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LESSONS FROM THE NINETEENTH CENTURY CONTROVERSIES OVER BIBLE READING AND AID TO RELIGIOUS SCHOOLS

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STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE (2012). Pp. 304. Hardcover $29.95.

In *Everson v. Board of Education*,[1] the United States Supreme Court, in its first modern Establishment Clause case,[2] stated that under the First Amendment "[n]o tax in any amount, large or small, [could] be levied to support any religious activities . . ."[3] and that the Establishment Clause was intended to erect "'a wall of separation between Church and State.'"[4] For close to forty years, *Everson* was the leading precedent in Establishment Clause jurisprudence and the decision's no-aid rhetoric dominated the Court's discourse. And though its no-aid principle was never rigidly enforced,[5] the Court relied heavily on *Everson* in invalidating numerous parochial aid programs.[6]

Sixty-five years later little remains of *Everson*'s no-aid rhetoric in the Court's current religion clause jurisprudence. The results in intervening cases amply reflect this development. In *Agostini v. Felton*,[7] for example, the Court directly overruled one of its precedents[8] and upheld a program allowing publically paid teachers to

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1. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).
2. *See id.* at 7-8.
3. *Id.* at 16.
4. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
5. *See id.* at 8-18. The no aid principle was not even rigorously applied in *Everson* itself as the Court upheld the aid provision that was the subject of the Establishment Clause challenge in that case—a state program that provided bus transportation to students attending religious schools. *See also, e.g.*, Walz v. Tax Commission, 397 U.S. 664 (1970) (upholding property tax exemptions for religious property); Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a program loaning textbooks to children attending religious schools).
6. *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (funding of public school teachers instructing religious school students on religious school premises); Meek v. Pittenger, 421 U.S. 349 (1975) (loans of instructional material to religious schools); Comm. for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (grants to religious schools for maintenance costs and tuition tax credit reimbursements); Lemon v. Kurtzman, 411 U.S. 192 (1973) (reimbursement to religious schools for secular educational services including teachers' salaries); Illinois *ex. rel* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (use of public schools facilities for religious release time programs).
7. 521 U.S. 203 (1997).
8. *See id.* at 235 (overruling Aguilar v. Felton, 473 U.S. 402 (1985)).

provide remedial services to low income students on the grounds of a parochial school. In *Mitchell v. Helms*[9] the Court went further, overturning both precedent[10] and a previously recognized Establishment Clause doctrinal tenet that government aid to pervasively sectarian religious institutions was impermissible.[11] In so doing, the *Mitchell* Court found constitutional a state statute that provided public funds to lend computers, software, and library books to parochial schools even though those materials could be used by the school for the purposes of religious indoctrination.[12] And in *Zelman v. Simmons-Harris*,[13] the Court upheld a voucher system allowing students to use public funds to attend parochial schools.[14]

Part of the movement away from *Everson* in Establishment Clause doctrine is undoubtedly the result of a broader trend in First Amendment jurisprudence to treat religion and non-religion relatively equally.[15] For example, under current Free Exercise Clause jurisprudence, an individual who claims that she has a religious reason for not complying with a neutral law of general applicability is no more entitled to an exemption from that law than an individual raising a non-religious objection.[16] Similarly, under the Free Speech Clause, the Court has consistently held that the government may not exclude religious speakers from access to government forums without violating fundamental principles of content-neutrality.[17] Allowing religious institutions to receive the same kinds of government aid received by non-religious entities might then be seen simply as the Establishment Clause corollary to these Free Exercise and Free Speech principles.

The change may also be explained by a series of political and cultural changes that have occurred since the time *Everson* was decided. As Ira Lupu has written, "America has experienced a religious awakening, in which high-intensity, publicly oriented religion has expanded dramatically."[18] Against this background, a theory of separatized, private religion has become far less consonant with the actual reality. Supreme Court decisions addressing school prayer may have also played a role.[19] As John Jeffries and James Ryan have noted, the school prayer decisions may have triggered a backlash against the no-aid principle by its intellectual founders, Christian evangelicals,[20] who had long believed that state support of religion would weaken religion by fostering its dependence upon the state and subjecting it to "worldly

9. 530 U.S. 793 (2000).
10. *See id.* at 835-36 (overruling *Meek*, 421 U.S. 349).
11. *See id.* at 826-29 (plurality opinion).
12. *See id.* at 809-14, 829-35.
13. 536 U.S. 639 (2002).
14. *See id.* at 648-63.
15. *See* William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 193 (2000).
16. *See* Emp't Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).
17. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981).
18. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 232 (1994).
19. Sch. Dist. Of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v Vitale, 370 U.S. 421, 429 (1962).
20. John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 328-29 (2001).

corruptions."[21] Removing prayer from the public schools was seen by some evangelicals as overtly antagonistic to religion, thereby provoking a political response.

