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The Insignificance of the Blaine Amendment

Steven K. Green*

Few events in American constitutional history have been as maligned as the Blaine Amendment of 1876.¹ The proposed federal amendment sought to apply the proscriptions of the First Amendment religion clauses to the actions of state governments while it expressly prohibited the appropriation of public funds for the support of any school under the control of a religious sect or denomination.² The Amendment came about at a time of heightened controversy over the religious character of American public education and the public funding of private religious schooling, primarily Catholic parochial schools.³ At times, the debate over the Amendment and the larger “School Question” devolved into ethnic and religious aspersions, a fact that has led critics to charge that the Amendment and the principles it represented were motivated chiefly by anti-Catholic animus.⁴ The Blaine Amendment

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1. See, for example, the titles of various law review articles on the Blaine Amendment: Kyle Duncan, *Secularism's Laws: Sease Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493 (2003); Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 *N.Y.U. ANN. SURV. AM. L.* 413 (2003); Michael J. Dailey, Comment, *Blaine's Bigotry: Preventing School Vouchers in Oklahoma . . . Temporarily*, 39 *TULSA L. REV.* 207 (2003); Brandi Richardson, Comment, *Eradicating Blaine's Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 *CATH. U. L. REV.* 1041 (2003).

2. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 *J. LEGAL HIST.* 38, 38 (1992) [hereinafter Green, *Blaine Amendment Reconsidered*]. The full text of the original Blaine Amendment 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 thereof, 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.

Id. at 53 n.96.

3. See *id.* at 38, 41–42.

4. 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*

failed to receive the necessary approval from the Senate,⁵ but several states subsequently enacted comparable amendments in their respective constitutions prohibiting the public funding of religious schooling.⁶ Critics have used the religious bigotry associated with the Blaine Amendment to discredit these state facsimiles and the no-funding principle they represent; as critic-in-chief Justice Clarence Thomas has written, the legal rule prohibiting funding of religious schools “has a shameful pedigree that we [should] not hesitate to disavow It is [a] doctrine, born of bigotry, [that] should be buried now.”⁷

I have written previously about the background to the Blaine Amendment, arguing that neither the history nor meaning of the Amendment can be easily distilled.⁸ 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 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.⁹

This Article will consider the Blaine Amendment from a different, though related, perspective: whether it established or advanced a principle of constitutional significance. The legal controversy over the Blaine Amendment that has taken place over

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).

5. Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 67.

6. See Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DEN. U. L. REV. 57, 68–94 (2005).

7. *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion).

8. See Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 38; Steven K. Green, “*Blaming Blaine*”: *Understanding the Blaine Amendment and the “No-Funding” Principle*, 2 FIRST AMENDMENT L. REV. 107 (2003) [hereinafter Green, *Blaming Blaine*].

9. Green, *Blaming Blaine*, *supra* note 8, at 113–14.

the past two decades has been misplaced. Particularly following the 2002 Cleveland voucher decision (*Zelman v. Simmons-Harris*),¹⁰ attention has turned to state constitutions as setting the rules for state aid to religion.¹¹ The interpretation and even constitutionality of these state provisions have been inextricably tied to the Blaine Amendment.¹² But the Blaine Amendment is insignificant as a *constitutional* event. While the Blaine Amendment is historically and politically significant, it matters little for constitutional purposes. The legal principles the Amendment embraced—nonsectarian public education and a prohibition on state funding of religious education—both predated the Amendment and were not significantly altered by it.¹³ Contemporary understandings of nonsectarian education and the no-funding principle emerged from the debates over the Blaine Amendment relatively unaffected.

In addition, the legal connection between the Blaine Amendment and a majority of the state no-funding provisions—I will resist referring to them as “Baby Blaines”—is uncertain at best. To be sure, twenty-two states adopted no-funding provisions in their constitutions during the fifty years following the defeat of the Blaine Amendment.¹⁴ Several of those provisions contain language that bears a similarity to language that appeared in one of the many versions of Mr. Blaine’s proposed amendment.¹⁵ But the majority do not.¹⁶ Rather, most of the post-1876 no-funding provisions mimic language that can be found in earlier constitutions of other states.¹⁷

10. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

11. See *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004), *aff’d on other grounds*, 919 So. 2d 392 (Fla. 2006).

12. See the party and amicus curiae briefs in *Locke v. Davey*, 540 U.S. 712 (2004); see also Symposium, *Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions*, 2 FIRST AMENDMENT L. REV. 1 (2003).

13. See generally Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65 (2002).

14. See *id.* at 110. Of that number, two state constitutions (Massachusetts and New York) previously contained express no-funding provisions with the later amendments rewriting or reclassifying the provisions.

15. See Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 50–60 (discussing the various proposals).

16. See generally Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REV. 1 (1997).

17. A common phrase prohibits the “withdrawing of public money for the benefit of religious societies or religious or theological seminaries,” a phrase that originated in the Michigan Constitution of 1835 (art. I, § 5). Another common phrase in post-1876 state

Despite their claims to the contrary, opponents of the no-funding principle have generally failed to demonstrate a connection between the Blaine Amendment and the various state provisions from legislative histories, convention records, or other historical sources.¹⁸ Instead, they have sought to taint the various state provisions with the stain of anti-Catholicism through guilt by association with the Blaine Amendment. But it is an argument based on innuendo and assumption, not historical fact.¹⁹

This Article argues that the Blaine Amendment is relatively insignificant—both as a constitutional event and as a tool for analyzing the no-funding amendments contained in the various state constitutions. Part I will consider the rise of the principle of nonsectarian education and its corollary, the no-funding principle. Both principles arose as solutions to a perceived need to create a morally reinforcing, financially secure, and universally accessible education system. Both principles predated the rise of nativism and the anti-Catholicism associated with the Blaine Amendment, and both principles maintained their validity apart from how nativists sought to pervert them for their own ends. Part II discusses the historical significance of the Blaine Amendment and its lack of

constitutions prohibits public funding “for or in aid of a sect, denomination or sectarian institution,” a phrase that appeared as early as the Ohio Constitution of 1851 (art. VI, § 2); *see also* FLA. CONST. of 1885, § 6; ILL. CONST. of 1870, art. VIII, § 3; KAN. CONST. of 1858, art. VII, § 5 (1859). *See generally* FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES* (1909).

18. For example, the Washington convention records do not support a connection between the Blaine Amendment and its no-funding provisions, particularly with respect to any anti-Catholic motivations of the delegates. *See* Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al. at 38–42, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), available at <http://pewforum.org/school-vouchers/locke/Historians.pdf>.

19. *See generally, e.g.*, HAMBURGER, *supra* note 4, at 297–99; Nathan A. Adams, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV. 1 (2005); Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1 (2003); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551 (2003); Mark Edward DeForrest, *Locke v. Davey: The Connection Between the Federal Blaine Amendment and Article I, § 11 of the Washington State Constitution*, 40 TULSA L. REV. 295 (2004); Duncan, *supra* note 1; Gall, *supra* note 1; Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657 (1998) [hereinafter Viteritti, *Blaine’s Wake*]; Dailey, *supra* note 1; Heytens, *supra* note 4; Richardson, *supra* note 1; J. Scott Slater, Comment, *Florida’s Blaine Amendment and Its Effect on Educational Opportunities*, 33 STETSON L. REV. 581 (2004).

constitutional significance. Finally, Part III considers the relationship between the Blaine Amendment and state constitutional no-funding provisions. While several of the later state provisions likely were inspired by the failed Blaine Amendment, it is impossible in most instances to establish a direct connection between the federal and state measures. Even if it is possible to link the provisions, it is irresponsible to attribute the possible motives of supporters for the federal proposal to those legislators who drafted the various state provisions. To be uncharitable to my own argument, it can be analogized to the adage of how to defend a dog-bite charge: "First, that was not my dog; second, my dog does not bite; and third, I do not own a dog." Similarly, the Blaine Amendment has no constitutional bite.

I. THE RISE OF THE NONSECTARIAN AND NO-FUNDING PRINCIPLES

Much ink has been spilled critiquing the origins of, motivations for, and necessity of the principle of nonsectarian education as it arose in the nineteenth century. A recurring problem in scholarship has been the tendency to view the assumptions and effects of nonsectarianism through a modern lens with current notions of ethnic and religious diversity and tolerance.²⁰ Today, the efforts and aspirations of many early education leaders appear elitist and xenophobic, if not shortsighted and misguided, at best. But at the time, most education leaders—many trained as Protestant clergy and others with close ties to Protestant communities—sincerely sought to create an inclusive education system that would acculturate and assimilate children from diverse religious and national backgrounds into the unfolding American experience.²¹ Also, there has been a tendency to assign the disreputable motivations and actions of Protestant nativists to those individuals who were actually in charge of developing and operating America's early public schools.²²

20. See, e.g., CHARLES L. GLENN, *THE MYTH OF THE COMMON SCHOOL* 63–83 (1988); VITERITTI, *supra* note 4, at 145–51.

21. GLENN, *supra* note 20, at 74–76 (discussing the goals and efforts of reformers such as James Carter, Edward Everett, and Horace Mann who sought universal, mandatory, and public education aimed at "implant[ing] in the minds of American youth the principles of virtue and of liberty and inspire[ing] them with just and liberal ideas of government and with an inviolable attachment to their own country") (citation omitted).

