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Anti-Catholicism and Modern Church-State Relations

*Thomas C. Berg**

This article discusses how disputes over church and state in modern America have been affected by societal attitudes toward Roman Catholicism. The article is part of an ongoing book-length project, a legal and cultural history of church and state since the late 1940s,¹ when the Supreme Court regularly began to decide such disputes. The project traces not only the familiar court decisions, but also how Americans have struggled with church and state in the broader culture: in legislatures, in academic and popular media, and amongst religious denominations themselves.

An understanding of the broader cultural currents is valuable. First, the cultural currents have likely affected the Court's rulings: as Justice White once wrote, the courts, left with discretion by the broad words and ambiguous history of the Religion Clause, have used it to "carve out what they deemed to be the most desirable national policy governing various aspects of church-state relationships."² In addition, courts obviously do not shape societal decisions and attitudes by themselves. Consider, for example, how the national media couched the constitutional debate in early 2001 over whether President Bush's new office of "faith-based" programs violated the Establishment Clause. By my calculation, almost three-quarters of the news stories that discussed the constitutional question referred to it as whether the plan violated

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1. Tentatively titled *The Third Disestablishment of Religion: Government, Religion, and American Society Since 1945*.

2. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting).

“the separation of church and state” or some equivalent phrase.³ These references show just how deeply imbedded the “separation” concept is in our public culture, even though the Constitution does not contain the term, and the Supreme Court has cautioned against reducing the First Amendment’s religion provisions to this single concept.⁴

In the three decades following World War II, a fairly strict “separation of church and state” became the dominant ideal in Supreme Court decisions and in the culture for explaining the proper relation between religion and the state. But this idea of strict separation has also declined in prominence in recent years, even though it remains strong in some respects.⁵ Church-state separation reached its height in the 1960s

3. Westlaw’s ALLNEWSPLUS database for January 29-31, 2001, the first three days after Bush announced the faith-based initiative, contained 210 stories with the search terms <“faith-based” & Bush & (constitution! or unconstitutional)>. Of these, 151 stories, or seventy-one percent, also contained the search terms <(separat! /s church /s state)>. My search missed at least one instance, and probably more, of a formulation basically identical to “separation.” See, e.g., Anne E. Kornblut, *For Bush, It’s Calm, Steady, On Theme*, BOSTON GLOBE, Jan. 29, 2001, at A1, available at 2001 WL 3916629 (“[C]ritics say [the plan] could violate the Constitution by mixing church and state.”).

4. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 672-73 (1984) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)) (“[T]otal separation is not possible in an absolute sense.’ . . . [T]he [wall of separation] metaphor . . . is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”).

5. See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997) [hereinafter *Esbeck, A Constitutional Case*]; Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994) (both arguing that separationism has declined in favor of an emphasis on equality and neutrality).

Douglas Laycock correctly points out that equal treatment of religion in public life is consistent with a moderate version of separationism: one that simply “separate[s] the authority of the church from the authority of the state, so that ‘no religion can invoke government’s coercive power and no government can coerce any religious act or belief.’” Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46 (1997) (footnotes omitted). He also suggests that properly conceived, the separation value is “a means of maximizing religious liberty, or minimizing government interference with religion.” *Id.* at 47. I agree with both of these points, and with the very appropriate term, “substantive neutrality,” that he has coined to capture that underlying value of liberty and noninterference. *Id.* at 46 (citing Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990)).

But as Professor Laycock acknowledges, there has also been prevalent a stricter form of separationism, whose “defining commitment seems to be to secular supremacy and religious subordination, or at least to religious marginalization.” *Id.* at 47. He argues that this view “has never commanded a majority of the Supreme Court,” but I question that claim. *Id.* at 48. The stricter, more hostile form of separation, I assert, is evident in some of the decisions that prohibited government from giving even-handed aid to religious schools and other institutions to achieve secular public purposes. For this reason, Carl Esbeck calls the stricter view “no-aid separationism.” Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 285 (1999). The more hostile view has also been evident in decisions like *Epperson v. Arkansas*, which struck down a prohibition on the teaching of evolution in schools on the ground that the law had been motivated by fundamentalist Christians’ political activism. *Epperson v. Arkansas*, 393 U.S. 97

and 1970s decisions forbidding public school prayers and aid to private religious schools. However, in the 1980s and 1990s, this strain of separationism lost ground, particularly with respect to school aid; not only does the Court now seem ready to permit such aid in the form of vouchers, but public support for them is increasing as well, from forty-five percent in 1994 up to fifty-one percent in 1998.⁶

This article discusses how attitudes toward Roman Catholicism in America fit into that overall story. I have three claims to make, corresponding to three parts of the last half-century. First, the late 1940s and the early 1950s saw a resurgence in fear and distrust of Catholicism, and these contributed to the rise of church-state separationism in constitutional decisions, especially in decisions limiting aid to religious, overwhelmingly Catholic, schools.⁷ Second, in the 1960s and 1970s, the negative attitudes toward Catholicism might have been expected to decline, but they lingered, and for that and for other reasons the ideal of church-state separation became even more strict—again, especially in restricting aid to religious schools.⁸ Finally, in the 1980s and 1990s, the rollback of separationism, especially of its restrictions on equal aid to religious schools, has been influenced in part by changes in the importance of anti-Catholicism.⁹ Although negative attitudes toward Catholicism certainly remain significant, they are less widely held, are less focused on Catholic schools as such, and are only part of a broader distrust of politically active social conservatives, including evangelical Protestants. This realignment of political-religious disputes has contributed to important recent changes in church-state legal doctrine.

I. LIMITED SEPARATIONISM: THE 1940S TO THE EARLY 1960S

The first period began in the late 1940s with the first Supreme Court decisions on religion and schools, *Everson v. Board of Education*¹⁰ and

(1968); see also *infra* Part II (discussing the 1960s and 1970s as the height of church-state separationism). Striking down a law on the ground that it is motivated by religious political activism is certainly a recipe for marginalizing religion in public life.

6. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 5 & n.14 (1999) (citing *Phi Delta Kappan/Gallup Poll of Parents' Attitudes towards the Public Schools, 1998*).

7. See *infra* Part I.

8. See *infra* Part II.

9. See *infra* Part III.

10. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding the Establishment Clause does not preclude a state from spending tax-raised funds on a busing program for both parochial and public schools).

Illinois ex rel. McCollum v. Board of Education,¹¹ and continued until the early 1960s. During these years, the alleged political power and danger of the Catholic Church was the most prominent issue in America concerning religion and public life. Relations between Protestants and Catholics reached a “nadir” after World War II, in the words of one historian, who considers this “almost the dominant issue in U.S. religious news in those years.”¹² Another historian, John McGreevy, has detailed how liberal intellectuals around mid-century came to define themselves heavily in terms of opposition to the Church, which they viewed as an authoritarian force that threatened reasoned inquiry, democratic politics, and social unity.¹³ McGreevy’s chief exhibit is the 1949 book *American Freedom and Catholic Power* by Paul Blanshard, a broadside attack that dismissed various Catholic doctrines and practices as “superstition”¹⁴ and “useless mortification,”¹⁵ compared the Church with Soviet Communism, and called for a “‘resistance movement’ against the ‘antidemocratic social policies’ of the [Catholic] hierarchy.”¹⁶ The book was a bestseller and received rave reviews in academic and liberal publications; John Dewey commended its “exemplary scholarship, good judgment, and tact,”¹⁷ and *The New Republic*’s reviewer its “careful objectivity” and “calm frankness.”¹⁸

Although Blanshard was a religious liberal and humanist, he even received plaudits from theologically conservative Protestants such as Southern Baptists. “Here is a book that should be read by every American,” said a professor at the Southern Baptists’ flagship seminary in Louisville, writing in the denomination’s most prestigious scholarly

11. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding release time program for religious instruction on premises of public schools violates the First Amendment).

12. ROBERT S. ELLWOOD, *THE FIFTIES SPIRITUAL MARKETPLACE: AMERICAN RELIGION IN A DECADE OF CONFLICT* 17, 51 (1997).

13. See generally John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928–1960*, J. AM. HIST., June 1997, at 97. The term “the Church” throughout this article refers to the Roman Catholic Church. Protestants use the term to refer to all Christian believers, but this article is about Catholicism.

14. PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 215, 233-34 (1949) (referring to beliefs in miracles and in the power of saints’ relics).

15. *Id.* at 287 (referring to monastic orders).

16. McGreevy, *supra* note 13, at 97 (quoting BLANSHARD, *supra* note 14, at 303).

17. *Id.* (quoting letter from John Dewey to Melvin Arnold on June 7, 1949 (on file with author)).

18. Russell Rhodes, *The Road From Rome*, NEW REPUBLIC, Oct. 10, 1949, at 19, 20 (reviewing BLANSHARD, *supra* note 14; AVRO MANHATTAN, *THE VATICAN IN WORLD POLITICS* (1949)).

theological journal.¹⁹ Among the popular conservative press, the assessment by *The Alabama Baptist's* assistant editor was typical: "Every (I mean one hundred percent) pastor ought to read it. . . . This book will open your eyes [to the Catholic threat] and make you mad. I hope you don't miss it."²⁰ Today we expect evangelical and fundamentalist Protestants to dismiss the ideal of church-state separation as a "myth."²¹ However, in the late 1940s, these groups, though divided from liberal Protestants on virtually all else, united with them in warning of Catholic power and in rhetorically defending the strict separation of church and state. Among the first acts of the new National Association of Evangelicals (NAE), formed in 1942; were to condemn President Roosevelt's appointment of a Vatican representative and to oppose government funds for parochial schools.²² In 1948, the NAE's executive secretary and the Southern Baptists' president, among others, founded Protestants and Other Americans United for Separation of Church and State (POAU), an organization designed to combat parochial school aid.²³ Today, under the name Americans United, the organization is composed almost entirely of religious liberals and nonbelievers. In the 1950s, however, POAU staff members and other anti-Catholic critics regularly contributed to the leading evangelical magazine *Christianity Today*, defending strict church-state separation and warning of the Catholic threat to America.²⁴ In many cases, evangelical and fundamentalist fear and hatred of the Catholic Church were as vitriolic in the 1940s as they had been during previous waves of anti-Catholicism in America. The editor of *The Alabama Baptist*, for example, was still warning in 1949 that the Church's push for parochial school aid "is all part of the world plan whereby the Pope would control

19. Dale Moody, Book Review, 47 REV. & EXPOSITOR 132, 132-33 (1950) (calling the book "an authoritative guide to the whole [Catholic] problem").

20. Hal D. Bennett, *American Freedom and Catholic Power: Book Review*, ALABAMA BAPTIST, Oct. 13, 1949, at 9.

21. See, e.g., DAVID BARTON, *THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE?* (6th ed. 1992).

22. 3 MARTIN E. MARTY, *MODERN AMERICAN RELIGION: UNDER GOD, INDIVISIBLE 1941-1960*, at 107 (1996).

23. See RICHARD E. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA* 52 (1968).

24. See, e.g., Anonymous, *America's Need: A New Protestant Awakening*, CHRISTIANITY TODAY, Oct. 28, 1957, at 5 (providing an "expose" of Catholicism by "a former Jesuit trainee"); C. Stanley Lowell, *If the U.S. Becomes 51% Catholic*, CHRISTIANITY TODAY, Oct. 27, 1958, at 8; C. Stanley Lowell, *The Rising Tempo of Rome's Demands*, CHRISTIANITY TODAY, Jan. 7, 1957, at 11.

the schools, the press, hospitals, government and all matters affecting faith and morals.”²⁵

The major church-state legal question of these years was whether government programs of education aid could include Catholic schools or their students. Indeed, the school aid debate often seemed to drive people’s attitudes on other church-state matters. For example, *The Christian Century*, the leading mainline Protestant magazine, reasoned that the Catholic Church would use any method “to blur the principle of separation of church and state,” and therefore it was necessary for Americans to “reinforce” the principle,²⁶ even to the point of doing away with government-paid chaplains for military servicemen²⁷ and the inclusion of churches among tax-exempt organizations.²⁸ The magazine acknowledged that such programs were sympathetic in themselves, but argued that they set dangerous precedents for parochial school aid. On the other side, while the Catholic bishops had once opposed public-school prayers and Bible readings because of their distinctively Protestant cast, they now gave outspoken support to such practices. After *McCollum*, the Catholic bishops issued a statement arguing that the Court, by striking down programs releasing students from school early to attend religion classes, had wrongly prevented “cooperation between religion and government,” creating “an establishment of secularism that would ban God from public life.”²⁹ The Establishment Clause, the bishops said, merely prohibited preferring one religious group over another. When the Court turned to striking down school-sponsored prayers in 1962,³⁰ New York’s Cardinal Francis Spellman pronounced himself “shocked and frightened,” and Los Angeles’ Cardinal James McIntyre called it “not a decision according to law, but a decision of license.”³¹ While the bishops clearly supported public school prayer itself (which had become less Protestant and more ecumenical over the years), they almost certainly were looking beyond the issue: their chief concern lay in establishing church-state

25. Bennett, *supra* note 20, at 9.

26. *Getting Down to Cases*, Editorial, 64 CHRISTIAN CENTURY 1512, 1513 (1947).

27. *Id.*

28. *Churches Should Pay Taxes!*, Editorial, 64 CHRISTIAN CENTURY 454, 455 (1947).

29. ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 363 (1964). Catholic leaders at mid-century, “in a dramatic reversal of their nineteenth-century stand[,] became the ardent, even aggressive, defenders of Sunday laws and religion in the schools.” NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY 129 (1995).

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

31. Alexander Burnham, *Wide Impact Is Foreseen; Churchmen Voice Shock*, N.Y. TIMES, June 26, 1962, at A1.

“cooperation” rather than separation as the rule for future school aid disputes. It may be an overstatement to say that “conflicts over religious observances [in public schools were] significant primarily because of their implications for struggles over funds [for Catholic schools]”,³² but the claim has a significant element of truth.

The widespread distrust of Catholicism was almost certainly a factor, though not the only one, in how the justices of the Supreme Court decided the first modern Establishment Clause cases.³³ The *Everson* decision did narrowly permit states to reimburse families for bussing their children to parochial schools—and for that, the decision sparked a number of formal resolutions of condemnation by Protestant denominations,³⁴ as well as the formation of the anti-aid lobby POAU. In fact, however, the main thrust of *Everson* sought to limit parochial aid in the name of separating church and state. The majority opinion adopted the metaphor of a “wall of separation” between church and state;³⁵ it insisted that government could pass no laws “which aid one religion, [or] all religions,” and that “[n]o tax in any amount . . . can be levied to support any religious activities or institutions, whatever they may be called.”³⁶ That prohibitive language proved far more influential over time than did the narrow approval of bus reimbursements. *Everson*’s separationist dicta became the basis for a series of later decisions, in the 1960s and 1970s, forbidding any significant aid to religious elementary and secondary schools; and several of those decisions specifically noted that *Everson* had characterized the bus payments as skirting on “‘the verge’ of forbidden territory.”³⁷ This was what Justice Hugo Black intended when he wrote for the *Everson* majority; Black reportedly told friends that he made the approval of the aid “as tight” as possible to render it a “pyrrhic victory” for aid

32. MORGAN, *supra* note 23, at 40.

33. A number of these connections have already been traced by John McGreevy and by Douglas Laycock. Laycock, *supra* note 5, at 57-58; McGreevy, *supra* note 13, at 120-24.

34. STOKES & PFEFFER, *supra* note 29, at 430 (describing mainline Protestant reaction to *Everson* as “uniformly severely critical or much alarmed”).

35. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

36. *Id.* at 15-16.

37. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Everson*, 330 U.S. at 16); *accord* *Sch. Dist. v. Ball*, 473 U.S. 373, 392-93 (1985); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775 (1973). Not surprisingly then, *Everson*’s “interpretive approach and rhetoric often overshadow the holding in discussions among scholars and lawyers.” Daniel L. Dreisbach, *Everson and the Command of History: The Supreme Court, Lessons in History, and the Church-State Debate in America*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 23, 24 (Jo Renee Formicola & Hubert Morken eds., 1997).

proponents.³⁸ Even that was not enough for the four dissenters, who insisted that the “complete and permanent separation” mandated by the Constitution required “comprehensively forbidding every form of public aid or support for religion.”³⁹ This stricter anti-aid position prevailed in many other forums; between 1949 and 1963, seven of the eight state supreme courts to consider bus reimbursement for Catholic students ruled it invalid under state constitutional provisions.⁴⁰ Moreover, the year after *Everson*, in *McCullum*, the Court turned the “high and impregnable” “wall between Church and State” into a holding, ruling that state schools could not release students early to attend religion classes on school grounds.⁴¹ Justice Frankfurter, joined by three others, concurred in *McCullum* to reiterate his disagreement with *Everson*’s result, abandoning his usual judicial restraint to emphasize that “[s]eparation means separation, not something less.”⁴²

Despite approval of the limited form of aid in *Everson*, these results are generally consistent with a pattern of distrust of Catholic power. The emphatic limits of *Everson*, as well as the general endorsement of strong separation, clearly signaled that little or no further aid would be permitted to the largely Catholic parochial schools. The strict separationist posture of *McCullum* likewise suggested little hope for parochial aid, which made many Protestants happy even though they had supported the release-time programs that *McCullum* struck down. In any event, as will be discussed in Part I.C, only four years later the Court approved release-time programs as long as the religion classes were held off of school grounds, a decision that many Protestants celebrated.⁴³ At the same time during this period the Court avoided altogether the issue of officially-sponsored prayer in the state schools, which likewise were much more acceptable to mainline Protestants.

38. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 363-64 (1994) (quoting Black’s remarks to Truman Hobbs and Louis Oberdorfer).

39. *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting). Justice Jackson, Justice Frankfurter, and Justice Burton also joined in the dissent. *Id.*

40. STOKES & PFEFFER, *supra* note 29, at 431. Decisions striking down bus aid included: *Bd. of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963); *State ex rel. Reynolds v. Nusbaum*, 115 N.W.2d 761 (Wis. 1962); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951); *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949); *Silver Lake Consol. Sch. Dist. v. Parker*, 29 N.W.2d 214 (Iowa 1947) (striking down bus aid in all of the aforementioned cases). *But see Snyder v. Newtown*, 161 A.2d 770 (Conn. 1961) (holding bus reimbursements constitutional).

41. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

42. *Id.* at 231 (Frankfurter, J., concurring).

43. *Zorach v. Clauson*, 343 U.S. 306 (1952); *see generally infra* Part I.C; *infra* notes 141-42 and accompanying text (discussing court decisions finding that certain federal funding could go to religious education and the public reaction to those cases).

What we know of the justices' religious views suggests that they joined in the fears of Catholic power. Hugo Black Jr.'s memoirs state that his father, the justice, read all of Paul Blanshard's books and that the one sentiment he did share with the Ku Klux Klan (of which Justice Black had once, famously, been a member) was a distrust of the Catholic Church.⁴⁴ In a later dissenting opinion, Black referred to proponents of school aid as "powerful sectarian religious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion."⁴⁵ Justice William Douglas, in later opinions, quoted a polemical anti-Catholic book approvingly⁴⁶ and accused institutional churches (of whom the Catholic Church would be the epitome) of "feeding from the public trough" through charitable tax exemptions.⁴⁷ Douglas' opinions were also laced with unfavorable images such as that of the Church "indoctrinat[ing] its creed."⁴⁸ Justice Wiley Rutledge complained about the "aggressive" and "persistent" posture of the Church on school aid.⁴⁹ Four justices attended a Unitarian-sponsored rally in Washington, shortly after *Everson*, where speakers celebrated Thomas Jefferson's anti-clerical religious views and, in an obvious reference to Catholicism, criticized religions that exercised "autocratic ecclesiastical control over the mind and conscience of [their] individual members."⁵⁰ These quotes and actions support the inference that the justices, who were generally members of the secular elite and the mainline Protestant churches, would have shared the negative views of Catholicism found widely in those circles.⁵¹ Even *Everson*'s narrow, grudging approval of bus transportation reimbursement coincided with the attitude of most liberals: some sympathy for Catholic children and their parents, but a determination to prevent any assistance to the institutional Church.

44. HUGO BLACK, JR., *MY FATHER: A REMEMBRANCE* 104 (1975); McGreevy, *supra* note 13, at 124.

45. *Bd. of Educ. v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting).

46. *Lemon v. Kurtzman*, 403 U.S. 602, 636 (1971) (Douglas, J., concurring) (quoting LORRAINE BOETTNER, *ROMAN CATHOLICISM* 375 (1962)) ("[T]he people who support a parochial school have no voice at all in [its] affairs.").

47. *Walz v. Tax Comm'n*, 397 U.S. 664, 714 (1970) (Douglas, J., dissenting).

48. *Lemon*, 403 U.S. at 630-31 (Douglas, J., concurring); *see also* *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (distinguishing colleges from parochial elementary schools on the ground that students at the former were "less impressionable" and "less susceptible to indoctrination" than those at the latter).

49. McGreevy, *supra* note 13, at 123-24 (quoting Justice Wiley B. Rutledge).

50. *Id.* at 121-22 (quoting the sermon of Frederick May Eliot at the Jefferson Memorial on April 13, 1947).

51. *See* Laycock, *supra* note 5, at 57-58.

Why did fear of Catholic power become so prominent in the late 1940s? To a significant extent, it simply followed longstanding patterns. Anti-Catholicism has had a long history in America, from outbreaks of mob violence in the mid-1800s against Catholic immigrants in Philadelphia and New York⁵² to the nativist, anti-immigrant campaign in the 1920s to make private schools illegal.⁵³ The Protestant majority was always particularly intense and united in opposing state aid to religious schools, which were historically primarily Catholic. The anti-aid forces enacted numerous state constitutional provisions in the 1800s prohibiting aid to religious schools, and they nearly succeeded in 1876 in passing the Blaine Amendment, which would have added such an explicit ban to the Federal Constitution.⁵⁴ Philip Hamburger's research in popular political and religious literature of the 1800s and early 1900s establishes that the phrase "separation of church and state" regularly served as code for a host of accusations and prejudices against Catholics and the Church.⁵⁵

However, one might have expected such opposition to weaken in the mid-twentieth century rather than resurge as it did. For one thing, tolerance of religious difference had by that time become a more central American virtue, especially for liberals, many of whom opposed the earlier crude anti-Catholicism and applauded when the Supreme Court in 1925 struck down the nativist laws prohibiting private schools.⁵⁶ In fact, the 1940s opponents of Catholicism were at pains to distinguish themselves from the earlier bigotry: for example, Paul Blanshard "expressed pleasure that 'the new movement against Catholic aggression is rising not on . . . the lunatic fringes of religion and fanaticism.'"⁵⁷

52. See, e.g., LLOYD JORGENSEN, *THE STATE AND THE NONPUBLIC SCHOOL, 1825-1925*, at 69-110 (1987) (describing Philadelphia riots and other manifestations of hostility in the mid-1800s); VITERITTI, *supra* note 6, at 151 (describing mob attacks on the New York Bishop's residence and St. Patrick's Cathedral).

53. See, e.g., WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927* (1994).

54. See, e.g., VITERITTI, *supra* note 6, at 151-56 (providing summaries of state provisions and the Blaine Amendment); see generally JORGENSEN, *supra* note 52, at 69-110.

55. See Philip Hamburger, *Separation of Church and State* (unpublished manuscript, on file with author).

56. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

57. McGreevy, *supra* note 13, at 98 (quoting Paul Blanchard); see also *Indecent Controversy*, Editorial, 65 *CHRISTIAN CENTURY* 198, 200 (1948) (warning that "the fanatical anti-Catholic fringe" should not use the aid controversy as an excuse for "a direct attack upon the Roman Church").

To be sure, recognizing Catholic schools' right to operate does not equate to supporting government aid to them. However, there was a second development by the mid-twentieth century that also might have made liberals more receptive to school aid. Prohibitions on aid to religious and other private education had rested partly on a "negative conception of the state," widely accepted in nineteenth century America, under which tax-supported aid to a private entity or activity was a departure from the state's proper role of simply preserving liberty.⁵⁸ But the New Deal emphasized that active government, through subsidies and regulation, could and should promote liberty in a positive way. The New Jersey law in *Everson* authorizing bus reimbursements, introduced in 1937 and passed in 1941, was a Depression Era welfare measure,⁵⁹ and many other forms of parochial school aid such as textbook loans and hot lunch programs stemmed from the New Deal or the Progressive Era programs.⁶⁰ As theologian John Bennett, one of the few liberal Protestant clergy who actively supported some form of parochial aid, stated, the availability of equal aid affected "the opportunity of citizens to exercise their religious liberty in positive ways. . . . [W]hat if positive free exercise of these rights depends upon 'cooperation' between Church and state?"⁶¹

Despite these arguments, most liberals maintained that assistance to parochial schools, even on the same terms as a public school alternative, was favoritism toward Catholic families, rather than simply an effort to preserve Catholics' ability to choose the kind of education they wanted for their children. On this issue many New Deal liberals reverted to laissez-faire premises that they would otherwise reject: they invoked a negative conception of the state under which aid to Catholic schools was positive favoritism for them rather than an attempt to equalize them with the aid already given to state-run schools. Because liberals of the New Deal Era embraced active, welfare-state government in general, the fact that they hardened their attitudes against school aid during that same period still calls for explanation. I claim that fear and distrust of Roman Catholicism and its parochial schools played a significant role.

I refer to such fear and distrust as "anti-Catholicism," but I want to be precise about that usage. The term "anti-Catholicism" often has a

58. MORGAN, *supra* note 23, at 20.

59. See Daryl R. Fair, *The Everson Case in the Context of New Jersey Politics*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS*, *supra* note 37, at 1, 3-7 (discussing the origins of parochial school aid in New Jersey).

60. BLANSHARD, *supra* note 14, at 89 (acknowledging these liberal origins but bemoaning that such services lead to claims for more significant aid).

61. JOHN C. BENNETT, *CHRISTIANS AND THE STATE* 233 (1958).

normative judgment embedded in it: that a person's opposition to Catholicism is an unjustified prejudice. Throughout this Article, however, I use the term to describe any view that rests on a fear or distrust of Catholicism, whether or not the view is justified. Such attitudes unquestionably were pervasive in important sectors of American life in the 1940s and 1950s. The separate question whether they were justified is the subject of the rest of Part I. Part I.A presents the asserted bases for distrusting Catholicism, and Part I.B critiques those bases. In my view, the fears of Catholicism at mid-century found some small justification in certain official teachings of the Church, especially concerning religious freedom. But the distrust, and the intense opposition to equal aid for parochial schools that it generated, were unjustified on the whole, because they rested on three flawed premises: (1) a great exaggeration of any Catholic threat to the rights of others, (2) a mistaken refusal to acknowledge the denial of equal school aid as a burden on Catholics, and (3) a tendency to oppose the Church for its internal theology and practices rather than its effect on others.

A. *The Bases for Anti-Catholic Fears*

Fear and distrust of Catholicism intensified in the late 1940s because of circumstances that made this an awkward period in the development of the Church in America. On the one hand, Catholics were rising in economic and social status, showing up more frequently in universities, corporations, and neighborhoods that formerly were dominated by white Anglo-Saxon Protestants. Overall, the number of Catholics rose dramatically: a fifty percent increase in parishioners from 1939 to 1954,⁶² and a doubling of parochial school enrollment in the 1950s.⁶³ Even more striking were the urban demographics: by 1944, Catholics had more churches than any other religious body in thirty-eight of the nation's fifty largest cities, where in Protestant eyes "they often got to have much of their political way."⁶⁴

62. ELLWOOD, *supra* note 12, at 59 (citing *Fast-Traveling Cardinal, His Fast-Growing Church*, NEWSWEEK, May 24, 1954, at 54-57) (noting rise from 20 million parishioners to 30 million). The same 1954 *Newsweek* story reported that sixty-four new parochial schools had opened in the Archdiocese of Los Angeles in just the previous two years, and that since 1900 the number of nuns in America had tripled and the number of men in orders had doubled. *Fast-Traveling Cardinal, His Fast-Growing Church*, NEWSWEEK, May 24, 1954, at 54-57.

63. See JAMES HENNESEY, S.J., *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* 296 (1981) (noting rise from 2.6 million enrollment in 1949 to 5.6 million in 1960).

64. 3 MARTY, *supra* note 22, at 110.

In the face of these numbers, the nation's Protestant majority began to develop a hypersensitivity toward threats to its historic dominance—an unwarranted “minority consciousness,” as Will Herberg put it in his mid-1950s classic *Protestant–Catholic–Jew*.⁶⁵ A mainline Protestant internal report in 1948 warned of a “militant program of [Catholic] evangelization” and expressed fear that many weakly committed Protestants would convert.⁶⁶ *The Christian Century* published a series of articles in 1946 entitled “*Can Protestantism Win America?*,” and in a similar series editor Charles Clayton Morrison lamented that Protestantism was “pathetically weak” and its “former pre-eminent position in public respect is being superseded by Catholicism.”⁶⁷ Bishop Fulton Sheen’s popular TV show “Life is Worth Living” symbolized for many Catholicism’s growing attractiveness, confidence, and power. In his best-selling books and to his two million television viewers, Sheen “well embodied the dogmatic, still combative, but newly confident and maturing Catholicism of the era,” showing “that an educated and informed Catholic could hold his own with anyone intellectually.”⁶⁸ In one commentator’s words, a major part of the Protestant reaction against Catholicism in the late 1940s was “status anxiety.”⁶⁹

At the same time, the increasingly prominent and successful Church still displayed features that non-Catholics had long found threatening. First, as of the 1950s the Vatican still officially taught that religious freedom was not a moral ideal in itself, but at most a prudential accommodation to the fact of diversity in religious beliefs. Rather, the ideal was a Catholic confessional state with support for the Church and at least some restrictions on the educational and evangelistic activities of other faiths. The leading political theory text taught in American Catholic colleges, written by the famous “New Deal priest,” John A.

65. WILL HERBERG, *PROTESTANT–CATHOLIC–JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 234 (1960).

66. Cecil Thompson, *Report to the Federal Council of Churches, Evangelism and Protestant Theological Seminaries*, Apr. 9, 1948, at 2 (on file with author); see generally Thomas C. Berg, “*Proclaiming Together?* Convergence and Divergence in Mainline and Evangelical Evangelism 1945-1967,” *RELIGION & AM. CULTURE*, Winter 1995, at 49, 56-57 (discussing Protestant response to perceived threat of Roman Catholicism).

67. Charles Clayton Morrison, *Roman Catholicism and Protestantism*, 63 *CHRISTIAN CENTURY* 585, 587 (1946); Charles Clayton Morrison, *The Wasted Power of Protestantism*, 63 *CHRISTIAN CENTURY* 746, 746 (1946) [hereinafter Morrison, *Wasted Power*].

