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# A POLITICAL HISTORY OF THE ESTABLISHMENT CLAUSE

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Now pending before the Supreme Court is the most important church-state issue of our time: whether publicly funded vouchers may be used at private, religious schools without violating the Establishment Clause.<sup>1</sup> The last time the Court considered school aid, it overruled precedent and upheld a government program providing computers and other instructional materials to parochial schools.<sup>2</sup> In a plurality opinion defending that result, Justice Thomas dismissed as irrelevant the fact that some aid recipients were “pervasively sectarian.”<sup>3</sup> That label, said Thomas, had a “shameful pedigree.”<sup>4</sup> He traced it to the Blaine Amendment, proposed in 1875, which would have altered the Constitution to ban aid to sectarian institutions. At the time, “it was an open secret that ‘sectarian’ was code for ‘Catholic.’”<sup>5</sup> Of course, said Thomas, the word *could* describe schools of other religions, but the Court “eliminated this possibility of confusion” by coining the phrase “pervasively sectarian” — a term applicable almost ex-

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\*\* Associate Professor, University of Virginia School of Law. B.A. 1988, Yale; J.D. 1992, University of Virginia. — Ed. We are grateful for the comments of Vince Blasi, Barry Cushman, Kim Forde-Mazrui, Michael Klarman, Douglas Laycock, Daryl Levinson, Elizabeth Magill, William Lee Miller, and participants in workshops at the University of Virginia and the University of California, Davis. Carter Burwell, Charles Marr, Elizabeth Polzin, and Matt Traupman provided valuable research assistance, as did the staff of the University of Virginia Law School Library.

1. *Zelman v. Simmons-Harris*, No. 00-1751, 2001 WL 576235 (U.S. Sept. 25, 2001).

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

3. The phrase originated in *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (noting that none of the four colleges allowed to receive federal aid in *Tilton v. Richardson* was “pervasively sectarian”). Reliance on this factor can be seen, for example, in *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (explaining that a factor in determining whether aid has the impermissible effect of advancing religion is “whether, and to what extent, the statute directs government aid to pervasively sectarian institutions”); *Aguilar v. Felton*, 473 U.S. 402, 412 (1985) (striking down a program because aid was provided “in a pervasively sectarian environment”); and *Lemon v. Kurtzman*, 403 U.S. 602, 636-37 (1971) (“A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.”).

4. *Mitchell*, 530 U.S. at 828.

5. *Id.*

clusively to Catholic parochial schools.<sup>6</sup> The exclusion of “pervasively sectarian” schools from otherwise permissible aid to education was, Thomas concluded, not a neutral interpretation of constitutional command but a doctrine “born of bigotry.”<sup>7</sup>

Justice Thomas did not attack the ban against aid to “pervasively sectarian” schools merely as a misunderstanding of text or original intent. He charged, rather, that the hostility to “pervasively sectarian” institutions reflected political conflict and popular prejudice. This is not the usual stuff of Supreme Court debate. Perhaps for that reason, Justice Souter’s dissent did not so much answer the accusation as make fun of it, noting only that some “pervasively sectarian” schools are not Catholic and that some Catholics oppose school aid.<sup>8</sup> Nevertheless, Thomas’s account is at least partly true. The constitutional disfavor of “pervasively sectarian” institutions is indeed a doctrine born, if not of bigotry, at least of a highly partisan understanding of laws “respecting an establishment of religion.”<sup>9</sup> The first and narrowest ambition of this Article is to document that assertion.

More broadly and more importantly, we contend that the entire body of Establishment Clause jurisprudence can profitably be viewed from a political perspective. The title of the Article signals the intent. We analyze Establishment Clause decisions *as if they were* political. More fully, we analyze Establishment Clause decisions *as if they were* products of political contests among various interest groups, both religious and secular, with competing positions on the proper relation of church and state. The “as if they were” qualification is important, as we do not claim that the justices thought of themselves as political actors, still less as representatives of religious interests, or that they consciously desired to conscript the Constitution to such ends. On the contrary, we believe that many justices would be shocked by this description of their work and would protest, in all sincerity, that they tried to elucidate, without favoritism or prejudice, the principles that they understood to be enshrined in the First Amendment. We accept that representation completely. But it requires no flight of imagination to believe that the justices’ views of what the Constitution *should* mean powerfully inform their views of what it *does* mean, and that normative beliefs often reflect prevailing attitudes. In this Article, we

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6. *Id.* at 828-29.

7. *Id.* at 829.

8. *Id.* at 912-13 (Souter, J., dissenting) (“The plurality nonetheless condemns any enquiry into the pervasiveness of doctrinal content as a remnant of anti-Catholic bigotry (as if evangelical Protestant schools and Orthodox Jewish yeshivas were never pervasively sectarian), and it equates a refusal to aid religious schools with hostility to religion (as if aid to religious teaching were not opposed in this very case by at least one religious respondent [a Roman Catholic]). . . .”) (footnotes omitted).

9. U.S. CONST. amend. I.

assume that mechanisms exist by which political ideology and dominant attitudes find their way (after the generational delay occasioned by age and longevity of the justices) to the Supreme Court. We make no effort to probe the subjective motivations of individual justices. Instead, we aim to reveal the correspondences between constitutional doctrine and popular sentiment in the area of church-state relations. Put crudely, this is an exercise in *post hoc, ergo propter hoc*, which is famous as a fallacy only because it is so often true.

Looking at the Establishment Clause in this way yields a more complete and coherent account of modern constitutional doctrine than can be derived from the conventional sources of text, history, and structure. Indeed, one good reason to analyze the Establishment Clause in this way is the lack of plausible alternatives. Whatever the modern decisions may be thought to represent, whether for good or ill, they cannot persuasively be attributed to original understanding, except perhaps at a level of generality largely devoid of meaning. They do not derive from the “intent of the Framers” or from any “constitutional moment,”<sup>10</sup> such as the Civil War, that might be thought to have replaced the original understanding. In terms of the conventional sources of “legitimacy” in constitutional interpretation, the Supreme Court’s Establishment Clause decisions are at least very venturesome, if not completely rootless. It makes sense, therefore, to look at establishment cases as the products of a subconstitutional — which is to say, political — contest among religious and secular interests with (often self-serving) ideological commitments on separation of church and state.

To preview the argument briefly, the modern Establishment Clause dates not from the founding but from the mid-twentieth century. At that time, the Supreme Court adopted a rhetoric of radical separation of church and state. That rhetoric had as its defining application and chief consequence a constitutional ban against aid to religious schools. Later, the Court also moved to purge religious observances from public education. These two propositions — that public aid should not go to religious schools and that public schools should not be religious — make up the separationist position of the modern Establishment Clause.

We begin with the ban against aid to religious schools. The modern no-aid position drew support from a broad coalition of separationist opinion. Most visible was the pervasive secularism that came to dominate American public life, especially among educated elites, a secularism that does not so much deny religious belief as seek to confine it to a private sphere. This public secularism appears on the face of Supreme Court opinions and is deeply embedded in Establishment

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10. BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 409 (1998).

Clause doctrine. Additionally, the ban against aid to religious schools was supported by the great bulk of the Protestant faithful. With few exceptions, Protestant denominations, churches, and believers vigorously opposed aid to religious schools. For many Protestant denominations, this position followed naturally from the circumstances of their founding. It was strongly reinforced, however, by hostility to Roman Catholics and the challenge they posed to the Protestant hegemony, which prevailed throughout the nineteenth and early twentieth centuries. In its political origins and constituencies, the ban against aid to religious schools aimed not only to prevent an establishment of religion but also to maintain one.

Today, much has changed. Anti-Catholic animosity has faded, and the crucial alliance between public secularists and Protestant believers has collapsed. Public secularists, whose devotion to public schools has declined in recent decades, now divide over the question of funding religious alternatives. More importantly, so do the Protestant faithful. While mainline Protestant denominations continue to demand strict separation of church and state, fundamentalist and evangelical opinion has largely deserted that position.<sup>11</sup> Today, fundamentalists and evangelicals have moved from the most uncompromising opponents of aid to parochial schools to its unlikely allies.

In origin, this about-face had less to do with theology than with politics and self-interest. The defection of fundamentalist and evangelical opinion from the separationist coalition flowed initially from their embrace of the private schools that sprang up throughout the South (and elsewhere) in the wake of court-ordered desegregation. Originally, these schools were secular. They were created purely and simply to escape integration. Most of them, however, were soon trans-

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11. By "mainline" Protestants, we refer chiefly to Episcopalians, Methodists, Presbyterians, and most Baptists until the 1980s, when fundamentalists gained control of the Southern Baptist Convention. See *infra* text accompanying notes 397-415. *Fundamentalists* and *evangelicals* refer generally to those who share a core set of beliefs that include faith in Jesus Christ as their personal savior; the need for a conversion in order to be saved; and the need to proselytize. Evangelicals also regard the Bible as an infallible source of religious authority, and for some, this means interpreting the Bible literally. Most, but not all, evangelicals are conservative. Fundamentalists, a strictly conservative subset of evangelicals, also believe in the literal truth of the Bible, including belief in the devil, miracles, and hell. They also (or at least used to) adhere to the Biblical command from 2 Corinthians 6:17 to "come out from among them and be ye separate." For a particularly insightful description of fundamentalists and evangelicals that captures the complexity of both movements, see GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* 1-6 (1991). For additional discussions of fundamentalists and evangelicals, see ROBERT BOOTH FOWLER ET AL., *RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE AND STRATEGIC CHOICES* 37-41 (2d ed. 1999) [hereinafter FOWLER ET AL., *RELIGION AND POLITICS*]; GODFREY HODGSON, *THE WORLD TURNED RIGHTSIDE UP: A HISTORY OF THE CONSERVATIVE ASCENDANCY IN AMERICA* 159-61 (1996) [hereinafter HODGSON, *CONSERVATIVE ASCENDANCY*]; and A. James Reichley, *The Evangelical and Fundamentalist Revolt, in PIETY AND POLITICS: EVANGELICALS AND FUNDAMENTALISTS CONFRONT THE WORLD* 72 (Richard J. Neuhaus & Michael Cromartie eds., 1987).

formed into, or succeeded by, Christian academies specializing in faith-based education. Today, virtually all of these schools say that they practice nondiscrimination, and many — perhaps most — enroll African-American students. Nonetheless, private academies remain havens for whites seeking to avoid minority status in public school systems dominated by persons of color.

Additionally, Christian academies are energized by antipathy to the triumphant secularism of public education and by the desire to maintain or recreate in the private sphere the unselfconscious Protestant establishment that once dominated public life. Allegiance to these schools and sympathy for the financial burden that they place on devout parents have moved many fundamentalist and evangelical Christians to rethink their traditional opposition to aid to religious schools. As a consequence, strict separationism is opposed today by true believers of many faiths, not just Roman Catholics (and a few other sects with a history of religious schools), but also by the nation's largest Protestant denomination (Southern Baptists) and by the great weight of opinion among the variety of churches called fundamentalist or evangelical.

Against this new coalition, we predict, the constitutional barrier against financial support of religious schools will not long stand. We see the current judicial uncertainty on this subject not merely as a continuation of the blurred and shifting margins that have plagued the field for years, but as a crack that goes to the core. We see the Court and the nation in the midst of a sea-change that ultimately will contradict past practice as clearly and fully as *Brown* rejected *Plessy*. This prediction does not depend (except in timing) on a guess about future appointments to the Supreme Court. It arises rather from the current realignment of the political forces historically arrayed against constitutional toleration of aid to religious institutions. Old coalitions have collapsed, and new alliances are demanding change. We think it likely that the emerging political combination in favor of government aid to religious education will prove, sooner or later, to be irresistible.

We do not, however, foresee an end to secularism in public education. In contrast to the political revolution on school aid, no new coalition has formed to overturn the Court's decisions outlawing school prayer and Bible reading. Religious exercises in public schools are endorsed today, as they were forty years ago, by the Catholic leadership and by conservative evangelicals and fundamentalists. They are opposed today, as they were forty years ago, by public secularists, main-line Protestant clergy, and most Jews. Moreover, increasing religious pluralism reinforces the secularist position. While the growing religious diversity of private schools makes government funding seem more "neutral" and hence more acceptable, the growing religious diversity of public school students makes it more and more difficult to envision any religious exercise that would not favor some faiths and

offend others. We therefore predict that the constitutional prohibition against religious exercises in the public schools will remain intact.

The argument proceeds in three stages. Part I describes the two policies that have dominated the modern Establishment Clause. Part II places those doctrines in historical context. It traces the political antecedents of the separationist policies and identifies the constituencies of their support. Part III addresses the current instability in Establishment Clause doctrine and analyzes the underlying realignment of political forces that are now deploying in favor of radical change.

The reader will notice in the pages that follow the little heed paid to the internal structure and logic of Establishment Clause decisions. That does not mean that we think such questions unimportant. We do not doubt that precedents matter or that reason and doctrinal analysis are forces in the law. We largely ignore such matters not because they are unworthy of attention, but because they have already received sustained attention from every conceivable point of view in a literature too varied to summarize and too voluminous to cite in full.<sup>12</sup> We aim here to examine the Supreme Court's Establishment Clause decisions from an external (or political) perspective, which has not yet been done in any comprehensive manner.<sup>13</sup> We think — and hope to show — that this approach yields an explanatory and predictive account of Establishment Clause jurisprudence that is useful and informative regardless of general jurisprudential commitments on the relative autonomy of law.

## I. THE MODERN ESTABLISHMENT CLAUSE

The modern Establishment Clause dates from *Everson v. Board of Education*,<sup>14</sup> decided in 1947. In the preceding century and a half, the Supreme Court decided only two cases under that provision, and neither cast a long shadow.<sup>15</sup> *Everson*, in contrast, set the course of Establishment Clause decisions for two generations.

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12. For those interested in a sampling of this literature, see *infra* notes 64-81.

13. Michael Klarman recognized as much when he expressed bewilderment that a thorough "social and political history of the transformation of Establishment Clause doctrine" had yet to be written. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 47 (1996) [hereinafter Klarman, *Rethinking the Revolutions*]. This Article responds to that invitation.

14. 330 U.S. 1 (1947).

15. See *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (upholding federal administration of an Indian trust fund that used tribal money to support education of Native Americans at sectarian schools); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding federal appropriations for construction of new hospital wards in the District of Columbia, notwithstanding the religious affiliation of a recipient hospital). See also *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), which upheld state provision of textbooks to students in all schools, including private sectarian schools, against the claim that taxation to support that program constituted a taking of private property for a private purpose. The Establishment Clause was not mentioned, perhaps because it was not yet clear that it applied to the States.

At issue in *Everson* was the validity of a New Jersey statute authorizing school districts to provide transportation to and from public and private schools, so long as the latter were not for profit.<sup>16</sup> Pursuant to this statute, Ewing Township, which operated public schools only through the eighth grade, reimbursed parents for bus fare to and from schools in neighboring communities, including both public and Catholic parochial schools.<sup>17</sup> In many States, plaintiffs could have challenged that action under state constitutions explicitly prohibiting aid to parochial schools,<sup>18</sup> but New Jersey had no such provision. When the highest state court found no state-law problem,<sup>19</sup> the issue came to the Supreme Court for an interpretation of the federal Constitution. The justices held, five-four, that the township's action did not violate the Establishment Clause, but the division of opinion on the result proved far less consequential than the commonality of approach. Both majority and dissent agreed that the Establishment Clause bound the States to a policy of strict separation of church and state, that the policy condemned neutral support of all religions as well as favoritism of any one of them, and that, as the defining application of that policy, no tax dollars could be used to aid religious activities or institutions.<sup>20</sup>

The *Everson* Court not only ascribed to the Establishment Clause separationist content; it imagined a past to confirm that interpreta-

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See *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (regarding all clauses of the First Amendment as applicable to the States).

16. New Jersey Laws, 1941, c. 191, at 581, N.J. Stat. Cum. Supp., tit. 18, c. 14, § 8 (1937), quoted in 330 U.S. at 3 n.1.

17. In an aspect of the case that preoccupied Justice Jackson, the township resolution authorized reimbursement of bus fare to "Trenton Catholic Schools," without provision for similar treatment of other nonprofit schools. Record at 8, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). From all that appears, Trenton Catholic schools were the only nonpublic, nonprofit schools attended by township students. Certainly, no challenge was raised by anyone who wanted to go elsewhere. Nonetheless, Justice Jackson characterized the resolution as specifically and exclusively aiding students attending Catholic schools and excluding schools of other faiths. 330 U.S. at 20-21 (Jackson, J., dissenting) ("Thus, under the Act and resolution brought to us by this case, children . . . are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths."). On this interpretation, the resolution was obviously invalid.

18. The prototype was the Blaine Amendment of 1875, which failed to pass at the federal level. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38, 47-57 (1992) [hereinafter Green, *The Blaine Amendment Reconsidered*] (describing origins of the proposal). By 1890, however, twenty-nine States had incorporated similar provisions in their state constitutions, often as a condition for admission to the Union. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 672-75 (1998) [hereinafter Viteritti, *Blaine's Wake*] (describing Republican response to Senate's failure to approve the Blaine Amendment).

19. *Everson v. Bd. of Educ.*, 44 A.2d 333 (1945).

20. See *infra* notes 29-30 and accompanying text.



tion.<sup>21</sup> Both majority and dissent treated the history of the United States as if it were the history of Virginia. Despite dissimilarity of language, the justices equated the Establishment Clause with Virginia's statute on religious freedom,<sup>22</sup> thereby appropriating for the federal provision the separationist message and rhetoric of the state enactment. It was "sinful and tyrannical," wrote Jefferson, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."<sup>23</sup> To avoid that evil, "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."<sup>24</sup> This language and Madison's soaring Memorial and Remonstrance against Virginia taxation to support the Episcopal Church<sup>25</sup> provided an impressive pedigree for the separationist philosophy that *Everson* now engrafted onto the First Amendment. On the fundamental point, there was no dissent. Writing for the Court, Justice Black said that the Establishment Clause meant "at least" that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>26</sup> Speaking for the four dissenters, Justice Rutledge agreed that "the Amendment forbids any appropriation, large or small, from public funds to aid or support any

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21. "Imagine the past" comes from Sir Lewis Namier by way of Alexander Bickel. See LEWIS B. NAMIER, *CONFLICTS: STUDIES IN CONTEMPORARY HISTORY* 69-70 (1942) ("[W]hen discoursing or writing about history, [people] imagine it in terms of their own experience, and when trying to gauge the future they cite supposed analogies from the past: till, by double process of repetition, they imagine the past and remember the future."); see also ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13 (1970) (quoting Namier).

22. Virginia Bill for Religious Liberty, enacted January 19, 1786, 12 Hening, *Statutes of Virginia* 84 (1823), quoted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 12-13 (1947); see also 330 U.S. at 28 (Rutledge, J., dissenting). Both opinions focused on Virginia. See *id.* at 11-13 (detailing the "great stimulus and able leadership" provided by Virginia in arousing the "sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty"); *id.* at 33 (Rutledge, J., dissenting) (describing the "long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination") (footnote omitted).

23. The language quoted in Justice Rutledge's dissent, *Everson v. Bd. of Educ.*, 330 U.S. 1, 28 (1947), reads as follows:

Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . .

*We, the General Assembly, do enact*, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief . . .

Justice Black quoted somewhat more. *Id.* at 12-13.

24. See *id.* at 28 (Rutledge, J., dissenting) (quoting the Virginia provision).

25. 2 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 183 (1900) (quoted in its entirety in an appendix to Justice Rutledge's dissent in *Everson*, 330 U.S. at 63-72).

26. *Everson*, 330 U.S. at 16.

and all religious exercises.”<sup>27</sup> No one stumbled over the fact that the history relied on was not directly applicable. The origins and purposes of the Virginia statute were adopted for the Establishment Clause, and on that borrowed foundation, *Everson* began the modern edifice of separation of church and state.

For half a century, the Supreme Court followed *Everson*'s lead. The years 1947-1996, inclusive, provide a convenient survey of the modern Establishment Clause, both because that period covers the great majority of all Establishment Clause decisions and because it stops just short of the first clear signal of change in 1997.<sup>28</sup> From 1947 through 1996, the Court decided fifty-two cases under the Establishment Clause. More than half involved education. In six cases the Court considered — and in all six cases upheld — government aid to religiously affiliated institutions or activities in higher education.<sup>29</sup> This hands-off attitude contrasts sharply with the rigor of the twenty-six Establishment Clause cases concerning elementary and secondary education. The number of Supreme Court Establishment Clause decisions concerning elementary and secondary schools during these fifty years exceeds the total of decisions from all other sectors of society, including prisons, the military, selective service,<sup>30</sup> employment,<sup>31</sup> taxation,<sup>32</sup>

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27. *Id.* at 41.

28. See *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

29. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995) (holding, *inter alia*, that the Establishment Clause does not bar disbursement of funds from student activity fees to religious organizations); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (holding that the Establishment Clause does not bar state aid in the form of vocational assistance to a blind student seeking to become a pastor); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding, *inter alia*, that the Establishment Clause does not bar religious groups from meeting on state university property); *Roemer v. Md. Pub. Works Bd.*, 426 U.S. 736 (1976) (holding that the Establishment Clause does not bar state funding of religiously affiliated institutions of higher education); *Hunt v. McNair*, 413 U.S. 734 (1973) (holding that the Establishment Clause does not bar state issuance of revenue bonds for construction of new facilities at religiously affiliated institutions of higher education); *Tilton v. Richardson*, 403 U.S. 672 (1971) (holding that the Establishment Clause does not bar federal funding of new facilities at institutions of higher education).

30. See *Gillette v. United States*, 401 U.S. 437 (1971) (upholding statute according conscientious objector status to persons whose religious beliefs led them to oppose all war but not to persons who opposed only a particular war).

31. *E.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding civil rights act provision exempting religious organizations from prohibition on religious discrimination in employment); *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (invalidating state law that gave employees an absolute right not to work on their Sabbath).

*NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), held that the NLRB did not have jurisdiction over parochial schools, on the grounds that extending such jurisdiction would constitute an impermissible entanglement with religion. This case is included in the census of decisions dealing with elementary and secondary education.

32. *E.g.*, *Jimmy Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378 (1990) (upholding state sales tax as applied to religious articles); *Hernandez v. Comm'r*, 490 U.S. 680 (1989) (upholding IRS policy of disallowing income-tax deductions for payments made to churches for training services); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invali-

church governance,<sup>33</sup> Sunday closing laws,<sup>34</sup> zoning laws,<sup>35</sup> religious displays in public places,<sup>36</sup> public prayer in noneducational institutions,<sup>37</sup> and all the other practices that might be interpreted as government endorsement of religion.

These cases show that the strict separationism of *Everson* did not apply universally or uniformly. On the contrary, Establishment Clause invalidations coalesce around two specific themes: one that flowed directly from *Everson*, and another that *Everson* may have influenced.

The Supreme Court's first concern during this period (1947-1996) was to inhibit aid to parochial schools. In thirteen cases, the Court considered various programs that would have eased the financial burden on parents who sent their children to church schools. The Court allowed reimbursement of transportation expenses,<sup>38</sup> loan of approved textbooks,<sup>39</sup> reimbursement for the costs of state-mandated testing and record-keeping,<sup>40</sup> state income tax deductions for private-school expenses,<sup>41</sup> and provision of a sign-language interpreter for a disabled child in parochial school.<sup>42</sup> None of these programs offered much more than incidental support to church schools.<sup>43</sup> Perhaps for that reason,

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dating a state law that exempted religious periodicals from generally applicable sales tax); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) (upholding state property tax exemption for religious organizations).

33. *E.g.*, *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (disapproving state court intervention in a dispute between church and a dismissed bishop); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969) (holding that state courts cannot consider ecclesiastical doctrine in resolving property disputes arising when a local congregation secedes from its national organization).

34. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing law). The Court upheld similar provisions in companion cases decided the same day. *Gallagher v. Crown Koshers Market*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961).

35. *E.g.*, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating state law that gave schools and churches the power to prevent issuance of liquor licenses to establishments located within 500 feet of the school or church).

36. *E.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that state was not barred from granting a group's request to display a cross on the statehouse grounds); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (allowing city display of Nativity scene if accompanied by non-Christian symbols); *Lynch v. Donnelly*, 475 U.S. 668 (1984) (allowing city display of Nativity scene).

37. *E.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983) (allowing legislature to begin every session with prayer by state-paid chaplain).

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

39. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

40. *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646 (1980).

41. *Mueller v. Allen*, 463 U.S. 388 (1983).

42. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

43. The only arguable exception to this statement is *Mueller v. Allen*, 463 U.S. 388, which approved state tax deductions for parochial school tuition. If it had been extended to federal taxation, with its much higher marginal rates, deductibility of tuition would offer

they survived Supreme Court scrutiny, but just barely. Only the textbook loan program had a vote to spare; the others, like *Everson*, divided five-four. More often, the Court struck down attempts to help church schools. Specifically, the Court prohibited state supplements for the salaries of nonpublic school teachers,<sup>44</sup> tuition reimbursement,<sup>45</sup> maintenance and repair of schools serving low-income students,<sup>46</sup> reimbursement for expenses of state-mandated and nonmandated testing,<sup>47</sup> provision of school services and educational equipment,<sup>48</sup> aid for instructional materials and field trips,<sup>49</sup> and loan of public-school teachers to teach secular subjects in parochial schools (twice).<sup>50</sup>

As has often been remarked, including by the justices,<sup>51</sup> the constitutional line between the permissible and the impermissible was thin and wavering. It would take an exceptionally nimble intellect to discern the difference between transportation and textbooks, which were permitted, and field trips and instructional materials, which were not. Nevertheless, the blurred margins of the no-aid policy should not disguise its effect. *Everson* drew the line between permissible support for education and impermissible aid to religion very far to one side. None of the programs struck down in this period could convincingly be characterized as endorsing religious belief, which the Court now stresses,<sup>52</sup> and none explicitly favored one religion over another. Al-

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substantial aid for high-income taxpayers. For low- and middle-income taxpayers, deductibility of parochial school tuition would be much less valuable. It seems likely, however, that the result in *Mueller* flowed not so much from the (probably correct) perception that the aid would be insubstantial, but from the fact that settled doctrine permitted deduction of contributions directly to churches, seminaries, and religious missions. Tax deductibility of parochial school tuition could scarcely be disapproved without calling into question the entire structure of deductibility of charitable contributions. See 463 U.S. at 396 n.5 (noting that state law allowed deductions for direct contributions to religious institutions and that *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970), approved that practice).

44. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

45. *Sloan v. Lemon*, 413 U.S. 825 (1973).

46. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (also invalidating tuition reimbursement for income-qualified families).

47. *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973).

48. *Meek v. Pittenger*, 421 U.S. 349 (1975).

49. *Wolman v. Walter*, 433 U.S. 229 (1977).

50. *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

51. *E.g.*, *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (Rehnquist, J.) (“It is not at all easy, however, to apply this Court’s various decisions construing the [Establishment] Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools.”); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Burger, C.J.) (“Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”).

52. *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (“[O]ur cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.”).

though there was always a constituency, both on and off the Court, for a more nearly absolute approach, the wall of separation between government funds and church schools remained high. Legislatures searched for exceptions to the constitutional prohibition and occasionally found one, but in the main they had to live with it. The cases prohibited direct and substantial government support of religiously affiliated primary and secondary education.

The Court's second policy complemented the first. If aid to religious schools was (more or less) strictly proscribed, public schools had to be suitable for persons of all faiths. Of course, there was no way to make public schools suitable for all faiths if some of them demanded faith-based instruction, but at least public education should not play favorites. Given the increasing diversity of religious practice in America, the only way to avoid choosing sides was to remain silent. Thus, the Court's second great project in the years 1947-1996 was to make the public schools secular. In ten nonaid cases, the Court struck down laws dealing with primary and secondary education. These decisions directly promoted public secularism as an accommodation to religious pluralism. Specifically, the Court disallowed religion classes in public schools<sup>53</sup> and prohibited officially sponsored student prayer,<sup>54</sup> graduation prayer,<sup>55</sup> Bible reading,<sup>56</sup> and silent meditation.<sup>57</sup> The Court also barred display of the Ten Commandments<sup>58</sup> and struck down laws banning the teaching of evolution<sup>59</sup> and mandating the teaching of creationism.<sup>60</sup> In all these decisions, the Court severed ties between the public schools and particular religious beliefs or practices.<sup>61</sup>

Today, change is underway. Although the Court remains committed to secularism in public education and shows no signs of wavering in its hostility to school prayer,<sup>62</sup> the no-aid policy is faltering. Four

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53. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

54. *Engel v. Vitale*, 370 U.S. 421 (1962).

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

56. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

57. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating law mandating a daily minute of silence for meditation or voluntary prayer).

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

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

60. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

61. The other nonfunding invalidations involving primary or secondary education were *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (striking down a state law that created a new school district for a single religious community), and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that NLRB jurisdiction did not extend to teachers in parochial schools).

62. *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down student-initiated and student-led prayer at school-sponsored football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down officially sponsored prayer at graduation).

justices have rejected it outright and declared their willingness to approve any secular aid uniformly available to adherents of all faiths and none.<sup>63</sup> Two additional justices have chosen narrower grounds to allow some forms of aid that would have been forbidden only a few years ago.<sup>64</sup> The question is whether the recent decisions merely continue the small-scale inconsistencies that have long characterized Establishment Clause jurisprudence or whether they signal something more. As noted, we think the current uncertainty reflects a radical realignment of political opinion that is already well advanced and that is likely — sooner or later — to overturn the separationist project begun in *Everson*. This necessarily speculative claim about the future is addressed in Part III.

In Part II, we look to the past. Stated most simply, the questions we address are: Where did the modern Establishment Clause come from? What are the ideological and political antecedents of the ban on aid to religious schools? And what moved the Supreme Court to secularize public education? Though the Court attributed both policies to the Framers, we think they are better explained by modern political history. In particular, we believe, as Justice Thomas charged, that the constitutional prohibition against aid to religious schools is in some measure the sanitized residue of nativism and anti-Catholic animosity. As we hope to show, the modern Establishment Clause aligns less closely with the constitutional text and history of the framing than with the political conflict and sectarian rivalry of the more recent past. To that task we now turn.

## II. THE POLITICAL HISTORY

### A. *Pre-History*

The *Everson* Court embraced three propositions about original intent: first, that the Establishment Clause mandated a substantive policy of separation of church and state; second, that the policy condemned neutral support of all religions as well as favoritism among them; and third, that the Fourteenth Amendment extended that policy

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63. *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion) (“[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.”).

64. *Id.* at 838-39 (O’Connor, J., with whom Breyer, J., joined, concurring) (“I do not quarrel with the plurality’s recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. . . . Nevertheless, we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.”); *Agostini v. Felton*, 521 U.S. 203, 225 (1997) (“[W]e have departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid.”).

to the States. Given these premises, the only question was whether reimbursing the expenses of parents who chose to send their children to parochial schools constituted aid to religion. On this issue — and in many subsequent disputes about degrees of indirection — the justices divided. In fact, however, none of the three propositions that united the Court in *Everson* can confidently be said to be true. Each step is debatable. By founding its thinking on three historical assertions, each of which can be challenged, the Court has cumulated improbability past the point of any meaningful connection between the modern Establishment Clause and original intent.

Begin with the bedrock proposition that the Establishment Clause requires separation of church and state. The provision bars Congress from making any law “respecting an establishment of religion.”<sup>65</sup> The phrasing suggests that Congress can neither establish nor *disestablish* religion. On this reading, the Establishment Clause adopts no substantive policy regarding separation of church and state but merely divests the national government of authority on the subject. Contemporary practice confirms this interpretation. At the time the First Amendment was adopted, seven of the fourteen States maintained government-sponsored churches, and several others used various means to advance the Christian religion.<sup>66</sup> With the barely arguable exception of Rhode Island, no American state could have been found in compliance with the modern understanding of separation of church and state.<sup>67</sup> It seems odd to think that the States would have adopted, with little discussion and less dispute, a constitutional provision condemning their current practices.<sup>68</sup>

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65. U.S. CONST. amend. I (emphasis added).

66. GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 13 (1987) [hereinafter BRADLEY, *CHURCH-STATE RELATIONSHIPS*] (“Each of the thirteen original states generously aided and promoted religion and should therefore . . . be called establishment regimes.”); *id.* at 20 (reporting that contemporary scholars agree that several established churches existed when the First Amendment was adopted but noting discrepancy as to numbers); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 76 (1986) [hereinafter LEVY, *ESTABLISHMENT CLAUSE*] (“In 1791, when the First Amendment was ratified, the addition of Vermont to the Union brought the number of states authorizing establishments of religion to seven.”); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 *ROGER WILLIAMS U. L. REV.* 1, 2 (1996) [hereinafter Amar, *Notes*] (“In 1789, at least six states had government-supported churches.”).

67. LEVY, *ESTABLISHMENT CLAUSE*, *supra* note 66, at 74 (noting that neither as a colony nor as a state did Rhode Island ever have an establishment of religion). However, Rhode Island did exclude Catholics and Jews from full citizenship, which, under modern conceptions, would be struck down as an establishment of religion. See BRADLEY, *CHURCH-STATE RELATIONSHIPS*, *supra* note 66, at 29 (“If one accepts the Supreme Court’s definition of establishment, then Rhode Island, that polar star of religious liberty, maintained an establishment at the time it ratified the First Amendment.”).

68. See BRADLEY, *CHURCH-STATE RELATIONSHIPS*, *supra* note 66, at 113-14 (noting that the records of state ratification debates, which are almost completely silent about the Establishment Clause, “speak in loud, unmistakably clear voices that in ratifying the Establishment Clause, they forbade sect preference by the national government and in no way im-

It may be, therefore, that the original Establishment Clause embraced no substantive conception of the proper relation of church and state, but merely reflected a determination that the issue be settled locally. This was the understanding of Joseph Story,<sup>69</sup> and it has been endorsed by competent scholars,<sup>70</sup> though of course opposed by others.<sup>71</sup> Although *Everson* made no mention of the states'-rights interpretation of the original intent, that view of the matter remains historically plausible. The foundational premise of the modern Establishment Clause thus turns out to be irreducibly speculative.

Even if it were clear that the original Establishment Clause mandated church-state separation, it would remain questionable whether that policy, as originally conceived, possessed anything like the sub-

paired the government's authority to aid, encourage, and support religion on a non-discriminatory basis").

69. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873, at 731 (Boston, Hilliard, Gray, and Co., 1833) ("Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the state constitutions."); *id.* (noting the denominational diversity among the States and concluding: "It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power.").

70. *E.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17, 18 (1995) [hereinafter SMITH, FOREORDAINED FAILURE] (arguing that the original meaning of the religion clauses was "purely jurisdictional," that is, that they were "simply an assignment of jurisdiction over matters of religion to the states — no more, no less"); Amar, *Notes, supra* note 66, at 3 ("The original establishment clause . . . is not *anti*-establishment but *pro*-states' rights; it is agnostic on the substantive issues of establishment versus non-establishment, and simply calls for the issue to be decided locally."); Kurt T. Lash, *The Second Adoption of the Establishment Clause*, 27 ARIZ. ST. L.J. 1085, 1088-89 (1995) [hereinafter Lash, *Second Adoption*] ("[T]he original Establishment Clause was intended to prohibit federal power over the subject of religion, reserving the same to the states. In this way, the original Establishment Clause expressed the principle of federalism: The federal government could neither establish religion at the federal level, nor *disestablish* religion in the states."); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990) [hereinafter Lietzau, *Rediscovering the Establishment Clause*] ("[T]he establishment clause embodied a structural safeguard to . . . preserve religious liberty by fostering local decisionmaking authority on church/state issues."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion."); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 379 ("[T]he establishment clause was meant to reserve powers to the several states.").

71. *E.g.*, Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 878 (1986) (arguing that the Establishment Clause embodied a substantive conception of church-state separation); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 411-14 (1986) [hereinafter Laycock, *Survey of Religious Liberty*] (arguing that the legislative history shows that the Framers intended to prohibit the federal government not only from favoring one religion over another but also from nonpreferentially aiding religion in general).



stantive reach of modern decisions. The kind of religious “establishment” familiar to the Framers involved direct governmental financial support of a favored church.<sup>72</sup> Modern school-aid cases are twice removed from that paradigm. For one thing, the benefits of school-aid programs flow indifferently to all private schools, not exclusively to adherents of one faith. The Framers might have intended, contrary to modern doctrine, to forbid government sponsorship of a favored church while allowing neutral support of education affiliated with religion.<sup>73</sup> We can only speculate, because the Framers did not focus on schools. They did not live in a world of government-funded education, so positing what they would have thought of school aid requires extrapolation of reasoning beyond its historical foundation. The point is not that the Court was necessarily wrong in expanding the original meaning of establishment to reach (some forms of) indirect aid to religious education, but only that the historical record does not demand that result. In moving beyond the historically grounded concept of “establishment” to forbid lesser connections between church and state, the Supreme Court has further attenuated the connection between modern doctrine and original intent.

Finally, the *Everson* Court’s assumption that the Fourteenth Amendment incorporated the Establishment Clause and made it applicable to the States compounds these eighteenth-century indeterminacies.<sup>74</sup> Perhaps the Framers of the Fourteenth Amendment meant to incorporate some or all of the provisions of the Bill of Rights, or perhaps not.<sup>75</sup> For the Establishment Clause, this familiar dispute has a

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72. At the time of ratification of the First Amendment, paradigmatic “establishments” still existed in Massachusetts and Connecticut, where a formal structure supported general taxation of the public and disbursement of revenue to churches and ministers. Originally, these systems supported only Congregationalist churches and ministers, but gradually this restriction was softened to allow disbursal of some funds to other state-certified Protestant denominations. BRADLEY, *CHURCH-STATE RELATIONSHIPS*, *supra* note 66, at 20; LEVY, *ESTABLISHMENT CLAUSE*, *supra* note 66, at 29-42, 45-49.

73. BRADLEY, *CHURCH-STATE RELATIONSHIPS*, *supra* note 66, at xiii (“The intuitively plausible conclusion — that government interaction with religion be conditioned on a neutrality among sects — is the historically demonstrable meaning of nonestablishment, and represents the fundamental alternative to what the Court has wrought.”); *id.* at 135 (“A rigorous historical inquiry into the adoption of the Establishment Clause has shown that it prohibits sect preference . . .”).

74. Though *Everson* was the first Supreme Court decision to apply the Establishment Clause to the States, the Court’s opinion does not specifically address that issue beyond noting that prior cases had incorporated the First Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 & n.22 (1947).

75. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 138-39 (1949) (arguing that the legislative history of the Fourteenth Amendment disproves an intention to incorporate the Bill of Rights against the States); *cf.* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 134-35 (1977) (supporting Fairman’s analysis); William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 20-21 (1954) (disputing Fairman’s conclusion). *But see* MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH*

special twist. If the original Establishment Clause aimed to confirm the exclusive authority of the States over religion, invoking that provision to disallow state aid to religion is paradoxical and perverse. In the words of Akhil Amar, “to apply the clause against a state government is precisely to eliminate [the state’s] right to choose whether to establish a religion — a right clearly confirmed by the establishment clause itself.”<sup>76</sup> In this respect, incorporation of the Establishment Clause presents difficulties additional to, and distinct from, those that attend the general issue.<sup>77</sup>

Recognition of the special difficulty of incorporating the Establishment Clause has spawned inventive attempts to recover a suitable pedigree for modern doctrine. Although conceded originally to have been concerned with states’ rights, the Establishment Clause is said by some to have acquired a substantive meaning in the years before Reconstruction, when the separationist philosophy that by then had become engrafted onto that provision was applied against the States.<sup>78</sup> As an attempt to specify historical antecedents for current doctrine,

AMENDMENT AND THE BILL OF RIGHTS 57-91 (1986) (rejecting Berger’s analysis); Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45, 100-01 (1980) (same). *But cf.* RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 45-142 (1989) (rejecting Curtis’ analysis). *See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 58-61 (1993) (summarizing the academic debate over incorporation and concluding in its favor).

76. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 33-34 (1998) [hereinafter AMAR, *BILL OF RIGHTS*].

77. *See* AMAR, *BILL OF RIGHTS*, *supra* note 76, at 41-42, which distinguishes the Establishment Clause from other First Amendment guarantees on the following ground:

The First Amendment, then, was not agnostic on whether speech, press, petition, assembly, and free exercise were liberties of citizens and good things. By contrast, the amendment was indeed agnostic on the issue of establishment. Congress had no more authority in the states to disestablish than to establish. Both actions were equally beyond Congress’ delegated powers; and the unfettered choice between establishment and dis-establishment was given to the states. As a more pure federalism provision, then, the establishment clause seems considerably more difficult to incorporate against states.

*See also* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (“The language of the fourteenth amendment, coupled with the federalistic motivation for the establishment clause, make it exceedingly difficult to argue that the framers and ratifiers of the fourteenth amendment intended to incorporate the establishment clause for application against the states.”); Lietzau, *Rediscovering the Establishment Clause*, *supra* note 70, at 1210 (“While many specific Bill of Rights incorporations have been criticized, none are so thoroughly contradicted by the historically discernible intentions of our forefathers than that of the establishment clause.”).

Of course, if the Establishment Clause was not a purely states’-rights provision but instead adopted a substantive policy of church-state separation, then incorporation would be less problematic. *See* Laycock, *Survey of Religious Liberty*, *supra* note 71, at 414-16.

78. The best presentation of the story of the reinvention of the Establishment Clause is Lash, *Second Adoption*, *supra* note 70, at 1135-37 (arguing that the “popular interpretation” changed from federalism to personal freedom). Something in the same direction appears in Justice Brennan’s opinion in *Abingdon School District v. Schempp*, 374 U.S. 203, 254-55 (1963) (Brennan J., concurring) (asserting that freedom of state involvement in religion was among the “panoply of new federal rights” created by the Fourteenth Amendment).

such reasoning is plausible and ingenious. It may even be true. But equally plausible arguments can be made the other way, starting with the fact that Congress in 1876 approved (though not by the required supermajorities) a constitutional amendment that repeated the words of the Establishment Clause and explicitly made them applicable to the States.<sup>79</sup> This would have been unnecessary if the Fourteenth Amendment had already accomplished that result. The point may not be conclusive, but it compounds the difficulty of applying a straightforward incorporation theory to the original prohibition of federal laws respecting an establishment of religion.

All these historical issues are debatable, in part due to changed circumstances and in part due to the uncertain evidence regarding original intent. The Framers said almost nothing about the Establishment Clause, and the authors of the Fourteenth Amendment even less.<sup>80</sup> Perhaps the safest inference that can be drawn from the historical record is a "lack of interest amounting virtually to apathy toward the establishment clause."<sup>81</sup> Against this background, historical assertions of the sort made in *Everson* remain essentially speculative.

The conclusion that we draw from this prehistory is modest and (should be) uncontroversial. When the *Everson* Court reached back to Virginia for the pedigree of modern separationism, the justices were not obeying a command from the Framers. They were making a

79. The Blaine Amendment began, "No State shall make any law respecting an establishment of religion . . ." Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 60. The full text is quoted *infra* note 115.

80. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 59-62 (Neil H. Cogan ed., 1997) (revealing only a few exchanges over the meaning of the Establishment Clause in the House and none in the Senate). Even scholars who find meaning in the shards of original history admit its inadequacy. *E.g.*, LEVY, ESTABLISHMENT CLAUSE, *supra* note 66, at 79 ("The debate [as unreliably reported] was sometimes irrelevant, usually apathetic and unclear."). For the lack of record from the Fourteenth Amendment, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1158 & n.132 (1993) (noting that the drafters of the Fourteenth Amendment often omitted any reference to the Establishment Clause in their discussions of individual rights); and Leitzau, *Rediscovering the Establishment Clause*, *supra* note 70, at 1208 (noting that the Framers of the Fourteenth Amendment consistently ignored the Establishment Clause).

81. DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE 71 (1991):

In fact, all of these suggestions about how to interpret the establishment clause based on the framers' intentions are just short of complete speculation because they are based solely on the extremely sparse and highly questionable historical records. The records simply contain too little evidence. To the extent that we can broadly read the sense of the secondhand historical documents, they most clearly show a lack of interest amounting virtually to apathy toward the establishment clause.

Others have suggested, however, that the evidence is thin only if one is seeking support for a substantive interpretation of the Establishment Clause. If, however, one is open to the possibility that the original meaning protected only states' rights, the evidence may be more than sufficient. SMITH, FOREORDAINED FAILURE, *supra* note 70, at 47-48 ("[T]he original meaning is not relevant in principle but unknowable in practice, as scholars like Drakeman suppose; it is, rather, knowable but unresponsive to present demands.").

choice. The past they imagined in *Everson* seemed obvious, natural, and clear to them because it fit so readily what they expected the Constitution to say. The opinion itself suggests as much. It displays little research and zero interest in conflicting evidence, competing inferences, or alternative interpretations.<sup>82</sup> The casualness of the Court's history and the confidence of its pronouncements signal the lack of dependence between the two. In our view, *Everson* reflects less a clear directive from the Framing than the conventional understanding in mid-twentieth century America. The real origins of the modern Establishment Clause lay not so much (or at least not only) in the utterances of Madison and Jefferson but in the political experiences and values that made aid to religious schools so problematic.

### B. *The Protestant Establishment*

The immediate reality faced by the Supreme Court in the mid-twentieth century was the collapse of the Protestant establishment. For most of its history, public education in America had been unabashedly patriotic and unmistakably Protestant. Whatever the state of faith at the time of the Framing, by the middle third of the nineteenth century, when the common-school movement took hold, the nation had experienced a massive evangelical resurgence.<sup>83</sup> Protestant ministers and churchmen led the common-school movement and took for granted "a congruence of purpose between the common school and the Protestant churches."<sup>84</sup> Civic leaders assumed "that Americanism and Protestantism were synonyms and that education and Protestantism were allies."<sup>85</sup> Early common schools featured Bible reading, prayer, hymns, and holiday observances, all reinforced by the

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82. See SMITH, *FOREORDAINED FAILURE*, *supra* note 70, at 5 (dismissing *Everson* as a "dismal historical performance"); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991) ("As a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government."); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1702 (1992) ("Significantly, *Everson* is devoid of any analysis justifying the incorporation of the Establishment Clause . . .").

83. 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 242 (1950) [hereinafter STOKES, *CHURCH AND STATE*] (describing the importance of the Great Awakening); David B. Tyack, *Onward Christian Soldiers: Religion in the American Common School*, in *HISTORY AND EDUCATION: THE EDUCATIONAL USES OF THE PAST* 212, 217 (Paul Nash ed., 1970) [hereinafter Tyack, *Onward Christian Soldiers*].

84. Tyack, *Onward Christian Soldiers*, *supra* note 83, at 217.

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

exhortations of the teacher and the pervasive Protestantism of the texts.<sup>86</sup>

The problem was that Protestantism was not one religion but many. In an age when genuinely secular public education was “simply inconceivable,”<sup>87</sup> common-school advocates had to find a way to keep religion in the public schools but keep controversy out. They did so by promoting least-common-denominator Protestantism and rejecting particularistic influences. The architect of this strategy was Horace Mann, secretary of the nation’s first board of education (in Massachusetts) from 1837-1849 and the leading figure in the common-school movement.<sup>88</sup> Mann himself was a Unitarian, and hence personally liberal and latitudinal, but in Massachusetts, he had to contend with orthodox Congregationalists, Baptists, Methodists, and other Christian sects.<sup>89</sup> Mann waged fierce battle with conservative critics, deriding their demands for more pronounced religious content as “sectarian.” Under that label, he banned doctrines “peculiar to specific denominations but not common to all.”<sup>90</sup> Charges of “godlessness” were answered with a strategy described as “a stroke of genius.”<sup>91</sup> Mann insisted on Bible reading, *without commentary*, as the foundation of moral education. In his own words, “our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and, in receiving the Bible, it allows it to do what it is allowed to do in no other system — *to speak for itself*.”<sup>92</sup>

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86. Tyack, *Onward Christian Soldiers*, *supra* note 83, at 218. The first textbook widely used in the United States was the *Hornbook*, which contained only the alphabet and “the prayer the Saviour designed to teach, which children use, and parsons, when they preach.” Later texts included the *New England Primer* and *Noah Webster’s Spelling Book*, both of which included stories with religious and ethical lessons. 2 MARK SULLIVAN, *OUR TIMES: THE UNITED STATES 1900-1925*, at 88-89 (1927). Even math textbooks contained Christian propaganda, asking students, for example, how to ensure that when “15 Christians and 15 Turks” are caught at sea in a storm and half need to be cast into the sea to save the other half, one could devise a “random” lottery to make sure that all of the Christians are saved. PAUL BLANSHARD, *RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY 15* (1963) [hereinafter *BLANSHARD, RELIGION AND THE SCHOOLS*].

87. STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 57* (2000) [hereinafter *MACEDO, DIVERSITY AND DISTRUST*].

88. ROBERT MICHAELSEN, *PIETY IN THE PUBLIC SCHOOL 72, 73 n.9* (1970) [hereinafter *MICHAELSEN, PIETY IN THE PUBLIC SCHOOL*] (summarizing and citing sources on Mann’s life).

89. *Id.* at 71.

90. Tyack, *Onward Christian Soldiers*, *supra* note 83, at 218; *see also* DONALD E. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 23-27* (1965) [hereinafter *BOLES, THE BIBLE AND PUBLIC SCHOOLS*] (describing Mann’s role as the “great crusader against sectarianism in the public schools”).

91. MICHAELSEN, *PIETY IN THE PUBLIC SCHOOL*, *supra* note 88, at 69.

92. Horace Mann, *Twelfth Annual Report of the Secretary of the Board of Education*, *TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION TOGETHER WITH THE*

Though Protestants clashed on many questions, they agreed on the Bible. Bible reading in public school became the basis for a pan-Protestant compromise, a vague and inclusive Protestantism that, when augmented by specific doctrinal instruction at Sunday school, proved acceptable to all.<sup>93</sup> Consequently, “most Protestant churches declared a truce with each other at the doors of the common school.”<sup>94</sup> The instruction behind those doors was nondenominational but emphatically not secular.<sup>95</sup> A generalized Protestantism became the common religion of the common school. From its inception, therefore, American public education was religious but nonsectarian. Both characteristics were essential to the consensus of support for the common school.<sup>96</sup>

Of course, that consensus did not include Catholics.<sup>97</sup> At the time of the Revolution, 30,000 Catholics lived in the new United States, barely one percent of the population.<sup>98</sup> By 1830, that number had increased to 600,000.<sup>99</sup> By 1850, there were 1.6 million U.S. Catholics,<sup>100</sup> and twice that many ten years later.<sup>101</sup> The number quadrupled to

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TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD 116-17 (Mass. Bd. of Educ., Boston 1849) (emphasis in original).

93. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL, *supra* note 88, at 78-79 (“By stressing Bible reading in the school Mann detonated the heaviest bombs of his conservative critics. Few Protestants opposed that practice. The Bible, then, became a major symbol for common religion around which liberal and conservative Protestants could rally.”).

94. Tyack, *Onward Christian Soldiers*, *supra* note 83, at 218.

95. ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA, 1880-1920, at 15 (1991) [hereinafter HANDY, UNDERMINED ESTABLISHMENT] (“The schools were understood to be nondenominational but certainly not nonreligious.”); Smith, *Protestant Schooling*, *supra* note 85, at 687 (“[I]t was not secularism but nondenominational Protestantism which won the day.”).

96. MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 57 (“A remarkably broad consensus supported the new common schools, which could only succeed in a religiously pluralistic environment if they were viewed by the vast majority of people as religious but nonsectarian; that is, as capable of inculcating basic moral precepts rooted in religion while avoiding sectarian impulses.”).

97. Timothy L. Smith, *Parochial Education and American Culture*, in HISTORY AND EDUCATION: THE EDUCATIONAL USES OF THE PAST 202 (Paul Nash ed., 1970) [hereinafter Smith, *Parochial Education*].

98. ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 58 (1971) [hereinafter HANDY, A CHRISTIAN AMERICA]. See also Philip Gleason, *American Identity and Americanization*, in CONCEPTS OF ETHNICITY 69 (Stephan Thernstrom et al. eds., 1982) [hereinafter Gleason, *American Identity*], who places the figure at 35,000.

99. HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 58.

100. Gleason, *American Identity*, *supra* note 98, at 69; see also H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. CHURCH & ST. 509, 521 n.26 (1987) [hereinafter Way, *The Death of the Christian Nation*] (giving the figure of 1.7 million as of 1850).

101. Gleason, *American Identity*, *supra* note 98, at 69.

twelve million in 1900, and doubled again by 1930.<sup>102</sup> This population was mostly immigrant, in the early days mostly Irish, and mostly poor.<sup>103</sup> They found the public schools unfriendly and inhospitable. Unaccompanied Bible reading, which was the cornerstone of the Protestant consensus, was to Catholics an affront. Public school students read from the King James Version, which the Catholic Church did not recognize. Indeed, the very fact of a direct and unmediated approach to God contradicted Catholic doctrine. The Douay Bible provided not only the officially approved English translation of the Scriptures, but also authoritative annotation and comment. Reading the unadorned text invited the error of private interpretation. As one cleric put the point in 1840: "The Catholic church tells her children that they must be taught their religion by AUTHORITY — the Sects say, read the bible, judge for yourselves."<sup>104</sup>

Religious conflict over Bible reading grew intense. In Maine and Massachusetts, Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible,<sup>105</sup> and crowds in Philadelphia rioted over whether Catholic children could be released from the classroom during Bible reading.<sup>106</sup> Above the level of the street, the most important consequence of Protestant religiosity in the public schools was to confirm the determination of Catholics to go elsewhere. If the public schools were Protestant, the Catholics wanted their own schools, and for that, they needed money.

The earliest confrontation over public funding came in New York, where by 1840 Catholics had considerable sway. Bishop John Hughes argued that if the State planned to educate all children under one roof,

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102. MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 24 (1990); Way, *The Death of the Christian Nation*, *supra* note 100, at 521 n.26.

103. MACEDO, *DIVERSITY AND DISTRUST*, *supra* note 87, at 48-49.

104. VINCENT P. LANNIE, *PUBLIC MONEY AND PAROCHIAL EDUCATION* 30 (1968), *quoted in* MACEDO, *DIVERSITY AND DISTRUST*, *supra* note 87, at 69; *see also* *THE BIBLE IN THE PUBLIC SCHOOLS, ARGUMENTS BEFORE THE SUPERIOR COURT OF CINCINNATI IN THE CASE OF MINOR V. BD. OF EDUC. OF CINCINNATI* 64 (1870) ("[T]he Catholic apprehends danger from the uncommented and indiscriminate reading of the Bible."), *quoted in* MACEDO, *DIVERSITY AND DISTRUST*, *supra* note 87, at 70. The same point was made in 1840 by the Fourth Provincial Council of Baltimore, which included among Catholic objections to Bible reading that each child was habituated to the idea of private interpretation and invited to rely on his or her own understanding. RICHARD J. GABEL, *PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS* 275-76 (1937).

105. *Donahoe v. Richards*, 38 Me. 379, 391-92, 398-400 (1854) (upholding the power of school officials to expel a student who refused to read the Protestant Bible); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Mass. Police Ct. 1859) (holding that beating a student who refused to read the Protestant Bible was within the discretion of public school officials).

106. MACEDO, *DIVERSITY AND DISTRUST*, *supra* note 87, at 68-69. Anti-Catholic rioting also broke out in Charlestown, Massachusetts, and Louisville, Kentucky, where twenty people were killed. Lash, *Second Adoption*, *supra* note 70, at 1119-20 (citing sources).

then it should exclude religion “in every shape and form.”<sup>107</sup> Knowing that was impossible, however, he campaigned instead for state support of church schools. The Bishop’s efforts so outraged Protestant and nativist opinion that in 1842 the New York legislature prohibited funding of any school where “any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced.”<sup>108</sup> This episode united Protestants in defense of public education and against government funding for Catholic schools.<sup>109</sup> The two sides refought the funding battle several times, until a state constitutional amendment in 1894 squashed a temporary Catholic victory in New York City by banning any public money for church-related schools.<sup>110</sup>

For the remainder of the nineteenth century and into the twentieth, the Protestant position was that public schools must be “nonsectarian” (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support “sectarian” schools (which in practical terms meant Catholic). The self-interested underside of these propositions surfaced repeatedly. The Know-Nothing Party arose in the 1850s to fight immigration and Catholic influence.<sup>111</sup> Their 1856 platform demanded public education free from denominational influence, but simultaneously declared the Bible “the depository and fountain of all civil and religious freedom” and condemned any effort to remove it from the classroom.<sup>112</sup> In 1869 the National Teachers Association (forerunner of today’s National Education Association) resolved both that “the appropriation of public funds for the support of sectarian schools is a violation of the fundamental principles of our American system of education” and that “the Bible should not only be studied, venerated, and honored . . . but devotionally read, and its precepts inculcated in all the common schools of the land.”<sup>113</sup> Most revealing is the Blaine Amendment, pro-

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107. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL, *supra* note 88, at 87 (quoting Bishop Hughes and citing sources).

108. JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 187 (1967), *quoted in* MICHAELSEN, PIETY IN THE PUBLIC SCHOOL, *supra* note 88, at 88.

109. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL, *supra* note 88, at 88.

110. N.Y. CONST. of 1894, art. 9, sec. 4, *quoted in* JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 252 (1967). On receipt of public funds by the Catholic diocese of New York City, see Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 42-43.

111. 1 STOKES, CHURCH AND STATE, *supra* note 83, at 833-35.

112. 2 STOKES, CHURCH AND STATE, *supra* note 83, at 67-68. In 1854, Know-Nothing Party members won the governorship, every state senate seat, and all but two House seats in Massachusetts. The Massachusetts legislature then passed laws restricting elected office to native-born citizens and requiring the reading of the “common English” version of the Bible in public schools. 1 STOKES, CHURCH AND STATE, *supra* note 83, at 836-37.

113. Tyack, *Onward Christian Soldiers*, *supra* note 83, at 221.



posed in 1875, which in 1876 passed the House of Representatives but fell just short of the two-thirds majority required in the Senate.<sup>114</sup> The final version laboriously attempted to close every possible loophole through which public money might flow to religious schools, then added that nothing in this elaborately separationist provision should “be construed to prohibit the reading of the Bible in any school or institution . . . .”<sup>115</sup>

The divide between Protestants and Catholics was not merely theological; it was also political, cultural, and in some sense racial. American Protestants saw their faith as allied with republicanism<sup>116</sup> and feared Catholicism as inimical to democracy. As Stephen Macedo noted, Americans

could see that the still-young republic’s core principles of individual freedom and democratic equality were at odds with the church’s authoritarian institutional structure, its long-standing association with feudal or monarchical governments, its insistence on close ties between church and state, its endorsement of censorship, and its rejection of individual rights to freedom of conscience and worship . . . .<sup>117</sup>

Rome hampered attempts by American Catholics to abandon the Church’s legacy by issuing reactionary pronouncements ideally suited to confirm the rankest prejudice. The Vatican “rejected, proscribed, and condemned” the possibility of genuinely secular public education.<sup>118</sup> Gregory XVI “greatly deplore[d] the fact that, where the ravings of human reason extend, there is somebody who studies new

114. Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 59-67. On the personal political background of Blaine’s proposal, see Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15 (1956) (discussing Blaine’s presidential ambitions and his desire to resolve doubts about his Protestantism).

115. Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 60. The full text read:

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

116. MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 57 (“Many people viewed Protestantism as inseparable from the American republican idea.”).

117. *Id.* at 61.

118. Papal Encyclical of 1864 (“reprobata, proscripata atque damnata”), *quoted in* MICHAELSEN, PIETY IN THE PUBLIC SCHOOL, *supra* note 88, at 123.

things and strives to know more than is necessary, against the advice of the apostle."<sup>119</sup> And Pius IX ridiculed freedom of conscience as the "liberty of perdition."<sup>120</sup>

The perception of Catholics as somehow un-American was fortified by the fact that they were overwhelmingly immigrant, urban, and poor. All three characteristics threatened defenders of Protestant, rural America. For example, Josiah Strong, a prominent evangelical and author of *Our Country*, a best-seller of the 1880s, freely mixed religious and social issues in his list of seven perils facing the nation. They were, in order: immigration, Catholicism, Mormonism, intemperance, socialism, wealth, and the city.<sup>121</sup>

Finally, the shift in origin of nineteenth-century immigration from Ireland to central and southern Europe reinforced the racial element in anti-Catholic animosity.<sup>122</sup> As the nineteenth century advanced, Protestants increasingly trumpeted their Anglo-Saxon heritage. Thus, the Reverend James M. King, a Methodist from New York, opined that the "most important lesson in the history of modern civilization is, that God is using the Anglo-Saxon to conquer the world for Christ by dispossessing feeble races, and assimilating and molding others."<sup>123</sup> And the Southern Baptists spoke for white Protestants on both sides of the Mason-Dixon line when they said, in 1890, that God had committed the world's salvation to the "Anglo-Saxon race."<sup>124</sup>

All these swirling sentiments came to a point in controversies over the public schools. Catholic educational separatism challenged the Protestant vision of a Christian America.<sup>125</sup> Protestants responded by trying to keep Bible reading in the public schools and to interdict

119. Gregory XVI, *Singulari Nos*, Jun. 25, 1834, *quoted in* MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 61.

120. Pius IX, *Quanta Cura*, Dec. 8, 1864, *quoted in* MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 61.

121. JOSIAH STRONG, *OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS* 30-144 (New York, Baker & Taylor Co., 1885); *see also* HANDY, UNDERMINED ESTABLISHMENT, *supra* note 95, at 17-18 (describing Strong's views).

122. *See* RICHARD E. MORGAN, *THE SUPREME COURT AND RELIGION* 47 (1972) [hereinafter MORGAN, *THE SUPREME COURT AND RELIGION*] ("The nineteenth century was pockmarked by this virulent fusion of hostility to the newcomer and inherited No-Popery.").

123. James M. King, *The Christian Resources of Our Country*, in NATIONAL PERILS AND OPPORTUNITIES 272 (1887), *quoted in* HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 106.

124. RUFUS B. SPAIN, *AT EAST IN ZION* 125 (1967), *quoted in* HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 106-07 ("[T]he religious destiny of the world is lodged in the hands of the English-speaking people. To the Anglo-Saxon race God seems to have committed the enterprise of the world's salvation.").

125. HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 104 ("Criticism of the public schools seemed to most Protestants to eat away at the foundations of the Christian America they envisioned.").

funding of sectarian education. These efforts were basically defensive. As the nineteenth century advanced and Catholic power grew, Protestants sought to entrench their former dominance in constitutions and statutes.

For Bible reading, such efforts were only marginally successful. As early as 1869, the school board in Cincinnati, then one of the most religiously heterogeneous of American cities, voted to ban Bible reading, hymns, and religious instruction in the public schools.<sup>126</sup> The resulting firestorm of protest prompted litigation all the way to the Ohio Supreme Court, which eventually ruled that the school board was *permitted* to omit religious instruction if it wished.<sup>127</sup> Some urban centers with large Catholic populations followed suit. In the 1870s, New York City, Chicago, Buffalo, and Rochester banned Bible reading in the public schools.<sup>128</sup> Indeed, by the early twentieth century, a few state courts had outlawed Bible reading and other religious observances in public school as violative of state constitutions,<sup>129</sup> though most courts continued to approve these practices.<sup>130</sup> In rural areas and throughout the South, Bible reading remained commonplace, but controversies in northern cities made many Protestants aware for the first time of the assault on their religious and cultural hegemony.<sup>131</sup> Where they could, conservatives responded with coercive legislation *requiring* daily Bible reading in public school, but Protestant opinion on that question was never unanimous,<sup>132</sup> and such laws passed in only a minority of jurisdictions.<sup>133</sup>

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126. This episode is recounted in detail in MICHAELSEN, *PIETY IN THE PUBLIC SCHOOL*, *supra* note 88, at 89-98. The school board was said to comprise eighteen Protestants, ten Catholics, two Jews, and ten "others." *Id.* at 93 (citing sources).

