Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12274

MIDDLESEX COUNTY

GEORGE CAPLAN, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

TOWN OF ACTON,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

AMICUS BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEE THE TOWN OF ACTON

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INTEREST OF THE AMICUS

The Becket Fund for Religious Liberty is a non-profit, public interest legal and educational institute that protects the free expression of all faiths. Becket has represented agnostics, Buddhists, Christian, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Becket believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

In accordance with this belief, Becket has long worked to prevent abuse of the law to discourage or eliminate the religious elements of American history and culture. For example, Becket has appeared before this Court to successfully defend the voluntary recitation of the Pledge of Allegiance in Acton schools. *See Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 468 Mass. 64 (2014) (counsel for interveners). Becket has also appeared, as counsel or amicus, in cases involving the constitutionality of a multi-faith religious display, *ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92 (3d Cir. 1999); and the exhibition of the "Ground Zero Cross" in the National September 11 Museum, *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d

227 (2d Cir. 2014). And recently, Becket filed an amicus brief with the New Jersey Supreme Court in a case that, like this case, presents the question whether the government may help to preserve qualifying religious buildings under a religion-neutral state historic preservation program. *See* Br. of the Becket Fund for Religious Liberty as *Amicus Curiae* in Supp. of Pet'rs-Appellants, *Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders*, No. A-71-16 (079277) (N.J. 2017), http://tinyurl.com/MorrisCnty.

In this case, Becket's concern is that adoption of the plaintiffs' theory would result in a culturally impoverished Commonwealth: one where the government is legally required to allow its historically important religious buildings--be it Old North Church or the Vilna Shul--to decay. But history scrubbed of religion is, put simply, bad history. And bad history is good for no one, religious or not.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Free Exercise Clause of the First Amendment to the U.S. Constitution prohibits states in all but the rarest of cases from conditioning public benefits on the religious status of the recipient. Should the Massachusetts Constitution's "Anti-Aid Amendment,"

Mass. Const. amend. art. XVIII, § 2, be interpreted--in accordance with its text--to be consistent with this prohibition?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus adopts the Statement of the Case and Statement of the Facts as presented in the brief of the Appellee Town of Acton.

SUMMARY OF THE ARGUMENT

Time takes its toll on all things--including the Commonwealth's historic places of worship. Accounting for this melancholy truth, Massachusetts municipalities have for decades made historic preservation funds allocated to them under the Community Preservation Act, G.L. c. 44B, §§ 1–17, available to buildings both religious and secular, provided the buildings meet the generally applicable criteria of being "significant in the history, archeology, architecture or culture of [the] city or town." *Id.*, § 2. Through this practice, CPA funds have helped preserve for future generations a diverse array of buildings representative of the Commonwealth's heritage, from the birthplace of Abigail

Adams[1] to the childhood church of Emily Dickinson[2]; from a Dartmouth farmhouse owned by Jewish immigrants fleeing from the 20th-century Russian pogroms[3] to a Cambridge synagogue at which other Jewish immigrants from Eastern Europe and Russia worshiped[4]; and from lighthouses[5] to Quaker meeting houses.[6]

This lawsuit endangers the CPA's preservationist mission by attempting to single out one class of building--places of worship--as categorically ineligible to receive CPA funds, however significant they are to the history of Massachusetts or one of its towns. Plaintiffs challenge three grants made by the

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[1] *Abigail Adams House*, CPA Projects Database, http://tinyurl.com/Abigail-Adams-House.

[2] *First Congregational Church – Automatic Fire Sprinkler System*, CPA Projects Database, http://tinyurl.com/FCC-Sprinklers; *see also History*, First Church Amherst, http://tinyurl.com/Amherst-Church.

[3] *Helfand Farmhouse*, CPA Projects Database, http://tinyurl.com/Helfland-Farmhouse; *see also* Robert E. Harding et al., *The Helfand Farm: Two Centuries of Hard Working Families*, Dartmouth Natural Resources Trust, http://tinyurl.com/Helfland-History.

[4] *Temple Beth Shalom*, CPA Projects Database, http://tinyurl.com/Beth-Shalom-Proj; *see also A Century of Shalom – History*, Temple Beth Shalom of Cambridge, http://tinyurl.com/Shalom100.

[5] *E.g.*, *Gay Head Lighthouse*, CPA Projects Database, http://tinyurl.com/Gay-Head-Proj.

[6] *E.g.*, *Preservation, Restoration and Rehabilitation to Quaker Meeting House*, CPA Projects Database, http://tinyurl.com/Quaker-Proj.

Town of Acton (the "Town") to two churches (the "Churches") to reimburse the Churches for repairs made to their structurally unstable exteriors. Plaintiffs do not dispute the Town's determination that the Churches' buildings are historically significant under CPA criteria. Instead, they assert that the grants violate the Massachusetts Constitution's "Anti-Aid Amendment," Mass. Const. amend. art. XVIII, § 2, for the sole reason that the recipients are places of worship.

This discriminatory reading of the Anti-Aid Amendment is wrong, as a matter of text, constitutional constraints, and precedent. The Amendment limits distributions of "public money" to both "church[es]" and other nonpublic "institution[s]" using precisely the same language: it provides that "[n]o grant, appropriation or use of public money or property" can be made "for the purpose of founding, maintaining or aiding" either of them.[7] In *Helmes v. Commonwealth*, this

[7] There are certain exceptions to the general rule. *See* Mass. Const. amend. art. XVIII, §§ 2–3 (exempting certain specific nonpublic institutions, including "the Soldiers' Home in Massachusetts" and "institutions for the deaf, dumb or blind"). Since Plaintiffs openly advocate exclusion of religious people, those exceptions are not relevant to this appeal. But they undermine the neutrality and general applicability of the Anti-Aid Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993).

Court explained that government aid complies with these limitations so long as it is awarded for a public purpose, is proportionate to that purpose, and does not result from abuse of the political system. 406 Mass. 873, 876–78 (1990). According to Plaintiffs, the *Helmes* test applies only to grants provided to *secular* private institutions, while grants to religious institutions are categorically forbidden. But as the Town rightly argues, that argument defies both this Court's previous interpretations of the Amendment, *see Commonwealth v. Sch. Comm. of Springfield*, 382 Mass. 665, 674–75 & n.14 (1981), and the common sense rule that words and phrases appearing in related sections of a constitutional amendment should generally be given "the same meaning," *Raymer v. Trefry*, 239 Mass. 410, 412 (1921); Brief of Defendants-Appellees ("Town's Br.") at 20–21. It should be rejected for these reasons alone.

But the Court should interpret the Amendment to require equal treatment for churches[8] and other private institutions for another reason: because to require one standard (the *Helmes* test) for secular nonpublic institutions and another (no grants whatsoever) for

[8] Following IRS practice, Amicus uses the term "church" to mean houses of worship of all religious traditions.

churches would constitute discrimination based on religious status, violating the Free Exercise Clause of the federal Constitution. As the United States Supreme Court recently explained, excluding an otherwise eligible religious organization from a public-benefits program solely because of its religious status "is odious to our Constitution . . . and cannot stand." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). Yet to adopt a rule like the one Plaintiffs seek here--under which historic preservation funds are available for privately-owned *secular* buildings but not churches--would be to endorse the very religion-based exclusion from public benefits that the Constitution forbids. *See infra* Parts I-II.

Finally, Plaintiffs and their amicus present a misleading version of the Amendment's history—-one that ignores the important role nativism and religious bigotry played in its passage. These omissions are corrected *infra* Part III.