68. ELLWOOD, *supra* note 12, at 61. Ellwood evokes Bishop Sheen’s “dramatic [television] presence, enhanced by striking deep-set eyes, purple episcopal robes with magenta cape and skullcap, distinct diction, and perfect sense of timing.” *Id.*

69. MORGAN, *supra* note 23, at 27.

Ryan, fully affirmed this teaching: while the government should not punish people for following other (false) faiths, it had the duty to nurture Catholicism and prohibit “the propagation of the false doctrine among Catholics,” and to restrict others to worshiping only “in such an inconspicuous manner as to be an occasion neither of scandal nor of perversion to the faithful.”⁷⁰ Conceding that this position was “intolerant” and “a hard saying,” Ryan argued that it was “not therefore unreasonable. Error has not the same rights as truth.”⁷¹ While Ryan was a prominent liberal on issues of economics and free speech and a member of the board of the ACLU,⁷² his statements on religious freedom became a “bugaboo” to non-Catholics for many years.⁷³

Protestants took no comfort from Ryan’s assurance that the Catholic-state ideal practically applied only to a state with an overwhelmingly Catholic population, which he predicted would not be relevant in America “for some five thousand years hence.”⁷⁴ Such a solely prudential basis for religious freedom (“rational expediency,” Ryan called it)⁷⁵ seemed far too contingent: Protestants thought it would collapse when Catholics became significant majorities, as was nearly the case in several large cities.⁷⁶ Occasionally, it appears, public school officials who were also Catholic laymen engaged in acts of overreaching, on which the anti-Catholic voices harped. The most frequently cited examples were a suburban Cincinnati school district where the Catholic-majority board funded a local parish school, eventually prompting most of the district’s teachers to resign⁷⁷ and a

70. JOHN A. RYAN & FRANCIS J. BOLAND, *CATHOLIC PRINCIPLES OF POLITICS* 317 (2d ed. 1940).

71. *Id.* at 318.

72. See FRANCIS L. BRODERICK, *RIGHT REVEREND NEW DEALER: JOHN A. RYAN* 114-15 (1963).

73. 3 MARTY, *supra* note 22, at 142. Ryan included the Catholic-state statements in the book from its first edition, in 1922, and they were used by nativists against the Catholic Al Smith in his run for the presidency in 1928. 3 *id.*

74. RYAN & BOLAND, *supra* note 70, at 320.

75. *Id.*

76. See BENNETT, *supra* note 61, at 255. “It is the threat of a local majority that leads non-Catholics to emphasize the protections of religious liberty in the [F]ederal [C]onstitution.” *Id.*

77. See, e.g., Harold E. Fey, *Preview of A Divided America*, 64 *CHRISTIAN CENTURY* 682 (1947). As Stokes and Pfeffer describe it, the incident, in Cincinnati’s North College Hill neighborhood, actually reflected a compromise common in other areas of the country with too few Catholics to support the parish school: the school would be made into a state entity under the local board’s control, but most of its features, such as religious teachers and masses, would remain the same. STOKES & PFEFFER, *supra* note 29, at 414-18. The Catholic-majority board in the Cincinnati neighborhood adopted the arrangement in order to maximize the number of public school pupils for state-aid purposes. *Id.* The protests began when the district superintendent clashed with the board over the appointment of new teachers and the board fired him. *Id.*

New Mexico school district where the school board abandoned the school buildings, moved classes into parish buildings, allowed catechism classes to be taught to students, and paid tax-supported salaries to the teaching nuns.⁷⁸ Here at last, the critics cried, was the “preview of Catholic America”: the increasingly powerful Church was “asserting its claim” to privilege, “long held in abeyance,” while Catholics were a minority.⁷⁹ The critics also pointed repeatedly to Spain, where the Franco regime enacted and sometimes enforced laws forbidding Protestant worship and literature distribution in public and discriminated against Protestants in hiring for government jobs.⁸⁰

In the 1950s, the most satisfactory intellectual response to these fears of a Catholic state came from John Courtney Murray, the leading American Catholic proponent of religious freedom as a human right. Murray was no defender of strict church-state separation,⁸¹ but in a series of articles beginning in 1945 he mined the historic Church teaching to excavate the theme of dignity of conscience and applied it to protect the public expression of all religious beliefs.⁸² In Murray’s view, error might not have rights, but individuals had rights of belief even if their beliefs were in error. Unfortunately, in 1954 Vatican officials censured Murray for his writings and directed him not to publish any more work on church and state—a move that no doubt suggested to anti-Catholic critics that the “Catholic state” ideal was as

78. See, e.g., *Are Schools Free in New Mexico?*, Editorial, 65 CHRISTIAN CENTURY 37, 37-38 (1948); *New Mexico School Case Opens*, Editorial, 65 CHRISTIAN CENTURY 1067, 1068 (1948).

79. Fey, *supra* note 77, at 684; *Now Will Protestants Awake?*, Editorial, 64 CHRISTIAN CENTURY 262, 264 (1947).

80. *Protestant Liberty in Spain*, Editorial, 64 CHRISTIAN CENTURY 103, 103-04 (1947); see generally RICHARD HERR, AN HISTORICAL ESSAY ON MODERN SPAIN 230 (1971) (describing 1945 Spanish laws under which “[n]on-Catholic Spaniards would not be molested for their private religious beliefs (a promise the regime violated regularly in the next decades), but only Catholic ceremonies could be conducted in public”).

81. “[Murray] believed in a ‘concordia,’ a harmony between church and state which allowed for cooperation.” HENNESEY, *supra* note 63, at 303. He connected church-state separation with secularism; separation, he thought, “operate[d] on the premise that democracy demanded a naturalist, secularist philosophy.” *Id.* at 295. Murray contributed heavily to an amicus brief filed in *Everson* by the National Catholic Welfare Conference, which argued that religiously grounded education was a sphere of church responsibility, to be accommodated rather than displaced by the state, and that bus transportation of students was an area where church and state could cooperate to facilitate religious activity without coercing others. After the *McCullum* decision, Murray criticized its separationist rationale for reflecting “bad history, muddy political theory, and bad judicial thinking” and for creating a “religion of democracy.” STOKES & PFEFFER, *supra* note 29, at 86-87 (quoting Murray).

82. See, e.g., JOHN COURTNEY MURRAY, S.J., GOVERNMENTAL REPRESSION OF HERESY (1948); JOHN COURTNEY MURRAY, S.J., THE PROBLEM OF RELIGIOUS FREEDOM (1965) (providing the fullest presentation of Murray’s argument).

strong as ever. As a result, Judge John Noonan remarked, “[t]he most knowledgeable man in America on the Catholic doctrine on religious freedom as it related to the American experience was effectively eliminated from the argument.”⁸³ Murray would not publish again on church and state until the 1960s, when, as advisor at the Second Vatican Council, he helped draft the Declaration on Religious Freedom, in which the Church finally vindicated his arguments on religious freedom as a human right.⁸⁴

The critics of Catholicism also claimed that the religion was inconsistent with a democratic political system. First, they worried that the Church would use the government to enforce Catholic views not only on church-state questions in the narrow sense, but also on a range of secular matters that implicated Catholic moral doctrines: laws prohibiting contraception, laws prohibiting abortion even to save the mother’s life, severe restrictions on divorce, and laws and boycotts suppressing criticism of the Church in books or movies.⁸⁵ Second, the critics focused on the Church’s hierarchical structure and practices, under which the clergy instructed Catholics to use the (allegedly) “inferior” parochial schools and restricted them from marrying outside the faith, participating in ecumenical organizations, or reading prohibited books.⁸⁶ Even these rules concerning Catholics’ own personal practices threatened democracy, said Paul Blanshard, because they conditioned Catholics to accept “censorship, thought-control and, ultimately, dictatorship.”⁸⁷ Many critics found such supposed conditioning unacceptable, especially at a time when America was fighting fascist and communist foes with the same dictatorial features and needed to nourish a unified culture of democracy. *The Christian Century*’s Charles Morrison called the Church’s structure “the perfect embodiment of the principles of fascism,” based on “a principle ‘exactly

83. JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 333 (1998). Judge Noonan’s excellent recounting of the story shows that Murray ran into church politics at a time when official doctrine was indeed in flux. Pope Pius XII had given a speech in 1953 in which he pointedly refrained from endorsing the traditional church-state position, and Murray, based on some inside advice, publicly opined that the Pope was signaling a change in doctrine. *Id.* at 332. But Cardinal Ottaviani, the Vatican official responsible for promulgations of doctrine, had just published a book reaffirming the traditional position; he took offense at Murray’s claims and imposed the censure. *Id.* at 331-38.

84. See *infra* note 177 and accompanying text (discussing the relaxation of Catholic dogma).

85. See, e.g., BENNETT, *supra* note 61, at 255; BLANSHARD, *supra* note 14, at 107-55, 159-70, 181-210.

86. BLANSHARD, *supra* note 14, at 181-82.

87. *Id.* at 257.

opposite to that embodied in our democracy and our Protestantism”⁸⁸; John Dewey warned that aid to Catholic schools would encourage “a powerful reactionary world organization in the most vital realm of democra[cy].”⁸⁹ The prominent Methodist Bishop G. Bromley Oxnam stated the argument succinctly: “It is hard to understand how the Roman Catholic Church can espouse democracy, when it rejects democracy in its own totalitarian and autocratic organization.”⁹⁰ As Professor McGreevy emphasizes, the Church’s efforts to shape Catholics’ thinking on political matters offended liberals’ understanding that a free society required individuals who would reason based on independent, common sense assessments of evidence.⁹¹

These charges of authoritarianism seemed partially confirmed by actions like Pius XII’s reaffirmation of papal infallibility in 1950—“the peak year of papal absolutism,” in one historian’s words.⁹² The shrill and dogmatic style of some American clergy like Francis Cardinal Spellman did not improve the situation: Spellman performed true to stereotype by getting Paul Blanshard’s works banned from New York public school libraries, and by mounting a vitriolic and widely-condemned attack on Eleanor Roosevelt because of her opposition to including parochial schools in programs of federal government aid.⁹³ Opponents of aid in the late 1940s constantly cited Spellman’s “explosion” and “un-christian blasts” as proof of the Church’s aggressiveness and malevolence.⁹⁴ Even theologian Reinhold Niebuhr, one of the few leading Protestants sympathetic to giving Catholic schools equal aid, thought that Spellman’s pugnacious style naturally “hardened the hearts of non-Catholics” and “filled them with fear.”⁹⁵

88. 3 MARTY, *supra* note 22, at 146 (quoting Charles Morrison).

89. BLANSHARD, *supra* note 14, at 106 (quoting John Dewey in *The Nation’s Schools*).

90. *Methodist Bishop Says Catholic Hierarchy Openly Attacking Separation of Church and State*, ALA. BAPTIST, Aug. 25, 1949, at 5 (quoting an interview with G. Bromley Oxnam on WWDC radio, August 7, 1949).

91. McGreevy, *supra* note 13.

92. ELLWOOD, *supra* note 12, at 57.

93. Cardinal Spellman, who called opponents of parochial aid “unhooded Klansmen,” wrote an “open letter” to Mrs. Roosevelt in which he accused her of “discrimination unworthy of an American mother” and concluded haughtily: “I shall not again publicly acknowledge you.” HENNESEY, *supra* note 63, at 297-98 (quoting letter from Cardinal Spellman). “So overreaching was Spellman’s move that public outcries forced him to apologize.” 3 MARTY, *supra* note 22, at 161.

94. Bennett, *supra* note 20, at 9; Moody, *supra* note 19, at 133.

95. Reinhold Niebuhr, *A Protestant Looks at Catholics*, COMMONWEAL, May 8, 1953, at 117-18.

In the anti-Catholics' view, the point at which Catholicism would most directly threaten a unified "culture of democracy" was in primary and secondary education, where children needed to be brought together in order to understand each other and develop common values. *The Christian Century* warned that aid to Catholic schools would create a profound "breach in the cultural foundations upon which a democratic state can be erected";⁹⁶ POAU's 1948 founding manifesto predicted that parochial aid "would divide American society itself into hostile sectarian camps" and cripple public schools, the "strongest bulwark against the development of religious intolerance in our political life, next to the Constitution."⁹⁷ The supposed threat to the public school from the insular, separatist Catholic school was the perfect embodiment of the supposed Catholic "threat" to America.

B. Critique of the Anti-Catholic Fears

For the reasons just given, the criticisms of Catholicism in the immediate post-war years had some justification, primarily the criticisms of older official teachings that rejected religious freedom as a moral ideal. However, I argue, the criticisms went significantly beyond what was justified in the light of basic American principles. The anti-Catholic critics pushed one set of conceptions of a liberal society: the ideal of autonomous individuals making decisions based on shared reason without "constraint" from non-rational or non-shared sources such as traditional religion or a particular clerical authority. But liberals who push this set of ideals always risk running afoul of other central liberal principles. In particular, they may dismiss as "illiberal" those groups or persons who do not accept the model of autonomous, individual decision-making. Another central liberal principle holds that even an "illiberal" group should not be legally disfavored for its beliefs and internal practices unless they pose a direct and unavoidable threat to the welfare and rights of others. The anti-Catholic critics at mid-century advocated disfavoring the Church because it was "illiberal." In so doing, the critics contravened this second liberal principle in several ways.

96. *Now Will Protestants Awake?*, *supra* note 79, at 262.

97. *Separation of Church and State: A Manifesto by 'Protestants and Other Americans United,'* reprinted in 65 *CHRISTIAN CENTURY* 79, 80 (1948). Even John Bennett, sympathetic to some forms of parochial aid, opposed full funding of Catholic schools on the ground that it would encourage the formation of Protestant and Jewish schools, which would be "educationally disastrous." BENNETT, *supra* note 61, at 246-47.

1. The Exaggerated Catholic "Threat"

First, on an empirical level, the critics greatly exaggerated the Catholic "threat." American Catholics were committed as a group to religious freedom and political democracy, notwithstanding the lingering of the old official teachings opposing or questioning those concepts. John Courtney Murray's writings articulated in theory what most American Catholics believed instinctively: religious freedom is a human right, and while church and state need not be rigidly separate and could cooperate fruitfully, the Church should not have a privileged connection with the government. The equal right of religious freedom was among the chief affirmations of the turn-of-the-century "Americanist" Catholic movement: the leader of that movement, Cardinal James Gibbons of Baltimore, stated that equal religious freedom for all was "the best conceivable plan . . . for the good of religion and of the state."⁹⁸ In 1948, the Archbishop of Cincinnati, the bishops' official spokesman on church-state matters, reaffirmed that Catholics sought no "union of church and state . . . either proximate or remote," and recognized the "moral obligation . . . to observe and defend the Constitution and its Amendments."⁹⁹

Democracy in the secular political sphere also had wide support from Catholics, even as they continued to accept authority within the Church. Archbishop Cushing, newly installed in Boston in the late 1940s, exhorted his flock to support political freedom and democracy: "Give no man ground to attack Catholicism because of your imperfect Americanism . . . Demonstrate, for all to see, that to be a good Catholic is to be a good American."¹⁰⁰ Again, to assert that Catholics lacked the democratic spirit because they belonged to a hierarchical organization was a leap, flying in the face of the facts. For one thing, as John Courtney Murray argued, the American democratic tradition, with its strong component of constitutionalism, could make a place for the natural law, for values higher than simple majoritarianism—indeed, Murray argued, it was historically founded on them—and to that extent it could be embraced by Catholics.¹⁰¹ Catholics did lobby for laws

98. John A. O'Brien, *Equal Rights for All Children*, 65 CHRISTIAN CENTURY 473, 473 (1948) (quoting Cardinal James Gibbons).

