics that publicly-supported schools were subtly introducing Protestant ideas to their children. Distrust and misunderstanding between Protestants and Catholics grew. Once the School Society promised to remove troublesome books, most Protestants were puzzled and irritated by continuing Catholic objections to the schools. One example of this fundamental misunderstanding concerned a textbook that the School Society felt contained an exemplary lesson in nondenominational Christian fellowship. In the lesson, a child walking with his father on a Sunday morning notes several different churches: Presbyterian, Methodist, Baptist, and Catholic, as well as a Quaker meeting house. The child asks his father why there are so many different churches. The father replies that God gave people the freedom to choose the manner of their worship. The child then observes a man faint in the street and a member of each church rush to the man's aid. The father tells his son that this charity is what God requires of mankind.<sup>116</sup> Catholics objected to this lesson because, in their view, it taught Protestant denominationalism. At this time,

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109. *Id.* (quoting L. SARGENT, *supra* note 107, at 120).

110. R. BILLINGTON, *supra* note 42, at 146-47.

111. *Id.* at 147.

112. A. STOKES, *supra* note 54, at 386.

113. R. BILLINGTON, *supra* note 42, at 147-48.

114. *Id.* at 148.

115. *Id.* at 149.

116. 1 J. HUGHES, *supra* note 104, at 46-47.

Catholics rejected the view that Christianity encompassed different denominations. A unity of faith in Christendom was important to Catholics; but to many Protestants, Catholics simply seemed intolerant.

More persistent problems centered around Bible readings in the public schools. Catholics insisted on reading from the Catholic Douay Bible because it was authorized by the Catholic Church and contained the Apocrypha. Protestants could not understand why Catholics insisted on their own text: certainly all the Protestant denominations were satisfied with a common text. Moreover, for the most part, there were no substantial differences between the King James and the Douay translations. When Catholics refused to read from the King James Bible, it simply confirmed the suspicions of many Protestants that Catholicism was unscriptural. When Catholics asked that they be permitted to read from their own text, many Protestants were concerned that acceding to the request would open the way for censorship of Milton, Locke, and other writers condemned by the Catholic Church.<sup>117</sup>

For most Catholics, however, the problem was more fundamental than the difficulties arising from the different texts. Bible reading in the schools was conducted without note or comment, in the interest of avoiding problems that could arise from different denominational interpretations. Bishop Hughes believed, however, that this practice silently introduced the Protestant position on a major question dividing the Christian churches: the practice, obviously, ignored the traditions and authority of the Catholic Church, which Catholics believe to be sources of Christian doctrine, along with scripture.<sup>118</sup>

A compromise between Catholics and Protestants over schools and school funding would have been extremely difficult. Such a compromise became impossible when nativist political groups, including Samuel Morse's Protestant Union, entered the dispute.<sup>119</sup> Concerned about threatened violence if the vote regarding the sharing of school funds went in favor of the Catholics, the New York City Council voted fifteen to one to deny the Catholic petition for a portion of the School Fund.<sup>120</sup>

After the Catholic defeat in New York City, Bishop Hughes turned his attention to Albany, the state capital, where the School Fund originated. Governor William H. Seward and his Secretary of State, John Spencer, were sympathetic to the Catholic position.<sup>121</sup> Spencer prepared, and the administration proposed, a bill under which

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117. See *Donahoe v. Richards*, 38 Me. 379, 407 (1854).

118. McCadden, *supra* note 76, at 194-95.

119. A. STOKES, *supra* note 54, at 233.

120. McCadden, *supra* note 76, at 201-02.

121. J. BURNS & B. KOHLBRENNER, *supra* note 47, at 159.

both state-supported and church-run schools would receive public funds, a truly "nonpreferential" measure. The nativist political group lobbied against the bill, and the State Senate postponed its consideration until after the election of November 1841.<sup>122</sup> In that election, Hughes entered a Catholic party, which supported some Democrats who favored the Seward-Spencer Bill and ran several candidates of its own. The party was soundly defeated; even among Catholics it attracted only one-third of the vote.<sup>123</sup>

Following the election, the State Assembly killed the Seward-Spencer Bill and passed what was intended as a compromise, the Maclay Act.<sup>124</sup> The Act gave complete authority over public education in New York City to an elected Board of Commissioners, ending the authority of the Public School Society. The Board was empowered to allot schools funds to the schools of the Public School Society and a few other institutions listed in the Act. None of the Roman Catholic schools in the city were on the list. Section 14 of the Act prohibited the distribution of funds to any school that taught "any religious sectarian doctrine or tenet."<sup>125</sup>

Nativist groups in New York City were outraged over the end of the Public School Society. Mobs shattered the windows of St. Patrick's Cathedral and stoned Bishop Hughes' home on Mulberry Street.<sup>126</sup> The anti-Catholic groups combined to form the Union Party, which ran a slate of candidates for the new school board. The Union Party candidates won, and a prominent nativist was appointed State Superintendent of Schools.<sup>127</sup> Daily Bible readings and prayers composed by Protestant ministers became a fixture in New York's public schools, lasting well into this century. The word "sectarian" in section 14 of the Maclay Act was construed to mean "nondenominational," permitting the use in the public schools of the King James Bible and the recitation of the Lord's Prayer as drawn from that Bible's version.