More recently, the attack on *Everson* and its no-aid principle has come from a very different angle. Some, most notably, Justice Clarence Thomas, have argued that rather than reflecting a principled view of church-state relations, the no-aid position is grounded in nineteenth century anti-Catholic bias and bigotry.[22] Justice Thomas contended, therefore, that the position against aid to religious education should be rejected because of this pedigree, even aside from any intellectual deficiencies that it might hold.[23]

Steven K. Green's remarkable book, *The Bible, the School, and the Constitution*[24] is, in large part, a response to, and refutation of, the claim that the no-aid principle is founded in anti-Catholic bigotry. By closely examining the nineteenth century historical record, Green succeeds in his mission. To be sure, Green does not assert, nor could he, that anti-Catholic bias had no role in the debates over church-state relations during the nineteenth century. Rather, he effectively shows that far more factors were at work in this history than anti-Catholicism alone, and that the arguments favoring the no-aid position were deeply rooted in a number of philosophical and theological movements, some pre-dating and others contemporaneous with that time period.

The Bible, the School, and the Constitution is critically important in another respect. In presenting this history, Green relates how the question of aid to private religious schools was inter-related with the question of the appropriate role of religious exercises, particularly Bible reading, in the public schools. He points out that the combination of the aid to private religious schools and public school prayer issues—contemporaneously termed the "School Question"[25]—dominated the nineteenth century debate over church-state relations. Accordingly, along with his analysis of the funding issue, Green offers an in-depth study of how the school prayer issue was treated during the nineteenth century.

Over one hundred years later, societal divisions over public school prayer and private religious school funding have not gone away. Even though the Court has consistently held the practice of public school prayer to be unconstitutional since the 1960's,[26] a majority of Americans still favor school prayer[27] and the Court re-

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21. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 6 (1965).

22. *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000); *see also* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004).

23. *See Mitchell*, 530 U.S. at 828.

24. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE (2012).

25. *Id.* at 8.

26. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 US 421, 429 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

27. *See* Jennifer Riley, *Survey: 65 Percent of Americans Support Prayer in Public Schools*, CHRISTIAN POST, Feb. 14, 2011, http://www.christianpost.com/news/survey-65-percent-of-americans-support-prayer-in-public-schools-48969 (citing a Rasmussen Report in which 65 percent of respondents supported prayer in public schools); *see Religion in the Public Schools*, PEW RES. CTR., May 9, 2007, www.pewresearch.org/2007/05/09/religion-in-the-public-schools/ (stating that 69 percent of Americans believe that "liberals have gone too far in trying to keep religion out of the schools . . . "); *see* David

mains divided over the scope of the prohibition.[28] School funding is equally contentious. The last two funding cases saw a deeply divided Court[29] and the extent that the Court will approve additional parochial aid programs remains uncertain.

Green's in-depth account of the persons, the politics, and the events that shaped the nineteenth century debate over the School Question is therefore particularly useful in providing insight into issues that are as relevant now as they were then. Part I of this article examines Green's analysis of the anti-Catholic animus issue. Part II looks at the broader history discussed by Green for some of its implications regarding the contemporary debate over state funding of private religious schools and religious exercises in public schools. Part III offers a brief conclusion.

