A Marketplace of Schooling:

Education and the American Regulatory State, 1870-1930

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A dissertation submitted in partial fulfillment of

the requirements for the degree of

Doctor of Philosophy

(History)

at the

UNIVERSITY OF WISCONSIN-MADISON

2013

Date of final oral examination: 5/13/13

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Acknowledgments

I owe completion of this dissertation to my many teachers, colleagues, friends, and family members, who instilled in me the passion to labor in the stuff of the past. First and foremost is my adviser, Bill Reese, who guided me through graduate school—and this dissertation—with a degree of generosity, trust, kindness, and rigor that is difficult to capture in words. I am immensely grateful and privileged to have worked with Bill, and have learned from him things I will take with me throughout my life, wherever I go.

I have also been fortunate in my other committee members, who have strengthened my arguments and writing. Adam R. Nelson and Jennifer Ratner-Rosenhagen have helped develop my abilities as a researcher and teacher since the beginning of graduate school, and were instrumental in helping me think through how to frame my dissertation's questions and arguments. Colleen Dunlavy and Julie Mead generously lent their expertise to this project in its later stages, and I am very grateful for all of their insightful comments during the defense.

Other faculty and staff at the University of Wisconsin and beyond have helped me through this project, in both small ways and large. I thank Leslie Abadie, Laird Boswell, Michael Fultz, Steve Kantrowitz, and Sarah Thal for their tireless assistance and mentorship. Jeremi Suri's guidance in the initial stages of this project helped get me started. Comments at conferences on my presented work from Ruben Donato, Ruben Flores, Carl Kaestle, Kip Kosek, Tracy Steffes, Maris Vinovskis, and Jonathan Zimmerman were also immensely helpful. I remain indebted to my undergraduate adviser, Mary Ann Dzuback, who introduced me to the history of education, and to the careful practice of historical scholarship.

I am also deeply fortunate to have been afforded the resources to complete this project in a timely and thorough manner. A fellowship through the National Academy of

Education/Spencer Foundation funded the final year of my dissertation. I am immensely thankful for NAE/Spencer's financial generosity, as well as for their unparalleled commitment to mentoring and developing young scholars. A fellowship from the University of Wisconsin's Department of History, along with a travel grant from the Graduate School, enabled me to engage in a critical semester of research away from Madison, while a grant from the American Catholic History Research Center and University Archives at the Catholic University of America funded much of the research that contributes to Chapter Six.

Librarians and archivists throughout my research have helped me gather the sources to tell my story. Most of the state documents this dissertation relies on are located in the Wisconsin Historical Society's library and archives—a national treasure. Without the expert guidance of librarians and archivists there, and elsewhere, I would have been lost. For all of their help I would also like to thank by name Burris E. Esplen at the Office for Archives and Record Center at the Catholic Diocese of Pittsburgh; Maria Mazzenga and William J. Shepherd at the American Catholic History Research Center; David Grinnell at the University of Pittsburgh's Archives Service Center; Scott Taylor at Georgetown University's Special Collections Research Center; and Shawn Weldon at the Philadelphia Archdiocesan Historical Research Center.

Fellow graduate students have helped me through every stage of this process. When I entered UW-Madison I had no idea how fortunate I would be to have Frank Honts and Campbell Scribner as colleagues studying the history of education. In addition to being dear friends, they are both exemplary scholars and professionals, whose intellectual style has deeply influenced me. Cam read every word of this dissertation, and this project is significantly better because of his suggestions. Others along the way also improved this dissertation. Christine Lamberson provided me with helpful suggestions for several chapters and, more importantly, balance during

my time in Madison. Britt Tevis helped me clarify and strengthen the arguments in Chapter Six. Jon Shelton, through careful readings of several chapters, added a much-needed different perspective from my own, and—during the wonderfully interdisciplinary NAE/Spencer events—a fellow historian who spoke my same disciplinary language. Other colleagues and friends in Madison, Baltimore, New York City, Washington, D.C. and elsewhere have been by my side, both literally and metaphorically—you are far too many to name, but you know who you are.

I owe special gratitude to my family, old members as well as new ones. Graduate study is a strange place to those outside of it. I am so lucky to have aunts, uncles, cousins, and a grandmother who showed an interest in my work and, when called upon, offered a bed for me to stay on when in town for work or pleasure. Greg and Liz Karas, have made the Upper Midwest feel even more like a second home for me, and I look forward to a lifetime of trips there. My parents, Richard Gross and Cathy Neuman, and my sister, Allison Gross, nourished me throughout this long journey, and I cannot express how deeply thankful I am for their constant encouragement and love. I dedicate this dissertation to Natalie Karas, who in addition to reading and commenting upon the entire dissertation, provides unwavering and unconditional faith in me every single day—for which I am eternally grateful.

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Introduction

Education and Regulation in American History

When the United States Commissioner of Education, Nathaniel H.R. Dawson, studied the nation's public school attendance data in 1887 he observed a puzzling trend. For the first time in American history enrollments appeared not only to have slowed, but in several cases, to have declined. Even more shocking, these trends were strongest in the Northern states, where public school systems had originated in the previous half-century and where public support for them was highest. Where had the students gone? After studying the data carefully Dawson offered his hypothesis: increasing numbers of pupils were enrolling in private schools. The decline in public school attendance was alarming enough, "a matter of the highest gravity," Dawson warned. That "there is going on a transfer of pupils from the public to private schools" had even greater ramifications. "This circumstance is of the greatest significance and demands careful consideration," he concluded.[1]

Dawson did not mention what his readers uniformly knew—that the term "private schools" referred to a particular set of institutions that had grown exponentially in the past two decades. These were the "parochial" institutions operated by American Roman Catholics: the schools attached to Catholic churches and attended by children residing in the local parish. In a nation with such a large and growing number of immigrants—roughly 29 million between 1870 and 1924—where Catholic children attended school was a major political, social, and religious question. At the dawn of the Civil War, Roman Catholicism was the largest single Christian denomination in the United States. In urban areas, where over 85 percent of Catholics dwelled, it

[1] United States Bureau of Education, *Report of the Commissioner of Education for the Year 1887-88* (Washington, D.C.: Government Printing Office, 1889), 64-65.

was especially difficult to ignore the constant noise of Catholic churches and schools being constructed.[2] Dawson's data suggested that increases in parochial school enrollments outpaced public school advances in both relative and absolute numbers. Nearly 900,000 Catholic children attended parochial schools in the late nineteenth century. By the early twentieth century, in cities such as Cleveland, Milwaukee, Cincinnati, Buffalo, Boston, and Pittsburgh, over forty percent of children—many the sons and daughters of immigrants—enrolled in private, predominately Catholic, schools.[3]

Dawson's report confirmed many American readers' fears that foreign and pernicious influences were supplanting the culture and institutions of their youth. The triumph of public school systems had been one of the most notable achievements of the nineteenth century. Americans living in 1800 would not have recognized distinctions between public and private in education: privately governed schools (mostly religious in nature) often received various forms of public funds, while schools operated by elected or appointed boards frequently depended on parental tuition payments. By 1870, clear distinctions between public and private schools had emerged, and a majority of Americans now attended tax-supported, publically governed schools. Was this development now in retreat? A number of Northern Protestants thought so and

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[2] Joseph J. Casino, "From Sanctuary to Involvement: A History of the Catholic Parish in the Northeast," in *The American Catholic Parish: A History from 1850 to the Present*, ed. Jay P. Dolan (Mahwah, NJ: Paulist Press, 1987), 1:13.

[3] David P. Baker, "Schooling All the Masses: Reconsidering the Origins of American Schooling in the Postbellum Era," *Sociology of Education* 72, no. 3 (October 1999): 197-215. The terms "public" and "private" in education have shifted over time. Except where noted, I use the terms as they were used in the late nineteenth and early twentieth century. "Public" referred to those schools that were supported by tax dollars and governed by elected officials, while "private" referred to all non-public schools: institutions (roughly 90 percent of which were religious in nature) that almost always did not receive direct funding from local and state sources, and that were operated by boards not elected by popular vote. I use the term "parochial school" to refer to institutions operated by Catholic parish churches. (Not all Catholic schools were parochial: many Catholic academies and high schools were operated independently of the Catholic parish, diocese, or archdiocese.) Finally, I use the term "state" to refer both to state governments as well as to the range of local functions, including public schooling, that were by law "state" responsibilities. Where relevant I distinguish between "federal," "state," and "local" actors and actions.

commented on the situation in dire tones. A Boston Unitarian minister, Joshua Young, could not understand how the decline of public schools could occur "here in New England, where the public school system was born and cradled, where, so to speak, it has been the people's pet." He wondered whether it "foreshadow[ed] a fatal deterioration of the public schools," the beginning of "the History of their Decline and Fall."[4] A university student, after reading Dawson's report, accused "foreigners" of not "appreciat[ing] the relation of education to the state separate from the church. They were never taught it in Europe and they cannot understand it here."[5]

Those familiar with the historical development of public school systems in the United States, and the motivations of their promoters, would not have been surprised by these responses. Public school reformers had long combined a self-assured Protestant outlook with a belief that all religious and ethnic groups would benefit from a "common" system of schools. Beginning in the early nineteenth century, advocates for universally accessible, centralized, and publicly funded schools successfully combined Americanization campaigns with Protestant notions of moral uplift. None did so more persuasively than Horace Mann, an energetic advocate of state public school systems in Massachusetts. Mann abhorred how European school systems, especially in Britain, stratified students and social classes by providing public funds for religious schools. Mann warned that British schools perpetuated dangerous and divisive social hierarchies, in which "each sect according to its own creed,--maintain separate schools, in which children are taught, from their tenderest years to wield the sword of polemics with fatal dexterity; and where the gospel instead of being a temple of peace, is converted into an armory of deadly weapons, for

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[4] Joshua Young, "Moral Education," *Lend a Hand* 5, no. 5 (May, 1890): 314.

[5] Morse Ives, "Immigration: 20th Joint Debate for the Championship of the University," *The Aegis* 5, no. 21-22 (1891): 343-46.

social, interminable warfare." He hoped American schools would be truly common, accommodating rich and poor, immigrant and native children, and thus become "the equalizers of the conditions of men—the balance wheel of the social machinery."[6] More controversially for denominationally minded Protestants, Mann urged that common schools in the United States embrace a pan-Protestant moral curriculum, incorporating readings from the (Protestant) King James Bible but without commentary from a Congregational, Baptist, Presbyterian, or other denominational perspective. Only through this sort of ecumenism, he asserted, could the American republic cope with the convulsive effects of immigration, industrialization, and urbanization. And from that perspective the rise of Catholic education posed a real challenge. Growing numbers of parochial schools threatened the common school's ability to be truly common.[7]

Many Protestants in the late nineteenth century hoped to use public power to stem the tide of private schooling. Protestant ministers joined federal, state, and local officials in detailing the dangers of Catholic schooling, and coalitions with anti-Catholic prejudices between the 1870s and the 1920s pursued state laws that would diminish parochial school attendance. Many New England and Midwestern states prohibited attendance in schools that instructed in foreign languages, a staple of parishes dominated by Catholic immigrant groups. They required parochial school curriculum and teachers to meet educational standards defined by state legislatures and public school boards. Catholic schools had to open their doors to inspection, and report the

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[6] Horace Mann, *First Annual Report*, in *The Republic and the School: Horace Mann on the Education of Free Men*, ed. Lawrence Cremin (New York: Bureau of Publications, Teachers College, Columbia University, 1957), 33.

[7] On Mann and the ideology of common school reformers see Carl Kaestle, *Pillars of the Republic: Common Schools and American Society* (New York: Hill and Wang, 1983), 75-103; William J. Reese, *America's America's Public Schools: From the Common School to "No Child Left Behind"* (Baltimore: Johns Hopkins University Press, 2005), 10-44.

names of students enrolled in their schools to attendance officers. In the 1920s, a resurgent Ku Klux Klan attempted to prohibit private schooling altogether, a movement that succeeded (albeit briefly) in Oregon before the Supreme Court intervened. That ruling (and others like it) saved parochial schools from abolition, but not from public regulation. One author's single-volume compilation of state statutes affecting private schools, completed in 1925, exceeded 100 pages.[8]

Yet parochial school attendance continued to surge despite these laws, growing by roughly 50 percent each decade and presenting historians with a paradox: Why did Catholic schooling expand in a nation seemingly committed to mass public education? In the broader economic language popular both at the time and today, how did educational *markets* and *competition*—the existence of alternatives to public education—emerge given the strong support for a public school *monopoly*? Why and how, in other words, did an educational marketplace emerge in the first place? The answer to this puzzle, I argue, lies in public policy, which significantly forged and structured the scope of private schooling in the United States. Public regulation not only helped expand private schooling, but developed the rules, procedures, and standards to constitute a functioning marketplace.

I

This dissertation thus explores how American government at the state and federal level structured markets—in this case, in education. Historians now recognize that municipal and state governments actively regulated local markets in manifold ways throughout the nineteenth century. Municipal ordinances, for example, delineated which animals could enter the public marketplace, where particular goods could be sold, how animals could be slaughtered, and where

[8] Charles N. Lischka, *Private Schools and State Laws: The Text as Well as a Classified Summary of All State Laws Governing Private Schools, in Force in 1924* (Washington, D.C.: National Catholic Welfare Conference, 1924).

garbage could be placed.[9] State legislatures, meanwhile, fervently protected private enterprises within their borders from competition with out-of-state firms.[10] Historians have a good understanding of how state and local governments managed markets in transportation, energy, finance, labor, and many other areas of private initiative.[11] As a result of this scholarship highlighting an often strong regulatory state, previous assumptions that nineteenth-century American governance was "weak" have been thoroughly debunked.[12]

It was frequently in education where Americans experienced the regulatory state most directly and extensively. By 1900 laws in Northern states mandated that students attend school and dictated when, how, and what they learned. Where nineteenth-century parents had largely controlled their children's education, families at the turn of the century found themselves subordinate to a range of new rules and procedures, compulsory attendance regimes chief among

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[9] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996), 95-96.

[10] Harry N. Scheiber, "State Law and 'Industrial Policy' in American Development, 1790-1987," *California Law Review* 75, no. 1 (January 1987): 415-44; Charles W. McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," *Journal of Economic History* 38, no. 3 (September 1978): 631-49.

[11] The literature on these subjects is enormous. On railroads see Colleen A. Dunlavy, *Politics and Industrialization: Early Railroads in the United States and Prussia* (Princeton, N.J.: Princeton University Press, 1994) and Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: Norton, 2011). On utilities see Charles D. Jacobson, *Ties that Bind: Economic and Political Dilemmas of Urban Utility Networks, 1800-1990* (Pittsburgh: University of Pittsburgh Press, 2000) and Werner Troesken, "Regime Change and Corruption: A History of Public Utility Regulation," in *Corruption and Reform: Lessons from America's Economic History*, ed. Edward Glaeser and Claudia Goldin (Chicago: University of Chicago Press, 2006), 259-84. On banking see John Josephis Wallis, Richard E. Syllva, and John B. Legler, "The Interaction of Taxation and Regulation in Nineteenth-Century U.S. Banking," in *The Regulated Economy*, 121-44. On labor see William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991).

[12] For overviews of state law and regulation in the nineteenth century see William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113, no. 3 (June 2008): 752-772; Novak, *The People's Welfare*; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, MA: Belknap Press of Harvard University Press, 1977); Gary Gerstle, "The Resilient Power of the States Across the Long Nineteenth Century," in *The Unsustainable American State*, ed. Lawrence Jacobs and Desmond King (New York: Oxford University Press, 2009), 61–87; Claudia D. Goldin and Gary D. Libecap, *The Regulated Economy: A Historical Approach to Political Economy* (Chicago: University of Chicago Press, 1994); Thomas McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA: Belknap Press, 1984).

them. Yet, despite the pervasiveness of educational regulation, scholars have only recently begun to explore how states and municipalities managed education markets: how schools themselves competed with one another for students and resources and how governments responded to that competition. William J. Novak's 1996 survey of nineteenth-century law and regulation, for example, left out education altogether.[13] Tracy Steffes' more recent study of educational regulation, meanwhile, largely focused on public schooling, leaving room to explore the relationship between states and the private sector.[14] More encouraging progress along these lines came when the journal *Social Science History* featured a special section on "Education Markets" in 2008, introduced by Nancy Beadie's historiographical essay summarizing the existing literature. While Beadie highlighted a growing interest among historians in private education, teacher labor markets, and the supply and demand for schooling, she noted that "very few studies in the history of education cross the public-private divide" and that historians generally confine their discussions of private education to the period before public systems proliferated, in the mid-nineteenth century.[15]

Education is largely absent from narratives of the regulatory state in large part because historians treat private schools as insignificant forces in the history of American education. Catholic (and to a much lesser extent Lutheran) schools represent an exception to this rule. Yet,

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[13] Novak, *The People's Welfare*, 16.

[14] Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012).

[15] Nancy Beadie, "Toward a History of Education Markets in the United States," *Social Science History* 32, no. 1 (2008): 47-73. Prominent examples work on Antebellum education markets includes Nancy Beadie, "Tuition Funding for Common Schools: Education Markets and Market Regulation in Rural New York, 1815-1850," *Social Science History* 32, no. 1 (2008): 107-33. For a fine-grained account of the market for schooling in New York, see Carl F. Kaestle, "Common Schools before the 'Common School Revival': New York Schooling in the 1790s," *History of Education Quarterly* 12, no. 4 (1972): 465-500. For the role of states in regulating *public* schools see Steffes, *School, Society, and State*.

as Beadie suggested, the histories of public and Catholic schools appear separately, with parallel but unequal stories of growth and systematization during the late nineteenth and early twentieth century. Historians have largely charted developments within public or Catholic school systems: their standardization at the local (or parish) and state (or diocesan) levels,[16] their relationships with politically marginalized communities, including African Americans, immigrants, political radicals, and women,[17] and their curricular and pedagogical reforms, such as those surrounding progressive, or child-centered education.[18] Historians of American education tend to write about public schooling and leave the story of private, parochial education to others—particularly historians of American Catholicism.[19]

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[16] David Tyack, *The One Best System: A History of American Urban Education* (Cambridge, MA: Harvard University Press, 1974); Raymond E. Callahan, *Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools* (Chicago: University of Chicago Press, 1962); Dorothy Shipps, *School Reform, Corporate Style: Chicago, 1880-2000* (Lawrence: Kansas University Press, 2006); Timothy Walch, *Parish School: American Catholic Parochial Education from Colonial Times to the Present* (New York: Crossroads Publishing Company, 1996); James W. Sanders, *The Education of an Urban Minority: Catholics in Chicago, 1833-1965* (New York: Oxford University Press, 1977).

[17] Ira Katznelson and Margaret Weir, *Schooling for All: Class, Race, and the Decline of the Democratic Ideal* (New York: Basic Books, 1985); David Plank and Rick Ginsberg, eds., *Southern Cities, Southern Schools: Public Education in the New South* (Westport, CT: Greenwood Press, 1990); William J. Reese, *Power and the Promise of School Reform: Grassroots Movements during the Progressive Era* (1986; repr., New York: Teachers College Press, Columbia University, 2002); Julia Wrigley, *Class Politics and Public Schools* (New Brunswick, NJ: Rutgers University Press, 1982); Davison M. Douglas, *Jim Crow Moves North: The Battles over Northern School Segregation, 1865-1954* (New York: Cambridge University Press, 2005); Jeffrey E. Mirel, *Patriotic Pluralism: Americanization Education and European Immigrants* (Cambridge: Harvard University Press, 2010); JoEllen McNergney Vinyard, *For Faith and Fortune: The Education of Catholic Immigrants in Detroit, 1805-1925* (Urbana and Chicago: University of Illinois Press, 1998); Paula Fass, *Outside in: Minorities and the Transformation of American Education* (New York: Oxford University Press, 1993).

[18] Lawrence Cremin, *The Transformation of the School: Progressivism in American Education, 1876-1957* (New York: Vintage Books, 1961); James A. Burns, *The Growth and Development of the Catholic School System in the United States* (New York: Benziger Brothers 1912); Thomas E. Woods Jr., *The Church Confronts Modernity: Catholics Intellectuals and the Progressive Era* (New York: Columbia University Press, 2004), 85-118.

[19] Beadie, "Toward a History of Education Markets in the United States," 66.

II

That schools have been absent from scholarly discussions of private enterprise and public regulation would have struck nineteenth-century observers as odd. In growing market towns, private schools were often big businesses, with corporate legal structures along with levels of capitalization and financial success that could rival local banks and textile mills.[20] Writers throughout that century referred to private schools as "private enterprises," understood to be part of a similar sphere of economic activity as bakeries and sawmills. Economists, meanwhile, routinely compared school competition and regulation to the forces affecting other segments in the American economy. Catholics, in turn, frequently discussed their own schools in the language of the marketplace, as "competitive" enterprises attempting to dislodge a "state monopoly." Finally, in the arena of American law few, if any, distinctions separated religious, educational, and business corporations. The dioceses, churches, or religious teaching orders that sponsored parochial schools were private corporations, able to contract and to acquire, hold, and dispose of property with the same vigor as any business corporation.[21] Noting this fundamental similarity, the preeminent scholar of American church law, Carl Zollman, wrote in 1917 that religious corporations are "a mere business agent," as "much a business corporation, within its limited powers, as the International Harvester Company is within its wider powers."[22]

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[20] Nancy Beadie, *Education and the Creation of Capital in the Early American Republic* (New York: Cambridge University Press, 2010), 215-32.

[21] As late as the 1790s the majority of entities holding the corporate form were non-business enterprises: governmental entities (cities, towns, and other units of local government), religious associations, educational institutions, and voluntary associations. Pauline Maier, "The Revolutionary Origins of the American Corporation," *William and Mary Quarterly* 50, no. 1 (January 1993): 53.

[22] Carl Zollman, *American Civil Church Law* (New York: Columbia University, 1917), 78-79. Michael B. Katz terms this strand of educational history and organization "corporate voluntarism." Michael B. Katz, *Reconstructing American Education* (Cambridge, MA: Harvard University Press, 1987), 24-57. For several suggestive attempts to merge the histories of nonprofit, religious, and business corporations see Kenneth Lipartito, "The Utopian

Indeed, educational and religious corporations had an enormous impact on the development of corporate law in the United States more generally, and some of the most significant and far-reaching Supreme Court cases dealing with the relationship between the state and private enterprise centered on private religious and educational corporations.[23] Education was crucial to the development of American law because disputes over the public regulation of private schooling touched on delicate questions of the police power—the state's authority to intervene in private affairs on behalf of the public good. What precisely constituted "public" and "private" in this formulation ultimately became a question for judges to decide. Cases dealing with states regulation of private schools thus became a primary means to define and redefine the scope of the public power.

If historians err in ignoring the important role that parochial schools played in the history of American schooling and private enterprise, those focused on Catholic education also neglect to recognize the ways that law and regulation shaped private school development. Narratives of parochial schooling in the United States frequently cast an embattled Catholic minority overcoming hostile state and non-state actors. And indeed, the extent of nativist and anti-Catholic organizations should not be underestimated: from the Know-Nothings and the American Protective Association in the nineteenth century, to the revitalized Ku Klux Klan and immigration restrictionists in the 1920s. Largely because of these numerous parochial school

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Corporation," in *Constructing Corporate America: History, Politics, Culture*, ed. Kenneth Lipartito and David B. Sicilia (New York: Oxford University Press, 2004), 94-119; Peter Dobkin Hall, "Religion and the Organizational Revolution in the United States," in *Sacred Companies: Organizational Aspects of Religion and Religious Aspects of Organizations*, ed. N.J. Demerath III et. al. (New York: Oxford University Press, 1998), 99-115.

[23] This dissertation discusses three of these cases: Dartmouth College v. Woodward, 17 U.S. 518 (1819), Berea College v. Kentucky, 211 U.S. 45 (1908), and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

opponents, public policy in these accounts represents a threat to Catholic school autonomy and success.[24]

I argue, in contrast, that public policy decisively shaped the educational marketplace in a manner favorable to Catholic school growth. While several prominent parochial school advocates anticipated that uninhibited educational competition, not state regulation, would best serve American schooling, the experience of America's cities suggested otherwise. Public regulation proved immensely powerful and, far from hindering parents' ability to choose schools, facilitated private education's expansion. State constitutions and legislatures provided parochial schools with backdoor fiscal subsidies, enabling them to redirect savings from their tax-exempt status into new buildings and student scholarships. Parochial schools also benefited from state-employed truant officers tasked with enforcing attendance in public and private schools alike. Most importantly, state regulations standardized the diffuse curriculum and teaching practices in public and private schools. Parents transferred their children from public to private schools with the understanding that the latter fit within the state's minimal education standards, and that their choice would not result in their child suffering academic or professional harm. From the perspective of school officials, meanwhile, more sophisticated pupil accounting mechanisms ensured that transfers between schools would occur efficiently, without students and their

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[24] Narratives of conflict between states and parochial schools include Lloyd Jorgenson, *The State and the Non-Public School, 1825-1925* (Columbia: University of Missouri Press, 1987); Randall E. Vance, *Private Schools and Public Power: A Case for Pluralism* (New York: Teachers College Press, 1994); Ward M. McaFee, *Religion, Race, and Reconstruction: The Public Schools in the Politics of the 1870s* (Albany: State University of New York Press, 1998); and James C. Carper and Thomas C. Hunt, *The Dissenting Tradition in American Education* (New York: Peter Lang, 2007). The literature on battles over particular state regulations affecting parochial schools is also large. See, e.g., William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927* (Lincoln: University of Nebraska Press, 1994); Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (Ann Arbor: University of Michigan Press, 2009); Vinyard, *For Faith and Fortune*; Richard J. Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888-1896* (Chicago: University of Chicago Press, 1971). Benjamin Justice deemphasizes the extent of religious conflict between Catholics and public schools in *The War that Wasn't: Religious Conflict and Compromise in the Common Schools of New York State, 1865-1900* (Albany: State University of New York Press, 2005).

records getting lost in the system. State and federal courts joined legislatures and school boards in forging a robust and regulated educational marketplace. They protected Catholic schools from wanton legislative discrimination, while codifying the scores of public regulations that had proved essential to promoting Catholic education.

Public regulations did not simply intervene in education markets; they constituted them. Public laws defined what schools parents could choose from and structured how parents made those choices. They provided financial incentives for parochial schools to open their doors to inspectors, and raised educational standards for parents and children anxious about Catholic education's reputation among high schools, colleges, and employers. As with the outdoor public marketplaces of the nineteenth century, which the political scientist Daniel Carpenter has described as "literally made by state regulation and government rules," public regulation of schools not only expanded but enabled competition.[25]

This close connection between public policy and private markets was neither accidental nor unusual. As numerous scholars of American political development recently have argued, policymakers in the United States frequently relied on the private sector to obtain public ends. In the nineteenth and early twentieth century states collaborated with private organizations—from railroads to charities—to expand their governing capacity, using techniques like subsidies, grants, and laws of incorporation. Public officials in the Gilded Age and Progressive Era, likewise, relied on regulation not only to supervise private schools, but to govern through them:

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[25] Daniel Carpenter, "Regulation," in *The Princeton Encyclopedia of Political History*, ed. Michael Kazin, Rebecca Edwards, and Adam Rothman (Princeton, N.J.: Princeton University Press, 2009), 2:665. See also Daniel Carpenter, "Confidence Games: How Does Regulation Constitute Markets?" in *Government and Markets: Toward a New Theory of Regulation*, ed. Edward J. Balleisen and David A. Moss (New York: Cambridge University Press, 2009), 164-92.

"borrowing" their capacity to educate mass numbers of children.[26] Local public school administrators understood that mass private school attendance provided immense fiscal relief to beleaguered municipal budgets and overcrowded public schools, since parents whose children were educated privately paid property taxes for (public) schools they did not use. Given the large percentages of children attending urban parochial schools, even anti-Catholic city school administrators understood that private schools fulfilled an enormously public function. Elected officials, too, learned the benefits of appeasing constituencies with ties to Catholic schooling. Political competition over Catholic immigrant voters ensured that legislators would attack parochial schooling only at their peril. The resulting alliance between public officials and private education reflected the shape of the American regulatory state more broadly, marked by close (though often obscured) ties between public power and private enterprise.[27]

As this study demonstrates, the rhetoric of "markets" and "choice" in education is not distinct to our current era. Nonetheless, these concepts operated differently a century ago. Parents certainly chose between schools, and the language of educational "monopoly" and "competition" pervaded formal discussions about the political economy of schooling, particularly among Catholics. But to equate the past with the present would be a mistake. School choice advocates today point to the relationship between educational competition and educational quality as measured by test scores, graduation rates, and job skills. These metrics

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[26] For more on "borrowed capacity" see Elizabeth Clemens, "Lineages of the Rube Goldberg State: Building and Blurring Public Programs, 1900-1940," in *Rethinking Political Institutions: The Art of the State*, ed. Ian Shapiro, Stephen Skowronek, and Daniel Dalvin, (New York: NYU Press, 2006), 187-215; Novak, "The Myth of the 'Weak' American State"; William J. Novak, "Public-Private Governance: A Historical Introduction," in *Government by Contract: Outsourcing and American Democracy*, ed. Jody Freeman and Martha Minow (Cambridge, MA: Harvard University Press). 23-40;

[27] On the "hidden" American state see Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); Adam Sheingate, "Why Can't Americans See the State?" *The Forum* 7, no. 4 (2009): Article 1, 1-14.

existed to some extent in the nineteenth century as well, and Catholic school proponents occasionally expressed their conviction that their students could outperform public school students on standardized assessments.[28] Yet important differences remain between the past and the present. Parents and children a century ago did not obsess over educational credentials and student achievement as they do today. Because the majority of children did not attend let alone graduate from high school, Americans placed far less of an emphasis on educational attainment. Parents certainly saw education as an important component of upward mobility, but that aim coexisted—and sometimes even competed—with the aspiration that schools should primarily transmit religious, ethnic, and linguistic traditions.[29] Theories of educational competition in the nineteenth century generally were more inchoate, more bound up with religious and cultural expectations, and dramatically less tethered to employment markets or quantitative assessment. Education researchers and policymakers can learn from the experience of school competition and regulation a century ago, but this story eludes simple parallels between the past and the present.

III

This dissertation charts the rise of parochial schools in American cities and explores how local and state governments, along with federal courts, responded.[30] Because well over a

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[28] On nineteenth-century testing see William J. Reese, *Testing Wars in the Public Schools: The Forgotten History* (Cambridge, MA: Harvard University Press, 2013).

[29] On the complex relationship between schooling and immigrant groups in the period see Stephen Lassonde, *Learning to Forget: Schooling and Family Life in New Haven's Working Class, 1870-1940* (New Haven: Yale University Press, 2007); Mirel, *Patriotic Pluralism*; Joel Perlmann, *Ethnic Differences: Schooling and Social Structure among the Irish, Italians, Jews, and Blacks in an American City, 1880-1935* (New York: Cambridge University Press, 1989); Fass, *Outside in: Minorities and the Transformation of American Education* (New York: Oxford University Press, 1993).

[30] For a history of these laws see Sister Raymond McLaughlin, *A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States: 1870-1945* (Washington, D.C.: Catholic University of America Press, 1946); for a history of Catholic education generally see Walch, *Parish School*.

majority of private school students attended Catholic institutions, it discusses only in passing other organizations responsible for private education. The chapters that follow travel through Rhode Island, Pennsylvania, Ohio, Massachusetts, Wisconsin, Illinois, and other Northern states between 1870 and 1930, focusing on how city and state governments supervised private schools, while acknowledging the important and subtle ways that local contexts influenced public regulations.[31] They also explore how political economists, national education leaders, lawyers, and courts addressed debates surrounding educational competition.

Why historians rarely mention schools when charting the development of the American regulatory state is itself partly a historical question. Chapter One provides an overview of how political economists theorized education in the nineteenth century. Chapter Two traces how new parochial schools in Pittsburgh, Pennsylvania and elsewhere transformed urban education and neighborhoods. Public school systems responded first by attempting to adapt to their new competitors. The second response, explored in the remainder of the dissertation, was to regulate the new parochial schools. Chapter Three turns to the origins of these laws in Rhode Island, before exploring how, in the 1870s and 1880s, Catholic school authorities embraced public regulation in return for maintaining their property tax exemptions. Chapter Four addresses new compulsory attendance laws and their enforcement in in Massachusetts, Rhode Island, Wisconsin, and Illinois during the 1880s. Chapter Five turns to the long period between 1890 and 1930, charting how new laws and administrative agencies governed dueling public and

[31] I focus on the North because Southern schooling—with its belated adoption of public school systems, blurred distinctions between public and private, rural character, racial apartheid, and smaller Catholic population—in the period under investigation was largely distinct and merits a separate investigation. On education markets in the South see, e.g., Nancy Beadie and Kim Tolley, "Socioeconomic Incentives to Teach in New York and North Carolina: Toward a More Complex Model of Teacher Labor Markets, 1800-1850," *History of Education Quarterly* 46, no. 1 (2006): 36-72; David Plank, "Educational Reform and Organizational Change: Atlanta in the Progressive Era," in *Southern Cities, Southern Schools: Public Education in the New South*, ed. David Plank and Rick Ginsberg (Westport, CT: Greenwood Press, 1990), 133-49.

Catholic school systems. Chapter Six describes how federal courts, most notably in *Pierce v. The Society of Sisters* (1925), sanctioned and solidified public regulation and in doing so saved private education from outright abolition. As Americans continue to debate the role of the state in providing and regulating education, schooling in the United States—whether public or private—will likely continue to reflect deep public demands. The Epilogue traces the ways in which ideas and practices of public regulation have remained powerful into the twentieth and twenty-first century.

Chapter One

Education and Political Economy in the Nineteenth Century

In the 1850s and 1860s advocates of public education foresaw a future with few, if any, private schools. Public systems had been growing rapidly in Northern states, and supporters eagerly noted that their rise had come at private education's expense. A "healthful competition has sprung up" observed H.H. Barney, a principal of a Cincinnati public high school, in 1851. Private schools "are discontinued for want of patronage" and parents everywhere, it seemed, preferred public education. Since the "public school is always better than the private," Barney wrote, "the schools which did not come up to the highest mark"—the private schools—"have gone down in public estimation."[1] Others agreed. In a small town in upstate New York a school commissioner noted that "no private schools" in his town "were reported to the Trustees; and we were congratulating ourselves upon the triumph of the common schools during the past year over every private enterprise of the kind."[2] In 1868 the Illinois superintendent of public instruction happily penned that "the public schools are steadily weakening and decimating private schools" before "ultimately crowd[ing] them almost wholly from the field."[3] Public school reformers agreed the public system would soon obliterate private alternatives.[4]

These observations pointed to how the rise of public school systems in the Northern United States transformed the market for formal education. The competitive and largely private

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[1] H. H. Barney, *Report on the American System of Graded Free Schools, to the Board of Trustees and Visitors of Common Schools* (Cincinnati: Daily Times, 1851), 24.

[2] "Reports of School Commissioners and City Superintendents," in *Twelfth Annual Report of the State Superintendent of Public Instruction, of the State of New York* (Albany: C. Wendell, 1866), 117.

[3] *Seventh Biennial Report of the Superintendent of Public Instruction of the State of Illinois, 1867-1868* (Springfield: Illinois Journal Printing Office, 1869), 24-25.

[4] See also the Massachusetts politician and education secretary George Boutwell's *Thoughts on Educational Topics and Institutions* (Boston: Phillips, Sampson and Company, 1859), 42, 68, 152-63.

provision of schooling that existed in the first decades of the nineteenth century, particularly in cities, morphed into a largely public, uncompetitive one. These changes occurred relatively swiftly. Within fifty years, beginning in the first three decades of the nineteenth century, privately operated and tuition-based schools, along with free "charity" schools for the poor, gave way to a tax-funded, publicly-operated, and state-regulated public school system.[5]

Prior to the mass acceptance of free public schooling, the majority of children in Northern cities attended a range of privately governed schools, including entrepreneurial "venture schools," charity schools operated by churches and towns, and academies and seminaries. These schools competed with one another for children's tuition payments and, with the preponderance of religious sponsors, for their souls as well. Local and state governments were not absent from education: they often subsidized schooling for the poor and regulated various aspects of educational quality through laws of incorporation. But the provision of schooling resembled a marketplace, driven more by consumer choices than by public policy.[6]

This privately governed matrix of schooling changed as Northern states during the 1840s and 1850s increasingly directed their treasury money toward newly constituted, publicly governed school systems. Unable to compete with state schools, the vast numbers of tuition schools in cities decreased considerably. Several factors explained the decline in private school attendance between 1830 and 1870. Reformers embraced centralized public systems as efficient

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[5] The definitive account of the rise of common school systems remains Carl F. Kaestle's *Pillars of the Republic: Common Schools and American Society* (New York: Hill and Wang, 1983). See also Jurgen Herbst, "Nineteenth-Century Schools between Community and State: The Case of Prussia and the United States," *History of Education Quarterly* 42, no. 3 (2002): 317-41; William J. Reese, "Changing Conceptions of 'Public' and 'Private' in American Educational History," in *History, Education, and the Schools* (New York: Palgrave Macmillan, 2007), 95-112.

[6] Nancy Beadie, "Toward a History of Education Markets in the United States," *Social Science History* 32, no. 1 (2008): 47-73; Carl F. Kaestle, "Common Schools before the 'Common School Revival': New York Schooling in the 1790s," *History of Education Quarterly* 12, no. 4 (1972): 465-500.

institutions capable of shaping and controlling the emerging capitalist, industrial social order.[7] But public schools' popularity was not limited to particular classes. Urban working and middle class families also saw much to like in the "common" schools: free and innovative instruction, graded classrooms, a generically Protestant curriculum, and, in growing cities, large public high schools like the one that H.H. Barney oversaw in Cincinnati.[8] Many upper and middle-class families continued to send their children to private schools, but common school advocates assumed—or at least hoped—that the public system's superiority would ultimately attract them as well. As a result of this transformation the vast majority of private schools either closed their doors or transitioned into public hands. By the 1870s, public schools had become the dominant educational provider in the North.[9]

While the story of this institutional transformation is familiar to historians, the intellectual revolution that accompanied it remains unexplored. Ideas of educational competition also shifted over the course of the nineteenth century, particularly in the North and over debates about mass education in the elementary subjects. Writing in the early part of the century, American political economists influenced by Adam Smith, the Scottish political economist and

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[7] Michael B. Katz, *Reconstructing American Education* (Cambridge, MA: Harvard University Press, 1987), 5-23.

[8] Ira Katznelson and Margaret Weir, *Schooling for All: Class, Race, and the Decline of the Democratic Ideal* (New York: Basic Books, 1985), Chapter 2. On the role of public high schools in attracting middle-class families into the common schools, see William J. Reese, *The Origins of the American High School* (New Haven: Yale University Press, 1999), 80-102. See also David Tyack, *Seeking Common Ground: Public Schools in a Diverse Society* (Cambridge, MA: Harvard University Press, 2003), 158-80.

[9] Historians' estimation of when this tipping point occurred differ. Lawrence Cremin interpreted the results of the 1850 Census as evidence that "publicly supported schools had already assumed the primary burden of the formal education of the American young." Albert Fishlow, relying on tax expenditures rather than student enrollments, argued that the transition happened between 1850 and 1870. In that latter year, "two-thirds of educational outlay was public, primary taxes, and more than 90 per cent of public school funds had a public source." See Lawrence A. Cremin, *The American Common School: An Historic Conception* (New York: Bureau of Publications, Teachers College, Columbia University: 1951), 179; Albert Fishlow, "The American Common School Revival: Fact or Fancy?" in *Industrialization in Two Systems: Essays in Honor of Alexander Gerschenkron*, ed. Henry Rosovsky (New York: John Wiley and Sons, 1966), 41, 54.

moral philosopher, argued that competition ought to be central to regulating the economy and education alike. While American scholars in the early nineteenth century often desired a greater role for state intervention in education than did Smith—himself an advocate of targeted public subsidies—most agreed that schools were similar to other market goods, and that educational competition was a virtue.

By the century's end, however, a new generation of American political economists no longer believed that competition should regulate all markets with equal efficiency. Responding in large part to the economic theories of the British social theorist Herbert Spencer, they argued that publicly operated, regulated, and noncompetitive schools could provide mass education with greater equity and efficiency than could competitive, private providers. These young economists pointed to areas of the economy where they believed the mechanisms of competition failed to operate, and asserted that many enterprises previously considered "private" and competitive were better suited for public, noncompetitive regulation or ownership. Schools, they held, fit into this latter category. Instead of likening schools to small, competitive firms, they frequently described public education as a "natural monopoly," akin to railroads and public utilities.

These late nineteenth-century attacks on educational competition did not go uncontested. Roman Catholic advocates of private, parish schooling maintained a commitment to competition in education, fearing that public education would grow to become a hostile "state monopoly." Much of this support came by necessity, as Catholic school defenders believed that the scholarly assault on educational competition reflected an inherent Protestant bias. They interpreted the abstract economic arguments of the young political economists as a front for their support of particular institutions (the public school) and their disdain for competitors (the Catholic school). Catholic ideas about political economy as a whole tended to look suspiciously on the amoral

forces of supply and demand. In the realm of education, however, Catholics defended their institutions by using the economic language of competition and efficiency.

I

The theoretical virtues of educational competition were hardly unique to the nineteenth century. As early as the fifteenth century British judges praised a competitive system of schooling over one monopolized by a single educational provider. In the Gloucester Schoolmaster's case of 1410, a court found that the teachers of a local school had no legal recourse to damages when the competitive pressures from a new rival forced them to lower tuition. As one judge commented at the time, when an "equally competent [instructor] comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law." Rivalry certainly harmed the old teachers, but it benefited the townspeople.[10]

The benevolent role of competition referred to by the judges in the Schoolmaster's case formed the basis of Adam Smith's economic theories, which dominated American political economy in the early nineteenth century. The prominent place American political economists gave to educational competition reflected the immense influence of Smith's *Wealth of Nations* (1776), which highlighted the centrality of competition to economic and educational welfare. In

[10] Y.B., 11 Henry IV., f 47, p. 21 (1410), reprinted in James Barr Ames, *A Selection of Cases on the Law of Torts, Volume I* (Cambridge, MA: John Wilson and Son, 1893), 679-80. American legal scholars writing in the nineteenth and early twentieth centuries treated the Gloucester Schoolmaster's case as a seminal moment in legal history. In their textbooks, students of corporate and tort law learned that the case served as the first known recognition in Anglo-American law that courts would not necessarily protect the value of one's property from competition. See, e.g., Bruce Wyman, *Control of the Market: A Legal Solution to the Trust Problem* (New York: Moffat, Yard and Company, 1911), 12-13. See also Howard A. Taylor, "The Meaning of Some Terms in the Law of Torts—II," *The Counsellor: The New York Law School Law Journal* 2 (1892-93): 171-72; Homer Blosser Reed, "The Morals of Monopoly and Competition," *International Journal of Ethics* 26, no. 2 (1916): 260; Milton Handler, "Unfair Competition," *Iowa Law Review* 21 (1935-36): 180-81; William Carey Jones, "Law of Torts, Part VII: Interference with Domestic, Contractual and Business Relations," in *Modern American Law*, ed. Eugene Allen Gilmore. (Chicago: Blackstone Institute, 1914), 330.

that work, Smith provocatively argued that market competition itself—namely, the rivalries between all consumers and producers—not state control, would provide the economy with the most efficient regulatory mechanism. In a world in which self-interest ruled, he asserted, these rivalries ensured that individual behavior would tend toward beneficial outcomes, not destructiveness. In markets regulated by competitive pressures, producers would have to set reasonable prices and rents, pay decent wages, and produce valuable goods. Failure to do so would result in their ruin, as other producers who charged less for goods and offered better wages to laborers would displace them in the marketplace.[11]

According to Smith, state intervention in the economy, particularly in the form of government-chartered monopolies, could potentially distort this competitive system. Whereas competition maintained market prices at what Smith considered their "natural" rates, monopolies artificially inflated them. Trade protections benefited a single producer at the expense of thousands of consumers. Joint stock companies receiving state subsidies or monopoly rights prevented more efficient firms from entering into the competitive marketplace. As Smith's classical economic and legal theory developed in Britain and the United States, its single, guiding principle was to end the exclusive, monopolistic privileges bestowed by government charters and contracts. Government was hardly the tool to break up monopolies, as Progressive Era reformers later would conceive of them. Rather, Smith argued, it enabled monopoly.[12]

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[11] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Dublin: Whitestone et. al. 1776). My interpretation of Smith's understanding of competition draws heavily from John T. Nockleby, "Two Theories of Competition in the Early 19th Century Labor Cases," *American Journal of Legal History* 28, no. 4 (1994): 452-81, as well as George J. Stigler, "Perfect Competition, Historically Contemplated," *Journal of Political Economy* 65, no. 1 (1957): 1-17.

[12] Nicholas Phillipson, *Adam Smith: An Enlightened Life* (New Haven: Yale University Press, 2010), 205-32; Gary M. Anderson and Robert D. Tollison, "Adam Smith's Analysis of Joint-Stock Companies," *Journal of Political Economy* 90, no. 6 (December 1982): 1237-56; Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991), 114-15, 190.

Smith applied these ideas about competition and monopoly to schooling, even while recognizing that states had an important role to play in enabling an elementary education for all. He scorned proposals whereby states wholly financed a public system, but acknowledged that governments must partially fund (and even compel attendance in) schools for the poor. Smith maintained that schools could operate efficiently only insofar as parents used their resources to make choices between competing educators, rendering teachers subject to the laws of supply and demand. Schemes that fully funded teachers and schools distorted the salutary effects of rivalry. Talented teachers who relied on private tuition payments would be reduced to penury, unable to compete with even the most ineffective public instructors who, by virtue of their subsidies, could charge parents less.[13] For Smith, efficient instruction required competition between teachers dependent at least in part on private parental payments. While never a proponent of educational *laissez faire*, Smith nonetheless held that the logic of markets, generally, applied to schools, teachers, and parents.[14]

Smith's ideas about competitive education and limited government intervention pervaded the thought of early nineteenth-century political economists in the United States.[15] An 1834 *New-*

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[13] Smith compared this dynamic to "a merchant who attempts to trade without a bounty, in competition with those who trade with a considerable one." Smith, *Wealth of Nations*, 3:133. Generally, see Smith, *ibid.*, bk. V, ch. I, pt. III, art. II-III.

[14] Ibid., 133. See also E.G. West, "Private Versus Public Education: A Classical Economic Dispute," *Journal of Political Economy* 72, no. 5 (1964): 465-66; Margaret G. O'Donnell, *The Educational Thought of the Classical Political Economists* (Latham, MD: University Press of America, 1958), 74, 94.

[15] *The Wealth of Nations*, which had praised colonial America's economic policies, received a warm and thorough reception among the American Founding generation as well. See Samuel Fleischacker, "Adam Smith's Reception among the American Founders, 1776-1790," *The William and Mary Quarterly* 59, no. 4 (2002): 897-924; Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Belknap Press of Harvard University Press, 1998), 81. For an overview of Antebellum American political economic thought see Joseph Dorfman, *The Economic Mind in American Civilization*, vol. 2 (New York: Viking Press, 1946); David F. Prindle, *The Paradox of Democratic Capitalism: Politics and Economics in American Thought* (Baltimore: Johns Hopkins University Press, 2006), 54-97, and Paul K. Conkin, *Prophets of Prosperity: America's First Political Economists* (Bloomington, IN: Indiana University Press, 1980).

York Evening Post editorial by the free-trade advocate and journalist William Leggett exemplified this influence. Leggett denounced free public education as suppressive of competition. Anticipating that his views would strike some Americans as "a little free-trade crazy," he played his trump card: much of his column simply copied, verbatim, Adam Smith's "immortal" *The Wealth of Nations*.[16] Once American readers realized that the origins of his arguments lay in Smith's own ideas, Leggett believed, they would undoubtedly accept them.

Smith's theories permeated contemporary Northern colleges as well, leaving few scholarly proponents of free public education. One of the most widely used textbooks in political economy was the French economist Jean-Baptiste Say's *Treatise on Political Economy* (first published in English in 1824), which exposed Smith's ideas about education to elites. In Say, as in Smith, students read that excessive public subsidies would drive even the best private teachers out of the marketplace, and thus "talent may be superseded by mediocrity."[17] The New England economist Francis Wayland's *Elements of Political Economy* (1837), which soon surpassed Say's in popularity among college instructors, also contained Smith's core educational prescriptions. It joined South Carolina College professor Thomas Cooper's *Lectures on the Elements of Political Economy* (1826) in echoing the conviction that even poor parents should supply private tuition payments for schooling to spur an interest in their child's education and inspire teachers to instruct more effectively.[18] This deference to educational competition was

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[16] William Leggett, "Literary Corporations," *Evening Post*, November 26, 1834, in *A Collection of the Political Writings of William Leggett,* ed. Theodore Sedgwick Jr. (New York: Taylor & Dodd, 1840), 1:171-78.

[17] Jean-Baptiste Say, *A Treatise on Political Economy; or the Production, Distribution, and Consumption of Wealth*, trans. C. R. Prinsep (Boston: Wells and Lilly, 1821), 3:230.

[18] Francis Wayland, *Elements of Political Economy* (New York: Leavitt, Lord & Company, 1837), 457-58; Thomas Cooper, *Lectures on the Elements of Political Economy*, (Columbia, S.C.: Telescope Press, 1826), 266-68. On antebellum political economy textbooks see Dorothy Ross, *The Origins of American Social Science* (New York: Cambridge University Press, 1991), 42-43.

pervasive. The Boston economist Willard Phillips, despite desiring a fairly robust state role in education, spoke for most American political economists when he praised Smith in 1828 for leaving "room enough . . . for individual effort and the effect of competition in education."[19] These arguments, made in a time when America lacked state-supported systems of public instruction, reflected the widespread view that education was largely analogous to other market goods, and would benefit similarly from healthy doses of competition.

Early nineteenth-century political economists also shared Smith's desire for some degree of state intervention in schooling. Jean-Baptiste Say, for example, conceded to his American readers that elementary schooling would be "so little stimulated by the competition of demand" that it required some form of public aid.[20] Indeed, American scholars on the whole tended to reserve a larger role for state support than did the *Wealth of Nations*. Willard Phillips explicitly rejected Smith's argument that governments should provide education only for the poor, rather than for all. He declared Smith's views to be illiberal, particularly in the United States, where literacy was far more widespread and class boundaries less rigid. Were education wholly "abandoned to the operation of demand and private competition," Phillips concluded, the result would be less equality of educational opportunity and outcomes.[21] In contrast to Smith, American political economists in the early nineteenth century were generally more comfortable extending public aid for the elementary education of all white children.[22]

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[19] Willard Phillips, *A Manual of Political Economy, with Particular Reference to the Institutions, Resources, and Condition of the United States* (Boston: Hilliard, Gray, Little, and Wilkins, 1828), 270-71.

[20] Say, *A Treatise on Political Economy*, 181.

[21] Phillips, *A Manual of Political Economy*, 270-71.

[22] See, e.g., Rev. John McVickar, *Outlines of Political Economy* (New York: Wilder & Campbell, 1825), 102; and Samuel P. Newman, *Elements of Political Economy* (New York: H. Griffin and Company, 1835), 323-24. Smith's emphasis on the educational incentives provided through parental demand had critics in England as well. Writing in

Americans' near-universal support for public schemes of mass education represented a self-consciously "enlightened" attempt to chart a different path from Europe's rigid class boundaries, monarchies, and established churches. When American revolutionaries swept away English rule in the 1770s, they tasked themselves with establishing a republican form of government whose rule depended on an "informed citizenry" of white men—albeit amid a permanent racial caste of African-descended slaves.[23] Maintaining a republican polity depended on the state assuming a larger role in educating all white men (and, frequently, women) to become "republican machines" (and women into "republican mothers"), as Benjamin Rush proposed in 1786.[24] Schools would eliminate any vestiges of monarchy from American life, and whereas England weathered intense debates over educating the poor, Americans in the early nineteenth century rarely suggested that universal white male education might disturb the natural social order. Educating African Americans represented a threat to established social hierarchies, but, to many, schooling poor whites seemed a necessity.[25]

American elites also believed that mass state-sponsored schooling would instill moral and religious values absent the strong educational influence of an established church. Although states did not uniformly end their tax support for churches until several decades into the nineteenth

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the 1780s, Vicesimus Knox argued that excessive reliance on parents, generally, undermined schools' ability to enforce discipline, teach difficult subjects, and free children from domestic vice. On Knox, see Michèle Cohen, "Gender and the Private/Public Debate on Education in the Long Eighteenth Century," in *Public or Private Education? Lessons from History*, ed. Richard Aldrich (London and Portland, OR: Woburb Press, 2004), 17-19.

[23] Richard D. Brown, "Bulwark of Revolutionary Liberty: Thomas Jefferson's and John Adams's Programs for an Informed Citizenry," in *Thomas Jefferson and the Education of a Citizen*, ed. James Gilreath, (Washington, D.C.: Library of Congress, 1999).

[24] Benjamin Rush, "A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania," in *Essays on Education in the Early Republic*, ed. Frederick Rudolph (Cambridge, MA: Belknap Press of Harvard University Press, 1965), 15-16.

[25] Kaestle, *Pillars of the Republic*, 33.

century, Americans nonetheless recognized that the nation lacked any equivalent to the Church of England. Without centralized religious authority, states would have to assume a larger role in providing education. Most Americans embraced this new responsibility. As Samuel Knox observed in his 1797 plan for a national system of education in the United States, "it is a happy circumstance peculiarly favorable to an uniform plan of public education that this country hath excluded ecclesiastical from civil policy and emancipated the human mind from the tyranny of church authority and church establishments."[26] In the United States, civil governments gradually would have to fill the educational void left by disestablished churches.

Finally, federalism also influenced educational thought in early America. The same political economists who trumpeted the virtues of free trade and competition among nations agreed that individual towns or states possessed the duty to regulate education and impede competition. Thomas Cooper, for example, deemed all national trade barriers unnecessary. Yet he carved out large roles for state governments in furnishing and standardizing elementary instruction in his *Lectures*. For Cooper, states possessed vast regulatory powers, or "police laws," that included state promotion of education and regulation of competition. That the federal government did not share these same rights only reinforced their centrality at the state and local level. Cooper exemplified the belief among American political economists that state and local governments possessed substantial powers to intervene in public and private life, including in education.[27]

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[26] Samuel Knox, "An Essay on the Best System of Liberal Education," in *Essays on Education,* ed. Rudolph, 315.

[27] Cooper, *Lectures on the Elements of Political Economy*, 264-66; Dorfman, *The Economic Mind in American Civilization,* 527.

Thus did interweaving traditions of republicanism, disestablishment, and federalism help explain why American political economists supported a greater state role. Thomas Jefferson's educational thought captured these influences well. Jefferson, a Virginia slaveholder and avid reader of political economy—he admired both Jean-Baptiste Say and Thomas Cooper—sought a more significant state provision of schooling than did most adherents of Adam Smith.[28] The preamble to his 1779 "Bill for the More General Diffusion of Knowledge" famously described the need for widespread education in order to stabilize republican governments, which were widely viewed as inherently unstable. That Jefferson had drafted his "Bill for Establishing Religious Freedom" two years earlier was no coincidence. Absent the authority of a nationally established church, the United States would need to be stitched together through the more subtle use of state policy—one that balanced local traditions with the demands of government. In theory, Jefferson's proposal—a tiered system of mass education for the young that gradually funneled selected male students into more advanced schooling—accomplished this aim. A state-driven plan by definition, Jefferson's proposal outlined the methods of local educational administration, curriculum, attendance, and finance. It mandated that the poor attend the lowest tier of schools free of charge, and that the best students be selected for subsequent tiers according to merit rather than ability to pay. While Jefferson's plan involved a significant degree of decentralized educational decision-making, the role it gave to state authorities rankled other Virginia legislators concerned about local control, who declined to enact it. Nonetheless, its

[28] Jefferson wanted them both as professors at the University of Virginia. See Herbert Baxter Adams, *Thomas Jefferson and the University of Virginia* (Washington, D.C.: Government Printing Office, 1888), 56-65.

contents conveyed the American political elite's anxiety over a populace—slaves notably excluded—whose education would be left entirely to private enterprise.[29]

II

American political economists' support for a competitive educational marketplace gradually dissipated over the course of the nineteenth century. Scholars proposed more ambitious, publicly funded schemes, departing from Smith's concerns about the efficacy of state spending on education. As early as 1838, the University of Pennsylvania political economist Henry Vethake wrote that "very few educated men will be any where found to object" to the "propriety of a legislative appropriation of the public money to the support of common schools, in which every child in the community may have an opportunity of acquiring the elements of an education."[30] College students who turned to the 1878 edition of Francis Wayland's textbook read that a "system of public education *must* provide free schools open to all classes," a far cry from the sentiments expressed in that volume's first edition from a half-century earlier.[31]

Much had changed in these middle decades of the nineteenth century. By 1870, schooling in the urban North functioned less like a competitive marketplace than it had in 1800. Public regulation, not competition, had won the day as far as schools were concerned. In the 1870s, Northern states, cities, and school districts published lists of school regulations running to dozens of pages, detailing scores of rules affecting attendance, administration, finance, and discipline.

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[29] Thomas Jefferson, "A Bill for the More General Diffusion of Knowledge," in *The Educational Work of Thomas Jefferson*, ed. Roy J. Honeywell (Cambridge, MA: Harvard University Press, 1931), 199-205.

[30] Henry Vethake, *The Principles of Political Economy* (Philadelphia: P.H. Nicklin and T. Johnson, 1838), 318.

[31] Francis Wayland, *The Elements of Political Economy*, ed. Aaron L. Chapin (New York: Sheldon & Company, 1879), 114. Emphasis in the original.

Compulsory attendance statutes proved the most theoretically invasive.[32] Between 1867 and 1883, the number of states with compulsory attendance statutes increased from a single one—Massachusetts—to fourteen. The "restraints and regulations affect almost everything imaginable," wrote the journalist Albert Shaw in 1887 in a wide-ranging essay on state regulation. Shaw singled out public schools—free, tax-supported high schools, in particular—as among the most prominent areas where governments "emphatically repudiate" unrestricted competition.[33] Northern school boards, departments of instruction, legislatures, and state courts were slowly shifting educational governance away from parents and local neighborhoods and toward centralized control, a process that continued well into the twentieth century.[34] Alongside these developments, a rising generation of political economists rarely discussed the virtues of educational competition as they had in the half-century after the *Wealth of Nations*. Nor did they liken schools to other market goods. Instead, they compared schools to railroads and public utilities—areas of the economy that were increasingly characterized by heavy public regulation or outright public ownership.