99. STOKES & PFEFFER, *supra* note 29, at 323 (quoting Archbishop James McNicholas).

100. MARK SILK, *SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II* 85 (1988) (quoting Archbishop Cushing).

101. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 39-43 (1960) (describing the natural law foundation for democracy as "the grounds on which Catholics participate in the American consensus").

reflecting their moral values on medical practices, the family, and other areas, but the critics had a difficult time explaining why such peaceful use of the political process was inconsistent with democracy. Francis McMahon, a Catholic philosopher at the University of Chicago, posed the question: “‘If Mr. X, a Protestant [l]iberal, can fight for [the contraception laws’] repeal, why cannot Mr. Y, a Catholic, fight for their retention?’” Why could Catholics legitimately lobby for some laws, like those protecting laborers, but not for others?¹⁰²

One rejoinder to the critics’ portrait of Catholicism came from John A. O’Brien, a philosophy professor at Notre Dame, who focused on countering the stereotype of parochial schools as “an alien importation without roots in American tradition.”¹⁰³ O’Brien pointed out that religious schooling had been the norm in America before the nineteenth century waves of immigration; it was the public school that was the “late arrival,” the “radical departure.”¹⁰⁴ He then summarized the educational ideal held by most Catholics who used the parochial schools: they were places

wherein the truths of the Christian religion could be taught along with other subjects. In those schools devotion to country, the duties of citizenship, and respect and esteem for people of other faiths and races are inculcated from the first grade to the last. They meet the highest standards in the secular branches. Their graduates follow with success and frequently with distinction in the courses in the public high schools and tax-supported colleges to which the majority subsequently go.¹⁰⁵

The critics ignored or underestimated other differences and developments within the Church as well. Ironically, Paul Blanshard would often bolster his attack on Catholic institutions by quoting internal critics: Catholic academics commenting on the low funding and quality of many Catholic colleges, critical priests pointing to corruption in the marriage-annulment system, and magazines like *America* bemoaning the vapid state of the Catholic literary world.¹⁰⁶ Blanshard thought that by citing Catholics he was adding credibility to his charges,

Likewise, Murray argued, American constitutional democracy limited the power of the state, especially in matters of religion. This was consistent with the historic Christian position that a person’s relation to God was “antecedent” to, and more important than, his relation to the state. *Id.* at 35-39.

102. See 3 MARTY, *supra* note 22, at 165 (quoting FRANCIS E. MCMAHON, A CATHOLIC LOOKS AT THE WORLD 130, 134-35 (1945)).

103. O’Brien, *supra* note 98, at 473.

104. *Id.* at 473-74.

105. *Id.* at 474.

106. See, e.g., BLANSHARD, *supra* note 14, at 102-03, 171-76, 192.

but he was also inadvertently undermining his key claim that Catholics marched lockstep behind their bishops. In reality, the clergy/laity differences existed. A well-regarded sociological study of a New Orleans parish documented that the laity had less fixed religious views than the priests,¹⁰⁷ and even in the conservative 1950s a national survey showed that half of Catholics disagreed with the teachings against contraception and against remarriage after divorce.¹⁰⁸ Blanshard acknowledged some diversity of views, but claimed that they had no effect because of the “autocratic” status of the hierarchy.¹⁰⁹ And when lay Catholics did strongly agree with each other on an issue—for example, the legitimacy of state aid to parochial schools—separationist critics chalked it up to a “fear [of] discipline” from the hierarchy.¹¹⁰ They never allowed that Catholics could, after conscientious examination, believe that they were being treated unjustly.

By contrast, observers more sympathetic to Catholicism correctly predicted that the Church’s commitment to principles such as religious freedom and political democracy would become stronger and more explicit over time. While the bishops had authority within the Church, it was primarily laypeople who voted in federal, state, and local elections; and the increasing influence of lay Catholics in society was bound to spill over into the Church as well.¹¹¹ Moreover, the bishops did not move in lockstep either—for example, some pushed for anti-contraception laws while others regarded the issue as one of private morality¹¹²—and in any event the bishops would likely become more explicit supporters of religious freedom and political democracy in the future. In 1957, only five percent of bishops were sons of college graduates,¹¹³ but that number was bound to increase dramatically in the coming years. As a result, mainline Protestant theologian John C. Bennett counseled against projecting the fears of the past into the future, and he predicted “much greater mutual understanding and the sharing of more moral and political purposes” between Protestants and

107. ELLWOOD, *supra* note 12, at 62 (discussing JOSEPH FICHTER, SOUTHERN PARISH (1951)).

108. HENNESEY, *supra* note 63, at 287.

109. BLANSHARD, *supra* note 14, at 10.

110. Charles R. Bell, Jr., *Report on Wisconsin*, 64 CHRISTIAN CENTURY 265, 266 (1947).

111. MORGAN, *supra* note 23, at 63. “[I]f laymen are instrumental in achieving aid [for Catholic schools], they may also claim an active part in running the schools which benefit from the new support.” *Id.* at 65.

112. *Id.* at 62.

113. HENNESEY, *supra* note 63, at 284-85.

Catholics.¹¹⁴ The changes in the Church would not become dramatic until the mid-1960s, but the signs were increasing. For example, the Church excommunicated Boston Priest Leonard Feeney, whose rigid teaching that all non-Catholics were condemned to hell impeded ecumenical relations and conflicted with the Church's own more complex understanding of who could be saved.¹¹⁵

My argument in this section should not be misunderstood. In focusing on the various changes taking place in Roman Catholicism, I do not mean to imply that the Church deserved equal status in American public life only if it became very much like Protestantism or the secular world in its internal structure or its method of moral reasoning. My claim is much more narrow: that (a) certain formal teachings of the pre-Vatican II Church on political matters like religious freedom were in tension with American constitutional understandings; (b) it was unjustified to use such teaching as a reason to disfavor American Catholics, when the vast majority of them were committed to religious freedom and political democracy; but (c) in any event, the changes occurring in the Church at the time could be expected to undermine even further the empirical case for disfavoring Catholicism in legal doctrine.

2. The Burden of Denying Equal Aid

The anti-Catholic critics responded that they did not deny the Church's right to practice the Catholic faith, only its right to be affirmatively supported by the government. Indeed, to the critics of Catholicism it was "absurd" to assert that the negative right to operate religious schools, free from state prohibition, should give any argument for the state positively to support such schools with tax-generated funds. As was mentioned above, the opponents of aid relied heavily on the distinction between negative rights against state interference and

114. BENNETT, *supra* note 61, at 268.

115. See SILK, *supra* note 100, at 75-83 (discussing the Feeney episode). In addition to ignoring the diversity of views within the Church, the opponents tended to impose unwarranted blame on Catholicism for certain problems and deny it credit for praiseworthy actions. For example, a 1954 *Christian Century* editorial about juvenile delinquency ended by assigning much of the blame to, of all things, bingo games in Catholic parishes: "When the churches for their own gain break the law in various forms of mass gambling, what does this teach the young?" *Why Is Crime Increasing?*, Editorial, 71 CHRISTIAN CENTURY 1196, 1196 (1954). But when the Archbishop of St. Louis ordered the diocesan schools desegregated and threatened to excommunicate parishioners who resisted, the *Christian Century* said that the action reflected a "clerical totalitarianism which holds a greater threat to [blacks'] freedom than a denial of access to parochial schools for 100 Negro children." *Negro Press Praises St. Louis Catholic*, Editorial, 64 CHRISTIAN CENTURY 1228, 1228 (1947).

positive rights to state assistance. However, that distinction eventually broke down, given that the state already supported its own free schools, in which more and more religious elements were deemed inappropriate. The strict, “no aid” version of church-state separationism insisted that only public schools, highly secularized, could receive state benefits; it therefore discriminated against religious schools in the provision of benefits, and it put pressure on Catholic parents to forego the choice of sending their children to parochial schools. This in turn put real financial pressure on the schools themselves.¹¹⁶ The majority of the Court in *Everson* recognized this selective denial of aid as a potential “restraint[] [on] the free exercise of religion,”¹¹⁷ but the opinion did not take that insight very far. As has already been emphasized, one might have expected more sympathy from New Dealers given their emphasis on the state’s positive role in increasing individuals’ freedom.¹¹⁸

The anti-Catholic critics, however, showed little sympathy for the situation of Catholic families. Paul Blanshard, for example, worried that in areas where Catholic schools were supported, a non-Catholic family might have difficulty finding a public school;¹¹⁹ but he was unperturbed by the converse problem of a Catholic family facing insufficient or expensive Catholic schools. His blithe answer was that Catholics could avoid double payments (taxes and parochial-school tuition) “and acquire superior education by using the public schools.”¹²⁰

Even assuming there was any danger that Catholics would use government to restrict others’ religious freedom, that danger could be dealt with directly: either the Establishment Clause or the Free Exercise Clause would bar such restrictions against non-Catholics. It scarcely followed that the proper response was to use government to disfavor and pressure Catholics themselves by denying them aid that was available to those attending state schools. Especially given the speculative nature of the Catholic “threat,”¹²¹ the stringent opposition to most forms of aid was an overreaction. Articulate Catholic

116. See, e.g., MORGAN, *supra* note 23, at 130 (noting that by the mid-1960s, “[a] decision not to aid Catholic parochial schools [was] seen increasingly as a sentence of mutilation and possibly of death-by-degrees”).

117. *Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947).

118. BENNETT, *supra* note 61, at 233 (calling on liberals to recognize the “injury” and “deprivation of freedom” to religious schools and individuals denied a share of educational benefits); see also *supra* notes 56-59 and accompanying text (discussing religious tolerance as a central American value in the mid-twentieth century).

119. BLANSHARD, *supra* note 14, at 96.

120. *Id.* at 303 (emphasis added).

121. See *supra* notes 98-115 and accompanying text.

commentators such as John O'Brien, the Notre Dame professor, pointed out that while the likelihood of oppression by Catholics in America was remote, the financial pressure *against* Catholics to forego the schools they preferred was immediate and pervasive.¹²²

The Protestant and secular opponents of parochial aid characterized the matter differently, asserting that because virtually all religiously affiliated schools were Catholic, such aid would give the Church a "special position" rather than equal treatment.¹²³ Had mainline Protestants operated their own religiously affiliated schools, they quite likely would have seen aid to them as equal treatment. But, the vast majority of Protestants, however, no matter their dissatisfaction with the increasing secularization of state schools, did not consider the prospect of operating their own systems. As we have seen above, they believed that such a course would destroy the public schools and thus strike a blow both to the unity of Americans and to the quality of education.¹²⁴

More than American unity was at stake; Protestant unity hung in the balance as well. After all, the state-operated, or "common," schools had been created to overcome the division between Protestant denominations during the first nineteenth century wave of Catholic immigration—to educate those various Protestant children (and ultimately, it was hoped, their Catholic counterparts) in "common."¹²⁵ In the 1940s, when Catholicism seemed to be waxing strong again, Protestants both liberal and conservative agreed that they could not afford to remain "divided and weak," in the words of the evangelical magazine *Christianity Today*.¹²⁶ As a result, the separationist view of parochial aid as a "special privilege," and public schools as the neutral baseline, retained more than a little of the fear that a divided Protestantism would be overwhelmed by a unified and aggressive Rome. In other words, the defense of the public school continued to reflect an anti-Catholic outlook.

122. See O'Brien, *supra* note 98, at 475 ("To grant the assistance flowing from public benefit legislation to some children and to deny it to others because of differences of faith or because of different schools attended embodies the element of unfair discrimination which constitutes the core of un-Americanism.").

123. *Now Will Protestants Awake?*, *supra* note 79, at 264.

124. See *supra* notes 96-97 and accompanying text.

125. See, e.g., VITERITTI, *supra* note 6, at 147-56.

126. *Billy Graham and the Pope's Legions*, Editorial, CHRISTIANITY TODAY, July 22, 1957, at 20; see also Morrison, *Wasted Power*, *supra* note 67, at 746 (asserting that Protestantism's greatest weakness was its "fragmented and atomized" denominations).

3. Attacks on Catholics' Internal Practices and First Amendment Rights

Finally, although the anti-Catholic critics (as we have seen) vowed not to attack Catholic internal doctrines and practices,¹²⁷ they sometimes broke that vow and thereby undercut their claim to represent the liberal position. Paul Blanshard, for example, ridiculed parochial schools for such things as including pictures of saints in math textbooks;¹²⁸ he dismissed the entire Catholic college system as “second-rate,” the Church’s medical ethics as “medieval,”¹²⁹ and the monastic orders as “useless mortification”;¹³⁰ and he accused the Church of superstition for believing in miracles and saints’ relics.¹³¹ By including such attacks on Catholic theology as a recurring part of his case for disfavoring the Church politically, Blanshard stepped over the line that held that religions should not be singled out legally except insofar as they harm others—a line important to the structure of liberal democracy.¹³²

Indeed, Blanshard and other critics wanted to do more than just deny affirmative aid to Catholic schools; they proposed policies that, by common consensus today, would have violated the First Amendment rights of Catholic individuals and organizations. Blanshard, for example, advocated (a) censoring parochial schools’ textbooks to remove any distortion done “for the benefit of the hierarchy”; (b) prohibiting public school teachers from wearing any religious costumes; (c) registering all American Catholic higher officials (such as diocesan bishops) as “foreign agents” until they were “chosen by the Catholic people of the United States” rather than by the Vatican; and (d) barring the appointment of Catholic judges unless they took a special oath (beyond the general one) to enforce state laws permitting eugenic sterilization, which the Church opposed (to its credit, we now say).¹³³

Underlying these highly intrusive proposals was a disturbingly aggressive concept of “democracy,” grudging toward the rights of dissenters and seemingly quite inconsistent with constitutionalism and limited government. Blanshard attacked the Catholic doctrine that

127. See *supra* note 57 and accompanying text.

128. BLANSHARD, *supra* note 14, at 78.

129. *Id.* at 105, 108-09.

130. *Id.* at 287.

131. *Id.* at 215, 233-34.

132. As John Bennett put it, Blanshard mixed up criticisms of the Church’s political activities with “an attack on the freedom of a Church to have its own authoritarian structure as a matter of faith.” BENNETT, *supra* note 61, at 253-54 n.2.

133. BLANSHARD, *supra* note 14, at 304-05 (summarizing these proposals).

education was the right and duty of parents rather than the state; he said it wrongly treated the state as “something *over against* the people” rather than something that “expresses the will of the people as a whole,” which was the “ultimate sovereignty.”¹³⁴ He insisted that Catholic thought wrongly resisted “the expanding conception of the democratic state” and tried to fix the limits of state jurisdiction.¹³⁵

Such statements gave some credence to the warnings of pro-Catholic writers, in turn, that pure democracy, unrestrained by notions of absolute moral principles and natural law, would be at least insensitive to minority rights and at worst totalitarian. The University of Chicago’s Francis McMahon repeated the Catholic claim that the rejection of absolute morals had paved the way for Nazism, and that the Catholic natural law tradition was “‘vitaly important for the preservation of Western culture and American democracy.’”¹³⁶ Protestant theologian Reinhold Niebuhr, a supporter of some forms of parochial aid, charged that the strict position against private schools made “absolute claims [on the individual] in the name of . . . the unity of the democratic community”; turned democracy into “an idolatrous center of meaning” contrary to Christians’ and Jews’ belief that duties to God stood above those to the community; and “violate[d] the rights of the individual which it must be the business of democracy to guard.”¹³⁷

Catholics, of course, saw the strict version of separationism—secularized government, no aid in any form to religion—as the true betrayal of democracy. A 1952 editorial in a Catholic newspaper summed it up:

A Catholic in the United States cannot realistically consider the United States a democracy. To him it is a Protestant aristocracy where Catholics are accorded little more than a half-share of the common rights. The United States is a place where a Catholic can be president *theoretically*, but not *actually* . . . [Protestants] have no patience with a democracy which would grant equal rights to Catholics.¹³⁸

As has been indicated, one small but important group of Protestants dissented from the vehemently anti-Catholic posture: the “Christian realists,” led by Reinhold Niebuhr and John Bennett of Union Theological Seminary and the journal *Christianity and Crisis*. The

134. *Id.* at 47.