PART I: ANTI-CATHOLIC ANIMUS AND THE NO-AID PRINCIPLE

In his 2000 opinion in *Mitchell v. Helms*,[30] Justice Thomas wrote:

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."[31]

Based on this historical record, Thomas argued, the no-aid principle should be understood as "born of bigotry, [and] should be buried now."[32]

The implications of Thomas's thesis for the direction of religion clause jurisprudence are dramatic. As Green notes in his introductory chapter:

> Whether or not one agrees with this assessment, this is a significant re-accounting of the development of separation of church and state in America. Essentially, this view declares that the ideological basis for fifty years of modern church-state doctrine was based not on noble principles espoused by Jefferson and Madison, but on bias and suspicion arising a half-century later by those who sought to

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W. Moore, *Public Favors Voluntary Prayer for Public Schools*, GALLUP.COM, Aug. 26, 2005, http://www.gallup.com/poll/18136/public-favors-voluntary-prayer-public-schools.aspx (stating that 76 percent of Americans favor some form of school prayer).

28. In *Lee*, the Court in a 5-4 decision struck down prayer at a public school graduation ceremony over a vehement dissent written by Justice Scalia. *Lee*, 505 U.S. 577. In *Santa Fe*, it invalidated public school prayer at an athletic event over an equally impassioned dissent written by Justice Rehnquist on behalf of himself and Justices Scalia and Thomas. *Santa Fe*, 530 U.S. 290.

29. Zelman v. Simmons-Harris, 536 U.S. 639, 641 (2002) (upholding school vouchers in a 5-4 decision); Mitchell v. Helms, 530 U.S. 793, 799-800 (2000) (4-2-2 decision upholding a state statute that provided public funds to lend computers, software, and library books to parochial schools).

30. *Mitchell*, 530 U.S. 793.

31. *Id.* at 828.

32. *Id.* at 829.

> maintain a Protestant stranglehold on the culture by subjugating all religious competition—particularly the Catholic Church. And it characterizes the nineteenth century debate over religious school funding—and the related controversy over religious activities in the public schools—as being motivated primarily by anti-Catholic animus. It challenges standard interpretations of nineteenth century legal and educational history and calls for a reevaluation of those historical developments.[33]

In fact, however, the claim that the "no-aid principle" was "born in bigotry" is not defensible. To the contrary, the notion of church-state separation was deeply ensconced in American thought even before the nineteenth century history referred to by Justice Thomas in his *Mitchell* opinion and scrutinized in-depth by Green. Early religious leaders in the Colonies writing in the seventeenth and eighteenth centuries, such as Roger Williams and Isaac Bacchus, called for a rigid church state separation because they believed that government support of religion corrupted its purity and its other-worldly purposes.[34] Aid to religion was improper according to this "anti-corruption" principle[35] because it served to weaken the purported "beneficiaries" of the government largesse. Anti-Catholicism was not a factor.

James Madison, writing in the eighteenth century, came at the matter from a totally different angle. In his *Memorial and Remonstrance Against Religious Assessments*,[36] Madison contended that government aid to religion should be opposed because it would violate the consciences of the taxpayers forced to support religious institutions with whose beliefs they disagreed.[37] Thus, while the anti-corruption argument was focused on protecting the purported religious beneficiaries of the government aid, Madison's argument was aimed at protecting non-beneficiary religious believers and institutions.[38] Again, anti-Catholicism played no role.

Green's account of the nineteenth century history presents additional factors that played a role in the development of the no-aid principles, all of which, again, had nothing to do with anti-Catholic animus. The first of these, and perhaps the most important, was the rise of public non-sectarian education, a movement that

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33. GREEN, *supra* note 24, at 6-7.

34. *See* HOWE, *supra* note 21, at 6 (discussing Roger Williams' vision of separation); ELWYN A. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES: THE DEVELOPMENT OF CHURCH-STATE THOUGHT SINCE THE REVOLUTIONARY ERA 15–26 (1972) (detailing the involvement of Isaac Backus, a New England pastor, in advocating the evangelical theory of separation of church and state); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L REV. 455, 469 (1991) (also discussing Roger Williams' vision of separation). *See also Mitchell*, 530 U.S. at 868 (Souter, J., dissenting) ("[t]he establishment prohibition of government religious funding . . . is meant . . . to protect the integrity of religion against the corrosion of secular support.").

35. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

36. James Madison, Memorial and Remonstrance against Religious Assessment (1785) (on file with the University of Virginia Library).

37. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-47 (2011) (quoting Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002)).