127. *Bd. of Educ. of Cincinnati v. Minor*, 23 Ohio St. 211 (1872) ("The Constitution [of Ohio] does not enjoin or require religious instruction, or the reading of religious books, in the public schools of the state.").

128. Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 47 (citing sources).

129. For decisions forbidding assigned Bible reading in public schools, see *People ex rel. Ring v. Bd. of Educ.*, 92 N.E. 251 (Ill. 1910); *Herold v. Parish Bd. of Sch. Dirs.*, 68 So. 116 (La. 1915); *State ex rel. Freeman v. Scheve*, 91 N.W. 846 (Neb. 1902); *State ex rel. Finger v. Weedman*, 226 N.W. 348 (S.D. 1929); *State ex rel. Dearle v. Frazier*, 173 P. 35 (Wash. 1918); and *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 44 N.W. 967 (Wis. 1890).

130. See G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 102 n.162 (1989) (citing decisions, approving Bible reading, from Colorado, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, New Jersey, Tennessee, and Texas).

131. Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 47.

132. Illustrative of the lack of Protestant unanimity on Bible reading were the state Republican conventions held in Ohio, Pennsylvania, and Vermont in March 1876. All three supported the Blaine Amendment, but declined to take a position on Bible reading in the public schools. Green, *The Blaine Amendment Reconsidered*, *supra* note 18, at 56.

133. ALVIN JOHNSON & FRANK H. YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 33 (1948) (identifying Massachusetts as the only state to legislate mandatory Bible reading in the nineteenth century, followed by Pennsylvania, Delaware, Tennessee, New Jersey, Alabama, Georgia, Maine, Kentucky, Florida, Idaho, Arkansas, and

Efforts to lock in the other half of the Protestant position proved more successful. Though the Blaine Amendment failed, many States incorporated similar provisions in their state constitutions, often because Congress required them to do so as a condition for admission to the Union. By 1890, twenty-nine of the forty-five States had strongly worded constitutional prohibitions on the use of public money to support sectarian schools.<sup>134</sup> Long before anyone realized that the Establishment Clause embodied a rigorous substantive policy against state aid to religious schools or that the Fourteenth Amendment had applied that policy to the States, state courts banned public funding of “sectarian” education under their versions of the Blaine Amendment.<sup>135</sup> These provisions no doubt reflected many ideas and agendas, but prominent among them were religious rivalry and anti-Catholic prejudice. In *Everson* and its progeny, the Supreme Court applied this legacy to the nation. At least in its historical antecedents, the constitutional ban against aid to sectarian schools was indeed a doctrine “born of bigotry.”

### C. *Post-Protestant America*

By the mid-1930s, according to historian Robert T. Handy, “[t]he Protestant era in American life had come to its end.”<sup>136</sup> Supplanting the informal Protestant establishment of the late nineteenth and early twentieth centuries was the recognition that real Americans now came in three varieties: Protestant, Catholic, and Jew.<sup>137</sup> Protestants remained the most numerous and continued to dominate many political,

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the District of Columbia in the twentieth); BOLES, *THE BIBLE AND PUBLIC SCHOOLS*, *supra* note 90, at 51 (same information).

134. Viteritti, *Blaine's Wake*, *supra* note 18, at 673 (1998).

135. 2 STOKES, *CHURCH AND STATE*, *supra* note 83, at 70 (noting that, between 1876 and 1913, thirty-three States passed constitutional amendments prohibiting state aid to parochial schools).

136. HANDY, *A CHRISTIAN AMERICA*, *supra* note 98, at 213; *see also* BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 86, at 6-7 (describing 1940 as the beginning of the “Post-Protestant” period); MARTIN E. MARTY, *THE NEW SHAPE OF AMERICAN RELIGION* 72 (1958) [hereinafter MARTY, *AMERICAN RELIGION*] (arguing that Protestant America, by the 1950s, had become “as obsolete as the side-wheel showboat, the cigar-store Indian, or the Fourth of July oration”).

137. WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (1955) [hereinafter HERBERG, *PROTESTANT-CATHOLIC-JEW*] (describing how the three religions became equal parts of a larger, common faith in the “American Way of Life”); MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 125 (“In contrast with the 19th century public religion, that of the mid-1940s was increasingly referred to as the distillation of ‘Three Great Faiths.’ ”); Klarman, *Rethinking the Revolutions*, *supra* note 13, at 53-56 (describing how the influx of Jewish and Catholic immigrants eventually dismantled the Protestant consensus and hegemony of the nineteenth and early twentieth centuries).

social, and economic institutions,<sup>138</sup> but the identification of America as a specifically Protestant nation was becoming harder and harder to maintain.<sup>139</sup> For the most part, Protestants understood and accepted the new religious pluralism. As one observer reported in 1955, Protestants “are particularly conscious, perhaps, of their coexistence with the Roman Catholics, but they are also generally ready to acknowledge the legitimacy of the Jewish community as a thoroughly American institution.”<sup>140</sup>

At the same time, many Protestants continued to fear Catholic power.<sup>141</sup> By the mid-1940s, Catholics were the country’s largest denomination.<sup>142</sup> In an increasingly urban nation, they dominated many major cities.<sup>143</sup> In addition to growing in number, Catholics also advanced socially and economically, reaching by the mid-1930s “a position of respect and integration in public life in the United States.”<sup>144</sup> With this growth and assimilation came newfound confidence, which surfaced in the increased assertiveness with which Catholics demanded aid for parochial schools.<sup>145</sup>

In the 1920s and 1930s, Catholics had convinced some state legislatures to help parochial schools pay for textbooks and bus transportation. By the time the Court decided *Everson*, twenty-two States had

138. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 227 (reporting that, as of 1955, roughly 68% of Americans self-identified themselves as Protestants); Ronald James Boggs, *Culture of Liberty: History of Americans United for Separation of Church and State, 1947-1973*, at 5 (1978) (unpublished Ph.D. dissertation, Ohio State University) (on file with the Ohio State University Library) [hereinafter Boggs, *History of Americans United*] (noting that Protestants maintained a “disproportionate share of economic, social, and political power and status in the 1940s. As individuals, they dominated most of the important American institutions and established norms for American culture”).

139. HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 206-08.

140. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 139. Of course, in rural areas and small towns, Protestantism remained “virtually identical with the American people,” *id.*, and many Protestants continued to identify American culture as essentially Protestant. Boggs, *History of Americans United*, *supra* note 138, at 5-6.

141. Will Herberg, *The Sectarian Conflict over Church and State*, 14 COMMENTARY 450, 453-55 (1952) [hereinafter Herberg, *Sectarian Conflict*]; Boggs, *History of Americans United*, *supra* note 138, at 11-12.

142. Boggs, *History of Americans United*, *supra* note 138, at 6.

143. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 168 (“The great centers of Catholic strength were the cities, some of which (Buffalo, Boston, New York) showed an actual majority, or very nearly a majority, of Catholics, and other very strong minorities.”); MARTY, AMERICAN RELIGION, *supra* note 136, at 74 (“Catholicism controls the urban centers with few exceptions outside the South and America is now a nation of urban dominance.”); *cf.* HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 208 (noting that by the end of the 1930s, “there were few American cities in which Protestant forces had a significant hold on the larger community to speak for it religiously”).

144. GEORGE Q. FLYNN, AMERICAN CATHOLICS & THE ROOSEVELT PRESIDENCY: 1932-1936, at 240 (1968).

145. Boggs, *History of Americans United*, *supra* note 138, at 10-11.

authorized transportation for children attending parochial schools.<sup>146</sup> Although even this limited aid caused controversy, it was relatively muted, in part because most States enacting aid legislation had sizeable Catholic populations.<sup>147</sup> In 1937, the issue became national and intensely controversial. In that year, the nascent drive for federal aid to education showed signs of strength, and the Roman Catholic Church switched from opposing federal aid to religious schools (out of fear that it would lead to federal control) to asking for federal tax dollars to support parochial schools.<sup>148</sup> The Catholic schools question would dominate discussion regarding federal aid for nearly two decades and transmute the issue from one of state choice to one of national constitutional law.

The third group in the triad of American religions was the smallest. Although the Jewish population increased threefold in the first two decades of the twentieth century, Jews in the 1930s and 1940s remained a tiny minority, between two and three percent.<sup>149</sup> Like Catholics, they made great strides economically and socially during the first half of the twentieth century, beginning a march of progress that would make Jews “the most successful minority group by almost any standard.”<sup>150</sup> Jewish achievement stemmed in part from their emphasis on education. Jewish parents “were passionately concerned with giving their children an education,” and they insisted that the education be secular.<sup>151</sup> Perhaps as a consequence, Jewish opinion on church-state relations was intensely separationist, and Jews would play a prominent role both in resisting aid to religious schools and in excluding religion from public education.<sup>152</sup>

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146. FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* 27-32 (1976) [hereinafter SORAUF, *WALL OF SEPARATION*]; Klarman, *Rethinking the Revolutions*, *supra* note 13, at 53-54.

147. Klarman, *Rethinking the Revolutions*, *supra* note 13, at 53-54.

148. BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 136, at 23.

149. HANDY, *A CHRISTIAN AMERICA*, *supra* note 98, at 164.

150. FOWLER ET AL., *RELIGION AND POLITICS*, *supra* note 11, at 47 (“Jews are the most successful minority group in America by almost any standard. . . . By every measure — education, income, professional status — Jews are disproportionately well off.”); MARTY, *AMERICAN RELIGION*, *supra* note 136, at 75 (“Jewish culture [by the 1950s] has come [like Catholic culture] to take a similarly responsible place in political life, in the entertainment world, in literature and the arts, nearly controlling them in many urban centers.”); Klarman, *Rethinking the Revolutions*, *supra* note 13, at 51-53 (describing social and economic integration of Jews in first several decades of the twentieth century).

151. On the importance that Jews placed on education, see HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 22, 203-04. On Jewish insistence that public education be secular, see *id.* at 254-55.

152. BOLES, *THE BIBLE AND PUBLIC SCHOOLS*, *supra* note 90, at 231-35; FOWLER ET AL., *RELIGION AND POLITICS*, *supra* note 11, at 48-49, 76; MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 125-26; Herberg, *Sectarian Conflict*, *supra* note 141, at 457-59.

Their prominence in these debates sprang not only from their position in society and from their commitment to the issue, but also from the special weight given Jewish views on religious freedom in the aftermath of the Holocaust.<sup>153</sup> As the enormity of the crimes against Jews began to sink in, claims by Jews on issues of religious freedom gained special resonance. Jews thus not only were motivated to protect public schools from religious influences; they also had special clout in advocating church-state separation. Even if they did not constitute anything close to a third of America's population, on church-state issues Jews laid an equal claim to America's conscience.<sup>154</sup>

The splintering of a Protestant nation into three great faiths also reinforced a growing public secularism, especially among educated elites. That secularism usually did not deny or condemn religious belief.<sup>155</sup> On the contrary, most persons we would call secularists were affiliated with a church.<sup>156</sup> But increasingly, many Americans took the view that in a nation of diverse belief, public observances and governmental policies should respect all faiths. As one prominent Protestant leader asked in 1937: "On what ground can we expect the gov-

153. Theodore Y. Blumoff, *The Holocaust and Public Discourse*, 11 J.L. & REL. 591, 594-601 (1994-95); Klarman, *Rethinking the Revolutions*, *supra* note 13, at 54-59.

154. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 40-55; Klarman, *Rethinking the Revolutions*, *supra* note 13, at 56.

155. Exceptions included John Dewey, an important figure in philosophy and especially the philosophy of education, who argued as early as 1908 that religion and morality could indeed be separated. For Dewey, morality was properly considered a secular concept, which flowed from social interaction rather than divine will. MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 139-45; Harvey G. Neufeldt, *Religion, Morality and Schooling: Forging the Nineteenth Century Protestant Consensus*, in RELIGION AND MORALITY IN AMERICAN SCHOOLING 21 (Thomas C. Hunt & Marilyn M. Maxson eds., 1981). Dewey specifically urged that public schools should not teach any religious dogma, but instead should promote democratic ideals as if these ideals were themselves religious. MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 142 ("Dewey's great aim, therefore, was to promote a society unified around a progressive democratic religion."). Dewey was not alone in his quest; other public intellectuals made similar arguments, and in 1933, a number of them signed the *Humanist Manifesto*, which argued that America should be a strictly secular society. See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 23 (1984). As Paul Blanshard, one of the signers of the Manifesto and later quite active in Protestants and Other Americans United for the Separation of Church and State, explained: "We have an obligation to expose and attack the world of religious miracles, magic, Bible-worship, salvationism, heaven, hell, and all the mythical deities. We should [specifically attack] such quack millennialists as Bill Graham and such embattled reactionaries as [the pope] because they represent the two greatest humanist aggregates in our society." *Id.*

156. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 13-16, 52-54 (describing mid-century paradox of pervasive secularism coexisting with sign of pervasive religiosity, including high church membership and attendance). Even those who were not adherents of any religion were, as one commentator aptly observed, "imperfectly irreligious," WILLARD L. SPERRY, RELIGION IN AMERICA 256 (1948), insofar as they "tend[ed] to regard religion as vaguely a 'good thing.'" ROBIN M. WILLIAMS, JR., AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION 346 (2d ed. 1960) [hereinafter WILLIAMS, AMERICAN SOCIETY].

ernment of a country in which half the people are not even nominally Christians, to lay down policies which are specifically related to Christianity?"<sup>157</sup>

Describing public secularists with precision is difficult, in part because secularism was (and remains) not so much an articulated philosophy as an underlying, pervasive, and almost unconscious means of organizing life and thought.<sup>158</sup> In general, public secularists treated religious belief as personal and in some sense private. They relegated specific religious beliefs to the private sphere, often while endorsing a vague public religiosity designed to include all — or at least to offend none.<sup>159</sup> Polling data round out the picture of this kind of secularism and confirm its ubiquity. In a survey conducted in 1948, the vast majority of respondents indicated that they believed in God and that religion was "very important" in their lives. Yet 54% of these respondents also said that their religious beliefs had no effect on their ideas of politics and business.<sup>160</sup> This paradox exemplified post-World War II America. While the overwhelming majority of Americans professed religious belief and claimed membership in one of the three American religions, many also contributed to a pervasive public secularism.<sup>161</sup> As

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157. Statement of Samuel McCrea Cavert, *quoted in* HANDY, A CHRISTIAN AMERICA, *supra* note 98, at 212. Cavert was the general secretary of the Federal Council of Churches, which was founded in 1908 and at the time the leading and largest Protestant organization, representing mainline and some Eastern Orthodox denominations and by extension millions of individual Protestants. *Id.*; *see also* HANDY, UNDERMINED ESTABLISHMENT, *supra* note 95, at 118-21; HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 134. The Federal Council of Churches has since been renamed the National Council of Churches and remains the largest single organization of Protestants. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 65-67; *see also infra* text accompanying notes 437-458.

158. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 13.

159. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 253-57; Herberg, *Secularian Conflict*, *supra* note 141, at 459; Roy Wallis & Steve Bruce, *Secularization: The Orthodox Model*, in RELIGION AND MODERNIZATION 8 (Steve Bruce ed., 1992); Bryan R. Wilson, *Reflections on a Many Sided Controversy*, in RELIGION AND MODERNIZATION 195 (Steve Bruce ed., 1992). For an interesting and informative overview of secularization theory, which defends the core idea that religion declined in social significance in the twentieth century, *see* David Yamane, *Secularization on Trial: In Defense of the Neosecularization Paradigm*, 36 J. SCI. STUD. OF REL. 109 (1997); *see also* Wilson, *supra*, at 210 (observing that "historians, sociologists, economists [and] psychologists" all "take secularization for granted," and suggesting that it is possible that they "could be overlooking a social force of paramount importance" in the fields in which they are expert, "but I doubt it"). For explication of the idea that religion has shifted from the public to the private realm, *see* JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 6-40 (1994) [hereinafter CASANOVA, PUBLIC RELIGIONS].

160. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 85-86.

161. *Id.* at 13-14 (describing data indicating that while Bible distribution reached an all-time high during the five-year period from 1949 to 1953, and four-fifths of Americans polled said they believe the Bible to be the "revealed word of God," a majority of Americans could not name even one of the first four books of the New Testament). The paradoxical trend has continued to the present day. As Godfrey Hodgson said of contemporary society, "deeply embedded religious life flourishes in the midst of a society that is in its public, political, business, and cultural life firmly secular." HODGSON, CONSERVATIVE ASCENDANCY, *supra* note



one commentator described, that secularism essentially involved “thinking and living in terms of a framework of reality and value remote from the religious beliefs simultaneously professed.”<sup>162</sup>

Public secularism also surfaced in a growing faith in what has been called the “Religion of Democracy” or “the American Way of Life.”<sup>163</sup> Many Americans who self-identified as Protestant, Catholic, or Jew in fact subscribed to a common structure of belief, synthesizing

all that commends itself to the American as the right, the good, and the true in actual life. It embrace[d] such seemingly incongruous elements as sanitary plumbing and freedom of opportunity, Coca-Cola and an intense faith in education — all felt as moral questions relating to the proper way of life.<sup>164</sup>

Among the ingredients in this secular religion was religion itself. Although Americans increasingly disregarded (or transcended) their specific religious affiliations, they were expected to profess belief in God.<sup>165</sup> As William Lee Miller put it, Americans’ faith was “not in God but in faith itself.”<sup>166</sup> The differences among religious beliefs receded before the conviction that all three great religions supported the overarching American faith in democracy and in itself.<sup>167</sup> For many, the three great religions represented simply “different boats heading

11, at 164; accord ANDREW M. GREELEY, *RELIGIOUS CHANGE IN AMERICA* 33 (1989); Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J. L. & RELIGION 1, 8-10 (1993-94).

162. HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 14; see also MARTY, *AMERICAN RELIGION*, *supra* note 136, at 76-78. The Lynds’ famous Middletown study supports the secularism that Herberg describes. When they studied Middletown in the 1920s, the Lynds discovered a significant gap between religious theory and actual practice; by the mid-1930s the gap had developed into a chasm “so wide that the entire institution of religion has tended to be put on the defensive.” See HANDY, *A CHRISTIAN AMERICA*, *supra* note 98, at 208.

163. HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 87-104; MARTY, *AMERICAN RELIGION*, *supra* note 136, at 78-89.

164. HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 88-89; see also MARTY, *AMERICAN RELIGION*, *supra* note 136, at 78-83 (describing similar tenets of the religion of democracy).

165. HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 88, 97-98.

166. William Lee Miller, *Piety Along the Potomac*, *THE REPORTER*, Aug. 17, 1954, quoted in HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 88 (He continued: “[W]e worship not God but our own worshiping.”).

167. OSCAR HANDLIN, *THE AMERICAN PEOPLE IN THE TWENTIETH CENTURY* 222 (1954) (“Creedal differences still divided Americans into more than two hundred and fifty distinct sects. But those differences now faded in importance.”); HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 101 (suggesting that the three American faiths had come to be seen by many “as three diverse, but equally legitimate, equally American, expressions of an over-all American religion”); WILLIAMS, *AMERICAN SOCIETY*, *supra* note 156, at 337 (arguing that Americans had “a marked tendency to regard religion as good because it is useful in furthering other major values,” and thus the Christian and Jewish faiths were prized insofar as they promoted values and standards of behavior that Americans were expected to share).

for the same shore.”<sup>168</sup> Dwight D. Eisenhower captured this relationship when he said that “[o]ur government makes no sense unless it is founded in a deeply felt religious faith — and I don’t care what it is.”<sup>169</sup> To a European, such a statement would have seemed heretical or silly, but Americans understood their leader perfectly. Eisenhower was not voicing indifference to religion but rather “the conviction that at bottom the three great faiths were really saying the same thing in affirming the spiritual ideals and moral values of the American Way of Life.”<sup>170</sup> For many Americans, religion had become merely the “handmaiden to democracy.”<sup>171</sup> Aside from the vague sense that religion was a good thing, national life was becoming increasingly secular.

In this essentially secular concept of the role of faith, no denomination could demand public support for specifically denominational goals; to do so would have been an act of heresy against the common religion of democracy.<sup>172</sup> This is where the Catholic Church got into trouble. To be sure, the secularization of faith and the reality of religious pluralism influenced the American Catholic Church. The traditional Catholic endorsement of church-state union remained in place in church manuals throughout the first half of the twentieth century, but American Catholic leaders increasingly took a different line, re-

168. MARTY, *AMERICAN RELIGION*, *supra* note 136, at 86.

169. Dwight D. Eisenhower, Address Before Directors of Freedoms Foundation (Dec. 22, 1952), in *N.Y. TIMES*, Dec. 23, 1952, at 16. President George H.W. Bush made a similar statement years later, when referring admiringly to this “Nation’s Judaeo-Christian moral heritage and . . . the timeless values that have united Americans of all religions and all walks of life: love of God and family, personal responsibility and virtue, respect for the law, and concern for others.” Proclamation No. 6508, 28 *WEEKLY COMP. PRES. DOC.* 2313 (Nov. 20, 1992).

170. HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 98.

171. Arthur Mann, *Charles Fleischer’s Religion of Democracy*, 16 *COMMENT.* 557 (1954). For further discussion of Mann’s article, see MARTY, *AMERICAN RELIGION*, *supra* note 136, at 78.

172. HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 98-99. Herberg argues that, by mid-century, the notion that no single church or religion should be favored by the state had become

something quite axiomatic to the American. This feeling, more than anything else, is the foundation of the American doctrine of the ‘separation of church and state,’ for it is the heart of this doctrine that the government may not do anything that implies the pre-eminence or superior legitimacy of one church over another.

*Id.* at 99; *cf.* John Coleman Bennett, *Patterns of Church-State Relations — Grounds for Separation*, in *CHURCH AND STATE IN AMERICAN HISTORY* 174 (John F. Wilson & Donald L. Drakeman eds., Beacon Press 1987) (1965). Writing in 1958, Bennett, who was president of the influential and prestigious Union Theological Seminary in New York City, observed:

Today when Church-State problems are discussed in this country the one concern that ranks above all others is the fear that one Church or a group of Churches may finally be able to use the state to bring about discrimination against citizens on grounds of religion or to limit the freedom of any religious bodies.

*Id.*

nouncing any desire to establish Catholicism as the national religion in the United States.<sup>173</sup> Speaking for the Catholic hierarchy in 1948, Archbishop John T. McNicholas declared: "We deny absolutely and without qualification that the Catholic Bishops of the United States are seeking a union of church and state by any endeavors whatsoever, either proximate or remote. If tomorrow Catholics constituted a majority in our country, they would not seek a union of church and state."<sup>174</sup> Nevertheless, the Catholic Church during this period aggressively sought aid for Catholic schools. In so doing, they revived Protestant and Jewish anxieties about Catholic domination. Just as important, they threatened what had become the high church of the Religion of Democracy: the public school.<sup>175</sup>

### 1. *The New Coalition Against Aid to Religious Schools*

In this post-Protestant America, where citizens feared the Catholic Church and revered the public schools, the inherited antipathy for aid to religious schools commanded wide support. In many ways, the Catholic Church's growing strength proved to be a weakness, as it motivated non-Catholics to oppose the Church's demand for school aid. Thus, while the Church had limited success in securing state subsidies for some parochial school expenses in the 1920s and 1930s, the effort

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173. HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 164-65.

174. *The Catholic Church in American Democracy*, press release of the National Catholic Welfare Conference, Jan. 26, 1948, *quoted in* HERBERG, PROTESTANT-CATHOLIC-JEW, *supra* note 137, at 165. Earlier Catholic leaders made similar statements, including Cardinal Gibbons, who declared in 1916 that Catholics preferred the American form of government to any other. "The separation of church and state in this country seems to [Catholics] the natural, inevitable, and best conceivable plan, the one that would work best among us, both for the good of religion and of the state. . . . No establishment of religion is being dreamed of here, of course . . ." 1 JAMES CARDINAL GIBBONS, A RETROSPECT OF FIFTY YEARS 210-11 (1916); *see also* Boggs, *History of Americans United*, *supra* note 138, at 5-6 (describing position of Catholic "Americanists," who supported religious pluralism and the separation of church and state). Not all Catholic leaders agreed with the "Americanist" position, to be sure, and some continued to argue in favor of the traditional Catholic state. *See, e.g.*, John A. Ryan, *Comments on the Christian Constitution of States*, in *THE STATE AND THE CHURCH* 29-39 (John A. Ryan & M.F.X. Millar eds., 1922). Ryan argued that the "State should officially recognize the Catholic religion as the religion of the commonwealth." Did this mean that other religions would not be tolerated? Ryan's response could not have provided much comfort to non-Catholics: "Much depends on circumstances," he wrote, "and much depends upon what is meant by toleration." *Id.* at 34-35.

175. On reviving Protestant and Jewish fears, *see, e.g.*, BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 23; Herberg, *Sectarian Conflict*, *supra* note 141, at 455-59; and Boggs, *History of Americans United*, *supra* note 138, at 11-13. On the status of the public school as the "church" of the religion of democracy, *see* MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 141 (noting that Dewey believed in the religion of democracy and that the "high church of this civil religion . . . was the public school"); and MARTY, AMERICAN RELIGION, *supra* note 136, at 80 (Arguing that the religion of democracy "has few temples or churches or synagogues. But it has an 'established church' in the field of public education.").

to secure federal aid in the late 1930s provoked intense resistance.<sup>176</sup> During the 1940s and 1950s, certain States and cities (usually with substantial Catholic populations) provided incidental aid to religious schools, but the weight of opinion in the nation as a whole remained decidedly hostile.<sup>177</sup> Three powerful segments of society opposed the Catholic position: almost all Protestants, who remained cohesive on this issue; almost all Jews; and public secularists.<sup>178</sup>

The first and most important constituency in the anti-aid coalition was the Protestant faithful. The demise of the informal Protestant establishment in the early twentieth century did not cause Protestants to rethink their views on school aid. If anything, Protestants became *more* united in their opposition; mainline denominations and fundamentalists, leaders and flocks, all came together to oppose public funding of religious schools.<sup>179</sup>

In 1941, for example, three Baptist groups — the Southern Baptists, the Northern Baptists, and the National Baptists — formed the Baptist Joint Committee on Public Affairs.<sup>180</sup> The Committee organized to present a unified Baptist position on issues of church and state and to combat the increasing power and influence of the Catholic Church.<sup>181</sup> From the outset, the Committee took a strictly separationist position, opposing the appointment of an ambassador to the Vatican, lobbying (at least initially) against federal education bills that included some aid to parochial schools, and arguing against the use of public funds to provide transportation to parochial schools.<sup>182</sup>

One year after the creation of the Baptist Joint Committee, fundamentalist and evangelical churches formed the National Association of Evangelicals (“NAE”), which also favored strict separation of church and state, “especially as the state might interrelate with the

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176. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 23.

177. *Id.*; Klarman, *Rethinking the Revolutions*, *supra* note 13, at 53-54.

178. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 121-23; MORGAN, THE SUPREME COURT AND RELIGION, *supra* note 122, at 81-88; Wilber G. Katz & Harold P. Southerland, *Religious Pluralism and the Supreme Court*, 96 DAEDALUS 180, 188 (1967).

179. Boggs, *History of Americans United*, *supra* note 138, at 5.

180. *Id.* at 7; Stan Halsey, *The History and Contributions of the Baptist Joint Committee on Public Affairs*, 20 BAPTIST HIST. & HERITAGE 35, 36-37 (1985); [hereinafter Halsey, *Baptist Joint Committee*]; Walfred Peterson, *The Baptist Joint Committee on Public Affairs and the Amicus Curiae Brief*, 66 MID-AMERICA 121, 122 n.4 (1984) [hereinafter Peterson, *Baptist Joint Committee*].

181. RICHARD E. MORGAN, THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA 54 (1968) [hereinafter MORGAN, POLITICS OF RELIGIOUS CONFLICT]; Boggs, *History of Americans United*, *supra* note 138, at 7.

182. RICHARD V. PIERARD, THE UNEQUAL YOKE: EVANGELICAL CHRISTIANITY AND POLITICAL CONSERVATISM 67-68 (1970) [hereinafter PIERARD, THE UNEQUAL YOKE]; Halsey, *Baptist Joint Committee*, *supra* note 180, at 36-37; Peterson, *Baptist Joint Committee*, *supra* note 180, at 122-24.

Roman Catholic Church.”<sup>183</sup> The NAE opposed aid to religious schools, as well as the appointment of an ambassador to the Vatican.<sup>184</sup> On school-aid issues, the Baptist Joint Committee and the NAE allied with the largest of all Protestant organizations, the National Council of Churches (“NCC”), which represented the bulk of mainline Protestantism.<sup>185</sup> Like its smaller counterparts, the NCC took a separationist stance on aid to religious schools.<sup>186</sup> Taken together, these three groups represented an enormous and diverse constituency, from the liberal mainline churches to the conservative fundamentalist ones.<sup>187</sup> All saw the Catholic Church as a potential threat — a threat to Protestants, to the public schools, to religious freedom and, indeed, to democracy itself.<sup>188</sup>

By the time the Court decided *Everson* in February of 1947, the Protestant-Catholic battle over church and state, and especially over the funding of religious schools, was well underway. Protestant groups had helped kill a 1945 proposal to provide federal funds to private schools, including religious ones.<sup>189</sup> In 1946, Protestants protested en masse against President Truman’s decision to appoint an ambassador to the Vatican.<sup>190</sup> And in January of 1947, Protestant groups rose in opposition to a bill introduced by Senator Taft of Ohio that would have provided federal aid to religious schools where such aid was not prohibited by state law.<sup>191</sup> In explaining why Protestants should oppose the bill, the editor of the *Christian Century* argued that preventing

183. Boggs, *History of Americans United*, *supra* note 138, at 9.

184. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 72-80.

185. The National Council of Churches, created in 1950, was a successor organization to the Federal Council of Churches, which was formed in 1908. HANDY, *A CHRISTIAN AMERICA*, *supra* note 98, at 171-74, 221; Boggs, *History of Americans United*, *supra* note 138, at 7.

186. *See, e.g.*, General Assembly of NCC, *Letter to Christian People of America*, N.Y. TIMES, Dec. 13, 1952, at 17 [hereinafter *Letter to Christian People*]; *see also* BOLES, *THE BIBLE AND PUBLIC SCHOOLS*, *supra* note 90, at 233.

187. The NCC alone represented approximately thirty-five million Protestants. BOLES, *THE BIBLE AND PUBLIC SCHOOLS*, *supra* note 90, at 233; HERBERG, *PROTESTANT-CATHOLIC-JEW*, *supra* note 137, at 139; *Letter to Christian People*, *supra* note 186, at 17. The Baptist Joint Committee represented about fifteen million Baptists when founded in 1941, and the NAE represented 1.5 million evangelicals and fundamentalists by 1947. Boggs, *History of Americans United*, *supra* note 138, at 7-9.

188. BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 136, at 120, 141-42; MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 87-88; Boggs, *History of Americans United*, *supra* note 138, at 33-34, 40.

189. Boggs, *History of Americans United*, *supra* note 138, at 21.

190. *Id.* at 14-16; MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 85.

