

The Know-Nothing Amendments

Barriers to School Choice in Massachusetts

No. 46
April
2009

A Pioneer Institute White Paper

by Cornelius Chapman



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The various modes of worship which prevailed in the Roman world were all considered by the people as equally true; by the philosopher as equally false; and by the magistrate as equally useful.

- Edward Gibbon

The Decline and Fall of the Roman Empire

Anti-Catholicism is the anti-Semitism of intellectuals.

- Peter Viereck, *Atlantic Monthly*, 1959

I am not a Know-nothing. How could I be? When the Know-nothings get control, the Declaration of Independence will read “all men are created equal, except negroes and foreigners and Catholics.

- Abraham Lincoln, letter to Joshua Speed, 1855

Introduction

This paper will consider a sad phenomenon in American history—19th-century nativism and in particular, anti-Catholic prejudice—and its lingering and deleterious effects on American primary and secondary education. The wave of nativist sentiment that swept through American thought and institutions in the 19th century wiped out an older, pluralistic approach to primary and secondary education in which the interests of parents were balanced with those of the state. The purported constitutional grounds for this shift will be shown to rest on an incorrect assumption as to whether the framers of the Constitution intended to include education within the prohibition of established religions. As a correction to this unwarranted shift in course, the author will suggest the use of more pragmatic standards for the evaluation of church-state controversies in K-12 education which place the Free Exercise Clause of the First Amendment on an equal footing with that amendment’s Establishment Clause.

York State Superintendent of Public Instruction, that appeared in leading educational journals between 1891 and 1893, the point of contention was not whether primary and secondary education in America had religious roots, but who should receive the credit—the Puritans of Massachusetts or the Protestant Dutch settlers of New York.¹ The boundaries between public and private sectors were not drawn with today’s formal lines, and the notion that education could or should be a public function independent of the religious beliefs of parents would have been considered an absurdity.²

The governments of the American colonies were similarly imbued with religious coloration from their birth. As the United States Supreme Court noted in *Reynolds v. United States*,

Before the adoption of the [U.S.] Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions.³

Thus the Massachusetts Constitution of 1780 required that in order to be eligible to hold the

offices of governor and lieutenant governor of the state, an individual must “declare himself to be of the Christian religion,”⁴ and provided for the “support and maintenance of public Protestant teachers of piety, religion and morality.”⁵ In Massachusetts, public school was Protestant school.⁶

The wave of nativist sentiment that swept through American thought and institutions in the 19th century wiped out an older, pluralistic approach to primary and secondary education in which the interests of parents were balanced with those of the state.

The charters granted to the colonies by the English Crown authorized the creation of established, state-supported religions, a continuation of the European practice of requiring “loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place.”⁷ The framers of the United States Constitution, by contrast, were able to start afresh; in the words of Thomas Jefferson, the American Revolution gave the Founding Fathers “an album on which [they] were free to write” what they pleased,⁸ and the First Amendment to the Constitution prohibited Congress from making any law respecting “an establishment of religion, or prohibiting the free exercise thereof.”⁹ George Mason, Jefferson’s fellow Virginian and the man whom Jefferson considered “the author of the bill of rights,”¹⁰ had witnessed controversy as a state legislator in Virginia when a bill to establish “provision for teachers of the Christian religion” had “brought out a determined opposition.”¹¹

State constitutional provisions that established particular religions were not prohibited until much later, however. In 1868, the Fourteenth Amendment to the United States Constitution, which provides that no “State shall deprive any

person of life, liberty or property, without due process of law,”¹² was ratified by the requisite number of states. That amendment, originally intended to secure the rights of former slaves in the post-bellum South, was interpreted by subsequent judicial decisions to require the application of the Bill of Rights to the states,¹³ which meant that the First Amendment’s prohibition against the establishment of a federal religion by Congress applied to comparable acts by state legislatures. Religious favoritism may thus be present in a state constitution that predates these cases as a vestige of a time when such prejudice was both socially accepted and legally permitted.¹⁴

Mason’s role in the disestablishment of a state religion in Virginia may be instructive as to how far the First Amendment’s prohibition on laws “respecting an establishment of religion” was intended to extend. In 1776, responding to complaints by “dissenting” denominations—that is, those other than the Anglican Church—about aid provided to Anglican ministers by the state, the Virginia legislature began to consider a series of measures aimed at reconciling the conflicting claims of publicly-supported clergy and dissenters from the established Anglican church. At the time, Anglican clergy were supported by a tax on every household in the state, which was used to pay their salaries and provide them with land and housing.¹⁵ In 1779, after several previous failures, Mason successfully resolved the church-state controversy with a bill that permanently suspended the ministers’ state salaries, but left property purchased with state funds in the hands of the Anglican Church.¹⁶

The three-year debate over disestablishment, which Jefferson later said represented “the severest contests in which I have ever been engaged,”¹⁷ took place independently of a concurrent effort to establish a system of public education;¹⁸ the legislators who fought so bitterly over the issue of an established church apparently

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considered that issue to be separate from the question whether religious instruction should be barred from publicly-supported schools.

If Mason was considered a liberal on church-state issues—he was dubbed “the Father of Religious Liberty” in America by an early historian¹⁹—Jefferson was considered an arch-liberal²⁰ who showed a “passion for religious liberty” that Mason never demonstrated.²¹ It is Jefferson’s letter to a Committee of the Danbury Baptist Association²² that crystallized in an image—“a wall of separation between church and State”—the debate over the role of religion in American public life. Yet even Jefferson did not draw the line of separation through the schoolhouse. In 1822, two decades after the letter to the Danbury Baptists, Jefferson wrote to the President of the University of Virginia recommending that religious denominations, without “giving countenance or ascendancy to any one sect over another,” be permitted “to establish their religious schools” on the grounds of that public institution of higher learning, thereby “enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations. . . or in the lecturing room of such professor.”²³ Jefferson concluded that:

*Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolable the constitutional freedom of religion, the most inalienable and sacred of all human rights.*²⁴

In other words, contrary to those who think that the wall Jefferson spoke of in his letter to the Danbury Baptists should separate religious education from state support, the arch-liberal of church-state separation believed that the support of religious education was a proper function of the state and permissible under the First Amendment

so long as no one religion was preferred over any other. Jefferson was adamant that church and state should remain separate, but not church and school.

II. The Nativist Reaction to Nineteenth Century Immigration

Between 1815 and 1865, approximately five million people immigrated to the United States from European countries.²⁵ Contrary to the stereotype of the penniless European immigrant, many arrived with sufficient skills and resources to sustain themselves until they escaped the crowded cities of the east coast and reached areas of the country where arable land was plentiful; many Germans, English, Norwegians, and Swedish landed in Boston, but few stayed, lured by the promise of cheap land and rich soil beyond the Alleghenies.²⁶

Jefferson believed that the support of religious education was a proper function of the state and permissible under the First Amendment so long as no one religion was preferred over any other.

The Irish represented a different case; they had been impoverished by a succession of measures dating back to the 17th century, including confiscation of their land by the English, changes in laws that made them tenants at will to absentee landlords, and the subdivision of rented lands into increasingly smaller and less profitable plots. Ireland “lived in a chronic state approaching famine,” and the particular years that have come to be known as the “Potato Famine”—the period from 1845 to 1850 when potato rot infected the staple of the nation’s diet—were simply those in which chronic symptoms became most acute.²⁷ Changes in political circumstances worked to

exacerbate the problem; the Corn Laws that had given Ireland's exports a protected place in English markets were repealed in 1846, and the Irish Poor Law of 1838 subjected landowners to a high tax that encouraged the forced emigration of tenant farmers. When the potato crop failed and tenant-farming "cottiers" could not pay their land-rent, a quarter-million families numbering some one million individuals were evicted, lodged in workhouses and then forced to emigrate—in some cases with government assistance—to other countries.²⁸ Between 1820 and 1860, a third of all immigrants to America were Irish; in the 1840s, half of all such immigrants were Irish.

When the Irish arrived in America they settled where they landed, in the large port cities of the east coast, because they had no accumulated wealth to move further inland and buy farmland. Between 1830 and 1850 the Irish population of Boston swelled to approximately 35,000 out of 137,000; within five years, it had increased to 50,000.²⁹ The Irish became a visible social problem in urbanized Boston because they lacked both capital and skills; they were disproportionately employed in unskilled labor because, having been farmers in Ireland, they were not prepared to enter the skilled trades into which labor was divided in an industrialized urban area. Even African-Americans, who generally toiled in less-desirable occupations, were more likely to be employed in skilled jobs; while skilled blacks' status "shone chiefly by comparison with less fortunate members of their race," it was nonetheless superior to that of the Irish.³⁰ "Unable to find employment or transportation elsewhere, . . . without one penny in store, the question, how [the Irish] should live, was more easily put than solved."³¹ Boston's Irish would thus become the first and most visible targets of native animus that would solidify a rigid educational uniformity that persists in America today.