38. *See also* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 13 (1947) (citing the preamble to the Virginia Bill for Religious Liberty (authored by Thomas Jefferson) for the proposition that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.").

began long before the mid-1830s, the period when anti-Catholicism began to take hold as a response to a perceived cultural threat to the majoritarian, Protestant demographic.[39] In 1805,[40] education reformers in New York began the movement away from a heavy emphasis on teaching religion in early education by opening public nonsectarian schools rooted in the "common rudiments of learning" and incorporating only "the fundamental principles of the Christian religion, free from all sectarian bias."[41] In 1827,[42] Massachusetts, under the direction of Horace Mann, took this one stop further in striving to remove any residual doctrinal elements or evangelizing tendencies from public education,[43] and create a program that would be palatable to all Christians, including Catholics.[44] Reformers in other states advocated similar changes.[45]

Opposition to funding private religious schools was inextricably tied to the support of the early public schools for a number of reasons.[46] First, public school advocates believed that protecting the financial stability of the newly formed common schools meant that school funding could not be diverted to private institutions.[47] Second, they favored funding only public schools for the pedagogical reason that a universal curriculum was necessary to educate and prepare children most effectively for the demands of the society into which they would matriculate.[48] Third, they contended that public funds should go only to public schools so that the state would be able to assure accountability and quality control in the use of the government funds.[49]

None of these reasons (all of which incidentally are fully present in contemporary debates over school vouchers)[50] were related to anti-Catholicism. Horace Mann's criticisms of funding for parochial schools, for example, were directed not at Catholics but at evangelical Protestants who resisted the expanding policy of ecumenism.[51] Moreover, as Green notes, the "developing no-funding rule applied not only to Catholic schools but also to the plethora of Protestant schools (Episcopal, Methodist, Presbyterian, Lutheran, Dutch Reformed)" and was actually responsible for a decline in Protestant private schooling.[52] Leaders of Catholic communities, meanwhile, initially supported the nonsectarian agenda, and encouraged attendance at these schools by Catholic youths.[53]

To be sure, as Catholic and Protestant divisions became more pronounced lat-

39. GREEN, *supra* note 24, at 19.
40. *See id.* at 16.
41. *See id.* at 17.
42. *See id.* at 20.
43. *See id.* at 21.
44. *See id.* at 23.
45. *See id.*
46. *See id.* at 11.
47. *See id.* at 45.
48. *See id.* at 45-46.
49. *See id.* at 46.
50. *See generally* Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. ECON. PERSP. 3 (2002) (examining the policy arguments surrounding the debate over vouchers and school choice).
51. GREEN, *supra* note 24, at 28.
52. *See id.* at 13.
53. *See id.* at 33.

er in the century in reaction to massive increases in Irish, German, and Italian immigration,[54] anti-Catholicism may have become a more prominent factor in the resistance to parochial school funding.[55] It does not follow, however, that objections to parochial school funding can be explained exclusively on the grounds of anti-Catholic animus. Most importantly, not all those opposing state aid to religious schools were anti-Catholic. As noted previously, some opposed aid to private religious education on a number of independent grounds that arose earlier than, and/or independent of, the advent of anti-Catholic sentiment.[56] Further, for whatever it is worth, it is not clear that religious prejudice was the motivating force on the question of aid to private religious schools even among those who lapsed into anti-Catholic bigotry. As one writer has succinctly stated, while "[n]ativist prejudice did sometimes strengthen popular convictions about separation . . . [f]ar more often . . . a preexisting commitment to separation provided the rationale or excuse for anti-Catholicism."[57]

Green's account of the School Question—i.e., the relationship between public school prayer and private school funding—provides another important ground for rejecting the claim that the no-aid principle should be deemed as being solely founded in anti-Catholic bigotry. The no-aid position cannot be understood as existing in a vacuum. As Green points out, at the time of the proposal of the Blaine Amendment, the provision that Justice Thomas claims reflects anti-Catholic bigotry,[58] the country was involved in a broad discussion about the role of religion in society that transcended parochial aid issues. The School Question was "part of a larger debate over the religious character of the nation and its institutions."[59] Attempts were made from one faction, for example, to pass a constitutional amendment that would declare the United States a Christian Nation,[60] while efforts from a segment at the opposite end of the spectrum sought a "total separation of Church and State" that would repeal church property tax exemptions, disallow Bible reading in the public school, and overturn Sunday observance laws, among other goals.[61]