191. Boggs, *History of Americans United*, *supra* note 138, at 22-26.

Catholics from getting public funds would help preserve America as a Protestant nation.<sup>192</sup>

*Everson* both affirmed and affronted the Protestant position. On the one hand, the separationist rhetoric of both majority and dissent confirmed the understanding of American Protestants that the Constitution itself condemned school aid. Nothing in the opinions led Protestants to doubt either the historical foundation or the constitutional legitimacy of their position. To the contrary, the *Everson* opinions told Protestants that hostility to parochial schools sprang not from sectarian rivalry or narrow self-interest but from high principle. On the other hand, the actual result of the case — in which the Court approved transportation funding for parochial schools — sparked alarm. Protestant periodicals, organizations, and leaders issued dire warnings about Catholic inroads on the separation of church and state. Editorials in the *Christian Century* expressed the hope that *Everson* would wake the mass of Protestants to Catholic encroachments on the wall of separation,<sup>193</sup> while Methodist, Baptist, and Presbyterian leaders spoke ominously of the Catholic Church's "determined and adroit campaign" to alter the traditional American understanding of the proper relationship of church and state.<sup>194</sup>

Protestant leaders formed a new organization to combat the Catholic threat. In May of 1947, leaders of Protestant denominations and organizations — including representatives from the Baptist Joint Committee and the predecessor of the National Council of Churches — launched Protestants and Other Americans United for the Separation of Church and State ("POAU").<sup>195</sup> Its sole purpose was "the maintenance of the American principle of separation of church and state."<sup>196</sup> Although POAU tried (not always successfully) to refrain from crass prejudice, it did not shrink from openly criticizing the Catholic Church. Shortly after its founding, for example, POAU sent the *New York Times* an "Open Letter" accusing Catholic leaders of trying to subvert the Constitution.<sup>197</sup> Similarly, POAU helped lead the opposition to President Truman's reappointment of an ambassador to

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192. CHARLES CLAYTON MORRISON, *THE SEPARATION OF CHURCH AND STATE* (1947) (discussed in Boggs, *History of Americans United*, *supra* note 138, at 25).

193. Editorial, *CHRISTIAN CENTURY*, Feb. 26, 1947, at 262-63.

194. This statement came from the Reverend Louis Newton, President of the Southern Baptist Convention, and is quoted in MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 83. For similar statements by Methodist and Presbyterian leaders, see *id.* at 82-83; Boggs, *History of Americans United*, *supra* note 138, at 28-30.

195. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 77; SORAUF, *WALL OF SEPARATION*, *supra* note 146, at 33; Boggs, *History of Americans United*, *supra* note 138, at 42-43.

196. Boggs, *History of Americans United*, *supra* note 138, at 59.

197. PAOU, *An Open Letter*, *N.Y. TIMES*, Mar. 8, 1948, at 20.

the Vatican and aggressively fought against legislative or judicial approval of any aid to religious schools.<sup>198</sup>

This unified and energized Protestant opposition to school aid was strongly supported by American Jewry. Believing that Jewish freedom depended on a secular society, Jewish groups were even more adamant than Protestants in demanding separation of church and state.<sup>199</sup> Jews opposed any interaction of church and state when it came to schools, and Jewish groups joined Protestants in court and before legislatures in arguing against any aid to religious institutions.<sup>200</sup> This position reflected not only the general Jewish preference for secularization of a largely Christian nation, but also a specific fear of the Catholic Church and its burgeoning political strength. For Jews, the Catholic Church remained the greatest threat to a secular society and the source of the historic Christian intolerance of Jews. The Catholic Church, in Jewish eyes, remained “the standard form of Christianity and the prime symbol of Christian persecution. Deep down, it is Catholic domination that is feared.”<sup>201</sup> From this perspective, aid to religious schools was another example of Catholic assertiveness and political strength, and fighting against such aid preserved religious liberty.<sup>202</sup>

Protestants and Jews also resisted funding of religious schools in order to protect public education. The desire to preserve the public schools and their mission of assimilating students from diverse backgrounds reinforced less lofty reasons for opposing aid to parochial education. Leaders of the forerunner of the NCC, for example, often argued against aiding religious schools on the ground that doing so would encourage more such schools and lead to further fragmentation of education in the United States. “Public support for parochial schools,” said one NCC representative appearing before the Senate in 1947, “would divide the community into sectarian educational systems

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198. MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 47; Boggs, *History of Americans United*, *supra* note 138, at 269-83.

199. Herberg, *Sectarian Conflict*, *supra* note 141, at 457.

200. On the Jewish position and their legislative advocacy, see BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 136, at 124; FOWLER ET AL., *RELIGION AND POLITICS*, *supra* note 11, at 48; and Herberg, *Sectarian Conflict*, *supra* note 141, at 457. As for their activities in the Courts, various Jewish groups, such as the American Jewish Congress, have filed amicus briefs advocating the separationist position in a host of cases, including *Engel*, *Schempp*, *Allen*, *Lemon*, and *Sloan*. See *Mueller v. Allen* 463 U.S. 388, 389-90 (1983); *Sloan v. Lemon*, 413 U.S. 825, 826 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 605-06 (1971); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 204 (1963); *Engel v. Vitale*, 370 U.S. 421, 421 (1962). In fact, the American Jewish Congress has filed more amicus briefs before the U.S. Supreme Court advocating separation of church and state than any other group. Dena S. Davis, *Ironic Encounter: African-Americans, Jews, and the Church-State Relationship*, 43 CATH. U. L. REV. 109, 112 (1993).

201. Herberg, *Sectarian Conflict*, *supra* note 141, at 459.

202. *Id.*

and destroy the unity essential as democracy faces the totalitarian threat to freedom."<sup>203</sup> A similar statement appeared in the 1960 *Doctrines and Disciplines of the Methodist Church*, which expressed the Methodists' unalterable opposition "to the diversion of tax funds to the support of private and sectarian schools. In a short time, this scattering process can destroy our public school system and weaken the foundations of national unity."<sup>204</sup>

In seeking to protect the public schools, Protestants and Jews aligned themselves with public secularists of all persuasions who had come to identify the nation with its public schools. Many secularists objected to aid to religious schools not specifically because it would help Catholics, nor even more generally because it would help religion, but because it would hurt public education. It is difficult to overstate the widespread support for, and belief in, public schools during this period.<sup>205</sup> It had become clear that "[t]he school, not the church, would now Americanize ethnic minorities and culturally deprived groups. The school, not the church, would now give instruction in prudence and morality — the basic niceties that became known as 'citizenship.'"<sup>206</sup> To the many who saw public schools as crucial to American democracy, funding religious schools seemed a dangerous diversion.<sup>207</sup> In a famous speech delivered in 1946, Dr. James Bryant Conant, President of Harvard, argued that federal funds should go

203. Statement of Samuel Calvert, *quoted in* LUKE E. EBERSOLE, CHURCH LOBBYING IN THE NATION'S CAPITAL 270 (1951). Similarly, in its *Letter to Christian People*, published in the *New York Times* in 1952, the NCC stated that funding religious schools would "be a devastating blow to the public school system, which must be maintained." *Letter to Christian People*, *supra* note 186, at 17. Less than a decade later, the NCC released a similar statement, suggesting that funding religious schools would fragment education in the United States, which in turn "would destroy the public school system or at least weaken it so gravely that it could not possibly adequately meet the educational needs of all the children of our growing society." Statement of NCC, Feb. 22, 1961, *quoted in* BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 124.

204. BOLES, THE BIBLE AND PUBLIC SCHOOLS, *supra* note 90, at 247; *see also* MORGAN, THE SUPREME COURT AND RELIGION, *supra* note 122, at 89-90 (reporting that Catholic criticism of public schools and advocacy of funding for religious schools alarmed "wide sectors of the Protestant community and especially . . . Protestant educators"); Boggs, History of Americans United, *supra* note 138, at 11 ("Protestants feared that if aid were given the Catholic schools the result would be governmental support for private, church interests and, most importantly, would mean the destruction of the public schools.").

205. *See* WILLIAMS, AMERICAN SOCIETY, *supra* note 167, at 290-91 (describing the "widespread faith in education" in this country and suggesting that "America's faith in universal education is its greatest asset"); *see also supra* text accompanying note 187 (discussing status of schools as the high church of the religion of democracy).

206. Edwin S. Gaustad, *Consensus in America: The Church's Changing Role*, 36 J. AM. ACAD. OF RELIGION 28, 35-36 (1968).

207. *E.g.*, MORGAN, THE SUPREME COURT AND RELIGION, *supra* note 122, at 85-88; Robert F. Drinan, *State and Federal Aid to Parochial Schools*, 7 J. CHURCH & ST. 67 (1965) ("The argument [against aid to religious schools] today centers . . . on the asserted indispensability of the public school as an organ of national unity."); Herberg, *Sectarian Conflict*, *supra* note 141, at 456.



only to public schools, because of their distinct contribution to democracy.<sup>208</sup> Many educators shared this view.<sup>209</sup> Indeed, some believed that *all* children should be required to attend public schools “in order that they might be protected against divisive cultural influences and helped to acquire a common outlook.”<sup>210</sup> Leaders of the National Education Association accordingly worked to secure money for public schools while preventing funding of private schools, sectarian and nonsectarian alike; their support for the separationist position was largely a function of their commitment to public education.<sup>211</sup>

Against this array of opinion, Catholic support for religious education proved ineffective. Given that almost all private religious schools were Catholic, it was easy to picture aid to religious schools as a conflict pitting Catholics against the rest of America. As described in 1963 by Paul Blanshard, a leader of the POAU and a strident critic of the Catholic Church, the “sectarian financial issue is 99 percent a Catholic issue. . . . Here is joined a Catholic versus American battle, with organized world Catholicism committed to a program and a philosophy of ecclesiastical education . . . while the law and tradition of the United States favor support for public schools.”<sup>212</sup> Blanshard’s rhetoric may have been extreme, but it did not much overstate the position of other Protestants, nor that of Jews and public secularists. As historian Richard Morgan observed, on the issue of aid to religious schools, “all sorts of Protestants, Jews, and secularists — those politically and doctrinally conservative, and those with liberal persuasions . . . — could make common cause.”<sup>213</sup> *Everson* adopted that cause and read it into the Constitution.

## 2. *The Secularization of Public Schools*

The Supreme Court’s campaign to oust religion from the public schools was never as popular as its ban against aid to religious schools. The project of public-school secularization did not begin in earnest until *Engel* and *Schempp* in the early 1960s. The project of public-school secularization was never as popular as its ban against aid to religious schools.<sup>214</sup> The Court had glanced in this direction in 1948, when

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208. See MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 88; Boggs, *History of Americans United*, *supra* note 138, at 20.

209. Boggs, *History of Americans United*, *supra* note 138, at 25-26.

210. Herberg, *Sectarian Conflict*, *supra* note 141, at 456.

211. Boggs, *History of Americans United*, *supra* note 138, at 26; MORGAN, *POLITICS OF RELIGIOUS CONFLICT*, *supra* note 181, at 58-59.

212. BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 136, at 120.

213. MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 85.

214. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

*McCollum* struck down released-time programs in public school,<sup>215</sup> but *McCollum* did not have lasting impact. Just four years later, the Court approved released-time programs held off school property, a ruling that transformed the released-time controversy from one about religious instruction in public schools into part of the larger fight over aid to religious education.<sup>216</sup> Left unanswered was the more inflammatory question of prayer, Bible reading, and other religious observances in public schools. In the early 1950s, the justices ducked the question.<sup>217</sup> When they finally reached it in *Engel* and *Schempp*, they did so in a political environment increasingly tolerant of secularization.<sup>218</sup>

The political forces arrayed against religion in the public schools were roughly the same as the coalition against aid to religious education, with one dramatic difference. On this issue, America's Protestants were not united. During the 1940s and 1950s, leading Protestant organizations seemed uncertain on the issue. Some groups, including Baptist and Presbyterian organizations, publicly opposed school prayer and Bible reading.<sup>219</sup> Others, including the National Council of Churches, expressed the hope that some "constitutional way" be found to continue traditional observances.<sup>220</sup> Still other groups said nothing at all, including POAU, the staunchest opponent of aid to parochial schools, whose board could not agree whether prayer and Bible reading in public school classrooms violated their separationist principles.<sup>221</sup>

Given the prominence of these issues after *Engel* and *Schempp*, it may seem surprising that Protestant organizations did not stake out a clearer position in advance of those decisions. At the time, however, there were good reasons for separationists to keep a low profile. In most places, public education had already become largely secular, and Protestants generally were comfortable with this transformation.<sup>222</sup>

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215. Illinois *ex rel.* *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

216. See *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding law that allowed students to leave public schools during the day in order to receive religious education in church schools). For discussion of *Zorach* and *McCollum*, see BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 80-81; and Boggs, History of Americans United, *supra* note 138, at 109-30.

217. See *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952) (deciding, by 6-3 vote, that taxpayer lacked standing to challenge New Jersey statute providing for the reading without comment of verses from the Old Testament at the start of each school day). For discussion of *Doremus*, see BOLES, THE BIBLE AND PUBLIC SCHOOLS, *supra* note 90, at 86-91.

218. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 378 (2000) [hereinafter POWE, THE WARREN COURT] (noting that "[i]n the religiously pluralistic society of the 1960s, the Court had terrific support" for its prayer and Bible reading decisions).

219. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 64; BOLES, THE BIBLE AND PUBLIC SCHOOLS, *supra* note 90, at 240-45.

220. NCC, *Letter to Christian People*, *supra* note 186, at 17.

221. Boggs, History of Americans United, *supra* note 138, at 196, 267-68.

222. BOLES, THE BIBLE AND PUBLIC SCHOOLS, *supra* note 90, at 277 (describing how, by the time of *Engel* and *Schempp*, "[t]he change to a secular public school system . . . was

Moreover, in the 1950s the nation became obsessed with fighting communism at home and abroad. In the midst of a national crusade against "godless alien communism," those who opposed religious observances in schools risked being misunderstood as dissenters from the American way of life.<sup>223</sup> Thus, even those Protestant leaders who favored completely secular public education had reason not to publicize that position.

After *Engel* and *Schempp*, Protestant leaders could no longer avoid taking a stand, and the waning passions of domestic anticommunism made it easier for them to do so.<sup>224</sup> Accordingly, the vast majority of Protestant leaders and organizations announced their support for excluding official prayer and Bible reading from the public schools. Baptist and Presbyterian leaders had already taken this position.<sup>225</sup> Joining them were POAU, which hesitated briefly before endorsing *Engel*, and the NCC, which eventually embraced both *Engel* and *Schempp*.<sup>226</sup> Protestant periodicals commended the decisions.<sup>227</sup> After *Engel*, one liberal publication featured a manifesto, signed by thirty-one Protestant leaders, arguing that the Court's ruling protected "the integrity of the religious conscience and the proper function of religious and governmental institutions."<sup>228</sup> The glaring exception to the near-consensus of Protestant opinion was the National Association of Evangelicals. Conservative evangelicals decried the Court's decisions,

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complete," and observing that, with "few exceptions, the public schools of this country no longer conduct religious exercises"); Herberg, *Sectarian Conflict*, *supra* note 141, at 451 (observing, in 1952, that "public school education . . . is no longer religious, neither Catholic, nor Protestant, nor Jewish; it is, by and large, *secularist*, even militantly so").

223. POWE, THE WARREN COURT, *supra* note 218, at 182; SORAUF, WALL OF SEPARATION, *supra* note 146, at 12-13; Klarman, *Rethinking the Revolutions*, *supra* note 13, at 60-62.

224. Klarman, *Rethinking the Revolutions*, *supra* note 13, at 60-62 (arguing that the Court was reluctant in the 1950s to appear to be on the side of "atheistic communists" on religious issues, but by 1962-63, "domestic anti-communism had become a largely spent force").

225. See *supra* text accompanying note 219. The Southern Baptist Convention went so far as to issue a statement after *Engel*, "thank[ing] the Supreme Court for this decision simply because such a required prayer is using the government to establish religion." Quoted in EDWARD L. QUEEN II, IN THE SOUTH THE BAPTISTS ARE THE CENTER OF GRAVITY: SOUTHERN BAPTISTS AND SOCIAL CHANGE, 1930-1980, at 109 (1991).

226. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 63-65; Boggs, History of Americans United, *supra* note 138, at 509-11.

227. The conservative periodical *Christianity Today*, for example, ran an editorial defending *Engel*, which argued that the decision was "compatible both with a proper Christian attitude toward government stipulation of religious exercises, and with a sound philosophical view of freedom." Editorial, CHRISTIANITY TODAY, Jul. 20, 1962. A similar editorial appeared on July 4, 1962, in the liberal periodical, THE CHRISTIAN CENTURY.

228. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 66. This statement was signed by, among others, a former president of the NCC, Methodist Bishops, and the President of the Southern Baptist Convention.

voicing grave fears over the increasing secularization of schools and society.<sup>229</sup>

Jews joined mainline Protestant leaders in supporting *Engel* and *Schempp*.<sup>230</sup> Indeed, Jewish commitment to public secularism in an overwhelmingly Christian nation led them to oppose school prayer and Bible reading with as much intensity as they fought school aid.<sup>231</sup> Jews insisted that public schools be hospitable to all faiths.<sup>232</sup> They defended the Court's decisions with powerful claims for religious pluralism, arguing that *any* sort of religious exercise — no matter how purportedly nondenominational — would offend their beliefs.<sup>233</sup> Accordingly, as Paul Blanshard described, “[f]rom the very beginning of the prayer controversy, the Jewish response was more articulate than that of any other religious group supporting the Court.”<sup>234</sup>

Separationist Protestants and Jews were joined by public secularists, who also sought to keep the public schools free from religion. Public secularists viewed opposition to school prayer and Bible reading as axiomatic, given that one of their defining beliefs was (and is) that religion should be largely private.<sup>235</sup> This principle applied with special force in the public schools, where students were a captive audience and any religious exercise would potentially be coercive. Accordingly, public secularists defended the ban on school prayer and Bible reading on the grounds of religious pluralism. As Paul Freund argued in 1965: “With more than two hundred sects in the United States, over eighty of them having more than fifty thousand members

229. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 82; Boggs, *History of Americans United*, *supra* note 138, at 509-13.

230. Indeed, the American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith filed amicus briefs in both cases supporting the secularist position.

231. Herberg, *Sectarian Conflict*, *supra* note 141, at 457 (describing Jewish position on aid to religious schools and religion in public schools as staunchly separationist).

232. See Klarman, *Rethinking the Revolutions*, *supra* note 13, at 58-59 (“To most Jews, school prayer and Bible reading remained exclusionary practices.”).

233. BOLES, *THE BIBLE AND PUBLIC SCHOOLS*, *supra* note 90, at 217-23 (noting that most Jewish groups believed that any religious exercises or observances in public schools would necessarily discriminate against minority religions); MORGAN, *THE SUPREME COURT AND RELIGION*, *supra* note 122, at 125-26 (stating that Jews were not comfortable with any religious observances in public schools); Herberg, *Sectarian Conflict*, *supra* note 141, at 459-60 (describing how most Jews felt that public religious observances would relegate Jews to the margins of society).

234. BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 136, at 67; cf. Klarman, *Rethinking the Revolutions*, *supra* note 13, at 58-59 (suggesting that the prayer and Bible reading decisions “can be seen as a symbolic recognition of [Jews’] more complete acceptance into American society”).

235. See Herberg, *Sectarian Conflict*, *supra* note 141, at 459 (observing that Jewish leaders shared “the basic secularist presupposition that religion is a ‘private matter’ ”); see also *supra* text accompanying notes 158-161.

each, it is not easy to envisage a strictly nonsectarian exercise. One man's piety is another's idolatry."<sup>236</sup>

If nondenominational religious exercises were truly impossible, many secularists concluded, they should be avoided altogether. Both the *Washington Post* and the *New York Times* argued that religion in public schools would spark discord. The *Post* said that excluding religious exercises "free[d] the public schools from an observance much more likely to be divisive than unifying," while the *Times* noted that "nothing could be more divisive in this country than to mingle religion and government in the sensitive setting of the public schools."<sup>237</sup> The broad consensus of elite opinion on this issue (as well as the close connection between Jews and public secularists) was demonstrated when Leo Pfeffer, counsel for the American Jewish Congress, rounded up 110 law school deans and professors of law and political science to sign a letter to the Senate Judiciary Committee supporting *Engel* and opposing school-prayer amendments on the ground that such observances in public schools would endanger "the institutions which have preserved religious and political freedom in the United States."<sup>238</sup>

Reinforcing the desire to maintain secular education in the public schools was the growing faith in the religion of democracy. In the nineteenth century, Horace Mann and other common-school leaders sought to maintain nondenominational (but Protestant) observances because they thought religion essential to moral training. Truly secular education would have lacked a moral compass. The desire for a moral foundation continued in post-Protestant America, even as the pan-Protestantism of the early common-school movement became less and less successful. But by the mid-twentieth century, many Protestants, Jews, and public secularists thought of democracy, patriotism, and "the American Way Life" as the moral basis for instruction.<sup>239</sup> Just as

236. PAUL A. FREUND & ROBERT ULICH, *RELIGION AND THE PUBLIC SCHOOLS* 14 (1965); see also BLANSHARD, *RELIGION AND THE SCHOOLS*, *supra* note 136, at 89 ("A moment's reflection will show that in a society which is as pluralistic as ours there is virtually no religious or ceremonial phenomenon that is not sectarian to somebody.").

237. Editorial, *N.Y. TIMES*, Jun. 27, 1962; Editorial, *WASH. POST*, Jun. 29, 1962. These editorials echoed what Justice Frankfurter had argued over a decade earlier in his concurrence in *McCullum*. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring). Frankfurter argued against released-time on the ground that religion interfered with the democratizing and assimilationist mission of public schools: "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." *Id.* at 216-17 (Frankfurter, J., concurring).

238. The text of the statement appears in *Prayers in Public Schools and Other Matters: Hearing on S.J. Res. 205, S.J. Res. 206, S.J. 207, S. Con. Res. 81, S. Res. 356 Before the Senate Comm. on the Judiciary*, 87th Cong. 167 (1962). A story on the statement appeared in the *New York Times*. See "Tampering" Seen in Prayer Bills, *N.Y. TIMES*, Nov. 11, 1962, at 134.

239. See BOLES, *THE BIBLE AND PUBLIC SCHOOLS*, *supra* note 90, at 202; MARTY, *AMERICAN RELIGION*, *supra* note 136, at 80-82; Herberg, *Sectarian Conflict*, *supra* note 141, at 451.

Horace Mann had turned to uncommented Bible reading as a way of uniting warring Protestants, his successors in the leadership of public schools turned to the civil religion of democracy as a way of uniting increasingly divergent faiths. Agnes Meyer, a strong advocate of secularization, captured the idea:

If we bear in mind that the whole future of our democracy depends upon moral solidarity, freedom of conscience, and freedom of inquiry, the secularization of our schools becomes an act of sublime courage and sublime loyalty to the American faith that our institutions should be of the people, by the people, and for the people.<sup>240</sup>

The coalition of Protestants, Jews, and secularists produced a remarkable array of elite opinion in favor of the Supreme Court's school-prayer and Bible reading decisions.<sup>241</sup> This coalition left out conservative evangelicals — who were then less numerous, less well organized, and far less influential than today — and Roman Catholics.<sup>242</sup> The Catholic position requires explication. Historically, religious observances in public schools had been distinctly Protestant, and Catholics objected to them on that ground.<sup>243</sup> In the 1940s, the church changed its mind and began to call for religious content in public education. The switch sprang in part from the elimination of Protestant specificity in religious exercises and in part from growing confidence that Catholic students would not be “lost to the fold” if they said ecumenical prayer.<sup>244</sup> Partly, however, the change in position was strategic. Catholic leaders began highlighting the secularization of public education in order to bolster the case for church schools. If public schools could be portrayed as hostile to the devout, the argument for funding religious education would be strengthened.<sup>245</sup> This strategic

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240. Agnes E. Meyer, *The Clerical Challenge to the Schools*, ATLANTIC MONTHLY, Mar. 1952, at 44. The Jesuit publication COMMONWEAL referred to Meyer as “the national spokesman” for the emerging religion of democracy. *Contra Gentiles*, COMMONWEAL, Jun. 4, 1954, at 212. For further discussion of Meyer, see MARTY, AMERICAN RELIGION, *supra* note 136, at 80-81.

241. *E.g.*, POWE, THE WARREN COURT, *supra* note 218, at 358 (“There was a dominant view shared by the well-educated — and therefore the justices of the Court — that religion was a private matter, best left to the homes and the churches.”).

242. The marginal status of conservative evangelicals at the time is confirmed by the fact that two contemporary observers, in reviewing the “Protestant” reaction to the prayer and Bible reading decisions, said nothing about the reaction of conservative evangelicals. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 62-66, 115-18; BOLES, THE BIBLE AND PUBLIC SCHOOLS, *supra* note 90, at 226-50.

243. Leo Pfeffer, *Amici in Church-State Litigation*, 44 LAW & CONTEMP. PROBS. 83, 96 (1981) (noting that “before *McColum*, practically every suit challenging religious practices in the public schools was brought by Catholic parents”).

244. MORGAN, THE SUPREME COURT AND RELIGION, *supra* note 122, at 125.

245. *E.g.*, BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 58-62 (describing how Catholic leaders and periodicals sought to use the decision in *Engel* “as a weapon in the campaign for parochial school aid”); Editorial, CATHOLIC REGISTER, Apr. 22, 1962 (“An adverse decision [in *Engel*] may not be altogether bad. It should shock many

motivation was not lost on commentators at the time: an editorial in the *New York Post*, for example, suggested that Cardinal Spellman's denunciation of *Engel* was prompted "not by the prohibition of a prayer which many churchmen would agree has little religious value, but by the potential impact of the decision on the aid-to-education battle."<sup>246</sup> That Catholic leaders actually cared more about funding Catholic schools than they did about keeping religion in the public schools became even more apparent when Catholic leaders either remained neutral or testified *against* constitutional amendments to validate school prayer.<sup>247</sup>

The fact that mainline Protestant leaders, Jews, and public secularists supported the Court's decisions against school prayer and Bible reading does not mean that a majority of Americans agreed. On the contrary, polls suggested that most Americans disapproved of the decisions, and some school districts ignored them.<sup>248</sup> In addition, a majority in Congress — but not the requisite supermajority — supported constitutional amendments to authorize school prayer.<sup>249</sup> These facts would impeach the claim — if anyone were prepared to make such a claim — that the Supreme Court slavishly follows popular opinion,<sup>250</sup> but they do not negate the utility of looking at the Establishment

Protestants out of their old complacency and dogged opposition of their leadership to any aid to the religious school child."'). The strategy employed by Spellman was similar to the one pursued over a century earlier by Bishop Hughes, who sought ultimately to use the lack of religion in public schools as a means of securing funding for Catholic schools. See *supra* text accompanying notes 116-117.

246. *Excerpts from Editorials on School Prayer Decision*, N.Y. TIMES, Jun. 29, 1962, at 11.

247. POWE, THE WARREN COURT, *supra* note 218, at 361. (explaining that, "in 1963 Catholic leaders had their sights on far bigger game — federal dollars for parochial schools — and were thus less inclined to worry about prayer in public schools"); Tyack, *Onward Christian Soldiers*, *supra* note 83, at 246 (noting that the "great majority of Protestant, Catholic, and Jewish leaders testifying on [the] prayer amendment[s] argued that the Court's decision [in *Engel*] was a proper interpretation of the American experiment in religious liberty"); James E. Wood, Jr., *Religion and Education in American Church-State Relations*, in RELIGION, THE STATE, AND EDUCATION 32-33 (James E. Wood, Jr. ed., 1984) (noting that "Roman Catholicism maintained an unsympathetic neutrality" regarding the prayer amendments).

248. Klarman, *Rethinking the Revolutions*, *supra* note 13, at 15 (noting that polls revealed "that anywhere from sixty to eighty percent of the public favored" the practices outlawed in *Engel* and *Schempp*); Gallup Poll, Sept. 1964, in *Public Opinion Online*, Roper Center, Apr. 11, 1990 (77% of those polled favored a constitutional amendment to legalize school prayer); National Opinion Research Center, Oct. 1964, in *Public Opinion Online*, Apr. 19, 1989 (57% of those polled strongly favored — and 26% somewhat favored — school prayer).

249. SORAUF, WALL OF SEPARATION, *supra* note 146, at 312-13; Ellis Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. PUB. L. 396, 398-401 (1965).

250. The most prominent proponent of the view that the Supreme Court's work generally confirms rather than contradicts majoritarian sentiment is Michael Klarman, and even he does not deny that the Court "occasionally plays a *limited* countermajoritarian function." Klarman, *Rethinking the Revolutions*, *supra* note 13, at 6, 15 (emphasis in original).

Clause in political context. At least three factors suggest why a Court deeply influenced by societal attitudes would have moved to secularize public education despite majority sentiment against that view.

First, polls and votes likely overstated the depth of support for school prayer. The positions of the Catholic Church and the United States Congress are especially telling. Catholic leaders strongly denounced *Engel* and *Schempp*, but when constitutional amendments were proposed to reverse them, Catholic leaders sat on their hands.<sup>251</sup> Similarly, many members of Congress found it impolitic to vote against those amendments but recognized privately that reinstating least-common-denominator school prayer would not bolster real faith.<sup>252</sup> Politicians, like the Catholic hierarchy, had reason to champion the *idea* of school prayer, but many were not committed to putting that idea into practice.

Second, and more importantly, the controversy over school prayer revealed a huge gap between the cultural elite and the rest of America. People generally may have supported school prayer and Bible reading, but the leadership class did not. Elite support for the Supreme Court's secularization project was clearly visible in the activities of law professors and deans, in the prominent newspaper editorials endorsing *Engel* and *Schempp*, and most importantly in the views of mainline Protestant leaders, who overwhelmingly supported the prayer decisions and opposed efforts to overturn them.<sup>253</sup> The contrary opinions of many of the Protestant faithful, especially conservative evangelicals, were less visible and less influential than the announced positions of religious organizations and leaders.

Just how easily the cultural elite dismissed evangelical opinion is captured in a wonderful quotation from Philip Kurland's *Foreword* to the *Harvard Law Review's* survey of the Supreme Court's 1963 term.<sup>254</sup> Kurland was no fan of the Warren Court. After vehement criticism of its work, he admitted that the Court was "fortunate" in its enemies,

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251. See *infra* text accompanying notes 261-262.

252. E.g., BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 52-74 (describing how members of Congress initially came out strongly against *Engel* but gradually came to accept the decision after reading positions of religious leaders and opinions in leading periodicals); POWE, THE WARREN COURT, *supra* note 218, at 188-90, 361-63, 377-78 (describing congressional reactions to *Engel* and *Schempp* and concluding that legislative proposals to overrule those decisions had no real chance of passing); Boggs, History of Americans United, *supra* note 138, at 513 (noting that members of Congress were afraid to vote against school-prayer amendments because "it was like voting against God"). As Blanshard and Powe point out, part of what initially angered Southern members of Congress was the fact that, as in desegregation, the Court was interfering with state control of education. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 52; POWE, THE WARREN COURT, *supra* note 218, at 188-89.

253. See *supra* text accompanying notes 224-240.

254. Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branch of the Government*, 78 HARV. L. REV. 143 (1964)



adding that “it is difficult not to help resist attacks from racists, from the John Birch Society and its ilk, and from religious zealots who insist that the Court adhere to the truth as they know it.”<sup>255</sup> As L.A. Powe observed, the fact that a noted conservative scholar could so readily lump “religious zealots” with racists and Birchers “says far more about how mainstream thought . . . viewed the publicly religious than it does about the publicly religious themselves.”<sup>256</sup> The Supreme Court and its intellectual allies readily discounted popular support for school prayer. To the justices, the broad consensus among mainline Protestants, Jews, and public secularists would have seemed richly confirmatory of the need to eliminate religious observances from public schools, even if a majority of Americans disagreed. Not surprisingly (and not for the last time), the justices championed the dominant views of the nation’s elite as against popular opinion.<sup>257</sup>

Although we have not found polling data from the 1960s that disaggregate school prayer opinion along class lines, subsequent data strongly confirm a gap between popular and elite opinion.<sup>258</sup> In 1991, support for school prayer fell from 73% of those with less than a high-school education, to 63% of those with a high school degree, to 44% of those who graduated from college, to only 31% of those with a graduate degree. And while a majority of persons with annual incomes below \$30,000 favored school prayer, a majority of those with incomes above \$75,000 opposed it.