The Protestant elite that had ruled Massachusetts since its founding became alarmed by the influx of Catholic immigrants from Ireland (and to a lesser extent, other European countries) in the 19th century. While this reaction in part reflected legitimate public health concerns over the squalor in which the new immigrants lived, it was heightened by anti-Catholicism, a legacy of religious conflict between Protestants and Catholics dating to 16th century England, when Henry VIII separated the Anglican Church from the hierarchy of the Roman Catholic Church.³² Anti-Catholic prejudice manifested itself in everyday life by parlor games such as "Break the Pope's Neck"³³ and the celebration of "Pope-Night" on November 5th, an American counterpart to Guy Fawkes Night in England, in which an effigy of the Pope was paraded through the streets of Massachusetts' cities and towns and then burned.³⁴ Anti-Catholic sentiment was expressed by the high-minded as well as the



"The Ignorant Vote", December 9, 1876

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low; Harvard's annual Dudleian Lectures were devoted to "detecting, convicting, and exposing the idolatry, errors and superstitions of the Romish Church.³⁵

Nativist sympathizers in Massachusetts and across America reacted to the influx of immigrants in the 19th century by forming various groups to preserve Protestant supremacy. Many, such as The Sons of Sires, The Sons of '78, The Druids, The Order of United Americans, had only brief lives.³⁶ One, The Order of the Star Spangled Banner, eventually coalesced into a national political organization formally known as the American Party.³⁷ Because its members pledged not to give out information about the party, and instead employed passwords and ritualistic handshakes to identify themselves to each other, the party came to be called the "Know-Nothing Party." Members would greet any inquiry about the party and its activities by replying "I know nothing."

The hypocrisy of the Anti-Aid Amendment's proponents became clear over time as public funds continued to be spent not only in local public schools, but also for private schools and academies.

In 1854, in what has been described as the greatest election upset in the history of Massachusetts,³⁸ the Know-Nothings gained control of both houses of the Massachusetts legislature and the State House as their gubernatorial candidate, Henry Joseph Gardner, defeated the Whig incumbent Emory Washburn.³⁹ During their time of predominance, the Know-Nothings' achieved some but not all of their nativist goals; a bill that would have prohibited an immigrant from voting until he had lived in Massachusetts for 21 years failed, for example, but a law was subsequently enacted that prohibited residents from voting until they

had been citizens for two years and residents for seven, thereby disenfranchising in the words of one Massachusetts legislator, the "Scot, Irish, and Germans" who were entering the state in large numbers.⁴⁰

The Know-Nothings' most enduring accomplishment is an amendment to the Massachusetts Constitution that survives to this day in modified form, commonly known as the "Anti-Aid Amendment." The Anti-Aid Amendment provided for the first time that state appropriations and local tax revenues for education could be "expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."⁴¹

Until 1833, the Massachusetts Constitution had practiced religious tolerance at the same time that it provided for a system of locally-funded religious schools by allowing an individual to direct that levies required to support "public Protestant teachers" be applied to "teachers of his own religious sect or denomination."⁴² While the effect of this measure in actual practice may have been limited, it represented a legal framework that created the possibility for educational and religious diversity. In modern terms, it allowed for dissent from the prevailing educational orthodoxy in the manner of a voucher, to be used in a school chosen by a child's parents, not one approved by a government.

This original text of the Declaration of Rights of the Massachusetts Constitution was amended in 1833 to remove the provisions relating to education, and the Anti-Aid Amendment elevated the question of school funding beyond the reach of the state's legislature, whose composition was subject to change due to shifts in population. The Catholics had begun to organize their own

schools, an initiative formalized in 1829 when the first Provincial Council of Bishops urged each community in Massachusetts to establish its own Catholic school in order to insulate children from anti-Catholic sentiments that were part of the culture and curriculum in Protestant-run public schools. These newly-formed schools attracted no more than 500 pupils in 1829, but had doubled their enrollment within six years.⁴³ Protestants feared that Catholic schools would grow to the point where their supporters would demand a share of public monies appropriated for the support of Protestant schools, as had happened in New York and Philadelphia, touching off anti-Catholic riots.⁴⁴ As one member of the Constitutional Convention of 1853 bluntly put it, the Know-Nothings feared that “some new sect may outvote the Protestants, and claim the school fund.”⁴⁵ The Anti-Aid Amendment put the issue of who would provide elementary and secondary education in Massachusetts into the state’s Constitution, its “organic law, something that cannot easily be changed.”⁴⁶

The new rule of law embodied in the Anti-Aid Amendment contained an inherent inconsistency. Schools under the superintendence of local authorities remained Protestant schools, as more than one speaker made clear during the constitutional debate. “A large portion of our constituents maintain, that the practice of reading the Protestant Bible in our schools, and of offering up prayers by the teachers who are Protestants, and which prayers are liable to partake of more or less of the character of argumentation and inculcation, I may say, perhaps of preaching—gives a sectarian character to these institutions.”⁴⁷ When thus confronted, the Know-Nothing majority was unapologetic, and blunt: “We teach Protestantism, and believe it to be right, and we glory in that belief.”⁴⁸ Another speaker made it clear that the ultimate goal of the Anti-Aid Amendment’s proponents was the conversion of the children of all minority faiths to Protestantism:

“Open your doors wide to all...and Catholics will become Protestants through the influence of these schools.”⁴⁹ The convention adopted the Anti-Aid Amendment after debate that focused particularly on the threat posed by the growing Catholic population of the state,⁵⁰ but its burden fell on all those who were not Protestants. Children of all religions were exposed to Protestant proselytes through the “common” schools; Jewish children were forced to attend school on their Sabbath and were subjected to indoctrination from the New Testament.⁵¹

The hypocrisy of the Anti-Aid Amendment’s proponents became clear over time as public funds continued to be spent not only in local public schools, but also for private schools and academies in Andover, Ashburnham, Deerfield, Georgetown, Harvard, Hatfield, Ipswich, Marion, Newbury, Newburyport, and West Bridgewater, all of which incorporated varying degrees of Protestant liturgy into their curriculum.⁵² During the period from 1853 to 1917, payments to such schools totaled over \$10 million.⁵³

By the beginning of the 20th century, Protestant influence in Massachusetts had declined as the number of immigrants in the state continued to grow rapidly. In the decade between 1900 and 1910, more than 150,000 Italian immigrants came to Massachusetts, along with 80,000 Poles, nearly 25,000 Lithuanians and increasing numbers of Jews, Asians, Greeks, Syrians and other ethnic groups. The African-American population of Boston grew from barely 2,280 at the time of the Civil War to 14,000 in 1910 as freed blacks moved north to escape segregation and lynchings.⁵⁴ A second generation of nativist groups sprang up, similar in outlook to the Know-Nothings, the most ambitious being the American Protective Association (“APA”). Founded on a resentment of immigrants with a particular hostility towards Catholics,⁵⁵ APA members swore never to vote for a Catholic, and attempted

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to restrict immigration to those who were of Protestant heritage. In Massachusetts, the APA recruited as many as 75,000 members, who were composed primarily of British-Americans and Orangemen from Ulster.⁵⁶

Anti-Catholic sentiment in the Commonwealth grew as Catholic political power increased. In 1914, David Ignatius Walsh became the Commonwealth's first Irish-Catholic governor. Catholic institutions of higher learning had opened, thus creating the prospect that they would seek funding from the public treasury in competition with Protestant institutions such as Harvard, Amherst and Williams. In 1913, the state's Supreme Judicial Court expressed the view that, while the Anti-Aid Amendment prohibited aid to parochial primary and secondary schools, it did not prohibit aid to institutions of higher education under sectarian control.⁵⁷ The once-solid wall of the Anti-Aid Amendment was showing signs of decay.

An examination of the Massachusetts state budget for 2009, for example, shows grants made to numerous institutions not controlled by the state or federal government, in violation of the Anti-Aid Amendment.

