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“BLAMING BLAINE”: UNDERSTANDING THE BLAINE AMENDMENT AND THE “NO-FUNDING” PRINCIPLE

STEVEN K. GREEN*

*Zelman v. Simmons-Harris*¹ was truly a watershed event in Establishment Clause jurisprudence.² On the most immediate level, *Zelman* settled a long-standing debate over whether the First Amendment bars publicly funded vouchers for religious schools.³ For years, vouchers had been a point of dissension and division among political, educational, and religious groups, hampering constructive discussions of educational reform. The modern voucher controversy spawned law suits throughout the country, from Wisconsin and Maine to Florida and Puerto Rico, with courts dividing over the issue of constitutionality, thus making the Supreme Court’s involvement inevitable.⁴ Although vouchers will continue to be controversial on political and educational grounds, *Zelman’s* 2002 holding appears to resolve the constitutional question, at least at the federal level.

On a different level, *Zelman* was a watershed in breaking new ground by allowing substantial public funding of religious activities. To be sure, on occasion the Supreme Court had upheld

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1. *Zelman v. Simmons Harris*, 536 U.S. 639 (2002).

2. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 279 (2001) (describing *Zelman* as raising “the most important church-state issue of our time”).

3. “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

4. See *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bush v. Holmes*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000); *Bagley v. Raymond Sch. Dist.*, 728 A.2d 127 (Me. 1999); *Asociación de Maestros v. Torres*, 137 P.R. Dec. 528 (1994); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

aid programs that benefited religious schools significantly, such as providing educational equipment and remedial teachers.⁵ Also, for close to twenty years the Court had been distinguishing between direct aid programs and “indirect aid” that flows to religious institutions only as a result of the private choice of individuals.⁶ But most of those cases involved insignificant amounts of aid that were directed at discrete or identifiably secular functions of the religious schools. Also, the Court usually was quick to point out that government aid was not funding religious *worship* or *instruction* and that no “funds ever reached the coffers” of the religious schools.⁷ *Zelman* changed all this by removing the constitutional barrier to *substantial* amounts of public aid being spent on *inherently religious activities*, provided the funds first symbolically flow through the hands of private individuals.⁸ The significance of *Zelman* thus cannot be understated: the holding constitutionalizes the deliberate funding of religious activity through the magic of private choice.

One remaining barrier threatens to derail the runaway train of *Zelman*: state constitutional provisions that commonly bar state aid from being spent “for the benefit of any religious or theological institution.”⁹ As noted, *Zelman* concerned only whether the federal Establishment Clause prohibits voucher programs such as currently exist in Cleveland and Milwaukee; it did not hold that states are

5. See *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

6. See *Agostini*, 521 U.S. at 205 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 12, 113 (1993); *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

7. *Agostini*, 521 U.S. at 228; see also *Zobrest*, 509 U.S. at 10. The sole exception was *Witters*, 474 U.S. at 489, which permitted a college scholarship to be used in a ministerial training program.

8. See Steven K. Green, *Private School Vouchers and the Confusion over “Direct” Aid*, 10 GEO. MASON U. CIVIL R. LAW J. 47, 50 (2000); Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, *passim* (2000).

9. OHIO CONST. art. I, § 5. Another common provision is represented by article VI, section 2 of the Ohio Constitution, which states, “No religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.” OHIO CONST. art. VI, § 2.

obligated to offer a private choice alternative or that such programs, if created, are not subject to state legal constraints. Approximately two-thirds of the state constitutions contain provisions that are more explicit and more prohibitory of public funds being spent on religious activities or given to religious institutions, schools or seminaries.¹⁰ The vast majority of these provisions date from the nineteenth century, with many tracing their lineages to the Blaine Amendment. In 1876 Congress considered a proposed amendment to the U.S. Constitution that would have made the religion clauses of the First Amendment directly applicable to state actions—thus making the later incorporation of the First Amendment via the due process clause of the Fourteenth Amendment superfluous—and expressly barred the appropriation of public monies to “religious sects or denominations.”¹¹ Although the Blaine Amendment fell short of passing Congress and being submitted to the states for ratification as the Sixteenth Amendment,¹² it served as the model or impetus for many of the state constitutional provisions, lovingly called “Baby Blaines.”¹³

Proponents of religious school funding are attacking Baby Blaines on two fronts. The first line of attack relies on the Supremacy Clause of the Constitution.¹⁴ This argument maintains

10. See Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1, 41–42 (1997).

11. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38 (1992).

12. 4 CONG. REC. 5595 (1876).

13. See Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 CONST. COMMENT. 651, 674 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 53 (1996); see also, e.g., Act of Feb. 22, 1889, ch. 180, sec. 4, 25 Stat. 676, 677 (1889) (mandating a state constitution provision for public schools among the requirements for statehood for Montana, Washington, North Dakota, and South Dakota stating, “[public schools] shall be open to all children of said States, and free from sectarian control”).

14. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United

that prohibiting individuals from applying public benefits at religious institutions (or excluding religious institutions from participating in neutral benefits programs) violates principles of equal protection and free exercise of religion.¹⁵ Previously, such “religious discrimination” was justified by the mandate of the Establishment Clause. Now that the Court has declared that the Establishment Clause no longer requires excluding religious schools from public benefits under a neutral private choice program, state constitutional provisions cannot stand in the way of these superior federal constitutional interests. Already, one appellate court has held that a stricter state constitutional prohibition must give way to a free exercise-based entitlement to use a state scholarship at a Bible college.¹⁶ The Supreme Court has granted review on the Ninth Circuit’s holding in *Davey v. Locke* to determine whether state restrictions on the use of a public benefit rise to the level of a free exercise violation,¹⁷ an interesting inquiry that is beyond the scope of this article.

The second line of attack does not engage in such an end-run around the Baby Blaines, but instead challenges them head-on. This approach argues that the original Blaine Amendment and its constitutional manifestation—the pervasively sectarian doctrine¹⁸—

States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI § 2.

15. See Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 960–72 (2003).

16. See *Davey v. Locke*, 299 F.3d 748, 759–60 (9th Cir. 2002) cert. granted, 123 S. Ct. 2075 (2003).

17. See *Locke v. Davey*, 123 S.Ct. 2075 (2003) (mem.).

18. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (defining “sectarian” as “an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in [its] religious mission”); see also *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971) (Brennan, J., concurring) (“[T]he secular education th[ese] schools provide goes hand in hand with the religious mission that is the only reason for the schools’ existence That teaching cannot be separated from the environment in which it occurs, for its integration with the religious mission is both the theory and the strength of the religious school.”);

are not based on legitimate constitutional values, but rest instead on a legacy of religious bigotry. According to Justice Thomas, the pervasively sectarian doctrine has a "shameful pedigree" that is tied to nineteenth century nativism and anti-Catholicism:¹⁹

Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."

....

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs This doctrine, born of bigotry, should be buried now.²⁰

Justice Thomas' claim finds support in the arguments of a handful of scholars and legal advocates who maintain that the no funding principle is based primarily on Catholic animus—with the Blaine Amendment as exhibit number one—and not on purer constitutional motives.²¹ As one critic has argued:

[T]he [no-funding principle] was not justified by any appeal to the abstract principle of

accord Meek v. Pittenger, 421 U.S. 349, 366 (1975).

19. See Mitchell v. Helms, 530 U.S. 793, 828 (2000).

20. *Id.* at 828–29. As support for his argument, Justice Thomas relied on this author's article, *The Blaine Amendment Reconsidered*. Green, *supra* note 11.

21. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 14, 193–251, 324–26 (2002); LLOYD P. JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 216–17 (1987); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 18, 152–54 (1999); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 134–40 (2000).

separation of church and state. The argument of the common school leaders was simple and blunt: the growth of Catholicism was a menace to republican institutions and must be curbed. Catholic schools, as a contributing factor to the growth of the Church, must be restricted and, if possible, suppressed.²²

This is no mere exercise in historical revisionism. The reason why this critique has so resonated is that it attacks the foundational assumptions underlying the Court's Establishment Clause jurisprudence. For approximately fifty years, the cardinal rule of the Establishment Clause was that the government could not give financial aid to religious institutions, in particular, to religious and parochial schools.²³ The accepted rationale was that such aid inevitably would fund religious indoctrination and worship, thereby invading rights of conscience and corrupting both religion and the government.²⁴ How legitimate is a doctrine that was presumed to ensure non-favoritism of religion but instead perpetuates religious bigotry and inequality? With the Court's slow retreat from the no funding principle as represented in the Cleveland voucher decision of *Zelman*, the stricter Baby Blaines serve as the remaining bar to greater public funding of religious schools. If these provisions can be discredited based on their association with nativism and the Blaine Amendment, the argument goes, then the no aid principle will have lost all legitimacy, and the *indirect* funding mechanism of a voucher will become superfluous as *direct* funds may freely flow.²⁵

This article takes issue with the growing tide of criticism of the no-funding principle and the Blaine Amendment. In particular,

22. JORGENSEN, *supra* note 21, at 216.

23. The period is that between *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Agostini v. Felton*, 521 U.S. 203 (1997).

24. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (asserting that the Establishment Clause was intended to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity"); accord *Agostini*, 521 U.S. at 223 ("As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.").

25. Lupu, *supra* note 15, at 960-72 (2003).

it challenges the assumption that anti-Catholicism was the overriding impulse behind the development of the no-funding principle or the Blaine Amendment itself.²⁶ This article makes two points. First, the no-funding principle and its corollary, nonsectarian education, predate the nineteenth century influx of Catholic immigration, the advent of parochial schooling as a "threat" to the common schools, and the rise of organized nativism. Rather than being simply a reaction to Catholic challenges to Protestant-oriented schooling and Catholic demands for a share of public school funds, the impulse toward nonsectarian public education was based on noble, republican ideals. The fact that nativist groups hijacked the no-funding principle for their bigoted aims does not invalidate the concept or mean that all advocates of the no-funding principle supported nativist goals. Although a philosophical defense of the no-funding principle may be timely, this article focuses on the historical bases of the rule, leaving a fuller discussion for another forum.²⁷

Second, even though anti-Catholicism motivated many supporters of the Blaine Amendment and unquestionably colored the debates,²⁸ that impulse was not the only concern that fueled the Amendment. Instead, the Blaine Amendment was a fulcrum in the century-long struggle over the propriety, role, and character of universal public education in America while, at the same time, it served as the capstone of an eight year controversy over the legitimacy of Protestant-oriented public schooling, a controversy that raged along side the parochial school funding question. The Blaine Amendment had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal

26. In so arguing, I do not retract from my article *The Blaine Amendment Reconsidered*, Green, *supra* note 11, which documents the pervasive Catholic animus of the 1870s. Anti-Catholicism was a *factor* in the Blaine Amendment, but it is not the *only* explanation for its support.