As Smith's influence in educational thinking waned, a new generation of political economists found a potentially powerful antagonist in the immensely influential British philosopher Herbert Spencer. Spencer's midcentury advocacy of free competition, minimal

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[32] See, e.g., Board of School Commissioners of Milwaukee, *Rules and Regulations of the School Board of the City of Milwaukee* (Milwaukee, 1884); *The School Manual: Containing the School Laws of Rhode Island; with Decisions, Remarks and Forms for the Use of School Officers of the State* (Providence: Providence Press Company, 1873).

[33] Albert Shaw, "The American State and the American Man," *The Contemporary Review* 51 (May 1887): 698, 705-10.

[34] Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012); David Tyack, *The One Best System: A History of American Urban Education* (Cambridge: Harvard University Press, 1974).

government, and the "survival of the fittest" attracted numerous Americans and also generated opposition. Spencer's influential early work on the individual and the state, *Social Statics* (1851), had extolled the virtues of competition in ways that went well beyond the *Wealth of Nations*. His treatment of education was no exception. Comparing children to property and schooling to private industries such as French manufactures and English dye-makers, Spencer had insisted that education, "like the choice of all other commodities, may be safely left to the discretion of the buyers." Unlike Smith, Spencer held that governments should not even provide education for the poor. The competitive market would generate unequal outcomes, he admitted, but so too would state-run education, which "would be administered for the advantage of those in power rather than the nation." To Spencer, government regulation of education usually stifled competition and suppressed "innovation" in the same ways that governments "encumbered" manufacturing with unnecessary regulations and tariffs.[35] In the United States, Spencer's most ardent supporters penned their own assaults on state education in journals such as the *Popular Science Monthly*.[36] While his philosophy was never perfectly in tune with pro-business, unregulated capitalism, that was how Spencer's American promoters and critics largely interpreted it, making him the perfect straw man for opponents of *laissez faire*.[37]

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[35] Herbert Spencer, *Social Statics: Or, the Conditions Essential to Human Happiness Specified, and the First of them Developed* (London: John Chapman, 1851), 332-41.

[36] See, e.g., "Functions of the State," *Popular Science Monthly* 30 (March 1887): 701-2; "State Education," *ibid.* 31 (June 1887): 124-27; Franklin Smith, "The Real Problems of Democracy," *ibid.* 56 (November 1899): 6-9.

[37] Mark Francis, *Herbert Spencer and the Invention of Modern Life* (Ithaca, NY: Cornell University Press, 2007), 2. On Spencer's reception in America, see Barry Werth, *Banquet at Delmonico's: Great Minds, the Gilded Age, and the Triumph of Evolution in America* (New York: Random House, 2009); Sidney Fine, *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* (Ann Arbor: University of Michigan, 1956), 32-47; Richard Hofstadter, *Social Darwinism in American Thought, 1860-1915* (Philadelphia: University of Pennsylvania Press, 1945), 18-36.

American opponents of Spencerian thought abounded in the 1870s and 1880s. When the English politician James Bryce recalled his impressions of the United States in those decades he wrote that Americans had awoken to the "dark side" of "unrestricted competition." In a chapter entitled *Laissez Faire*, Bryce described how Americans had reacted to the growth, corruption, and exploitative nature of large corruptions—the railroads chief among them—with disgust. State legislatures passed laws regulating private enterprises in a variety of ways, while restricting laborers' work hours and child labor. Americans, Bryce observed, believed that "unlimited competition seems to press too hardly on the weak." States throughout the country were using the powers of government to defeat the forces of *laissez faire*.[38]

Competition in educational governance was on the retreat as well, both in theory and practice. Bryce identified schools as one realm in which Americans have used "public authority to undertake work which might be left to individual action and the operation of supply and demand." If state regulation worked to halt the pernicious influence of *laissez faire* generally, it could also restrain the ill effects of educational competition. Bryce noted that laws in Northern states required teachers to obtain certificates to instruct in public schools, restricting competition from the unlicensed.[39] Other writers in the Gilded Age likewise applied their disdain of *laissez-faire* ideas to education. Even the competition offered by private schools was not spared. In an 1893 essay for the *School Review* James Mackenzie, a headmaster at an elite private school, argued that states needed to regulate private educational initiatives to the same degree that they

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[38] James Bryce, *The American Commonwealth* (London and New York: Macmillan and Co., 1888), 3:273-76, 282. On the railroads, see Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: Norton, 2011).

[39] Bryce, *The American Commonwealth*, 3:279-80. Teacher licensing likely departed from Adam Smith's prescriptions as well. In a section in the *Wealth of Nations* on science and philosophy instructors, Smith questioned the value of such licensing, writing that students "would soon find better teachers for themselves than any whom the state could provide for them." Smith, *Wealth of Nations*, 3:159.

intervened in other public concerns. "If I cannot sell sour bread or hawk decayed fish without the interference of the board of health," he asked, "why should I fear the 'paternalism' in government, state or municipal, that bars me from giving an inferior quality of instruction?"[40] Like any other economic arena, Mackenzie concluded, educational competition could not be trusted to operate efficiently on its own.

Summing up this critique of unlimited competition in 1894, the prominent sociologist Lester Frank Ward warned that Herbert Spencer's *laissez-faire* ideas would "involve the repeal of all the humane and industrial legislation":

> It would abolish all public works, including lighthouses and harbors; it would necessitate a return to a private postal system which the whole world has outgrown; would reestablish the monopoly telegraph in those countries which have replaced it by a national telegraph . . . it would turn over cities to private water companies and private fire companies, . . . there would be a reversion to a system of strictly private, or 'wildcat' banking; public schools would be abolished, probably the last thing next to liberty that any enlightened nation would surrender; and all forms of sanitary regulation, including quarantine precautions against great epidemics, would be left to the wisdom of individual citizens.

"This," Ward concluded, "cap[s] the climax of *laissez faire* absurdity."[41] According to Ward and others, the growth of the regulatory state implied that ideals of free competition had little practical value in American life. Public school systems stood prominently in Ward's list of areas where government intervention proved essential. Schooling, Ward suggested, was not akin to the small, competitive firms to which Spencer had likened them. Instead, it was fundamentally similar to water provision, fire protection, sanitation, transportation, and the posts—areas in

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[40] James C. Mackenzie, "The Supervision of Private Schools by the State or Municipal Authority," *The School Review* 1, no. 7 (1893): 392-93.

[41] Lester Frank Ward, "The Political Ethics of Herbert Spencer," *Annals of the American Academy of Political Science* 4, no. 4 (1894): 611-12.

which many municipalities and states in the late nineteenth-century believed competition ought to be suppressed.

III

This critique of free competition and promotion of government regulation found an organizational home with the formation of the American Economic Association [AEA] in 1885. Established by a rising generation of political economists, the group gave voice to scholars seeking stronger state intervention in the economy. Their platform condemned *laissez faire* and "the political economy of a past generation." In its place they highlighted the state's ability to regulate the economy successfully, positing that the state represented an "ethical agency whose positive aid is an indispensable condition of human progress." Leading the organization was a group of young economists steeped in evangelical Protestantism and German university training: Richard Ely of Johns Hopkins University, Henry Carter Adams of the University of Michigan and Cornell, Edmund James of the Wharton School, John Bates Clark of Smith College, and two former students of Ely's at Hopkins, Edward Bemis and Albert Shaw.[42] Imbued with their benevolent and almost spiritual view of the state, the AEA economists believed that governments under expert management could rationalize and humanize the industrial order. Amid the chaotic Gilded Age conflicts between railroads and farmers, labor and capital, the AEA economists contended that American life required greater coordination and bureaucratic order.[43] Together,

[42] Richard T. Ely, "Report of the Organization of the American Economic Association," *Publications of the American Economic Association* 1 (1887): 6-7.

[43] This view reflected the broader Progressive Era agenda that Robert Wiebe has described in *The Search for Order: 1877-1920* (New York: Hill and Wang, 1967). See also Robert Crunden, *Ministers of Reform: The Progressives' Achievement of American Civilization* (Urbana: University of Illinois Press, 1984).

they aimed to identify the areas of the economy where cooperation and state intervention, rather than competition, should organize social activity.

That competition ought not characterize all enterprises formed the crux of the AEA's disagreements with Spencer and his American champions—men such as the Yale sociologist William Graham Sumner. Where Sumner, for example, argued that social Darwinian ideas of competition should characterize nearly every sphere of American life, the younger insurgent economists insisted that social cooperation could be equally if not more operative in various arenas of public concern.[44] Richard Ely's seminal 1884 essay on the "Past and the Present of Political Economy," for example, discussed "the inadequate action of competition in regulating and controlling great corporations."[45] John Bates Clark dedicated an entire chapter of his 1894 textbook to what he termed "Non-Competitive Economics." Even Adam Smith's ideas, Clark wrote, had to be updated in an age in which "competition is no longer adequate to account for the phenomena of social industry."[46] This assault on free competition, together with promotion of state intervention, permeated the first four essays published by the AEA in 1887: Edmund James on municipal regulation and ownership of gas supplies, Albert Shaw on "Cooperation in a Western City," Edward Bemis on "Cooperation in New England," and Henry Carter Adams on state intervention in industry.[47] In the America these scholars envisioned, many more private

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[44] Sumner at one point suggested that each social class should provide for their own children's education. See William Graham Sumner, *What Social Classes Owe to Each Other* (New York: Harper & Brothers, 1883), 95. On Sumner's relationship with Herbert Spencer, see Werth, *Banquet at Delmonico's*, 88-89, 224-29.

[45] Richard T. Ely, *The Past and the Present of Political Economy* (Baltimore: N. Murray, 1884), 26.

[46] John B. Clark, *The Philosophy of Wealth: Economic Principles Newly Formulated* (Boston: Ginn & Company, 1894), 203-4.

[47] James, "The Relation of the Modern Municipality to the Gas Supply," *Publications of the American Economic Association* 1 (1887): 53-122; Shaw, "Cooperation in a Western City," *ibid.*: 129-228; Bemis, "Cooperation in New England," *ibid.*: 335-464; Adams, "The Relation of the State to Industrial Action," *ibid.*: 461-549.

enterprises would become subject to government regulation or ownership, transitioning, as Ely wrote, from a "private competitive condition, to a public non-competitive condition."[48] That vision increasingly reflected reality. Urban Americans had witnessed the process with the utility industry, where gas and electric companies along with waterworks generally moved from private competition to public monopoly. In this context, more American political economists and legal scholars began questioning the virtue of unlimited competition, including in education.

The AEA scholars held that publicly-sanctioned monopolies could be more beneficial than industries regulated solely by competition. With public school systems fully entrenched, political economists likened education to other industries characterized as "natural monopolies," or areas where technological and organizational innovations had rendered competitive principles obsolete. While the theory of natural monopoly failed to provide an explicit policy recommendation regarding educational competition, it forged an important link between public ownership and non-competition. Richard Ely's dictum that "monopolies are the field for public activity" while "competitive pursuits are the field for private activity" exemplified this trend. As education itself became more public, scholars no longer treated it as a market good.[49]

The theory of natural monopoly arose as part of the assault on free competition. The AEA economists increasingly argued that monopolies, when either publicly regulated or publicly owned, did not always function as the harmful entities that muckraking journalists eventually made them out to be. Consumers, after all, profited from the efficiencies that came with

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[48] Richard T. Ely, *Political Economy, Political Science and Sociology: A Practical and Scientific Presentation of Social and Economic Subjects* (Chicago: University Association, 1889), 255. See also Richard T. Ely, "Natural Monopolies and the Workingman: A Programme of Social Reform," *The North American Review* 158, no. 448 (March 1894): 294-303.

[49] Richard T. Ely, *Natural Monopolies and Local Taxation* (Boston: Robinson and Stephenson, 1889), 2.

economies of scale in large industries, a dynamic that economists and regulators observed in the emerging structures of late-nineteenth century railroads and municipal utilities. As early as 1870, the railroad regulator Charles Francis Adams famously summarized "the whole transportation problem," writing: "competition and the cheapest possible transportation are wholly incompatible."[50] Consumers would hardly benefit from two competing railroad tracks carrying long-haul goods between the same two points; ratepayers would have to absorb the cost of additional tracks, railway cars, terminal facilities, and so forth. Two half-empty railway cars traveling to the same location in place of one full car was absurd.[51] Instead, as Henry Carter Adams (no relation to Charles Francis) asserted, it was exponentially cheaper for an existing railroad to expand its facilities to meet demand than "for a new industry to spring into competitive existence." For Carter Adams, the "*possibility* of cheapness and efficiency" appeared "to lie in the very nature of a monopoly." That railroad corporations tended to merge with one another with incredible frequency reinforced this point. "If it is for the interest of men to combine no law can make them compete," he wrote. Railroad monopolies were not only "natural," but potentially preferable as well.[52]

The same anticompetitive logic that applied to railroads held for competing municipal waterworks and electric utilities. By virtue of their heavy capital costs, direct utility competition

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[50] Charles Francis Adams, "Railway Commissions," *Journal of Social Science* 2 (1870): 234. On Adams, see Thomas McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA: Belknap Press, 1984), 1-56. See also Maury Klein, "Competition and Regulation: The Railroad Model," *Business History Review* 64 no. 2 (July 1990): 311-25.

[51] White, *Railroaded*, 5-7, 174-77. Much of my account of nineteenth-century natural monopoly and regulatory economics derives from the following interpretations: Herbert Hovenkamp, "Regulation History as Politics or Markets," review of *The Regulated Economy: A Historical Approach to Political Economy*, by Claudia Goldin and Gary D. Libecap, *Yale Journal on Regulation* 12 (Summer 1995): 549-63; McCraw, *Prophets of Regulation*, 1-79.

[52] Adams, "The Relation of the State to Industrial Action," 513-14, 528. Italics in the original.

rarely occurred within a particular municipality for a sustained period of time. As with the railroads, the barriers to entry were substantial enough to keep a competing waterworks company from laying duplicate sets of pipes. Absent this competition, city residents complained that the utility monopolies had little incentive to fulfill the terms of their franchises. Rates were too high and services too constrained. By the late nineteenth century, cities either began to operate utilities themselves or regulate them by imposing rate ceilings. Even when privately operated, political economists and legal scholars argued, utilities deserved monopoly status because of their public nature and technological characteristics.[53]

The AEA economists thus sought to harness the potential benefits of monopoly on behalf of the public. To Carter Adams, the important question was whether these mergers would be run as "an irresponsible, extra-legal monopoly" or a "monopoly established by law and managed in the interests of the public."[54] Richard Ely and John Bates Clark were critical of federal anti-trust laws led by small producers to enforce competition with more efficient and larger firms. "The practical danger which confronts us is this," Ely wrote. "In attempting to force the application of the principles of competition to those pursuits which are not adapted to competition we will miss our present opportunity and do more harm than good." In these industries, Ely and other economists viewed regulated monopoly, not state-abetted competition, as the optimum policy.[55]

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[53] On public utility regulation see Charles D. Jacobson, *Ties that Bind: Economic and Political Dilemmas of Urban Utility Networks, 1800-1990* (Pittsburgh: University of Pittsburgh Press, 2000), 1-136; Mark Guglielmo and Werner Troesken, "The Gilded Age," in *Government and the American Economy: A New History*, ed. Price Fishback and Douglass C. North (Chicago: University of Chicago Press, 2007), 255-87; David Cutler and Grant Miller, "Water, Water Everywhere: Municipal Finance and Water Supply in American Cities," in *Corruption and Reform: Lessons from America's Economic History*, ed., Edward L. Glaeser and Claudia Goldin (Chicago: University of Chicago Press 2007), 153-86.

[54] Adams, "The Relation of the State to Industrial Action," 528

[55] Richard T. Ely, *Problems of To-Day: A Discussion of Protective Tariffs, Taxation, and Monopolies* (New York: Thomas Y. Corwell and Company, 1888), 108, 115-19; John B. Clark, "The Limits of Competition," *Political*

Private monopoly, not monopoly itself, was the real menace. Where monopolies formed "naturally," states had a responsibility to channel their productivity and eliminate competition on behalf of the citizenry.

Schools entered into these conversations about natural monopoly despite the fact that comparisons between public education and public utilities were often strained. Schools and utilities were an odd match for at least three reasons. First, although public schools in the second half of the nineteenth century almost always enrolled the vast majority of schoolchildren, they did not monopolize local education in the same way that electric utilities, for example, monopolized lighting.[56] Private schools continued to operate in virtually every city in the country. Second, while schools absorbed a large share of tax dollars, they lacked the tremendous fixed costs of railroads, waterworks, or electric companies. Unlike those enterprises, schools did not seem to benefit as clearly from economies of scale. Educational reformers had long argued for larger schools to provide graded classrooms, always in short supply in rural areas with their ubiquitous one-room buildings, but as long as cities required dozens of elementary schools and, increasingly, multiple high schools, the analogies with public utilities seemed difficult to maintain. Finally, the fee structure of education differed substantially from the utilities. Public utilities charged rates and consumers paid according to the volume of their usage. By the 1870s, however, states and localities in the North prohibited public schools from raising funds through

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Science Quarterly 2, no. 1 (1887): 45-61. For Ely, introducing competitive pressures into these industries tended to create "war" and "destructive" conditions.

[56] The Boston University Law Professor Frank Parsons, for example, singled out public schools as one of the only institutions where the benefits of public ownership came without the establishment of monopoly. See *Report of the Industrial Commission on Transportation* 9 (Washington, D.C.: Government Printing Office, 1901), cxcvi.

similar "rate," or tuition, bills.[57] Schools utilized various incentives to attract additional pupils, but scholars realized that pricing public education was hardly similar to financing public utilities.

Together, these distinctions struck some analysts as having significant policy implications. "The support of public education, police and fire protection and parks," the editors of the journal *Public Policy* wrote in 1904, hardly resembled the "gas and electricity supplied for light, heat and power, and transportation facilities." To equate the two represented an "illogical mixing up of non-commercial with commercial purposes."[58] Where the first group clearly deserved to be owned by the public, the latter only needed to be regulated. Similarly, the editors of the Spencerian journal *To-Day* believed that gas companies should receive monopolistic protection through state regulation, but then argued that schools should be guided by *laissez-faire* principles, similar to bakeries or manufacturers.[59]

Despite objections to treating schools akin to public utilities, AEA members made frequent comparisons between public education and other natural monopolies characterized by non-competition. John Bates Clark believed that railroads and education shared important "non-competitive" qualities given that "in both cases does a public agency intervene in order to secure the general diffusion of important utilities."[60] Richard Ely's textbook on political economy in 1894 likened public schools to municipally owned gas works—all "natural monopolies" that are "best owned and operated by government, while competitive businesses flourish only in the

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[57] Claudia Goldin and Lawrence Katz, *The Race Between Education and Technology* (Cambridge, MA: Belknap Press, 2008), 140-146; Kaestle, *Pillars of the Republic*, 148-51.

[58] "True and False Socialism," *Public Policy* 9, no. 25 (December 17, 1904): 290.

[59] "Editor of To-Day," *To-Day* 3, no. 76 (February 11, 1892): 811-12.

[60] Clark, *The Philosophy of Wealth*, 217.

atmosphere of private enterprise and free competition."[61] In his *Outlines of Economics*, Ely similarly applied the theory of natural monopoly to private institutions of higher education, arguing against the "uncohesive [sic] and wasteful character of private enterprise in education" in contrast to the "efficiently consolidated" and "unifying power … of the State."[62] The public ownership advocate Frank Parsons took the comparison still further, arguing that "public education rests upon the idea that learning is more likely to be well distributed among the whole people by means of public schools than by reliance upon private institutions." Private schools, like private utilities, lacked the incentive to deliver their services to outlying areas, for example. As Parsons put it, "private gas and water companies lay their mains only in streets that will yield a profit. Public works put their pipes into any street where there is a reasonable demand for the service. Private schools and turnpikes go only where they will 'pay'--can't go anywhere else except on the basis of charity; but public schools and roads go into every district where there are children to educate or people to travel." For Parsons, educational competition, like utility, competition, had little business operating in cities.[63]

As one of the most visible, large-scale activities almost entirely converted into public ownership, schools provided a clear example to political economists of the benefits of public regulation and ownership. In his 1887 essay for the AEA's first journal publication, the Wharton professor Edmund James pointed specifically to public schools in a study on public ownership of

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[61] Richard T. Ely, *An Introduction to Political Economy* (New York: Hunt & Eaton, 1894), 242. The textbook that evolved from this work became the most widely adopted textbook on political economy in American colleges prior to World War II. Ross, *Origins of American Social Science*, 192.

[62] Richard T. Ely, *Outlines of Economics* (New York: The Chautauqua Century Press, 1893), 339.

[63] Frank Parsons, *The City for the People: Or, the Municipalization of the City Government and of Local Franchises* (Philadelphia: C.F. Taylor, 1901), 18, 145. David Tyack has attributed one of the reasons for the popularity of public schooling in the nineteenth century to the economic efficiency that came with large public school systems over many separate denominational institutions. See Tyack, *Seeking Common Ground*, 165.

gas utilities. He attacked opponents of public ownership as ignorant of "the history of government in ancient and modern times," a history that conveyed an abiding state role in economic life. "It is by such arguments as these [opposing public ownership]," he wrote, "that the government was kept for years from assisting in the establishment of free schools." Absent the persuasive arguments of public ownership advocates, James continued, Americans would have "to-day no free schools, no sanitary regulations, no safeguards of life and liberty such as we now have in many different fields; we should be in a sorry way indeed."[64] As municipal ownership of public utilities gained momentum in the decades after James wrote, similar arguments placing public schools at the center of a larger story about public ownership proliferated.[65] The title to a paper delivered at the 1923 conference of the Public Ownership League by Margaret Haley, an early champion of public school teachers' unions in the United States, captured this sentiment nicely: "Our Public Schools—America's Greatest Public Enterprise."[66]

By 1925, the secretary of the Public Ownership League, Carl D. Thompson, would suggest that public schools served as the chief exemplars, if not progenitors, of the wave of future public ownership:

> Here is a sphere in which public ownership is so firmly fixed that it is taken as a matter of course. He who to-day would undertake to say that our public school system is not a success and should be turned over to a private corporation or to private individuals on the ground that they could handle the system more efficiently and more in accord with the spirit of true Americanism, and all that, would not be given consideration anywhere. And yet there was a time when

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[64] James, "The Relation of the Modern Municipality to the Gas Supply," 79-80.

[65] To cite data in one industry, the share of publicly owned municipal water systems rote from 42 percent in 1860 to 70 percent by 1920. Cutler and Miller, "Municipal Finance and Water Supply in American Cities," 168.

[66] *Public Ownership* 4, no. 9 (September-October 1922): 51.

> education was almost wholly a matter of private enterprise and private initiative, undertaken and carried on for private profit, just as today our railroads and street car lines, for the most part, are so operated.[67]

To advocates of public ownership like Thompson, public schools served as both a direct reminder of the government's activist stance, as well as an example for future action. If governments could operate schools for the benefit of the people, then monopolistic public ownership in many other enterprises should necessarily follow, and competition reduced.

IV

The AEA economists' growing equation of education with non-competition struck some as dangerously narrow-minded. Political economists writing in the late nineteenth century about the virtues of public education systems generally dismissed the ways in which, for many Americans, schools could not easily be subject to theories of efficiency and the "public interest." Composed largely of interconnected men drawn from similar evangelical Protestant families and German training, the founders of the "new" political economy offered prescriptions that reflected a particular social and cultural milieu. Lester Frank Ward, Richard Ely, Henry Carter Adams, and Edmund James grew up in pious, Protestant communities and households where, as Ely later wrote of his childhood in upstate New York, "the interests of the community were more often centered in its churches and schools than in economic problems."[68] Indeed, Protestant churches and common schools often merged seamlessly together in these small communities. In the nineteenth century, textbooks such as the *McGuffey Reader* weaved pan-Protestant messages into

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[67] Carl Dean Thompson, *Public Ownership: A Survey of Public Enterprises, Municipal, State, and Federal, in the United States and Elsewhere* (New York: Thomas Y. Corwell, 1925), 9. See also J.W. Keegan, "Should Water Be Served By Municipalities Free of Charge?" *Public Policy* 6, no. 22 (May 31, 1902): 350-52.

[68] Richard T. Ely, *Ground under Our Feet: An Autobiography* (New York: The Macmillan Co., 1938), 9. At seventeen Ely spent a year teaching in a common school. Edmund James and Henry Carter Adams were sons of ministers.

literacy instruction, which students then used to read the Protestant King James Bible—another staple of the common school classroom. As adults, these social scientists formed part of a broader movement that sought to combine the moral authority of evangelical Protestant teachings with the need for political, economic, and social reform. Given the intensity of their beliefs, they conflated the public's interest with their own moral precepts, failing to acknowledge that not all Americans—particularly non-Protestants—accepted their benevolent views of government intervention and natural monopoly. Though their cultural heritages were rarely on explicit display, the economists' similar backgrounds colored their collective work, producing a discrete intellectual community. Their embrace of public education reflected a particular American identity and experience, one that others in the country did not share.[69]

Catholic defenders of parochial schooling in particular rejected the Protestant political economists' assumption that public schooling was truly "public," as socially neutral a good as water provision or transit. They viewed such analyses with alarm, a position that reflected the context of the 1870s, when Catholics believed that their schools were under assault by a Protestant-dominated Republican Party. Many Republicans championed the public school, given its pan-Protestant ethic, as the institution most capable of reconstructing a nation recently torn apart by civil war. Schools would educate and modernize freedmen and ex-Confederates in the feudal South, assimilate Native Americans in the West, and discipline unruly Irish-Catholic immigrants in the North.[70] The thousands of Catholic parochial schools constructed in Northern

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[69] For collective biographies of these men see Crunden, *Ministers of Reform*, 69; Nancy Cohen, *The Reconstruction of American Liberalism, 1865-1914* (Chapel Hill: The University of North Carolina Press), 143-76; Ross, *The Origins of American Social Science*, 101-8; Rodgers, *Atlantic Crossings*, 85; John Rutherford Everett, *Religion in Economics: A Study of John Bates Clark, Richard T. Ely and Simon Patten* (New York: King Crown Press, 1946).

[70] Jeremi Suri, *Liberty's Surest Guardian: American Nation-Building from the Founders to Obama* (New York: Free Press, 2011), 77-81; David Wallace Adams, *Education for Extinction: American Indians and the Boarding School*

cities over the previous decades threatened this Republican national agenda. Republicans reacted by proposing both stronger federal support of public schooling, and, relatedly, the abolition of any public funding for "sectarian" (or denominational) schools.[71] Since Republican statist policies and Protestant chauvinism appeared to meld seamlessly together, Catholics looked askance at political economists who championed "public" institutions at the expense of individual freedom and private competition.[72]

It was no surprise that Catholic authorities rejected the embedded assumption that education could be ethnically or religiously neutral, or worse, that it should be implicitly Anglo-Saxon and Protestant. As the largest alternative to public schooling in the nation, Catholic education thrived on priests' and parents' preference for the parish school and, therefore, for the very ideals of educational competition that political economists spurned. An 1883 book review in the *Catholic World* exemplified this Catholic critique of late nineteenth-century political economy. The book under review was *Dynamic Sociology* by the renowned sociologist Lester Frank Ward. Ward's background evidenced the close bond between evangelical Protestantism and public schooling characteristic of the insurgent political economists. He grew up in an evangelical Protestant household deeply distrustful of Roman Catholicism and committed to common schooling. In 1860, at age nineteen, Ward worked as a public school teacher. A year

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Experience, 1875-1928 (Lawrence: University Press of Kansas, 1995); Ward M. McAfee, *Religion, Race, and Reconstruction: The Public Schools in the Politics of the 1870s* (Albany: State University of New York Press, 1998).

[71] While attempts at federal legislation failed, by 1890 twenty-nine state legislatures had amended their constitutions to prohibit religious schools from receiving public money. Joseph P. Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," *Harvard Journal of Law and Public Policy* 21, no. 3 (Summer 1998): 657-718; Benjamin Justice, "The Blaine Game: Are Public Schools Inherently Anti-Catholic?" *Teachers College Record* 109, no. 9 (September 2007): 2171-2206; Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 287-334.

[72] McAfee, *Religion, Race, and Reconstruction*, 23-24, 41-42.

later he enrolled in a small Pennsylvania college founded several years earlier as a Presbyterian-sponsored teacher-training institute. Though Ward later distanced himself from formal religion, this upbringing indelibly shaped his lifelong commitment to public education.[73]

Ward's chapter on the political economy of education in *Dynamic Sociology* mirrored his colleagues' desire to sever the intellectual link between schooling and other market goods. He likewise argued that "education can not be successfully conducted on the competitive system," and that it must be "excepted from every other established law of politico-economics." Ward attacked the "*laissez faire* principles" in English schooling, where "no system of public education can be said to exist," and praised America's preference for equitable, universal education instead unequal, private schools. Assailing the application of market-based arguments for education, he argued that demand for schooling differed from consumer demand for other goods. While Ward realized that the supply of private education might congeal to the demands of even negligent parents, he believed that a true market for education would produce privately operated schools perpetuating inequalities and diminishing learning. In private schools, "education [is] a business" and the "teacher, like the tailor, is obliged to suit his customers." Teachers dependent on tuition dollars had incentives to pass children regardless of merit—"in private education, there is truly 'no such word as 'fail'"—lest a rival school arise whose competitive advantage lay in granting even easier access to the credential. In order to attract and maintain pupils private teachers had to engage in advertising rather than instruction, the "tricks of diplomacy at the expense of educational progress." For Ward, this race to the bottom characterized the "self-regulating system" of private schooling, producing a result not only

[73] Edward C. Rafferty, *Apostle of Human Progress: Lester Frank Ward and American Political Thought, 1841-1913* (Landham: MD: Rowman & Littlfield, 2003), 16-31.

inferior to public education, but "absolutely worse" than no formal schooling at all. He dismissed the critics of public schooling who insisted on a private, religious education for their children with a single line: "The few who object on the ground of conscientious religious scruples, considering the entirely secular character of state education, are not sufficiently numerous to command respect."[74] Ward's coolly economic reasoning, together with his swift rejection of denominational education, placed him squarely in the mainstream of the new political economy.[75]

The Reverend Walter Elliot, reviewing *Dynamic Sociology* for the *Catholic World*, spared none of the book's arguments. He rejected the "first principles" behind Ward's assumptions that government services, let alone public schools, could advance the religious beliefs of Catholics. Behind Ward's view of a beneficent state actor Elliot saw particular individuals with particular motives. "*Who* will discover, *who* apply, these social forces?" he asked. Given the history of tensions between public schools and Catholics, Ward's educational prescriptions triggered a broader Catholic fear about the alliance of state education with Protestantism or, worse, godlessness. Elliot deemed it "strange that agnostics should put such value on the school as a means of making men disbelievers" while "our Protestant brethren fail to perceive its value in making men Christians." What Ward and similarly minded political

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[74] Lester F. Ward, *Dynamic Sociology, or Applied Social Science, as Based upon Statical Sociology and the Less Complex Sciences* (New York: D. Appleton and Company, 1883), 2:584-92, 609.

[75] Twenty years later, in a subsequent treatise entitled *Applied Sociology*, Ward's opinion of private religious schools had not changed: "In condemning private schools, as I did in Dynamic Sociology, and as I still do on the grounds there urged, for the most part, I did not and do not mean to condemn the motives that inspire them. Except where they are instituted for sectarian propagandism…" Lester Frank Ward, *Applied Sociology: A Treatise on the Conscious Improvement of Society by Society* (Boston: Ginn and Company, 1906), 309.

economists saw as prescriptions to increase efficiency and the public interest, Catholics like Elliot saw as Protestant or godless attacks on their traditions and institutions.[76]

To combat the views of Ward and others, advocates of Catholic schooling consistently promoted educational competition throughout the late nineteenth century. Their advocacy for educational competition was not the product of *laissez-faire* beliefs, as such, since Catholic social thinkers generally embraced regulatory measures like minimum wages and unionization.[77] Rather, it arose from an often pragmatic desire that states place Catholic schools on an equal playing field with the public schools: through access to public funds at best, or at least freedom from discriminatory laws. Regardless of motivation, it was largely these defenders of Catholic education, not university political economists, who during the nineteenth century maintained that competition among schools had substantial benefits. "Competition is good and healthy; without it education is deprived of its constant spur," editorialized the *Catholic World* in 1879.[78] "As competition is the life of trade, so also of education," a Jesuit priest and educator, James Conway, wrote in the *American Catholic Quarterly Review* in 1884. "And as State monopoly is prejudicial to any branch of business, so it must be to education."[79] Through the mechanism of educational competition, these Catholic writers noted, state subsidies for parochial schools would produce improved instruction. "Let the funds be apportioned to all schools according to the actual proficiency in those studies of each child as shown by state examination," Lorenzo

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[76] Walter Elliott, review of *Dynamic Sociology*, by Lester Frank Ward, *The Catholic World* 38, no. 225 (December 1883): 386-88.

[77] John T. McGreevy, *Catholicism and American Freedom: A History* (New York: W.W. Norton and Company, 2003), 127-50.

[78] "Current Events," *Catholic World*, 29, no. 171 (June 1879): 422.

[79] Rev. James Conway, "The Rights and Duties of Family and State in Regard to Education," *American Catholic Quarterly Review* 9 (January 1884): 106.

Markoe wrote in the *Catholic World* in 1891. "Under the plan here proposed only the truly successful educators would get the children, and only they would be encouraged and sustained by the apportionment of the school fund. Competition would bring to the front the real educators of real intrinsic merit; and those of inferior abilities would soon drop out of sight."[80] As Catholic schooling came under attack both domestically and in Europe during the late nineteenth century, the Catholic press frequently summoned the specter of "state monopoly" and praised its opposite: educational competition.

The marketplace of urban education that characterized both the theory and the practice of American schooling in 1800 was quickly in retreat in the last decades of the nineteenth century. Public schools not only dominated urban attendance, but changed how many Americans conceived of education—from a competitive market good to a non-competitive public service. American scholars in the nineteenth century gradually severed the intellectual links, forged by British classical economists, between schooling and other marketable commodities. While American political economists never fully accepted *laissez faire* among schools, at the beginning of the century they nonetheless drew from British thinkers, acknowledging the importance of competition in creating educational incentives and spurring efficiency and innovation. By 1900, however, American economists argued that schooling represented an uncompetitive good, better left to government regulation or outright ownership. The stated educational benefits of competition that had been a staple of antebellum political economy textbooks were, a half-century later, absent from discussion. Growing public school systems not only disrupted actual practices of competition among schools. It also produced a new generation of scholars—

[80] Lorenzo J. Markoe, "Is there Any System of Public School That Would Satisfy Catholics?" *Catholic World* 75, no. 447 (June 1902): 333. See also "The Idea of a Parochial School," *The American Catholic Quarterly Review* 16, no. 63 (July 1891): 461.

individuals with deep ties to Protestantism and public schooling—who suggested that publicly governed, tax-supported schools could educate all of the members of the community in the same neutral manner that a publicly owned utility provided electricity.

The remaining defenders of educational competition in the late nineteenth were predominately advocates of Catholic parochial schools, who believed that professional political economists harbored a bias toward Protestantism and public schooling. That ideas about educational competition were shifting just as Catholic schools exploded in numbers occasioned a clash between public officials and Catholic school sponsors in the late nineteenth century. The new Catholic schools of the 1870s and 1880s entered into a very different educational marketplace than the private schools of 1800—one that would be vastly more regulated and managed by public authorities.

Chapter Two

Parochial Schools and the Rise of Educational Competition

In 1905, Robert Fitzsimmons traveled from Cincinnati to Pittsburgh to attend a gathering of alumni celebrating their beloved Duquesne School. By all accounts the reunion was a grand affair, a time to relive fond memories. The Duquesne alums cheerfully sang "Ye Olden Times" and ate Slade's Taffy, a candy from their youth. "It was a day to meet old friends, to recall the ties of youth, to talk about things that had happened when the world was very young," a booklet commemorating the event noted. On this one lovely, June afternoon the Duquesne alums were "children again for a day." Over six hundred of the school's former pupils, teachers, administrators, and their family members gathered for the reunion. In a city with larger-than-life personalities—names like Carnegie, Mellon, and Frick—the Pittsburgh celebrities on hand were decidedly local, if not equally as popular. Mary Eaton, the school's longtime principal, traveled from Illinois to see her former students. Pittsburgh's public school superintendent, Samuel Andrews, also attended.[1]

As the school's oldest alumnus Fitzsimmons's presence was particularly notable. The Duquesne School claimed the honor of being Pittsburgh's first public school, established in 1835, one year after Pennsylvania's "Common School Law" had set in motion a system of universal, state-supported free public schooling.[2] Fitzsimmons had attended the school, then called the First Ward School, when it was in its infancy. He was the sole alumnus present who

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[1] *Reunion of the Old Scholars, Teachers and Directors of the First Ward School* (Pittsburgh, 1905), 7-8, Library & Archives Division, Senator John Heinz History Center, Pittsburgh, PA.

[2] Prior to the 1834 Pennsylvania school law the state provided free education (in privately governed schools) only for the poor, as stipulated in its 1790 Constitution and authorized by an 1809 act of the legislature. On this history see Sarah H. Killikelly, *The History of Pittsburgh: Its Rise and Progress* (Pittsburgh: B.C. & Gordon Montgomery Co., 1906), 269-337. See also *Report of the Superintendent of Common Schools of the Commonwealth of Pennsylvania* (Harrisburg: Singerly and Myers, 1868), xxviii-xxxvii.

remembered the school's initial location in the basement of a Methodist church. Fitzsimmons was now in his eighties, and those days seemed distant. When he was born, Pittsburgh had no free public schools at all, but rather a mixture of tuition-based schools and church-run institutions.[3] That its first school met in a church basement was no accident. Thousands of public schools in the first half of the nineteen century had emerged out of privately governed religious schools.[4] Within a couple of decades of the Duquesne School's opening, the vast majority of Pittsburgh's children attended free, tax-supported, publicly administered, and nonsectarian schools. The Duquesne school moved to a new building shortly after opening. At the reunion, only Robert Fitzsimmons had experienced that distant past—a public school student in a Protestant church basement.

The triumphant expansion of public education in Pittsburgh and throughout the urban North—a story symbolized by the Duquesne School, its reunion, and Fitzsimmons's presence—seemed to come to a halt when Catholics embarked on an ambitious program to build an alternative system of schools. Reformers founded public schools as "common" institutions, places where children from all classes would learn together under a curriculum guided by the moral teachings of Protestant Christianity.[5] They intended those schools to be governed by the

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[3] *Reunion of the Old Scholars*, 3-5. The range of schools are detailed in Killikelly, *The History of Pittsburgh*, 269-304, 323. Killikelly disputed the First Ward School's claim to being Pittsburgh's first public school.

[4] The most famous example was in New York City during the early nineteenth century, when charity schools run by a range of Christian denominations became consolidated under a privately administered, nonsectarian (though nonetheless Protestant-run) organization, the New York Free School Society. When that Society's schools—rather than existing denominational ones—successfully lobbied the legislature for exclusive rights to public funds the society changed its name in 1826 to the Public School Society. See Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (New York: Hill and Wang, 1983), 51-53; William J. Reese, "Changing Conceptions of 'Public' and 'Private' in American Educational History," in *History, Education, and the Schools* (New York: Palgrave Macmillan, 2007), 99-100.

[5] On the intersections of common schooling and Protestantism see Kaestle, *Pillars of the Republic*; William J. Reese, "The Public Schools and the Great Gates of Hell," *Educational Theory* 32 (Winter 1982): 9-18; David Tyack and Elisabeth Hansot, *Managers of Virtue: Public School Leadership in America, 1820-1980* (New York: Basic

people and their elected leaders at the state and local level. Catholic schools represented a challenge to that vision: schools run by parishes, not state-drawn districts, for the secular and religious instruction of Catholic children. The explosion of Roman Catholic parochial schools in urban areas in the 1870s and 1880s introduced competitive, alternative school systems for parents and their children. These schools fundamentally altered the landscape of urban education in the North. From the construction of a single parochial school in Pittsburgh's First Ward, to dozens of schools in cities such as Chicago and Cleveland, Catholic school competition had a profound impact on attendance, employment, and public school governance. Protestants and lawmakers generally abhorred these new schools, resenting the competition parochial schools introduced with public schools for Catholic students, and fearing the consequences of large numbers of students attending private institutions. Some local school boards responded by accommodating certain Catholic educational demands, such as foreign language instruction, hoping that these reforms would attract Catholic immigrants to public schools. Other school boards attempted more dramatic compromises and provided direct public money to Catholic schools so long as they relegated denominational instruction until after hours. The more pervasive response among public officials, detailed in future chapters, was to pass laws regulating parochial schools.

I

While Northern cities differed substantially from one another in character and history, they all experienced the broader forces of industrialization and immigration. Nineteenth-century urban education was transformed in the process. The Duquesne School, like the urban

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Books, 1982), 15-43; David B. Tyack, "Onward Christian Soldiers: Religion in the Common School," in *History and Education: The Educational Uses of the Past*, ed. Paul Nash (New York: Random House, 1970), 215-55.

environment around it, had changed dramatically since Fitzsimmons's time, a product of deeper shifts in Pittsburgh's economic and social life. At the school's reunion, the proud alumni could not help but note that their beloved institution had declined considerably in the past forty years. At its height in 1869 the school had enrolled 424 children. In 1893, only twenty nine attended.[6] Industrial development produced dramatic changes to the First Ward, known colloquially as "The Point," denoting the area where the Allegheny and Monongahela rivers fed into the Ohio. That convenient geographic location made the area the city's center for manufacturing and commercial activity. In 1850, the downtown core of the city's oldest four wards featured a mixed economy, where banks and bankers lived among manufacturers, professionals, and workers. Over three-quarters of the city's professionals lived in these four downtown wards.[7]

By the 1880s, however, a transportation revolution had drastically shifted the demographics of the First Ward. As commuter railroads and street cars facilitated geographic mobility, the downtown central business district steadily lost population to the city's suburbs and new manufacturing centers on the South Side and further along the rivers to the east. The more established, Protestant families of these downtown wards had the resources to benefit from early suburbanization. As these families departed, increasing numbers of skilled and unskilled immigrant workers, largely Irish Catholics, took their place.[8] From 1868-1900, the city grew from roughly 55,000 inhabitants to over 300,000, while territorial annexation increased its size

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[6] *Reunion of the Old Scholars*, 4.

[7] Joel A. Tarr, "Transportation Innovation and Changing Spatial Patterns in Pittsburgh, 1850-1934," *Essays in Public Works History* no. 6 (April 1978), 3-4.

[8] Tarr, "Transportation Innovation," 11-13. See also Francis G. Couvares, *The Remaking of Pittsburgh: Class and Culture in an Industrializing City, 1877-1919* (Albany: State University of New York University Press, 1984), 31-34; and S.J. Kleinberg, *The Shadow of the Mills: Working-Class Families in Pittsburgh, 1870-1907* (Pittsburgh: University of Pittsburgh Press, 1989), 41-99.

from 1.77 to over 28 square miles. By 1880, the largely Catholic foreign-born population totaled over one-quarter of Pittsburgh's population. In thirty years, the children of these immigrants would make the city majority Catholic.[9] As early as 1890 one third of the First Ward's population was foreign-born, giving rise to its reputation as a seedy slum area. When the Census reported on the neighborhood's vital statistics in 1894, it noted only that one "section . . . was occupied by prostitutes" and that in the "remainder of the ward the residents were largely Irish and Italians."[10] Four years earlier, the Pittsburgh Bureau of Health referred to the cramped working-class dwellings there as the "hovel of the Irish laborer."[11]

These trends of Catholic in-migration and Protestant out-migration resulted in a powerful confluence for the Duquesne School. For the alumni, these demographic changes were intensely personal and local. Robert Fitzsimmons had witnessed them over his long lifetime. The Duquesne School reunion's directors noted their beloved institution's decline briefly in their booklet. They referred to "the pressure of business" forcing people to "seek homes outside the ward," and spoke of the neighborhood's newcomers as "of foreign birth and tongue . . . with no knowledge of the English language or American history."[12] The neighborhood had changed, and so had its school.

Nowhere, however, did the booklet mention what the school's alumni surely remembered as another principle reason for its decline: the erection of a parochial school in 1890. The public

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[9] Joel A. Tarr, "Infrastructure and City-Building in the Nineteenth and Twentieth Century," in *City at the Point: Essays on the Social History of Pittsburgh*, ed. Samuel P. Hays (Pittsburgh: University of Pittsburgh Press, 1991), 228.

[10] Department of the Interior, Census Office, *Report on Vital and Social Statistics in the United States at the Eleventh Census: 1890, Part II* (Washington, D.C.: Government Printing Office, 1896), 293.

[11] "Report of the Pittsburgh Bureau of Health," *The Pittsburgh Medical Review* 4 (August 1890): 253.

[12] *Reunion of the Old Scholars*, 4-5.

school that was once housed in a Methodist basement did not attract all of the ward's immigrant Catholic parents, many of whom instead sought a Catholic education for their children. The school that Catholics attached to their nearby St. Mary of Mercy Parish represented a

"Atlas of the cities of Pittsburgh, Allegheny, and the adjoining boroughs: from actual surveys & official records" (1872), Plate 15, G. M. Hopkins Company Maps, 1872-1940. Historic Pittsburgh Maps Collection. The Duquesne School is located on the northeast corner of First Ave. and Short St.

competitive challenge to the Duquesne School. Catholic parents who had sent their children to the local public school now faced a choice over their children's schooling. In growing numbers, those parents elected the parochial school. As the Duquesne School hemorrhaged students to its new competitor, the city's public school promoters feared that the ground was shifting under their feet. Catholic parishes were building schools throughout the city. The Protestant ideal of the "common" school was under dire threat.

School politics in Pittsburgh during the late nineteenth century were primarily local affairs. Neighborhoods, not district, municipal, or state governments, were chiefly responsible for governing Pittsburgh's public schools—a feature of decentralized school administration where local sub-district committees managed each of the city's thirty-six wards.[13] Likewise, individual Catholic parishes—rather than dioceses or archdioceses—established most educational policies. This local nature of school administration meant that conflicts over education were intensely fought at the ward level. One year prior to St. Mary of Mercy Parish's decision to enlarge its Catholic school in the First Ward, such a conflict erupted in Pittsburgh's south side Thirty-Fourth Ward. In the fall of 1887, the school committee in that heavily populated Irish neighborhood hired a Catholic priest as the ward school's principal. Having determined that a local parochial school was no longer necessary, the priest, James McTighe, proceeded to close the parish's Catholic school and transfer those students to the local public school. Cautious about setting off a storm, McTighe prohibited religious instruction during public school hours and did not wear his priestly garb. He even insisted that the ward's students

[13] Each of Pittsburgh's sub-district school boards had control over local taxes, school grounds and construction, and teacher appointments. For a description of the system see *Reports Concerning the Public Schools for 1909 and 1910, Volumes 41 and 42* (Pittsburgh: Shaw Brothers, 1910), Library & Archives Division, Senator John Heinz History Center, Pittsburgh, PA.

and parents call him "Mr. Principal" rather than "Father." Nonetheless, the incident aroused controversy in the city and attracted national attention. McTighe and his school became the object of several threats from local Protestant groups, prompting the priest to write, rather hyperbolically, that "since the fall of Sumter nothing ever happened in the United States to produce such intense excitement, to provoke such angry language." As a result of these protests, as well as from pressure from his own congregation, McTighe resigned a mere three months into his tenure as principal and re-opened the parochial school.[14]

An article in the *Chicago Tribune* about the McTighe incident served as a warning of what to expect if Catholics composed a majority on the school board and in the ward itself. In the First Ward, the *Tribune* announced, the "Catholic population greatly outnumbers the Protestants" and "attendance at the parochial schools now largely exceeds that at the public."[15] The Duquesne School had been losing students for the past decade. By the late 1880s, the low student population at the public school had led to the dismissal of ten teachers and increasingly empty classrooms. Less than a year after the McTighe incident, the Duquesne School's directors concocted a solution that they believed pragmatically addressed the ward's changing demographics. In the summer of 1888, they designed a plan to rent out the school's unused classrooms to Morgan M. Sheedy, an Irish-born Catholic priest whose parish school needed additional room to expand. Here was a way to raise additional funds for the public school while efficiently using the building's previously empty classrooms.[16] As one admirer of the plan

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[14] James T. McTighe, "The Pittsburgh Failure," *The Independent* 42 (September 4, 1890): 7-8.

[15] "Pittsburgh Public Schools," *Chicago Tribune,* October 9, 1887.

[16] "Parish School," *Pittsburgh Commercial Gazette*, August 25, 1888; "Trouble about Schools," *New York Times*, August 25, 1888.

observed in the *Commercial Gazette*, Sheedy "scrubs the floor and takes the cobwebs from the windows of the unused rooms in the First ward building and gathers in a few children from the alleys of the Point." [17] There appeared to be little downside.

But the Duquesne School directors' plan quickly backfired when news of the scheme leaked out to the city's Protestants in August 1888. The directors knew that Pittsburgh's Protestants might not look fondly upon a Catholic priest again "occupying" public school property. They had tried but failed to keep their solution to declining enrollments a secret until Sheedy opened his school in September. Now made public, the plan by the school directors produced a firestorm among numerous Protestants. A nativist organization, the Junior Order of the American Mechanics, was the first to denounce the deal in late August, saying that the plan would allow "the enemy within the lines" of the public schools.[18] In early September, the Presbyterian Ministerial Association announced its own opposition to the rental agreement.[19] When local newspapers reported that the plan had forced two "efficient teachers" from the public school—the result, in part, of even greater numbers of pupils abandoning the public school side of the building for the Catholic side—those opposed to the school grew more strident. The First Ward's alderman remarked that Sheedy "was as much mistaken in taking the step as was Father McTighe," and that "the feeling against the action of the board in renting the rooms for a parochial school, as well as dispensing of two efficient teachers, is very high, and it will certainly

[17] "The Rev. Mr. Knox's Position," *Pittsburgh Commercial Gazette*, October 6, 1888.

[18] "Parish School," *Pittsburgh Commercial Gazette*, August 25, 1888

[19] "The Local Resume," *Pittsburgh Dispatch*, January 1, 1889. See also "Pronounced Bigotry," *Pittsburgh Catholic*, September 15, 1888.

react upon those who were parties."[20] The Methodist *Pittsburgh Christian Advocate*, in one of several vituperative columns, called it "an effort on the part of Romanists not only to show their disapproval of the public schools, but to supplant them with their own system."[21] By the end of September, newspapers reported that Protestant leaders were prepared to bring suit against the contract, and that both the city and state superintendent of schools had declared the rental agreement illegal.[22] In October, angry Protestants even brought their case to the city's impotent central board of education, reading aloud portions of the Pennsylvania State Constitution in hopes of persuading the city's elites that the sale violated the law of the land.[23]

Father Sheedy reveled in the controversy. He, like scores of other parochial school promoters, believed that American public education—with its Protestant teachers and King James Bible reading—generally consisted of nothing less than a collection of *de facto* Protestant schools. As religious minorities and as taxpayers, he argued, Catholics were deprived of the very same benefits accrued to Protestants: free, publicly financed, religious schools. Sheedy made no secret of his contempt for those who cast aspersions at his deal with the school directors. For generations, Pittsburgh's public schools, including the Duquesne School in its early years, had been used by Protestants for Sunday school and other religious purposes. Sheedy thus found the outrage directed at him to be hypocritical. "Does this mean that [public schools] may be used for a variety of purposes so long as those using them are not Catholics and their use denied when

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[20] "Father Sheedy's School," *New York Times*, September 4, 1888.

[21] "Editorial," *Pittsburgh Christian Advocate*, September 6, 1888.

[22] "Trouble about Schools"; "The Local Resume," *Pittsburgh Dispatch*, January 1, 1889. See also "Catholic Schools in Public School Buildings," *Pittsburgh Christian Advocate*, October 11, 1888; "Catholics and the Public Schools," *Chicago Tribune*, September 19, 1888.

[23] Central Board of Education Minutes, 1882-1890, October 9, 1888, Pittsburgh School District Records, Pittsburgh, Minute Books, Box 28E, Archives Service Center, University of Pittsburgh.

application is made to the directors of Catholic citizens?" he asked in an interview with the *Pittsburgh Press* one month after his school had opened. "The whole point seems to be that a prejudiced class of narrow and illiberal views would deny to Catholic citizens the rights and privileges claimed and used by themselves."[24] The opportunity to open a Catholic school directly adjacent to a public one represented a unique opportunity. It would reveal the equality, if not superiority, of the parochial school, and it would demonstrate the continued demand among Catholic parents for parish over public education.

Sheedy received a national platform in August 1889 when he published an essay entitled "The School Question: A Plea for Justice" in *The Catholic World*. There, he highlighted the surging need for parochial schools in Pittsburgh, citing the Catholics' "constant demand for additional school room." On several occasions he remarked upon the supremacy of the Catholic schools and concluded by suggesting ways "of testing the superiority of one system over the other" through "an honest competition between the pupils in equal grades of the two systems." The parochial school Sheedy directed, housed in the same building as a public school, represented a laboratory for these ideas about Catholic education and educational competition.[25] When the editors of New England's *Journal of Education* read Sheedy's essay they remarked that "the church of Rome is making war upon the American school system."[26]

The rental arrangement, as intended, did not last. While Protestants failed to challenge it successfully in court, Sheedy fulfilled the terms of his contract and left the Duquesne School after one year. By all accounts, he had achieved his goals. As one newspaper observed, the

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[24] "What Father Sheedy Says," *Pittsburgh Press*, October 2, 1888.

[25] Morgan M. Sheedy, "The School Question: A Plea for Justice," *The Catholic World* 49 (August 1889): 653-54.

[26] The Parochial School Issue," *Journal of Education* 30, no. 7 (August 22, 1889): 121.

Catholic side of the Duquesne School enrolled over two hundred pupils, whereas the adjacent public side had a "much smaller" attendance.[27] Sheedy acknowledged that school quality should not be measured exclusively by attendance, since "most parents are influenced by other considerations in selecting a choice of schools for their children" other than "comparing the efficiency of one system with the other." Nonetheless, in the popular imagination, and likely for Sheedy as well, numbers mattered. Speaking in the language of competition, Sheedy knew that the ultimate arbiter would be the consumer, "the choice of the parents."[28]

It came as little surprise to Pittsburgh residents, then, when Sheedy announced in 1889 that a large new parochial school attached to St. Mary of Mercy Church, in the First Ward, would open within a year's time. Parochial school attendance, according to Catholic sources, had continued to keep pace with the city's growing population, rising from 7,152 students in 1880 to 12,426 (compared with 31,000 in public schools) a decade later.[29] In April 1889, Father Corcoran of St. Agnes Church, in the city's Fourteenth Ward, told parishioners that their Catholic school would be expanding within the year and that, as the *Pittsburgh Dispatch* recounted, "parents who had been sending their children to public schools should take them away."[30] Each August and September, the local newspapers reported on the Catholic schools that had opened, as well as on the sermons of Catholic priests urging their parishioners to attend them. In 1888 the *Pittsburgh Catholic* remonstrated its readers to appreciate "their duty in

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[27] "Excitement among the Protestants of Pittsburgh, *New York Times*, September 4, 1888;

[28] Sheedy, "The School Question," 654.

[29] "Diocesan Statistics, 1880-1901," Associate General Secretariat (RG 4, 1 Chancellor), Historical Records Collection, Catholic Diocese of Pittsburgh; James H. Blodgett, *Report on Education in the United States at the Eleventh Census, 1890* (Washington, D.C.: Government Printing Office, 1893), 139.

[30] "Public and Parochial Schools," *Pittsburgh Dispatch*, April 29, 1889.

reference to the selection of school in which they are intending to entrust their little ones for training and educational purposes."[31] Father Corcoran reportedly sermonized that he would refuse absolution to parents who sent their children to the public, "unchristian" school.[32]

Public school officials and Protestant clergymen issued their own laments each August and September as hundreds of Catholic students transferred from public to parochial schools. Opposite the page from the story on Corcoran's exhortation, the *Dispatch* featured a sermon from the Methodist preacher Charles E. Locke, who called Catholic parochial schools "non-American" and a "menace" that will "destroy the most splendid system of public education that the world has seen."[33] In early September, 1889, the *Dispatch* reported that Father Corcoran's efforts had in fact moved around two hundred students in the Fourteenth Ward to transfer to the parochial school. "The [public school] teachers . . . are viewing with alarm the exodus of Catholic pupils from their school," the article read. "If the attendance drops off it may become necessary to discharge several teachers." Such an event, the newspaper continued, was not unusual. "About one year ago teachers were dropped in the Mount Albion schools for the same reason. When St. Kyrnan's school was opened the Catholic parents withdrew their children from the public school and sent them to Father Briley."[34] "Catholics Want More Room," a *Dispatch*

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[31] "The Re-Opening of the Schools," *Pittsburgh Catholic*, September 1, 1888.

[32] "A Talk to Parents," *Pittsburgh Dispatch*, August 26, 1889.

[33] "A Preacher Replies," *Pittsburgh Dispatch*, August 26, 1889.

[34] "A Large Increase," *Pittsburgh Dispatch*, September 9, 1889. The *Commercial Gazette* reported the previous year that roughly 300 pupils from the McGandless public school would leave for St. Kyrans. "From the Public School," *Pittsburgh Commercial Gazette*, September 3, 1888.

headline declared in early November. The city's Catholics, it appeared, could not expand their parochial schools fast enough.[35]

In the First Ward, the *Pittsburgh Press* warned that the majority of the 127 children of the Duquesne School "will be taken away from the school in November when Father Sheedy's parochial school opens." While the Duquesne School's principal guessed that the opening would cause fifty public school students to depart, the school's former principal and now city superintendent—George J. Luckey—was more pessimistic. "Nearly all of the Protestant families moved out of the ward," to the city's East End, he remarked. "In a year or so from now there will scarcely be a Protestant family in the district." While the majority of the estimated 350 Catholic children in the ward currently attended the public school, the *Dispatch* wrote, "when the new school opens these children will be drawn off, and the public school will be almost depleted." At that point, the school directors would be saddled with an empty edifice that might potentially be a worthless asset, a "school building on their hands with no way of getting rid of it," as the *Dispatch* put it. Special legislation would be needed to dispose of the school. The First Ward's traditional assets, along with the Protestant families that had first contributed to them, were desiccating. While the new parochial school did not spur these trends, it certainly accelerated them.[36]

The new St. Mary of Mercy Parish school opened in early 1890 to much fanfare. Three-hundred children marched around the parish as Catholic priests sang hymns and sprinkled holy water in the classrooms. One week before George Washington's birthday, Sheedy sermonized on

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[35] "Catholics Want More Room," *Pittsburgh Dispatch*, November 4, 1889.