This national debate on religion involved spiritual leaders, public intellectuals, the press, and politicians, including a remarkably thoughtful contribution by President Ulysses S. Grant.[62] Some of the entries in this national discussion were based on theological principle, some on constitutional theory, some on civic conviction, some on chauvinism, some on xenophobia, and some on no more than cynical efforts to manipulate public opinion for partisan purpose.[63] Some were influenced by anti-Catholic animus, some were not. James Blaine himself, for example, appeared to be motivated primarily by politics rather than by anti-Catholic animus, or, for

54. *See id.*
55. *See id.*
56. *See supra* notes 34-49 and accompanying text.
57. William R. Hutchison, Book Review, 23 L. & HIST. REV. 201, 203 (2005) (reviewing HAMBURGER, *supra* note 22).
58. *See* Mitchell v. Helms, 530 U.S. 793, 913 (2000).
59. GREEN, *supra* note 24, at 206.
60. *See id.* at 138-40.
61. *See id.* at 167.
62. *See id.* at 187.
63. *See id.* at 188, 194-95.

that matter, high principle.[64] (Blaine's mother was a Catholic and his daughters were educated in Catholic boarding schools).[65] Given the depth, breadth, and complexity of this historical record, Green's case that the no-aid principle cannot be ascribed to simple anti-Catholic animus alone seems irrefutable.[66]

PART II: LESSONS FROM GREEN'S NINETEENTH CENTURY ACCOUNT

There is much to learn from *The Bible, the School and the Constitution* beyond only its refutation of the claim that the no-aid principle was "born in bigotry." The book provides enormous insight into the strains of social, educational, constitutional, theological, and civic theory that pervaded the era. It is rich in its account of the personalities and the politics of nineteenth century America. It reminds us—as if we need to be reminded—of the destructive power of nativist, anti-immigrant sentiment.

Green's review of the nineteenth century debates over the School Question also brings to life the dangers of religious divisiveness when religion and politics mix. It demonstrates that the ploy of turning one religion against another can readily be used by politicians intent on exploiting an us-versus-them mentality for partisan ends.[67] In some instances, this means that religious or political leaders will seek to kindle bias against a minority religious group for their own advantage, as illustrated by the nineteenth century's anti-Catholicism legacy.[68] In other instances, this means religious partisans may seek to use government to affirm their own religion's cultural or theological dominance,[69] as when some Protestants during this period sought to have only the Protestant Bible read in the public schools.[70] In either case, a dangerous and harmful politics inevitably follows.[71]

Two other questions that arise from the history recounted in Green's book deserve special mention. First, what are its implications for current disputes regard-

64. *See id.* at 195-97.

65. *See id.* at 196.

66. *See also* Kent Greenawalt, *History as Ideology: Philip Hamburger's* Separation of Church and State, 93 CALIF. L. REV. 367, 392 (2005) (book review) (cautioning against an oversimplified embrace of anti-Catholicism as a comprehensive explanation for the doctrine of church-state separation).

67. *See* GREEN, *supra* note 24, at 209-10, 217-18.

68. *See id.* at 217-18.

69. This is not to say that Protestant chauvinism was the only factor at work. There was, after all, prayer in the public school long before the swelling of anti-Catholic sentiment and many believed that it was pedagogically necessary to have some religion in early education in order to inculcate moral values. *See id.* at 11-12.

70. *See id.* at 100.

71. Notably, one hundred years later, the Court in *Engel v. Vitale*, 370 U.S. 421 (1962), elevated the religious divisiveness concern to a constitutional dimension when it warned in the context of school prayer of "the anguish, hardship, and bitter strife" that inevitably follows when "zealous religious groups [struggle] with one another to obtain the Government's stamp of approval." *Id.* at 429. The nineteenth century experience suggests that *Engel*'s suggestion that removing matters from political contest that may trigger religion's seeking the government stamp of approval, such as the government's choice of school prayer, was well-taken. In this respect, it is notable that the question of the validity of legislative prayer will be before the Court during the upcoming October 2013 Term. *See* Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3336 (May 20, 2013) (No.12-696). As Christopher Lund has shown with respect to current controversies surrounding legislative prayer, the serious divisions that arise between competing religious forces when the choice of prayer is left to the political processes does not occur only when the venue is the public schools. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010).

ing the constitutionality of religious exercises in the public schools? Second, what are its implications for the question of aid to private religious education? How should the nineteenth century debates over both facets of the School Question, in short, affect our understanding of those same issues today? The remainder of this section offers an opening response to these inquiries.