Finally, the Supreme Court’s own prior pronouncements influenced its insistence on excluding religion from public schools. The Court could not reconcile school prayer with its high-flown separationist rhetoric in *Everson*. The justices had only two choices: they could either purge religion from the public schools or eat their own words. As Edmond Cahn remarked at the time, when seen against the background of *Everson*’s version of history, “the Supreme Court’s decision in *Engel v. Vitale* was about as close to predictable as the judicial process becomes.”<sup>259</sup> *Engel* and *Schempp* not only followed the

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255. *Id.* at 176, quoted in POWE, THE WARREN COURT, *supra* note 218, at 358.

256. POWE, THE WARREN COURT, *supra* note 218, at 358.

257. The description also fits the Court’s work in obscenity, flag-burning, and other protections of minority speech. See Michael J. Klarman, *What’s So Great About Constitutionalism*, 93 NW. U. L. REV. 145, 189-91 (1997) (describing ways in which the Court’s decisions reflect elite opinion); cf. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”).

258. National Opinion Research Center, Poll 1991, in *Public Opinion Online*, Roper Center, Jan. 23, 1995.

259. Edmond Cahn, *On Government and Prayer*, 37 N.Y.U. L. REV. 981, 986 (1962); cf. BLANSHARD, RELIGION AND THE SCHOOLS, *supra* note 136, at 79 (“The Court, having embarked on its present interpretation of constitutional history . . . could not have reached any other conclusion in the prayer case without contradicting its whole recent philosophy.”).

historical and rhetorical framework of *Everson*, but also fit comfortably within a broader trend of increasing protection for religious minorities, which was itself a response to the nation's increasing religious pluralism. Most prominently, the Court had upheld the right of Jehovah's Witnesses to refuse to salute the flag or pledge allegiance at the start of the school day.<sup>260</sup> The sensibility that sought to protect Jehovah's Witnesses and other religious minorities from official coercion<sup>261</sup> also motivated *Engel* and *Schempp*. The Court recognized that in a religiously pluralistic society, any public observances were bound to offend some believers and, in some contexts, would tend to coerce them. Put another way, *Engel* and *Schempp* drew not only on the imagined history and separationist rhetoric of the modern Establishment Clause but also on a concern for individual liberty of conscience more readily identified with the Free Exercise Clause.

### III. THE COMING REVOLUTION

"It is written in our country's constitution that church and state must be, in this nation, forever separate and free."

— Reverend W.A. Criswell, Pastor of the First Baptist Church of Dallas, the largest congregation in the Southern Baptist Convention, 1960<sup>262</sup>

"I believe this notion of the separation of church and state was the figment of some infidel's imagination."

— Reverend W.A. Criswell, 1984<sup>263</sup>

For over three hundred years, Baptists and other Protestants insisted on strict separation of church and state. They unselfconsciously tolerated religious exercises in public schools, but insisted on strict separation when it came to funding religious schools. From the middle of the seventeenth century until the middle of the twentieth, American Protestants, with few exceptions, shared a vision of church-state relations shaped not only by Protestant traditions and principles, but also by mutual self-interest and a shared suspicion of Roman Catholics.<sup>264</sup>

260. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

261. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963) (upholding the right of a Seventh Day Adventist to receive unemployment benefits after being discharged for refusing to work on Saturday); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down Maryland law that required all public officers to affirm a belief in God).

262. W.A. Criswell, *Religious Freedom and the Presidency*, ACTION, Sept. 1960, at 9-10.

263. Richard A. Pierard, *The Historical Background of the Evangelical Assault on the Separation of Church and State in the U.S.A.*, in INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE 65 (Menacham Mor ed., 1993).

264. *See supra* Sections II.B, II.C; *see also* FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 13-14; MORGAN, THE SUPREME COURT AND RELIGION, *supra* note 122, at 82-93.

Today, much has changed. Protestant opinion is now divided both on aid to religious schools and on religious observances in the public schools. Leaders of mainline Protestant denominations now take a consistently separationist stance, opposing both aid to religious schools and religion in the public schools. Evangelical Christians take a consistently accommodationist position, advocating both aid to religious schools and the reintroduction of religion into public education. Where there was once a nearly monolithic, if internally contradictory, Protestant position on church and state, there is now a great schism, with each side staking out internally consistent but diametrically opposed positions.

This splintering of Protestant opinion might not have been of major consequence but for another change among Protestants: a dramatic shift in energy and political power from mainline denominations to evangelicals. The former have lost parishioners and political clout, so much so that by the 1990s some suggested that the mainline denominations had become the "sideline" denominations. Meanwhile, evangelical churches experienced explosive growth.<sup>265</sup> Newly energized evangelicals joined other faiths in alliances that would have been unimaginable a few decades ago. Most remarkably, evangelical Christians sided with Catholics and Orthodox Jews in supporting aid to religious schools. We believe that this coalition will eventually produce a new understanding of the Establishment Clause.<sup>266</sup> Indeed, as *Mitchell v. Helms* indicates, the transformation may already be underway.

#### A. *The Supreme Court and Christian Academies*

An irony in modern church-state politics is the Supreme Court's unintended role in energizing the political forces that now seek to overthrow its Establishment Clause jurisprudence. The Court itself planted the seeds of revolution, first in ordering desegregation and

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265. For descriptions of the simultaneous decline of mainline denominations and growth among evangelical churches, see FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 42-43; ANDREW M. GREELEY, RELIGIOUS CHANGE IN AMERICA 33 (1989); HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 165-66; and DONALD E. MILLER, REINVENTING AMERICAN PROTESTANTISM: CHRISTIANITY IN THE NEW MILLENNIUM 4 (1997).

266. Sources for this paragraph include FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 29-148; AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 138-39 (1993) [hereinafter WELLS, TIME TO CHOOSE]; Bruce S. Cooper, *The Changing Demography of Private Schools: Trends and Implications*, 16 EDUC. & URBAN SOC'Y 429, 437-42 (1984) [hereinafter Cooper, *Changing Demography of Private Schools*]; John Herbers, *Activism in Faith: Big Shift Since '60*, N.Y. TIMES, Sept. 12, 1984, at B9 [hereinafter Herbers, *Activism in Faith*]; William J. Reese, *Soldiers for Christ in the Army of God: The Christian School Movement in America*, 35 EDUC. THEORY 175, 177, 194 (1985) [hereinafter Reese, *Soldiers for Christ*].

later in excluding prayer and Bible reading from the public schools.<sup>267</sup> These two lines of decision caused evangelicals to form their own schools.<sup>268</sup> The dramatic explosion of evangelical schools, in turn, drew evangelicals from the pulpits into politics and helped transform their views on separation of church and state. The story of the coming revolution therefore begins with the rise of the Christian academy.

In the early days of this country, many Protestant denominations experimented with church schools, but this effort gave way to the common-school movement and the proliferation of public schools in the late nineteenth century. By the early twentieth century, most Protestants no longer sponsored religious schools.<sup>269</sup> A few evangelical groups — the Missouri Synod Lutherans, the Seventh Day Adventists, and the Calvinists (Christian Reformed) — continued to do so, but their numbers were always small.<sup>270</sup> Additionally, a few fundamentalist churches, perhaps 150 nationwide, founded private schools in the first half of the twentieth century.<sup>271</sup> Overwhelmingly, however, religious schools were Catholic schools.<sup>272</sup> Until the late 1960s, almost all Protestants — whether liberal or conservative, mainline or evangelical — attended public schools. These public schools reflected Protestant val-

267. The crucial desegregation decision was *Green v. New Kent County School Board*, 391 U.S. 430 (1968), in which the Court rejected a freedom-of-choice plan, indicated that the time for “all deliberate speed” in desegregation had ended, and ushered in the phase of massive desegregation in the South. See J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, 78 (1979) [hereinafter WILKINSON, *FROM BROWN TO BAKKE*]. The prayer and Bible reading decisions were, respectively, *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963).

268. That the two sets of decisions were linked in the eyes of some observers is apparent from the statement of Representative George Andrews of Alabama, who stated after the *Engel* decision: “They put the Negroes in the schools and now they’re driving God out.” HODGSON, *CONSERVATIVE ASCENDANCY*, *supra* note 11, at 168.

269. James C. Carper, *The Christian Day School*, in *RELIGIOUS SCHOOLING IN AMERICA* 111 (James C. Carper & Thomas C. Hunt eds., 1984) [hereinafter Carper, *The Christian Day School*]; Susan Rose, *Christian Fundamentalism and Education in the United States*, in *FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE SCIENCES, THE FAMILY, AND EDUCATION* 452-53 (Martin E. Marty & R. Scott Appleby eds., 1993) [hereinafter Rose, *Christian Fundamentalism*]; Smith, *Parochial Education*, *supra* note 97, at 196-97.

270. Reese, *Soldiers for Christ*, *supra* note 266, at 175. See generally WALTER H. BECK, *LUTHERAN ELEMENTARY SCHOOLS IN THE UNITED STATES: A HISTORY OF THE DEVELOPMENT OF PAROCHIAL SCHOOLS AND SYNODICAL EDUCATIONAL POLICIES AND PROGRAMS* (1939) (describing the creation and growth of Lutheran elementary schools).

271. Carper, *The Christian Day School*, *supra* note 269, at 111-12.

272. Donald A. Erickson, *Choice and Private Schools: Dynamics of Supply and Demand*, in *PRIVATE EDUCATION: STUDIES IN CHOICE AND PUBLIC POLICY* 82, 86 (Daniel C. Levy ed., 1986) [hereinafter Erickson, *Choice and Private Schools*]; Thomas C. Hunt & Norlene M. Kunkel, *Catholic Schools: The Nation’s Largest Alternative School System*, in *RELIGIOUS SCHOOLING IN AMERICA* 1-7 (James C. Carper & Thomas C. Hunt eds., 1984).

ues, and some continued to sponsor pan-Protestant religious exercises.<sup>273</sup>

Enter school desegregation. The South met *Brown v. Board of Education* with massive resistance.<sup>274</sup> The ultimate threat in the South's arsenal of reaction was to close the public schools altogether and/or to create all-white private academies, perhaps with the help of state-funded vouchers.<sup>275</sup> By 1958, all Southern States except Tennessee had enacted school-closing measures.<sup>276</sup> Because of the success of Southern defiance and the glacial pace of school desegregation, few public schools were closed, and correspondingly few segregationist academies were opened, in the ten years after *Brown*.<sup>277</sup> Notable exceptions occurred, including the closing of the Prince Edward County public schools in rural Virginia and the opening of private all-white schools supported by state vouchers.<sup>278</sup> But overall, Southern private-school enrollment remained nearly level in the decade after *Brown*.<sup>279</sup>

Change began in 1964, when desegregation first became a reality in many parts of the South. Private schools began to multiply after the passage of the Civil Rights Act of 1964 and the ensuing increase in court-ordered desegregation. In 1964 the Citizens Council (formerly the White Citizens Council) opened the first of a chain of private segregation academies in Mississippi, and the first segregationist academies opened in South Carolina in the same year.<sup>280</sup> Over the next three

273. DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 90-91 (1987); Carper, *The Christian Day School*, *supra* note 269, at 112-119; Reese, *Soldiers for Christ*, *supra* note 266, at 177-78; Tyack, *Onward Christian Soldiers*, *supra* note 83, at 216-19.

274. WILKINSON, FROM BROWN TO BAKKE, *supra* note 267, at 78-102.

275. NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE 248-50, 275, 279, 281-84, 288-89 (1969) [hereinafter BARTLEY, MASSIVE RESISTANCE]; MATTHEW LASSITER, TWENTIETH-CENTURY SECESSIONISM, THE SEGREGATED PRIVATE SCHOOL MOVEMENT IN THE SOUTH 6-7 (Dec. 1999) (unpublished manuscript, on file with authors) [hereinafter LASSITER, TWENTIETH-CENTURY SECESSIONISM]; WILKINSON, FROM BROWN TO BAKKE, *supra* note 267, at 82.

276. BARTLEY, MASSIVE RESISTANCE, *supra* note 275, at 288-89; LASSITER, TWENTIETH-CENTURY SECESSIONISM, *supra* note 275, at 8.

277. BENJAMIN MUSE, TEN YEARS OF PRELUDE: THE STORY OF INTEGRATION SINCE THE SUPREME COURT'S 1954 DECISION 156-57 (1964) [hereinafter MUSE, TEN YEARS OF PRELUDE].

278. WILKINSON, FROM BROWN TO BAKKE, *supra* note 267, at 95-102; Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L.J. 327, 340-43 (1997). See generally BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951-1964 (1965). The Supreme Court put an end to this form of resistance in *Griffin v. County School Board*, 377 U.S. 218 (1964), when it ordered Prince Edward officials to reopen and fund racially nondiscriminatory public schools.

279. MUSE, TEN YEARS OF PRELUDE, *supra* note 277, at 156-57; DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH 6 (1976) [hereinafter NEVIN & BILLS, THE SCHOOLS THAT FEAR BUILT].

280. NEVIN & BILLS, THE SCHOOLS THAT FEAR BUILT, *supra* note 279, at 7; see also *Norwood v. Harrison*, 413 U.S. 455, 457 (1974) (noting that, between the 1963-1964 school

years, enrollment in segregation academies increased ten-fold, and the number of schools grew by nearly two hundred.<sup>281</sup> Although some were affiliated with churches, most were secular and located in rural areas where total resistance to any integration held sway.<sup>282</sup>

By the late 1960s, both the rural and the urban South faced imminent desegregation. The result was a dramatic explosion in the number of private schools and a turn to church-based education.<sup>283</sup> Private schools arose in rural areas when it became clear that freedom-of-choice plans and other means of token compliance would no longer suffice. They arose in urban areas as they too faced orders to desegregate, often by forced busing.<sup>284</sup> The demise of freedom-of-choice and the advent of busing triggered a massive exodus of whites from public schools and a scramble to find private alternatives.<sup>285</sup> Those fleeing public schools, particularly in urban areas, often turned to churches as the organizing loci for new schools.<sup>286</sup>

The numbers tell the story. In 1954, fewer than 1% of students in the South attended private school. By 1971, that figure had grown to 6% across the region and 12% in certain States.<sup>287</sup> If we narrow our focus a bit, it becomes clear that the pace of private school enrollment tracked the pace of school desegregation. A comparative focus clarifies the role of school desegregation. Between 1961 and 1971, enrollment in private, nonsectarian schools in the twelve-state southeast region grew by 242.2%, and enrollment in non-Catholic sectarian schools grew by 167.7%.<sup>288</sup> This dramatic explosion in private educa-

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year and 1970, the number of private, non-Catholic schools in Mississippi grew from seven-teen to 155, with enrollment increasing from 2,362 to an estimated 42,000).

281. Kitty Griffith, *Segregation Academies Flourish in South*, SOUTH TODAY, Oct. 1969, at 1.

282. NEVIN & BILLS, THE SCHOOLS THAT FEAR BUILT, *supra* note 279, at 1-11; Georgann Hansen Eglinski, Note, *Section 1981 Applicable to Private School Admissions*, 25 U. KAN. L. REV. 247, 251-52 (1977) [hereinafter Eglinski, *Private School Admissions*]; Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1441-48 (1973) [hereinafter Hafter & Hoffman, *Segregation Academies*].

283. LASSITER, TWENTIETH-CENTURY SECESSIONISM, *supra* note 275, at 6-10; John C. Walden & Allen D. Cleveland, *The South's New Segregation Academies*, 53 PHI DELTA KAPPAN 234, 234 (1971).

284. See NEVIN & BILLS, THE SCHOOLS THAT FEAR BUILT, *supra* note 279, at 11.

285. Eglinski, *Private School Admissions*, *supra* note 282, at 251; Hafter & Hoffman, *Segregation Academies*, *supra* note 282, at 1441.

286. NEVIN & BILLS, THE SCHOOLS THAT FEAR BUILT, *supra* note 279, at 7-8.

287. Eglinski, *Private School Admissions*, *supra* note 282, at 251.

288. The figures in this and the preceding sentence are from the U.S. Office of Education, and are reported in Hafter & Hoffman, *Segregation Academies*, *supra* note 282, at 1442 n.45. See also Virginia Davis Nordin & William Lloyd Turner, *More Than Segregation Academies: The Growing Protestant Fundamentalist Schools*, 61 PHI DELTA KAPPAN 391 (1980) [hereinafter Nordin & Turner, *Protestant Fundamentalist Schools*] (describing the rapid growth of Christian academies between 1961 and 1979).

tion in the South was directly contrary to the contemporary experience in the rest of the nation. In the five years following the Civil Rights Act of 1964, while private school enrollment *increased* tenfold in the South,<sup>289</sup> it *decreased* 23% nationwide.<sup>290</sup>

The most significant and enduring of the new private schools were the Christian academies. Also known as Christian day schools, the academies were sponsored by a range of evangelical Protestants; some were affiliated with individual churches and others with local Christian school societies.<sup>291</sup> The most conservative wing of the evangelical movement, the fundamentalists, sponsored a significant number of academies, then and now.<sup>292</sup> Although many evangelical and fundamentalist churches do not affiliate with a particular denomination, many are Baptist, and independent Baptist congregations sponsored a large fraction of the Christian academies.<sup>293</sup> The school founders used the terms *Christian day school* or *Christian academy* to emphasize the fundamentalist distinction between those who are "saved" (true Christians) and those who are not.<sup>294</sup> The schools usually had small enrollments, predominately of white children from middle-class and working-class families. Though they had differing educational qualities and facilities, Christian academies shared an emphasis on religion, obedience to authority, and traditional conservative values.<sup>295</sup>

The academies were havens from all that conservative Protestants found wrong with public education, and the first complaint was integration. That desegregation prompted the creation of Christian academies is sometimes disputed, perhaps because of lingering reputa-

289. Jeremy A. Rabkin, *Taxing Discrimination: Federal Regulation of Private Education by the Internal Revenue Service*, in PUBLIC VALUES, PRIVATE SCHOOLS 138-39 (Neal E. Devins ed., 1989) [hereinafter Rabkin, *Taxing Discrimination*].

290. Hafter & Hoffman, *Segregation Academies*, *supra* note 282, at 1442 n.45.

291. See Carper, *The Christian Day School*, *supra* note 269, at 113; Erickson, *Choice and Private Schools*, *supra* note 272, at 88-89; Rose, *Christian Fundamentalism*, *supra* note 269, at 453.

292. Rose, *Christian Fundamentalism*, *supra* note 269, at 453-54.

293. Peter Skerry, *Christian Schools v. the I.R.S.*, 61 PUB. INT. 18, 21-23 (1980) [hereinafter Skerry, *Christian Schools v. the I.R.S.*].

294. Rose, *Christian Fundamentalism*, *supra* note 269, at 453. Christian academies should also be distinguished from "Christian" schools begun by the Calvinists or Dutch Reformed. Although they also refer to their schools as "Christian," Calvinist Day Schools began much earlier than the Christian day schools, did not begin primarily as a protest against public schools, and generally do not associate with Christian academies or their support organizations. *Id.* at 454; see also Donald Oppewal & Peter P. DeBoer, *Calvinist Day Schools: Roots and Branches*, in RELIGIOUS SCHOOLING IN AMERICA 58-80 (James C. Carper & Thomas C. Hunt eds., 1984).

295. For descriptions of the schools and the families whose children attended them, see NEVIN & BILLS, THE SCHOOLS THAT FEAR BUILT, *supra* note 279, at 19-88; PAUL F. PARSONS, INSIDE AMERICA'S CHRISTIAN SCHOOLS 3-110 (1987) [hereinafter PARSONS, INSIDE AMERICA'S CHRISTIAN SCHOOLS]; Reese, *Soldiers for Christ*, *supra* note 266, 177-87.

tional damage,<sup>296</sup> but the temporal connection between public-school desegregation and the advent of Christian academies is too obvious to ignore: Christian academies blossomed in the late 1960s, when desegregation became a reality in the South.<sup>297</sup> Many conservative Christians and commentators point to the prohibition of school prayer and Bible reading as the motivations for creating Christian academies. Although these decisions doubtless played a part,<sup>298</sup> they came down in 1962 and 1963, respectively.<sup>299</sup> Christian academies — many of which were begun quite hastily — did not appear in numbers until late in the decade.<sup>300</sup> It is implausible to believe that conservative Christians did nothing for five or six years *in response to* the school-prayer and Bible reading decisions, then suddenly leapt into action to organize private schools, often on shoe-string budgets and in makeshift facilities. The more plausible inference is that the precipitating event was the arrival of blacks in large numbers in previously all-white public schools.

Geography reinforces this conclusion. Christian academies began in the South.<sup>301</sup> Within that region, they tended to be concentrated in areas where flight to de facto segregated public schools was impossible or inconvenient. In Memphis, for example, where avoiding school desegregation meant moving across state lines, Christian academies flourished; in Atlanta, where flight to a suburban jurisdiction was easy, few private schools blossomed.<sup>302</sup> If religion and not race were the dominant motivation behind the initial wave of Christian academies, both timing and location would have been different.

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296. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 116; James C. Carper & Jack Layman, *Black-Flight Academies: The New Christian Day Schools*, 61 EDUC. FORUM 114, 115-16 (1997) [hereinafter Carper & Layman, *Black-Flight Academies*]; Skerry, *Christian Schools v. IRS*, *supra* note 293, at 28, 34-35.

297. A few specific examples help solidify the point. An article in *The Nation* in 1969, described the "opening of 50 new 'Christian Academies' in North Carolina, the year before it was clear that North Carolina must 'totally integrate its schools.'" Harry Golden, *THE NATION*, Dec. 22, 1969, at 697. Another article, which generally downplays the connection between school desegregation and Christian academies, nonetheless admits that "there is no question that non-public enrollments in Louisville have increased substantially since the implementation of forced busing." Nordin & Turner, *Protestant Fundamentalist Schools*, *supra* note 288, at 392.

298. NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 26; Skerry, *Christian Schools v. the I.R.S.*, *supra* note 293, at 26.

299. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

300. On the haste with which Christian academies were erected, see NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 27-36; and Golden, *supra* note 297, at 697.

301. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at xii.

302. NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 11-12. See also PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 124-25 (describing how a metropolitan desegregation plan in Little Rock, Arkansas, drove white parents from the school and led to the opening of Christian academies "all over the Little Rock metropolitan area").



Finally, many of those involved in creating Christian academies spoke candidly about their motivations. "I would never have dreamed of starting a school, hadn't it been for busing," reported Brother Floyd Simmons, who created the Elliston Baptist Academy in Memphis during the early 1970s.<sup>303</sup> Other pastors admitted that "some parents send their kids to Christian schools because they just don't like blacks."<sup>304</sup> Some parents spoke with equal frankness. When asked why she sent her children to a Christian academy, one parent responded: "I am revolting against busing."<sup>305</sup>

To be sure, integration was not the only thing that conservative Christians tried to escape. They left public schools for other reasons only partly based on racial discomfort: they also disliked the values being taught to their children, the lack of discipline, and the danger and chaos that many of them came to see in the public schools.<sup>306</sup> As an early study described, conservative Christians who fled to the academies viewed the public schools as "horrid and dangerous places. They believe schools are full of drugs, sexual license and fighting; that white teachers are intimidated by black students, and black teachers can't handle students of either race; that classrooms are chaotic, discipline has vanished and learning has stopped."<sup>307</sup>

They also believed that public schools had become godless.<sup>308</sup> Here the formative hand of the Supreme Court again emerges. Many of those supporting Christian academies pointed to the Court's prayer and Bible decisions as their reason for abandoning public schools.<sup>309</sup> North Carolina parents who were asked why they left public schools most frequently cited the Court's school-prayer decision.<sup>310</sup> That decision, reinforced by the Court's Bible-reading decision the following year, led many evangelicals to conclude that hostility to religion dominated the public schools.

303. NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 30.

304. See Skerry, *Christian Schools v. the I.R.S.*, *supra* note 293, at 28.

305. NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 25. We do not mean to suggest that all opposition to busing reflected racial animus, but only that desegregation — and the means to achieve it — provoked white flight to Christian academies.

306. NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 19-25; Reese, *Soldiers for Christ*, *supra* note 266, at 177-79; Rose, *Christian Fundamentalism*, *supra* note 269, at 455-56; Skerry, *Christian Schools v. the I.R.S.*, *supra* note 293, at 26-28.

307. NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 21.

308. Erickson, *Choice and Private Schools*, *supra* note 272, at 88; Nordin & Turner, *Protestant Fundamentalist Schools*, *supra* note 288, at 392; Rose, *Christian Fundamentalism*, *supra* note 269, at 455; David Sikkink, *The Social Sources of Alienation from Public Schools*, 78 *SOCIAL FORCES* 51, 66 (1999).

309. RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 165-68* (1984); Carper, *The Christian Day School*, *supra* note 269, at 115-16.

310. Skerry, *Christian Schools v. the I.R.S.*, *supra* note 293, at 26.

In the next two decades, more and more evangelicals came to share this disdain for public education. By the late 1970s and 1980s, the desire to escape the immorality and godlessness of public schools augmented and reinforced the desire to avoid integration. While desegregation provided the original impetus for Christian academies, opposition to the secularization of public education gave them sustenance.<sup>311</sup> As conservative Christians came to dislike what their children were being taught in the public schools (as well as who attended them), they became increasingly pointed in their criticisms. “We believe public schools are immoral,” said one private school activist in Kentucky. “The public schools breed criminals. They teach [children] they’re animals, that they evolved from animals. Christianity has been replaced by humanism in the public schools. It’s disgusting.”<sup>312</sup> As this statement suggests, conservative Christians often targeted humanism — or so-called “secular humanism” — as the cause of moral decline in the public schools. “Humanism has turned our public schools into a jungle,” said one parent from Nebraska, “in which any kind of animal can do anything it wants.”<sup>313</sup> There is no reason to doubt the sincerity of such statements, but there is also no reason to ignore the echo of racial unease they contain.

Growing disenchantment with public schools led evangelicals and fundamentalists to seek private alternatives.<sup>314</sup> In the 1980s and 1990s, Christian academies constituted the fastest growing segment of private education.<sup>315</sup> Precise enrollment figures are hard to come by, in part because many schools refused to report information and in part because the federal and state governments did not aggressively seek to account for private-school enrollment.<sup>316</sup> Nonetheless, estimates exist,

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311. *E.g.*, PARSONS, *INSIDE AMERICA’S CHRISTIAN SCHOOLS*, *supra* note 295, at 126 (“Clearly, the evidence suggests that the *primary* motivation for the *continued existence* of Christian schools is religious and not racial.”).

312. Reese, *Soldiers for Christ*, *supra* note 266, at 178.

313. *Id.* at 178-79.

314. The change in position regarding private schools represented not only a departure from the traditional Protestant stance, but also a departure from the more recent stance taken by fundamentalists toward Christian day schools. As one scholar reported, until the early 1960s, “most right-wing Fundamentalist churches were officially opposed to the ‘Christian day school movement,’” insisting that fundamentalists should patronize public schools. Erickson, *Choice and Private Schools*, *supra* note 272, at 90.

315. See Rose, *Christian Fundamentalism*, *supra* note 269, at 454. See generally Nordin & Turner, *Protestant Fundamentalist Schools*, *supra* note 288, at 391; Reese, *Soldiers for Christ*, *supra* note 266, at 180.

316. On reporting and monitoring difficulties, see NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 5-9; Carper, *The Christian Day School*, *supra* note 269, at 116; Erickson, *Choice and Private Schools*, *supra* note 272, at 89; and Rose, *Christian Fundamentalism*, *supra* note 269, at 454-55.

and all portray explosive growth.<sup>317</sup> According to Professor Donald Erickson, one of the most respected scholars of private education, in 1961-1962 no more than 250 or 300 Christian academies existed nationwide.<sup>318</sup> By 1982-1983, there were approximately 10,740.<sup>319</sup> The enrollment figures are equally remarkable. In 1965, approximately 110,000 students attended Christian academies.<sup>320</sup> By 1982, that figure had grown to over 900,000.<sup>321</sup> By 1985, approximately one million students — one-fifth of all private school students — attended Christian academies.<sup>322</sup>

Though concentrated in the South, Christian academies were not confined to that region.<sup>323</sup> They arose throughout the country, including in areas that never had to confront school desegregation.<sup>324</sup> Today, Christian academies exist in nearly every state, and their student bodies are increasingly diverse.<sup>325</sup> Virtually every such school has adopted a nondiscriminatory racial policy, and an estimated 75% are at least nominally integrated.<sup>326</sup> In addition, a small but growing number of black evangelical congregations have created their own schools.<sup>327</sup>

317. Although commentators arrive at different estimates regarding the growth and numbers of Christian academies, they uniformly describe the growth as explosive or dramatic. JEREMY RIFKIN & TED HOWARD, *THE EMERGING ORDER: GOD IN THE AGE OF SCARCITY* 121-26 (1979); PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 186; Carper, *The Christian Day School*, *supra* note 269, at 116; Cooper, *Changing Demography of Private Schools*, *supra* note 266, at 430; Erickson, *Choice and Private Schools*, *supra* note 272, at 89; Reese, *Soldiers for Christ*, *supra* note 266, at 175; Rose, *Christian Fundamentalism*, *supra* note 269, at 455.

318. Erickson, *Choice and Private Schools*, *supra* note 272, at 89.

319. Cooper, *Changing Demography of Private Schools*, *supra* note 266, at 430.

320. *Id.* at 432; Erickson, *Choice and Private Schools*, *supra* note 272, at 87.

321. Erickson, *Choice and Private Schools*, *supra* note 272, at 87.

322. Reese, *Soldiers for Christ*, *supra* note 266, at 175; Carper, *The Christian Day School*, *supra* note 269, at 114-15. Growth in Christian academies has slowed in recent years, as indicated by estimates of enrollment in the 1990s, which still hover around one million students. FOWLER ET AL., *RELIGION AND POLITICS*, *supra* note 11, at 33; Rose, *Christian Fundamentalism*, *supra* note 269, at 454.

323. Judith Cummings, *Non-Catholic Schools Growing Fast*, N.Y. TIMES, Apr. 13, 1983, at A1 (reporting statistics from National Center for Education that show enrollment in non-Catholic religious schools grew by 47% in the Northeast during the 1970s, while enrollment quadrupled during this period in the South).

324. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 126; Nordin & Turner, *Protestant Fundamentalist Schools*, *supra* note 288, at 391-92; Skerry, *Christian Schools v. the I.R.S.*, *supra* note 293, at 18.

325. Carper & Layman, *Black-Flight Academies*, *supra* note 296, at 115-16; *see also* PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 186.

326. Carper & Layman, *Black-Flight Academies*, *supra* note 296, at 115-16.

327. *Id.* at 115-18.