[36] "The Opening Wedge," *Pittsburgh Press*, September 30, 1889; "First Ward Rivalry," *Pittsburgh Dispatch*, September 30, 1889.

the first president's Christian values. Later in the ceremony, officials read letters from the Archbishop of Baltimore, who regretted his absence. Leading the children in song were a group of nuns from the Sisters of Mercy. The Sisters would work as the school's teaching force, and they were essential to its survival. Like the thousands of nuns staffing parochial schools throughout the country, the Sisters required barely any remuneration. Low teacher wages allowed parochial schools like St. Mary of Mercy's to keep tuition at $1 or less per month. It allowed Catholic elementary schools to offer a form of private, mass education that rivaled the public schools.[37]

Shortly after the parish school's opening, the principal of the Duquesne School resigned. The *Dispatch* reported that "while there was no danger of his being dropped for the present, the directors felt assured that it would be only a matter of time until there would be no need of the services of a principal." With only three teachers remaining, "it will not be necessary to elect any person to his place." [38] A dwindling one-hundred children remained in the public school, around a third of the parochial school's attendance. In 1892 the school closed, reopening a year later with a mere twenty-nine students.[39] In the 1860s, when the Duquesne School was at its height, it was inconceivable that a public school could face this type of competition. By 1890, such competition among schools for Catholic pupils was impossible to ignore.

II

As millions of Catholic immigrants entered into large cities in the North they constructed parochial schools at a rapid pace, producing educational competition and religious conflict. At

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[37] "In His New School," *Pittsburgh Dispatch*, February 13, 1890; "Father Sheedy's School," *Pittsburgh Catholic*, February 22, 1890.

[38] "Why Prof. Sullivan Resigned," *Pittsburgh Dispatch*, April 1, 1890.

[39] *Reunion of the Old Scholars*, 4.

the very same time that political economists began associating public schools with "natural monopolies," in other words, immigrants were reshaping American educational history in ways their fellow Americans did not foresee. The timing of the controversy surrounding St. Mary of Mercy's parish school was no accident, coming in the midst of a longer, broader, and transnational nineteenth-century Catholic revival. This Jesuit-enabled, Vatican-centered movement encompassed a variety of goals, each one intended to beat back the assault on Catholic power by Protestants, secularists, and liberals in Europe and elsewhere. In the United States, Roman-trained American bishops adhered to the philosophy of Thomas Aquinas and his communal vision of church, state, and society against Protestant individualism. They, along with a large group of Jesuits fleeing Europe during the anticlerical and anti-Catholic movements embedded in the Revolutions of 1848, emphasized respect for church hierarchy and a commitment to "ultramontanism": looking to the unifying authority of the Pope in Rome rather than to the unique expression of Catholicism within and outside of the borders of the nation state. The nineteenth-century Catholic revival was responsible for new organizations, institutions, and professions—youth groups and schools, teachers and writers—but had less tangible effects as well. American Catholics brought to their churches and their lives a renewed and more intensive piety, one filled with beliefs in miracles, apparitions, and the suffering Jesus of the Passion.[40]

Parochial schools stood centrally within this vision of a revitalized Catholicism. Beginning in the 1840s and continuing through the decades following the Civil War, the Catholic bishops of New York (John Hughes), Cincinnati (John Purcell), and Rochester (Bernard J.

[40] John T. McGreevy, *Catholicism and American Freedom: A History* (New York: W.W. Norton and Company, 2003), 7-42; Jay P. Dolan, *Catholic Revivalism: The American Experience, 1830-1900* (Notre Dame: University of Notre Dame Press, 1978).

McQuaid) dedicated immense resources to building Catholic schools within their dioceses.[41] In the wake of several dramatic confrontations between Catholics and Protestants over prayer and bible reading in public schools—including riots in Philadelphia, most famously—Catholic bishops assumed increasingly hostile stances toward state education. They urged parishes to construct parochial schools and sought to persuade state legislatures that those schools should be funded with public tax dollars. This emphasis on Catholic education reached a climax with the 1884 Third Plenary Council of Baltimore. While the bishops at the Third Plenary Council addressed a whole range of issues facing American Catholicism, a full quarter of the Council's legislation dealt with matters of Catholic education.[42] The bishops linked parochial schools to the future of American Catholicism. They decreed that every Catholic Church must organize a school and, with several noted exceptions, that every parent send their child to it.[43] Within a decade of the Third Plenary Council, Catholics had expanded parish school buildings and attendance numbers by over fifty percent, with 755,038 children—the majority of them the sons and daughters of working-class first and second-generation immigrants—enrolled in close to four thousand parochial schools.[44]

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[41] On Hughes, see Vincent Lannie, *Public Money and Parochial Education: Bishop Hughes, Governor Seward, and the New York School Controversy* (Cleveland: Case Western Reserve University Press, 1968); on Purcell, see James A. Gutowski, "Politics and Parochial Schools in Archbishop John Purcell's Ohio" (Ph.D. diss., Cleveland State University, 2009); on McQuaid, see Frederick James Zwierlein, *The Life and Letters of Bishop McQuaid: Prefaced with the History of Catholic Rochester Before His Episcopate* (Rochester: The Art Print Shop, 1926), 2:119-53; on McMaster, see Thomas T. McAvoy, "Public Schools vs. Catholic Schools and James McMaster," *The Review of Politics* 28, no. 1 (1966): 19-46.

[42] Jay P. Dolan, *The American Catholic Experience: A History from Colonial Times to the Present* (Garden City, NY: Doubleday & Company, 1985), 271-72.

[43] "Decrees of the Council—Title VI," in *Catholic Education in America: A Documentary History*, ed. Neil G. McCluskey (New York: Bureau of Publications, Teachers College, 1964), 94. The text here is translated from the Latin. Parents could be exempted from enrolling their children in parochial schools if "a sufficient training in religion is given either in their own homes, or in other Catholic schools; or when because of a sufficient reason, approved by the bishop, with all due precautions and safeguards, it is licit to send them to other schools."

These hierarchical decrees from above combined with Catholic immigrants' demand from below to invest in Catholic education. Catholic attendance in parochial schools increased exponentially even while, to the hierarchy's chagrin, it was never universal. Why particular Catholic parents chose to enroll their children in parochial rather than public schools is a complex question. Many parents believed their children's attendance in Catholic schools aligned them with God or with their religious and cultural heritage. Others followed the dictates of their priests and bishops. Still others compromised, sending their children to Catholic school until they received First Communion, before transferring them to public schools or into the labor market. Spatial considerations also mattered. Some parents lacked easy access to a parish school because of where they lived. Better to enroll their children in proximate public schools than risk their health by sending them over railroad tracks and rivers. A range of other, more personal and idiosyncratic considerations also influenced these decisions.[45]

Generally, however, the most significant barriers to attendance in private schools were cost and geography. Cities with large working-class Catholic populations in the late nineteenth century were also sites of low wages and economic depressions. Unemployment skyrocketed to roughly 25 percent in the years after the panics of 1873 and 1893. In response to these economic realities, parishes like St. Mary's in Pittsburgh kept tuition down to remarkably low levels. In larger, more established parishes, general church coffers could remove the need for any tuition at all, or provide grants to parents who could not afford it. These policies helped parochial schools grow in hard times, but competing with public schools on cost would always be nearly

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[44] Philip Gleason, "Baltimore III and Education," *Catholic Historian* 4, no. 3/4 (1985): 273-313. See also *Memorial Volume: A History of the Third Plenary Council of Baltimore, November 9-December 7, 1884* (Baltimore: The Baltimore Publishing Company, 1885), 17, 170.

[45] Chapter Five discusses Catholic school choice in greater depth.

impossible. For working class parents making $400 or less annually—particularly those with large numbers of children—tuition charges could amount to 5 percent or more of the family's annual income. Many parents chose to send their children to public schools or to the workplace and save these expenditures on other goods.[46]

The range of spiritual, ethnic, linguistic, and geographic identities that composed American Catholicism made any simple characterization of Catholic attitudes toward schools impossible, particularly as Poles, Mexican-Americans, Italians, Czechs, Slovaks, and other Catholics entered Northern cities in large numbers beginning in the 1890s. Catholics had a diverse and shifting relationship to parochial schools. Italians tended to enroll their children in Catholic schools at low rates, a result in part of their alienation from centralized, Irish-led dioceses. The demand for Polish Catholic schools, meanwhile, was typically quite high, as the Polish diaspora (the "*Polonia*") strove hard to replicate the language and piety of the old country.[47] School attendance patterns also varied by locale. Different cities, despite relatively similar demographics, could build parochial schools at highly divergent rates. In New York, Brooklyn, Newark, Philadelphia, and Pittsburgh anywhere between 35 and 60 percent of parishes had parochial schools. Chicago's Catholics educated 50 percent of their children in the parish.

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[46] Joel Perlmann, *Ethnic Differences: Schooling and Social Structure among the Irish, Italians, Jews, and Blacks in an American City, 1880-1935* (New York: Cambridge University Press, 1989), 74; Robert E. O'Brien, "The Cost of Parochial Education in Chicago," *Journal of Educational Sociology* 2, no. 6 (February, 1929): 349-56.

[47] John T. McGreevy, *Parish Boundaries: The Catholic Encounter with Race in the Twentieth-Century Urban North* (Chicago: University of Chicago Press, 1996), 12-13; Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (New York: Cambridge University Press, 1990), 84-94; Dolan, *The American Catholic Experience*, 279-83; Paula Fass, *Outside in: Minorities and the Transformation of American Education* (New York: Oxford University Press, 1993), 222-23.

In Boston, by contrast, only 12 percent of parishes had a Catholic school in 1880, enrolling 25 percent of Catholic children.[48] Several factors accounted for Boston's divergent Catholic school attendance in the nineteenth century. As arguably the birthplace of public education in America Boston's public schools possessed a unique aura that had benefited the city's rising Catholic middle-class. Having attended Boston's elite public high schools themselves, they did not share other Catholics' faith or desire that parochial schools compete for Catholic students. The city's bishops, meanwhile, were more reluctant supporters of school-building campaigns than their peers elsewhere. With money perpetually tight, Boston's Catholic leadership preferred to expand Catholic churches. By the latter decades of the nineteenth century, the economic and political ascendance of Boston's Irish Catholics produced further support for public education. Catholics were now graduates, teachers, elected school board members, and even administrators of the city's schools. The city's public institutions thus proved more responsive to Catholic demands, and when they failed to do so, elections would eject offenders from office.[49] While attendance in Boston parochial schools grew more steadily in the twentieth century, evidence of old attitudes remained. As late as the 1940s Catholic public school teachers expressed disdain for how "the increase of parochial schools put them out of jobs" and how

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[48] John J. White, "Puritan City Catholicism: Catholic Education in Boston," in *Urban Catholic Education: Tales of Twelve American Cities*, ed. Thomas C. Hunt and Timothy Walch (Notre Dame: Alliance for Catholic Education Press), 93-101; Joseph J. Casino, "From Sanctuary to Involvement: A History of the Catholic Parish in the Northeast," in *The American Catholic Parish: A History from 1850 to the Present*, ed. Jay P. Dolan (Mahwah, NJ: Paulist Press, 1987), 23-111; David W. Galenson, "Neighborhood Effects on the School Attendance of Irish Immigrants' Sons in Boston and Chicago in 1860," *American Journal of Education* 105, no. 3 (May, 1997): 261-93; Dolan, *The American Catholic Experience*, 282-83.

[49] Galenson, "Neighborhood Effects"; James W. Sanders, "Boston Catholics and the School Question, 1825-1907," in *From Common School to Magnet School: Selected Essays on the History of Boston Schools*, ed. James W. Fraser, Henry L. Allen, and Nancy Barnes (Boston: Boston Public Library, 1979), 43-75; Dolan, *The American Catholic Experience*, 264. Timothy Meagher found a similar dynamic in Worcester, MA, where Irish-American priests and congregations had neither the "will or even interest" to build schools. See Timothy Meagher, *Inventing Irish America: Generation, Class, and Ethnic Identity in a New England City, 1880-1928* (Notre Dame: University of Notre Dame Press, 2001), 158-161.

enrolling their own children in parochial schools would represent "bit[ing] the hand that feeds me."[50] The Boston case exemplified how a particular urban context could produce a vastly different set of educational preferences.

III

Native-born public school advocates ignored these ethnic and regional variations in Catholic school attendance, seeing instead only a uniform threat to the dominant Protestant culture. In this context, the battles over single parochial schools in a given city or ward formed part of a broader narrative of public school decline. Throughout the urban North in the late 1880s public officials noted a drop in public school attendance as a result of parochial school construction. The United States Commissioner of Education, Nathaniel H.R. Dawson, dedicated a year to determining why public school attendance and the proportion of enrollments dropped over the previous decade.[51] After nearly a half-century of enormous growth, public education appeared to be losing ground to private schools.

This decline had broader religious and cultural reverberations. Within national politics, public schools by the 1870s had become inextricably tethered to Protestant values and Republican Party politics. Republicans believed that public schools could unite a nation reeling from conflicts produced by civil war, western expansion, and mass immigration. By constructing parochial schools, immigrant Catholics threatened the common school ideal. The *Harpers Magazine* cartoonist (and German-American Republican) Thomas Nast captured these perceived threats well, illustrating the frequently anti-Catholic timbre behind Republican, common school

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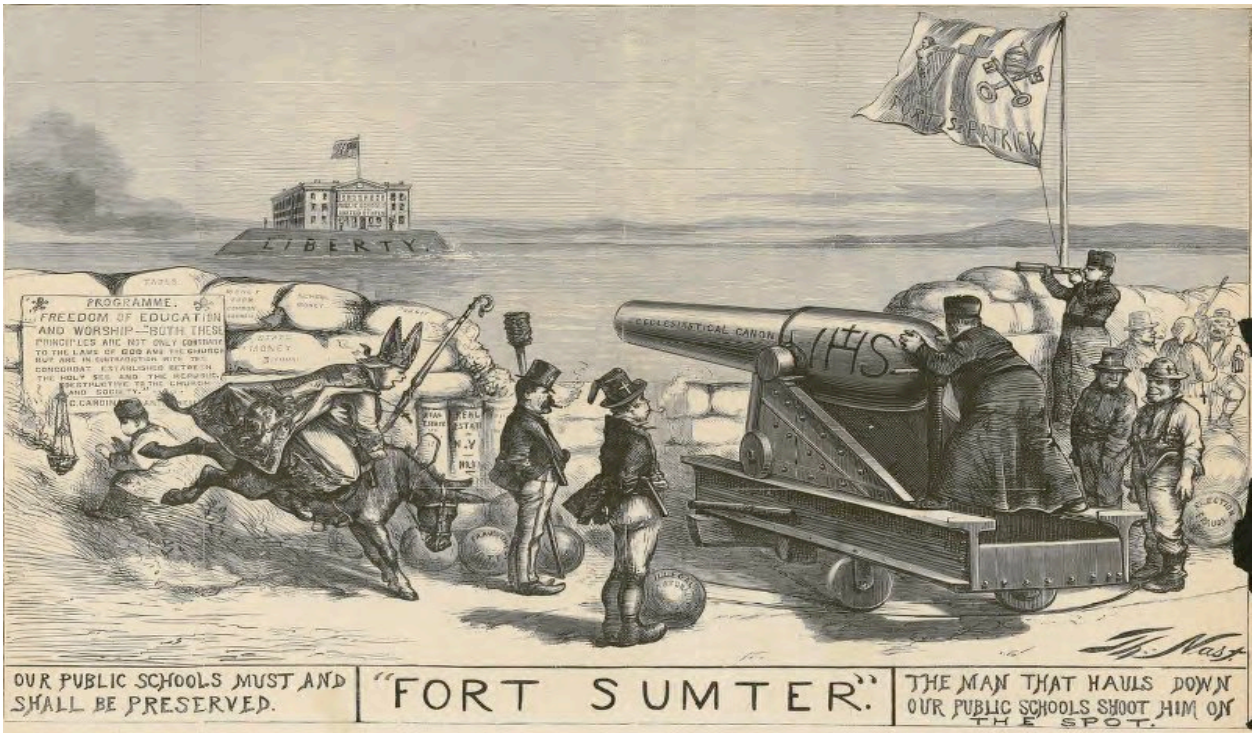
[50] Reverend David Sylvester, "Why Catholic Children Are Not Attending Catholic Schools: A Study of the Reasons Offered by Their Parents" (PhD Diss., Catholic University of America, 1947), 30, 58.

[51] Nathaniel H.R. Dawson, *Report of the Commissioner of Education for the Year 1887-88* (Washington: Government Printing Office, 1889): 64-5.

advocates' rhetoric throughout the decade. In an 1870 cartoon, he depicted a group of foreign and sinister-looking Catholics firing on an island with a common school on it. "Fort Sumter," Nast titled his cartoon, connecting in his readers' imaginations the battle for national unity, common schooling, and anti-Catholicism.[52]

The product of these recriminations was a divisive cyclical process. More Catholic parochial schools produced more anxiety among Protestants, fueling greater anti-Catholic sentiment and, in turn, louder calls among Catholics for their own schools. Catholic leaders also kept a close eye on liberal European governments seeking to separate church and state and cripple the traditional power of the Catholic Church. The 1871 Paris Commune, the 1879 Ferry Laws under the French Third Republic, and the 1879 Humbeeck School Laws of Belgium each



Cartoon by Thomas Nast. "Fort Sumter," *Harper's Weekly*, March 19, 1870. Photo courtesy of Princeton University Digital Library.

[52] Ward McAfee, *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s* (Albany: State University of New York Press, 1998); Benjamin Justice, "Thomas Nast and the Public School of the 1870s," *History of Education Quarterly* 45, no. 2 (Spring 2005): 171-206.

sought to remove the Church's influence from schools in unprecedented ways. Thus, Catholic educational authorities wondered: would American Catholic schools soon also be under siege?[53]

On this national stage, battles between Catholics and Protestants over school politics represented a true culture war. Readers of Catholic and Protestant periodicals in the 1870s and 1880s encountered long, passionate diatribes on public and Catholic schooling. To Catholic writers, public schools were "anti-Catholic," "Protestant," or worse, "godless." To Protestants, Catholic schools were "Romish" and "foreign." In this volatile climate, nearly every major issue of the 1870s became grafted onto battles between Catholics and Protestants over schools. Protestants associated Gilded Age corruption and urban bossism with New York City mayor William M. Tweed's support of public funding for parochial schools. The politics of Reconstruction, too, entered into these debates. Several prominent Northern Protestant Republicans evoked the horrors of Southern legal racial segregation in their attempts to promote common over "sectarian" schooling. Only through public schools could the North avoid the kind of caste system featured in the South, they asserted. Behind every area of American public life, it seemed, lay a symbol of Catholic-Protestant enmity.[54]

Religious conflicts over schools migrated seamlessly into federal politics. In 1875 and 1876, the Republican Party rallied around a proposal from Ulysses S. Grant and Maine Senator James G. Blaine to add an amendment to the federal constitution that would bar public funds for religious schools. The amendment was widely perceived in the press to be aimed at Catholics, who ran the largest system of religious schools in the nation. While Catholic schools rarely

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[53] For more on this transatlantic context see McGreevy, *Catholicism and American Freedom*, 7-42.

[54] These themes are explored in McAfee, *Religion, Race, and Reconstruction.*

received direct taxpayer dollars, Protestant Republicans viewed the Blaine amendment as a way to permanently foreclose any potential political and financial ties between urban Democratic political machines and Catholic voters. When the amendment failed to gather sufficient votes in the Senate, Republican-controlled state legislatures soon took up the call instead. By 1876, fourteen states had enacted legislation or had amended their state constitutions to prohibit public funding of religious institutions; by 1890, those measures stretched to twenty-nine states. Preventing Catholics from having access to public funds, Republicans believed, would severely curtail efforts to build up robust parochial-school systems.[55]

To Catholic writers, the Blaine amendments represented an anti-Catholic attack on their schools. Several claimed that the United States was on its way to establishing a dangerous, secular "state monopoly" of education that paralleled European governments' attempts to constrain the influence of Catholic schools. For these Catholic writers, state control of education summoned the same set of fears that drove Protestant Republicans' mistrust of Catholic schools: each was an expression of antidemocratic sentiment and a corruption of American values. To one Jesuit commentator, writing in the *American Catholic Quarterly Review*, the battle between the state and parochial schools was nothing less than a "struggle . . . between individual, domestic,

[55] Historians today agree that Blaine's support for the bill was mostly driven by political, rather than purely prejudicial, calculations. Blaine's mother was Catholic and he had sent his own daughters to Catholic academies. Hoping to attract the support of anti-Catholic Republican voters for his own presidential nomination, Blaine sought to capitalize on the backlash produced by several recent Catholic "victories" in battles over education. In Cincinnati, Catholics persuaded the school board to remove Protestant Bible-reading from public schools in 1869. Meanwhile, in New York City and elsewhere, Democratic politicians hoping to build support among Catholic voters acquired some public funds for religious educational institutions. Scholarly interests in the history behind these so-called "Blaine Amendments" have risen following recent Supreme Court cases dealing with publicly-funded vouchers for religious schools. See Joseph P. Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," *Harvard Journal of Law and Public Policy* 21, no. 3 (Summer 1998): 657-718; Benjamin Justice, "The Blaine Game: Are Public Schools Inherently Anti-Catholic?" *Teachers College Record* 109, no. 9 (September 2007): 2171-2206; Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 287-334; and Steven K. Green, "Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle," *First Amendment Law Review* 2 (Winter 2003): 107-151.

and religious liberty on the one hand, and State monopoly of education on the other."[56] These types of remarks drawing stark ideological contrasts between Catholic and public schools were common in American periodicals during the 1870s and 1880s. Amid this backdrop of Catholic-Protestant enmity, Catholic school construction proceeded apace, transforming American urban education in the process.

IV

In American cities, stories of parochial school construction and competition similar to Pittsburgh's occurred throughout the 1870s and 1880s. In school reports, evidence of their effects typically would yield a sentence or two. In Cincinnati, the superintendent noted the Third Plenary Council's effects in 1889, writing that "there has been an increasing pressure upon parents to induce them to send their children to parochial and other church schools," resulting in a "falling off in the number of pupils attending the [public] schools." The Cincinnati data suggested the movement from public to private schools was most dramatic "in the districts where … new parochial schools have been established."[57]

In the city-suburbs surrounding Boston, reports of Catholic school building in the wake of the Third Plenary Council created significant conflict along religious lines. Waltham's Catholic leadership finally realized its goal when a large parochial school opened in 1888. The sudden rush of 800 Catholic students from the public schools into the new parochial school attracted national attention. Newspapers reported that public school attendance had been reduced by more than one-third, closing two schools in the process. "Children then had to be transferred,

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[56] Rev. James Conway, "The Rights and Duties of Family and State in Regard to Education," *American Catholic Quarterly Review* 9 (January 1884): 106.

[57] *Fifty-Ninth Annual Report of the Public Schools of Cincinnati for the School Year Ending August 31, 1888* (Cincinnati: Ohio River Valley Company, 1889), 32.

and teachers discharged," announced the *New York Times*. Such events produced noticeable tensions in the town. "The Waltham school system is in a demoralized condition, and the Protestants are not inclined to look with favor upon the parochial school which has caused the trouble."[58] As school committee elections approached in late 1888, newspapers elsewhere reported scores of new Protestant voters—women, in particular—fighting off what they deemed "priestly encroachment on the public school domain." As the *Boston Evening Transcript* reported, "the beginning of the movement of the sudden waking up of the women of Waltham to the value of the school committee franchise . . . dates from the opening of the great parochial school."[59] Catholics no doubt responded that parochial-school building represented the very opposite of encroachment on public schools. But the broader context mattered. The events in Waltham mirrored patterns occurring throughout the cities that ringed Boston. The specter of emptying public schools occasioned impassioned feelings and exacerbated longstanding tensions between American Catholics and Protestants.

In these smaller urban areas, the erection of a single school could have dramatic effects on town-wide public school enrollments and jobs. In the northern Boston suburb of Malden, the opening of a large parochial school in 1881 attracted close to five-hundred students, requiring several public schools to be closed and teachers dismissed. When the public schools opened in September of 1888 to continued diminished attendance, public school proponents charged the parish priest with coercing Catholic students. "Intimidation of Public School Children," a

[58] "The Catholic Agitation," *New York Times*, September 9, 1888.

[59] "Waltham's Women Voters," *Boston Evening Transcript*, December 5, 1888. See also "Parochial Schools: How They Affect Waltham's Public Schools," *Boston Daily Advertiser*, September 10, 1888; "Boston's Fair Voters," *Pittsburgh Press*, October 7, 1888.

headline in the *Boston Evening Transcript* read, focusing on the priest, Father Flattery.[60] The *Chicago Tribune* even covered the story, adding that "when the public schools opened this morning . . . many of them showed scanty attendance." As was the case seven years earlier, the parochial school's opening had repercussions for the public schools. "This action of the Catholic parents will necessitate the closing of some of the schools there probably, as at Waltham," the *Tribune* commented. Newly opened parochial schools were becoming a news sensation.[61]

The fallout from parochial school construction even tore apart a school committee in one city. In Woburn, ten miles north of Boston, the construction of a new parochial school in 1884 resulted in three-hundred students leaving the public schools. The school board splintered over whether to consolidate the public schools, given the diminished attendance. A majority of the board felt such a course, while necessary, should only be practiced minimally so as not to "disturb the efficient running of our schools." A vocal minority disagreed. With fewer students attending the same number of schools, the minority—pushing for consolidation—alleged that the board was left exposed "to the charge of extravagance." When the board's majority discovered that the minority planned to publish their comments in a dissenting report, they approached the local publisher and forbade him from printing it.[62]

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[60] "Intimidation of Public School Children," *Boston Evening Transcript*, September 11, 1888; "Malden," *Boston Daily Globe*, September 11, 1881.

[61] "Catholics and the Public Schools," *Chicago Tribune*, September 11, 1888.

[62] "A House Divided," *Boston Daily Globe*, March 25, 1885. The *Boston Daily Globe* printed dozens of stories on the opening of new parochial schools around Boston, especially in the wake of the Third Plenary Council. See the following stories: "French Catholics Buy a Church Site," June 19, 1885; "New Parochial School in Cambridge," June 21, 1885; "New Parochial Schools," December 13, 1886; "Laying Corner-Stones," April 11, 1887; "A New Parochial School," June 22, 1887; "Watertown Parochial School," June 22, 1887; "Noble Structure," August 16, 1888; "New Parochial School," August 16, 1888; "New Parochial School," August 17, 1888; "The Mission Parish School, Roxbury District," February 3, 1888; "For Catholic Children," September 3, 1888; "Arlington Parochial School," September 5, 1888; "North Brookfield School," September 5, 1888; "Mission Church School," August 19, 1889; "St. Michael's R.C. Church, Hudson," August 26, 1889; "New Parochial School," September 4, 1889;

Far from New England, conflicts over ethnic identity dominated the politics of parochial-school construction. Catholic immigrants from non English-speaking nations placed an enormous value on preserving their cultural traditions amid the presumed assimilationist emphasis of American public schools. European Catholic immigrants from Germany, Poland, Italy, Slovakia, and elsewhere also refused to assimilate into the predominately Irish-led and English-speaking American Catholic Church. Instead, they constructed their own parishes, with their own priests conducting church services in their own languages. For centuries, Catholic parishes had been defined by geographical boundaries, but the diversity of American cities belied attempts to impose such territorial designations. Catholic immigrants sought and largely succeeded in superimposing their own ethnic parishes onto preexisting Catholic parish boundaries. In Chicago, the nation's most diverse Catholic archdiocese, a patchwork of ethnic "national" churches coexisted alongside the traditional English-speaking (and increasingly Irish-led) "territorial" parishes. Within these national churches, the language of the old country filled priestly sermons, devotional practices, and dozens of parish societies. Foreign-language schools, meanwhile, served as central ethnic institutions, capable of meeting immigrant groups' distinctive ethnic demands more effectively than the local public schools. Ethnic Catholic schools offered instruction in foreign languages, in addition to teaching about the history, culture, and devotional practices of the mother country. Half of Chicago's Catholic school students attended national parochial schools: German, Polish, Bohemian, Lithuanian, Slovak, and others.[63] In 1886, the *Chicago Tribune* noted that only 10 percent of the city's Polish-

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"Malden's Parochial School," December 23, 1891; "Parochial School at Charlestown," December 23, 1891; "Parochial School Assured, April 20, 1891."

[63] James W. Sanders, *The Education of an Urban Minority: Catholics in Chicago, 1833-1965* (New York: Oxford University Press, 1977), 40-55; Józef Miąso, *The History of the Education of Polish Immigrants in the United States*

American school children attended public schools.[64] In the 1870s it was estimated that eighty percent of German-Americans in St. Louis attended German-language private schools.[65]

Public schools struggled to attract immigrant parents away from the allure of ethnic parochial schools. When the Chicago school board refused to adopt German language instruction in 1879, the result was a mass exodus to parochial schools. As the *Illinois Staats Zeitung* reported, one local public school "has practically no attendance, while the neighboring parochial and private schools, which teach German, are crowded--and in these institutions there is no free tuition!"[66] Many immigrant community leaders resisted public school attendance even when those schools did offer foreign language instruction. When Milwaukee Poles attempted to introduce Polish language instruction in the public schools, they faced opposition by their own parish priests, who advised the school board that "[we] know that the above measure will be of no advantage to us, as we now have all necessary facilities for learning our language."[67] Luring immigrants away from their national parishes and schools proved exceedingly difficult.

Public officials tried nonetheless, frequently by adopting several of the distinctive features of ethnic schools. In Cleveland, the public schools attempted to reform their own

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(New York: Kosciuszko Foundation, 1977), 126; Dolan, *The American Catholic Experience*, 162-63, 207-8; McGreevy, *Parish Boundaries*, 15.

[64] "Our Polish Citizens," *Chicago Daily Tribune*, March 14, 1886.

[65] Selwyn K. Troen, *The Public and the Schools: Shaping the St. Louis System, 1828-1920* (Columbia: University of Missouri Press, 1975), 53; *The Future of Foreign-Born Catholics; and Fears and Hopes for the Catholic Church and Schools in the United States: Two articles from the St. Louis Pastoral* (St. Louis: B. Herder, 1884), 76.

[66] "German in the Public Schools," *Illinois Staats Zeitung*, December 31, 1879, Chicago Foreign Language Press Survey, http://flps.newberry.org/article/5418474_1_0697/

[67] Milwaukee School Board, *Proceedings of the School Board* (1897): 37. See also William J. Galush, "What Should Janek Learn? Staffing and Curriculum in Polish-American Parochial Schools, 1870-1940," *History of Education Quarterly* 40, no. 4 (2000), 402; Jonathan Zimmerman, "Ethnics Against Ethnicity: European Immigrants and Foreign-Language Instruction, 1890-1940," *Journal of American History* 88, no. 4 (March 2002): 1400.

curricula in order to remain competitive. "Were the people dissatisfied with their [public] school, they would send their children to private schools, which is always the first remedy to suggest itself," Cleveland's public school superintendent, Andrew Rickoff, affirmed in 1876.[68] Thousands of German immigrants living in Cleveland in the 1850s and 1860s had done just that and enrolled their children in German-language private and parochial schools. By 1870, the city's school board began promoting German instruction in the public schools, in large part to siphon German-American children away from private alternatives. In the decades that followed, officials frequently boasted about the competitive advantages that accrued to the public schools once German was introduced.

In a city where one in three children attended church schools throughout the 1870s and 1880s, adopting the very methods that made private schools attractive in the first place promised vast dividends. As Rickoff explained in 1874, Germans "think they can do better for the preservation of their peculiarities by founding and maintaining private Schools." Why not, then, co-opt some of these peculiarities? "That the Public Schools are free is not sufficient to draw the German children into them," said Rickoff's successor in 1886. Only the addition of German language instruction in the public schools could induce large transfers from private schools. By 1887, the president of the school board triumphantly attested that "many parochial and private schools have been largely abandoned, and the German-American now shares in common with the Anglo-American . . . the privileges of a common popular education."[69] But the reality was more complicated. The extent of a massive German migration to public schools was difficult to

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[68] *Thirty-Ninth Annual Report of the Board of Education for the School Year Ending August 31, 1875* (Cleveland: Robison, Savage and Co., 1876), 77.

[69] *Thirty-Seventh Annual Report of the Board of Education of the Cleveland Public Schools for the School Year Ending August 31, 1873* (Cleveland: Robison, Savage and Company, 1874), 52-53.

quantify precisely; based on their own statistics, the public school officials appeared to exaggerate. Eight years after German-language instruction had been adopted in the public schools, the percentage of children enrolled in church schools had fallen only one percent.[70]

V

Elsewhere, public officials responded to Catholic school competition by adopting the kind of reform that Pittsburgh's First Ward school board members had implemented: arranging for some degree of public-private cooperation. The most heralded local compromise began in Poughkeepsie, New York in 1873, soon publicized nationally as the "Poughkeepsie Plan." There, the city's school board arranged a deal with the local priest to lease the Catholic school building. Public tax dollars would pay for Catholic teachers and, in return, these new Catholic "public" schools would be required to follow public school rules and regulations, which included limiting religious instruction to after-school hours. Catholic officials agreed to similar plans in nearly two-dozen small cities throughout the North in the 1870s and 1880s. For school boards, consolidating parochial schools within the public system had the benefit of attracting Catholics to public schools, eliminating the expenses for new buildings, and diminishing the disruptions imposed by educational competition.[71]

In a period in which distinctions between public and private education were hardening, and competition between public and private schools was increasing, the Poughkeepsie Plan represented an alternative path motivated by cooperation. Yet, it was precisely the plan's attempt

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[70] *Annual Report of the Cleveland Public Schools* (Cleveland: Leader Printing Company, 1886), 25, 93; *Annual Report of the Cleveland Public Schools* (Cleveland: Plain Dealer Publishing Company, 1887), 19. Also, *Annual Report of the Cleveland Public Schools* (Cleveland: Wiseman and Harvey, 1879), 63.

[71] Timothy Walch, *Parish School: American Catholic Parochial Education from Colonial Times to the Present* (New York: Crossroad Publishing Company, 1996), 68-71. On these arrangements in New York state, see Benjamin Justice, *The War that Wasn't: Religious Conflict and Compromise in the Common Schools of New York State, 1865-1900* (Albany: State University of New York Press, 2005), 189-218.

to blur conceptions of public and private that led to its defeat. As in Pittsburgh, Protestant periodicals abhorred the use of public funds for Catholic schools. Even though these arrangements precluded religious instruction during school hours, public money would still go toward paying for Catholic teachers—nuns in religious garb—in schools attached to Catholic churches. Furthermore, critics of Catholic education reasoned, these arrangements incentivized attendance in Catholic "public" schools by guaranteeing free tuition. State school officials, meanwhile, often felt that these local arrangements undermined the goals of public systems. Many Republican state superintendents of public instruction, such as New York's, viewed their mission as fulfilling Horace Mann's vision of common schools. Public education simply could not be "common" if it employed teachers in religious garb. "Public" schooling entailed a degree of uniformity—and, increasingly, secularization—in education that the Poughkeepsie Plan made impossible.[72]

The Poughkeepsie Plan proved even more controversial within the American Catholic Church. German Catholics declared that, by agreeing to public school rules and regulations, these reforms would imperil their ethnic curriculum and independence.[73] Conservative Catholic archbishops, meanwhile, refused to compromise the religious nature of parochial schools by marginalizing Catholic education to after-school hours. When John Ireland, the liberal Archbishop of Saint Paul, Minnesota, proposed the Poughkeepsie Plan in two small Minnesota towns, conservative Catholic hierarchs reacted furiously. The ensuing "School Controversy" over Ireland's plan, lasting between 1890 and 1893, featured intense national debates and, ultimately, the Pope's intervention. When the dust had settled, America's conservative bishops

[72] Justice, *The War that Wasn't*, 198, 209-11.

[73] Walch, *Parish School*, 69-70.

appeared victorious. Ireland's school plan in Minnesota, like Poughkeepsie itself, failed when state officials squashed the local arrangements. Catholic "public" schools, typically found in rural communities with homogenous populations, remained well into the twentieth century, but sustained attempts at urban public-private cooperative plans were, by the 1890s, almost entirely nonexistent.[74]

Instead, cities would be characterized by two competing school systems, one public and one Catholic. In 1890, no one knew how this competition would shape the future of American schooling. "Has the public school system reached and passed its maximum phase in the North and West?" the U.S. Education Commissioner Nathanial Dawson asked in his 1887 report.[75] Advocates of public schooling feared that the explosion in parochial school attendance represented a future where the common school ideal would disintegrate, pulled apart by the conflicting demands of differing ethnic and religious identities. Catholic authorities, meanwhile, envisioned that in a country dominated by Protestantism and public education, parochial schooling would become harassed by the state and its so-called "monopoly" over children's upbringing. In response to these conflicts, states sought ways to regulate this new educational competition.

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[74] McGreevy, *Catholicism and American Freedom*, 120-22. For evidence of "Catholic district schools" see Folder 9, 10: Catholic Distrct/Public Schools, 1923-1940, 1934," Box 7, Records of the United States Conference of Catholic Bishops Education Department, American Catholic History Research Center and University Archives, The Catholic University of America, Washington, D.C.

[75] United States Bureau of Education, *Report of the Commissioner of Education for the Year 1886-87* (Washington, D.C.: Government Printing Office, 1888), 90.

Chapter Three

Law and Educational Regulation in the Gilded Age

Laws regulating private schools relied on a division between public and private education that evolved rapidly over the course of the nineteenth century. Initially, in the first half of the century, this legal division shielded private schools from government oversight. The Supreme Court's ruling in *Dartmouth v. Woodward* (1819) pointed to a future where public schools would be regulated by states in exchange for public money, while private schools would be substantially free from state regulation, in return for foregoing access to public subsidies. While this arrangement functioned well for the minority of wealthy private schools that did not depend on public money, it threatened the vast majority of poorer religious institutions for whom public subsidies were crucial. When Catholic immigrants engaged in a wave of parochial-school construction in the 1870s and 1880s, parish authorities feared that state legislatures would pass regulations constricting their growth. Those regulations, however, never materialized.

States passed scores of laws affecting parochial schools in the late nineteenth and early twentieth century, but those regulations did not halt parochial school expansion. Beginning in the 1870s, parochial school advocates first in Rhode Island and then Ohio accepted—indeed, fought for—forms of public regulation in return for maintaining an important fiscal subsidy: the property tax exemption. Catholic educators elsewhere echoed these sentiments, arguing that their schools were "public" and so deserving of the public subsidies—and public regulation—that came with that legal designation. Many Catholic school authorities thus feared state oversight, but they invited it in nonetheless, knowing that such regulation was essential to financial solvency. As legal divisions between public and private education hardened, public officials and Catholic authorities alike sought ways to blur these distinctions. By the early twentieth, the

Supreme Court itself had backed away from the divisions between public and private announced in *Dartmouth*.

I

The sharp division between public and private schools that emerged in the nineteenth century was a legal innovation. Generally, states and localities assumed vast powers to shape education. Their authority stemmed from the ancient basis of common law regulation, the state's "police power," derived from the idea that the sovereign can intervene in the polity on behalf of the safety, health, morals, and general welfare of the people. The police power gave states broad license to regulate children's upbringing and prevent them from encountering harmful influences, including in schools. It also extended well beyond education, suffusing the economy at large. Laws of incorporation transformed private entities into corporate "creatures of the state," created by public acts of state legislatures. Courts treated corporations largely as private or quasi-public enterprises carrying out public functions such as transportation, finance, lighting, and water provision. Corporations, therefore, had few claims to autonomy from state control. Corporate charters enabled state governments to attach numerous regulations to how enterprises operated, limiting their actions to those specified in their charter and reserving state rights of supervision and regulation. Under this wide-ranging conception of what constituted "public" activity, states could regulate much of American life on behalf of the "people's welfare."[1]

The Supreme Court's 1819 ruling in *Dartmouth College v. Woodward* narrowed that broad understanding of public power. *Dartmouth* carved out new legal distinctions between

[1] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996). See also Christopher Tomlins, "Necessities of State: Police, Sovereignty, and the Constitution," *Journal of Policy History* 20, no. 1 (2008): 47-63, and Charles W. McCurdy, "The Knight Sugar Decision of 1895 and The Modernization of American Corporation Law, 1869–1903," *Business History Review* 53 (1979): 305.

public and private schools, in addition to establishing new rights for private corporations. The Court's decision, which protected the private Dartmouth College from substantial state regulation, reasoned that Dartmouth's "private" governance outweighed its "public" function. Only publicly funded and administered schools merited regulation by the state.[2]

The question the court faced in *Dartmouth* was whether or not the New Hampshire legislature could amend the college's original colonial corporate charter (by installing new trustees) without infringing on the college's constitutional rights under the contract clause. Few legal scholars at the time doubted that education was a clear "public" undertaking. The court's challenge in *Dartmouth* was to reconcile the college's public function with its private operation. In short, the court needed to determine whether a corporate charter had the same binding power as a private contract.

While states chartered all corporations, the appeals courts hearing the case distinguished between the regulation of "private" and "public" corporations. The New Hampshire Supreme Court and the Supreme Court of the United States agreed that private corporations served individuals while public corporations benefited the "common privileges" and "common interest" of state property. This bifurcation signified that while states could perpetually amend the charters of such evidently "public" corporations as their municipalities and school districts, they had significantly fewer constitutional means to interfere with the property rights of "private" corporations such as banks, insurance companies, and manufacturing firms. As the New

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[2] Morton J. Horwitz, "The History of the Public/Private Distinction," University of Pennsylvania Law Review 130, no. 6 (June 1982): 1425. Much has been written about *Dartmouth's* implications for public and private higher education. For two contrasting accounts on the case's impact see John S. Whitehead, *The Separation of College and State: Columbia, Dartmouth, Harvard, and Yale, 1776-1876* (New Haven: Yale University Press, 1973), Jurgen Herbst, *From Crisis to Crisis: American College Government, 1636-1819* (Cambridge, MA: Harvard University Press, 1982). See also Herbst and Whitehead, "How to Think about the Dartmouth College Case," *History of Education Quarterly* 26, no. 3 (1986): 333-49.

Hampshire Supreme Court put it, pithily, "all publick interests are proper objects of legislation." Private interests, on the other hand, had greater autonomy from state regulation.[3]

Whether New Hampshire could amend Dartmouth College's charter thus depended on whether or not the college was a "public" or "private" corporation. Here the New Hampshire Supreme Court and the Supreme Court of the United States differed. Citing two reasons, the New Hampshire court ruled that the college was public and susceptible to such forms of state regulation. First, the justices asserted that Dartmouth's original charter implied that its educational services would benefit all of the state's inhabitants. The charter spoke of the college's purpose as "spreading christian knowledge among the savages of our American wilderness," as well as providing that "the best means of education be established in our province of New-Hampshire, for the benefit of said province." To the justices, these words implied a public purpose. Second, the judges argued that insofar as education was inherently public, "sound policy" would dictate that it should be subject to some form of state regulation. Education "is a matter of too great moment, too intimately connected with the public welfare and prosperity, to be thus entrusted in the hands of a few," the decision read. "The education of the rising generation is a matter of the highest public concern, and is worthy of the best attention of every legislature." Given the public nature of the college's charter and educational purpose, the state had every right to amend its corporate character. Indeed, no educational institution, the court implied, could claim immunity from such regulation.[4]

Upon appeal, the Supreme Court of the United States, in a majority opinion written by John Marshall, agreed that education represented a central public concern, but denied that such

[3] The Trustees of Dartmouth College v. William H. Woodward, 65 N.H. 473, 631 (1817).

[4] *Dartmouth*, 65 N.H. at 503, 642.

an interpretation required state intervention. Indeed, Marshall contended that treating all forms of education as "public functions" was itself absurd. "Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation?" he asked. Marshall held that regardless of how many of New Hampshire's citizens benefited from the college, its charter intended it to serve the charitable interests of its private benefactors. As a private institution, Dartmouth College's incorporating charter represented a contract that could not be unilaterally altered. Its charter was similar to any contract between two private parties.[5] States therefore had substantially less plenary authority to regulate private corporations—whether private schools or private businesses—once they incorporated.[6]

Dartmouth's stark divisions between public and private in education, however, belied the more complex realities of urban mass education in the nineteenth century. When states first began regulating various aspects of parochial schooling in the 1850s, those regulations were not imposed on parochial schools so much as mutually accepted. Public regulation implied a degree of "public" legitimacy that parochial schools sought. More importantly, it meant access to the public treasury. In cities and states throughout the North, lawyers for parochial schools understood that the only path they could take to acquire taxpayer funds was by declaring their

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[5] The Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 634 (1819).

[6] While *Dartmouth* today is often read as a movement toward the legal separation of private business and state legislatures, at the time those Americans affiliated with the emerging Jacksonian wing of the Democratic Party doubted that Marshall's ruling would have that effect. Insofar as *Dartmouth* sanctified corporate charters as contracts, Jacksonians feared that states would no longer be able to untangle themselves from older corporate charters granting monopoly privileges. In this important sense, Jacksonians worried that the Federalist Marshall had solidified monopoly in *Dartmouth*, rather than liberalized economic opportunity and competition. It took a later Supreme Court decision, Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837), to facilitate the Jacksonian goal of permitting states to extricate themselves from prior monopoly charters. Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991), 17-35.

schools to be "public" and so subject to public regulation. Legally, therefore, parochial schools in the 1870s and 1880s secured their tax exempt status by accepting state regulation. Tax-exempt laws, themselves frequently subject to statutory revisions, provided impoverished parishes with an essential public subsidy to build schools. Insofar as increased state supervision was the price parochial schools had to pay to receive these subsidies, Catholic authorities believed it was necessary. In this indirect but vital way, regulations fostered the continued growth of parochial schools and the educational competition they produced.

II

Regulation of private schooling came neither naturally nor inevitably to state legislatures and local school boards, but rather developed over the course of the nineteenth century. When policymakers in the period considered educational regulations, after all, they thought principally of state and local governments' struggle to regulate *public* schooling. State oversight of public schools rose dramatically over the second half of the century, though American traditions of voluntary attendance and local control thwarted most efforts by state reformers to impose their will on local educational decision-making. In contrast to European nations, mass schooling in the United States had never been associated with centralized government policy. In rural areas especially, antebellum Northerners achieved high rates of school attendance *prior* to any legislation that provided school subsidies and compelled attendance.[7] By 1871, Northern states had abolished the parental tuition payments (termed "rate bills") upon which public schools long

[7] On the relationship between public or state funding and school attendance see Albert Fishlow, "Levels of Nineteenth-Century American Investment in Education," *The Journal of Economic History* 26, no. 4 (December 1966): 418-36; Carl F. Kaestle, and Maris A. Vinovskis, *Education and Social Change in Nineteenth-Century Massachusetts* (New York: Cambridge University Press, 1980); Nancy Beadie, "Education, Social Capital, and State Formation in Comparative Historical Perspective: Preliminary Investigations," *Paedagogica Historica* 46, no. 1 (2010) 15-32.

depended, replacing them with local property taxes and small amounts of state aid.[8] This triumph of public financing of schools, however, did not produce dominant, top-down state control over local districts. Local traditions of self-reliance in education were a powerful force in community resistance to centralization.[9]

Nonetheless, state legislatures subjected public schools to hundreds of laws and regulations. Rhode Island's 1882 *School Manual*, prepared by the state school commissioner on behalf of a Rhode Island General Assembly resolution, ran to well over three-hundred pages. The list of laws passed by the legislature pertaining to schools was enormous, touching on virtually every area of public education. Regulations addressed an incredible range of topics: where the permanent school fund could be invested, the amount in property taxes the city of Providence could raise for its schools, the methods of tax collection, the composition, elections, terms, meeting schedules, and authorities of the State Board of Education and of local school committees, the maximum annual salary of the State Commissioner's clerk, the duties of the State Commissioner, the permissible amount of state funds to purchase "dictionaries, encyclopedias and other works of reference, maps, [and] globes," the correct methods of local bookkeeping, the corporate privileges of school districts, the conditions for joining districts, the maximum teacher-student ratios permitted, and the requirements for student expulsions, teacher licensure, and teacher dismissal. The *School Manual* mandated the minimum distance that swine

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[8] Claudia Goldin and Lawrence Katz, *The Race Between Education and Technology* (Cambridge, MA: Belknap Press, 2008), 143.

[9] Carl Kaestle, *Pillars of the Republic: Common Schools and American Society* (New York: Hill and Wang, 1983), 136-81.

could be kept from school property, and prevented school authorities from profiting from their own textbooks. State authority had obviously yielded a surfeit of rules and regulations.[10]

Individual cities and school districts passed hundreds of additional regulations not listed in these state manuals. State law charged local school boards (called "committees" in Rhode Island) to make "rules and regulations for attendance and classification of the pupils, for the introduction and use of text-books and works of reference, and for the instruction, government and discipline of the public schools, and [to] prescribe the studies to be pursued therein."[11] Local school committees thus set policies ranging from teacher discipline and student misconduct to examination schedules and janitorial guidelines.[12]

Occasionally, local regulations conflicted with state prerogatives, in which case state authorities exercised their legal supremacy. North Kingstown, Rhode Island's "regulation No. 26" was one such example. The regulation, which the school committee passed in 1852, gave teachers the right to order students to make the daily fires that heated the schoolroom. When parents in the town challenged the law that same year—presumably because it imposed an excessive, if not dangerous, burden on young students—the state school commissioner, Elisha Potter, upheld the "power of the committee to make regulations," but found this particular one too onerous. The state's authorizing statute read that school committees had the power "to make and cause to be put in each school-house, or furnished to each teacher, a general system of rules

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[10] *The School Manual: Containing the School Laws of Rhode Island; with Decisions, Remarks and Forms for the Use of School Officers* (Providence: E.L. Freeman and Co., 1882), 5-66. As evidence of the close link between Christianity and public schooling the manual also included suggested morning and afternoon prayers that spoke of "Jesus Christ Our Lord" and "our understandings by Thy Holy Spirit."

[11] *School Manual*, 36-37.

[12] See, for example, *Rules and Regulations of the Milwaukee Board of School Directors* (Milwaukee: Edward Keogh, 1898.

and regulations for the admission and attendance of pupils, the classification, studies, books, discipline, and method of instruction in the public schools." Potter believed that forcing children to make the daily fires exceeded this authority. If this particular regulation was permissible, Potter wrote in 1853, "we might as well infer a right to require the scholars to cut and saw the wood," which he considered ridiculous. Enforcing this ruling would have been challenging for state departments of instruction, given their small number of employees, but Potter's words were symbolically significant. Even such a relatively minor issue as school heating allowed state commissioners like Potter to exercise their authority in regulating schools.[13]

Public regulations over private schools in the 1850s were a different matter, over which Commissioner Potter, like the Supreme Court justices in the *Dartmouth* decision, did not believe public administrators had much, if any, authority. Northern manuals outlining state education laws in the 1850s and 1860s generally said little about private schools. Potter explained the reasons behind this silence in his 1853 opinion. He argued that public schools were by definition state institutions, established not only by statute but also written into state constitutions. As such, they were institutions where each parent had a "legal right to send his children." While the state could pass laws circumscribing the conditions through which parents exercised this right, local school committees and authorities could not legally abrogate it through their own regulations.[14]

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[13] E. R. Potter, C.P.S., "Decision No. 58., Appeal from School Committee of North Kingstown" (1853), *Rhode Island School Manual*, 128-29.

[14] Potter, "Decision No. 58," 128. State laws granting children the right to a public school education were of course rarely treated with sanctity in practice in the North, where African American children, children with disabilities, or simply boisterous children were excluded from public schools with tremendous frequency. On the tensions between state law and local practice see Davison M. Douglas, *Jim Crow Moves North: The Battles over Northern School Segregation, 1865-1954* (New York: Cambridge University Press, 2005); Joseph L. Tropea, "Bureaucratic Order and Special Children: Urban Schools, 1890s-1940s*, History of Education Quarterly* 27, no. 1 (Spring 1987): 29-53.

Parents, however, did not possess a similar right to attend those schools operated by private actors. In the private school, therefore, the nature of the contract between parent and schoolmaster differed substantially. "In a private school the teacher has a right to prescribe his own terms," Potter wrote. "The parent who sends children to the school delegates to the teacher the right to govern them according to his own rules, and to punish to a reasonable extent for the violation of them." When public schools violated parental liberties, the parents could rely on their statutory and constitutional rights. The options for parents with children in private schools differed. "The remedy of the [private school parent], if he does not like the school or its regulations, is in not sending [her child] to it." The assumption was that parents, not states and localities, acting as consumers, would sort out private school politics.[15]

Potter's generally *laissez-faire* attitude toward private schools gradually retreated in Rhode Island and throughout the North. This decline represented a response to rising parochial school enrollments. Rhode Island, with its growing Catholic population, became one of the first states to pass laws regulating parochial schools. The state experienced the effects of parochial school building and educational competition well before its neighbors. Catholic parochial schools there began increasing rapidly as early as the 1850s. In 1851, the Providence school committee lamented that "a considerable diminution of the numbers attending several of the schools has recently taken place by the removal of children of Roman Catholic parents; schools having been provided for them under the immediate supervision of the clergy of their order." Four years later, it again noted that "this apparent decrease in the number of children attending our public schools, notwithstanding the large increase in population," was accounted for "by the

[15] Potter, "Decision No. 58."

fact that several hundred children have been withdrawn to attend upon the Roman Catholic schools."[16] In response to such dramatic developments, anxious legislators sought to curb parochial school expansion and restrict the private sector.

Just as Potter became state commissioner, legislators in the state house debated ways of restricting parish education. In 1853, the same year as Potter's opinion on state regulation, the General Assembly considered a set of compulsory school attendance bills that would have effectively treated all students not enrolled in public schools as truants. In the context of a strong nativist Know-Nothing movement in the state—which also sought to impose the King James Bible on Catholics enrolled in public schools—the bills would have virtually outlawed parochial school attendance. Potter, however, remained committed to his belief that states had little regulatory authority over parochial schools, and he spoke out against these attempts until the bills ultimately died in the state senate.[17]

With the abolition of parochial schools defeated in the legislature, Rhode Island spent the next thirty years debating how to regulate parochial schools and the educational competition they introduced. Lawmakers determined that parochial schools performed too important a function to operate autonomously from state oversight. In response, they attempted to regulate their operations through the existing legal mechanisms. Northern states tended to recognize private

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[16] The minutes to these School Committee meetings were reproduced in *Report of the School Committee for the Year 1899-1900: Centennial Celebration of the Establishment of the Public Schools* (Providence: Providence Press, 1901), 133. See also Charles Carroll, *Public Education in Rhode Island* (Providence: E.L. Freeman Company, 1918), 155; David Gartner, "The Growth of a Catholic Educational System in Providence and the Protestant Reaction, 1848-1876," *Rhode Island History* 55 (1997), 136-37.

[17] Barbara Tucker Cervone, "Rounding up the Children: Compulsory Education Enforcement in Providence, Rhode Island, 1883-1935" (Ph.D. diss., Harvard Graduate School of Education, 1983), 39; Patrick T. Conley, *The Rhode Island State Constitution: A Reference Guide* (Westport, CT: Praeger, 2007), 257-58; Patrick T. Conley and Matthew J. Smith, *Catholicism in Rhode Island: The Formative Era* (Providence: Diocese of Providence, 1976), 78-79. Ohio attempted to pass a similar law in 1853.

schools—and their church sponsors, more generally—through two legal channels. The first was through state incorporation laws that, in Rhode Island, gave private entities the ability to take, hold, transmit, and convey specified amounts of property, to elect their own officers, to make "by-laws and regulations" for their governance, and to partake in various other privileges.[18] The second were through statutes delineating church property liable to taxation. Various churches had been exempt from taxation throughout American history, dating back to the earliest colonies. In New England, where states had tax-supported, "established" churches well into the early nineteenth century, tax exemption was so accustomed that legislatures felt no need to codify it through written statutes. Only when states began severing the direct fiscal ties between church and government (Massachusetts and its Congregational Church was the last to disestablish in 1833) did legislatures enact laws exempting church property, along with property belonging to governments, educational and charitable institutions, and a smattering of other legal bodies.[19] Rhode Island, like most other states, retained the right to exempt property specified by charter through acts of incorporation.[20]

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[18] Provisions Respecting Corporations in General, R.I. Gen. Laws § 19-125-1 (1857). While non-parish-based Catholic academies and seminaries were incorporated individually, parochial schools were generally incorporated with their sponsoring parishes, dioceses, or, later, religious teaching orders. In 1869, the Rhode Island legislature passed an act to incorporate the entire Catholic diocese of Hartford (which at the time included Rhode Island), which granted the body power to receive and hold all property "for the support of the educational or charitable institutions of that church" within a specified dollar amount. See An Act to Incorporate the Bishop and Vicar General of the Diocese of Hartford, Together with the Pastor and Two Laymen of Any Roman Catholic Church or Congregation in Rhode Island, 1869 R.I. Acts & Resolves 221-23.

[19] On the history of tax exemptions see Stephen Diamond, "Efficiency and Benevolence: Philanthropic Tax Exemptions in 19th-Century America," in *Property Tax Exemptions for Charities*, ed. Evelyn Brody (Washington, D.C.: The Urban Institute Press, 2002), 115-44; Carl Zollman, "Tax Exemptions of American Church Property," *Michigan Law Review* 14, no. 8 (1916): 646-57.

[20] See, for example, Of Property Liable to Taxation, R.I. Gen. Laws § 8-37-2 (1857). In New York, only incorporated parochial schools could claim property tax exemption. See The Church of St. Monica v. The Mayor, Aldermen and Commonalty of the City of New York, 119 N.Y. 91 (1890).

