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THE HISTORICAL CONTEXT OF THE FAILED FEDERAL BLAINE AMENDMENT OF 1876

WARD M. MCAFEE*

I. INTRODUCTION

Today, race and religion are linked in the controversy over vouchers in public education. Some fear that vouchers will lead to more racial segregation than already exists; others see vouchers as the best hope for inner-city racial groups suffering under a failed public education system. Likewise, some fear that vouchers will lead to religious indoctrination at state expense, whereas others see a degree of religious education as imperative in the development of good citizens.

In the nineteenth century, race and religion were also linked in a somewhat similar controversy. Specifically, in the 1870s, some feared that public funds spent on sectarian education would lead to a balkanization of American culture. Roman Catholic Church schools receiving public funds were then the focus of the issue. Typically, opponents of public funds going to Catholic schools did not worry that racial segregation would result because of this practice. At that time, there was precious little racial integration in the nation's schools to protect. Even in the North, racial segregation in public schools was the norm, despite the fact that "reconstructing" the nation to make African Americans first-class citizens was then the supposed order of the day.

In the 1870s, there were a few localities where some public schools were racially integrated. By and large, however, white northerners were as insistent as white southerners that the races be kept apart in the public schools, even if it meant racially segregated classrooms within schools that were theoretically "mixed," the

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nineteenth century term for “integrated.”¹ If northerners were not much concerned about publicly funded sectarian education promoting racial segregation, though, many were nevertheless very concerned about a religious form of segregated schooling. They feared that state aid to sectarian schools would prevent newly arrived immigrants, many of whom were Roman Catholics, from becoming “full Americans.” The American public school had been created in part to make its charges, many of which were the children of recently arrived immigrants, fully “American.” And, as American culture was then heavily informed by Protestant evangelical assumptions, these religious expectations were then part and parcel of the public schools, which Roman Catholics derisively dubbed “Protestant Publics.”

Religious indoctrination at public expense did not bother most Americans in the 1870s. The question that troubled them was whose brand of religious indoctrination was going to be favored by the state. It is well known that at that time public schools began each day with a generalized Protestant service, replete with scripture reading and hymn singing. Jews, as well as Roman Catholics, did not like having their children being forced into this Protestant regimen. Atheists and freethinkers attacked it as well; even a few thoughtful Protestant leaders urged that any and all religion be taken out of public education. These people preferred that each religious sect operating on its own without state assistance conduct religious instruction of the community’s youth. One representative of this particular viewpoint remarked at the time:

Cannot the church send out its ministers? Or are they too busy, day after day, in their studies, preparing to dole out dogmatic theology Sunday after Sunday, to the tired ears of their wearied congregations? Cannot they send out their missionaries . . . ? Must we say that the church has grown idle and lazy, and

1. See W. E. Burghardt DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 328–29 (1935); see also WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION 130–35, 157–61 (1998) (discussing attitudes and statements regarding integration in schools during the 1870s).

can only hobble on its crutches, and therefore that our school directors must set themselves up as teachers of religious truth?²

Protestant critics of existing public school practices were in a small minority. Most Protestant Americans in the 1870s firmly believed in religious instruction in public education. It was then a common belief that a dose of religion in education was necessary for the development of good citizens.

At that time, no one argued that the First Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment,³ forbade state aid to either religious or sectarian education. In the 1870s, the most active opponents of religious education in the public schools never stated that argument, which in our own time has become the constitutional standard for those wanting a rigorous separation of church and state. The Reverend Samuel T. Spear, a liberal Protestant who wanted religion taken out of public education, openly lamented the lack of any constitutional defense to prevent a takeover of public education by the Roman Catholic Church. Additionally, he worried that the precedent of Protestant practices in public education was being used by Roman Catholics to justify the creation of their own Catholic public schools, which already existed in a few urban school districts, where Catholic voters constituted a majority.