Nonetheless, enrollment at most Christian academies remains overwhelmingly white.<sup>328</sup>

Importantly, the surge in Christian academies occurred during a period when enrollment in Catholic schools declined dramatically. Until 1965, to say you were enrolled in a private school was to say, essentially, that you attended a Catholic parochial school. In 1965, 6.3 million students attended private schools; of that number, 5.5 million — almost 90% — attended Catholic parochial schools.<sup>329</sup> Of those remaining, 350,000 attended nonreligious institutions, and slightly more than 450,000 went to religious schools not associated with the Catholic Church. Thus, while Catholic schools accounted for nearly 90% of all private-school enrollment, all other religious schools combined — including Protestant schools of all denominations and Jewish schools — accounted for only 7% of that figure.<sup>330</sup>

Over the next two decades, the demographics of private schools changed dramatically, with Catholics and Protestants passing each other at the schoolhouse door. As conservative Christians led a mass exodus from the public schools, many Catholics deserted parochial education in favor of public school.<sup>331</sup> Between 1965 and 1983, while Christian academies grew by over 700%, Catholic schools lost nearly half their enrollment, with the number of students falling from 5.6 to three million.<sup>332</sup> Many causes account for this drop in enrollment, including a declining birthrate, the Church's failure to build schools in the suburbs, and the growing acceptability of public schools, which had lost their Protestant identification.<sup>333</sup> Whatever the precise cause, the result was clear: By the mid-1980s, private schools were no longer overwhelmingly Catholic. Indeed, by 1984, there were 1,300 more Christian academies than Catholic parochial schools, although the latter had a majority of private-school students because of higher average enrollment.<sup>334</sup>

The rise of Christian academies and decline of parochial schools has had three important consequences for church-state politics. First, Catholic schools no longer dominate the private school landscape. In

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328. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 126; Carper & Layman, *Black-Flight Academies*, *supra* note 296, at 115; Reese, *Soldiers for Christ*, *supra* note 266, at 187.

329. KENNETH A. SIMON & W. VANCE GRANT, U.S. DEPARTMENT OF HEALTH, EDUC. AND WELFARE, *DIGEST OF EDUCATIONAL STATISTICS 32* (1968).

330. *Id.*

331. Carper, *The Christian Day School*, *supra* note 269, at 111.

332. Erickson, *Choice and Private Schools*, *supra* note 272, at 87.

333. SORAUF, *WALL OF SEPARATION*, *supra* note 146, at 322-23; JOSEPH P. VITERITTI, *CHOOSING EQUALITY* 81-82 (1999) [hereinafter VITERITTI, *CHOOSING EQUALITY*]; Erickson, *Choice and Private Schools*, *supra* note 272, at 86-88.

334. Cooper, *Changing Demography of Private Schools*, *supra* note 266, at 430.

the 1997-1998 school year, 27,400 private schools existed nationwide, serving nearly five million students — approximately 10% of total elementary and secondary school enrollment.<sup>335</sup> For the first time in this century, Catholic schools accounted for less than half of private-school enrollment. Other religious schools, most of which are Christian academies, enrolled 34.8% of private-school students. Although precise figures on enrollment in Christian academies are not available, a conservative estimate puts it at no less than 20% of the total of all private-school students.<sup>336</sup> This growing diversity among private schools opened the door to political alliances that previously had been unthinkable and eased the path to doctrinal reform by altering the practical effects of government aid to religious institutions.

The second consequence of the rise of Christian academies was an upsurge in political activity as evangelicals and fundamentalists fought to protect their fledgling schools. As we discuss below, Christian academies played a crucial role in the formation of a politically active religious right. The third consequence was that conservative Protestants now had an incentive to rethink their traditional hostility to school aid and to soften their stance on church-state separation. Over time, and with some limited exceptions, this is exactly what transpired.

### B. *The New Politics of Protestantism*

In hindsight, it seems inevitable that the growth of Christian academies would lead to a splintering of the Protestant position on church-state separation. Evangelicals now had schools of their own, which desperately needed financial support. Mainline denominations did not. But the disintegration of the Protestant coalition — and the shift in political power away from mainline denominations to evangelicals — occurred more gradually than deterministic hindsight might suggest.

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335. These figures and the additional ones cited in this paragraph all come from a report published by the National Center for Education Statistics. NAT'L CENTER FOR EDUC. STAT., 1997-98 PRIVATE SCHOOL UNIVERSE SURVEY 1-4 (Aug. 1999).

336. This estimate derives from commentators' estimates, e.g., FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 33; Rose, *Christian Fundamentalism*, *supra* note 269, at 454; as well as from the figures reported in the NAT'L CENTER FOR EDUC. STAT., *supra* note 335, at 3. The latter indicates that non-Catholic religious schools enrolled 34.8% of private-school students. Of these, those unaffiliated with any major denomination constituted 9.4%; those affiliated with a national denomination were 10.9%; and those affiliated with a conservative Christian school association were 14.5%. Not all Christian academies are affiliated with a conservative Christian school association; some are affiliated only with a national denomination and some are not affiliated at all. Based on the estimates given by Rose and Fowler, it thus seems reasonable to conclude that Christian academies enroll about one million students.

### 1. *Evangelicals and the Religious Right*

The advent of Christian academies did not lead to instant calls for government aid, because the initial impulse behind these schools was resolutely separatist. Those creating and attending Christian academies wanted to separate themselves from the public schools and from the dominant secular culture they reflected. To take financial assistance from the government would have exposed Christian academies to the secular control and influence that had polluted the public schools and driven evangelicals away.<sup>337</sup> The immediate aim of the Christian academies was thus not to secure government aid but to fight government regulation.<sup>338</sup>

Throughout the 1970s, evangelicals sought to secure private funding and resist government supervision, including accreditation and teacher certification requirements.<sup>339</sup> Christian academies waged dozens of court battles against state regulators, many of them successful.<sup>340</sup> Evangelicals argued that their schools were an extension of their ministries, and that schools and churches could not be distinguished. As Moral Majority leader Jerry Falwell said in 1981, when helping to fight state regulation of Christian academies in Nebraska, “to submit to state certification is to submit to licensure and the right of the state to license a church and its Christian ministry. We believe the church and the church school are all the church.”<sup>341</sup> Falwell, like other evangelical leaders, would change his tune (or whistle out of the other side of his mouth) when it came to seeking government assistance for religious schools. That ambition, of course, required that a religious school *not* be seen merely as an extension of the church. But in the early days of the Christian academies, the dominant concern of evangelicals was captured by Falwell’s statement in Nebraska. Evangelicals resisted

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337. As one Pentecostal minister in Kentucky explained, “[w]e don’t want any state money,” because “[w]e don’t want their nose in our business all the time.” Reese, *Soldiers for Christ*, *supra* note 266, at 193.

338. Perhaps that is why NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, written in the mid-1970s, does not once suggest that these schools were interested in securing government aid.

339. For descriptions of these fights, see Carper, *The Christian Day School*, *supra* note 269, at 121-22; Reese, *Soldiers for Christ*, *supra* note 266, at 181-83; Rose, *Christian Fundamentalism*, *supra* note 269, at 464 (calling this issue a “cause célèbre” among evangelicals and fundamentalists); and B. Drummond Ayres, Jr., *Private Schools Provoking Church-State Conflict*, N.Y. TIMES, Apr. 28, 1978, at A1.

340. These cases are discussed in PARSONS, *INSIDE AMERICA’S CHRISTIAN SCHOOLS*, *supra* note 295, at 146-52; Carper, *The Christian Day School*, *supra* note 269, at 121-22; Reese, *Soldiers for Christ*, *supra* note 266, at 182.

341. Reese, *Soldiers for Christ*, *supra* note 266, at 182; see also PARSONS, *INSIDE AMERICA’S CHRISTIAN SCHOOLS*, *supra* note 295, at 141 (explaining that, to fundamentalists, “a church school is not a separate entity from the church, not an agency of the church, not an arm of the church. Rather, it is the church itself in action.”).

government regulation on the ground that their academies had been "accredited by the Lord."<sup>342</sup>

Their position on school aid began to change when evangelicals organized politically. The impetus for that organization came, appropriately enough, from a fight over regulations proposed by the epitome of government officiousness, the IRS.<sup>343</sup> Spurred by a lawsuit, the IRS in 1970 decided to deny tax-exempt status to nonprofit private schools that discriminated on the basis of race. In 1975, the IRS extended this policy to private religious schools. Enforcement, however, was notoriously lax. Civil rights advocates pressed for stringent guidelines to assure that private schools not only considered black applicants but made special efforts to attract them. In 1978, at the behest of the Carter administration, the IRS proposed new regulations that would have presumed that schools begun during a period of desegregation were segregationist. The schools could rebut this presumption only by actually enrolling a certain quota of African-American students or by documenting substantial recruiting efforts.

The proposal ignited a political firestorm. Christian conservatives were outraged, and not simply because the loss of tax-exempt status would hurt their schools financially. Perhaps more importantly, they saw the government attempting to control the Christian academies. They "were shocked to be told that their schools must alter their curriculum or provide special scholarships for minorities to avoid government harassment."<sup>344</sup> With the help of Jerry Falwell, at the time a relatively unknown televangelist, Christian conservatives mounted an assault on the IRS. Falwell supplied the Christian Action Coalition with a mailing list of his contributors, and the Coalition organized a writing campaign. The IRS received 150,000 letters of protest, many

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342. Reese, *Soldiers for Christ*, *supra* note 266, at 183. For similar statements, see PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 147-48.

343. The information in this paragraph comes from NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 15-19; PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 119-22; Rabkin, *Taxing Discrimination*, *supra* note 289, at 139-47; Skerry, *Christian Schools v. the I.R.S.*, *supra* note 293, at 31-40.

344. Rabkin, *Taxing Discrimination*, *supra* note 289, at 145. It is difficult to tell whether conservative evangelicals were more upset by the prospective loss of tax-exempt status or by the symbolic effect of being taxed, but the latter may have been the more irksome. Most Christian academies received relatively modest donations from individuals, NEVIN & BILLS, *THE SCHOOLS THAT FEAR BUILT*, *supra* note 279, at 13-15, 29-36, who did not receive much financial benefit from the deductibility of donations and thus would not likely be deterred from giving money by a change in the law. Instead, it seems that conservative evangelicals viewed the tax-exempt status of private schools as a neutral baseline and considered the proposal to tax such schools as an effort to control them. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, *supra* note 295, at 123 (explaining that "Christian school proponents argue that the power to tax is the power to control"). The 1978 IRS proposal surely only strengthened this perspective, as it obviously attempted to use the carrot and stick of tax exemptions to induce Christian academies to embrace affirmative action.

more than they had ever received regarding any proposal. The opposition succeeded when Congress prohibited the IRS regulations.<sup>345</sup>

Even more important than the victory over the IRS was the culture war inspired by that battle. Success against the IRS prompted Falwell and Warren Billings, the leader of the Christian Action Coalition, to found the Moral Majority.<sup>346</sup> A highly publicized and controversial organization, the Moral Majority launched what we now call the “religious right” — an affiliation of like-minded conservative religious individuals and organizations that would influence the Republican Party and emerge in the 1990s as a potent force in American politics.<sup>347</sup> In this way, the Christian academies helped create a political movement that increased the influence of evangelicals.<sup>348</sup> The Moral Majority, and later the Christian Coalition, provided an organizing locus for what otherwise might have remained a diffuse collection of mostly independent churches and schools. Through the major organizations of the religious right, evangelicals and fundamentalists could present a unified front.<sup>349</sup> The political mobilization and growing political influence of the religious right meant that the conservative evangelical position on church-state relations suddenly *mattered*.

Though the organizational origins of the religious right lay in the fight to protect Christian academies, the Supreme Court’s decisions on abortion helped energize the movement.<sup>350</sup> Legalizing abortion, like removing prayer and Bible reading from the schools, confirmed evangelical fears that America was deserting Christianity. To the faithful, these decisions were ominous signals “that the country had fallen into

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345. For a description of Falwell’s participation and the letter writing campaign, including the reaction of Congress, see Rabkin, *Taxing Discrimination*, *supra* note 289, at 144-45.

346. *Id.* at 144.

347. On the rise of the religious right, see CASANOVA, PUBLIC RELIGIONS, *supra* note 159, at 135-66; and FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 79-82, 90-91, 142-48. See generally NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS (Michael Cromartie ed., 1993) (a collection of essays and responses on the growth and future of the religious right).

348. HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 175-78 (arguing that government regulation of Christian schools, both threatened and real, was the primary reason why conservative Christians became politically active).

349. This is not to say that all evangelicals are members of the religious right and support its goals, nor that the religious right consists only of conservative evangelicals. Although identifying with precision those individuals or groups who make up the religious right is impossible, the religious right essentially consists of those evangelicals and fundamentalists “who participated in or sympathized with the movement [begun in the late 1970s] to bring conservative moral and social change to the United States, in line with their religious values.” Robert Booth Fowler, *The Failure of the Religious Right*, in NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS 60 (Michael Cromartie ed., 1993).

350. See, e.g., A. James Reichley, *The Evangelical and Fundamentalist Revolt*, in PIETY AND POLITICS: EVANGELICALS AND FUNDAMENTALISTS CONFRONT THE WORLD 69, 76 (Richard John Neuhaus & Michael Cromartie eds., 1987) [hereinafter Reichley, *Evangelical Revolt*].



the hands of secular elites who were hostile to traditional faith and its norms."<sup>351</sup>

When the Moral Majority began in 1979, therefore, the time was ripe for political activism. Conservative evangelicals, especially fundamentalists, traditionally viewed politics as a distasteful engagement with a sinful world.<sup>352</sup> Although many evangelical churches encouraged members to vote, they did not invest much effort in politics, beyond the occasional fight over alcohol or gambling.<sup>353</sup> During the civil rights struggles of the 1950s and 1960s, for example, while mainline denominations offered active assistance and support for voting and civil rights for African Americans, Falwell and other conservative evangelical leaders remained on the sidelines.<sup>354</sup> In 1979, however, Falwell and compatriots began a campaign to convince fellow believers to abandon what was now called "the myth" that fundamentalists should avoid politics.<sup>355</sup> The religious right conducted an intensive and largely successful campaign to convince conservative evangelicals that their religious commitment to church-state separation did not preclude them from entering the political arena. "The pulpit should be in politics," leaders of the Moral Majority argued, adding that "when you baptize a child you should register him to vote."<sup>356</sup> Falwell and other leaders spread their message through publications, such as Falwell's book *Listen, America!*, which urged evangelicals to become active politically.<sup>357</sup> They also used their ubiquitous television broadcasts to reach literally millions of viewers.<sup>358</sup>

351. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 142.

352. CASANOVA, PUBLIC RELIGIONS, *supra* note 159, at 147-49; FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 40; HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 159; Reichley, *Evangelical Revolt*, *supra* note 350, at 74-75.

353. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 40; Reichley, *Evangelical Revolt*, *supra* note 350, at 74-75.

354. CASANOVA, PUBLIC RELIGIONS, *supra* note 159, at 148-49; HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 180; RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 10 (1984).

355. John Herbers, *Moral Majority and Its Allies Expect Harvest of Votes for Conservatives*, N.Y. TIMES, Nov. 4, 1984, at A38 [hereinafter Herbers, *Moral Majority and Its Allies*]; see also FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 40; Reichley, *Evangelical Revolt*, *supra* note 350, at 88.

356. Herbers, *Moral Majority and Its Allies*, *supra* note 355, at A38.

357. JERRY FALWELL, LISTEN, AMERICA! (1980). For a thorough exegesis of Falwell's book, see CASANOVA, PUBLIC RELIGIONS, *supra* note 159, at 150-54.

358. Evangelicals and fundamentalists cornered the market for religious broadcasting in the 1970s. The Federal Communications Commission (FCC) has always required television stations to devote some airtime to religious programming, but in the 1970s the stations, with FCC approval, began charging for the time. Mainline denominations declined to enter the market, which was quickly dominated by evangelical and fundamentalist preachers. See Reichley, *Evangelical Revolt*, *supra* note 350, at 74-75. The importance of television to the rise of the religious right cannot be gainsaid. "Had the Religious Right not enjoyed the technologies of religious television," observed sociologist Robert Wuthnow, "it might never have

As Falwell and other leaders of the religious right succeeded within the churches, they gained power elsewhere. The reason is not hard to fathom: white evangelical Protestants constitute approximately one-fourth of the American electorate.<sup>359</sup> Most evangelicals are politically conservative. Despite theological and political differences, evangelicals represent a broad coalition that generally supports conservative Republican politics.<sup>360</sup> As evangelicals mobilized politically through various organizations of the religious right, politicians heard their call.<sup>361</sup> As early as the 1980 election, Ronald Reagan courted their support. At a convention of televangelists in 1980, Ronald Reagan acknowledged that they, as religious leaders, might be unable to endorse a political candidate, but, he declared, "I endorse you."<sup>362</sup> In response, evangelicals abandoned their born-again brother, President Carter, and supported Reagan's victorious presidential bid.<sup>363</sup> Reagan responded by endorsing their agenda and by including prominent evangelicals, such as Gary Bauer, in his administration.<sup>364</sup>

Although it stumbled at times, particularly in the late 1980s, the religious right has maintained support and influence. The Moral Majority, which generated a lot of publicity and at one point claimed four million members, always rested on shaky financial grounds and dis-

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become the powerful movement it did." Robert Wuthnow, *The Future of the Religious Right*, in *NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS* 41 (Michael Cromartie ed., 1993).

359. See FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 92; HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 184; Reichley, *Evangelical Revolt*, *supra* note 350, at 72. Though African Americans are overwhelmingly Christian, predominately Protestant, and a substantial portion are evangelical Protestants, they do not tend to support the Republican Party. In increasing numbers, however, they do support aid to religious schools through measures such as vouchers. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 111-12.

360. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 41; Robert Dugan, *Comment*, in *NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS* 82 (Michael Cromartie ed., 1993) [hereinafter Dugan, *Comment*] ("evangelicals are more conservative, generally, than are most other segments of the population"); Kathleen Murphy Beatty & B. Oliver Walter, *Fundamentalists, Evangelicals, and Politics*, 16 AM. POL. Q. 43 (1988); Corwin Smidt, *Evangelical Voting Patterns, 1976-1988*, in *NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS* 97-100 (Michael Cromartie ed., 1993). See generally PIERARD, *THE UNEQUAL YOKE*, *supra* note 182 (describing how, by the 1960s, evangelical Christians were ideologically in tune with conservative politicians).

361. Dugan, *Comment*, *supra* note 360, at 82-83 (describing how, beginning in 1979, "Republicans have been actively cultivating evangelicals"). The Democratic Party, by contrast, has rebuffed overtures from evangelical groups such as the National Association of Evangelicals. *Id.* at 83.

362. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 119.

363. *Id.* at 101; HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 169.

364. Rose, *Christian Fundamentalism*, *supra* note 269, at 473.

banded in 1986.<sup>365</sup> Despite premature obituaries, however, the larger movement did not wither. Instead, the Christian Coalition, led by Pat Robertson and Ralph Reed, emerged in the late 1980s as the premier organization of the religious right. By the mid-1990s, Reed had helped build an organization with over one million members, affiliates in every state in the country and in 900 localities, an active lobby in Washington, and a budget exceeding twenty million dollars.<sup>366</sup> The Christian Coalition has since been joined by other groups, including the Family Research Council (led by Gary Bauer) and Focus on the Family (led by James Dobson), along with the Southern Baptist Convention and the National Association of Evangelicals.<sup>367</sup> These organizations help shape the Republican Party's national agenda and exert influence in local and state political contests, including placing conservative Christians on local and state boards of education.<sup>368</sup>

Just what, exactly, has the religious right been fighting for? From the beginning, protecting religious schools and prohibiting abortion have topped the agenda.<sup>369</sup> Less obviously, given their separationist tradition, they also want to restore school prayer.<sup>370</sup> More surprisingly still, the protection of Christian academies quickly came to include not simply shielding them from state regulation but also securing government financial assistance. By the late 1970s, Falwell and other leaders of the religious right began to flip on church-state separation; where they once had argued that financial aid to religious schools violated the Establishment Clause, they now clamored for increased governmental assistance, typically in the form of tuition tax credits or vouchers.<sup>371</sup> In 1978, for example, a tuition tax-credit bill debated in

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365. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 79-82; BARBARA B. GADDY ET AL., SCHOOL WARS: RESOLVING OUR CONFLICTS OVER RELIGION AND VALUES 23 (1996) [hereinafter GADDY ET AL., SCHOOL WARS].

366. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 142-48.

367. For a description of the various groups comprising the religious right, see CASANOVA, PUBLIC RELIGIONS, *supra* note 159, at 146-47; GADDY ET AL., SCHOOL WARS, *supra* note 365, at 17-32; Richard V. Pierard, *The Historical Background of the Evangelical Assault on the Separation of Church and State in the U.S.A.*, in INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE 65-68 (Menachem Mor ed., 1993); and People for the American Way, *Who's Who on the Religious Right*, [http://www.pfaw.org/issues/right/bg\\_groups.shtml](http://www.pfaw.org/issues/right/bg_groups.shtml) (last visited Oct. 15, 2001).

368. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 81-82, 148; GADDY, ET AL., SCHOOL WARS, *supra* note 365, at 55-61; Dugan, *Comment*, *supra* note 360, at 82-83.

369. Rose, *Christian Fundamentalism*, *supra* note 269, at 464; Charles Austin, *Religious Right Growing Impatient with Reagan*, N.Y. TIMES, Aug. 16, 1982, at A13 [hereinafter Austin, *Religious Right Growing Impatient*].

370. *E.g.*, FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 19-43 (1999) (describing the religious right's campaign to restore school prayer).

371. See Reese, *Soldiers for Christ*, *supra* note 266, at 193-94; *School Tax Credits: Making New Converts*, CHRISTIANITY TODAY, Sept. 22, 1978, at 37-38 [hereinafter *School Tax Credits*]. As Reese points out, the new stance on aid to schools taken by evangelical leaders

Congress received strong support not only from Catholic groups, but also from Jerry Falwell and evangelicals.<sup>372</sup>

This is not to suggest that all conservative evangelicals changed their minds on school aid. The issue remained controversial within this community, and some fundamentalists continued to oppose any form of governmental assistance on the ground that it would lead to governmental control.<sup>373</sup> But since the 1980s, the religious right increasingly has supported government aid for religious schools. In 1982 the *New York Times* reported that allowing school prayer, prohibiting abortion, and securing tuition tax-credits topped the agenda of religious conservatives.<sup>374</sup> Similar reports appeared two years later<sup>375</sup> and continued through the Reagan and Bush Administrations, as leaders of the religious right supported tax credits and vouchers.<sup>376</sup> Conservative evangelicals also joined in litigation designed to secure benefits for parochial schools.<sup>377</sup> By the mid-1990s, the religious right and aid to

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placed them in the awkward position of simultaneously opposing any government regulation of Christian academies and advocating for government subsidies. Reese, *Soldiers for Christ*, *supra* note 266, at 193. The inconsistency of this position — and therefore perhaps the extent to which evangelicals had reversed course on church-state separation — was tempered somewhat by the fact that evangelical leaders initially confined their support to indirect aid through tax credits or vouchers, rather than direct aid to religious schools. Vouchers and tax credits, at least formally, aid parents, who then decide how to use them. They may therefore not be regarded as equivalent to direct financial subsidies. Nonetheless, as Reese and others explain, supporting tax credits and vouchers represented a new stance for evangelicals. *Id.* at 193; *School Tax Credits*, *supra*, at 37.

372. Reese, *Soldiers for Christ*, *supra* note 266, at 193. As an article in *Christianity Today* described:

Floyd Robertson, public affairs director of the National Association of Evangelicals, super-church pastors Robert Schuller and Jerry Falwell, and Pat Robertson, talk show host and head of the Christian Broadcasting Network, all favored the bill. Even evangelist Billy Graham voiced loud support for this bill that would give federal income tax credit for school tuition. Evangelical support for the bill was an about face for some people who in the past would have opposed the bill on grounds of separation of church and state; tax credits — money subtracted from taxes due — would especially benefit students in parochial schools.

*School Tax Credits*, *supra* note 371, at 37. Mainline Protestant groups, including the Baptist Joint Committee on Public Affairs, opposed the bill. See *Private Education: A Tax Break*, CHRISTIANITY TODAY, Apr. 21, 1978, at 43 [hereinafter *Private Education: A Tax Break*].

373. Reese, *Soldiers for Christ*, *supra* note 266, at 193; see also PARSONS, INSIDE AMERICA'S CHRISTIAN SCHOOLS, *supra* note 295, at 152 (citing a principal of one fundamentalist school who, in the 1980s, refused any government assistance "because government intervention always follows government handouts").

374. Austin, *Religious Right Growing Impatient*, *supra* note 369, at A13.

375. Herbers, *Activism in Faith*, *supra* note 266, at B9.

376. E.g., PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 6-7, 29-30, 65 (1994) [hereinafter COOKSON, SCHOOL CHOICE]. See also VITERITI, CHOOSING EQUALITY, *supra* note 333, at 92-113.

377. The Christian Legal Society, for example, which represents the interests of evangelical Christians, has appeared as amicus in numerous court cases, arguing in support of prayer at school graduation and aid to religious schools. In *Lee v. Weisman*, 505 U.S. 577 (1992), it filed an amicus brief, joined by the National Association of Evangelicals, in sup-

religious schools were inextricably linked. Indeed, in 1995, Ralph Reed, at a press conference attended by Newt Gingrich and Phil Gramm, announced the Christian Coalition's Contract with the American Family.<sup>378</sup> Following the form of the Republicans' Contract with America, the Coalition listed ten goals, the first three of which concerned schools. They were, in order: securing a constitutional amendment to allow prayer in schools and at other public events, eliminating the department of education, and providing vouchers for private schools.<sup>379</sup>

In fighting for school aid, religious-right political organizations such as the Moral Majority and the Christian Coalition were joined by conservative religious groups. These included the Southern Baptist Convention, which is the leadership organ of the nation's largest Protestant denomination, and the National Association of Evangelicals.<sup>380</sup> For both organizations, these positions represented an about-face from their traditional stand on church-state separation.

Until the 1980s, the Southern Baptist Convention was a faithful constituent of the Baptist Joint Committee on Public Affairs, organized in 1941 to fight for separation of church and state.<sup>381</sup> The Southern Baptist Convention and the Baptist Joint Committee played key roles in the creation of Protestants and Other Americans United for the Separation of Church and State, an organization specifically devoted to maintaining complete separation.<sup>382</sup> In the 1980s, however, fundamentalists won control of the Southern Baptist Convention, and the Convention soon began to distance itself from the Baptist Joint Committee.<sup>383</sup> Throughout the 1980s, the Convention endorsed the

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port of allowing prayer at school graduations. It also filed amicus briefs in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Mitchell v. Helms*, 593 U.S. 793 (2000). The NAE joined both.

378. *The Christian Coalition Signs on the Dotted Line*, BOSTON GLOBE, May 21, 1995, at A45.

379. *Id.* In 1998, Randy Tate, who succeeded Ralph Reed as executive director of the Christian Coalition, indicated that his organization's members ranked school choice as only second in importance to pro-life issues. Ted C. Olsen, *Voucher Victory*, CHRISTIANITY TODAY, Sept. 7, 1998, at 2, available at <http://www.christianityonline.com/ct/8ta/8ta072.html> [hereinafter Olsen, *Voucher Victory*].

380. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 65-68; DAVID STRICKLIN, *A GENEALOGY OF DISSENT: SOUTHERN BAPTIST PROTEST IN THE TWENTIETH CENTURY 150-51* (John B. Boles ed., 1999) [hereinafter STRICKLIN, *SOUTHERN BAPTIST PROTEST*].

381. EDWARD L. QUEEN II, *IN THE SOUTH THE BAPTISTS ARE THE CENTER OF GRAVITY: SOUTHERN BAPTISTS AND SOCIAL CHANGE, 1930-1980*, at 102-10 (Jerald C. Brauer & Martin E. Marty eds., 1991) [hereinafter QUEEN, *SOUTHERN BAPTISTS AND SOCIALCHANGE*].

382. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 76-77; Peterson, *Baptist Joint Committee*, *supra* note 180, at 128-30.

383. NANCY AMERMAN, *BAPTIST BATTLES: SOCIAL CHANGE AND RELIGIOUS CONFLICT IN THE SOUTHERN BAPTIST CONVENTION 69-72* (1990); Herbers, *Moral Majority and Its Allies*, *supra* note 355, at A38.

Republican Party's positions on church-state issues, including a return to organized school prayer and government funding for religious schools.<sup>384</sup> In the early 1990s, the Southern Baptist Convention severed all ties with the Baptist Joint Committee.<sup>385</sup> The Convention is now a staunch advocate of school prayer and aid to religious schools.<sup>386</sup>

Like the Southern Baptist Convention, the National Association of Evangelicals ("NAE") traditionally supported strict separation of church and state. Formed in 1948 and now representing twenty million evangelicals from seventy-four denominations and 50,000 churches,<sup>387</sup> the NAE's original constitution endorsed "the preservation of separation between church and state."<sup>388</sup> With the Southern Baptists, the NAE was an early and active supporter of Protestants and Others United for the Separation of Church and State.<sup>389</sup> In 1979, however, the leadership of the NAE linked with the newly founded Moral Majority.<sup>390</sup> In the 1980s and 1990s the NAE publicly supported prayer in public schools and government assistance for religious schools.<sup>391</sup> The

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384. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 67-68; QUEEN, *SOUTHERN BAPTISTS AND SOCIAL CHANGE*, *supra* note 381, at 112.

385. STRICKLIN, *SOUTHERN BAPTIST PROTEST*, *supra* note 380, at 150-51.

386. *E.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997) (appearing as amicus, along with the Christian Legal Society, the National Association of Evangelicals, and the Catholic League, to argue in favor of overturning *Aguilar* and allowing public school teachers to provide remedial instruction in religious schools); *Lee v. Weisman*, 505 U.S. 577 (1992) (appearing as amicus to argue in favor of allowing prayer at graduation ceremonies).

387. See Brief of Amici Curiae NAE et al. at 2, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648).

388. *EVANGELICAL ACTION: A REPORT OF THE ORGANIZATION OF THE NATIONAL ASSOCIATION OF EVANGELICALS FOR UNITED ACTION* 42-43, 104, 112 (Executive Committee ed., 1942).

389. See Editorial, *Defending Religious Liberty!*, 7 UNITED EVANGELICAL ACTION 12 (Mar. 1, 1948) ("[W]e not only heartily endorse 'Americans United' but we intend to work with them to preserve our liberty."). Until the late 1970s, the NAE worked with Americans United to oppose aid to parochial schools and diplomatic relations with the Vatican. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 72-80 (identifying anti-Catholic sentiment as the main motivation for the NAE's separationist stance).

390. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 68.

391. *Religious Freedom Protection: Hearing on H.J. Res. 184 Before the House Subcomm. on the Constitution & Comm. on the Judiciary*, 105th Cong. 97-180 (1996) (statement of Forest Montgomery, Counsel, Office for Governmental Affairs, Nat'l Ass'n of Evangelicals) (supporting amendment to allow school prayer and funding of private religious schools); PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 66; William Bentley Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 262-63 & n.4 (1997); Joyce Price, *Wisconsin Wants Parochial Schools in Choice Program; Strong Challenges Expected on Church-State Grounds*, WASH. TIMES, Jan 16, 1995, at A1 (quoting the head of NAE's office of Public Affairs in praise of vouchers). An editorial in 1998 in CHRISTIANITY TODAY, a magazine devoted to evangelical positions on church-state issues, similarly praised vouchers and argued that including private religious schools did not violate the Establishment Clause. See Editorial, *Religious Schools Make the Grade: Give Wisconsin an A for Saying No to Secularist Nonsense*, CHRISTIANITY TODAY, Aug. 10, 1998, at 28, available at <http://www.christianityonline.com/ct/8t9/8t9028.html>.

