



**THE POLITICAL ORIGINS OF SECULAR
PUBLIC EDUCATION:
THE NEW YORK SCHOOL
CONTROVERSY, 1840-1842**

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INTRODUCTION

[A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. [The] refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism.

Justice Potter Stewart, dissenting
School District of Abington v. Schempp
374 U.S. 203, 313 (1963)

Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.

Justice Felix Frankfurter, concurring
McCullum v. Board of Education
333 U.S. 203, 216-31 (1948)

Justice Stewart's pointed dissent in *Schempp* exposes a fundamental problem with the Supreme Court's current approach to enforcing religious neutrality in public education: that is, excluding all religious speech does not, and cannot, enable the state to truly abstain from religious questions. Unfortunately, in religious matters, there is no "neutral" worldview; there are instead myriad sets of beliefs and traditions, among which are secularism, agnosticism, and atheism.¹ In a series of cases beginning in 1947,² however, the Court adopted the jurisprudential position that a secular outlook—one that relies on "empirically observable facts, not theories of the unseen"³—actually strips away all religious questions and leaves only neutral, amoral "facts." This position is quite logical from a secular or agnostic point of view,⁴ and thus many Americans have, it seems, been able to accept it as true. But to the devout religious believer—for whom even fundamental questions of epistemology and causality involve religious judgments—secular education is anything but neutral and amoral; rather it is a conscious decision to discard anything unseen and empirically unknowable, including deeply held religious beliefs, as, at best, unimportant.

Justice Frankfurter's *McCullum* concurrence attempts to justify the Court's decision to treat secularism as a neutral worldview, and does so, at least partly, on public policy grounds. One of the fundamental goals of American public education, dating back to the common schools of the early nineteenth century, has been to provide a space for cultural and political assimilation: a common meeting

¹ For an erudite and thought-provoking analysis of the conceptual problems that arise when we treat secularism as a religiously neutral viewpoint, see Randy Huntsberry, *Secular Education and Its Religion*, 42 J. AM. ACAD. OF RELIGION 733 (1974). But really the point is as simple to understand as this: Is teaching the theory of evolution (for example) religiously neutral, or does it tend to belittle certain religious beliefs? Huntsberry argues that such practices reduce religious beliefs to the status of myths. *Id.* at 735-36.

² *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

³ NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 113 (2005) (paraphrasing George Jacob Holyoake, creator of the term "secularism").

⁴ I hesitate to suggest that a particular secular worldview, which attempts (unsuccessfully) to take *no* position on religious questions, would satisfy an atheistic belief system that affirmatively rejects God's existence.

place where children from different ethnic, racial, and religious backgrounds might come together under the banner of pluralist democracy. Frankfurter and others since have pointed to this goal in support of the Court's effort to exclude all religious speech from public schools—even as that effort perpetuates the legal fiction that secularism is equivalent to religious neutrality. Perhaps uneasy interpreting a fundamental constitutional right based purely on a particular policy preference, however, the Court has also created a new historical narrative which locates the exclusive version of state neutrality in the ideology of the constitutional founding. According to this narrative, the framers—particularly Thomas Jefferson and James Madison—articulated a clear position on the need to exclude religious speech from the schools.⁵ The Court's historicizing on this point is problematic for several reasons, not least of which is that there were no public schools in 1787. Nonetheless, the Court's rationale has proven so persuasive that many Americans, even many lawyers and educators, seem to have accepted that religious exclusion—or established secularism—is the only plausible means of protecting religious freedom in the public schools. This is certainly not the case, and in pages that follow I hope to demonstrate that the Court has adopted this position as a matter of public policy—not constitutional necessity—and that we should at least be open to the possibility that an *inclusive* neutrality policy might better serve our educational goals.

This paper is the second installment in what I hope will be a three-part project presenting a comprehensive challenge to the standard judicial narrative of the Establishment Clause as applied in the public school context. The basic impetus for this project is my belief that our public school system is broken and in desperate need of innovative thoughts and solutions. The first installment in this series presents a theoretical critique of the received narrative grounded in the interpretative tradition of structuralism.⁶ This second paper revisits the political and cultural history of religion in American schools, and attempts to reengage our historical experience with our modern constitutional and educational discourse.

⁵ *Everson*, 330 U.S. at 12-16.

⁶ Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 NYU J.L. & LIBERTY 311 (2007).

The third and final piece in the series will undertake an empirical evaluation of school voucher programs.

With that said, this paper is a historical project which aims to bring more attention to the origins and evolution of secular education and to further discredit the notion that neutrality as exclusion sprung fully formed from the constitutional founding. It is my hope that a historically and intellectually honest conversation on this issue could inspire profound educational change—or it might just as easily reveal that the social policy concerns advanced in the 1820s, and again in the 1960s, are important enough to serve as the true and acknowledged basis for secular public education. Either way, the effort to recover and rehabilitate the true history of schooling and religion should better allow us to make clear-eyed normative judgments about these issues moving forward. My purpose here is to explore the New York school controversy in the mid-nineteenth century, which was a formative moment in our national conversation about religion and schooling. I contend that from this controversy emerged the central themes and arguments that continue to animate the school debate today. Further, I argue that it was this controversy that sowed the seeds of modern secular education. The paper's overall scope is somewhat broader, however, as I attempt to provide a brief sketch of religion's place in the public schools over all of America's history. Thus, the first section briefly examines the nonsectarian common school movement in early America, the second section explores the New York City controversy in detail, and the final section examines the New York controversy's legacy in the state legislatures and the modern Court.

I. THE EVOLUTION OF COMMON SCHOOLS AND NONSECTARIANISM

Education in colonial America was localized and diverse, though it seems clear that, as a whole, the colonists were a relatively literate and learned population.⁷ While there was certainly

⁷ CARL KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* 3 (1983). This is particularly true of New England, where some estimates suggest 70%-100% literacy at the time of the American Revolution. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783*

no public education in the modern sense, the various colonies and communities began to educate their children in ways that served their particular characters and purposes. The planter colonies of the middle south, intent on turning a profit for chartered English companies, paid little attention to intellectual or aesthetic inquiry, and in colonial Virginia childhood education likely consisted only of daily visits to church.⁸ New England, on the other hand, developed as a network of devout religious communities—Massachusetts Puritans hoped to model a godly “city upon a hill” for the world⁹—and regular education was an important means of maintaining civil and religious order.¹⁰ Thus, as early as 1647 Massachusetts law required all towns with more than one hundred households to establish a grammar school with an appointed teacher.¹¹ Eventually, with the coming of the Enlightenment, New England schooling began to emulate the English model, with dissenting private academies providing an alternative to narrow sectarian education.¹² These academies would ultimately become the model for the development of the American high school.¹³

Still, at the constitutional founding organized schooling was by no means prevalent outside of New England.¹⁴ And,

546 (1970). Even if only substantially correct, this estimate would place New England among the most literate societies in world history to that point.

⁸ JOEL SPRING, *THE AMERICAN SCHOOL: 1642-1993* 13 (3d. ed. 1994).

⁹ John Winthrop, *A Model of Christian Charity* (1630), reprinted in *THE AMERICAN PURITANS* 83 (Perry Miller, ed., 1956).

¹⁰ SPRING, *supra* note 8, at 13. It is also true that the Puritans, like most Protestant groups, believed that individuals could, and should, read and interpret scripture for themselves. This belief system, of course, depended upon a literate public. See MARK NOLL, *A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA* 40-48 (1992) (describing the Puritan way of life in New England).

¹¹ SPRING, *supra* note 8, at 7. This is the famous “Old Deluder Satan Law,” which also required towns of fifty households to appoint a reading and writing teacher. *Id.*

¹² *Id.* at 16.

¹³ *Id.* at 16-17.

¹⁴ ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY* 61-70 (Houghton Mifflin Co. 1934) (1919). Professor Cubberley argues that the New England colonies were well ahead of others in establishing systematic schooling. He points to constitutional provisions in Massachusetts (1776), New Hampshire (1776), and Vermont (1777), as well as statutes in Connecticut (1798) and New York (1812), as examples of public efforts that resulted in “good-school-conditions,” while the other early states lagged behind. *Id.* at 94-99.

although the Constitution itself makes no mention of public education,¹⁵ within a few years there was growing concern among the lettered classes that the young democracy would not long survive without some systematic means of ensuring an educated electorate. While the major Protestant sects—Episcopalians, Congregationalists, Presbyterians, Baptists, Lutherans, and Methodists—all made some early efforts to create their own system of schools,¹⁶ these institutions, even considered together, served a relatively small number of children.¹⁷ Thus, soon after ratification a variety of plans for larger, centralized educational systems began to emerge. This section considers the evolution of these systems and their relationship to organized religion in three parts: (1) the early ideas of men such as Thomas Jefferson and Noah Webster; (2) the emergence of Sunday and charity schools, particularly in urban areas; and (3) the growth of nonsectarian common schools.

A. THOMAS JEFFERSON, NOAH WEBSTER, AND THE EDUCATED DEMOCRACY

The most prominent early American to put forward a comprehensive proposal for public education was Thomas Jefferson of Virginia. In truth, Jefferson's ideas about the relationship between schooling and religion differed sharply from those of his contemporaries, and, indeed, his vision would not be realized in the next century and a half. Precisely because his thoughts provide a stark contrast against which to discern the contours of later ideas, however, Jefferson's proposals are an excellent place to begin.

In 1779, Jefferson presented the Virginia legislature with *A Bill for the More General Diffusion of Knowledge*, which proposed a three-tiered educational system intended to provide a minimum level of education to the masses, and also to identify and cultivate the next generation of "promising genius[es]" needed to fill

¹⁵ *Id.* at 52. It bears note, however, that the authority for establishing and maintaining schools remained implicitly with the states under the Tenth Amendment. *Id.* at 84.

¹⁶ Jerome E. Duffley, *Catholic Reaction to American Public Education: 1792-1852* 57-73 (June, 1959) (unpublished Ph.D. dissertation, on file with University of Notre Dame Library).

¹⁷ KAESTLE, *supra* note 7, at 32.

leadership positions.¹⁸ He envisioned one hundred schoolhouses in every county that would provide all children with at least three years of instruction in “reading, writing, and common arithmetick,” with an emphasis on classical history.¹⁹ Beyond these schools, Jefferson hoped to cultivate a natural aristocracy by selecting “the boy of best genius in [each] school” for further education in Latin and Greek at a county grammar school.²⁰ After two more years, the school overseers would select the most promising student in each grammar school class for four more years of public schooling.²¹ At the end of this time, the best half of these elite grammar school “seniors” would move on to the College of William and Mary, “there to be educated, boarded, and clothed [for] three years” at the public expense.²² In this way, Jefferson hoped to provide the general education necessary to produce an informed democratic citizenry, while also nurturing a suitable group of natural aristocrats to replace the aging national founders.

Beyond its scope and ambition, what is truly notable about Jefferson’s proposal is that he did not envision the basic schoolhouses actively providing religious or political guidance. Four years later, after his bill failed to garner support, he explained in his *Notes on the State of Virginia* that he felt it unwise to put “the Bible and Testament into the hands of the children at an age where their judgments are not sufficiently matured for religious inquiries.”²³ Further, Professor Joel Spring has observed that, unlike most of his contemporaries, “Jefferson did not believe that schooling should impose political values or mold the virtuous republican citizen. Rather, he believed that education should provide the average citizen with the tools of reading and writing and that political beliefs

¹⁸ Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1779), reprinted in JAMES W. FRASER, *THE SCHOOL IN THE UNITED STATES: A DOCUMENTARY HISTORY* 19, 24 (McGraw Hill 2001).

¹⁹ *Id.* at 20-21.

²⁰ *Id.* at 23-24.

²¹ *Id.* at 24.

²² *Id.*

²³ Thomas Jefferson, *Notes on the State of Virginia* (1783), reprinted in FRASER, *supra* note 18, at 24-25. The Court has quoted this language in support of its position that the framers’ intended to keep religion out of the schools, see, e.g. *Sch. Dist. of Abington v. Schempp*, 374 U.S. at 235 (Brennan, J., concurring), but it is more accurately seen as Jefferson’s defense of an otherwise unpopular proposal.

would be formed through the exercise of reason.”²⁴ Perhaps this is not surprising given Jefferson’s general disdain for centralized government and his skepticism regarding organized religion, but in this sense he was certainly out of step with the predominant educational ideas of the day. This largely explains why Jefferson’s proposal twice more failed to get the votes necessary to become law in Virginia.²⁵ Unlike Jefferson, most contemporary proponents valued public education precisely because the schools would mold virtuous young Christians with a strong sense of civic and national pride.²⁶ Prominent among the early champions of this educational vision was New England’s Noah Webster.

Webster, probably best known today for his namesake dictionary, was born in Connecticut in 1758, and spent his early career as a rural schoolmaster.²⁷ It was while teaching that Webster decided to design and produce a systematic new means of educating American children.²⁸ He focused his energies primarily on developing English language skills, and he thus set out to write a three-volume series of educational books to replace or supplement existing schoolbooks such as the *The New England Primer*.²⁹ The first book, completed in 1783, was a spelling textbook, followed a year later by a grammar text and a reader.³⁰ The books—particularly the speller—enjoyed tremendous popularity, and in this way Webster was largely responsible for creating a distinctly American form of the English language.³¹ It was in this spirit that the introduction to his speller urged the new nation to develop its own intellectual identity: “For America in her infancy to adopt the maxims of the Old World would be to stamp the wrinkles of old age upon the

²⁴ SPRING, *supra* note 8, at 37.

²⁵ KAESTLE, *supra* note 9, at 9. Jefferson eventually attributed this failure to “ignorance, malice, egoism, fanaticism, religious, political and local perversities.” *Id.* (internal quotations omitted).

²⁶ See, e.g., Benjamin Rush, *Thoughts Upon the Mode of Education Proper in a Republic* (Philadelphia, Thomas Dobson 1786) reprinted in FRASER, *supra* note 18, at 27-29 (advocating a system of public education based in Christian principles and dedicated to building republican and nationalistic virtue).

²⁷ SPRING, *supra* note 8, at 35.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ FRASER, *supra* note 18, at 35.

bloom of youth, and to plant the seed of decay in a vigorous constitution.”³² And, unlike Jefferson, Webster very much believed that public education should help shape students’ political values, particularly a strong sense of nationalism. Thus, the cover of his reader advised Americans to “Begin with the infant in the cradle; let the first word he lisps be Washington.”³³

Webster also differed from Jefferson in his views on the role of religion in schooling. In a 1790 essay entitled *On the Education of Youth in America*, he initially suggested that schools should abandon “the use of the Bible as a schoolbook,” but then quickly clarified that the Bible should remain in the classroom as a source “of religion and morality.”³⁴ Webster’s objection was not to religion in school, but rather to the common practice of using the Bible as a reading textbook, which he feared might desensitize children and cause the scriptures to “lose their influence by being too frequently brought into view.”³⁵ Instead, presumably, schools could purchase the Webster reader to teach literacy and save the Bible for its more important pedagogical role as teacher of Christian morality. Indeed, Webster’s speller, like most schoolbooks of the day, contained a Moral Catechism which directly referenced the Bible as the source of “all necessary rules to direct our conduct.”³⁶ This ideal of the public schools as founts of political and religious guidance certainly conflicted with Jefferson’s Enlightened intellectual conception, but is safe to say that Webster’s vision of schools as engines of moral and social policy better represented the general opinion of the times, and his ideas had a far greater impact on the next century of American education.³⁷

³² KAESTLE, *supra* note 7, at 6 (internal quotations omitted).

³³ SPRING, *supra* note 8, at 37.

³⁴ Noah Webster, *On the Education of Youth in America* (1790), reprinted in FRASER, *supra* note 18, at 35, 37-38.

³⁵ *Id.* at 37.

³⁶ Noah Webster’s *Moral Catechism* (1754) reprinted in SPRING, *supra* note 8, at 36. In keeping with his twin moral and political goals, Webster’s speller also contained a Federal Catechism, which taught the virtues and vices of democratic government.

³⁷ SPRING, *supra* note 8, at 37.

B. URBAN SUNDAY AND CHARITY SCHOOLS IN THE EARLY NINETEENTH CENTURY

While Noah Webster provided textbooks and a pedagogical model, most states still left the burden of building and maintaining actual schools to private organizations, at least in the urban centers.³⁸ So-called "charity schools" initially developed in England near the end of the seventeenth century in reaction to a perceived period of "moral laxity and religious indifference" under the post-Puritan Stuarts.³⁹ Devout Anglicans of the day established the "Society for Promoting Christian Knowledge" in 1698 to print and distribute religious literature to parishes for educating children.⁴⁰ This society quickly took on an educational mission in the British colonies, particularly North America, under a branch known as the "Society for the Propagation of the Gospel in Foreign Parts."⁴¹ The S.P.G., as it was commonly known, provided a number of schools and teachers for American Anglicans before withdrawing from the colonies at the end of the Revolutionary War.⁴² Several decades later, however, these early Anglican schools came to serve as a model for other private philanthropic school societies that developed out of an awakening educational consciousness.⁴³

Among the earliest of these philanthropic endeavors was the Sunday School Movement, which grew out of the efforts of publishing magnate Robert Raikes in England around 1780.⁴⁴ Raikes developed and funded a plan whereby poor working children could receive a basic education in reading and catechisms on Sundays.⁴⁵ Raikes' schools were a success and soon his ideas migrated

³⁸ KAESTLE, *supra* note 7, at 30. In rural townships, particularly in New England, schools were organized and supported on a district basis beginning in the eighteenth century, with tax money devoted to school purposes at an early stage; but this was not generally the case in the more densely populated urban areas until much later. See CUBBERLEY, *supra* note 14, at 177-80 (discussing the rise of tax-supported district schools).

³⁹ EDWARD H. REISNER, *THE EVOLUTION OF THE COMMON SCHOOL* 97 (1930).

⁴⁰ *Id.* at 98.

⁴¹ *Id.*

⁴² CUBBERLEY, *supra* note 14, at 24-25; accord Diffley, *supra* note 16, at 57-60.

⁴³ CUBBERLEY, *supra* note 14, at 120-21.

⁴⁴ *Id.*

⁴⁵ *Id.*

to America, where Sunday Schools quickly emerged in Philadelphia (1791) and New York (1793).⁴⁶ Over the next fifteen years, Sunday School societies developed in Boston, Baltimore, Pawtucket, and Washington,⁴⁷ each devoted to providing urban children with religious and literary instruction to counter the evil effects of deficient parenting and poverty.⁴⁸ Most schools met in the morning and then again in the afternoon, with activities that included “prayer, hymn singing, learning the alphabet from cards, and, for the older children, reading, memorizing, and reciting the Bible.”⁴⁹ Although Professor Ellwood Cubberley has characterized these early schools as “secular,”⁵⁰ it is clear that Protestant Christianity provided the pedagogical backbone—and indeed the *raison d’être*—for the Sunday School movement.⁵¹ While ostensibly the schools taught literacy, for their benefactors they were really an act of Christian charity and a means of preserving civil and religious order.