The New York school controversy was repeated across the United States, at times with even more violence than that seen in New York. When a school-board member in a Philadelphia suburb introduced a resolution to stop Bible reading in the school, nativist groups organized for a major battle. They distributed broadsides, held mass rallies, and

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122. *Id.* at 160.

123. *See id.*

124. (N.Y. 1842), discussed in R. BILLINGTON, *supra* note 42, at 153-54.

125. Maclay Act § 14 (N.Y. 1842), discussed in McCadden, *supra* note 76, at 207. For other accounts of the New York City school crisis, see R. BILLINGTON, *supra* note 42, at 145-54; A. STOKES, *supra* note 54, at 231-32.

126. McCadden, *supra* note 76, at 207.

127. R. BILLINGTON, *supra* note 42, at 154-55.

adopted resolutions stating

[t]hat the present crisis demands that without distinction of party, sect, or profession, every man who loves his country, his Bible, and his God, is bound by all lawful and honorable means to resist every attempt to banish the Bible from our public institutions.<sup>128</sup>

On May 6, 1844, the anti-Catholic groups organized a mass rally to be held in Kensington, the Irish section of Philadelphia. The groups called upon all "native Americans" to defend their rights "against the assaults of Aliens and Foreigners."<sup>129</sup> A day of rioting was sparked when an unknown person fired shots during the rally and a nativist was killed.<sup>130</sup> A nativist newspaper, the *Native American*, trumpeted: "Another St. Bartholomew's Day is begun on the streets of Philadelphia. The bloody hand of the Pope has stretched itself forth to our destruction."<sup>131</sup>

Fanned by such journalism, the riots continued for several days. Two Catholic churches, St. Augustine and St. Michael, were burned to the ground. A nativist mob obtained an artillery piece and subjected the Church of St. Phillip de Neri to a cannonade.<sup>132</sup> The general public was sympathetic to the nativists' goals if not to their methods. Failing to return an indictment against nativist leaders, the grand jury investigating the riots "ascribed the trouble to 'the efforts of a portion of [the] community to exclude the Bible from [the] Public Schools,' " a "portion" that "had resided in our country only for a short period."<sup>133</sup>

The Massachusetts public school system, founded by Horace Mann in 1837, has justly received a great deal of credit for its advancement of common education in America. Even in that system, however, the Bible was read each day without "note or comment." Mann thought the Bible essential to moral education. Describing its importance in the Massachusetts school system, Mann wrote in 1848:

Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in

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128. *Id.* at 222 (quoting N.Y. Observer, Mar. 16, 1844).

129. *Id.* at 223 (quoting Native Am., May 4, 1844).

130. *Id.* at 223-24.

131. *Id.* at 225 (quoting Native Am., May 7, 1844).

132. *Id.* at 228-30.

133. *Id.* at 230 (quoting Native Am., June 17, 1844 (reprinting grand jury presentment)).  
<https://ecommons.udayton.edu/udlr/vol13/iss2/4>

receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.<sup>134</sup>

Finding the public school systems objectionable, Catholics established their own schools. In Massachusetts, however, Catholic schools did receive some public funds. Two Catholic schools in Lowell were incorporated into the public school system and proceeded to follow all the regulations of the local school committee. The committee examined and appointed the teachers in the schools and approved all the textbooks.<sup>135</sup> As part of the compromise, religious education was held after school.

The Know-Nothings ended the Lowell experiment. The Know-Nothing legislature, which enacted the notorious Convent Inspection Law,<sup>136</sup> adopted the following amendment to the Massachusetts Constitution:

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 . . . such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school.<sup>137</sup>

Although the statute is phrased in general terms, the "religious sect" the legislature had in mind was Roman Catholicism. The Know-Nothings did not intend the amendment to interfere with the nondenominational Protestant exercises in the public schools. Indeed, they made the exercises mandatory. A general statute of 1855 directed that each "school committee shall require the daily reading of some portion of the Bible in the common English version."<sup>138</sup>

The argument that Bible reading constituted sectarian instruction was categorically rejected in nineteenth-century litigation. Courts adopted the Protestant view that the King James Bible was not a sectarian book. The Supreme Court of the United States held as much in *Vidal v. Girard's Executors*<sup>139</sup> when it construed the will of Stephen Girard.

134. A. STOKES, *supra* note 54, at 267 (quoting H. MANN, ANNUAL REPORT (1845-1848)).

135. *Id.* at 268; J. BURNS & B. KOHLBRENNER, *supra* note 47, at 156-57. The Lowell experiment took place from 1831 to 1852.

136. See *supra* notes 100-01 and accompanying text.

137. S. BROWN, *supra* note 59, at 110 (citing MASS. CONST. of 1780, art. XVIII (1855)).

138. *Id.* at 78 (citing Act of —, 1855 (Mass.)).

139. 42 U.S. 127 (1844).