NAE has also participated as an amicus in Supreme Court cases, arguing in support of prayer at graduation ceremonies and direct federal financial assistance to religious schools.<sup>392</sup>

Christian schools themselves joined the phalanx of supporters of school aid. They are represented by two leading groups: the American Association of Christian Schools (“AACS”), founded in 1972, and the Association of Christian Schools International (“ACSI”), founded in 1978 through the merger of a number of smaller organizations.<sup>393</sup> The ACSI is the larger and more pluralistic of the associations, while the AACS is smaller and more fundamentalist.<sup>394</sup> While the AACS has tended to keep a low profile in legislative and legal battles, the ACSI has been active in both.<sup>395</sup> It belongs to the Council for American Private Education — an umbrella organization that lobbies for increased aid for private schools — whose state chapters filed an amicus brief in *Helms* supporting government aid to religious schools.<sup>396</sup> In 1992, the ACSI joined with nineteen other secular and religious groups to form the National Coalition for Improvement and Reform in Education, which supported President Bush’s school-choice proposal.<sup>397</sup>

Why did evangelicals and fundamentalists switch sides on the question of aid to religious schools? The obvious answer is self-interest: as Christian academies proliferated and the need for financial assistance increased, conservative evangelicals reassessed their earlier opposition

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392. Brief of Amici Curiae Christian Life Commission et al., *Mitchell v. Helms*, 530 U.S. 793 (2000) (98-1648) (joining Christian Legal Society to argue for including religious schools in federal funding program); Brief of Amici Curiae Christian Life Commission et al., *Agostini v. Felton*, 521 U.S. 203 (1997) (96-552) (joining Christian Legal Society, Catholic League, and Southern Baptist Christian Life Commission in arguing to overrule *Aguilar*); Brief of Amici Curiae Christian Life Commission et al., *Lee v. Weisman*, 505 U.S. 577 (1992) (90-1014) (joining brief of Christian Legal Society in favor of prayer at graduation).

393. Rose, *Christian Fundamentalism*, *supra* note 269, at 455.

394. The ACSI represents over 2,000 schools and close to 400,000 pupils; the AACS represents about 1,400 schools with approximately 200,000 students. Carper & Layman, *Black-Flight Academies*, *supra* note 296, at 118; Rose, *Christian Fundamentalism*, *supra* note 269, at 455.

395. This is not to suggest that the AACS has been dormant on the issue. In 1988, for example, it joined nearly thirty other organizations, including the National Association of Evangelicals, the U.S. Catholic Conference, and Phyllis Schlafly’s Eagle Forum, to form Americans for Educational Choice (AEC). One of the AEC’s objectives is to secure government financing of religious schools. See Sidney Goetz, ‘*Parental Choice*’ *Could Destroy Public Education*, ST. PETERSBURG TIMES, Nov. 10, 1990, at A2 [hereinafter Goetz, *Parental Choice*]. The AACS has been less visible, however, in court cases, not having appeared as amicus in any of the recent Supreme Court decisions involving prayer or aid to religious schools.

396. Council for American Private Education, <http://www.capenet.org/member.html> (listing members); Amicus Brief of Arizona Council for American Private Education et al., *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648).

397. WELLS, TIME TO CHOOSE, *supra* note 266, at 138-39; Mark Walsh, *Private School, Religious Groups Join to Back President’s Choice Proposal*, EDUC. WEEK, Jan. 29, 1992, at 23.

to state aid.<sup>398</sup> Additionally, the enemy changed. The historic Protestant hostility to school aid sprang, at least in part, from antipathy toward Roman Catholics. Conservative evangelicals were less committed to the abstract principle of separation than to the practical goal of preventing Catholics from acquiring political power.<sup>399</sup> Beginning with the school-prayer decisions, conservative evangelicals came to see secularists as their real enemies.<sup>400</sup> Catholics joined evangelicals in opposition to the increasing secularization of American public life, seeking the reintroduction of prayer in schools, aid to religious education, and an end to abortion.<sup>401</sup> Thus, the enemy of the enemy became a friend, and much of the emotional energy for opposing school aid evaporated.<sup>402</sup>

Finally, political engagement fed on itself. As conservative evangelicals became more engaged politically, they overcame their squeamishness about political involvement in a secular world and became more insistent that the government advance their policies. Not only did conservative evangelicals begin to argue for government aid to their schools; they also called for a return to school prayer.<sup>403</sup> The very act of political engagement appears to have helped shape the politics of evangelicals, transforming a separatist agenda into one that sought government endorsement — of their schools, through financial assistance, and of their moral views, through prohibition of abortion and reintroduction of school prayer.<sup>404</sup>

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398. COOKSON, SCHOOL CHOICE, *supra* note 376, at 65 (arguing that “Fundamentalists support vouchers for the obvious reason that they would like to be able to receive state funds to subsidize their schools”); Reichley, *Evangelical Revolt*, *supra* note 350, at 76 (arguing that the “financial needs of the [Christian] schools . . . weakened the Evangelicals’ longstanding opposition to government aid for church-sponsored education”); Interview with Forrest Montgomery, Office for Governmental Affairs, National Association of Evangelicals (NAE) (Sept. 8, 2000) (suggesting that the NAE went from opposing aid to parochial schools to supporting it in the 1980s because, by then, there were a large number of Christian evangelical schools).

399. Boggs, *History of Americans United*, *supra* note 138, at 120.

400. In 1963, for example, the NAE Office of Public Affairs issued a statement criticizing the Court’s school prayer decision, arguing that it “augments the trend toward complete secularization.” Don Gill, *Capital Commentary*, 22 UNITED EVANGELICAL ACTION 2 (Aug. 1963). The NAE then played an active role in supporting various efforts, including a constitutional amendment, in 1963 and 1964 to overturn the school prayer decisions. PIERARD, THE UNEQUAL YOKE, *supra* note 182, at 82.

401. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 70-74; Herbers, *Activism in Faith*, *supra* note 266, at B9; John Herbers, *Church Issues Spread to State Races*, N.Y. TIMES, Sept. 19, 1984, at B9 [hereinafter Herbers, *Church Issues*].

402. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 249-51. For further discussion on the alliance between Catholics and conservative Evangelicals, see *infra* notes 460-465 and accompanying text.

403. Austin, *Religious Right Growing Impatient*, *supra* note 369, at A13.

404. Rose, *Christian Fundamentalism*, *supra* note 269, at 480 (observing that, “as fundamentalists have reasserted their presence and influence in the last two decades, they have become less separatist”).



In terms of concrete achievements, the record of the religious right has been mixed. Although the movement has begun to have some success on the question of aid to religious schools, it has made little progress in restoring prayer to the public schools. In the legislative sphere, the impact of the religious right has been slight. At the federal level, none of the various proposals to grant tuition tax-credits or vouchers for private schools have been enacted.<sup>405</sup> The religious right, working in tandem with a diverse group of school choice supporters, has been more successful at the state level, where several voucher programs have been adopted.<sup>406</sup>

But this less-than-impressive legislative record should not mask the remarkable success that the religious right has had in setting the agenda of the Republican Party on school prayer and aid to religious education. Beginning with the Reagan Administration, the Republican Party has strongly endorsed the goals of restoring prayer in public schools and providing financial assistance to parents who wish to send their children to religious schools.<sup>407</sup> Reagan supported a constitutional amendment to allow school prayer and various proposals for tuition tax-credits.<sup>408</sup> Bush, although at first lukewarm to the religious right, made amends with that group by introducing a school-choice

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405. The current Bush administration has continued the Republican tradition of supporting vouchers for use at religious schools. The administration proposed a voucher plan of its own, which it eventually abandoned in light of opposition from Congress. See Lizette Alvarez, *Senate Rejects Tuition Aid, a Key to Bush Education Plan*, N.Y. TIMES, Jun. 13, 2001, at A26. The Bush administration also filed an amicus brief urging the Supreme Court to grant certiorari in a case challenging the constitutionality of the Cleveland voucher program, and to issue a decision upholding the use of vouchers at religious schools. Linda Greenhouse, *White House Asks for Voucher Ruling*, N.Y. TIMES, Jul. 8, 2001, at A19. The Court has recently granted the petition and will hear the case in early 2002. See *supra* note 1.

406. Voucher programs, which allow parents to use state-funded vouchers at private, religious schools, exist in Milwaukee, Cleveland, and Florida. Evangelicals actively supported the programs in each state. E.g., COOKSON, SCHOOL CHOICE, *supra* note 376, at 64-68 (describing Milwaukee program); VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 92-113 (describing Milwaukee and Cleveland programs, as well as privately funded voucher programs); HURBERT MORKEN & JO RENEE FORMICOLA, THE POLITICS OF SCHOOL CHOICE 168-93 (1999) (describing political activities of evangelicals regarding school choice).

407. Both goals have been a part of the Republican Party platform since 1980. See Republican Platform 2000, *Education and Opportunity: Leave No American Behind*, available at <http://www.expandnato.org/rp2.html>; *Republican Platform: Prosperity, Self Government, and 'Moral Clarity'*, 52 CONG. Q. ALMANAC D21, D32 (1996); *The Platform: Party Stresses Family Values, Decentralized Authority*, 48 CONG. Q. ALMANAC 78A, 80A-81A (1992); *Republican Party Issues Detailed, Long Platform*, 44 CONG. Q. ALMANAC 46A, 54A, 57A (1988); *Text of 1984 Republican Party Platform*, 40 CONG. Q. ALMANAC 41B, 50B (1984); *1980 Republican Platform*, 36 CONG. Q. ALMANAC 58B, 63B (1980).

408. COOKSON, SCHOOL CHOICE, *supra* note 376, at 6-7, 17-18, 29-30 (describing Reagan's support of funding private school choice); Herbers, *Church Issues*, *supra* note 401, at B9 (describing how Reagan embraced both fundamentalist Protestants and conservative Catholic positions on abortion, homosexuality, and aid to parochial schools).

proposal of his own in 1992.<sup>409</sup> And Republicans (and a few Democrats) in Congress have introduced various school-prayer amendments and school-choice proposals and, in 1996, sought to amend the Constitution to allow for both.<sup>410</sup>

This proposed amendment, entitled the Religious Freedom Amendment, shows just how far conservative evangelicals and the Republican Party have moved on aid to religious schools.<sup>411</sup> In the 1870s, the Republican Party, backed by Protestants of all stripes, supported the Blaine Amendment, which would have explicitly prohibited any and all forms of financial assistance to religious schools. More than a century later, a different Republican Party again sought to amend the Constitution, only this time to ensure that religious schools would be entitled to any and all government benefits that would flow to similar institutions.<sup>412</sup> Like the Blaine Amendment, the Religious Freedom Amendment failed to pass despite majority support in the House.<sup>413</sup> But just as the Blaine Amendment expressed Republican and Protestant hostility toward religious (meaning Catholic) schools in the nineteenth century, the Religious Freedom Amendment captured the fervor with which conservative evangelical Protestants now supported aid to religious schools.<sup>414</sup> It also revealed the extent to which evangelicals managed to influence the Republican Party, at the ex-

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409. COOKSON, SCHOOL CHOICE, *supra* note 376, at 7; FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 120, 143; VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 87-88. As Fowler describes, Bush, an Episcopalian, did not like to talk much about his religion and when forced to do so, sometimes appeared awkward. Retelling his experience of being shot down as a Navy pilot in World War II, for example, Bush said that, while floating in the Pacific Ocean: "I thought of my family, my mom and dad, and the strength I got from them. I thought of my faith and the separation of church and state." FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 120 (quoting *Bushisms: President George Herbert Walker Bush, in His Own Words* (New Republic ed., 1992)).

410. On school prayer amendments, see, e.g., Steve Benent, *Injudicious Committee: Istook Religion Amendment Clears House Judiciary Panel, Heads for Floor*, 51 J. OF CH. & ST. 4 (1998) [hereinafter Benent, *Injudicious Committee*]; and *Rep. Delay Attacks Church-State Separation*, 53 J. OF CH. & ST. 19 (2000). On school choice proposals, see, e.g., VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 88; and Rob Boston, *Congressional Alert*, 52 J. OF CH. & ST. 13 (1999) [hereinafter Boston, *Congressional Alert*].

411. For background on the Religious Freedom Amendment, also called the Istook Amendment after its main sponsor, Representative Ernest Istook (R-Okla.), see Benent, *Injudicious Committee*, *supra* note 410; and Rob Boston, *Istook Amendment Defeated!*, 51 J. OF CH. & ST. 8 (1998) [hereinafter Boston, *Amendment Defeated*].

412. The Amendment would guarantee the right to pray "on public property, including schools," and would prohibit denying "equal access to a benefit on account of religion." The intent of the latter provision, according to supporters of the amendment, was to guarantee that religious schools would "be treated the same as secular schools are treated" and would be entitled to receive public funding. See Benent, *Injudicious Committee*, *supra* note 410 (quoting Henry Hyde).

413. The vote was 197 Republicans and twenty-seven Democrats in favor, twenty-eight Republicans and 175 Democrats against. See Boston, *Amendment Defeated*, *supra* note 411.

414. Religious right organizations such as the Christian Coalition strongly supported the Amendment. See *id.*

pense of mainline denominations, which saw their political influence wane.<sup>415</sup>

## 2. *Other Protestants: From Mainline to Sideline*

Over the past four decades, the experience of mainline Protestant denominations has been the opposite of that of conservative evangelicals. While conservative evangelicals have become more accommodationist on church-state issues, mainline Protestants — or at least their leadership — have become more consistently separationist. And while conservative evangelicals have seen their political influence grow, mainline Protestants have seen theirs diminish.

In Part II, we described the origins of the three leading Protestant groups on church-state issues — the Baptist Joint Committee, Protestants and Other Americans United for the Separation of Church and State, and the National Council of Churches. The subsequent histories of these groups all demonstrate increased commitment to separation of church and state and (perhaps partly as a consequence) decreased political clout.

As noted above, in 1941 the Southern Baptist Convention, the Northern Baptist Convention, and the National Baptist Convention formed the Baptist Joint Committee. The founders organized the Committee to present a unified position on issues of church and state and to counter the growing political power of the Catholic Church. From the outset, the Committee took a strictly separationist position on church-state issues, opposing both aid to religious education and prayer in public schools.<sup>416</sup> With slight deviations — including its eventual endorsement of the 1965 Elementary and Secondary Education Act, which provided some aid to religious schools — the Baptist Joint Committee has maintained a separationist stance.<sup>417</sup> The Committee

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415. Some opponents in Congress described the vote on the Amendment as a Republican Party payback to aggressive religious right groups like the Christian Coalition, Focus on the Family, and the Family Research Council. As Representative Boehlert (R-N.Y.) asserted: "The Religious Freedom Amendment has nothing to do with acknowledging the power of God and everything to do with asserting the power of special interest groups that are all too human and flawed." Boston, *Amendment Defeated*, *supra* note 411.

416. *See supra* text accompanying notes 182 and 219.

417. For descriptions of the role played by the Baptist Joint Committee in assisting the passage of the 1965 Elementary and Secondary Education Act ("ESEA"), including the Committee's acceptance of religious schools as beneficiaries of federal financial aid, see PHILIP MERANTO, *THE POLITICS OF FEDERAL AID TO EDUCATION IN 1965*, at 72-74; Peterson, *Baptist Joint Committee*, *supra* note 180, at 131-32. Also, see generally Dean M. Kelley & George R. Lanoue, *The Church-State Settlement in the Federal Aid to Education Act*, in *RELIGION AND THE PUBLIC ORDER 110-65* (Donald A. Gianella ed., 1965). Despite eventually supporting the inclusion of religious schools within the act's provisions, the Committee became an early critic. In 1966, for example, the Committee argued that the law, as applied, violated principles of church-state separation. *See* Brief of Amicus Curiae of Baptist Joint Committee at 2, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648). The Committee's criticism of the act continued for the next three decades, culminating in an amicus

publicly supported the Court's school-prayer and Bible reading decisions and opposed efforts to overturn those decisions by constitutional amendment.<sup>418</sup> The Committee has since appeared as amicus advocating separatist positions in cases involving religion in the public schools.<sup>419</sup> It has also consistently opposed public funding for religious education, testifying against federal aid proposals and arguing in court cases involving aid to religious schools.<sup>420</sup>

While the Baptist Joint Committee remains one of the most active groups on church-state issues,<sup>421</sup> it has lost its largest constituency. In the early 1990s, the Southern Baptist Convention severed all ties with the Joint Committee. In consequence, the Committee lost the largest part of its membership and its main source of funding.<sup>422</sup> It also lost (any pretense of) the ability to speak for all Baptists. In two of the Court's most recent Establishment Clause cases — *Lee v. Weisman* and *Agostini v. Felton* — the Baptist Joint Committee and the Southern Baptist Convention filed amicus briefs presenting diametrically opposed views.<sup>423</sup>

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brief in *Helms* arguing that successor legislation was unconstitutional. *Id.* For a description of the Committee's stance on tax exemptions for churches, and the decision by the Committee to file a brief in support of this position in *Walz v. Tax Commission*, 397 U.S. 664 (1970), see Peterson, *Baptist Joint Committee*, *supra* note 180, at 135-36.

418. QUEEN, SOUTHERN BAPTISTS AND SOCIAL CHANGE, *supra* note 381, at 102-110; SORAUF, WALL OF SEPARATION, *supra* note 146, at 314.

419. *E.g.*, Brief Amicus Curiae of Baptist Joint Comm., *Lee v. Weisman*, 505 U.S. 577, 579-80 (1992).

420. *E.g.*, *Private Education: A Tax Break*, *supra* note 372, at 43 (noting Committee's opposition to 1978 bill that would provide tuition tax credits); see also Brief of Amicus Curiae Baptist Joint Committee, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648) (opposing federal program that provides educational and instructional materials, including computers, to private religious schools); Brief of Amicus Curiae American Jewish Congress et al., *Agostini v. Felton*, 521 U.S. 203 (1997) (Nos. 96-552, 96-553) (opposing federal program that sends public school teachers into parochial schools for remedial instruction and supporting *Aguilar*); Brief of Amicus Curiae Baptist Joint Committee et al., *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (No. 83-990) (opposing state program that sent public school teachers into parochial schools); Brief of Amicus Curiae Baptist Joint Committee, *Mueller v. Allen*, 463 U.S. 388 (1983) (No. 82-195) (opposing state income tax deduction for tuition).

421. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 213-14.

422. PIERARD, THE UNEQUAL YOKE, *supra* note 182, at 67-68; see also Walfred Peterson, *Religious Pressure Group: An Examination of the Baptist Joint Committee on Public Affairs*, 15 J. Church and State 271, 273, 287 (1973) (reporting that in 1970 Southern Baptists accounted for over half the membership of the Baptist Joint Committee and that the Southern Baptist Convention contributed 90% of the funds for the Committee's budget).

423. Compare Brief of Amici Curiae American Jewish Congress et al., *Agostini v. Felton*, 521 U.S. 203 (1997) (Nos. 96-552, 96-553), and Brief of Amici Curiae American Jewish Congress et al., *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014), with Brief of Amici Curiae Christian Legal Society et al., *Agostini v. Felton*, 521 U.S. 203 (1997) (Nos. 96-552, 96-553), and Brief of Amicus Curiae Southern Baptist Convention Christian Life Commission, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014). See also Brief of Amicus Curiae Baptist Joint Committee at 2, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648) (noting that "the Baptist Joint Committee does not purport to speak for all Baptists").

Just as the Baptist Joint Committee lost the ability to speak for all Baptists, Americans United for the Separation of Church and State failed to maintain a united position for Protestants generally. The twisting fate of Americans United over the last four decades provides a fascinating glimpse of the upheavals in Protestant thinking on church and state. Born in the bosom of the Baptist Joint Committee in 1947, Protestants and Other Americans United for the Separation of Church and State ("POAU") aimed to counteract the growing political power of the Catholic Church.<sup>424</sup> POAU originally drew support from mainline Protestant groups as well as from evangelicals. During the 1960s, however, POAU's anti-Catholic vigor and unswerving devotion to separation drove away many mainline Protestant groups, including the Baptist Joint Committee and the National Council of Churches.<sup>425</sup> The thaw in Protestant-Catholic relations made mainline Protestants uncomfortable with POAU's anti-Catholic rhetoric.<sup>426</sup> The fight over the inclusion of religious schools as beneficiaries of the 1965 Elementary and Secondary School Act widened the split when the Baptist Joint Committee and National Council of Churches somewhat grudgingly supported the Act. The POAU harshly criticized them for doing so<sup>427</sup> and in turn found itself attacked as inflammatory.<sup>428</sup> The Baptist Joint Committee effectively ended its working relationship with POAU when the Committee's representative resigned his position on POAU's board of directors.<sup>429</sup>

Evangelicals and fundamentalists, by contrast, were less uncomfortable with POAU's anti-Catholic baggage. By the mid-1960s, POAU's core support had shifted to conservative, rural, evangelical Protestants.<sup>430</sup> But while conservatives shared POAU's strident hostility to school aid, they soon parted company over school prayer. When POAU endorsed the Supreme Court's decisions in *Engel* and *Schempp*, conservative evangelical groups jumped ship.<sup>431</sup> As a result, POAU's membership and revenues declined dramatically. By 1969,

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424. PIERARD, *THE UNEQUAL YOKE*, *supra* note 182, at 77; SORAUF, *WALL OF SEPARATION*, *supra* note 146, at 33; Boggs, *History of Americans United*, *supra* note 138, at 42-43.

425. Boggs, *History of Americans United*, *supra* note 138, at 403-21.

426. *Id.* at 414, 501-17.

427. For descriptions of the involvement of the Baptist Joint Committee and the National Council of Churches in the passage of the ESEA, as well as the POAU's criticism in response, see Boggs, *History of Americans United*, *supra* note 138, at 501-06; and Peterson, *Baptist Joint Committee*, *supra* note 180, at 131-33.

428. See Editorial, *P.O.A.U. Should Fight Hard but Fair*, *THE CHRISTIAN CENTURY*, Feb. 5, 1964, at 167.

429. Peterson, *Baptist Joint Committee*, *supra* note 180, at 133-35.

430. Boggs, *History of Americans United*, *supra* note 138, at 507.

431. *Id.* at 509-10.

POAU had lost backing from both mainline denominations and conservative evangelicals.<sup>432</sup>

Over the last three decades, POAU has managed to remain active by reinventing itself. It now relies chiefly on non-Protestants, including atheists, Jews, and humanists, a switch that prompted the group in 1971 to shorten its name to Americans United for Separation of Church and State (“AU”).<sup>433</sup> AU continues to file amicus briefs advocating strict separation, but it rarely teams up with Protestant organizations. Instead, it usually appears alone or with liberal Jewish groups.<sup>434</sup> AU also continues to advance its views publicly, through its *Journal of Church and State*, and to involve itself in legislative battles involving church-state issues,<sup>435</sup> but its identity has been transformed and its influence curtailed. Where POAU once represented mainline Protestant thought before the Supreme Court, AU now operates as a liberal interest group, a junior cousin to the American Civil Liberties Union with only 60,000 members nationwide.<sup>436</sup>

Although the National Council of Churches (“NCC”) has not experienced the dramatic upheavals of the Baptist Joint Committee and AU, it has long been hampered by a schism between the liberal leaders of the NCC and their more conservative members. Created in 1908 as the Federal Council of Churches, the NCC has sought to promote unity among non-Catholic Christians, representing, at least nominally, the bulk of mainline Protestants. In 1963, the NCC sponsored its first conference on church-state issues, which was attended by delegates from twenty-four Protestant and Orthodox denominations.<sup>437</sup> In published “findings,” the delegates recognized that religious pluralism in American society raised “crucial questions concerning both the separation and interaction of church and state.”<sup>438</sup> They answered those questions with a broadly separationist response. Specifically, they en-

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432. *Id.* at 532-40.

433. *Id.* at 541.

434. Americans United filed solo amicus briefs in *Agostini v. Felton*, 521 U.S. 203, 208 (1997); *Aguilar v. Felton*, 473 U.S. 402, 403 (1985), *Grand Rapids School District v. Ball*, 473 U.S. 373, 374 (1985), and *Mueller v. Allen*, 463 U.S. 388, 389 (1983). It filed amicus briefs with Jewish groups in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 756 (1995), and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 822 (1995).

435. Boston, *Amendment Defeated*, *supra* note 411 (describing AU’s efforts to defeat Religious Freedom Amendment).

436. See Brief of Amici Curiae AU et al. at 1, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648).

437. National Council of Churches, *Separation and Interaction of Church and State*, 6 J. OF CHURCH & ST. 147 (1964) [hereinafter NCC, *Separation and Interaction*].

438. *Id.* at 148.

dorsed the Supreme Court's school-prayer and Bible reading decisions and opposed funding for religious schools.<sup>439</sup>

Whereas POAU's stance on church-state separation arose principally from opposition to Catholics, the NCC's stance on church-state separation in the 1960s seems to have stemmed from devotion to public education "as a major cohesive force in our pluralistic society."<sup>440</sup> The conference delegates justified their opposition to school aid on precisely this ground. Aid to religious schools, the delegates argued, "may well have the result of further fragmentation of the educational system and weaken the role and position of the public schools."<sup>441</sup> Published in 1963 by the Board of the NCC, a policy statement entitled "The Churches and the Public Schools" confirms the importance of public education in the formulation of the NCC's position on church-state separation. In that statement, the Board reaffirmed its support of the public school system and called on Christian churches and Christian parents, including those who send their children to private schools, "to strengthen and improve the American system of public education."<sup>442</sup> The Board also expressed its belief that neither official prayers nor the devotional use of the Bible were necessary to promote either "true religion [or] good education," but said it wished to leave local school boards discretion as to whether prayers would be offered on special occasions.<sup>443</sup>

Over the next four decades, the NCC became, if anything, more separationist. In 1992 the NCC argued in *Lee v. Weisman* that prayers at graduation should be disallowed, a position at odds with the more relaxed view expressed in 1963. Like the Baptist Joint Committee and AU, the NCC fought school aid and opposed legislative attempts to amend the Constitution to allow school prayer.<sup>444</sup> Although the NCC still nominally represents a large constituency of mainline Protestants, estimated in 1998 to number nearly fifty-two million,<sup>445</sup> it has become progressively less active in recent debates about public schools and the

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439. *Id.* at 148, 151-52.

440. National Council of Churches, *The Churches and the Public Schools*, 6 J. OF CH. & ST. 176, 177 (1963) (policy statement of Board of NCC) [hereinafter NCC, *Churches and Public Schools*].

441. NCC, *Separation and Interaction*, *supra* note 437, at 151-52.

442. NCC, *Churches and Public Schools*, *supra* note 440, at 176-79.

443. *Id.* at 178.

444. *E.g.*, SORAU, WALL OF SEPARATION, *supra* note 146, at 314 (describing opposition to school prayer amendments); National Council of Churches, *The Churches and the Public Schools at the Close of the Twentieth Century: A Policy Statement* (Nov. 11, 1999), at <http://www.nccusa.org/about/edpol.html> (stating that, "as a general rule, public funds should be used for public purposes" and cautioning against further government aid to parochial schools) [hereinafter NCC, *Policy Statement*].

445. Steve Kloehn, *Protestants Take Aim at Vouchers*, CHICAGO TRIB., Nov. 11, 1998, at 1N.

funding of private alternatives.<sup>446</sup> In a 1999 Policy Statement on Churches and the Public Schools, the NCC recognized that “in recent years the voices of our churches have been largely absent from the ongoing debate about the meaning and future of our nation’s schools.”<sup>447</sup> The NCC’s silence stemmed in part from the continuing disagreement among member churches on the propriety of vouchers. Indeed, in 1997, the General Assembly of the NCC rejected a proposed policy statement that would have reaffirmed the traditional position that “public moneys should be used only for public schools.” Every speaker at the meeting criticized the statement, prompting one observer to comment that he felt like he “was attending a meeting of the National Association of Evangelicals.”<sup>448</sup>

NCC’s intramural controversy over funding religious schools signals a decline of faith in the public schools among mainline Protestants. The strictly separationist position of the NCC in the mid-twentieth century was tied to a strong belief in public schools; as that belief has faltered, some NCC leaders have begun to rethink the question of funding. As the NCC admitted in its 1999 Policy Statement, some NCC members “understandably feel” that minority students are unfairly trapped in failing urban schools and will remain so without some public funding to help them attend private schools.<sup>449</sup> Instead of attempting to resolve its differences over this issue, the NCC simply stated its “conviction that, as a general rule, public funds should be used for public purposes.”<sup>450</sup> This statement reflects a weakening of the NCC’s traditional opposition to school aid,<sup>451</sup> a shift replicated among public secularists, as described below.

The disagreement among churches within the NCC over aid to religious schools also suggests a larger failure of mainline Protestant leaders to maintain cohesion among their followers. In the 1950s and 1960s, many Protestant leaders embraced the ideal of the social gospel

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446. It has filed amicus briefs in the Court, although its appearances in this venue have been more sporadic than those of other pro-separation groups. The NCC joined amicus briefs, for example, in *Ball* in 1985, arguing against a program that sent public school teachers into parochial schools, and in *Lee* in 1992, arguing against allowing prayer at school graduations. See *Lee v. Weisman*, 505 U.S. 577, 579-80 (1992); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 374 (1985). It has not filed or joined briefs, however, in the two most recent parochial cases, *Mitchell v. Helms*, 530 U.S. 793 (2000), and *Agostini v. Felton*, 521 U.S. 203 (1997).

447. NCC, *Policy Statement*, *supra* note 444, at 1.

448. Michael M. McManus, *Church Council Moderates Positions*, FRESNO BEE, Nov. 22, 1997, at A13.

449. NCC, *Policy Statement*, *supra* note 444, at 2.

450. *Id.*

451. *Cf.* NCC, *Separation and Interaction*, *supra* note 437, at 152 (stating unequivocally, in 1963, that “government funds should not be authorized or appropriated for overall support of [parochial] schools” and that the state has no obligation to support parental choice of religious schools).



and worked to address society's injustices, including poverty, racism, and sexism.<sup>452</sup> While the mainline clergy largely retain a liberal orientation, their flocks are often more conservative.<sup>453</sup> They are also dwindling. In 1960, more than 40% of all whites claimed membership in mainline denominations, compared to 27% who belonged to evangelical churches.<sup>454</sup> Today, thanks partly to the changing character of the Southern Baptists, evangelicals and fundamentalists outnumber mainline Protestants. White evangelicals constitute one-fourth of the population, while mainline Protestants comprise only about one-fifth. Additionally, one-tenth of the population are African-American Protestants, and a majority of this group are evangelicals.<sup>455</sup>

The cleavage between mainline Protestant leaders and their followers has weakened the political influence of mainline clergy and of the groups that they dominate. Mainline clergy are thus depicted as "generals without armies."<sup>456</sup> At the very least, they are generals with often indifferent or rebellious troops and no clear mandate to lead. As a result, while mainline Protestants continue to tilt toward the Republican Party, as they have for more than a century, that party has become noticeably less responsive to the demands of their leaders.<sup>457</sup> Politicians "often discount the pronouncements of mainline clergy because they know few of them have lay support."<sup>458</sup> The inability of mainline clergy to influence the Republican Party and the corresponding success of evangelicals are demonstrated by Republican positions on restoring prayer in public schools and providing aid to religious schools — both measures that mainline clergy generally oppose and evangelical leaders support.

### 3. *New Alliances*

As the Protestant consensus on church-state relations fell apart, different elements of the Protestant majority allied with other groups. The result is a radically new landscape of church-state politics. At one

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452. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 42-43, 65-67; HODGSON, CONSERVATIVE ASCENDANCY, *supra* note 11, at 166.

453. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 43, 67-68.

454. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 97.

455. *Id.* at 34-39, 97. In addition, as church attendance is much lower in mainline churches than in evangelical ones, the membership figures for mainline Protestants exaggerate the numbers who are actually involved in church life. *Id.* at 97. Given the connection between participation in church activities and political activism, see Verba study, *cited in id.* at 32, the greater church attendance rates among evangelicals also helps explain why they have been relatively more active in politics in the last few decades than have their mainline counterparts.

456. *Id.* at 43.

457. *Id.* at 43, 104.

458. *Id.* at 43.

end of the spectrum stands a broad coalition of accommodationist opinion. It is opposed by a similar, though smaller, coalition of separationists. In between are public secularists, a characterization that includes both those without religious affiliation and those (probably more numerous) who merely seek to confine religion to a private sphere.