27. Arguments in support of the no-funding principle can be found in Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C.L. REV. 1111 (2002) and Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692 (2001).

28. See Green, *supra* note 11, at 67.

power over education as it did with Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation. Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times. Part I of this article considers the origins of the no-funding principle, while Part II examines the Blaine Amendment.

I. ORIGINS OF THE NO FUNDING PRINCIPLE AND NONSECTARIAN EDUCATION

The American principles of religious liberty, liberty of conscience, and separation of church and state arose independently of and prior to the rise of the common school movement or the Catholic parochial school system. As early as the 1770s, Thomas Jefferson and James Madison were equating government financial support for religion with infringements on religious liberty and rights of conscience. “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical,” Jefferson wrote in 1779, “[E]ven forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern.”²⁹ Madison echoed Jefferson’s belief that funding of religious worship and instruction violated notions of liberty: “Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”³⁰ Jefferson and Madison did not make these arguments in the abstract but raised them in opposition to an effort by the Virginia Assembly to impose an

29. Thomas Jefferson, *A Bill for Establishing Religious Freedom, June 12, 1779*, in 5 THE FOUNDERS’ CONSTITUTION 77, 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

30. James Madison, *Memorial and Remonstrance Against Religious Assessments, 20 June 1785*, in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 29, at 82, 82.

assessment for the support of houses of worship and teachers of religion, including teachers in private religious schools.³¹ Madison applied this principle later as President when he vetoed a bill that would have authorized an Episcopal church in the District of Columbia to receive poor funds for the education and care of destitute children.³²

Although Jefferson and Madison's spacious views on church-state separation were not shared by all of their contemporaries, greater consensus existed over the issue of public funding of religion. Funding of religious enterprises was viewed as the antithesis of disestablishment. In providing that "there shall be no establishment of any one religious church," the North Carolina Constitution of 1776 declared that no person could be "obliged to pay . . . [for] the building of any house of worship, or for the maintenance of any minister or ministry."³³ Baptist leader Isaac Backus urged disestablishment in Massachusetts on similar grounds, denying the authority of a "civil Legislature to impose religious taxes" for the support of any ministry.³⁴ At the time of the framing of the First Amendment, "[t]he belief that government

31. See THOMAS BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787*, at 133 (1977) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so."); Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 WM & MARY L. REV. 875, 897 n.108 (1986).

32. See JAMES MADISON, *Veto Message to Congress* (Feb. 21, 1811), in *JAMES MADISON ON RELIGIOUS LIBERTY* 79, 79 (Robert S. Alley ed., 1985). A week later Madison vetoed another bill that would have provided federal land for a Baptist church in Mississippi, with Madison stating that it established "precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" JAMES MADISON, *Veto Message to Congress* (Feb. 28, 1811), in *JAMES MADISON ON RELIGIOUS LIBERTY*, *supra* at 80.

33. N.C. CONST. of 1775 art. 34.

34. See Isaac Backus, *1775 Resolution to the Massachusetts Assembly*, in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 29, at 65, 65 ("[W]e are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God.").

assistance to religion, especially in the form of taxes, violated religious liberty had a long history."³⁵

As is evident, the Jeffersonian-Madisonian no-funding strain has its basis in rights of conscience and found primary application against late colonial forms of religious establishment: the official support of and preference for recognized religious ministries. Because this strain arose before the advent of common or parochial schooling, it might be argued that it had little influence on later attitudes toward private school funding. Although opportunities for applying this no-funding strain to religious schooling were rare prior to 1800, those instances alluded to above provide sufficient assurance that Jefferson and Madison viewed their constitutionally-based principle as applying in religious school context where worship and instruction as to tenets take place.³⁶ This principle of non-funding of religion became embedded in early notions of religious liberty, and people could easily extrapolate from the broader principle to the religious school context. This version of the no-funding principle therefore provides an independent and sufficient basis for nineteenth century opposition to funding of religious schools, apart from specific concerns about funding of Catholic schools.

The no-funding principle also developed in conjunction with the rise of the common school. At the time of the nation's founding, public education was practically nonexistent. A few towns, most located in New England, operated primary schools open to resident children; most other education took place through private tutors or in a handful of church-run schools. Education in most instances was restricted to children of the well-to-do, and the content of the schooling was universally religious (i.e., Protestant).³⁷

Following the Revolution, early educational reformers such as Benjamin Franklin, Benjamin Rush, and Noah Webster began

35. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 217 (1986).

36. *Id.* at 141; Laycock, *supra* note 32, at 897.

37. See *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* xvi-xvii (Frederick Rudolph ed., 1965); see also *READINGS IN PUBLIC EDUCATION IN THE UNITED STATES* 75-140 (Ellwood P. Cubberely ed., 1934) (collecting various documents describing nineteenth century schooling practices).

agitating for universal public schooling. These founding fathers were motivated by the conviction that education of children was indispensable for the stability and ultimate success of the new republic. Education was "essential to the continuance of republican governments," Webster wrote in 1790, as it "gives every citizen an opportunity of acquiring knowledge and fitting himself for places of trust."³⁸ Benjamin Rush also argued for a national system of education to "convert men into republican machines," which was necessary if "we expect them to perform their parts properly in the great machine of the government of the state."³⁹ Universal education, under the control of public authorities, would encourage knowledge, break down class differences, and train children in the essential skills for the still unfolding democratic society.

At the same time these framers were promoting universal public education, they were scrutinizing the traditional role of religion in the pedagogical process. In 1779, Thomas Jefferson drafted a plan for establishing public elementary schools in Virginia, proposing, "Instead . . . of putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European, and American History."⁴⁰ Webster, writing a decade later, also criticized the reliance on religious texts and the teaching of sectarian doctrine common in most schooling. The repetitive reading of scripture led pupils to disrespect its precepts and inhibited their ability to think critically. Although Webster supported the reading of selective passages of the Bible in the schools, he encouraged relying on secular subjects such as geography, economics, law, and government for inculcating virtue

38. Noah Webster, *On Education of Youth in America*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC*, *supra* note 38, at 65–66.

39. Benjamin Rush, *Thoughts upon the Mode of Education Proper in a Republic*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC*, *supra* note 38, at 17.

40. 3 THOMAS JEFFERSON, *Notes on the State of Virginia*, in *THE WRITINGS OF THOMAS JEFFERSON* 68, 252–53 (Paul Leicester Ford ed., N.Y., G.P. Putnam's Sons 1894).

and moral character.⁴¹

While Webster's recommendations hinted at the value of a secular-based curriculum, it was Maryland clergyman Samuel Knox who set out a comprehensive argument for what became nonsectarianism. Writing an essay in 1799 that won the American Philosophical Society's prize for the best design for a public education curriculum, Knox proposed a secular program of liberal study that avoided all religious instruction other than teaching "a reverence of the Deity, a sense of His government of the world, and a regard for morals."⁴² Although Knox did not object to a "short and suitable" nondenominational prayer each day addressed "to the great source of all knowledge," he offered his system of liberal education as the only means of "preserving that liberty of conscience in religious matters which various denominations of Christians in these states justly claim."⁴³ Knox's emphasis on practical subjects and his concern for the sensibilities of children from various religious backgrounds laid the foundation for a nonsectarian educational system divorced from most religious influences and control.

The first attempt at a comprehensive nonsectarian educational program came with the founding of the Free School Society of New York City in 1805.⁴⁴ From its inception, the Society distinguished its charity schools from the local denominational schools by stressing the nonsectarian character of its curriculum which, its publications asserted, made its schools appropriate for children of all religious faiths. In addition to instructing in the "common rudiments of learning," the Society described its

41. V.T. THAYER, RELIGION IN PUBLIC EDUCATION 28-31 (1947); Webster, *supra* note 39, at 50-51, 64-67.

42. Samuel Knox, *An Essay on the Best System of Liberal Education Adapted to the Genius of the Government of the United States*, in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC, *supra* note 38, at 332, 332-34.

43. *Id.*

44. See generally WILLIAM OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK (N.Y., William Wood & Co. 1870); JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 158-203 (1967); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 3-76 (1974).

curriculum as teaching only "the fundamental principles of the Christian religion, free from all sectarian bias, and also those general and special articles of the moral code, upon which the good order and welfare of society are based."⁴⁵ The Society asserted that its nonsectarian curriculum allowed children of all faiths to learn without the hobbling effects of sectarianism.⁴⁶

The radical notion that public schools should not only be free and open to all children but also nonsectarian in character belied the reality of the situation. At the same time that the Free School Society was promoting its nonsectarian curriculum to the state legislature, its officials were busily convincing local clergy that its version of nonsectarianism did not mean secularism. From its beginnings, the Society promoted its schools as distinctly Protestant, declaring that one of its "primary object[s], without observing the particular forms of any religious society, [will be] to inculcate the sublime truths of religion and morality contained in the Holy Scriptures."⁴⁷ Daily readings from the King James Bible were instituted at its first school, following shortly thereafter with daily prayer, the reciting of the Lord's Prayer, and the singing of Protestant hymns.⁴⁸

This distinction between sectarianism and nonsectarianism seems unintelligible by modern standards. In retrospect, aspects of the nonsectarian curriculum—readings from the Protestant King James Bible, Calvinist-leaning catechisms, and texts such as the McGuffey reader—appear highly sectarian, particularly if a student was Catholic or Jewish.⁴⁹ However, the Society's nonsectarian program must be viewed within the context of the early nineteenth century where the only contemporary model was that of a church school with curricula that revolved around sectarian instruction. The nonsectarian emphasis on a liberal curriculum complemented by commonly shared religious values represented a dramatic break

45. BOURNE, *supra* note 44, at 9.

46. *Id.* at 38, 641.

47. *Id.* at 6–7.

48. *Id.* at 636–44.