Girard was born and educated in France in the mid-eighteenth century. When he died in 1831, he left a substantial part of his estate to the City of Philadelphia for the establishment of a free orphan's school, Girard College.<sup>140</sup> Girard directed that no cleric of any kind could teach in or visit the college. He also prescribed that the moral education of the children was to be completely secular, leaving the children free to develop their own religious views as they matured.<sup>141</sup>

Girard's descendants contested the bequest. Their attorneys, led by Daniel Webster, argued that the gift was contrary to Christianity—which, they suggested, was part of the common law of Pennsylvania—and therefore void. Inclined to agree with this argument, the Supreme Court suggested that a gift might be void if it established a "school or college, for the propagation of Judaism, or Deism, or any other form of infidelity."<sup>142</sup> It held, however, that Girard's devise was valid because his will, as the Court construed it, would not prohibit the reading of the Bible:

[T]he objection itself assumes the proposition that Christianity is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises . . . . Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament.<sup>143</sup>

Catholic schoolchildren were disciplined and even expelled for refusing to read from the King James Bible in public schools. When such children sued to vindicate their rights under the religion clause of the applicable state constitution, the courts uniformly rejected their claims.<sup>144</sup> As stated previously, courts consistently held that the King James Bible was a nonsectarian text essential to moral education.

On the other hand, the courts found Douay Bible to be a sectarian text because it was recognized only by Catholics. Catholic schoolchildren who offered to read from that text during Bible class were held to

140. *Id.* at 128–30.

141. *Id.* at 128, 133.

142. *Id.* at 198.

143. *Id.* at 199–200.

144. *E.g.*, *Donahoe v. Richards*, 38 Me. 379 (1854); *Commonwealth v. Cooke*, 7 Am. Leg. Reg. 417 (Mass. Police Ct. 1859); *Hart v. School Dist.*, 2 Lancaster L.R. 164 (Pa. C.P. 1885).

have violated the state's religion clause:

Can it be that those pupils whose religion teaches them that the Douay version of the Bible is the only true record of the Scriptures, shall be permitted to read and repeat the Lord's Prayer and the Ten Commandments from their own Bible? Grant the request and what follows? . . . [T]he very thing would be done which is now complained of, that of favoring the tenets of a particular religion.

Is the compromise to be that of a division of the school moneys, allowing separate schools to be carried on in accordance with religious views? Our Constitution declares that no money raised by taxation for the support of schools shall ever be appropriated to any religious sect for the maintenance, exclusively, of its own schools.<sup>145</sup>

As this quotation makes clear, there was no compromise on the school question. By the Civil War, most of the northern states had established public schools. Religious instruction in those schools was consistent with the beliefs of the mainstream Protestant churches: non-denominational, so far as Protestants were concerned. Catholics saw the schools as sectarian institutions and increasingly turned to building their own schools. Bishop Hughes directed that each Catholic parish build its school before building its church.<sup>146</sup> Parishoners supported their building funds and, at the same time, were taxed to support the public schools. As one foreign observer noted, "This heavy burden will be borne, however, until the Catholics in any State have numbers and political power sufficient to compel a division of the school fund . . . . That day, in several States, cannot be very distant, and is looked forward to with dread by many Protestant Americans."<sup>147</sup> A few years after the Civil War, it seemed to many Protestants that that day had come.

## V. THE BLAINE AMENDMENT

Although the Civil War diverted attention from the school issue, the controversy returned in the 1870s when an ever-growing Catholic population heightened fear of eventual Catholic control of the public schools. Catholic political power had grown. Through the Democratic Party, Catholic voters could control New York and other cities. In the 1860s and 1870s in New York City, Boss Tweed of Tammany Hall strongly supported city leaders who granted large sums of money to Catholic charities.<sup>148</sup> In contrast, Protestants were alarmed by such aid

145. *Cooke*, 7 Am. Leg. Reg. at 424-25.

146. J. BURNS & B. KOHLBRENNER, *supra* note 47, at 160.

147. 2 T. NICHOLS, FORTY YEARS OF AMERICAN LIFE 84 (1864).

148. S. LIPSET & E. BAER, THE POLITICS OF UNREASON 74 (1970).



to church institutions.

International events also raised Protestant concerns over Catholic participation in democratic politics. In 1864, Pius IX issued his ringing denunciation of liberalism, the *Syllabus of Errors*,<sup>149</sup> in which he condemned several ideas widely held in America, including the following:

15. Every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true.

45. The entire government of public schools . . . may and ought to appertain to the civil power . . .<sup>150</sup>

The *Vatican Decree of Papal Infallibility of 1870*<sup>151</sup> also alarmed many Protestants, who saw it as an effort by the Pope to increase his control over the Catholics of the world.<sup>152</sup>

Protestant fears that this power could be directed at their public schools were fed by new nativist organizations and journals. *Harper's Weekly*, a national publication, published the work of the anti-Catholic cartoonist Thomas Nast. His 1871 cartoon, "The American River Ganges," captured the deep anxiety caused by growing Catholic political power. In the cartoon, Boss Tweed leans on a cliff at the edge of the sea while his cohorts, well-known Irish politicians, throw Protestant school children to Catholic prelates emerging like alligators from the sea.<sup>153</sup>

The school question was introduced to national politics when the Republican Party needed a new emotional issue to supplant the waning appeal of the "bloody shirt" of the Civil War and Reconstruction. Anti-Catholics were an important constituency of the Republican Party;<sup>154</sup> in fact, President Ulysses S. Grant and both of his vice-presidents had been active Know-Nothings at one time and were well-known anti-Catholics.<sup>155</sup> In an address to a veteran's reunion in the fall of 1875, President Grant declared, "If we are to have another contest in the near future of our national existence, I predict that the dividing line will not be Mason and Dixon's; but between [Protestant] patriotism and intelligence on one side, and [Catholic] superstition, ambition and

149. PIUS IX, SYLLABUS OF ERRORS (1864).

150. A. STOKES, *supra* note 54, at 328-29 (quoting PIUS IX, *supra* note 149).

151. PIUS IX, VATICAN DECREE OF PAPAL INFALLIBILITY OF 1870.

152. A. STOKES, *supra* note 54, at 328-29.

153. See J. HIGHAM, STRANGERS IN THE LAND (1967). The cartoon is reprinted from J. KELLER & E. MORTON, THE ART AND POLITICS OF THOMAS NAST (1968).