Weekday charity schools began to emerge at around the same time as the Sunday Schools, and the two types of institutions developed simultaneously over the next several decades.⁵² These schools blossomed in urban areas after about 1790 as existing charitable organizations began to devote their efforts to rescuing underclass children from the vicissitudes of an increasingly troublesome street culture.⁵³ Perhaps the most prominent of these early school societies was the New York Free School Society,⁵⁴ which the next section of this paper examines in more detail. Founded in 1805, the Free School Society hoped to educate indigent children who could not find a place in the smaller church schools around the city. The Society stated its benevolent ambitions clearly when it petitioned the New York legislature for an act of incorporation:

⁴⁶ *Id.* at 122.

⁴⁷ *Id.*

⁴⁸ KAESTLE, *supra* note 9, at 44.

⁴⁹ *Id.* at 45.

⁵⁰ CUBBERLEY, *supra* note 14, at 120-23. Cubberley, wrote in 1919, when the terms “secular” and “sectarian” had different meanings than they do for the modern reader. Moreover, Cubberley undoubtedly intended to contrast the Sunday School societies with denominational church schools.

⁵¹ KAESTLE, *supra* note 7, at 46-47.

⁵² *Id.* at 44.

⁵³ SPRING, *supra* note 8, at 44.

⁵⁴ CUBBERLEY, *supra* note 14, at 124.

The personal attention to be bestowed on these children for the improvement of their morals, and to assist their parents in procuring situations for them, where industry will be inculcated and good habits formed, as well as to give them the learning requisite for the proper discharge of the duties of life, it is confidently hoped will produce the most beneficial and lasting effects.⁵⁵

To help meet its goals, the Free School Society incorporated a revolutionary educational system developed in England by Joseph Lancaster.⁵⁶ The Lancasterian school system employed older students as “monitors” to teach the younger students, and so, through a rigid hierarchical structure based on rewards and punishments, Lancaster’s method allowed one schoolmaster to successfully instruct hundreds of children.⁵⁷ Society president and future New York Governor DeWitt Clinton was so impressed that he publicly praised Lancaster as “the benefactor of the human race,” and lauded his system as “a blessing sent down from heaven to redeem the poor and distressed of this world from the power of dominion and ignorance.”⁵⁸

New York was not alone in its need for organized schooling, and similar societies established charity school networks in Baltimore, Philadelphia, Boston, Providence, Washington, and dozens of smaller cities.⁵⁹ Eventually almost all of these societies employed some version of the Lancasterian system,⁶⁰ and, with this system in place, charity schools began to demonstrate that mass education was possible, and even effective, in urban areas. But as the schools took on an increasingly large and diverse student population, they

⁵⁵ Memorial of the New York Free School Society to the State Legislature (Feb. 1805), reprinted in WILLIAM OLAND BOURNE, *HISTORY OF THE PUBLIC SCHOOL SOCIETY OF NEW YORK* 4 (W.M. Wood & Co. ed., 1870).

⁵⁶ SPRING, *supra* note 8, at 45.

⁵⁷ See CUBBERLEY, *supra* note 14, at 128-137 (containing a detailed description of the Lancasterian system); see also DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* 12-17 (2d ed. 2000).

⁵⁸ DeWitt Clinton, Address Dedicating the Chatham Street Schoolhouse (Dec. 11, 1809), reprinted in BOURNE, *supra* note 55, at 19.

⁵⁹ CUBBERLEY, *supra* note 14, at 132; KAESTLE, *supra* note 7, at 37.

⁶⁰ SPRING, *supra* note 8, at 45.

confronted the difficulty of educating different religious groups in the same schoolhouse.⁶¹ Because education was traditionally based largely on sectarian religious teachings, the emerging student heterogeneity created a very real pedagogical problem.⁶² Lancaster's solution to this problem was, in DeWitt Clinton's words, to "carefully steer[] clear, in his instructions, of any peculiar creed, and [to] confine[] himself to the general truths of Christianity."⁶³ It was these week-day charity schools, then, that began to develop a means of providing common moral instruction in nondenominational Christian terms. Most Americans still thought that religion should play a central role in education, but increasingly educators came to believe that they could derive and teach generally accepted biblical principles without offense to any particular sect. This belief and reliance on a set of shared Christian values was essential to the growth of mass education in the early nineteenth century, and would come to form the basis of a "nonsectarian" curriculum at the heart of the emerging common schools.⁶⁴

C. THE GROWTH OF NONSECTARIAN COMMON SCHOOLS

Charity schools began the work of educating the growing number of poor children in America's cities, but by the 1820s it became increasingly clear that a truly effective program of mass education would require systematic state funding and supervision.⁶⁵ As early as 1812, cities with established charity school networks, such as New York, began funneling state funds into the existing system, while newer states like Ohio simply bypassed the charity model and began to legislate tax-supported public schooling on a district basis.⁶⁶ From these early efforts grew a wider movement aimed at creating state controlled schools to teach diverse social groups a

⁶¹ PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 220 (2002).

⁶² See SPRING, *supra* note 8, at 68 (describing Horace Mann's later struggles with the same problem).

⁶³ BOURNE, *supra* note 55, at 19.

⁶⁴ FELDMAN, *supra* note 3, at 61.

⁶⁵ *Id.* at 58. (Professor Feldman attributes the increased interest in mass schooling partly to the election of populist Andrew Jackson.)

⁶⁶ SPRING, *supra* note 8, at 62.

common body of basic knowledge.⁶⁷ It was with these standardized “common schools” that the modern American public school system began to take shape.

Professor Spring observed that the common school movement, which reached its zenith in the 1830s and 1840s, differed from earlier educational efforts in at least three significant and related ways.⁶⁸ First, unlike charity schools that served only the poor, the common schools were designed to teach *all* children, including diverse economic, religious and ethnic groups, in the same classroom. In this way, educators hoped to ease social tensions and instill a common sense of purpose and identity.⁶⁹ Second, the movement hoped to utilize the schools as a medium to further government policy. It was hoped that state controlled schools could directly implement broad educational policies to solve social, economic, and political problems in a way that privately run schools could not.⁷⁰ Finally, establishing these schools precipitated the creation of state agencies for educational supervision and control. It was as part of the common school movement that the states began to develop the bureaucratic apparatus—including political offices such as that of state school superintendent—necessary to implement a common educational agenda.⁷¹

One such officeholder was Massachusetts lawyer Horace Mann,⁷² who became the generally acknowledged father of the common school.⁷³ A graduate of Brown University, Mann served for a time as president of the Massachusetts Senate, where he supervised the creation of a new State Board of Education, and then

⁶⁷ *Id.* at 63. For a complete discussion of the transition from charity schools to public school districts see REISNER, *supra* note 39, at 302-317.

⁶⁸ SPRING, *supra* note 8, at 63.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² CUBBERLEY, *supra* note 14, at 222-26.

⁷³ *Id.* at 226. Nearly as influential as Mann was Henry Barnard of Connecticut. Barnard spent time in Europe studying the work of Swiss educator John Henry Pestalozzi, *id.*, whose groundbreaking work with popular education paved the way for the American common school, REISNER, *supra* note 39, at 179-80. Barnard brought Pestalozzi's lessons back to Connecticut and Rhode Island, where he spearheaded the common school effort. CUBBERLEY, *supra* note 14, at 226.

became the Board's first Secretary in 1837.⁷⁴ Upon becoming education secretary, Mann gave up a profitable law practice and devoted himself wholly to the development of the common school movement.⁷⁵ He explained his motivations in a letter to a friend:

My law books are for sale. My office is "to let." The bar is no longer my forum. My jurisdiction is changed. I have abandoned jurisprudence and betaken myself to the larger sphere of minds and morals. Having found the present generation composed of materials almost unmalleable, I am about transferring my efforts to the next. Men are cast-iron; but children are wax. Strength expended upon the latter may be effectual, which would make no impression upon the former.⁷⁶

Although Mann had great energy and passion, he had little direct power to change the existing system.⁷⁷ Instead he relied on his considerable powers of persuasion: he presented his reform message to the public in the pages of the *Massachusetts Common School Journal*, which he edited, and he urged changes upon lawmakers in twelve annual reports made in his capacity as Secretary of Education.⁷⁸ In his twelfth and final report, made in 1848, Mann summarized his ideas about the goals and mechanisms of common schooling, including his thoughts on the proper role of religion in the state-supported common schools.⁷⁹

Mann had confronted very much the same problem as had the New York Free School Society in its efforts to educate different religious sects in the same classroom.⁸⁰ To make mat-

⁷⁴ LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876* 134 (1980).

⁷⁵ *Id.* at 165.

⁷⁶ Horace Mann, Letter to A Friend (July 2, 1837), reprinted in *LIFE AND WORKS OF HORACE MANN* v. I, 83 (Mary Peabody Mann ed., 1891).

⁷⁷ CREMIN, *supra* note 74, at 136.

⁷⁸ SPRING, *supra* note 8, at 65, 68.

⁷⁹ *Id.* at 68.

⁸⁰ Horace Mann, *Twelfth Annual Report to the Massachusetts Board of Education* (1848), reprinted in FRASER, *supra* note 18, at 54, 57-58 [hereinafter *Mann Report*].

ters more difficult, the common school movement came close on the heels of the Second Great Awakening, which saw an explosion of sectarian diversity among Protestants and left Americans more divided on matters of Christian orthodoxy.⁸¹ So, like the Lancasterian charity schools, Mann espoused a curriculum grounded in general biblical truths “not imparted to [students] for the purpose of making [them] join this or that denomination . . . but for the purpose of enabling them to judge for [themselves], according to the dictates of [their] own reason and conscience, what [their] religious obligations are, and whither they lead.”⁸² This ideal of education in a “common” set of Christian principles—perfectly appropriate to a “common school”—came to be known as the doctrine of “nonsectarianism.”⁸³

Although nonsectarianism had its critics, even within the Protestant community,⁸⁴ many educators and religious figures welcomed the opportunity to educate a broad spectrum of children in basic Christian values.⁸⁵ One such figure was the Reverend Horace Bushnell of Connecticut, who was an outspoken advocate of nonsectarian common schooling. Educated in law at Yale, Bushnell turned his attentions to theology while tutoring at his alma mater in 1831.⁸⁶ In 1833, he was ordained as minister of the North Congregational Church in Hartford, Connecticut, where he remained until 1859.⁸⁷ Bushnell was a prolific author, a committed advocate for the common school cause, and a steadfast supporter of nonsectarianism.⁸⁸

⁸¹ See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 472-91 (1972) (describing the diversity of Christian sects that grew out of the Second Great Awakening).

⁸² *Mann Report*, *supra* note 80, at 58.

⁸³ Bartrum, *supra* note 6, at 357.

⁸⁴ Some commentators argued that nonsectarianism diluted the Bible to the point of abandoning Christianity. See *Mann Report*, *supra* note 80, at 59 (refuting claims that the common schools were “anti-Christian”).

⁸⁵ FELDMAN, *supra* note 3, at 59-63.

⁸⁶ HOWARD A. BARNES, *HORACE BUSHNELL AND THE VIRTUOUS REPUBLIC* 4-5 (American Theological Library Association 1991).

⁸⁷ *Id.* at 5, 66. Interestingly, Bushnell was an opponent of the revivalism that characterized the Second Great Awakening. *Id.* at 66. Perhaps this is consonant with his belief in the need for more structured and centralized education in Christian principles.

⁸⁸ Diffeley, *supra* note 16, at 82. It should be noted that Bushnell was also a virulent anti-Catholic, which no doubt inspired his staunch support for nonsectarianism. *Id.* at 83-85.

In an 1838 speech praising state legislation to improve public schooling, Bushnell offered his thoughts on the doctrine's benefits:

The great point with all Christians must be to secure the bible [sic] in its proper place. To this as a sacred duty all sectarian aims must be [sic] sacrificed. Nothing is more certain than that no such thing as a sectarian religion is to find a place in our schools. It must be enough to find a place for the bible as a book of principles, as containing the true standards of character and the best motives and aids to virtue. . . . To insist that the state shall teach the rival opinions of sects and risk the loss of all instruction for that, would be folly and wickedness together.⁸⁹

Bushnell spoke for the majority of Protestant school administrators, who, like he, believed that "[e]ducation without religion, is education without virtue," but who also believed that the noble cause of mass education required sacrifice and compromise.⁹⁰ This determined spirit buoyed a period of sustained growth in common school enrollments through the 1830s.⁹¹

By 1840, the push for common schooling was well underway, and the conviction that nonsectarian instruction could inculcate basic Christian principles without violating anyone's religious liberties was central to the new pedagogy. In truth, of course, nonsectarianism was generic Protestant Christianity and it was not—as its proponents liked to believe—religiously neutral.⁹² Indeed, Horace Mann acknowledged and passionately defended the Christian basis of common schooling:

⁸⁹ Rev. Horace Bushnell, *Extracts from an Unpublished Discourse: Clergy and Common Schools* 7 CONN. COMMON SCH. J. 102 (1840).

⁹⁰ Diffley, *supra* note 16, at 83.

⁹¹ CREMIN, *supra* note 74, 178.

⁹² HAMBURGER, *supra* note 61, at 220. By generic Protestantism, I mean a fundamental belief in the individual's ability to read the King James Bible, without note or comment, and derive a basic set of shared Christian values.

The Bible is in our Common Schools by common consent . . . If the Bible, then, is the exponent of Christianity; if the Bible contains the communications, precepts, and doctrines, which make up the religious system called and known as Christianity; . . . how can it be said that the school system, which adopts and uses the Bible, is an anti-Christian, or an un-Christian system?⁹³

In reality, however, nonsectarianism excluded a relatively large portion of the Christian community—the Roman Catholics.⁹⁴ As Professor Philip Hamburger has observed, “the ostensibly nonsectarian schools of [New York] had some broadly Protestant, even if not narrowly sectarian, characteristics. . . . [The] schools required children to read the King James Bible and to use textbooks in which Catholics were condemned as deceitful, bigoted and intolerant.”⁹⁵ As a result, Catholics in New York generally chose not to send their children to the common schools.⁹⁶ And by 1840 the Catholic leadership was prepared to mount a vigorous and principled challenge to nonsectarianism New York City.

⁹³ *Mann Report*, *supra* note 80, at 59.

⁹⁴ It is quite telling that in the common school literature and discourse of this period the terms “Christian” and “Protestant” became nearly synonymous, while “Catholicism” was often characterized as a dark, sectarian force controlled by a “foreign potentate.” Diffley, *supra* note 16, at 19-21; *also* Vincent P. Lannie, Archbishop Hughes and the Common School Controversy, 1840-1842 (1963) (unpublished Ph.D. dissertation, Teacher’s College, Columbia University) (available on microfilm at University of Michigan library) [hereinafter Lannie “Hughes”].

⁹⁵ HAMBURGER, *supra* note 61, at 220 (quotations and citations omitted). The King James Bible is, from the Catholic perspective, an unauthorized and thus heretical Anglican translation. The Douay Bible was the only authorized English translation then available.

⁹⁶ HON. JOHN H. SPENCER, REPORT OF THE SECRETARY OF STATE UPON MEMORIALS FROM THE CITY OF NEW YORK, RESPECTING THE DISTRIBUTION OF THE COMMON SCHOOL MONEYS IN THAT CITY, REFERRED TO HIM BY THE SENATE (Apr. 26, 1841), *reprinted in* BOURNE, *supra* note 55, at 356, 359-60 [hereinafter Spencer Report].

II. THE CATHOLIC CHALLENGE TO NONSECTARIANISM: NEW YORK CITY 1840-1842

Common schooling developed differently in New York City than in it did in New England, or even in the rural areas of New York state.⁹⁷ As discussed above, a private charitable corporation—the New York Free School Society—initiated the mass education effort in the city by supporting a network of charity schools. After 1813, the Society began to receive regular state funding for its mission and, in 1826, changed its name to the Public School Society of New York.⁹⁸ With state dollars in hand, the Public School Society began to operate a number of common schools and hoped eventually to teach all of the city’s children in their common schoolhouses. While these schools adopted a nonsectarian pedagogy, New York’s large Catholic population made the religion question more difficult for the Society than it was for educators with more homogenous constituencies. From early on, Catholics resisted sending their children to the Society’s schools, and eventually—with a dramatic increase in Irish Catholic immigration—the issue came to a head in 1840.⁹⁹ Under the leadership of Bishop John Hughes, Catholics petitioned the city for a share of the education funds for their own schools and in the process set off a debate that would shape both the future of American education and our national conception of church-state separation. This section examines the New York City controversy in three parts: (1) the growth of the Public School Society; (2) the Catholic petitions to the Common Council; (3) and legislative reforms at the state level, notably the publication of the Spencer Report and passage of the Maclay Bill.

⁹⁷ Whereas common schooling was accomplished by statute—often on a district basis—in rural areas, New York City’s common schools grew out of the existing charity school network. *See generally* S.S. RANDALL, HISTORY OF THE COMMON SCHOOL SYSTEM OF THE STATE OF NEW YORK 1-50 (1871) (recounting development of common schools in New York).

⁹⁸ BOURNE, *supra* note 55, at 101.

⁹⁹ HAMBURGER, *supra* note 61, at 220.

A. THE NEW YORK PUBLIC SCHOOL SOCIETY

In early 1805, several members of the existing societies for the education of free blacks and poor females in New York City held an informal meeting to discuss the possibility of forming a non-denominational network of charity schools for all indigent children.¹⁰⁰ From this original gathering a larger meeting was called, and on February 25 nearly one hundred of “the best elements of the old English, Dutch, and other families” signed a memorial to the New York Legislature seeking an act of incorporation for the Free School Society.¹⁰¹ On April 9, the Legislature granted the Society’s request, and thirteen trustees were appointed with DeWitt Clinton serving as President.¹⁰² In May, the trustees published an address seeking the “encouragement and support of the affluent and charitable of every denomination of Christians” in their quest to remedy the “pernicious effects resulting from the neglected education of the children of the poor.”¹⁰³ And from the very beginning the Society announced that it planned to take a serious but nonsectarian approach to religious teaching: “[I]t will be a primary object, without observing the peculiar forms of any religious Society, to inculcate the sublime truths of religion and morality contained in the Holy Scriptures.”¹⁰⁴

Encouraged by early support, the Society made plans to adopt the Lancasterian educational system, and, on May 17, 1806, began to teach a small group of students in a modest apartment on modern day Madison Street.¹⁰⁵ The school’s enrollment quickly outgrew its classroom, however, and the Society began to explore new sites.¹⁰⁶ Colonel Henry Rutgers (later the patron of Rutgers

¹⁰⁰ THOMAS BOESE, PUBLIC EDUCATION IN THE CITY OF NEW YORK: ITS HISTORY, CONDITION, AND STATISTICS 26 (1869).