22. See Viteritti, *Blaine's Wake*, *supra* note 19, at 667 ("One cannot separate the

Another error in related scholarship has been to view nonsectarianism and the no-funding principle as concepts that remained static throughout much of the nineteenth century.²³ First, there was no single model of nonsectarian education, despite the commanding influence of reformers such as Horace Mann.²⁴ Local control over education and varying degrees of religious homogeneity ensured that educational patterns differed from one town to another. And then, the principle and practice evolved over time, going through at least three distinct phases.²⁵ By the time of the Blaine Amendment, nonsectarian education in America was in the transition from its second phase to its third—from a curriculum that emphasized moral values by teaching “universal” religious principles to one that was increasingly secular with perfunctory reliance on religion.²⁶ A similar development was also taking place in constitutional law prior to the Civil War, as states gradually added express provisions against funding of religious institutions to complement the already-existing “no compelled support” clauses that, at least on paper, placed restrictions on government support of religion.²⁷ Each of these developments—the nonsectarian principle and the no-funding principle—will be discussed briefly in turn.

A. *The Nonsectarian Principle*

Nonsectarian education arose out of a general movement to establish a system of publicly-operated schools universally accessible

founding of the American common school and the strong nativist movement that had its origins at the Protestant pulpit.”); see also JORGENSEN, *supra* note 4, at 20–30.

23. See *supra* sources cited in note 19.

24. Feldman, *supra* note 13, at 72–73.

25. The most thorough and balanced analysis of nonsectarianism is Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL'Y 65 (2002).

26. See B.J. McQuaid, *Religion in the Schools*, 132 N. AM. REV. 332, 337 (1881) (criticizing the secularizing trend of the previous decade and the “perfunctory” use of the Bible); R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education*, 86 J. AM. HIST. 1581, 1594–99 (2000). One could argue that a fourth phase occurred in nonsectarian education at the end of the nineteenth century with a reaction to the secularization trend that brought about a re-emphasis of Bible reading in the early twentieth century. See JEROME K. JACKSON & CONSTANCE F. MALMBERG, *RELIGIOUS EDUCATION AND THE STATE I* (1928) (discussing a post-1900 “trend very definitely in the direction of giving Bible reading more place in the public schools”).

27. See discussion *infra* Part III.

to all children.²⁸ With the creation of the new national government, political and civic leaders became convinced that the education of children was indispensable for the stability and ultimate success of the new republic. Noah Webster wrote that education was "essential to the continuance of republican governments," while Benjamin Rush insisted that a goal of education was 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."²⁹ 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 republican society.³⁰ This central mission of public education did not dissipate throughout the nineteenth century; even at the century's end people still expressed concern about the fragility of republican government and that the skills of self-governance were not innate but had to be taught.³¹ Although this attitude was based in part on contempt for a generally poor and uneducated immigrant class, it also reflected a belief that most immigrants had no experience in self-governance.³²

For at least the first half of the nineteenth century there was a consensus that necessary republican skills could not be divorced from their moral and religious foundations. Protestants and Catholics alike concurred on this point,³³ as one Catholic commentator wrote late in the century: "Can a republic, of all forms of government, endure, whose children, for generations, are educated in schools without

28. Feldman, *supra* note 13, at 73-80.

29. Benjamin Rush, *Thoughts upon the Mode of Education Proper in a Republic*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 17 (Frederick Rudolph ed., 1965); Noah Webster, *On Education of Youth in America*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC*, *supra* at 65-66.

30. Webster, *supra* note 29, at 66.

31. William T. Harris, *The Church, the State, and the School*, 133 *N. AM. REV.* 215, 220 (1881) ("[T]he forms for the political life of a representative self-government have never been created nor needed before in world-history.")

32. See Lyman Abbott, *Danger Ahead*, 31 *CENTURY* 51, 51 (1885) ("Th[e] vast immigrant population [is] . . . sometimes densely ignorant. They have never been taught the difficult art of self-government.")

33. See Rush, *supra* note 29, at 10 ("[T]he only foundation for a useful education in a republic is to be laid in RELIGION. Without this, there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments.") (citation omitted).

religion, without God?"³⁴ Public schools were seen as indispensable for inculcating the civic, moral, and religious virtues upon which the republic depended.

In the beginning, the emerging common or public schools differentiated themselves from the denominational schools and town-operated schools frequently run by a local minister in two respects. First, early educational reformers insisted that the public school curriculum would emphasize the teaching of liberal subjects to instill democratic values and useful knowledge (e.g., mathematics, history, geography), rather than relying on religious texts and the teaching of sectarian doctrine common in most schooling. Relatedly, in order to ensure that the schools were accessible to children of all faiths, the curriculum would de-emphasize religious doctrine out of respect for liberty of conscience and the theological differences of various denominations. Moral education, based on shared religious principles, however, would remain a centerpiece of the curriculum.³⁵ Thus, as Professor Noah Feldman has written:

[T]he theorists of the common schools thought that the schools must impart some foundational moral values to promote civic virtues and believed that those moral values must derive in some way from Christian religion. . . . Non-sectarianism, it was thought, would keep the state out of bitter inter-denominational disputes, enable the flourishing of diverse voluntary, private churches, and simultaneously enable the state to take a stance in favor of broadly shared, foundational Christian virtues.³⁶

It would be shortsighted to view nonsectarian education simply as an effort by the dominant Protestant group to ensure theological control over public education. That the common schools were consciously Protestant was not denied; however, the schools were as "American" as they were "Protestant." Protestantism was part of the national identity in the early nineteenth century: "citizens assumed that Americanism and Protestantism were synonyms and that education and Protestantism were allies."³⁷ To those early education

34. McQuaid, *supra* note 26, at 333.

35. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860*, 75-82, 95-99 (1983).

36. Feldman, *supra* note 13, at 66-67.

37. Timothy L. Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 J. AM. HIST. 679, 680 (1967).

reformers, and even for many later in the century, the religious instruction in the common schools could not be distinguished from the civic values that were necessary to maintain America's political society.³⁸

Nonsectarian education was a dynamic and evolving concept throughout much of the nineteenth century. Initially, many public schools were nonsectarian only in the sense that the religious and moral instruction did not track the tenets of any Protestant denomination.³⁹ To varying degrees, lessons and catechisms reflected Calvinist concepts of sin, obedience, and redemption, and were used to instill religious devotion. The practices of the New York Free School Society, founded in 1805 as the earliest nonsectarian common school, included daily readings from the King James Bible, followed with daily prayer, the reciting of the Lord's Prayer, and the singing of Protestant hymns. 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."⁴⁰ Thus, indoctrinating students in shared Protestant beliefs was one of the chief goals of the common schools during the first phase of nonsectarian education, though educators would have denied their goal was religious conversion.⁴¹

Initial "nonsectarian" programs must be viewed within the context of the early nineteenth century, where most Americans, Protestant and Catholic alike, believed that civic education could not be divorced from instruction into religious and moral values. For the first half of the century, the point of disagreement was not over whether public education should be religious or secular, but over how religious that education should be.⁴² Also, the only alternative to the nondenominational common school was a church school with

38. STEPHEN MACEDO, DIVERSITY AND DISTRUST 54–59 (2000).

39. See Duncan, *supra* note 1, at 503–04 (The common-school movement "championed the infusion of common schools with explicitly religious moral instruction—a curriculum whose theological content evidenced a 'pan-Protestant compromise, a vague and inclusive Protestantism' designed to tranquilize conflict among Protestant denominations.") (citation omitted).

40. Daniel Patrick Moynihan, *The Irish (1963, 1970)*, in MAKING THE IRISH AMERICAN: HISTORY AND HERITAGE OF THE IRISH IN THE UNITED STATES 475, 486 (J.J. Lee & Marion R. Casey eds., 2006).

41. Feldman, *supra* note 13, at 72–75.

42. KAESTLE, *supra* note 35, at 75–103.

a curriculum that revolved around sectarian instruction. In the early 1800s, the nonsectarian emphasis on a liberal curriculum complemented by commonly shared religious values represented a dramatic break from the status quo.

Importantly, at this point, the Protestantism taught in the common schools was not used as a militant juxtaposition to Catholicism; before the mid-1830s, America's Catholic population was relatively small.⁴³ Rather than being anti-Catholic, nonsectarian programs, like the Free School Society of New York City, and later those developed by Horace Mann, were designed to diffuse conflict among Protestant sects and to attract children excluded from the Protestant denominational schools.⁴⁴ The Protestant complexion of early common schooling reflected the belief that the schools could teach commonly shared beliefs and practices without reverting to sectarianism (i.e., denominationalism). The Protestantism taught was considered to be inclusive, not exclusive, except to the extent it excluded those sectarian differences that separated the various Protestant bodies.⁴⁵

Initially, common schools integrated the growing population of immigrant children. According to Professor Lloyd Jorgenson, otherwise a critic of nonsectarian education, "[p]rior to 1840, there had been no strong Catholic protest against the Common School Movement. On the contrary, many Catholic leaders were at first sympathetic to the movement and indeed participants in it."⁴⁶ Before long, however, the Protestant prayer, Bible reading, hymn singing, and catechism found in books such as *The McGuffey Reader* became offensive to Catholics and the small number of American Jews. The conflict became pronounced in the late 1830s and 1840s with the onslaught of Catholic immigration, initially from Ireland, and later from Germany and Italy. Many school officials viewed Catholic objections to nonsectarian instruction as an attack on public

43. Walter J. Walsh, *Religion, Ethnicity, and History: Clues to the Cultural Construction of Law*, in THE NEW YORK IRISH 48, 51 (Ronald H. Bayor & Timothy J. Meagher eds., 1996).

44. Feldman, *supra* note 13, at 78.

45. WILLIAM KAILER DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION? THE DECLINE OF RELIGIOUS TEACHING IN THE PUBLIC ELEMENTARY SCHOOL 1776-1861, at 116-29 (1958) (documenting that Mann was responding to the disestablishment controversy in Massachusetts between Congregationalists, Baptists, and Unitarians); Smith, *supra* note 37, at 681-82; accord Feldman, *supra* note 13, at 73-74.