49. See RAVITCH, *supra* note 44, at 18–19; *Connecticut School Document, No. XIII 1892*, in READINGS IN PUBLIC EDUCATION IN THE UNITED STATES, *supra* note 37, at 54–55.

from the status quo. At this point, Protestantism was not used as a militant juxtaposition to Catholicism—in the 1810s and 1820s, New York City's Catholic population was relatively small.⁵⁰ Rather, the Free School Society's nonsectarian program was designed to attract children excluded from the city's Presbyterian, Episcopalian, Methodist, and Dutch Reformed schools.⁵¹ The Protestant complexion of the Free School Society thus represented a belief that schools could reflect commonly shared beliefs and practices without reverting to sectarianism (i.e., denominationalism). The Protestantism was inclusive, not exclusive, except to the extent it excluded those sectarian differences that separated the various Protestant bodies.

For the first seventeen years of existence, the Free School Society competed with the denominational "charity schools" for a share of the state public school fund administered by the New York Common Council. Due to the prominence of its board and benefactors—Governor DeWitt Clinton, for one—the Free School Society increasingly received the lion's share of tuition and building funds.⁵² That favored position was challenged in 1822 by Bethel Baptist Church, which established a charity school in its church and secured a state grant from surplus school funds for construction of a school building, funds that had heretofore been available only to the Free School Society.⁵³ The Society viewed the grant as a threat to the nonsectarian model and its economic well-being; as a result, the Society vigorously urged repeal of the grant in memorials to the state legislature. In addition to touting the superiority of its nonsectarian program that was available to children of all faiths and backgrounds, the Society claimed that funding of sectarian schools violated notions of separation of church and state.⁵⁴ Here, for the

50. RONALD H. BAYLOR & TIMOTHY J. MEAGER, *THE NEW YORK IRISH* 51 (1996).

51. See Timothy L. Smith, *Protestant Schooling and American Nationality, 1800–1850*, 53 J. AM. HIST. 679, 682 (1967).

52. PRATT, *supra* note 44, at 165–66.

53. BOURNE, *supra* note 44, at 49–50; *id.* at 166–67.

54. The Society's initial request was modest: Bethel Baptist Church should be excluded from receiving surplus state funds while its share of tuition funds should be restricted to pay for only those students whose parents

first time, the Society articulated several arguments that would serve as the basis for the no-funding principle: that the grant "impose[d] a direct tax on our citizens for the support of religion" in violation of rights of conscience; that funding of religious schools would cause competition and rivalry among faiths; that the school fund was "purely of a civil character;" and that "the proposition that such a fund should never go into the hands of an ecclesiastical body or religious society, is presumed to be incontrovertible upon any political principle approved or established in this country. . . . that church and state shall not be united."⁵⁵ After considering the Society's memorials and those of others,⁵⁶ in 1824 the legislative Committee on Colleges, Academies and Common Schools recommended the legislature discontinue funding for religious charity schools, opining "whether it is not a violation of a fundamental principle . . . to allow the funds of the State, raised by a tax on the citizens, designed for civil purposes, to be subject to the control of any religious corporation."⁵⁷ The legislature, opting for the easier course, voted to authorize the New York City Common Council to make all future allotments of the school fund.⁵⁸ The following year, the Common Council voted to end the funding of religious charity schools.⁵⁹

What is significant about this episode is that the notion that funding of sectarian schools violated constitutional principles arose in the context of a request made by a Protestant school. As the Society asserted in one of its resolutions, the funding of Bethel Baptist Church's school "promot[ed] . . . private and *sectarian*

attended Bethel Baptist Church. BOURNE, *supra* note 44, at 52–55, 67. As a result, the Society's memorial was supported by several Presbyterian, Dutch Reformed, Methodist, and other Baptist churches with charity schools. *Id.* at 71.

55. *Id.* at 52–55, 88; PRATT, *supra* note 44, at 167.

56. The New York City Mayor and Common Council supported the Society's position, arguing in its own memorial that funding of "religious or ecclesiastical bodies is . . . a violation of an elementary principle in the politics of the State and country." BOURNE, *supra* note 44, at 64–67.

57. *Id.* at 70–72.

58. *Id.* at 72–75.

59. *Id.* at 72–75; PRATT, *supra* note 44, at 167.

interests.”⁶⁰ While it is possible that some Society officials were looking forward to the establishment of Catholic parochial schools when they were crafting their arguments, nothing in the memorials or reports indicates such an awareness or apprehension. The first significant wave of Irish Catholic immigration was still a decade off, and it was not until the Second Provincial Council in 1833 that the American Catholic Church recommended the creation of a parochial school system.⁶¹ Due to contemporary acceptability of anti-Catholic attitudes, it is doubtful that supporters of nonsectarianism would have felt constrained in voicing such concerns if such motives had informed their decision making. According to popular understanding of the time, a sectarian school was any religious school in which particular doctrines were taught.⁶² The Protestant denominational schools were *sectarian*. The developing consensus that public funds should not pay for religious education arose within this context.

That Catholic animus played little part in the rise of the no-funding principle is supported by the next episode in the New York “school controversy.” Six years following the Common Council’s decision to defund all religious schools, the Roman Catholic Orphan Asylum and the Methodist Charity School petitioned for a share of the school fund to support their respective programs. Again, the Free School Society, recently incorporated by the city as the Public School Society, opposed the requested distributions on church-state grounds. While raising the same objections as before, the Society also made what can best be described as an early

60. BOURNE, *supra* note 44, at 51. In an 1825 report prepared in conjunction with the Common Council’s vote to defund religious charity schools, the Society wrote that it was “totally incompatible with our republican institutions, and a dangerous precedent in our free Government, to permit any part of such funds to be disbursed by the clergy or church trustees for the support or extension of sectarian education.” *Id.* at 88.

61. RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800–1860*, at 35–37 (1938); PETER GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY, 1792–1919*, at 60–61, 74 (1923).

62. See BOURNE, *supra* note 44, at 66 (noting that the memorial of the Mayor of New York, “Memorial and Petition of the Mayor, Alderman, and Commonalty of the city of New York,” referred to the Protestant charity schools as “sectarian”).

argument about the pervasively sectarian character of the schools, noting that "one of the objects aimed at in all such schools is to inculcate the particular doctrines and opinions of the sect having the management of them."⁶³ In its characterization of sectarian schools, the Society did not distinguish between Catholic and Methodist programs. The Council's Law Committee concurred with the Society arguments in its report, writing that "to raise a fund by taxation, for the support of a particular sect, or every sect of Christians, . . . would unhesitatingly be declared an infringement of the Constitution, and a violation of our chartered rights."⁶⁴

Your committee cannot, however, perceive any marked difference in principle, whether a fund be raised for the support of a particular church, or whether it be raised for the support of a school in which the doctrines of that church are taught as a part of the system of education.

....

If all sectarian schools be admitted to the receipt of a portion of a fund sacredly appropriated to the support of common schools, it will give rise to a religious and anti-religious party, which will call into active exercise the passions and prejudices of men. A fierce and uncompromising hostility will ensue, which will pave the way for the predominance of religion in political contests. The unnatural union of Church and State will then be easily accomplished—a union destructive of human happiness and subversive of civil liberty.⁶⁵

Despite the committee's warning, the Common Council approved payment to the Catholic Orphan Society on the apparent theory that the funds primarily supported the *care* of the orphans, not their education. The Common Council, though, denied the

63. *Id.* at 126; *see also id.* at 128 (arguing that the "system of education" in such schools is "so combined with religious instruction").

64. *Id.* at 139.

65. *Id.* at 139–40.

request of the Methodist Charity School, reaffirming its 1825 decision that public funds could not pay for sectarian education.⁶⁶ The episode again indicates that all parties viewed the notion of sectarian education and the accompanying bar on its funding in generic terms—applying to all religious schools.⁶⁷ In this instance, because the Catholic Orphan Society was providing primarily a charitable service rather than sectarian education, it was eligible for public support, much to the chagrin of the Methodist parochial school. If anti-Catholicism had fueled the debate, then the outcome would have been reversed, or at least resulted in the denial of funds for both institutions.

As a result of these episodes, the no-funding principle was firmly established in New York by the time the first true controversy over Catholic school funding arose in 1840. In January of that year, Governor William H. Seward proposed to the state legislature that schools be established in the city so that children “may be instructed by teachers speaking the same language with themselves and professing the same faith.”⁶⁸ Taking Seward’s proposal as an invitation to share in the public school fund, the Catholic archdiocese quickly filed a petition with the Common Council requesting that a portion of the school monies be allocated to its parochial schools. Opposition this time came not only from the Public School Society and Protestant churches—which insisted that only nonsectarian schools should receive public funding—but also from nativist groups that had sprung up in response to the

66. *Id.* at 145, 148.

67. In urging the Council to adhere to its 1825 decision, the Law Committee argued:

Methodist, Episcopalian, Baptist, and *every other sectarian school*, [would] come in for a share of this fund. . . . It would be . . . no[] less fatal in its consequences to the liberties and happiness of our country, to place the interest of the school fund at the disposal of sectarians. It is to tax the people for the support of religion, contrary to the Constitution, and in violation of their conscientious scruples.

Id. at 140 (emphasis added).

68. *Id.* at 179 (quoting Seward’s “Annual Message”); PRATT, *supra* note 44, at 175–80.

recent Catholic immigration. Tensions mounted as Bishop John Hughes in turn attacked the common schools for their practices of Protestant Bible reading and instruction.⁶⁹ After the Council rejected the Catholic petition in January, 1841, Bishop Hughes sought recourse from the state legislature, but even with the support of Governor Seward and State School Superintendent John Spencer, his efforts were to no avail. Rather than extending funding to parochial schools, the New York legislature enacted a law in 1842 that prohibited the granting of public funds to any school where "religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." The legislature amended the law in 1843 to prohibit public funds from going to schools "in which any book or books containing sectarian compositions shall be used," thereby inserting into public policy the notion of nonsectarian education.⁷⁰ Again, although the 1842 law may have been in response to the Catholic petition, the no-funding principle upon which it was based had been established for twenty years. Here, the principle was being applied to Catholic schools.

While the 1843 law effectively resolved the legal status of religious school funding in New York, it did little to stunt the burgeoning nativist movement in antebellum America. As has been extensively documented, the nativist movement reached a highpoint in the 1840s and 1850s with riots in Boston and Philadelphia and through the rise of the anti-Catholic Know-Nothing Party.⁷¹ As part of their bigoted agenda, nativists regularly attacked Catholic education while they defended the overtly Protestant character of many early common schools. As support for their claims, nativists embraced the argument that public funding of religious schools violated constitutional principles; in

69. BOURNE, *supra* note 44, at 178–323, 350–495; PRATT, *supra* note 44, at 178–81; RAVITCH, *supra* note 44, at 46–57; N.Y. OBSERVER, Jan. 16, 1841, at 10.