This Court is not the only state high court currently considering the wrongheaded claim that religious buildings are uniquely disabled from receiving religion-neutral historic preservation funds. *See Freedom From Religion Found. v. Morris Cty. Bd. of Chosen*

Freeholders, No. A-71-16 (079277) (N.J. certification granted June 2, 2017). Thus it is all the more important that the Court recognize what both the Anti-Aid Amendment and *Trinity Lutheran* require: when it comes to the Community Preservation Act, churches are "member[s] of the community too." *Trinity Lutheran*, 137 S. Ct. at 2022.

ARGUMENT

I. Interpreting the Anti-Aid Amendment neutrally with respect to religion avoids violating the First Amendment.

The "anti-aid amendment 'marks no difference between "aids," whether religious or secular.'" *Springfield*, 382 Mass. at 674 n.14 (quoting *Bloom v. Sch. Comm. of Springfield*, 376 Mass. 35, 45 (1978)). But even if the Amendment were ambiguous on this point, this Court would be constrained to interpret it not to discriminate against religion to "avoid[the] doubts about its constitutionality" that Plaintiffs' argument would trigger. *O'Malley v. Public Improvement Comm'n of Boston*, 342 Mass. 624, 628 (1961); *see also, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1971) ("[T]he state constitution must give way to requirements of the

Supremacy Clause when there is a conflict with the Federal Constitution.").

A. Excluding houses of worship from public benefit programs simply because they are religious violates the Free Exercise Clause under *Trinity Lutheran*.

"The fundamental requirement" of the First Amendment "is that the government must treat religious and nonreligious groups equally." *Taunton E. Little League v. City of Taunton*, 389 Mass. 719, 726 (1983). In *Trinity Lutheran*, the United States Supreme Court made clear that because of this neutrality requirement, a church must be allowed "to compete on an equal footing" for public benefits, and cannot be disqualified "solely because it is a church." 137 S. Ct. at 2022 (internal quotation marks omitted).

In *Trinity Lutheran*, a Missouri agency offered reimbursement grants to public and private schools, nonprofit daycares, and other nonprofit entities that resurfaced their playgrounds using recycled shredded tires. *Id.* at 2017. But Missouri interpreted its constitution to require it to "categorically disqualify[]" churches and other religious organizations from its public-benefits program. *Id.* Thus, even though Trinity Lutheran would otherwise have received funding

for its daycare's playground, its application was rejected solely because it is a church. *Id.* at 2018.

The Supreme Court held that denying Trinity Lutheran "a grant simply because of" its status as "a church" violated the Free Exercise Clause. *Id.* at 2023. Missouri's interpretation of its constitution, the Court explained, "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. Such discrimination "imposes a penalty on the free exercise of religion that" is unconstitutional unless it survives "the most exacting scrutiny." *Id.*

The Court rejected the government's argument that there was no serious burden on the free exercise of religion where the state merely denied a subsidy that it "had no obligation to provide in the first place." *Id.* at 2022–23. As the Court explained, what was unconstitutional about the government's action was "not the denial of [the] grant" but instead "the refusal to allow the Church--solely because it is a church--to compete with secular organizations for a grant." *Id.* at 2022. In other words, a church's eligibility for a public benefit must be evaluated "on an equal footing" with secular institutions. *Id.* A different rule would

impermissibly put churches "to the choice between being a church and receiving a government benefit": "to pursue the one, [they] would have to give up the other." *Id.* at 2020, 2024.

Plaintiffs' interpretation of the Anti-Aid Amendment would impose just the sort of "special disabilit[y] on the basis of . . . religious status" that the Supreme Court rejected in *Trinity Lutheran*. *Id.* at 2021. The Town has made CPA funds available to those who meet certain criteria--namely owning a building that is "of historical architectural, archeological, and cultural significance" to the Town. JA176–77. Yet according to Plaintiffs' view of the Anti-Aid Amendment, the Town must withhold those funds from any *church* that meets these criteria, *solely because it is a church*. This status-based religious discrimination, like that at issue in *Trinity Lutheran*, would "penalize[] . . . free exercise" by requiring churches and other houses of worship to either give up being churches or else forfeit the right to compete for CPA funds. *Trinity Lutheran*, 137 S. Ct. at 2020, 2024.

And indeed, although Plaintiffs now attempt to deny that their interpretation of the Amendment would discriminate against churches as such, *see* Appellants'

Memorandum of Law ("Pls.' Supp.") at 3-4, they freely acknowledged that fact before *Trinity Lutheran* was decided. In their trial-court briefing, for example, Plaintiffs clarified that they are not "asking the Court to hold that a historic church building that is no longer used for religious activities cannot be restored with public funds"; they sought only to exclude church buildings *currently* used for worship. JA1003; *see also* Appellants' Reply Br. at 5 ("same public aid that is prohibited to a church might be permitted to a non-religious entity"); JA1306 (similar representations at preliminary-injunction hearing below). So for Plaintiffs, if tomorrow the Churches were to "renounce [their] religious character," *Trinity Lutheran*, 137 S. Ct. at 2024, CPA funding would become permissible. A rule that puts potential benefits recipients to this kind of "choice between being a church and receiving a government benefit" is by definition a rule that discriminates on the basis of religious status under *Trinity Lutheran*. *Id.* at 2020–24.[9]

[9] Plaintiffs' position that the Churches could become eligible for CPA funds if they simply stopped being churches is not entirely hypothetical. The Town has twice made CPA grants--with which Plaintiffs have not taken issue--to church buildings no longer owned by

Plaintiffs' reading of the Amendment would thus violate the federal constitution unless it can survive "the most exacting scrutiny." *Id.* at 2021. It cannot. The only government interest Plaintiffs and their amicus offer in support of their discriminatory reading of the Amendment is a "policy preference for skating as far as possible from religious establishment concerns." *Id.* at 2024; *see* Brief of Amici Curiae ACLU and ACLU of Massachusetts ("ACLU Br.") at 4, 11-15 (Amendment designed to "ensure a greater separation between church and state" than was achieved by the disestablishment of the Commonwealth's state church); Pls.' Br. at 14-19. But as the Court held in *Trinity Lutheran*, a state takes such anti-establishment interests "too far" if it "pursue[s them] to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character." 137 S. Ct. at 2024.

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active churches. *See* JA184-85. One of those grants was to a building that today looks just as much like a church as it did when it was one. That ought to have invoked Plaintiffs' ostensible concerns about the expressive nature of a church building, Appellants' Brief ("Pls.' Br.") 24, except that this case is solely about discriminating against churches. *See* JA702–26 (photos of community theater, formerly West Acton Universalist Church); JA184-85 (Acton Women's Club meets in "Chapel" formerly used by one of the Churches).