154. The Republican Party had absorbed most of the Northern Know-Nothing Party by the late 1850s. See S. LIPSET & E. RAAB, *supra* note 148, at 60-61.



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The Priests and the Children.

ignorance on the other."<sup>156</sup> Grant closed the address with a ringing admonition to "[k]eep the Church and the State forever separate"<sup>157</sup> and proposed a federal constitutional amendment that would prohibit states from funding parochial schools.

In his annual State of the Union Message sent to Congress on December 7, 1875, President Grant declared that such an amendment was urgently needed to prevent Democrats and Roman Catholic priests from controlling the votes of immigrants:

Under [our] form of government it is of the greatest importance that all should be possessed of education and intelligence enough to cast a vote with a right understanding of its meaning. A large association of ignorant men cannot, for any considerable period, oppose a successful resistance to tyranny and oppression from the educated few, but will inevitably sink into acquiescence to the will of intelligence, whether directed by the demagogue or by priestcraft. Hence the education of the masses becomes of the first necessity . . . . As the primary step . . . I suggest for your earnest consideration . . . a constitutional amendment . . . making it the duty of each of the several States to establish and forever maintain free public schools . . . and prohibiting the granting of any school funds . . . for the benefit or in aid . . . of any religious sect or denomination . . . .<sup>158</sup>

The proposed amendment was introduced in the House of Representatives on December 14, 1875, by Republican Representative James G. Blaine of Maine, Speaker of the House during the first six years of Grant's presidency and a leader of the House Republicans in their new minority status.<sup>159</sup> In August 1876, his resolution passed the House without debate—and without Blaine, who had been appointed to the Senate on July 10<sup>160</sup>—by a vote of 180 to 7, with 98 abstentions.<sup>161</sup> A large number of Democrats in the House cast their votes for the resolution; a larger group abstained on the vote. Democrats refrained from public opposition to the measure, sensing a Republican-laid election-year trap. In fact, New York Governor Samuel J. Tilden, the Democrats' standard-bearer in the 1876 presidential election, wanted to avoid the Catholic question in his campaign.<sup>162</sup> Interestingly, his Republican opponent—and the eventual victor—was Governor Rutherford

156. *Id.* (citing A. STAUFFER, *ANTI-CATHOLICISM IN AMERICAN POLITICS 1865-1900*, at 68-69 (Ph. D. Thesis, Dep't of History, Harvard University 1933)).

157. *Id.*

158. State of the Union Message of President Ulysses S. Grant, 4 CONG. REC. 175 (1875).

159. O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DETROIT L.J. 137, 151 (1963).

160. See CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 486 (1975).

161. O'Brien, *supra* note 159, at 166 (citing 4 CONG. REC. 5191 (1876)).

162. *Id.* at 166 (citing N.Y. Times, Aug. 5, 1876, at 5).

B. Hayes of Ohio, who had made Catholic control of the Democratic Party an issue in his 1875 gubernatorial campaign.

Following the election, the Senate took up the Blaine Amendment in extremely partisan debates marked by religious animosity. The Senate version of the Amendment was particularly resented by Catholics because it prohibited any aid to their schools, lumped their church in with "anti-religious sects," and specifically permitted the public schools to continue Bible reading. As introduced, the Senate version declared:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . . 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, . . . 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 anti-religious sect, . . . or wherein the particular tenets of any religious or anti-religious sect, . . . shall be read or taught . . . . This article shall not be construed to prohibit the reading of the Bible in any school or institution . . . .<sup>163</sup>

In the debate, Senator Oliver H.P.T. Morton, Republican of Indiana, took an openly anti-Catholic position. Claiming that the public school system had been interdicted,<sup>164</sup> and referring repeatedly to the condemnation of secular education by Pope Pius IX in the *Syllabus of Errors*,<sup>165</sup> Morton accused those opposed to the Blaine Amendment of acting in harmony with the Pope to establish the Catholic Church in the states.<sup>166</sup> Republican Senator George F. Edmunds of Vermont argued that once Catholics controlled a state politically, they would compel the public schools to teach Catholicism.<sup>167</sup>

In response, the Democrats accused the Republicans of inciting religious bigotry to maintain their political power. Senator Lewis V. Bogy of Missouri declared that the Republicans had exhausted the political capital they could make of the Civil War and therefore turned to anti-Catholicism: "the bloody shirt' can no longer call out the mad bull, another animal has to be brought forth by these matadores . . . . The Pope, the old Pope of Rome, is to be the great bull that we are all to attack."<sup>168</sup>

The debates continued in such fashion for days.<sup>169</sup> The Senate vote

163. 4 CONG. REC. 5580 (1876).

164. *Id.* at 5585 (statement of Sen. Morton).

165. *See supra* note 149-50 and accompanying text.

166. 4 CONG. REC. 5591 (1876) (statement of Sen. Morton).

167. *Id.* at 5587 (statement of Sen. Edmunds).