In the two years following the Rhode Island legislature's failure to pass an act criminalizing private-school attendance, lawmakers there succeeded in regulating privately operated schools by amending their tax and school laws. In early 1854 the General Assembly passed a law allowing for inspection of all tax-exempt private educational institutions.[21] Schools that refused such visits would be fined one-hundred dollars and their exemption immediately removed. This "Act to enlarge the powers of the School Committee" was motivated by an attempt to inspect a newly proposed Catholic orphan asylum, and while it, like tax-exemption statues generally, applied to schools run by Protestants and Catholics alike, the nativist context suggested that Catholic parochial schools were the intended targets. The bill's opponents in the House recognized its bigoted, "sectarian" nature. Henry A. Potter, a relative of the State Commissioner, argued that it was "exceedingly unjust to empower [school committee members] to visit Catholic schools" when several of those members were Protestant clergymen.[22] For its aim at Catholic institutions the act soon acquired the name "the Nunnery Bill."[23] If Rhode Island's Catholics wanted state legislatures to charter their religious corporations and receive the accompanying financial subsidies, lawmakers insisted that they open their doors to state inspection. The Rhode Island law gave Catholic schools a distinct choice: maintain property tax exemption and a "public" status at the cost of regulation, or refuse this exemption and become legally "private."

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[21] The Act read that "any school or asylum incorporated by or receiving aid from the state, either by direct grant or by exemption from taxation shall be liable to be examined or visited by the school committee of the town or city in which such institution is situated, whenever the committee shall see fit." See "An Act to enlarge the powers of the School Committee,--passed January 1854," in E.R. Potter, *Report upon Public Schools and Education, in the State of Rhode Island* (Providence: Sayles, Miller & Simons, 1854), 37. Two years earlier, the Assembly had limited the amount of tax-exempt property held by schools, academies, and colleges to three acres.

[22] "General Assembly," *Providence Daily Post*, February 18, 1854.

[23] Conley and Smith, *Catholicism in Rhode Island*, 78-9; Carroll, *Public Education in Rhode Island*, 179, 197-98.

Rhode Island's 1854 act tying regulation to tax exemption became a model for other states during the 1870s, when a nationwide financial panic forced legislatures throughout the country to reassess their revenue streams. Taxes on urban Northern property owners had already been skyrocketing since the end of the Civil War, as cities built new public schools, constructed sewer and transportation systems, and began to light the streets. As taxes, property valuations, and municipal debts soared, cities faced a growing revolt from their middle classes who complained of bearing a vastly disproportionate share of the burden. From 1865 to 1875 the number of property owners in the North's thirteen largest cities rose by 70 percent, while taxable valuations increased by 157 percent, taxes by 363 percent, and debts by 271 percent. So long as cities relied on taxes on tangible property for revenues, urban property holders felt squeezed, bearing the cost of low taxes on corporations and the wealthy—railroads and corporate leaders were notorious for tax evasion—and absorbing the cost of caring for the non-property owning poor. As a result, urban tax policy emerged as a central arena of conflict following the 1873 panic, and tax commissions formed in its wake searched for new revenue sources and reformed fiscal policies.[24]

In state after state, these commissions turned to what they considered low-hanging fruit: the property-tax exemptions held by churches, charities, and private educational institutions. Religious exemptions came under particular scrutiny for several different, often overlapping, reasons. First and foremost, many Republican legislators and Protestant ministers in the North feared the growing ecclesiastical properties held by the Catholic Church, and said as much publicly. Secular considerations also contributed to the attack on church exemptions. Legislators

[24] Clifton K. Yearley, *The Money Machines: The Breakdown and Reform of Governmental and Party Finance in the North, 1860-1920* (Albany: State University of New York Press, 1970), 8-10, 15-17; R. Rudy Higgens-Evenson, *The Price of Progress: Public Services, Taxation, and the American Corporate State, 1877-1929* (Baltimore: Johns Hopkins University Press, 2003), 12-24.

in Northern states pointed to proud disestablishment traditions and of state constitutions proclaiming religious freedom. Tax exemption, they argued, was simply tax support by another name. To a number of Northern Republican legislators, taxing the growing property of the North's increasingly expansive Catholic parochial schools helped accomplish each of these objectives. It could help raise additional revenues, arrest the growth of public school competitors, and sever the privileged financial ties between the state and the parochial school.

Battles in the North over tax exemption demonstrated the fiscal and symbolic significance of parochial schools on municipal government. In the minds of many Northern Protestants, parochial schools competed with public schools for students and for funds. If their tax exemptions continued, each additional Catholic school represented a new building whose land could not be taxed to support the public schools. In his 1875 annual message, President Ulysses S. Grant implicitly highlighted the connection between public education and religious tax exemptions. He proposed that states be required to maintain public school systems and that "no sectarian tenets shall ever be taught" in any public school. "In connection with this important question," he continued, states ought to make "all church property . . . bear its own proportion of taxation." For Grant, spreading secular public education went hand in hand with limiting the fiscal privileges given to religious communities.[25]

Others far from federal offices in Washington called for increased taxes on parochial schools to support public schools. Public officials commonly complained about public schools' lack of funds to expand, in contrast with the growth of parochial schools. An alderman from Boston, speaking at an 1890 hearing on the city's dire fiscal state, complained that public schools

[25] Ulysses S. Grant, "Seventh Annual Message," December 7, 1875, http://www.presidency.ucsb.edu/ws/index.php?pid=29516

did not have "much money." They "have drifted behind for the last five years" while the "number of parochial schools has increased," he remarked, before concluding that "we have got to have new schools, primary and grammar schools, without driving the children out into other schools."[26] The *Pittsburgh Dispatch* noted in 1889 that "as there are a large number of schools in this city of the [Catholic] class alluded to, the tax would make quite an item in the city's tax list." Northern lawmakers concluded that the fiscal health of cities depended on taxing these schools, which meant removing whatever "public" vestiges they might have, including state rights to supervision.[27]

Rhode Island's experience in the 1870s typified this volatile mix of tax policy and parochial school politics. By 1870, it had the highest percentage of Catholics of any state, roughly one third of its inhabitants. Irish, German, and French-Canadian Catholic immigrants filled cities like Providence and smaller mill towns like Woonsocket and Warren.[28] To the dismay of local public school officials, many Catholics did not assimilate or send their children into existing public school systems but rather swelled parochial school rosters. Between 1873 and 1886, the number of parochial schools in the diocese nearly doubled to seventeen. By 1880, sixty-three percent of Providence's Catholic parishes had a school—a number that dwarfed neighboring Boston's thirty-seven percent.[29] The 1875 census enumerated Catholic school

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[26] "There Must Be Loans," *Boston Daily Globe*, March 8, 1890

[27] "Likely to Affect Catholics," *Pittsburgh Dispatch*, January 19, 1889.

[28] Roger Finke and Rodney Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy* (Piscataway, NJ: Rutgers University Press, 2005), 120; Robert W. Hayman, *Catholicism in Rhode Island and the Diocese of Providence, 1780-1886* (Providence, RI: Diocese of Providence, 1982), 294.

[29] Joel Perlmann, *Ethnic Differences: Schooling and Social Structure among the Irish, Italians, Jews, and Blacks in an American City, 1880-1935* (New York: Cambridge University Press, 1989), 66-67; Hayman, *Catholicism in Rhode Island*, 257.

attendance at twelve percent of the state's total school population. In Rhode Island's cities, the census reported far higher rates of Catholic school attendance. Over one in five Providence school pupils attended a Catholic school. In Newport, it was one in three. In the Francophone dominated mill town of Woonsocket, an astounding 44 percent of pupils attended the Catholic schools.[30] Rhode Island's Governor, Henry Howard, highlighted the competition spurred by these new schools, noting in 1873 that the "existence of a large number of private . . . schools have done much to draw from the attendance upon our public day schools."[31] In response, city and state officials demanded legislation to restrict parochial school growth.

Whereas the Rhode Island legislature in the 1850s attempted to attach inspections to parochial-school tax exemptions, the Assembly in the 1870s sought to eliminate the tax privileges of church institutions. Parochial schools had long been exempt from taxation in the state, falling under the broad designation of "houses for schools, academies and colleges . . . owned by any town, company or corporation."[32] In an 1870 act the Assembly placed a $20,000 limit on the amount of church property exempt from taxation.[33] Four years later, the legislature formed a joint committee to amend the state's tax exemption statute in the wake of the financial panic. In public hearings, the Catholic Bishop of Providence argued that the city's parochial schools saved the municipality large sums of money by educating children at no expense to the

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[30] Edwin M. Snow, *Report upon the Census of Rhode Island, 1875* (Providence: Providence Press Company, 1877), 58-60. In 1872, the mayor of Providence even went so far as to veto the construction of a public school building because he feared the competition that the school would face from a nearby Catholic school. See Gartner, "Growth of a Catholic Educational System," 142.

[31] "Message of Henry Howard, Governor of Rhode Island, to the General Assembly at Its January Session, 1874" (Providence: Providence Press Company, 1874), 14.

[32] Of Property Liable to Taxation, R.I. Gen. Laws § 8-37-2 (1857).

[33] Hayman, *Catholicism in Rhode Island*, 294.

taxpayer. Other Catholic authorities, as well as several Protestant religious and educational leaders, echoed the Bishop's call to maintain the property tax exemptions of churches and their schools.[34]

The joint committee, however, regarded these as minority voices in the state and concluded that the exemptions "should either cease entirely, or at least be checked." Feeling that complete revocation of exemption for churches was too drastic, the committee held that "a due consideration for the wishes of perhaps a majority of the citizens of the State should lead [church leaders] to surrender a *portion*, at least of those privileges and immunities which rest on so precarious a foundation." The committee then proceeded to suggest a compromise, exempting church and private educational buildings, but not the land underneath them.[35]

The final bill that emerged from the legislature in spring 1876 differed dramatically from the joint committee's proposal. It maintained exemptions on church land, and instead taxed church schools. In mid-March, several legislators—newspaper accounts did not reveal their names—had worked to add the language of "free public" before school-house exemptions, distinguishing state schools from private schools in ways the statute had not done earlier. By the end of the month, private schools ("academies and colleges," as the original statute read) had been removed entirely from the list of exempted institutions in the amended bill. While one state senator, in the words of the *Press*, found it a "reproach to the State to tax educational institutions, whether public or private," the amendment removing private schools from property-tax

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[34] *Report of the Joint Special Committee on the Subject of 'Property Liable to and Exempt from Taxation' Made to the General Assembly of the State of Rhode Island, at its January Session* (Providence: Providence Press Company, 1875), 7-10.

[35] *Ibid*., 12-13, 14-17.

exemption passed.[36] While the law applied to all private schools, parochial schools by virtue of their large and growing numbers were the chief targets.

Not surprisingly, Catholic authorities defended their institutions against the new tax. The value of untaxed parochial school property, while difficult to measure precisely, was not trivial. Providence's tax books aggregated church property by parish, meaning that city officials did not list the assessed real estate value of particular parochial schools. In 1875, the city valued St. Joseph's church's property at $29,100 which resulted in a tax of $421.95.[37] Assuming its school was valued similarly (as a percentage of the total church property) as other parochial schools in the state, it would have been taxed at roughly $50, enough to cover the annual educational costs of at least ten children. Such a tax would have diminished, if not eliminated entirely, attendance in some schools.[38]

When in the late 1870s Providence city officials attempted to enforce the new tax code against the parochial school attached to St. Joseph's Parish, the church sued Providence's tax assessors. In court, the church's lawyer, Charles E. Gorman, declared that their educational enterprise was public and, subsequently, deserving of both tax exemption and state regulation. Gorman was one of the leading Roman Catholic political figures in the state—according to one biographer, the first Irish-Catholic to join the Rhode Island bar, the state legislature, and the Providence City Council. In the 1870s he led a movement to amend the Rhode Island

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[36] "General Assembly," *Providence Evening Press*, March 17 and March 31, 1876.

[37] Board of Assessors, *List of Persons, Copartnerships, and Corporations Assessed in the City Tax Ordered by the City Council of the City of Providence* (Providence: A. Crawford Greene, 1877), 216.

[38] Calculated from the 1884 itemized property listings of Pawtucket's St. Mary's Church. Rhode Island Assessors, *A List of Persons, Corporations, Companies and Estates, Assessed in the Town Tax, Ordered By the Electors Qualified to Vote upon Any Proposition to Impose a Tax or Expend Money in the Town of Pawtucket, R.I. Assessors* (Pawtucket: Sibley and Lee, 1884), 21.

Constitution, which placed property requirements exclusively on foreign-born voters. The fight to maintain parochial school tax exemptions formed part of this broader struggle of the state's Catholics to assert their religious, political, and educational rights. Not surprisingly, therefore, Gorman claimed in court that the statute's exemption of "free public schools" included parochial schools, since they were open to all and almost always gratuitous.

In the 1878 ruling of *Saint Joseph's Church vs. The Assessors of Taxes of Providence*, the Rhode Island Supreme Court disagreed. The short opinion, written by the Chief Justice, Thomas Durfee—later an outspoken opponent of easing the foreign-born's access to the franchise—asserted that because parochial schools were not operated by the state and, therefore, not subject to state regulation, they could not be construed as public in the meaning of the statute. "Free public schools," Durfee wrote, "signify the schools which are established, maintained, and regulated under the statute laws of the State." Parochial schools did not qualify, and thus were not exempt from taxation.[39]

Durfee's opinion abided by the logic of Rhode Island's 1853 parochial school inspection act. Where that law gave public school authorities the right to inspect parochial schools in return for tax exemption, the ruling in *Saint Joseph's* implied that when the legislature removed tax exemption from parochial schools, those schools could no longer be subject to public oversight

[39] Saint Joseph's Church vs. The Assessors of Taxes of Providence, 12 R.I. 19, 19-21 (1878). On Durfee's views, see Thomas Durfee, *Some Thoughts on the Constitution of Rhode Island* (Providence: Sidney S. Rider, 1884), 12-18. Durfee warned that if the state's large number of foreign-born voted the result would be wide-scale "corruption" and the rule of political bosses.

and became legally "private." To be "public" was to be regulated. The Church, ultimately, sought the state regulation that the Rhode Island legislature and Supreme Court denied them.[40]

Similar stories played out in other Northern states, where courts also placed Catholic school authorities in the position of defending state regulation of parochial schools in order to maintain tax exemption. In Ohio, as in Rhode Island, Catholic school lawyers fought on behalf of a regulated, "public" designation. When the 1873 Panic hit Ohio, Republican legislators attempted to place church property generally, and parochial schools specifically, onto the tax rolls. Again, these efforts, like most aimed at regulating parochial schools, were driven by a mixture of narrow anti-Catholicism and a broader concern for the commonweal. Separation of church and state advocates argued, as one Cleveland Republican put it during the state's 1873-4 constitutional convention, that these exemptions "compe[l] people—though indirectly—to support places of worship."[41]

While any church or school exemption would affect both Catholic and Protestant schools, fears of vast "Romish" untaxed property nevertheless inundated public discussions of church exemption. By the early 1870s, Ohio was no stranger to controversy between Catholics and public school officials. In 1869 a so-called (bloodless) "war" broke out in Cincinnati over the public school committee's resolution to remove Bible reading from the city's common schools. While the resolution likely originated out of secular rather than Catholic motivations, the practice of reading the Protestant King James Bible in public schools had long discomfited Catholics and

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[40] As the historian and Rhode Island public school official Charles Carroll wrote, "as [the 1875 law] abolished tax exemption, the new law took away from school committees the right, established by law in 1855, to visit and inspect private and parochial schools." Carroll, *Public Education in Rhode Island*, 198.

[41] "Proposition No. 148," *Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio, Volume I* (Cleveland: W.S. Robison and Company, 1873), 1254.

drawn the ire of the city's Archbishop powerful John Purcell. And while many pious Catholics agreed with Protestants that a school without religious instruction was "godless" and dangerous, the city's diocesan newspaper nonetheless came to embrace the committee's actions. The result was local, and then national, outrage by Protestants, who claimed that Catholics—not sufficiently satisfied with their attempts to gain access to public funds for their church schools—now sought to remove all Protestant influence from the public schools.[42] Given this tense relationship between Catholics and Protestants, attempts to tax Catholic churches produced legal conflict in Ohio.

The language of Ohio's constitution made taxation of Catholic school buildings legally feasible. While other state constitutions authorized the exemption of "educational institutions" and "schools," Ohio exempted only "public school-houses." When the Hamilton County treasurer began to tax church-school property in Cincinnati in 1874, however, Archbishop Purcell challenged it in court. The county's lawyers believed they had a straightforward case, and applied the same kind of reasoning that Thomas Durfee had used in the 1870s. They insisted that the Catholic Church and its schools constituted a private corporation. Unlike the "public" or "common" schools, the government did not administer Catholic education. Equally important, the county's lawyers argued, "state authorities [lack] any right of visitation or criticisms; so to all intents and purposes they are private, not public schools." Ohio's parochial schools, in other words, were private precisely because they were unregulated by the state. As the Rhode Island lawmakers similarly had insisted, to be "public" was to be subject to regulation.[43]

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[42] Much has been written about these events. See, for example, Ward M. McaFee, *Religion, Race, and Reconstruction: The Public Schools in the Politics of the 1870s* (Albany: SUNY Press, 1998), 27-33.

[43] John Gerke and Walker Yeatman v. John B. Purcell, 25 Ohio St. 229, 235 (1874, argument for plaintiff in error).

To preserve their tax exempt status, Purcell's lawyers had to contend that, to the contrary, Catholic schools were indeed public. They argued that the word referred not to the "nature of the title to the property, but to the character of its uses." Public, they held, signified "open for public use" and not "owned by the state, city, county, or school-district." The Supreme Court of Ohio's ruling in *Gerke v. Purcell* in 1874 rejected the diocese's claim that the schools were "public school-houses" in the meaning of the constitution, but decided that they did fall under the exemption for "public charity." The court found that regardless of its private Catholic administration, the parochial schools were open to a broader public, including Protestant students. Under the statute and the State Constitution, they asserted, parochial schools qualified as "public" institutions, no different than the private academies and colleges explicitly exempted by statute. Thus, while the court did not go as far as Purcell's lawyers in arguing for the legal equivalency of public and Catholic schools, they clearly placed private parochial schools in a "public" category. Because the Catholic schools qualified as "public," the law exempted them from taxation.[44]

The ruling in *Gerke* did not stop the state's Republicans from pursuing their aim of removing parochial schools from tax exemption. In Cleveland two years later, public officials similarly attempted to tax the parochial schools, which generated another lawsuit. The lawyers for the named defendant, the Cuyahoga county treasurer Frederick Pelton, went beyond the arguments made in *Gerke*. They held that parochial schools qualified as neither free, nor public, nor charitable. Moreover, they argued, parochial schools by definition were hostile to the public, "so opposed to the public policy of the state that they are not and ought not to be exempt from

[44] *Gerke*, 25 Ohio St. at 237.

taxation." In other words, tax incentives to schools that competed with the public schools contradicted the very idea of state education.[45]

Unconvinced, in *Gilmour v. Pelton* (1887) the Ohio Supreme Court upheld an 1883 ruling by the Ohio Court of Common Pleas of Cuyahoga County that definitively preserved Catholic schools' exemptions. Insofar as the schools were religious in nature, the Court of Common Pleas judge had argued, they could not be against the religious policy of the state—in a religiously neutral nation, there is no such religious policy. Neither could the schools be construed as contrary to public policy insofar as they were private, for "it certainly can not be claimed that it is the public policy of the state that the children of the state shall not receive any education in any other school than in one of the public schools established by itself," the opinion read. "Neither do we think that it can be truthfully claimed that it is the public policy of the state that children shall not be taught religious faith and morals in addition to secular instruction, either in the public or private schools in the state."[46] Parochial schools may be private, but the Ohio judges again sided with the Catholic school authorities in asserting that private institutions fulfilled a "public" function. As the lawyers for the state in *Gerke* asserted, "public" entailed state regulated.

The same terms of debate recurred throughout the North: tax *exempt* implied being public and regulated, while *taxed* implied being private and unregulated. In an 1874 Massachusetts legislative hearing on tax exemption the President of Harvard College, Charles Eliot, contended that church buildings and private schools deserved the same tax exemption as a sewer or public

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[45] Bishop Gilmour v. Pelton, 6 Am. L. Rec. 26, 31 (Ohio Ct. Comm. Pleas, 1887). The district court's decision was ultimately affirmed by the State Supreme Court, who found there to be "no material difference between the facts in this case and those in Gerke v. Purcell."

[46] *Gilmour*, 6 Am. L. Rec. at 33.

highway. He argued that both performed public services that translated into a net savings to taxpayers. As tax-exempt public institutions, however, Eliot insisted that private schools and church buildings merited some form of regulation. These institutions, as he put it, "must admit the ultimate right of the State to inquire into the administration of their affairs." Once these institutions were taxed like a "private person" they could claim immunity from such "state inquiry." The arguments private-school advocates made on behalf of tax exemption, Eliot surmised, were equivalent to those in favor of state regulation.[47]

Northerners seeking to place parochial schools onto the tax rolls insisted, similarly to the lawyers in *Gilmour*, that such schools were rivals with public schools, undeserving of any public recognition or subsidy. In an 1881 Pennsylvania case in which tax assessors challenged Catholic school's exemption, the state's lawyers argued that the schools were against the "public utility" and "in competition with the public schools."[48] In 1894 a Rhode Island lawmaker argued that "no aid should be given to any school which in any way comes in direct competition with the free public schools."[49] Protestant periodicals detailed the ways in which tax exemptions on Catholic property were "starving the treasury of the state,"[50] with "disastrous results to state interests."[51] This mixture of fiscal trouble and anti-Catholicism proved a potent force. "The prime moving cause [of movements to remove church exemptions] is undoubtedly the tendency to enormous

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[47] Charles W. Eliot, "The Exemption from Taxation of Church Property, and the Property of Educational, Literary and Charitable Institutions," in *Report of the Commissioners Appointed to Inquire into the Expediency of Revising and Amending the Laws Relating to Taxation and Exemption Therefrom* (Boston: Wright and Potter, 1875), 384.

[48] Miller's Appeals, WNC 168 (Penn. Ct. Comm. Pleas, 1881).

[49] "Legislative Hearings," *Manufacturers and Farmers Journal*, June 11, 1894.

[50] Samuel T. Spear, "Taxation and Religious Corporations," *The Independent* 28, no. 1436 (June 8, 1876): 3.

[51] "The Taxation of Church Property," *Scribner's Monthly* 7, no. 6 (April 1874): 755.

accumulations of property by the Romish hierarchy, and the immense advantage which they gain by its exemption from taxation," a Presbyterian commentator wrote regarding efforts in New Jersey.[52] Anti-Catholic legislators believed parochial schools could be limited by starving them of funds. Until the 1890s, legislatures by and large wanted to *remove* state oversight of these schools. In the 1870s and early 1880s, parochial school advocates defended the "public" status of their institutions, since it would preserve exemption, even at the expense of regulation.

III

Catholic arguments on behalf of tax exemption highlighted the extent to which the legal distinctions between "public" and "private," codified in *Dartmouth*, became blurred in America's Gilded Age. In various areas of the law, state court judges ruled that private schools were "public" in nature, not dissimilar from the private railroad and grain elevator corporations that federal judges in the 1870s and 1880s also regarded as "affected with a public interest" and thus deserving of special tax and regulatory treatment. Some legal scholars and Supreme Court Justices lamented this Gilded Age judicial trend, fighting to clarify and maintain distinctions between public and private corporations in order to delineate more assiduously the limits of government regulation. The "public purpose" doctrine, however, lasted well into the twentieth century, defeating any attempt to sustain *Dartmouth's* divisions between public and private.[53]

In *Berea College v. Kentucky* (1908) the Supreme Court, for example, continued to expand the state's regulatory authority over private school corporations, seemingly at

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[52] Lyman H. Atwater, "Taxation of Churches, Colleges, and Charitable Institutions," *The Presbyterian Quarterly and Princeton Review* no. 10 (April 1874): 343.

[53] Munn v. Illinois, 94 U.S. 113, 126 (1877). On the development and transformation of the "public purpose" doctrine in American law see Harry N. Scheiber, "The Road to *Munn*: Eminent Domain the Concept of Public Purpose in the State Courts," in *Perspectives in American History*, vol. 5, ed. Donald Fleming and Bernard Bailyn (Cambridge, MA: Charles Warren Center for Studies in American History, Harvard University, 1971), 329-404.

Dartmouth's expense. The Kentucky legislature had passed a law in 1904 preventing Berea (a private, incorporated college) and all other private institutions in the state from offering racially integrated instruction. Berea sued, claiming that the state law deprived the school, its teachers, and its students of property without due process of law, a violation of the Fourteenth Amendment. Its lawyers, intent on maintaining the private-public distinctions articulated in *Dartmouth*, argued that "a private school stands upon exactly the same footing as any other private business" and that, therefore, the "right to maintain a private school is no more subject to legislative control than the right to conduct a store, or a farm, or any other one of the various occupations in which the people are engaged." The Fourteenth Amendment, Berea's lawyers argued, placed defined limits around the state's police power.[54]

The majority of Supreme Court justices, affirming the Court of Appeals ruling, disagreed, determining that the college could expect very little autonomy from public oversight. "As a corporation created by this state," the majority's opinion read, "[the College] has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it." Ruling on the narrower grounds of the state's right to amend Berea's charter, the Court upheld the law. The deeper meaning of the decision was clear: in the context of state-imposed racial apartheid in Southern public schools and public facilities, privately run institutions that contradicted "public" norms would be forced to reform or shutter their doors.[55]

The response to the majority's opinion in *Berea* looked past racial segregation to focus on the consequences of the decision for state regulation, generally. Justice John Marshall Harlan's

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[54] Berea College v. Kentucky, 211 U.S. 45, 48 (1908, argument for plaintiff in error).

[55] *Berea,* 211 U.S. at 53. The state's lawyers argued explicitly that "to preserve race identity, the purity of blood, and prevent amalgamation, and such is the settled public policy of the State," and thus a reasonable extension of its police powers. *Berea,* 211 U.S. at 51 (1908, Argument for Defendant in Error).

dissent declared that while states had every right to impose segregation in its own schools, the Fourteenth Amendment protected privately governed institutions from such regulations.[56] While Harlan did not mention *Dartmouth*, the relationship between the two was unmistakable. The *Virginia Law Register* praised the *Berea* decision for its repudiation of *Dartmouth*. Recalling the race and class-based populism of Southern intellectual life, the *Register* insisted that their support for the decision was not so much for the "set back it gives the Negrophile, but for the salutary doctrine laid down as to the right of a State to control its creations, the corporations." To the *Register*'s editorialists, no longer would public policy tolerate private "corporate aggression." While the legal autonomy of privately incorporated schools remained murky, state and federal court rulings suggested that they could no longer expect the same autonomy from state oversight that it could following *Dartmouth*.[57]

For Catholic school authorities, however, this increase in state regulation had distinct advantages. The 1870s and 1880s witnessed the initial tradeoffs of regulation for tax exemption, but Catholics continued to cite its benefits in the decades that followed. "All private institutions are, in a sense, public beneficiaries," a Catholic University of America professor wrote in 1916. "By reason of the public service which they discharge, the State exempts them from taxation. It has, therefore, a right to see that they discharge their social function in a proper and reasonable manner."[58] Catholic school authorities feared the effects of state oversight, but those fears did not translate into a refusal to be regulated. So long as property tax exemptions served as an essential

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[56] *Berea,* 211 U.S. at 60-70 (Harlan, J., dissenting).

[57] "Editorial," *The Virginia Law Register* 14, no. 8 (December 1908): 643-44. David E. Bernstein explores the relationship between *Berea* and other early Fourteenth Amendment cases in, "*Plessy* versus *Lochner*: The *Berea College* Case," *Journal of Supreme Court History* 25, no. 1 (March 2000): 93-111.

[58] John O'Grady, "State Supervision of Catholic Institutions," *The Ecclesiastical Review* 55 (July 1916): 12.

state subsidy to parochial school growth, Catholic school leaders were willing to accept state regulation in return. As the growing regulatory state steadily blurred public and private realms, Catholic authorities recognized that public policy could aid, rather than hinder, parochial school growth.

Chapter Four

Public Governance and Private Power in an Age of Compulsory Attendance

Amid cold January temperatures, Philadelphia's public school superintendent, Edward Brooks, sent a private letter in 1898 to John W. Shanahan, the Archdiocese of Philadelphia's Catholic school superintendent. Brooks wanted to discuss Pennsylvania's compulsory school attendance law. Passed three years earlier, it mandated that all children between eight and thirteen years of age attend "day school" for at least thirteen weeks. For public school officials throughout the state, the law was a long-awaited triumph. Brooks was particularly pleased. He had dedicated much of his long career to seeing compulsory attendance laws adopted, and now, Brooks was charged with administering the law in Philadelphia. When he died, the influential New England *Journal of Education* properly called him a "pioneer in compulsory education."[1]

Catholic officials like Shanahan, on the other hand, had good reason to fear compulsory attendance laws as tools to regulate their schools. Republican legislators and school officials in Northern states frequently admitted their disdain for parish education and its success in luring thousands of students from public schools. Through their annual reports, public officials implored state legislatures to pass stricter laws that would close or dramatically reform the Catholic system. Compulsory attendance statutes enabled these regulations. For the next century, every major law affecting private schools would be layered, like a collage, onto compulsory attendance statutes that dated to the late nineteenth century. Lawmakers who introduced these bills in the North argued that private schools operating with "substandard" buildings and teachers, or instructing in a foreign language, might not fulfill the statutory meaning of a

[1] On Brooks, see his obituary "Dr. Edward Brooks," *Journal of Education* 76, no. 2 (July 11, 1912): 66.

"school." Children attending parochial schools, then, could be considered truants and their parents prosecuted. Pennsylvania's new compulsory attendance law thus placed the Archdiocese of Philadelphia's 115 parish schools and 40,000 students—roughly 40 percent of the city's public primary school population—in legal jeopardy.[2] If truant Catholic children avoided attendance in their parish schools, would public attendance officers place them in the local public school? Would public officials fine Catholic parents? Would they close down Catholic schools that did not meet some unwritten standard?

Brooks's letter to Shanahan, perhaps surprisingly, contained none of these threats. Instead, his message to the Catholic superintendent was simple: Pennsylvania's compulsory attendance laws would not be enforced on students attending Catholic schools in Philadelphia. As Brooks wrote in his letter, the "relation of . . . all Private Schools to the administration of the law is one of considerable delicacy."

> I have instructed the Attendance Officers not to demand anything from these Private Institutions. The law is new and it requires care and tact in its execution, and I have taken great pains in cautioning the Attendance Officers not to give any annoyance to the Private Schools. Of course they will cordially co-operate with the authorities of the public and parochial schools as soon as the law is fully understood.[3]

Lacking the will, let alone the mechanisms, to enforce the law, Brooks privately assured Shanahan that the relationship between parochial schools and public administrators would

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[2] Archdiocese of Philadelphia, *Annual Report of the Superintendent of Parochial Schools of the Archdiocese of Philadelphia for the Year Ending June 30, 1898* (1898), 1, Philadelphia Archdiocesan Historical Research Center, Philadelphia, PA [hereafter PAHRC]; Board of Public Education, *Annual Report of the Superintendent of Public Schools of the City of Philadelphia for the Years 1898-9* (Philadelphia: Walther Printing House, 1899), 12.

[3] Edward Brooks to Rev. John W. Shanahan, 18 January, 1898, Box 1, Superintendent of Schools Files (1998/01), PAHRC.

remain respectful. Attendance laws may have barked at Catholic schools, but in Philadelphia, as elsewhere, they did not bite.

Indeed, despite new attendance laws and heightened anti-Catholic rhetoric, Catholic school enrollments in the United States more than doubled between 1880 and 1900. By the turn of the century, the number of children attending parish schools approached one million students.[4] What explains this discrepancy between Catholic fears of legislative strangulation and the reality of Catholic school growth? Catholic determination to construct schools in spite of threats by public officials was an important reason. Brooks's letter, however, suggests an additional, if not more significant, cause. Even when legislatures passed laws that ostensibly introduced strict regulations affecting private education, those laws did not have a significant impact on the state's relationship with parochial schools. Nor did they negatively affect attendance in these schools. Behind the threats of public laws, in other words, lay the compromises embedded in private letters and tacit agreements between public and private school officials.

Despite all the controversies surrounding state regulations of parochial schools in the 1880s, in practice regulation was loose and enforcement rare. Local school committees rarely attempted to use compulsory attendance laws to shut down parochial schools. The strategy's impotency resulted from both political and economic forces. In the late 1880s and early 1890s, Republican politicians throughout the North staked their campaigns on state regulation of private school curricula and teaching. But legislatures that tried to enforce stricter compulsory attendance statutes encountered opposition sufficiently fierce to merit either reconsideration or repeal. Politicians who favored such legislation found themselves facing dire reelection

[4] Harold A. Buetow, *Of Singular Benefit: The Story of Catholic Education in the United States* (New York: Macmillan, 1970), 179.

prospects. Given the growing numbers of Catholic voters—and the fear that hostile laws would produce a single-issue (Catholic) voting bloc—few lawmakers dared pass or enforce statutes that would result in a swift backlash.[5] Likewise, in towns where Catholics composed the majority of the school board, laws that placed an undue burden on Catholic schools simply went ignored out of respect for communal stability. Thus, while legislatures passed laws that elicited ethnic and religious conflict and aimed to reduce parochial school attendance, their actions did not restrict educational competition. Brooks's attention to the political "delicacy" of compulsory attendance laws was a case in point.

In addition to these political reasons, many public school officials failed to enforce regulations that would dampen the economic benefits of parochial schools. Parochial schools resembled a release valve, limiting the pressures exerted by compulsory attendance laws. As Northern school administrators attested on numerous occasions, parochial schools relieved overcrowding, lowered property taxes, and lessened the need for new school construction. In short, they provided municipalities and states with virtually costless classrooms, desks, and teachers. While public school advocates may have resented the ethnic or religious values that parochial schools propagated, they recognized that without them, the quality of public school education might deteriorate, while taxes would surely rise. Public officials thus self-consciously governed through private institutions, believing that parochial schools served a crucial, though often obscured, public function.

Contrary to lawmakers' desires, and Catholics' fears, compulsory attendance laws did not diminish the numbers of Catholic schools. In Rhode Island and Massachusetts, Republican

[5] On the strong correlation between Catholicism (or religion, generally) and party affiliation, see Richard Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888-1896* (Chicago: University of Chicago, 1971), xii, 58-88; Ballard Campbell, *Representative Democracy: Public Policy and Midwestern Legislatures in the Late Nineteenth Century* (Cambridge, MA: Harvard University Press, 1980), 4-17.

politicians' attempts to constrict parochial school growth faced significant legislative hurdles and implementation obstacles. In Wisconsin and Illinois, Catholics and Lutherans made swift work of the state Republican leaders responsible for new compulsory attendance laws: they voted them out of office at the first available opportunity. So long as states compelled school-going without the will to pay for universal public school attendance, parochial schools would not only be permitted to exist, but would flourish. As a result, the first major attempts to regulate private schools in the 1880s, ironically, contributed to their expansion.

I

Compulsory attendance laws originated in the Northern states as a wedge issue for Republican politicians. In the 1870s, factions within the Republican Party pushed for compulsory attendance legislation against the opposition of Democrats. Prior to 1867, only Massachusetts had such a law, but by 1883 legislatures in Vermont, New Hampshire, California, Michigan, Connecticut, Kansas, New Jersey, New York, Maine, Ohio, Wisconsin, Illinois, and Rhode Island had passed statutes compelling school attendance.[6] While individual motivations differed, Republicans generally found that compulsory attendance legislation accorded with their broader ideas about the role of the state in promoting national growth and unity.

Following the Civil War, the promotion of compulsory attendance tied the Republican Party's goals in the South with those in the North. In both regions, those populations requiring assimilation—former Southern rebels, freedmen, and Northern immigrants—were expected to endorse and support public schools, which Republicans believed could meld a fractured nation.

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[6] Stephen J. Provasnik, "Compulsory Schooling, from Idea to Institution: A Case Study of the Development of Compulsory Attendance in Illinois, 1857-1907" (Ph.D. diss., University of Chicago, 1999), Appendix E, 332. Martin Jay Eisenberg also found strong correlations between Republican representatives and compulsory attendance laws. See Eisenberg, "Compulsory Attendance Legislation in America, 1870 to 1915" (Ph.D. diss., University of Pennsylvania, 1988).

Republicans insisted that former Confederate states adopt public school systems for readmission to the Union. In the North, they pushed for laws that criminalized parental efforts to avoid school attendance. Here, political calculations mattered immensely. Leaders within Republican Party (GOP) yearned for a unified Protestant American culture, buttressed by an expansive compulsory public school system, which would help to peel Protestants away from the Democratic Party in the South and unite them with their coreligionists in the North.[7]

Compulsory attendance laws were controversial not only because of their partisan origins. In no other area of the law did states so powerfully intrude on local educational practices and values. The legislation found its legal basis in the common law doctrines of the police power and the related concept of *parens patriae*, the sovereign's right to act as "the parent of the nation." It was precisely this theoretical replacement of children's guardians with the state that many parents and religious groups found offensive. Traditionally, parents dictated children's school attendance according to labor opportunities, family economic needs, and individual decisions surrounding the value of formal education. States generally did not grant local school boards the authority to interfere in those family choices, or to punish employers for hiring young children. Compulsory attendance laws drastically changed that relationship. While few questioned the state's authority to regulate large areas of children's experience within the public schools, compelling attendance there was a different matter.[8]

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[7] These views were articulated most prominently by Henry Wilson in, "New Departure of the Republican Party," *Atlantic Monthly* 27 (January 1871): 104-20. Ward M. McaFee, *Religion, Race, and Reconstruction: The Public Schools in the Politics of the 1870s* (Albany: State University of New York Press, 1998). Republicans conceived of economic policy in the late nineteenth century as accomplishing similar ends of national growth and partisan dominance. See Richard Bensel, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000).

[8] Stephen Provasnik has found that state courts throughout the nineteenth century gave school authorities broad discretion to regulate school policies surrounding student attendance, conduct, and discipline. In contrast, courts tended to side with parents over disputes concerning curriculum, suggesting that judges still valued parental belief

Compulsory attendance, according to critics, broke a long-standing tacit, voluntary social contract between parent and school. It represented a substantial intervention into family life and parental authority. As the *Catholic World* put it in 1891, "here is State interference and State control in matters which had hitherto been considered as within the exclusive right and jurisdiction of the parents," an attempt "to dictate to the family how much and what sort of schooling it must give the child, and where and at what time."[9] In terms of effective public policy, these laws did not produce a revolution in school attendance during the nineteenth century. Northern communities already had achieved extraordinarily high rates of school attendance and literacy, and communities lacked the capabilities, as well as incentives, to pry more children away from the farm, factory, or street. Nonetheless, compulsory attendance ushered in widespread protest and evasion among parents with children in public schools. Even fiercer opposition followed when these laws began to regulate private schools as well.[10]

Rhode Island exemplified these trends. A heavily urban, industrial, and Catholic state, its patterns of school attendance reflected educational, ethnic, and religious practices. Debates over compulsory attendance laws in Rhode Island thus often pitted Protestant Republicans against immigrant Catholic parents whose children did not attend school, as well as factory owners who employed child labor. Large enrollments in Rhode Island's Catholic schools also shaped battles over compulsory attendance. Lawmakers debated whether attendance in Catholic private schools could satisfy these new laws, and how compulsory attendance would affect the state's coffers.

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systems over those imposed by the state. See Stephen Provasnik, "Judicial Activism and the Origins of Parental Choice: The Court's Role in the Institutionalization of Compulsory Education in the United States, 1891-1925," *History of Education Quarterly* 46, no. 3 (Fall 2006): 321-28.

[9] E.A. Higgens, "The American State and the Private School," *Catholic World* 53, no. 316 (July 1891): 522.

[10] Carl F. Kaestle, and Maris A. Vinovskis, *Education and Social Change in Nineteenth-Century Massachusetts* (New York: Cambridge University Press, 1980); Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012), Chapter Four.

Ultimately, politicians grew convinced that the key to successfully administered attendance laws lay in regulating parochial schools in new ways.

In the 1870s and early 1880s, however, Rhode Island Republicans sheepishly admitted that their state lacked legislation to compel children to attend school. That every other Northern state with the exception of Pennsylvania already had such laws made their own laggard behavior all the more embarrassing. Leading opinion makers in Rhode Island joined the crusading state School Commissioner Thomas B. Stockwell in calling for compulsory attendance legislation. In previous decades, the state's manufacturing elite had made persuasive arguments that such legislation would harm factory productivity, drive up prices, and harm exports. But as other states proved that successful local economies and attendance laws could go hand in hand, those arguments disappeared. As the Republican *Providence Evening Press* editorialized in early 1883, "if … a compulsory education law has been successful in Massachusetts, there is no reason why it should not be so in this state." Indeed, the editorial continued, the state's economic competitiveness demanded it. "We cannot afford to maintain our bad preeminences of having a larger percentage of illiterates than any other northern state," it read. "It will place in jeopardy our industrial standing, since in the fierce competition which has to be met in every kind of business, intelligent workmanship alone will enable us to hold our own."[11] Other commentators feared that high rates of illiteracy would lead to economic degradation. A late nineteenth-century commentator familiar with Rhode Island's education laws also found a direct link between the state's lack of a compulsory attendance legislation and its economy. The state, he said, "became an inviting field to parents who opposed these restrictions," since "the want of restrictions in the employment of children in factories brought to the state a large foreign and illiterate population."

[11] "Compulsory Education," *Providence Evening News*, April 9, 1883.

Whereas Rhode Island's original settlers had sought religious liberty, immigrants now presumably viewed the state as a safe haven for their ignorance.[12]

Census statistics in Rhode Island confirmed that increasing numbers of children were not attending school, particularly in its largest city, Providence. Between 1879 and 1882, the numbers of the unschooled rose faster—both in relative and in absolute terms—than those in either the public or parochial schools of the city.[13] In 1883, attendance statistics revealed that 14,700 boys and girls in the state, or one in three children between five and fifteen years old, were not in school.[14] In an economy increasingly dependent on a literate and numerate working class, literacy rates appeared to reflect this low educational attainment. Much to Rhode Islanders' horror, the 1880 federal census showed that Rhode Island was the North's most illiterate state.[15]

When state assemblymen took up a compulsory attendance bill in 1883, Rhode Island's illiteracy rates among Irish and French Catholic immigrants stood foremost in their minds. In 1878, Commissioner Stockwell had successfully urged the Assembly to enact a law mandating an annual census of attendance. Armed with those statistics, Stockwell and other public school officials now pleaded with the Assembly to stem the rising tide of illiteracy among immigrants and to Americanize the foreign-born. "Few people are aware that in some of our largest towns and villages the number of foreign born persons and their immediate descendants far exceeds those of strictly American parentage," Stockwell wrote in 1880. "The key to this whole matter,"

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[12] John William Perrin, "The History of Compulsory Education in New England" (Ph.D. Diss., University of Chicago, 1896), 69.

[13] *Annual Report of the School Committee, of the City of Providence* (Providence: Providence Press, 1887), 64-65.

[14] *Fourteenth Annual Report of the Board of Education, Together with the Thirty-Ninth Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Co., 1884), 80.

[15] Perrin, "Compulsory Education in New England," 69.

he continued, is that "this illiteracy is almost entirely confined to the foreign element," the Francophone in particular.[16] Without new laws, he feared, it was only a matter of time until "this State will come into the power of an illiterate majority."[17] With these threats looming, the General Assembly in the spring of 1883 considered Stockwell's law compelling school attendance.

The existence of large numbers of Catholic laboring children raised uncomfortable questions for state lawmakers and local school officials. After all, if compulsory attendance legislation pushed immigrant and Catholic children and their parents into both public and private schools, might it not spur further parochial school construction? Cities like Woonsocket suggested that such a reality would be immediate. By 1882, the city's 7000 Francophone mill workers maintained five French-language parish schools. With roughly 40 percent of the student population already enrolled in parochial schools, few doubted that such a number would increase if laws forced laboring French children out of the factories.[18]

The framers of the compulsory attendance bill knew that parochial school attendance was exploding throughout the state. In Providence, Rhode Island's largest city, attendance in parochial schools had quadrupled in the quarter century between 1855 and 1879, rising to 2,676 students. While public school attendance also rose, it was at less than half that rate. In Providence's Third Ward the number of children attending Catholic schools increased from 11 to 295, while the public schools' dropped from 1040 to 807. Long-term trends in some wards

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[16] *Eleventh Annual Report of the Board of Education, Together with the Thirty-Sixth Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Co., 1881), 85-86.

[17] *Twelfth Annual Report of the Board of Education, Together with the Thirty-Seventh Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Co., 1882), 92.

[18] See the "Canadian French in New England," in *Thirteenth Annual Report of the Bureau of Statistics of Labor* (Boston: Rand, Avery, and Co., 1882), 73-74.

showed even sharper declines. In the First Ward, public school attendance diminished from a high of 1647 students in 1855, not to regain that level of attendance again until 1887. Over the same period, the parochial school attendance in the First Ward rose from 181 pupils to over 700.[19]

Rhode Island state officials resented these growing parochial schools. Many of them harbored anti-Catholic and nativist views that spilled over into beliefs about immigrant children and their parishes. Politically, Rhode Island's dominant Republican Party had largely kept the franchise away from immigrants until an 1888 amendment to the state constitution removed property qualifications for foreign-born voters. Apportionment rules favoring rural districts, meanwhile, further skewed representation in the state away from urban areas where the vast majority of Catholic immigrants lived. As one historian has calculated, because each Rhode Island town was allotted one senator, "a voter in Jamestown (population 459) had 228 times as much representation as a voter in Providence (population 104,847)."[20] One indication of Republican power was the governor's office, which the GOP held for all but two years between 1857 and 1903.[21]

Republican drafters of the 1883 attendance bill feared how a compulsory education law would neglect private schools. Deeply mistrustful of Catholic schools and the parents who sent

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[19] *Annual Report of the School Committee, of the City of Providence* (1887): 64-65.

[20] Peter H. Argersinger, "The Value of the Vote: Political Representation in the Gilded Age," *Journal of American History* 76, no. 1 (June 1989): 63. On the dominance of the Republican Party in Rhode Island see John D. Buenker, "The Politics of Resistance: The Rural-Based Yankee Republican Machines of Connecticut and Rhode Island," *The New England Quarterly* 47, no. 2 (June 1974): 212-37.

[21] In the 1870s, Rhode Island was the only state that set different voting rules for natives and foreign-born citizens. In 1885, only 15 percent of Providence's foreign-born met the property qualifications for voting. On the context surrounding these laws see Evelyn Savidge Sterne, *Ballots and Bibles: Ethnic Politics and the Catholic Church in Providence* (Ithaca, NY: Cornell University Press, 2003), 60-65.

their children to them, the assemblymen envisioned numerous scenarios whereby immigrants would use private schools to skirt public attendance laws. They might establish parish "schools" that in practice amounted to merely a superficial education: educational facades that might fulfill the letter but not the spirit of the law. Or, even if immigrants actually attended schools, they might receive instruction exclusively in foreign languages and cultures, undermining Republican's assimilationist goals.

To prevent these problems, the committee in charge of drafting the compulsory attendance bill inserted language that placed parochial and other private schools under the supervision of public authorities. The bill mirrored almost every other compulsory education law in the country in mandating that every child between ages seven and fifteen attend a public school for at least twelve weeks (six consecutively). And, like other bills, its first section listed various exceptions to that general rule, including if a child attended a "private day school approved by the school committee of such town." Here the Rhode Island law borrowed from neighboring Massachusetts, which in 1873 had amended its compulsory attendance statute to require that students attend only approved private schools.[22] In 1878, Massachusetts clarified what constituted "approval": teaching in private schools had to equal the quality of local public schools and had to be conducted in English.[23]

Rhode Island's law mirrored these provisions. It defined "approval" as "thorough and efficient" instruction "in the English language." To quell any fears that the colony founded on

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[22] An Act Relating to the Attendance of Children at School, 1873 Mass. Acts ch. 279, 708. As early as the 1830s Massachusetts had child labor statutes that required children seeking employment to have attended public schools or private day schools with a "qualified" teacher. See An Act to provide for the better Instruction of Youth employed in Manufacturing Establishments, 1836 Mass. Acts ch. 245, 950. In the 1850s they again amended the child labor law to include private day schools "approved by the school committee." See An Act in addition to an Act concerning the Employment of Children in Manufacturing Establishments, 1855 Mass. Acts ch. 379, 766-67.

[23] An Act in Relation the Approval of Private Schools by School Committees, 1878 Mass. Acts ch. 171, 126.

religious liberty now persecuted Catholic schools, the lawmakers—also borrowing from Massachusetts—inserted a clause prohibiting school committees from "refus[ing] to approve a private school on account of the religious teaching therein." It was *foreign* parochial schools, not Catholic education per se, that represented the true menace, the bill's framers insisted. In April 1883, the legislature passed the bill into law.[24]

In the ensuing decades, state officials justified the law by referencing an older rationale for state regulation: that private schools were sufficiently "public" to warrant it. As the State Board of Education wrote in 1897, the "state has assumed the responsibility of deciding who shall practice law, or medicine, or dentistry, within its borders, thus aiming to protect its citizens from being imposed upon. Has not the State an equal responsibility to protect its citizens and itself from being imposed upon in the character and extent of the education which it is not proposed to give to the children who attend schools not under direct public control?"[25] A year later, the State Board continued to defend its increased supervision of private schools, claiming that "unless some connection is established between the State and these private enterprises, what means has the State of securing that uniform attendance at school which should be required of every normal child?"[26] According to these officials, states had the same authority to regulate private schools as they did a host of professions and private enterprises. Insofar as they performed a public service affecting the citizenry, parochial schools merited some form of public

[24] An Act in Relation to Truant Children, and of the Attendance of Children in the Public Schools, 1883 R.I. Acts & Resolves ch. 363, 146-50.

[25] *Twenty-Seventh Annual Report of the State Board of Education, Together with the Fifty-Second Annual Report of the Commissioner of Public Schools of Rhode Island* (Providence: E.L. Freeman and Sons, 1897): 28-29.

[26] *Twenty-Eighth Annual Report of the State Board of Education, Together with the Fifty-Third Annual Report of the Commissioner of Public Schools of Rhode Island* (Providence: E.L. Freeman and Sons, 1898, 25-26.

supervision. As soon as the state began compelling attendance on behalf of the public good, then, every school by virtue of its public nature fell under its regulatory orbit.

The Rhode Island law ushered in muted, though by no means massive, protests. Within the assembly, the *Providence Evening Press* noted that only Elisha Dyer, a Providence Republican and future governor of the state, voiced any opposition to the "approval" language found in the bill. Dyer's move to strike out the language, the paper noted, "was defeated by a very large majority." Opposition to the bill was neutered by the leadership of William P. Sheffield, an imposing presence on the House Judiciary Committee. A Republican from Newport, Sheffield spearheaded the bill through the assembly and made no secret of his particular disdain for Catholics, foreigners, and parochial schools—nor his belief that the state should regulate them. When the House in 1884 debated a bill that would regulate liquor sales near public schools, Sheffield moved to insert language that included parochial schools as well. Children in those schools will become "peculiarly susceptible to the baneful influence of the grogshops," he commented. When a Catholic assemblyman chastised him for the remark, Sheffield responded (inaccurately, as it turned out) that "the reason the gentlemen cannot see it is because he was brought up in one of those schools."[27] Catholics who viewed attendance laws as attacks on their schools needed only to cite Sheffield's contempt for Catholic education. Many Rhode Island Catholics resented the legislation. According to the Providence superintendent, Catholics feared that the law would provide a backdoor avenue for truant officers to force Catholic children into public schools, exclusively—an interpretation he denied.[28]

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[27] "Another Day's Work," *Providence Evening Press*, March 8, 1883; "At Work Again," *ibid*., March 13, 1883; "The State Legislature," *Ibid*., March 20, 1883; "General Assembly," *Providence News*, March 5, 1884.

[28] *Annual Report of the School Committee, of the City of Providence* (Providence, Providence Press: 1891), 46.

Many public school officials, however, did hope to use regulations to close down parochial schools. They believed that immigrant children belonged in public schools, and that public law was one tool to achieve this outcome. The new legal role of the state in eviscerating illiteracy among the immigrant population suggested that the bar for an approved parochial school ought to be quite high. As a result, public officials frequently expressed their belief, rooted in a combination of hearsay and inspections, that parochial schools were inferior to the public schools, and that the competition they introduced depressed overall educational quality.

Frank McFee, Woonsocket's superintendent, lambasted the extent of education in Woonsocket, where close to 40 percent of pupils attended private schools. "Only of five out of eight [children] can we predicate with certainty the quality and quantity of their education, or what they are doing to become good American citizens," he wrote. "We desire … to make the un-American, American; to send out from our schools, not Irish, or French, but Americans." McFee held four "French schools" in particular contempt, claiming they were "crowded all the time," a point he determined "need[ed] re-emphasizing this year and every year until they are provided with better accommodations." "What can parents be thinking of," he demanded, "to allow their children to breathe the foul air of such rooms for six hours a day and eleven months in the year, to have the light, which should strike from the left or the rear, strike directly on the eye, producing near-sightedness or other defects of vision?" For McFee, it was precisely the existence of such substandard private schools that necessitated legal intervention, as the 1883 law permitted. He urged the school committee "to place under the full control of the [school]

Committee for fours a day the French parochial school," under a scheme similar to the famous Poughkeepsie plan. "The Public School for All," McFee titled his report.[29]

In Warren, another industrial mill town, the superintendent, Benjamin Bosworth, wrote in 1892 that parents sending their children to parochial schools "do not understand the object of the public schools." Fearing that Catholic schools left the state with a mass of unassimilated adults, he lamented that "if these children attending private schools are to remain among us and become, as citizens, interested in our community . . . it is to be regretted that they are not receiving the education and culture the public school affords." The private schools, Bosworth grumbled, were conducted "in a language foreign to our own," particularly troubling since they served a quarter of the town's children. Alluding to the 1883 law, he urged parents to pay attention "to the laws of the State" which "approve of a private school only when the teaching is in the *English* language," and concluded that once the parents became "convinced" of the public schools' superiority, despite currently "acting in violation of the law, they would at once recognize the duty they owe their children and the community at large." Bosworth, like McFee, saw regulation as a means to shift attendance from parochial to the public schools.[30]

These Rhode Island school officials abhorred the competition that parochial schools introduced in large part because they believed it fundamentally antithetical to the meaning of public education. If one of the central goals of schooling was assimilation, a variety of competing schools mocked that ideal. Insofar as ethnic parochial schools gained their popularity from resisting the public school curriculum and clientele, they would continue to breed a

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[29] *Eighteenth Annual Report of the Board of Education, Together with the Forty-Third Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Son, 1888), Appendix, 53, 72.

[30] *Twenty-Second Annual Report of the Board of Education, Together with the Forty-Seventh Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Son, 1892), Appendix, 48.

dangerous class of people. In 1894, Frank Draper, the school superintendent in Lincoln—a town halfway between Providence and Woonsocket—articulated public fears that the competition unleashed by parochial schools inflicted permanent damage on public education. "The Public schools of our country," he wrote,

> if they are to continue, must do so because they are manifestly superior to the many religious and secular private schools which are entering the field and are to prove by no means trifling adversaries to our common schools. For these private institutions represent organized effort towards ends which are widely at variance with, if not directly antagonistic to, the aims of the public schools. The latter seek to unite and assimilate the diverse elements of our school population, and are distinctively levellers of un-American class distinctions, the children of rich and poor, native and foreign-born, meeting upon terms of equal rights and common duties. The former are for sects and classes, and are openly and honestly maintained to perpetuate distinctions of race, creed, or social conditions which their patrons refuse to expose to the atmosphere of the common schools. . . . The contest is unequal. The task of the public school presents as many problems for solution as the number of its competitors.

To Draper, public education thrived in the absence of educational competition. Draper's ideal of the truly "common school," much like Horace Mann's, precluded alternatives.[31]

Trends in Rhode Island, however, continued to point to more competition and not less. The official Rhode Island school census measured enormous gains in parochial school attendance throughout the 1880s and 1890s. The Commissioner of Industrial Statistics's 1889 report reflected these fears. More attuned to labor than to educational matters, the commissioner, Josiah Bowditch, was nonetheless charged with keeping track of school attendance, recorded in tandem with the statistics on child labor. In the conclusion of his report Bowditch told the Rhode Island General Assembly that "the rapid spread of parochial schools in our towns is a serious menace to the success and efficiency of our public school system." He admitted that "the

[31] *Twenty-Fourth Annual Report of the State Board of Education, Together with the Forty-Ninth Annual Report of the Commissioner of Public Schools of Rhode Island* (Providence: E.L. Freeman and Son, 1894), Appendix, 47-49.

Catholics have an undoubted right to establish these schools—as much right as Protestant denominations have to establish religious schools," but believed that Catholic school building would be dire for the state. Like so many other public school proponents in the 1880s, Bowditchfeared that unless public schools reformed in some way, they would continue to hemorrhage students to their Catholic competitors. "The numerous changes of Catholic children from the public to the parochial schools is to be regretted," he wrote. "It is incumbent upon us to make every effort to increase the efficiency of our schools, and, as a natural sequence, reduce the grounds of dissatisfaction with them." Bowditch wanted to enhance demand for public schools by making them more attractive to parents. Other lawmakers in the state clearly disagreed, believing that laws should limit the supply of parochial schools.[32]

II

Given the venomous rhetoric expressed toward parochial education in the state, what accounted for the continued growth of Catholic school attendance? Catholic persistence explains some of the story. The subtle role of public policy accounts for the rest. Recall that tax exemptions for parochial schools usually contributed to private school growth. Fiscal policy mattered in other ways as well. One significant reason that local school committees did not ruthlessly prosecute private schools and their parents—despite laws that authorized them to do so—was that the public schools had much to gain from their existence. As Catholic groups ceaselessly pointed out, laws producing parochial school closures inevitably placed additional tax burdens on the public. Every student educated in the parish school was one less the state had to finance, and taxes paid by Catholics also helped the public system. Parochial schools thus

[32] *Annual Report of the Commissioner of Industrial Statistics, Made to the General Assembly* (Providence: E.L. Freeman and Son, 1889), 128. Bowditch's solution was to use the resources of the public treasury to provide public school students with free textbooks, which he believed parochial schools could not afford to offer.

provided states and municipalities with an enormous, often unrecognized, subsidy. While estimates of these savings varied enormously and were nowhere near precise, to Catholic parents they showed up every year in the form of their property tax bills and tuition costs. The *Catholic World* estimated that American taxpayers in 1876 saved over $5,000,000 on the backs of Catholic parents.[33] To many school officials in Northern cities, the specter of Catholic children flooding into the public schools posed a graver threat than Catholic children attending parochial schools.