Throughout the early 1870s, Spear argued that, as a defensive measure, Protestant practices be immediately removed from public education in school districts where Protestant voters were still in the majority. Spear lamented that most of his fellow Protestants did not yet appreciate what their own educational/religious preferences might later encourage by way of precedent. Dramatically, he urged that a new constitutional amendment be drafted, guaranteeing separation of church and state in public schools throughout the nation. In making his case, Spear acknowledged as fact that the First Amendment only restricted the

2. JOHN D. MINOR, *THE BIBLE IN THE PUBLIC SCHOOLS* 284–85 (Robert G. McCloskey, ed., Da Capo Press 1969) (1870).

3. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

federal government and did not apply to the states, calling this condition “a defect in the Constitution itself.”⁴

II. THE ORIGINAL BLAINE AMENDMENT

Late in 1875, former Speaker of the House Republican James G. Blaine proposed what popularly became known as the Blaine Amendment. It read:

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 therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.⁵

Most supporters of the Blaine Amendment did not share Reverend Spear's opinion that religious practices should be removed from the public schools. They did not want to end Bible reading in the schools, and at first did not realize that their enemies could easily interpret Blaine's proposal to require just that. As they understood the situation, Protestant practices in public education did not constitute “sectarian” education because no particular sect was favored. Religious instruction in the American public school was generalized so as not to favor Presbyterian Calvinism over Methodist Arminianism, adult baptism over infant baptism, or any other kind of divisive issue then afflicting the Protestant sects. Indeed, their own habit of excusing the dominance of Protestant practices in public education as non-sectarian in nature led them to see Blaine's proposal as aimed solely at thwarting the threat of the Roman Catholic “sect” to the American public school. Very

4. MCAFEE, *supra* note 1, at 35, 61–62; Samuel T. Spear, *Religion and the Constitution*, INDEPENDENT (N.Y.), July 14, 1870, at 2; Samuel T. Spear, *Religion and the Constitution*, INDEPENDENT (N.Y.), Feb. 22, 1872, at 4.

5. 4 CONG. REC. 205 (1875); MCAFEE, *supra* note 1, at 197.

slowly, they came to realize that the Blaine Amendment was potentially a double-edged sword. That part of the story is fleshed out below.

III. THE POLITICAL CONTEXT OF 1875–1876

Before completing the story of the Blaine Amendment, it is necessary to understand the political dynamic that led to it in the first place. It is a tale that involves both racism and religious bigotry. The 1870s was a decade when Reconstruction of the South began to falter. The Republican Party that had won the Civil War by destroying slavery was in danger of losing Reconstruction by pushing too hard for racial fair play. Mandating civil rights for the defeated South was one thing, but applying civil rights in the North was politically dangerous. Many northern communities were liberalizing their ancient restrictions on African Americans, but they wanted to decide such matters without undue federal interference. Public education was perhaps the most important arena concerning these developments. Most northern public schools had made only slight gestures toward racial integration. In the early 1870s, Massachusetts Republican Senator Charles Sumner demanded more than tokenism. Decades earlier, he had devoted himself to integrating Boston's public schools. Now, he wanted that model imprinted upon the whole nation.

Enemies of the party then commonly called it the "Black Republican" Party. As Sumner pushed for racially integrated schools, northern voters wavered in their loyalty to the party that had saved the Union. In the midterm elections of 1874, the Democrats won the House of Representatives by a landslide.⁶ By 1875, when the new Democratic House was installed, the Republican Party desperately needed some political antidote to counteract the virus of racism eating away at the party's strength, and it found that antidote in religious bigotry.

The party had long flirted with religious bigotry, but had always held it at arm's length. The Know-Nothing movement of the 1850s had exploited a widespread Protestant hatred and distrust of

6. MCAFEE, *supra* note 1, at 154–68.

Roman Catholicism. When that political movement collapsed in 1856, most northern Know-Nothings retreated into the new Republican Party. Republican leaders welcomed the additional recruits, but they resisted being tainted by the latter's strong religious prejudices. Republican leaders such as William Seward and Abraham Lincoln especially made a point of keeping Know-Nothingism suppressed within their party. Their focus was upon preventing slavery's expansion into the western territories, and they wanted no distraction from that matter. Meanwhile, religious bigotry lurked in the party's shadows. In the 1870s, it emerged in full force, ready to do political battle.

Throughout the 1870s, Democrats suggested that Republicans were "soft" on African Americans. A bigoted retort could not be suppressed: Democrats were "soft" on Irish Catholics. This theme became especially prominent after the disastrous midterm elections of 1874. The Democrats suggested that Republicans wanted to integrate the races in the public schools. Republicans shot back that Democrats wanted to funnel state money to Roman Catholic schools, thereby permanently segregating white people into separate and distinct cultural boxes. Republicans had long charged that the Democratic Party was hostile to developing a true national culture, which Republicans then touted as the best insurance against a repeat of sectional and factional strife. Republicans reminded the nation that they, not the Democrats, had "saved the Union." And, in 1875, Republicans charged that the Union was again in danger, this time from a foreign invasion of Roman Catholic immigrants.