168. *Id.* at 5589 (statement of Sen. Bogy).

169. O'Brien, *supra* note 159, at 166. It is interesting to note that at no time during the Senate floor or committee debates did any Senator voice the modern incorporation theory, under  
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split along party lines. Thirty-eight senators voted for the Amendment, twenty-four voted against it, and twelve abstained.<sup>170</sup> With the vote falling short of the two-thirds required for passage of a constitutional amendment,<sup>171</sup> Catholics had obtained an important victory. Although at least twenty measures similar to the Blaine Amendment would be introduced in Congress between 1876 and 1947, Catholics would have sufficient political strength to prevent the adoption of any of them.<sup>172</sup>

Throughout the remainder of the nineteenth century, each of the two major parties made the school issue a plank in its platform. The Republicans repeatedly called for adoption of the Blaine Amendment while the Democrats stood for local control of schools. Northern Democrats increasingly saw the Catholic vote as a key in national politics.

Catholic support for the Democratic Party is widely credited for helping to defeat Senator Blaine in his 1884 race for the Presidency.<sup>173</sup> Near the end of the campaign, a group of Protestant ministers called upon Blaine in a New York City hotel. Pledging their full support for the Republican ticket, one clergyman condemned the Democratic Party as the party of "Rum, Romanism, and Rebellion."<sup>174</sup> The remark, not disavowed by Blaine until too late, was widely publicized in the newspapers and likely cost him the support of a significant number of Catholic voters.<sup>175</sup> Blaine lost the election to Democrat Grover Cleveland by an extremely narrow margin: The shift of 1,047 votes in New York State would have made Blaine the twenty-second President of the United States.<sup>176</sup> Many Americans believed that the Catholic vote lay behind the defeat, the first for Republicans since 1856.<sup>177</sup>

Although Catholics had some political success at the national level, they met only failure in the states. During the last thirty years of the nineteenth century, most states amended their constitutions to prohibit any public aid to parochial schools.

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which the recently-adopted fourteenth amendment would have made the Blaine Amendment redundant. *See id.*

170. *Id.* at 192 (citing 4 CONG. REC. 5595 (1876)).

171. *Id.* (citing 4 CONG. REC. 5595 (1876)).

172. O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 207 (1965).

173. S. LIPSET & E. RAAB, *supra* note 148, at 75.

174. 2 D. PERKINS & G. VAN DEUSEN, *THE UNITED STATES OF AMERICA: A HISTORY* 207 (1968).

175. *Id.*

176. CONGRESSIONAL QUARTERLY, *supra* note 160, at 238, 277.

177. S. LIPSET & E. RAAB, *supra* note 148, at 75; *see also* A. STOKES, *supra* note 54, at

## VI. THE STATE CONSTITUTIONS AND THE NEW NATIVIST MOVEMENTS

In the late nineteenth century, the following states adopted constitutional amendments that, like the defeated Blaine Amendment, would prohibit aid to sectarian schools: Alabama (1875), Arkansas (1874), California (1879), Colorado (1876), Delaware (1897), Florida (1887), Georgia (1877), Idaho (1890), Illinois (1870), Kansas (1858), Louisiana (1898), Minnesota (1877), Mississippi (1890), Missouri (1875), Montana (1889), Nebraska (1875), Nevada (1880), New Hampshire (1877), New Jersey (1875), New York (1894), North Carolina (1876), North Dakota (1889), Oregon (1857), Pennsylvania (1874), South Carolina (1894), South Dakota (1889), Tennessee (1870), Texas (1876), Utah (1895), Virginia (1902), Washington (1889), West Virginia (1872), and Wyoming (1889).<sup>178</sup> Although the constitutional provisions varied somewhat in form, the intent of each was very clear: to prohibit the appropriation of public funds to sectarian institutions.

Just as in the 1840s and 1850s, there was no compromise on the school issue in the years following Reconstruction. Bible reading and what Catholics perceived as sectarian instruction continued to be required in virtually all the public schools. In some states, Bible reading was expressly sanctioned by the Constitution. For example, Mississippi's religion clause stated that it was not to be construed so as "to exclude the Holy Bible from use in any public school of [the] state."<sup>179</sup> In other states, Bible reading was required by statute. West Virginia teachers were required "to read or cause to be read at least one chapter from the Bible . . . every day at the opening of the school."<sup>180</sup> Other states simply supported Bible reading without mandating it. For example, an Indiana statute of 1894 declared, "The Bible shall not be excluded from the public schools of the state."<sup>181</sup>

Reflecting the growing concern for Bible instruction in the schools, Florida's school law of 1869 stated that "[t]he reading of the Bible in, and short devotional exercises of a non-sectarian character at the opening of school, [were] not to be prohibited but no pupil [was] to be required to engage in them against his conscience."<sup>182</sup> In 1889, the Florida law was made more uncompromising by the removal of the clause