An anti-Catholic group called the American Minute-Men was organized for the specific purpose of defeating Catholic candidates in the state-wide elections of 1914, and held mass anti-Catholic rallies.⁵⁸ A Constitutional Convention was called in 1917 for the purpose of modifying the Anti-Aid Amendment so that it would prohibit aid to any institution "not publicly owned and under the exclusive control, order and superintendence" of the state or federal government.⁵⁹ The measure passed after spirited debate in which the amendment was denounced

as a "gratuitous insult to the Catholic people of this state"⁶⁰ because the groups that had agitated for its passage were comprised of Protestants motivated by the "fear that there will be a call. . . for money to pay for the support of parochial schools."⁶¹

The 1917 Amendment to the Anti-Aid Amendment is sometimes characterized as a purgative that cured the Anti-Aid Amendment of its anti-Catholic bias because henceforth its prohibition would apply to all charitable institutions, not just schools, with limited exceptions.⁶² The truth is that the 1917 Amendment was drafted by a committee on Bill of Rights dominated by Protestants⁶³ who resisted attempts by the Convention as a whole to amend its text.⁶⁴ In addition, there were larger political considerations at work; the Minute-Men, who had sworn to vote against Catholic politicians, had grown to 100,000 members.⁶⁵ They were prepared to vote in favor of the 1917 Amendment, according to one of the leading anti-Catholic legislators, Frederick Anderson of Newton, and if it did not pass, he would re-introduce an alternative measure that affected only Catholic institutions.⁶⁶ The 1917 Amendment was thus no ecumenical compromise; it was imposed by a "vicious faction" who prevailed over "the less violent adherents of the sect of anti-Catholicity."⁶⁷ The Catholic legislators who participated in the 1917 Constitutional Convention viewed it as less offensive than the more virulent measure proposed by Anderson, and voted for it out of political expediency in the face of increasingly virulent anti-Catholic and anti-immigrant sentiment that had developed during the period leading up to World War I. The 1917 Amendment was not accepted without bitterness, however; Catholics, noted one speaker to the convention, "have paid their share of the nineteen million dollars appropriated to private institutions in the past fifty years," while receiving "comparatively nothing,"⁶⁸ and the supporters of the 1917 Amendment were



"Priestly Slavery", December 30, 1871

representatives of the Protestant institutions that had already received public funds and had fought against funding for Catholic institutions.⁶⁹

Regardless of whether the 1917 Amendment is viewed as an ecumenical compromise that cleansed the Massachusetts Constitution of its nativist and anti-Catholic stain, or a combination by previously-warring Protestant denominations to stop a mounting Catholic threat to their control of the state's school fund, Protestant supporters of the 1917 Amendment who said they would "ask no more State aid"⁷⁰ and would abide by the principle of "equal rights for all, special privileges for none"⁷¹ were disingenuous. Their Catholic fellow-travelers—led by Martin Lomasney, the boss of Boston's Ward Eight who was generally considered to be politically astute—were correspondingly deceived. Institutions "not publicly owned and under exclusive control, order and supervision of public officers or public agents" have continued to receive aid from the state, notwithstanding the 1917 Amendment. An examination of the Massachusetts state budget for 2009, for example, shows grants made to numerous institutions not controlled by the state or federal government, in violation of the Anti-

Image appears courtesy of HarpWeek, LLC.

Aid Amendment.⁷² In a typical budget year such grants have been made to over 150 different private groups, many of them religious in origin or nature; these institutions may perform good works, but under the Anti-Aid Amendment, that is irrelevant. The promise of the 1917 Constitutional Convention, which agreed upon "the principle of not appropriating public money for private institutions,"⁷³ has been broken. As predicted by more than one member of the 1917 convention, the only institutions not represented on the long list of private beneficiaries of state aid nine decades later are Catholic schools.⁷⁴ The unfortunate victims of this breach of trust are those parents who seek, for a variety of reasons, an alternative to the schools to which their children are consigned by the accident of birth and the limitations of wealth.

As predicted by more than one member of the 1917 convention, the only institutions not represented on the long list of private beneficiaries of state aid nine decades later are Catholic schools.

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The prejudice against immigrants in general and Catholics in particular that found its first expression in mid-19th century Massachusetts was the driving force behind similar amendments to the constitutions of thirty-six other states over the next six decades, and a proposed amendment to the United States Constitution to prohibit the use of public funds in “sectarian” schools (by which was meant Catholic schools⁷⁵) was only narrowly defeated a quarter century later.⁷⁶ The passage of these amendments, now known as “Blaine Amendments” after James G. Blaine, the sponsor of the failed amendment to the United States Constitution, coincided with the development of “common schools” that would be eligible to receive public funds under these amendments.⁷⁷

The term “common school” is understood, both in its original intent and its current usage, to refer to schools “that all the children of a community attend, in contrast to the schools that churches” maintain for their adherents’ children.⁷⁸ Such schools were contrasted by the legislators who voted in favor of the Anti-Aid Amendment (and later, Blaine Amendments) with “sectarian” Catholic schools,⁷⁹ but the common schools were equally sectarian; they taught the tenets of the Congregational Church—which had at one time been the established church of Massachusetts—and later Protestantism in general. The “common” element of the common schools’ curriculum was that they taught religious doctrine acceptable to both Orthodox and Unitarian Congregationalists—the competing divisions within the Congregational faith—but which were offensive to Catholics, Jews, and others.⁸⁰ Thus, the conception of the common school in Massachusetts was not, to borrow a concept from Catholic theology, immaculate.

In Massachusetts—their birthplace—“common” schools represented a narrowing of parents’ educational options for those who did not follow the prevailing Protestant orthodoxy, since parents’

right to educate their children according to the faith of their choice had been protected by the Massachusetts Constitution of 1780. The nativist animus that foreclosed that right in Massachusetts would go on to eliminate competition in American primary and secondary schools across the nation through Blaine Amendments.

III. Scaling the Higher Wall of Blaine Amendments

Even though, as noted above, the First Amendment to the United States Constitution has been applied to the states,⁸¹ it is a two-edged sword; it prohibits both laws that establish government religions, and laws that prohibit individuals’ free exercise of religion.⁸² Accordingly, a state may pass a law that erects a higher wall of separation between church and state, so long as it does not thereby improperly restrict a person’s free exercise of religion.

In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs.

State litigation under the Anti-Aid Amendment has invoked the First Amendment only as a guide to interpretation, as the Massachusetts Supreme Judicial Court has stated that the Anti-Aid Amendment is “more stringent” than the establishment limitations of the First Amendment.⁸³ Thus, for example, federal cases permit government entities to provide textbooks to parochial school students,⁸⁴ while Massachusetts cases interpreting the Anti-Aid Amendment do not.⁸⁵ Accordingly, Anti-Aid Amendment jurisprudence has developed in a vacuum, as if the First Amendment’s prohibition against state

laws that restrict the free exercise of religion were not also a consideration in such controversies. The Massachusetts Constitution contains three separate provisions that guarantee religious freedom,⁸⁶ but none of them has been invoked in litigation under the Anti-Aid Amendment.

In the federal courts, the bigoted history of Blaine-type limitations on educational diversity was first noted in the 2000 case of *Mitchell v. Helms*.⁸⁷ In his plurality opinion, Justice Thomas wrote that:

. . . hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. Although the dissent professes concern for “the implied exclusion of the less favored,” the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.” . . . In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.⁸⁸

Despite this encouraging sentiment joined in by three other judges, parents in states with Blaine-type barriers to overcome still face long odds in overturning state constitutional restrictions on the right to educate their children in a manner consistent with deeply-held beliefs. The cost of litigation to challenge the denial of education benefits under Blaine Amendments is great, and the substantial length of time between the

commencement of a case and its conclusion can mean that a child will have graduated from school before a judicial resolution is obtained.

In addition, Supreme Court cases invalidating state constitutional amendments, which of necessity must be approved by popular vote, are scarce.⁸⁹ Into this near-void of precedent, the Supreme Court in 1996 dropped its ruling in *Romer v. Evans*,⁹⁰ invalidating a state constitutional amendment for the first time on the basis, in part, of animus towards the class of persons affected, namely, homosexuals.⁹¹ A desire “to harm a politically unpopular group cannot constitute a legitimate governmental interest,” and a law passed on such a basis does not “bear a rational relationship to a legitimate governmental purpose.”⁹²

The essence of the Anti-Aid Amendment is that certain individuals—parents who wish to educate their children in non-government schools—may not seek aid from their state legislatures on an issue of critical importance to them, the education of their children.

The other principle enunciated in *Romer v. Evans* with relevance to the Blaine Amendments is its conclusion that “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense.”⁹³ The essence of the Anti-Aid Amendment and Blaine Amendments in other states is that certain individuals—parents who wish to educate their children in non-government schools—may not seek aid from their state legislatures on an issue of critical importance to them, the education of their children from kindergarten through high school.

