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## Essay

### The New Victims of the Old Anti-Catholicism

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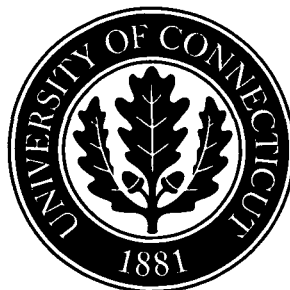
*Santayana once said that those who cannot remember the past are condemned to repeat it, the implication being that we can avoid future mistakes by paying better attention to past ones. Perhaps this is so. Or perhaps it is as George Bernard Shaw once said—that we learn from history only that we learn nothing from history. Yet one thing is surely clear. To the extent that modern injustices have identifiable historical antecedents, we rightly stand doubly condemned for them.*

*This Essay looks at four modern church-state cases which span the First Amendment spectrum. The plaintiffs are religiously diverse—one is a Wiccan, one is a Muslim, one is an evangelical Protestant, and one is an atheist. Unsurprisingly, their claims find support in very different political communities. But the plaintiffs in these cases all have certain things in common. They are all, in their own ways, religious minorities. All of their legal cases were ultimately lost. And, most importantly for the purposes of this Essay, each of their cases connects deeply with the nineteenth-century history of Catholicism in this country.*

*In various ways, Catholics of the nineteenth century were mistreated by the Protestant majority. The injustices they faced were sanctioned by courts as well as legislatures, and legal rules were created to render their injuries both judicially non-cognizable and socially invisible. These four modern plaintiffs are, in some ways, latter-day Catholics. They suffer some of the same injuries; indeed, they are sometimes inhibited by the very same legal doctrines created to repress the Catholic minority over a century ago. One can think of these four plaintiffs as the new Catholics—or, perhaps more accurately, as the new victims of the old anti-Catholicism. As we struggle with our twenty-first century challenges of religious pluralism, it helps to realize how much our struggles have in common with earlier ones. Perhaps, armed with this knowledge, we can do a bit better now than our forefathers did then.*

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# The New Victims of the Old Anti-Catholicism

CHRISTOPHER C. LUND\*

## I. INTRODUCTION

Over the past decade or so, there has been a surge of legal scholarship looking at the history of anti-Catholicism in this country.<sup>1</sup> Legal academics have plunged themselves into the nineteenth century to examine the ardent conflicts between Protestants and Catholics of that era. And at least some of this interest can be easily explained. For decades, the Supreme Court took the position that government funds going to private religious schools, even under evenhanded criteria, amounted to an unconstitutional establishment of religion. But many felt differently. Endeavoring to change both the mind of the Supreme Court and of the general public, they turned to history, explaining how American political and constitutional reluctance over funding religious schools actually had deep roots in nineteenth-century anti-Catholicism. The normative implications of much of this historical work were clear—the Supreme Court’s harsh stance against funding had a shameful history and therefore was best abandoned.

Less attention has been paid, however, to the other ways in which this history might have modern salience. And it turns out that a variety of other modern church-state disputes also have antecedents in the nineteenth-century struggles between Protestants and Catholics. Consider the following disputes. A high school student in the state of Washington receives a state scholarship for college, but loses it when the state discovers he is an evangelical Protestant who will be majoring in theology.<sup>2</sup> An atheist objects to how his daughter’s public school recites

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<sup>1</sup> This footnote surely cannot provide an exhaustive list, but some fine works influenced this piece heavily. See, e.g., NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551 (2003); Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

<sup>2</sup> *Locke v. Davey*, 540 U.S. 712, 715–17 (2004).

the Pledge of Allegiance, with its assertion that this country is “one nation under God.”<sup>3</sup> A Muslim police officer is fired from her job for wearing an unobtrusive religious veil at work.<sup>4</sup> A Wiccan minister is barred from offering a prayer at a local county board meeting because the county insists that only those of the Judeo-Christian tradition have the right to offer prayers.<sup>5</sup> These four cases have almost nothing to do with each other. They raise radically different doctrinal issues; they find support in radically different political corners. Yet the plaintiffs in these four cases all stand in shoes worn earlier by nineteenth-century Catholics. Each of these modern disputes is, in some ways, a replay of a clash from an earlier time. This short Essay connects past with present, linking the struggles between Catholics and Protestants in the nineteenth century with the struggles here in the twenty-first.

Of course, profound differences separate the two eras and the two sets of struggles. Astute readers might wonder why this Essay focuses so heavily on the similarities but gives such short shrift to the differences. The answer is simply that everyone can spot the differences. They are obvious, even to those with little knowledge of history or legal doctrine. The interesting point is how, despite all of the contrasts, a kernel of similarity remains. Indeed, saying that two things are analogous itself implies that they differ in significant ways—analogies are not equivalences.

Having said this, an important difference between the two eras must be flagged at the outset to avoid any misunderstanding. This Essay will criticize the motives of some in the nineteenth century as being in some ways anti-Catholic. But it certainly does not mean to impugn the motives of people on either side of these debates today. Indeed, I myself have defended (and litigated for) positions that I now criticize. This Essay concerns itself with effects rather than motives. And from that angle, the problems faced by religious minorities today do not look so different from those faced by Catholics years ago. The struggles of yesteryear still have something to teach us, both about the nature of our struggles over religious diversity and about how to respond to them.

## II. *LOCKE V. DAVEY*

For our first case, we turn to the Supreme Court’s decision in *Locke v. Davey*, which involved a high school student stripped of a college scholarship from the state of Washington because of his decision to major

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<sup>3</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4–5 (2004).

<sup>4</sup> *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009).

<sup>5</sup> *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 279–80 (4th Cir. 2005).

in theology.<sup>6</sup> But before discussing *Davey*, this Essay begins with a brief account of some history that will inform the discussion of all four cases.