46. JORGENSON, *supra* note 4, at 73.

education and the democratic values it embodied. Resistance on both sides led to mistreatment of immigrant school children and outright violence between Protestant and Catholic factions.⁴⁷

Beginning with the leadership of Horace Mann in the middle of the nineteenth century, nonsectarian education underwent a shift from instruction in nondenominational Protestantism toward an emphasis on universal religious values. Mann, a liberal Unitarian, believed in the unmediated power of Bible reading to instill commonly shared values. "The diversity of religious doctrines, prevalent in our community, would render it difficult to inculcate any religious truths," Mann wrote. He insisted, however, that "the points on which different portions of a Christian community differ . . . are far less numerous than those on which they agree."⁴⁸ Mann believed that schools should teach the "fundamental principles of Christianity," but that schools should stop there out of respect for freedom of conscience:

[A nonsectarian system] earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and, in receiving the Bible, it allows it to do what it is allowed to do in no other system,—to *speak for itself*. But here it stops, not because it claims to have compassed all truth, but because it disclaims to act as an umpire between hostile religious opinions.⁴⁹

Although Mann's system de-emphasized religious doctrine, it retained a goal of instilling religious devotion: "to make the perfect example of Jesus Christ lovely in [the children's] eyes."⁵⁰

In every course of studies, all the practical and perceptive parts of the Gospel should have been sacredly included; and all dogmatical theology and sectarianism sacredly excluded. In no school should

47. See *Donahoe v. Richards*, 38 Me. 379, 380 (1854); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417, 418 (Mass. Police Ct. 1859); RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 142-65, 220-37 (1938).

48. HORACE MANN, 2 *THE LIFE AND WORKS OF HORACE MANN* 29 (Mary Mann ed., 1867).

49. HORACE MANN, *TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION, COVERING THE YEAR 1848*, at 116-17 (Boston, Dutton & Wentworth 1849).

50. HORACE MANN, *Lecture IV, in LECTURES AND ANNUAL REPORTS ON EDUCATION* 289-90 (Cambridge 1867).

the Bible have been opened to reveal the sword of the polemic, but to unloose the dove of peace.⁵¹

Importantly, Mann's modifications to nonsectarian education, introduced in the late 1830s, were not precipitated by the burgeoning Catholic immigration. Rather, Mann's efforts stemmed from lingering inter-Protestant conflicts that had led to disestablishment in Massachusetts. While Mann's assumptions about being able to distill and teach universal religious values can now be questioned, his efforts were not based on any animus toward Catholics, Jews, or evangelical sects.⁵² According to Professor Jorgenson, Mann was sensitive to Catholic concerns.⁵³ As Professor Feldman has written:

Protestants like Mann sincerely believed that their non-sectarianism was capacious enough to include Catholics, who were Christians like themselves. As late as 1853, Horace Bushnell, minister of the North Church in Hartford and an influential theorist of Christian education, argued that the common school ought to be not Protestant but Christian. Common schools should do all they could to make themselves acceptable to Catholics; in return, Catholics ought to participate in the venture of common schools rather than form schools of their own.⁵⁴

Thus, this second phase of nonsectarianism, like the first, was not developed to ensure Protestant cultural dominance over Catholicism.⁵⁵

51. HORACE MANN, *GO FORTH AND TEACH: AN ORATION DELIVERED BEFORE THE AUTHORITIES OF THE CITY OF BOSTON* 44-45 (Centennial ed. 1937) (1842).

52. See NEIL GERARD MCCLUSKEY, *PUBLIC SCHOOLS AND MORAL EDUCATION* 14-15 (1958); Feldman, *supra* note 13, at 78 ("The idea of non-sectarianism was not, to begin with, born as an insult to those who might be considered to belong to sects. It was, rather, an elegant solution to the serious problem of how to teach morality without teaching particularistic religion.").

53. JORGENSEN, *supra* note 4, at 37. Another acknowledged leader of the common school movement and nonsectarian education was Henry Barnard, the first U.S. Commissioner of Education, who served as state school superintendent in Connecticut and Rhode Island during the 1840s-1860s. Although committed to a system of nonsectarian education, including the use of scriptures to teach moral values, his motivations also cannot be considered anti-Catholic. In 1865, Barnard supported Catholic objections to readings of the King James Bible in Hartford public schools, agreeing that the practice infringed on religious liberty interests. *Id.* at 38.

54. Feldman, *supra* note 13, at 80-81.

55. DUNN, *supra* note 45, at 117-29; Feldman, *supra* note 13, at 73-74; see also GLENN, *supra* note 20, at 65 (acknowledging that "rapid immigration developed *after* Horace

Mann's version of nonsectarianism became the model for many school systems, and the standard by the mid-nineteenth century. Despite (or because of) its religiosity, Mann's modification of nonsectarianism was highly controversial. As religious historian Sidney Mead commented, "Mann's brand seemed to many evangelical Protestants to be suspiciously 'Unitarian,' and at best what passed as 'nonsectarian' religious teaching seemed to many Unitarians, Roman Catholics, and others to be evangelical Protestantism."⁵⁶ He was attacked from all sides—by evangelicals, Catholics, and secularists. Evangelicals assailed the Massachusetts schools as "Godless," while Catholic Bishop Hughes charged that the Mann model amounted to "the sectarianism of infidelity."⁵⁷

Following the Civil War, educational reformers such as William Torrey Harris modified nonsectarian education yet again.⁵⁸ This third generation of reformers sought to make public education not simply nondenominationally religious but truly nonsectarian, in that only universally acknowledged *moral* principles would be taught and religious devotion eliminated.⁵⁹ The movement received a boost from an 1872 decision by the Ohio Supreme Court that banned all Bible reading and religious instruction in the Cincinnati public schools.⁶⁰ But the movement toward secularization had its own momentum, brought about by a desire to make public schooling more professional, academically rigorous, and religiously inclusive.⁶¹ In a December 1869 opinion piece in the *New York Tribune*, Henry Ward Beecher, one of the nation's leading preachers, wrote that "compulsory Bible in schools is not in accordance with American

Mann and the Board of Education began their work of defining the mission of the 'common school' in 1837").

56. SIDNEY E. MEAD, *THE LIVELY EXPERIMENT* 67 (1963).

57. See READINGS IN PUBLIC EDUCATION IN THE UNITED STATES 202-12 (Ellwood P. Cubberley ed., Greenwood Press 1970) (1934); WILLIAM OLAND BOURNE, *HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK* 436 (New York, William Wood & Co. 1870).

58. See generally MCCLUSKEY, *supra* note 52, at 145-73. William T. Harris, previously commissioner of the St. Louis public schools which forbade any Bible reading or religious exercises, succeeded Henry Barnard as U.S. Commissioner of Education. Mr. Harris took an even firmer position that moral education had to be divorced from the use of religious texts. *Id.* at 147.

59. *Id.*

60. *Bd. of Educ. v. Minor*, 23 Ohio 5t. 211 (Ohio 1872).

61. MCCLUSKEY, *supra* note 52, at 152-56; William T. Harris, *Recent Progress in the Public Schools*, 90 HARPER'S NEW MONTHLY MAG. 789-95 (1895).

doctrine of the liberty of conscience" and should be abolished. The state, Beecher insisted, "has no business to teach religion, or to show partiality to one or another sect in religion."⁶² Similar sentiments were expressed in a contemporaneous article in *Harper's Weekly* that called for the removal of the Bible from the common schools. The article argued that, based on the nation's growing religious diversity, public schools should be restricted to secular education solely and should "have nothing to do with any religious tenets whatever."⁶³ It even 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."⁶⁴

As U.S. Commissioner of Education, William T. Harris became the leading spokesperson for the elimination of Bible reading, even when conducted "without note or comment." "The reading of the Bible, the offering of prayers, [and the teaching of] some simple catechism, are devices borrowed from some particular forms of Protestantism," Harris insisted. "[I]t is impossible to have any such unsectarian religion that is not regarded as sectarian by the more earnest religious denominations."⁶⁵

During the last quarter of the century, religious instruction disappeared and even Bible reading declined—much to the consternation of many Protestant and Catholic leaders.⁶⁶ Where it did take place, it was increasingly pro-forma and justified on non-

62. Henry Ward Beecher, *Henry Ward Beecher on the School Question*, N.Y. TRIB., Dec. 3, 1869, at 5.

63. *The Battle of the Schools*, HARPER'S WKLY., Dec. 18, 1869, at 802.

64. *Id.* Harper's Weekly 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.*

65. William T. Harris, *The Separation of the Church from the Tax-supported School*, 26 EDUC. REV. 222, 226-27 (1903). "The principle of religious instruction is authority; that of secular instruction is demonstration and verification. It is obvious that these two principles should not be brought into the same school, but separated as widely as possible." *Id.* at 224.