70. BOURNE, *supra* note 44, at 496–525; PRATT, *supra* note 44, at 182–90; RAVITCH, *supra* note 44, at 58–76.

71. See generally BILLINGTON, *supra* note 61; JORGENSON, *supra* note 21; Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 REV. OF POL. 503 (1970); Smith, *supra* note 51.

places, they became the most vocal supporters of the no-funding principle. In a handful of instances, Know-Nothings supported the enactment of laws and constitutional provisions at the state level that prohibited public funding of religious institutions, including parochial schools.⁷² In Massachusetts, for example, Know-Nothings swept the 1854 state elections and were reputedly instrumental in obtaining passage of a no-funding provision in the state constitution.⁷³

Nativism cannot be held responsible for all state enactments, however. As Professor Ray Billington indicated in his seminal study of antebellum nativism, the Know-Nothings were relatively ineffective in enacting anti-Catholic legislation, even in those states where they briefly held clear majorities.⁷⁴ Even if nativists were partially responsible for such enactments in one or two states, that impulse does not explain the basis for similar and earlier enactments in other parts of the country without significant religious dissension or nativist activity.⁷⁵ Michigan adopted a no-funding provision in its 1835 constitution⁷⁶ even though the state lacked a significant number of Catholic parochial schools and the enactment came before the wave of Catholic immigration.⁷⁷ According to Billington, at the same time that Michigan was drafting its constitution, the Protestant Home Missionary Society was reporting a lack of concern over Catholic activity in the upper

72. See generally BILLINGTON, *supra* note 61; JORGENSEN, *supra* note 21; Lannie, *supra* note 71; Smith, *supra* note 51.

73. See JORGENSEN, *supra* note 21, at 85–93; JOHN R. MULKERN, THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76, 94–103 (1990).

74. BILLINGTON, *supra* note 61, at 412–17.

75. Billington notes that nativism was most effective in the northeastern states and that Know-Nothings “showed little strength in the middle west.” *Id.* at 391, 396.

76. “No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.” MICH CONST. of 1835, art. I, § 5.

77. THOMAS M. COOLEY, MICHIGAN: A HISTORY OF GOVERNMENTS 306–29 (8th ed. Boston, Houghton, Mifflin & Co. 1897). Apparently, Catholic and Presbyterian clergy were instrumental in the movement to establish universal nonsectarian schooling at both the collegiate and common school levels. *Id.* at 309–11.

midwest.⁷⁸ The Michigan Constitution served as the model for similar constitutional provisions in Wisconsin (1848), Indiana (1851), and Minnesota (1857), all states without significant conflicts over parochial school funding at the time.⁷⁹ In Wisconsin, for example, the common school movement's emphasis on universal, nonsectarian education predated the Catholic Church's establishment of a parochial school system.⁸⁰ As in other parts of the country, supporters emphasized that the public schools would infuse democratic values in children from both native stock and immigrant backgrounds while "fus[ing] them into a 'homogeneous whole.'" ⁸¹ The motives, by and large, were well intentioned, if not shortsighted, by modern standards.⁸² Despite some growing tension between native Protestants and German Catholic and Lutheran immigrants during the late territorial period, there is "no evidence that the [Wisconsin] lawmakers and constitution makers were anti-religious in making [the no-funding] requirements, or that they harbored a prejudice against any sect."⁸³ The no-funding provision of the Indiana Constitution of 1851 supports a similar conclusion.⁸⁴

78. BILLINGTON, *supra* note 61, at 130.

79. My thanks to Professor Bill Long for sharing this research with me.

80. See RICHARD N. CURRENT, 2 *THE HISTORY OF WISCONSIN* 162–69 (1976); ALICE E. SMITH, 1 *THE HISTORY OF WISCONSIN* 577–86 (1973); see also Joseph A. Ranney, 'Absolute Common Ground': *The Four Eras of Assimilation in Wisconsin Education Law*, 1998 WIS. L. REV. 791, 793–94, 796–98 (placing the development of the parochial school systems after the enactment of the 1848 Constitution). Even Professor Lloyd Jorgenson, a critic of the common school movement, documented no Catholic animus in his study of the creation of the Wisconsin public education system. See LLOYD P. JORGENSEN, *THE FOUNDING OF PUBLIC EDUCATION IN WISCONSIN* 68–93 (1956).

81. CURRENT, *supra* note 80, at 162 (citations omitted); see CHARLES LESLIE GLENN, JR, *THE MYTH OF THE COMMON SCHOOL* 73–78 (1988).

82. See GLENN, *supra* note 81, at 67–69.

83. SMITH, *supra* note 80, at 593.

84. See Barclay Thomas Johnson, *Credit Crisis to Education Emergency: The Constitutionality of Model Student Voucher Programs Under the Indiana Constitution*, 35 IND. L. REV. 173, 200–03 (2001) (indicating that in 1850, less than six percent of Indiana inhabitants were immigrants and fewer still were Catholics); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659 n.162 (1998) (stating that the no-funding provision was not "a remnant of

Thus there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the no-funding principle or in the enactment of many no-funding provisions prior to the Civil War. The principle, based on an early consensus that funding of religious instruction violated rights of conscience, developed in response to Protestant sectarian schooling. The principle carried over into the period of state constitution making where drafters were primarily concerned with the survival and financial security of the nascent public schools.⁸⁵ Even in those states where anti-Catholicism may have played a role in the enactment of the no-funding provisions, the rationale for the no-funding principle was already well established.

II. THE BLAINE AMENDMENT

The Blaine Amendment is a complicated, if not confusing, episode in our nation's constitutional history.⁸⁶ Introduced by Representative James G. Blaine in December 1875 as a means of garnering support for a potential presidential campaign, the amendment sought to apply the First Amendment's religion clauses⁸⁷ directly to state actions, to prohibit the disbursement of public funds for parochial education, and to forbid the exclusion of the Bible from the nation's public schools.⁸⁸ Congress debated the

nineteenth century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics").

85. Johnson, *supra* note 84, at 200.

86. See generally Green, *supra* note 11, at 38-69 (1992).

87. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

88. As introduced on the floor of the House, the Blaine's amendment read as follows:

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

measure during the heat of the 1876 summer presidential campaign, an election overshadowed by a resurgent Democratic Party and the inevitable demise of federally-mandated southern reconstruction.⁸⁹ Blaine's proposal passed the House of Representatives by an overwhelming margin,⁹⁰ but fell four votes short in the Senate of being submitted to the states as the Sixteenth Amendment to the United States Constitution.⁹¹ Had the Amendment passed and been ratified by the states—a likely possibility—it would have radically altered the development of First Amendment law.

The Blaine Amendment can be viewed from several levels. At the simplest level, the proposed Amendment was an effort to prevent, through constitutional edict, any public funding of religious schools, which by the 1870s were primarily of the Catholic parochial variety. Many within the Protestant majority saw Catholic schools as a threat to nonsectarian public schooling and, for some, to republican principles and the American way of life. In an 1875 editorial entitled "A Coming Struggle," the *New York Tribune* stated that the school funding issue "excite[d] sharp controversy," and was threatening "the very existence of the republic. . . . The admission of parochial schools as a part of the public school system [was] openly demanded. Sooner or later the broad question [had to] be met, 'Whether popular education belong[ed] to the State or to the churches.'" ⁹² Nonsectarian schooling was a way of integrating immigrant children into the greater American (Protestant) culture, thereby diffusing potential political and social threats presented by the growing "Catholic menace" in the nation's cities. Funding of Catholic schools would

used, be divided among any religious sects or denominations.

4 CONG. REC. 205 (1875)

89. See generally WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION (William D. Dean ed., 1998).

90. The House passed the amendment with a vote of 180 to 7. 4 CONG. REC. 5191. It should be noted that the House version denied Congress the authority to enforce the amendment's provisions, weakening its potential effectiveness. See *infra* text accompanying notes 175–77.

91. JOSEPH P. VITERITTI, CHOOSING EQUALITY 153 (1999).

92. *A Coming Struggle*, N.Y. TRIB., July 8, 1875, at 4.

only strengthen Catholic power at the expense of preferred assimilation and Protestant hegemony.⁹³

Although this characterization is accurate, it also is incomplete as the explanation for the Blaine Amendment. The Blaine Amendment was the culmination of eight years of heightened attention to and activity over the "School Question." Arising in the years following the Civil War, the School Question involved more than concern about parochial school funding; that issue was only part of a larger controversy over the responsibility and role of government in public education: which level of government – local, state, or national – should direct public education's operation; whether that education should be truly universal for all social and economic classes and races (including its extension to the children of recently freed slaves); and whether that education should be secular, nonsectarian, or more religious.⁹⁴ Not solely Catholics and nativists were involved in the controversy. Other individuals and groups became vested in the School Question: evangelical Protestants who sought to preserve the religious character of the public schools, including the daily prayer and readings from the King James Bible; liberal Protestants, freethinkers, and Jews who opposed the religious exercises and nonsectarian character of the nation's schools; conservative Protestants who viewed nonsectarian public schooling as too secular and sought to *increase* its religious character; education and civil rights reformers who urged a larger government role in funding and regulating public education; Democratic and Republican partisans who had little interest in education issues but viewed Catholics as a voting block to be either cultivated or demonized; and states-righters who saw no government role in education, particularly at the federal and state levels. Finally, the School Controversy of the 1870s cannot be separated from the disaggregated forces of industrialization, urbanization, and scientific skepticism that together threatened those perceived

93. See GLENN, *supra* note 81, at 73–77 (1988); VITERITTI, *supra* note 84, at 145–55.

94. MCAFEE, *supra* note 89, at 105–24.

American values so closely intertwined with Protestant hegemony.⁹⁵ The controversy over the Blaine Amendment must be viewed within this larger context.