135. *Id.* at 48.

136. 3 MARTY, *supra* note 22, at 168 (quoting MCMAHON, *supra* note 102, at 292).

137. REINHOLD NIEBUHR, *Protestants, Catholics, and Secularists on the School Issue*, in *ESSAYS IN APPLIED CHRISTIANITY* 253, 254-55 (D. B. Robertson ed., 1959).

138. ELLWOOD, *supra* note 12, at 33 (quoting *Are We a Paper Democracy*, SIGN, Mar. 1952, at 9).

Niebuhrans, who at this time were quite influential in both religious and political circles,¹³⁹ complained, as thoughtful Catholics also did, that the imposition of strict, “no aid” separationism in education fueled the secularization of society, elevated the democratic community to a kind of religion in itself, and did injustice to families who believed that their children should be educated in a religious setting.¹⁴⁰ Niebuhr publicly criticized the Supreme Court’s decision in *McCullum* for too rigidly restricting efforts to teach religion in public schools,¹⁴¹ but the Niebuhrans went a step further by also supporting various forms of parochial school aid beyond the bus payments upheld in *Everson*. Although Bennett balked at any full aid direct to Catholic schools, Niebuhr actually proposed what today we would call a voucher system for elementary and high schools: “federal scholarship[s],” modeled on the G.I. Bill of Rights for college education, “to go to scholars in any school, provided it is to the scholar and not the school.”¹⁴² This position went far beyond *Everson* and basically coincides with the current, non-separationist Court’s approval of various forms of school aid.¹⁴³ While Niebuhr and Bennett gave the pro-aid side “the opportunity of pointing to prominent friends in the Protestant community,”¹⁴⁴ they did not succeed in convincing many Protestants to support the inclusion of religious school children in substantial programs of aid.

C. *The Moderating Influence of Civil Religion*

Thus, in the formative years of modern church-state law, a widespread fear of Catholic power helped initially to solidify the

139. See, e.g., Whitaker Chambers, *Faith For a Lenten Age*, TIME, Mar. 8, 1948, at 70 (featuring a cover story on Niebuhr and his influence).

140. See, e.g., Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1600-06, 1631-35 (1995).

141. See Reinhold Niebuhr, *Editorial Notes*, 8 CHRISTIANITY & CRISIS 34 (1948); see also *Statement on Church and State* (June 17, 1948), reprinted in 26 FIRST THINGS 32 (1992) (arguing that the strict separation approach of *McCullum* would “greatly accelerate the trend toward the secularization of our culture,” as indicated in the statement organized and drafted in part by Niebuhr).

142. REINHOLD NIEBUHR, *The Rising Catholic-Protestant Tension*, in ESSAYS IN APPLIED CHRISTIANITY, *supra* note 137, at 233, 237; see James Leo Garrett, Reinhold Niebuhr on Roman Catholicism 15 n.57 (1972) (unpublished pamphlet, on file with author). “Niebuhr advocated a system of federal scholarships for students in all schools, public, parochial, and private.” *Id.*

143. See, e.g., Mitchell v. Helms, 530 U.S. 793, 834-36 (2000) (plurality opinion); *id.* at 867 (O’Connor, J., concurring in the judgment) (both approving equal aid to students in religious elementary and secondary schools); Witters v. Wash. Dep’t of Servs. for the Blind, 474 U.S. 481 (1986) (approving unrestricted use of indirect aid by students at religious colleges).

144. MORGAN, *supra* note 23, at 66.

separation of church and state as a basic constitutional ideal in the courts and popular culture. However, strict separation was not the only strong ideal of the time. There was a competing ideal: that of civil religion, a generalized amalgam of Jewish and Christian affirmations relevant to government and public morality. This attitude, like anti-Catholicism, did not limit itself to right-wing religionists; it pervaded the nation's elite institutions like the Supreme Court. The Court in 1952 limited its separationist *McCullum* decision in *Zorach v. Clauson*, holding that public school students *could* be released early to attend religious classes off campus.¹⁴⁵ In two famous passages, the Court emphasized that the First Amendment

does not say that in every and all respects there shall be a separation of Church and State [If it did,] the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly We are a religious people whose institutions presuppose a Supreme Being When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.¹⁴⁶

Two years later, on Flag Day 1954, Congress inserted the words “under God” into the phrase “One nation, . . . indivisible” in the Pledge of Allegiance. The impetus for this move began with a sermon by a leading Presbyterian minister in one of Washington's elite pulpits, at a Sunday evening service attended by President Eisenhower.¹⁴⁷ Further strengthening civil religion, Congress in 1954 created a nondenominational prayer room in the Capitol and in 1956 formally made “In God We Trust” the national motto (it was already on coins and now was added to paper money).¹⁴⁸ “The manifestations of religion in Washington have become pretty thick,” remarked one commentator in 1954, noting the proliferation of ceremonial invocations and White House prayer breakfasts, and even a float in the 1953 inaugural parade representing Judeo-Christian religion (“God's Float”).¹⁴⁹ Another major manifestation of civil religion, generalized prayers and Bible readings officially sponsored in the public schools, remained a strong presence in the 1950s despite the separationist principles of *McCullum*.

145. *Zorach v. Clauson*, 343 U.S. 306 (1952).

146. *Id.* at 312, 313-14.

147. See 3 MARTY, *supra* note 22, at 299-300; STOKES & PFEFFER, *supra* note 29, at 570-71.

148. See STOKES & PFEFFER, *supra* note 29, at 570, 571.

149. William Lee Miller, *Piety Along the Potomac*, REPORTER, Aug. 17, 1954, at 25, reprinted in WILLIAM LEE MILLER, *PIETY ALONG THE POTOMAC: NOTES ON POLITICS AND MORALS IN THE FIFTIES* 41 (1964).

Indeed, in 1952 the leading separationist litigator, Leo Pfeffer of the American Jewish Congress, tried to dissuade ACLU-sponsored lawyers in New Jersey from pressing their attack on that state's policy of prescribing Bible readings in schools; Pfeffer was convinced that neither the courts nor the culture were ready for an attack on such a familiar practice.¹⁵⁰

Moreover, despite the distrust toward Catholicism that we have seen, this widespread civil religion often welcomed Catholicism as an equal participant. President Eisenhower's famous 1952 statement on the value of generalized religion—"Our form of government . . . has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is"¹⁵¹—implied that Catholicism could serve as one pillar of that foundation. By 1955, Will Herberg's book *Protestant-Catholic-Jew* concluded that Catholicism and Judaism had gained equal status with Protestantism as "one of the three great 'religions of democracy'": one of the three legitimate modes of being a religious American, indeed an American in general.¹⁵² How does one explain this paradox of a strong church-state separationism driven partly by distrust of Catholicism and an equally strong civil religion that recognized American Catholicism as a legitimate option?

In part, the two ideals competed, and each prevailed at different times in the 1940s and 1950s. The *Zorach* majority, which in 1952 approved off-campus release time, included a pair of relatively conservative Truman appointees, replacing New Deal liberals Frank Murphy and Wiley Rutledge, who had formed part of the *McCollum* majority.¹⁵³ Moreover, by the mid-1950s, when Herberg wrote about Catholicism's equal status, the sharpest Protestant-Catholic clashes over school aid had already passed. Opponents of parochial school aid succeeded in excluding it from federal educational bills in 1948 and 1949, and the issue did not come up again at the federal level, where it would have the most visibility, for more than a decade.¹⁵⁴ With the school aid issue less prominent, the need for strict separation seemed less pressing.

150. GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* 117 (1995).

151. SILK, *supra* note 100, at 40 (quoting President Eisenhower).

152. HERBERG, *supra* note 65, at 161; *id.* at 258 ("America thus has its underlying culture-religion—best understood as the . . . American Way of Life—of which the three conventional religions are somehow felt to be appropriate manifestations and expressions.").

153. The new justices were Tom Clark and Sherman Minton. But new personnel cannot alone explain the change from *McCollum* to *Zorach*. Three carryover justices switched their votes: Chief Justice Fred Vinson, William Douglas (who wrote *Zorach*), Harold Burton.

154. See STOKES & PFEFFER, *supra* note 29, at 435-40.

Civil religion, on the other hand, had staying power in the 1950s in large part because all major American religions perceived a common external threat: atheistic Communism. The chief need was for unity against that threat—for “the binding tie of cohesive sentiment,” in Justice Frankfurter’s words from the first flag salute case¹⁵⁵—and thus the various denominations ultimately had good reason to moderate their conflict over domestic matters such as church-state relations. Frankfurter, along with a number of secular liberals, thought that this “cohesive sentiment” could only be found in secular values.¹⁵⁶ For most Americans, though, democracy would have insufficient “sentiment”—insufficient substance—unless its defining values included some sort of generalized religious affirmation. Frankfurter recognized that “[w]e live by symbols,”¹⁵⁷ but the nation in this period moved to add more religion to those symbols, as with the Pledge and the national motto. Secretary of State John Foster Dulles told the mainline Presbyterian General Assembly in the early 1950s: “The truth is that a society of freedom *cannot* persist, and probably *ought not* to persist, except as a religious society”;¹⁵⁸ only a “righteous and dynamic faith” could counter Communism with its “‘creed . . . of worldwide import’” spread “with ‘missionary zeal.’”¹⁵⁹

In fact, for many Americans there was no real conflict between the two ideals of separationism and civil religion. The resolution of the apparent tension between the two lay in the ideal of national unity. Protestants and secular liberals feared that Catholic schools were divisive, separatist forces, endangering the creation of a unified democratic culture in a time when unity was imperative against outside threats. However, even the anti-Catholics acknowledged that Catholicism held some common values with Protestantism, such as anti-materialism, anti-Communism, and a concern for human dignity. Where it shared these values with Protestantism and secular liberalism, Catholicism could be welcomed as a partner in the fight. As Will Herberg put it, “[h]owever severe the tensions, however deep the

155. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

156. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring). Thus, he wrote in his concurring opinion in *McCollum* that the public schools, the “symbol of our secular unity” and “the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . must keep scrupulously free from entanglement in the strife of sects.” *Id.* (Frankfurter, J., concurring).

157. *Minersville Sch. Dist.*, 310 U.S. at 596.

158. 3 MARTY, *supra* note 22, at 127 (citation omitted).

159. SILK, *supra* note 100, at 91-92 (quoting Dulles).

suspensions, that divide Protestant and Catholic and Jew, there are limits beyond which they cannot go.”¹⁶⁰ This inclusion of Catholicism as an American religion, however, could never extend fully, in the view of Protestants and liberals, to the separate Catholic school system.

A parallel distinction in legal standards was embraced by many Americans in the 1940s and 1950s. “Separation” meant the complete separation of the state from the many different particular religious institutions like parochial schools, but not from the generalized, shared religious values reflected in public school prayers, the Pledge of Allegiance, and other manifestations of the civil religion that promised to unite Americans. For example, the Senate sponsor of the “under God” amendment to the Pledge argued that his bill was not an establishment of religion because “[a] distinction exists between the Church as an institution and a belief in the sovereignty of God. The phrase ‘under God’ recognizes only the guidance of God in our national affairs, it does nothing to establish a religion.”¹⁶¹ Likewise, *The Christian Century* in the late 1940s argued for the constitutionality of nondenominational public-school prayers, while vehemently opposing release-time religious instruction and parochial-school aid, on the ground that prayers “d[o] not involve any participation by any church as an institution,” only participation by individual clergy or school officials.¹⁶²

II. HIGH-WATER SEPARATIONISM: THE 1960S AND 1970S

The second period of modern church-state relations, I claim, runs from the early 1960s through the 1970s. Church-state separationism, which had been moderate and partial in the 1940s and 1950s, expanded and reached its height in these next two decades. By invalidating officially sponsored prayers in state schools in 1962¹⁶³ and Bible readings the next year,¹⁶⁴ the Warren Court questioned the generalized civil religion that the 1950s had affirmed. Additionally, the Burger Court, in a series of decisions in the 1970s beginning with *Lemon v. Kurtzman*,¹⁶⁵ severely limited government aid to religious elementary

160. HERBERG, *supra* note 65, at 241-42.

161. STOKES & PFEFFER, *supra* note 29, at 571.

162. *Getting Down to Cases*, Editorial, 64 CHRISTIAN CENTURY 1512, 1513 (1947).

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

164. See *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

165. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating state legislation partially funding nonpublic school teachers' salaries and secular education expenses).

and secondary schools and their students.¹⁶⁶ These decisions made clear that *Everson's* approval of aid that benefited children, not the schools, would not be extended to permit many forms of aid beyond transportation assistance.

Fear of Catholicism continued to be reflected in the high-water separationism of the 1960s and 1970s. One might have expected the opposite to happen, however, because some of the most important bases for anti-Catholic fears began to crumble in the 1960s. The first change was the 1960 election of John F. Kennedy, the first Roman Catholic president. Late in the campaign, when a group of Protestant ministers again raised the question whether a Catholic president would be “pressured” by the Vatican, Kennedy answered emphatically that he believed in church-state separation and would decide on issues “as President—on birth control, divorce, censorship, gambling, or any other subject—in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates.”¹⁶⁷ By opposing federal aid to parochial schools as well as an ambassador to the Vatican,¹⁶⁸ Kennedy cemented the idea that a Catholic leader would not necessarily take “Catholic” positions on policy issues.

The second major event was the Second Vatican Council, the landmark conclave in the mid-1960s that “opened the windows of the Church” to the modern world, in Pope John XXIII’s words,¹⁶⁹ and thus reduced Catholicism’s perceived threat to liberal democracy. The Council’s Declaration on Religious Freedom, issued in December 1965, embraced John Courtney Murray’s arguments that (a) religious freedom against governmental restraint was a basic component of human dignity and responsibility, not merely an accommodation to the presence of

166. See also *Wolman v. Walter*, 433 U.S. 229 (1977) (invalidating a state program that loaned instructional equipment, which could be used for religious purposes, to pupils of nonpublic schools or their parents), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Meek v. Pittenger*, 421 U.S. 349 (1975) (invalidating a state program that loaned instructional equipment, which could be used for religious purposes, to nonpublic schools), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Sloan v. Lemon*, 413 U.S. 825 (1973) (invalidating state legislation reimbursing parents for nonpublic school tuition expenses); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (invalidating state legislation granting funds to nonpublic schools for maintenance and repairs and providing a tuition reimbursement to parents of nonpublic school pupils).

167. STOKES & PFEFFER, *supra* note 29, at 334 (quoting Kennedy’s speech to the Houston Ministers Association on September 13, 1960).

168. See *id.* at 279-80, 441.

169. GEORGE WEIGEL, *CATHOLICISM AND THE RENEWAL OF AMERICAN DEMOCRACY* 35 (1989).

differing faiths; that (b) the right extended even to people whose religious beliefs were erroneous;¹⁷⁰ and that (c) religious freedom included the right to act on religious beliefs “privately or publicly, whether alone or in association with others, within due limits.”¹⁷¹ The old charge that school aid was the first step toward Franco-like restrictions on non-Catholic activity no longer found support even in formal doctrine. A Protestant delegate-observer to the Council pronounced that on the day the Declaration passed, “[a] very ancient order of things, . . . the era of Constantine—sixteen hundred years of it—passed away.”¹⁷² With Christians now showing “unanimity in support of virtually equivalent appeals for religious liberty,” Protestant spokesmen “confidently expect[ed] various improvements” in Catholic-Protestant relations in the future.¹⁷³ In 1966, the year the Council closed, the president of the National Council of Churches welcomed the “new spirit of Christian brotherhood and fellowship that is flowering from [it].”¹⁷⁴ Even Paul Blanshard wrote a somewhat complimentary book on his time in Rome observing the Council proceedings.¹⁷⁵

The Declaration on Religious Freedom was particularly important to church-state relations because it specifically concerned that subject and the Church’s position toward the legal rights of other faiths. However, Vatican II also changed many other features of the pre-1960s Church, both theological and structural, that had inflamed critics. The Council’s various declarations pointed explicitly toward greater ecumenical cooperation with other faiths, an increased role for the laity in worship and administration, and generally a less authoritarian posture by clergy.