At the time of the founding, the nation was overwhelmingly Protestant in character.<sup>7</sup> In 1789, the country had about 35,000 Catholics, who together made up less than one percent of the population.<sup>8</sup> Catholics were feared and disliked by Protestants, of course. But at the beginning, they posed little threat to the Protestant consensus. And in the early decades following the Founding, the country, if anything, became more Protestant. Those decades saw a religious revival, known as the Second Great Awakening; Methodists and Baptists in particular gained many new members.<sup>9</sup>

Yet as the nineteenth century progressed, things changed. The country began to see significant numbers of Catholics immigrate from Ireland and parts of Eastern Europe.<sup>10</sup> By 1840, over half a million Catholics lived in America (3.3% of the population); by 1891, there were roughly eight million (12.9%).<sup>11</sup> These Catholic immigrants differed religiously from the native Protestant population. But they also differed in other important ways—they tended to be poorer, more urban, less educated, and less likely to speak English.<sup>12</sup> Thus began the notorious friction between Catholics and Protestants that lasted throughout the nineteenth century and continued deep into the twentieth.

One domain of particular conflict—one area where the two groups could not easily avoid each other—was in the public schools. Organized systems of public schools had begun to develop early in the nineteenth century—before large numbers of Catholic immigrants started arriving.<sup>13</sup> Protestants had expected that the public schools would provide some sort of religious education for their children. But this created a problem. Protestantism is not a denomination in itself. It is, instead, an umbrella term for many of the religious groups that came out of the Reformation—

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<sup>6</sup> *Davey*, 540 U.S. at 717.

<sup>7</sup> See, e.g., *Hale v. Everett*, 53 N.H. 9, 111 (1868) (“Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants.”) (quoting 2 GEORGE BANCROFT, *GEORGE BANCROFT’S HISTORY OF THE UNITED STATES* 456 (1859)).

<sup>8</sup> Heytens, *supra* note 1, at 135; see also Jeffries & Ryan, *supra* note 1, at 299 (providing similar figures).

<sup>9</sup> See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 415–90 (1972) (discussing the influence of the Second Great Awakening).

<sup>10</sup> See Jeffries & Ryan, *supra* note 1, at 300.

<sup>11</sup> Heytens, *supra* note 1, at 135; see also Jeffries & Ryan, *supra* note 1, at 299–300 (providing comparable numbers).

<sup>12</sup> See Heytens, *supra* note 1, at 136 (citing JAMES HENNESEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* 184 (1981)).

<sup>13</sup> See Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840–1842*, 3 N.Y.U. J.L. & LIBERTY 267, 271–72 (2008) (discussing the origin of the common school movement).

Lutherans, Presbyterians, Methodists, Episcopalians, and so on. Early public schools thus had to figure out how to provide religious instruction in a way that would satisfy a very diverse coalition of Protestant groups.<sup>14</sup> The ultimate solution was a compromise. Schools would teach a general least-common-denominator sort of Protestantism, which would avoid discussion of any topics where Protestants disagreed with each other.<sup>15</sup> In this way, the early public schools had Bible readings, prayers, and hymns, but simultaneously refused to allow more particularized kinds of religious instruction. This became known as “nonsectarianism,” and the nonsectarian compromise satisfied Protestants of all stripes.<sup>16</sup>

But this compromise proved to be completely unsatisfactory to newly arriving Catholic immigrants. For the prayers and hymns were Protestant ones, and the Bible readings were from the King James Bible (which Catholics rejected).<sup>17</sup> Indeed, in some sense, the defining feature of the “nonsectarian” compromise was that it rejected Catholic religious traditions—which makes a certain amount of sense, because one thing that Protestant groups all shared was their common rejection of Catholicism. To Catholics then, the “nonsectarian” compromise seemed little more than a Protestant attempt to close ranks against them.<sup>18</sup>

And as the Catholic population grew, they began to resist this compromise. Catholics were numerically strongest in the cities, and so it was there that they began to push for government funds for their own schools.<sup>19</sup> Seeing this as a threat to the social fabric of their society, Protestants responded with force. Perhaps the most notorious incident came in New York in 1842. After the Catholic Bishop John Hughes campaigned for state support for church schools, an angry mob destroyed his home. Not pacified, the mob then threatened to raze St. Patrick’s Cathedral, and eventually the state militia had to intervene to keep the peace.<sup>20</sup> Similar (though less dramatic) things happened in other cities as

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<sup>14</sup> See Jeffries & Ryan, *supra* note 1, at 298; see also Bartrum, *supra* note 13, at 282–84.

<sup>15</sup> See Jeffries & Ryan, *supra* note 1, at 299 (“A generalized Protestantism became the common religion of the common school.”); see also David B. Tyack, *Onward Christian Soldiers: Religion in the American Common School*, in HISTORY AND EDUCATION: THE EDUCATIONAL USES OF THE PAST 212, 218 (Paul Nash ed., 1970) (“Most Protestant churches declared a truce with each other at the doors of the common school.”).

<sup>16</sup> See Jeffries & Ryan, *supra* note 1, at 299; Tyack, *supra* note 15, at 218.

<sup>17</sup> See HAMBURGER, *supra* note 1, at 220–21; see also Jeffries & Ryan, *supra* note 1, at 299–300.

<sup>18</sup> Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 188 (2004).

<sup>19</sup> See Jeffries & Ryan, *supra* note 1, at 306–07.

<sup>20</sup> DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–1973, A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELDS OF SOCIAL CHANGE 75 (1974); see also Bartrum, *supra* note 13, at 313–19.

well.<sup>21</sup>

Eventually, Protestant resistance to the funding of Catholic schools formalized in what came to be known as the Blaine Amendment.<sup>22</sup> Proposed in 1875, the Blaine Amendment would have amended the federal Constitution to prohibit individual states from giving funds to “sectarian” (i.e., Catholic) schools. The Blaine Amendment narrowly failed in Congress.<sup>23</sup> But afterwards, many states added similar amendments to their own constitutions, most of which still exist today.<sup>24</sup> To be sure, not all of these provisions were necessarily tainted by anti-Catholicism. And even the tainted ones were likely the products of some legitimate concerns as well.<sup>25</sup> But few doubt the serious role anti-Catholicism played in the entire affair.<sup>26</sup> When Justice Thomas recently remarked that “hostility to aid to pervasively sectarian schools has a shameful pedigree,”<sup>27</sup> he was undoubtedly standing on solid historical ground.