¹⁰¹ *Id.* The memorial is reprinted in BOURNE, *supra* note 55, at 3-4.

¹⁰² BOESE, *supra* note 100, at 26.

¹⁰³ Address of the Trustees of the “Society for Establishing a Free School in the City of New York, for the Education of such Poor Children as do not Belong to, or are not Provided for by, any Religious Society” (May 18, 1805), reprinted in BOURNE, *supra* note 55, at 6-7.

¹⁰⁴ *Id.*

¹⁰⁵ BOESE, *supra* note 100, at 27-29.

¹⁰⁶ *Id.* at 29-30.

University) came forward with the gift of two lots on Henry Street for the construction of a new schoolhouse, and the Society also petitioned both the Legislature and the city for assistance in procuring suitable properties.¹⁰⁷ The city made available a building adjacent to the public Almshouse and gave the Society an additional \$500 to convert it to a suitable classroom.¹⁰⁸ In return, the Society agreed to take on fifty children from the Almshouse.¹⁰⁹ The original school population moved to its new quarters in April 1807, and two years later the city presented another larger building in return for a promise to educate all the Almshouse children.¹¹⁰ In 1811, the Society opened a second schoolhouse at the donated lots on Henry Street and also received a gift of additional property from the Trinity Church.¹¹¹ That same year, the Legislature granted the Society \$4000 with an annuity of \$500 to continue its work.¹¹²

In 1812, the Legislature commissioned a report on the possibility of establishing a statewide fund for the maintenance of a common school system.¹¹³ The report estimated that a fund of roughly \$50,000 a year could arise from the sale of state lands, interest on various stockholdings, and penalties imposed on citizens unwilling to perform military duties,¹¹⁴ and the Legislature passed a law effecting the committee's recommendation on June 19.¹¹⁵ A supplementary act the following year distributed common school funding to the state's counties and provided that New York City's portion of money would be given to the Free School Society, various charity schools, and "*such incorporated religious societies in the city as supported, or should establish, charity schools.*"¹¹⁶ For the next three

¹⁰⁷ BOURNE, *supra* note 55, at 10-11.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, at 10-11

¹¹⁰ BOESE, *supra* note 100, at 30-31.

¹¹¹ *Id.* at 31.

¹¹² *Id.*

¹¹³ Commissioners Report on a System for the Organization and Establishment of Common Schools (Feb. 17, 1812), *reprinted in* RANDALL, *supra* note 97, at 17-23.

¹¹⁴ *Id.* at 20.

¹¹⁵ BOESE, *supra* note 100, at 223.

¹¹⁶ BOURNE, *supra* note 55, at 48.

years, while the young nation found itself again at war with Great Britain, state assistance from the school fund was modest, but in the prosperous years following the war the Society's schools began to flourish.¹¹⁷ A salaried English schoolmaster, well-versed in Lancaster's system, arrived in 1818 to take over a third schoolhouse on Hudson Street, and another Englishman headed up a fourth schoolhouse a year later on Rivington Street.¹¹⁸ Beginning in 1821, the Society felt emboldened to make ambitious new plans—including five new schoolhouses over the next ten years—and proposed citywide per capita and property taxes to cover the costs.¹¹⁹ By 1822, the Society educated over 3,400 students at its schools, and held property assets valued at roughly \$68,000.¹²⁰

In that year, however, the Free School Society faced the first serious challenge to its nonsectarian hegemony. In 1820, the Bethel Baptist Church on Delancey Street opened a school in its basement, which took on poor children of all denominations.¹²¹ In 1821, the Baptist school began receiving a small portion of the city school fund under the 1813 statute's provision for religious societies.¹²² Pursuant to that statute, recipients of the school funds could spend the money only to pay teacher's salaries, but in 1822 the Legislature passed a law permitting the Bethel Baptists to put any surplus in the funds they received towards building a schoolhouse.¹²³ Although the Free School Society enjoyed the same privilege, the Society's trustees immediately took exception to the Baptist's encroachment and made plans to block their efforts to erect a new building.¹²⁴ The trustees characterized their objection as one of principle, however, suggesting that the new legislation presented the grave danger of state-supported sectarianism: "[The new law] is calculated to divert

¹¹⁷ BOESE, *supra* note 100, at 31. In 1815, the Society received its first full apportionment of \$3,708.14 from the school fund.

¹¹⁸ *Id.* at 32-33.

¹¹⁹ BOURNE, *supra* note 55, at 45.

¹²⁰ *Id.* at 77-78.

¹²¹ *Id.* at 49.

¹²² *Id.*

¹²³ *Id.* at 49-50.

a large portion of the common school fund from the great and beneficial object for which it is established, and to apply the same for the promotion of private and sectarian interests.”¹²⁵

The Society did not raise a constitutional objection to the Baptists’ position, but instead presented a memorial to the Legislature protesting the law as one “which may create a spirit of hostility heretofore unknown among the different religious denominations.”¹²⁶ The trustees worried that many religious groups might eventually seek the same privileges, and that ultimately the school fund would be asked to support all kinds of sectarian endeavors unrelated to education.¹²⁷ In March of 1823, a new trustee, attorney Hiram Ketchum, was sent to Albany to lobby for the Society’s cause, and, after much investigation and debate, the State Assembly’s Committee on Colleges, Academies, and Common Schools returned a report on the matter to the full Legislature.¹²⁸ The report largely adopted the Society’s position and concluded that:

[The common school] fund is considered, by your committee, purely of a civil character, and therefore it never ought, in their opinion, to pass into the hands of any corporation or set of men who are not directly amenable to the constituted civil authorities of the Government, and bound to report their proceedings to the public. Your committee [further wonders] whether it is not a violation of a fundamental principle of our legislation, to allow the funds of the State, raised by a tax on the citizens,

¹²⁴ *Id.* at 50-51.

¹²⁵ Resolution of the Trustees of the New York Free School Society (Aug. 2, 1822) *reprinted in id.* at 51.

¹²⁶ Memorial of the Trustees of the New York Free School Society to the State Legislature (Dec. 6, 1822) *reprinted in id.*, at 52, 54.

¹²⁷ *Id.* at 52-55.

¹²⁸ BOURNE, *supra* note 55, at 68-70.

designed for civil purposes, to be subject to the control of any religious corporation.¹²⁹

The Legislature promptly enacted a new school statute that was consistent with the Committee's recommendations, stipulating that the common school funds would henceforth go to the Common Council of New York City for subsequent distribution to the various school societies.¹³⁰ As a result, after 1824 the common school funds were no longer distributed to any sectarian religious organizations.¹³¹

Two years later, the Society petitioned the Legislature for a change in the terms of its incorporation.¹³² The new charter changed the corporation's name to the New York Public School Society and, more importantly, permitted the Society to take on *all* students—not just the poor—and to charge more affluent parents “a moderate compensation” in return for their services.¹³³ Now operating as truly “common” schools, rather than charity schools, student enrollments steadily increased over the next five years, so that by 1831 the Society operated twenty-three schools throughout the city, educating—according to their own estimates—over 7,300 pupils.¹³⁴ Still, the Society itself acknowledged that up to 20,000 school-aged children did not attend any school¹³⁵ and the growing population of Irish Catholics made up a large part of that number.¹³⁶

The American Catholic Church was profoundly aware of this problem, and also of the growing spirit of anti-Catholic “nativism” in

¹²⁹ Report of the Committee on Colleges, Academies, and Common Schools (Jul. 23, 1824) *reprinted in id.* at 70, 72.

¹³⁰ VINCENT P. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION: BISHOP HUGHES, GOVERNOR SEWARD, AND THE NEW YORK SCHOOL CONTROVERSY 37 (1968).

¹³¹ *Id.*

¹³² BOURNE, *supra* note 55, at 101.

¹³³ An Act in Relation to the Free-School Society of New York (Jan. 28, 1826) *reprinted in* BOURNE, *supra* note 55, at 101. The Society later abolished the tuition system in 1832. *Id.* at 150.

¹³⁴ BOURNE, *supra* note 55, at 150.

¹³⁵ *Id.* at 122.

¹³⁶ See LANNIE, *supra* note 130, at 21 (“[m]any of the New York City’s Catholic children did not attend the public schools on religious grounds . . .”).

both the state and the nation.¹³⁷ In a national Pastoral Letter of 1829 the church expressed the fear that, in the common schools “the school-boy can scarcely find a book in which some one or more of our institutions or practices is not exhibited far otherwise than it really is, and greatly to our disadvantage: the entire system of education is thus tinged throughout its whole course.”¹³⁸ Thus, the church urged the laity to “be vigilant in securing the spiritual concerns of your offspring, during the period of their preparation for business or for professions; . . . this security can, in general, be far better attained under the parent’s roof.”¹³⁹ Realizing, however, that many Catholic children could not avail themselves of home schooling, the New York diocese operated several schools, including one at the Roman Catholic Orphan Asylum on Prince Street. In March of 1831, the Asylum’s directors petitioned the common council for a portion of the school fund.¹⁴⁰ The council eventually rejected this first Catholic remonstrance against the Society’s schools, but the church would not abandon its fight with the Public School Society. Over the next nine years, the Catholic population continued to grow exponentially in the city, and with new leadership, both in the New York diocese and in the Statehouse, the church prepared for another, more vigorous battle against Protestant nonsectarianism in 1840.

B. BISHOP JOHN HUGHES AND THE CATHOLIC CHALLENGE TO THE
“SECTARIANISM OF INFIDELITY”

At the First Provincial Council of Baltimore, convened in 1829, the American Catholic bishops began to reconcile themselves to the fact that they would eventually need to establish a comprehensive network of their own schools if they hoped to protect their

¹³⁷ For a full and vivid account of the nativist movement see RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938).

¹³⁸ First Provincial Council of Baltimore, Pastoral Letter to the Laity (Oct. 17, 1829) reprinted in PETER GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY (1792-1919)* 19, 28 (1954).

¹³⁹ *Id.* at 26.

¹⁴⁰ BOURNE, *supra* note 55, at 124.

faith in an increasingly hostile cultural context.¹⁴¹ After lamenting the corrosive effects of the existing educational system, the Council decreed it “absolutely necessary that schools be established in which children can be taught the principles of faith and morals while being instructed in letters.”¹⁴² By the time the Second Provincial Council met four years later, the number of Catholic elementary schools had grown slightly,¹⁴³ but nativist hostility to Catholicism had grown faster. In 1834, a nativist mob—spurred on by the popular Presbyterian Reverend Lyman Beecher—burned an Ursuline Convent in Charlestown, Massachusetts after a false rumor about the mistreatment of a nun spread through Boston.¹⁴⁴ In 1836, an “escaped nun” from Montreal appeared in New York City with several Protestant ministers, where, with the ministers’ support, she published *The Awful Disclosures of Maria Monk*, which told lurid tales of sexual abuse and infanticide in a Canadian convent.¹⁴⁵ More scrupulous ministers visited Montreal and debunked Ms. Monk’s story; the book, however, and other sensationalist accounts like it, fueled the flames of nativist bigotry and intensified the Catholic clergy’s fears for their parishioners’ education and spiritual well-being.¹⁴⁶

In the face of this mounting social adversity, Catholics also struggled with the practical impossibility of self-schooling a population that had grown from 24,000 in 1790 to nearly 650,000 by 1840.¹⁴⁷ Nonetheless, the church continued to reject the Protestant common schools as a matter of religious principle.¹⁴⁸ In 1837, a relatively young Philadelphia priest named John Hughes wrote to

¹⁴¹ Diffley, *supra* note 16, at 237.

¹⁴² First Council of Baltimore, Thirty-Fourth Decree (1829) *reprinted in id.* at 237.

¹⁴³ Diffley, *supra* note 16, at 245-46.

¹⁴⁴ BILLINGTON, *supra* note 137, at 72-75.

¹⁴⁵ *Id.* at 100-02.

¹⁴⁶ *Id.* at 100-34.

¹⁴⁷ Diffley, *supra* note 16, at 237, 255. According to Diffley, the Catholic population *doubled* in the decade between 1830 and 1840 alone. *Id.* at 237. The Catholic population would continue to grow dramatically as thousands of Irish Catholics fled the potato famine between 1845 and 1849.

¹⁴⁸ *Id.* at 264-65.

Cincinnati Bishop John Purcell explaining the Catholics' unique position in regard to the nonsectarian curriculum:

In religious coalition [Protestants] have *nothing to lose*, whatever may be the effect of the experiment. Their creeds, so called, are so ambiguously defined that the addition or subtraction of half-a-dozen dogmas cannot destroy their identity – except, perhaps, one of the tenets adopted should be atheism! They know that we have a creed which cannot exist *but in its integrity*. We cannot, therefore, meet them on equal grounds.¹⁴⁹

As Hughes observed, there were fundamental differences between Catholics and all other Christian denominations that made conflict on educational questions seem inevitable. Indeed, it was this absolutist, all-or-nothing aspect of Catholic doctrine that would later puzzle Protestants when it formed the centerpiece of Hughes' challenge to nonsectarianism.

At the time of his letter to Bishop Purcell, John Hughes was a rising star in American Catholicism. Born in Annalaghan, Ireland in 1797 as the third of seven children, the young Hughes never forgot the bigotry and oppression he experienced as a Catholic under English rule.¹⁵⁰ Hughes happily followed his father to America in 1818, and, determined to enter the priesthood, he persuaded Father John Dubois to take him on as a gardener at St. Mary's Catholic College and

¹⁴⁹ John Hughes, Letter to John Purcell (June 27, 1837), reprinted in Duffley, *supra* note 94, at 194 (emphasis in original) (enumeration omitted). Hughes objected particularly to the Protestant practice of allowing children to read the Bible without note or comment. *Id.*, at 193-94. While this was common for Protestants, who generally agreed that individuals could interpret the Scriptures for themselves, Catholic doctrine permitted the teaching of only official church interpretations. Lannie, Hughes, *supra* note 96, at 44.

¹⁵⁰ JOHN R.G. HASSARD, LIFE OF THE MOST REVEREND JOHN HUGHES 14-17 (1866). Hassard recounts the elderly Hughes' bitter memory of his young sister's burial, at which the priest could only bless a handful of earth for a layman to throw on the grave because English law forbade him entry to the cemetery. *Id.* at 17.

Seminary in Emmitsburg, Maryland.¹⁵¹ In just a year, Hughes had impressed Father Dubois enough to gain regular entry into the college, and he quickly established himself as both an excellent student and a willing intellectual combatant.¹⁵² While still a student at St. Mary's, he published his first essay in a weekly paper rebuking a local speaker for defaming the Catholic Church during an Independence Day oration.¹⁵³ Then, as a young priest in Philadelphia, Hughes gained national recognition when he engaged the well-known Presbyterian Reverend John Breckinridge in a series of published debates.¹⁵⁴ Though Breckinridge had the benefit of a far greater education, Hughes' impassioned and erudite defense of Catholicism won him many admirers—as did his fearless service to the sick and poor of all denominations during the cholera epidemic of 1832, when many Protestant clergymen abandoned their city posts for the safety of country life.¹⁵⁵ These were signs of things to come for John Hughes, who quickly earned a reputation as a priest who was willing—even eager—to stand up in defense of his flock and his faith.

Shortly after his 1837 letter to Bishop Purcell, the Provincial Council nominated Hughes to serve as coadjutor to his old schoolmaster, John Dubois, then the aging and sickly Bishop of New York.¹⁵⁶ Just two weeks after Hughes' papal appointment in 1838, Bishop Dubois suffered a debilitating stroke, and the younger bishop assumed the heavy burdens of a nearly bankrupt diocese that struggled to provide its growing population with adequate

¹⁵¹ *Id.* at 20, 27-28.

¹⁵² *Id.* at 25, 34-35.

¹⁵³ *Id.* at 35.

¹⁵⁴ BILLINGTON, *supra* note 137, at 62-65. For a partial record of the published debates, see JOHN HUGHES & JOHN BRECKINRIDGE, *CONTROVERSY BETWEEN REV. MESSRS HUGHES AND BRECKINRIDGE ON THE SUBJECT "IS THE PROTESTANT RELIGION THE RELIGION OF CHRIST?"* (1833).

¹⁵⁵ For an excellent account of Hughes' tireless work during the cholera epidemic, see RICHARD SHAW, *DAGGER JOHN: THE UNQUIET LIFE AND TIMES OF ARCHBISHOP JOHN HUGHES OF NEW YORK* 81-89 (1977).

¹⁵⁶ HASSARD, *supra* note 150, at 178.

schooling.¹⁵⁷ Even as he wrestled with numerous financial and ecclesiastical issues, Hughes still plainly recognized the profound importance of education to the health of the church.¹⁵⁸ Among his first acts was to issue a pastoral letter in support of efforts to establish a seminary in the city:

The absence of Catholic faith and feeling among too many of the children of Catholic parents – the absence of sacrifice and sacraments of religion from whole districts, in which our people are numerous;—these are the distressing evidences that [a seminary] . . . is essentially necessary to the progress and prosperity of our holy faith.¹⁵⁹

Hughes was committed to elementary education too, as he improved relations between the church and its existing city schools and helped establish at least three new parochial institutions before 1840.¹⁶⁰ But, despite his best efforts, the New York diocese simply did not have the resources to educate more than “a small portion of the Catholic youth,”¹⁶¹ and Hughes remained stubbornly opposed to Protestant nonsectarian education for Catholic children.¹⁶²

The same year as Hughes’ appointment, however, New York Catholics received an unexpected blessing when William Henry Seward was elected as the state’s new governor.¹⁶³ Although a Whig—traditionally the party of Protestant nativism—Seward

¹⁵⁷ *Id.* at 186-87.

¹⁵⁸ HASSARD, *supra* note 150, at 186-87. Hassard contends that education was always foremost on Hughes’ mind, even as he engaged in a bitter power struggle with the lay trustees for control of the city’s churches. *Id.* at 189-97. Hughes tried unsuccessfully to carry out Dubois’ plans for a college and seminary in Brooklyn, but he would later found St. John’s College, now Fordham University. *Id.* at 190-205.

¹⁵⁹ John Hughes, Pastoral Letter (1838) reprinted in Diffley, *supra* note 16, at 252.

¹⁶⁰ Diffley, *supra* note 16, at 253.

¹⁶¹ *Id.* (quoting JAMES A. BURNS AND BERNARD J. KOHLBRENNER, A HISTORY OF CATHOLIC EDUCATION IN THE UNITED STATES 94 (1937)).

¹⁶² See HASSARD, *supra* note 150, at 226 (describing Hughes’ objections to the Society’s schools).