178. For texts of these provisions, see S. BROWN, *supra* note 59, at 103-19.

179. MISS. CONST. art. III, § 18.

180. Act of February 26, 1866, 1866 W. Va. Sess. Laws ch. 74, § 29, discussed in S. BROWN, *supra* note 59, at 81.

181. Act of March 6, 1894, Ind. Ann. Stat. Rev. § 5980, discussed in S. BROWN, *supra* note 59, at 77.

182. Act of January 30, 1869, § 30 (Fla.), discussed in S. BROWN, *supra* note 59, at 76-77.

excusing students for reasons of conscience.<sup>183</sup>

Congress had a hand in the state constitutional movement to forbid aid to parochial schools. Democrats in Congress could not prevent Republicans from requiring that five northwestern states admitted to the Union in 1889 "adopt ordinances guaranteeing that public schools would be established 'free from sectarian control.'"<sup>184</sup> Thereafter, when several other western states were admitted to the Union, Congress required the adoption of such ordinances in the form of compacts that would prevent later changes without congressional consent.<sup>185</sup> Complying with the directive, North Dakota's constitutional provision contained a feature that echoed Grant's 1876 State of the Union address:<sup>186</sup>

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government of the people being necessary in order to insure the maintenance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools . . . free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.<sup>187</sup>

Concern over the schools was fueled by evangelical ministers such as Reverend Josiah Strong, whose 1885 book entitled *Our Country: Its Possible Future and Its Present Crisis*<sup>188</sup> sold over 167,000 copies. Strong warned that "[Rome was] concentrating her strength in the western territories. As the West is to dominate the nation, she intends to dominate the West."<sup>189</sup> Likewise, new nativist parties appeared in strength in the 1880s, among them the American League, the United Order of Native Americans, the Loyal Men of American Liberty, and the Red and White and Blue.<sup>190</sup> These groups generally called for statutes requiring that classes only be conducted in English, a measure aimed primarily at schools run by German teaching orders who had left Germany during the *Kulturkampf*.<sup>191</sup> They also invariably de-

183. Act of June 8, 1889, § 31 (Fla.), discussed in S. BROWN, *supra* note 59, at 77.

184. A. STOKES, *supra* note 54, at 435 (referring to Montana, North Dakota, South Dakota, Wyoming, and Washington).

185. *Id.*

186. Grant's 1876 State of the Union Address is discussed *supra* note 158 and accompanying text.

187. N.D. CONST. art. VIII, § 147 (1889).

188. J. STRONG, *OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS* (1985).

189. D. KINZER, *AN EPISODE IN ANTI-CATHOLICISM: THE AMERICAN PROTECTIVE ASSOCIATION* 19 (1964).

190. J. HIGHAM, *supra* note 153, at 61.

191. See D. KINZER, *supra* note 189, at 17-18.

mandated a strict separation of Church and State. The 1888 Platform of the American Party declared that "America should belong to Americans" and resolved:

That we reassert the American principles of absolute freedom of religious worship and belief, the permanent separation of Church and State; and we oppose the appropriation of public money or property to any church or institution administered by a church.<sup>192</sup>

The nativist groups coalesced in the late nineteenth century to form the American Protective Association (APA), the most significant nativist organization since the Know-Nothings of the 1850s.<sup>193</sup> By 1895, the APA, which claimed to have as many as 2,500,000 supporters,<sup>194</sup> had participated in changing many state constitutions. For example, one of its constituent groups, the National League for the Protection of American Institutions (NLP AI), proposed a state constitutional amendment passed by New York in 1894 that prohibited aid to parochial schools.<sup>195</sup> Concurrently, the APA took the campaign to the United States Congress.

#### VII. THE BLAIR EDUCATION BILL AND THE END OF FEDERAL AID TO INDIAN MISSIONS

On several occasions in the 1880s, Republican Senator Henry William Blair of New Hampshire, a champion of the APA, introduced a proposal to amend the Constitution to require the states to establish free public schools.<sup>196</sup> He also proposed a ten-year federal aid program to finance the schools. Often making anti-Catholic remarks on the floor of the Senate in support of his public-school proposal, Blair claimed that education in the North was "threatened and in many cases already controlled by Jesuitical craft and power."<sup>197</sup> If his bill passed, Blair suggested, "there [would] be an end of this struggle for the possession of the American child on the part of these outcast European Jesuits."<sup>198</sup>

Apart from these remarks, Catholics were particularly troubled by the language of the bill. It was, in their eyes, worse than the Blaine

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192. 2 A. SCHLESINGER & F. ISRAEL, *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1968*, at 1661-62 (1971).

193. S. LIPSET & E. RAAB, *supra* note 148, at 79.

194. *Id.*

195. D. KINZER, *supra* note 189, at 134.

196. See A. STOKES, *supra* note 54, at 565-67.

197. Evans, *Catholics and the Blair Education Bill*, 46 CATH. HIST. REV. 273, 294 (1960) (quoting 21 CONG. REC. 1542 (1890) (statement of Sen. Blair)).

198. 21 CONG. REC. 1542-45 (1890) (statement of Sen. Blair). See generally Evans, *supra* note 197, at 294-95.



Amendment in its perpetuation of the Protestant character of the public schools. Section 2 of the proposed amendment was a major cause of their concern:

Each state in this union shall establish and maintain a system of free public schools, adequate for the education of all the children therein, between the ages of six and sixteen years inclusive, in the common branches of knowledge and in virtue, morality, and *the principles of the Christian religion*.<sup>199</sup>

Despite APA support, Blair's proposal failed to come to a vote before Congress.<sup>200</sup>

Nonetheless, the APA was more successful in ending federal aid to sectarian schools among the Indians. In 1870, President Grant had initiated a new Indian program in response to widespread corruption in the federal Indian agencies. Under the program, the federal government placed each of the seventy-odd agencies under the control of religious denominations, which were responsible for supervising the Indian agents, establishing missions, and conducting schools among the Indians under contract with the federal government.<sup>201</sup> Mission societies of the Quakers, Methodists, Baptists, Presbyterians, Congregationalists, Unitarians, Episcopalians, and the American Reformed Church were invited to participate in the new program; Lutherans and Disciples of Christ joined later.