Accommodationists include white evangelicals, most Roman Catholics, Orthodox Jews, and a growing number of African Americans. With a shared interest in obtaining school aid, fighting abortion, and restoring school prayer, evangelicals and Catholics shelved their mutual antipathy and began to work together.<sup>459</sup> As early as 1984, the *New York Times* reported a dramatic shift among Catholic and Protestant allegiances since 1960, the most important feature of which was the agreement among conservative Catholics and fundamentalist Protestants on such issues as abortion and aid to private schools.<sup>460</sup> Throughout the 1980s and 1990s, evangelicals and Catholics collaborated on aid to religious schools. In 1988 the Catholic League for Religious and Civil Rights joined the National Association of Evangelicals in forming Americans for Educational Choice, a group dedicated to securing government assistance for parents who send their children to religious schools.<sup>461</sup> In five of the Supreme Court's most recent Establishment Clause cases, conservative evangelicals and Catholic organizations have appeared as amici advocating accommodation.<sup>462</sup> Indeed, in the 1997 case of *Agostini*, the Catholic League joined the amicus brief of the Christian Legal Society, along with the Southern Baptist Christian Life Commission and the National Association of Evangelicals.<sup>463</sup> That same year, Catholic Bishops, evangelical Protestant leaders, and religious-right luminaries — such as Gary Bauer, Ralph Reed, and James Dobson — issued “A Statement of

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459. John Swomley, *One Nation Under God: National Council of Bishops Seeking to Influence Policy*, 58 THE HUMANIST, May-Jun. 1998, at 6-7 (1998) (describing successful efforts of Catholic Bishops to form alliances with “the Southern Baptist Convention, the Mormons, and numerous other groups led by Protestant evangelists, including Pat Robertson, Jerry Falwell, and James Kennedy, and lay leaders, including Missouri Senator John Ashcroft of the Assemblies of God”).

460. Herbers, *Activism in Faith*, *supra* note 266, at B9; Herbers, *Church Issues*, *supra* note 401, at B9.

461. Goetz, *Parental Choice*, *supra* note 395, at A2. Catholic school associations and evangelical school associations, including the Association of Christian Schools, have also joined together in the Council for American Private Education (“CAPE”), a group that actively supports vouchers. See CAPE website, at <http://www.capenet.org/member.html> (last visited Oct. 15, 2001).

462. See *Mitchell v. Helms* 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203, 208 (1997); *Capitol Square Review v. Pinette*, 515 U.S. 753, 757 (1995); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 822 (1995); *Lee v. Weisman*, 505 U.S. 577, 579-80 (1992).

463. Brief of Amici Curiae Christian Legal Society et al., *Agostini v. Felton*, 521 U.S. 203 (1997) (Nos. 96-552, 96-553).

Christian Conscience and Citizenship,” criticizing the Supreme Court.<sup>464</sup> While “strongly affirm[ing] the separation of church and state,” the statement attacked the Court’s “specious interpretation” under which “our public schools are denuded of moral instruction and parents are unjustly burdened in choosing a religious education for their children.”<sup>465</sup>

Orthodox Jews add to this pietist alliance. The Jewish proportion of the United States population is quite small, roughly two percent, and the majority of Jews are politically liberal and strongly committed to separation of church and state.<sup>466</sup> In recent years, however, Orthodox Jews have begun to assert views at odds with those of liberal Jews and consistent with those of evangelical Protestants and conservative Catholics, especially on abortion, gay rights, and public prayer. In particular, the Rabbinical Council — a national organization representing Orthodox congregations — has become outspoken in support of aid to religious schools.<sup>467</sup> Additionally, Orthodox Jews have filed amicus briefs supporting prayer at school graduations, aid to religious schools, and the right of states to create school districts for a single, religiously homogeneous (Hasidic Jewish) community.<sup>468</sup>

African Americans are the final constituency in the accommodationist camp, and they are particularly significant in the debate over vouchers. African Americans are overwhelmingly Protestant and generally more devout than any other ethnic group: nine out of ten report that religion is very important in their lives, and over half say that they

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464. *We Hold These Truths: A Statement of Christian Conscience and Citizenship*, FIRST THINGS, Oct. 1997, at 51-53, available at <http://www.firstthings.com/ftissues/ft9710/articles/documentation.html> [hereinafter *Statement of Christian Conscience*]. Conservative Catholic leaders, to cite another example, also supported the Istook Amendment. See, e.g., John Dart & Lee Romney, *High Court's Ruling May Give Proposed Amendment a Boost*, L.A. TIMES, Jun. 28, 1997, at B4; Letter from Deacon Keith A. Fournier, President, Catholic Alliance, to Rep. Ernest Istook (Apr. 23, 1998) (on file with authors). Not all Catholic leaders, however, supported the Amendment. The Interfaith Alliance, for example, which includes one Catholic Bishop on its Board, opposed the Amendment. See *Clergy Speak Out Against Istook Amendment*, Talking Points Prepared by Interfaith Alliance (Jul. 22, 1997) (on file with authors).

465. *Statement of Christian Conscience*, *supra* note 464.

466. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 48-49, 75-76; Dena S. Davis, *Religion in the Public Arena: Black Political Leaders and Jewish Voters*, in INTERNATIONAL PERSPECTIVES ON CHURCH & STATE 52-54 (Menachem Mor ed., 1993).

467. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 49, 76, 110. Two of the cosponsors of 1997 bill that would have provided vouchers to low-income students in Washington, D.C. were Floyd Flake, a black Protestant minister and Democratic Representative from New York, and Joseph Lieberman, an Orthodox Jew and Senator from Connecticut. See VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 88-89.

468. The National Jewish Commission on Legal and Public Affairs filed amicus briefs in *Lee, Kiryas, Joel, Agostini*, and *Helms*. See *Mitchell v. Helms* 530 U.S. 793, 801 (2000); *Agostini v. Felton*, 521 U.S. 203, 208 (1997); *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 689 (1994); *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

pray several times a day.<sup>469</sup> Although black voters are more liberal than white Protestants on social welfare and economic issues, they tend to be conservative on issues such as abortion, gay rights, and school prayer.<sup>470</sup> Most importantly, a growing number of African Americans support school vouchers. This represents a dramatic change from the 1950s and 1960s, when African Americans were heavily invested in public schools as the vehicle of societal desegregation and deeply distrustful of private alternatives. Recently, however, black support of public schools has waned in light of the harsh realities of many poor urban schools, such that today African Americans support school vouchers more strongly than whites.<sup>471</sup> A recent poll indicated that 72% of black parents supported school vouchers, compared to only 48% of the general public.<sup>472</sup> That fact has helped reshape the voucher debate, which increasingly concerns not only the propriety of government funding for religious schools, but also the question of whether vouchers will improve the educational opportunities of disadvantaged students.<sup>473</sup>

On the other side are the committed separationists. They include mainline Protestant clergy and many of their followers, most Jews, and those we call "ideological secularists." We offer that term to describe those persons, usually with little or no personal religious commitment, whose opposition to school aid stems from a broader ideological commitment to a secular society. Examples include members of the ACLU, the National Committee for Public Education and Religious Liberty ("PEARL"), and People for the American Way ("PFAW"), three politically liberal interest groups that actively oppose aid to re-

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469. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 111.

470. *Id.* at 39, 111-12.

471. COOKSON, SCHOOL CHOICE, *supra* note 376, at 65-66; FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 111; VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 88.

472. See James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. TIMES, Dec. 27, 1997, at A1 (reporting survey results); NEW REPUBLIC, Jan. 2001 (back-page advertisement for African-American group supporting school choice).

473. *E.g.*, VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 209-13 (describing "the growing consensus that seems to be emerging among people of different political persuasions . . . that supports a policy of targeted choice designed specifically to benefit economically disadvantaged children"); William Galston & Diane Ravitch, *Scholarships for Inner-City School Kids*, WASH. POST, Dec. 17, 1996, at A23 [hereinafter Galston & Ravitch, *Scholarships*] (arguing for a national experiment with means-tested vouchers); Olsen, *Voucher Victory*, *supra* note 379, at 6 (reporting that Charles Glenn, Professor at Boston University's School of Education and a minister, has suggested that voucher supporters should "argue the justice side of school choice" and point out that "[s]chool choice already exists, but not for the poorest students"); William Raspberry, *Let's At Least Experiment with School Choice*, WASH. POST, Jun. 16, 1997, at A21 [hereinafter Raspberry, *Let's Experiment*] (arguing that vouchers should be tried for the sake of poor students in central cities).

ligious schools.<sup>474</sup> These three groups often team up with liberal Jewish organizations, including the American Jewish Committee and the American Jewish Congress, as well as with Americans United for Separation of Church and State, to contest government financing of religious schools.<sup>475</sup>

Between these two poles lie the public secularists. Though secularists comprise only about 15% of the electorate, they have exerted a strong influence over public policy since World War II.<sup>476</sup> In the 1950s and 1960s public secularists strongly supported public education. They opposed aid to religious schools chiefly out of fear that government support for private education would undermine the assimilative and democratizing mission of public schools.<sup>477</sup> Over the last two decades, however, many public secularists have lost confidence in the public schools.<sup>478</sup> This loss of faith seems tied to numerous factors, including

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474. The ACLU described itself, in an amicus brief in *Helms*, as “a nationwide . . . non-partisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights, including the separation of church and state.” Brief of Amici Curiae ACLU et al. at 1, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648) [hereinafter ACLU *Helms* Amici Brief]. PFAW, in the ACLU’s amicus brief in *Helms*, described itself as founded “by a group of religious, civic, and educational leaders devoted to our nation’s heritage of tolerance, pluralism, and liberty,” and consisting of over 310,000 members nationwide. *Id.* at 4. In another amicus brief in *Helms*, PEARL described itself as a “national coalition of organizations sharing the objective of preserving religious freedom and the separation of church and state,” and listed among its members the American Humanist Association, the American Jewish Committee, United Church of Christ, and the Council for Secular Humanism. Brief of Amici Curiae PEARL et al. at 1, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648).

475. An amicus brief filed in *Helms* provides a perfect illustration. Joining a single brief, which argued against allowing federal assistance to religious schools, were the ACLU, the American Federation of Teachers, the American Jewish Committee, the American Jewish Congress, AU, the Anti-Defamation League, the Jewish Council for Public Affairs, and PFAW. See ACLU *Helms* Amici Brief, *supra* note 474, at 1-4.

476. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 92, 107-08.

477. See *supra* text accompanying notes 205-211; see also ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 120-51 (1970). Bickel argued that the Supreme Court’s prohibition of funding religious schools — like the Court’s unwillingness to tolerate tuition grants to support secular segregation academies — rested on the notion that public schools served the unique function of assimilating and Americanizing a diverse range of students. *Id.* The notion was that *only* public schools could properly prepare students to become responsible American citizens. Bickel also foresaw that “the insistence on the assimilationist mission of public schools which are unable to perform it cannot be maintained,” and he further suggested that once this assimilationist mission is abandoned, decisions prohibiting religion in public schools or financial support of religious schools “must also go.” *Id.* at 149.

478. *E.g.*, CAROL ASCHER ET AL., HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION I (1996) [hereinafter ASCHER ET AL., HARD LESSONS] (stating, in the first line of the book, that “[m]any Americans have lost faith in public schools”); COOKSON, SCHOOL CHOICE, *supra* note 376, at 1-9 (describing loss of faith in public institutions, including public schools); MACEDO, DIVERSITY AND DISTRUST, *supra* note 87, at 16-20 (describing various groups who have lost faith in public schools). It is worth noting that all three of these books defend public schools and that the authors depict themselves as arguing against the popular grain.

disappointment over the limited success of desegregation, the continued existence of poorly performing, racially isolated, and by any measure dismal urban schools, and evidence that Catholic parochial schools often outperform their public counterparts, even when educating racially and economically diverse students.<sup>479</sup> The loss of faith in public education also appears tied, at a more fundamental level, to a loss of faith in the civic purposes of public schools. Today, many public secularists appear to believe that the primary purpose of schools is not to assimilate students and prepare them for citizenship, but to teach them skills and prepare them for the workforce.<sup>480</sup> As public secularists have come to doubt that public schools are performing these tasks well, they have become open to alternatives.<sup>481</sup>

As a result, an increasing number of public secularists have abandoned their opposition to school aid. The shift is most visible in the fight over vouchers. Although only a few voucher programs exist as yet, voucher programs enjoy much stronger and more widespread support than they did two decades ago.<sup>482</sup> That support comes not only

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479. *E.g.*, ASCHER ET AL., *HARD LESSONS*, *supra* note 478, at 2-3 (describing various causes of dissatisfaction with public schools); MACEDO, *DIVERSITY AND DISTRUST* *supra* note 87, at 129 (suggesting that “today’s loss of faith in public schools” is tied in part to “large and anonymous” city schools); VITERITTI, *CHOOSING EQUALITY*, *supra* note 333, at 80-86 (describing how the literature on the academic performance of Catholic schools “would prove to have a great bearing on the question of educational equality” and school choice). James Coleman has conducted the most well-known research comparing public and private schools, including Catholic parochial schools. *See generally* JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982); JAMES S. COLEMAN & THOMAS HOFFER, *PUBLIC AND PRIVATE SCHOOLS: THE IMPACT OF COMMUNITIES* (1987). Research by Coleman and others on Catholic schools has not gone unnoticed by members of the popular media. *E.g.*, James Traub, *What Can Public Schools Learn?*, *N.Y. TIMES*, Nov. 9, 1997, sec. 7 (book review), at 13 (describing data demonstrating that “impoverished minority children were significantly likelier to graduate, and to go on to college, if they attended Roman Catholic rather than comparable public schools”).

480. MACEDO, *DIVERSITY AND DISTRUST*, *supra* note 87, at 16-26 (describing the arguments of various supporters of school choice). As Macedo observes, “[w]hat is striking in debates over public school reform is that the emphasis on markets, choice, and cultural diversity often seems accompanied by a profound loss of faith in civic purposes.” *Id.* at 16. *See generally* COOKSON, *SCHOOL CHOICE*, *supra* note 376, at 4-9.

481. Peter Cookson captured this view when he described how Americans traditionally shared a “firm belief that public schools are the mediators of merit and the cradles of democracy. With the weakening of the consensus [on this point], traditional methods of educational reform appear inadequate” and more and more people become open to market-based alternatives. COOKSON, *SCHOOL CHOICE*, *supra* note 376, at 9; *see also* Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 *CHI.-KENT L. REV.* 417 (2000) (expressing qualified support for vouchers); Galston & Ravitch, *Scholarships*, *supra* note 473 (offering qualified support for vouchers); Raspberry, *Let’s Experiment*, *supra* note 473 (same). It is especially telling that Macedo supports vouchers, given that his impressive book, *DIVERSITY AND DISTRUST*, is dedicated to establishing that schools should still attempt to forge a shared civic culture. *See* MACEDO, *DIVERSITY AND DISTRUST*, *supra* note 87.

482. *See generally* COOKSON, *SCHOOL CHOICE*, *supra* note 376 (describing history of school choice movement). *E.g.*, VITERITTI, *CHOOSING EQUALITY*, *supra* note 333, at 80-116

from religious groups, but also from a politically diverse array of public secularists. Supporters thus include not only libertarian and conservative groups and individuals, such as the Manhattan Institute, the Heritage Foundation, the Institute for Justice, William Bennett, Robert Bork, and Ed Meese.<sup>483</sup> They also include more politically liberal individuals such as former Clinton Chief of Staff Erskine Bowles, former Clinton Domestic Policy Adviser William Galston, *Washington Post* columnist William Raspberry, Martin Luther King III, and Howard Fuller, an African American who was the superintendent of the Milwaukee schools and “the father” of its voucher program.<sup>484</sup> Billionaire Theodore J. Forstman, a strong voucher proponent, has enlisted Bowles, King, and Fuller, among others, to form the “Campaign for America’s Children,” which advocates school choice through both newspaper and television advertising.<sup>485</sup> The television advertisements typically feature minorities and depict the question of vouchers as largely one about equalizing educational opportunities.<sup>486</sup> This view of vouchers has been endorsed by other politically liberal secularists, including Robert Reich, Clinton’s former Labor Secretary, who wrote an opinion piece in the *Wall Street Journal* making the case for what he termed “progressive vouchers.”<sup>487</sup>

This is not to say that all public secularists now favor aid to private schools. Vouchers are opposed by powerful secular organizations, such as the teachers’ unions, as well as by traditional civil rights groups, such as the ACLU and the NAACP.<sup>488</sup> But the shift in opinion among public secularists, who at one time almost uniformly supported public schools and opposed religious alternatives, is both real and important. It also stands in sharp contrast to what has (not) occurred on the issue of religion in public schools. Although many public secular-

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(describing various school choice initiatives undertaken since 1980); Jodi Wilgoren, *School Vouchers: A Rose by Any Other Name*, N.Y. TIMES, Dec. 20, 2000, at A1 [hereinafter Wilgoren, *School Vouchers*] (noting that “[p]ublic opinion polls have registered a growing interest in vouchers in recent years” and describing existing voucher programs and proposals).

483. COOKSON, SCHOOL CHOICE, *supra* note 376, at 30-33; Boston, *Congressional Alert*, *supra* note 410; Getz, *Parental Choice*, *supra* note 395, at A2.

484. VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 91-92 (describing support of Raspberry and Galston); Wilgoren, *School Vouchers*, *supra* note 482, at A1 (describing support of Bowles, King, and Fuller).

485. VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 91-92; Wilgoren, *School Vouchers*, *supra* note 482, at A1.

486. *Id.* at 91-92; Wilgoren, *School Vouchers*, *supra* note 482, at A1.

487. Robert B. Reich, *The Case for ‘Progressive’ Vouchers*, WALLST. J., Sept. 6, 2000, at A26. Although vouchers remain associated largely with conservative Republicans, registered Democrats, according to a 1998 poll, are actually more sympathetic to vouchers than are Republicans. The Phi Delta Kappa/Gallup Poll indicated that 51% of Democrats endorsed vouchers, whereas only 48% of Republicans did. Phi Delta Kappa/Gallup Poll, *The Public’s Attitudes Toward the Public Schools 1998*, PHI DELTA KAPPAN, Sept. 2000.

488. VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 101-10, 171-72.

ists have softened or abandoned their opposition to funding religious schools, their hostility to religious exercises in public schools has not decayed.<sup>489</sup> We see no movement among secularists to reintroduce prayer into public schools. We see no wealthy entrepreneurs, for example, bringing together a collection of prominent and diverse individuals to advocate returning religion to the classroom. Nor do we see the conservative foundations and think-tanks that advocate vouchers simultaneously working to restore school prayer. Even personally devout intellectuals, such as Yale Law Professor Stephen Carter, who argue that religion should be taken more seriously in public life and who support school vouchers, do not advocate a return of school prayer.<sup>490</sup>

Today, it seems likely that the alignment of these groups is producing a new political majority in favor of school aid. Although we cannot attach precise numbers to those who belong to one faction or another, estimates are possible. The current electorate is roughly 25% Catholic, 25% white evangelical Protestant, 20% mainline Protestant, 15% secular, 10% black Protestant, 2% Jewish, and the remaining 3% Mormons, Muslims, and others.<sup>491</sup> Catholics and white evangelical Protestants combined thus represent about half the population of the United States. Not all of them are committed accommodationists, but they are joined by Orthodox Jews, many black Protestants, and some secularists. It thus seems reasonable to conclude that today, in sharp contrast to the situation at the time of *Everson*, well over half of the current citizens in the United States support greater accommodation of religion.<sup>492</sup>

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489. *E.g.*, VITERITTI, CHOOSING EQUALITY, *supra* note 333, at 195-96 (arguing *against* religion in public schools and *for* providing funds to parents to send their children to private, religious schools).

490. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 15 (1993).

491. FOWLER ET AL., RELIGION AND POLITICS, *supra* note 11, at 34-35, 75, 92, 111-12.

492. Polls on religious issues support this estimate, as they reveal majority support for prayer in public schools and majority support for the use of vouchers at religious schools. For polling data on prayer in public schools, see *supra* note 482. Polls on vouchers are numerous and often tell contradictory stories, depending on how the question is posed. They also indicate that the public at this point knows very little about vouchers, making current polls even more unreliable. See STEVE FARKAS ET AL. PUBLIC AGENDA, ON THIN ICE: HOW ADVOCATES AND OPPONENTS COULD MISREAD THE PUBLIC'S VIEWS ON VOUCHERS AND CHARTER SCHOOLS 9-12 (1999); see also Carl Campanile, *NYers Support School Choice*, N.Y. POST, Aug. 25, 2000, at 20 (reporting results of recent poll indicating that about 75% of city residents familiar with school vouchers support them, but that only 55% of those polled were familiar with the use of vouchers). With those caveats in mind, the Phi Delta Kappa/Gallup Poll revealed that, in 1998 and 1999, 51% of those asked supported allowing parents to send their children to private schools, including church-related schools, with the government paying all or part of the tuition. In 2000, however, that percentage dropped to 45%. See Lowell C. Rose & Alec M. Gallup, *32nd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, at <http://www.pdkintl.org/kappan/kpol0009.htm>. Stronger support for vouchers was found in a



### C. *Looking Back, Looking Ahead*

We think it likely that the seismic shift in the politics of church-state relations will, sooner or later, have a profound effect on Establishment Clause doctrine. The emerging majority in favor of school aid is a major new fact in American politics, and one that we think will eventually influence the Supreme Court. Moreover, other factors reinforce the new majority's support for school aid. Today, religious schools are no longer invariably Catholic, and school aid no longer favors one religion. It can no longer be understood (or misunderstood) as bringing public policy into the orbit of a particular church. In these changed circumstances, any set of justices, whatever their backgrounds and predispositions, would find it easier to tolerate public funding of religious schools than did their predecessors of 1947.

Also easing the path toward accommodation is the declining faith in public schools. In recent years, the public schools have undergone intense and not undeserved criticism for failing to prepare students adequately for higher education or the workforce. At the same time, the hope of using schools to achieve the social goal of desegregating American society has faded, as has the belief in the public-school mission to inculcate democratic virtues. In this more critical and less optimistic atmosphere, the idea of seeking alternatives to public schools has become more attractive not only to white, conservative evangelicals, but also to African Americans and to many public secularists, both conservative and liberal — including, importantly, the secular elite, the class from which most justices hail.<sup>493</sup> As alternatives to public schools have become more appealing, secularist opposition to private school aid has declined.

The stage seems set, therefore, for a transformation in the Court's approach to the issue of funding religious schools. The changes that began in the late 1970s have been compounding ever since. As one would expect, given the age of the justices and the pace of judicial appointments, the Supreme Court did not respond immediately as the political ground shifted. Through the 1980s and the early 1990s, the Court continued along a twisting path of prohibiting all but incidental aid to religious schools. The Court's two most recent aid decisions,

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survey done in 1999 by Public Agenda. In that poll, 68% of parents, 57% of the general public, and 51% of community leaders endorsed vouchers. PUBLIC AGENDA, ON THIN ICE, at 13-14. Perhaps the most revealing poll, however, asked respondents to assume that their state government were starting a voucher program, and then asked whether the vouchers should be limited to nonreligious schools or should be available for religious schools as well. A remarkable 78% of those surveyed stated that parents should be able to use the vouchers at religious schools as well. PUBLIC AGENDA, ON THIN ICE, at 17-18. This last poll indicates quite clearly that, while there is still a division of opinion about whether to institute a voucher program, there is a great deal of support for the principle that any voucher program adopted should include religious schools.

493. See *supra* text accompanying notes 471-472, 478-481.

however, suggest a change of direction. Decided in 1997 and 2000, *Agostini v. Felton*<sup>494</sup> and *Mitchell v. Helms*<sup>495</sup> reveal four justices willing to allow even pervasively sectarian institutions to receive government aid, whenever that aid is also available to secular institutions on the same terms. Two other justices refuse to go that far but appear willing to tolerate substantial aid that certainly would have been prohibited ten years ago. Both *Agostini* and *Helms*, moreover, depart from the Court's earlier practice of distinguishing, often in plainly unpersuasive ways, unfavorable precedents. Instead, *Agostini* and *Helms* expressly repudiate prior decisions.

Of course, *Agostini* and *Helms* do not prove that the Court will embrace a major restructuring of Establishment Clause doctrine,<sup>496</sup> but they may well signal that the Court is beginning to rethink its approach. Our prediction of a coming revolution does not, however, depend primarily on what the Court has already said. More important, in our view, are the shifting fundamentals — the emergence of a strong new coalition in favor of school aid, the proliferation of religious diversity among the potential recipients of that aid, and the declining confidence in the monopoly of public education. Based primarily on these factors, we predict that the use of vouchers at private, religious schools will, sooner or later, be upheld.

While these factors suggest radical change on the question of aid to religious schools, they do not support any comparable prediction of radical change for religious observances in the public schools. That branch of the modern Establishment Clause remains intact, and the Supreme Court has made no move toward reconsideration. Several factors suggest that the Court likely will maintain that position in the foreseeable future. For one thing, the politics of this issue are different from those regarding school aid. The political alignment regarding religious exercises remains the same as it was when *Engel* and *Schempp* were decided: Protestants remain split on the issue, with conservative evangelicals joining Catholics and Orthodox Jews in support of prayer, while both ideological and public secularists, most Jews, and mainline clergy oppose it. To be sure, conservative evangelicals have acquired more political influence during the last generation, but the weight of elite opinion continues to oppose them on this issue.

More importantly, our nation's ever-increasing religious pluralism has very different implications for the two branches of Establishment Clause doctrine. The growing religious pluralism among private

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494. 521 U.S. 203 (1997).

495. 530 U.S. 793 (2000).

496. The Court of Appeals for the Sixth Circuit, which recently struck down the Cleveland voucher program by a divided vote, did not read *Helms* and *Agostini* as establishing the constitutionality of vouchers. See *Simmons-Harris v. Zelman*, 234 F.3d. 945 (6th Cir. 2000) cert. granted, No. 00-1751, 2001 WL 576235 (U.S. Sept. 25, 2001).

schools bolsters the case for government funding by removing the taint of state aid to a particular church. And given the fact that aid would also flow to nonreligious schools, of which there are a healthy number, school aid may also be seen as neutral as between religion and irreligion. In contrast, the growing religious pluralism of American society makes it less likely that our nation will return to officially sponsored religious observances in public education. In a nation of many faiths and none, it is hard to square officially sponsored school prayer and Bible reading with any viable conception of neutrality. It may be true, as some argue, that excluding prayer from public schools implicitly supports antireligious or nonreligious viewpoints as against the religious,<sup>497</sup> but reinstating prayer would do precisely the reverse. In this context, no meaningful opportunity for complete neutrality as between religion and nonreligion exists. More importantly, officially sponsored school prayer would threaten the ideal of government neutrality *among* religions. Any religious exercise or statement would be offensive to some. Today, even more than in the 1960s, officially sponsored prayer or Bible reading in the public schools would necessarily favor some beliefs over others. The prohibition of religious observances in public school therefore functions as a prophylactic against coercion of religious minorities and nonbelievers. As such, the Supreme Court's policy against school prayer and Bible reading responds to diversity of belief, and diversity of belief has only increased in the years since *Engel* and *Schempp*.

We believe, therefore, that the two propositions that make up the modern Establishment Clause are beginning to diverge. The ban against aid to religious schools is already fraying and may well collapse. The purging of religious observances from public education, in contrast, seems secure. Both predictions arise not from the internal logic of Establishment Clause doctrine but from consideration of the underlying political and sectarian forces that gave that doctrine birth.

#### CONCLUSION

This Article offers an external, or "political," account of the modern Establishment Clause. Our analysis differs from most existing scholarship in the field in at least three respects. First, it does not serve any normative agenda. Most investigations of the history of the Establishment Clause construct the past to support some vision of the future. This conjoining of the positive and the normative is invited, if not coerced, by the Supreme Court, which has consistently cast its Estab-

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497. E.g., Stephen Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1627 (1997); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 122 (1992); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and The "No Endorsement" Test*, 86 MICH. L. REV. 266, 278 & n.60 (1987).

lishment Clause decisions in historical terms. A lawyer or scholar who wishes to engage the justices on their own terms must therefore speak the language of history, even if doing so merely disguises a normative argument. Our analysis, in contrast, is entirely positive. We have tried to understand what has happened and to predict what will happen with as little regard as possible for normative concerns or implications. We do not pretend to have achieved some ideal of objectivity or "truth," but that has been our aim.

Second, our analysis differs from existing literature in the relative weight it gives to various periods of history. As the Supreme Court's reliance on the past stems from some version of original intent, attention is focused on the late eighteenth century. Indeed, many accounts of the history of the Establishment Clause take a direct flight from James Madison to the present, with perhaps a brief detour to buzz the airport of Reconstruction. These accounts pass over the long stretches of the nineteenth and twentieth centuries as featureless terrain of little interest. Our understanding is precisely the reverse. Neither the Bill of Rights nor the Fourteenth Amendment had much to do with the establishment of religion. The origins of the modern Establishment Clause lay not in the late eighteenth century, but in the nineteenth and twentieth. Accordingly, any attempt to understand where we are and how we got here must focus on exactly those periods that conventional history neglects.

Most important, we have not focused on the internal structure and logic of Establishment Clause doctrine. Instead, we have charted the broad correspondences between that doctrine and the history of church and state in America. We believe that this external perspective provides a richer and more informative account of the modern Establishment Clause than any analysis that resides within the decisions of the Supreme Court. We do not wish to be understood, however, as suggesting that internal factors played no role. Reasoning, doctrine, and precedent matter, and they have certainly figured in the history of the Establishment Clause.

The interplay between external and internal factors is especially vivid in the case of *Everson*. We think it plain that the separationist project begun in *Everson* did not result from legal analysis. Neither the constitutional text nor demonstrable original intent nor pre-existing doctrine or precedent determined that decision. To understand *Everson*, one *must* seek an external account. There is no other choice. But the decision, once rendered, surely influenced future cases. *Everson* traced a line backward from the mid-twentieth century to the framing and projected future controversies along the same trajectory. Justices who came to the Court without ironclad commitments on church and state found the direction of decision clearly marked. The disagreement between the *Everson* majority and dissent was so trivial, as compared to the questions deemed settled, that a justice who took

his cue from prior decisions would have found the area of choice quite constrained. Absent some fundamental shift in perspective or social context, debate over small-scale disagreements within the existing doctrinal framework might continue indefinitely, as *Everson* survived without serious challenge for almost fifty years. Radical change awaits the conviction that existing doctrine is radically wrong and that the right response is not refinement but repudiation.

We have not tried to follow the paths by which such convictions reach the Supreme Court. To do so would require a massive excursion into judicial biography. The broad outlines of that process, however, are not obscure. Part of the story turns on presidential elections and on the array of political opinion to which presidents respond. Part of it — especially in recent decades — turns on the disposition of the Senate and on the likelihood that particular commitments will arouse support or opposition. The choice between one presidential candidate and another, or between one Supreme Court nominee and another, obviously influences the course of constitutional law, and indeed often is made on just that basis.

Part of the story, however, turns on political choices over time. Supreme Court justices chosen from a younger generation will have experiences and perceptions different from their predecessors, regardless of political party or inclination. We do not suppose that sitting justices routinely change their minds to conform to new political alignments or social realities, but neither do we believe that justices chosen in an era of changed political alignment or altered social reality will be unaffected by it.

Thus, for example, no Supreme Court justice chosen in 1900, 1930, or 1950 would have doubted that aid to religious schools meant aid to Roman Catholic schools. The correspondence was nearly exact and was everywhere so perceived. In contrast, no Supreme Court justice chosen in the year 2000 could see aid to religious schools as favoritism to one religion. The previously controlling assumption is no longer tenable. The social reality has changed, and the social and political content of *Everson* separatism has changed with it.

The story of the changing social reality of church and state in America and the corresponding changes in constitutional doctrine is the political history of the Establishment Clause. This history, we believe, is a far better guide to understanding the modern Establishment Clause than anything actually said on its behalf in the opinions of the Supreme Court.