Tales of drastic overcrowding characterized superintendents' reports in Northern cities throughout the 1880s. Localities could not build schools fast enough to accommodate the influxes of children who arrived from the countryside or from across the Atlantic. While Northern public officials were generally delighted by compulsory attendance legislation, they frequently expressed concerns about the burdens these new students could impose on the schools.[34] In Providence, the superintendent referred to the prospect of overcrowding as the "dark side of the picture" of compulsory attendance.[35] Numerous pages in his annual reports implored the city to build "enough good schools to supply the demand."[36] When children complied with the laws and attended parochial schools instead of public ones, as many did, local officials realized immediate savings. In Warren, 140 children illegally employed in factories began attending a French-language parochial school after truant officers began enforcing the

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[33] "The Friends of Education," *The Catholic World* 22, no. 132 (March 1876): 768.

[34] On fears that compulsory attendance laws would increase overcrowding see David Tyack, *The One Best System: A History of American Urban Education* (Cambridge, MA: Harvard University Press, 1974), 70-71.

[35] *Annual Report of the School Committee, of the City of Providence* (Providence: Providence Press Company, 1888), 16.

[36] *Annual Report of the School Committee, of the City of Providence* (Providence: Providence Press Company, 1887), 24.

child labor and compulsory attendance laws in 1893. The town's superintendent lamented the school's operating in "palpable violation of law," but officials never closed it.[37]

Northern school administrators understood that parochial schools relieved overcrowding and dampened the need for additional buildings. Providence's superintendent remarked in 1887 that "the only thing that should cause delay [in further school construction] is the question as to what the Catholics will do about their proposed parochial schools," adding that "if these are built as has been proposed by them, in every parish, the public schools will be greatly relieved."[38] The city's parochial schools consistently educated between 15 and 20 percent of the school-going population. To have the Catholic truants and child laborers—whose numbers in many wards dwarfed the parochial school population—attend Catholic rather than public schools would save the city tens of thousands of dollars. Not surprisingly, few public officials risked raiding the public treasury by shutting down parochial schools. Over the decade following passage of the compulsory attendance law, state-gathered statistics showed parochial school enrollments expanding at a rate that far outpaced the public sector—a trend brought to a temporary end by the financial Panic of 1893. The fiscal demands of Rhode Island's localities trumped the commands of state laws. Not surprisingly, Rhode Island was not alone in this regard. In Massachusetts as well, lawmakers struggled with implementing policies that alienated significant numbers of voters and taxpayers.

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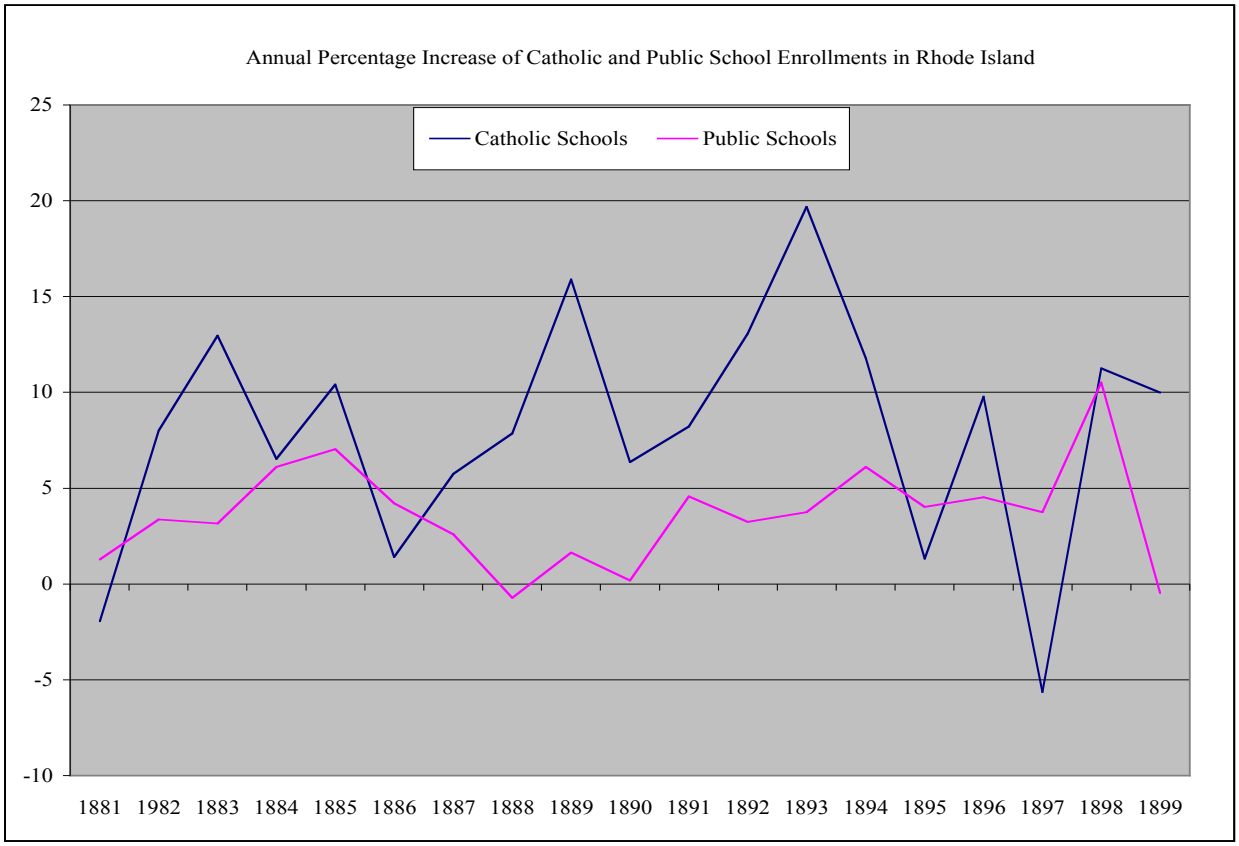
[37] *Twenty-Third Annual Report of the State Board of Education, Together with the Forty-Eighth Annual Report of the Commissioner of Public Schools of Rhode Island* (January 1883), Appendix, 37.

[38] *Providence School Committee* (1887), 24 .



Data tabulated from *Annual Reports of the State Board of Education, Together with the Annual Report of the Commissioner of Public Schools of Rhode Island*, 1881-1899.

III

Massachusetts had laws dating back to the early 1870s that required private schools to be "approved" by the local school committee in order to qualify as "schools" under the compulsory attendance statutes. Yet, as in 1880s and 1890s Rhode Island, the laws were rarely, if ever, enforced. Everyone from the Massachusetts commissioner of education to Catholic school advocates agreed that these regulations were a "dead letter," never acted upon and rarely mentioned. For almost two decades, the law requiring public regulation of private schools went unheeded.[39]

[39] On the failure to enforce the "approval" of parochial schools by local school committees see Thomas Dwight, "The Attack on Freedom of Education in Massachusetts," *The American Catholic Quarterly Review* 13, no. 51 (July 1888): 547.

By the late 1880s, however, Massachusetts Republicans began urging public officials to enforce, if not enhance, the regulations. The rise of parochial schools in the heavily Catholic state had sent lawmakers scurrying to find ways to dampen the competition. As concerns about parochial schools multiplied, legislators turned to the idea of strengthening the language in the compulsory attendance statute. In 1888, Massachusetts's Governor, Oliver Ames, fired the first salvo in an address to the legislature that reminded lawmakers how much parochial schools threatened public education and weakened the very fabric of the nation. "Within the past few years many children of school age have been withdrawn from the public schools and placed in private schools," he began. "This has been done to such an extent as to cause some alarm. And there is reason for this alarm, for the perpetuity of our Republican institutions depends largely upon the education of all the children together in schools whose instruction is controlled by the State itself." Ames instructed the legislature to address the problem through four different means. First, by "making the public schools so good that all parents will insist on sending their children to them." Second, by ensuring that private schools have no access to public funds. Third, by executing the existing compulsory attendance law and its requirements that private schools receive "approval" by the local school committee. And fourth, by amending or enacting a statute in order to enhance the regulations affecting parochial schools. In sum, Ames sought to further Massachusetts's tradition as the nation's leader in compulsory attendance legislation.[40]

Legislators soon answered Governor Ames' call. A special joint committee originally tasked with revising Massachusetts's child labor laws elicited an uproar when it produced a bill substantially revising the state's relationship with private schools. The committee recommended

[40] "The Governor's Message," *Boston Evening Transcript*, January 5, 1888. See also "The School Question," *Boston Daily Advertiser*, January 11, 1888.

that private schools provide public officials with a list of their pupils and attendance records, that school committees be *required* to inspect all private schools and pass annual votes approving or disapproving each one, and that all private school instructors hold the same teaching certificates as public school instructors. The draft bill also added enforcement measures. Private school teachers who did not turn over their attendance records would be fined, the resulting revenues going to public schools. School officials would be given full authority to inspect schools, with no prior notice necessary. Should a school committee change their minds and deem a private school substandard, they could at a moment's notice vote to close it down. Through these provisions, the proposed bill sought to build stricter requirements and tougher enforcement mechanisms into the existing regulations.[41]

The majority of the bill's opponents argued that its intent was to harm parochial schools and weaken the competition they generated with public schools. The joint committee's lone dissenter, Michael McEttrick, a Catholic assemblyman, made the bill's anti-competitive regulations the focal point of his minority report. He warned against the bill's "tendency to give to the State a monopoly in the business of education" before making sweeping arguments on behalf of educational competition. "There is a competition, friendly, that can be maintained and eminently advantageous between public and private schools," he began.

> As in the business world it may truly be said that competition is for the good of the community, may it not also say that in the business of education it may have its utility? . . . If you make the one the slave of the other, you throw away the possibility of generous rivalry, which is so beneficial in education and commerce. Competition is an American principle. Monopoly has not yet commended itself to the American people, because it secures its existence by a more or less arbitrary suppression of others' rights and privileges.

[41] "Report of the Joint Special Committee of The General Court of 1887 on the Employment and Schooling of Children" (1888), Taylor Room, Wirtz Labor Library, U.S. Department of Labor, 26-8.

Better to have legislation that would "promote fair, free, and friendly emulation between public and private schools," he concluded. Free competition and the rights of parents to direct their children's education became the rallying cry of the bill's opponents, who eagerly expressed their views in the public sphere.[42]

In a series of hearings many of Boston's lined up to criticize the bill's attack on private schools. A former Massachusetts school superintendent, August Small, echoed McEttrick and spoke of the ways that "true competition is the life of trade and of education." Small argued that competition bred innovation—"new discoveries and inventions"—and that the best way to improve public and parochial schools would be to stimulate "rivalry" between them. "Emulation and self-interest are reliable guarantees of the healthiness of private instruction," he noted. "Statutory control of private schools would be costly, unprofitable, pernicious."[43] In a published response to the bill, Nathan Matthews Jr., an advocate for private academies, said the value of a free, flourishing private school sector is precisely that it "afford[s] to our public schools that competition which is the indispensable prerequisite to progress in educational matters as in everything else; and partly by furnishing a means of educational experiment which would otherwise be wanting."[44] Even the notable Civil War veteran Colonel Wentworth Higginson spoke up against the bill. A Protestant, Higginson recounted his "first lesson in religious liberty" when as a child he stood by his mother's side watching a Protestant mob burn down a Catholic

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[42] "The Protest against the Majority Report of the Joint Special Committee of the General Court of 1887, on the Employment and Schooling of Children, (House Document No. 19,) and Against any Legislative Interference with Private Schools, Being a Digest of the Remarks of the Remonstrants, at the Hearings of the Legislative Committee on Education in March, 1888" (1888), Catholic University Rare Books and Special Collections, 54-57.

[43] "The Protest against the Majority Report," 14-16.

[44] Nathan Matthews Jr., *The Citizen and the State: An Argument by Nathan Matthews, Jr. in Defense of Private Schools, Before the Joint Committee on Education of the Massachusetts Legislature, April 25, 1889* (Boston: Geo H. Ellis, 1889), 6.

convent. This bill, part and parcel of that same tradition, would wrongly elevate the power of the state's "school committees and its superintendents" for the express purpose of making the "public schools models and drive the private schools off the track because the public schools are better." Educational innovation and competition, welcome in public and private schools alike, were under attack in Massachusetts, the bill's opponents insisted.[45]

The impressive degree of opposition to the bill effectively killed it. The law that eventually passed made superficial changes to the existing compulsory attendance statute, but nothing like the sweeping changes the Joint Committee had proposed. The *American Catholic Quarterly* suggested that Massachusetts politicians sufficiently feared the reprisals of Catholic voters that they refused to carry out the suggestions in the original bill. Given the political consequences of upsetting parochial school advocates, the law's opponents believed that the existing regulations requiring private school "approval" would continue to go unenforced.[46]

That hope was short-lived. In early 1889, the school committee in Haverhill, a town thirty miles north of Boston, decided to prosecute six Francophone parents whose children attended St. Joseph's Parish school. The town had long been heavily dominated by French-speaking workers, and public officials had expressed their disdain with the immigrants' unwillingness to assimilate. In the adjacent town of Lawrence, officials told stories of Francophone children segregating themselves during recess.[47] The Haverhill superintendent remarked that "the movement for French parochial schools" was nothing less than "an attempt to establish a new France upon the

[45] "The Protest against the Majority Report," 21.

[46] "The Attack on Freedom of Education in Massachusetts," *The American Catholic Quarterly Review*, 553.

[47] "Our French Canadians," *Boston Daily Globe*, December 28, 1884.

soil of New England."[48] After inspecting the parochial school, the school committee refused to approve it, finding instruction dominated by French-language teachers, resulting in an educational product inferior to a typical public school. With these findings, the committee ruled that the parents who sent their children to the school violated the compulsory attendance law's English-language mandates. In February, 1889, they charged six parents with illegally enrolling their children in an unapproved private school. Three of the parents contested the charges.[49]

Given the incident's proximity to the previous year's battle over private school regulations, the ensuing court battle drew wide attention throughout Massachusetts. The state's Catholic school advocates were relieved when the judge in the case, Henry Carter, ultimately ruled in favor of the Francophone parents. Carter reasoned that the legislature had intended the statute to apply to parents who "neglected" their children's education, not those who, out of fear of thrusting French-speaking students into English-speaking public schools, sought a different kind of education. The school committee had every right to approve or disapprove of schools, continued Carter, but they had no legal authority to close them or prosecute parents. Rather, respecting the "the private judgment of parents" was paramount. Similar to the opponents of the 1888 bill, Carter believed the regulations imposed by the school committee were excessively onerous, if not outright injurious, to maintaining educational quality.[50]

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[48] "Private School Fight," *Boston Daily Globe*, April 4, 1889.

[49] Jorgenson, *The State and the Non-Public School*, 176-78.

[50] "The Decision," *Boston Evening Journal*, February 11, 1889. See also "The Haverhill School Case Again," *Boston Evening Transcript*, February 12, 1889. Carter's opinion, as quoted in the *Evening Transcript*, conveyed his belief that native and non-native speakers would benefit from educational segregation until the latter's English improved. As he put it, in an integrated setting the children "would be but hindrances to each other, and the other scholars to some extent. It is a hindrance that the teachers would have to get over, to manage, to control." When several years later a town school committee charged another parent with violating the attendance law a Massachusetts court found, similarly, that the "great object of the provisions of the statutes has been that all the

The failure to convict the Haverhill French parochial school parents only reinforced lawmakers' desire to make private schools more accountable to public officials. In February, a Methodist minister and assemblyman S.R. Gracey, introduced a new compulsory attendance bill that made the previous year's efforts look tame. The bill's language mirrored the previous year's measure, but it added additional provisions obviously aimed at Catholic priests by barring individuals from pressuring parents to withdraw their children from public schools. The bill again occasioned widespread controversy, featuring a total of sixteen heavily-attended hearings between March and April.[51]

Yet, as with the previous bill, members of the heavily-Republican State House balked when given the choice to sponsor it in the legislature. Preferring to achieve tougher regulations without the stain of passing this particular bill, they urged the Massachusetts Supreme Court to render an official opinion on the meaning of the existing laws—hoping that the Court would, at least, overturn Judge Carter's interpretation. After the Court refused to weigh in on the controversy, the legislature superficially amended the compulsory attendance law in June of 1889, but few felt the new legislation would make any difference. As the Boston *Journal of Education* put it, the amended law was "a compromise . . . in the interest of peace and harmony."[52] It was "the least objectionable, because it appeared to do the least."[53]

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children shall be educated, not that they shall be educated in any particular way." See Commonwealth v. Frank Roberts, 159 Mass. 372, 373 (1893).

[51] Jorgenson, *The State and the Non-Public School*, 179.

[52] "The Parochial School Bill," *Journal of Education* 29, no. 24 (June 13, 1889): 377.

[53] "Massachusetts Legislation," *Journal of Education* 29, no. 25 (June 29, 1889): 393; Jorgenson, *The State and the Non-Public School*, 180-84.

For all the controversy surrounding parochial school regulation in Massachusetts, the inspection and approval system made very little difference. Many private school advocates feared that it would result in diminished educational competition, but as the Haverhill case demonstrated, it proved exceedingly difficult to close even one school. As state officials knew, local school committees were far more inclined to let parochial schools go uninspected, or to approve them so as to avoid controversy. The Massachusetts school controversy generated religious and ethnic tension, but barely influenced actual policy implementation.

Three factors especially account for why Massachusetts's laws affecting parochial schools failed to halt their growth. First, as in Rhode Island, local school administrators knew that reducing parochial school attendance could lead to dire consequences for the public treasury and the public schools. Few public officials wanted to experiment with throwing thousands of parochial school students into the public schools, cramping existing conditions and placing pressure on taxpayers to fund additional buildings. "We may say what we like about parochial schools," a Boston alderman acknowledged in early 1889, "but if it were not for the recent withdrawals from the public schools of pupils who have been sent to the parochial schools we would be badly cramped for room. That is the only thing that has relieved us."[54] The superintendent of Waltham, Massachusetts echoed these remarks, as did a large study on the effects of Massachusetts parochial schools by the *Boston Daily Advertiser.*[55] Indeed, the savings were so widely acknowledged that some individuals in Massachusetts joked about them. In a series of hearings in Boston over a proposed property tax increase, the future Democratic Boston mayor Nathan Matthews Jr. told the city council that the best way to keep taxes low would be for

[54] "School Buildings: What Can Be Done to Improve Their Condition," *Boston Daily Advertiser*, February 1, 1889.

[55] "Parochial Schools: How They Affect Waltham's Public Schools," *Boston Daily Advertiser*, September 10, 1888.

public schools to continue to discriminate against Catholics and push them into parochial schools![56] Given that Boston citizens already had among the nation's highest tax burdens, city officials knew that, like all jokes, there was an element of truth to what Matthews said. The financial cost of closing parochial schools outweighed the perceived benefits.[57]

A second, and related, reason that public school advocates feared regulating parochial schools too harshly was that new laws might lead to more fervent calls among Catholics for access to public funds. As the tax exemption battles in the 1870s and 1880s demonstrated, Catholic school authorities were often willing to exchange greater state oversight for access to public subsidies. To Catholics and Protestants alike, laws requiring that parochial schools resemble public schools could very well justify access to the same public money. This interpretation of public regulations proved so powerful that when news of the 1888 bill first broke, newspapers and citizens considered the possibility that the new regulations would *benefit* parochial schools. Was the bill "aimed at parochial schools, or is it a measure intended ultimately to promote their interests?" the *Boston Daily Globe* wondered. Several Catholics interviewed by the newspaper believed that the law would aid parochial schools. "If it 'approves' the schools, it … so 'approves' what is taught in them," one Catholic clergyman argued. He reasoned that "if the parochial schools be given the same standing as the public schools, then they will be entitled to claim a share of the public school appropriations."[58]

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[56] "The Legislature," *Boston Morning Journal*, February 28, 1890.

[57] "Mr. Matthews on City Finance," *Boston Daily Globe,* March 1, 1890. On Boston's tax burden see Charles Phillips Huse, *The Financial History of Boston from May 1, 1822, to January 31, 1909* (Cambridge: Harvard University Press, 1916); John B. Legler, Richard Sylla, and John J. Wallis, "U.S. City Finances and the Growth of Government, 1850-1902," *The Journal of Economic History* 48, no. 2 (June 1988): 354.

[58] "State and School," *Boston Daily Globe*, January 22, 1888.

Prominent public school advocates agreed. As the anti-Catholic *Boston Evening Transcript* put it, even members of the State Board of Education believed that tougher regulations would not only "awaken hostility from the Catholic element, but practically recognize the parochial establishments as State schools, and thus logically lead to the demand for a division of the school tax in their favor."[59] One public school principal was so alarmed by the threat of parochial schools accessing the school fund that he spoke out publicly against the bill. "If you supervise them, then, of course, you give them a claim for a division of the school fund," the principal, J.W. McDonald began. "If private schools can compete with us let them do it; we ask for no favors. There is only one way you can injure us, that is by legislating private schools into popularity by adverse legislation."[60] The prospect of public funding for parochial schools suggested that the bill's regulations would increase educational competition—the exact opposite of its stated intention.

Finally, insofar as the regulations threatened to "awaken hostility" from Catholics, public officials feared voter retribution. Catholic parents could decide to enroll their children in parochial schools, but they still voted in local public school committee elections, in addition to other local and statewide races. Lawmakers who sponsored laws threatening parochial schools risked payback at the polls. Worse for many Protestants was the threat that such legislation might produce a solid Catholic voting bloc increasingly alienated from the Protestant governing elite. Catholic voting power was no imagined phenomenon. Bostonians had elected their first Catholic mayor, Hugh O'Brien, in 1885, and by 1888 the city's school board was evenly split between Protestants and Catholics. After a bitter controversy erupted over an anti-Catholic textbook used

[59] "Public and Private Schools," *Boston Evening Transcript*, February 9, 1889.

[60] "The Protest against the Majority Report," 14.

by a public school teacher in 1888, Catholic (and Protestant) women in Boston registered in droves to vote in the next school board elections.[61] Charles Eliot, the President of Harvard College, regarded Catholic voting power as the central reason to oppose the 1888 bill. In his public remarks to the joint committee he testified that "those of us who are Protestants may reasonably look with some apprehension upon the possible [electoral] results in those Massachusetts communities where the Catholics are in the majority, or are rapidly approaching a majority." Eliot argued that the bill, if passed into law, would "enlist every conscientious Catholic in the support of parochial schools."[62] Republican legislators in 1888 and 1889 knew that stringent parochial school regulations risked turning an entire generation of French-descended Catholics into Democrats.[63] Their refusal to pass the parochial-school inspection bills into law reflected this fear. Nativist and anti-Catholic political agitation remained a fixture of Massachusetts politics throughout the 1890s, but Catholic voting power there, and elsewhere, made it highly unlikely that stringent regulations affecting parochial school attendance would be passed and enforced.[64]

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[61] Lois Bannister Merk, "Boston's Historic Public School Crisis," *The New England Quarterly* 31, no. 2 (June 1958): 180. The Republican ticket won the school board election and, according to Merk, Catholic women voters in Boston diminished thereafter.

[62] "The Protest against the Majority Report," 7-9.

[63] See "Massachusetts Legislation."

[64] One historian has found evidence that school boards in some New England towns were so dominated by Francophones that they simply refused to prosecute their fellow ethnics who attended non-approved parochial schools. Because the law left enforcement to local communities, this type of evasion was likely rampant. See Sara Errington, "'The Language Question': Nativism, Politics, and Ethnicity in Rhode Island," in *New England's Disharmony: The Consequences of the Industrial Revolution*, ed. Douglas M Reynolds and Katheryn Viens (Kingston: Rhode Island Labor History Society and Labor Research Center, 1993), 95. Benjamin Justice emphasizes this type of local compromise along issues of ethnic and religious strife in *The War that Wasn't: Religious Conflict and Compromise in the Common Schools of New York State, 1865-1900* (Albany: State University of New York Press, 2005).

IV

These voter revolts over new state attendance regulations occurred with striking ferocity elsewhere as well, particularly in Wisconsin and Illinois. Wisconsin's "Bennett Law" and Illinois's "Edwards Law," both passed by Republican legislatures in 1889, were in some ways more moderate than the bills proposed in Massachusetts. Almost all of their provisions resembled Massachusetts's 1873 law that required "approval" of private schools, and defined "schools" as those that taught in the English language.[65] In other ways, however, the bills went beyond any existing state law. The Bennett Law had a clause requiring children to attend school in the district in which they lived, a provision that opponents feared would force children educated at a parish outside of district lines to move or abandon their parochial school.[66]

Compared with Massachusetts, the origins of Wisconsin's private school regulations lay more strictly in ethnic, rather than religious, politics, since the law equally affected the state's large German-Protestant (Lutheran) community and its private schools. Together, the Catholic and Lutheran Germans of Wisconsin made up half of the state's foreign-born population in the late nineteenth century. By 1890, Wisconsin's parochial schools, many of which featured instruction in German, had risen to educate over 15 percent of the state's school-attending children.[67] In large Catholic centers like Milwaukee, well over one third of school-going children attended these private schools.[68]

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[65] The Illinois and Wisconsin laws were largely identical. For a side-by-side comparison, see *The Daily News Almanac and Political Register for 1891* (Chicago: Chicago Daily News, 1891), 66-67.

[66] "Some Facts," *The Milwaukee Journal*, March 29, 1890.

[67] Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850-1900* (New York: Free Press, 1970), 162-68; Jensen, *The Winning of the Midwest*, 122-26.

[68] "Notes," *Wisconsin Journal of Education* 13, no. 5 (May, 1883): 217.

Over the course of the 1880s the state's public education organ, *The Wisconsin Journal of Education*, expressed increasing concerns about the rising attendance in German-speaking schools. Public school authorities in Wisconsin, as in New England, had long looked upon private school competition with some degree of suspicion. In 1879 the *Journal* reprinted an address that O.B. Wyman, the superintendent of Vernon County public schools, delivered to the State Teachers' Association on the "Compulsory Educational Law." Like his counterparts in Rhode Island and other states, Wyman believed that compulsory attendance legislation led inexorably, as well as productively, toward educational monopoly. "The history of the past teaches, among many other lessons, that when the education of the masses is left to individual enterprise, or to private societies, that the training given too often tends to limit the understanding," he wrote. Echoing what would become the theory of natural monopoly, he continued, "as to the efficiency of private enterprise in promoting the education of the masses, it is too irregular in its action, too costly in its methods, and too inadequate in its means. Private enterprise never has—we believe it never will—educate the whole people." For Wyman, "the strong arm of the law" ought to eliminate educational competition as swiftly as possible.[69]

The *Journal*'s official position in 1879 was that German-language private schools fulfilled compulsory attendance laws. Even "the most despotic government in Europe does not attempt to compel education through one language only, where several languages are spoken," it noted.[70] Gradually, however, that position shifted. In 1882 the *Journal* reported that in one city, "the attendance at a private denominational school is greater than the aggregate attendance at any

[69] O.B. Wyman, "Compulsory Educational Law," *ibid.* 9, no. 9 (September, 1879), 366.

[70] "Official Department, Questions and Answers – The Compulsory Law," *Ibid.* 9, no. 10 (October 1879), 442.

three of the public schools," and English was quickly "becoming a dead [language]."[71] By 1889 the *Journal* announced that "it has come to light that the teaching of English is either utterly neglected or very imperfectly conducted in a large number of parochial schools," and referred to these trends as "a very serious evil." When, that same year, an obscure Catholic, Republican state legislator—Michael Bennett—proposed a bill compelling attendance in schools taught in English, the *Journal* endorsed the measure. So, too, did Wisconsin's Governor, William Hoard, who signed the bill into law in April, 1889. [72]

The state's Catholic and Lutheran leaders reacted furiously to the Bennett Law. Noting national trends, Milwaukee's *Catholic Citizen* accused Hoard of "circulat[ing] in this State the bad money that has done duty in bigoted Boston."[73] Wisconsin's three German-American Catholic bishops joined the Wisconsin Lutheran Synod in denouncing the measure publicly as an assault on parental and religious freedom. In a rare display of unity, Scandinavian Lutherans joined German Lutherans, and German Catholics joined Irish Catholics. Most importantly, Catholics and Lutherans—for centuries at each other's throats in Europe—became allies.[74]

These new multiethnic coalitions temporarily transformed local and state politics, blunting the Bennett Law's effects. In Massachusetts Protestant Republicans had anticipated drastic electoral consequences for anti-Catholic legislation, and in Wisconsin those fears quickly became reality. Given that "every obnoxious law against Catholics and their Church, passed in the Wisconsin legislature, has originated with the Republican Party," the *Catholic Citizen*

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[71] "Notes," *Ibid.* 12, no. 6 (June, 1882), 280-81.

[72] "Editorial," *Ibid.* 19, no. 9 (September, 1889), 379.

[73] "The Quintessence of a Slander," *The Catholic Citizen*, September 13, 1890.

[74] Jensen, *The Winning of the Midwest*, 122-26. See also "The Bennett Law," *The Catholic Citizen*, July 26, 1890.

warned, the Bennett Law alone would "be reason enough for every Catholic voter to vote the Democratic ticket."[75] Many Lutherans, long stable Republican voters, agreed. One German Lutheran publication declared it the special duty of the "German citizen who is willing to assert the freedom of conscience and the rights of the German parochial schools to enter his protest by voting against the Republican party."[76] These hopes and predictions soon came true as Republicans, arrogant from decades of electoral dominance in the state, went down in defeat. In April of 1890, a Democrat, running in opposition to the Bennett Law, won Milwaukee's mayoral race for the first time in fifteen years. Later that year, despite pledging to amend the law, Republicans met an even greater voter revolt. Save for one congressional seat, the GOP lost every major office, along with their majority in the state legislature. Wisconsin's Lutheran and Catholic voters, meanwhile, trounced Hoard at the polls and elected a Democratic governor for only the second time since 1856.[77] As a result of this swift and impressive political mobilization, the Bennett Law barely, if at all, made a dent in private school attendance. The incoming Democrats fulfilled their campaign promise and immediately repealed the law. When the legislature passed a new compulsory attendance law in 1891, it no longer included language referring to residency and English language requirements.[78]

In Illinois, the similarly motivated and worded Edwards Law also met stiff resistance and, ultimately, defeat. As in Wisconsin, little evidence exists that the regulations embedded in the Edwards Law had a significant impact on school attendance. Between 1889, when

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[75] "Watch Words for Wisconsin Voters," *The Catholic Citizen*, November 1, 1890.

[76] *Germania* (Milwaukee), March 25, 1890, quoted in Kleppner, *The Cross of Culture*, 160

[77] Jensen, *The Winning of the Midwest*, 127-44.

[78] Robert C. Nesbit, *The History of Wisconsin: Urbanization and Industrialization, 1873-1893*, vol. 3 (Madison: State Historical Society of Wisconsin, 1985), 614.

Republicans in the legislature approved the law, and 1893, when Democrats repealed it, newspapers reported few cases of enforcement. As in Wisconsin, the law made a greater impact on elections than school attendance. By the 1892 state elections, even the Republicans endorsed the Edwards Law's repeal. In their platform they stressed that parents should be "left absolutely free to choose in what schools" they enrolled their children, and that public officials never be given the authority "to interfere with private or parochial schools." Despite Illinois Republicans' attempts to avoid the fate of their colleagues in Wisconsin, voters ousted them from their majority in the senate, and, in the land of Lincoln, elected their first Democratic governor since 1856. Once in power, the Democrats immediately repealed the provisions in the Edwards law mandating English language instruction and granting school board authority to approve private schools.[79] Democratic politics proved once again capable of overwhelming attempts to stifle parochial school attendance.

V

The historian David Tyack famously characterized nineteenth-century compulsory attendance laws as "symbolic" measures without any teeth—the result of a wide gap between legislators' designs and actual enforcement mechanisms.[80] The history of compulsory attendance enforcement in Rhode Island, Massachusetts, Illinois and Wisconsin reveals an additional gap that served to prevent meaningful enforcement: between statewide officeholders and local

[79] Provasnik, "Compulsory Schooling, from Idea to Institution," 276-86. Provasnik found that school boards in at least eight counties sought to force parents to remove their children from local, unapproved parochial schools that instructed in foreign languages. In one case Provasnik found, a school board ordered parents to remove their child from a Lutheran school despite its compliance with state laws.

[80] David Tyack, "Ways of Seeing: An Essay on the History of Compulsory Schooling," *Harvard Educational Review* 46, no. 3 (1976): 359.

ideologues who saw compulsory attendance laws as politically popular, and local school officials who had a more intimate knowledge of school finance and politics.

This particular sensitivity to local conditions was on display at a meeting of the National Council of Education, a prestigious body of the larger National Education Association. There, in 1891, educational administrators from around the nation met to discuss the controversies surrounding compulsory education laws. Attendees heard blustery rhetoric praising increased state oversight of dangerous, foreign parochial schools. A paper produced by a committee chaired by the Saint Paul, Minnesota public school superintendent barely concealed its anti-Catholicism. The committee accused those opposed to the Bennett and Edwards laws as an "un-American religio-political movement," close to a "foreign scheme, to be supported by foreign governmental and ecclesiastical influence." The report attacked parents who sent their children to foreign-language parochial schools and ended by suggesting that such parents lose their voting rights.[81] At the meeting, as in other gatherings of public school officials in the 1880s and 1890s, anti-Catholicism was heavily on display.[82]

The committee, however, did not have the last word. In a discussion following the paper, a group of public school superintendents rose in defense of parochial schools—not out of any particular affinity with Catholic education, but out of expediency. "To war on private schools in any way," Kansas City's Frank Fitzpatrick claimed, "is not in the providence of the public school." Fitzpatrick noted that "in my city it would require an increase of fifteen per cent in the taxes to provide accommodations in the public schools for all the children." Cincinnati's

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[81] "Report of the Committee on State School Systems: Compulsory Education," *National Educational Association Journal of Proceedings and Addresses* (1891), 295-96.

[82] The National Educational Association featured a heated debate over Catholic education during its 1889 annual meeting. See *The Two Sides of the School Question* (Boston: Committee of One Hundred, 1890).

superintendent, Emerson White, agreed, arguing that states should acknowledge the difficulties with providing English instruction in communities where most of the teachers are foreigners. Better to focus first on the *public* schools that illegally instruct in foreign languages, White argued, and to use greater caution in supervising private education. "It is now hazardous and unnecessary to couple with [the question of compulsory education] the control of private schools," he concluded.[83] The audience of administrators erupted into cheers. While harassing parochial schools through burdensome regulations may have been the priority of a few nativist zealots, it was rejected by mainstream urban school administrators.

The efforts to inspect and approve parochial schools in Northern states often proved immensely divisive, but they made no significant impact on educational policy. Few schools were ever closed due to inspections, and still fewer parents convicted for aiding truancy. While greater numbers of parochial schools might have been pressured to close in more inconspicuous ways, most local school committees abstained from upsetting local ethnic groups. Despite the adversarial rhetoric and legislation of Republican state officials, compulsory school laws did not reduce attendance in parochial schools. On the contrary, because of other provisions in these laws, they facilitated their continued expansion.

[83] "Report of the Committee on State School Systems (Discussion)," 301-2.

Chapter Five

Regulating the Educational Marketplace in the Progressive Era

Charles Lischka's book grew to surprising lengths. A researcher for the National Catholic Welfare Conference, he had set out in 1924 to compile and publish a short pamphlet on state laws regulating parochial schools. Soon, however, the list of laws began to fill over one hundred pages, detailing often intricate, state-imposed guidelines on private school attendance, accreditation, teacher certification, curriculum, accounting, student health, buildings, and many other policy areas. In the preface to his text, Lischka declared that even Americans steeped in school law would find it a "revelation" to read the variety of regulations and restrictions affecting private schools. States required medical inspection and fire drills. In over a dozen Northern states, local school committees certified or inspected private schools. A still larger number required courses on the Constitution, civics, patriotism, and English as the official language of instruction in the school. Michigan and Nebraska mandated that teachers in parochial schools obtain the same occupational license as those in public schools.[1]

This trend toward greater state regulation and oversight of private schools stretched back for decades. Parochial school attendance surged between 1890 and 1930, as Catholic immigrants flooded into Northern cities from Southern and Eastern Europe. The number of Catholics in the United States more than doubled between 1890 and 1915, rising to sixteen million. Immigrant populations were particularly noticeable in urban areas, where, by 1916, Catholic communicants

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[1] Charles N. Lischka, *Private Schools and State Laws: The Text as Well as a Classified Summary of All State Laws Governing Private Schools, in Force in 1924* (Washington, D.C.: National Catholic Welfare Conference, 1924), 5. A summary of the laws appears on 102-8. For a later summary of these laws, refer to Sister Raymond McLaughlin, *A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States: 1870-1945* (Ph.D. diss., Catholic University of America Press, 1946).

composed majorities in thirty-one cities with over 100,000 residents.[2] In large cities such as Cleveland, Milwaukee, Cincinnati, Buffalo, Boston, and Pittsburgh, more than forty percent of children attended Catholic schools.[3] As public and parochial school systems competed for students, their governance structures increasingly mirrored one another. For public schools the triumph of a bureaucratic "one best system"—of publicly financed, standardized, and state supervised schools—marked the era's dominant reform agenda.[4] For Catholic schools the aims and means were remarkably similar: expanding the system, centralizing administration in offices of diocesan school superintendents, and standardizing curriculum across the parishes.[5] Essential differences remained between the two systems, from the religious content of parochial schooling to the increased emphasis on manual and vocational training in public schools. But in large and small cities alike, the existence of two distinct, competing systems was impossible to miss.[6]

The "one best system" of public education that linked increasingly centralized local districts with state standards, funding, and laws, also included private schools. As Lischka noted,

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[2] Bureau of the Census, *Religious Bodies, 1916* (Washington, D.C.: Government Printing Office, 1920), 30, 127.

[3] David P. Baker, "Schooling All the Masses: Reconsidering the Origins of American Schooling in the Postbellum Era," *Sociology of Education* 72, no. 3 (1999): 197-215.

[4] David Tyack, *The One Best System: A History of American Urban Education* (Cambridge: Harvard University Press, 1974). Raymond E. Callahan, *Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools* (Chicago: The University of Chicago Press, 1962); Dorothy Shipps, *School Reform, Corporate Style: Chicago, 1880-2000* (Lawrence: Kansas University Press, 2006), 16-49; Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012).

[5] Timothy Walch, *Parish School: American Catholic Parochial Education from Colonial Times to the Present* (New York: Crossroad Publishing Company, 1996), 100-117; James W. Sanders, *The Education of an Urban Minority: Catholics in Chicago, 1833-1965* (New York: Oxford University Press, 1977), 141-160; James A. Burns, *The Growth and Development of the Catholic School System* (New York: Benziger Brothers, 1912), 197-216

[6] For an older historiographical essay that highlights the ways in which Catholic schools emulated public competitors see Marvin Lazerson, "Understanding American Catholic Educational History," *History of Education Quarterly* 17, no. 3 (1977): 297-317. See also Paula Fass, *Outside in: Minorities and the Transformation of American Education* (New York: Oxford University Press, 1993), 189-228

the rise of laws regulating private schools blurred distinctions between public and private in education entirely. "Many legislators," he wrote, "consider private schools not merely a part of the educational resources of the state, but practically a part of its educational system, subject to indefinite regulation and restriction."[7] The more Catholic educational systems grew and matured, the more state legislatures required that parochial schools align with centralized, "public" priorities—a process known as educational "standardization."

Efforts to create a single system of legal authority over public and parochial schools arose because Catholic children by and large attended neither institution exclusively. Instead, pupils often transferred between them, reflecting a more urban America where parents had access to educational choices and a larger "marketplace" of schools. As reformers witnessed millions of Catholic parents exercising monthly and annual choices over their children's schooling, they sought ways to regulate that marketplace.

Unregulated school choice posed two problems, in particular. First, officials complained that compulsory attendance laws could not be enforced properly if cities lacked mechanisms to track attendance shifts between public and private schools. So long as parochial schools declined to voluntarily report attendance to public officials, truant officers could not maintain accurate enrollment statistics. Moreover, Catholic parents and children seeking to evade attendance mandates could simply transfer to the parochial school in order to avoid the truant officer's watchful eye. Laws that addressed parochial school attendance thus became a rallying cry for reformers during the Progressive Era. Legislators in Northern states crafted new regulations forcing parochial schools to coordinate their attendance systems with local public schools. In

[7] Lischka, *Private Schools and State Laws*, 5.

addition, urban school boards constructed vast bureaus of attendance to manage transfers between school systems, tying together public and parochial school governance in ways unthinkable during the nineteenth century.

Transfers between rival systems also posed instructional problems, what one Chicago researcher in 1912 termed "the difficulty of harmonizing two courses of study having diverse aims and methods."[8] Because almost all Catholic dioceses lacked secondary schools of their own, students were often first educated in the parish elementary school and then attended a public high school. Catholic and public officials alike sought ways to ensure that parochial schools met minimum standards and that their graduates were adequately prepared for public high school curricula. As a response, in addition to the minimum requirements written into compulsory attendance statutes, school boards in several Northern cities during the Progressive Era began accrediting pre-secondary parochial schools. Students graduating from parochial schools officially "approved" by school committees received privileges in their applications to public high schools not afforded to those from unaccredited schools. Graduates from approved schools, for example, could be admitted to public high schools without taking an entrance examination, thus facilitating access to institutions increasingly crucial to upward mobility. Parochial school officials calculated, accurately, that parents would spurn their institutions if they did not comply with accreditation standards.

Because Northern cities featured ethnically and religiously diverse neighborhoods, new regulations and administrative bureaus arose to govern otherwise dizzyingly chaotic, competing school systems. Indeed, public regulation, as it had in previous decades, actually fostered

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[8] Ernest L. Talbert, *Opportunities in School and Industry for Children of the Stockyards District* (Chicago: University of Chicago Press, 1912), 8.

increased competition. Regulatory reforms satisfied public and parochial school authorities' desire for "modern" administration and encouraged better school attendance in the dueling systems. Over the first two decades of the twentieth century Catholic educators willingly, even happily, complied with state laws that required them to report attendance information to public officials. Accreditation and the raised standards that came with it, meanwhile, satisfied Catholic concerns that secondary schools and labor markets would treat parish institutions as equivalent in quality to public schools. By the 1920s, cities and states regulated public and parochial schools to a degree unfathomable a half-century earlier. A tightly regulated educational marketplace had been born.

I

The push to regulate Catholic parents' school choices and the educational marketplace those choices created fit comfortably within the broader agenda of municipal and state reformers between the 1890s and 1920s. Public regulation of private behavior was not new to the period, but as the United States in the late nineteenth and early twentieth century shifted from a predominately rural to an urban society, more Americans felt the strengthened hand of the regulatory state. Because of their tremendous growth, concentrated wealth and poverty, and cultural diversity, cities became the focus of regulatory reform. Cities had a surfeit of social concerns that captivated reform-minded citizens. Reformers targeted the machine bosses and *padroni* (exploiters of immigrant labor), men who victimized the uneducated masses with false promises of future rewards.[9] Their vision involved corruption-free, efficient municipal government, run by the wisdom of experts rather than desperately impoverished and illiterate

[9] The literature on these urban figures is extensive. Classic works include Richard Hofstadter, *The Age of Reform: From Bryan to FDR* (New York: Random House, 1955), 174-214. On padrones, see Gunther Peck, *Reinventing Free Labor: Padrones and Immigrant Workers in the North American West, 1880-1930* (New York: Cambridge University Press, 2000).

voters. With meandering zeal, urban reformers promoted clean government and attacked vice wherever it existed. "In whatever direction you look, there is a fierce competition for people," a Congregational minister and educator in Wisconsin wrote in 1903. "The lodges want them, the theaters, the party, the dance, the trolley, the steam car. . . . We want people who out of the host of things they choose, choose the church."[10] Whether out of religious or secular motivations, laws regulating private "vices" proliferated, including restraints on Sunday alcohol consumption, prostitution, racial mixing, miscegenation, divorce, and polygamy.[11] Reformers and so-called "child savers" targeted commercial amusements such as vaudeville and motion pictures, concert saloons and dime museums—each of which led children and men into opprobrium.[12] By 1890, virtually every state in the nation had anti-lottery laws. State censorship boards, along with new municipal zoning laws, emerged to "protect" children and neighborhoods from the corrupting influence of particular industries, such as films and publishing.[13]

Police power regulation surged at the state level, as the locus of public policymaking shifted from local to state jurisdiction.[14] At the turn of the twentieth century, twenty-eight states limited child factory labor; in 1917, thirty-nine limited women's work hours. By 1914, every state licensed dentists and pharmacists. New York, the most populated state, averaged over 1,000

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[10] Howard R. Vaughn, "The Summer School," Aug. 1903, Howard Vaughn Family Papers, Stout Area Research Center, University of Wisconsin-Stout, MSS, Box 26, Folder 4. See also Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (New York: Cambridge University Press, 1990), 83-84.

[11] Morton Keller, *Regulating a New Society: Public Policy and Social Change in America, 1900-1933* (Cambridge, MA: Harvard University Press, 1994).

[12] David Nasaw, *Going Out: The Rise and Fall of Public Amusements* (New York: Basic Books, 1993), 169-185.

[13] Morton Keller, *America's Three Regimes: A New Political History* (New York: Oxford University Press, 2007), 166-68, 189.

[14] Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009), 325.

new statutes per session during the Progressive Era.[15] Between 1860 and 1900, the Empire State's expenditures for regulatory agencies grew 1800 percent, from $50,000 to $900,000.[16] In those decades New York established a railroad commission to regulate rates, a board of health to investigate disease and enforce pure food laws, and boards and bureaus to inspect factories, bakeries, sweatshops, and farms.[17] Wisconsin soon after led other states in pioneering banking and insurance regulations and civil service reform, and passed the first income tax and workers' compensation laws.[18]

Urban school reform was a central component of this rising regulatory state. Beginning in the nineteenth century, compulsory attendance laws transformed school attendance from a private concern to one heavily regulated by states and administrative agencies. While other spheres of American life witnessed immense statutory revision, education stood out as a primary locus of reform. The Chicago reformer Sophonisba Breckinridge believed that "there are few branches of the law which have been more completely revolutionized by statutory amendment" than education, thanks to compulsory attendance legislation.[19] Illinois's state superintendent

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[15] William J. Novak, "Law and the Social Control of American Capitalism," *Emory Law Journal* 60, no. 2 (2010): 398.

[16] These included regulative services other than public health. Tony A. Freyer, "Business Law and American Economic History," in *The Cambridge Economic History of the United States*, ed. Stanley L. Engerman and Robert E. Gallman, vol. 2 (New York: Cambridge University Press, 2000), 462.

[17] Richard Scylla, "Experimental Federalism: The Economics of American Government, 1789-1914," in ibid., 537-38.

[18] Keller, *America's Three Regimes*, 181, 189. For an excellent summary of policy innovation in Massachusetts in the 1880s and 1890s, see Ballard C. Campbell, "Public Policy and State Government," in *The Gilded Age: Perspective on the Origins of Modern America*, ed. Charles William Calhoun (Lanham, MD: Rowan& Littlefield, 2007), 358.

[19] Sophonisba P. Breckinridge, *Marriage and the Civic Rights of Women: Separate Domicil and Independent Citizenship* (Chicago: University of Chicago Press, 1931), 3; Sophonisba P. Breckinridge, *The Family and the State: Select Documents* (1934; repr., New York: Arno Press and The New York Times, 1972), 231.

favorably compared attendance laws to eminent domain and public health standards.[20] New York City's Attendance Bureau director, John Davis, argued in his 1915 report that compulsory attendance enforcement perfectly encapsulated the period's yearning for public solutions to private problems. For Davis, compulsory attendance joined pure food and drug laws, banking oversight, and occupational licensing as central regulatory reforms of the early twentieth century. In education, he remarked, the "state has interfered more and more" by "assert[ing] . . . the superior rights of the child and that of the State . . . against parental neglect."[21] The vast administrative apparatus Davis oversaw to enforce these laws supported his claim. In New York City, over 100 truant officers employed by the Bureau of Attendance investigated 375,000 cases of truancy in one year (1916-17) alone.[22] An entire system of municipal courts—the Domestic Relations Court and the Children's Court—existed in part to prosecute parents and commit children to truant schools.[23] The rise of an administrative state was perhaps nowhere more visible than in the realm of public educational regulation.

Public regulation of school attendance formed only one of the poles supporting a broader tent of school reform. In the Progressive Era, urban school reformers demanded that public laws rationalize the educational decisions made by a host of "inexpert" actors including families,

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[20] Steffes, *School, Society, and State*, 124. On compulsory attendance laws as a tool of state police power see "Constitutionality and Construction of Compulsory Education Laws," *Central Law Journal* 56, no. 19 (May 1903): 361-63.

[21] New York City Department of Education, Bureau of Attendance, *First Annual Report of the Director of Attendance for the Year Ending July 31, 1915* (1916): 2-5.

[22] New York City Department of Education, Bureau of Attendance, *Report of the Bureau of Attendance for the Period Between July 31, 1915 to July 31, 1918* (1919), 20, 271.

[23] See also John Frederick Bender, *The Functions of Courts in Enforcing Compulsory Attendance Laws* (New York: Teachers College, 1927). On the explosion of judicial activity at the local level and its indebtedness to new social scientific ideas, see Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003).

political bosses, ward representatives, and school boards. In cities throughout the country Progressive Era reformers—a coalition that frequently included elite and grassroots organizations—replaced the lay, "political" educational leadership with a smaller corps of administrative professionals. By World War I urban school boards no longer exhibited the same extent of occupational and economic diversity that they had in the nineteenth century. Thanks to smaller school boards and citywide (rather than ward) elections, educational governance lay in the hands of metropolitan elites, a more distant group of administrators.[24] With increasing vigor school boards compelled attendance, enforced district boundary lines, standardized curriculum, certified teachers, and centralized school governance.

Courts both accommodated and accelerated governmental policing of private educational choices. With greater frequency they ruled in favor of public schools over challenges by parents. State courts held that legislatures had the right to compel attendance in public and "approved" private schools. Insofar as they could compel attendance, courts reasoned, schools could also compel vaccinations. Parents and teachers who expressed curricular and pedagogical preferences contrary to state guidelines also found decreasing sympathy from courts, as judges decided that states could proscribe instruction in politically "radical" subjects and in foreign languages.[25]

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[24] Ira Katznelson and Margaret Weir, *Schooling for All: Class, Race, and the Decline of the Democratic Ideal* (New York: Basic Books, 1985); Jeffrey Mirel, *The Rise and Fall of an Urban System: Detroit, 1907*-1981, 2nd ed. (Ann Arbor: University of Michigan Press, 1999); David Plank and Rick Ginsberg ed., *Southern Cities, Southern Schools: Public Education in the New South* (Westport, CT: Greenwood Press, 1990); William J. Reese, *Power and the Politics of School Reform: Grassroots Movements during the Progressive Era* (1985; repr., New York: Teachers College Press, Columbia University 2002); Julia Wrigley, *Class Politics and Public Schools* (New Brunswick, NJ: Rutgers University Press, 1982).

[25] Stephen Provasnik, "Judicial Activism and the Origins of Parental Choice: The Court's Role in the Institutionalization of Compulsory Education in the United States, 1891-1925," *History of Education Quarterly* 46, no. 3 (2006): 311-47; Ethan Hutt, "Formalism over Function: Compulsion, Courts, and the Rise of Educational Formalism in America, 1870-1930," *Teachers College Record* 114, no. 1 (January 2012): 1-27; Joachim Frederick Weltzin, *The Legal Authority of the American Public School as Developed By a Study of Liabilities to Damages* (Grand Forks, ND: Mid-West Book Concern, 1931); Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012), 135-43.

Even parents seeking legal address for tort liability discovered that courts sided with schools over families. In the last three decades of the nineteenth century, judges ruled in favor of cities and school districts even when students had been severely injured, or even killed, as a result of poorly constructed classrooms and buildings. Providing education constituted the clearest of "public duties," a Massachusetts judge wrote, which private individuals had no recourse to redress.[26] Courts thus represented an important actor in what one Catholic commentator in 1915 referred to as a larger, "generous shifting of the responsibility of the parent to the state," one that emphasized public administration guided by expertise.[27]

Progressive Era administrators focused on schools as key sites of reform and regulation because, echoing Horace Mann and the common school reformers, they believed education could lead the way to reforming the polity. More than other institutions, schools had the potential to improve the lives of individuals and strengthen families.[28] In the absence of a strong domestic welfare state, they provided a social safety net and public services for working-class children.[29] Administrators ultimately helped transform schools into more social institutions. Beginning in the 1890s parents, voluntary associations, and local governments tasked schools with performing a dizzying variety of new roles. Schools provided children not only with academic instruction

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[26] Charles W. Hill v. City of Boston, 122 Mass. 344 (1877). See also Susie H. Wixon v. The City of Newport, 13 R.I. 454 (1881); Folk v. City of Milwaukee, 108 Wis. 359 (1900); Weltzin, *The Legal Authority of the American Public School*.

[27] Paul Blakeley, "Sociology: Are Parents Superfluous?" *America Magazine* 14, no. 5 (November 15, 1915): 118-19. William R. Brock, *Investigation and Responsibility: Public Responsibility in the United States* (Cambridge, UK: Cambridge University Press, 1985).

[28] On this view see Lawrence A Cremin, *The Transformation of the School: Progressivism in American Education, 1876-1957* (New York: Vintage Books, 1961).

[29] Miriam Cohen, "Reconsidering Schools and the American Welfare State," *History of Education Quarterly* 45, no. 4 (Winter 2005): 512-537; Michael B. Katz, "Public Education as Welfare," *Dissent* 56, no. 3 (2010): 52-56.

but also vocational training, medical care, and hot meals.[30] They stayed open at night to teach immigrants English and to serve as venues for political and social activities.[31] Whether public or parish-based, schools became critical community centers. Reformers hoped that this transformation of the school would beget an assimilated and productive populace. As Americans expanded their ideas about what schools should do, reformers aimed to shape and direct parental choices over education by defining which schools children could attend, when, and why.

II

Effective public regulation of urban schools would have been vastly simpler if all children attended public schools, and if all families lived perpetually in one neighborhood. Neither, however, was the case. Geographical mobility was a familiar feature of urban life, and families moved regularly. In response, legislators and school boards tried to shape parental decisions about school attendance. Catholics were not passive amid this state activity. Churches and dioceses designed their own educational guidelines, while parents negotiated this complex world of competing schools and policies as the situation allowed, making decisions deemed in their family's best interests. Indeed, private educational authority and parental choice frustrated policymakers' attempts to regulate school attendance as they saw fit. As Catholic parents continued to exercise choices over where to live and where to send their children to school, reformers accordingly pushed for stronger laws to regulate the very act of choosing—or "transferring"—between schools.

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[30] Herbert Kliebard, *Schooled to Work: Vocationalism and the American Curriculum, 1876-1946* (New York: Teachers College Press, 1999); Reese, *Power and the Promise of School Reform*; William J. Reese, "After Bread, Education: Nutrition and Urban School Children, 1890-1920, *Teachers College Record* 81, no. 4 (1980): 496-525.

[31] Ronald Cohen, *Children of the Mill: Schooling and Society in Gary, Indiana, 1906-1960* (New York: RoutledgeFalmer, 2002); Jeffrey Mirel, *Patriotic Pluralism: Americanization Education and European Immigrants* (Cambridge: Harvard University Press, 2010); Michael Johanek and John L. Puckett, *Leonard Covello and the Making of Benjamin Franklin High School: Education as If Citizenship Mattered* (Philadelphia: Temple University Press, 2007).

Catholic parents, like all parents, never made educational choices free from the constraints imposed by circumstance and by custom. The Catholic Church was central to the lives of millions of urban residents and remained a ubiquitous force in promoting parochial schooling. Diocesan schools, for example, had their own set of rules, codified by church hierarchs as "statutes," and just as public school officials shaped attendance zones by district or ward, so too did Catholic officials carve out school boundaries. The very term "parochial" cultivated geographic images and linear enclosures, which Catholic churches treated as expressions of canon law. Dioceses limited Catholic school attendance to the parish. They mandated that Catholic children attend parochial school unless their parents provided the bishop with a reasonable excuse—the most ubiquitous being that a family resided over three miles from the nearest parish school.[32] Diocesan regulations often required priests to refuse absolution to parents whose children attended the public schools. Fearing the monopoly that public laws had on school attendance, the Catholic Church thus imposed its own constraints on parishioners.[33]

Church regulations that arose from inside or outside of the parish could even contain content strikingly similar to state laws. When immigration restriction and nativism reared its head in the years immediately following World War I, American-born Catholic bishops believed that Church-led Americanization efforts would protect immigrant parishioners from outside

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[32] See, e.g., Diocese of Pittsburgh, "De Jeventute Instituenda," Chapter IV, in *Statuta Dioeceos Pittsburgensis in Synodis Dioecesanis* (1906), 34-36, Historical Records Collection, Catholic Diocese of Pittsburgh; Diocese of La Crosse, "Rules and Regulations of the School Boards of the Diocese of La Crosse," Article VI, in *Second Annual Report of the Diocesan School Board of the Diocese of La Crosse*, 8, Wisconsin Historical Society Library and Archives Pamphlet Collection; Diocese of Fort Wayne, *Fifth Annual Report of the Diocesan School Board* (Fort Wayne, IN: Gazette Co., 1884), Georgetown University Special Collections.

[33] On Cincinnati see Edward A. Connaughton, "A History of Educational Legislation and Administration in the Archdiocese of Cincinnati" (Ph.D. Diss., Catholic University of American, 1946), 91-106. On Cleveland and other cities see Thomas T. McAvoy, "Public Schools vs. Catholic Schools and James McMaster," *The Review of Politics* 28, no. 1 (1966): 24-5. For Detroit see JoEllen McNergney Vinyard, *For Faith and Fortune: The Education of Catholic Immigrants in Detroit, 1805-1925* (Urbana and Chicago: University of Illinois Press, 1998), 86-110.

attacks. As a result, in large and diverse dioceses where immigrant (or "national") Catholic parishes had distanced themselves from the American-born hierarchy, Catholic bishops in the early 1920s often pursued centralized policies aimed at assimilation. Church leaders often aided state efforts to prohibit foreign-language instruction in private elementary schools. George Mundelein, Chicago's Catholic leader, was particularly unafraid to challenge that archdiocese's longstanding policy of accommodating national parishes. Shortly after becoming the new archbishop in 1916, Mundelein prohibited new national parishes and tried to impose English into immigrant church services. Equally as controversial, he mandated that all parochial schools in the archdiocese use English-language textbooks in the major subjects.[34] Buffalo's diocesan superintendent pursued a similar measure.[35]

In addition to these official rules, Catholic communities with high rates of parochial school attendance exerted informal mechanisms to direct children away from public schools. In a study on patterns of school attendance completed in 1897, the University of Chicago social scientist Daniel Folkmar emphasized that parents decided which schools, if any, their children attended, according to their "wish to live in accordance with the social demands of the community or to obey the law which the community demands."[36] One Irish-American novelist added that mothers feared "what the neighbors would think" if their sons did not attend a

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[34] Cohen, *Making a New Deal*, 83-84; Mirel, *Patriotic Pluralism*, 115-118; Ann Marie Ryan, "Negotiating Assimilation: Chicago Catholic High Schools' Pursuit of Accreditation in the Early Twentieth Century," *History of Education Quarterly* 46, no. 3 (2006): 354-55; Sanders, *The Education of an Urban Minority*, 105-120.