66. See O. A. Kingsbury, *The Roman Catholics and the Public Schools*, NEW ENG. & YALE MAG., Sept. 1885, at 620; McQuaid, *supra* note 26, at 332; *A Report on the Schools: The Conference Opposes the Secular Idea*, N.Y. TIMES, Apr. 8, 1890, at 8.

religious grounds.⁶⁷ As Commissioner Harris summarized the situation in an 1895 government report,

[Outside] New England there is no considerable area where [the Bible's] use can be said to be uniform. This condition has come about as much by indifference as by opposition. . . . There has been a change in public sentiment gradually growing toward complete secularization of the Government and its institutions. . . . Secularization of the schools is accepted or urged by many devout people who deem that safer than to trust others with the interpretation of the laws of conscience.⁶⁸

Nonsectarianism during the nineteenth century was thus a dynamic and evolving concept and practice. While Bible reading remained the norm in many parts of the country until the end of the century, it was increasingly conducted for symbolic and political reasons,⁶⁹ rather than to instill religious values. As one early twentieth-century review of the transition in nonsectarian education concluded, for most of the prior century the nation had experienced “a gradual but widespread elimination of religious and church influences from public education.” The study attributed the trend to “[d]ifferences of religious belief and a sound regard on the part of the state for individual freedom in religious matters, coupled with the necessity for centralization and uniformity, rather than [reflecting] hostility toward religion as such.”⁷⁰

Most significantly, however, this evolution in the character of public education would have taken place without the episode of the Blaine Amendment and likely in the absence of the Catholic-Protestant conflict over religious instruction. While the secularization of public schooling occurred partly to address Catholic complaints, it had its own origins and momentum.⁷¹

67. Michael Dehaven Newson, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 243 (2002).

68. WILLIAM T. HARRIS, REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1894-1895, at ii, 1656 (1896).

69. Robert J. Coan, Note, *Bible Reading in the Public Schools*, 22 ALB. L. REV. 156, 161 (1958).

70. SAMUEL WINDSOR BROWN, THE SECULARIZATION OF AMERICAN EDUCATION 1, 3 (1912).

71. KAESTLE, *supra* note 35, at 170.

B. The No-Funding Principle

The no-funding principle also developed prior to, and relatively independent of, Catholic immigration and the resulting Protestant reaction. Once the decision was made to embrace universal common schooling, it was a logical step to grant public schools exclusive control over the public school funds.

The no-funding principle arose out of several complementary rationales. Foremost, public school officials sought to prevent the division of school funds in order to secure the financial stability of the nascent common schools. In the early nineteenth century, public commitment to a system of public education did not come naturally and had to be earned. Competing educational options stood in the way of gaining this public commitment.⁷² Closely related, public officials viewed the no-funding principle as a means to standardize education and to ensure financial accountability.⁷³ And finally, educational leaders and public officials increasingly came to identify the no-funding principle with principles of religious nonestablishment. Funding of religious education violated nonestablishment in three ways, according to contemporaries: it violated rights of conscience to force one person to pay for another's religious instruction; it would bring about religious dissension over the competition for funds; and it would result in ecclesiastical control over public monies.⁷⁴ These concerns can be seen in the objections of New York common school officials in 1824 to a proposal to share the public school fund with a Baptist school:

With respect to the school fund, it is purely of a civil character; . . . 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. . . . [T]he leading principle of all our legislation has ever been, to let religion support itself . . . and any law that should impose a direct tax on our citizens for the support

72. For a discussion of the different options in an urban setting, see KAESTLE, *supra* note 35, at 30–61.

73. *Id.* at 13–61; accord *Editor's Table*, 7 HARPER'S NEW MONTHLY MAG. 269 (1853) ("By State education can be rightly meant nothing else than a governmental control—having the charge and supervision of the very purposes, and all the purposes, for which the funds are bestowed.").

74. William T. Harris, *The Division of School Funds for Religious Purposes*, 38 ATLANTIC MONTHLY 171, 173–74 (1876).

of religion, would assuredly meet the disapprobation of the whole community.⁷⁵

The earliest recorded decision to prohibit the public funding of a church-controlled school came in this 1824 controversy over competition for funds between the New York Free School Society (soon to become the "Public School Society") and the Bethel Baptist Church school. In rejecting the church's petition for funding, the Common Council held that it would violate "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."⁷⁶ Six years later, the New York Common Council again rejected a petition for a share of the school fund, this time by a Methodist school. There, the Common Council held:

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.⁷⁷

To be sure, the constitutional argument was not particularly dominant in these early funding controversies; the Public School Society was primarily concerned about eliminating competition for the limited school funds. But legislators and other officials were also becoming concerned about the growing religious dissension surrounding the funding issue, and increasingly they focused on the constitutional norms behind the no-funding principle.⁷⁸ Equally significant, these early applications of the no-funding principle involved Protestant religious schools. All parties viewed the notion of sectarian education and the accompanying bar on its funding in *generic* terms, applying to all religious schools.⁷⁹ As a result of these

75. BOURNE, *supra* note 57, at 88; see also JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 166-67 (1967).

76. BOURNE, *supra* note 57, at 72.

77. *Id.* at 140.

78. PRATT, *supra* note 75, at 166-68.

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

episodes, the no-funding principle was already established by the time the first true controversy over Catholic school funding arose in New York in 1840.⁸⁰

In 1827, Massachusetts became the first state to prohibit the expenditure of funds in any school where sectarian doctrine was taught.⁸¹ Mann, who inherited the law, believed that nonsectarian education was consistent with, if not required by, principles of nonestablishment. He argued that if people were taxed to support the schools as "religious institutions . . . it would satisfy, at once, the largest definition of a Religious Establishment."⁸² Mann was blind, of course, to the possibility that the teaching of universal religious principles in his nonsectarian schools violated the same constitutional principle. But irrespective of his myopia, Mann and other mid-century reformers identified the no-funding principle as a constitutional principle. "The step to a church establishment is a very short one from the endowment of church schools," wrote William T. Harris.⁸³ Following the lead of Massachusetts, state legislatures began to enact laws and adopt constitutional provisions that expressly prohibited the expenditure of public funds on religious education or toward the benefit of religious societies.⁸⁴

Significantly, many states adopted these express provisions in the absence of any controversy over Catholic schooling or any nativist agitation. Michigan adopted a no-funding provision in its 1835 constitution⁸⁵ even though the state lacked a significant number of Catholic parochial schools and the enactment came before the wave

that "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." BOURNE, *supra* note 57, at 140 (emphasis added).

80. *Id.* at 178–23, 350–95; PRATT, *supra* note 75, at 177–90; DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–1973*, at 46–57 (1974).

81. Feldman, *supra* note 13, at 74–75.

82. MANN, *supra* note 49, at 117.

83. Harris, *supra* note 74, at 174; see also BOURNE, *supra* note 57, at 139 ("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.").

84. Feldman, *supra* note 13, at 74–75 & n.35 (noting Massachusetts law); see also MICH. CONST. of 1835, art. I, § 5; BOURNE, *supra* note 57, at 521–25; PRATT, *supra* note 75, at 182–90; RAVITCH, *supra* note 80, at 58–76.

85. MICH. CONST. of 1835, art. I, §§ 4, 5; THORPE, *supra* note 17, at 1931.

of Catholic immigration to that state.⁸⁶ In addition to providing that no person could be compelled to attend, erect, or support any place of worship or to pay taxes to support any teacher of religion, the constitution added an express clause stating: "No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries."⁸⁷ According to Professor Ray 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 Midwest.⁸⁸ The no-funding prohibition was repeated in the 1850 Michigan Constitution without apparent controversy, even though Detroit's Catholic immigrant population had grown significantly.⁸⁹

The Michigan Constitution served as an example for similar no-funding constitutional provisions in Wisconsin (1848), Indiana (1851), Ohio (1851), and Minnesota (1857)—all states without significant conflicts over parochial school funding at the time.⁹⁰ Separate studies of both Indiana and Wisconsin indicate that there was "no evidence that the lawmakers or constitution makers were anti-religious in making the [no-funding] requirements, or that they harbored a prejudice against any sect."⁹¹ Similarly, relations between

86. 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.

87. MICH. CONST. of 1835, art. 1, § 5.

88. BILLINGTON, *supra* note 47, at 130.

89. JORGENSEN, *supra* note 4, at 101; DAVID TYACK, *THOMAS JAMES & AARON BENAVIDE, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1854*, at 79–86 (1987). In 1842, the Detroit Board of Education prohibited the reading of the King James Bible in the public schools out of sensitivity for Catholic concerns. After Protestant complaints, the Board amended its policy in 1845 to allow the reading of either the Catholic Douay or Protestant King James version without note or comment. *Id.*

90. See THORPE, *supra* note 17, at 2:1074 (Indiana); *id.* at 4:1993 (Minnesota); *id.* at 5:2925 (Ohio); *id.* at 7:4078–79 (Wisconsin). According to Professor Jorgenson, however, in 1853, Protestants were instrumental in defeating a bill in the Minnesota territorial legislature that would have allowed any church-related school with more than twenty-five pupils to receive a share of the public school fund. JORGENSEN, *supra* note 4, at 103–04.

91. ALICE E. SMITH, *1 THE HISTORY OF WISCONSIN* 588–93 (1985); see also RICHARD N. CURRENT, *2 THE HISTORY OF WISCONSIN* 162–69 (1976); 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 A. Ranney, "Absolute Common Ground": *The Four Eras of Assimilation in Wisconsin Education Law*, 1998 *Wis. L. REV.* 791, 793, 796–97 (placing the development of

Catholic and public school officials in Cincinnati, the Ohio city with the largest immigrant population, were amicable in the years prior to the 1851 constitutional amendment. In 1842, at the request of Catholic Bishop John Purcell, the Cincinnati school board adopted a policy allowing dissenting students to "read such version of the sacred scriptures as their parents or guardians may prefer."⁹² The *Catholic Telegraph* praised the tolerance and "liberality which characterize[d] the Cincinnati [School] Board" and its policies.⁹³ The Ohio Constitution served as the model for the no-funding provision of the Kansas Constitution, adopted in 1858,⁹⁴ and the Indiana Constitution served as the basis for a similar provision in the 1857 Oregon Constitution.⁹⁵ The minutes of the Oregon Constitutional Convention are bereft of any statements hostile toward Catholicism or parochial school funding; the only religious controversies were over whether to allow for legislative chaplains and whether to acknowledge the deity in the constitution preamble (both rejected).⁹⁶ During the debates, one Oregon delegate articulated his understanding of the constitutional basis for the no-funding provision, stating he did not

believe that congress had any right to take the public money, contributed by the people, of all creeds and faith [sic], to pay for religious teachings. It was a violent stretch of power, and an unauthorized one. A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and

the parochial school systems after the enactment of the 1848 Constitution). The no-funding provision was not "a remnant of 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." Viteritti, *Blaine's Wake*, *supra* note 19, at 659. Even Professor 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).