Roughly 125 years after the federal Blaine Amendment failed, Joshua Davey graduated from high school in the state of Washington. He sought to take advantage of Washington’s Promise Scholarship Program, which had been created in 1999 to help deserving students from poor families attend college.<sup>28</sup> The scholarships could be used for full-time study at any accredited Washington university, public or private, religious or not.<sup>29</sup> And they were generally available to all students satisfying the academic

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<sup>21</sup> See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 669 (1998) [hereinafter Viteritti, *Blaine’s Wake*] (discussing similar courses of events in Michigan, Minnesota, and Massachusetts); Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions That Are the Basis for School Finance Litigation*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 58, 78 (2007) [hereinafter Viteritti, *The Inadequacy of Adequacy*] (discussing a similar course of events in Philadelphia).

<sup>22</sup> 4 CONG. REC. 205 (1876) (introduction of the Blaine Amendment).

<sup>23</sup> A number of historical accounts provide details of these developments. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 50 (1992); Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 15 (1956).

<sup>24</sup> See, e.g., Sarah Barringer Gordon, “Free” Religion and “Captive” Schools: Protestants, Catholics, and Education, 1945–1965, 56 DEPAUL L. REV. 1177, 1183 n.22 (2007) (putting the number of active state Blaine Amendments at 37); Heytens, *supra* note 1, at 134 (putting the number at around 30).

<sup>25</sup> E.g., Green, *supra* note 1, at 1740–44; Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 FIRST AMENDMENT L. REV. 153, 176 (2003).

<sup>26</sup> See, e.g., Green, *supra* note 1, at 1742–43 (arguing that “multiple interests influenced those who supported the various versions of the Blaine Amendment,” but also noting that “there is little doubt that anti-Catholicism informed later applications of the nonsectarian principle and the larger debate surrounding the Blaine Amendment”).

<sup>27</sup> *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

<sup>28</sup> See *Locke v. Davey*, 540 U.S. 712, 715–17 (2004); see also WASH. REV. CODE § 28B.119.005–050 (2006).

<sup>29</sup> *Davey*, 540 U.S. at 716; see also WASH. REV. CODE § 28B.119.110(1)(a)(ii).

and income requirements. But there was a statutory proviso—students could not use the money to major in theology.<sup>30</sup> Meeting all the other requirements, Joshua Davey was awarded a scholarship. He attended Northwest College, a university affiliated with the Assemblies of God, double majoring in business administration and pastoral ministries.<sup>31</sup> But the election of this second major, which was considered a degree in theology, cost Davey his scholarship.<sup>32</sup>

Davey responded by filing suit, claiming that Washington had religiously discriminated against him in violation of the Free Exercise Clause.<sup>33</sup> His claim had an airtight logic about it. The Free Exercise Clause forbids religious discrimination.<sup>34</sup> And this was religious discrimination—the statute referred to religion on its face, barring theology majors (and only theology majors) from funding.<sup>35</sup> Yet the Supreme Court found Davey’s claim unpersuasive. Indeed, everything seemed to indicate that the Court thought the case easy. The opinion was short and quite terse; the Court was nearly unanimous; and the decision was issued quickly and released long before the end of the term.<sup>36</sup> Concluding that Davey did not face any criminal charge or civil penalty, the Court held that he was not sufficiently burdened by the Washington statute.<sup>37</sup> While Davey could not be fined or jailed for attending divinity school, he had no right to have the government pay for his religious education.<sup>38</sup>

There are natural parallels between Joshua Davey’s situation and that of nineteenth-century Catholics. In *Davey*, the government was willing to pay for a secular education but not a religious one. Those financial incentives worked to pressure Davey away from his chosen religious vocation in order to get the government’s scholarship. With nineteenth-century Catholics, the government was willing to pay for a Protestant education but not a Catholic one. And those financial incentives worked to pressure Catholics into having to endure the Protestant public schools.

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<sup>30</sup> *Davey*, 540 U.S. at 716; see also WASH. REV. CODE § 28B.119.010(8).

<sup>31</sup> *Davey*, 540 U.S. at 717.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 718.

<sup>34</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (explaining that the state cannot “target[] religious conduct for distinctive treatment”); *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (explaining that the state cannot “impose special disabilities on the basis of religious views or religious status”).

<sup>35</sup> See Laycock, *supra* note 18, at 172 (calling this “discrimination under any understanding of discrimination”).

<sup>36</sup> Christopher C. Lund, *Of Government Funding, Religious Institutions, and Neutrality: Seeing the Charitable-Choice Debate Through the Lens of Arrow’s Impossibility Theorem*, 40 TULSA L. REV. 321, 323 (2004).

<sup>37</sup> *Davey*, 540 U.S. at 725.

<sup>38</sup> See *id.* at 720–21 (“[Washington’s program] imposes neither criminal nor civil sanctions . . . [I]t does not require students to choose between their religious beliefs and receiving a government benefit . . . The State has merely chosen not to fund a distinct category of instruction.”).



There are differences between the two situations—one cannot expect nineteenth-century history to line up perfectly with twenty-first-century disputes. But both cases involve discriminatory financial incentives pushing people away from their chosen religious commitments.

Besides the factual parallels, there is also a historical link. The *Davey* Court itself drew this connection when it referred to the “historic and substantial” state interests standing behind Washington’s decision to exclude theology majors from its scholarship program.<sup>39</sup> Over the preceding sixty years, the Court had decided more than twenty cases about the public funding of private religious education—going back to the 1947 decision in *Everson v. Board of Education*,<sup>40</sup> which first put constitutional limits on the practice.<sup>41</sup> The Court’s twentieth-century opposition to such funding was certainly informed by the nineteenth-century conflicts between Catholics and Protestants on this issue. Consider Justice Brennan’s remark in the 1971 case of *Lemon v. Kurtzman*,<sup>42</sup> when he grounded his opposition to funding in that history: “[F]or more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions.”<sup>43</sup> All this is to say that the funding dispute in *Davey* had a historical lineage directly traceable to the nineteenth-century conflicts between Catholics and Protestants. And the resolution of those nineteenth-century conflicts, by *Davey*’s time, had solidified into a social tradition and a legal precedent that Joshua Davey could not overcome.

Indeed, the historical connection to these nineteenth-century funding conflicts is even more pronounced in Davey’s particular case. As explained earlier, many states in the nineteenth century had passed Blaine Amendments, some of which were stained by unjustified fears of Catholicism. Washington’s Blaine Amendment dates back to this period; it had been passed in 1889.<sup>44</sup> Some of Davey’s amici argued that this ancient Blaine Amendment unconstitutionally tainted Washington’s 1999 decision to exclude theology majors from its scholarship program.<sup>45</sup> The Supreme Court sidestepped this claim, saying that it was not litigated

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<sup>39</sup> *Id.* at 725.