[35] Józef Miąso, *The History of the Education of Polish Immigrants in the United States* (New York: Kosciuszko Foundation, 1977), 228-29.

[36] Daniel Folkmar, "The Duration of School Attendance in Chicago and Milwaukee," *Transactions of the Wisconsin Academy of Sciences, Arts, and Letters* XII, no. 1 (1898): 279.

Catholic school.[37] Even lapsed Catholics who did not attend church could not always escape pressure to send their children to Catholic schools. When diocesan officials canvassed neighborhoods to obtain parish demographic data, one of the first questions asked regarded parochial school attendance. As one census-taker reported, when parents indicated that their children attended public school he "argued the matter out with them."[38] Finally, the Catholic press stressed the need to attend parochial schools. Each summer, the conservative Jesuit magazine *America* published articles with titles such as "School-Picking Time," and "What School for Your Child," highlighting the extent of choices, and the importance of choosing the Catholic school.[39] Editorials equated Catholic parents who sent children to public schools with Judas, warning of a "fearful reckoning" in the afterlife.[40] The foreign-language press added to the pressure. When a Chicago-based Polish-language newspaper asked readers, "which of the two schools shall we select: public or parochial?" the answer was obvious.[41] Catholic parents could quickly discover that while public laws compelled school-going, private rules and pressures often framed what school children attended.[42]

The power of Catholic authorities to shape educational policy disturbed many public school advocates, who argued that public regulations should have the exclusive power to compel

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[37] James T. Farrell, *Young Lonigan* (1932; repr. New York: Signet Classics, 2004), 61.

[38] Fr. Walter, "Census-Taking and Its By-Products," *The Ecclesiastical Review* 71 (November 1924): 454.

[39] See, e.g. John McNichols, "Education: School-Picking," *America Magazine* 15, no. 16 (July 29, 1916): 385; F. Heiermann, "Education: What School for Your Child," *ibid.* 19, no. 20 (August 24, 1918): 485-86.

[40] Joseph S. Hogan, "Education: The Parish School," *ibid.* 23, no. 19 (August 28, 1920): 454; "Catholic Parents and the Catholic School," *ibid.* 23, no. 23 (October 2, 1920): 567.

[41] "The Selection of a School," *Dziennik Zjednoczenia*, August 19, 1926, Chicago Foreign Language Press Survey, http://flps.newberry.org/article/5423968_1_0234.

[42] Joseph S.J. Hogan, "Education: Can We Take a Chance" *America Magazine* 23, no. 19 (August 28, 1930): 454; "Catholic Parents and the Catholic School," *America Magazine* 23, no. 23 (October 2, 1920): 566-67.

attendance. In a debate on the role of Catholic schools in America sponsored by the National Educational Association in 1889, the public school champion Edwin Mead centered his remarks on church policies that forced children into parochial schools. Mead aimed to turn Catholic arguments about the coercive nature of public schools and compulsory attendance laws on their head. It was the Catholic Church, he insisted, that truly interfered with "parental freedom" and the ability "for parents to choose such schools for their children as they believe best." The state, he insisted, "cannot for a moment permit any church to coerce any citizen into the support of its own denominational schools."[43] Recall that in the same year as Mead's address, antipathy toward Catholic educational policy appeared in legislation as well. The Massachusetts legislature debated a bill, though never signed into law, that threatened to prosecute any priest who pressured children to enroll in parochial over public schools. Wisconsin's Bennett Law, meanwhile, notoriously required children to attend school in the public school district in which they lived, presumably prohibiting attendance in parochial schools outside of state-imposed lines.[44] As early as the 1880s and 1890s, then, public school advocates saw fit to challenge private educational policy with state power.

Despite attempts by public and church officials to shape where children attended school in the early twentieth century, parental choice in education remained a prominent feature of Northern urban life. Millions of Catholic parents each year defied official church rules requiring that their children attend parochial schools. Sociological studies of urban Catholic life in the

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[43] Edwin D. Mead, "Has the Parochial School Proper Place in America?" in National Educational Association, *Journal of Proceedings, and Addresses* (1889): 129, 142. For a similar sentiment on how Catholic schools were "under a compulsory system . . . from the clergyman" see "News and Notes," *Wisconsin Journal of Education* 20, no. 9 (September 1890): 389-90

[44] "Some Facts," *The Milwaukee Journal*, March 29, 1890; Lloyd Jorgenson, *The State and the Non-Public School, 1825-1925* (Columbia: University of Missouri Press, 1987), 179.

early and mid-twentieth century listed dozens of reasons for why Catholic parents elected public over parochial school, or vice versa. Catholics were divided by ethnicity and language, and parents to different degrees cared about the academic reputation of particular schools, parochial or public, that their children might attend. Which schools seemed to have better teachers, or better discipline, or smaller class sizes?[45] Behind the abstract percentages of Catholic children attending public schools lay thousands of individual stories: a mother who believed the public school offered better services for her sickly child; a father's memory of how cruelly he was treated at the parish school; a father who feared that sending his child to the parochial school would unravel the secrecy of his marriage outside of the church.[46]

Catholic parents who sent their children to parochial schools were not necessarily following priestly mandates: some parents hoped that their children could lead a religious life, or become prosperous, or attend the school closest to home. Some parents enrolled their children until they received their First Communion (around eight or nine years old), others until Confirmation.[47] Catholic children, in turn, could attempt to influence their parents, or be perplexed by the mysterious decisions of their guardians. Consider the responses a Minnesota researcher and school inspector received from children in the 1920s when he inquired why their parents sent them to a private (likely Catholic) high school: "I just have to hang out at this

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[45] Burns, *Growth and Development of the Catholic School System*, 357-59.

[46] Reverend David Anthony Sylvester, "Why Catholic Children Are Not Attending Catholic Schools: A Study of the Reasons Offered by Their Parents" (master's thesis, Catholic University of America, 1947) 57-60; Gerald J. Schnepp, "Leakage from a Catholic Parish" (Ph.D. Diss., Catholic University of America, 1942), 183, 187-88.

[47] Schnepp, "Leakage from a Catholic Parish" (Ph.D. Diss., Catholic University of America, 1942), 169-70, 174; Louise Montgomery, *The American Girl in the Stockyard District* (Chicago: University of Chicago Press, 1913), 11; See also Robert Enslow O'Brien, "A Study of the Roman Catholic Elementary Schools of Chicago," Ph.D. Diss. (Chicago: Northwestern University, 1928), 44-45; 64; Jay P. Dolan, *The American Catholic Experience: A History from Colonial Times to the Present* (Garden City, NY: Doubleday & Company, 1985), 283.

dump," "Because it's a jail," "Haven't the slightest idea," "Don't ask me," "I have often wondered," "No one knows," and "None of your business."[48] Decision-making by parents often seemed opaque. Undoubtedly for most, if not all parents, choices about their children's schooling intersected with a tangle of other concerns, as Catholics navigated the economic opportunities, cultural expectations, and religious norms of the urban environment that surrounded them.

In addition to cost, geography was a leading factor in determining where parents sent their children to school. Parents valued schools near their homes, and so long as public policy and parish rules structured attendance according to residence, where one lived was the chief factor in determining where one went to school. Residential choices, in turn, frequently reflected urban ethnic identity, wealth, and the prejudices of landlords. By the late nineteenth century, new mass transit systems, together with mass industrial production, had erased many existing neighborhood boundaries, annihilating the formerly close relationship between home and workplace and the enclosures set by rivers and hills. Instead, Northern cities featured a series of overlapping neighborhood communities characterized by their racial and ethnic character, each one fiercely (often physically) defensive against individuals who dared cross an invisible border. More so than other religious groups, Catholics were deeply rooted in physical communities, a consequence of their spiritual ties to the parish. Where Protestants and Jews generally relocated their churches and synagogues to wherever they chose to move, Catholic parishes were, by custom and church law, immobile. As a result, Catholic immigrant groups invested substantially in property near their churches and identified their neighborhoods by parish ("St. Stanislaus,"

[48] Leonard V. Koos, *Private and Public Secondary Education: A Comparative Study* (Chicago: University of Chicago Press, 1931), 24. Koos's study found that 81.2 percent of students in Catholic high schools cited "religion" as their primary motive for attendance.

"Holy Redeemer").[49] Ironically, deep ties to parish and ethnicity also produced swift demographic changes when new migrants threatened to upset homogeneity. The brutally violent ethnic enclaves of 1916 Chicago fictionalized in James T. Farrell's *Young Lonigan* (1932) recalled a world where street battles between Irish, African American, and Jewish youths were common, and where the encroachment of a single "undesirable" family over a commonly-recognized neighborhood boundary line could trigger mass hysteria and neighborhood turnover.[50]

Despite these deep ties to the parish, geographic mobility was nonetheless a constant feature of urban life, including for Catholics. Working-class families seeking employment or cheaper rent moved, both from and within a given city as the demand for labor, and the supply of housing, shifted.[51] Socially mobile families sought larger accommodations and safer neighborhoods. The historian Stephen Thernstrom famously described the nineteenth-century Irish workers of Newburyport, Massachusetts as "permanent transients," relocating in order to pursue the dream of stable work and suitable accommodations.[52] In late-nineteenth century Omaha, Nebraska, over 75 percent of the city's young families moved locations within the city

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[49] Robert E. Park, "The City: Suggestions for the Investigation of Human Behavior in the City Environment, *American Journal of Sociology* 20, no. 5 (March 1915): 577-612; Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008), 185-87; John T. McGreevy, *Parish Boundaries: The Catholic Encounter with Race in the Twentieth-Century Urban North* (Chicago: University of Chicago Press, 1996), Chapter One; Gerald H. Gamm, *Urban Exodus: Why the Jews Left Boston and the Catholics Stayed* (Cambridge, MA: Harvard University Press, 1999), 14-15; Joshua M. Zeitz, *White Ethnic New York: Jews, Catholics, and the Shaping of Postwar Politics* (Chapel Hill: University of North Carolina Press, 2007); Johanek and Puckett, *Leonard Covello*, 48-76; Eileen M. McMahon, *What Parish Are You From?: A Chicago Irish Community and Race Relations* (Lexington: University Press of Kentucky, 1996); Dolan, *The American Catholic Experience*, 181.

[50] Farrell, *Young Lonigan*, 16.

[51] In many cities landlords contributed to this constant movement by offering new tenants one month's free rent. David Nasaw, *Children of the City: At Work and at Play* (New York: Oxford University Press, 1985), 32.

[52] Stephen Thernstrom, *Poverty and Progress: Social Mobility in a Nineteenth-Century City* (Cambridge, MA: Harvard University Press, 1964), 31, 85.

every five years.[53] Rates of residential mobility in Pittsburgh were similar.[54] While home-ownership varied considerably across cities and between different ethnic groups, estimates are that around three-quarters of urbanites lived in rented quarters during the late nineteenth century, ready to move at the next promise of an improvement for their family.[55] In this context of swirling population movements, children migrated frequently from place to place every year, changing schools in the process. In New York City, the sociologist Le Roy E. Bowman noted in 1925, such ethnic patterns of mobility had rendered "one school, ten years ago 99 per cent Jewish . . . now 99 per cent Italian."[56]

Parental educational preferences, along with residential and demographic shifts, also meant that Catholic children oscillated between public and parochial schools. Scores of school reports and studies from the late nineteenth century onward featured accounts of children attending two schools, one parochial and one public, even during the same year. "Children go not only from one school to another, but from one school system to an entirely different one," wrote Edith Abbott and Sophonisba Breckinridge in a study of school attendance in Chicago. They "go

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[53] Howard P. Chudacoff, Judith E. Smith, and Peter C. Baldwin: *The Evolution of American Urban Society,* 7th ed. (Upper Saddle River, NJ: Prentice Hall, 2010), 98-99. The pioneering historical study of residential mobility is Howard P. Chudacoff, *Mobile Americans: Residential and Social Mobility in Omaha, 1880-1920* (New York: Oxford University Press, 1972). For studies of other cities see William Jenkins, "In Search of the Lace Curtain: Residential Mobility, Class Transformation, and Everyday Practice among Buffalo's Irish, 1880-1910," *Journal of Urban History* 35, no. 7 (2009): 970-97; Robert G. Barrows, "Hurryin' Hoosiers and the American 'Pattern': Geographic Mobility in Indianapolis and Urban North America," *Social Science History* 5, no. 2 (1981): 197-222.

[54] S.J. Kleinberg, *The Shadow of the Mills: Working-Class Families in Pittsburgh, 1870-1907* (Pittsburgh: University of Pittsburgh Press, 1989), 53.

[55] Chudacoff, Smith, and Baldwin, *Evolution of American Urban Society*, 113.

[56] Le Roy E. Bowman, "Population Mobility and Community Organization," in *The Urban Community: Selected Papers from the Proceedings of the American Sociological Society, 1925*, ed. Ernest W. Burgess (Chicago: University of Chicago Press, 1926), 160.

constantly back and forth' between [the neighborhood] school and near-by parochial schools."[57] Another in Chicago noted "the great fluctuations of population through immigration and exodus," and the "transfer of pupils to and from parochial and private schools."[58] The Woonsocket, Rhode Island, superintendent noted in 1898 that "pupils are continually changing from public to private, and from private to public . . . just as the mood of the parent happens to be."[59] In Pittsburgh, one observer referred to a "constant migration to the public schools, as well as in the reverse direction, an ebb and flow occasioned by the requirements of confirmation."[60] When school officials in large cities such as New York City and Philadelphia attempted to quantify these transfers, the numbers were substantial. New York City officials estimated that well over 10,000 children transferred from public to parochial schools alone in 1911, a number that surely underestimated the additional thousands who went uncounted in a city lacking efficient pupil accounting practices.[61] In Philadelphia, the number of transfers between public and parochial schools generally hovered around eight or nine thousand each year.[62] In every

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[57] Edith Abbott and Sophonisba P. Breckinridge, *Truancy and Non-Attendance in the Chicago Schools: A Study of the Social Aspects of the Compulsory Education and Child Labor Legislation of Illinois* (Chicago: University of Chicago Press, 1917), 102, 105.

[58] Folkmar, "The Duration of School Attendance in Chicago and Milwaukee," 261. See also O'Brien, "A Study of the Roman Catholic Elementary Schools of Chicago," 60-62; Montgomery, *The American Girl in the Stockyard District*, 10.

[59] *Twenty-Sixth Annual Report of the Board of Education, Together with the Fifty-First Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Sons, 1896), Appendix, 39.

[60] Lila Ver Planck North, "Pittsburgh Schools," in *The Pittsburgh Survey*, ed. Paul Underwood Kellogg, (New York: Russell Sage Foundation, 1914), 246.

[61] New York City Department of Education, Bureau of Attendance, *Report of the Bureau of Attendance*, 256, 265.

[62] The Board of Public Education, School District of Philadelphia: Bureau of Compulsory Education, *Report for the Year Ending June 30, 1915* (1916), 12; *Report for the Year Ending June 30, 1919* (1920), 11; *Report for the Year Ending June 30, 1920* (1921), 16-17.

Northern city with a large Catholic population, transfers between public and parochial schools were embedded in the cycles of the school year.[63]

The ubiquity of urban mobility and shifting schools alarmed early twentieth-century social scientists, who feared that such instability disrupted productive lives. Robert Park and Ernest Burgess deemed mobility "subversive and disorganizing." In neighborhoods where migration and dislocation were common, they claimed, so too were poverty, crime, delinquency, suicide, and other ills.[64] When the nation's leading sociologists gathered in 1925 to discuss the state of urban society, this high degree of urban mobility emerged as a central theme. The University of Minnesota professor, M.C. Elmer, noted that an important characteristic of the Twin Cities were so-called "zones of transition," or areas with "a high percentage of mobile population, such as temporary boarders and roomer, unsettled families, persons moving up the social scale, and persons moving down the social scale."[65]

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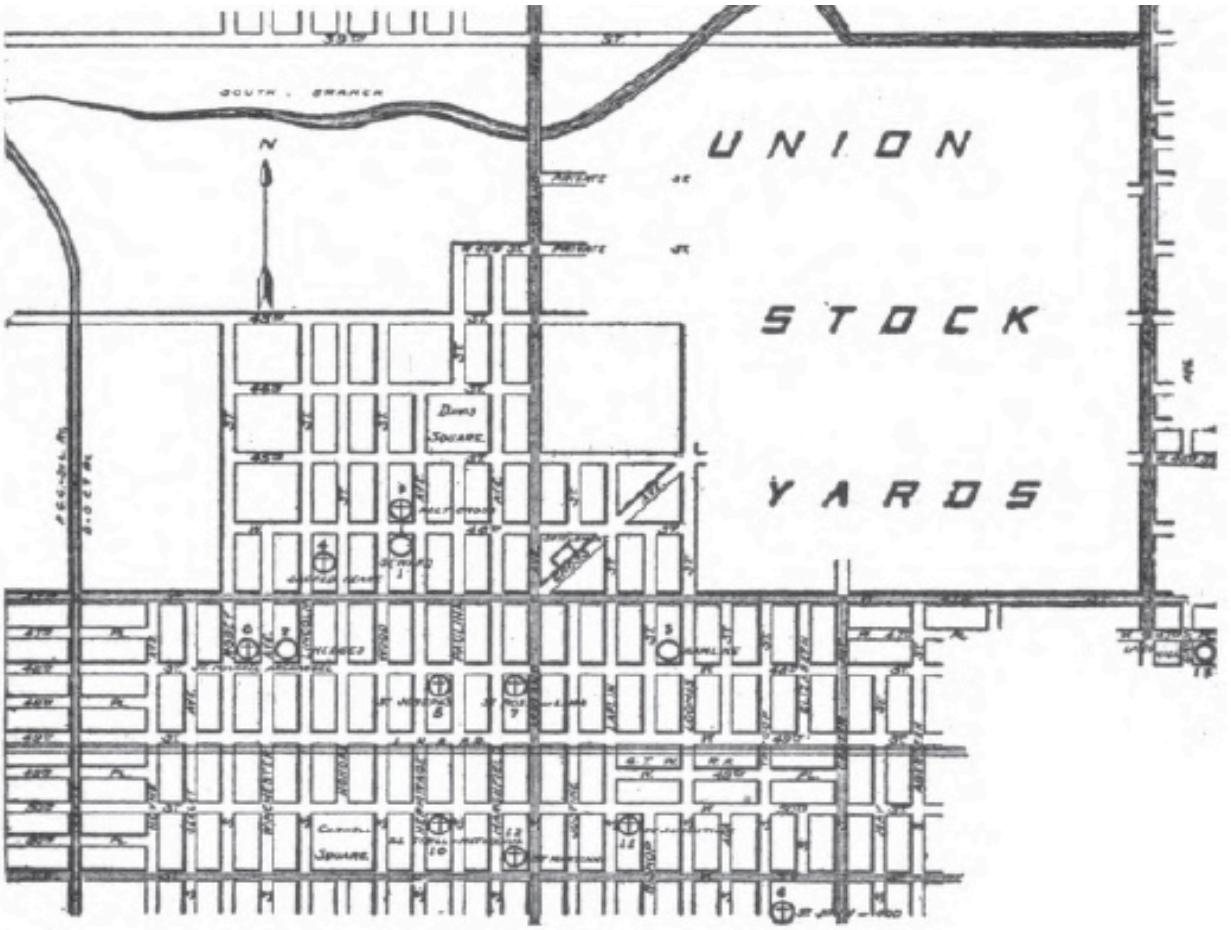
[63] For other examples of migrations between parochial and public schools see "Annual Report of the School Committee," in *Reports of the Town Officers of Southbridge* (Southbridge: Journal Steam Book Print, 1887), 121; Providence School Committee, *Annual Report of the School Committee* (Providence: Providence Press, 1892), 34. *Thirty-Second Annual Report of the Board of Education, Together with the Fifty-Seventh Annual Report of the Commissioner of Public Schools, of Rhode Island* (Providence: E.L. Freeman and Sons, 1902), Appendix, 18; Edward Clinton Bixler, *An Investigation to Determine the Efficiency with which the Compulsory Attendance Law Is Enforced in Philadelphia* (Philadelphia: University of Pennsylvania, 1913), 52-53.

[64] Robert E. Park and Ernest W. Burgess, *The City: Suggestions for Investigation of Human Behavior in the Urban Environment* (1925; repr. Chicago: University of Chicago Press, 1967), 153.

[65] M.C. Elmer, "Maladjustment of Youth in Relation to Density of Population," in *The Urban Community*, 162.



MAP SHOWING THE LOCATION OF PUBLIC AND PAROCHIAL SCHOOLS

1. Seward Public School.
2. Hedges Public School.
3. Hamline Public School.
4. Sacred Heart, Polish Catholic School.
5. St. Joseph, Polish Catholic School.
6. St. John of God, Polish Catholic School.
7. St. Rose of Lima, Irish Catholic School.
8. St. Michael, Slovak Catholic School.
9. Holy Cross, Lithuanian Catholic School.
10. S. S. Cyrill and Methodius, Bohemian Catholic School.
11. St. Augustine, German Catholic School.
12. St. Martinni, German Lutheran School.
13. Lake Public High School.

Transfers were particularly common in Chicago's "Back of the Yards" neighborhood, which featured an array of public and parochial schools. Louise Montgomery, *The American Girl in the Stockyard District* (Chicago: University of Chicago Press, 1913), 9.

Reformers particularly feared the effects of urban mobility on children. To some educational experts, school reform would be unrealized if children did not remain in stable neighborhoods and a single school. In 1898 the Woonsocket, Rhode Island, school superintendent declared it "certainly detrimental to the true interest of the child to move him

about thus, from place to place."[66] In his widely read 1909 jeremiad on the failures of American education, *Laggards in Our Schools*, Leonard Ayres deemed it "manifest that children are bound to suffer more or less when they leave one school to attend another." Ayres's book linked transfers between school and the "laggards" (a synonym for "retardation") of his title—the frequently held-back children not performing at grade level. He explained that, given "our shifting population such changes are so frequent as to effect a considerable part of the children attending school."[67] The belief was relatively widespread. A Chicago doctor studying school children in public and parochial schools remarked in 1912 that "not only was retardation caused by differing standards in the schools, but by days and weeks where it was possible to be out of school during the process of transfer."[68] As late as 1926, Frederick Emmons described such transfers as a "source of serious educational loss."[69] Studies of juvenile delinquency claimed close correlations between mobility and truancy. One report found that 170 families with truant children had moved households a combined 425 times, with sixty-seven of the families having moved more than three times.[70] In an urban context of constant dislocation and mobility, consistent school attendance—and, therefore, effective urban education—always seemed just out

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[66] *Twenty-Sixth Annual Report of the State Board of Education, Together with the Fifty-Second Annual Report of the Commissioner of Public Schools of Rhode Island* (Providence: E.L. Freeman and Sons, 1896), Appendix, 38.

[67] Leonard P. Ayres, *Laggards in Our Schools: A Study of Retardation and Elimination in City School Systems* (New York: Russell Sage Foundation, 1909), 198. See also Paul Klapper, "The Bureau of Attendance and Child Welfare of the New York City Public School System," *Educational Review* 50 (November 1915): 373-74.

[68] The study found that "400 retarded children had 'done time' in 159 parochial schools and in 257 public schools other than the ones in which they were studied; or, each pupil averaged more than two schools." Caroline Hedges, "The Children of the Stockyards," *Transactions of the Fifteenth International Congress on Hygiene and Demography* 3, pt. I (Washington: Government Printing Office, 1913), 180.

[69] Frederick Earle Emmons, *City School Attendance Service* (New York: Teachers College, 1926), 71.

[70] Sub-Commission on Causes and Effects of Crime, New York State Crime Commission, *From Truancy to Crime--A Study of 251 Adolescents* (Albany, NY: J.B. Lyon Company, 1928), 51-52. See also Jacob Riis's comments in "The Rights of Children," *Charities* 7, no. 2 (July 13, 1901): 48; Park, "The City," 594.

of reach. Parents could still elect to send their children to school, but frequent relocations and school transfers rendered the education less than optimal.

III

For school officials charged with tracking and enforcing attendance, mobility posed significant practical problems. The Wisconsin Bureau of Labor and Industrial Statistics implored school officials in 1911 to undertake a great "system of registration of children" in a context of constant upheaval: "Parents move from one district to another, families move in from different states. Children enroll in one parochial school for a time, and leaving it enroll in another, or in the public school. Children in the [public] school withdraw and enroll in a private or parochial school."[71] Tracking attendance in this endless maze of transfers was no simple task. When New York City's head of attendance enforcement recommended a permanent census to track school transfers in 1907—"necessary because of the migratory characteristics of a larger part of the city's population"—he noted that hundreds of thousands of children changed schools every year. "Many people move from place to place, often two or three times within a school year," the administrator noted, leading to "non-attendance and truancy."[72] Compelling attendance under these conditions would be impossible unless city officials had mechanisms to follow children from school to school, ensuring that they had properly enrolled and that attendance officials did not count them twice.

Within densely populated cities filled with parochial schools the dilemmas posed by transfers became more acute. Parents and children who transferred schools to avoid attendance

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[71] *Fifteenth Biennial Report of the Bureau of Labor and Industrial Statistics, Part II: Truancy in Wisconsin* (Madison: Democrat Printing Company, 1911), 54.

[72] New York City Bureau of Attendance, *First Annual Report of the Director of Attendance*, 8-9.

and evade truant officers became tropes in reports issued by reformers and school officials. A popular belief among administrators, echoed by the Cleveland superintendent in 1902, was that "pupils who do not wish to attend school register with the parochial schools and almost immediately cease attendance and spend their time as they wish, either upon the streets or at work."[73] Skeptical truant officers frequently discussed finding children on the street only to be told they "belonged to a Catholic school," "transferred to the Catholic school," off for a "religious holiday," or free because the parochial school "teacher is sick."[74] A truant officer in Maryland reported that "there have been so many cases of this kind that I could spend my entire time . . . and be kept busy."[75] One attendance official from York, Pennsylvania grew so concerned about all the children in the streets claiming to be from Catholic schools that he worried about his job safety and, writing to the superintendent, suggested that children from private schools wear official badges on days their schools were closed.[76]

Social workers echoed these accounts, targeting immigrant Catholic parents for using parochial schools to shield their children from receiving a formal education. A 1906 study by Gertrude Howe Britton, a social worker in Chicago, recounted several of these examples. She discussed James G. of the Goodrich school, a twelve-year-old boy and "one of many who use the

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[73] Cleveland Public Schools, *Sixty-Fifth Annual Report of the Board of Education* (Cleveland: The W.M. Bayne Printing House, 1901): 44.

[74] Gertrude Howe Britton, *An Intensive Study of the Causes of Truancy in Eight Chicago Public Schools including a Home Investigation of Eight Hundred Truant Children* (Chicago: Hollister, 1906), 23, 25-26, 30-31; Maryland State Board of Education, *Report Covering One Year of Compulsory School Attendance in the Counties of Maryland, Including an Account of Five Years of Compulsory School Attendance in Baltimore County* (1918), 19.

[75] Maryland State Board of Education, *Report Covering One Year of Compulsory School Attendance*, 19.

[76] H.C. Ginter, "Attendance Officer's Report," *Annual Report of the Public Schools of York, PA* (York: York Dispatch Print, 1913-14): 100. The idea might have come from licensed child laborers (selling newspaper, for example) wearing badges to certify their excuse from compulsory school attendance laws. Nasaw, *Children of the City*, 149.

device of being transferred from the public school to the parochial school and from the parochial school to the public school to cover their absence from both." James, like his mother, told truant officers that he "belonged to a Catholic school," which Britton believed to be a lie. The mother of seven-year-old Alice L. similarly deceived school authorities into thinking the child was enrolled in the parochial school, as did Maggie T.'s mother, who enrolled her child in the parochial school under the belief social workers could no longer "interfere with her." Throughout Chicago, she noted, "the loop-holes afforded by the transfer system are made use of to escape attendance in either school."[77] In a report issued eight years later, settlement house workers in Chicago found little had changed, noting a "serious problem" created by "transfers from public and parochial schools."[78] While no quantitative evidence suggested that the majority of children who transferred between public and parochial schools did so to avoid enrollment, these anecdotes were sufficient to persuade a legion of child welfare workers to reform the attendance system.

As in other areas, attendance reformers sought to subjugate private vices to public mores. While many reformers would have liked to see mobility decreased substantially, the only realistic legal option was to have it managed and ordered. City and state school officials believed that the solution to the transfer problem lay in superior bookkeeping. Beginning in the 1880s, state superintendents began insisting that private schools turn over their attendance registers to public officials. Without these returns, reformers argued, officials could not determine how many

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[77] Britton, *An Intensive Study of the Causes of Truancy*, 23-31.

[78] Abbott and Breckinridge, *Truancy and Non-Attendance in the Chicago Schools*, 105. For Massachusetts see *Reports of the Town Officers of Southbridge* (1887), 121, "Public and Private Schools," *Boston Evening Transcript*, February 9, 1889. See also Harry Gustav Abraham, "A Study of Pupil Accounting in City School Systems as Revealed by School Surveys" (Ph.D. diss. University of Chicago, 1929), 75-76.

children outside of public schools received any education at all. Wisconsin's state superintendent of public instruction endorsed forcing parochial school officials to hand in attendance reports three times in his annual reports in the late 1880s.[79] In 1891, when the U.S. Commissioner of Education, William T. Harris, asked Rhode Island's State Commissioner of Education, Thomas Stockwell, to comment on the "relation of the State to private schools," it was precisely this need for statistics that dominated the discussion. Stockwell called for a series of accounting mechanisms: accurate enrollment data for private schools buoyed by the use of uniform registers and annual returns by private schools. Amid the "chaos and ignorance" of school attendance in the state, Stockwell wrote, only an "accurate statement of facts" by private schools would suffice.[80]

Legislatures responded to these pleadings by incorporating reporting requirements into their school codes. In Ohio's compulsory attendance statute, passed in 1889, the legislature mandated that private schools provide local attendance officers with their enrollment data. As one Ohio official recounted the law's aim: "Suppose [the truant officer] finds on the street or in a factory a boy thirteen years old, and he says, 'My boy, have you attended a school one hundred days?' He says, 'Yes, sire.' 'Where?' 'At Father Quigley's, at St. Francis de Sales.' It is necessary for the officials charged with the enforcement of that law to know whether that is true or not."[81] As more children attended parochial schools, states required more accurate attendance data. Connecticut, Rhode Island, and New York also passed laws in the 1880s and 1890s

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[79] *Biennial Report of the State Superintendent of the State of Wisconsin for the Two Years Ending June 30, 1884* (Madison: Democrat Printing Co., 1885), 13; *Ibid*. (1886), 19-20; *Ibid.* (1888), 1-2, 19.

[80] William T. Harris, *Report of the Commissioner of Education for the Year 1888-89, Volume II* (Washington, D.C.: Government Printing Office, 1891), 611.

[81] Patrick Francis Quigley, *Compulsory Education: The State of Ohio Versus The Rev. Patrick Francis Quigley, D.D.* (New York: Robert Drummond, 1894), iii, 94.

requiring private schools to maintain attendance records and furnish them to local officials. By 1925 Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Dakota, Washington, West Virginia, and Wisconsin had enacted similar provisions.[82]

Reporting requirements aimed to regulate the act of choosing schools itself or, in other words, to mitigate the perceived dangers of parallel urban school systems with high rates of mobility between them. To school superintendents across the country, such requirements fulfilled a glaring need, as one Rhode Island superintendent put it, to "adequately gover[n] frequent change of school relations."[83] These laws "would answer the question where the child really belongs," a Pennsylvania city superintendent wrote.[84] They would "determine the degree of effectiveness with which the compulsory attendance law is being enforced," one study found.[85] A Wisconsin official added that, by addressing the transfer process itself, reporting requirements would "prevent . . . the whimsical changing from one school to another so common in the parochial schools."[86] Once school officials solved the "poorly worked-out system for keeping track of the child," compulsory attendance statutes could be properly enforced, and the chaos produced by parallel school systems properly coordinated.[87]

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[82] Lischka, *Private Schools and State Laws*, 107-8.

[83] *Twenty-Sixth Annual Report of the State Board of Education of Rhode Island*, Appendix, 38.

[84] Supt. Jas. L. Couglin, "Laws Necessary to Render the Compulsory Attendance Act Efficient," *Pennsylvania School Journal* 47 (Lancaster, PA: Wickersham Printing, 1899), 372.

[85] John Mabry Mathews, *Principles of American State Administration* (New York: D. Appleton and Company, 1917), 334.

[86] State of Wisconsin, *Fifteenth Biennial Report of the Bureau of Labor and Industrial Statistics*, 54. See *School Survey, Grand Rapids Michigan* (Grand Rapids: Board of Education, 1916), 16.

[87] Hedges, "The Children of the Stockyards," 180.

As administered by superintendents and attendance officers, new transfer laws devised mechanisms with which to follow children from school to school. When initially passed in the 1880s and 1890s, truant officers employed blunt policing methods to obtain the data they sought. In Toledo, Ohio, a truant officer simply walked into a parochial school and demanded that the priest turn over a list of enrolled pupils. When the priest, Reverend Patrick Francis Quigley indignantly refused the request—believing it an assault on the church's privacy rights—the officer had him imprisoned and, ultimately, criminally prosecuted.[88]

In the ensuing decades municipalities and states developed more sophisticated methods to track and enforce attendance. Amateur truant officers engaged in less policing of individual children and schools. Rather, they became professional members of "attendance services" and, using the tools and rhetoric of the emerging social sciences, focused more heavily on prevention, persuasion, and bureaucratic welfare services for "maladjusted" children.[89] The process for determining attendance statistics itself shifted. Cities in the nineteenth century had administered an annual "school census" to register how many children lived in the city and attended school annually.[90] While state departments of instruction used these statistics primarily to distribute annual state appropriations, reformers focused on compulsory attendance found the census woefully inadequate, since it failed to account for the frequent residency changes throughout the year. To address the reality of shifting populations, cities in the early twentieth century gradually adopted permanent or continuous censuses. New York State's 1908 permanent census law

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[88] Quigley, *Compulsory Education*, viii, 570-71. For other evidence of resistance to reporting see Abbott and Breckinridge, *Truancy and Non-Attendance in the Chicago Schools*, 105; State of Wisconsin, *Fifteenth Biennial Report*, 46.

[89] David Tyack and Michael Berkowitz, "The Man Nobody Liked: Toward a Social History of the Truant Officer, 1890-1940," *American Quarterly* 29, no. 1 (Spring 1997): 31-54.

[90] Paul Henry Neystrom, "The School Census" (master's thesis, University of Wisconsin, 1910).

stipulated that parents of school-aged children report to authorities when their children reached compulsory school age, or when they moved addresses or schools. State legislatures also wrote the continuing census into their compulsory attendance statutes, mandating that children who moved from one school to another report the transfer to local authorities.[91]

Once equipped with more accurate demographic data, cities then implemented increasingly strenuous pupil accounting practices. School districts across states implemented uniform attendance procedures, ensuring that children who transferred schools within the state—whether within the public system or between public and parochial schools—would be tracked efficiently. A cottage industry of administrative experts arose, producing new standard forms and mechanisms for superintendents and attendance officers to track students.[92] Typically, students leaving one school for another received a "transfer card" to present to their new school. A copy of the transfer card would then be sent to the attendance department, which would update

[91] The "efficiency" reformer David Snedden made the case for a continuous census in a book he co-wrote with William H. Allen, *School Reports and School Efficiency* (New York: The Macmillan Company, 1908), 128-50. Forest Chester Ensign, *Compulsory School Attendance and Child Labor: A Study of the Historical Development of Regulations Compelling Attendance and Limiting the Labor of Children in a Selected Group of States* (Iowa City: Athens Press, 1921), 146-47; Lischka, *Private Schools and State Laws*, 107-8.

[92] See, e.g., Arthur B. Moehlman, *Child Accounting: A Discussion of the General Principles Underlying Educational Child Accounting Together with the Development of a Uniform Procedure* (Detroit: Friesema Bros. Press, 1924). On the culture of education administrators' expertise, generally, see Ellen Condliffe Lagemann, *An Elusive Science: The Troubling History of Education Research* (Chicago: The University of Chicago Press, 2000); Raymond E. Callahan, *Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools* (Chicago: The University of Chicago Press, 1962); David Tyack, "Ways of Seeing: An Essay on the History of Compulsory Schooling," *Harvard Educational Review* 46, no. 3 (1976): 374.

"Attendance Officer Taking School Census—City," The Board of Public Education, School District of Philadelphia, *Bureau of Compulsory Education, Report for the Year Ending June 30, 1926*.

the student's permanent record card. If the child was absent at the new school for three or four days, attendance departments would alert the truant officers, triggering an investigation. One researcher studying 346 cities found that 245 required private schools to cooperate with attendance officers.[93]

More stringent, bureaucratic attendance mechanisms legally mandated the compliance of parochial schools. Resistance of the sort that got Father Quigley jailed in Ohio dissipated as parochial school administrators increasingly found reasons to comply with, even embrace, public

[93] Bermejo, *The School Attendance Service in American Cities* (Menasha, WI: George Banta Publishing Co., 1924, 35-36. For descriptions of the various methods used, see Ethel Hanks, "Administration of Child-Labor Laws, Part 4: Employment-Certificate System, Wisconsin," *U.S. Department of Labor Industrial Series* no. 2 (Washington, Government Printing Office, 1921), 79; Klapper, "The Bureau of Attendance and Child Welfare," 360-74; School District of Philadelphia, *Report for the Year Ending June 30, 1922* (1923), 11-12; John Dearling Haney, *Registration of City School Children: A Consideration of the Subject of the City School Census* (New York: Teachers College, Columbia University, 1910), 60-112; Iowa State Teachers Association, *A Uniform Child Accounting System for the State of Iowa: Preliminary Report of the Committee on Child Accounting Submitted to the Educational Council of the Iowa State Teachers' Association, 1926* (Des Moines: Iowa Teachers Association, 1927).

oversight over attendance. Thus, while the Cleveland superintendent still found "no willingness displayed on the part of [parochial] schools to furnish us" with data a decade after the Father Quigley incident, by the 1910s and 1920s such expressions among public officials were uncommon.[94] Experts on compulsory attendance laws and their enforcement noted that Catholic schools generally followed attendance procedures. In one of the Progressive Era's most detailed and sweeping analyses of compulsory attendance enforcement, published in 1921, Forest Chester Ensign described how, in New York City, "parochial schools, formerly distinctly suspicious of any law or ruling which touched their interests, now welcomed the assistance and supervision of the State Department, thus marking one more advance in the direction of unification in the educational activities of the state."[95] New York City's director of school attendance frequently identified the "close cooperation" between city officials and parochial schools, the latter of whom he claimed provided assistance "cheerfully."[96] As evidence for such cooperation, he described how the number of children formally listed as "discharged" to the public schools—that is, those who exited the attendance department's accounting system entirely—had dropped by over one-half between 1911 and 1918. Rather than attribute this drop to parents' increased preference for public education, the director instead surmised that it was due to "an assimilation of the procedure of the public schools by the parochial schools," creating a common system of attendance.[97]

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[94] Cleveland Public Schools, *Sixty-Fifth Annual Report of the Board of Education* (1901), 44. See also State of Wisconsin, *Fifteenth Biennial Report*, 46.

[95] Ensign, *Compulsory School Attendance and Child Labor,* 147.

[96] New York City Bureau of Attendance, *First Annual Report of the Director of Attendance*, 189.

[97] New York City Department of Education, Bureau of Attendance, *Report of the Bureau of Attendance*, 265-67.

Catholic officials in New York City and elsewhere corroborated these accounts. The Superintendent of Brooklyn's Catholic Parish Schools, Joseph McClancy, remarked in 1916 that the city's attendance officials "handle . . . the manner at once creditable to themselves and cordial to the Catholic school officials."[98] Even Catholic officials in Toledo had moved past the bitter relationships between city officials and parochial schools typical in Father Quigley's day. In 1912, Toledo's Bishop, Joseph Schrembs, told a gathering of Catholic school authorities that "we ought to meet the stand[ards] of the State in the spirit of kindliness in all matters pertaining to the general welfare of the child, and I can see no good reason for refusing certain elementary politeness." He urged "greater compliance in Catholic schools in general," and admonished his colleagues to refrain from "excessive criticism of the public school" as well.[99] Catholics and public school officials alike observed the change in attitudes toward state regulations.

As several commentators noted, self-interest played an important role in driving the eventual widespread Catholic compliance with new attendance regulations. Parochial school enrollments, after all, benefited from public attendance officials who enforced orderly transfers and enrollments. Parochial schools, one public official assured an audience of Catholic educators, "have access to the attendance officers, thereby giving them the same facilities for a high percentage of attendance as the public schools."[100] Ellwood Cubberley, the widely read Stanford education professor and critic of private education, also acknowledged that extending compulsory attendance laws to parochial schools placed the latter "on the same plane as public

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[98] Joseph V.S. McClancy, "Discussion," in Brother Azarias, "The Accurate Keeping of School Records," *NCEA Bulletin* 13 (November 1916): 275.

[99] Rt. Rev. Joseph Schrembs, "Discussion," in Walter George Smith, "Educational Legislation as It Affects Catholic Interests," *NCEA Bulletin* 9 (November 1912): 133.

[100] C.F. Hoban, "School Legislation in Relation to Non-State Schools," *The Catholic Educational Association of Pennsylvania Bulletin* 2, no. 1 (March 1922): 42.

schools in the matter of school attendance, and . . . extends to them the public facilities for enforcing attendance."[101] Philadelphia's diocesan superintendent, Philip McDevitt, frequently corresponded with the city's chief attendance officer, urging him to provide assistance with parochial school truants in return for Catholic compliance with all reporting requirements.[102] Insofar as Catholic schools gradually came to recognize the accrued benefits of consistent, orderly transfer practices, they complied with state laws mandating attendance reporting.

Catholic schools also complied with complex reporting requirements because the data compiled therein symbolized modern education.[103] As the superintendent of Pittsburgh's parish schools, Reverend Paul E. Campbell, acknowledged in 1931, "we live in an age devoted to the scientific study of education," where "meticulously we apply statistical method to the study of educational data."[104] Catholic school administrators, not surprisingly, echoed their public school colleagues in searching for new methods of child accounting. Meetings of the National Catholic Educational Association meetings featured long discussions of the subject, as did dissertations produced by graduates of the Catholic University of America's Department of Education—each sprinkled with citations to the latest works on educational psychology and accounting.[105] In

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[101] Ellwood P. Cubberley, *State and County Educational Reorganization: The Revised Constitution and School Code of the State of Osceola* (New York: Macmillan Company, 1914), 194.

[102] Sister M. de Sales to Philip R. McDevitt, 18 February, 1910, Box 1, Folder: February 1910, Superintendent of Schools, Philadelphia Archdiocesan Historical Research Center [hereafter PAHRC], Philadelphia, PA; McDevitt to Captain William Thornton, 21 February 1910, ibid.; Henry J. Gideon to McDevitt, 10 November, 1911, Box 2, Folder: July-December 1911, ibid.; McDevitt to Rev. M.A. Kopytkewicz, 11 November, 1911, ibid.; Gideon to McDevitt, 13 November, 1912, Box 2, Folder: October-December, 1912, ibid.

[103] Callahan, *Education and the Cult of Efficiency*; Lagemann, *An Elusive Science*.

[104] Reverend Paul E. Campbell, "School Records and Reports," in *National Catholic Educational Association Bulletin* 28, no. 1 (November 1931): 591.

[105] Brother Azarias, "The Accurate Keeping of School Records," *National Catholic Educational Association Bulletin* 13, no. 1 (November 1916): 261-73; Reverend Charles F. M'Evoy, "The Superintendent's Report and Office Records," *National Catholic Educational Association Bulletin* 20 (November 1923): 390-98; Reverend

Philadelphia, Superintendent McDevitt urged parochial school principals in 1910 to "keep accurately and faithfully the records of enrollment and attendance, in order that the Annual Report of the parish schools may have both value and authority." Together with his admonition four years earlier, via order of the city's archbishop, that principals "co-operate with the officials of the Bureau of Compulsory Education" wherever possible, Catholic school officials received the message that data and public compliance were essential to furthering the aims of the system.[106] Ultimately, then, while some Catholic educators quietly lamented how "modern public taste in matters educational is more concerned with adequacy of records than with skill in teaching," they dared not resist it.[107] As parochial schools continued to grow, becoming ever more centralized and bureaucratic, Catholics' demand for educational measurement kept pace with public school reformers'.

IV

Managing and measuring transfers between parochial and public schools, in sum, enabled administrators to coordinate the existence of dual, parallel systems. Yet administrators were not the sole group to benefit from a closer articulation between public and parochial schools. Catholic parents and their children also had good reasons to push parochial schools toward greater compliance with public mandates. Children had much to gain from a private school system that met modern, state standards. The vast majority of students attending parochial schools who aspired to attend high school had to transfer to the public system. As increasing

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George Johnson, "The Possible Value of a Survey to a Diocesan System," *Ibid*., 414-420; Martin L. McNicholas, "Child Accounting in Catholic Elementary Schools" (Ph.D. diss., Catholic University of America, 1931).

[106] Philip R. McDevitt to the Principal, 1 September, 1910, School Files, Office of the Superintendent, SF 2, PAHRC; McDevitt to the Principal, September 28, 1906, SF 2, PAHRC.

[107] McClancy, "Discussion," 274.

numbers of Catholic parents sought to enroll their children in secondary schools, parochial primary schools benefited from cooperating with state officials.

Catholic parents and children, like most Americans, turned to public high schools with growing vigor in the decades surrounding the turn of the twentieth century. High school attendance in the United States doubled every decade from 1890 to 1930, spurred by increased urbanization, stronger compulsory attendance and child labor laws, the gradual decline in the youth labor market, and the literacy, numeracy, and vocational skills required by twentieth-century industrial jobs.[108] High school attendance and attainment varied dramatically by ethnicity, and Catholic families from more rural, traditional cultures such as southern Italy were particularly resistant to the institution. By the 1930s, however, the high school fulfilled its reputation as the "people's college," becoming the normative experience for American teenagers and, as those who graduated from high school discovered, a ticket to the skilled professions.[109]

While Catholic parents and children sought access to secondary education, parochial secondary institutions were scarce. Costs, in many cases were prohibitive. Public high schools originated, by design, as expensive enterprises. Their mid nineteenth-century advocates believed that physically imposing structures and well-paid instructors would attract middle-class parents away from the private toward the public sector.[110] Cities in the early twentieth century

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[108] William J. Reese, *America's America's Public Schools: From the Common School to "No Child Left Behind"* (Baltimore: Johns Hopkins University Press, 2005), 119; Claudia Goldin and Lawrence Katz, *The Race Between Education and Technology* (Cambridge, MA: Belknap Press, 2008); Edward Krug, *The Shaping of the American High School, 1880-1920* (Madison: University of Wisconsin Press, 1969), 170-71.

[109] Joel Perlmann, *Ethnic Differences: Schooling and Social Structure among the Irish, Italians, Jews, and Blacks in an American City, 1880-1935* (New York: Cambridge University Press, 1989); Stephen Lassonde, *Learning to Forget: Schooling and Family Life in New Haven's Working Class, 1870-1940* (New Haven: Yale University Press, 2007); Thomas Hine, *The Rise and Fall of the American Teenager* (New York: Perennial, 2000); Goldin and Katz, *The Race Between Education and Technology*.

[110] William J. Reese, *The Origins of the American High School* (New Haven: Yale University Press, 1999), 80-102

constructed similarly grandiose edifices. New high schools featured science laboratories, elaborate vocational training programs, state-of-the-art gymnasiums, and swimming pools. By World War I, 79 percent of the public high schools accredited by the North Central Association had manual training programs, 83 percent had cooking classes, and 68 percent had courses in typewriting.[111] By the second decade of the twentieth century, average per capita costs per pupil enrolled could exceed $100.[112]

Immigrant Catholic communities, in contrast, could barely afford to fund parochial *primary* schools, despite estimates that costs averaged only $8 per pupil.[113] As a result, according to one report authored at the turn of the century, only 53 Catholic parishes had official "high schools" attached to their larger elementary branches, enrolling a total of less than 2000 students nationwide. More than ten times that number attended "private" rather than "parochial" institutions—tuition schools run by religious orders or Catholic colleges for the benefit of the middle classes, in contrast to the legions of parish schools that aspired to universal Catholic attendance.[114] While the number of Catholic high schools would increase considerably over the next three decades, they would never educate Catholic children in proportions similar to

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[111] Edward Krug, *The Shaping of the American High School, Volume II, 1920-1940* (Madison: University of Wisconsin Press, 1972), 42-43; Krug, *The Shaping of the American High School, 1880-1920*, 440. Krug notes that even high schools in sparsely populated states like Idaho had many of these features.

[112] This was the average cost at four large township high schools in Cook County, Illinois in 1914. The average cost of township high schools in Illinois, generally, was a smaller though still substantial $63.72. *Journal of Proceedings of the Sixty-second Annual Meeting of the Illinois State Teachers' Association and Sections* (Springfield: Illinois State Journal, 1915), 72.

[113] Burns, *Growth and Development of the Catholic School System*, 293.

[114] Rev. James A. Burns, "Catholic Secondary Schools," *American Catholic Quarterly Review* 26 (July 1901): 488-91. Burns assumed that many more parochial schools had one or more of the "higher grades," without having high schools.

parochial elementary schools. The vast majority of Catholic parents who aspired to send their children to secondary schools had little choice but to elect public high schools.[115]

To ensure seamless matriculation between private primary and public secondary schools, parents demanded that parish institutions as closely as possible conform to local and state standards. Since their inception in the early nineteenth century, public high schools had imposed numerous requirements for admission, usually in the form of written entrance examinations. As urban public schools grew into standardized and centralized systems, and as the demand for secondary education burgeoned, most high schools gradually dropped these requirements, assuming that graduates from public primary schools met the standards.[116] Private schools, however, were another matter. Many urban school systems in the late nineteenth century continued to require parochial school graduates to pass an entrance exam in order to matriculate into a public high school.[117]

Growing numbers of high schools chose a different method for assessing parochial school quality, however, one that colleges used for high school graduates: accreditation.[118] The development of Milwaukee's school laws was a case in point. In the 1880s and 1890s the city's

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[115] Given this absence of Catholic high schools, prominent Catholic writers frequently encouraged parents to enroll their children in public institutions. See, e.g., John T. Murphy, "Catholic Secondary Education in the United States," *The American Catholic Quarterly Review* 22 (July 1897): 451-64.

[116] "Promoting to the High School," *The School Journal* 64, no. 24 (June 14, 1902): 689. In the 1840s and 1850s urban high school typically required a year of prior public school attendance. See Reese, *Origins of the American High School*, 146, 157.

[117] See, e.g. Boston Public Schools, *Rules of the School Committee and Regulations of the Public Schools of the City of Boston* (Boston: Rockwell and Churchill, 1888), 47.

[118] I have not encountered any secondary sources discussing this process for private elementary schools. On the development of public high school accreditation see Marc VanOverbeke, *The Standardization of American Schooling: Linking Secondary and Higher Education* (New York: Palgrave Macmillan, 2008); for Catholic high school accreditation see Ryan, "Negotiating Assimilation"; Fayette Breaux Veverka, *"For God and Country:" Catholic Schooling in the 1920s* (New York: Garland Publishing, 1988), 127-52.

schools permitted public elementary school graduates to enroll in the Milwaukee public high school "without further examination." The school board did not extend that allowance to private school students, however, who in addition needed to produce a certificate indicating that their course of instruction was "equivalent to that of the public schools."[119] In 1901, the board changed course and began to admit private school students into city high schools without an examination, provided that their schools met the "equivalency" standard.[120] A school board committee on course instruction soon began judging the schools that met this standard, adding their names to a growing list of approved, or "accredited schools."[121] A similar process characterized other cities as well.[122]

With this stamp of official approval, children who graduated from accredited parochial schools had the advantage of attending high school without the added strain of an entrance exam, or—for those with no high school ambitions—the "stigma" of attending a non-accredited institution. A study of Chicago parochial schools in the 1920s found that "nonaccredited [parochial] schools experience some difficulty in retaining pupils who intend to enter public high schools." The author attributed the exodus of students from seventh and eighth grade in large

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[119] School Board of the City of Milwaukee, Wisc., *Rules and Regulations* (1885), 47; Milwaukee Board of School Directors, *Rules and Regulations* (1898), 43.

[120] Milwaukee Board of School Directors, *Rules and Regulations* (1901), 56-57.

[121] School Board of the City of Milwaukee, *Proceedings of the School Board from May, 1905 to May, 1906* (1906), 409.

[122] For Omaha, Nebraska's accreditation system, see Transcript of Oral Argument of Arthur F. Mullen, in Behalf of Plaintiffs-in-Error at 5, Meyer v. State of Nebraska, 262 U.S. 390 (1923) (October Term, 1922, No. 325). For Chicago, see Robert E. O'Brien, "Relations Between the Public and Catholic Schools of Chicago," *Journal of Educational Sociology* 3, no. 2 (1929): 121-24. For Parsons, Kansas, see Patrick Creyhon et al. v. Board of Education of the City of Parsons, Kansas, 99 Kan. 824 (1917).

part to the desire to "to avoid the examinations they would have to take to enter the public high school if they graduated from a nonaccredited parochial school."[123]

In the increasingly crowded urban marketplace of schooling, diocesan officials understood that regulations caused parents to seek schools that resembled one another, conforming to the same standards. As early as 1904, Buffalo's diocesan school superintendent, E.F. Gibbons, told a gathering of Catholic school administrators that raising standards to conform with public expectations was essential to attract students and parents hoping to attend high school. "There are the children and their parents, who are only too apt to place the modest little [parochial] school in damaging contrast with a fine public school, with its complete staff of teachers, free books, and every inducement to pupils," he announced.[124] By the 1920s, administrators talked openly about a "Catholic educational market" amid the new educational demands imposed by parents. One administrator noted that "Catholic parents are becoming increasingly aware of the handicaps under which the graduates of non-accredited schools labor," particularly for those students anxious about eventually attending Catholic high schools.[125] Reverend Daniel Richard Sullivan, who led a Catholic high school, was particularly colorful about how students and parents yearned for state approval of Catholic schools. Speaking in front of the Catholic Educational Association of Pennsylvania in 1923, he remarked that

> young women at least, like their mothers, have an eye for standard quality both in toilet articles and in education, and will take what bears a recognized stamp and no other. The very first questions they ask you are 'what is the rating of your

[123] O'Brien, "Relations Between the Public and Catholic Schools of Chicago," 124. O'Brien, a critic of parish education, reported that 162 out of Chicago's 214 Catholic elementary parochial schools were accredited, with "overcrowding" being the reason for those non-accredited.

[124] E.F. Gibbons, "School Supervision—Its Necessity, Aims and Methods," *Report of the Proceedings and Addresses of the Catholic Educational Association* (1905): 167.

[125] Campbell, "School Records and Reports," 596.

> school? Is it approved? How do its graduates stand with my state board and with the professional schools?' …. They, and not the pastors, are in a position to recommend schools to their pupils, and they evaluate schools in terms of the standardizing agencies and not otherwise.[126]

Other contemporaries agreed. When George Johnson in 1925 looked back on the previous several decades of Catholic education, he noted that "Catholic parents [have] expected the same type of education from us that the children of their neighborhood receive in the public school across the street."[127] In 1928, a Catholic woman from Buffalo, writing privately to the editors of *America*, argued that its exhortations regarding universal parochial school attendance were meaningless unless Catholic schools "are brought up to a high standard." "Catholics do not want their children's education branded as inferior to others," she wrote. Catholic school graduates from institutions with low standards "feel bitter about such things, when they find they are unable to compete with others in the educational and business and professional world."[128] Parental and student demand for Catholic education, in other words, had clear limits. Parochial schools that failed to meet local and state standards were unable to compete with public schools that guaranteed parents an automatic bid to the high school and, so it seemed, the job market.

To assuage these parents, Superintendent Gibbons recommended enhancing standards, which would "protect our graduates when they present themselves for matriculation in higher schools." In New York State, the examinations offered by the Regents of the University afforded just such a possibility. Gibbons argued that the exams, given to students hoping to attend the

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[126] Reverend Daniel Richard Sullivan, "Standardization in its Economic Aspects," *The Catholic Educational Association of Pennsylvania Bulletin* 3, no. 1 (March 1923): 53, 55.

[127] George Johnson, "The Need of a Constructive Policy for Catholic Education in the United States," *National Catholic Educational Association Bulletin* 22 (1925): 59-60.

[128] Helen C. Williams to America Press, January 20, 1928, Box 9, Folder 19, America Magazine Archives, Georgetown University Special Collections, Washington, D.C.

state's high schools and colleges, "offer at least one great advantage to our parish schools, viz., a common ground upon which our pupils can meet those of the public schools, and prove their ability to measure up to the public-school or State standard." Like other parochial school administrators, Gibbons welcomed the exams that would accompany accreditation because they pressured parochial schools to raise their standards. In addition, publicly sponsored examinations gave diocesan and parish authorities the ability to quantify and publicize the quality of their institutions to Catholic parents. "We must advertise in this age of advertising," he remarked. "We shall display our wares if we wish to draw customers."[129] Accreditation offered the stamp of state approval that diocesan administrators knew would appeal to ambitious, upwardly mobile Catholic parents.[130]

A savvy and pragmatic administrator, Gibbons admitted that such standards, when imposed from outside Catholic authorities, might resemble "ignominious slavery," but acknowledged that there was little parochial schools could "do to escape" from public standards. "It seems to me that in New York we must be careful not to adopt any plan that would be out of harmony with that of the state schools," he concluded. "Our schools simply have to measure up

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[129] E.F. Gibbons, "School Supervision—Its Necessity, Aims and Methods," *Report of the Proceedings and Addresses of the Catholic Educational Association* (1905): 174-55. Catholic high schools and academies who officially met these standards often did advertise their state approval. In bold letters, St. Mary's Academy in Indiana publicized its "Recognition by the Indiana State Board of Education," in the *New York Sun.* See "The Roman Catholic Schools of America," *New York Sun*, August 21, 1916, Box 16, Bishop Francis W. Howard Collection, American Catholic History Research Center and University Archives, The Catholic University of America, Washington, D.C [hereafter ACUA].