In the 1870s, the Democrats advocated "home rule" for the South, meaning that Republican Reconstruction should end. Republicans countered that they wanted "home rule" for the United States, meaning that a foreign Pope was threatening to control the nation by virtue of a growing Catholic influence within the Democratic Party. In the years immediately following the 1874 midterm elections, Republicans emphasized nativism in hopes of maintaining power.⁷

After the Civil War, the Republican Party had sought to

7. *Id.* at 175–92.

implant its world view in the Constitution itself. The Reconstruction amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—were all designed primarily with the liberation of black Americans in mind. The Blaine Amendment, which was slated to become the Sixteenth Amendment, was no less of a Reconstruction amendment, but in this case religion, not race, was the focus of attention. Instead of continuing to be the recipient of bigoted political attacks, the Republican Party began to dish them out.

In proposing prior Reconstruction amendments, the Republican intent was constitutional reform. With the Blaine Amendment, the plan was somewhat different. It was designed to serve the purposes of political propaganda, rather than being a serious attempt to amend the U.S. Constitution. A constitutional amendment requires a two-thirds majority in each house of Congress and then ratification by three-fourths of the states.⁸ In 1875–1876, this was an impossible expectation so far as the Blaine Amendment was concerned. The Democrats then controlled the House, and the Republicans had only a narrow majority in the Senate. The Democratic Party then controlled about half of the states. Republicans expected Democratic opposition to the proposal, and they hoped that that opposition would give them their primary talking point in the upcoming presidential campaign. One Republican newspaper editorial stated the matter clearly:

If [the] Democracy, with its large majority in the lower house, on account of its political affiliation with Roman Catholics and its dependence for support on Catholic votes, chooses to reject [the Blaine Amendment], then let [the] Democracy take the responsibility of the choice. This quasi-secret game between a religious sect and a political party has been played long enough. Let it be played openly, if it must be played at all. The people will then see the game and vote accordingly.⁹

8. U.S. CONST. art. V.

9. INDEPENDENT (N.Y.), Dec. 9, 1875, at 14.

Republicans wanted voter attention drawn away from civil rights, seemingly endless southern Reconstruction, and runaway corruption in the administration of President Ulysses Grant. With each passing year, the South was becoming more solidly Democratic. By 1876, only three Republican state governments remained. Catholic immigration was growing as well, threatening Republican control in several northern states. Grasping at straws, Republicans in 1876 looked to the Blaine Amendment as their best hope to reverse their losses. If Protestant Democrats could be frightened into the party, Republican candidates at all levels would benefit.

President Grant encouraged this development. Addressing Union veterans in Des Moines on September 29, 1875, Grant told his audience of aging warriors that as the nation approached its first centennial, it was a good time to strengthen American public education, which he termed “the foundation” of the Republic. He warned against the Catholic threat to this foundation and prophesied that, if civil war should ever again erupt, it would not be between northerners and southerners, but rather between “patriotism and intelligence on one side, and superstition, ambition, and ignorance on the other.”¹⁰ What he meant was that the next civil war would be between Protestants and Catholics.

A Democratic Party pamphlet responded immediately: “The President at last changes front in the face of his victorious opponents, discards the ‘bloody shirt’ as an obsolete rag, and, nailing to the mast the black flag of Know-Nothingism, unsheathes his sword for a ‘religious war.’”¹¹ The “bloody shirt” referred to a Reconstruction era Republican tactic of waving a bloodied nightshirt of a southern public school teacher brutalized by Ku Klux Klan terrorists.¹² As long as Republican propaganda had focused on civil rights, the party had portrayed itself as the party of mass education and uplift, whereas the Democratic Party was the party

10. MCAFEE, *supra* note 1, at 192–93.

11. DEMOCRATIC PARTY OF N.Y., ADDRESS OF TAMMANY HALL TO THE ELECTORS OF THE COUNTY 6–7 (N.Y. 1875) (pamphlet, available at Huntington Libr., San Marino, Cal.).