<sup>40</sup> 330 U.S. 1 (1947).

<sup>41</sup> *Id.* at 17 (upholding the provision of government-funded bus rides to students attending private school).

<sup>42</sup> 403 U.S. 602 (1971).

<sup>43</sup> *Id.* at 648–49 (1971) (Brennan, J., concurring).

<sup>44</sup> See Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 676–77 (enabling act for North Dakota, Montana, South Dakota, and Washington) (“That provision shall be made for the establishment . . . of systems of public schools, which shall be . . . free from sectarian control.”).

<sup>45</sup> See Brief for the Becket Fund for Religious Liberty et al. as Amici Curiae Supporting Respondents at 29, *Locke v. Davey*, 540 U.S. 713 (2004) (No. 02–1315), 2003 WL 22118852 at \*29.

below and that more evidence was needed.<sup>46</sup> This decision made some sense. Even if Washington's Blaine Amendment was tainted by unconstitutional anti-Catholicism, it would still be hard for Davey to establish a causal link between the Blaine Amendment and the loss of his scholarship—after all, even if Washington had never passed a Blaine Amendment in 1889, it still might have chosen to exclude theology majors in 1999.<sup>47</sup>

Yet consider the larger issues of causation at play here. Consider what would have happened without the nineteenth-century history of anti-Catholicism in this country. Without it, we might never have had *Everson*; we might never have had the early cases first prohibiting aid to religious schools. Without this nineteenth-century history, perhaps the whole line of Supreme Court cases restricting aid would never have happened. After all, the no-aid cases are, in some ways, deep anomalies. There are no other doctrinal areas where the Supreme Court tolerates rank discrimination against religious individuals and groups—perhaps the only factually analogous case is *McDaniel v. Paty*,<sup>48</sup> which involved Tennessee laws prohibiting clergy from being legislators and which the Supreme Court struck down unanimously.<sup>49</sup>

Of course, this is indeed speculation of the rankest sort; it is impossible to know how the twenty-first century would look if things had been different in the nineteenth. But the larger point is that *Davey* and the nineteenth-century disputes are deeply tied to each other, not only in terms of doctrine and fact, but also in the sophisticated but uncertain web of historical causation. And certainly when the *Davey* Court explained its conclusion by referring to the longstanding tradition of not funding religious entities—the Court's reference to the "historic and substantial state interest"<sup>50</sup> involved—it suggests that what happened to Joshua Davey is in part justified by what happened to the Catholics of a century ago, a troubling conclusion indeed.

### III. *ELK GROVE SCHOOL DISTRICT V. NEWDOW*

As we have seen, nineteenth-century Protestants worked to deny government funding to Catholic private schools. Yet there was a second and complementary aspect to this effort. Just as they denied Catholics funds for their own schools, Protestants also sought to keep their schools dependably Protestant. As explained above, that meant Protestant Bible readings, Protestant hymns, and Protestant prayers. And Catholics, quite

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<sup>46</sup> See *Davey*, 540 U.S. at 723 n.7.

<sup>47</sup> Laycock, *supra* note 18, at 189.

<sup>48</sup> 435 U.S. 618 (1978).

<sup>49</sup> *Id.* at 628–29.

<sup>50</sup> *Davey*, 540 U.S. at 725.

understandably, found this arrangement unacceptable.

One can see the struggle perhaps most vividly in the fights over Bible reading. Public schools arranged to have the King James Bible read by itself—that is, without any interpretative notes or commentary. That was a sensible compromise among Protestants, who could agree on the value of reading the Bible without being able to agree on precisely what the Bible meant. But that arrangement frustrated Catholics. Catholics rejected the King James Bible, to be sure. But more fundamentally, they rejected the very idea that the Bible was properly understood without commentary. For Catholics, reading the Bible by itself was an error that Protestants made. Indeed, it was the sort of error that in a way defined Protestantism—by encouraging people to approach complicated issues without guidance, Protestantism naturally led to individuals adopting dangerously unpredictable and erroneous religious conclusions. So while Protestants thought of their approach as a workable response to the problem of increasing religious pluralism, Catholics saw it simply as a tool of Protestant repression.<sup>51</sup>

Just as Catholics sought government funding for their own schools, they simultaneously worked to remove the most obvious signs of Protestantism from the common public schools. Here too there was trouble. Dissenting Catholic students faced individual hardships. Sometimes they were expelled for disobedience;<sup>52</sup> sometimes they were punished physically.<sup>53</sup> When they dared to sue, reviewing courts usually deferred to school administrators.<sup>54</sup>

On a wider level, these public school conflicts exacerbated tensions between Protestant and Catholic communities. In Cincinnati, for example, a group of Catholics—along with some Jews and Freethinkers—successfully persuaded a school board to drop required Bible reading from the public school curriculum. This caused a massive uproar that, one historian notes, “plunged Cincinnati into a boiling cauldron of fear and bigotry.”<sup>55</sup> The local paper denounced the school board’s action as

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<sup>51</sup> See, e.g., Jeffries & Ryan, *supra* note 1, at 300 (“Unaccompanied Bible reading, which was the cornerstone of the Protestant consensus, was to Catholics an affront.”).

<sup>52</sup> See *Donahoe v. Richards*, 38 Me. 376, 379 (1854) (dismissing a claim brought by a Catholic student expelled for refusing to read the King James Bible).

<sup>53</sup> See *Commonwealth v. Cooke*, 7 Am. L. Reg. 417, 419, 425–26 (Mass. Police Ct. 1859) (dismissing the prosecution of a public school teacher who beat a Catholic student for refusing to read from the King James Bible and the Protestant version of the Ten Commandments).

<sup>54</sup> One scholar concluded that that there were “twenty-five similar suits (fifteen by Catholics) brought in nineteen States through 1925, only five of which resulted in favorable rulings for the plaintiffs.” Viteritti, *Blaine’s Wake*, *supra* note 21, at 668.

<sup>55</sup> Harold M. Helfman, *The Cincinnati ‘Bible War,’* 60 OHIO ST. ARCHAEOLOGICAL & HIST. Q. 369, 369 (1951).