Trinity Lutheran is based on a simple premise: that churches don't have to stop being churches to be eligible for benefits on the same terms as other citizens. They therefore are not required to "resign[] themselves to the role of museums" to be "eligible for . . . preservation grants." *Auth. of the Dept. of the Interior to Provide Hist. Pres. Grants to Hist. Religious Props. Such as the Old North Church*, 27 Op. O.L.C. 91, 96–99, 117 (2003) ("Old North Church Op.") (Addendum ("Ad.") 7-10, 28) (approving the constitutionality of federal historic-preservation grants to Old North Church in Boston, a still-"active house[ ] of worship"). Because Plaintiffs' interpretation of the Anti-Aid Amendment would require them to do just that to become eligible for CPA funding, that interpretation would violate the Free Exercise Clause.[10]

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[10] Plaintiffs attempt to argue that *Trinity Lutheran* is limited by a footnote joined by only four Justices that is therefore not a part of the Court's holding. *See* Pls.' Supp. at 3–4. But footnote 3 says no more than what's true about *every* judicial decision: A court decides the case in front of it, and reason dictates the reach of *stare decisis* in future cases. To read *Trinity Lutheran* as applying only to playground-resurfacing cases would run counter to the bedrock principle that it is not just a Supreme Court opinion's narrow result but also its "explications of the governing rules of law" that binds later courts. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy,

B. Plaintiffs' attempts to distinguish *Trinity Lutheran* fail.

In their supplemental briefing, Plaintiffs attempt to distinguish *Trinity Lutheran*, asserting that their discriminatory reading of the Amendment is permissible under the Supreme Court's earlier decision in *Locke v. Davey* and that *Trinity Lutheran* does not apply here because the grants at issue violate the federal Establishment Clause. Pls.' Supp. at 4-8. These arguments fail. *Locke* is inapposite because (1) as *Trinity Lutheran* makes clear, *Locke* can never be used to justify discrimination on the basis of religious *status*; and (2) in any event, the grants at issue here do not implicate the sort of historical antiestablishment interests invoked in *Locke*. Further, the grants do not violate the federal Establishment Clause.

1. *Locke* is irrelevant in cases of discrimination based on religious status.

Locke is simply irrelevant in cases in which the state—as Plaintiffs would have Massachusetts do here—attempts to discriminate against potential benefit recipients on the basis of their religious status.

J., concurring in judgment in part and dissenting in part).

In *Locke v. Davey*, the Supreme Court upheld against Free Exercise challenge a state's decision not to fund the plaintiff's degree in devotional theology, even though it funded degrees in other programs like history and biology. 540 U.S. 712, 719-20 (2004). Critically, however, the state did not deny funding to the plaintiff because of his religious *status*—*i.e.*, because he himself was religious. *Id.* at 720-21. Instead it denied funding to him because of his planned, "essentially religious" *use* of the funds--training to become a minister--which, the Court stated, implicated the historic "antiestablishment interest[]" in the state not paying for clergy training. *Id.* at 721-22.

Under *Trinity Lutheran*, this status/use distinction is the key to determining whether *Locke* is relevant at all. In *Trinity Lutheran*, the state "rel[ied] on *Locke*," emphasizing its "constitutional tradition of not furnishing taxpayer money directly to churches." 137 S. Ct. at 2023. But the Court refused to apply *Locke*. Under *Locke*, the Court explained, traditional antiestablishment interests are relevant "*only after*" it is "determin[ed]" that the state is not attempting to discriminate on the basis of religious status—*i.e.*, that it is not requiring a potential benefits recipient

"to choose between their religious beliefs and receiving a government benefit." *Id.* (emphasis added, internal quotation marks omitted). If instead the state's benefit program *does* discriminate on the basis of religious status--—*i.e.*, it does require applicants to choose between religiosity and their eligibility—-then *Locke* is irrelevant, and the program is unconstitutional under the Free Exercise Clause. *Id.* at 2023-24.

Plaintiffs' proposed interpretation of the Amendment is governed by *Trinity Lutheran*, not *Locke*. Like the policy struck down in *Trinity Lutheran*, Plaintiffs' proposed "rule is simple: No churches need apply" for historic preservation funds. *Id.* at 2024. That is status-based discrimination, and it cannot be justified by *Locke*.

2. In any event, there is no historic antiestablishment interest in excluding churches from historic-preservation programs.

Even if *Locke* were relevant to this case, Plaintiffs' attempted analogy to it would fail. *Locke* turned on the states' unique, historical antiestablishment interest against government funding for clergy training, which at the founding era was a "hallmark[] of an 'established' religion." 540 U.S. at 722-723. But there is no comparable antiestablishment interest in excluding

churches from generally available historic preservation funds. To the contrary, governments have "an obvious and powerful interest in preserving all sites of historic significance . . ., without regard to their religious or secular character." Old North Church Op. at 102 (Ad.13).

Massachusetts has long recognized as much: Massachusetts municipalities have approved more than 300 CPA projects involving religious institutions. Town's Br. at 12. Through the Massachusetts Historical Commission, the state government, too, has awarded preservation funds to active religious institutions, approving 38 such grants to houses of worship like Vilna Shul in Beacon Hill, Trinity Church in Boston, and St. George Greek Orthodox Cathedral in Springfield. *Id.*

Likewise, the federal government has for over a decade made historic preservation funds available to religious institutions as well as secular ones, in accordance with Congress's express statutory command. *See* Christen Sproule, *Federal Funding for the Preservation of Religious Historic Places: Old North Church and the New Establishment Clause*, 3 Geo. J. L. & Pub. Pol'y 151 (2005). In addition to Old North Church, federal funds have helped preserve, among other buildings, Washington, D.C.'s Mount Bethel Baptist Church, a key Civil Rights

Movement site; and Newport, Rhode Island's Touro Synagogue, the country's oldest synagogue. Sproule, *supra*, at 154–57. These buildings remain active houses of worship, but incur heightened upkeep costs because of their added roles as tourist sites and community centers. *Id.* at 154–157. Without public support, then, Americans wishing to learn about them could be restricted to the history books. *Id.* at 158 ("20% of all historic houses of worship are expected to suffer partial collapse or worse in the next five years").

Nor have most other states attempted to vindicate antiestablishment principles by discriminating against houses of worship. Even before *Trinity Lutheran*, "[m]any, and perhaps most, of the states that offer[ed] their own historic preservation grants" did so on "neutralist" terms, offering them to both religious and secular institutions. Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. Rev. 1139, 1167–71 (2002). No doubt these other "neutralist" states are just as opposed to established religion as is Massachusetts. Indeed, many of their constitutions feature an amendment analogous to the

Anti-Aid Amendment. *Trinity Lutheran*, 137 S. Ct. at 2037 n.10 (Sotomayor, J., dissenting) (collecting citations).

Finally, even jurisdictions with far more radically separationist approaches to church–state issues recognize the secular benefits of preserving historical places of worship. France, for example, interprets church–state separation so rigidly as to bar public-school students from voluntarily wearing religious symbols to class. *See* T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. Rev. 419, 420 n.2, 452–66 (2004). Yet in France, "the state pays for repairs and restoration of the churches, either in conjunction with or independent of contributions made by religious groups, tourists, and others." T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation, and State Intervention*, 57 Drake L. Rev. 949, 956 (2009). To affirm the trial court here would no more run the risk of establishing the Acton Congregational Church than France's using public money to help keep Notre-Dame and Chartres standing risks a reversion to the *ancien régime*.[11]

[11] Nor does France's former colony see a conflict between

To accept Plaintiffs' conception of what anti-establishment interests require would call into question all these programs—and indeed would suggest that governments are required to sit idly by while many of civilization's greatest artistic and cultural achievements, from St. Paul's in London to the Pantheon in Rome, submit to the ravages of time. But there is no need to adopt a policy of iconoclasm by neglect. Antiestablishment interests do not require such an absurd result--and in this country, the Free Exercise Clause forbids it. *Trinity Lutheran*, 137 S. Ct. at 2024.