12. MCAFEE, *supra* note 1, at 194, 211.

of mass ignorance and violence. When Reconstruction had been palatable with the voters, Republicans on the stump had commonly said that not every Democrat might have been a traitor during the war, but that every traitor had been a Democrat. The Democratic pamphlet stated that as these kinds of appeals were no longer effective, Republicans had to resort to anti-Catholic prejudice, which was then quite strong.¹³ The Republican *New York Tribune* agreed: "Every politician knows that there is no subject on which the average well-to-do-citizen in the country districts is so sensitive as upon the possibility of Roman Catholic aggression, particularly with reference to the schools."¹⁴

Some Republicans naively hoped to appeal to southern white Protestants with their new tactic. Certainly, there was little theological affinity between northern Catholic Democrats and their southern Protestant political allies. But southerners had their priorities firmly fixed on ending Reconstruction and would not be diverted from that quest. They intended to remain in alliance with northern Catholics if it helped them restore white supremacy. As one South Carolina Democrat put it, over time a misguided Roman Catholic might be converted to Protestantism, but a black man would always be a black man.¹⁵ In the South, race easily trumped religion. In the North, religion had more of a fighting chance to activate the electorate. Indeed, some northern Republicans who were deeply racist were willing to continue civil rights, as they saw African American Protestants as their allies in what they regarded as a more important fight against the Roman Catholic immigrant invasion of Protestant America.¹⁶

13. *Id.*

14. Vincent P. DeSantis, *Catholicism and Presidential Elections, 1865-1900*, 42 *MID-AMERICA* 70 (1960).

15. *The Colored People*, ENTERPRISE & MOUNTAINEER (Greenville, S.C.), May 26, 1875, at 2 (quoting *Jeremiah* 13:23 (King James), "Can the Ethiopian change his skin or the leopard his spots?," which southerners were fond of quoting in regard to the permanency of race in contrast to the impermanency of religious preference); see also *American Catholicism*, DAILY J. (Wilmington, N.C.), May 1, 1875, at 2.

16. MCAFEE, *supra* note 1, at 50-51, 70-71, 162-63, 172-73, 180-81, 185-86, 211.

Shortly after Grant's Des Moines address, the Vatican in Rome released a statement to direct the faithful on matters pertaining to the American public school. It was not the first of its kind, but the timing of this papal message inevitably excited Republican anti-Catholic feeling to new heights. This document criticized the nation's public schools for having teachers "selected from every sect indiscriminately."¹⁷ These teachers, the report continued, were "infusing into the young minds the seeds of error and vice."¹⁸ The statement also damned American public schools for mixing the sexes "in the same class and class-room,"¹⁹ thus endangering the morals of both genders. Pope Pius IX called for every Catholic congregation to erect separate Catholic schools, so as to deny all Catholic parents any excuse for sending their children to the public schools.²⁰ The report concluded by encouraging American bishops to excommunicate parents sending their children to public schools in districts where a Catholic alternative existed.²¹ As for the American bishops themselves, they hoped for Democrats to win in both state and national contests, thereby increasing their chances of winning public aid for Roman Catholic schools.

IV. MORAL EDUCATION

One irony in this religious confrontation was that the overwhelming majority of Americans then deeply believed that, without a religiously informed moral education, secular education was shallow, if not dangerous. This was true of Catholics as well as Protestants. One Catholic spokesman, Orestes Brownson, claimed that a secular education devoid of any moral content could only produce an "intellectual monster turned loose upon society, with no

17. Instruction from the Congregation of Propaganda de Fide Concerning Catholic Children Attending American Schools (Nov. 24, 1875), *reprinted in* DOCUMENTS OF AMERICAN CATHOLIC HISTORY 418 (John Tracy Ellis, ed. 1956) [hereinafter *Instruction*].

18. *Id.*; see MCAFEE, *supra* note 1, at 188.

19. *Instruction*, *supra* note 17, at 232-37.