92. Harold M. Helfman, *The Cincinnati 'Bible War,' 1809-1870*, 60 OHIO ST. ARCHAEOLOGICAL & HIST. Q. 369, 370 (1951); see also *THE BIBLE IN THE PUBLIC SCHOOLS: ARGUMENTS IN THE CASE OF JOHN D. MINOR ET AL. VERSUS THE BOARD OF EDUCATION OF THE CITY OF CINCINNATI ET AL.* (Robert McCloskey ed., Da Capo Press 1967) (1870).

93. CATHOLIC TELEGRAPH, Sept. 3, 1840, at 288.

94. KAN. CONST. art. VI, § 5.

95. OR. CONST. art. I, § 5.

96. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 296-308 (Charles Henry Carey ed., 1926).

classes to inculcate directly or indirectly the tenets of any one of them.⁹⁷

Another Oregon delegate remarked that it was true that

this constitution goes a step further than other constitutions on this subject, but if that step is in the right direction, and consistent with the proper development of our institutions, I see no weight in the objection that it is new. Let us take the step farther, and declare a complete divorce of church and state.⁹⁸

Thus, the no-funding principle was already established as a constitutional principle before the Know Nothings of the 1850s, the advent of the Civil War, or the controversy over the Blaine Amendment. Also, there is little evidence that anti-Catholicism or disdain for Catholic schooling played a significant role in the development of the principle or in the enactment of many of the early no-funding provisions. In his seminal study of antebellum nativism, Professor Billington indicated the Know-Nothings were relatively ineffective in enacting anti-Catholic legislation even in those states where they briefly held clear majorities.⁹⁹ The Massachusetts constitutional amendment of 1854, enacted by a nativist-controlled legislature, stands as the primary exception.¹⁰⁰

This is not to suggest that the later refinement and application of the no-funding principle was unrelated to the rise of Catholic immigration in the late 1830s and 1840s and the subsequent development of Catholic parochial schooling, led in part by Catholic objections to the Protestant-oriented, nonsectarian curriculum in many public schools.¹⁰¹ Catholic requests for a share of the public

97. *Id.* at 305 (referencing the arguments of Mr. Williams).

98. *Id.* at 302 (quoting Mr. Grover). "The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embracing very nearly the principle contained in this section, as reported, now under consideration." *Id.*

99. BILLINGTON, *supra* note 47, at 412-17. 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.

100. See JORGENSEN, *supra* note 4, at 85-93; JOHN R. MULKERN, *THE KNOW-NOTHING PARTY IN MASSACHUSETTS: THE RISE AND FALL OF A PEOPLE'S MOVEMENT* 76, 94-103 (1990). Jorgenson also claims that the California Legislature repealed the existing practice of funding religious schools in 1855 after both houses of the legislature and the governor's office were captured by the Know-Nothings. *Id.* at 104-06.

101. See *The Pastoral Letter of 1840*, in PETER GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY, 1792-1919*, at 132-34 (1923); *The Pastoral Letter of 1852*, in

school funds were fiercely opposed by public officials, educators, and Protestant leaders.¹⁰² Protestant nativists seized on the no-funding principle as a tool to maintain Protestant hegemony in the culture and the schools and used charges of papal designs to fuel anti-Catholic bigotry. The ensuing funding conflict resulted in religious suspicion, acrimony, dissension, and violence in many eastern cities.¹⁰³

Thus, there is no question that anti-Catholicism played a significant role in the development of the School Question during the nineteenth century. But “anti-Catholicism”—a loaded word—is an imprecise term that may encompass multiple motivations. As Professor Richard Garnett has written: “The anti-Catholicism running through American history, law, and culture is not so easily reduced to widespread, irrational dislike . . . toward Irish immigrants [or the papacy].”¹⁰⁴

That American Protestants often misunderstood Catholicism, and labored under mistakes about Catholic doctrine, practice, and history, does not change the fact that many strongly disagreed with, and were not merely “biased” against, the Catholic Church. As many Americans understood it, the Church had certain aims, and it made certain claims about things that mattered. And, as many Americans understood it, these claims were false, these aims were dangerously un-American, and they needed to be resisted.¹⁰⁵

Protestant hostility toward the Catholic Church thus cannot be explained away as nothing more than anti-Catholic bigotry. Protestant Americans had varied and complex reasons for their opposition to Catholicism. Some people opposed the public funding of religious education based on constitutional conviction, with Catholic parochial schools being the primary example; some opposed the Catholic religion for its anti-democratic traditions and ongoing

PETER GUILDAY, *supra* at 191.

102. BILLINGTON, *supra* note 47, at 221.

103. *Id.* at 220–37; Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 REV. POL. 503, 512 (1970).

104. Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMENDMENT L. REV. 45, 69 (2003). “Americans’ widely shared opinions and fears of Catholicism reflected a culture that for centuries was saturated with the polemics and rhetorical excesses of anti-‘popery,’ with a thoroughly Protestant version of English and European history, and with religious individualism and anti-clericalism.” *Id.* at 70–71.

105. *Id.* at 70.

autocratic declarations;¹⁰⁶ some opposed the hierarchy and power of the Catholic Church; some despised the Catholic faith based on its differences with Protestant theology; and many disdained Catholic immigrants for their social position, their ethnicity, and perceived docility toward a foreign authority.¹⁰⁷ But opposition to Catholic doctrines or the funding of Catholic schooling was not necessarily the same as Catholic bigotry.¹⁰⁸ In addition, many opposed dividing the school fund for reasons unrelated to the Catholic Church. One such reason was concern about the financial security of a nascent public education system and a desire to move away from a system of religiously-based education to one that was more professional and standardized.¹⁰⁹ For educational reformers, the funding of private religious schooling of any brand was moving in the wrong direction.

Though the controversy over the role of religion in public education subsided during the Civil War, it reemerged with a vengeance in the late 1860s with allegations of surreptitious funding of Catholic schools and the highly-charged controversy involving the exclusion of Bible reading from the Cincinnati public schools.¹¹⁰ But at its core, the no-funding principle—which developed in response to Protestant sectarian schooling—was based on an early consensus

106. See Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 FIRST AMENDMENT L. REV. 153, 169–76 (2003) (documenting various doctrines and statements of the Catholic Church during the nineteenth century that “gave rise to a generalized fear of an anti-democratic, autocratic Catholic Church which was seeking political power everywhere”); *Secular and Sectarian Schools*, 40 HARPER’S NEW MONTHLY MAG. 910 (1870) (comparing Protestant Republicans with Roman Catholic Absolutists).

107. Nativism—animus toward immigrants or the “policy of favoring native inhabitants as opposed to immigrants,” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 788 (1987), had both ethnic and religious elements. Lannie, *supra* note 103, at 504–05. Although the issues of Irish ethnicity and Catholicism were intertwined, not all nativist animosity toward Irish immigrants was necessarily based on religious bigotry. See Nicholas P. Canny, *The Ideology of English Colonization: From Ireland to America*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 47–68 (Stanley N. Katz & John M. Murrin eds., 1983) (discussing the long-standing British animus toward the Irish that was shared by American colonialists).

108. Stern, *supra* note 106, at 176 (“[The] positions [of the Catholic Church] gave rise to legitimate fears about the intentions of the Catholic Church and whether it intended to mobilize its believers into putting the Church’s officially stated doctrine into place in the United States The record . . . strongly suggests that Protestants were not tilting at windmills but at a real ideological threat.”).

109. Harris, *supra* note 74, at 175–76, 182–84.

110. See Helfman, *supra* note 92, at 369 (“The board of education’s action was destined to be the focus of a public opinion which plunged Cincinnati into a boiling cauldron of fear and bigotry.”). See generally THE BIBLE IN THE PUBLIC SCHOOLS, *supra* note 92.

that funding of religious instruction would violate rights of conscience, lead to competition among various sects, undermine the acculturating role of the common schools, and threaten the financial security of early public schools. These rationales predated the controversy surrounding the Blaine Amendment and remained salient long after the Amendment's demise.

II. THE SIGNIFICANCE OF THE BLAINE AMENDMENT

The Blaine Amendment was a highly significant political event of nineteenth-century American history. Several important impulses converged around the proposal and related debates. The specific issue at hand—application of the First Amendment religion clauses to the states with an express prohibition on funding religious schools—became subsumed in a much larger matrix involving a growing discomfort with the forces of change in post-Civil War America and an uncertainty over the future direction of the nation. For a brief moment, the School Question became a proxy for the nation's ills, and the Amendment became a preventative for troubling trends, a surrogate for political reform, and a stand-in for ethnic and religious suspicion. After the Amendment failed, it was largely forgotten as a political event, though the overarching issues remained unresolved for decades.¹¹¹

The first issue that came to a head in the controversy surrounding the Blaine Amendment was the debate over the role, character, and future of public education in America. By 1875, public schooling, as an institution, had existed for less than seventy years.¹¹² New York, Pennsylvania, and Massachusetts had been at the forefront of creating common schools and an administrative and funding infrastructure for public education beginning in the 1820s. In many other states, particularly in the South, systematic public education was in its nascent stages or otherwise nonexistent. Public schooling still faced seemingly intractable issues involving staffing, accessibility, curriculum content, secure funding, and popular support.¹¹³ And, as discussed above, by the 1870s, Americans were

111. See generally PAUL CARTER, *THE SPIRITUAL CRISIS OF THE GILDED AGE* (1971); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (David Donald ed., 1967).

112. See *supra* note 28 and accompanying text for a discussion of early nonsectarian school systems.

113. KAESTLE, *supra* note 35, at 104-225.

divided over whether the public schools should teach “universal” religious doctrines, religiously derived moral values, or predominately secular principles.