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In Massachusetts, the injury is compounded by the fact that the same Constitutional Convention that approved the 1917 Amendment also voted to give the people of the state the right of initiative—a process by which legislation can be proposed by citizens and placed on a statewide ballot for approval by popular vote without going through the traditional legislative process—but prohibited its use to amend the Anti-Aid Amendment. The right of initiative was promoted by the Progressive Party as a means of countering business domination of state legislatures by giving ordinary citizens the right to craft legislation directly.⁹⁴ The Progressive Party had achieved sufficient electoral gains in Massachusetts at the time of the 1917 Constitutional Convention for its votes to be needed by the proponents of the 1917 Amendment,⁹⁵ and the initiative procedure was approved by the 1917 Constitutional Convention with a unique limitation; it could not be used to repeal either the Anti-Aid Amendment, or the provision barring its use to repeal the Anti-Aid Amendment.⁹⁶ This double impediment to potential popular repeal or modification of the Anti-Aid Amendment violates the principle of *Romer v. Evans* that “government and each of its parts remain open on impartial terms to all who seek its assistance.”⁹⁷

Given these impediments, what avenues are open to parents whose children are trapped in inadequate or dangerous⁹⁸ public schools, or who find the orthodoxy—not religious but irreligious—of today’s common schools offensive to their personal beliefs? What follows is a collection of legal theories that have not yet been tried in the battle against Blaine Amendments, and a discussion of techniques for expanding educational choices that would appear to be permissible even in states where Blaine Amendments prohibit direct payments to schools not under public control.

A. Substantive Due Process

The doctrine of substantive due process is a restraint on the power of state and federal governments to infringe upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest.⁹⁹ Under the United States Constitution, the notion of substantive due process applies to the states pursuant to the Fourteenth Amendment, which provides that no state may “deprive any person of life, liberty or property, without due process of law.”¹⁰⁰ After a long period of desuetude,¹⁰¹ the concept of substantive due process made a comeback in the last third of the 20th century,¹⁰² although its use is currently limited to cases in which no specific constitutional provision applies to a claim.¹⁰³

Indeed, a system of neutral aid to parents that allowed their tax dollars to follow students to whichever school their parents chose would in many cases result in a financial benefit to taxpayers.

As noted above, the history of primary and secondary education in the United States begins with religious schools and, in some states, the right of parents to direct compulsory public support of education to a school that would teach their children in a manner consistent with closely-held religious beliefs was protected. Indeed, a state attempt to prohibit children from attending parochial school was struck down by the United States Supreme Court in 1925 in the case of *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*. In that case, an Oregon state law required every parent, guardian or other person in control or custody of a child between eight and sixteen years to send him or her to a public school, with minor exceptions. The law was passed by an

initiative measure and was aimed at immigrant youths and children of immigrants. The Court held that the law unreasonably interfered with the “liberty of parents and guardians to direct the upbringing and education of children under their control,” and that this right, guaranteed by the Constitution, could “not be abridged by legislation which has no reasonable relation” to a legitimate state purpose.

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State.¹⁰⁵

The decision in *Zelman* is based on the need to provide “educational assistance to poor children in a demonstrably failing public school system” as a “valid secular purpose” sufficient to sustain the law.

A substantive due process argument based on the liberty of parents to direct the upbringing and education of their children would proceed along the following lines: (a) state governments in jurisdictions with Blaine Amendments tax parents for the support of schools that are inadequate (either in terms of educational performance or lack of safety) or which are objectionable to parents on religious or moral grounds; (b) the rights of parents in these regards are fundamental;

(c) there are less intrusive and more effective means of ensuring that children are educated in a manner that will enable them to be informed and self-sufficient citizens;¹⁰⁶ and (d) such states accordingly have an obligation to provide parents with benefits equivalent to those received by parents who find public schools—the sole source of free public elementary and secondary education—to be acceptable.

Justice Thomas suggested an argument along these lines in his concurring opinion in *Zelman v. Simmons-Harris*, the decision that upheld the Cleveland, Ohio school voucher program. Noting that urban minority children “have been forced into a system that continually fails them,”¹⁰⁷ Thomas questioned the extent to which the First Amendment’s prohibition against established religions should constrain state action under the Fourteenth Amendment, which was passed following the Civil War to ensure that states would not deprive citizens of liberty without due process of law. Noting the tragic irony of the use of the First Amendment to deprive minority children of an adequate education that the Court’s landmark decision in *Brown v. Board of Education of Topeka*¹⁰⁸ held was essential to their success in life, he called for a more nuanced approach under which state programs of neutral aid that did “not impede free exercise rights or any other individual religious liberty interest”¹⁰⁹ would be permitted. As Justice O’Connor noted in her concurring opinion in *Zelman*, quoting Justice Black, the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”¹¹⁰ A religious person may be taxed to send an atheist’s child to public school, and an agnostic may be taxed to send the children of both believers and non-believers to public school in the name of the general welfare of a state. Further, both religious and non-religious parents are taxed to send children—their own and others—to schools

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where teachers may inculcate beliefs and values with which they disagree. The minimal burdens imposed on an individual's conscience in these examples are rightfully subordinated to the greater societal goal of an educated citizenry. There is no difference between these examples and the attenuated harm suffered by a taxpayer who complains of a state's reimbursement of bus fares paid by New Jersey parents to transport their children to non-public schools, the harm complained of in *Everson v. Board of Education of the Township of Ewing*. The law does not bother with trifles.¹¹¹

Indeed, a system of neutral aid to parents that allowed their tax dollars to follow students to whichever school their parents chose would in many cases result in a financial benefit to taxpayers; in the Boston area, for example, the annual expenditures per pupil in fiscal year 2007 were \$16,466.67 in the Boston Public School system, and \$24,467.10 for the Cambridge Public Schools.¹¹² By contrast, an inner-city parochial elementary school in Boston charged \$3,400 for one child, and \$5,800 for two children,¹¹³ while representative parochial high schools in the area charge tuition in the range of \$10,000 to \$12,000.¹¹⁴

B. The Free Exercise Clause and the Voucher Model

As noted above, in states with Blaine Amendments appellate courts have often interpreted such restrictions to be more restrictive than the Establishment Clause of the First Amendment,¹¹⁵ but under the Supremacy Clause of the United States Constitution, any such state constitutional provision is subordinate to the laws of the United States, including the Free Exercise Clause of the First Amendment. The Supremacy Clause reads in pertinent part as follows:

*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; (...) shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*¹¹⁶

Just as parents have suffered by the application of the First Amendment's Establishment Clause in cases striking down programs of state aid to students in parochial schools, they could correspondingly benefit by the invocation of the Free Exercise Clause in such cases. In the 2002 case of *Zelman v. Simmons-Harris*, the Supreme Court upheld the Cleveland school voucher program under the United States Constitution, even though its benefits flowed disproportionately to parochial schools.¹¹⁷ The plaintiffs in *Zelman* did not need to make a First Amendment claim under the Free Exercise clause because the Ohio voucher program was in effect and was challenged by state taxpayers on First Amendment Establishment Clause grounds. The decision in *Zelman* is based on the need to provide "educational assistance to poor children in a demonstrably failing public school system"¹¹⁸ as a "valid secular purpose" sufficient to sustain the law.

The logic of putting direct federal aid in the hands of college freshmen, but not parents of elementary and secondary school students whom one can reasonably assume will make educational choices from a more mature perspective, seems counterintuitive at best.

Zelman thus represents a beginning and not an end. In that respect, it is like the graduate school cases that preceded the United States Supreme Court's landmark decision in *Brown v. Board of Education of Topeka*,¹¹⁹ such as *Missouri ex rel.*

Gaines v. Canada,¹²⁰ in which the Court struck down particular instances of racial discrimination without recognizing an affirmative state duty to dismantle the existing educational paradigm of segregation and create a new one. Low-income parents are bound by state compulsory attendance laws¹²¹ to send their children to schools and forced to pay local, state and federal taxes in support of such schools, but in many cases the schools fail to educate their children or expose them to beliefs that partake of the spiritual and are contrary to the parents' moral beliefs. As the jurisprudence of vouchers develops, it may be useful to combine the two types of claims; a secular claim based on the failure of a public education system, and a Free Exercise claim by one or more parents who is a member of a religion whose values are offended by the public school orthodoxy, in the same manner that dissenters from the established Congregational religion of colonial Massachusetts were allowed to opt out of schools whose teachings were contrary to their beliefs.¹²² Just as the "A.P.A. faction" of the 20th century could not understand that the pedagogy of the Massachusetts common schools would be perceived as sectarian by Catholics and Jews,¹²³ current-day supporters of a monopolistic public school system seem sometimes to be solipsistic about the character of the views taught there.