20. *Id.*

21. *Id.* at 420.

other motive in life than to gratify its desires and keep out of the penitentiary!"²² Another leading Catholic critic of the public schools and Chief Justice of the Supreme Court of Arizona Territory, Edmund F. Dunne, advocated in 1875 that the only meaningful approach to keeping religious content in mass education was through state funding of sectarian schools.²³ Meanwhile, Protestants were under attack to water down the specific religious content informing the public school curriculum so as not to offend Roman Catholics, Jews, and atheists.²⁴ The "one-size-fits-all" mode of Protestant moral education had been created originally out of a paternalistic concern that the parents of many poor immigrant children were incapable of providing an effective moral education at home.²⁵ With increasing controversy over Protestant practices being funded with taxpayer dollars, moral education became with each passing year more and more platitudinous, nationalistic, oriented toward a cult of individual material success, and divorced from specific Biblical references.²⁶ By 1948, when the U.S. Supreme Court finally ordered religious content out of the public schools under the Establishment Clause,²⁷ little more than an empty shell of religious instruction remained in them.

Today, discussion of the appropriateness of vouchers necessarily involves the desirability of effective moral education and whether or not the state needs to be involved in supporting it.

22. Orestes Brownson, *The Public School System*, 3 BROWNSON'S Q. REV. 517, 528 (1875).

23. Edmund F. Dunne, *Our Public Schools: Are They Free for All, or Are They Not?* 4 (1875) (unpublished pamphlet, available at Huntington Libr., San Marino, Cal.).

24. See MCAFEE, *supra* note 1, at 27–29 (detailing an 1869 controversy in Cincinnati over religious instruction that would be acceptable to diverse religious backgrounds).

25. *Id.* at 37–38.

26. See *id.* at 4, 9, 28–29, 35–38, 47, 58, 68–69, 191–92.

27. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (barring the use of privately employed religion teachers during school hours, even where students had the option of studying secular subjects elsewhere during that time); see also *Engel v. Vitale*, 370 U.S. 421, 433 (1962) (barring in-class recitation of nondenominational prayer).

Today, it is quite clear that a “one-size-fits-all” moral education no longer works—as one person’s moral education has become another person’s unjustified indoctrination and/or bigotry. In Claremont, California, a school program designed to teach multicultural tolerance is attacked as gay and lesbian indoctrination. In Concord, California, a school sex-education program is challenged as being hostile to a woman’s constitutional right to choose whether or not to terminate a pregnancy.²⁸ In other areas of the country, distribution of condoms is interpreted by some as official approval of sexual intercourse among minors. Today, some Americans define morality with a tight focus on individual behavior, whereas others see immorality primarily in social injustices involving poverty, war, and bias against historically oppressed groups. In such a pluralistic environment, can a uniform program of moral education have any meaningful content? Similar to the process by which vacuous high school textbooks are produced, uniform programs of moral education have to be massaged and re-massaged so as not to offend any constituency. Some voucher advocates argue that the only hope for meaningful moral education is a system that can fund varied and divergent notions of moral education at public expense. Roman Catholic spokesmen unsuccessfully used this same argument over 130 years ago.

In the 1870s, both Catholic and Protestant spokesmen commonly agreed that religion did not need the state to survive but rather that the state needed religion, especially in the area of moral education. Both sides argued that if traditional religion were ever removed completely from public education, other values would inevitably replace it. A civil religion combining flag-waving nationalism and unabashed materialism then seemed a prime candidate.²⁹ After all, the Gilded Age began in the 1870s. In any case, both Catholic and Protestant spokesmen then argued that there could be no effective separation of religion and state, and any thoroughgoing attempt to achieve this impossible aim “would be

28. Carol Pogash, *Classes Make Parent Uneasy*, L.A. TIMES, Jan. 13, 2003, § 2, at 5.

29. MCAFEE, *supra* note 1, at 44.

like trying to separate the heart from the body.”³⁰ They may have fought with each other regarding how to implement this principle, but they at least agreed on the principle itself.

In the 1870s, Protestants smugly asserted that they were best informed to create effective moral education in the public schools. They pointed to the fact that Roman Catholics were then over-represented in the nation’s prison populations and claimed this as proof of the inadequacy of Roman Catholic moral understandings. Father Isaac Hecker, a leading Catholic spokesman, responded by describing the “moral education” of the “Protestant Publics” as turning out impudent, willful, and arrogant boys and girls who refused to obey father, mother, or church authorities.³¹ Outspoken atheists asserted that all Bible-based moral education was fatally flawed, whether Protestant, Catholic, or Jewish. They stated that well-known “Old Testament” characters modeled both fraud and permissive sexuality. The Christian scriptures came under especial attack as being “the faithful handmaid of despotism” in teaching passivity in the face of tyranny.³² Accordingly, atheists demanded that the Bible be removed from public education in order to improve moral education.³³

Americans in the 1870s came to no agreement on how best to address problems associated with moral education. The Protestant majority continued to muddle along with the unachievable ideal of a uniform system. And the Blaine Amendment itself became caught up in this controversy, as some came to realize that this proposal could be interpreted to remove Bible reading from the public schools.