[130] For other Catholic praise of the Regents Exams, see Bishop McQuaid to Cardinal Leochowski, n.d. (likely 1895), in *The Life and Letters of Bishop McQuaid,* ed. Frederick J. Zwierlein (New York: Art Print Shop, 1927), 3:127; Rev. J.F. Mullaney, "Regents of the State of New York and the Catholic Schools," *American Catholic Quarterly Review* 17 (1892): 638-42; Rev. Joseph F. Smith, "Educational Legislation in New York in Relation to Catholic Interests," *National Catholic Educational Association Bulletin* 4 (1907): 87; J.B. Culemans, "A Plea for Diocesan Superintendents," *Catholic Educational Review* 11 (1916): 34.

to their requirements."[131] State standards could thus provide parochial schools with the opportunity to publicize their quality. As another Catholic educational leader noted, conforming to the "same standards" as public schools "would seem the part of wisdom, if only for the protection of our reputation and prestige."[132] Catholic schools had every incentive to meet the various voluntary and involuntary requirements states and localities hoped to impose on schools through accreditation and other regulations.

Accreditation and parental demand thus forced Catholic administrators to raise their standards, even though they often resented the pressure. As one Catholic educator put it in 1917, schools seeking accreditation did so "as a necessary means of subsistence, or as a consequence of competition for local patronage" rather than as a "matter of election or choice."[133] A speaker at the National Catholic Educational Association's 1907 meeting similarly admitted that parochial schools were raising standards and centralizing administration not for an intrinsic reason, but "in order to compete with the public schools." Accreditation and state regulation, these administrators acknowledged, forced Catholic schools into more competition, not less.[134]

The Catholic push for state standards reached its apex in Michigan in 1921, when an Irish-Catholic state legislator and parochial school graduate, Vincent P. Dacey, introduced a bill to supervise and enforce new teacher quality standards in private schools. The bill placed

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[131] E.F. Gibbons to Francis Howard, 23 January 1914, Folder: Gibbons, E.F, Box 9, Bishop Francis W. Howard Collection, ACUA.

[132] Reverend F. A. Discoll, "Teacher Preparation—The Present Problem," *The Catholic Educational Association of Pennsylvania Bulletin* 2, no. 1 (March, 1922), 33-3.

[133] Reverend Patrick J. McCormick, "Standards in Education," *The Catholic Educational Association Bulletin* 14 (1917): 81-82.

[134] Rev. John J. Sullivan, "Educational Legislation of Pennsylvania in Relation to Catholic Interests," *National Catholic Educational Association Bulletin* 4 (1907): 82. On the competitive pressures placed on Catholic high schools to seek accreditation, see Ann Marie Ryan, "Negotiating Assimilation."

parochial schools under the supervision of the state's superintendent of public instruction. It allowed state officials to investigate parochial schools and inspect their enrollment records. More significantly, it mandated that parochial school instructors possess equivalent teaching licenses as their public school equivalents, excepting those who had taught for at least ten years. Michigan's Catholics overwhelmingly supported the bill. Some of the state's bishops believed that it would ward off more severe regulations; others hoped that it could help them force laggard schools into modernizing their instruction.[135] Michigan's large second-generation Polish community, eager to direct their children into quality high schools and good jobs, also weighed in to support the bill's passage.[136] So, too, did the National Catholic Educational Association [NCEA]. A.C. Monahan, the NCEA's director, referred to the Dacey bill as "sympathetic to Catholic education." Because "Catholics of the State in large number supported this Bill," he continued, it "indicates to the general public that [Catholics] have confidence that their schools are satisfactory as any other schools in the State." As for the possibility of anti-Catholic enforcement of the law, Monahan knew that the public officials would not dare antagonize the state's large Catholic population. "The inspection which will result will probably be sympathetic," he added, "as the State Department of Education is a political office and can not afford to antagonize the Catholics of the State without great cause." As a result of Catholic support, the Dacey bill passed overwhelmingly into law.[137]

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[135] Mich. Comp. Laws §108-5840-20 (August 18, 1921); Leslie Woodcock Tentler, *Seasons of Grace: A History of the Catholic Archdiocese of Detroit* (Detroit: Wayne State University Press, 1995), 449.

[136] Vinyard, *For Faith and Fortune*, 244-66.

[137] A.C. Monahan to rev. Joseph J. Rice, June 23, 1921, Folder: Michigan School Bill, Box 21, Records of the United States Conference of Catholic Bishops (hereafter USCCB) Education Department, ACUA.

Most but not all Catholic school officials spoke favorably of the tighter state standards in bills such as Dacey's. Some bishops, particularly those closer to the more conservative American hierarchy, were much more skeptical about state involvement in Catholic education. Monahan's superiors in the National Catholic Welfare Conference [NCWC], for example, reacted with fury after learning about his comments in Catholic press. In a series of internal letters and telegrams, Father John Burke, the National Catholic Welfare Conference's general secretary, called Monahan's actions "disorderly" and "a worse than mistake." Burke declared that Monahan's support for the Dacey bill, which American Catholics could confuse for the NCWC's own endorsement, "has done much harm and has been the cause of much misunderstanding."[138] Monahan quickly offered to resign, and the controversy ended, but the conflict revealed ongoing disagreements among Catholic officials over the extensiveness of state regulation.[139]

Ultimately, however, most Catholic educators recognized the positive value of complying with new state standards. A 1930 study found that public schools continued to place transfers from parochial schools into lower grades, but that standardization tended to lessen the "danger of discrimination in the event of transfer."[140] Dissertations by Catholic University students in the 1930s and 1940s argued that Catholic compliance with accreditation had been "highly desirable."[141] On the subject of fledgling Catholic high schools one even remarked that the "pressure exerted by accrediting agencies has done more to raise the standards" than "any action

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[138] John Burke to Austin Dowling, June 24, 1921, Folder 1, Box 106, USCCB Office of the General Secretary, ACUA.

[139] James Ryan to Burke, June 25, 1921, Ibid.

[140] Reverend William R. Kelly, "The Superintendent's Relations with Public Authorities and the Officials in the Public-School System," *The Catholic Educational Association Bulletin* 28 (1931): 639.

[141] Jeremiah P. Shea, "The Extent of State Control over Catholic Elementary and Secondary Education in Pennsylvania" (Ph.D. diss., Catholic University of America, 1948), 35-37.

taken within the Catholic body itself."[142] Without this voluntary "pressure" by local and state authorities, Catholics would not have patronized parochial schools in such consistently large numbers. In an age where educational attainment and advanced schooling was seen as central to upward mobility, Catholic schools responded to state regulation and accreditation by raising their standards. In doing so, they attracted students to their schools, before sending them off to public high schools with the proud stamp of state approval.

V

As Charles Lischka and many other Catholic school authorities understood, Progressive Era regulations produced a diocesan system decidedly more "public" than ever before. With new transfer and accreditation policies, two urban systems, "under quite distinct management" became vastly more coordinated and standardized.[143] State laws and urban administrators pressured diocesan officials to link their students and records with public schools. Catholic educators, understanding the importance parents placed on public institutions and public approval, complied with increasing alacrity. By the 1920s, the nation's two million Catholic school students attended institutions whose curriculum, instructional methods, building design, teacher credentials, and health codes reflected the public school's own standards. In an ideal world, urban children transferring from parochial to public systems felt the effects of this coordination when they arrived at their new school. Their new teacher would have an enrollment card with the child's name, old school, and grades. The child would be familiar with American history and civics and be comfortable with a teacher instructing in English. He or she also would be familiar with fire drills, medical inspections, and vaccinations. Most importantly, coming

[142] Rev. James T. O'Dowd, "Standardization and Its Influence on Catholic Secondary Education in the United States," (Ph.D. diss., Catholic University of America, 1935), 122.

[143] Abbott and Breckinridge, *Truancy and Non-Attendance in the Chicago Schools*, 102.

from a school with similar standards, the child was ready to learn, at the same ability level as his or her peers.

Standardized public and parochial educational systems enabled Catholic parents to choose between schools that they could be assured were roughly equivalent academically. With middle-class success increasingly tied to educational attainment—attendance at high schools, and even colleges—Catholic parents and administrators relied on this regulated system of schooling. They yearned for forms of state endorsement that could expand the system, make it easier to compete with public schools, and attract the approval of public high schools. The continued expansion and increasing competitiveness of parochial school systems in the Progressive Era was inextricably linked to the dense texture of laws and administrative procedures that enveloped them.

Chapter Six

Education, Private Enterprise, and the Supreme Court in the 1920s

Amid growing parochial school enrollments, social and political movements in the early 1920s staged the most concerted campaigns since the origins of public school systems to monopolize education. Public power generally had been used in the Progressive Era to expand private school attendance, but these efforts in the 1920s aimed to abolish educational competition altogether. Over a dozen states attempted to prohibit attendance in private schools, although only Oregon enacted a law compelling students to attend public schools exclusively. These campaigns emerged from a post-World War I context rife with nativist, anti-Catholic sentiment. In Oregon and throughout the North, membership in a reconstituted Ku Klux Klan spiked. In Congress, lawmakers sharply restricted immigration from southern and eastern Europe, and debated establishing a federal department of education capable of dramatically increasing Americanization programs in public schools.

As states like Oregon sought to eliminate educational competition, federal courts emerged to protect it. The Supreme Court, in its 1925 decision in *Pierce v. Society of Sisters*, struck down Oregon's law. By monopolizing schooling, the Court reasoned, Oregon violated the Fourteenth Amendment's guarantee that no "state shall deprive persons of life, liberty, or property without due process of law." The state had deprived private school operators of their "property" (their schools), and parents of their "liberty" to choose such schools for their children. Children are not "the mere creature of the state" read the unanimous opinion, authored by Justice James C. McReynolds. Rather, parents had a "fundamental," substantive right to elect private schools for their children. *Pierce* represented one of the federal government's most significant

interventions in state educational policy to that time. With the decision, the Supreme Court gave immediate national sanction to the educational competition forged during the past half-century.[1]

Judges and legal historians have usually highlighted *Pierce's* broadly defined "liberal" qualities, stressing that the decision contributed to human freedom by limiting discriminatory government policies.[2] Supreme Court justices in the 1930s cited *Pierce* to justify increased judicial scrutiny of laws infringing on basic civil liberties.[3] Later, in 1954, Chief Justice Earl Warren cited *Pierce* in an early draft of *Bolling v. Sharpe* (the Washington, D.C. companion case to *Brown v. Board*), drawing on the decision's rhetoric of the "fundamental" rights to education and liberty.[4] In the 1960s and 1970s the Court relied on the broad, unenumerated liberties enunciated in *Pierce* to expand women's rights to contraception and abortion in *Griswold v. Connecticut* and *Roe v. Wade*.[5]

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[1] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[2] William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927* (Lincoln: University of Nebraska Press, 1994); Randall E. Vance, *Private Schools and Public Power: A Case for Pluralism* (New York: Teachers College Press, 1994); Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004); David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011); David M. Mayer, "The Myth of 'Laissez-Faire Constitutionalism': Liberty of Contract During the *Lochner* Era," *Hastings Constitutional Law Quarterly* 36, no. 2 (Winter 2009): 270-73; "David B. Tyack, "The Perils of Pluralism: The Background of the Pierce Case," *The American Historical Review* 74, no. 1 (October 1968): 74-98; Gary Gerstle, "The Resilient Power of the States Across the Long Nineteenth Century," in *The Unsustainable American State*, ed. Lawrence Jacobs and Desmond King (New York: Oxford University Press, 2009), 73.

[3] *Pierce* was one of a handful of cases cited by Justice Harlan Stone in his fourth footnote to the 1938 case United States v. Products Co., 304 U.S. 144, 155 (1938), where he suggested the Court would be turning away from careful scrutiny of economic legislation, in favor of looking more closely at civil rights.

[4] Dennis J. Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958," *Georgetown Law Journal* 68 (1979-1980): 46-49

[5] Griswold v. Connecticut*,* 381 U.S. 479 (1965), citing *Pierce* as an example of the Court recognizing certain liberties ("penumbras") not explicitly mentioned in the U.S. Constitution; Roe v. Wade, 410 U.S. 113 (1973); Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Public Education* (Ann Arbor: University of Michigan Press, 2009), 217.

In the past several decades, however, revisionist historians have subjected the decision to greater criticism. They note how the opinion appeared to draw from the same jurisprudential doctrines of "substantive due process" and the "liberty of contract" that conservative judges used to strike down a range of progressive regulatory policies, from state laws limiting working hours in the early twentieth century to federal economic policies during the New Deal. It was precisely because of *Pierce's* association with these ideas of economic liberty and *laissez faire* that Earl Warren, under pressure from his colleagues, removed the citation from his opinion in *Bolling*.[6] Studies of the individuals involved in the *Pierce* litigation support the view that the decision reflected "conservative" beliefs. William D. Guthrie, the lead attorney for the National Catholic Welfare Conference representing the Society of Sisters of the Holy Names of Jesus and Mary and their parochial schools, was a corporate lawyer and constitutional scholar renowned for his defense of private property and his contempt for federal progressive legislation such as the income tax and child labor laws. Meanwhile, Justice McReynolds, who authored the opinion, was a racist and economic conservative, who became notorious during the 1930s as one of the "Four Horsemen" of the Court perennially striking down New Deal legislation.[7]

Interpretations both favorable and unfavorable to *Pierce* agree that the ruling carved out a greater space for private enterprise and parental authority at the expense of an activist state. Liberal and libertarian scholars who praise the decision cite the Court's protection of parental freedom in the case.[8] In August 2012, the libertarian *Reason* magazine even listed *Pierce* as one

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[6] Hutchinson, "Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958," 46-49.

[7] Barbara B. Woodhouse, "'Who Owns the Child?': *Meyer* and *Pierce* and the Child as Property," *William and Mary Law Review Quarterly* 995 (1992): 995-1122; James S. Liebman, "Voice Not Choice," *The Yale Law Journal* 101, no. 1 (October 1991): 259-314.

[8] See, e.g. Ross, *Forging New Freedoms*; Bernstein, *Rehabilitating Lochner.*

of the "Top 10 Libertarian Supreme Court Decisions" in all of American history.[9] *Pierce*'s critics, on the other hand, note how the ruling foreclosed the possibility that government might mitigate class stratification and protect children's rights. This latter interpretation highlights the democratic and egalitarian promise of mass—even compulsory—public schooling, and scorns how the rhetoric of "parental rights" neglected the autonomous needs of children.[10] Ultimately, therefore, scholars on both sides of the debate over the merits of *Pierce* agree on the decision's meaning: that the Court expressed a hostility to government intervention in private life, protecting private corporations and religious associations on the one hand and patriarchs on the other. "Antistatism" is the word scholars most frequently use to encapsulate the Court's legal philosophy in the case.[11]

Catholic officials at the time interpreted the decision differently, seeing *Pierce* as a profound approval of state regulation. Far from removing states' ability to regulate parochial schools, in fact, Catholics viewed the opinion as reaffirming such authority. The unanimous decision explicitly upheld "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[12]

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[9] Damon W. Root, "Top 10 Libertarian Supreme Court Decisions," *Reason*, August 10, 2, 2012, accessed November 26, 2012, http://reason.com/archives/2012/08/02/top-10-libertarian-supreme-court-decisio

[10] Woodhouse, "'Who Owns the Child?'"; Liebman, "Voice Not Choice"; Robert C. Post, "Defending the Lifeworld: Substantive Due Process in the Taft Court Era," *Boston University Law Review* 78 (1998): 1536.

[11] See, e.g., Abrams, *Cross Purposes*, 218; Kersch, *Constructing Civil Liberties*, 255-57.

[12] *Pierce* 268 U.S. at 534.

To regulate, inspect, supervise, examine, and compel—in one sentence the Supreme Court countenanced the vast array of state laws and administrative agencies that had developed over the previous decades. Indeed, several high-ranking Catholic educational authorities expressed disappointment with the Court's obeisance to existing state regulations. As Father John Burke, the National Catholic Welfare Conference's [NCWC] general secretary, wrote in a private letter, the opinion's treatment of these laws "should sober those who are inclined to be drunk with enthusiasm over this decision."[13] Worried that further regulation might nonetheless hamper Catholic education, Burke concluded that parts of the decision "do not give us so much comfort."[14] *Pierce* protected parochial schools from state abolition, but at the expense of approving the scores of laws regulating nearly every aspect of their existence.

In reality, deference to state regulation was central to the legal arguments proffered by his own side, the NCWC, and its lead counsel, William D. Guthrie. At the core of Guthrie's briefs and oral arguments was a distinction between regulation on the one hand and prohibition on the other. Where Oregon had every right to engage in the former, Guthrie reasoned, it crossed the boundaries established by the Fourteenth Amendment when it exercised the latter. Moreover, Guthrie argued, the notion that the state could achieve its educational goals only through abolishing parochial schools was utterly unreasonable: sound laws regulating parochial schools negated the very rationale for prohibition in the first place. As he asserted in his brief, "where regulation is so completely adequate, prohibition is unnecessary and constitutes mere

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[13] John Burke to Judge P. Kavanaugh, June 10, 1925, Folder 11, Box 14, United States Conference of Catholic Bishops Office of the General Secretary[hereafter USCCB], American Catholic History Research Center and University Archives (hereafter ACUA), The Catholic University of America, Washington, D.C.

[14] Burke to Thomas O'Mara, June 10, 1925, Folder 11, Box 14, ACUA.

arbitrariness and wanton abuse of power."[15] Under the state's police powers, he reasoned, Oregon—like any state—possessed substantial tools to shape its parochial schools.

Guthrie's arguments highlighted the ways in which state regulations had grown to become part of the rationale for parochial schools. Far from threatening the existence of private education, state regulations provided Catholic lawyers with the arguments necessary for its survival. The irony of *Pierce*'s "antistatist" protection of parents and corporations from government interference was that the decision also represented a profound assertion of state power. Much as federal courts in the late nineteenth century helped forge a national, interstate commercial market, so the Court in *Pierce* gave federal sanction to the emergent educational marketplaces within states.

I

Prior to the ruling in *Pierce* the fate of private education in the United States was in doubt. For William Guthrie, a devout Catholic, the stakes were larger. "The Catholic Church ha[s] never before since the foundations of our National Government faced so dangerous and far-reaching a crisis," he wrote of the Oregon law in 1924. Other state legislatures were in the process of debating similar measures, making it "quite evident that the contagion of the movement was likely to spread." Even more alarming, the mass abolition of private schooling—what Guthrie considered the "greatest possible menace"—could possibly be upheld by the courts. In Iowa, Nebraska, and Ohio, state courts recently had sustained laws that made it a criminal offense for private school instructors to teach subjects in a foreign language. Now Guthrie wondered if state courts might countenance state abolition of private education

[15] Brief on Behalf of Appellee, Society of the Sisters of the Holy Names of Jesus, in *Oregon Cases, Complete Record* (Baltimore: Belvedere Press, 1925), 259.

altogether. A successful legal challenge to the Oregon law would likely have to reach the federal courts, on a federal claim grounded in the liberties protected by the U.S. Constitution. The immediate threat of the Oregon law may have been relegated to the northwestern corner of the nation, but its implications and solutions were national in scope.[16]

As one of private enterprise's greatest defenders, Guthrie was accustomed to making sweeping claims about federal power and constitutional rights. A former partner in the storied Wall Street law firm of Seward, Guthrie & Steele (known today as Cravath, Swaine & Moore), Guthrie had midwifed American business through a period of immense transformation and growth. As U.S. Steele, Standard Oil, and Union Pacific grew into corporate behemoths during the 1890s, lawyers such as Guthrie drew up the contracts, facilitated the mergers, and managed the vast legal intricacies of corporate finance. Guthrie's inventory of clients, contacts, and arguments in front of the Supreme Court reads like a list from a textbook of American business history. He represented Andrew Carnegie, J.P. Morgan, and the Vanderbilt family, railroads and banks. In the 1890s, as Congressional majorities sought to redistribute income through taxation and expand the scope of federal regulation, Guthrie forcefully stood in the way. He argued against a federal income and excise tax in the famed *Pollock v. Farmers' Loan and Trust Company* (1895) and *McCray v. United States* (1904). In 1920 he disclaimed the constitutionality of alcohol prohibition in *The National Prohibition Cases*.[17]

With mansions on Park Avenue and on Long Island neighboring America's business magnates, their physical proximity reflective of tight intellectual bonds, Guthrie held views that

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[16] William D. Guthrie, "The Oregon School Law," *Columbia* (June 1924): 4.

[17] Pollock v. Farmers' Loan and Trust Company 157 U.S. 429 (1895); McCray v. United States 195 U.S. 27 (1904); (1904); The National Prohibition Cases 253 U.S. 350 (1920).

merged seamlessly with his clients' interests and his own background. He opposed income taxes and anti-trust laws both on principled as well as on pragmatic grounds, since these measures were calculated to harm his clients, and he disdained child labor laws since his own humble beginnings as a Catholic child growing up in New York City had not blocked his path to fame and fortune.[18] Oregon's compulsory education law represented everything that Guthrie abhorred: ugly American anti-Catholicism mixed with senseless abolition of private property and individual rights.

The law Guthrie challenged in *Pierce* grew from sources both new and old. It not only drew on elements of the state regulatory policies forged throughout the North between the 1890s and the 1920s but also emerged in a different context, with distinct aims. It simultaneously tapped into older, nineteenth-century traditions deeply suspicious of private schooling, as well as the renewal of white, Protestant values among the populace in the 1920s. In particular, drives for compulsory public school attendance combined a mixture of motives intensified by World War I. The rise of German militarism and Russian radicalism revivified fears about immigrant education, recalling the animated political battles surrounding compulsory attendance laws in the 1880s.

Catholic school authorities had responded to the domestic fallout of World War I by supporting the war effort. Guthrie had enthusiastically backed relief efforts of U.S. allies after the war, giving his time and financial resources to beleaguered Catholics in France.[19] He applauded the "splendid record . . . of patriotic service and in the Army and Navy" of American

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[18] Robert T. Swaine, *The Cravath Firm and its Predecessors*, *1819-1947*, vol. 1 (New York: Cravath, 1946), 359-780. On the role of lawyers in facilitating corporate construction, see Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerald W. Gawalt (Westport, CT: Greenwood Press, 1984), 52-74.

[19] "To Aid French Catholics," *New York Times*, June 13, 1919.

Catholics, especially parochial-school graduates, who Americans perennially suspected of being "un-American." Catholic participation in the war "refuted all the slanders and libels of the past," he wrote, auguring a new era of comity between Catholics and Protestants in the nation.[20]

But the politics of school reform both during and immediately after the war quickly disillusioned Catholic authorities, many of whom watched in horror as the federal government assumed new powers over education. The war created the will and administrative capacity to produce vast reforms of the nation's schools, both public and private. War mobilization also fanned deep American anxieties about school quality, particularly in comparison with Germany, a nation whose efficient educational systems observers touted worldwide.[21] Many Americans, including the renowned educational philosopher John Dewey, believed that the triumph of American democracy over Prussian militarism depended less on the troops overseas than on the public school systems at home.[22] The federal government assumed unprecedented powers during the war, enabling it to engage in sweeping educational reforms. Federal officials in Washington, for example, nationalized American railroads and became more intimately involved in promoting the war in local school systems. The Treasury Department and Food Administration inundated state and local officials with propaganda materials and dramatically increased spending on educational programs. In 1917, Congress enacted the first major federal educational program: aid

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[20] Guthrie, "The Oregon School Law," 6

[21] Raymond E. Callahan, *Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools* (Chicago: The University of Chicago Press, 1962), 11-13; John Carson, *The Measure of Merit: Talents, Intelligence, and Inequality in the French and American Republics, 1750*-1940), 197-228.

[22] John Dewey, "Our Educational Ideal in Wartime," in *John Dewey: The Middle Works, 1899-1924* ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1979), 10:179; *Beloit Daily News*, "U.S. Education Needs Shakeup Says Authority," April 19, 1917; *Beloit College Round Table*, "Professor Dewey Has Large Audience," and "We are Fighting Ideas Declares Prof. Dewey," April 21, 1917.

for vocational education in high schools. A year later, to augment war mobilization, the United States House and Senate nearly approved the Smith Act, which would have created a federal Department of Education capable of dispensing $100 million of funds to the states as carrots to induce higher educational quality. As the United States entered war the impulse, will, and capacity to fundamentally reform American education breathed with renewed vigor.[23]

Private schools had always rested uncomfortably in the ideological matrix of reformers who focused on public education systems. In the context of war, fears about immigrant private schooling and radical education spiked. States responded to concerns about German-speaking Americans with xenophobic restrictions on the schools they attended. By the early 1920s twenty-nine states required English as the principal, if not exclusive, language of instruction in both public and private primary schools. Two-dozen states passed laws mandating that private schools teach courses on the Constitution, civics, or patriotism.[24] Following the armistice, as fears of Kaiserism turned into fears of Bolshevism, public officials began rooting out private radical and experimental schools. In 1921, only months after a group of anarchists exploded a bomb on Wall Street that killed 38 people, the New York legislature banned instruction in schools that promoted the "doctrine that organized governments shall be overthrown by force, violence or unlawful means." A state appellate court upheld the law the following year.[25]

As Congress debated stringent immigrant restriction laws, federal school officials commented with aplomb on the need to regulate private schools. The U.S. Commissioner of

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[23] Douglas J. Slawson, *The Department of Education Battle, 1918-1932: Public Schools, Catholic Schools, and the Social Order* (Notre Dame: University of Notre Dame Press, 2005), 19.

[24] Charles N. Lischka, *Private Schools and State Laws: The Text as Well as a Classified Summary of All State Laws Governing Private Schools, in Force in 1924* (Washington, D.C.: National Catholic Welfare Conference, 1924), 105-7.

[25] The People of the State of New York v. American Socialist Society, 196 N.Y.S. 943 (1922).

Education, P.P. Claxton, echoed the call for English-language instruction in private schools, writing in 1920 that "it is the duty of the State to make such inspection of all private and parochial schools as may be necessary to make sure that . . . they offer instruction in those subjects which are generally considered necessary for good and intelligent citizenship and for successful living in a democracy."[26] In the proposed but never enacted Smith-Towner bill (so-called after being amended and cosponsored by Republican House representative Horace Mann Towner), states receiving federal money were required to Americanize their foreign-born residents by stressing instruction in English.[27] Guthrie, writing as an interested Catholic as well as an expert in constitutional law, called the bill an unconstitutional recipe for the "complete nationalization of education" and a threat to religious education throughout the nation.[28]

The Smith-Towner bill also elicited enormous protests among certain members of the National Catholic Welfare Council and an interlocking organization, the National Catholic Educational Association. The NCWC, which would lead the legal effort against the Oregon law several years later, was itself a product of Catholic support for the war. Originally named the National Catholic War Conference, the NCWC created a unified national organization led by a committee of bishops. Following the armistice, these bishops helped transform the NCWC into a powerful, centralized lobbying force for Catholic interests, with offices in Washington. One of the NCWC's first tasks was to mobilize Catholics against Smith-Towner. Together with the Catholic press, the NCWC complained that increased federal authority in education would raise

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[26] P.P. Claxton, "States Should Not Forbid Private Instruction," *School Life* 5, no. 9 (November 1, 1920): 8.

[27] Slawson, *Department of Education Battle,*19-23; Woodhouse, "Who Owns the Child?," 1004.

[28] William D. Guthrie, "The Federal Government and Education," *The American Bar Association Journal* 7 (1921): 16; William D. Guthrie, "The Federal Government and Education," *Catholic Educational Association Bulletin* 16, no. 4 (August 1920): 53-63

the status of public schools at the expense of private ones. It would result in a greater centralization of education along the very Prussian lines that had led Germany down its path to war. It would unfairly raise taxes for Catholics who, by virtue of their commitment to private education, would not see the fruits of new public projects. It would violate the federalist principles embodied in the Tenth Amendment of the Constitution, which left un-enumerated powers (such as education) to the states. Finally, it would harm Catholic school's ability to compete with public alternatives. Because the public purse was better endowed than parish coffers, Catholic schools would be hard-pressed to keep up with public systems' modern buildings, school buses, and free textbooks. The more the federal government spent on public schools, the less Catholic authorities could justify the superiority—in secular matters, at least—of parochial institutions. In large part due to the NCWC's opposition, the Smith-Towner bill ran aground after two aborted attempts in the early 1920s.[29]

The more menacing, short-term threat to Catholic education in the immediate postwar years was not federal intervention, but rather state abolition of parochial schools. Anti-Catholic social movements in Michigan and elsewhere fought to outlaw attendance in parochial schools. As early as 1918 a Detroit-based organization calling itself the Wayne County Civic League proposed an amendment to the state legislature compelling attendance exclusively in public schools. When that measure was defeated, the group—now named the Public School Defense League—gathered the required number of signatures to place compulsory public school attendance on the 1920 ballot, subjecting it to popular referendum. In response, a coalition of Catholics and Lutherans organized to oppose the measure and soundly defeated the amendment.

[29] Slawson, *The Department of Education Battle*, 19-31. The Jesuit *America* magazine led the push to shape public opinion along these lines. See, e.g, "The Essentials of Liberty," *America* (July 3, 1920): 254-55; "Paternalism and the Smith Bill," *ibid.* (October 9, 1920): 591.

Once again, in 1924, the Public School Defense League, together with the local Ku Klux Klan, gathered the requisite number of signatures to place it on the ballot, which Michigan voters again rejected, this time even more resoundingly.[30]

Political movements in over a dozen states attempted to follow Michigan's lead by passing similar legislation. Only in Oregon did such a measure succeed. There, the Scottish Rite Masons cooperated with the Klan to introduce a compulsory public school bill in 1920. Unlike in Michigan, where the state's large parochial school population posed a potential fiscal problem by threatening to significantly increase the numbers of children suddenly attending public schools, Oregon had only a small Catholic school population. The roughly nine thousand Catholic students, two-thirds of whom resided in Portland, diminished economic arguments against increased public school attendance.[31]

In order to court the local Klan's political support, Oregon's Democratic gubernatorial candidate Walter M. Pierce supported compulsory public education. When the bill, along with Pierce's candidacy, appeared on the ballot in the fall of 1922 a majority of Oregon supported both. Set to take effect in 1926, the law compelled children ages eight to sixteen to attend public school, exempting children physically unable to attend school, children who completed the eighth grade, children living at too great a distance from a public school, and children who received private tutoring, so long as they received annual written permission from the county

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[30] JoEllen McNergney Vinyard, *For Faith and Fortune: The Education of Catholic Immigrants in Detroit, 1805-1925* (Urbana and Chicago: University of Illinois Press, 1998), 220-50; Timothy Mark Pies, "The Parochial School Campaigns in Michigan, 1920-1924: The Lutheran and Catholic Involvement," *The Catholic Historical Review* 72, no. 2 (April 1986): 222-38; John Frederick Stach, *A History of the Lutheran Schools of the Missouri Synod in Michigan: 1845-1940* (Ann Arbor: Edwards Brothers, 1943), 143-55.

[31] Abrams, *Cross Purposes*, 89.

superintendent and sat for a quarterly examination. Noncompliant parents faced heavy fines and imprisonment.[32]

Efforts to abolish parochial schooling unified and mobilized American Catholics to a nearly unprecedented extent. Nearly 100,000 protesters gathered in Detroit's baseball stadium to dissent against Michigan's 1920 compulsory public school attendance law. Responses to the Oregon bill came from across the nation, as churches, newspapers, and advocacy groups flooded local Catholic groups with tracts and, eventually, funds for legal defense. Coming in the wake of World War I, those on both sides of the argument stressed the "foreign" nature of their opponents. While proponents of the law argued that only public schooling could ensure an America free from radical and antidemocratic forces, the Catholic press assaulted it as a proposed "state monopoly" reminiscent of the very Prussian, or Bolshevik, school systems that Americans had fought to defeat.[33]

"Demonstration given by 100,000 people at Navin Field [Detroit, MI] against the school amendment, Sunday, October 31, 1920" [1920], Library of Congress Prints and Photographs Division, Washington D.C.

Education officials within the NCWC quickly sought to distinguish these existential threats from the much longer, and more sanguine, history of state regulation. Harrisburg's

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[32] Abrams, *Cross Purposes*, 7-22; Robert D. Johnston, *The Radical Middle Class: Populist Democracy and the Question of Capitalism in Progressive Era Portland, Oregon* (Princeton: Princeton University Press, 2003), 227-33; Tyack, "Perils of Pluralism."

[33] Vinyard, *For Faith and Fortune*, 235; Abrams, *Cross Purposes*, 36-88.

Bishop Phillip McDevitt drew a line between the "enlargement of civil authority over private schools" and "legislation that would make education the exclusive function of the State." Educational regulation, McDevitt argued, was distinct from the creation of a "State monopoly of education."[34] A.C. Monahan, the National Catholic Educational Association's director, went even further, arguing that support for state regulations affecting parochial school attendance, teaching licenses, and curriculum standards were essential to maintaining their existence. He wrote that "the attitude that the Parochial school is a private institution, and not a public utility, which has been assumed by a few of our Catholic authorities, is bound to create unjust suspicion toward them and their work, and result either in their abolition or in their complete control by public authorities." Catholic schools with the state's stamp of approval were less likely to meet with public suspicion. Better to support a strong regulatory regime in the short term, Monahan believed, than to risk Catholic education's long-term abolition.[35]

II

When William Guthrie constructed his legal argument in defense of parochial schools, he opted to foreground this insight that regulation could be private schools' salvation. That public regulation occupied a central place in Guthrie's argument in the first place might seem peculiar. Guthrie's biography, after all, conforms with classic depictions of the early twentieth-century legal establishment as a bastion for *laissez-faire* ideas. In nearly all of the Supreme Court cases that Guthrie argued, he represented private individuals or firms battling against state and federal legislatures, who allegedly overstepped their constitutional authority. His views reflected the

[34] Rev. Phillip McDevitt, "The State and Education," *Columbia* (October 1922): 17, Box 12, Papers of Bishop Francis W. Howard, ACUA.

[35] Monahan to Rice.

broader jurisprudential agenda of what historians term the "*Lochner* Era," in which several notable decisions struck down state and federal regulatory laws under the due process clause of the Fourteenth Amendment. In *Lochner v. New York* (1905)—a case that critics believed defined the Court's ideological stance until the 1930s—the Supreme Court famously ruled that a New York statute imposing maximum working hours for bakers was unconstitutional, in part because it violated an unenumerated "liberty of contract." When the legal scholar Benjamin Twiss began researching the origins of judicial conservatism amid the obstructionism of the New Deal Supreme Court, he focused on Guthrie, a standard bearer for the "outstanding triumph of laissez faire" during the period.[36] While legal historians have revised this facile understanding of the *Lochner* Era, Guthrie's name continues to appear with the words "*laissez faire*" attached.[37]

Guthrie's legal conception of public regulation—his view of "police powers jurisprudence"—was decidedly more complex than the rigid absolutism of *laissez faire*. In general, he felt that courts should strike down government regulation under two conditions: when it discriminated against one individual or group and favored another, or when a regulation's provisions were arbitrary or unnecessary. Like some of the members of the *Lochner* Court, Guthrie also believed that the due process clause of the Fourteenth Amendment guaranteed a substantive, "fundamental right" to property and contract.[38] But nowhere did he suggest that individual and corporate activity could be unrestrained by public regulation. Indeed, much of his

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[36] Benjamin Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton: Princeton University Press, 1942), 229.

[37] See, e.g., Woodhouse, "'Who Owns the Child?'," 1002; Liebman, "Voice Not Choice," 302, n. 209; Abrams, *Cross* Purposes, 115; Arnold M. Paul, *Conservative Crisis and the Rule of Law Attitudes of Bar and Bench, 1887-1895* (Ithaca, NY: Cornell University Press, 1960), 173. *Lochner* Era historiography is summarized in David Bernstein, "*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism," *Georgetown Law Journal* 92, no. 1 (2003): 1-13.

[38] See, for example, his attack on the Sherman Anti-Trust Act in "Unconstitutional," *The Sun* (New York), April 11, 1897.

concerns about government interference with private property were procedural in nature, stemming from his conviction that federal courts, rather than state legislatures, should be the primary arbiter of "reasonable" police powers. For Guthrie, courts played an essential role in structuring the most contested sites of public regulation in the late nineteenth century: the relationship between labor and capital and between private enterprise and the state. Understanding Guthrie's jurisprudential philosophy, as well the legal context that surrounded it, is essential to rediscovering the forgotten regulatory emphasis of *Pierce*.

Guthrie's ideas about the Fourteenth Amendment and the role of federal courts were part and parcel of the immense transformation in American law ushered in by Northern victory in the Civil War. The Fourteenth Amendment, ratified in 1868, brought to the forefront of American law an interlocking yet unwieldy set of ideas about individual rights and centralized governance. Republicans proposed the amendment as a way to codify civil rights legislation and to protect African Americans from racially discriminatory Southern state laws—the Black Codes—passed immediately following the Civil War. Where the Fifth Amendment's due process clause protected Americans from discriminatory federal laws, the due process and equal protection clauses of the Fourteenth Amendment applied these protections to Americans from the several states. The freedmen would now have the same rights to life, liberty, and property (including the right to contract) as white citizens.[39] Indeed, all Americans could now invoke due process rights when seeking redress from discriminatory or arbitrary state uses of the police power, including

[39] Eric Foner, *Reconstruction: America's Unfinished Revolution* (New York: Harper and Row, 1988), 257. Women and minority groups, including freed slaves, rarely witnessed these ideals of color-blind voluntary exchange translated into law and policymaking.

laws that affected their private enterprises.[40] The titles of the great legal treatises on police power in the late nineteenth century captured these new constitutional checks on state regulatory authority: Thomas Cooley on the *Constitutional Limitations which Rest upon the Legislative Power of the States* (1871); Christopher Tiedeman on the *Limitations of Police Power in the United States* (1886); and Ernst Freund's subtitle to his book, *The Police Power: Public Policy and Constitutional Rights* (1904).[41]

Protecting individual rights from state governments, however, required even greater centralized authority, and federal courts became the primary agency to protect liberty and property. Beginning in the 1840s, successive political generations empowered federal courts to restrain interstate rivalries and forge a more fluid, national marketplace. In 1842 the Supreme Court ruled in *Tyson v. Swift* that federal courts could decide what common-law rules applied in cases involving parties from different states. The *Swift* doctrine set in motion a body of federal common law that undermined states' efforts to protect particular local enterprises from interstate competition. In 1867 and 1875 Congress passed laws further extending the reach of the federal courts, granting them greater jurisdiction to hear state cases in which a party felt they could not receive a fair hearing from local judges. Republican lawmakers believed these judicial reforms would assist African Americans seeking fair trials and, indeed, these acts became essential—if

[40] The due process clause proved far more amenable to protecting citizens from state activity after the majority opinion in the Slaughterhouse Cases, 83 U.S. 36 (1873) significantly limited the scope of the Fourteenth Amendment's privilege and immunities clause. Bernstein, *Rehabilitating* Lochner, 12-13.

[41] Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1871); Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis: The F.H. Thomas Law Book Co., 1886); Ernst Freund, *Police Power: Public Policy and Constitutional Rights* (Chicago: The University of Chicago Press, 1904).

imperfect—tools for racial and ethnic minorities, along with women, pursuing civil liberty within their state.[42]

Multistate corporations also benefited from heightened federal review, and their remonstrations proved immensely successful in removing barriers to enter into individual state markets. As the United States economy grew more integrated in the 1870s and 1880s, the Court aggressively protected interstate commerce from parochial and protectionist state laws, striking down state licensure, inspection, and taxation regimes that attempted to keep "foreign" goods and salesmen from entering the state. The federal government, with the Supreme Court leading the way, stood poised to impose greater uniformity in legal arenas across American life.[43] *Pierce* was a direct result of this legacy.

In the realm of state regulation (the subject of *Pierce*), the Fourteenth Amendment's due process clause became the primary means to enforce these dual commitments to private rights along with greater federal judicial power. Guthrie, an active and lifelong Republican, became one of the Amendment's most prominent exponents. In a variety of prominent venues Guthrie defended judicial independence and the rights of federal judges to strike down state legislation that he deemed unconstitutional.[44] In addition to his arguments in front of the United States

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[42] Tony A. Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, CT: Jai Press, 1979), xx, 99-120.

[43] James Willard Curst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956), 45-50; Charles W. McCurdy, "The Knight Sugar Decision of 1895 and The Modernization of American Corporation Law, 1869–1903," *Business History Review* 53 (1979): 309-11; Barry Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," *University of Chicago Law Review* 67, no. 4 (2000): 1101-9. In two cases in front of the Supreme Court, Champion v. Ames, 188 U.S. 321 (1903) and *McCray*, 195 U.S., Guthrie himself argued on behalf of striking down federal laws that discriminated against particular goods (lottery tickets and oleomargarine) from being sold in interstate commerce.

[44] See, for example, William D. Guthrie, "Criticism of the Courts," in *Magna Carta and Other Addresses* (New York: Columbia University Press, 1916), 130-58.

Supreme Court, he served as president of both the New York State Bar Association and the Association of the Bar of the City of New York. His personal ties to wealthy donors and trustees opened doors to the most prestigious chaired lectureships and professorships in America Law. He delivered the esteemed Yale Law School's Storrs Lectures in Constitutional Law in 1907 and in 1909 became the Ruggles Professor of Constitutional Law at Columbia Law School.[45] In his widely read *Lectures on the Fourteenth Amendment*, published in 1898, he referred to the Fourteenth Amendment as America's "new Magna Charta," a "bulwark" on which citizens would protect themselves from the "growing tendency to invade the liberty of the individual and to disregard the rights of property."[46]

Guthrie's enunciations of individual liberty, however, did not signify an opposition to all, or even most, of the emerging regulatory state. For Guthrie the Fourteenth's Amendments protections only rendered particular types of laws unconstitutional. State regulations would be upheld so long as they fulfilled two basic conditions: that they be neutral in their classification and enforcement, and reasonable in their scope.[47] Like most prominent lawyers and judges trained in constitutional law during the late nineteenth century, he believed that the due process clause gave citizens and businesses alike substantial freedom from the burden of unequal laws. In contrast to the Populists and progressives at the time who feared the *de facto* powers that private business owners wielded over defenseless workers, forcing them to labor in underpaid, exacting, and dangerous conditions, Guthrie and other lawyers feared the *de jure* authority that

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[45] Swaine, *Cravath*, 363. Guthrie's former colleague at Columbia, Charles Beard, determined that his appointment was through "backstairs negotiations," as Guthrie was a partner of one of the trustees. "Dr. Beard Attacks Columbia Trustees," *New York Times*, December 28, 1917.

[46] William D. Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States* (Boston: Little, Brown and Company, 1898), 30.

[47] Guthrie, *Lectures*, 80-88.

legislatures possessed to shape private enterprise in ways that benefited one group over another: "class legislation" that used the police power to take from one party and give to another. Neither taxes that soaked the rich nor building codes that disproportionately affected the immigrant poor could be countenanced by a Constitution that mandated strict neutrality and equality in conflicts between social groups. Courts therefore had the responsibility to strike down all public regulations that discriminated against particular classes, whether workers or owners, immigrants or natives. Minimum wages, maximum hours, and income taxes that arbitrarily singled out particular groups tended to fit in this category of "class legislation."[48]

The maximum hours law for bakers at the heart of *Lochner*, Guthrie believed, was one such law. In a 1912 address on "Constitutional Morality" given before the Pennsylvania State Bar Association, he defended the *Lochner* ruling as exemplifying the proper role of federal courts "in protecting the individual and the minority against unconstitutional enactments favoring one class at the expense of another." In *Lochner*, he said, the legislature's maximum hours law discriminated against owners, who would be prosecuted for the actions of their employees.[49] In other cases, however, owners were the favored class. In describing the 1885 New York case, *in re Jacobs*, Guthrie discussed how the owners of large tobacco factories in New York had colluded "to destroy the competition of cigar manufacturers who worked at home" by pressuring the legislature to prohibit tobacco production in tenement houses. The small business owners and workers had as much of a right to their liberty and property, he argued, as

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[48] The classic account of this jurisprudential view of neutrality is Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993).

[49] Gillman argues that the majority in *Lochner* believed that the decision violated the principle of neutrality in another manner: that it singled out bakeries for regulation, leaving similar professions free from maximum hours legislation. Gillman, *Constitution Besieged*, 128-30.

did the bakery owners in *Lochner*. Reasonable police powers ought to be neutral in their impact. When public regulations served particular private interests they violated the constitutional protections afforded by the Fourteenth Amendment.[50]

For state regulations to be constitutional, according to Guthrie, they not only had to be neutral in their intended impact but also reasonable in their scope. Legislatures could regulate railroad or grain elevator rates, for example, but they could not set those rates so low as to deprive businesses of property without due process. Federal courts, then, had the responsibility to draw the line between "reasonable" regulation and "unreasonable" (and unconstitutional) deprivation. Guthrie was fond of quoting Chief Justice Morrison Waite's pronouncement that the "power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."[51] In his *Lectures* he favorably transcribed the portion of the majority opinion in *Lawton v. Steele* (1894), which insisted that regulations be "necessary for the accomplishment of the purpose, and not unduly oppressive."[52] When the Supreme Court overturned a state regulation as having ventured into the territory of confiscation—as it did in *Chicago, Milwaukee and St. Paul Railway Company v. Minnesota* (1890)—Guthrie eagerly showered the judges with praise.[53]

Guthrie therefore was hardly a zealot for unbridled capitalism. So long as regulations were neutral and reasonable, he deemed them permissible. He believed that judges would rightly

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[50] William D. Guthrie, "Constitutional Morality," *The North American Review* 196, no. 681 (1912): 154-73.

[51] See Guthrie, "Unconstitutional!," and Guthrie, *Lectures*, 80-81. The original quotation is from Railroad Commission Cases, 116 U.S. 307, 331 (1886). Waite evidently was playing on John Marshall's remarks on the taxing power in McCulloch v. Maryland, 17. U.S. 316, 431 (1819).

[52] Guthrie, *Lectures*, 77-78. See Lawton v. Steele, 152 U.S. 133, 137 (1894).

[53] *Ibid.*, 80-83; Chicago, Milwaukee and St. Paul Railway Company v. Minnesota, 134 U.S. 418, 458 (1890).

uphold public police authority most of the time, recognizing that states required flexibility in order to govern.[54] Like the Supreme Court of the *Lochner* Era—which *upheld* over 99 percent of the social and economic regulations that came before it between 1887 and 1911[55]—Guthrie had no constitutional objections to the vast majority of public regulations. "The truth is that our constitutions, national and State, do not stand in the way of any fair and just exercise of what is called the police power," he wrote in 1912. "They do not prevent reasonable regulations tending to protect the health of the community; and that they certainly do not prevent the enactment of proper and reasonable factory Acts or proper and reasonable workmen's compensation Acts." New York's general Public Health Law, which prevented food manufacturing in unsanitary places, was a perfect example of a regulation "clearly within the police power of the legislature." It protected workers and consumers in a way that did not discriminate against one particular class, unlike the unconstitutional bakery law the legislature enacted to single out a particular group of workers.[56]

Guthrie's defense of state police powers was not mere rhetoric. Five years before *Pierce*, he defended New York's right to impose emergency rent ceilings during the housing shortage following World War I. Guthrie took the case for free, at the pleading of his law partner.[57] Amid the "extortionist" rents being charged by landlords, and the war industry's immense hunger for housed workers, he submitted a brief arguing for the "ever-existing police power and *duty* of the State to legislate by fair and appropriate means to secure the protection, safety and general

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[54] Guthrie, *Lectures*, 74, 76.

[55] Charles Warren, "The Progressivesness of the United States Supreme Court," *Columbia Law Review* 13, no. 4 (April 1913): 295.

[56] William D. Guthrie, "Constitutional Morality," 165-67.

[57] Julius Henry Cohen, *They Builded Better than They Knew* (New York: Julian Messner, 1947), 169.

welfare of the community." In the context of the war emergency, the brief read, "the rights of property . . . are not so absolute as to necessitate any such self-destructive and suicidal policy of government."[58] The rent controls, in other words, were perfectly reasonable given the exigencies created by the war. Such support for state police powers stunned Guthrie's friends. His corporate lawyer colleagues upbraided him privately, inquiring politely whether he had lost his mind.[59] The secretary of the NCWC's National Catholic Educational Association, Francis Howard, barely concealed his astonishment after Guthrie sent him the brief.[60] Despite these pressures to reconsider his position, Guthrie persisted, seeing little contradiction between his general advocacy of property rights, and his support for reasonable state police powers when merited by circumstance.

When Oregon voted to outlaw attendance in private schools in November 1922, Guthrie was the NCWC's obvious choice to lead the legal battle against it. Francis Howard had immense respect for Guthrie's longstanding devotion to the Catholic Church and to private property—both victims of the Oregon law. The two had corresponded extensively in early 1920 amid the controversy over the Smith-Towner bill, sharing their concerns about the growth of the federal government and the assault on private enterprise, including in education.[61] In March 1923, four months before the NCWC filed suit against the Oregon law in federal court, they officially

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[58] Brief on Behalf of the Attorney-General and the Joint Legislative Committee on Housing of the State of New York, at 20, *Marcus Brown*, 256 U.S. 170.

[59] Cohen, *They Builded Better than They Knew*, 169.

[60] Father Francis Howard to William D. Guthrie, June 25, 1921, Box 25, Folder: Guthrie, W.D., Papers of Bishop Francis W. Howard, ACUA.

[61] See the correspondence between them in, ibid.

named Guthrie lead counsel in the case.[62] Guthrie, however, had already been at work pressuring the Supreme Court, with its attention now drawn to another private school case in Nebraska, to turn toward Oregon.

III

When it was argued in 1923, *Meyer v. Nebraska* marked the most prominent regulatory dispute involving a parochial school to reach the United States Supreme Court. The spark that ignited the case occurred on an otherwise average Tuesday in May of 1920. When the school superintendent of Hamilton County, Nebraska, some seventy miles west of Lincoln, paid a visit to the Lutheran Zion's Parochial School he found its teacher, Robert Meyer, leading the class in German. Teaching German in private schools was illegal in Nebraska, as it was in several states that passed English-only laws in the wake of World War I. The state convicted Meyer who, joining with the Lutheran Missouri Synod, soon appealed. The Synod's lawyer, Arthur Mullen, claimed that the law violated Meyer's property rights—his right to work—as protected under the Fourteenth Amendment. Furthermore, insofar as foreign languages were not, *per se*, inimical to the public welfare, they did not constitute a "legitimate subject for prohibitory legislation."[63] The U.S. Supreme Court agreed to hear *Meyer* in 1922, which it bundled together with a handful of similar lawsuits emanating from Catholics and Lutherans in Nebraska, Iowa, and Ohio.[64]

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[62] Guthrie joined the Portland Catholic Archdiocese's attorney, Judge John P. Kavanaugh, in arguing the case, with the understanding the Kavanaugh would primarily be responsible for the district court arguments while Guthrie would take on the appellate court responsibilities.

[63] Brief and Argument for Plaintiff in Error at 6, 14, Meyer v. State of Nebraska, 262 U.S. 390 (1923) (October Term, 1922, No. 325).

[64] See Bartels v. Iowa, Bohning v. Ohio, Pohl v. Ohio, and Nebraska District of Evangelical Lutheran Synod v. McKelvie, 262 U.S. 404 (1923).

Guthrie was undoubtedly disturbed by the Nebraska law but publicly chose to withhold his opinion. The English-only statutes were minor affairs when compared with the Oregon law, which, after all, abolished all instruction within private schools. To draw the Justices' attention to what he saw as the more significant issue, Guthrie and his law partner, Bernard Hershkopf, submitted an *amicus* brief in *Meyer*. There, Guthrie struck at the distinction popularized by Justice Waite between regulation and abolition, arguing that while the Nebraska law might pass constitutional muster, legislatures did not have limitless police powers over private schools. He acknowledged that Nebraska and Oregon's laws were not equivalent, but that if the Supreme Court affirmed the English-only law in *Meyer* it must draw the line there. Abolishing private education interfered with the natural rights of parents, he wrote, similar to how Plato's *Republic* envisioned a utopia where children would be raised communally. Equally as important, Guthrie insisted, was how Oregon's law violated private schools' property rights, a claim shared by Meyer's lawyers. A private school, Guthrie wrote, was "an ordinary and honest business" employing "many worthy citizens," equally subject to due process protections as the other private enterprises he had defended.[65]

Guthrie's *amicus* brief proved immensely influential. Arthur Mullen had mentioned the specter of private school abolition during oral arguments, but it did not appear in the Lutheran Synod's brief. Guthrie placed private school abolishment front and center. The thin line he introduced between prohibition of foreign language instruction and abolition of private schools likely moved the Justices. As they learned during the oral arguments, the Nebraska legislature passed its language law only after a measure to ban private education entirely had failed by a

[65] Brief for William D. Guthrie and Bernard Hershkopf as Amici Curiae at 6, *Meyer*, 262 U.S. 390.

single vote.[66] The majority opinion, written by James McReynolds, adopted the property rights arguments introduced by Mullen and Guthrie in noting how the law "interfere[d] with the calling of modern language teachers." It placed itself squarely within the post-Civil War jurisprudential movement, championed by Guthrie, to have federal courts protect "those privileges long recognized at common law," including the right to contract, hold employment, and receive education. In a more direct reference to Guthrie's brief, McReynolds referred to the overweening educational policies in Plato's *Republic*, establishing a clear link between Nebraska's regulation and Oregon's abolition.[67] Ultimately, the Supreme Court ruled 7-2 that language laws like Nebraska's violated the Constitution. Justices Oliver Wendell Holmes and George Sutherland dissented, citing the reasonableness of the English-language laws given the desirability "that all citizens of the United States should speak a common tongue."[68] When the NCWC legal team learned of the Court's majority ruling in *Meyer*, they filed their challenge to the compulsory education law in the Oregon federal district court. McReynolds's opinion hinted that the Supreme Court would likely be receptive to their cause, more so, certainly, than were Oregon state judges, whose allegiances were more suspect.[69]

IV

Pierce vs. The Society of Sisters was perfectly suited to Guthrie's litigation experience. Unlike Robert Meyer, the Society of Sisters of the Holy Names of Jesus and Mary was a

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[66] Transcript of Oral Argument of Arthur F. Mullen, in Behalf of Plaintiffs-in-Error at 2, *Meyer*, 262 U.S. 390.

[67] *Meyer*, 262 U.S. at 399, 401. McReynolds knew Guthrie well from their days as New York attorneys. When Guthrie left the Cravath firm he had helped build in 1907, McReynolds took his place. See Abrams, *Cross Purposes*, 113.

[68] Officially, the dissents were filed separately in the *Bartels* cases. *Bartels*, 262 U.S. at 412-13 (Holmes, J. dissenting).

[69] Abrams, *Cross Purposes,* 124.

corporation, owning and operating six schools throughout Oregon and educating over 865 students. It was exactly the legal entity (with the technical exception of it being a non-profit corporation) that Guthrie had defended his whole life.[70] Others in the NCWC feared that a corporate plaintiff would harm their case, and even Guthrie at first was concerned about establishing a legal argument on the basis of property rights rather than religious and parental liberty.[71] John Burke, for example, worried that an individual would have a stronger claim to Fourteenth Amendment due process protections.[72] Others grew anxious that the Court might hold, as it did a mere fifteen years earlier in *Berea v. Kentucky*, that states had ample right to regulate the private educational corporations they chartered. But Guthrie quickly assuaged any concerns about corporate rights. As an eyewitness to the growth of corporate power and consolidation in the late nineteenth century, a movement aided by the Supreme Court, he reminded Burke that "it is the settled rule that the word 'persons' as used in the [Fourteenth] Amendment includes corporations and that corporations are entitled to the protection of its guaranties."[73] As for the precedent in *Berea*, Guthrie responded that to bring suit by an individual "might create the impression on the court that we were fearful that the doctrine of the *Berea College* case applied," which could potentially expose the Catholic Church itself to future litigation. *Berea* was nothing to be feared, as nowhere did it "go to the length of permitting a State to prohibit parents, guardians and custodians from sending children to any properly

[70] In addition to the Society of Sisters, the Hill Military Academy, a nonsectarian private school, also joined the lawsuit, though its legal funds derived from the Catholic Knights of Columbus.

[71] William D. Guthrie to John Burke, January 5, 1923, Folder 7, Box 14, USCCB, ACUA.

[72] See John Burke to William D. Guthrie, January 3, 1924, Folder 8, Box 14, USCCB, ACUA.

[73] Guthrie to Burke, January 4, 1924, ibid.

conducted school, corporate or otherwise."[74] Kentucky was regulating, not prohibiting, private schools, and public regulation was not the legal issue.

On March 31, 1924, Judge Charles Wolverton of Oregon's federal court delivered a decision striking down the state's compulsory attendance law. In a sentence that Guthrie no doubt was pleased to read, Wolverton's opinion noted that the state's "exercise of the police power is subject to judicial review, and property rights cannot be ruthlessly destroyed by wrongful enactment." Oregon's law violated due process in part because it discriminated against private schools despite there being no evidence that private education was particularly harmful. More importantly, however, the law went far beyond the reasonable scope of valid state police powers. The state "destroy[ed] the business and occupation of the complainants' schools," exceeding the "limitations of its power" and therefore depriving the aggrieved parties of their property without due process of law.[75] While Wolverton's decision proved only temporary, with Oregon's Attorney General quickly issuing an appeal, the reasoning mattered. As Guthrie prepared his arguments for the Supreme Court, he employed the distinction between regulation and abolition, noted by Wolverton, to the Sisters' advantage.

Public regulation, Guthrie insisted time and time again in his brief, was not at issue in *Pierce*. Catholics and private school operators, after all, tolerated many kinds of laws. To punctuate his point, Guthrie submitted an appendix to his Supreme Court brief with a 156-page list of state laws regulating private schools. Throughout his brief he referenced this list,

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[74] Ibid. Guthrie's partner in the case, Judge P. Kavanaugh, also distinguished *Berea* from *Pierce* in that the Kentucky statute incorporating Berea contained a provision reserving the power to alter corporate franchises, where none existed in Oregon. Kavanaugh to Guthrie, January 6, 1924, Ibid.