The immediate setting for the Blaine Amendment occurred in October 1869 when a controversy erupted over a decision by the Cincinnati school board to abolish the practice of daily prayer and readings from the King James Bible.⁹⁶ The board acted at the behest of a group of Catholics, Jews and freethinkers who argued the Protestant exercises excluded too many children from the benefits of a public education. Although many saw the Cincinnati board's action as a way of ameliorating Catholic complaints about the Protestant-oriented schools and defusing claims for a share of the school fund, the latter issue played no direct part in the Cincinnati controversy—the Catholic diocese had not requested a share of the school fund.⁹⁷ The primary battle lines were much more basic, between people who held differing visions of the religious character of American public schooling.

95. See JOSIAH STRONG, *OUR COUNTRY* vi–vii (Jurgen Herbst ed., 1963) (listing industrialization, immigration, urbanization, wealth, and the "School Question" as among eight perils facing the nation). See generally PAUL A. CARTER, *THE SPIRITUAL CRISIS OF THE GILDED AGE* (1971); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (David Donald ed., 1967).

96. See generally *THE BIBLE IN THE PUBLIC SCHOOLS* (Robert G. McCloskey ed., Da Capo Press 1967) (1870) (recounting the arguments made and opinions rendered in *Minor v. Board of Education of Cincinnati*); Harold M. Helfman, *The Cincinnati 'Bible War,' 1869–1870*, 60 *OHIO ST. ARCHAEOLOGICAL & HIST. Q.* 369 (1951).

97. Ironically, Cincinnati had a long history of amicable relations between its Protestant and Catholic immigrant communities. Even though Bible reading was inaugurated in the Cincinnati public schools in 1829, the school board had taken steps to ensure:

every thing sectarian, and all that might conflict with the religious tenets of parents" was removed from the curriculum, and the board later adopted a policy at the request of Catholic Bishop John Purcell allowing dissenting students to "read such version of the sacred scriptures as their parents . . . may prefer."

Helfman, *supra* note 96, at 370.

The *Catholic Telegraph* praised the tolerance and "liberality which characterize[d] the Cincinnati [School] Board" and its policies. *Id.*

To be sure, for many people the two issues of nonsectarian religious instruction and public funding of parochial schools were inseparable. For more than thirty years Catholic leaders had argued that the Protestant-oriented exercises and textbooks made public schools inhospitable for Catholic children, with the only solution being a pro-rata division of the school fund so that Catholic children could receive schooling according to Catholic teachings.⁹⁸ As a result, the no-funding issue lurked below the surface of the Cincinnati Bible controversy. The Methodist *Christian Advocate* declared that Catholic opposition to Bible reading in Cincinnati was actually part of a "Romanist policy" that sought "the overthrow, the abolition, of the whole American scheme of Common School Education" and replacement of it with religious schooling, whereas Reverend Amory Mayo warned that "the black brigade of the Catholic priesthood" was behind the resolutions and was seeking nothing less than "to knock out [the Republic's] underpinning, to poison the very wells of its water of life . . . and [to] darken the very light by which it live[d] and breathe[d]." ⁹⁹ Others, however, viewed the controversy much differently, as implicating the nation's commitment to universal free education for children of all classes, religions and nationalities. The "public school is the common property of the *whole* people," wrote Rev. Samuel Spear, a columnist for the Congregationalist journal *The Independent*, "and not exclusively of any portion of them."¹⁰⁰

Proponents of Bible reading, including many, but not all, local Protestant leaders, filed suit and had the school board decision overturned by the Superior Court.¹⁰¹ In a dissent, Superior Court

98. See PETER GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY* 124-35 (1923); *The School Question*, 11 *CATHOLIC WORLD* 91 (1870).

99. AMORY D. MAYO, *RELIGION IN THE COMMON SCHOOLS* 17, 28 (Cincinnati, Robert Clarke & Co. 1869); *The Common School War*, *CHRISTIAN ADVOC.*, Dec. 2, 1869, at 380; *Conspiracy Against the School System*, *CHRISTIAN ADVOC.*, Nov. 25, 1869, at 372.

100. See SAMUEL T. SPEAR, *RELIGION AND THE STATE* 43 (N.Y., Dodd, Mead & Co. 1876).

101. See *Minor v. Board of Education* (Super. Ct. Cinn. 1870) (Hagans & Storr, J.J.), reprinted in *THE BIBLE IN THE PUBLIC SCHOOLS*, *supra* note 96, at 351-89.

Judge Alphonso Taft characterized the controversy as involving matters of rights of conscience and religious equality: "No sect can, because it includes a majority of a community or a majority of the citizens of the State, claim any preference whatever."¹⁰² Based on the principle that government must be neutral toward religion, "it prefers none, and it *disparages* none."¹⁰³ Taft declared that just as the state could not support "the parochial schools with Catholic religious instruction," it was barred from promoting nonsectarian Bible readings that favored Protestants.¹⁰⁴ On appeal, a unanimous Ohio Supreme Court reversed the Superior Court and reinstated the school board's ban on Protestant religious exercises.¹⁰⁵ Embracing Judge Taft's dissent, the court affirmed that any religious preference, even in the sense of nonsectarian religious practices, violated notions of religious equality and government neutrality. As one ground for why Protestant exercises were unconstitutional, the court raised the no-funding principle: that the government had "no right to tax [citizens in] support [of] religious instructions" in public schools, and that to do so was "the very essence of tyranny" and the "first step in the direction of an 'establishment of religion.'"¹⁰⁶ The court provided several rationales to explain why governments were barred from supporting religion, financial or otherwise: it averted "conflict of opinions as to things divine" and "violation[s] of private rights [and] public peace;" it protected "a man's right to his own religious convictions;" and it prevented government corruption of religion through "the doctrine of 'hands off.'"¹⁰⁷ Thus, as Judge Taft had found, established constitutional principles required that public schooling be truly non-religious. Significantly, as used in this context, the no-funding principle supported Catholic interests by protecting rights of conscience and preventing religious preferences within the public schools. More important, the Ohio Supreme

102. *Id.* at 414 (Taft, J., dissenting). Judge Taft was the father of the future President and Supreme Court Chief Justice William Howard Taft.

103. *Id.* at 415 (emphasis in original).

104. *Id.* at 410.

105. *Bd. of Educ. v. Minor*, 23 Ohio St. 211, 248–49 (Ohio 1872).

106. *Id.* at 250.

107. *Id.* at 251.

Court, relying on Jeffersonian and Madisonian principles, had identified several constitutional values that underlie prohibitions on parochial school funding and religious exercises in the public schools, values that stood independent of Catholic animus.

The "Cincinnati Bible War," as it came to be called, drew national attention with newspapers in New York and Chicago reporting every development. Many within the Protestant community viewed the removal of Protestant prayer and Bible reading with alarm, as leading to immorality and "the ruin of the Republic."¹⁰⁸ "It is religious and moral truths, ideas of the infinite and perfect, God and eternity, that most quicken, expand, and sublime the human, and especially the youthful, intellect," wrote the *The Biblical Repertory and Princeton Review*.¹⁰⁹ "Education, therefore, divorced from morality and religion, becomes shrunken, distorted, and monstrous."¹¹⁰ At the same time, Protestant critics attacked the public schools' drift into secularism, with some urging an increase in religious instruction or the abolishment of public schools entirely.¹¹¹

Not all Protestants viewed the Cincinnati School Board's action with the same degree of alarm. As the controversy unfolded, a number of Protestant leaders began advancing arguments that public schools should be free of *all* religious instruction, including devotional Bible readings. Bible reading, prayer, and hymn singing, even when conducted in a nonsectarian manner, were seen as exclusive and inconsistent with universal education.¹¹² In December, 1869, Henry Ward Beecher, one of the nation's best-known preachers, wrote an opinion piece for the *New York Tribune*

108. See *Conspiracy Against the School System*, *supra* note 99, at 372.

109. *Recent Publications on the School Question*, BIBLICAL REPERTORY & PRINCETON R., Apr. 1870, at 313, 321. While supporting Protestant prayer and Bible reading in the public schools, *The Biblical Repertory and Princeton Review* also opposed "the appropriation of the public moneys to support the Romish schools . . . [f]or if it is allowed to the Romanists, it cannot be withheld from Christians of other denominations, from Jews and people of other religious or irreligious persuasions." *Id.* at 315-16.

110. *Id.* at 315-16.

111. See SPEAR, *supra* note 100, at 36-38.

112. *Id.* at 77-87.

that argued against Bible reading in the schools.¹¹³ While asserting his own belief that Bible reading "would do a world of good and no harm," Beecher declared that "compulsory Bible in schools is not in accordance with American doctrines of the liberty of conscience" and should be abolished.¹¹⁴ The state, Beecher insisted, "has no business to teach religion, or to show partiality to one or another sect in religion."¹¹⁵ Beecher was not alone in his thinking. *Harper's Weekly* published an article, in the same month, calling for the removal of the Bible from the common schools.¹¹⁶ Time had come for Protestants to embrace the nation's religious diversity and to recognize that not all Christians agreed on the same "great general truths" of the Bible, the magazine asserted.¹¹⁷ Because Christians disagreed over even basic theological doctrine, public schools should be restricted to secular education solely and should "have nothing to do with any religious tenets whatever." *Harper's* went so far as to question the spiritual value of rote prayer and Bible reading, asserting that the great lessons of Christian charity and love of God "do not appear in a ceremonial and hollow reading to a chapter in the Bible." The article represented a significant departure from an earlier position for *Harper's Weekly* that had embraced Bible reading as the means of ensuring evangelical dominance of the public schools.¹¹⁸

The Cincinnati Bible controversy was not an isolated event, but spawned controversies in other cities. In June 1872, prior to the

113. *The Bible in the Public Schools*, N.Y. TRIB., Dec. 3, 1869, at 5.

114. *Id.*

115. *Id.*

116. *The Battle of the Schools*, HARPER'S WKLY, Dec. 18, 1869, at 802. *Harper's* was equally concerned that Bible reading and religious instruction provided Catholics with ammunition in their ongoing battle for a share of the common school fund:

Do not leave them an honest sectarian objection
Free the schools of every thing against which this kind of
opposition may be fairly urged, and then stand fast upon
the principle that the public money shall not educate the
people in the private religious faith of the teachers.

Id.