Plaintiffs' sole example of a founding-era precedent supporting the disqualification of church buildings from state funding—the James Madison-led "public backlash" resulting from the introduction of Virginia's bill "Establishing A Provision for Teachers of the Christian

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secularism and preservation. Just last year, the Canadian and Quebecois governments awarded Montreal's St. Joseph's Oratory--a Catholic Church-owned building, active church, and pilgrimage site--more than $60 million in government funding. When "[a]sked why governments are contributing millions to a property governed by the Catholic Church," Montreal's mayor "was terse[:] 'Because it's a heritage property, for God's sake. . . . It's an investment, not an expense.'" René Bruemmer, *St. Joseph's Oratory Getting $80 Million for Upgrades*, Montreal Gazette, June 6, 2016, http://tinyurl.com/StJosephsOratory.

Religion"—is woefully wide of the mark. *See* Pls.' Supp. at 8-9. That bill would have imposed a general assessment on Virginia taxpayers to fund religion--and religion alone. In other words, the bill would not have funded churches merely because they "fell within the neutrally drawn boundaries of some larger category"; it would have "singled [them] out for special support." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 49 (1997). Thus, invoking the public opposition to the Virginia bill as evidence of founding-era opposition to programs like the CPA--which helps to preserve all kinds of buildings, secular and religious, so long as they "f[all] within the neutrally drawn boundaries" of being historically, archeologically, architecturally, or culturally significant--"gives historical analogy a bad name." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 297 (6th Cir. 2009) (rejecting analogy to Virginia general-assessment bill in the historic-preservation context).

C. The grants at issue here do not violate the federal Establishment Clause.

This same history disposes of Plaintiffs' new argument that the federal Establishment Clause prohibits the

grants at issue here. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 ("[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.") (quotation marks and citation omitted). And any doubt on the matter was settled by *Trinity Lutheran*. Far from holding that the First Amendment prohibits a house of worship from participating on equal terms in a public benefit program, the court held that the First Amendment *requires* it. And the Court reached this conclusion even though Trinity Lutheran Church used the playground "in conjunction with its religious mission." *Trinity Lutheran*, 137 S. Ct. at 2027-28 (Sotomayor, J., dissenting).

Plaintiffs' recently-minted Establishment Clause arguments--never asserted in their complaint or elsewhere below, *see* JA20-21, 79-100--simply echo what *Trinity Lutheran* already rejected. *Compare* Pls.' Supp. at 4-6 (relying on *Nyquist*, *Tilton*, and *Mitchell*); *with Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting) (same); *see also Am. Atheists*, 567 F.3d at 291-300 (analyzing *Nyquist*, *Tilton*, and *Mitchell* and concluding that historic preservation grants to active houses of worship do not violate Establishment Clause);

Old North Church Op. at 113-17 (Ad.24-28) (same). Indeed, the Supreme Court has rejected Plaintiffs' Establishment Clause arguments more than once. Counsel for Plaintiffs, who represented the plaintiffs in *Town of Greece*, offered a variation on the same arguments in *Town of Greece*; they were rejected by both the majority *and* the principal dissent. *Town of Greece*, 134 S. Ct. at 1818-20; *id.* at 1841-42 (Kagan, J., dissenting).

II. The *Helmes* test must itself be applied neutrally with respect to religion.

Plaintiffs argue that even if the Court applies the *Helmes* test, the grants still are improper because any "aid to sectarian institutions" fails the *Helmes* criteria. Pls.' Br. at 26. Although Plaintiffs phrase this as an alternative argument, *id.* at 21, Plaintiffs' view of how the *Helmes* test applies to churches is functionally identical to the flat prohibition on funding for churches advanced as their primary argument. *See, e.g.*, Pls.' Br. at 25-26 (arguing, under *Helmes* criterion two, that *any* grants for preserving a church building are impermissibly "substantial")[12]; 29

[12] Alternatively, this portion of Plaintiffs' brief could be read to assert that any aid to a church's *interior* is per-se "substantial." *See* Pls.' Br. at 25-26. But that would be an odd argument here, since as the Town

(arguing, under *Helmes* criterion three, that *any* grants to churches constitute the type of "aid" the Amendment was adopted to eliminate).

But Plaintiffs cannot smuggle their discriminatory interpretation of the Amendment in through the back door. Applying *Helmes* to forbid any grants to churches just because they are churches would invite exactly the same constitutional difficulty as would adopting Plaintiffs' faulty interpretation of the Amendment

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explains, the grants challenged in this case were exclusively for exterior repair. Town's Br. at 34–36.

A similarly misguided application of this interior/exterior distinction appears in the ACLU's brief, which argues that because under this Court's *Society of Jesus* decision, church *interiors* are immune from landmark designation, the government may not help fund their preservation. *See* ACLU Br. at 15–16. But in an earlier opinion expressly reaffirmed in *Society of Jesus*, this Court held that church *exteriors* could be designated as landmarks. *Opinion of the Justices*, 333 Mass. 783, 784–85 (1955). Thus, even if the ability to award preservation funds were coextensive with the authority to apply landmark designations--which this Court has never held--that argument would cut in favor of the Town, not Plaintiffs. *See Am. Atheists*, 567 F.3d at 300 ("If the . . . government may regulate the exterior of . . . churches due to their historical significance . . ., [it] ought to be able to help fix up their exteriors through generally applicable, neutral aid programs."); *see also* Lupu & Tuttle, *supra*, at 1174 ("Because the state has constitutionally sufficient reasons to regulate the exterior of houses of worship, the state should also be free to subsidize the preservation of these exteriors, including religious symbols that constitute a part of such exteriors.").

itself: it would result in religious institutions being treated less favorably than other similarly situated private institutions, on the sole basis of religion. Thus, to the extent the Free Exercise Clause bars Plaintiffs' discriminatory reading of the Amendment, *see supra* Part I, it bars Plaintiffs' discriminatory application of the *Helmes* test as well.

Fortunately, this Court need only follow its precedent to avoid this constitutional difficulty. This Court has never applied the *Helmes* test as a bright-line prohibition on aid to religious institutions. *See* Town's Br. at 26 (collecting cases upholding funds awarded to secular and religious private institutions on the same terms). Instead, it has used the *Helmes* criteria to distinguish public expenditures made to advance a public purpose--which are permissible, regardless of the recipient's religious status--from those made merely to advance private purposes--which are not. Because the grants here satisfy that standard, *see* Town's Br. at 27–43, the trial court correctly rejected Plaintiffs' challenge.

III. Plaintiffs and their *amicus* ignore the Amendment's bigoted history.

Finally, although the Amendment's text and *Trinity Lutheran* suffice to dispose of Plaintiffs' legal arguments, the Court should be aware of the glaring omissions Plaintiffs and their amicus make in presenting the Amendment's history. *See* Pls.' Br. at 12-19; ACLU Br. at 2-10. As Plaintiffs and their amicus tell it, the Amendment is simply a benign attempt to protect religious liberty. But it is well recognized that the original, 1855 version of the Amendment was a religiously bigoted, xenophobic measure aimed not at *protecting* religion but at *suppressing* one variety of it: the Catholicism of the Irish and other European immigrants who came to Massachusetts in great numbers in the mid-19th century. And although the current version of the Amendment applies to both religious and secular private institutions, that same anti-Catholic animus remained an important catalyst for its adoption.

"[W]idespread anti-Catholic prejudice was a motivating factor behind passage of the original Anti-Aid Amendment in 1855." *Wirzburger v. Galvin*, 412 F.3d 271, 284–85 (1st Cir. 2005). The year before, the Know-Nothings--a nativist, anti-Catholic secret society--had

seized political power in the Commonwealth, and they set about using it to "Americanize America," preserve Protestant hegemony, and launch "a state-sponsored attack on the civil and political rights of the foreign-born and Roman Catholics that went beyond anything else found in the country." John R. Mulkern, *The Know-Nothing Party in Massachusetts: The Rise and Fall of a People's Movement* 102 (1990) (Ad.31). The original Anti-Aid Amendment--which prohibited government aid to only "sectarian," or Catholic,[13] schools--was one fruit of this effort.