C. Going Over Blaine's Head

The difficulties faced by parents who seek to exercise their right to educate their children outside public schools but lack the financial resources to do so could be alleviated in those states with Blaine amendments by direct federal aid to parents in the form of a voucher, or tax relief in the form of a deduction from income or a credit against federal tax liabilities that conformed to the requirements in *Zelman*; namely, a program enacted for the "valid secular purpose of providing educational assistance to poor

children in a demonstrably failing public school system."¹²⁴ Under the Supremacy Clause,¹²⁵ states can no more stand in school house doors to keep students in, in violation of a federal educational program, than segregationist governors could stand in school house doors to keep them out.¹²⁶ This model is currently in use at the collegiate level without constitutional objection through the Pell Grant Program, which provides direct aid by the federal government through participating institutions—religious or secular—to financially needy students who have not yet earned their first bachelor's degree.¹²⁷ The logic of putting direct federal aid in the hands of college freshmen, but not parents of elementary and secondary school students whom one can reasonably assume will make educational choices from a more mature perspective, seems counterintuitive at best.

D. The Contracting Model

State payments to private institutions in Massachusetts can take several forms, including direct grants and amounts paid for services rendered under contracts.¹²⁸ The Anti-Aid Amendment—which goes further than Blaine Amendments generally—bars grants, but not payments for services performed by private educational institutions. Thus, laws authorizing payments to private schools to educate special needs children have been upheld as permissible under the Anti-Aid Amendment,¹²⁹ as have laws requiring local school committees to provide transportation for students attending private schools in fulfillment of compulsory attendance laws.¹³⁰

A practical limitation on the application of these cases is that they involve services ancillary to the function of education itself, namely, transportation, or which affect only a subset of a school's overall student population—special needs children. Under the laws of most states,

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the process of closing a failing public school entirely (other than charter schools, which must periodically obtain renewal of their right to operate) is long, difficult and often inconclusive.¹³¹ In Massachusetts, an extraordinary intervention in the public schools of Chelsea—a low-income suburb to the north of Boston—designed to reform that city’s chronically underperforming school system survived a challenge under the Anti-Aid Amendment because the legislature and the Governor approved the private institution that was retained to manage the city’s schools.¹³² A state’s ability to contract with a third party to manage and operate an elementary or secondary school in its entirety may thus require general or special legislation even where case law approves the delegation of limited or ancillary educational functions as not in violation of a Blaine Amendment.

[L]aws authorizing payments to private schools to educate special needs children have been upheld as permissible under the Anti-Aid Amendment.

In the absence of special legislation such as that which authorized the management of the Chelsea schools by a private entity,¹³³ or a permanent regulatory framework by which public schools may be placed under private management in a manner consistent with a Blaine Amendment, competition between public and private providers of elementary and secondary education will remain rare. This aspect of the American public school system makes it an exception among the numerous services purchased by our cities and states and provided to the public, and clashes with a basic principle of good government; namely, that public entities are best served when they can procure goods and services from multiple vendors, rather than a sole source.¹³⁴

In states whose laws require competitive bidding as a condition to the purchase of public services, but which do not expressly exclude elementary and secondary education, the case can be made that local school districts and state-funded education programs should be opened up to competition, and not procured on unfavorable terms from a sole source.¹³⁵

[P]ublic entities are best served when they can procure goods and services from multiple vendors, rather than a sole source.

E. The International Consensus

In recent years, the United States Supreme Court has looked beyond the laws of America to the “values we share with a wider civilization” to decide cases involving controversial social issues.¹³⁶ It has not yet done so in the realm of parental choice in education, however, even though a parental right to guide a child’s free education is included in the United Nations’ Declaration of the Rights of the Child,¹³⁷ and is recognized in a number of countries. In France, for example, parochial schools qualify for a variety of subsidies in recognition of the belief that “effectiveness, freedom, justice and democracy” can be enhanced by “a system of diversity and choice in education.”¹³⁸ In the Netherlands, a system of differentiated schooling characterized by religious diversity and parental choice results in a large number of children attending both Protestant and Catholic schools at state expense; a multitude of educational providers is thought to provide a sounder footing for the state by providing multiple pillars of support, or “verzuiling,”¹³⁹ recalling Edward Gibbon’s comment that, to the magistrates of the Roman world, all forms of worship were equally useful.¹⁴⁰ Until the United States Supreme Court faces the question whether

a parental right to direct a child's compulsory education is limited to the fixed route of the public school to which he or she is consigned by the accidents of birth and wealth, we will not know whether the Justices' openness to foreign influences is selective or general.

IV. Conclusion: The Social Benefits of Educational and Religious Diversity

We encourage competition in the marketplace for both public and private services because of the belief, at least as old as Adam Smith, that it produces better results. "Monopoly," he wrote, "is a great enemy to good management, which can never be universally established but in consequence of that free and universal competition which forces everybody to have recourse to it for the sake of self-defence."¹⁴¹ In other words, a multiplicity of vendors who compete with each other is more likely to produce satisfactory products and services than a single provider who, by legal means or economic strength, can achieve a monopoly. We honor this principle in the private sector with anti-trust laws, and in the public sector with competitive bidding statutes—except in the realm of education.

In the case of elementary and secondary education, the existence of alternative school systems supported by parents and religious denominations, such as those operated by Catholics, Baptists, and Seventh-day Adventists, has served to keep government-funded public schools honest. There is no aspect of K-12 education where the value of this religious diversity is more readily apparent than the sad history of racial segregation in public schools.

Until the 1954 United States Supreme Court Decision in *Brown v. Board of Education of Topeka*, the delivery of public education

to African-Americans was governed by the principle that racially segregated schools for blacks were permissible under the "separate but equal" doctrine announced in the case of *Plessy v. Ferguson*.¹⁴² The *Brown* decision did not end segregation in America's public school, either immediately or "with all deliberate speed", the phrase the Court used to describe the pace at which the process of desegregation should proceed. The schools of Boston, for example, were not found to be desegregated in compliance with *Brown* until a third of a century later, in 1987.

Among the principles that have been subordinated to educational uniformity along the way are the right of parents to direct the education of their children, and the right of minorities to receive an adequate education in exchange for their tax dollars.

American Catholic schools, by contrast, integrated much earlier—voluntarily and peacefully. Following the principle first announced in the 16th century at the Council of Trent that parishes should serve all who lived within their boundaries regardless of nationality, race or ethnicity, American Catholic schools were racially integrated even in urban neighborhoods that were ethnically homogenous and culturally insular long before white public schools were forced to do so by lengthy litigation, and in the face of sometimes violent resistance.¹⁴³ In opposition to the neutral but hard-hearted doctrine of "separate but equal," the Catholic schools interposed the notion that all children, regardless of their color, are created in the image and likeness of God.

In other words, just as the rain forests of South America serve as the lungs of the world, producing a disproportionate share of the oxygen in the atmosphere, religious schools provide an

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alternative moral order to politically expedient doctrines such as “separate but equal” that are found in retrospect to have been deleterious to the proper functioning of a free society. Religious schools were right about educational segregation in the past; what, in future years, will we discover they’ve been right about in the present?

The nativist impulse in American public education has often worked to impose pedagogical and religious uniformity upon successive generations of primary and secondary school students, using a government-funded, sole-source provider as its instrument. Among the principles that have been subordinated to educational uniformity along the way are the right of parents to direct the education of their children, and the right of minorities to receive an adequate education in exchange for their tax dollars. The First Amendment’s Free Exercise Clause has atrophied, while its Establishment Clause has grown to be a robust arm; until the two are restored to their intended equilibrium, both parents and children will struggle in the latter’s grip.

About the Author:

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Mr. Chapman was one of the organizers of two state-wide petition drives in the late 1990s to amend the Anti-Aid Amendment to permit school choice. A case related to those petition drives, *Wirzburger v. Galvin*, was appealed to the United States Supreme Court, which declined to review it.

He is frequent contributor to the *Boston Herald* on public policy topics, and his articles have appeared in *The Atlantic Monthly*, *The Boston Globe Magazine*, and *Reason*, among others. He is the author of *The Year of the Gerbil*, a history of the 1978 Red Sox-Yankees pennant race, and *CannaCorn*, a novel to be published by Joshua Tree Publishing this year.