117. *Id.*

118. *Id.*

Ohio Supreme Court decision, the State Superintendent of the New York public schools ordered several school boards on Long Island to suspend the practice of daily Bible readings and religious exercises in response to Catholic complaints.¹¹⁹ Following the Cincinnati case, the New York and Chicago city school boards prohibited Bible reading and religious instruction in their respective schools. Similar moves to ban religious exercises began in Michigan and other northern states. In March 1875, the Buffalo school district excluded Bible reading and religious exercises from its schools, followed by the Rochester school board in June.¹²⁰ In response, evangelical Protestants rallied their forces: "Everywhere the indications of a rising tide of Evangelical Protestant sentiment on the school question are visible," wrote *The Index*, a journal of freethought.¹²¹ "Chicago ministers are almost a unit in protesting against the exclusion of the Bible from the schools . . ."¹²² Ultra-conservative Protestants mounted a campaign for a constitutional amendment to insert recognition of God in the Preamble, in part to ensure that America and its institutions remained "Christian."¹²³ The soul of the nation and its special relationship with God were at stake. As one Protestant leader declared:

The expulsion of the Bible is only the starting point; it means ultimately the elimination from public instruction of all that tends to the promulgation of the doctrines of true religion, or morality, and of the rights of free human worship. . . . It is time for the people of America to arouse, and, if there is no law or statute in the Constitution to specify what principle of religion or of faith shall be sustained, then it is necessary for the people to speak and

119. *The Bible in the Schools*, N.Y. TIMES, June 12, 1872 at 5.

120. *The Bible as a School Book*, 5 INDEX 294, 295 (1875); *Glimpses*, 5 INDEX 373, 373 (1875); *The School Question in Buffalo*, INDEPENDENT (N.Y.), Apr. 8, 1875, at 14.

121. *Glimpses*, 5 INDEX 517, 517 (1875).

122. *Id.*

123. C.A. Blanchard, *The Conflict of Law*, 12 CHRISTIAN STATESMAN 202-03 (1874); see also Steven K. Green, *The National Reform Association and the Religious Amendments to the Constitution, 1864-1876*, at 1-55 (1987) (unpublished M.A. thesis, University of North Carolina at Chapel Hill) (on file with the University of North Carolina Libraries) (chronicling the rise and fall of the "Christian Amendment").

amend the Constitution.¹²⁴

In this climate, an unlikely champion stepped forward: President Ulysses S. Grant. In a September 30, 1875 address to an audience of Civil War veterans in Des Moines, Iowa, Grant urged the importance of guaranteeing "the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men irrespective of nationality, color, or religion."¹²⁵ Toward this end, Grant called for federal action that would:

Encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor Nation, nor both combined shall support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions. Keep the Church and State forever separate.¹²⁶

Newspapers throughout the country reported Grant's speech favorably as offering a solution to the intractable School Question.¹²⁷ The Methodist *Christian Advocate* described the speech as "full of wisdom" and noted that a constitutional amendment was needed to put the suggestions into place.¹²⁸ Even the freethought journal, *The Index*, called the speech "a most remarkable one," despite its criticism of atheism.¹²⁹ The President

124. *Glimpses*, *supra* note 121, at 517.

125. *Army of the Tennessee*, N.Y. TRIB., Oct. 1, 1875, at 1.

126. *Id.*

127. *E.g.*, *Something Significant*, 50 CHRISTIAN ADVOC. 316, 316 (Oct. 7, 1875); *id.* (noting "[t]he President's speech was greeted with applause, which was repeated again and again").

128. *Something Significant*, *supra* note 127, at 316.

129. *Glimpses*, 5 INDEX 469, 469 (1875) (adding as to the speech, "there

had placed the school issue above politics by identifying free education with the nation's heritage. Only Catholics dared to question the sincerity of the address.¹³⁰

Grant clearly had mixed motives in giving his speech. On one level, Grant sought to divert attention away from his scandal-ridden administration and recapture the mantle of reform for the Republican Party. One approach was to emphasize universal public education, an issue with which the Democratic Party, with its Southern conservative wing and its Catholic following, had never been associated.¹³¹ Later, in his December address to Congress, Grant was more express (and more expansive) in the scope of his proposal, asking Congress for a constitutional amendment "making it the duty of each of the several States to establish, and forever maintain, free public schools adequate to the education of all the children in the rudimentary branches within their respective limits, irrespective of sex, color, birthplace, or religion."¹³² This language, suggesting federal involvement in public education, was a shot across the bow for most Democrats, particularly those from the South, as it would have obligated states to provide public schooling for all children, including black children. Even though language obligating universal education would not make it into the latter versions of the Blaine Amendment, this issue remained associated with the proposed amendment¹³³ and informed the public debate.¹³⁴

is nothing truer, finer, or weightier in the world-famous 'Farewell Address' of George Washington").

130. See *The President's Speech at Des Moines*, 22 CATHOLIC WORLD 433-43 (1876) (supporting the plain language of Grant's speech, but acknowledging impressions abroad and among some Catholics that the speech may have been motivated by anti-Catholicism).

131. See MCAFEE, *supra* note 89, at 12, 18.

132. ULYSSES S. GRANT, ULYSSES S. GRANT, 1822-1885, at 92 (Philip P. Moran ed., 1968); U.S. Grant, *Extracts from the President's Message*, 5 INDEX 593, 593 (1875); see also *The President's Message*, CHI. TRIB., Dec. 8, 1875 at 4 (analyzing "The President's Message" and noting its broad message of universal education combined with a careful avoidance of any suggestion of anti-Catholicism).

133. SPEAR, *supra* note 100, at 39-41; see N.Y. TIMES, Dec. 8, 1875, at 6 (crediting the "The President's Message" and the actions of James Blaine on the floor of the House together in "land[ing] the Democratic majority in a

On a different level, Grant likely saw his speech as a way of aligning more closely the Republican Party with the Protestant cause. Despite the possible merits of the proposal, most observers recognized the partisan nature of the proposal. Professor Ward McAfee has argued that partisan elements within the Republican Party seized on the Catholic-immigrant issue as a substitute for the "bloody shirt" when public interest in Reconstruction began to wane.¹³⁵ As the Republican *New York Times* observed, an "appeal to religious passions was worth twenty-five thousand votes to the Republicans."¹³⁶ Grant likely sought to capitalize on this trend as a way of propelling himself into a third term as President.¹³⁷

This fact on its own did not make the proposal anti-Catholic—Grant's remarks criticized sectarianism along with "pagan" and "atheistical doctrines"—although he decried "superstition, ambition and ignorance," code words for Catholicism.¹³⁸ In fact, many Protestants expressed concerns that Grant's proposal would lead to the removal of all nonsectarian instruction in the public schools.¹³⁹ While *The Catholic Standard* criticized Grant's speech as "an attack on the Catholics of the United States," *The Catholic World* was cautiously hopeful about the proposal, stating, "We find nothing in the oration with which we are in the least disposed to take issue. On the contrary, we are prepared to join our tribute to the burst of applause which echoes through the land."¹⁴⁰ Still, *The Catholic World* doubted the proposal could be accepted on face value and called upon Grant to free Catholics from the tax burden of supporting Protestant-oriented public schools if they could not receive their fair "pro

deep quagmire").

134. 4 CONG. REC. 5453–56, 5580–95 (1876); *id.* at 21.

135. See MCAFEE, *supra* note 89, at 175, 192–95.

136. N.Y. TIMES, Oct. 22, 1875, at 1.

137. See *Glimpses*, *supra* note 129, at 469 (dismissing out of hand suggestions that Grant's Des Moines speech "was a bid for a 'third term,' as "ungracious[]" and "malicious[]").

138. See S.S. Hunting, *The President's Speech*, 5 INDEX 513, 513 (1875).

139. SPEAR, *supra* note 100, at 39–41; Lyman H. Atwater, *Civil Government and Religion*, 5 PRESBYTERIAN Q. & PRINCETON REV. 195, 232 (1876).

140. *The President's Speech at Des Moines*, *supra* note 130, at 435.

rata” share of the school fund for their schools.¹⁴¹ “We ask for nothing which we are not willing to concede to all our fellow-citizens—viz., the natural right to have their children brought up according to their parents’ conscientious convictions.”¹⁴²

Grant’s proposal was immediately picked up by Representative and former Speaker of the House, James G. Blaine, who in 1875 was a more viable presidential candidate than Grant. Like Grant, Blaine realized the political capital to be gained in resolving the “School Question.” In a publicly released letter, Blaine wrote:

The public school agitation in your late campaign is liable to break out elsewhere, and . . . may keep the whole country in a ferment for years to come. . . . It seems to me that this question ought to be settled in some definite and comprehensive way; and the only settlement that can be final is the complete victory for non-sectarian schools.¹⁴³

As a lasting solution, Blaine proposed a new constitutional amendment, to wit:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of the public schools, or derived from any public fund therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations.¹⁴⁴

Blaine asserted that his proposal would not:

141. *See id.* at 437.

142. *Id.*; *see also* *The President’s Message*, 22 CATHOLIC WORLD 707, *passim* (1876) (outlining Catholics’ arguments in opposition to the President’s proposed elimination of the tax exemption for most church property in order to fund common schools failing to “satisfy the conscientious demands of all citizens”).

143. J. G. Blaine, *Non-Sectarian Schools*, N.Y. TIMES, Nov. 29, 1875, at 2.

144. *Id.*

interfere with any State having just such a school system as its citizens may prefer, subject to the single and simple restriction that the schools not be made the arena for sectarian controversy or theological disputation. This adjustment it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious faith and the conscience of every man free and unmolested.¹⁴⁵

Following Grant's December address to Congress, Blaine introduced his constitutional amendment in the House of Representatives on December 14.¹⁴⁶ The event did not go unnoticed. "Mr. Blaine has introduced his amendment, and the chances are that he will be able to carry it," reported the Democratic *New York Tribune*.¹⁴⁷ "Reports from Washington indicate that the ex-Speaker is already sure of considerable Democratic support, and it would not be surprising if we should yet see his amendment passing almost by common consent."¹⁴⁸

Public attitudes toward the proposed amendment varied widely. Not surprisingly, many people viewed the amendment as crass political maneuvering designed to appeal to anti-Catholic voters. As *The Nation* observed later that spring, "Mr. Blaine did, indeed, bring forward at the opening of Congress a constitutional

145. *Id.*

146. 4 CONG. REC. 205 (1875).

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id.; compare Blaine, *supra* note 143, at 2.