¹⁶³ LANNIE, *supra* note 130, at 13.

was an intellectual son of the Enlightenment, and throughout his career he remained committed to John Locke's idealist conception of natural and inalienable rights.¹⁶⁴ Seward expressed these views eloquently in a letter written to a constituent just after the conclusion of the Catholic school controversy:

[I] regard the human race as constituting one family, having the same heavenly parentage, the same earthly rights, and the same ultimate hopes. . . . Wherever any human being goes, there, in my judgment he is entitled to security and protection of his inalienable rights to life and liberty, and happiness, if he does not by misconduct endanger the rights of others. Physical and moral enjoyment none will deny him, but his rights of conscience are even more sacred.¹⁶⁵

Happily for Hughes, Seward was also a friend to the Irish Catholics¹⁶⁶ and a lifelong proponent of public education.¹⁶⁷ On July 4, 1839, while speaking at a Protestant Sunday School on Staten Island, Seward lauded the common schools as "the great leveling institutions of the age,"¹⁶⁸ and promised to make educational expansion a

¹⁶⁴ *Id.* at 16.

¹⁶⁵ Letter from William Seward to M.P. Mann (May 5, 1842), *microformed on* William Henry Seward Papers, University of Rochester Archival Collection, Microfilm Edition (Research Publications) [hereinafter Seward Papers]. M.P. Mann is most likely Horace Mann's wife, Mary Peabody.

¹⁶⁶ For a spirited debate on the virtue and character of Irish Catholics see the exchange of letters between Seward and Whig nativist Harman Westervelt in March and April of 1840 *microfilmed on* Seward Papers, *supra* note 165. One letter gave Seward occasion to again express his Lockean idealism: "Quite the contrary of all this. I think all men, of all nations and kindred alike endowed with reasoning powers which enable them to defend themselves against danger and injustice, and seek their own happiness, and to improve their condition." Letter from William Seward to Harman C. Westervelt (Mar. 25, 1840) *microfilmed on* Seward Papers, *supra* note 165.

¹⁶⁷ LANNIE, *supra* note 130, at 17-20.

¹⁶⁸ William Seward, Address at a Sunday School Celebration (July 4, 1839), *reprinted in* GEORGE BAKER, LIFE OF WILLIAM H. SEWARD WITH SELECTIONS FROM HIS WORKS 204 (Redfield 1855).

prominent feature of his gubernatorial term.¹⁶⁹ During his visit to the city that summer, however, he also discovered what Hughes well knew: that thousands of poor Catholic parents boycotted the common schools on religious grounds.¹⁷⁰ This realization would figure prominently in Seward's educational prescription, which he articulated in his annual message to the state legislature in 1840.¹⁷¹

After his city visit in July 1839, Seward had expressed his belief that the common school methodology was "defective" in its application to city life, and that the system was in need of reform.¹⁷² But in 1840 Seward took the more radical step of suggesting that the common school fund should help support Catholic schools in New York City:

The children of foreigners, found in great numbers in our populous cities . . . are too often deprived of the advantages of our system of public education, in consequence of prejudices arising from difference of language or religion. It ought never to be forgotten that the public welfare is as deeply concerned in their education as in that of our own children. I do not hesitate therefore to recommend the establishment of schools in which they may be instructed by teachers speaking the same language with themselves, and professing the same faith. . . . Since we have opened our country and its fullness to the oppressed of every nation, we should evince wisdom

¹⁶⁹ 1 FREDERIC BANCROFT, LIFE OF WILLIAM HENRY SEWARD 96 (1900).

¹⁷⁰ LANNIE, *supra* note 130, at 20.

¹⁷¹ *Id.* at 20-21.

¹⁷² William Seward, Annual Message to the Legislature (1839) reprinted in BAKER, *supra* note 168, at 210-12. In a letter of November 1840, Seward admitted that he "had never heard of the New York Public School Society" before that year—and he was discouraged to learn that a private corporation wielded such power over the public welfare in New York City. Letter from William Seward to Samuel Luckey (Nov. 29, 1840) microfilmed onto Seward Papers, *supra* note 165.

equal to such generosity by qualifying their children for the high responsibilities of citizenship.¹⁷³

This was a welcome invitation to New York Catholics, who—despite Bishop Hughes’ absence in Europe—quickly put together a petition to the Common Council for their own portion of the common school fund.¹⁷⁴

Late in 1839, Hughes had departed on a fund raising tour through France, Austria, and Italy,¹⁷⁵ but his two vicars general back in New York—the Reverends John Power and Felix Varela—responded quickly to Seward’s message.¹⁷⁶ Urged on by assurances of legislative support from a prominent Catholic in Albany, Power convened the church trustees at St. Peter’s in New York in order to draft a petition seeking a share of the common school funds.¹⁷⁷ On February 25, 1840, Power presented a short and simple petition to the Common Council.¹⁷⁸ Perhaps because he felt so encouraged by his contacts in Albany, Power felt no need to list the church’s principled grievances against the nonsectarian schools, and instead he appealed purely in terms of financial need.¹⁷⁹ By March, however, two other religious groups—the Scotch Presbyterians and the Jews—had forwarded their own appeals to the council, and the school controversy was begun.¹⁸⁰ While it is not entirely clear

¹⁷³ William Seward, *Annual Message to the Legislature (1840)* reprinted in BAKER, *supra* note 168, at 212-13. While there is some debate as to whether Seward believed that reaching out to Catholics would help him politically, in reality Seward suffered at the polls for taking a position unpopular with the traditional Whig constituency. Compare LANNIE, *supra* note 130, at 22 (arguing against a political motive) with John W. Pratt, *Religious Conflict in the Development of the New York Public School System*, 5 HIST. EDUC. Q. 110, 110-15 (1965) (attributing a political motive).

¹⁷⁴ LANNIE, *supra* note 130, at 27-28.

¹⁷⁵ COMPLETE WORKS OF JOHN HUGHES 9 (Lawrence Kehoe, ed., 1866) [Hereinafter “HUGHES WORKS”].

¹⁷⁶ LANNIE, *supra* note 130, at 29.

¹⁷⁷ *Id.* at 31.

¹⁷⁸ RAVITCH, *supra* note 57, at 40.

¹⁷⁹ *Id.*; see also LANNIE, *supra* note 130, at 40-41 (speculating that Power saw no reason to antagonize the Society).

¹⁸⁰ LANNIE, *supra* note 130, at 33.

whether these secondary petitions were intended to aid or impede the Catholic cause,¹⁸¹ there was no doubting the motives behind the flood of remonstrances the council received in opposition to the Catholic petition.¹⁸² The most formidable of these objections came from the Public School Society, which continued to receive the lion's share of the city's school funds.¹⁸³ As it had since 1822, the Society staunchly opposed the diversion of funds to any sectarian group.¹⁸⁴ It argued that such funding violated the constitutional separation of church and state, and predicted that a decision in the Catholics' favor would leave the council vulnerable to similar requests from every sect in the city.¹⁸⁵

In March, the council assigned the Catholic petition to the city's Committee on Arts, Sciences, and Schools, which held public hearings on the matter.¹⁸⁶ Again, the Catholics presented their case as solely one of financial need, and held back any potentially inflammatory criticism of the Public School Society.¹⁸⁷ The Society responded as it had in writing, but took the further step of providing Reverend Varela with review copies of the common school-books in an attempt to head off future attacks on its curriculum.¹⁸⁸ The committee wasted little time in deliberation, and returned its report to the council in late April.¹⁸⁹ The report opined that, pursuant to the 1824 statutory changes, the council had no power to award public monies to any sectarian organization.¹⁹⁰ Although this presumably settled the question, the committee nonetheless went

¹⁸¹ Professor Lannie contends that these two "petitions" were actually meant to validate the fear that granting the Catholic's petition would open the floodgates to requests from every sect. *Id.* at 33-34. Other commentators, however, suggest that the Presbyterian and Jewish petitions were made in good faith and in the same spirit as the Catholic request. *Id.* at 34, n.14.

¹⁸² *Id.* at 35-41.

¹⁸³ *Id.* at 36.

¹⁸⁴ RAVITCH, *supra* note 57, at 40.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 41.

¹⁸⁷ *Id.* at 42.

¹⁸⁸ *Id.*

¹⁸⁹ LANNIE, *supra* note 130, at 44.

¹⁹⁰ *Id.* at 46.

on to assess the constitutional implications of the petition, concluding that “[b]y granting a portion of the School Fund to one sect, to the exclusion of others, a preference is at once created, a ‘discrimination’ is made, and the object of [the] great Constitutional guarantee is defeated.”¹⁹¹ Accordingly, the committee recommended that the Common Council reject the Catholic petition, which it promptly did.¹⁹²

In Hughes’ absence, the Catholic community had actually remained somewhat divided on the school question, with one faction opposing any legislation affecting religion at all.¹⁹³ That changed, however, with the bishop’s return to New York in mid-July.¹⁹⁴ Hughes quickly took command of the situation and held a series of bi-weekly meetings in the basement of St. James Church to discuss Catholic strategy.¹⁹⁵ The bishop made it clear that he did not intend to give up the school fight, explaining that he did not believe the first petition had adequately presented the Catholic’s complaint against the common schools.¹⁹⁶ At an August meeting, he appointed a committee to help him draft an address to the people of New York.¹⁹⁷ The address recounted the familiar litany of Catholic objections to Protestant nonsectarianism—the offensive textbooks, the use of the unauthorized King James Bible, and the practice of private scriptural interpretation.¹⁹⁸ The bishop also presented a novel theoretical argument, however, that struck directly at the

¹⁹¹ Report of the Committee of the Arts and Sciences and Schools, on the Petition of the Officers and Members of the Roman Catholic and Other Churches, in the City of New York, for an Apportionment of School Moneys, to the Schools Attached to Said Churches (April 27, 1840) *quoted in id.* at 48.

¹⁹² LANNIE, *supra* note 130, at 49.

¹⁹³ RAVITCH, *supra* note 57, at 41. There were two prominent Catholic papers in the city: the *Truth Teller*, published by Jacksonian laymen; and the *Register*, which Reverend Varela established in 1839. *Id.* The *Truth Teller* opposed the Catholic petition, while the *Register* supported it. *Id.* For a more detailed discussion of this episode, see LANNIE, *supra* note 130, at 41-43.

¹⁹⁴ LANNIE, *supra* note 130, at 51-53.

¹⁹⁵ *Id.* at 53-54.

¹⁹⁶ *Id.* at 54.

¹⁹⁷ *Id.* at 57.

¹⁹⁸ John Hughes, Address of the Roman Catholics to Their Fellow Citizens of the City and State of New York (Aug. 10, 1840) *reprinted in* HUGHES WORKS, *supra* note 175, at 57, 62-63 [hereinafter “Hughes Address”].

heart of nonsectarianism itself: he accused the common schools of effectively banishing Christianity from the classroom and replacing it with what he called – in a turn of phrase that would continue to puzzle the Public School Society throughout the controversy – the “sectarianism of infidelity.”¹⁹⁹ Many Protestants simply could not understand this apparent inconsistency in Hughes’ logic; it seemed to them impossible that the schools could simultaneously inculcate sectarianism *and* banish Christianity.²⁰⁰ To Catholics, however, for whom religious teaching was an all-or-nothing affair, the argument was straightforward: by diluting Christianity to make it acceptable to all sects, the Society had resorted to liberal deism, which was, in effect, a sectarian ideology that abandoned positive Christianity.²⁰¹ Hughes thus challenged the concept of nonsectarianism itself—even apart from the anti-Catholic texts and rhetoric—and in so doing questioned whether religiously neutral schools were even possible: “If the public schools could have been constituted on a principle which would have secured a perfect NEUTRALITY of influence on the subject of religion, then we should have no reason to complain. But this has not been done, and we respectfully submit that it is impossible.”²⁰²

While many Protestants, particularly those in the Public School Society, found Hughes’ position “difficult to understand,”²⁰³ one newspaper, the Episcopalian *The Churchman*, captured his ideas nicely:

The “Address” is, to say the least, very carefully and artfully constructed. . . . [It] assumes a fundamental position, the neutrality of influence on the subject of religion cannot be secured by the present system of public school instruction. It argues that a new sectarianism, antagonist to all Christian sects, has been generated in the public schools of New

¹⁹⁹ *Id.* at 59.

²⁰⁰ LANNIE, *supra* note 130, at 61.

²⁰¹ Hughes Address, *supra* note 198, at 58-59.

²⁰² *Id.* at 63 (emphasis in original).

²⁰³ LANNIE, *supra* note 130, at 61.

York, and that the advantages which are denied to, what it terms, Christian sectarianism of every kind, are necessarily transferred to infidel sectarianism.²⁰⁴

The Churchman understood that the bishop had thrown down a formidable theoretical gauntlet—one that haunts Establishment Clause jurisprudence to this day—but the Society remained unpersuaded.²⁰⁵ Undeterred, Hughes presented a second petition for funds to the Common Council in late September, this time stating the Catholic's specific objections to the Society's schools in direct and forceful terms.²⁰⁶ The Society promptly objected to the Catholic petition, and the debate was rekindled.²⁰⁷ Due largely to the intense public interest Hughes managed to inspire in the renewed petition, the council took the unusual step of organizing a special hearing for the Catholic petitioners and the various remonstrants, which was scheduled for October 29th in City Hall.²⁰⁸

The buildup to the "great debate" was tremendous,²⁰⁹ and by late afternoon on the appointed day a "vast crowd filled and surrounded the council chamber and blocked up the passages, and the speakers had great ado to force their way into the room."²¹⁰ Bishop Hughes was the lone Catholic representative, while the Society sent two prominent attorneys to speak on its behalf, one of whom was Hiram Ketchum of the 1822 Bethel Baptist controversy.²¹¹ Three other remonstrants—the Methodists, Presbyterians, and Reformed

²⁰⁴ *The Romanists and the Common School Fund*, THE CHURCHMAN, Aug. 22, 1840, at 94 c. 6 (emphasis omitted). The *Churchman* maintained a more sophisticated and dispassionate editorial position than most contemporary papers; and, as discussed later, it alone truly foresaw the long-term implications of the entire debate. See *infra* notes 313-14 and accompanying discussion.

²⁰⁵ Compare *id.* with *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting). This is, after all, the very same point that Justice Stewart makes in the quotation at the head of this paper.

²⁰⁶ LANNIE, *supra* note 130, at 67-68.

²⁰⁷ *Id.* at 69.

²⁰⁸ *Id.* at 73-74.

²⁰⁹ *Id.* at 75.

²¹⁰ HASSARD, *supra* note 150, at 235.

²¹¹ *Id.* at 234-35.

Dutch Church—also sent representatives.²¹² After a reading of the petition and remonstrances, Bishop Hughes took the floor and spoke for three straight hours,²¹³ which he largely spent refuting the Society's attacks on the church's motives, rather than presenting a principled legal challenge to the administration of the common school fund.²¹⁴ He did, however, renew his theoretical challenge to the very idea of nonsectarian education: "They say their instruction is not sectarian; but it is; and of what kind? The *sectarianism of infidelity* in its every feature."²¹⁵ Again, this apparent contradiction in Hughes' logic was a target of the remonstrants' attack,²¹⁶ although, in general, the Society focused much more closely, and effectively, on the legal question of the council's authority to grant the Catholics petition under the 1824 statute.²¹⁷ But the remonstrants were no more succinct than the bishop, and after over six hours of continuous debate, the meeting was adjourned and carried over to the following day.²¹⁸

The second day of debate was much like the first, with tremendous crowds choking the corridors of City Hall.²¹⁹ After the last of the remonstrants had had their say, Hughes was given the chance for a final refutation, and this time he focused more clearly on his contention that the common schools were simultaneously sectarian and infidel.²²⁰ Again, the Society simply did not comprehend this argument, and continued to accuse Hughes of inconsistency in thought.²²¹ Professor Vincent Lannie has explained the

²¹² *Id.* at 235.

²¹³ *Id.*

²¹⁴ LANNIE, *supra* note 130, at 78-79.

²¹⁵ John Hughes, On the Claim of the Catholics to a Portion of the Common School Fund, Before the Board of Alderman of the City of New York (Oct. 29, 1840), reprinted in HUGHES WORKS, *supra* note 175, at 142.

²¹⁶ LANNIE, *supra* note 130, at 89.

²¹⁷ *Id.* at 78-82.

²¹⁸ *Id.* at 85.

²¹⁹ *Id.* at 86.

²²⁰ *Id.* at 89.

²²¹ *Id.* at 90.

parties' inability to understand each other on this point as a product of fundamentally different religious viewpoints:

[The] charge of "inconsistency" can be traced to the protagonists' different frames of reference. Hughes defined religion as being inseparable from specific denominational doctrines, and denied that it could be equated with generally accepted Christian moral principles. . . . What Hughes defined as religion, the Society and assistant aldermen labeled as sectarianism; what the latter regarded as nondenominational Christianity, Hughes scorned as sectarianism. . . . This difference was basic, and the two positions never met. It was not that either side was right or wrong. They simply started from different premises and proceeded on their separate ways—equal but separate.²²²

In truth, it is elemental religious conflicts like this one that continue to make Establishment Clause jurisprudence so difficult, and which have complicated and undermined the neutrality doctrine in the modern Court.²²³

The furor over the school question died down in the months after the City Hall debates, as the council appointed a special committee of aldermen to prepare a report on the matter.²²⁴ The committee returned its report on January 11, 1840, recommending, predictably, that the council reject the Catholic petition.²²⁵ For the second time in a year, the Catholics had failed to persuade the New York City Common Council, and so, in the early months of 1841,

²²² *Id.* at 90-91.

²²³ *See infra* Section III.B.

²²⁴ LANNIE, *supra* note 130, at 96.

²²⁵ *Id.* at 99.

Hughes made plans to move the battle to Albany, where he rightly predicted a more favorable reception.²²⁶

C. JOHN SPENCER'S REPORT AND PASSAGE OF THE MACLAY BILL

In the time between the City Hall debates and the Common Council's decision, Governor Seward won a relatively narrow reelection,²²⁷ and so in early 1841 Bishop Hughes began to rally his constituency behind a petition to the Legislature.²²⁸ On February 11, he urged a large Catholic gathering to carry the fight to Albany:

We have an appeal to a higher power than the Common Council—to the Legislature of the State. And I trust it will be found that the petty array of bigotry, which influenced the Common Council, cannot overawe the Legislature. . . . This is the ground on which the question will meet with respect, both from your brethren in faith, and your fellow-citizens at large. This is a question of right; and though a whole Board should be found to bend the knee to the Baal of bigotry, men will be found who can stand unawed in its presence, and do right.²²⁹

Within weeks, Catholic committees collected seven thousand signatures on a draft petition, and Rev. Power enlisted prominent Albany attorney Joseph O'Connor to get the document into the friendly hands of Whig Assemblyman Gulian Verplanck.²³⁰ On March 29, Verplanck submitted the Catholic petition to the Senate, where it

²²⁶ *Id.* at 101.