[75] Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 F. 928, 931, 936 (D. Oreg. 1924).

demonstrating to the justices that Oregon's private schools were not challenging state regulations. "At the outset, it should be clearly understood that the private and parochial schools of Oregon are not in court complaining of any *regulatory* measure," he wrote. "Private and parochial schools in Oregon are, and long have been, subject to inspection by the State Superintendent of Public Instruction, and anything prejudicial to the public welfare could easily have been prevented by proper and reasonable supervisional regulation."[76]

> As Appendix II further shows, the education laws of the various states provide for varying degrees of regulation and control by the state of private schools, their several curricula and teachers. Provision has, for example, been made that representatives of the state shall inspect private schools, that their standing under the compulsory school laws and otherwise shall depend upon approval by the state authorities, that general standards laid down by the state authorities shall control the curriculum of the private school, that certain subjects inculcating patriotism shall be taught, such as courses related to the Constitution, civic duties, etc., that elementary courses shall be conducted in English, that the flag shall be displayed about the schoolhouse, that teachers in private schools shall obtain certificates from the state and be required to be citizens of the United States or to take the oath of allegiance, that private schools shall furnish reports and statistical data to the state authorities in connection with the compulsory school laws and otherwise, that private schools shall be subject to state regulation as to medical, health and sanitary matters, and that no doctrine subversive of the authority of the state shall be taught in private schools.

"These statutory provisions," Guthrie concluded, "show how far the control of the state over private education may reasonably extend and how unnecessary it is to suppress all private and parochial schools in order to insure unobjectionable methods of teaching and courses of study, or the inculcation of patriotism in the minds of American children." Guthrie returned to this argument repeatedly, insisting that Catholics were not challenging the dozens of reasonable state regulations affecting private schools.[77]

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[76] Brief on Behalf of Appellee, 257, 271.

[77] Ibid., 232.

Precisely because of these regulations, Guthrie argued, abolishing private education was unreasonable, a deprivation of property without due process. "In such a system of regulation, there is no element of total and indiscriminate prohibition," he added. "It is not reasonably necessary to destroy the private and parochial schools conducted by this appellee, which has scrupulously obeyed the law." After all, "where regulation is so completely adequate, prohibition is unnecessary and constitutes mere arbitrariness and wanton abuse of power." If Oregon schools truly failed to fulfill basic American principles, then "they can be made to do so by proper regulation." In this reading, regulation was not so much the oppressor of Catholic schools in Oregon as a means to its survival. Public law negated the need to abolish private schools.[78]

On June 1, 1925 the Supreme Court unanimously struck down the Oregon law. As in *Meyer,* Justice McReynolds authored the opinion. As in *Meyer*, he admitted the close connection between private schools and other private enterprises. He likened parents to "customers" and referenced "property" or "business" eleven times. In a fourteen-paragraph decision, McReynolds used one to explain how the law violated the "fundamental theory of liberty" of parenting that he had asserted earlier in *Meyer*. The aspects of the case relating to the corporations' property rights, on the other hand, occupied four paragraphs. McReynolds defended the view that corporations, like individuals, could seek protection under the Fourteenth Amendment, and that a court injunction was reasonable—despite the law not yet having taken effect—since it was necessary to "protect business enterprise against interference with the freedom of patrons or customers."[79]

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[78] Ibid., 259. Guthrie's law partner, John P. Kavanaugh, added, "we conform to reasonable regulation. . . . We comply with all the regulations of the state. We are in favor of compulsory education. The state has a right to impose that."

[79] *Pierce* 268 U.S. 510, at 535, 536.

The opinion situated the case exactly where Guthrie said it belonged: in the annals of corporate rights and unreasonable state police powers. But McReynolds's decision, like Guthrie's brief, also asserted that corporate autonomy had its limits. Guthrie had noted countless times that states had a wide array of tools to regulate corporations and, just as McReynolds had borrowed the language of Plato's *Republic* from Guthrie's *Meyer* brief, so in *Pierce* McReynolds drew upon Guthrie's arguments about reasonable state regulation. In a remark that echoed Guthrie's elongated sentences about proper state police powers, McReynolds wrote that nowhere did this opinion prevent the "power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[80] Here was the three decades' worth of state laws that Guthrie had summoned in his voluminous appendix.

With McReynolds's decision, the Supreme Court, by virtue of its ultimate federal jurisdiction, affirmed on constitutional grounds the regulated educational marketplaces of American states. On the one hand, the ruling prohibited states from eliminating educational competition. Majorities could not mandate public school monopolies, nor, as McReynolds would reiterate two years later in a case about foreign-language schools in the U.S. territory of Hawaii, could the Constitution justify wantonly regulating private schools out of the existence.[81] On the other hand, state regulation of private schools would continue unabated. When states and localities failed to uphold this federal mandate courts would act as a quasi-"super" board of

[80] *Ibid.*, at 534.

[81] Farrington v. Tokushige, 273 U.S. 287 (1927).

education, capable of maintaining educational competition throughout the nation.[82] As the NCWC's executive director James H. Ryan observed shortly after the decision, even when "discriminatory legislation [is] enacted in isolated instances, the private schools always can have recourse to the courts."[83] In striking down state laws in *Meyer* and *Pierce*, the Court did not diminish the power of the government to shape education. At the state level the Court affirmed it. At the federal level, the Court dramatically enhanced it.

Responding to the decision, Catholic officials within the NCWC acknowledged its assertions of state police power. "*Regulation* is normal, *prohibition* is *drastic*," the NCWC's legal expert Charles Lischka summarized.[84] Guthrie, for one, always had recognized the potential pitfalls of his own arguments elevating state regulation, at one point writing in private that he was growing "apprehensive that the court may stress the feature of the power of regulation, which is so open to abuse and oppression." He had tried to prevent this abuse through a "constant use of the word 'reasonable' in that connection," but the opportunity for the Court to make broad claims about public regulation was always present.[85] Fortunately for Guthrie, McReynolds used the qualifier "reasonably" in his discussion of state regulation in the opinion. When Burke read that portion of the decision, he remarked that "the word 'reasonably' saves the paragraph." Nonetheless, Burke recognized that the decision was anything but the paean to private property

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[82] The concept of the Supreme Court acting as a "super board of education" stems from Robert Jackson's concurring opinion in McCollum v. Board of Education of School District 333 U.S. 203, 237 (1948).

[83] James H. Ryan, "What the Oregon Decision Means for American Education," *NCWC Bulletin* 7 (July 1925): 9-10.

[84] Charles N. Lischka, "The Appeal of the Oregon School Law," *NCWC Bulletin* (April, 1925): 12, Folder 13: Oregon School Law, 1923-1924, Box 29, Records of the United States Conference of Catholic Bishops Education Department, ACUA. See also Rev. James H. Ryan, "What the Oregon Decision Means for American Education," *Ibid*. (July 1925), ibid.

[85] Guthrie to Burke, March 23, 1925, Folder 10, Box 14, USCCB, ACUA.

as some critics concluded. "I am inclined to believe that legally the paragraph in its decision dealing with State supervision settles nothing," he wrote. "The paragraph on its face betrays the disposition and mind of the Court and shows that it would not be willing to declare a law unconstitutional which prohibited schools wherein, for example, the teachers were not of patriotic disposition and wherein certain studies, plainly essential to good citizenship, were not taught."[86] A lawyer corresponding with Burke agreed, claiming that the decision "leaves open, of course, the extent to which specific examination questions may be insisted upon and how far inspection and supervision in general may go."[87] James H. Ryan remarked optimistically that Catholic schools were "prepared and even anxious to meet all the just demands" and regulations the decision portended.[88] NCWC officials, though ecstatic with the decision, understood that the Court did nothing to remove the state's heavy involvement from their schools.

Other legal observers outside of the NCWC also recognized the decision's approval of state regulation. When a doctoral student at American University in Washington, D.C. (and a public utility regulator) read through the case materials in *Pierce* several years later, he saw state power everywhere. *Pierce* "recognizes that the state has the unequivocal right to determine and prescribe the subjects to be thus taught and to supervise and regulate this instruction," he concluded. "It is difficult to see wherein the states could ask for any broader authority to regulate rightfully the secular education in private and parochial schools than is afforded by the decision

[86] Burke to Kavanaugh, June 10, 1925.

[87] Thomas F. O'Mara to John Burke, July 1, 1925, Folder 11, Box 14, USCCB, ACUA.

[88] Ryan, "What the Oregon Decision Means for American Education," 10.

in the Oregon cases."[89] Interpretations stressing the regulatory implications of *Pierce* even found their way into the other major 1925 court case involving schools: *The State of Tennessee v. John T. Scopes*, about whether the state could prohibit teaching the theory of evolution in its public schools. Arguing for the State of Tennessee, William Jennings Bryan had intended to read excerpts of *Pierce* aloud, especially McReynolds's pronouncements on "the right of the state" to "direct what shall be taught and also forbid the teaching of anything 'manifestly inimical to the public welfare.'" Although *Pierce* dealt with private school regulation, and *Scopes* with public schools, Bryan believed the emphasis "fits this case exactly."[90] Those searching for statist justifications in *Pierce* found them easily.

State courts, instead of highlighting *Pierce's* enunciations of parental liberty, seized upon the decision's regulatory emphasis. Four years after *Pierce*, in *State v. Oscar Hoyt*, the New Hampshire Supreme Court relied on McReynolds's opinion in upholding a state statute that prohibited home schooling. The decision quoted verbatim his paragraph on the state's ample police powers over education, reasoning that "attendance at some school may still be required, and that the state may supervise the school attended." Ultimately, the court found that this "power to supervise necessarily involves the power to reject the unfit, and to make it obligatory to submit to supervision," an authority the local statute did not exceed.[91] Likewise, courts in New Jersey (1937), Virginia (1948), New York (1950), and California (1953) cited McReynolds in upholding prosecutions of parents who violated compulsory attendance statutes, usually through

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[89] Calvin Kephart, "State Control and Regulation of Private and Parochial Schools of Primary and Secondary Grades" (Ph.D. diss., American University, 1933), 176, 204.

[90] William Jennings Bryan, "Text of Bryan's Proposed Address in Scopes Case," in *The World's Most Famous Court Trial: Tennessee Evolution Case* (Cincinnati: National Book Company, 1925), 321-22.

[91] State v. Oscar Hoyt, 84 N.H. 38, 40-41(1929).

homeschooling.[92] For many parents yearning for the liberty to school their children in alternative ways, *Pierce* was a dead end. While the decision protected private schools across the nation from abolition it also sanctioned a federally applied ceiling of permissive educational regulation, whose heights states did not often approach.

V

The story of how judges and scholars came to ignore *Pierce*'s regulatory emphasis began in the federal courts and the liberal press. As a rising tide of liberal reformers sought to defeat *Lochner* Era jurisprudence, they succeeded in discarding and discrediting *Pierce*. For American progressives, *Pierce* needed to be thrown out with the rest of the conservative jurisprudential bathwater. As a result, the state power inherent in the *Pierce* decision was forgotten as quickly as it was asserted.

Beginning in 1925, American progressives began interpreting *Pierce* as an attack on the regulatory state. In a series of articles published in the *New Republic* shortly after the ruling, liberals seized on the Court's use of *Lochner* Era police-powers jurisprudence. They attacked McReynolds's reliance on substantive due process—that the Society of Sisters had a right to its property—all the while ignoring his strong defense of state educational regulation. In an unsigned editorial entitled "School, Church and State," the author asserted that "no question . . . of the quality of the educational training of parochial schools is even bruited" and that "the right of the state to stipulate what education its children shall receive is hardly mentioned."[93] The

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[92] Stephens v. Bongart, 15 N.J. Misc. 80, 83 (1937); Rice v. Commonwealth of Virginia, 188 Va. 224, 232 (1948); People v. Donner, 99 N.Y.S.2d 830, 834 (1950); People v. Turner, 121 Cal. App. 2d Supp. 861, 865 (1953).

[93] "School, Church, and State," *New Republic*, June 24, 1925, 114. McReynolds's opinion, of course, had contained ample discussion of state regulation—as much as his discussion of the "fundamental rights" of parents for which the case is best known.

writer continued by denouncing the very basis of the decision in property rights.[94] In another letter sent to the magazine, the legal scholar Morris R. Cohen echoed these remarks, writing that the Court had "stretched the term property" to well beyond its traditional meaning.[95] Harvard Law School professor Felix Frankfurter offered a more nuanced reading than his colleagues, at one point acknowledging that the decision left ample room for regulatory activity. Yet, while Frankfurter approved of the outcome in *Pierce* he was uncomfortable with how it provided yet another example of a conservative Supreme Court overturning a state law. Insofar as *Pierce* involved striking down the will of the people, it formed part of the dangerous turn in the American judiciary, epitomized by *Lochner*, toward usurping the authority of democratically elected legislatures. Damning the decision with faint praise, he wrote that "a heavy price has to be paid for these occasional services to liberalism."[96]

For decades *Pierce* strained under the portrait that Frankfurter and others painted of it as an example of conservative judicial activism. As a rising tide of liberal appointments displaced the Court's pre-New Deal majorities, criticisms of *Pierce* abounded. Frankfurter continued to assault the decision when he became a Justice in 1939. When his colleague, Wiley Rutledge, decided to cite *Pierce* in a 1944 opinion dealing with the rights of Jehovah's Witnesses, Frankfurter sent him a letter informing him that he would not join the opinion. He told Rutledge that Holmes's dissent in the *Meyer* companion cases "remained compelling," and that the Court

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[94] "School, Church, and State," *New Republic*, June 24, 1925, 114-16.

[95] Morris R. Cohen, "Social Policy and the Supreme Court," *The New Republic*, July 15, 1925, 195.

[96] Felix Frankfurter, "Can the Supreme Court Guarantee Toleration," in *Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution*, ed. Philip B. Kurland (Cambridge, MA: Belknap Press of Harvard University Press, 1970), 174-78. The article was originally published as an unsigned editorial in the *New Republic*.

would "rue the implications of *Pierce*."[97] In 1949, Justice Hugo Black, a Franklin Roosevelt Supreme Court appointee, wrote that the "due process philosophy" used in *Pierce* and other cases "[has] been deliberately discarded."[98] Black urged Chief Justice Earl Warren to remove any mention of *Pierce* from Warren's 1954 opinion in *Bolling*, which struck down legally enforced school segregation in Washington, D.C. Bowing to the dominant mood on the Court at the time, Warren obliged.[99]

Indeed, *Pierce* became so stigmatized by its association with conservatism that, by the 1960s, in order to resurrect its protections of liberty a lawyer arguing in front of the Court in *Griswold v. Connecticut* had to explicitly sever *Pierce* from the "line of due process decisions exemplified by *Lochner*."[100] When the majority opinion in *Griswold* agreed with the lawyer's use of *Meyer* and *Pierce*, Justice Black again dissented. "The reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated," Black wrote, "and which I cannot accept."[101] As midcentury American jurisprudence decisively broke with the *Lochner* Era, lawyers and judges found it almost impossible to untether *Pierce* from its roots in the "discarded" philosophy of substantive due process. Today, legal scholars on both sides of the ideological spectrum generally treat *Pierce* much as its liberal critics did from the 1920s through the 1960s: as a decision constricting the scope of the regulatory state. The decision's strong affirmation of public regulation has been lost.

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[97] Felix Frankfurter to Justice Wiley Rutledge, January 22, 1944, General Correspondence, Rutledge, Wiley, Reel 61, Felix Frankfurter Papers, Microfilm Edition. The case was Prince v. Massachusetts, 321 U.S. 158 (1944).

[98] Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525, 537 (1949).

[99] Hutchinson, "Unanimity and Desegregation," 48.

[100] Brief for Appellants, *Griswold*, at 23; Bernstein, *Rehabilitating* Lochner, 114.

[101] *Griswold*, at 516 (Black, J. dissenting)

A final irony of *Pierce*'s legacy is that while the case was a decision about corporations and private property, scholars since the 1960s almost entirely discuss it in the context of education and religion.[102] Much as *Dartmouth College v. Woodward* had revolutionized the relationship between state governments and private corporations generally, so scholars initially drew on *Pierce* to continue to define the scope of corporate rights. Legal scholars writing during the 1930s and the 1940s cited *Pierce* in articles entitled "Corporations as Persons, Citizens, and Possessors of Liberty," "Non-Natural Persons and the Guarantee of Liberty under the Due Process Clause," and "Is a Corporation Always Entitled to Due Process of Law."[103] Similarly, as New Deal programs dramatically expanded the scope of public activity, legal scholars in the 1930s turned to *Pierce* to search for how the Supreme Court managed conflicts between public and private enterprise. Thus did *Pierce* appear in articles on "Municipalities in Competition with Private Business," "Power of the Federal Government to Compete with Private Enterprise," and "Standing of Public Utilities to Challenge the Constitutionality of the TVA."[104]

William Guthrie most likely would have been surprised to see *Pierce* exclusively discussed as a case about religion. His career had exemplified the close legal ties between corporations and schools. As Guthrie knew well, private parochial schools were more than

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[102] An advanced search of the JSTOR database reveals that in the thirty years between 1925-1956 there were seven articles that cited Pierce with "corporate," "corporation[s]," "private enterprise," or "private business" in the title, and twenty-four with "religion" or "religious." In the fifty years from 1956-2006 that number was two and sixty-seven, respectively.

[103] Frederick Green, "Corporations as Persons, Citizens, and Possessors of Liberty," *University of Pennsylvania Law Review* 94, no. 2 (January 1946): 235-37; D.J. Farage, "Non-Natural Persons and the Guarantee of Liberty under the Due Process Clause," *Kentucky Law Journal* 28 (1939-1940): 273-75; and "Is a Corporation Always Entitled to Due Process of Law," *Georgetown Law Journal* 26 (1937-1938): 134-35.

[104] "Municipalities in Competition with Private Business: The Effect upon Governmental Powers," *Columbia Law Review* 34, no. 2 (February 1934): 328; J.F., "Power of the Federal Government to Compete with Private Enterprise," *University of Pennsylvania Law Review and American Law Review* 83, no. 5 (March 1935): 670; and "Constitutional Law — Public Utilities —Standing of Public Utilities to Challenge the Constitutionality of the TVA," *Michigan Law Review* 37, no. 7 (May 1939): 1136.

creatures of religious expression: they were institutions near the center of enduring arguments among Americans about the relationship between private enterprise and the state.

In a nation where educational policymaking legally devolved to states and localities, the Supreme Court's decision in *Pierce* was decidedly national in scope. Just as the Gilded Age Supreme Court had shifted American law toward constituting a national commercial market, so the Court, beginning in the 1920s, defined the legal contours of the educational marketplace, albeit at the state level. The educational arena, the Court ruled, must accommodate private sources of schooling as well as public ones. States had to permit educational competition, and state-mandated educational monopolies were unconstitutional. But local schooling and educational competition were not the legal realms of *laissez faire*. As William Guthrie had demonstrated, the compiled laws affecting private schools in the American states now filled up hundreds of pages of text. These regulations, as he asserted and the Court agreed, were essential to the very fabric of a competitive educational marketplace. By compelling attendance and ensuring a minimum standard for all schools, they obviated the need for compulsory public schooling. Because of public regulation, private schools would not be prohibited, but given federal recognition.

Epilogue

Regulating Education—Its Past and Present

Parochial schooling reached its apex in the mid-twentieth century. Attendance in Catholic schools doubled between 1920 and 1955. A decade later, enrollments had shot up by an additional third, with 5.5 million students educated by the Catholic Church. A number of factors explained this surge. Catholics shared in America's postwar prosperity and baby boom, making it easier—and more necessary—to construct, subsidize, and attend private schools. The surge in attendance also reflected the rising importance parents placed on quality schooling. Not until the 1930s did a majority of American teenagers attend high school, and as college attendance grew in the post-war years, parents and children began to consider school choices more carefully. Religion and ethnicity also mattered. Catholics entered mainstream American life, including the highest political offices, in ways a generation prior could barely imagine. In 1928 Al Smith was the first Catholic nominated by a major party for the Presidency. Three decades later, John F. Kennedy became the first Catholic President, a dramatic symbol of Catholic assimilation.

By the 1950s, second and third-generation ethnics sounded more like their Protestant coreligionists, losing traditional ethnic traits such as non-native languages. As Cold War Americans defended religious faith against Communist atheism, public intellectuals began championing a distinctive "Judeo-Christian" American tradition, or a tripartite conception of an America at once "Protestant-Catholic-Jew," a shift that softened Protestant suspicion of Jews and Catholics. For postwar Catholics, the children of those targeted in the 1920s by Ku Klux Klan rallies and immigration restriction, acceptance was never as robust as desired. But neither were improved relations among Catholic and Protestants imagined. Protestant writers, for example,

continued to denounce parochial schools on occasion, but Catholics did not need to be nearly as defensive of their institutions in these years.[1]

Even while Catholics in these decades, as before, were burdened by "double taxation"—paying taxes for public schools they did not use—they continued to benefit, in less obvious ways, from various public subsidies. Since the previous century, states had bestowed backdoor subsidies to parochial schools in the form of tax exemptions, which state and federal judges protected from the attacks of hostile school boards and some city and state governments. States also provided truancy officers (at public expense) to compel private school attendance. Public regulations made it easier, and more legitimate, for students to transfer to and from parochial schools, while new public standards raised their academic quality and, more importantly, their reputation in the eyes of Catholic parents. It was the very existence of these regulations that had enabled parochial schools to survive abolition in the 1920s.

In the middle decades of the twentieth century these public subsidies grew more visible. During the Great Depression Catholic schools in various cities received public money (including federal dollars) in order to avoid closing down and burdening public schools with more students.[2] Some states used tax dollars to provide free textbooks and transportation services for

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[1] Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (New York: Doubleday, 1956). The complexity of midcentury religious pluralism Catholic assimilation has been explored most recently in R. Scott Appleby and Kathleen Sprows Cumming ed., *Catholics in the American Century: Recasting Narratives of U.S. History* (Ithaca: Cornell University Press, 2012); Kevin M. Schultz, *Tri-Faith America: How Catholics and Jews Held Postwar American to Its Protestant Promise* (New York: Oxford University Press, 2011). The most widely read critique of postwar Catholicism and parochial schooling was Paul Blanshard's bestselling *American Freedom and Catholic Power* (Boston: Beacon Press, 1949).

[2] Reports of these arrangements are compiled in Folder 9: "Catholic District/Public Schools, 1923-1940," Box 7, Records of the United States Conference of Catholic Bishops Education Department, American Catholic History Research Center and University Archives, The Catholic University of America, Washington, D.C. See also Martin Poluse, "Archbishop Joseph Schremb's Battle to Obtain Public Assistance for the Parochial Schools of Cleveland during the Great Depression," *The Catholic Historical Review* 83, no. 3 (1997): 428-51; Ann Marie Ryan, "Keeping 'Every Catholic Child in a Catholic School' During the Great Depression, 1933-1939," *Catholic Education* 11, no. 2 (2007): 157-75. When President Lyndon Johnson lobbied for Catholic support for the Elementary and Secondary

children who attended private schools, practices which the Supreme Court generally upheld.[3] In the 1960s, finally, the National Catholic Welfare Conference and other private school advocates successfully lobbied Congress to allow federal education funds—significantly increased through the 1965 Elementary and Secondary Education Act—to flow to children attending parochial schools.[4] While courts and lawmakers justified these measures as benefiting American children, rather than private (religious) schools, their effects on private education specifically were substantial. Absent these public laws and responsibilities, Catholic private schools would have experienced far less dramatic growth, and in some states perhaps outright closure. Public regulation and the creation of an educational marketplace, with systematic alternatives to public schooling, were deeply interdependent.

This symbiosis of public regulation and private enterprise both reflected, as well as contributed to, the development of American political economy more generally. Law, regulation, and public investment had been used as tools to achieve private economic growth throughout the nineteenth century. Local regulations had established the very rules and structures for local outdoor marketplaces. States and the federal government lent their treasury money and lands to build canals and railroads. The Supreme Court facilitated interstate commerce—and, as a result, legalized large, interstate corporations—by proscribing states from passing laws that discriminated against outside firms. In the twentieth century, as the federal government

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Education Act in 1964 he informed one influential Catholic congressmen that as Texas's director of the National Youth Administration during the Depression he had diverted federal funds to Catholic institutions. Gareth Davies, *See Government Grow: Education Politics from Johnson to Reagan* (Lawrence: University of Kansas Press, 2007), 27.

[3] Poluse, "Archbishop Joseph Schremb's Battle to Obtain Public Assistance," 450; Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930); Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968).

[4] Diane Ravitch, *The Troubled Crusade: American Education, 1945-1980* (New York: Basic Books, 1983), 27-41, 148; Davies, *See Government Grow*, Chapter One.

responded to two world wars and economic depression, public economic planning and stimulus only deepened. American private enterprise did not emerge naturally, solely by dint of innovation and individual initiative. Like the marketplace of urban schooling, it was the product of law and public policy.[5]

Just as private schools benefited from public regulation, so too did they also contribute to the development of America's regulatory state. Tax codes and compulsory attendance laws extended into private affairs in unprecedented ways, bringing state inspectors into church schools and truant officers into homes. Supreme Court cases involving private schools also shaped the relationship between state legislatures and private enterprise. In *Dartmouth* and *Pierce* the Court defined the legal boundaries that constituted private enterprise's autonomy and prohibited states from penetrating those private rights. *Pierce* not only established new constitutional protections from government intervention, but also affirmatively recognized broad state police authority over private education. In the following decades, for example, judges relied on *Pierce* to uphold convictions of parents who had violated compulsory attendance by homeschooling their children.

State and local government officials also relied on mass attendance in private schools to govern more effectively. Public education was the most expensive, if not most important, service of state and local government.[6] Were it not for the "double taxation" faced by hundreds of

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[5] William J. Novak, "Common Regulation: Legal Origins of State Power in America," *Hastings Law Review* 45 (1993-1994): 1061-1097; Gary Gerstle, "The Resilient Power of the States Across the Long Nineteenth Century," in *The Unsustainable American State*, ed. Lawrence Jacobs and Desmond King (New York: Oxford University Press, 2009), 61–87; Daniel Carpenter, "Regulation," in *The Princeton Encyclopedia of Political History*, ed. Michael Kazin, Rebecca Edwards, and Adam Rothman (Princeton, N.J.: Princeton University Press, 2009), 2:665; Charles W. McCurdy, "The Knight Sugar Decision of 1895 and The Modernization of American Corporation Law, 1869–1903," *Business History Review* 53 (1979): 309-11; Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright, 2013).

[6] On the ways in which expanding the scope of education contributed to American political development see Tracy Steffes, *School, Society, and State: A New Education to Govern Modern America, 1890-1940* (Chicago: University of Chicago Press, 2012).

thousands of Catholic families, public education would have suffered even more from drastically overcrowded and underfinanced schools. Public officials understood this dynamic well. They often protested, or refrained from enforcing, laws that would result in thousands of students suddenly being shifted into public schools, and used fiscal policy to relieve demands on the public treasury. Property tax exemptions for parochial schools never met serious challenges after the 1870s in large part because private schools served this "hidden" public function. Better to deliver backdoor fiscal subsidies to private schools, legislators believed, then to see parochial schools close and their students enter public schools en masse. Public officials thus learned that they could expand education during the Progressive Era by governing through private schools.[7]

In the second half of the twentieth century, advocates of educational privatization and competition reemerged with a force not seen since the early nineteenth century. A growing number of scholars and lawmakers on the left and right even proposed dissolving "public education" (at least as it had been institutionalized since the nineteenth century) entirely and replacing it with voucher plans, whereby students would rely on public dollars to pay tuition in private schools. While these proposals envisioned a radically different structure of American education, they nevertheless relied on old methods. Drawing on the traditions forged in the late nineteenth and early twentieth century, voucher proponents continued to accept the role of public regulation in ensuring the quality and accessibility of market-based alternatives. In an age of deregulation, in other words, Americans continued to believe that mass education necessitated heavy public intervention, and calls for public accountability today remain as forceful as ever.

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[7] Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago: University of Chicago Press, 2011).

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Post-World War II proposals to transform education into a competitive, privately governed system derived from disparate sources. Beginning in the 1950s, legislators and intellectuals of various stripes began to call for radically alternative approaches to school governance, including educational vouchers, which would allow states to redirect tax dollars to private schools. The most far-reaching and immediately successful voucher legislation emanated from the American South in the 1950s and 1960s. There, state legislators, worried that court-ordered school desegregation would destroy their systems of public education altogether, circumvented judicial orders by providing tuition grants for students to attend all-white private schools, so-called "segregation academies." Officials in Prince Edward County, Virginia, for example, abolished the public system entirely, paving the way for a private system exclusively for whites.

Southern lawmakers recognized the close relationship between public policy and private education forged in the nineteenth and early twentieth century. In addition to revising their tax codes to allow parents to deduct the cost of private education from their property taxes, Southern states also attempted to protect private schools from court orders by repealing their compulsory attendance laws, untethering private education from the state.[8] These evasions ultimately ran aground when federal courts struck them down as explicit state attempts to recreate a segregated

[8] Walter Murphy, "Private Education with Public Funds?" Journal of Politics 20, no. 4 (November 1958): 636-37, 642; Jim Carl*, Freedom of Choice: Vouchers in American Education* (Santa Barbara, CA: Praeger, 2011), 52-54. Two recent books explore these events in Prince Edward County. See Julia Titus, *Brown's Battleground: Students, Segregationists, and the Struggle for Justice in Price Edward County, Virginia* (Chapel Hill: University of North Carolina Press, 2011); Christopher Bonastia, *Southern Stalemate: Five Years without Public Education in Prince Edward County, Virginia* (Chicago: University of Chicago Press, 2012); Michael W. Fuquay, "Civil Rights and the Private School Movement in Mississippi, 1964-1971," *History of Education Quarterly* 42, no. 2 (Summer 2002): 159-80.

educational system funded with public money, in clear violation of the ruling in *Brown v. Board of Education* (1954).[9]

Voucher proposals emanated from the North as well, albeit from distinct and varied motives. Catholics proposed tuition grants or tax credits that would pay for attendance in parochial schools, while neoliberal economists at the University of Chicago and elsewhere aimed to revolutionize public education with a voucher system that would increase parental choice and market discipline. By the mid-1960s several prominent liberal and New Left voices, discontented with the perceived failures of public school systems in inner cities, also promoted vouchers and greater educational competition as a means to achieve higher quality schools.[10]

Cold War pressures often underlay proposals by Catholic and neoliberal voucher advocates. Critics of public education systems compared state school systems with the centralized designs of their Communist foes. Virgil Blum, an ordained Catholic priest, anti-Communist, and professor at Marquette University in Milwaukee, was one of the most outspoken 1950s adherents of greater educational competition. Along with the free-market economists at Chicago, Blum helped disassociate voucher plans from Southern segregationists.[11] Born in Iowa in 1913 and educated in parochial schools, Blum had observed the anti-Catholic crusades of the 1920s with horror. Well into the 1950s he continued to think of Oregon's

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[9] These cases are discussed in Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970), 152-60.

[10] Jurgen Herbst, *School Choice and School Governance: A Historical Study of the United States and Germany* (New York: Palgrave Macmilan, 2006), 99-102; Jeffrey R. Henig, *Rethinking School Choice: Limits of the Market Metaphor* (Princeton, N.J.: Princeton University Press, 1994), 64-66; James Forman Jr., "Secret History of School Choice: How Progressives Got There First," *Georgetown Law Journal* 93 (2004-5): 1287-1320; David K. Cohen and Eleanor Farrar, "Power to the Parents?—The Story of Education Vouchers," *Public Interest* 48 (Summer 1977): 72-67.

[11] Carl, *Freedom of Choice*, 58.

compulsory public education law as recent history, and as an example of why Catholics needed to be eternally vigilant about protecting their rights.[12] Blum fashioned himself as a civil rights advocate for American Catholics, and framed his struggle as a fulfillment of American values on the world stage.

For Blum, states discriminated against Catholics by burdening them with the additional costs of sending their children to parochial schools. Thus, while he praised the *Pierce* decision for giving Catholic parents the choice to send their children to parochial school, he urged Catholics to recognize that they were never *free* to choose. Catholic parents with children in parochial schools faced the burden of being taxed for public schools they did not attend. They witnessed public school students riding on free buses, receiving free hot lunch meals, reading free textbooks, and receiving free medical attention.[13] In his 1958 book *Freedom of Choice in Education*, Blum proposed a voucher or federal tax credit for parents electing to send their children to private schools. His plan received a wide audience. The prominent Jewish theologian Will Herberg wrote a forward to his book, which received attention in national publications such as *U.S. News and World Report* as well as in Catholic journals. Blum sent pamphlets that condensed his arguments to powerful figures in American politics and religion, from congressmen in Washington to Catholic bishops throughout the country.[14] In 1959 he helped organize the Citizens for Educational Freedom, whose mission was to propagate educational

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[12] Virgil C. Blum, "Untitled Address," Subseries 3, Box 3, Folder: Untitled Address, 1955, Rev. Virgil C. Blum, S.J., Papers, Marquette Special Collections (hereafter cited as Blum Papers). On national battles over public aid to parochial schools in these years see Diane Ravitch, *The Troubled Crusade: American Education, 1945-1980* (New York: Basic Books, 1983), 27-42.

[13] Virgil C. Blum, "Freedom of Choice in Education," 3, Subseries 3, Box 3, Folder: Freedom of Choice in Education, Blum Papers.

[14] See the correspondence in Subseries 3, Boxes 10 and 11, Folders: Correspondence - Freedom of Choice in Education, Blum Papers.

vouchers. The same year that Blum died, in 1990, the Wisconsin legislature enacted the nation's first public voucher program, operated in Milwaukee—a symbolic, if not direct, tribute to Blum's advocacy.[15]

Blum's proposal drew on the work of University of Chicago economics professor Milton Friedman. In a 1955 essay entitled "The Role of Government in Education," Friedman suggested eliminating public education altogether, replacing it with a system where states gave students tax-funded vouchers that they would use to attend tuition schools. Blum cited Friedman's essay in his book, and in 1959 he received an invitation to participate in a seminar led by Friedman on free-market economics.[16] The rhetoric of market competition pervaded *Freedom of Choice in Education*. Blum talked about an "educational market place" in which private schools, given their financial disadvantages, could barely compete. He referenced the need for Catholics to "appeal to the competitive spirit of free enterprise" in the United States.[17] The increasingly close intellectual bonds between Blum and Friedman represented a new and abiding alliance between conservative Catholics and free-market economists, exemplified by the prominent Catholic William F. Buckley and his conservative publication, *National Review*—a venue Blum himself sought for his work.[18] It also highlighted the new and more secure foothold that Catholics and Jews had in American life in the decades after World War II.

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[15] Carl, *Freedom of Choice*, 88-122.

[16] See Subseries 6, Box 9, Folder: Wabash College Conference on Economics and Freedom, Blum Papers.

[17] Virgil C. Blum, *Freedom of Choice in Education* (New York: Macmillan Company, 1958), 18, 144.

[18] In 1956, Blum attempted to get an article entitled "Freedom in Education" published in *National Review*. See Virgil C. Blum to William F. Buckley, Jr., February 18, 1956, Subseries 3, Box 11, Folder: Correspondence to Bishops Miscellaneous Articles, 1952-1956, Blum Papers.

Friedman's voucher proposal broke with scholars' conventional wisdom, stable since the nineteenth century, that education was best provided by public authorities. He explicitly rejected late nineteenth-century "natural monopoly" arguments for public schooling as anachronistic, asserting that the rise of densely populated cities and urban transportation networks made educational diversity and competition more feasible. In a market economy, Friedman believed, vouchers reflected important liberal values. In addition, they would more effectively allocate educational opportunity. In education "as in other fields," he wrote, "competitive private enterprise is likely to be far more efficient in meeting consumer demands than either [state] enterprises or enterprises run to serve other purposes."[19]

Friedman's proposal recaptured the market ideas and metaphors of the early nineteenth-century classical economists. Like some of those economists Friedman believed that governments should intervene in financing the education of the poor and even compelling attendance. These measures were necessary because schooling was largely a public good given its "neighborhood effects," or positive externalities, whereby one child's education produced discrete *social* benefits, including a greater proportion of law-abiding, productive citizens. It was because of these neighborhood effects, Friedman noted, that governments could compel education as well as the taxation to pay for it.[20]

And yet Friedman's essay also represented a departure from classical economic theory. Unlike most nineteenth-century classical economists, Friedman did not propose limiting government interventions only to compulsory attendance and taxation. Rather, he suggested that

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[19] Milton Friedman, "The Role of Government in Education," in *Economics and the Public Interest*, ed. Robert A. Solo (New Brunswick, NJ: Rutgers University Press, 1955), 124, 129, 130, 132.

[20] Ibid., 124-26.

governments should regulate educational quality as well. In this regard, Freidman's essay did not propose an "unregulated" voucher system, as several of his interpreters later stressed.[21] For Friedman, states had to "require a minimum level of education" for all children. They would limit vouchers to those redeemed for "approved educational services." They would ensure that "schools met certain minimum standards such as the inclusion of a minimum content in their programs." Schools would arise to fulfill niche preferences, Friedman acknowledged, but he was confident that schools could instill a "common core of values" provided that they "satisfied specified minimum standards." Friedman's remarks more closely resembled the Progressive Era legislator than the classical economist.[22]

Indeed, Friedman's proposal was decidedly modern. While his plan arose as a response to public education's bureaucratic nature, he believed, ironically, that it was precisely America's administrative structures that made a voucher system feasible. Nineteenth-century cities and school districts, Friedman surmised, may have implemented voucher systems of their own had they possessed "an efficient administrative machinery to handle the distribution of vouchers and to check their use." The twentieth century had witnessed precisely the "development of such machinery," thanks to the "enormous extension of personal taxation and of social security programs." While Friedman did not spell out this machinery in detail, its effect in education was

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[21] Teachers College professor George R. La Noue organized a 1972 edited volume that collected various voucher proposals into sections on "The Unregulated Voucher" (featuring essays by Blum and Friedman) and the "Regulated Voucher." George R. La Noue, "Vouchers: The End of Public Education?" in *Educational Vouchers: Concepts and Controversies*, ed. George R. La Noue (New York: Teachers College Press, 1972), ix, 136-37. See also Henig, *Rethinking School Choice*, 65, 234 n. 21.

[22] Friedman, "The Role of Government in Education," 127-29. As Angus Burgin recently has pointed out, Friedman in the early 1950s was still in the process of becoming a free-market libertarian. In a 1951 essay, for example, Friedman had argued that government interventions such as welfare programs and the Sherman Antitrust Act were justified. See Angus Burgin, *The Great Persuasion: Reinventing Free Markets since the Depression* (Cambridge, MA: Harvard University Press, 2012), 170.

omnipresent, particularly in the vast attendance bureaus that could identify and track hundreds of thousands of urban students. For Friedman, voucher ideas had risen in tandem with these "modern developments in governmental administrative machinery that facilitate such arrangements." They owed their very existence to the public administrative agencies at the local, state, and federal level forged during the Progressive Era and New Deal.[23]

While Friedman's proposal was far from *laissez faire*, other voucher advocates in the 1950s and 1960s, particularly those on the political left, insisted on stricter governmental controls of private schools. Left-liberal support for vouchers emerged as public school systems appeared unable to stem the tide of urban segregation, poverty, and decay. Vouchers, they argued, could empower minority parents while diminishing the segregation produced by public school attendance zones and high property taxes. Not surprisingly, left-liberal voucher proposals stressed that vouchers could achieve egalitarian outcomes only through abundant public regulations.[24]

In the late 1960s, the Harvard education professor Christopher Jencks and other liberal education reformers drew up a voucher plan for the Center for the Study of Public Policy, with a grant from the United States Office of Economic Opportunity, which contained complex regulatory mechanisms. Their proposal stipulated how schools accepting vouchers admitted students, distributed vouchers, maintained educational quality, and informed consumers.[25] Similarly, in his influential treatise on school finance, published in 1970, John E. Coons, a

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[23] Friedman, "The Role of Government in Education," 132.

[24] Forman Jr., "Secret History of School Choice: How Progressives Got There First."

[25] Center for the Study of Public Policy, *A Report on Financing Elementary Education by Grants to Parents*, in *Education Vouchers: From Theory to Alum Rock*, ed. James A. Mecklenburger and Richard W. Hostrop, (Homewood, IL: ETC Publications, 1972), 151-221. For a concise summary of the proposal see Christopher Jencks, "Giving Parents Money for Schooling: Education Vouchers, *Phi Delta Kappan* 52, no. 1 (September 1970): 49-52.

product of Catholic parochial schools and a prominent University of California law professor, argued (alongside two coauthors) that a tightly regulated voucher system was the most efficient way to produce equal educational opportunities in the United States consistent with the principles of local control.[26] Other liberal and left voucher advocates, including Harvard Graduate School of Education Dean Theodore Sizer, offered additional ideas about how a carefully regulated voucher program could benefit the disadvantaged and prevent discrimination.[27]

These left-liberal intellectuals sought to distinguish their own voucher plans from Friedman's approach. In particular, they abhorred how Friedman had eschewed proposing regulations that would prevent vouchers from going toward segregated schools.[28] Jencks listed seven distinct education voucher plans currently in circulation, ranging from what he termed an "Unregulated Market Model," where he placed Friedman's proposal, to a "Regulated

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[26] Coons, and his coauthors William H. Clune III and Stephen D. Sugarman, grounded their ideas about vouchers and school finance equalization in the Roman Catholic principle of "subsidiarity," which they defined, quoting Pope Pius XI, as "it is wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community. It is also an injustice . . . to assign to a greater and higher association what a lesser and subordinate organization can do." John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private Wealth and Public Education* (Cambridge, MA: The Belknap Press of Harvard University Press, 1970), 14-15, 256-68. The book was widely read and cited by state court judges and legislatures in the 1970s tasked with creating new and more equitable school finance formulas. See Davies, *See Government Grow*, Chapter Eight. Later in the decade, Coons and Sugarman offered a more detailed account of how their plan would regulate school choice and vouchers. John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control* (Berkeley: University of California Press, 1978), Part IV. On Coons's support for Catholic education see John E. Coons, "Why the Catholic Inner City School Is Worth Saving," in *American Catholic Identity: Essays in an Age of* Change, ed. Francis J. Buther (Kansas City: Sheed & Ward), 178-84.

[27] Theodore R. Sizer, "The Case for a Free Market," in *Education Vouchers*, ed. Mecklenburger and Hostrop, 24-43.

[28] Friedman argued that private acts of persuasion, rather than public acts of compulsion, should guide delicate racial questions. See Friedman, "The Role of Government in Education," 131, n. 2. Jencks, responded that "a voucher system which does not include these or equally effective safeguards would be worse than no voucher system at all. Indeed, an unregulated voucher system could be the most serious setback for the education of disadvantaged children in the history of the United States." See Judith Green and Christopher Jencks, "Education Vouchers: A Proposal for Diversity and Choice," in *Educational Vouchers*, ed. La Noue, 54.

Compensatory Model," which closely resembled his own.[29] Jencks argued that proposals like Friedman's represented "an unregulated system [that] would have all the drawbacks of other unregulated markets," producing racial and economic segregation, and great income inequality. As a result, his plan detailed how poor children's vouchers "would have a somewhat higher redemption value" in order to encourage their attendance in socio-economically integrated schools.[30] Likewise, Coons argued that Friedman's proposal, ironically, was "not conservative enough" in truly guaranteeing "freedom of choice" because it did nothing to prevent wealthy parents from using their financial power to supplement vouchers with personal funds.[31] Partly in order to popularize their ideas among other liberals, voucher advocates like Jencks and Coons drew clear lines of demarcation between their proposals and Friedman's.

Nonetheless, the differences between Friedman on the one hand and Jencks and Coons on the other should not obscure their similarities. As Jencks himself admitted, all of these "diverse voucher schemes" were simply "different approaches to the regulation of the educational marketplace." And each proposal, from Friedman's to Coons's, acknowledged that governments could never extricate themselves entirely from the education business. When the economist Henry M. Levin surveyed different voucher proposals in 1968 he noted that, even including Friedman's, "it is important to point out that all of the advocates of the market approach view basic schooling as a public function" where—albeit to varying degrees—the political process must sort out issues of educational standards, accountability, and funding. While support for vouchers by the late 1970s had come to include some "strange bedfellows" across the political

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[29] Center for the Study of Public Policy, *A Report on Financing Elementary Education by Grants to Parents*, 164, 168-72.

[30] Jencks, "Giving Parents Money for Schooling," 50.

[31] Coons, Clune, and Sugarman, *Private Wealth*, 260-61.

and ideological spectrum, as the sociologist James Coleman observed in the late 1970s, intellectual commitments to public regulation remained .[32]

The origins of this consensus around regulated vouchers lay as much as in past as in the present. After all, in the previous century, cities and states had developed laws and mechanisms to supervise private school quality. While the voucher proposals of the 1960s and 1970s ambitiously sought to create an equitable and regulated system, their means were thus decidedly unoriginal. The Jencks plan established seven requirements for determining whether a school could be approved to accept vouchers. Three of the criteria had their origins in the late nineteenth-century laws that regulated parochial schools: to "agree to make a wide variety of information about its facilities, teachers, program, and students available … to the public," to "maintain accounts of money received and disbursed," and to "meet existing state requirements for *private* schools regarding curriculum, staffing, and the like."[33] The regulated educational marketplace envisioned by school reformers drew on a nearly century-old tradition of overseeing and approving private schools.

II

Early voucher proposals re-envisioned the political economy of American schooling just as demographic changes were already transforming American education. Urban public schools in the 1960s and 1970s struggled to educate effectively increasing numbers of poor and minority students. Parochial schools, meanwhile, were rapidly declining, even as they educated growing numbers of African American and Latino children whose parents sought an alternative to urban

[32] James S. Coleman, foreword to *Education by Choice*, xii.

[33] Judith Green and Christopher Jencks, "Education Vouchers: A Proposal for Diversity and Choice," in *Educational Vouchers*, ed. La Noue, 53. Emphasis in original.

public schools.[34] Altogether, nearly 2700 Catholic schools closed between 1970 and 1990, the result of diminishing demand amid suburban "white flight" and declining supply as expensive lay teachers replaced tens of thousand of low-cost nuns.[35]

These declines, coupled with perceptions of public school failure, produced more enthusiasm for supporting beleaguered Catholic schools in the 1970s and 1980s. In 1972, a panel convened by President Richard Nixon at the behest of Daniel Patrick Moynihan, his urban affairs assistant, recommended tuition tax credits for poor and minority students to attend urban Catholic schools.[36] A decade later, James Coleman produced a widely read study purporting to demonstrate the superior academic achievement produced by Catholic secondary schools, and relied on these findings to call for a "reorganization of the public sector."[37] School vouchers became a major tenet of President Ronald Reagan's education agenda, and since has become a steady component of Republican Party platforms.[38] Widespread voucher policies never caught fire locally, however. As a result, this renewed attention to Catholic education failed to prevent

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[34] Paula Fass, *Outside in: Minorities and the Transformation of American Education* (New York: Oxford University Press, 1993), 224-26.

[35] Andy Smarick, "Can Catholic Schools Be Saved," *National Affairs* (Spring 2011): 117-120. The percentage of the female religious in Catholic schools declined from around 90 percent in the 1950s to less than 5 percent by 2007. In roughly that same period the number of nuns fell from 180,000 in 1965 to 68,000. Peter Meyer, "Can Catholic Schools Be Saved," *Education Next* 7, no. 2 (Spring 2007): 14.

[36] Commission on School Finance, The President's Panel on Nonpublic Education, *Nonpublic Education and the Public Good* (Washington, D.C.: Government Printing Office, 1972), 56-57.

[37] James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* (New York: Basic Books, 1982); James S. Coleman, "Quality and Equality in American Education: Public and Catholic Schools," *Phi Delta Kappan* 63, no. 3 (November 1981): 164. An earlier study financed by the Carnegie Corporation and the United States Office of Education found wide-ranging social benefits. See Anrdew M. Greeley and Peter H. Rossie, *The Education of Catholic Americans* (Chicago: Aldine Publishing Company, 1966).

[38] Patrick J. McGuinn, *No Child Left Behind and the Transformation of Federal Education Policy, 1965-2005* (Lawrence: University Press of Kansas, 2006), 42-43; Henig, *Rethinking School Choice*, 71-72.

massive parochial school closures. Indeed, as charter schools entered American cities in large numbers in the 1990s and 2000s, Catholic schools have continued to hemorrhage students.

III

Much like urban areas in the 1870s and 1880s, American public schools today face new educational competitors in the form of charter schools and voucher programs. Catholic school advocates who once praised educational competition in the name of piety and ethnic solidarity have been replaced by reformers who want to give parents "school choice." In the second decade of the twenty-first century, these ideas have found many adherents. The *Wall Street Journal* deemed 2011 the "Year of School Choice," citing thirteen states which enacted legislation expanding charter schools and vouchers.[39] Charter schools, which receive public funding but are governed independently of traditional public school systems, enroll over two million students in the United States, a number that includes rising enrollments in virtual (online) schools. In several cities, the percentage of students enrolled in charter schools rivals, and even surpasses, the rate of Catholic school attendance a century ago.[40] Voucher plans spurred by Republican-led state houses are also on the rise.[41] As increasing numbers of students attend private and charter schools, conceptions of public and private in American education are once again shifting. But as more students seek to attend private schools, the more publically accountable those schools are likely to become.

If educational competition itself is not new to American cities, neither are its consequences. One of the major effects of increased educational competition now, as city

[39] "The Year of School Choice," *Wall Street Journal*, July 5, 2011.

[40] Motoko Rich, "Enrollment in Charter Schools Is Increasing," *New York Times*, November 14, 2012.

[41] "The Year of School Choice."

officials from a century ago understood, is massive school transfers and closures. Over 1000 traditional public schools closed in 2010-11, many due to student transfers to charter schools.[42] Citing low enrollments, school officials in Washington, D.C. and Philadelphia announced in 2012 that they had targeted dozens of public schools for closure in the coming years.[43] As families move and choices proliferate, and as new schools arise and others close, students move frequently between schools. A study by the Thomas B. Fordham Institute referred to these transfers as creating vast numbers of "student nomads." Over a two-year period in the Columbus, Ohio area, 20,345 students transferred between traditional public schools and charter schools.[44]

Transfers from parochial to free charter schools have been particularly devastating to Catholic enrollments.[45] Catholic schools today enroll under two million students, 3.2 million fewer than at their peak. Between 2000 and 2012 alone nearly 2000 Catholic schools closed their doors. In late 2012, charter schools surpassed Catholic schools in total enrollments.[46] "Where charter schools are expanding, Catholic schools are dying," the education scholar and blogger Diane Ravitch told the *New York Times* in 2010. For Ravitch, who had followed James

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[42] Stephanie Banchero, "Schools Ring Closing Bell," *Wall Street Journal*, December 2, 2012.

[43] Motoko Rich and Jon Hurdle, "Rational Decisions and Heartbreak on School Closings," *New York Times*, March 8, 2013

[44] Community Research Partners for the Thomas B. Fordham Institute, "Ohio Student Mobility Research Project: Columbus Area Profile" in *Student Nomads: Mobility in Ohio's Schools* (Columbus, OH, 2012), 6. http://www.edexcellencemedia.net/publications/2012/20121107-student-nomads-mobility-in-ohios-schools/OSMS_Columbus%20Area%20Profile%2011-7-12.pdf

[45] Richard Buddin, "The Impact of Charter Schools on Public and Private School Enrollments," *Cato Policy Analysis Series* no. 707 (August 28, 2012): 1-64; "Charter Schools Causing Collapse of Religious Schools," *CAPE Outlook*, no. 373 (March 2012): 3. See also Rajashri Chakrabarti and Joydeep Joy, "Do Charter Schools Crowd Out Private School Enrollment? Evidence from Michigan," *Federal Reserve Bank of New York Staff Reports*, no. 472 (September 2010): 1-31; Stephanie Ewert, "The Decline in Private School Enrollment," *U.S. Census Bureau SEHSD Working Paper*, no. FY12-117 (January 2013): 1-24.

[46] Sean Kennedy, "Chartering a Future for Catholic Education," *City Journal* (October 15, 2012), http://www.city-journal.org/2012/eon1015sk.html

Coleman's analysis of Catholic school benefits closely in the 1980s, the growth of charters at Catholic schools' expense was unfortunate: "the Catholic schools have a well-established record of being effective, and they're being replaced by schools that have no track record."[47] For the first time in a century-and-a-half, Catholic schools no longer represent the largest K-12 educational sector outside of traditional public schools.

IV

Defenders of public education lament the "creative destruction" of market competition, charter school advocates celebrate it.[48] Debates about school choice policies, however, generally ignore the close historical ties between public regulation and education markets. Advocates and critics debate the merits and detriments of charter schools and voucher programs as though they are institutions independent of government regulation. Yet, like the Catholic schools from a century ago, charter schools and voucher programs today are subject to a range of public regulations. State legislatures, together with the federal government, have the potential to exercise immense regulatory controls over charter school operators and their authorizers—the agencies that approve, supervise, and hold charter schools accountable. Seeing this potential, scholars have proposed detailed model charter legislation to use charter schools "to further goals of equal educational opportunity."[49] Researchers, meanwhile, have found a close relationship

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[47] Samuel G. Freedman, "Lessons from Catholic Schools for Public Educators," *New York Times*, April 30, 2010. See also Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* (New York: Basic Books, 2010), 221.

[48] See, for example, Ravitch, *The Death and Life of the Great American School System;* Andy Smarick, *The Urban School System of the Future: Applying the Principles and Lessons of Chartering* (Lanham, MD: Roman & Littlefield Education, 2012). For a nuanced take on why the market forces function weakly in public schools see Frederick M. Hess, *Revolution at the Margins: The Impact of Competition on Urban School Systems* (Washington, D.C.: Brookings Institution Press, 2002).

[49] Julie F. Mead and Preston C. Green III, "Chartering Equity: Using Charter School Legislation and Policy to Advance Equal Educational Opportunity" (Boulder, CO: National Education Policy Center, February, 2012), 1.

between charter school quality and the extent of state regulations.[50] So, too, have states. In 2002, auditors in Ohio explicitly linked the state's poor educational regulations with the poor academic quality of its charter schools. The state legislature responded by significantly revamping who could supervise Ohio charter schools and limited the extent to which poorly performing charter management organizations could open new schools.[51]

Much as Catholic school advocates recognized the benefits that would arise with higher standards and state approval, so certain charter school promoters today are some of the most vocal proponents of tighter regulations for their sector. Many school choice defenders acknowledge that charter quality varies considerably across states and that public accountability measures are essential to charter school growth.[52] In 2012, the National Association of Charter School Authorizers [NACSA] launched a campaign "urging state legislatures to adopt new laws that hold both [charter] schools and authorizers accountable for their performance."[53] The organization called for states to enact laws setting high standards for academic performance and clear consequences for charter schools that fail to meet those standards. By at least one

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http://nepc.colorado.edu/files/PB-CharterEquity_0.pdf. See also Suzanne E. Eckes, "Charter School Legislation and the Potential to Influence Student Body Diversity," in *The Charter School Experiment: Expectations, Evidence, and Implications*, ed. Christopher A. Lubienski and Peter C. Weitzel (Cambridge, MA: Harvard Education Press, 2010), 51-72.

[50] Sara Mead and Andrew J. Rotherham, "A Sum Greater than the Parts: What States Can Teach Each Other about Charter Schooling (Washington, D.C.: Education Sector, 2007). http://www.educationsector.org/sites/default/files/publications/CharterSchoolSummary.pdf

[51] The Thomas B. Fordman Institute et. al., "Turning the Corner to Quality: Policy Guidelines for Strengthening Ohio's Charter Schools" (October 2006), 9-10. http://www.publiccharters.org/data/files/Publication_docs/file_OhioChartersFINALforprint_20110402T222336.pdf

[52] Paul T. Hill, Robin J. Lake, and Mary Beth Celio, *Charter Schools and Accountability in Public Education* (Washington, D.C.: Brookings Institution Press, 2002).

[53] National Association of Charter School Authorizers, "A Call for Quality: National Charter School Authorizers Group Says More Failing Schools Must Close for Reform to Fully Succeed," November 28, 2012. http://www.qualitycharters.org/images/stories/Final_OML_Press_Materials11.28.12.15.pdf

measure—the percentage of charter schools closed due to poor quality—states have begun exercising greater accountability measures. According to NACSA, charter authorizers refused to renew the contracts of twice as many charter schools in 2012 as they had two years earlier.[54]

Regulations of voucher programs have been more lax. A 2012 review by the *Washington Post* found that hundreds of students taking advantage of the federally sponsored voucher programs in Washington, D.C. attended unaccredited and substandard schools. Federal law did not require private schools accepting vouchers in the city to report test scores. Unlike D.C.'s charter schools—and the city's traditional public schools—private schools accepting vouchers could not be shut down for poor student performance. The *Post* discovered a family-run school operating out of a storefront, a Nation of Islam school housed in a converted residence, and a school espousing a pedagogical philosophy conceived by an obscure Bulgarian psychotherapist.[55] These schools, like the hundreds of other small private schools accepting vouchers in Indiana, Louisiana, and Wisconsin, might very well feature an engaged student body, high test scores, and low dropout rates. Absent any system of public oversight and approval, however, they will likely find it difficult to attract a continued flow of new students. Surveys have shown overwhelming popular support for regulating voucher schools.[56]

Reformers might succeed in privatizing much of the provision of education, but even if they fail, American definitions of public and private in education are sure to change in the future, as they have in the past. Certain continuities are likely to persist as well. As Catholic school

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[54] Sean Cavanagh, "A New Campaign to Close Sub-Par Charter Schools," *Education Week*, November 28, 2012, http://blogs.edweek.org/edweek/charterschoice/2012/11/a_new_campaign_to_close_sub-par_charter_schools.html

[55] Lindsey Layton and Emma Brown, "Quality Controls Lacking for D.C. Schools Accepting Federal Vouchers," *Washington Post*, November 17, 2012.

[56] See the discussion in Terry M. Moe, *Schools, Vouchers, and the American Public* (Washington, D.C.: Brookings Institution Press, 2001), 293-343.

authorities noted in the nineteenth century, and Milton Friedman admitted in the twentieth century, Americans view their schools as fundamentally public goods. Schooling in the twenty-first century United States will likely continue to reflect the designs of school boards, legislatures, and departments of education. Educational change is inexorable, but the shape it takes is not. If history is any guide, Americans will continue to desire a strong public presence in their schools, and the future of American education will likely be structured as much by public policies and court rulings as by competition and the next round of educational innovations.

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