Issues of immigration and race also impacted the debate over the educational content and character of public schooling. By 1860, the number of immigrants—primarily Irish, German, and Italian Catholics—had risen to approximately three million.¹¹⁴ Immigration only accelerated following the Civil War, fueled increasingly by eastern Europeans, most of whom were Catholic, Orthodox, or Jewish in belief.¹¹⁵ The antebellum concerns about religion, ethnicity, class, foreign allegiance, and the lack of skills in self-governance were also compounded by the problems of industrialization, urbanization, political radicalism, and science-based skepticism.¹¹⁶ And following the Civil War, the debate over the necessity and character of universal education was complicated by questions about society’s commitment to the education of African-American children and their possible integration into white schools.¹¹⁷

An additional issue that informed the controversy surrounding the Blaine Amendment was the growing debate over the role of federal government in promoting education or setting educational standards or milestones. Traditionally, education had been a local, and then a state, issue. The educational reformers of New England and the Midwest, for example, though often working within state education departments, advocated reforms that transcended state boundaries and interests.¹¹⁸ During the antebellum era, Congress and the federal government had taken hesitant steps to promote public schooling, such as providing land grants to the states for the

114. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299 (2001).

115. WILLIAM L. BARNEY, *THE PASSAGE OF THE REPUBLIC: AN INTERDISCIPLINARY HISTORY OF NINETEENTH-CENTURY AMERICA* 294–96 (1987)

116. See JOSIAH STRONG, *OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS* 184–87 (1885) (listing industrialization, immigration, urbanization, wealth, and the School Question among eight perils facing the nation); Abbott, *supra* note 32, at 51; see also PAUL ALLEN CARTER, *THE SPIRITUAL CRISIS OF THE GILDED AGE* (1971). See generally WIEBE, *supra* note 111.

117. KAESTLE, *supra* note 35, at 171–81.

118. DAVID TYACK & ELIZABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980*, at 21–25 (1982); see also KAESTLE, *supra* note 35, at 104–35.

purpose of supporting education.¹¹⁹ The Civil War and Reconstruction had brought about an aggrandizement of federal authority at the expense of the states.¹²⁰ One principal way in which this new federal power had been exercised was through the creation of schools for Southern black children under the auspices of the Freedmen's Bureau. The black schools were highly controversial, and the precedent they established provided a window into possible mandates that might accompany future federal involvement in local education.¹²¹

The event that brought the issue of federal involvement in education to a head, however, was President Grant's speech to Congress in December 1875, where he recommended a constitutional amendment that became the Blaine Amendment. In addition to calling for a national ban on religious school funding, President Grant included a provision that would have required states "to establish, and forever maintain, free public schools adequate to the education of all the children . . . irrespective of sex, color, birthplace, or religion."¹²² In comparison to this latter provision, the no-funding requirement was relatively uncontroversial. Even though James Blaine's later proposal omitted a requirement mandating states to offer universal schooling,¹²³ that issue continued to haunt the debate surrounding the Amendment. 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."¹²⁴ Similarly, the nation's leading Protestant newspaper, *The Independent*, asked "[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."¹²⁵ For most people, any constitutional requirement of education would lead to federal regulation of local schooling,

119. TYACK ET AL., *supra* note 89, at 22.

120. *Id.* at 20-42.

121. WARD MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870s, 4-5, 15-21, 105-24 (William D. Dean ed., 1998).

122. 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).

123. Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 38 (setting out text of Blaine's original proposal).

124. MCAFEE, *supra* note 121, at 204 (quoting NASHVILLE DAILY AM., Aug. 5, 1876, at 2).

125. SAMUEL T. SPEAR, RELIGION AND THE STATE 21 (N.Y., Dodd, Mead & Co. 1876).

along with possible requirements about the education of black children. It was a highly combustible combination.

The final, and dominant, force at work in the Blaine Amendment debate was partisan politics. Ten years after the Northern victory in the Civil War, the Republican Party was hemorrhaging. The Republicans' unity in winning the war had masked deep divisions within the new party, divisions that emerged over the administration of Reconstruction. By 1875, the commitment to Reconstruction had waned as many Republicans reflected the weariness of the general public toward the process. Attempts to redefine the Republican image and agenda for the future were overshadowed by the failures of Reconstruction and the corruption of the Grant Administration. The 1874 election had brought about a Democratic victory in the House of Representatives and they appeared poised to retake the presidency with the help of the newly-reconstructed Southern states. The year 1875 was therefore a crucial time for the Republican Party with the potential fear that the party could end up like its Whig predecessors.¹²⁶

The Republicans needed an issue, and they found it in the School Question.¹²⁷ The School Question provided something for everyone. First, it placed the party on the side of education and reform. On one level, this diverted attention away from the Grant corruptions, while it satiated the religious element within the party that had long supported moral and civic education.¹²⁸ Second, it provided a contrast between the Republicans and the Democrats with the latter's lukewarm support for education. More importantly, it allowed Republicans to distinguish their supporters from the Democratic constituency, which included the majority of recent immigrants, who many native-born Americans considered to be ignorant and uncouth. One way to emphasize the differences in constituencies was to contrast the immigrants, many of whom were Catholic, from the old-stock Americans who identified with Protestant values. More subtly, but no less importantly, support for

126. Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 48-49; see also MCAFEE, *supra* note 121, at 1-7, 151-73.

127. See Henry Wilson, *New Departure for the Republican Party*, 27 ATLANTIC MONTHLY 104 (1871). Wilson, chairman of the Republican Party, proposed that universal education should become the party's vanguard issue.

128. See generally VICTOR B. HOWARD, *RELIGION AND THE RADICAL REPUBLICAN MOVEMENT 1860-1870* (1990).

the School Question allowed Republicans to evince fealty to republican values. Public schools reinforced American values of democracy, patriotism, civic virtue, morality and, yes, nonsectarian religion. No less important, they stood for the principle of separation of church and state—a principle that Americans of all stripes embraced, irrespective of how they may have defined it.¹²⁹

The Blaine Amendment thus became the fulcrum of these distinct but interrelated issues. The Amendment came to represent a solution to the School Question on both issues of funding and religious content. The Amendment represented much more than resolving a funding question, however. The Amendment also assumed the much larger issues of how to perpetuate American institutions and values in light of the pressures imposed by immigration, race, Reconstruction, urbanization, and industrialization.

First and foremost, however, the Blaine Amendment was a political device designed to maintain (or regain) Republican political hegemony.¹³⁰ All observers recognized that both Grant and Blaine had seized upon the School Question as a way to secure the 1876 Republican presidential nomination and hold the office for the party. The Amendment not only provided each candidate with the mantle of education reform, it had the additional advantage of appealing to Protestant, anti-Catholic, and anti-immigrant voters. Few observers were fooled. As the *Nation* observed later that spring,

Mr. Blaine did, indeed, bring forward at the opening of Congress a Constitutional 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.¹³¹

The Republican *New York Times* concurred, noting that an “appeal to religious passions was worth twenty-five thousand votes to the Republicans.”¹³² Without question, some who supported the

129. MCAFEE, *supra* note 121, at 175–202; Green, *Blaming Blaine*, *supra* note 8, at 130.

130. 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. MCAFEE, *supra* note 121, at 204.

131. NATION, Mar. 16, 1876, at 173.

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

Blaine Amendment and the no-funding principle it embraced did so out of disdain for Catholic immigration and Catholic schooling. But others supported the measure based on sincere disagreements with the Catholic Church.¹³³

This awareness of the political maneuvering behind the Amendment did not prevent people from supporting the measure for nobler reasons. Some viewed the Amendment as an opportunity to resolve the larger School Question and the religious strife it engendered. Both the Republican *New York Times* and the Democratic *New York Tribune* endorsed the measure as a way to diffuse the religious issue.¹³⁴ "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*.¹³⁵ Even a Democratic opponent to the final Senate version of the Amendment remarked that "no sensible and patriotic man questions the righteousness of an act that tends to bring peace out of discord, and . . . the elimination of the religious question from politics."¹³⁶

Diffusing the school controversy meant more than resolving the no-funding issue—it also required eliminating all Protestant preferences in the public schools, including the nonsectarian prayer and Bible reading that offended Catholic parents.¹³⁷ The funding issue "manifestly does not cover the whole question in controversy," *The Independent* insisted in 1876.¹³⁸ Rather, the controversy "bring[s] to the surface the whole subject of Church and State, civil

133. Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 16 n.52 ("One might note that the Blaine Amendment might have been motivated, not by hostility to the religious dimensions of Catholicism, but by concern about political aspects of Catholic doctrine in the 1870s, which proponents of the amendment believed had strongly antidemocratic implications").

134. See *The President's Message*, N.Y. TIMES, Dec. 8, 1875, at 6; N.Y. TIMES, Dec. 15, 1875, at 6; *The Message*, N.Y. TRIB., Dec. 8, 1875, at 6; N.Y. TRIB., Dec. 15, 1875, at 4.

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

136. 4 CONG. REC. 5454 (1876) (statement of Sen. Randolph).

137. See William T. Harris, *Moral Education*, AM. J. EDUC., Nov. 1875, at 5. 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 schools. *The President's Speech at Des Moines*, 22 CATHOLIC WORLD 433, 437 (1876).