But for the Know-Nothings and their allies, there was a problem with the 1855 version of the Amendment: it applied only to Catholic schools, and not to the other Catholic institutions they wanted to discriminate against. Thus, beginning in 1900, nativists in the legislature each year proposed an "anti-sectarian amendment" to prohibit public funding of any institution under "sectarian" control. See I *Debates in the Massachusetts Constitutional Convention 1917-1918*

[13] *See Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality op.) (the era of the original Amendment was "a time of pervasive hostility to the Catholic Church and to Catholics in general" and "it was an open secret that 'sectarian' was code for 'Catholic'").

("*Debates*"), at 182 (Ad.50); *Bulletins for the Constitutional Convention 1917-1918*, vol. II, Bulletin No. 17, "Appropriations for Sectarian and Private Purposes" at 26-29 (Ad.61-64). These amendments were introduced during a resurgence of organized anti-Catholicism—a resurgence triggered by fear of the increasing political power of Catholics, including the election of the Commonwealth's first Catholic governor. *Debates* at 183-84 (Ad.51-52). And the amendments typically were sponsored by secret, religiously bigoted societies akin to the Know-Nothings, like the "American Minute Men," the "Guardians of Liberty," and the "Knights of Luther." See Robert H. Lord et al., III *History of the Archdiocese of Boston* 583 (1944) (Ad.68). When these legislative attempts were unsuccessful, proponents of the anti-sectarian amendment turned to the 1917–18 Constitutional Convention.

Frederick Anderson--a member of one such society[14] and the principal actor in the ACLU's historical narrative—

[14] Anderson denied that his secret society was organized around nativist or anti-Catholic principles--but in the process tied his society to the American Minute Men, a nativist group known to be among "[t]he most important" of the "anti-Catholic secret societies." Lord, *supra*, at 583; *see also Debates* at 77-78 (Ad.41-42) ("I want to say something about [my] organization, as it has been

-rode this resurgence in anti-Catholicism to a seat at the Convention. See *Debates* at 159-61 (Ad.43-45). At the Convention, Anderson proposed an amendment "to embody the views of those who were especially desirous of preventing appropriations of public money to Roman Catholic institutions." Raymond L. Bridgman, *The Massachusetts Constitutional Convention of 1917*, at 23 (1923) (Ad.73). Like the earlier anti-sectarian amendments proposed in the legislature, Anderson's proposal targeted only appropriations to institutions under "sectarian or ecclesiastical control." *Id.* Other nativist and anti-Catholic delegates supported the proposal, including one who on the Convention floor referred to immigrants from majority-Catholic Poland as "dirty, immoral, and thriftless." *Id.* at 71 (Ad.35).

Ultimately, however, Anderson and his allies encountered resistance, and Anderson's proposal was broadened to apply not just to "sectarian" institutions

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very much slandered and very much misunderstood. I wish to say in the first place, that it is not a secret society in any way, shape or manner . . .. I want to say, too, that it is not an A.P.A. society. . . . It has been a high class movement."); *id.* at 160 (Ad.44) ("We have a society called the Minute-Men, not a secret society; . . . it is distinctly not an A.P.A. society, but an association in which the broadest and most liberal men have gathered together.").

but to all nonpublic institutions. Anderson then forced this version on the Amendment's opponents by threatening that if they did not accept the broader version of the Amendment, he would ensure that "the old-anti-sectarian amendment" was passed. *Debates* at 164, 209 (Ad.48, 56). Thus the current version of the Amendment—which applies both to religious and private nonpublic institutions—was a compromise supported by nativist and anti-Catholic forces at the Convention only as the most politically expedient way for them to attain their ultimate goal: suppressing Catholics. Unsurprisingly, this move was viewed as a "bitter pill" by Catholics, who rightly recognized at the time that "[i]t was but too obvious that the [Amendment] originated in animus against th[e] Church." Lord, *supra*, at 584 (Ad.69).

All this goes unmentioned in Plaintiffs' and their amicus's sanitized, know-nothing account of the Amendment's history—perhaps because it reveals that Plaintiffs are asking the Court to adopt by interpretation a version of the Amendment even more discriminatory than the one the Know Nothings and their allies were able to achieve in 1918. But this Court need not perpetuate religious animus in its interpretation of the Amendment. Because the grants at issue here would

undisputedly be permissible under the Anti-Aid Amendment if made to secular private organizations, they must be permissible for the Churches as well.

CONCLUSION

The judgment of the Superior Court should be affirmed.

Respectfully submitted.

Date: August 21, 2017 /s/ Mark L. Rienzi

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CERTIFICATE OF COMPLIANCE

In accordance with Mass. R. App. P. 16(k), I certify that this brief complies with the rules of court that pertain to the filing of appellate briefs.

/s/ Mark L. Rienzi

ADDENDUM

Contents

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Articles of Amendment

M.G.L.A. Const. Amend. Art. 18

Art. XVIII. Free exercise of religion; support of public schools; use of public money or credit for schools and institutions

Currentness

SECTION 1. No law shall be passed prohibiting the free exercise of religion.

SEC. 2. No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

SEC. 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

SEC. 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

SEC. 5. This amendment shall not take effect until the October first next succeeding its ratification and adoption by the people.

M.G.L.A. Const. Amend. Art. 18, MA CONST Amend. Art. 18
Current through amendments approved August 1, 2017

End of Document

Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church

The Establishment Clause does not bar the award of historic preservation grants to the Old North Church or to other active houses of worship that qualify for such assistance, and the section of the National Historic Preservation Act authorizing the provision of historic preservation assistance to religious properties listed on the National Register of Historic Places is constitutional.

April 30, 2003

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF THE INTERIOR

You have asked us whether the Establishment Clause of the First Amendment permits the Department of the Interior ("DOI") to provide grants for preservation of historic structures that, although open to the general public, are also used for religious purposes. In the National Historic Preservation Act, Congress expressly provided that DOI's authority to award grants for the preservation of properties listed in the National Register of Historic Places, *see* 16 U.S.C. § 470a(e)(3) (2002), extends to grants "for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant." *Id*. § 470a(e)(4). Accordingly, on September 27, 2002, the National Park Service ("Park Service") awarded such a grant to the Old North Church, where lanterns were hung on the eve of the Revolutionary War—"One, if by land, and two, if by sea"—signaling to Paul Revere whether the British were approaching by land or water. Shortly thereafter, however, the Park Service reversed its position, relying on a 1995 opinion of this Office advising that a reviewing court, applying then-current Establishment Clause precedent, would likely invalidate the provision of a historic preservation grant to an active church. *See Constitutionality of Awarding Historic Preservation Grants to Religious Properties*, 19 Op. O.L.C. 267 (1995) ("1995 Opinion"). You have asked whether the 1995 Opinion reflects our understanding of the law today. For the reasons set forth below, we conclude that the Establishment Clause does not bar the award of historic preservation grants to the Old North Church or other active houses of worship that qualify for such assistance, and that the section of the National Historic Preservation Act that authorizes the provision of historic preservation assistance to religious properties is constitutional.

I.

A.