30. *Id.* at 43.

31. Isaac T. Hecker, *Unification and Education*, 12 CATHOLIC WORLD 1, 5–10 (1871).

32. MCAFEE, *supra* note 1, at 33.

33. Damon Y. Kilgore, *The Bible in Public Schools*, Address Upon a Resolution to Petition the Board from Public Schools, Delivered Before the Liberal League of Philadelphia 19–20 (Oct. 17, 1975) (pamphlet, available at Huntington Libr., San Marino, Cal.); see also ROBERT GREEN INGERSOLL, *THE GODS AND OTHER LECTURES* 14, 22 (Peoria, Ill., C.P. Farrell 1874) (criticizing harshly Bible study as an inhibitor to educational freedom).

V. AMENDING THE BLAINE AMENDMENT, 1876

In 1876, James G. Blaine was a major contender for the Republican presidential nomination.³⁴ But questions about his suitability for the nation's highest office pursued him. Many of these involved tales of political corruption involving bribes from railroad corporations. Other questions began to arise from a close reading of his proposed constitutional amendment affecting religion and American public education. Was the proposal that he offered a double-edged sword? Would it eliminate Protestant Bible reading and hymn singing from the public schools as well as preventing a Roman Catholic sectarian takeover? Once it became law, could Roman Catholics legally attack Protestant Public Schools as constituting "an establishment of religion"? The fact that Blaine's mother was a Roman Catholic was used against him. Even though Blaine had adopted his father's Presbyterianism, his questionable origins eroded trust in his leadership on so important an issue. For a multitude of reasons, the Republican National Convention rejected his candidacy in favor of Ohio's Governor Rutherford B. Hayes, a person not only untainted by charges of corruption, but also thoroughly safe on maintaining Protestant preferences in American public education.

While Republicans were busy undermining Blaine, the Democrats had been plotting. They too saw the weaknesses in the Blaine Amendment, and they decided to exploit them for maximum effect. They caucused in the House, which was under their control, and agreed to pass the Blaine Amendment with only slight modifications. This, they hoped, would completely defuse the Blaine Amendment as a campaign issue. The major change they made was a line that Congress would not be able to use the amendment to enact legislation elaborating upon the meaning of its sparse provisions.³⁵ The Democrats wanted an amendment that

34. MCAFEE, *supra* note 1, at 200-02.

35. The House version read almost exactly as Blaine's original proposal. The only major modification came with the addition of the last sentence. In its entirety, the House version read as follows:

No state shall make any law respecting an establishment

could be used only by courts to void state actions violating the amendment's specific requirements.

The major concern of Democrats was any possibility that a subsequent Congress might use the Blaine Amendment to federalize public education, ostensibly to prevent Catholic dominance in northern urban school districts. Southern Democrats, who were just then regaining control over their states, especially feared a federalization of public education, as they wanted no Yankee influence in their public schools continuing after the end of Reconstruction.³⁶ Some Republicans had attempted to federalize American public education earlier in that decade but had been temporarily defeated by the onslaught of a national economic depression in 1873.³⁷ That earlier federalization effort had been motivated primarily by a desire to use public education to reconstruct the culture of the South.³⁸ Modifying the amendment in order to prevent any new federalization efforts was something that all Democrats, northern and southern, saw as essential.

The Republican minority in the House was in a quandary. If they voted against the modified Blaine Amendment, it could only serve to confuse voters who would not understand the subtleties involved. Accordingly, most House Republicans reluctantly went along, and the modified Blaine Amendment passed the House by an overwhelming vote of 180–7, well over the two-thirds vote required. The fact that twice as many Democrats as Republicans voted for the proposed amendment effectively emasculated the

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 therefore, or any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any moneys so raised or lands so devoted be divided between religious sects or denominations. This article shall not vest, enlarge, or diminish legislative power in the Congress.

See 4 CONG. REC. 5245 (1876)

36. MCAFEE, *supra* note 1, at 115.

37. *Id.* at 121.