The author wishes to acknowledge comments provided by Professor Charles L. Glenn, Boston University School of Education, Professor William G. Howell, University of Chicago, and Professor Patrick J. Wolf, University of Arkansas, on a draft of this article, and to thank Alison Conboy for her assistance in the legal research supporting it. The views expressed and all errors herein are the sole responsibility of the author. For the record, the author is an agnostic.

About Pioneer:

Pioneer Institute is an independent, non-partisan, privately funded research organization that seeks to change the intellectual climate in the Commonwealth by supporting scholarship that challenges the “conventional wisdom” on Massachusetts public policy issues.

Endnotes

¹ Bernard Bailyn, *Education in the Formation of American Society*, (New York, W.W. Norton, 1972), 11.

² As a nineteenth century anti-Catholic put it, “the real education of a people is its religion; beside it all other teaching is as nothing.” Edgar Quinet, *The Religious Revolution of the Nineteenth Century* (Whitefish: Kessinger, 1881), 26.

³ 98 U.S. 145, 162-63 (1879).

⁴ MASS. CONST. pt . 2, ch. II, §1 art. 2; id. at pt .2, ch. II, §2, art. 1. The religious qualification appears in the current text of the Massachusetts Constitution, although it has been superseded by amendments, article VII.

⁵ MASS. CONST. pt 1, art. 3.

⁶ The cited provision of the Massachusetts Constitution went on to allow individuals to apply moneys paid “to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instruction he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.” *Id.* Thus, a religious taxpayer had some freedom to divert monies that would otherwise be used to support Protestant teachers of a sect or denomination of which he was not an adherent to those who provided instruction in his faith. A non-religious taxpayer apparently had no such right, and moneys raised from such individuals went by default to teachers of established denomination, the Congregational Church.

⁷ *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 9 (1947).

⁸ Merrill D. Peterson, *Thomas Jefferson: Writings* (New York: The Library of America, 1984), p. 1491 [hereinafter *Jefferson*] (Letter from Thomas Jefferson to Major John Cartwright, June 5, 1824).

⁹ U. S. CONST. amend. I.

¹⁰ *Jefferson* at 1501 (Letter from Thomas Jefferson to Henry Lee, May 8, 1825).

¹¹ *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

¹² U.S. CONST. amend. XIV.

¹³ *Gitlow v. New York*, 268 U.S. 652 (1925), is generally considered the first case to so hold. A prior Supreme Court case, *United States v. Cruikshank*, 92 U.S. 542 (1875), had held to the contrary. *See also, Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

¹⁴ See, e.g., the Preamble to the Massachusetts Constitution, which expressly acknowledges a supreme being as “the great Legislator of the universe; Part the First, Art. II, which provides that it is “the right as well as the duty of all men . . . to worship the SUPREME BEING”. The government of Massachusetts subsumed an established religion from its inception; before the first meeting of the General Court in October of 1630 in Boston, a predecessor body, the Court of Assistants, had provided that “ministers should be mayntayned,” and it “was ordered that houses should be built for them with convenient speede, att the publique charge.” Darren Staloff, *The Making of an American Thinking Class* (New York: Oxford University Press, 1998), p. 18.

¹⁵ Jeff Broadwater, *George Mason: Forgotten Founder* (Chapel Hill: The University of North Carolina Press, 2006), p. 119 [hereinafter *Broadwater*].

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¹⁶ *Id.* at 122.

¹⁷ *Jefferson*, 34.

¹⁸ *Broadwater*, 105.

¹⁹ *Id.* at 258, citing P. Slaughter, *The History of Truro Parish in Virginia* (Philadelphia: George W. Jacobs & Company, Publishers), 143-150.

²⁰ *Id.* at 281 (R. Rutland, *George Mason and the War for Independence* (Williamsburg: Virginia Independence Bicentennial Commission, 57); R. Rutland, *Mason: Reluctant Statesman* (Baton Rouge: Louisiana State University Press), 68-69.

²¹ *Id.* at 119-123.

²² *Jefferson*, 510 (Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association in the State of Connecticut, January 1, 1802).

²³ *Id.* at 477 (Thomas Jefferson, extract from the Minutes of the Board of Visitors, University of Virginia, 1822-1825, Report to the President and Directors of the Literary Fund).

²⁴ *Id.* In a subsequent letter to Dr. Thomas Cooper, Jefferson indicated that the proposed arrangement preserved the various sects' "independence of us and of each other," and would "soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality." *Jefferson*, 1465.

²⁵ Oscar Handlin, *Boston's Immigrants, 1790-1880: A Study in Acculturation* (Cambridge: The Belknap Press of Harvard University Press, 1991), 26 [hereinafter, *Handlin*]. During the period from 1815-1860, the total number of immigrants admitted to the U.S. was approximately five million. See generally *Reports of the Immigration Commission, U.S. Government Printing Office*, 1911.

²⁶ *Id.* at 30-37.

²⁷ *Handlin*, 43 (citing George O'Brien, *Economic History of Ireland in the Eighteenth Century* (Dublin, 1918), 102).

²⁸ *Id.* at 37-43.

²⁹ *Id.* at 51-56.

³⁰ *Id.* at 70.

³¹ *Id.* at 59 (citing Benevolent Fraternity of Churches, Fourteenth Annual Report (Boston 1848), 23-24).

³² See, for a contemporaneous instance of English anti-Catholicism, the description of the 1840 "Gordon riots" in Edmund Wilson's *The Wound and the Bow*: "The immediate occasion for the Gordon riots had been a protest against a bill which was to remove from the English Catholics such penalties and disabilities as the sentence of life imprisonment for priests who should educate children as Catholics and the disqualifications of Catholics from inheriting property." Churches and houses were "burnt wholesale, the prisons of London broken open, and even the Bank of England attacked." Edmund Wilson, *Literary Essays and Reviews of the 1930s & 40s* (New York: Library of America, 2007), 286.

³³ See, e.g., Asa Greene, *The Life and Adventures of Dr. Dodimus Duckworth* (New York: Peter Hill, 1833).

³⁴ See, e.g., Joshua Coffin, *A Sketch of the History of Newbury, Newburyport, and West Newbury* (Boston: Samuel G. Drake, 1845), 249-51. The connection between Guy Fawkes Night, which celebrates the foiling of a Catholic plot to set off a bomb in Parliament and kill England's Protestant aristocracy, and anti-Catholicism in America is expressed by the following piece of doggerel, which boys would

chant as they wheeled the Pope's effigy from house to house, importunately "begging" for money in the manner of current-day Halloween trick-or-treaters:

"The fifth of November,
As you well remember,
Was gunpowder treason and plot;
I know of no reason
Why the gunpowder treason,
Should ever be forgot. . . .
Here is the pope that we have got,
The whole promoter of the plot.
We'll stick a pitchfork in his back,
And throw him in the fire."

³⁵ "Changing Times at Harvard", Thomas H. O'Connor, *The Boston Globe*, August 16, 1999.

³⁶ Thomas H. O'Connor, *The Boston Irish: A Political History* (Boston: Northeastern University Press, 1995), 75 [hereinafter, *O'Connor*].

³⁷ *Handlin*, 201.

³⁸ John R. Mulkern, *The Know-Nothing Party in Massachusetts: The Rise and Fall of a Peoples Movement* (Boston: Northeastern University Press, 1990), 67 [hereinafter, *Mulkern*].

³⁹ Lloyd P. Jorgensen, *The State and the Non-Public School, 1825-1925* (Columbia: University of Missouri Press, 1987), 88.

⁴⁰ *O'Connor*, 80 (citing W.G. Bean, *Party Transformation in Massachusetts, with Special Reference to the Antecedents of Republicanism, 1848-1860* (1922) (Ph.D. dissertation, Harvard University), 293.

⁴¹ MASS. CONST. amend. XVIII, *amended by* MASS. CONST. amend. XLVI, *subsequently amended by* MASS. CONST. amend. CIII.

⁴² MASS. CONST. pt. 1, art III. "[T]he legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, . . . for the support and maintenance of public Protestant teachers of piety, religion and morality . . . And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination." *Id.*

⁴³ *Handlin*, 168, (citing Official Catholic Yearbook, 1928, 407). The Archdiocese of Boston did not do so until 1884, when Archbishop John Williams announced that he would establish a separate parochial school system that would compete with the Protestant schools of Boston. *Id.*

⁴⁴ David O'Brien, *Public Catholicism: Bicentennial History of the Catholic Church in America* (New York: Macmillan Publishing Company, 1989), 47.