Of special note, the Council’s Declaration on Christian Education abandoned the model of the insular parochial school in favor of one

170. VATICAN II, *Declaration on Religious Freedom: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*, § 2, in THE DOCUMENTS OF VATICAN II 675, 679 (Walter M. Abbott ed., 1966) (“[T]he right to religious freedom has its foundation, not in the subjective disposition of the person, but in his very nature. . . . even in those who do not live up to their obligation of seeking the truth and adhering to it.”).

171. *Id.*

172. HENNESEY, *supra* note 63, at 311 (quoting Robert Cushman, Duke University, in AMERICAN PARTICIPATION IN THE SECOND VATICAN COUNCIL (Vincent A. Yzermans ed., 1967)).

173. Dean M. Kelley & Claud D. Nelson, *Religious Liberty: Toward Consensus*, 83 CHRISTIAN CENTURY 651, 653 (1966) (providing article by officials of the National Council of Churches and the National Conference of Christians and Jews).

174. Bishop Reuben H. Mueller, *An Adventure in Ecumenical Cooperation*, in *Introduction to the Documents of Vatican II*, *supra* note 170, at xx.

175. PAUL BLANSHARD, *PAUL BLANSHARD ON VATICAN II* (1967); *see also* HENNESEY, *supra* note 63, at 312 (describing Blanshard’s Vatican II book as “reasonably mellow”).

“enlivened by the gospel spirit of freedom and charity”;¹⁷⁶ in response Catholic primary and secondary schools became less separatist, engaging the broader culture in a manner closer to, if still distinct from, that of the public schools. The Vatican II declarations and documents following from them undermined several of the images of the pre-Vatican II parochial school. To the extent it was ever true, the stereotype of parochial school “indoctrination”—of religious leaders simply commanding Catholic children to believe certain dogmas—was replaced by an emphasis on helping students to form a well ordered, but voluntary, conscience. The Declaration on Religious Freedom stated that “[t]he truth cannot impose itself except by virtue of its own truth,” and that “in introducing religious practices, everyone [in the Church and other religious communities] ought . . . to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy.”¹⁷⁷ Moreover, the image of teachers as dogmatic priests and nuns was replaced by a broader notion of “vocation” in which teachers, lay as well as clerical, “help parents in carrying out their duties and act in the name of the community”—the civil as well as the Catholic community.¹⁷⁸ As one important part of these developments, the percentage of laity among parochial school teachers rose sharply, from forty-three percent in 1968–69 to sixty-seven percent a decade later, while the percentage of nuns among teachers dropped from fifty percent to twenty-eight percent.¹⁷⁹

These dramatic changes in Catholicism might have made parochial school aid acceptable to more Americans in the 1960s. Indeed, *Newsweek* reported in 1964 that the more positive ecumenical relations ushered in by Vatican II had created a “crisis” in membership and purpose for POAU, the separationist organization that had thrived on combating the supposed Catholic “threat.”¹⁸⁰

176. VATICAN II, *Declaration on Christian Education*, § 8, in THE DOCUMENTS OF VATICAN II, *supra* note 170, at 635, 646.

177. VATICAN II, *Declaration on Religious Freedom*, §§ 1, 4, in THE DOCUMENTS OF VATICAN II, *supra* note 170, at 677, 682. For a carefully-reasoned defense of the secular value of Catholic parochial schools in the light of these documents, see Brief Amicus Curiae for the Catholic League for Religious and Civil Rights at 11-28, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648) (written by Professor Gerard Bradley, Notre Dame Law School) [hereinafter Catholic League Brief].

178. Catholic League Brief at 17-18, *Helms* (No. 98-1648).

179. Thomas C. Hunt & Norlene M. Kunkel, *Catholic Schools: The Nation's Largest Alternative School System*, in RELIGIOUS SCHOOLING IN AMERICA 1, 18 (James C. Carper & Thomas C. Hunt eds., 1984).

180. *POAU in Crisis*, NEWSWEEK, Oct. 5, 1964, at 102.

Likewise, the spirit of the Great Society, the renewed effort under Presidents Kennedy and Johnson to use large-scale government subsidies to help the needy, pointed toward giving equal support to Catholic education. Several federal aid programs enacted in these years benefited religious education: federal construction grants to religious colleges among others in the Higher Education Facilities Act of 1963, the provision of instructional materials and after-school remedial classes to religious school children (on the same terms as to public-school children) under the Elementary and Secondary Education Act of 1965.¹⁸¹ In fact, the late Warren Court, historically the most sympathetic Court to anti-poverty policies, gave a qualified approval to textbook loans to parochial school children in 1968.¹⁸² In Lucas Powe's words, "when a Great Society program was at issue," some of the liberal justices "were with the children and not with [a] dogmatic reading of the Establishment Clause."¹⁸³

Despite these changes, however, separationism actually strengthened in these years, and the 1970s Court rejected parochial school aid for the most part. In fact, on church-state separation, as in many other areas of constitutional law, it was the supposedly conservative Burger Court that not only solidified liberal doctrine but dramatically extended it.¹⁸⁴ Church-state separationism was one of many liberal cultural tides that, as critic David Frum has pointed out, actually crested in the 1970s rather than the 1960s.¹⁸⁵

Why did anti-aid separationism strengthen in the 1970s even though some of its foundations were beginning to crumble? For one thing, some of the changes in Catholicism might not yet have registered or been taken seriously. "[R]esidual anti-Catholicism"¹⁸⁶ could be expected to persist, especially for older Americans, like many of the Supreme Court justices, whose suspicion of Catholicism was ingrained over years. Justices Black and Douglas were eighty-two and seventy, respectively, when they lashed out at institutional Catholicism in the

181. Higher Education Facilities Act of 1963, 20 U.S.C. §§ 711-721 (1964) (repealed 1972); Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301-8962 (1994 & West 2000 & West Supp. 2001).

182. *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968).

183. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 369 (2000).

184. *See, e.g.*, EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986*, at 265-67 (2000).

185. *See* DAVID FRUM, *HOW WE GOT HERE: THE 70S, THE DECADE THAT BROUGHT YOU MODERN LIFE—FOR BETTER OR WORSE* 234-35 (2000) (describing Burger Court rulings on school aid).

186. Laycock, *supra* note 5, at 58.

opinions quoted above.¹⁸⁷ The anti-aid justices of the Burger Court, born between 1906 and 1920,¹⁸⁸ grew up in a nation in which suspicion of Catholicism was still pervasive. Moreover, as Earl Maltz and Mark Tushnet have both remarked, the Burger Court exhibited above all a preference for upper-middle-class values, which typically included a commitment to public schools and a distrust of the parochial school alternative.¹⁸⁹

Although John F. Kennedy proved that a Catholic president would not inevitably follow the Vatican, he was not necessarily a representative example of how Catholics would behave when they held national office. Kennedy was an especially secularized person: Protestant theologian Martin Marty found him “spiritually rootless and politically almost disturbingly secular.”¹⁹⁰ The anti-Catholic critics could well worry that Catholics more devout than Kennedy would be unwilling to separate their religion so completely from their public decisions as he did. Indeed, to a significant extent the price Catholics were asked to pay to be accepted was to give up so-called “sectarian” features of their faith. For example, the Court in *Tilton v. Richardson*, in 1971, permitted religious colleges to participate in grant programs only if they resembled secular colleges in their basic instruction and confined religious teaching to specific classes and activities.¹⁹¹

The Kennedy dynamic shows another reason why church-state separationism became even more strict in the 1960s. Some of the changes that made Catholic culture less of a perceived threat also made it less distinctive, more like secular and Protestant America. Parochial schools were an example: the very changes that made them less insular in the wake of the Vatican Council also prompted many people, including Catholics, to question whether they were necessary or viable. The Vatican II spirit of openness to the world, combined with the

187. See *supra* notes 45-48 and accompanying text (describing three different Supreme Court cases in which Justices Black and Douglas express views in opposition to Catholicism).

188. The majorities from *Lemon* through *Wolman*, the key 1970s decisions prohibiting aid, included Brennan (born 1906), Burger and Powell (born 1907), Blackmun and Marshall (born 1908), Stewart (born 1915), and Stevens (born 1920). See MALTZ, *supra* note 184, at 8, 14-23.

189. See *id.* at 267-69 (discussing in particular Justice Powell, “a well-educated, upper class Protestant,” and his hostility toward parochial school funding); Mark V. Tushnet, *The Burger Court in Retrospective: The Triumph of Country-Club Republicanism*, in *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION* 203, 208 (Bernard Schwartz ed., 1998).

190. SILK, *supra* note 100, at 120 (quoting Martin Marty).

191. *Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (upholding the 1963 federal program of college construction grants for those colleges that were not “pervasively sectarian”); *accord* *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (upholding general state grants for non-pervasively sectarian colleges on same ground).

increased social status of Catholics symbolized by Kennedy's presidency, made Catholics far more willing to interact with secular society and, as a corollary, to send their children to state schools:

In the context of such acceptance, the protectionist mentality afforded by a ghetto Church and its separate social institutions seemed strangely anachronistic. In an ironic twist, at the very moment when Catholic school enrollment had reached its apogee, Mary Perkins Ryan published a controversial book, *Are Parochial Schools the Answer?*, which raised serious questions about the continued need for Catholic schooling.¹⁹²

From a height of 5.6 million students in 1965, Catholic school enrollment fell forty percent, to 3.29 million by 1978.¹⁹³ The dramatic drop in religious vocations during the same period deprived the schools of "the services they [nuns and priests] contributed in the form of the[ir] very low salaries";¹⁹⁴ it "force[d] officials to hire lay teachers at salaries that in the old days would cover the pay of several religious teachers."¹⁹⁵ As one New Orleans teacher told *The New York Times*, "[w]hen Pope John opened the windows at Vatican II, he let in a hurricane."¹⁹⁶

The declining enrollment and ballooning costs left Catholic schools in "a severe financial crisis," as the United States bishops put it in 1970,¹⁹⁷ burdened by, among other things, scores of excess buildings; nearly twenty percent of the schools existing in 1968 had been forced to close by 1973.¹⁹⁸ The crisis prompted the wave of state aid legislation that reached the Supreme Court in the 1970s,¹⁹⁹ but it also may have

192. ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 33 (1993); see also Hunt & Kunkel, *supra* note 179, at 12 (Ryan "maintained that the age when Catholic schools were necessary to protect the faith of an immigrant minority population, living in a hostile environment, had passed.").

193. Hunt & Kunkel, *supra* note 179, at 1.

194. BRYK ET AL., *supra* note 192, at 33.

195. John Deedy, *Trouble For the Catholic Schools*, N.Y. TIMES, July 4, 1971, § 4, at 7.

196. Andrew H. Malcolm, *Troubled Catholic Schools Seeking Ways to Survive*, N.Y. TIMES, July 1, 1973, § 1, at 1.

197. *Catholic Bishops Pledge Recommitment To Parochial Schools*, 88 CHRISTIAN CENTURY 38 (1971).

198. See Warren Weaver, Jr., *Parochial Schools: The Court Reverses A Trend*, N.Y. TIMES, July 1, 1973, § 4, at 7 (noting 2,300 Catholic schools closed in those five years, bringing the number to 10,500).

199. For example, the findings accompanying the New York statute at issue in *Nyquist* stated that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare, and safety of nonpublic school children' in low-income urban areas." Comm. for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 763-64 (1973) (quoting the 1972 New York statute on Education and Tax Laws); see also Lemon

persuaded swing justices on the Court that the Catholic schools' decline was inevitable and as a result subsidies were pointless. Of course no justice expressed such a view,²⁰⁰ but it did appear in influential forums such as *The New York Times*, which shrugged in a 1971 editorial that if financially pressed Catholic schools had to close, their students "will simply have to be absorbed by the public schools."²⁰¹

The campaign for equal aid for Catholic education was also hampered by the issue of racial desegregation in schools, to which the Court was firmly committed at the time and which was threatened by increases in private schooling. As Douglas Laycock has pointed out, by the time of the early 1970s parochial aid cases, the Court "was at the height of its battle 'to achieve the greatest possible degree of actual desegregation' in public schools."²⁰² It had already struck down one southern county's effort to avoid desegregation by subsidizing private schools.²⁰³ It had just rejected a "freedom of choice" plan for a formerly segregated public school district on the ground that it would perpetuate segregation.²⁰⁴ Finally, in June 1973, on the same day as *Nyquist* struck down parochial aid, the Court held that Mississippi could not provide textbooks to segregated private schools, many of them Protestant, which had multiplied nine-fold in the state after desegregation orders.²⁰⁵

To the extent that Catholic school systems survived, there was a danger that it might have been largely because of white flight from desegregating public schools. The remaining Catholic schools could end up segregated even if they did not intend it; opponents of aid emphasized the danger. For instance, the National Council of Churches' spokesman on religious liberty issues, Reverend Dean Kelley, warned in 1966 that religious schools "might succeed in

v. Kurtzman, 403 U.S. 602, 609 (1971) (referring to the "crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs").

200. Justice Douglas did express skepticism about the financial crisis, repeating his claim that churches were "feeding from the public trough." See *Tilton v. Richardson*, 403 U.S. 672, 696 (1971) (Douglas, J., dissenting in part) ("The mounting wealth of the churches makes ironic their incessant demands on the public treasury."). Cf. *Wolman v. Walter*, 433 U.S. 229, 262-63 (1977) (Powell, J., concurring in part) (joining in striking down some forms of aid while still commending "the positive contributions of sectarian schools"), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

201. See 'Times,' 'Star' Blast President's Parochial School Aid Stand, 88 CHRISTIAN CENTURY 1019 (1971) (quoting *The New York Times*).

202. Laycock, *supra* note 5, at 61 (quoting *Davis v. Bd. of Sch. Comm'rs*, 402 U.S. 33, 37 (1971)).

203. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

204. *Green v. County Sch. Bd.*, 391 U.S. 430, 441 (1968).

205. *Norwood v. Harrison*, 413 U.S. 455, 457 (1973).

carrying out a *de facto* form of racial segregation with federal funds”;²⁰⁶ the next year, the NAACP president in New York state announced a fund-raising drive to oppose parochial aid, stating that “[w]e are against aid in any way, shape or form, because it only helps those who would skirt legislation on desegregation.”²⁰⁷ Catholic leaders and educators acknowledged the problem. Parochial systems in Dallas and elsewhere froze transfers from public schools in the early 1970s, vowing “not to let our schools become havens for segregationists.”²⁰⁸ The bishops’ education director, Monsignor James Donohue, in several widely-publicized speeches in 1966 and 1967, candidly worried that Catholic schools were serving as “escape valves” for anti-integration whites.²⁰⁹

Whether or not they benefited from white flight, Catholic schools were still likely to be nearly all-white, because very few blacks were Catholic. In his speeches, Donohue lamented that Catholic schools were overwhelmingly white (only four percent black in 1969) and that inner-city schools serving blacks were the most likely ones to be closed in the ongoing period of retrenchment.²¹⁰ A study commissioned by the bishops’ conference showed that between 1967 and 1973, inner-city parochial schools closed at two to five times the rate of those in broader urban areas generally: as of the early 1970s “the [C]hurch appear[ed] to have reached its organizational limits for [inner-city schools’] support.”²¹¹ Battling the rising costs through tuition increases (tuition doubled in many systems in three years in the early 1970s)²¹² would ensure that the schools’ population would be comprised of the white and wealthy. An editor at the Catholic magazine *Commonweal* summed up the conventional wisdom, even among prominent Catholics, by saying:

206. MORGAN, *supra* note 23, at 45 (quoting Dean M. Kelley, *What Part Should the Federal Government Play in Constructing Schools?*, published in 1966).