Bible Reading and the Changeable Meanings of 'Non-Sectarianism' and 'Hostility to Religion'

As Green relates, the meaning of non-sectarianism at the outset of the nineteenth century was relatively clear. Because the country was predominately Protestant, non-sectarianism meant non-favoritism among the competing Protestant sects.[72] Horace Mann then could be fully consistent in reconciling public school (Protestant) Bible readings with his commitment to non-sectarian education.[73]

As the country grew more religiously diverse, however, the assertion that neutrality among Protestant sects was the same thing as a true, religiously-neutral non-sectarianism became increasingly difficult to defend. Thus Green quotes an 1869 *Harpers Weekly* editorial supporting the decision of the Cincinnati school board seeking to remove Bible reading from the public schools to the effect that it was time "for Protestants to recognize that not all Christians agreed on the same 'great general truths of the Bible.'"[74] And indeed they did not. Catholics and Protestants did not (and do not) even share the same Bible.[75]

Accordingly, a commitment to a non-sectarianism that recognized the existence of non-Protestant Christian beliefs (not to mention non-Christian religious beliefs) would require the elimination of Bible reading in the public schools, a policy that the City of Cincinnati enacted in 1869 partially in response to Catholic concerns.[76] But the tack of eliminating Bible reading led to its own set of objections. The first was a pedagogical concern—it was argued that public school children would thereby be denied the benefit of the teaching of morals and values that the Bible purportedly provided.[77] The second had a constitutional echo—that eliminating Bible reading meant that schools were being improperly secularized and therefore hostile to religion.[78]

The same debate was repeated during the mid-twentieth century when the

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72. "Protestantism was such a part of the national identity in the early nineteenth century that educators had difficulty distinguishing between it and republican values; they 'assumed that Americanism and Protestantism were synonyms and that education and Protestantism were allies.'" GREEN, *supra* note 24, at 19 (quoting Timothy L. Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 J. AM. HIST. 679, 680 (1967)).

73. GREEN, *supra* note 24, at 21-24.

74. *Id.* at 103-04.

75. *See id*. at 34 (noting criticism by Catholics of the use of the King James (Protestant) Bible and desire for the Douay (Catholic) Bible to be available for Catholic students).

76. *See id.* at 93.

77. *See id.* at 93, 98.

78. *See id.* at 99 (describing opponents' declarations that atheists, infidels, and skeptics had allied themselves with the Catholics to "plunge [the nation] into the bottomless pit of Atheism.", (quoting AMORY D. MAYO, RELIGION IN THE COMMON SCHOOLS: THREE LECTURES DELIVERED IN THE CITY OF CINCINNATI, IN OCTOBER, 1869 20-28, 35, 36 (1869)).

constitutionality of Bible reading and prayer in the public schools was addressed by the Supreme Court.[79] Again the argument was advanced that Bible reading and school prayer (no matter how devoid of theological content) were inevitably sectarian. Again the response was that their exclusion from the public schools constituted hostility towards religion.[80]

At the outset of the twenty-first century, the argument has again resurfaced in the debate over the constitutionality of the use of the words "under God" in the recitation of the Pledge of Allegiance in the public schools.[81] Now, because the country has become even more religiously diverse, any public expression of religion could be seen as taking on some aspect of sectarian preference. Thus, while it might be true that the inclusion of the relatively innocuous phrase "under God" in the Pledge can be defended as being little more than an expression of a general non-sectarian belief in the existence of God that is fully consistent with the beliefs of a vast majority of Americans,[82] it is also true that those words may be perceived as explicitly and overtly sectarian to atheists or to those believers whose religious tenets do not include the existence of a Supreme Being.[83] The question, then as now, is when does the commitment to non-sectarianism end and hostility to religion begin? The answer, then as now, depends as much on the social and intellectual context of the times as it does upon abstract theories about the appropriate relationship between Church and State.