“hand[ing] the public schools over to Pope, Pagan, and Satan.”<sup>56</sup> Protestant objectors filed suit and had the decision overturned.<sup>57</sup> And sometimes when Catholics opposed the religious assimilation of the public schools, there were deadly riots—as in Philadelphia, where Catholic homes, churches, and seminaries were burned to the ground.<sup>58</sup> In places where Catholics were most numerous, they sometimes succeeded in getting Bible reading removed from the public school curriculum.<sup>59</sup> On the whole, however, they were not particularly successful; one scholar estimates that seventy-five to eighty percent of school districts kept Bible reading in some form.<sup>60</sup>

Moving forward to the modern day, consider the case brought by Michael Newdow, who had a daughter in the Elk Grove public school system in California. Each day, her elementary school teacher led the class in a group recitation of the Pledge of Allegiance, part of which refers to this country as being “one Nation under God.”<sup>61</sup> Objecting to the religious dimension of the Pledge, Newdow brought suit and his case eventually reached the Supreme Court.<sup>62</sup> But the Court did not reach the merits of Newdow’s claim. Instead it concluded that Newdow, who was the child’s noncustodial parent and who had tenuous and uncertain parental rights under California law, lacked standing to bring the suit.<sup>63</sup> Three Justices wrote separately, all concluding that they would have upheld the phrase “under God” in the Pledge as constitutional.<sup>64</sup> No Justice disputed that conclusion.

Many have rightly recognized the connection between Joshua Davey’s story and nineteenth-century history, but few (if any) have written about the link between Michael Newdow’s story and that same history. Catholics in the nineteenth century complained of having to endure a foreign religion in the government-run public schools. That religion was

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<sup>56</sup> ROBERT MICHAELSEN, *PIETY IN THE PUBLIC SCHOOL: TRENDS AND ISSUES IN THE RELATIONSHIP BETWEEN RELIGION AND THE PUBLIC SCHOOL IN THE UNITED STATES* 118 (1970).

<sup>57</sup> See Green, *supra* note 1, at 132. Similar decisions by school boards in Chicago and New York led to similar controversies. See, e.g., Viteritti, *Blaine’s Wake*, *supra* note 21, at 670.

<sup>58</sup> See MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 275–76 (1984).

<sup>59</sup> See Jeffries & Ryan, *supra* note 1, at 304 (noting that “New York City, Chicago, Buffalo, and Rochester banned Bible reading in the public schools” and that “by the early twentieth century, a few state courts had outlawed Bible reading and other religious observances in public school as violative of state constitutions”).

<sup>60</sup> See, e.g., Viteritti, *Blaine’s Wake*, *supra* note 21, at 667 (claiming that “between seventy-five and eighty percent of the schools in the country voluntarily followed the practice” of Bible reading in the public schools).

<sup>61</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 7 (2004).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 17.

<sup>64</sup> *Id.* at 18 (Rehnquist, C.J., concurring); *id.* at 36–37 (O’Connor, J., concurring); *id.* at 54 (Thomas, J., concurring).

nondenominational in the sense of being agreeable to most Protestants, but it was incompatible with Catholicism. This, of course, is essentially what Newdow claimed with regard to the Pledge: while it might be nondenominational in the sense of speaking generally about God in terms that most monotheists would accept, it was incompatible with atheism, agnosticism, and a number of other religions. In her opinion upholding the Pledge, Justice O'Connor put great emphasis on its nonsectarian nature. Only because the Pledge made no "reference to [any] particular religion" and contained "minimal religious content" was it constitutional in her eyes.<sup>65</sup> But this, of course, is precisely how nineteenth-century Protestants defended Bible reading and hymn singing—as so lacking in divisive theological content as to be unobjectionable. What we think of as divisive theological content has changed in the past hundred years. But that is all that seems to separate Newdow from his nineteenth-century Catholic predecessors. Professor Joseph Viteritti once referred to the *de facto* Protestantism in nineteenth-century public schools as "a telling story of the risks incurred when a ruling majority is allowed to establish a monopoly over the educational process and to impose its [religious] values upon everyone else's children."<sup>66</sup> That was well put and not too far from what Michael Newdow meant when he called the Pledge "an example of the majority using the machinery of the state to enforce its preferred religious orthodoxy . . . in the public schools."<sup>67</sup> In both instances, the government has taken advantage of its control over the educational process to religiously pressure a captive audience of schoolchildren.

#### IV. *WEBB V. CITY OF PHILADELPHIA*

A third aspect to the public school controversies between Protestants and Catholics is one that has been almost completely forgotten today. In addition to delicate questions over the funding of private schools and the religious character of public schools, the growth of Catholicism also introduced the question of what to do about teachers wearing religious garb. That question arose one hundred and fifty years ago, and the resolution reached then still enters into how we perceive the question today.

During the nineteenth century, it was common for clergy to work as school teachers. In his great study of America, de Tocqueville noted how

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<sup>65</sup> *Id.* at 42–43 (O'Connor, J., concurring).

<sup>66</sup> See Viteritti, *Blaine's Wake*, *supra* note 21, at 668.

<sup>67</sup> Respondent's Brief on the Merits at 2, *Newdow*, 542 U.S. 1 (No. 02-1624), 2004 WL 314156 at

"[a]lmost all education is entrusted to the clergy."<sup>68</sup> As the Catholic population grew, it was thus entirely natural that Catholic priests and nuns would begin to take positions teaching in the public schools. But that disturbed Protestants, especially given the Catholic Church's insistence that priests and nuns wear clothing reflecting their Catholicism.<sup>69</sup> Protestants feared that this would unduly influence public school children toward Catholicism. And some Protestants surely realized that banning religious garb would be a devastatingly effective way of keeping priests and nuns out of the public schools and off the government's payroll.