²²⁷ *Id.* at 119. Seward apparently suffered for his views on Catholic education, and he was reelected only on the coattails of a very strong national ticket ("Tippecanoe and Tyler too!") headed by William Henry Harrison. *Id.*

²²⁸ *Id.* at 125-26.

²²⁹ John Hughes, Address to a Meeting in Washington Hall (Feb. 11, 1841), reprinted in HUGHES WORKS, *supra* note 175, at 242-43.

²³⁰ LANNIE, *supra* note 130, at 126.

was read and immediately referred to the attention of Secretary of State John Spencer, who served as the state's chief educational officer.²³¹ With that, the second act of the school controversy was underway, and prospects for Catholic success seemed brighter. The legislative process that followed occurred in two distinct phases: (1) Secretary Spencer's report to the Senate; and (2) the battle over the proposed Maclay Bill to amend state school laws.

1. John Spencer's "Absolute Non-Intervention"

John Canfield Spencer was an extremely intelligent man and a dedicated public servant. Before becoming New York's Secretary of State he had edited the popular American edition of Alexis de Tocqueville's *Democracy in America*,²³² and, just a few months after his investigation of the New York school question, President John Tyler appointed him as the national Secretary of War.²³³ Following that appointment, Spencer went on to serve two years as Secretary of the Treasury²³⁴ before Tyler nominated him (unsuccessfully) to serve on the United States Supreme Court in 1844.²³⁵ In early 1841, however, Spencer was still William Seward's loyal Secretary of State, and, like the Governor, he took the Catholic school petition very seriously.

Spencer spent nearly a month meeting with the interested parties in the school matter before submitting a detailed report to the Senate on April 26, 1841.²³⁶ After recounting the history of the Public School Society and summarizing the Catholics' objections, Spencer's report quickly made it clear that the Society could no longer count on preferential political treatment:

²³¹ *Id.* at 127-28.

²³² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (John C. Spencer ed., Henry Reeve trans., George Dearborn & Co. 1838).

²³³ BIOGRAPHICAL DICTIONARY OF THE UNITED STATES SECRETARIES OF THE TREASURY 1798-1995 347 (Bernard S. Katz & C. Daniel Vencill eds., 1996).

²³⁴ *Id.*

²³⁵ CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* V. II 384-86 (Little, Brown, and Company 1922).

²³⁶ Spencer Report, *supra* note 96, at 356-73.

The merits of the Public School Society, the devotion and energy of its trustees, and the success of its schools, cannot and ought not to prevent an investigation to ascertain whether it is necessarily limited in its operation; whether it accomplishes the main purposes of its organization; or whether its continuance violates essential and fundamental principles, and thus presents a perpetual source of irritation and complaint. The question to be determined is far more broad and comprehensive than the merits of any particular society. It involves the inquiry whether the intentions of the Legislature have been fulfilled, to furnish the means of education to all those who are destined to exercise the rights of citizenship.²³⁷

The Secretary then cited citywide school attendance statistics to demonstrate that the Society was not, in fact, fulfilling its legislative charge. Of roughly 63,000 school-aged children in the city, less than half (30,758) attended any public school at all.²³⁸ The Society claimed to educate 22,955 of those students, but only 13,189 actually attended school on a regular basis.²³⁹ Thus, the Society reached only about 21% of eligible city students, while the common schools in the rest of the state educated nearly 93% of children between the ages of five and sixteen.²⁴⁰ Given these numbers, Spencer found it easy to conclude that the Society had “not accom-

²³⁷ *Id.* at 360 (internal quotations omitted).

²³⁸ *Id.* at 368. Spencer estimated that 8,000 Catholic children stayed home on religious grounds. *Id.* at 357.

²³⁹ *Id.* at 369.

²⁴⁰ *Id.* Recall that the Secretary of State administered the common schools outside of the city largely on a district basis. See RANDALL, *supra* note 97, at 1-50 (detailing development of common school districts in upstate New York).

plished the principal purpose of its organization . . . for which the public funds have been so freely bestowed upon it.”²⁴¹

Spencer blamed this failure partly on the fact that the Public School Society was a private corporation, which was not directly accountable to any kind of public or parental oversight.²⁴² But, of more interest to Catholics, Spencer also undertook a careful examination of the religious conflicts that seemed certain to frustrate any hope for future success.²⁴³ He conceded that the Society had made an effort to remain nonsectarian, but, like Hughes, he expressed doubt as to whether such a goal was attainable.²⁴⁴ In Spencer’s mind, religion was an inevitable part of *all* schooling—and any form of religious instruction must necessarily be somewhat sectarian in nature.²⁴⁵ Thus, he saw the common schools as caught on the horns of a difficult dilemma: “While some degree of religious instruction is indispensable, and will be had under all circumstances, it cannot be imparted without partaking, to some extent, of a sectarian character, and giving occasion for offence to those whose opinions are impugned.”²⁴⁶ Given this reality, however, Spencer nonetheless believed that he had hit upon a political remedy in the form of an approach he called “absolute non-intervention.”²⁴⁷

According to Spencer, his approach had its roots in the Establishment and Free Exercise Clauses which, to his mind, should prevent government from enacting any legislation that touched upon religion.²⁴⁸ Spencer suggested that to respect this principle in

²⁴¹ Spencer Report, *supra* note 96, at 369.

²⁴² *Id.* at 366, 370.

²⁴³ *Id.* at 362-66.

²⁴⁴ *Id.* at 363. In this sense, Spencer understood Hughes’s complaint against the sectarianism of infidelity: “It is impossible to conceive how even those [basic] principles can be taught, so as to be of any value, without inculcating what is peculiar to some one or more denominations, and denied by others.” *Id.*

²⁴⁵ *Id.* It is the first of Spencer’s premises here (that all education is necessarily religious) that modern secularists reject. Thus, like nineteenth-century nonsectarians, modern secularists cling to a Ptolemaic conception of religious neutrality that seemingly grows more convoluted and untenable every year. *See infra* Part III.B.

²⁴⁶ Spencer Report, *supra* note 96, at 363.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

educational matters, the state must abstain from any religious qualifications or inquiries –including whether a school intended to adopt a sectarian curriculum—when distributing public monies.²⁴⁹ He argued that the Public School Society’s approach to common schooling necessarily violated individual rights of conscience because it attempted to provide a universal, religiously homogeneous education to the whole of the city’s diverse population.²⁵⁰ The solution, then, was to break the city down into smaller parts—on something like a district basis—and in these localized schools leave “the degree and kind [of religious teaching] . . . to the choice of parents in small masses . . . [so that] religious instruction would be imparted to the young, without encountering the feelings, prejudices, or conscientious views of any.”²⁵¹ In this way, Spencer’s approach to ensuring religious freedom was much like the one James Madison suggested in Federalist No. 51.²⁵² Like Madison, Spencer understood that the greatest promise for individual liberty lies in American democracy’s greatest strength: republican diversity.²⁵³ Thus, he proposed a radical realignment of the city’s common schools,

[Absolute non-intervention] can be effected by depriving the present system in New York of its character of universality and exclusiveness, and by opening it to the action of smaller masses, whose interests and opinions may be consulted in their schools, so that every denomination may freely enjoy its religious profession in the education of its youth.²⁵⁴

²⁴⁹ *Id.* at 363-64; see also LANNIE, *supra* note 130.

²⁵⁰ Spencer Report, *supra* note 96, at 364.

²⁵¹ *Id.*

²⁵² THE FEDERALIST NO. 51 (James Madison). (“In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.”)

²⁵³ *Id.*; see also Bartrum, *supra* note 6, at 366-67 (suggesting that localized control over religion in schools might better stabilize and protect religious freedom).

²⁵⁴ Spencer Report, *supra* note 96, at 364.

In Spencer's mind, then, the common schools could only guarantee religious neutrality by *including* all denominations in the distribution of the school funds, not—as the Public School Society hoped—by *excluding* all religion except Protestant nonsectarianism. Thus, Spencer's report presented an alternative to the "sectarianism of infidelity" that seemed better calculated to preserve an authentic republican form of free conscience.

While Bishop Hughes's and the Catholics felt vindicated by Spencer's report,²⁵⁵ the Secretary's recommendations elicited a predictably negative response from the Public School Society.²⁵⁶ Speaking on the Society's behalf, Hiram Ketchum challenged Spencer's use of the school attendance statistics.²⁵⁷ He argued that Spencer had not accounted for the number of students enrolled in the city's various private schools, and further suggested that the discrepancy between the number of students on the Society's register and the number who showed up at school daily was simply a matter of illnesses, weather, and other factors.²⁵⁸ More importantly, however, Ketchum took serious issue with the Secretary's proposed reconfiguration of the city's common schools.²⁵⁹ In essence, Ketchum argued that Spencer's vision of localized schools teaching religious doctrines approved by their small, homogeneous districts was simply not a practical possibility:

²⁵⁵ LANNIE, *supra* note 130, at 140-41. Hughes praised Spencer's report as "a blow . . . from which the Public School Society will never recover." *Id.* at 141 (quoting Letter from John Hughes to McCaffrey (May 6, 1841)).

²⁵⁶ See Letter from Robert Browning Minturn to William Seward (Apr. 26, 1841), *microformed on Seward Papers*, *supra* note 165 ("The Trustees of the Public School Society at a large meeting held last evening resolved unanimously not to approve Mr. Spencer's report, and appointed a committee to proceed to Albany and oppose it before the Legislature.").

²⁵⁷ Hiram Ketchum, Speech to the Senate Committee on Literature (May 8, 1841), *reprinted in* BOURNE, *supra* note 55, at 373, 391 [hereinafter Ketchum Rebuttal]. For further evidence of Ketchum's views—and his displeasure with Spencer—see Letter from Hiram Ketchum to William Seward (Apr. 27, 1841) *microformed on Seward Papers*, *supra* note 165.

²⁵⁸ Ketchum Rebuttal, *supra* note 257, at 391-92.

²⁵⁹ LANNIE, *supra* note 130, at 139.

I deny the Secretary's proposition. I affirm that it is false and erroneous from beginning to end. This school fund can never, under any circumstances, be made use of or employed in teaching the particular doctrines or particular dogmas of any religious denomination. If there were five hundred in one district, and but one man in that district that protested, he would have a clear right to do so. . . . I affirm that the religion taught in the [Society's] schools is precisely that quantity of religion which we have a right to teach. It would be inconsistent with public sentiment to teach less; it would be illegal to teach more.²⁶⁰

Thus, while Ketchum presented a compelling argument about the practical difficulties of public religious education—one that is still heard today—he also pressed on in ironic ignorance of the fact that the Society's schools *already* taught particular religious doctrines; and that the Catholics who protested those doctrines numbered more than one in five hundred.²⁶¹

Interestingly, Ketchum did not present what seems to be the most obvious objection to Spencer's proposal. The Secretary's plan would effectively abandon one of the fundamental principles of common schooling: the effort to educate everyone, including diverse religious ethnicities, in the same schoolhouse.²⁶² By creating small, relatively homogenous district schools, Spencer hoped to

²⁶⁰ Ketchum Rebuttal, *supra* note 257 at 389-90.

²⁶¹ Again, these circumstances are at least roughly analogous to those that exist today. While modern secularists would deny that they intentionally teach any religious doctrine, it is certainly impossible to discuss many scientific issues without taking at least an implicit position on various religious teachings. And, while we may view those who object to the teaching of evolution (for example) as extremists, they, too, number far more than one in five hundred. See, e.g., Laurie Goodstein, *Teaching of Creationism is Endorsed in New Survey*, N.Y. TIMES, Aug. 31, 2005, at A9 (citing a poll that found 64% of Americans endorsed teaching creationism alongside evolution, while 38% favored teaching *only* creationism).

²⁶² SPRING, *supra* note 8, at 63

respect authentic religious freedom in education; but he would do so at the expense of those common spaces for socialization and nationalization that Horace Mann was working so hard to establish.²⁶³ It was here that two competing and important educational values necessarily collided—as individual freedom of conscience ran squarely into the quest for shared values and cultural unity.²⁶⁴ Practically speaking, it seemed that the public schools had no choice but to sacrifice one goal for the sake of preserving the other.

In the next century, it was largely this problem—really a question of social policy—that would doom Spencer’s vision to political failure, but in the short term the Secretary’s report inspired the Senate to take up a bill entitled “An Act to Extend the Benefits of Common School Education in the City of New York.”²⁶⁵ The Public School Society still had enough political muscle to get the bill tabled for the remainder of the 1841 session,²⁶⁶ but in 1842 the Legislature would confront the school issue again; this time in a revised bill named after its new sponsor, Assemblyman William Maclay.²⁶⁷

2. The Maclay Bill

During the postponement of the school bill, a statewide election took place, in which the city’s two Senate and thirteen

²⁶³ For a modern perspective on this issue in the context of school voucher programs, see Denise C. Morgan, *The Devil is in the Details: Or, Why I Haven’t Yet Learned to Stop Worrying and Love Vouchers*, 59 N.Y.U. ANN. SURV. AM. L. 477, 479 (2003).

²⁶⁴ See Bartrum, *supra* note 6, at 311-12, 336-41 (exploring the “paradox of public virtue”); see also RAVITCH, *supra* note 57, at 61-63 (discussing the inherent tension between “common” and “dissident” moral values in education in the context of Spencer’s report).

²⁶⁵ LANNIE, *supra* note 130, at 145.

²⁶⁶ *Id.* at 150-52. Hiram Ketchum, who spearheaded the movement to postpone the bill, suffered personally for his efforts. While Seward had promised Ketchum a vacant judgeship on the state circuit court, he reneged after Ketchum’s display before the Senate. RAVITCH, *supra* note 57, at 66.

²⁶⁷ There were originally two similar versions of the school bill submitted to the Senate: Spencer’s and another version sponsored by John O’Sullivan (later of “Manifest Destiny” fame). LANNIE, *supra* note 130, at 150-54. After the postponement, William Maclay submitted a renewed and revised plan. *Id.* at 212.

Assembly seats were at stake.²⁶⁸ Troubled by the Senate's initial reaction to the proposed legislation, and wary of politician's promises, Bishop Hughes took a forceful, but perhaps ill-advised, step into the political arena.²⁶⁹ After pro-Society Protestants elicited support from all fifteen Whig candidates—and most of the Democratic candidates as well—Hughes decided to try to unify his Catholic flock behind a handpicked slate of delegates.²⁷⁰ At a meeting in Carroll Hall just days before the election, Hughes exhorted a large crowd of Catholics to support his chosen nominees at the polls:

You have often voted for others and they did not vote for you, but now you are determined to uphold with your own votes your own rights. Will you then stand by the rights of your offspring, who have so long suffered under the operation of this injurious system? [Loud cheering] Will you adhere to the nomination made? ["We will! [W]e will!"] Will you be united? [Standing ovation] Will you let all men see that you are worthy sons of the nation to which you belong? ["Never fear—we will!" "We will till death!"] Will you prove yourselves worthy of friends? [Loud cheering] *Will none of you flinch?* [Indescribable excitement].²⁷¹

Although Hughes' ticket—alternatively known as the "Carroll Hall party" or, derisively, the "Church and State party"—did not carry the election intact, the unified Catholics vote did affect the balance

²⁶⁸ *Id.* at 166.

²⁶⁹ Hughes would never quite live down his political maneuverings on this point, and his actions incurred the wrath of both a Protestant mob, which attacked "the political bishop's" home on Election Day, and James Gordon Bennett, editor of the *New York Herald*. See *id.* at 178-183; HASSARD, *supra* note 150, at 250-51.

²⁷⁰ BILLINGTON, *supra* note 137, at 151-52. Many Protestants organized under the banner of the American Protestant Union, with the virulent anti-Catholic Samuel F. B. Morse (of telegraph fame) serving as President. LANNIE, *supra* note 130, at 166.

²⁷¹ HASSARD, *supra* note 150, at 245.

of power.²⁷² Democrats scored a tremendous statewide victory (gaining six seats in the Senate and thirty-three in the Assembly), with the notable exception of three city Assemblymen that Hughes had opposed.²⁷³ While they could not yet elect their own independent candidates,²⁷⁴ the Catholics' demonstration of political will and strength set the tone for a reinvigorated debate of the school issue in the 1842 legislative session.²⁷⁵

When the Legislature resumed, Catholics presented a revised school petition to New York City Democrat William Maclay, whom the Assembly had appointed chair of its Committee on Colleges, Academies, and Common Schools.²⁷⁶ Maclay's committee reported a revised school bill back to the Assembly on February 14, 1842,²⁷⁷ which characterized the issue as a failure of the monopolistic Public School Society.²⁷⁸ The new bill reiterated that the Society was a closed and unaccountable private corporation, and, to make matters worse, Maclay used the newest school attendance numbers to demonstrate that the Society had utterly failed in its educational mission.²⁷⁹ While the Society received roughly three times more money per pupil as the rural district schools, it managed to educate a far lesser percentage of children than did the upstate schools.²⁸⁰ As Spencer recommended, Maclay's bill would extend the school district system to the city on a ward basis, and would place the Public School Society under the jurisdiction of elected ward commissioners.²⁸¹ Each ward would act as

²⁷² LANNIE, *supra* note 130, at 188-90.

²⁷³ *Id.*

²⁷⁴ *See id.* at 189. Professor Lannie calculates that each of Hughes' independent Assembly nominees received over 2,000 votes – which were not nearly enough for election – but which, if cast for Democratic candidates, would have ensured the defeat of the entire Whig Assembly ticket. *Id.*

²⁷⁵ *See* RAVITCH, *supra* note 57, at 70 (“The press looked at the 2,000-odd votes received by the independent Catholics and thought that the election was a decisive rejection of the Catholic position. But Hughes knew otherwise.”).

²⁷⁶ LANNIE, *supra* note 130, at 210; RAVITCH, *supra* note 57, at 71.

²⁷⁷ LANNIE, *supra* note 130, at 212 n.18.

²⁷⁸ RAVITCH, *supra* note 57, at 71.

²⁷⁹ *Id.*

²⁸⁰ LANNIE, *supra* note 130, at 211.