Assigned all but seven of the Indian agencies, the denominations sent representatives regularly to meet with the Board of Indian Commissions. Catholics, assigned the seven remaining agencies under a separate Bureau of Catholic Indian Missions, believed that they were entitled to a greater number. When President Grant originally announced the new Indian program, he indicated that each agency would be assigned to the denomination with the nearest existing mission. When there were several missions in the vicinity of an agency, Grant seemed to support assigning the agency to the oldest mission among them. Thus, the Catholic hierarchy claimed that this allotment scheme should have given them thirty-eight agencies instead of only seven. Nevertheless, the Catholics accepted the seven agencies and received regular appropriations along with the Protestant denominations.<sup>202</sup>

Sectarian divisiveness dominated the project. Under the original plan, the assigned agencies were exclusive, and the federal government policed encroachments by one sect upon the territory of another. This

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199. A. STOKES, *supra* note 54, at 566 (emphasis added).

200. D. KINZER, *supra* note 189, at 28–29.

201. R. BEAVER, *supra* note 78, at 134.

202. *Id.* at 134–37.

state of affairs resulted in some blatant denials of religious liberty. In 1873 and 1874, for example, Catholic priests were expelled from reservations that had been "assigned" to Presbyterian and Methodist missions.<sup>203</sup> A request by Red Cloud, a chief of the Oglala Teton Dakota tribe, that Roman Catholic missionaries be permitted to serve his people was denied for similar reasons.<sup>204</sup> Perhaps the most egregious denial occurred among the Devil's Lake community of Lakota Indians. The agent among the Lakota refused rations to the Reverend Daniel Renville and his wife even though both were Dakota Indians. Unfortunately for them, they were also ministers in the Lakota Christian Mission and the territory was assigned to the agency of the American Missionary Society. When notified of the problem, the Federal Indian Commission ordered the agent to expel the Renvilles, stating that "[i]t is against the rule of the Indian office to allow teachers of one denomination to intrude on the field held by another."<sup>205</sup>

Adverse reaction to the latter incident led the Secretary of the Interior to repeal the exclusionary regulations on February 11, 1881, opening the reservations to all denominations.<sup>206</sup> The repeal led to a remarkable growth in the number of Catholic mission schools. During an eight-year period ending in 1893, Catholic schools received \$2,355,416 in federal funds while eight Protestant agencies together received only \$938,977.<sup>207</sup> Not surprisingly, this state of affairs led many of the Protestant churches to reconsider the advisability of the partnership between the federal government and the church mission boards in Indian education.<sup>208</sup>

The APA took the lead in the campaign to end appropriations to the Indian schools. First, the APA wrote to each of the Protestant boards operating a mission school under contract with the federal government and asked them to cease accepting the appropriations. The APA's letters were accompanied by tables that demonstrated the alarming growth of the Roman Catholic schools. One by one, Episcopalians, Methodists, Presbyterians, and the American Missionary Association decided not to seek further subsidies for their Indian schools.<sup>209</sup>

The APA then turned to Congress. In June 1894, one of the or-

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203. *Id.* at 157.

204. *Id.* at 157-59.

205. *Id.* at 160 (citing 76 MISSIONARY HERALD 346 (Sept. 1880)).

206. *Id.*

207. *Id.* at 167 (citing PROTESTANT EPISCOPAL CHURCH, 1892 JOURNAL OF THE GENERAL CONVENTION 418).

208. *Id.* at 166-68.

209. *Id.* at 167 (citing PROTESTANT EPISCOPAL CHURCH, *supra* note 207, at 416-19).

ganization's favored Congressmen, Republican William S. Linton of Michigan, spoke against the Indian appropriations. He declared that "for more than a century the Mission Indians [had] been under Jesuit control, education, and influence" and urged the Congress "to replace the contract school system with one modeled after the public school system."<sup>210</sup> A few days later, Republican Congressman John H. Gear of Iowa introduced a petition calling for an end to all appropriations to the contract schools. Prepared by the NLP AI, the petition had been signed by the Reverend Josiah Strong, Frederick Law Olmstead, and other prominent citizens.<sup>211</sup> Although the contract schools survived a House vote to cut off federal funding on June 16, 1894,<sup>212</sup> appropriations were limited in 1895, when Congress granted funds only to existing contract schools and only in amounts not to exceed 80% of the previous grants. In 1897, that amount was cut to 50%. After an additional cut in 1898, federal subsidies for sectarian Indian schools were ended with a final appropriation in 1899.<sup>213</sup>

The end of federal aid for church-sponsored Indian schools is a fitting conclusion to nineteenth-century efforts to terminate all funding of sectarian schools. In many ways, the episode fits the pattern of the century. At first, few Americans saw any problems in funding church-run schools; indeed, the leading Protestant denominations welcomed the help. However, attitudes changed when Roman Catholics sought a significant share of the funds. Nativist groups worked to turn the public against federal participation and set a political agenda to end the funding.