38. *Id.* at 173–74.

issue for campaign purposes.³⁹

The House version was then sent to the Republican Senate.⁴⁰ Presidential nominee Hayes was outraged that his party had been so easily outflanked on what Republicans had hoped would become the defining campaign issue.⁴¹ In 1876, the Democrats were primed to talk of corruption in the Grant administration and the desirability of ending the Reconstruction experiment. Against this, the Republicans had intended to rely primarily on northern fears of the Roman Catholic Church taking control of public education in regions where it was dominant. Republicans had expected that the Democrats would reject the Blaine Amendment, thereby validating these fears. The fact that they did not caused Republicans to regroup and in desperation provide the worst possible interpretations of Democratic motives for use in the coming election.

The original Blaine Amendment had only pertained to “money raised by taxation in any state for the support of public schools.”⁴² Paranoid Senate Republicans began to worry that future Catholic-controlled legislatures at multiple layers of government within the federal system might simply make outright grants to Roman Catholic schools, thereby bypassing the restriction referring to designated state school funds alone. So, in undertaking a complete revision of the Blaine Amendment, they added language to prevent all possible contingencies for government aid to Catholic schools. Senate Republicans also added a section similar to that appearing in the three Reconstruction amendments, giving the Congress authority to elaborate upon the meaning of the amendment in future legislation. And, most importantly, the Republican Senate version insisted that the amendment never be interpreted to disallow Bible reading in America’s public schools, a Protestant practice especially offensive to Roman Catholic sensibilities that the Bible should be used only under priestly

39. *See id.* at 203–04 (discussing in greater detail the Democrats’ treatment of the Blaine Amendment in the House).

40. *Id.* at 204–05.

41. *Id.* at 203–04.

42. *Id.* at 197.

supervision. When completed, the Republican Senate version of the Blaine Amendment read more like an insurance policy than a constitutional amendment:

Section 1. No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any state. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any state, territory, district, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any organization, or denomination shall be 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.

Section 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.⁴³

If a Democrat-controlled House overwhelmingly passing a Republican proposal did not already confuse voters, the Senate version thoroughly muddled the waters. Only in the minds of

43. 4 CONG. REC. 5453 (1876).

Republican zealots were the nuances of the dispute clear. Editorials in Democrat newspapers had lots of fun with this turn of events. One stated: "Blaine's school amendment was pronounced a most brilliant thing by the Republicans when he offered it. When the Democratic House passed it, the Republicans denounced it. They are very consistent."

On August 14, 1876, the Senate voted on the measure, with twenty-eight Republicans voting "aye" and sixteen Democrats voting "nay." Here was the strict party vote that Republicans had expected and wanted in the House. But it was too late to revive the Blaine Amendment for the presidential campaign, for Democrats argued that the branch of Congress under their control passed a slightly modified Blaine Amendment overwhelmingly, whereas the Republican Senate failed to get the necessary two-thirds vote for their own radically revised version. Democratic Party propagandists continued that if the Republicans really wanted a Blaine Amendment, all they had to do was to endorse the House version by a two-thirds majority vote in the Senate. Then the Blaine Amendment could be passed along to the states for ratification. With Democrats and Republicans united, three-fourths of the states would certainly ratify the measure. And the constitutional process for finalizing the Blaine Amendment would be complete.⁴⁴

44. See MCAFEE, *supra* note 1, at 207-18 (discussing more fully the Republican modification of the Blaine Amendment in the Senate); cf. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992). Green's otherwise good account of the Blaine Amendment is confused in one very significant regard. Green states that the Blaine Amendment "fell four votes short in the Senate of being submitted to the states." *Id.* at 38. This statement implies that the Senate considered the same version as passed by the House. In fact, the Senate (Republican) version was radically different from the House (Democratic) version, both in language and intent. Neither house was prepared to support the measure of the other, and both sides knew this. Democrats voted overwhelmingly for the House version, whereas every Democrat in the Senate voted against the so-called Blaine Amendment in that body. These facts, involving two very different versions of the Blaine Amendment, demonstrate that neither party was really serious about amending the Constitution in that year. The Republicans wanted to use the Blaine Amendment for campaign purposes; by passing its own watered-down

In the end, Republican campaigners settled on trying to prove that the Democratic presidential candidate, Governor Samuel J. Tilden of New York, had allowed public funds to go to New York City Roman Catholic schools.⁴⁵ As for the outcome of the election, it proved to be the messiest presidential contest in all of U.S. history, involving both voter intimidation and ballot box stuffing on a massive scale. The difficult election of 2000 was relatively clean by comparison. Hayes was the eventual winner, but due entirely to Republican control of a special election commission set up to sort out the election results, together with a deal cut with southern Democrats to bring Reconstruction officially to an end.