207. *Id.* (quoting Dr. Eugene T. Reed in *The New York Times* on February 6, 1967).

208. *Briefly Noted*, 88 CHRISTIAN CENTURY 1103 (1971).

209. *See, e.g.*, Hunt & Kunkel, *supra* note 179, at 13; *Are Parochial Schools Racial Escape Valves?*, 83 CHRISTIAN CENTURY 1297 (1966).

210. Hunt & Kunkel, *supra* note 179, at 13; *see* NATIONAL CATHOLIC EDUCATION ASSOCIATION, STATISTICAL REPORT ON CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS FOR THE YEARS 1967–68 TO 1969–70 at 10 (1970) (noting blacks constituted 5.1% of parochial elementary school students and 3.7% of secondary school students).

211. Reverend Virgil C. Blum, S.J., *Why Inner-City Families Send Their Children to Private Schools: An Empirical Study*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES 17, 21 (Edward M. Gaffney, Jr. ed., 1981) (citing THOMAS VITULLO-MARTIN, CATHOLIC INNER-CITY SCHOOLS: THE FUTURE (U.S. Catholic Conference, 1979)).

212. Malcolm, *supra* note 196, at 15.

[U]nlike the public school, the parochial school is hardly a microcosm of the larger society. Containing neither religious nor racial mix (the average parochial school is predominantly white), the Catholic school becomes in the minds of many a handicap for the child.²¹³

The courts were likely aware of such developments. As Professor Laycock has shown, opponents of parochial aid raised race discrimination claims in litigation. The lead plaintiff in *Lemon*, Alton Lemon, was black, the other plaintiffs included the Pennsylvania NAACP, and the plaintiffs' Supreme Court brief included an equal protection challenge to the funding of private schools as well as an establishment challenge.²¹⁴ "[E]very Justice [in *Lemon*] took note of the issue," as Laycock points out, "and it is hard to believe that no Justice was influenced by it."²¹⁵

The justices of the early 1970s were certainly also influenced by the fact that at that time aid to private schools was still perceived as a benefit almost exclusively for the Catholic Church. Catholic school students still made up more than eight-five percent of private school enrollment nationwide, and even more in the states where typical aid programs passed: ninety-seven percent in Pennsylvania and ninety-five percent in Rhode Island, the two states that produced the decision in *Lemon*.²¹⁶ The influence of this factor on the Court is apparent in the 1970s opinions themselves, which repeatedly cite the overwhelmingly Catholic numbers and argue that the aid in question was invalid because, in part at least, "the narrowness of the benefited class" would increase its "potential divisiveness."²¹⁷ The only religious schools whose features the Court described in *Lemon* were "the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the [aid statute]," and it was the Catholic schools that the Court pronounced pervasively sectarian.²¹⁸

Although evangelical and fundamentalist Protestant schools were mushrooming at the time, their growing numbers provided no impetus to the drive for equal funding because they did not want state funds

213. Deedy, *supra* note 195, at 7.

214. See Laycock, *supra* note 5, at 62 & n.116 (citing Appellant's Brief at 47-57, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (No. 70-89)).

215. *Id.* at 62 n.117 (citing the Court's opinion in *Lemon* and the various concurring and dissenting opinions).

216. *Id.* at 60 & nn.100, 105 (citing Brief of Appellants at 13, *Lemon* (No. 70-98)) (stating Pennsylvania statistics); *Lemon*, 403 U.S. at 608 (stating Rhode Island statistics).

217. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973); see also *Sloan v. Lemon*, 413 U.S. 825, 832 (1973) ("The State has singled out a class of its citizens for a special economic benefit.").

218. *Lemon*, 403 U.S. at 615, 618.

themselves. Leading voices in Protestant evangelicalism, including the Southern Baptist Convention and the magazine *Christianity Today*, condemned school aid programs and endorsed the decision in *Lemon*.²¹⁹ As late as 1980, the Reverend Jerry Falwell, prominent as the leader of the Moral Majority, urged “that no church or private religious school be underwritten by the government.”²²⁰ When fundamentalist educators became politically active in the late 1970s, it was not to seek government aid, but to resist regulation: in particular, to try to block the federal government’s effort to withdraw tax exemptions from all-white Christian schools in the South and Midwest.²²¹ Throughout the 1970s, fundamentalists opposed any government involvement with private schools and simply wanted “to be left alone to teach their children as they pleased.”²²²

Finally, in explaining why distrust of Catholicism persisted among church-state separationists in the 1970s, we must not forget that the old, crumbling bases for distrust were quickly being replaced by a new, powerful one: abortion. In the 1940s disputes between liberals and Catholics over the issue were limited to whether to permit “therapeutic” abortions to save the mother’s life or health; even Paul Blanshard noted that abortions for other purposes were condemned by “[a]ll religious faiths.”²²³ However, *Roe v. Wade*²²⁴ was decided in 1973, just weeks before the strict anti-aid *Nyquist* decision invalidating New York’s aid program.²²⁵ Proponents of liberalized abortion laws at that time viewed the Catholic Church as their chief opponent, and they were already accusing “the hierarchy” of “imposing its morals” on others.²²⁶ By 1976, the Hyde Amendment banning federal funds for non-medically-necessary abortions had passed, and pro-choice groups challenged it as a violation of the Establishment Clause on the basis of “the magnitude

219. Laycock, *supra* note 5, at 59 (citing *Baptists Support Separation*, 24 CHURCH & STATE 38 (1971); *Holding the Line on “Parochialism,”* Editorial, 15 CHRISTIANITY TODAY 284 (1970); *Plight of Parochialism*, Editorial, 15 CHRISTIANITY TODAY 971 (1971)).

220. Jerry Falwell, *Ninety-Five Theses for the 1980s*, reprinted in SALT AND LIGHT: EVANGELICAL POLITICAL THOUGHT IN MODERN AMERICA app. at 160, 164 (Augustus Cerillo, Jr. & Murray W. Dempster eds., 1989).

221. See, e.g., WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 169-73 (1996); *id.* at 173 (arguing that this regulatory controversy “play[ed] a pivotal role in bringing together conservative Christians and creating a genuine politically effective movement”).

222. *Id.* at 173 (quoting Religious Right activist Paul Weyrich).

223. BLANSHARD, *supra* note 14, at 115.

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

225. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

226. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 128 (1984).

of the organized effort of the clergy and laity of the Roman Catholic Church to obtain [its] passage.”²²⁷

In sum, a distrust of Catholic power and Catholic education was still a factor in the stricter “no aid” separationism of the 1960s and 1970s. However, this motivation was less defining and less dominant than it had been in church-state relations in the 1940s and 1950s. As has already been noted, the Warren and Burger Courts also attacked the generalized civil religion that Protestants had traditionally supported, by striking down official prayers, Bible readings, and other religious elements in state schools²²⁸ as well as state requirements that officeholders declare a belief in God.²²⁹ Near the end of the Warren Court era, in *Epperson v. Arkansas*, the justices specifically took a swipe at the evangelical Protestant majority of the South, striking down the Scopes-era law that forbade the teaching of evolution in Arkansas schools.²³⁰ The majority objected that it was “clear that fundamentalist sectarian conviction was and is the law’s reason for existence,”²³¹ thereby suggesting that religious involvement in politics was suspect in general. In addition to these limits on majoritarian religion, the Court extended direct protection to minority faiths by exempting them from generally applicable laws under the Free Exercise Clause²³² and by reading conscientious exemptions broadly to include beliefs that “occupy the same place in [the objector’s] life as the belief in a traditional deity” held by orthodox religionists.²³³ This solicitude extended to Catholicism in *NLRB v. Catholic Bishop of Chicago*, which construed the labor laws to shield parochial schools from having to bargain collectively with lay teachers’ organizations.²³⁴

227. *McRae v. Califano*, 491 F. Supp. 630, 690-91 (E.D.N.Y. 1980), *rev’d*, *Harris v. McRae*, 448 U.S. 297 (1980).

228. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *see also Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*) (striking down display of Ten Commandments in public school classrooms); *see supra* notes 163-66 and accompanying text (discussing the Warren and Burger Courts religion decisions).

229. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

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

231. *Id.* at 107-08.

232. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (plurality opinion) (exempting Amish from compulsory schooling laws); *Sherbert v. Verner*, 374 U.S. 398 (1963) (exempting Seventh-Day Adventists from requirements of Saturday work).

233. *United States v. Seeger*, 380 U.S. 163, 187 (1965); *see also Welsh v. United States*, 398 U.S. 333 (1970) (exempting from military service those whose belief against war equals strength of traditional religious convictions).

234. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).

The stricter separationism of these decades therefore reflected a general distrust of any majority position on matters of religion, not simply a distrust of Catholicism (which sometimes was, but sometimes was not, a majority faith). The 1960s and 1970s separationism reflected a desire to protect minority faiths from the majority's power—a position that, at least for the Warren Court, coincided with the Court's overall concern for protecting minorities.²³⁵ The distrust of public religion also coincided with the rise in the 1960s of an "increasingly aggressive secularism."²³⁶ Secularists of the 1960s asserted that traditional religion and its institutions had failed to address important moral questions, such as racial discrimination and women's rights, and that social justice could be achieved only by embracing the secular world and by increasingly relying on government rather than on private charity and private institutions. As one commentator has put, a large number of social activists in the 1960s concluded

that to leave a matter to "private initiative" is to insure that it will be done incompetently, prejudicially or not at all Religious schools are seen as especially regressive . . . and the argument that church-related schools might become publicly subsidized middle-class havens for whites running from Negroes and other poor people clinches their case.²³⁷

III. THE DECLINE OF SEPARATIONISM: THE 1980S TO THE PRESENT

Since about 1980, we have been in a third period of modern church-state relations. The last two decades have seen the decline of strong separationism as the dominant church-state ideal—a slow, partial, but continuing decline²³⁸—and the corresponding rise of the principle that religion can be an equal participant with other ideas and activities in public life, including in government benefit programs. The Court has approved an increasing number of measures that permit religious schools or individuals to receive aid on equal terms with other beneficiaries; the recent decisions in *Agostini v. Felton*²³⁹ and *Mitchell v. Helms*²⁴⁰ overrule separationist precedents from the Burger Court of

235. See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (Mark Tushnet ed., 1993).

236. MORGAN, *supra* note 23, at 131.

237. *Id.*

238. In Ira C. Lupu's evocative phrase, a "lingering death." Lupu, *supra* note 5, at 230.

239. *Agostini v. Felton*, 521 U.S. 203 (1997).

240. *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion).

the 1970s and early 1980s.²⁴¹ Not only does the Court appear ready to permit a voucher program for primary-schools, including religious schools, but public sentiment, although still very divided, has moved in the direction of vouchers as well.

What has caused this shift in the Supreme Court's direction on religious school aid? There are two familiar explanations, one political and one jurisprudential. One can simply point to the Republican dominance of the Court, with at least six of the justices appointed by presidents who promised to roll back judicial activism and who received crucial support from evangelical Protestants and conservative Catholics. On the other hand, one could argue that the Court has recently corrected the errors of the 1960s and 1970s and again recognized religion's legitimate role in public life. At the least, it could be argued, the school aid jurisprudence of the 1970s was so full of contradictions and arbitrary distinctions that it was bound to be overturned.²⁴²

I do not discount either of these explanations. However, I assert that the balance has also tipped away from separation for another reason: many of the assumptions of the 1960s and 1970s about religious schools—and Catholic schools, in particular—have proven unfounded or have been undercut by various events. In the words of Ira Lupu, the case against equal educational aid for families in religious schools has become “increasingly anachronistic.”²⁴³

First, as Lupu points out, aid to religious schools can no longer be seen as a benefit solely for Catholics. Only about fifty percent of private school students today are in Catholic schools, compared with the

241. *Agostini*, in holding that government could pay for public school teachers to teach after-hours remedial classes in secular subjects in religious schools among other private schools, overruled *School District v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985). *Mitchell*, in holding that government could include religious schools as recipients of instructional materials and equipment for nonreligious uses, overruled *Meek v. Pittenger*, 421 U.S. 349 (1975) and parts of *Wolman v. Walter*, 433 U.S. 229 (1977). See also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (approving equal aid from the university to a religious student magazine); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (approving equal aid to a deaf student attending Catholic high school); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (approving equal grants to religious social services for counseling against teenage pregnancy); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (approving equal aid to a college student studying for ministry).

242. The most notorious inconsistencies were the Court's holding that states could loan textbooks to parochial school students, but could not loan other instructional materials to the schools, compare *Everson* with *Meek*; and that states could reimburse the cost of bus rides for parochial students to and from school, but not on school field trips, compare *Everson* with *Wolman*.

243. Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 375 (1999).

more than ninety percent of the early 1970s. Further, only thirty percent of private schools in America are now Catholic,²⁴⁴ compared with sixty-five percent at the time of *Lemon*.²⁴⁵ The number of Catholic schools has shrunk, and the number of evangelical Protestant schools has continued to increase dramatically.²⁴⁶ The conversion of many evangelicals to the pro-aid position not only makes aid appear more religiously neutral to a court, it also creates a more far-reaching lobby in state legislatures and Congress. Moreover, Catholic schools themselves serve many non-Catholic students; non-Catholic enrollment rose fivefold from 2.6% in 1970 to 14.3% in 1990,²⁴⁷ and by 1980 half of the black students in Catholic schools were from non-Catholic families.²⁴⁸

Second, while Catholic schools could be seen as educationally weak in 1950 and fiscally ill around 1970, they now appear much stronger on both counts, especially as compared with many public schools that continually struggle. The trend from insularity to openness has continued: lay teachers rose further from seventy-five percent of the teaching staff in 1983 to eighty-five percent in 1990,²⁴⁹ and about sixty percent of Catholic school teachers have spent at least a year teaching in state schools.²⁵⁰ Moreover, much of the parochial schools' increased attractiveness to non-Catholics has stemmed from their strong educational performance. Research by James Coleman, Andrew Greeley, and others since the 1980s has indicated that Catholic schools produce better educational results than public schools at a lower cost per student, primarily because of the parochial schools' relatively greater atmosphere of spiritual commitment, non-bureaucratic organization, and effective discipline.²⁵¹ Critics of these studies assert that public schools

244. *Id.* at 387-88 (citing STEPHEN P. BROUGHAM & LENORE A. COLACIELLO, NATIONAL CENTER FOR EDUCATION STATISTICS, PRIVATE SCHOOL UNIVERSE SURVEY, 1995-96, at 5 tbl.1 (1998)).

245. *Id.* at 387 (citing DIANE GERTLER & LINDA A. BARKER, U.S. DEPARTMENT OF HEALTH, EDUC. & WELFARE, STATISTICS OF NONPUBLIC ELEMENTARY SCHOOLS, 1970-71, at 5-10 (1973)).

246. *Id.* at 387-88.

247. BRYK ET AL., *supra* note 192, at 69.

248. Andrew M. Greeley, *Catholic High Schools and Minority Students*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES, *supra* note 211, at 6.

249. BRYK ET AL., *supra* note 192, at 33.

250. *Id.* at 72.