Your request for advice involves the Save America's Treasures program ("Program"), which is administered by the Park Service working together with the States. The Program, established in 1998 pursuant to the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470–470x-6 (2000), provides matching grants for preservation of "the enduring symbols of American tradition that define us as a nation." *See* Letter for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from William G. Myers III, Solicitor, Department of the Interior, at 3 (Jan. 24, 2003) ("Myers Letter"); Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 425 (2001). Matching Save America's Treasures grants are available for work on "nationally significant intellectual and cultural artifacts and nationally significant historic structures and sites." *FY 2002 Federal Save America's Treasures Grants—Guidelines and Application Instructions* at 1 ("Guidelines"), *available at* http://www.pcah.gov/sat/SAT2002.html. In a typical year, approximately 70 percent of the Save America's Treasures grants are awarded for the preservation of historic structures or sites, and 30 percent are awarded for museum and archival collections. Past grantees include Frank Lloyd Wright's Taliesin Estate in Spring Green, Wisconsin, the Star Spangled Banner at the Smithsonian Institute, Thomas Jefferson's papers at the Massachusetts Historical Society, and the ancient cliff dwellings of Mesa Verde National Park in Colorado. Myers Letter at 2. Funding for the Program is provided by the Historic Preservation Fund, which was created by the NHPA. *See* 16 U.S.C. § 470h.

Four types of entities, including both public and private institutions, are eligible to apply for Save America's Treasures grants: federal agencies that receive funding under DOI appropriations legislation; units of state and local government; federally recognized Indian tribes; and organizations that are tax-exempt under section 501(c)(3) of the Internal Revenue Code. Guidelines at 1. Representatives of the Park Service review and rank applications on the basis of extensive criteria, primarily related to historical significance.[1] Most important, as a "threshold criterion," the applicant must demonstrate the property's "national significance," as that term is defined by the Guidelines. *Id*. at 3.[2] Reduced to its essentials, this

[1] Representatives of the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute for Museum and Library Services review applications for funding of museum and archival collections under the Program.

[2] "The quality of national significance is ascribed to . . . historic properties that possess exceptional value, or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States, that possess a high degree of integrity and:

requires a showing that the property possesses "exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States," that it possesses "a high degree of integrity," and that it is associated with events, persons, ideas, or ideals that are especially significant in American history. *Id*. In addition, the property must have been either designated as a National Historic Landmark or listed as a place of "national significance" in the National Register of Historic Places ("National Register"), or be provisionally eligible for such designation or listing. *Id*. at 3–4.[3]

> "That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent the broad patterns of United States history and culture and from which an understanding and appreciation of those patterns may be gained; or,
>
> "That are associated importantly with the lives of persons nationally significant in the United States history or culture; or,
>
> "That represent great historic, cultural, artistic or scholarly ideas or ideals of the American people; or,
>
> "That embody the distinguishing characteristics of a resource type
>
> > "that is exceptionally valuable for the study of a period or theme of United States history or culture; or
> >
> > "that represents a significant, distinctive and exceptional entity whose components may lack individual distinction but that collectively form an entity of exceptional historical, artistic or cultural significance (e.g., an historic district with national significance), or
> >
> > "that outstandingly commemorate or illustrate a way of life or culture; or,
>
> "That have yielded or may be likely to yield information of major importance by revealing or by shedding light upon periods or themes of United States history or culture."

Guidelines at 3.

[3] To establish a historic structure's eligibility for the National Register, an applicant must first demonstrate the building's "significance in American history, architecture, archeology, engineering, and culture" in light of its "integrity of location, design, setting, materials, workmanship, feeling, and association." 36 C.F.R. § 60.4 (2002) ("*National Register criteria for evaluation*"). Eligibility for the National Register also requires that a building be one that:

> (a) is "associated with events that have made a significant contribution to the broad patterns of our history";
>
> (b) is "associated with the lives of persons significant in our past";
>
> (c) "embod[ies] the distinctive characteristics of a type, period, or method of construction, or that represent[s] the work of a master, or that possess[es] high artistic values, or that represent[s] a significant and distinguishable entity whose components may lack individual distinction"; or
>
> (d) "ha[s] yielded, or may be likely to yield, information important in prehistory or history."

Id. Nominations to the National Register may be made by the State Historic Preservation Office, by federal agencies, or jointly by state and federal authorities. *See id*. §§ 60.6, 60.9, 60.10. A property may be listed in the National Register for local, regional, or national significance, but a listing for national significance must satisfy more stringent criteria.

In addition to "national significance," applicants for Save America's Treasures grants must also demonstrate that the historic property is "threatened" or "endangered," or that it has an "urgent preservation and/or conservation need." Guidelines at 3. Moreover, the proposed project "must address the threat and must have educational, interpretive, or training value and a clear public benefit (for example, historic places open for visitation or collections available for public viewing or scholarly research)." *Id*. The project must be "feasible (i.e., able to be accomplished within the proposed activities, schedule and budget described in the application), and the applicant must demonstrate ability to complete the project and match the Federal funds." *Id*. Once a project has met the threshold criterion of "national significance," the threat to the structure amounts to 30 percent of its total

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Designation as a National Historic Landmark requires satisfying more stringent criteria than those that must be satisfied for listing in the National Register. DOI regulations provide:

> The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association, and:
>
> (1) That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or
>
> (2) That are associated importantly with the lives of persons nationally significant in the history of the United States; or
>
> (3) That represent some great idea or ideal of the American people; or
>
> (4) That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or
>
> (5) That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or
>
> (6) That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

36 C.F.R. § 65.4(a) (2002). These evaluations, while "reflect[ing] both public perceptions and professional judgments," are "undertaken by professionals, including historians, architectural historians, archeologists and anthropologists familiar with the broad range of the nation's resources and historical themes." *Id*. § 65.4. "The final decision on whether a property possesses national significance," however, "is made by the Secretary on the basis of documentation including the comments and recommendations of the public who participate in the designation process." *Id*. In addition, a property's designation as a National Historic Landmark automatically results in its being listed in the National Register. *Id*. § 60.1(b).

evaluation score; how the project addresses the threat amounts to 30 percent of its score; the educational value of the project amounts to 10 percent of its score; and the applicant's ability to meet budget and secure the non-federal matching funds amounts to 30 percent of its score. *Id*. at 4.

After the Park Service completes its ranking of applicants, a Grants Selection Panel ("Panel") further reviews the ranked applications and recommends grantees to the Secretary of the Interior. Myers Letter at 2. The Panel comprises federal employees, selected by the Park Service, with professional expertise in fields such as history, preservation, conservation, archeology, and curatorship. *Id*. In order to insulate the panel members from external influence, DOI does not disclose their identity to the public. *Id*. If the Secretary agrees with the Panel's recommendations, the Park Service informs the applicants of the results. *Id*.[4]

Applicants that qualify for a grant under the substantive criteria discussed above must also satisfy a number of administrative requirements before commencing their projects. For example, because projects funded by the Program are "undertakings" within the meaning of the Historic Preservation Act, *see* 16 U.S.C. § 470f, the Park Service requires that grant recipients consult with their State Historic Preservation Officer prior to the receipt of funds. *See* 36 C.F.R. pt. 800 (2002); Guidelines at 2. In addition, grant recipients must agree to encumber the title to their property with a 50-year covenant, enforceable by the State Historic Preservation Office (or another entity designated by the Park Service), that runs with the land and provides that the owners "shall repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places." Guidelines at 3. Finally, because Save America's Treasures grants are provided "only for the benefit of the public," "interior work (other than mechanical systems such as plumbing or wiring), or work not visible from the public way, must be open to the public at least 12 days a year during the 50-year term of the preservation easement or covenant." *Id*.