### VIII. NONPREFERENTIALISM RECONSIDERED

This review of the nation's nineteenth-century experience casts considerable doubt on the nonpreferentialist version of history, which contends that, in the early years of the Republic, America did not prefer one sect over another in funding church-sponsored activities. If this were true, it would not be because of an American tolerance toward all faiths. While Americans at the time were developing a nondenominational view of the Protestant Christian church, their tolerance, once truly tested by nineteenth-century immigrants, did not extend to Catholics—let alone to non-Christians such as the Indians they sought to convert through federally-funded missions. Americans in the first

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210. D. KINZER, *supra* note 189, at 136.

211. *Id.* at 137.

212. *Id.* The appropriations bill was passed without the Gear amendment by a vote of 158 for, 58 against, and 135 not voting. The 158 favorable votes were cast by 147 Democrats, 6 Republicans, and 5 Populists. *Id.*

213. R. BEAVER, *supra* note 78, at 167–68.

century of the nation's history did not and could not countenance for very long any governmental programs under which non-Protestants received significant amounts of public funds. In short, nonpreferentialism rests on myth, not history. From the colonial era through the nineteenth century, Americans clearly preferred the mainstream Protestant churches and that preference was manifested in both state and federal governments.

This review also undercuts another aspect of the nonpreferentialist thesis. Nonpreferentialists have railed at an "activist" Supreme Court, which, they claim, has established a rigid "wall of separation" between church and state without adequate foundation in the nation's history. According to the nonpreferentialists, the courts have been particularly overzealous in prohibiting financial aid to sectarian schools.<sup>214</sup> Yet, as we have seen, that prohibition was well-established in the states before the Supreme Court ever addressed the issue. Likewise, Congress ended the funding to church-run Indian schools long before any judicial pronouncement on the constitutionality of such aid. In both cases, however, it was a political movement led by nativists—and not an activist judiciary—that led to the termination of government aid.

Review of the bitter feuds provoked in the nineteenth century over funding of sectarian schools may make an even more telling point against the nonpreferentialist position than would a simple quarrel over their reading of history. Our experience as a nation lends support to those who fear the sectarian divisiveness that state funding of religious activities could cause. There were rancorous denominational quarrels over the division of both state and federal funds in the nineteenth century. For example, Governor Seward's proposal to fund all church-run schools in New York spawned a church-run political party and eventually provoked riots.<sup>215</sup> On the federal level, the churches bickered among themselves and constantly lobbied for an increased share of the Indian mission funds, until the Protestant churches became alarmed over the Catholics' share and lobbied for a cessation of the funding.<sup>216</sup>

Government funds have never enhanced fellowship among American religious groups. On the contrary, such funds have always bred an ugly sectarianism. History supports, and the nonpreferentialists would do well to remember, Father John Courtney Murray's remark that "the first two articles of the First Amendment are not articles of faith but articles of peace."<sup>217</sup>

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214. See, e.g., R. CORD, *supra* note 13, at 143–45; Smith, *supra* note 13, at 636–42.

215. See *supra* text accompanying notes 119–27.

216. See *supra* text accompanying notes 201–13.

217. J. MURRAY, *WE HOLD THESE TRUTHS* 56 (1960).

Beyond the problems caused by narrow sectarianism, experience has shown the practical difficulty in carrying out any nonpreferentialist policy. American religious life is so diverse it may simply be impossible for even the most well-intentioned public program to avoid offending one group or another. For example, the members of the New York School Society attempted in good faith to remove texts offensive to Catholics from the public schools. However, their efforts to accommodate Catholic beliefs failed, in large part, because they simply did not understand those beliefs. Bible reading without note or comment seemed unobjectionable to the Society, but not to Bishop Hughes and his followers, who believed that the practice ignored the tradition and teaching authority of the Roman Catholic Church and thereby subtly introduced Protestant beliefs to Catholic children.<sup>218</sup> Although members of the Society had no evil motive, they nevertheless offended a religious minority.

There is no reason to believe a nonpreferentialist program would fare any better today. After all, Catholics and Protestants are closely-related religious groups. If accommodating both of these groups proved difficult in the nineteenth century, how much more difficult would it be to accommodate the increased diversity of American religious life? Today's schools, for example, educate increasing numbers of non-Christian students of non-Western descent. In addition, American religious opinion ranges from passionate fundamentalism to a more secular view of the world. Public support of any religious practice, no matter how well-intentioned and how well-designed, simply may not be able to avoid offense.

It must be said that the nonpreferentialists have provoked a debate worthwhile in enhancing an overall understanding of the first amendment. Certainly, their criticism of the *Lemon v. Kurtzman*<sup>219</sup> test is well taken. That test has led to an uneven line of decisions giving little guidance on exactly what the establishment clause prohibits. The *Lemon* test should be replaced with a unified principle of decision. Nonpreferentialism, however, would be a poor replacement.

Nonpreferentialism rests upon faulty history. When one looks beyond the framers through the nineteenth century, history suggests that nonpreferentialism is an unwise and ultimately unworkable social policy in a nation as diverse as the United States. The search for a unified principle to guide establishment decisions should concentrate on gov-

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218. See *supra* text accompanying notes 116-18.

219. 403 U.S. 602 (1971).

ernment "neutrality,"<sup>220</sup> an ideal never attained in the nineteenth century, but one that respects the pluralism of modern American life.

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220. For thoughtful, but different approaches to neutrality, see Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986); Laycock, *supra* note 16.