Consider what happened in Pennsylvania. In 1894, the Pennsylvania Supreme Court offered some protection to the Catholic minority when it rejected the claim that the employment of garbed Catholic nuns and priests in the public schools itself violated the Pennsylvania state constitution.<sup>70</sup> But this sparked an outcry from outraged Protestants—and a year later, Pennsylvania passed a statute barring public school teachers from wearing religious garb.<sup>71</sup> Everyone now agrees that the statute was aimed at Catholics and was the result of anti-Catholic prejudice.<sup>72</sup> But unwilling to get involved, the Pennsylvania Supreme Court upheld the statute when it came under fire.<sup>73</sup>

What happened in Pennsylvania happened in other states around the country, although the details understandably differed. Some states passed statutes to bar religious garb.<sup>74</sup> Some courts interpreted their own state constitutions to bar religious garb, even without any statute.<sup>75</sup> And some

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<sup>68</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 320 n.4 (Francis Bowen & Phillips Bradley eds., Alfred A. Knopf 1945) (1838); see also Viteritti, *Blaine's Wake*, *supra* note 21, at 663 ("Education . . . was usually administered by the clergy and combined with religious instruction.").

<sup>69</sup> See 1983 CODE c.669, §1 (Canon Law Society of America trans. 1983) ("Religious are to wear the habit of the institute made according to the norm of proper law as a sign of their consecration and as a testimony of poverty.").

<sup>70</sup> *Hysong v. Sch. Dist. of Gallitzin*, 30 A. 482, 484 (Pa. 1894).

<sup>71</sup> Act of June 27, 1895, No. 282, 1895 Pa. Laws 395 (codified as amended at 24 PA. STAT. ANN. § 11-1112 (West 1992)).

<sup>72</sup> Several recent courts have found this as a legal matter. See, e.g., *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, No. 87-2842, 1989 WL 52506, at \*10 (E.D. Pa. May 17, 1989) (concluding that "anti-Catholicism was a significant factor in the passage of the Pennsylvania religious garb bill of 1895"); see also *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 893-94 (3d Cir. 1990) (agreeing with this conclusion).

<sup>73</sup> See *Commonwealth v. Herr*, 78 A. 68, 73 (Pa. 1910).

<sup>74</sup> See, e.g., NEB. REV. STAT. § 79-898 (2008) ("Any teacher in any public school in this state who wears, in such school or while engaged in the performance of his or her duty, any dress or garb indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination, shall be deemed guilty of a misdemeanor . . ."); OR. REV. STAT. § 342.650 (2009) (similar); 24 PA. STAT. ANN. § 11-1112 (West 1992) (similar); N.D. CENT. CODE § 15-47-29 (1991) (similar) (repealed 1998).

<sup>75</sup> See *Knowlton v. Baumhover*, 166 N.W. 202, 210 (Iowa 1918).

state and local education boards barred religious garb on their own.<sup>76</sup> By 1946, the National Education Association concluded that thirty-eight states prohibited public school teachers from wearing religious garb.<sup>77</sup> And there was no doubt that many of these prohibitions were prompted by a disturbing sort of anti-Catholicism. Early courts simply could not hide their distaste for Catholics—consider what one New York court said about Roman Catholic nuns serving as public school teachers:

It seems to us these sisters should never be permitted to teach in our public schools. From the very nature of their vows and lives, they should not be permitted to have the care and instruction of young persons, without the free consent of their parents. Catholics may consent to it. Protestants will not and do not consent to it.<sup>78</sup>

Similar stories abound elsewhere.<sup>79</sup> Of course, a sympathetic modern reader might see these prohibitions on religious garb as legitimate—not as a way of stopping Catholicism, but as a way of stopping teachers from pushing any sort of religion on their students.<sup>80</sup> But such a reading is far too generous to history. For the nineteenth-century legislators and judges who created these restrictions on religious garb, it was clearly Catholicism that was the threat. One state supreme court decision from the era, for example, barred Catholic nuns from wearing religious garb in the public schools, but then immediately went on to reaffirm that Protestant religious exercises (including the saying of the Lord's Prayer and the reading of Scripture from the King James Bible) were nevertheless still appropriate.<sup>81</sup>

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<sup>76</sup> See, e.g., *O'Connor v. Hendrick*, 77 N.E. 612, 613–14 (N.Y. 1906) (upholding an executive order by the state superintendent of public education prohibiting teachers from wearing the “distinctive dress of the Roman Catholic religious order known as the ‘Sisterhood of St. Joseph’”).

<sup>77</sup> See NATIONAL EDUCATION ASSOCIATION, *THE STATE AND SECTARIAN EDUCATION* 11 (1946); see also LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 497, 774 nn.30–31 (2d ed. 1967) (reporting same). Anson Phelps Stokes estimated that there were thirty-five states forbidding teachers from wearing religious garb. See 2 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 590 (1950) (“In some states—now about fifteen—nuns wearing their religious garb are permitted as public-school teachers.”).

<sup>78</sup> See *O'Connor v. Hendrick*, 96 N.Y.S. 161, 169 (App. Div. 1905), *aff'd*, 77 N.E. 612 (N.Y. 1906).

<sup>79</sup> See *Cooper v. Eugene Sch. Dist.*, 723 P.2d 298, 308 (Or. 1986) (explaining that Oregon's religious garb statute also comes “from the period of anti-Catholic intolerance”); 2 STOKES, *supra* note 77, at 590, 790 n.292 (explaining a number of similar incidents in a variety of states, including a poignant one from North Dakota).

<sup>80</sup> See, e.g., Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 18–20 (2005) (arguing that prohibitions on religious garb are needed to prevent teachers from endorsing religion to their students).

<sup>81</sup> See *Knowlton v. Baumhover*, 166 N.W. 202, 212 (Iowa 1918) (“Nothing in this opinion is to be construed as a departure from the decision of this court in *Moore v. Monroe* . . . [which] permitt[ed] the

Only a particular fear of Catholicism—rather than a general fear of state-imposed religion—can explain this asymmetry.