As further conditions of assistance, Save America's Treasures grantees must also keep detailed records of their expenditures and are subject to audit by the government to ensure that the Save America's Treasures grants are spent only for designated purposes. 16 U.S.C. § 470e. The Act expressly requires grantees to maintain "records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that

[4] The Program's appropriations legislation purports to require that "all projects to be funded shall be approved by the House and Senate Committees on Appropriations prior to the commitment of grant funds," Department of the Interior and Related Agencies Appropriations Act 2002, Pub. L. No. 107-63, 115 Stat. 414, 425 (2001), and the Program's guidelines state that a list of successful applicants is forwarded "to the House and Senate Committees on Appropriations for concurrence." Guidelines at 3. This provision, however, is unenforceable. *See INS v. Chadha*, 462 U.S. 919 (1983).

portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit." *Id*. In fulfillment of these requirements, the Secretary of the Interior requires that grant recipients sign agreements that obligate them to secure matching, non-federal funds; to seek reimbursement for incurred costs (grant funds are provided after the reimbursable expenditures have been incurred); and to submit to rigorous auditing and record-keeping requirements. Myers Letter at 3. These requirements ensure that grantees do not use federal funds for unauthorized purposes.

The guidelines that currently govern applications for Save America's Treasures grants expressly bar funding of "[h]istoric properties and collections associated with active religious organizations (for example, restoration of an historic church that is still actively used as a church)." Guidelines at 2. In contrast, the NHPA provides that "[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant." 16 U.S.C. § 470a(e)(4). Likewise, although current DOI regulations governing inclusion in the National Register provide that properties "owned by religious institutions or used for religious purposes" are "[o]rdinarily" deemed ineligible for the National Register, those regulations contain an exception for "religious property deriving primary significance from architectural or artistic distinction or historical importance." 36 C.F.R. § 60.4 ("*Criteria considerations*"). No such exception appears in the Program's guidelines. Thus, as the Program now stands, a religious property may be listed in the National Register or designated as a National Historic Landmark—and subjected to any regulatory requirements that may attend that designation[5]—but may not receive federal funding for preservation.

B.

On April 3, 2002, the Old North Foundation ("Foundation") applied to the Park Service for a Save America's Treasures grant to preserve the Old North Church in Boston, Massachusetts.[6] The Old North Church is most famously associated with

[5] Although listing on the National Register does not itself trigger any federal regulatory restrictions, numerous states and local governments impose extensive restrictions on historic properties. *See, e.g.*, Daniel R. Mandelker, *Land Use Law* §§ 11.22–11.34 (3d ed. 1993); Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 Urb. Law. 405, 409 (1998) ("Many historic preservation ordinances (or state law) require a person to obtain approval from either the local commission or the governing body of the city or county to alter a historic property, or the exterior of a structure on that property, or to place, construct, maintain, expand, or remove a structure on the property."); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) ("this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city").

[6] The Foundation, a nonprofit corporation under section 501(c)(3) of the Internal Revenue Code, was established to develop educational programs that address "issues relating to freedom in the life of

Paul Revere's ride to warn colonists of the impending arrival of British troops on the eve of the Revolutionary War. Revere arranged for a signal to be sent by lanterns hung from the Old North Church's steeple—"One, if by land, and two, if by sea." On the night of April 18, 1775, the Church's sexton, Robert Newman, climbed the steeple and hung two lanterns, signaling to the Sons of Liberty and to Revere—then crossing the Charles River toward Charleston—that the British Regulars were moving up the River to Cambridge, from which they would later march on Lexington. On reaching Charleston, Revere raced by horseback across the Middlesex countryside to notify the colonists that the British were coming—summoning the Nation's first militia. The "shot heard 'round the world" was fired the following day, commencing the Revolutionary War. *See generally* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance); Henry Wadsworth Longfellow, *Paul Revere's Ride*, *in The Home Book of Verse* 2,422 (selected & arranged by Burton E. Stevenson, 9th ed. 1950). Recognizing the importance of these events, the Park Service has described the Old North Church as "an icon in American history," *see* http://www nr.nps.gov/writeups/66000776 nl.pdf, and as "one of America's most cherished landmarks," both "[h]istorically and architecturally," *see* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance). The Church has been listed as a "religious facility" in the National Register of Historic Places since the Register's creation in 1966. It was designated as a National Historic Landmark in 1967. *See* http://tps.cr.nps.gov/nhl/detail.cfm?resourceId=585&resourceType=Building.

Construction of the Old North Church began in 1723 and was completed in 1745. Inspired by the design of Sir Christopher Wren's London churches, the Church was built in the Georgian style on a piece of pastureland near the crown of Copp's Hill, the highest elevation in the North End of Boston. *See* National Register of Historic Places Inventory—Nomination Form, Part 7 (Description); http://www nr.nps.gov/writeups/66000776 nl.pdf (describing the Old North Church as "a superb example of colonial Georgian architecture"). The Old North Church was located close to the wharfs and warehouses of sea captains and merchants settling in the area. It contains the first maiden peal of church bells heard in North America, and its first guild of bell-ringers was formed in 1750 by Paul Revere, then a fifteen-year-old Congregationalist and founding member of the Church. *See* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance); http://www.oldnorth.com/guid htm; http://www nps.gov/bost/Old_North_Church htm.

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the nation," and in particular to "support the maintenance of Old North Church and its associated buildings as a symbol of freedom." Myers Letter at 3. It sought a grant award under the competitive program established by DOI's 2002 appropriations bill, which designated $30 million for historic preservation grants in fiscal year 2002. 115 Stat. at 425.

The Old North Church still contains the original window through which Robert Newman left the Church after hanging the lanterns on April 18, 1775. Although it was covered with brick in 1815, the window was rediscovered during restoration work in 1989. It now houses the Church's "Third Lantern," which was lit by President Ford on April 18, 1975, as a symbol of freedom and renewed resolve for the next century of the nation's life. Among other items of historical significance, the Church also houses the first bust of President George Washington; a plaque commemorating the 1736 visit of Charles Wesley, a preacher, hymn-writer, and co-founder of the Methodist Church; an 18th-century organ and two 18th-century chandeliers; a plaque commemorating the heroism of British Major John Pitcairn at the Battle of Bunker Hill; and the Bay Pew, which is decorated in a manner common during the early days of the Republic. *See* National Register of Historic Places Inventory—Nomination Form, Part 7 (Description); http://www.oldnorth.com/hist htm.

The Old North Church also operates a museum and gift shop and is open to the general public for tours and other purposes from 9 a m. to 5 p.m. daily. National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance). For example, the Church offers school groups a basic tour that provides introductory background on the Church's involvement in the American Revolution. The Old North Church also offers a "Behind the Scenes" tour that provides a more in-depth view of the Church and its history, and "Paul Revere Tonight," a dramatic presentation that focuses on the relationship between Revere and the Church. The gift shop sells hundreds of books on these and related historical topics. According to the Park Service, visiting the Old North Church "bring[s] to life the American ideals of freedom of speech, religion, government, and self-determination." *See* http://www nps.gov/bost/; *see also* http://www.oldnorth.com/sginfo htm#tours.