⁴⁵ *Official Report of the Debates and Proceedings in The State Convention Assembled May 4, 1853 to Revise and Amend the Constitution of the Commonwealth of Massachusetts* (Boston: White & Potter, 1853), 615 (Debate of B. F. Hallett of Wilbraham) [hereinafter *1853 Debates*].

⁴⁶ Debates in the Massachusetts Constitutional Convention 1917-1919 (Boston: Wright & Potter Printing Co.), 90 [hereinafter *1917 Debates*] (Debate of John W. Cummings of Fall River).

⁴⁷ *1853 Debates*, 158 (Debate of Charles W. Upham of Salem). For a judicial discussion of the basis on which Catholics find the Protestant Bible to be offensive, *see* *State ex rel. Finger v. Weedman*, 226 N.W. 348, 351 (S.D. 1929). "The King James version [of the Bible] is a

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translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as ‘that man of sin.’” *Id.*

⁴⁸ *1853 Debates*, 621 (Debate of Benjamin F. Butler of Lowell).

⁴⁹ *Id.* at 622 (Debate of George S. Ball of Upton).

⁵⁰ “The Catholics are increasing very fast.” *Id.* at 546 (Debate of Robert Rantoul of Beverly).

⁵¹ *Handlin*, 167.

⁵² *1917 Debates*, 107, 186-7 (Debate of Horace I. Bartlett of Newburyport).

⁵³ The precise sum was calculated at \$10,133,159.40. *Id.* at 86.

⁵⁴ J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families*, (New York: Random House, 1986), 58.

⁵⁵ The A.P.A. took the position that a Catholic, holding allegiance to the Pope, could not be a good American citizen. *1917 Debates*, 78.

⁵⁶ *O'Connor*, 152, 153.

⁵⁷ Opinion of the Justices to the Senate and the House of Representatives, 214 Mass. 599 (1913). In the same opinion, three of seven justices took the position that the Anti-Aid Amendment did not prohibit appropriations in aid of churches or religious denominations. *Id.*

⁵⁸ See *1917 Debates*, 354 (Debate of Martin Lomasney of Boston: “Minute men went through the State before the next election and the issue under cover was: ‘These men voted with the Catholics . . . and many good men were defeated for no other reason’”).

⁵⁹ The so-called “anti-sectarian” amendment was first introduced in the Constitutional Convention of 1900, the year after a \$10,000 was made to Carney Hospital, Catholic institution, sparking protests by Protestants. During the period from 1860 to 1917, \$37,951,000 in appropriations had been made for the benefit of non-Catholic, primarily Protestant institutions. The “anti-sectarian” amendment failed in 1900, and was re-introduced in subsequent years without success until the Constitutional Convention of 1917-18, called after David Ignatius Walsh became the first Roman Catholic governor of Massachusetts. The anti-sectarian measure passed in that Convention after it received a favorable report from the Committee on Constitutional Amendments, which was appointed by members of a third party, the Progressives, in a compromise with Republicans. *1917 Debates*, 184-185.

⁶⁰ *Id.* at 212 (Debate of John W. Cummings of Fall River).

⁶¹ *Id.* at 211 (Debate of John W. Cummings of Fall River).

⁶² MASS. CONST. amend. XVIII, *amended by* MASS. CONST. amend. XLVI, *subsequently amended by* MASS. CONST. amend. CIII. Exceptions including the Soldiers’ Home, free public libraries, and conditional obligations to the Massachusetts Institute of Technology and The Worcester Polytechnic Institute, which had been incurred pursuant to chapter 78 of the Resolves of 1911. *1917 Debates*, 120.

⁶³ Nine members of the committee were Protestant; four were Catholic; one was Jewish, and one was agnostic. *Id.* at 221.

⁶⁴ *Id.* at 250 (Debate of former Attorney General Pillsbury of Wellesley).

⁶⁵ *Id.* at 160 (Debate of Frederick L. Anderson of Newton).

⁶⁶ *Id.* at 209 (Debate of John W. Cummings of Fall River); *Id.* at 44 (The text Delegate Anderson's alternative amendment).

⁶⁷ *An Unworthy Compromise*, *The Pilot*, Sept. 22, 1917, at 1.

⁶⁸ *1917 Debates*, 92 (Debate of John W. Cummings of Fall River).

⁶⁹ One speaker at the 1917 Constitutional Convention thought it advisable to assert that the group that had agitated for the expansion of the Anti-Aid Amendment to exclude other “sectarian” institutions was made up of “high-grade men and was “not an A.P.A. society,” *Id.* at 77 (Debate of Edwin U. Curtis of Boston).

⁷⁰ *Id.* at 130 (Debate of Martin Lomasney of Boston, quoting a Protestant named Mr. Parkman whose institution had been receiving \$50,000 a year in state aid).

⁷¹ *Id.* at 293.

⁷² 2008 MASS. ACTS ch. 182.

⁷³ *1917 Debates*, 203 (Debate of Horace I. Bartlett of Newburyport).

⁷⁴ *Id.* at 290 (Debate of Edwin U. Curtis of Boston quoting John W. Cummings of Fall River).

⁷⁵ “We may as well admit that the anti-sectarian amendment is aimed at the Catholic Church.” *Id.* at 209 (Debate of John W. Cummings of Fall River quoting Roland D. Sawyer of Ware).

⁷⁶ In 1875, Representative James G. Blaine introduced a proposed amendment to the U.S. Constitution in the House of Representatives that would have barred states from giving aid to sectarian schools; the measure passed the House 180-7 but fell four votes short of passage

in the Senate. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992).

⁷⁷ The term “Blaine Amendment” is used generally herein to refer both to such amendments and to the Anti-Aid Amendment, which predates Blaine Amendments.

⁷⁸ Charles L. Glenn, Jr., *The Myth of the Common School* (Oakland: ICS Press, 2002), 4 [hereinafter Glenn].

⁷⁹ See, e.g., *Hale v. Everett*, 53 N.H. 9, 111 (1868) (“Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants.”) (quoting Bancroft’s History U.S. 456). See also E.I.F. Williams, *The Life of Horace Mann: Educational Statesman* (New York: Macmillian, 1937), 266. The myopia of the Protestant world view was expressed tongue-in-cheek fashion by the satirical magazine The Onion in a historical spoof entitled “Citizens Are Now Free to Practice Any Form of Protestantism They Want.” http://www.theonion.com/content/news/historical_archives_citizens_are.

⁸⁰ As one Catholic legislator put it during the Constitutional Convention of 1917-18, proponents of the anti-sectarian amendment say “‘That is not sectarian, it is not offensive. . . . Nothing is ever said about your religion or anybody else’s religion. There is nothing sectarian about it.’ But I say: ‘Why my friend, that is sectarian to me; it is sectarian to my Jewish friend.’” *1917 Debates*, 187 (Debate of Joseph C. Pelletier of Boston).

⁸¹ See note 13, *supra*, and accompanying text.

⁸² U. S. CONST. amend. I.

⁸³ *Attorney General v. Sch. Comm. of Essex*, 387 Mass. 326, 332-33 (citing *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1 (1947)).

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⁸⁴ *Bd. of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

⁸⁵ *Bloom v. Sch. Comm. of Springfield*, 376 Mass. 35 (1978).

⁸⁶ MASS CONST. pt 1, art. II (“no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.”); MASS CONST. pt 1, art. III (“all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.”); MASS CONST. amend. XLVI, §1 (“No law shall be passed prohibiting the free exercise of religion.”).

⁸⁷ 530 U.S. 793 (2000).

⁸⁸ *Id.* at 828- 29 (citing Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992) (internal citations omitted).

⁸⁹ Compare *Reitman v. Mulkey*, 387 U.S. 369 (1967) (upholding the right of the State of California to invalidate a an amendment to its state constitution that encouraged racial discrimination) and *Gordon v. Lance*, 403 U.S. 1 (1971) (upholding a constitutional requirement that political subdivisions could not increase tax rates or incur bonded indebtedness without obtain the approval of 60% of voter).

⁹⁰ 517 U.S. 620 (1996).

⁹¹ *Id.* at 634.

⁹² *Id.* at 635 (citing *Dpt. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Kadrmas v.*

Dickinson Public Schools 487 U.S. 450, 462 (1988)) (emphasis in original).

⁹³ *Id.* at 633.

⁹⁴ *Theodore Roosevelt: An Autobiography*, ch. XV The Peace of Righteousness, appx B, (New York: Macmillan, 1913).

⁹⁵ *1917 Debates*, 184.

⁹⁶ MASS. CONST. art. XLVIII, pt II, §2.

⁹⁷ 517 U.S. at 633.