147. N.Y. TRIB., Dec. 15, 1875, at 4.

148. *Id.* The Republican *New York Times*, in contrast, doubted the measure would receive a majority of the votes in the Democratic-controlled House, let alone the necessary two-thirds. N.Y. TIMES, Dec. 15, 1875, at 6.

amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it, but to use it in the campaign to catch anti-Catholic votes."¹⁴⁹ *The Catholic World* also criticized those "politicians who hope to ride into power by awakening the spirit of fanaticism and religious bigotry among us."¹⁵⁰

Blaine's motives are less than clear, however. Nothing indicates that Blaine had any real interest in the issues at the center of the amendment that bears his name. In his autobiography, *Twenty Years of Congress*, published in 1884, Blaine made no reference to the amendment.¹⁵¹ His lack of concern for the religious aspects of his amendment is evident in his total disregard for the proposal once he had lost the nomination. Blaine did not take part in any of the debates surrounding the amendment, even though he had ample opportunity to influence the measure in both chambers.¹⁵² Also, there is no evidence that Blaine had any personal animosity toward Catholics. His mother was Catholic¹⁵³ and his daughters were educated in Catholic boarding schools. Blaine claimed to be Presbyterian, but his religious commitment was nominal at best.¹⁵⁴ Blaine maintained that he was not anti-Catholic and that the amendment was intended to remove the school issue from public controversy.¹⁵⁵ More likely, Blaine was in it for the political mileage. After the amendment failed to secure him the nomination, it also lost all importance as even a historical

149. *Two "Favorite Sons"*, 22 NATION 173, 177 (1876).

150. *The President's Message*, *supra* note 132, at 711.

151. 2 JAMES G. BLAINE, *TWENTY YEARS OF CONGRESS*, *passim* (Norwich, Conn., The Henry Bill Publ'g Co. 1884). In addition to making no mention of his amendment, Blaine failed to mention any part of his efforts for sectarian schools. In Blaine's autobiography, Grant's 1875 Message received only a brief comment. *Id.* at 570.

152. See 4 CONG. REC. 5453-56, 5580-95 (1876).

153. HENRY DAVENPORT NORTHROP, *LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE "THE PLUMED KNIGHT"* 21 (Phila., H. J. Smith & Co. 1893).

154. Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATHOLIC HIST. REV. 15, 30-34 (1956).

155. NORTHROP, *supra* note 153, at 21-22; see *id.* at 29-32.

event.¹⁵⁶

While few people were fooled by Blaine's political ambitions, some viewed the amendment as an opportunity to resolve the larger School Question while avoiding religious strife. Both the Republican *New York Times* and the Democratic *New York Tribune* supported the proposal as a way of diffusing the religious issue.¹⁵⁷ "Thinking men of all parties see much more to deplore than to rejoice over, in the virulent outbreak of discussions concerning the churches and the schools, and welcome any means of removing the dangerous question from politics as speedily as possible," wrote the *Tribune*.¹⁵⁸ Resolving the school controversy, though, meant more than simply nationalizing the no-funding position—it also required the elimination of all Protestant preferences in the public schools, including nonsectarian prayer and Bible reading.¹⁵⁹ Initially, *The Catholic World* also viewed the measure as a way of diffusing religious conflict, provided that Catholics were allowed to apply their taxes toward parochial

156. The lack of significance Blaine attached to the amendment is shown by the fact that his contemporary biographers made, at most, only passing references to the measure. See, e.g., JAMES P. BOYD, *LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE* 351 (n.p., Publishers' Union 1893) (reprinting Blaine's open letter and devoting a single paragraph to the amendment); THERON CLARK CRAWFORD, *JAMES G. BLAINE* (n.p., Edgewood Publ'g 1893) (failing to mention the amendment); GAIL HAMILTON, *BIOGRAPHY OF JAMES G. BLAINE* 322 (Norwich, Conn., The Henry Bill Publ'g Co. 1895) (committing a single paragraph); WALTER R. HOUGHTON, *EARLY LIFE AND PUBLIC CAREER OF HON. JAMES G. BLAINE* 54 (Cincinnati, Cincinnati Book & Bible House 1884) (making a passing reference); WILLIS FLETCHER JOHNSON, *LIFE OF JAMES G. BLAINE, "THE PLUMED KNIGHT"* (Phila., Atl. Publ'g Co. 1893) (failing to mention the amendment); *id.* (failing to mention the amendment); H. J. RAMSDELL, *LIFE OF HON. JAMES G. BLAINE* (N.Y., J. W. Lovell Co. 1888) (failing to mention the amendment).

157. *The Message*, N.Y. TRIB., Dec. 8, 1875, at 6; See N.Y. TRIB., *supra* note 137, at 4; *The President's Message*, N.Y. TIMES, Dec. 8, 1875, at 6.

158. N.Y. TRIB., *supra* note 137, at 4.

159. See generally William T. Harris, *The Division of School Funds for Religious Purposes*, 20 ATLANTIC MONTHLY 171, 173 (1876) (presenting the grounds, from a contemporary perspective, for preserving "the common school as a purely secular institution, without any religious instruction in it whatever").

schools.¹⁶⁰

Still others viewed the measure as part of a larger question about the future of American public schooling, of whether its character would be truly universal and religiously neutral. Reverend Spear, of *The Independent*, wrote a series of articles throughout the spring of 1876 that attempted to place the controversy within this broader context. The funding issue “manifestly does not cover the whole question in controversy,” Spear insisted.¹⁶¹ Rather, the controversy “bring[s] to the surface the whole subject of Church and State, civil government and religion, in their relations to each other.”¹⁶² The fundamental issue was whether all Americans, be they Protestant, Catholic or Jewish, were citizens entitled to equal regard under the Constitution. “The objection, therefore, of the Catholic, the Jew, and the Infidel against any Protestant *regime* in the public school is a valid one, and admits no answer unless we abandon the fundamental principles of our republican system.”¹⁶³ The only solution, wrote *The Independent*, was “a purely secular system of education.”¹⁶⁴

Even though Blaine’s proposal omitted a requirement mandating states to offer universal schooling, as Grant had proposed, that issue continued to haunt the debate surrounding the amendment. The hallmark of Reconstruction had been the aggrandizement and centralization of authority in the federal government, and many hoped, while others feared, that the amendment would effectively lead to federally mandated universal education.¹⁶⁵ *The Independent*, although supporting Blaine’s proposal, raised concerns that the amendment was the first step toward mandating states to provide universal education.¹⁶⁶ Even though the journal supported the notion of universal education in

160. *The President’s Speech at Des Moines*, *supra* note 130, at 437.

161. SPEAR, *supra* note 100, at 18.

162. *Id.* at 24.

163. *Id.* at 51, 53. “All these people are citizens, belonging to the State The public school is the common property of the *whole* people” *Id.* at 43 (emphasis in original).

164. *Id.* at 65.

165. MCAFEE, *supra* note 89, at 4–5, 15–21, 105–24.

166. SPEAR, *supra* note 100, at 21.

principle, "[w]hether a State shall have a public school system or not is purely and absolutely a State question . . . and it should be left to the sovereign discretion of every State."¹⁶⁷ *The Independent* was not alone in viewing the controversy in broader terms of federalism and state obligations for universal schooling. One southern newspaper claimed the Blaine Amendment was a "stupendous stride toward centralization [of education]" and would "turn over the children to be educated by the federal government."¹⁶⁸ *The Chicago Tribune*, in contrast, urged that Blaine's proposal be expressly expanded to incorporate Grant's call for mandating states to provide universal education,¹⁶⁹ while the Free School Guard—apparently a secret nativist organization—urged in its publications that the "State or National government [should] provide for the education of every capable child. Education shall be compulsory."¹⁷⁰

Universal, secular education was an anathema to both Catholics and many conservative Protestants. Because education could not be divorced from the teaching of "divine truths," said Rochester Bishop B. J. McQuaid in February 1876, the state has no right to educate.¹⁷¹ "To the Catholic, secularism is as much sectarian as evangelicalism."¹⁷² Agreeing with the Catholics on the federalism issue, *The Presbyterian Quarterly* wrote that proposals for universal secular education were "wholly beyond the proper function of the national government, and an unwarranted invasion of the proper liberties and franchises of the States. . . . There is no middle ground between religion, or religious principles of some

167. *Id.*

168. NASHVILLE DAILY AM., Aug. 5, 1876, at 2, reprinted in MCAFEE, *supra* note 89, at 204.

169. *The President's Message*, CHI. TRIB., Dec. 8, 1875, at 4.

170. *Current Topics at the Capital: The New Free School Guard*, N.Y. TRIB., Jan. 31, 1876, at 1; *Glimpses*, 6 INDEX 61, 61 (1876). The Free School Guard also advocated that "[n]o sectarian school [should] receive State or National aid," and "No education—no franchise." *Glimpses, supra*, at 61.

171. B. J. McQuaid, *The Public School Question, as Viewed by a Catholic American Citizen*, Lecture Before the Free Religious Association (Feb. 13, 1876), in 6 INDEX 86, 88 (1876).

172. *Id.* at 88.

sort, and atheism. Neutrality here is out of the question.”¹⁷³

Therefore, these other issues—whether public schooling should be secular or religious and truly universal for all faiths, races and nationalities; whether the national government should mandate schooling at the state or local levels; and how best to diffuse religious strife—colored the debate as much as the issues of parochial school funding or anti-Catholicism. For many people these issues were interrelated. The fact that they were intertwined, however, does not mean that the concerns that fueled the debate were one dimensional or limited solely to efforts to disadvantage Catholics by denying them a share of the public school fund. Despite the tendency of some elements to resort to inflamed rhetoric, most observers viewed the controversy in broader terms about the future of American education.

Public debate over the Blaine Amendment continued throughout the spring and into the summer. Democrats, who controlled the House of Representatives, were lukewarm on Blaine’s proposed amendment, not wanting to alienate their Catholic constituents. After initially deciding to table the amendment until after the November elections, the House leadership opted to report the measure out in early August with a proviso that the amendment would not “vest, enlarge, or diminish legislative power in the Congress.”¹⁷⁴ This addendum allowed Democrats to vote for the measure while claiming its provisions would carry no force. Despite Republican objections that the addendum would render the amendment meaningless, the House passed the resolution by an overwhelming vote of 180 to 7.¹⁷⁵

In the Senate, which was controlled by Republicans, the Judiciary Committee omitted the House’s limiting language but attached its own addendum. After stating that “no particular creed or tenets shall be read or taught” in any public school, the resolution provided that “[t]his article shall not be construed to

173. Lyman Atwater, *Civil Government and Religion*, PRESBYTERIAN Q. AND PRINCETON REV., Apr. 1876, at 195.

174. 4 CONG. REC. 5189 (1876).