138. SPEAR, *supra* note 125, at 18. Mr. Spear's work was originally published in *The Independent*. See *id.* at ii.

government and religion, in their relations to each other.”¹³⁹ The fundamental issue was whether all Americans, be they Protestant, Catholic, or Jewish, were citizens entitled to equal regard under the Constitution.¹⁴⁰ “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 of no answer unless we abandon the fundamental principles of our republican system.”¹⁴¹ The only solution, wrote *The Independent*, was “a purely secular system of education.”¹⁴²

What was lost in this debate was serious constitutional discussion. This should not be surprising, as the Blaine Amendment was not proposed to refine or expand a constitutional principle. Debate over pulpits, in the press, and in Congress focused on issues of partisanship, of federalism and states’ rights, of the need to secure public education financially, and of the dangers presented by Catholic designs on educational funding.¹⁴³ Serious discussion of constitutional doctrine was rare. While politicians of both parties made rhetorical allusions to principles of church-state separation when discussing the funding of religious schools, no one saw the Amendment as affecting existing legal principles. Senator Frederick Frelinghuysen, the floor manager of the Amendment, declared that the measure affirmed the long-standing principles of freedom of conscience and that “people should not be taxed for sectarian purposes.” “The whole history of our country, from its origin to the present day, establishes and fortifies these positions.”¹⁴⁴ A Democratic senator concurred during the debates, noting the proposal “founds no new principle, expresses no opinion as the wisdom or policy of an existing practice. It recognizes the fact that a system known as the common-school system has obtained in almost every State, has the sanction directly or indirectly of most State governments [and] has the generous support of most taxpayers. . . .”¹⁴⁵

139. *Id.* at 24.

140. *Id.* at 53.

141. *Id.* at 51. “All these people are citizens, belonging to the State The public school is the common property of the *whole* people. . . .” *Id.* at 43.

142. *Id.* at 65.

143. See Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 47–57.

144. 4 CONG. REC. 5561 (1876) (statement of Sen. Frelinghuysen).

145. *Id.* at 5454 (statement of Sen. Randolph). Senator Randolph, a Democrat from

The only legislator to discuss constitutional doctrine at length was Senator Oliver Morton, a Republican from Indiana and a leading supporter of the Blaine Amendment. Senator Morton asserted that the Amendment merely reaffirmed the status quo:

The idea of free schools not denominational but general, the idea of a free church not supported by the government or maintained by the government is an original one in American liberty. It has always prevailed in this country. Now it is proposed to give it form and put it in the Constitution. [But] [i]t has been in the minds of our people for one hundred years¹⁴⁶

That claim, understandably, required Senator Morton and other Republicans to justify the need for the Amendment. Their response was that the Amendment would prevent further slippage of *existing* principles. In defense of the proposal, Senator Morton asserted that “circumstances ha[d] occurred in the last fifteen or twenty years proving that there is danger and that the time has come when this idea which has been somewhat nebulous in its character should receive distinct form and enunciation and go into the fundamental law.”¹⁴⁷ Senator Morton’s claim that the Blaine Amendment would do little was self-serving and must be viewed with skepticism, as he was seeking to allay concerns of hesitant Democrats. And Democrats and Republicans alike knew that the Amendment, if enacted, would potentially impose an additional restriction on state funding of religious schools. But the Amendment would have established no new legal standard through enforcing the no-funding principle in states with lax enforcement or that lacked express statutory or constitutional provisions. As Senator Morton remarked in one of the few statements that put the no-funding principle in constitutional terms:

I believe that the example of one State establishing a religion, or doing what amounts to the same thing in principle, establishing denominational schools to be supported at public expense, endangers the perpetuity of the nation. The support of a school by

New Jersey, made the remark in reference to the House version of the Amendment, which more closely tracked Blaine’s proposal, in opposition to the final expanded version proposed by the Republican-controlled Senate.

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

147. *Id.*

public taxation is the same thing in principle as an established church.¹⁴⁸

Without question, Catholics would have disagreed with both propositions—that support for parochial schools equaled a religious establishment and that public funding of their schools would endanger the nation. But the former proposition was not a novel constitutional principle in 1876.¹⁴⁹ Thus the debate surrounding the Blaine Amendment was not an exercise in constitutional statecraft.¹⁵⁰ Rather, social, political, and religious issues subsumed the legal controversy. To be sure, the Blaine Amendment, had it been enacted and ratified, would have placed an express prohibition on the public funding of religious schools in the Constitution, imposing that mandate on the states. It would have imposed a legal obligation on all states to abandon any remaining funding arrangements with religious schools. But the best evidence is that by the final quarter of the century, such arrangements were increasingly rare.¹⁵¹ Although most states lacked express no-funding provisions as of 1876,¹⁵² the consensus already was that such funding violated constitutional principles.¹⁵³ Chiefly, the Blaine Amendment would have constitutionalized the status quo. All manifestations of the school controversy had deep roots and would have taken place without the introduction of the Blaine Amendment.¹⁵⁴ The public and legislative debate over the Amendment merely gave the controversy a public platform. But the Blaine Amendment added little to the debate or understanding of the no-funding principle.

148. *Id.*

149. See BOURNE, *supra* note 57, at 139 (quoting the 1831 Report of the Committee on Laws and Applications to the Legislature) (“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.”).

150. Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 69.

151. The vast majority of court cases during this period involved challenges to public funding of religious orphanages as opposed to religious schools, the latter being presumed to be ineligible for funding. See *People v. McAdams*, 82 Ill. 356 (Ill. 1876); *St. Mary's Indus. Sch. v. Brown*, 45 Md. 310 (Md. 1876); *Jenkins v. Inhabitantes of Andover*, 103 Mass. 94 (Mass. 1869); *Nevada ex rel. Nev. Orphan Asylum v. Hallock*, 16 Nev. 373 (Nev. 1882); *St. Patrick's Orphan Asylum v. Bd. of Educ.*, 34 How. Pr. 227 (N.Y. 1867); *People v. Bd. of Educ.*, 13 Barb. 400 (N.Y. 1851).

152. See *supra* Part II.

153. See *supra* notes 81–92 and accompanying text.

154. See *supra* Part I.B.

III. THE RELATIONSHIP TO STATE NO-FUNDING PROVISIONS

Despite the failure of the Blaine Amendment, it has widely been credited for being responsible for the subsequent enactment of various state no-funding provisions.¹⁵⁵ With this connection assumed, many have argued that the anti-Catholic taint of the Blaine Amendment should be transferred to these state provisions and used to discredit the no-funding principles contained therein.¹⁵⁶

Counts may vary, but thirty-eight states have express provisions limiting or prohibiting public funding to religious schools (by whatever name) and/or prohibiting control of the education fund by a religious entity.¹⁵⁷ Of that number, twenty-one states adopted their provisions between 1876—the year of the debate over the Blaine Amendment—and 1911—the year marking the admission of New Mexico, the last state admitted before a fifty-year hiatus broken by Alaska and Hawaii. On its own, this number appears telling: fifty-five percent of the states with express no-funding provisions enacted them in the thirty-five years following the Blaine Amendment. For many who seek to establish a connection between the Blaine Amendment and the state provisions (and to extend guilt by association between the alleged impetus behind the national measure and those in the states), this correlation is sufficient.¹⁵⁸

However, such numbers can be analyzed differently. Forty-five percent of the state no-funding provisions were drafted before the

155. See, e.g., Emily Wexler, *Privatization of Public Education: An Examination of U.S. and Canadian Policies and Trends Utilizing Vouchers that Indirectly Aid Sectarian Schools*, 12 NEW ENG. J. INT'L COMP. L. 327, 332 (2006) ("The failure of the federal Blaine Amendment encouraged the anti-funding movement that resulted in almost every state passing their own version of the Amendment. Congressman Blaine's 'real legacy lay in the numerous state constitutional amendments spawned after the failure of his federal amendment'") (citations omitted).

156. See sources cited *supra* note 19.

157. See Goldenziel, *supra* note 6, at 69; Kemerer, *supra* note 16, at 1.

158. The Utah Constitution of 1895, containing four no-funding provisions, should be stricken from any list. See UTAH CONST. art. I, § 4; art. II, § 4; art. X, §§ 1, 13. The forty-year struggle between the federal government and the Mormon-dominated Utah Territory was unique in American history and has no connection to the controversy over funding parochial schools. These various provisions were included to resolve the "Mormon Question," not the "School Question." See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002); Orma Linford, *The Mormons and the Law: The Polygamy Cases, Part I*, 9 UTAH L. REV. 308 (1964); Orma Linford, *The Mormons and the Law: The Polygamy Cases, Part II*, 9 UTAH L. REV. 543 (1965).

debate over the Blaine Amendment. The Blaine Amendment cannot explain these earlier provisions. Just as important, the no-funding provisions in those seventeen pre-Blaine state constitutions could have as easily served as models for the post-Blaine provisions.¹⁵⁹ This was the common practice. For example, the Washington Constitutional Convention of 1889 modeled many of its provisions on the Oregon Constitution.¹⁶⁰ A cursory review of many of these state provisions reveals a variety of terminology and coverage, with the language often parroting that found in other state constitutions.¹⁶¹

Also, one should distinguish within the twenty-one post-Blaine provisions those of newly admitted or reconstructed states—states required to draft whole constitutions—from those that simply amended their existing constitutions by adding a no-funding provision. Twelve of the twenty-one states adopting no-funding provisions did so as part of whole-scale constitutional drafting.¹⁶² As was common practice in such instances, most state conventions looked to the constitutions of other states, borrowing language and phrasing freely. In addition, creating a public education system and securing its financial footing became a primary concern of states in the post-Civil War era. The inclusion of a no-funding provision in such situations raises fewer inferences that it was added as part of an anti-Catholic agenda. Some may say that this is a distinction without a difference, but I think not. Greater inference of hostile or mixed motives can be drawn from the addition of provisions to shore up existing (or lacking) no-funding rules rather than can be drawn from provisions that are included as part of comprehensive constitution-making that uses existing models.