251. *See id.* at 297-304 (emphasizing core curriculum, sense of community, decentralized and non-bureaucratic governance, and "inspirational ideology" of personal dignity); JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982) (emphasizing discipline and other school policies); ANDREW M. GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS (1982) (emphasizing quality of teaching and effectiveness of discipline).

are disadvantaged by having to serve all students and that much of the success of parochial students stemmed from more positive family circumstances²⁵²—to which Greeley and Coleman responded with evidence isolating the positive effect attributable to the Catholic schools themselves, even for students from unsettled or poor families.²⁵³ Whatever the precise merits of this debate, there is little doubt that Catholic schools are perceived as far more effective than they once were, and are perceived as often more effective than the state schools. This success has strengthened their claim for aid as a policy matter and has also bolstered their constitutional claim that equal aid is simply a secular measure to improve education.

Finally, today aid to religious schools, or to Catholic schools at least, cannot be tarred with the charge of perpetuating racial and class segregation. Partly, this is because de facto residential segregation and the rejection of busing mean that public schools too are commonly single race.²⁵⁴ But in addition, Catholic schools now serve racial minorities more than ever before. As white ethnic Catholics migrated to the suburbs and to public schools, the Catholic schools in the inner cities had to serve the new minority residents or close their doors. To its credit, the Church from the late 1970s on fought the demographic and financial pressures and limited its inner city closings. Vatican II, with all its other effects, also inspired a commitment to maintain the urban schools for the neediest families, a commitment reflected for example in the Bishops' 1979 statement that “[n]o sacrifice can be so great, no price can be so high, no short-range goals can be so important as to warrant the lessening of our commitment to Catholic education in minority neighborhoods.”²⁵⁵

As a result of these efforts, in the decade from 1970 to 1980, black enrollment in Catholic schools nearly doubled from between four and five percent to almost eight percent,²⁵⁶ substantially more than the two percent share of blacks in the Church overall.²⁵⁷ “When religious preference[s] [are] taken into account . . . blacks attend Catholic

252. BRYK ET AL., *supra* note 192, at 58-59 (summarizing criticisms).

253. COLEMAN ET AL., *supra* note 251, at 122-78; Greeley, *supra* note 248, at 8-11.

254. See VITERITTI, *supra* note 6, at 30-32, 50 (citing statistics).

255. BRYK ET AL., *supra* note 192, at 52-53 (quoting the National Conference of Catholic Bishops in *Brothers and Sisters to Us*).

256. Thomas Vitullo-Martin, *How Federal Policies Discourage the Racial and Economic Integration of Private Schools*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES, *supra* note 211, at 25, 28-29 (quoting National Catholic Education Association Data Bank).

257. *Id.* at 25.

secondary schools in higher proportions than do whites or Hispanics.”²⁵⁸ The percentage of black students was even higher in large urban Catholic school systems such as Chicago (27.5%) and New York (17.5%); and when the figures included Hispanics, the other major disadvantaged minority group, the Catholic schools in these cities were nearly fifty percent minority.²⁵⁹ Some research, including Greeley’s, also showed that the positive differential in performance in parochial over public schools was particularly strong for minority students, and strongest for the most disadvantaged minorities.²⁶⁰ Greeley concluded that Catholic schools “provide an equality of educational opportunity independent of the social class of parents” and that “[t]he Catholic schools seem, in fact, to be the real ‘common’ schools.”²⁶¹ Private schools, it turned out, could actually help maintain racial mixing in urban neighborhoods; in a Seattle survey over three years, thirty-six percent of public school families left the city for suburbs, but only six percent of Catholic school families did so.²⁶²

Not surprisingly then, blacks and the poor increasingly have become the group most supportive of religious schools and of school-choice proposals that include religious schools. As far back as 1971, *The Christian Century* reported that because of the “[g]hetto despair over public schools,” “inner city blacks in growing number feel they have a stake in keeping private schools alive.”²⁶³ By 1997, the poll numbers showed that a full school-choice proposal had the support of fifty-seven to sixty-two percent of blacks, about sixty-one percent of non-whites overall, and about fifty-five percent of people with incomes below \$30,000.²⁶⁴

These changes, to be sure, have not created a consensus for vouchers. A large segment of the population will always oppose government aid for religious and other private schools, just as another segment always

258. BRYK ET AL., *supra* note 192, at 69.

259. Vitullo-Martin, *supra* note 256, at 30 (quoting unpublished tabulations from New York and Chicago Catholic school systems); see also BRYK ET AL., *supra* note 192, at 69 (reporting twenty-two percent minority enrollment in Catholic high schools nationwide by 1990).

260. GREELEY, *supra* note 251; Greeley, *supra* note 248, at 11 (“The success of the Catholic schools is not among those who come from affluent and well educated black and Hispanic families but among precisely the opposite—from the less affluent and non college educated.”).

261. Greeley, *supra* note 248, at 11.

262. Vitullo-Martin, *supra* note 256, at 31.

263. *School Daze, Policy Maze*, 88 CHRISTIAN CENTURY 1071, 1071 (1971).

264. DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL & ECONOMICS STUDIES, 1997 NATIONAL OPINION POLL—CHILDREN’S ISSUES 7 (1997); VITERITTI, *supra* note 6, at 5-6 & nn.15-16 (citing *The 29th Annual Phi Delta Kappan Gallup Poll of Public Attitudes Toward the Public Schools* from 1997).

supports it. However, the changes in the nature of religious schools have affected those in the middle, which is where contentious issues are usually decided. The changes in religious schools have helped slowly increase support for aid and also, I think, helped make the courts more open to permitting experiments with school aid. Thus, the relaxation of separationism concerning school aid has happened partly because Catholic schools no longer have certain features to which people traditionally objected.

Notwithstanding this shift in attitudes toward Catholic Schools, explicit dislike of Catholicism continues to appear in church-state debates. Today's cultural-political debates, over matters such as abortion and gay rights, are if anything more visceral than the debates of the 1940s and 1950s, and the Church's position on such issues is obviously highly controversial. Opponents of the Church on these matters sometimes move beyond criticism and take illiberal measures against the Church. For example, prominent people suggested that Clarence Thomas might be unfit for the Supreme Court simply because of his Catholic background,²⁶⁵ others raised similar questions about the choice of Jesuit scholar Timothy Healy to head the New York Public Library.²⁶⁶ The statements of one prominent Healy opponent, columnist Jimmy Breslin, were especially revealing: "[l]ook, I went to [Catholic schools] . . . 'and we had to stand up and take a pledge not to see certain movies, not to read certain books Some people say that's old hat, it's gone. It's not gone with me.'"²⁶⁷ The radical wing of the

265. When the nomination was announced, Virginia Governor Douglas Wilder noted that Thomas was a very devout Catholic and added that "[t]he question is, 'How much allegiance is there to the [P]ope?'" See, e.g., Robert Di Veroli, *Religious Beliefs of Thomas May Be Key Hearing Issue*, SAN DIEGO UNION-TRIB., Aug. 24, 1991, at A9; Marcus Stern, *Catholic Question Revived by Thomas' Nomination*, SAN DIEGO UNION-TRIB., July 13, 1991, at A1. A feminist lawyer and civil rights advocate, Flo Kennedy, expressed opposition to putting a third Catholic on the Supreme Court. *Id.* Even Republican Senator Orrin Hatch, who ended up a defender of Thomas, said, "[I]t's fair to ask if his Catholic faith means he would blindly follow the [P]ope." Di Veroli, *supra*, at A9. Most of the charges were even wrong in their premise: Thomas was not a Catholic but an Episcopalian when he was nominated, although he had been baptized Catholic, he had attended Catholic schools, and he subsequently returned to Catholicism in 1996. *Id.*; see also Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 384 & n.5 (1998).

266. See, e.g., Miriam Horn, *Timothy Healy's Sacred Trust: Can a Roman Catholic Priest Direct an Institution Dedicated to Freedom of Inquiry?*, U.S. NEWS & WORLD REP., June 5, 1989, at 52 (describing letters of opposition from authors Joseph Heller and Gay Talese, the latter of whom questioned whether Healy would "stand up for the 'literary interests of those who disagree with his church'"). The criticism was especially arbitrary because, as president of Georgetown University, Healy several times publicly contradicted Vatican positions on married clergy, women's ordination, in vitro fertilization, and other subjects. *Id.*

gay rights movement has been known to vandalize churches and disrupt worship services.²⁶⁸ Some opponents or dissidents try to use laws to force Catholic institutions to employ people who would teach views the Church rejects.

Despite all of this, dislike of Catholicism does not play the overwhelming role in church-state debates that it did in the 1940s and 1950s. First, it is now more widely accepted that criticisms of the Church—which of course opponents have a right to make—should not lead to disabilities against Catholics. A wide-ranging group of clergy challenged John F. Kennedy's Catholic background, and Paul Blanshard's popular book recommended that Catholic judges be forced to take additional oaths of office; but the suggestions that Justice Thomas and Father Healy were unqualified for their offices received immediate and almost unanimous condemnation.²⁶⁹ Garry Wills's very critical book *Papal Sin*,²⁷⁰ unlike Blanshard's, contains no suggestions that the law should pressure the Church toward what Wills regards as more sensible teachings on sex.

Second, while of course we are in the midst of a very vigorous cultural war, the division is no longer between Catholics and everyone else, as it was around 1950. Rather, as sociologist James Davison Hunter has shown, the war pits so-called traditionalists against so-called progressives, a divide that runs through all the major religious groups—including Roman Catholicism—and to a lesser extent through the identifiably secular population.²⁷¹ Most notably, in reaction to the activity of groups like the Moral Majority and the Christian Coalition from 1980 on, the "open hostility [of liberals] was equally directed at

267. Lawrence Feinberg, *The Secular Storm Around Rev. Healy*, WASH. POST, Apr. 21, 1989, at C1 (quoting Jimmy Breslin).

268. See, e.g., Ed Magnuson, *In a Rage over AIDS: A Militant Protest Group Targets the Catholic Church*, TIME, Dec. 25, 1989, at 33 (describing ACT-UP protests disrupting mass at St. Patrick's Cathedral, throwing communion wafers to the ground, and smearing paint on Catholic churches in Los Angeles and San Francisco).

269. See, e.g., *supra* note 133 and accompanying text (discussing Blanshard's proposed oath requirement); *supra* notes 167-68 and accompanying text (discussing Kennedy); *supra* notes 265-66 and accompanying text (discussing opposition to Justice Thomas and Father Healy's appointments). For example, Americans United for Separation of Church and State condemned excluding Father Healy from the library position because of his faith. Feinberg, *supra* note 267.

270. GARRY WILLS, *PAPAL SIN: STRUCTURES OF DECEIT* (2000).

271. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); see also Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1070-79 (1996) (acknowledging that the traditional and progressive culture war not only encompasses people of all religions, but flows into the secular realm as well).

evangelical Protestants.”²⁷² A fundraising letter from Americans United for Separation of Church and State, cited by Doug Laycock, epitomizes the new view of the enemy: “[W]e must stop the Christian Coalition, the Roman Catholic hierarchy, and their allies from destroying public education and demolishing the church/state wall.”²⁷³ The “hierarchy” remains an important part of the supposed threat, but it is only a part.

The realignment obviously has not done away with church-state debates, but it has affected their substance and results. One of the major effects has already been emphasized. The case for equal funding of religious schools is stronger now because it is espoused not just by Catholics, but by many Protestants as well.

As the so-called Catholic question no longer defines church-state relations, other themes have taken its place. In comparison with the dominant Protestant-Catholic divide of the late 1940s, today we face a wide assortment of religions that can interact with the law in a dizzying variety of ways. In many ways, as we have seen, “separation of church and state” is a doctrine designed by religious individualists—many Protestants and non-believers—to determine what to do with a large, highly institutionalized religion like Roman Catholicism. Separationism emphasizes keeping the state apart from religious institutions; but separationism may, in a very Protestant way, encourage the state to promote the generalized religious beliefs held by most individuals in a society. As we have seen, many Protestants supported this concept of church-state separation in the 1940s and 1950s.²⁷⁴ By contrast, greater pluralism in religion—or at least a more noticeable pluralism—makes it less easy, and less necessary, to construct a doctrine to handle one particular kind of religious challenge. Rather, the wide plurality of religions drives the courts to treat all religions equally.

Not surprisingly, the Court’s move away from relatively strict, “no aid” separationism in the last twenty years has been in the direction of equal treatment, between various religions and between religion and other ideas and activities.²⁷⁵ The approval of school aid is an obvious example, as is the approval of the equal right of religious bodies to

272. Laycock, *supra* note 271, at 1070-71.

273. *Id.* at 1071 n.170 (quoting the *Contribution Memorandum from Americans United for Separation of Church and State* (1995)).

274. See *supra* Part I.C and accompanying text (discussing concept of church-state separation that still made room for elements of “civil religion”).

275. See, e.g., Esbeck, *A Constitutional Case*, *supra* note 5, at 40-41; Lupu, *supra* note 5, at 231-32.

participate in political debate and legislation without risking constitutional objections. At the dawn of the 1980s, the Court in *Harris v. McRae*²⁷⁶ established the constitutional legitimacy of such involvement, holding that legislation that reflects traditional moral values does not violate the Establishment Clause simply because religious groups were active in promoting those values. *Harris* specifically involved the Catholic Church's political opposition to abortion.²⁷⁷ A separationist approach that focused on limiting Catholic influences, as so much of separationism in the twentieth century has done, might have produced a different result. *Harris*, however, unanimously held religious involvement in politics permissible,²⁷⁸ and today it appears that only Justice Stevens disagrees with that holding.²⁷⁹

The Rehnquist Court has adhered to the separationist results of the 1960s and 1970s in one area, official prayers and religious exercises in public schools. Indeed, in the last decade the Court extended those decisions to bar some prayers by students, as well as prayers given at non-mandatory events like graduation ceremonies and football games.²⁸⁰ This component of separationism surviving in the recent decisions is extremely important, but it has little to do with Catholicism. Indeed, a church-state approach focused on limiting the distinctively Catholic threat might have followed the approach that was common in the 1940s and 1950s: it might have made more room for official prayers that were "nonsectarian" and formally noncoercive and that did not involve the school with particular religious institutions or their clergy.²⁸¹ The Rehnquist Court is not separationist in its views across the board, as its willingness to approve school aid shows. Rather, the Court's continued adherence to the school prayer decisions reflects its overarching principle of equality. Given the wide range of incompatible religious beliefs in today's religiously pluralistic America, any explicit religious statement by the state school itself is bound to be an

276. *Harris v. McRae*, 448 U.S. 297 (1980).

277. *Id.* at 319.

278. *Id.*

279. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 566-68 (1989) (Stevens, J., dissenting) (arguing that some restrictions on abortion reflect only Catholic theological doctrine and have no secular legislative purpose).

280. See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000) (invalidating prayer given at football game by a student elected by student body, on the grounds that the election procedure involved the school in endorsing the prayer); *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayer given by a rabbi, invited by school officials, at a non-mandatory graduation ceremony).

281. See *supra* notes 161-62 and accompanying text (citing the examples of adding "under God" to the Pledge of Allegiance and participating in non-denominational public school prayers).

unacceptably sectarian position for the government itself to take. That principle responds to religious pluralism, not to any special dangers supposedly posed by Catholicism.

IV. CONCLUSION

The course of church-state decision-making in the last sixty years, in the courts and in other political and cultural institutions, has been influenced by many currents besides attitudes toward Roman Catholicism. The increasing influence of secularism, the continued growth in religious pluralism, the increasing concern for the status of religious minorities in the light of horrors like the Holocaust: all of these factors have had an effect. Yet attitudes toward Catholicism in the key sectors of American society—the continually shifting patterns of negative and positive attitudes—sheds considerable light on the development of modern American law concerning the state and religion. It is an oversimplification to assert that the modern doctrine of strict church-state separation has risen with the tide of anti-Catholicism and fallen with it as well. But the assertion has a good deal of truth.