This brings us to the case of Kimberlie Webb, a practicing Muslim, who had been employed by the City of Philadelphia as a police officer.<sup>82</sup> Webb sought permission to wear a traditional Muslim veil, known as the khimar, while at work.<sup>83</sup> Webb's khimar would have covered the back of her head, slight parts of her forehead, and the sides of her face—although the khimar itself would have been largely covered up by Webb's standard-issue police shirt and hat.<sup>84</sup>

But the City of Philadelphia had a rule, known as Directive 78, which permitted only certain kinds of clothes on the job. And while Directive 78 allowed certain scarves to be worn, the Police Department interpreted it as forbidding the khimar.<sup>85</sup> The Third Circuit ultimately upheld the Directive and dismissed Webb's claim. While the khimar did not interfere with any particular part of Webb's job, the Third Circuit nevertheless concluded that the khimar could properly be banned in order to maintain the police department's religious neutrality.<sup>86</sup>

Kimberlie Webb's story is only a slight variation on that of nineteenth-century Catholic priests and nuns, who were similarly excluded from public employment because of their commitment to wearing religious clothing. Indeed, the two narratives are not just similar; they are historically connected as well. Remember that Webb was bringing suit in Philadelphia. And the state of Pennsylvania still had (and still has) the garb statute enacted back in 1895 to exclude nuns and priests from the public schools.<sup>87</sup> This ancient statute became a central part of the argument against Webb—given that Pennsylvania had long barred religious garb from its public schools, the Police Department argued, it made sense that state police departments would also bar it.<sup>88</sup> Indeed, in the actual court decisions, both the district court and the Third Circuit cite Pennsylvania's garb statute in their denial of Webb's claim.<sup>89</sup> This then

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teacher of a public school to include in the daily exercises of such school the reading of the Scriptures and recitation of the Lord's Prayer.").

<sup>82</sup> *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009) [hereinafter *Webb I*].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 258 & n.1.

<sup>86</sup> *Id.* at 261–62.

<sup>87</sup> Act of June 27, 1895, No. 282, 1895 Pa. Laws 395 (codified as amended at 24 PA. STAT. ANN. § 11-1112 (West 1992)).

<sup>88</sup> See Defendant's Supplemental Motion for Summary Judgment at 17 n.14, *Webb v. City of Phila.*, Civ. A. No. 05-5238, 2007 WL 1866763 (E.D. Pa. June 27, 2007), 2007 WL 1155604 [hereinafter *Webb I*] (discussing the Garb Statute of 1895); see also Defendant's Reply Brief in Support of Its Supplemental Motion for Summary Judgment at 5, *Webb I*, 2007 WL 1866763 (No. 05-5238), 2007 WL 1742185 (same).

<sup>89</sup> *Webb II*, 562 F.3d at 259–60 n.3; *Webb I*, 2007 WL 1866763, at \*3.



provides a perfect demonstration of how injustices can become routinized and socially invisible; the unfair treatment of nuns and priests over a hundred years ago becomes precedent (and therefore justification) for similar treatment of Muslims today. Nowhere in the opinion does the Court address the costs that its decision will have on religious believers like Kimberlie Webb. Going forward, *Webb* seems to mean that those who insist on wearing religious garb—Jews who seek to wear a yarmulke, Muslims who want to wear a khimar, Christians who wish to wear a cross or rosary—are all properly barred from governmental employment. And in the areas of education and law enforcement, where government is the largest or only provider of services, this means that religious believers may have to go unemployed or change their line of work. What was true for priests and nuns in the nineteenth century has now become true for observant Muslims in the twenty-first; they will sometimes be able to follow the dictates of their religion only at the cost of their jobs.

#### V. *SIMPSON V. CHESTERFIELD COUNTY*

The final connection between modern church-state disputes and nineteenth-century anti-Catholicism takes us away from public schools altogether and into the realm of legislative prayer. Legislative prayer has a long history in this country—one of the very first acts of the first Congress was to hire chaplains.<sup>90</sup> Almost thirty years ago, the Supreme Court held that legislative prayer did not generally violate the Establishment Clause, which left state and local governments generally free to open their sessions with prayer.<sup>91</sup> But legislative prayer has also sometimes created contentious issues.<sup>92</sup> One of them has been over which groups will have the right to pray on behalf of the government. This issue divided Catholics and Protestants in the nineteenth century; it divides us still.

Consider the case of Charles Constantine Pise, a Catholic priest in the early nineteenth century. Pise had close relationships with a number of influential politicians. Those relationships led, in 1832, to his becoming the first Roman Catholic chaplain in the United States Congress.<sup>93</sup> No Catholic had ever been a federal chaplain before, either in the Armed Forces or in Congress.<sup>94</sup> And Pise quickly came under attack from groups

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<sup>90</sup> See Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71 (“And be it further enacted, That there shall be allowed to each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress . . .”).

<sup>91</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>92</sup> For more on legislative prayer generally and the issues it creates, see Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972 (2010).

<sup>93</sup> See M. Eulalia Teresa Moffatt, *Charles Constantine Pise (1801–1866)*, in 20 HISTORICAL RECORDS AND STUDIES 64, 79–80 (United States Catholic Historical Society ed., 1931); MILDRED AMER, CONG. RESEARCH SERV., RS 20427, HOUSE AND SENATE CHAPLAINS 1 (2008).

<sup>94</sup> See Moffatt, *supra* note 93, at 79.

of Nativist Protestants—one biographer wrote of the “intense anti-Catholic feeling and bigotry [in] press and pulpit . . . alike” at the time of Pise’s nomination, and described how “[t]he thought of a Catholic priest holding such a position of honor in the Senate of the United States called forth strenuous efforts to prevent this ‘disaster’ to the Republic.”<sup>95</sup> Shortly after Pise’s election, Protestant chaplains in state legislatures refused to offer prayers in apparent protest,<sup>96</sup> and Congress began receiving petitions seeking to end Congress’s chaplaincies altogether.<sup>97</sup> On July 4, 1833, Pise addressed the forces attacking him:

[W]as it not circulated through the press, as an argument against my election to the Chaplaincy of the Senate, that I am a subject of the Pope; that I had made an oath of allegiance to him as a temporal lord . . . Shall I contradict all these assertions? . . . [I declare that] I acknowledge no allegiance to [the Pope’s] temporal power—I am no subject of his dominions—I have sworn no fealty to his throne—but I am, as all Americans glory to be, independent of all foreign temporal authority—devoted to freedom, to unqualified toleration, to republican institutions. America is our country; her laws are our safeguard . . . .<sup>98</sup>

Pise ended up leaving office in December 1833, serving one day short of a year and leaving it ultimately unclear whether anti-Catholicism contributed to his departure. But it is clear that, after Pise, anti-Catholicism became a great force with regard to the chaplaincies. Protestants began to oppose the chaplaincies precisely because they feared that they might fall again into Catholic hands. Congressmen complained that the chaplaincies “place us upon a level with the priest ridden despotisms of the Old World” and they objected to Catholic priests “promulgating [their] sectarian views” while on government salaries.<sup>99</sup> Many feared Catholicism’s quick growth in this country—given the “rapid strides of priestcraft, now being made in these United States,” it would be better to abandon the chaplaincies altogether than for them to be

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<sup>95</sup> See Moffatt, *supra* note 93, at 79; see also Charles Constantine Pise, in 14 *DICTIONARY OF AMERICAN BIOGRAPHY* 634 (Dumas Malone ed., 1934) (noting that Pise was “duly elected . . . despite an intense nativist opposition in press and pulpit to his creed and foreign honors”).