The argument in response is that attaching controlling significance to the Blaine Amendment is irrelevant—that a focus on its direct connection obscures the fact that various state amendments

159. Goldenziel, *supra* note 6, at 66–70.

160. ARTHUR S. BEARDSLEY, NOTES ON THE SOURCES OF THE CONSTITUTION OF THE STATE OF WASHINGTON 1889–1939 (1939); *see also* ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 9 (2002) (stating that the Washington Declaration of Rights drew from a model drafted by W. Lair Hill, which was based on the Oregon Constitution).

161. *See* sources cited *supra* note 17.

162. Arizona, Florida, Idaho, Kentucky, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming. *See* THORPE, *supra* note 17 *passim*.

arose in the same climate of religious bigotry that fueled the Blaine Amendment. According to this argument, it is not important whether the Blaine Amendment served as the model for the later state enactments but whether the same prejudice that motivated congressmen to support the no-funding principle on the national stage was shared by those state legislators who were successful in their endeavors.

There are several responses to this argument. First, drawing particular attention to the Blaine Amendment may be undeserved, but it has served as the primary point of criticism. Critics of the no-funding principle as contained in the various state constitutions have focused almost exclusively on the national amendment.¹⁶³ This is likely due to the substantial historical record surrounding the Blaine Amendment, which contains damning rhetoric, and the lack of corresponding state legislative histories. Critics have sought to taint the state provisions with material connected to the national effort, sometimes to the extent of inaccurately attributing anti-Catholic animus to James Blaine, as if his alleged sin transfers through his amendment down to the state measures.¹⁶⁴ In the recent debate over the propriety of the state no-funding provisions, the Blaine Amendment *has* mattered.

Even if one steps back from the particulars of the Blaine Amendment, it is difficult to draw anything more than vague parallels from the climate surrounding the national amendment. While the Blaine Amendment gave the School Question a national platform, it was essentially a state or local issue. As such, the degree of Protestant-Catholic animosity varied from locale to locale.¹⁶⁵ The bigotry exhibited in some of the debate over the Blaine Amendment was not unique to that measure, but it was also directly tied to the crass manipulation of the issue by the National Republican Party in

163. See sources cited *supra* note 19.

164. See *Mitchell v. Helms*, 530 U.S. 793, 798, 828–29 (2000). Evidence suggests that Blaine harbored no anti-Catholic attitudes but was sympathetic to Catholic issues. His mother was Catholic and his daughters attended Catholic schools. Green, *Blaine Amendment Reconsidered*, *supra* note 2, at 54 n.103. According to Professor Klinkhamer, during the 1876 campaign for the Republican Presidential nomination, “Blaine issu[ed] vigorous protests against injecting the issue of his [alleged] Catholicity or the reverse into the campaign.” Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 30 (1955).

165. See Adams, *supra* note 19, at 12–14, 24–26.

its effort to exploit anti-Catholicism for political gain.¹⁶⁶ This dynamic cannot automatically be transferred to the states. Undoubtedly, every state provision was supported with the awareness that it impacted Catholic schooling while it protected nonsectarian public schooling. But increasingly in the late nineteenth century, evangelical Protestants did not view the public schools as reflecting their values. Many people considered the late-century resolution of the School Question—encompassing the integrated issues of religious observances and school funding—as a compromise.¹⁶⁷ The same non-bigoted reasons that drew many to support the Blaine Amendment on a national level also led people to support a resolution of the School Question at the state and local levels.

As with the national proposal, state legislators may have been motivated by concerns about ensuring the stability of still nascent public schools, preserving the integrity of public school funds, avoiding religious competition, and adhering to a principle of nonestablishment.¹⁶⁸ Legislators could legitimately have viewed the public funding of parochial schools as a threat to these principles without devolving into anti-Catholic animus.¹⁶⁹ It is irresponsible for critics of the no-funding principle to transfer only the anti-Catholic animus from the national debate to the state levels without including the reform impulses that were shared nationwide. The issues that informed the debate nationally also affected attitudes in the states.¹⁷⁰

There may be one place to see the legacy of the Blaine Amendment. Four of the newly created states during this period added their no-funding provisions as part of a mandate imposed by Congress under the Enabling Act of 1889, which required the state constitutional conventions to include a provision “for the establishment and maintenance of a system of public schools, which

166. See *supra* Part II.

167. SPEAR, *supra* note 125 *passim*.

168. See *supra* text accompanying notes 111–18.

169. See MACEDO, *supra* note 38, at 63 (“It was not unreasonable for Americans to worry about the fragility of their experiment in self-government. There were also civic, secular reasons for fearing that an education in orthodox Catholicism could be hostile to republican attitudes and aspirations.”); Stern, *supra* note 106, at 176 (“[T]he Blaine Amendments were legitimate attempts to protect a conception of religious liberty different than that endorsed by the Catholic Church.”).

170. See Feldman, *supra* note 13, at 111–13 (discussing the “very broad appeal” of the nonsectarian ideology that transcended anti-Catholicism).

shall be open to all the children . . . and free from sectarian control.”¹⁷¹ Blaine Amendment critics draw a connection between the failed 1876 amendment and the Enabling Act.

Some critics go further and seek to taint the Enabling Act and the respective state provisions with anti-Catholic animus based on the nativist-sounding statements of one supportive senator, William Blair of New Hampshire. Justice Utter and Professor Larson point to Blair’s statements that the purpose of the Enabling Act was to prohibit funding of sectarian schools while ensuring that public schools could continue to educate children in “virtue, morality, and the principles of the Christian religion,”¹⁷² likely code words for Protestant nonsectarianism.¹⁷³ In earlier remarks, Blair had attacked the Catholic Church and Jesuits in particular, claiming that the latter sought “to secure the control of this continent by destroying the public school system of America.”¹⁷⁴ He also tied the present legislative efforts to the Blaine Amendment of twelve years earlier.¹⁷⁵ Although no senator objected to Blair’s comments about the purpose behind the Enabling Act, as Utter and Larson contend, no senator concurred.¹⁷⁶ Silence alone cannot be interpreted as consent or agreement.¹⁷⁷ Also, Blair was a conservative evangelical who had sponsored separate legislation to protect Bible reading and Protestant exercises in the nation’s schools, as well as to impose a national Sunday observance law.¹⁷⁸ Blair’s own notion of “nonsectarian” education—which included *devotional* instruction—was no longer the norm in most public schools by 1889, much to his chagrin. Blair had his own religious agenda, and his sentiments with

171. See Enabling Act, ch. 180, § 4, 25 Stat. 677 (1889).

172. S. 86, 50th Cong., 1st Sess. at 2 (1888).

173. See Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 460–67 (1988).

174. 19 CONG. REC. 1218 (1888) (statement of Sen. Blair).

175. *Id.*

176. See 20 CONG. REC. 2100–01 (1889).

177. See *United States v. O’Brien*, 391 U.S. 367, 384 (1968) (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.”).

178. See GAINES M. FOSTER, *MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865–1920*, at 39–42 (2002) (discussing Blair’s religious background and his ties to religious reform groups); ANSON PHELPS STOKES & LEO PEEFFER, *CHURCH AND STATE IN THE UNITED STATES* 566 (1964) (discussing Blair’s association with ultraconservative religious causes).

respect to the Enabling Act cannot be attributed to other members of Congress.

Even if Blair's bigotry can be attached to the Enabling Act, those motives cannot be attributed to the delegates in the various state conventions who wrote the particular no-funding provisions that federal law required them to include. For example, my research into the Washington Convention of 1889 reveals no evidence of anti-Catholic animus during the debates, even though several religious matters were considered by the convention.¹⁷⁹ Critics of the Blaine Amendment have been unable to point to anti-Catholic animus in the debates for the other three state constitutions.¹⁸⁰

Thus, it is likely that several of the state no-funding provisions would have been enacted regardless of the failed Blaine Amendment. No doubt the federal measure served as an inspiration for the enactment of several of the state provisions, but it was not necessary. The best-case scenario for Blaine Amendment critics is that the no-funding provisions of four states enacted pursuant to the Enabling Act have some connection to the Blaine Amendment. But it is equally likely those four states would have enacted a no-funding provision absent the Enabling Act.¹⁸¹ All in all, it is impossible to assign a "but for" status to the Blaine Amendment without more particular evidence from the other twenty-one states. But more than anything, it is irresponsible to assign anti-Catholicism as the sole or chief motive behind each of these measures. Too many other factors were in play.

IV. CONCLUSION

The Blaine Amendment was a significant historical event from a social and political standpoint. It is worthy of study and critique for what it tells us about nineteenth-century attitudes toward religious pluralism, cultural assimilation, and education as the engine of democratic self-governance. But as a constitutional event, the Blaine

179. See Brief for Historians and Law Scholars as Amicus Curiae on Behalf of Petitioners at 28–29, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729.

180. See *Pucket v. Rounds*, No. Civ. 03-5033-KES, 2006 WL 120233 (D.S.D. Jan. 17, 2006) (challenging the no-funding provisions of the South Dakota Constitution, Article VI, § 3 and Article VIII, § 16).

181. See Feldman, *supra* note 13, at 113–14 (“From the beginning of the last quarter of the nineteenth century, states uniformly—even where no state Blaine existed—declined to fund religious education directly, instead restricting direct funding to the public schools.”).

Amendment is insignificant. The inordinate attention it has received by justices and advocates with their focus on its attendant anti-Catholicism obscures the complex issues that were at stake in the nineteenth-century controversy over the role and content of public education. The Blaine Amendment, it seems, has become its own “bloody shirt,” used to discredit a constitutional principle that stands on its own merit. The more it is used as a legal football, the harder it is to appreciate its true significance. And the more we focus on the anti-Catholicism of the period, the less we are able to understand the host of other issues that informed the nineteenth-century School Question and what that history means for current funding controversies. To paraphrase Justice Thomas, we should “bury” the Blaine Amendment and give it a rest.