²⁸¹ *Id.* at 212.

its own town for school purposes: electing its own trustees, school inspectors, and commissioners to handle school monies—which would be appropriated on a pro rata basis as in the rest of the state.²⁸² Significantly, the bill made no provision for the appropriate role of religious instruction—sectarian or otherwise—and thus implicitly adopted Spencer’s absolute non-interventionism as official state policy.²⁸³

As Maclay’s bill languished in stalled debates in the Assembly, the Public School Society and its supporters closed ranks in a last ditch effort to defeat the legislation.²⁸⁴ Protestant newspapers initially tried to cast doubt on the authenticity of the signatures appended to the Catholic petition, and when that proved ineffective, they began to mount a signature campaign of their own.²⁸⁵ By mid-March, Society supporters claimed that they had collected 20,000 names in opposition to the bill, and they made widely publicized plans for a massive public demonstration in City Hall Park.²⁸⁶ Unfortunately for the Society, the demonstration was an “unmitigated disaster.”²⁸⁷ The event’s organizers had inadvertently planned the rally on the eve of St. Patrick’s Day, and, of the roughly 5,000 people that showed up, almost 1,000 were Irish Catholic belligerents.²⁸⁸ Despite the speakers’ conciliatory attempts to acknowledge the need for some change, they were rudely catcalled—or perhaps chased—off the stage, and the meeting was quickly adjourned.²⁸⁹ To those Assemblymen who were still ambivalent about Maclay’s bill, the Society’s poor showing at its own rally seemed evidence of its waning popularity in the city.²⁹⁰

²⁸² *Id.*

²⁸³ RAVITCH, *supra* note 57, at 72.

²⁸⁴ LANNIE, *supra* note 130, at 218.

²⁸⁵ *Id.*

²⁸⁶ RAVITCH, *supra* note 57, at 73.

²⁸⁷ *Id.*

²⁸⁸ See LANNIE, *supra* note 130, at 219, 222-23 (estimating a crowd of “perhaps a thousand Democrats ‘of the most noisy and riotous class’”) (quoting N.Y. HERALD, Mar. 17, 1842).

²⁸⁹ *Id.* at 221.

²⁹⁰ RAVITCH, *supra* note 57, at 73.

Just five days later, the Assembly finally took up a real debate of the Maclay bill, despite several last minute motions to postpone.²⁹¹ One of the city's Whig representatives quickly introduced an amendment specifying that "no religious doctrine of sectarian character be in any manner taught or inculcated in . . . the city of New York."²⁹² Maclay argued against the amendment, and it was defeated—again, definitive evidence that the Assembly intended to give absolute non-intervention a try.²⁹³ When it was finally put to a vote, Maclay's bill passed easily, with sixty-five in favor and only sixteen opposed.²⁹⁴ Hughes and the Catholics relished their victory, but even as they celebrated they knew very well that a much more difficult battle lay ahead in the Senate.²⁹⁵

The New York Senate was far more conservative than the Assembly, where the Democrats held a large majority.²⁹⁶ In the Senate, Whigs were a mere two seats in the minority, and it was well known that the two New York City Democrats opposed the school bill.²⁹⁷ Upon receipt, the Senate immediately referred the bill to its Committee on Literature, which returned it in just two weeks with several substantial amendments.²⁹⁸ First, the Committee created a centralized board of education to provide some degree of uniformity throughout the ward schools.²⁹⁹ But, more significantly, the amended bill abandoned Spencer's absolute non-intervention and adopted an explicit ban on sectarian teaching in the city's schools.³⁰⁰ This was a terrible blow to Bishop Hughes' cause, because, even if the bill became law, Catholic children would be subject to Protestant nonsectarianism in the public schools. With this one late amendment, the Committee on Literature seemed to assure that

²⁹¹ LANNIE, *supra* note 130, at 223.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 226.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 227.

²⁹⁹ RAVITCH, *supra* note 57, at 74.

³⁰⁰ *Id.* at 73-75.

neither the Public School Society nor the Catholic Church stood to benefit from the reform of New York City's school system.

Even with the amendments which the Committee had hoped would bolster the bill's chances of success, the Senate still seemed likely to reject the legislation entirely.³⁰¹ Thus, in early April the Catholic hierarchy swung back into political action, although on this occasion Bishop Hughes remained noticeably absent from meetings.³⁰² Catholics again nominated a slate of independent candidates, this time for the upcoming city elections, which included the mayor and all the seats on the Common Council.³⁰³ Faced with the potential loss of these seats, New York City Democrats put heavy pressure on their Senate counterparts to pass the amended Maclay bill before the municipal elections on April 12.³⁰⁴

The Catholic strategy worked, and the Senate took up consideration of the Maclay bill on the afternoon of April 8.³⁰⁵ After a heated debate and several failed motions to adjourn, the Senate agreed to the Committee on Literature's amendments, and the final amended version was read for a third time at around nine-thirty at night.³⁰⁶ At a quarter to eleven, after a series of parliamentary maneuvers and nighttime "retirements" had reduced the Whig majority, the bill was put to a final vote.³⁰⁷ With the numbers counted, the measure had passed by a single vote: 13 to 12.³⁰⁸ The remaining Whigs futilely tried to schedule a reconsideration vote for the next morning, but as the hour neared midnight, they conceded defeat.³⁰⁹

³⁰¹ LANNIE, *supra* note 130, at 229-31.

³⁰² *Id.* at 229.

³⁰³ RAVITCH, *supra* note 57, at 75.

³⁰⁴ *Id.*

³⁰⁵ LANNIE, *supra* note 130, at 228.

³⁰⁶ *Id.* at 231.

³⁰⁷ *Id.* at 232.

³⁰⁸ *Id.* One of the New York City Democrats, a known opponent of the bill, conveniently went to bed before the final vote. He later claimed to have "paired off" with one the bill's supporters so as not to affect the outcome, but his partner had actually already agreed to pair off with another Senator. RAVITCH, *supra* note 57, at 75.

³⁰⁹ LANNIE, *supra* note 130, at 232.

The following day, the Assembly approved the amended bill, and Governor Seward quickly signed it into law.³¹⁰

Bishop Hughes and the Catholics certainly celebrated the destruction of the Public School Society's monopoly over education in New York City, but they recognized that it was a pyrrhic victory. With John Spencer's absolute non-intervention explicitly rejected in the final law, Catholics still faced the prospect of surrendering their children to Protestant nonsectarianism in the public schools; and, eventually, nonsectarianism would give way to secularism.³¹¹ As hard as Bishop Hughes had fought to preserve religious and educational freedom for Catholics, he had become an unwitting ally in the coming movement to "secularize" public education.³¹² This was not the result Hughes had hoped for, and he spent his elder years lamenting the public schools' descent into "godlessness."³¹³ As a result, in the years following the civil war, the American Catholic hierarchy began to make plans for a comprehensive network of independent Catholic schools to combat the growth of secularism, and in 1884, the Third Plenary Council of Baltimore mandated that priests build parochial schools, to which they required the laity to send their children.³¹⁴ Professor Lannie notes the irony of Hughes' central role in bringing about these later developments:

As a result [of the school controversy], many Catholic authors have honored Hughes as the father of Catholic education in America. If this be so, then it is

³¹⁰ RAVITCH, *supra* note 57, at 75.

³¹¹ FELDMAN, *supra* note 3, at 111-13.

³¹² See LANNIE, *supra* note 130, at 254-55. ("If [Horace] Mann's non-sectarian compromise set in motion a process which has resulted in the legal secularization of most modern public school education, then the New York bishop's logic necessarily made him an unwitting ally in this secularization process.") (internal quotations omitted); see also John W. Pratt, *Governor Seward and the New York City School Controversy, 1840-1842: A Milestone in the Advance of Nonsectarian Public Education*, 42 N.Y. HIST. 351, 363 (1961) ("The almost unintended outcome of the New York City school controversy was a victory for the principle of Church-State separation.").

³¹³ LANNIE, *supra* note 130, at 253.

³¹⁴ *Id.* at 257.

paradoxical that the father of American Catholic education should also have acted as a catalyst in the eventual secularization of American public education.³¹⁵

But the preservation of nonsectarianism was a temporary victory for Protestants as well. Though they had succeeded in driving back the perceived dangers of Catholic education, their constitutional arguments would ultimately prove too much. The very logic that initially excluded sectarian practices ultimately ousted the King James Bible and the Book of Common Prayer as well. It is perhaps ironic to realize that those evangelical Protestants who complain most loudly about school secularism today are, historically speaking, hoist on their own petard.

III. SECULARISM AND STATE NEUTRALITY TOWARDS RELIGION

In typical fashion, New York's Episcopalian newspaper, *The Churchman*, saw the long-term implications of the new school law more clearly than the city's other partisan publications.³¹⁶ Commenting on the legislation shortly after its passage, the paper suggested that the statute might better be entitled "An Act for the more effectual exclusion of religion, and for the better establishment and propagation of Atheism."³¹⁷ Over the next half-century, as *The Churchman* predicted, American public schools began to transition from nonsectarianism to secularism, as the latter ideology gained ever-wider acceptance.³¹⁸ In the years following the Civil War, the

³¹⁵ *Id.* at 258.

³¹⁶ See *supra* note 204 and accompanying text.

³¹⁷ *Public Schools*, THE CHURCHMAN, April 9, 1842, at 22, c. 6. The editors succinctly stated the problem in the same terms that Spencer understood it: "To abolish or extirpate religion from the schools is impossible; and therefore one of two alternatives remains, either to define a system of religious education, and give it the sanction and authority of law, or to throw the whole matter open for the various religious denominations . . . The Legislature have done neither." *Id.*

³¹⁸ See HAMBURGER, *supra* note 61, at 288-312 (recounting the rise of liberal secularism and separationism); In the decades following the New York controversy, other state legislatures began to pass similar laws banning appropriations for sectarian schools. See generally SAMUEL WINDSOR BROWN, THE SECULARIZATION OF AMERICAN

Protestant nativist voices that had opposed Hughes in New York joined forces with the emerging liberal secularist movement to promote a constitutional amendment explicitly forbidding state contributions to sectarian schools.³¹⁹ Maine Congressman James Blaine saw the most successful of these proposals through the House of Representatives, though his namesake amendment finally fell four votes short of a supermajority in the Senate.³²⁰ Versions of the Blaine Amendment quickly sprung up in the state legislatures, however, where they became foundation stones in the secularization movement.³²¹ By the early twentieth century, with Darwin's evolution and Nietzsche's Zarathustra leading the way, secularism was well on its way to dominating American culture, and in the middle of the century the Supreme Court began to equate the new ideology with religious neutrality.³²²

Ultimately, what had begun as the religiously partisan defeat of John Spencer's absolute non-intervention grew into a social and educational policy designed to "promot[e] cohesion among a heterogeneous democratic people,"³²³ and, eventually, secular public education took up seemingly permanent residence behind the Establishment Clause's protective shield. The final section of this paper examines just two aspects of this long and complex process: (1) the Blaine Amendment and its legacy in the state legislatures; and (2) the jurisprudence of neutrality as secularism in the Supreme Court.

A. THE BLAINE AMENDMENT AND THE STATE LEGISLATURES

In the decades following the New York school controversy, Catholics resorted occasionally to the state courts in their continued

EDUCATION: AS SHOWN BY STATE LEGISLATION, STATE CONSTITUTIONAL PROVISIONS AND STATE SUPREME COURT DECISIONS 93-98 (1912) (canvassing relevant state laws).

³¹⁹ HAMBURGER, *supra* note 61, at 288-312.

³²⁰ Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 509 (2003).

³²¹ *Id.* at 512-15.

³²² See, e.g., *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225-27 (1963); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948).

³²³ *McCullum*, 333 U.S. at 216 (Frankfurter, J., concurring).

fight against Protestant schooling. In New York City, the Roman Catholic Orphan Asylum sued unsuccessfully for a portion of the common school fund in 1851,³²⁴ and Catholic parents tried, and failed, to stop Protestant religious practices in Maine and Massachusetts schools over the next eight years.³²⁵ After the Civil War, Catholics in Cincinnati finally met with some success when the Ohio Supreme Court upheld the city school board's power to remove the King James Bible from the public schools.³²⁶ Evangelical groups nationwide condemned the Ohio decision,³²⁷ but the secularist tide was rising in the North. The Chicago and New York City school boards soon suspended religious readings and exercises, and Buffalo and Rochester eventually followed suit.³²⁸

In the mid-1870s, however, evangelical Protestants found an unexpected friend in the White House. Second-term President Ulysses Grant was floundering politically, as his administration suffered through the Whisky Ring scandal—among others³²⁹—and

³²⁴ Roman Catholic Orphan Asylum Soc'y v. Bd. of Educ., 13 Barb. 400 (N.Y. Gen. Term 1851).

³²⁵ See *Donahoe v. Richards*, 38 Me. 376 (1854) (upholding expulsion of Catholic girl for refusing to read from the King James Bible); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Mass. Pol. Ct. 1859) (upholding compulsory reading of King James Bible and Protestant Decalogue against Catholic challenge).

³²⁶ *Bd. of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211 (1872). Justice Welch's opinion nicely summarized the emerging secular position on religion and education:

To teach the doctrines of infidelity, and thereby teach that Christianity is false, is one thing; and to give *no instructions* on the subject is quite another thing. The only fair and impartial method, where serious objection is made, is to let each sect give its own instructions, elsewhere than in the state schools, where of necessity all are to meet; and to put disputed doctrines of religion among other subjects of instruction, for there are many others, which can more conveniently, satisfactorily, and safely be taught elsewhere.

Id. at 253 (emphasis added).

³²⁷ Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 46 (1992).

³²⁸ *Id.* at 47.

³²⁹ GEORGE B. TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 825-27 (W.W. Norton & Co. 5th ed., 1999).

his Republican Party lost control of the House of Representatives in 1874.³³⁰ Grant was searching for a cause around which to rally Republican support, and the Protestant outcry over perceived Catholic efforts to drive the Bible out of schools seemed a perfect fit.³³¹ In September of 1875, at a speech before the Society of the Army of the Tennessee in Des Moines, Iowa, Grant took an official stand on the school question, simultaneously managing to align his party with both the Protestant nativists and the emerging liberal secularist movement:³³²

Let us, then, begin by guarding against every enemy threatening the prosperity of free republican institutions. . . . Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford to every child growing up in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school supported entirely by private contributions. Keep the church and state forever separate.³³³

³³⁰ Green, *supra* note 326, at 49.

³³¹ *Id.* at 48-49. It is, of course, ironic that Protestants continued the push to drive sectarianism (Catholicism) out of the schools in an attempt to preserve the Bible as a core text.

³³² For a detailed discussion of the liberal secularists—under the leadership of men such as Francis Ellingwood Abbot—and their relationship to the proposed constitutional amendments see HAMBURGER, *supra* note 61, at 292-328. This was also, of course, just after the height of anti-Catholicism in American politics, as evidenced in the power and popularity of the “Know-Nothing Party.” See TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW-NOTHINGS AND THE POLITICS OF THE 1850S* 246-79 (1992).

³³³ President Ulysses S. Grant, Address to the Society of the Army of the Tennessee (Sept. 30, 1875), *reprinted in Domestic Intelligence*, HARPER’S WKLY., Oct. 16, 1875, at 835.

The speech, which was among the longest Grant had given as President, had an immediate and widespread effect, and in one blow Grant seemed to have reinvented the Republican Party as the home of school reform.³³⁴

The recently dispossessed Republican Speaker of the House, James Gillespie Blaine of Maine, took careful notice of Grant's success and began to make political plans of his own.³³⁵ Blaine hoped to make a run at the Republican Presidential nomination, and he decided to take full advantage of the mounting national school controversy.³³⁶ He arranged to publish a private letter revealing his thoughts on the issue in the *New York Times*, in which he explained, "It seems to me that this question ought to be settled in some definite and comprehensive way; and the only settlement that can be final is the complete victory for the non-sectarian schools."³³⁷ Blaine was no doubt aware of the recent failure of two proposed constitutional amendments intended to forbid state aid to sectarian schools,³³⁸ but he believed that, with Grant's newfound support, a third proposal might succeed. Thus, his letter suggested the following addition to the Constitution:

³³⁴ *Army of the Tennessee*, CHI. TRIB. Sept. 30, 1875, at 2. Grant was a notoriously succinct speaker, and this speech of "unpresidential length" took up only about eight column inches of newsprint. *Id.* For a description of the speech's national impact, see Green, *supra* note 326, at 49. It is worth noting that even some secularist commentators reacted unfavorably to Grant's speech as furthering anti-Catholic motivations. See Francis E. Abbot, *An Open Letter to His Excellency Ulysses S. Grant*, THE INDEX, Nov. 4, 1875, at 522, c.2.

³³⁵ Green, *supra* note 326, at 49.

³³⁶ *Id.*

³³⁷ James G. Blaine, Letter to the Editor, *Non-Sectarian Schools*, N.Y. TIMES, Nov. 29, 1875, at 2, c. 3.

³³⁸ In early 1871, Senator Willard Warner of Alabama proposed an amendment prohibiting appropriations to any religious sect, which never made it out of committee. Several months later, Nevada Senator William Stewart proposed a more specific amendment banning aid to sectarian schools, which also received a negative committee report and died. Green, *supra* note 326, at 43-44.

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of the public schools, or derived from any public fund therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations.³³⁹

Following on the heels of Grant's speech, Blaine's letter aroused a tremendous surge of public reaction.³⁴⁰ Already enraged by Catholic efforts to oust the Bible from the common classrooms, evangelical Protestants generally rose up in favor of the proposed ban on funding for sectarian (Catholic) schools.³⁴¹ Commenting on a large rally in New York, the secularist journal *The Index* suggested that "the bitterness of some of the speakers showed how dangerous already is the excitement of Protestant fanaticism,"³⁴² but, in truth, the secularists' only objection to the proposed amendment was that it did not go far enough.³⁴³ In the midst of this growing controversy, President Grant delivered his annual message to Congress, and he took the opportunity to reinforce the position he had laid out at Des Moines:

I suggest for your earnest consideration, and most earnestly recommend it, that a constitutional amendment be submitted to the legislatures of the several States for ratification . . . forbidding the

³³⁹ Blaine, *supra* note 336, at 2, c. 3. It bears note that many Blaine Amendment scholars focus on the first two clauses as evidence that the 14th Amendment had not "incorporated" the First Amendment's religion clauses against the states. See e.g., Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

³⁴⁰ Green, *supra* note 326, at 51.

³⁴¹ *Id.*

³⁴² *Glimpses*, 5 THE INDEX, Nov. 4, 1875, at 517.

³⁴³ See HAMBURGER, *supra* note 61, at 321-28 (describing liberal secularist efforts to expand the focus of the amendment beyond anti-Catholicism to separate Christianity generally from state affairs).

teaching in [the common] schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination.³⁴⁴

Again, Grant's message met with broad approval in the Protestant press, and Congressman Blaine wasted no time in submitting his proposed amendment to the House.³⁴⁵

Unfortunately for Blaine, who had no real interest in the school question aside from its political value,³⁴⁶ his proposal did not earn him the Republican Presidential nomination, which went instead to Ohio Governor Rutherford B. Hayes.³⁴⁷ But the amendment lived on in the Republican Party platform, and, after the party conventions, the House Judiciary Committee took up the issue in earnest.³⁴⁸ This put the Democratic majority on the Judiciary Committee in a delicate spot, as they tried to appease their traditional Catholic constituency and still acknowledge public support for Blaine's proposal.³⁴⁹ Thus, the committee reported a substantially compromised version of the amendment back to the full house; effectively neutering the proposal by adding a final limiting clause: "This article shall not vest, enlarge, or diminish legislative power in

³⁴⁴ Ulysses S. Grant, Seventh Annual Message to the Senate and House of Representatives (Dec. 7, 1875), reprinted in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 334 (James D. Richardson ed., 1898).