175. *Id.* at 5191.

prohibit the reading of the Bible in any school or institution"¹⁷⁶
This clause had been inserted as a result of the lobbying efforts of conservative Protestants who had assured the senators that the provision would "introduce no new feature into our education" nor "require the reading of the Bible" in the schools but would merely respect existing local practices. The committee members apparently were swayed by the argument, and the clause was incorporated into the final report.¹⁷⁷

Even though the clause protecting Bible reading made the amendment more controversial, debate on the floor of the Senate focused on the issues of states' rights to control education and the proposal's ban on parochial school funding. Senator Theodore Randolph (D-N.J.) spoke first to the concern that the amendment infringed on state autonomy in local educational matters. The

176. *Id.* at 5453. The text of the proposed amendment was:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall be required as a qualification to any office or public trust under any State. No public property and no public revenue, nor any loan of credit by or under the authority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds or tenets shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution, and it shall not have the effect to impair the rights of property already vested.

Id.

177. See *The Defeated Constitutional Amendment*, 6 INDEX 402, 402 (1876); T.P. Stevenson, *An Open Letter*, 6 INDEX, 411, 411 (1876); see also *Religious Train-Wreckers*, 6 INDEX 414, 414.

Senate version not only infringed on state authority over education, Randolph insisted, it also created new obligations upon the states by imposing the duty to educate, an area reserved to the states under the 10th Amendment. This went far beyond the original purpose of the amendment, which only inhibited the pre-existing power of the states to legislate for public education.

[T]here is not only no duty devolving upon the Federal Government, by reason of any provision in the Constitution, to directly care for the education of its citizens, but that the attempt upon the part of the Federal power to exercise authority in this direction would be without warrant, and as pernicious in precedent as it would finally become dangerous in practice.¹⁷⁸

Numerous senators echoed Randolph's concern that the amendment would usurp state authority over educational matters.¹⁷⁹ As Senator Francis Kernan (D-N.Y.) stated: "I believe that the matter of educating our children may be wisely left to the people of each State. I believe that it is a home right."¹⁸⁰ Democratic objections to the educational issue were so great that the Republicans spent the bulk of their time responding to this

178. 4 CONG. REC. 5455 (1876). Beyond his specific concern over usurpation of state authority over education, Randolph also believed the amendment threatened state control over general expenditures by imposing an obligation on the states to establish schools. *See id.*

179. Senator Kernan remarked, "The founders of the Federal Government had the wisdom to perceive the advantage of leaving to the people of each State the control and management of their local State matters." *Id.* at 5580. Later in the debate on the Senate floor, Senator Stevenson exclaimed, "No, sir; this power [to legislate in this area] is not in the Federal Government. Kentucky does not want New England and other states to dictate to her what her schools shall be or what her taxes shall be, and least of all what her religion shall be." *Id.* at 5589; *see also id.* at 5592 (remarks by Sen. Eaton); *id.* at 5190 (comments by Rep. Hoar during House debate: "Nobody wants Congress shall undertake to legislate in regard to the school system of the States.").

180. *Id.* at 5580.

concern.¹⁸¹ State autonomy and control over educational matters was the overriding issue on both sides of the aisle.

The second common topic of debate was the partisan nature of the amendment. Both Grant and Blaine had claimed the amendment would "take the religious issue out of politics."¹⁸² Even though the amendment proponents adhered to this line,¹⁸³ few on the Senate floor believed the Blaine Amendment depoliticized the School Question. Senator Lewis Bogy (D-Mo.) called the amendment "a cloak for the most unworthy partisan motives" and charged the Republicans were replacing the "bloody shirt" with unfounded fears of an imperial papacy.¹⁸⁴ The Republican goal, Bogy continued, "is to arouse feeling against the democratic party, and make it appear that it is dependent upon the support of the Catholics for success."¹⁸⁵ Senator William Eaton (D-Conn.) agreed, declaring that "this whole matter is brought up as an election dodge" by the Republicans to tie the Democrats to the fortunes of the Catholic Church.¹⁸⁶ Even the Republicans, who continued to assert the amendment benefited Protestants and Catholics alike,¹⁸⁷ were often unable to resist aligning their opponents with the Catholic Church, thereby substantiating the Democrats' claim.¹⁸⁸

Of additional concern for many senators was the proposal's failure to resolve the larger issue of the religious character of the

181. See *id.* at 5583–84, 5594 (comments by Sens. Christiancy and Morton).

182. BOYD, *supra* note 156, at 352–53; *The President's Speech at Des Moines*, *supra* note 130, at 434–35.

183. 4 CONG. REC. 5561 (1876). Senator Frelinghuysen stated that the amendment was proposed "because this vexed question was to be removed from the arena of party politics." *Id.*

184. *Id.* at 5589.

185. *Id.* at 5590.

186. *Id.* at 5592. Senator Eaton: "This whole business originated with Hon. James G. Blaine. Did you ever hear of him? It was one of his dodges to get a nomination." *Id.*

187. Senator Morton: "[The amendment] simply places religious liberty in this country and education upon impregnable grounds. It is no blow upon the Catholic Church. . . . It protects catholicism as it protects protestantism." *Id.* at 5594.

188. See *id.* at 5587–88 (comments by Senator Edmunds).

public schools. Senator Randolph seized on the apparent inconsistency in the amendment which forbade religious instruction but guaranteed that Bible reading “shall not be prohibited in any school or institution.”¹⁸⁹ Describing the two provisions as “a flat contradiction,” Randolph asked, “or is the Bible not a religious book? . . . Which edition shall it be, if the state assumes to designate one according to its ‘consciences?’”¹⁹⁰ Senator Frederick Frelinghuysen of New Jersey, primary spokesperson for the Republicans, acknowledged that there was nothing in the amendment that prohibited religious instruction as distinguished from the teaching of particular creeds or tenets. But because Christianity “permeates all of our laws” and “sustains . . . our liberty,” Bible reading could never be incompatible with public education.¹⁹¹ “I am for the broadest toleration,” Frelinghuysen stated, “but I would never agree to a constitutional amendment that would exclude from the schools the Bible.”¹⁹² In response, Senator Kernan asserted the new version with its Bible reading provision went “far beyond that proposed by Mr. Blaine; and in my judgment, instead of allaying strife and dissension, it will increase them and bring evil to our schools, to our institutions, and to the people of our country.”¹⁹³

A final area of debate and controversy surrounded language in the proposed amendment that would have applied the First Amendment religion clauses to actions of local and state officials.¹⁹⁴ Advocates argued that, aside from the funding issue, the provision was necessary to guarantee universal religious liberty. Senator Morton argued that “an essential principle of American liberty” was that “we shall have perfect freedom of religious worship, that there shall be no established church, no religion established by law. . . . [S]o far as states being left free to establish a church if they see proper or to establish denominational schools at public expense,

189. *Id.* at 5456.

190. *Id.*

191. *Id.* at 5562.

192. *Id.*

193. *Id.* at 5581.

194. *See id.* (comments of Sen. Kernan); *id.* at 5583 (comments of Sen. Whyte); *id.* at 5584–85 (comments of Sen. Morton).

I believe that the safety of this nation in the far future depends on their being deprived of any such power."¹⁹⁵ Others objected the provision ran counter to the design of the Constitution, and would give "the Federal Government supreme power," transferring authority for the enforcement of civil rights to federal courts. "That matter was discussed in the convention that made the Constitution, and it was not thought wise to put in any such provision, but to leave it to the States," Senator Kernan replied.¹⁹⁶

Overall, Senate debate covered more than twenty-three pages in the *Congressional Record*. In the end, the debate had little effect on the outcome of the amendment. The Senate voted twenty-eight to sixteen in favor of the amendment, with Republicans and Democrats voting along straight party lines.¹⁹⁷ The final result was four votes shy of the two-thirds necessary for passage.¹⁹⁸ In the final analysis the amendment failed because of a combination of concerns about federalism, mandating universal public education, the religious/secular character of public schools, and the imposition of federal constitutional protections on the states.¹⁹⁹ While Catholic animus informed the amendment and its debates, that element should be distinguished from sincere beliefs that funding of parochial schools would threaten the nation's commitment to public schooling and undermine church-state separation. Animus toward Catholics and immigrants generally was but one part—a significant part, to be sure—of a larger debate over the character and future of American public schooling and of American culture in general. In that sense, its presence in the Blaine Amendment should not be surprising. But it would be inaccurate to brand the Blaine Amendment as solely an exercise in Catholic bigotry.

195. *Id.* at 5585.

196. *Id.* at 5581.

197. *Id.* at 5595.

198. *Id.*

199. 2 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 727 (1950).

CONCLUSION

The no-funding principle has been part of our constitutional jurisprudence for over two hundred years. This “bedrock principle” has been affirmed by the Court for approximately sixty years, by justices of all ideological persuasions. Even Justice Thomas has acknowledged the Court’s unwavering attention to the “special risks that governmental aid will have the effect of advancing religion.”²⁰⁰

Contrary to recent criticism, the no-funding principle is not based on religious bigotry or Catholic animus. Instead, the principle predates the rise of the nineteenth century School Controversy over funding Catholic parochial schools. The mere fact that the no-funding principle became the primary argument against Catholic school funding—an application that unquestionably would have led to public support of religious worship and instruction—does not invalidate the “historical and jurisprudential pedigree” of the principle.²⁰¹ Although nativist groups used the no-funding principle to advance their bigoted goals, not all supporters of the principle were nativists or equated church-state separation with anti-Catholicism. Similarly, the Blaine Amendment must be considered within the context of the larger controversy over universal, free, secular education. While nativism motivated many of the amendment’s supporters and colored the debates, it does not fully explain the events that brought the amendment to the brink of passage and then to failure. Contrary to Justice Thomas’ assertions, opposition to public funding of sectarian schools rests on longstanding constitutional principles of religious liberty, non-coercion, and non-favoritism. “No-funding” is a principle with a pedigree that we *should* not hesitate to *reaffirm*.²⁰²

200. *Mitchell v. Helms*, 530 U.S. 793, 819 n.8 (2000) (Thomas, J., plurality opinion).

201. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 849 (1995) (O’Connor, J., concurring).

202. *Cf. Mitchell*, 530 U.S. at 828 (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”).