As for the Blaine Amendment, more versions of it were unsuccessfully attempted in later years. Variants of it were more successful at the state level in amending state constitutions, where they too were called “Blaine” amendments. Colorado, which joined the Union in 1876, had a “Blaine Amendment” included in its state constitution. As the relevant passages in the Colorado Constitution did not prohibit “an establishment of religion” but rather focused entirely on restricting state aid to specific churches and sects, this state-based “Blaine Amendment” was clearly designed to protect current Protestant practices then generally characterizing American public education.⁴⁶ As Democrats then

version, the Democrats wanted to foil the anti-Catholic Republican political agenda for 1876. See MCAFEE, *supra* note 1, at 207–18.

45. *Id.* at 213.

46. Colorado’s constitutional language is as follows:

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

COLO. CONST. art. 9, § 7.

controlled the House, while Republicans controlled the Senate, bipartisan cooperation was needed to get Congressional approval for Colorado's Constitution. Republicans at that time had no reason to complain regarding the wording of the Colorado "Blaine Amendment." Indeed, it met all of their concerns regarding ambiguities present in Blaine's original proposal. And Democrats, intent upon destroying the federal "Blaine Amendment" as a Republican campaign issue, had no motive to reawaken religious animosities by quibbling over the Colorado constitution's wording, which could only offend Catholic Democrats.

VI. THE MODERN CONTEXT

In the late nineteenth century, anti-Catholicism was high among supporters of constitutional restrictions of government aid to sectarian organizations. Other opponents of dividing the school funds were motivated by different concerns. Today, those against vouchers likewise hold differing reasons for their position. Some want to counter a significant threat to decent salaries and benefits for teachers. Others fear that a permanent segregation and balkanization within American culture may occur if voucher systems are allowed to survive. Many of this latter group worry that charlatans will principally benefit in running schools at public expense that do nothing to improve academic performance and instead teach hardened ideologies and bigotries of various sorts. Other opponents are wedded to "a wall of separation" between church and state-funded schooling. To a degree, these same varied fears were alive during the decade that produced the Blaine Amendment.⁴⁷

Likewise, not all voucher advocates hold the same reasons for their passion. Some are motivated by an entrepreneurial desire to build new educational enterprises that can generate profits for

Colorado's constitution also stipulates another restriction on educational appropriations: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." *Id.* at art. 5, § 34.

47. See MCAFEE, *supra* note 1, at 209-11.

investors. Some are driven to put effective moral instruction back into mass education. Others simply want to improve academics, which today are failing in segments of public education.

In the nineteenth century, public education was widely seen as an engine of progress. Today, that traditional faith is somewhat shaken. Indeed, if there is any striking difference between then and now, it is in the evaluation of public education itself. In the 1870s, Roman Catholic schools were commonly seen as medieval bastions that had no positive role to play in the development of modern, progressive America. Even Roman Catholic intellectuals such as Orestes Brownson conceded the academic inferiority then typical of Catholic schools. Today, many Protestants concede that Roman Catholic schools are, by and large, superior in academics. In contrast, there are few that now celebrate public education, as currently constituted, as the leading hope for America's future.

In the 1870s, each side in the contest over "dividing the school funds" demonized the other. In that sense, little has changed. The backers of vouchers commonly see only the worst in those that oppose them and vice versa. Conversations between the two sides often consist more of verbal abuse than meaningful dialogue. This lack of civility is unfortunate. Both sides do have worthy things to say and deserve to be heard in the fullest meaning of listening well.

The progressive reformer Robert LaFollette once praised our federal system as consisting of separate states within which different policy approaches might be tolerated, tested, and dispassionately evaluated. Unfortunately, that spirit did not exist in the 1870s relating to the education of the nation's children. And it is highly unlikely that any mutually agreed upon experiments could be carried on today. When children are involved in any such experiments, emotions commonly ride high in the saddle, positions become hardened into constitutional imperatives, and confrontation becomes substituted for relationship. Such is the legacy of the Blaine Amendment controversy of 1876.