<sup>96</sup> See, e.g., *THE GETTYSBURG STAR & REPUBLICAN BANNER*, Jan. 1, 1833, at 3.

<sup>97</sup> See, e.g., *THE GETTYSBURG STAR & REPUBLICAN BANNER*, May 20, 1833, at 2.

<sup>98</sup> The magazine editors reporting the address remarked at being “struck with this passage.” *ADAMS SENTINEL* (Gettysburg, Pa.), Aug. 12, 1833, at 3.

<sup>99</sup> See *CONG. GLOBE*, 35TH CONG., 1ST SESS. 25–26 (1857) (recitation of a remonstrance by Rep. Jones).

maintained only to eventually fall into Catholic hands.<sup>100</sup> And these concerns about Catholic chaplains continued for generations. Perhaps the most amazing fact is that it was not until the year 2000—166 years after Pise left office—that Congress elected another Catholic as a congressional chaplain.<sup>101</sup>

Compare Pise's experience with that of Cynthia Simpson.<sup>102</sup> Cynthia Simpson was a Wiccan woman living in Chesterfield County, Virginia. The County had a decades-long tradition of opening meetings of its Board of Supervisors with a prayer.<sup>103</sup> The County Clerk sent a letter to local congregations, inviting their clergy to come offer prayers on a first-come, first-served basis. Simpson contacted the clerk, explained that she was a clergyperson in the Wiccan faith, and asked for her turn. The Board wrote back to Simpson, explaining that it would not allow her to offer a prayer:

Chesterfield's non-sectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition. Based upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities. Accordingly, we cannot honor your request to be included on the list of religious leaders that are invited to provide invocations at the meetings of the Board of Supervisors.<sup>104</sup>

In response, Simpson filed suit, claiming that she was the victim of unconstitutional religious discrimination. But the Fourth Circuit rejected her claim. The court explained that Chesterfield County's policy had been fairly inclusive—while the vast majority of the prayer-givers were Christian, it was also true that most of the people in the county were Christian. And at least some religious minorities were represented—there was evidence that at least one Jewish rabbi and one Muslim imam had also delivered invocations. This, the Fourth Circuit explained, was a sufficient demonstration of inclusivity: "It would, of course, be possible for any court to pick fault with any elected body's selection of clergy."<sup>105</sup>

Little separates what happened to Charles Constantine Pise from what happened to Cynthia Simpson, apart from their different religions and time

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<sup>100</sup> KEHUKKEE PRIMITIVE BAPTIST ASS'N IN NORTH CAROLINA, MEMORIAL, S. MISC. DOC. NO. 30-2, at 1 (1848).

<sup>101</sup> Even in that election, there were allegations of anti-Catholicism. For more on this point, see Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1191-93 (2009).

<sup>102</sup> *Simpson v. Chesterfield Cnty.*, 404 F.3d 276 (4th Cir. 2005) [hereinafter *Simpson II*]; *Simpson v. Chesterfield Cnty.*, 292 F. Supp. 2d 805 (E.D. Va. 2003) [hereinafter *Simpson I*].

<sup>103</sup> *Simpson II*, 404 F.3d at 278.

<sup>104</sup> *Simpson I*, 292 F. Supp. 2d at 808.

<sup>105</sup> *Simpson II*, 404 F.3d at 286.

periods. Protestants doubted that Pise was a proper religious role model for the country because of his Roman Catholicism. Objecting to his religion, they naturally objected to him giving prayers on behalf of Congress. Precisely the same is true for Cynthia Simpson. The Chesterfield County Board of Supervisors doubted her ability to act as a proper religious role model because of her Wiccan beliefs. Objecting to her religion, they understandably objected to her giving prayers on behalf of the board.<sup>106</sup> Both Pise and Simpson faced exclusion from public life for having religious views beyond the boundary of religious tolerance in their time. What was true about our first three examples is true here as well—the religious affiliations of the various factions have changed, but the underlying issues are really the same.

## VI. CONCLUSION

On the surface, our twentieth and twenty-first century struggles with religious diversity appear to be unique tests of our social fabric. But they are not unique. In many respects, they are mere repeats of the struggles of earlier generations. Just as Catholicism tested the Protestant consensus of the nineteenth century, other religions (like Islam and atheism) now test our modern religious consensus. In some sense, the circle has expanded. Our inclusion of Catholics now is something that would have been found preposterous in an earlier age. But perhaps our inclusivity is really just a by-product of our greater exclusivity. Maybe it is just an attempt to close ranks on those we find even more foreign and dangerous, just as the Protestants of old only began to accept each other when they recognized a common enemy in Catholicism.

We have much to learn from the nineteenth-century episodes between Catholics and Protestants. We have yet to realize the lessons of these episodes, let alone begun to change our ways in light of those realizations. The losses are tragic now, as they were a century ago. Mark Twain is reputed to have once said that history does not repeat itself, but it rhymes.<sup>107</sup> Listening to our history will hopefully help us hear the injustices of the present and, perhaps, aid us in correcting them.

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<sup>106</sup> One board member called Wicca “a mockery” and said it was “not any religion I would subscribe to.” *Id.* at 285–86 n.4. Another board member, in referring to Simpson, remarked, “I hope she’s a good witch like Glenda,” and added, “[t]here is always Halloween.” *Id.* The Fourth Circuit concluded that these “ill-advised remarks do not override the fact that the County seriously considered Simpson’s request and, as described at length herein, adopted an indisputably broad and inclusive legislative invocation practice.” *Id.*

<sup>107</sup> Letter to the Editor, *History’s History*, N.Y. TIMES, June 26, 1988.