⁹⁸ In her concurring opinion in *Zelman v. Simmons-Harris*, Justice O’Connor noted that an inner-city parent might choose a parochial school for his or her child for reasons of safety and discipline, as well as academic superiority. 536 U.S. 639, 675 (2002).

⁹⁹ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

¹⁰⁰ U.S. CONST. amend. XIV.

¹⁰¹ *Lochner v. New York*, which struck down a New York law limiting the number of hours a baker could work each week as a violation of the “right to free contract” implicit in the Fourteenth Amendment’s due process clause, is a leading case from the early days of substantive due process jurisprudence, and gave the name to the “Lochner Era”, roughly 1890 to 1937, a period during which economic regulations were routinely overturned on substantive due process grounds. 198 U.S. 45 (1905).

¹⁰² See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that the substantive due process right to live together as a family extended to a grandmother, son and grandsons by different mothers in overturning a municipal housing ordinance that limited occupancy in a dwelling unit to parents and their children). See

also *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰³ *Graham v. Connor*, 490 U.S. 386 (1989);
United States v. Lanier, 520 U.S. 259 (1997).

¹⁰⁴ 268 U.S. 510 (1925).

¹⁰⁵ *Id.* at 534-35.

¹⁰⁶ Such as a proficiency test that a student would be required to pass in order to receive a state-issued certification of minimum educational attainment.

¹⁰⁷ 536 U.S. 639, at 676.

¹⁰⁸ 347 U.S. 483 (1954).

¹⁰⁹ *Id.* at 679-80.

¹¹⁰ *Id.* at 669 (citing *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1 (1947)).

¹¹¹ A principle of common law, expressed in Latin as “De minimis non curat lex.” *Shamir Khalif Rashad v. Massachusetts*, 10 Mass. L. Rep. 282 (1999).

¹¹² Massachusetts Department of Elementary & Secondary Education, http://finance1.doe.mass.edu/schfin/statistics/function07_sum.aspx?

¹¹³ Pope John Paul II Catholic Academy, <http://www.blessedmotherteresaschool.org/application/tuition.html>.

¹¹⁴ Malden Catholic High School’s tuition for 2008-09 was \$9,850, Catholic Memorial High School’s tuition for that school year was \$12,175. <http://www.maldencatholic.org/s/22/malden.aspx?sid=22&gid=1&pgid=1132>; <http://www.catholičmemorial.org/index.php?base=/mainoffice/admissions>. The lack of economic injury resulting from the increasing cost of public education as compared to parochial school tuition may over time undermine

plaintiff’s standing to complain of state programs to assist parents of parochial school students.

¹¹⁵ *Attorney General v. Sch. Comm. of Essex*, 387 Mass. 326, 332-33 (1982).

¹¹⁶ U.S. CONST. art. VI, cl. 2.

¹¹⁷ 536 U.S. 639, 657 (2002). Ohio’s constitution includes a Blaine amendment, but it is phrased as a prohibition on the exclusive control of any one religion to state school funds, rather than a prohibition against the grant of any funds to a religious school. OHIO CONST. art. 6, §2 (“no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state”).

¹¹⁸ 536 U.S. at 648.

¹¹⁹ 347 U.S. 483 (1954).

¹²⁰ 305 U.S. 337 (1938).

¹²¹ Massachusetts was the first state to enact a compulsory school attendance law in 1852. Prior to that time, the Massachusetts General Court had passed a law in 1647 that required every town to create and operate a grammar school. Fines were imposed on parents who did not send their children to school and children could be removed from their home and apprenticed to others if government officials found the parents “unfit to have the children educated properly”. Murray N. Rothbard *Conceived in Liberty Vol I: The Puritans “Purify”: Theocracy in Massachusetts* (New York: Arlington House Publishers, 1975).

¹²² See note 42, *supra*, and accompanying text.

¹²³ See note 80, *supra*, and accompanying text.

¹²⁴ *Zelman*, 536 U.S. at 649.

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¹²⁵ U.S. CONST. art. VI, cl. 2.

¹²⁶ During his campaign to become governor of Alabama in 1962, George Wallace told audiences that if the federal government sought to integrate Alabama's schools, "I shall refuse to abide by any such illegal federal court order even to the point of standing in the schoolhouse door." After he was elected, Wallace blocked the enrollment of African-American students at the University of Alabama in 1963 by following through on this threat. *See* <http://www.spartacus-schoolnet.co.uk/USAwallaceG.htm>.

¹²⁷ Higher Education Act of 1965, as amended, 105 P.L. 244.

¹²⁸ *See* 2008 MASS. ACTS ch. 182 (An example of payments made under a contract, line item 4510-0810, providing for contractual payments in the amount of \$3,623,068 to the Massachusetts Children's Alliance for a statewide sexual assault nurse examiner program and pediatric sexual assault nurse examiner program for the care of victims of sexual assault.).

¹²⁹ *Commonwealth v. Sch. Comm. of Springfield*, 382 Mass. 665 (1981).

¹³⁰ *Attorney General v. Sch. Comm. of Essex*, 387 Mass. 326 (1982).

¹³¹ *See, e.g.*, 603 MASS CODE REGS. 2.03 (2008), which creates a mechanism for intervention by the Board of Education in the case of under-performing schools. In order to be declared a "Commonwealth Priority School," a school must fail to make "adequate yearly progress" (as defined in the federal "No Child Left Behind Act", 107 P.L. 110) for four or more years. A school that is so designated may seek reconsideration, and no intervention may be commenced while a request for reconsideration is pending. After self-assessment by the school and fact-finding by the Department

of Elementary and Secondary Education, the school superintendent (or head of school in the case of a charter school), is required to submit a school improvement plan within six months after being declared a Commonwealth Priority School or a "Chronically Underperforming School." Such a school improvement must include performance expectations for raising school-wide adequate yearly progress standards within two years. In other words, the failure of an underperforming public school can continue for more than six years before it is held accountable.).

¹³² *Fifty-One Hispanic Residents of Chelsea v. Sch. Comm. of Chelsea*, 421 Mass. 598 (1996).

¹³³ 1989 MASS. ACTS ch. 133, §2.

¹³⁴ *See, e.g.*, MASS. GEN. LAWS ch. 30B, §1(a) (2008) (The Massachusetts law governing the purchase of goods and services by governmental bodies: "This chapter shall apply to every contract for the procurement of supplies, services or real property," with stated exceptions.).

¹³⁵ Unions are legal monopolies because they are exempt from antitrust laws; the Clayton Act amended federal labor laws to provide that the labor of a human being is not a commodity or article of commerce subject to prohibitions on monopolies in restraint of trade, 15 U.S.C. §17 (2007).

¹³⁶ *Lawrence v. Texas*, 539 U.S. 558, 576-577 (2003).

¹³⁷ *See, e.g.*, G.A. Res. ¶7, 1386 (XIV) (Nov. 20, 1959) (United Nations Declaration of the Rights of the Child, General Assembly resolution). "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of

equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.” *Id.*

¹³⁸ Charles L. Glenn, *The Myth of the Common School* (Oakland, ICS Press, 2002), 270 (quoting Alain Madelin, *Pour libérer l’école: L’enseignement à la carte* (Paris: Laffont, 1984), 176).

¹³⁹ *Id.* It should be noted, however, that Dutch religious schools that accept students at public expense must conform their curriculum to government standards and agree to hire union teachers. See *Educating Citizens: International Perspectives on Civic Values and School Choice* (D. Ferrero, S. Macedo, C. Venegoni and P. Wolf, eds.) (Washington, D.C., Brookings Institution Press, 2004).

¹⁴⁰ Edward Gibbon, *The Decline and Fall of the Roman Empire* (New York, Alfred A. Knopf, Inc., 1993).

¹⁴¹ Adam Smith, *The Wealth of Nations* (Chicago: The University of Chicago Press, 1976), 165.

¹⁴² 163 U.S. 537 (1896).

¹⁴³ John T. McGreevey, *Parish Boundaries: The Catholic Encounter With Race in the Twentieth Century Urban North* (Chicago: University of Chicago Press, 1998), 11. But cf. Bentley Anderson, S.J., *Black, White and Catholic New Orleans Interracialism, 1947-1956* (Nashville: Vanderbilt University Press, 2005). The author entered first grade in a racially integrated Catholic school in Missouri in 1957, a time when public schools locally and nationally had for the most part not yet been desegregated, most

notoriously in the case of Little Rock, Arkansas, where racial integration was achieved only with federal intervention in the fall of that year. See “Retreat from Newport,” *Time*, September 23, 1957, and “Case No. 3113” *Time*, September 30, 1957.

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