³⁴⁵ Blaine submitted his amendment on December 14, just a week after Grant's annual message. Green, *supra* note 326, at 53.

³⁴⁶ *Id.* at 53-54. Once he lost the Republican nomination, Blaine took no further part in the Congressional debates, and he did not even show up for the final vote on his proposal. Duncan, *supra* note 321, at 509.

³⁴⁷ Green, *supra* note 326, at 56. Blaine entered the convention with a plurality of delegates, but could not manage the supermajority needed to win the nomination from New York Senator Roscoe Conkling. With the convention thus deadlocked, the party compromised on Hayes. *Id.*

³⁴⁸ *Id.* at 57-58.

³⁴⁹ *Id.* at 57.

the Congress.”³⁵⁰ During the House debates, Democrats explained that the amendment was simply intended as a declaration of principles, and contended that Blaine (who was notably absent from the floor) never meant to enlarge or diminish congressional authority on the issue.³⁵¹ The weakened amendment offered a political compromise that both parties could accept, and the proposal breezed through the House with a final vote of 180-7.³⁵²

The sailing was not so smooth in the Senate, however, where the Republican majority acted quickly to put teeth back in the amendment. The Senate Judiciary Committee reported a considerably more specific and potent version back to the full Senate:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall be required as a qualification to any office or public trust under any State. No public property and no public revenue, nor any loan of credit by or under the authority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creeds or tenets shall be taught. And no such particular creeds or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or

³⁵⁰ 4 Cong. Rec. 5189 (Aug. 4, 1876).

³⁵¹ See Comments of Congressman Scott Lord, 4 Cong. Rec. 5191 (Aug. 4, 1876) (“It is simply declaratory; more than this, if the Congress had any power over the question before, it is thoroughly and absolutely reserved.”).

³⁵² 4 Cong. Rec. 5191.

denomination or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution, and it shall not have the effect to impair the rights of property already vested.³⁵³

This uncompromising language left Senate Democrats little choice but to protect their Catholic constituency by voting the measure down—though they largely characterized their objections as concerns over state educational sovereignty.³⁵⁴ The final vote thus came down along straight party lines: 28 in favor and 16 opposed (with 27 absent); four votes short of the necessary two-thirds majority.³⁵⁵

Supporters of the Blaine Amendment—both nativists and secularists—would not go away, however, and after their failure in Congress, they turned their attention to the state legislatures. In the 1870s alone, at least eleven states adopted some version of the Blaine Amendment, prohibiting the diversion of school funding for sectarian institutions.³⁵⁶ The Republican Party adopted the amendments as a central party plank, and the push for separationism grew so strong that Congress began to require new states to include Blaine language in their constitutions as a condition of admittance to the Union.³⁵⁷

³⁵³ 4 Cong. Rec. 5453 (Aug. 11, 1876).

³⁵⁴ See 4 Cong. Rec. 5560-90 (Aug. 14, 1876). Interestingly, at least one Senator pointed out the obvious contradiction between the prohibition of religious reading and the protection of the Bible: “Is this not a flat contradiction, or is the Bible not a religious book?” Comments of Senator Theodore Randolph, 4 Cong. Rec. 5454-56 (Aug. 11, 1876). For an interesting discussion of the state sovereignty argument see HAMBURGER, *supra* note 61, at 323-24.

³⁵⁵ Green, *supra* note 326, at 67.

³⁵⁶ The number of state Blaine Amendments passed in the 1870s is a matter of some dispute. See Duncan, *supra* note 321, at 513 n.91. Some accounts have the number as low as eight or nine, and while Professor Duncan puts the number at twelve, I would not include Texas, whose anti-sectarian language was not included until 1891. My count, based on BROWN, *supra* note 317, at 104-19, includes Alabama (1876), California (1879), Colorado (1876), Georgia (1877), Illinois (1870), Louisiana (1879), Minnesota (1877), Missouri (1875), Nebraska (1875), New Hampshire (1877), and Pennsylvania (1874).

³⁵⁷ The 1889 legislation that brought the Dakotas, Montana, and Washington into the Union required the new states to enact constitutional provisions for “the establish-

Thus, by 1890, twenty-nine states had adopted constitutional language in keeping with the spirit of Blaine's Amendment.³⁵⁸ The trend continued well into the twentieth century, as Alaska and Hawaii incorporated similar language into their state charters as late as the 1950s.³⁵⁹ All told, thirty-seven states include some Blaine provision in their constitutions at this writing.³⁶⁰

Not all Blaine Amendments are the same, however, as the state constitutions vary in the scope and degree of separation required. Professor Mark DeForrest has divided the various provisions into three rough-but-useful categories.³⁶¹ The first category of "less restrictive" states seek to ensure that public primary and secondary schools offer no sectarian instruction, and to prohibit direct public contributions to parochial schools; but these states generally allow for various types of indirect contribution to religious institutions.³⁶² DeForrest's second category of "moderate" provisions at least leave the question of indirect funding (such as voucher programs) open to judicial interpretation, while, in general, the "most restrictive" states explicitly forbid any type of indirect state aid.³⁶³ The practical application of these constitutional provisions varies widely from state to state: for example, the Massachusetts Constitution (less restrictive) explicitly allows parents to use state scholarship money at religious universities,³⁶⁴ while the Washington Constitution (most restrictive) prevents the use of state vocational

ment and maintenance of systems of public schools which shall be open to all the children of said States, and free from sectarian control." 25 Stat. 676 (1889). Similar language appeared in the acts that brought in Utah, Oklahoma, New Mexico, and Arizona. 28 Stat. 107 (1894) (Utah); 34 Stat. 267 (1906) (Oklahoma); 36 Stat. 557 (1910) (New Mexico & Arizona).

³⁵⁸ Duncan, *supra* note 321, at 514.

³⁵⁹ Mark E. DeForrest, *An Overview of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, HARV. J.L. & PUB. POL'Y 551, 573 (2003).

³⁶⁰ Duncan, *supra* note 321, at 493.

³⁶¹ DeForrest, *supra* note 358, at 576-88. For another perspective on the variety of state provisions see Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1 (1997).

³⁶² DeForrest, *supra* note 358, at 577.

³⁶³ *Id.* at 578, 587.

³⁶⁴ MASS. CONST. amend. CIII (amending MASS. CONST. art. XLVI, § 2).

funds for sectarian schooling—even when the Federal Constitution would permit it.³⁶⁵

Taken as a whole, however, the state Blaine Amendments were a nineteenth-century national referendum on the place of religion, particularly Catholicism, in the public schools. As evidence of the evolving national culture at that time, the amendments demonstrate a clear rejection of John Spencer's absolute non-interventionism—albeit a rejection based more often on passion and bigotry than on principle—and the perhaps unwitting acceptance of an emerging national ideology: secularism. As such, the state Blaine Amendments would provide an important political foundation for the mid-twentieth century judicial movement to establish secularism in the public schools.

B. SECULARISM AS NEUTRALITY: THE SUPREME COURT AND COMMON EDUCATION

Although the Supreme Court incorporated the Free Exercise Clause in 1940,³⁶⁶ the Court did not officially recognize the Establishment Clause until 1947.³⁶⁷ It is hardly surprising that the recognition finally came in the context of a school decision. In *Everson v. Board of Education*, the Court confronted a New Jersey statute that authorized public school districts to reimburse parents for their children's bus fare to and from both public and parochial schools.³⁶⁸ In a five-four decision, the Court upheld the statutory scheme as merely a general aid program, but, more significantly, all nine justices agreed on the applicable principles of Establishment Clause

³⁶⁵ *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989); accord *Duncan*, *supra* note 319, at 493-94.

³⁶⁶ The Court incorporated the Free Exercise Clause in 1940, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), but did not explicitly address the Establishment Clause until 1947.

³⁶⁷ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). In the years between 1947 and 1996 the Court decided fifty-two Establishment cases; more than half involved the school question. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 287 (2001).

³⁶⁸ *Everson*, 330 U.S. at 3.

jurisprudence.³⁶⁹ Both the majority and dissent concluded that the clause required the states to navigate a “neutral” course on religious matters, which, in practice, meant that the government could neither support one religion, *nor all religions equally*, with public funds.³⁷⁰ In reaching this conclusion, the Court ignored the long history of religion and education described above—including the entire New York controversy—and instead relied almost exclusively on Thomas Jefferson’s *Virginia Statute of Religious Freedom* and James Madison’s *Memorial and Remonstrance Against Religious Assessments*, both of which address the law of colonial Virginia.³⁷¹ Thus, without so much as a comment, the Court definitively rejected John Spencer’s policy of absolute non-intervention as a matter of constitutional law and adopted the doctrinal position that state neutrality requires the *exclusion*, rather than the *inclusion*, of all religious viewpoints in the public schools.

There are several important problems with the Court’s history on this point, which attempts to justify the idea of religious neutrality by exclusion as an originalist position. The first is that common schooling, much less public schooling in anything like its modern form, simply did not exist at the constitutional founding. Thus, Jefferson and Madison cannot have had anything very meaningful to say about the freedom of religion in this particular context.

³⁶⁹ *Id.* at 15; *Id.* at 21-22 (Jackson, J., dissenting).

³⁷⁰ *Id.* at 18 (majority opinion).

³⁷¹ See generally THOMAS JEFFERSON, *THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM (1786)*, reprinted in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM xvii-xviii* (Merrill D. Peterson & Robert C. Vaughan eds., 1988); JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS*, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 6-7* (Marvin Meyer ed., 1981) (1785); accord Jeffries & Ryan, *supra* note 366, at 285-86 (“The *Everson* Court not only ascribed to the Establishment Clause separationist content; it imagined a past to confirm that interpretation.”) (citation omitted). The Court’s conclusion here received immediate scholarly challenge. Two books, J.M. O’Neill’s, *Religion and Education Under the Constitution* and Wilfrid Parsons’ *The First Freedom*, quickly disputed the idea that the Constitution required the exclusion of all religion—arguing instead against sectarian preferences, and thus in favor of Spencer’s idea. See Samuel A. Alito, Jr., Note, *The “Released Time” Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 *YALE L.J.* 1202, 1209 (1974).

A second, and equally significant, problem is that in 1790 the Establishment Clause simply did not apply against the states, which were certainly responsible for any schooling that did take place. But, perhaps more importantly, even what Jefferson and Madison did say does not adequately justify the Court's conclusions. We have already seen Jefferson's educational proposals, and while it is true that he would have excluded the Bible from the classroom, his ideas were so unpopular that they never gained much support.³⁷² And the *Virginia Statute of Religious Freedom*, which did gain support, might just as easily be read to support an inclusive state neutrality as an exclusive one.³⁷³ By the same token, Madison's *Memorial and Remonstrance*, which objected to a tax in support of Anglican teachers, spoke directly to the issue of state funding for a *particular* religious school, but little in the document suggests that he would have objected to equal funding for all religious sects.³⁷⁴ Moreover, both the *Virginia Statute* and the *Memorial and Remonstrance* specifically address Virginia law, and, while Madison was later instrumental in the development of the federal religion clauses, neither of these documents coincide with the national founding.

Finally, Jefferson and Madison, while prominent, were the only ones who got a vote in ratifying the Bill of Rights. There is very plausible evidence—which Justices Stewart and Thomas have drawn on—to suggest that the Establishment Clause was originally a federalism provision, meant to prevent federal interference with

³⁷² See *supra* Part I.A.

³⁷³ While the statute's preamble does proclaim "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," Jefferson also went on to declare that "to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty." Jefferson, *supra* note 370, at xvii-xviii. Further, the statute itself guarantees that "all men shall be free to profess, and by argument to maintain, their opinion in matters of religion." *Id.* at xviii. These latter sentiments could certainly be read in support of equal treatment for all religious beliefs in public schools.

³⁷⁴ See MADISON, *supra* note 370, at 6-8. Indeed, Madison's language suggests he might even have endorsed such a measure: "As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions." *Id.* at 9.

state establishments.³⁷⁵ Given these problems, the Court's historical treatment has inspired withering academic criticism³⁷⁶ and a growing political backlash,³⁷⁷ and has largely deflected jurisprudential debate away from the difficult policy choices the Court confronted. Nonetheless, with *Everson*, the Court adopted secular neutrality as an originalist disestablishment doctrine, and only in the cases that followed did the justices slowly reveal the social policy concerns that actually underlay their decision.

Many commentators divide the Court's treatment of the school question since *Everson* into two categories: (1) decisions preventing state aid to religious schools; and (2) decisions aimed at enforcing secular neutrality in the public schools.³⁷⁸ Indeed, the Court itself seems to treat these as truly distinct constitutional issues, and, while it has shown no sign of relaxing the limitations on public schools,³⁷⁹ the modern Court has begun to ease restrictions on state funding to parochial schools.³⁸⁰ This is in many ways a false distinction, however, which only identifies two sides of the same doctrinal coin: no schools that teach religion can receive public funds, and no publicly funded schools can teach religion. Thus, while some scholars see the history of the New York controversy as relevant only to the first issue—state aid to parochial schools—this

³⁷⁵ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998).

³⁷⁶ See, e.g., J.M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 189 (1949) ("It would be difficult to find another set of arguments . . . from any responsible source containing so many instances of ignoring and misinterpreting relevant facts of history . . .").

³⁷⁷ See, e.g., FELDMAN, *supra* note 3.

³⁷⁸ See, e.g., Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 788-815 (2001) (contrasting the evolution of "money" and "message" cases); Jeffries & Ryan, *supra* note 366, at 288-90 (outlining distinct lines of school cases).

³⁷⁹ See, e.g., *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 316-317 (2000) (invalidating student-led prayer before high school football games).

³⁸⁰ See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) ("[R]equir[ing] the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . [is] born of bigotry [and] should be buried now."); accord Jeffries & Ryan, *supra* note 366, at 290-91.

paper contends that it is equally informative to the second.³⁸¹ If, for example, New York and other states had adopted John Spencer's absolute non-intervention in the nineteenth century, there would be no distinction to draw: all public schools could freely engage in religious speech, and private schools could receive state aid whatever their religious affiliation. It is only because the Court has chosen to enforce religious neutrality by exclusion that the doctrinal division even arises. With that said, the remainder of this paper focuses primarily on those cases that established neutrality – as secularism – in the public schools, and only touches upon the most recent state aid decisions in order to demonstrate the current Court's potential return to both Hughes' and Spencer's ideas.

The Court decided its first public school case just a year after *Everson*, and while most modern commentators devote relatively little attention to *McCullum v. Board of Education*,³⁸² Justice Felix Frankfurter's concurring opinion nicely captures the social policy concerns that would shape the Court's establishment jurisprudence over the next several decades.³⁸³ *McCullum* involved an Illinois program that permitted privately employed teachers to conduct religious classes in the public schools on a weekly basis.³⁸⁴ These classes took place during regular school hours, and students who did not wish to participate had to leave their classrooms to pursue secular studies elsewhere in the building.³⁸⁵ Applying the principles

³⁸¹ Indeed, that history partly reveals why the distinction even exists: the Protestant majority found it easy to argue against aid to Catholic schools, but that same majority always found it difficult to give up their own version of nonsectarian Christian education. See Jeffries & Ryan, *supra* note 366, at 318 (“The Supreme Court’s campaign to oust religion from the public schools was never as popular as its ban against aid to religious schools.”).

³⁸² *McCullum v. Board of Education*, 333 U.S. 203 (1948). *McCullum* is often minimized in modern scholarship because the Court revisited a similar issue just four years later, and reached a contrary result in *Zorach v. Clauson*, 343 U.S. 306 (1952).

³⁸³ *McCullum*, 333 U.S. at 216 (Frankfurter, J., concurring).

³⁸⁴ *Id.* at 205 (majority opinion). There were three separate classes taught by a Protestant minister, a Catholic priest, and a Jewish rabbi. *Id.* at 208-09.

³⁸⁵ *Id.* at 209.

announced in *Everson*, the Court had little difficulty striking the Illinois program down as a violation of the Establishment Clause.³⁸⁶

Justice Frankfurter wrote a concurring opinion, however, primarily to reinforce the strict-separationist *Everson* dissenters' continuing objection to that holding,³⁸⁷ and the arguments he marshaled against the Illinois scheme reveal the policy judgments that seem to be at the true center of the Court's continuing effort to banish all religion from the public schools. Frankfurter recounted some of the history of Horace Mann's common schools in support of the Court's holding, and explicitly raised the objection to Spencer's absolute non-intervention that Hiram Ketchum had passed over in 1841:³⁸⁸

Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.³⁸⁹

Thus, in at least four justices' minds, community cohesion and the prevention of divisive conflict were among the most important reasons to enforce educational secularism.³⁹⁰ While these are certainly laudable policy goals, their constitutional pedigree is ambiguous

³⁸⁶ *Id.* at 211-12.

³⁸⁷ Alito, *supra* note 371, at 1210-22.

³⁸⁸ See *supra* notes 261-62 and accompanying discussion.

³⁸⁹ *McCullum*, 333 U.S. at 216-17 (Frankfurter, J., concurring).

³⁹⁰ Recall that Spencer's solution would have seen the public schools divided upon religious lines, without the "common" classroom to promote the cohesion Frankfurter describes. See *supra* notes 262-263 and accompanying discussion.

even in James Madison's writing – upon which the Court selectively relied.³⁹¹ Nonetheless, Frankfurter felt safe suggesting that the founding fathers enshrined in the Constitution a “complete hands-off”³⁹² policy towards religion because “secular education in this country is the inevitable product of the utter impossibility of harmonizing multiform creeds.”³⁹³ In his closing lines, Frankfurter went so far as to write, “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.”³⁹⁴

The public reaction to *McCullum* was overwhelmingly negative, as both Catholics and evangelical Protestants sharply protested the seemingly dramatic move toward educational secularism.³⁹⁵ Perhaps the outcry reached the Court's ears, because just four years later – in *Zorach v. Clauson* – the justices agreed to consider a similar program in the New York public schools.³⁹⁶ There, however, the religious classes were not held in public school buildings, and thus the Court distinguished *McCullum* and upheld the program.³⁹⁷ Whether the Court really saw a principled difference between the Illinois and New York schemes, or if it in fact chose to “beat a retreat”³⁹⁸ from *McCullum*, is hard to know; but the justices did duck the public school question for another full decade.³⁹⁹ When the Court

³⁹¹ Compare MADISON, *supra* note 370 (objecting to state pay for religious teachers), with James Madison, *The Federalist No. 51*, Independent Journal (1788) (“In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects.”); See also Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1682-84 (2006) (tracing the origins of the unity/divisiveness approach to disestablishment).