The Non-Lesson of the Blaine Amendment and the Constitutionality of Aid to Private Religious Schools

A final lesson may be a non-lesson. The Blaine Amendment, of course, did not pass.[84] Many have tried to make a great deal of this non-event. Does this mean, as some have argued,[85] that the nation in 1876 believed that state funding of private religious school was not problematic? Or is Green correct in asserting that in 1876 "the no-funding rule was the accepted legal doctrine in the states"[86] and that the passage of the Amendment would have merely "nationalized the legal status quo"?[87]

My sense is that although Green may have the better historical case in this dispute, any attempt to draw definitive conclusions from the historical record surrounding the Blaine Amendment would be unsuccessful. Green's book is masterful in showing that there were a multitude of cross-currents at work in the nineteenth century regarding the appropriate relationship between Church and State. He does not show, nor could he, that there was anything close to universal consensus on any issue or that there was even consensus among those who shared the same end goals. Some were against aid to private religious schools because they opposed aid

79. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).
80. *See id.* at 245-46.
81. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).
82. *Id.* at 42-44 (describing the reference to God as "minimal" and "ceremonial").
83. *Id.* at 8, 42 (referencing the perspectives of atheists and members of nontheistic religious groups).
84. GREEN, *supra* note 24, at 222.
85. *Id.* at 228.
86. *Id.* at 227.
87. *Id.* at 230.

to religion generally, some because they were concerned with underfunding the public schools through diverting resources to private actors, some because they wanted to establish the primacy of Protestantism, some because they were anti-Catholic bigots, and some because they believed that funding religion violated essential constitutional principles of Church-State separation. Bringing only one of these rationales to the fore as the definitive rationale underlying nineteenth century support for the no-aid principle seems to me to be unjustified.

Nevertheless, for the sake of argument, let us assume otherwise for a moment and accept the assertion that nineteenth century thought coalesced around the belief that public aid to private religious school violated the Constitution. Should that guide our twenty-first century understanding?

In answering this question, consider what we have already learned about the changeable meaning of non-sectarianism. As diversity of religion in America broadened, the meaning of religious neutrality necessarily changed.[88] Accordingly, what was constitutionally unobjectionable at the beginning of the nineteenth century was seen as raising major concerns one half century later.

Parallel changes in the way we view religion may similarly affect our approach to aid to private religious schools. In our era, it has become increasingly hard to distinguish between religion and non-religion both in the manner individuals adhere to their belief structures and the services that religious and non-religious institutions provide. In such circumstances, disallowing religious entities from receiving the same type of aid that parallel non-religious institutions receive may take on aspects of hostility towards religion that did not exist when the nature of religion was far more distinct. This is not to say that any or all aid to private religious schools is or is not constitutionally permissible.[89] Rather, as with Bible reading, the lesson from history is that the constitutionality of aid to private religious school depends as much on the context of the times as it does on abstract constitutional principle.

PART III: CONCLUSION

Stephen Green's book, *The Bible, the School, and the Constitution* offers a compelling and colorful account of the so-called School Question, the debate over the issues of aid to private religious schools, and Bible reading in the public school that occupied nineteenth century American history. In so doing he effectively accomplishes his central purpose—refuting Justice Thomas's assertion in *Mitchell v. Helms* that the principle that no state aid should be granted to private religious schools was based in anti-Catholic animus.

Along the way, Green's exposition of nineteenth century history provides us with a broader lesson about the meaning of the Establishment Clause and perhaps about constitutional interpretation more generally. In one way, Green's history shows us that the more things change, the more they stay the same.[90] After all, dis-

88. *See id.* at 22 (explaining how Protestant Bible readings were considered neutral only by virtue of the homogeneity of the community).

89. Nor does it shed any light on the issue of whether aid to religious schools is good public policy.

90. "What has been will be again, what has been done will be done again; there is nothing new under

putes over aid to private religious schools and the role of religion in the public schools are as divisive now as they were then.

But Green's history also shows that things do change. The term non-sectarian meant something different at the outset of the nineteenth century when the nation was predominately Protestant than it did after the country became more religiously diverse. The application of a constitutional rule reflecting a commitment to non-sectarianism would therefore lead to a different result at the beginning of the century than at its end. Corresponding changes in how we perceive the distinctiveness of religion from non-religion may similarly affect our understandings of the no-aid rule. One of the many challenges of constitutional law is how to apply longstanding principles to changing contexts. Green's account of the School Question provides a case history for this study.

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the sun." *Ecclesiastes* 1:9. (NIV).