³⁹² It is ironic that a true “hands-off” policy would look something like Spencer's absolute non-intervention, which Frankfurter soundly rejected.

³⁹³ *McCullum*, 333 U.S. at 216, n.4 (internal quotations omitted).

³⁹⁴ *Id.* at 231.

³⁹⁵ DAVID FELLMAN, RELIGION IN AMERICAN PUBLIC LAW 89 (1965).

³⁹⁶ *Zorach v. Clauson*, 334 U.S. 306 (1952).

³⁹⁷ *Id.* at 315.

³⁹⁸ Alito, *supra* note 371, at 1203 (internal quotations omitted).

³⁹⁹ Jeffries & Ryan, *supra* note 366, at 319.

finally considered the question again, it chose to take on the most controversial aspects of the issue: the still common practice of Bible reading and nonsectarian religious exercises in the public classroom.⁴⁰⁰

Engel v. Vitale and *Abington School District v. Schempp*, decided just a year apart (1962 and 1963 respectively), saw the Court jump into the school question with both feet, and the Court's opinions in those cases stake out fundamental disestablishment positions that reach back to the New York controversy and forward to today. In *Engel*, the Court struck down a New York public school policy that asked students to voluntarily recite a nonsectarian prayer before classes each day.⁴⁰¹ *Schempp* invalidated similar programs in Pennsylvania and Maryland that authorized Bible readings and recitation of the Lord's Prayer.⁴⁰² Together, the cases clearly signaled the demise of Protestant nonsectarianism in the public schools, and ushered in the ideology of legal secularism to take its place.⁴⁰³ Both Bishop Hughes' "sectarianism of infidelity" and John Spencer's absolute non-intervention echoed through the various opinions; but both were ultimately rejected to preserve the common classroom as a place for cultural integration.

Justice Hugo Black, author of the majority opinions in both *Everson* and *McCullum*, again took the lead in *Engel*. And, again, Black carefully avoided any discussion of the actual history of public schools and religion in the United States, and focused instead on the history of establishment in England and colonial Virginia.⁴⁰⁴ But before striking down the New York policy, Black implicitly addressed both Hughes' and Spencer's ideas, though neither objection appeared in the dissent.⁴⁰⁵ Recalling Hughes' sectarianism of infidelity, Black acknowledged that, "It has been argued that . . . [our

⁴⁰⁰ *Engel v. Vitale*, 370 U.S. 421, 422-24 (1962); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963).

⁴⁰¹ *Engel*, 370 U.S. at 422-24. The prayer at issue was, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

⁴⁰² *Schempp*, 374 U.S. at 223.

⁴⁰³ Bartrum, *supra* note 9, at 360.

⁴⁰⁴ *Engel*, 370 U.S. at 425-30.

holding] indicate[s] a hostility toward religion or toward prayer," but he went on to conclude that "[i]t is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."⁴⁰⁶ Further, Black conceded that the short, nonsectarian prayer at issue did "not amount to a total establishment of one particular religious sect to the exclusion of all others,"⁴⁰⁷ which would have made the practice constitutionally sound in Spencer's mind. But, without further explanation, Black simply reached back again to Madison's *Memorial*: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"⁴⁰⁸ Having dismissed these two formidable objections with a bit of rhetorical sleight of hand, Black forwarded the policy of social cohesion announced in the *McCullum* concurrence by declaring the program unconstitutional.⁴⁰⁹

Justice Potter Stewart's dissent got right to the point: "With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."⁴¹⁰ Like many scholars, Stewart was unimpressed with the majority's historicizing—"What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our

⁴⁰⁵ *Id.* at 433-36.

⁴⁰⁶ *Id.* at 435. This conclusion, while nice rhetorically, does nothing to answer Hughes' (or, later, Stewart's) complaint that official *exclusion* of prayer works to establish an infidel (or secular) viewpoint.

⁴⁰⁷ *Id.* at 436.

⁴⁰⁸ *Id.* (quoting MADISON, *supra* note 370, at 7).

⁴⁰⁹ *Id.* at 436. Justice Douglas again mentioned the "divisiveness" issue in his concurrence. *Id.* at 443.

⁴¹⁰ *Id.* at 445 (Stewart, J., dissenting).

government”⁴¹¹—and he chose instead to focus on the numerous official traditions, rituals, and mottos in which religious references appear.⁴¹² Notably, Stewart objected neither to the apparent establishment of secularism, nor to the majority’s *ipse dixit* dismissing preferential sectarianism as an establishment touchstone. His dissent suffered for these omissions, but Stewart would get another chance just a year later, and his opinion in *Schempp* would hit much closer to the mark.

Stewart’s dissent in *Schempp* centered on two points: First, he argued that part of the Establishment Clause’s original purpose was to prevent Congress from interfering with those states that already had an established church at the constitutional founding; and, second, that the Court should properly decide *Schempp* under the Free Exercise clause, not the Establishment Clause.⁴¹³ While there is perhaps some merit to Stewart’s first contention, this understanding and purpose largely perished in Reconstruction, and, in any case, that history is not this paper’s focus.⁴¹⁴ Stewart used his second contention, however, to ably attack the majority’s attempt to equate state neutrality with secularism.

[A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the

⁴¹¹ *Id.* at 445-46.

⁴¹² *Id.* at 446, n.3.

⁴¹³ *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 309-13 (Stewart, J., dissenting).

⁴¹⁴ Justice Clarence Thomas has, however, revived this argument in recent years. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.”). For a more complete description of the divergent Founding and Reconstruction understandings of the Establishment Clause, see AMAR, *supra* note 375, at 32-45.

matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.⁴¹⁵

Stewart was not prepared to limit public school students' right to exercise their religion freely in the classroom, and, in closing, he hinted that something like Spencer's absolute non-intervention might offer the best protection for individual religious freedom:

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate. But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.⁴¹⁶

In his second chance at dissent, then, Stewart recalled the fundamental religious conflicts that complicated the New York school controversy in the 1840s; he threw down the same theoretical gauntlet as Hughes' in his protest against the "sectarianism of infidelity"; and he

⁴¹⁵ *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting).

⁴¹⁶ *Id.* at 319-20.

presented an elemental—and largely unanswerable—objection to the claim that secularism represents a neutral religious viewpoint.

Justice Thomas Clark's majority opinion attempted to answer Stewart's dissent by giving a slightly fuller description of the nature of state neutrality, and by outlining the operative doctrinal distinction between Free Exercise cases and Establishment Clause cases.⁴¹⁷ Clark opined that the former clause is implicated only when the government acts to coerce religious behavior, which, he concluded, was not the case in *Schempp*.⁴¹⁸ He also offered a brief, obligatory dismissal of absolute non-interventionism: "[T]his Court has rejected unequivocally the contention that the *Establishment Clause* forbids only governmental preference of one religion over another."⁴¹⁹ On the whole, though, Clark's majority opinion is a fairly unexciting recitation of the principles established in *Everson* and *Engel*.⁴²⁰

Of more interest is Justice William Brennan's lengthy concurrence, which presented the most comprehensive consideration yet of the establishment questions raised by public school prayer.⁴²¹ Brennan provided a detailed examination of the Court's neutrality cases, the permissibility of various other types of government interaction with religion, the propriety of fourteenth amendment incorporation, and much of the history recounted in this paper.⁴²² But the heart of Brennan's opinion lies in its first section, in which he outlined four reasons why an originalist history of the Establishment Clause is not particularly useful.⁴²³ First, he noted that the record of the framers' views on disestablishment is "at best ambiguous, and statements can readily be found to support either side of the proposition."⁴²⁴ Second, he acknowledged, as this paper has demonstrated, that there was no

⁴¹⁷ *Id.* at 222-23.

⁴¹⁸ *Id.* at 223.

⁴¹⁹ *Id.* at 216 (emphasis in original).

⁴²⁰ *Id.* at 221-22.

⁴²¹ *Id.* at 230-305 (Brennan, J., concurring).

⁴²² *Id.*

⁴²³ *Id.* at 237.

⁴²⁴ *Id.*

system of state-funded public education at the founding, making useful comparisons to the founders' views difficult.⁴²⁵ Third, he explained that the explosion of religious diversity the country has experienced since 1787 has completely changed the context in which establishment decisions must take place.⁴²⁶

It is, however, to his fourth reason that Brennan devoted the most space, and it is the policy concern expressed therein that truly lies at the core of the Court's decision to reject Spencer's pluralistic absolute non-interventionism in favor of the secular neutrality to which Stewart objected. In Brennan's words,

[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the *Establishment Clause* to forestall. The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences

⁴²⁵ *Id.* at 238-39.

⁴²⁶ *Id.* at 240-41.

of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.⁴²⁷

Here, echoing Frankfurter in *Everson*, is the real reason why the Court could not support authentic religious freedom of the kind Spencer (or perhaps Stewart) envisioned. To take a truly hands-off approach—to allow individual communities to support whatever religion they choose in their own schools—would abandon the schools' public function as cultural assimilators. Even if Spencer's approach might have made sense in nineteenth-century New York, and even if it is a more authentic realization of state neutrality and the constitutional mandate, as a matter of social policy we need our public schools to provide a *common* classroom that imparts a *common* heritage. And, in the 1960s, the Court decided that this common heritage must be a secular one.

The public reaction to *Engel* and *Schempp* was mixed. For the most part, religious organizations declared their public support for secular public education, with a few notable exceptions.⁴²⁸ Evangelical Protestants, predictably, condemned America's precipitous plunge into godlessness; and even Catholics, who traditionally supported efforts to rid schools of Protestantism, saw the move to secularism as a greater danger.⁴²⁹ Interestingly, both the *New York Times* and the *Washington Post* recognized that the social policy goals behind the decisions—the Post suggested that secular neutrality “freed the public schools from an observance much more likely to be divisive than unifying”⁴³⁰—were just as important as constitutional text or history. But popular opinion was strongly opposed to the Court's holdings. Most Americans thoroughly disapproved of

⁴²⁷ *Id.* 241-42 (final emphasis added).

⁴²⁸ Jeffries & Ryan, *supra* note 366, at 320-22.

⁴²⁹ *Id.* at 320-23.

⁴³⁰ *Id.* at 322 (quoting *Editorial*, WASH. POST, Jun. 29, 1962); see also *id.* (quoting *Editorial*, N.Y. TIMES, Jun. 27, 1962) (“[N]othing could be more divisive in this country than to mingle religion and government in the sensitive setting of the public schools.”).

the effort to ban school prayer, and some school districts chose to ignore the Court's mandate altogether.⁴³¹ Over time, however, many, if not most, Americans have come to accept secularist neutrality as the "religion of democracy,"⁴³² and the Court has pressed on its campaign to eliminate the vestiges of nonsectarianism from the public schools. In the last four decades the Court has struck down laws banning the teaching of evolution;⁴³³ displays of the Ten Commandments;⁴³⁴ moments of silence (during which prayer could occur);⁴³⁵ prayer at school graduations;⁴³⁶ and even voluntary, student-led prayer at high school football games.⁴³⁷ As before, Hughes'⁴³⁸ and Spencer's⁴³⁹ ideas echoed through various dissents, but, again, the value of secular public schools as sources of cultural unity won out.⁴⁴⁰ In 2007, then, secularism has truly become the religion of democracy; or, at the very least, the assimilationist religion of the American public school.

There is some reason to believe that a sea change is occurring on the modern Court, however, particularly in the context of state aid to parochial schools. In a line of cases beginning with *Widmar v. Vincent*, the Court has recognized that the Free Speech clause prevents state entities from discriminating against groups with a religious viewpoint when allocating resources for use as, or

⁴³¹ *Id.* at 324.

⁴³² *Id.* at 322.

⁴³³ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁴³⁴ *Stone v. Graham*, 449 U.S. 39 (1980).

⁴³⁵ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

⁴³⁶ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁴³⁷ *Santa Fe Indep. Sch. Dist v. Doe*, 530 U.S. 290 (2000).

⁴³⁸ See *Epperson*, 393 U.S. at 113 (Black, J., dissenting) ("Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.").

⁴³⁹ See *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting) ("The Establishment Clause was . . . designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others . . . nothing in the Clause requires government to be strictly neutral between religion and irreligion.").

⁴⁴⁰ See *Santa Fe*, 530 U.S. at 311 ("The [program at issue] encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause.").

in, a public forum.⁴⁴¹ This logic has evolved through *Lamb's Chapel v. Center Moriches Union Free School District*,⁴⁴² *Rosenberger v. Rector and Visitors of University of Virginia*,⁴⁴³ and *Mitchell v. Helms*,⁴⁴⁴ to the point where, in *Good News Club v. Milford Central School*, the Court required a public school to open its gymnasium after school to a religious education group.⁴⁴⁵ And, in *Kiryas Joel Village School District v. Grumet*—a 1994 decision that vividly recalled Spencer's absolute non-intervention—the Court struck down state legislation creating a special school district for a religious enclave of Satmar Hasidic Jews; but hinted that a similar law that treated all religions equally might be constitutional.⁴⁴⁶ Although there is little hard evidence that it will relax its rigid enforcement of secular neutrality in the public schools in the near future, cases like *Good News Club* and *Kiryas Joel* suggest that the current Court is at least open to revisiting the “strict and lofty neutrality” it imagined in *Everson*.⁴⁴⁷ While such a change would probably better serve the disestablishment mandate, it remains an open question whether an inclusive version of neutrality would be wise social or educational policy, and this is a question that deserves an honest and thoughtful debate.

IV. CONCLUSION

Ultimately, of course, we might ask whether it really matters that exclusive neutrality is a matter of public policy rather than constitutional necessity. I suggest that it does matter, in that the policy basis of the modern doctrine allows us to explore a number of questions that might not otherwise be possible. And an honest

⁴⁴¹ *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁴⁴² *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

⁴⁴³ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

⁴⁴⁴ *Mitchell v. Helms*, 530 U.S. 793 (2000).

⁴⁴⁵ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (observing, in a remarkable reformulation of neutrality doctrine, that “allowing [a religious group] to speak on school grounds would ensure neutrality, not threaten it”).

⁴⁴⁶ *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-04 (1994) (“The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way.”).

⁴⁴⁷ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 24.

evaluation of these questions may allow us to pursue courses of reform we might not now consider feasible. I think there are at least three related kinds of questions that my argument here invites.

First, we might ask how well the school prayer decisions, as policy choices, have legitimated themselves in modern American legal culture. Perhaps the most important test of any significant constitutional decision is the degree to which the winners are able to bring the losers on board, thereby completing or consolidating a change in constitutional meaning.⁴⁴⁸ The Supreme Court's two most visible decisions over the last half-century—*Brown v. Board of Education* and *Roe v. Wade*—provide an easy exercise in contrast. It is difficult to find a lawyer, judge, or scholar working today that does not hold the view that *Brown* was correctly decided, while the decision in *Roe* is still the subject of bitter controversy and debate. Certainly, these are very different cases, with different moral issues at stake, but I suggest that at least part of *Roe's* failure to consolidate new constitutional meaning is traceable to the opinion's problematic rationale.⁴⁴⁹ While the school prayer decisions are not now as controversial as *Roe*, neither are they as universally accepted as *Brown*. Again, I would suggest that some of the lingering opposition to these decisions has its roots in the Court's unpersuasive historical analysis. Thus, I think an honest reappraisal of our national experience with education and religion, and of the policy reasons that truly underlie the exclusive neutrality doctrine, can only lend more credibility and legitimacy to the constitutional discourse on one of the most pressing and important issues of our time.

Second, if exclusive neutrality is a policy-based doctrine, it is fair to both assess the policy's roots and evaluate its successes and failures. After all, one important aspect of policy decisions is that we can revisit them, gauge their purposes and effectiveness, and

⁴⁴⁸ This is what Professor Bruce Ackerman calls the "consolidation" phase of constitutional law making. See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 20-21 (1998).

⁴⁴⁹ I am not alone in making this suggestion. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE 157 (1982).

modify our course accordingly. I think I have demonstrated that exclusive neutrality's roots are less than completely admirable: the policy was born, at least in large part, out of prevalent and virulent anti-Catholicism, even if it now serves an assimilationist educational vision. As to the second part of the question, assessing the policy's success or failure, I can only make the anecdotal observation that our public schools are failing to provide our children with either the intellectual or personal character skills necessary to a healthy and vibrant democracy. I very much hope that the third part of my overarching project—the empirical study of voucher schools—can provide some solid guidance regarding the merits or demerits of alternative educational approaches. If the assimilationist policy is actually failing our children and our political culture, I hope I have shown that there should be no constitutional barrier to a change in direction.

Third, recognizing exclusive neutrality as a policy choice allows us to ask some theoretical kinds of questions about the place of assimilationism within our democracy. Certainly, some degree of assimilation is essential to any self-governing society—as I have argued in detail elsewhere⁴⁵⁰—but I think it is fair to carefully scrutinize those instances where the state acts coercively to homogenize groups and opinions. Indeed, as long as we continue to hold up Federalists 10 and 51 as towering Madisonian advancements in democratic political theory, we must pay something more than lip service to the idea that it is diversity itself that best safeguards our cherished civil liberties and democratic heritage. And, as Michel Foucault has famously observed, it is only in schools, barracks, and prisons that we force such diverse groups of people to share such small spaces together.⁴⁵¹ Seen in this light, it seems possible that an inclusive version of neutrality, with small, diverse, community-based schools, might not only provide a better educational model, but it might also be a more American kind of idea that serves distinctly American kinds of purposes.

⁴⁵⁰ Bartrum, *supra* note 6, at 311-12.

⁴⁵¹ See generally, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195-228 (1995) (describing forced conformity and the “panopticon”).

In recent years, there are indications that the Court might revisit the doctrinal choices it made in the mid-twentieth century; that it could return to John Spencer's vision of inclusive neutrality as the best realization of constitutional disestablishment. While it has yet to suggest this possibility in the context of a public school decision, there has been considerable turnover on the bench since the last relevant case. If the Court does reconsider these issues, we should welcome the opportunity for national reflection: it should be an opening for creative and independent thinking, and a meaningful chance to reevaluate the strengths and weaknesses of localized forms of republican government. If nothing else, we need to acknowledge the flaws in the historical and theoretical foundation the Court has laid for secular public education, and we need to engage in a sincere and forthright conversation about the relative importance of real religious freedom, on the one hand, and cohesive and religiously integrated public classrooms, on the other. This time around we should weigh carefully, and openly, the cost of compromising such fundamental constitutional principles as disestablishment and local self-government in the interest of a furthering a nationalistic social policy—or, it may be that secular public schools have served us so well as institutions of cultural assimilation that we dare not truly consider deep pedagogical change.