Although the Old North Church is open to the general public for many purposes, it also remains "an active Episcopal church" that is "a mission of the Episcopal Diocese of Massachusetts." *See* http://www.oldnorth.com; *see also* http://www.oldnorth.com/info.htm. The Church has approximately 150 members, and its programs and activities include adult education, choir, and various community outreaches. It holds two services on Sunday morning, worships according to the Book of Common Prayer, and administers Christian rites such as baptism. It has a dozen full- or part-time staff members. The bishop of the Diocese is the rector of the Old North Church, and he is represented by the vicar, who, acting for the bishop, oversees its activities and staff. *Id.*; *see also* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance).

The Old North Church is governed by the Corporation of Christ Church in the City of Boston. Its board includes nine members of the congregation, plus the vicar and the bishop, and meets monthly to oversee the operations of the church and the historic site. The Church's board is separate, however, from the board of

the Foundation, which comprises mostly non-church members and assists with the management of historic site programs and building preservation. *See* National Register of Historic Places Inventory—Nomination Form, Part 8 (Statement of Significance); http://www.oldnorth.com/info.htm.

The Foundation sought a grant from the Park Service to prevent deterioration of the structure, to repair the Old North Church's windows, to preserve the Church's early-18th- and 19th-century glass, and to restore natural ventilation to the building. The last significant maintenance of the Church's windows occurred in 1912, and the Foundation concluded that the building would lose its remaining historic glass and suffer water leakage absent timely restoration efforts. In addition, windows that were installed in the 1970s had a deleterious effect on the original windows, by trapping moisture and heat and leading to high building temperatures during summer months. The Foundation estimated that the proposed project, which was to be completed in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties, *see* 36 C.F.R. pt. 68 (2002), would add a century or more to the expected life of the windows. Moreover, the ventilation improvements would improve the atmosphere for the numerous tourists who visit the Old North Church. Myers Letter at 3.

The Old North Church was one of 389 organizations that submitted applications for historic preservation grants in 2002. The Park Service reviewed its application and concluded that it was an "ideal candidate for a Save America's Treasures Grant, given its standing and importance in the history of America." Myers Letter at 3. On September 27, 2002, the Park Service informed the Foundation that its application had been accepted and that it would receive a grant of $317,000. Less than one month later, however, after requesting a revised budget and description of the scope of work from the Foundation, the Park Service notified the Foundation that it was withdrawing its award on the ground that the Old North Church is owned by a religious organization and used by an active religious congregation. *Id*. The Park Service based its reversal on the 1995 Opinion of this Office, which stated that "a court applying current precedent is most likely to conclude that the direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause." 19 Op. O.L.C. at 273.

C.

The 1995 Opinion responded to an inquiry from then-Solicitor of the Department of the Interior John Leshy, who asked this Office to analyze the constitutionality of providing grants to preserve historic properties used for religious purposes. The opinion acknowledged that the question was a "very difficult one," that the line between permissible and impermissible assistance was "hard to discern," and that "the Supreme Court's jurisprudence in this area is still developing." 19 Op.

O.L.C. at 273. It concluded, however, that a reviewing court applying then-existing precedent would likely invalidate the provision of a historic preservation grant to a religious property that is actively used for worship. *Id*. at 267, 273.

The 1995 Opinion reasoned that a "two-part rule . . . govern[s] direct financial support of religious institutions." *Id*. at 268. First, it stated that direct aid may be given to "non-pervasively sectarian" religious institutions, provided the aid is not used to fund "specifically religious activity" and is "channeled exclusively to secular functions." *Id*. Second, it explained that there are institutions—"pervasively sectarian" institutions—"in which 'religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission.'" *Id*. at 269 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). Because "most if not all active houses of worship" would qualify as "pervasively sectarian" institutions, in which the "secular and religious functions" are "inextricably intertwined," the government may not provide direct aid to them "with or without restrictions," because the aid will inevitably end up advancing religion. *Id*. In addition, the 1995 Opinion reasoned, to the extent that it is possible to distinguish between the religious and secular components of a church—the difficulty of which may be compounded by the relationship between architectural design and theological doctrine—any governmental effort "to identify those elements of a house of worship that do not have 'direct religious import' could well involve the kind of 'monitoring for the subtle or overt presence of religious matter' prohibited by the Establishment Clause." *Id*. at 270. In support of this reasoning, the 1995 Opinion cited Supreme Court decisions involving direct aid to religious organizations, and in particular *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which imposed certain restrictions on the government's provision of construction, maintenance, and repair aid to properties used by religious educational institutions.

The 1995 Opinion distinguished historic preservation grants from other sorts of benefits to religious institutions that have been sustained in recent decisions on the ground that the latter were "generally available to all interested parties, on a religion-neutral and near-automatic basis." 19 Op. O.L.C. at 271 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–45 (1995); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 757–59, 763 (1995); *Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226, 252 (1990)). As the opinion stated:

> Historic preservation grants, by contrast, do not appear to be generally available in the same sense. Properties, including religious properties, qualify for initial listing on the Historic Register only if they meet subjective criteria pertaining to architectural and artistic distinction and historical importance. Once listed, properties are eligible to compete for grants based on additional measures of "project wor-

> thiness" established by the states. Participation by pervasively sectarian institutions in this kind of competitive grant program raises special concerns, absent in cases like *Rosenberger*, *Pinette*, and *Mergens*, that application of necessarily subjective criteria may require or reflect governmental judgments about the relative value of religious enterprises.

Id. at 271–72.

Since 1995, this Office has given advice that casts doubt on the continuing validity of the 1995 Opinion. Most important, in 2002 we opined that it was constitutional for the Federal Emergency Management Agency ("FEMA") to provide direct federal disaster assistance for the rebuilding of the Seattle Hebrew Academy, a religious school. *See Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*, 26 Op. O.L.C. 114 (2002) ("2002 Opinion"). We explained that the aid at issue was made available on the basis of neutral criteria to a broad class of beneficiaries defined without reference to religion and including not only educational institutions but a host of other public and private institutions as well. We further reasoned that the FEMA program was amenable to neutral application, and that the evidence demonstrated that FEMA exercised its discretion in a neutral manner. Thus, we concluded that provision of disaster assistance to the Academy could not be materially distinguished from aid programs that are constitutional under longstanding Supreme Court precedents establishing that religious institutions are fully entitled to receive generally available government benefits and services, such as fire and police protection. *Id.* at 122–132.

In so ruling, we expressly noted that the 1995 Opinion "did not consider whether the rule of [*Tilton* and *Nyquist*] should apply where the grants at issue are available to a wide array of nonprofit institutions, rather than being limited to educational institutions." 2002 Opinion, 26 Op. O.L.C. at 127 n.13. "[T]o the extent that the [1995 Opinion] failed to consider the possibility that the rule of *Tilton* and *Nyquist* does not apply where direct aid is more generally available than was the aid in those cases," we observed, "it does not represent our current thinking, which is set forth in this Memorandum." *Id*. In addition, we explained, "significant portions" of the reasoning of *Tilton* and *Nyquist* are "subject to serious question in light of more recent decisions." *Id*. at 126 n.13. For example, we stated that "the 'pervasively sectarian' doctrine, which comprised the basis for many of the Court's Establishment Clause decisions in the early 1970s (including *Nyquist*, 413 U.S. at 774–75), no longer enjoys the support of a majority of the Court," which now requires proof of "*actual* diversion of public support to religious uses" and rejects "presumptions of religious indoctrination." *Id*.

II.

You asked us to determine whether the NHPA's authorization of grants to historically significant religious properties is constitutional, and in particular whether the Establishment Clause poses a barrier to the Park Service's provision of Save America's Treasures grants to religious structures such as the Old North Church. There is no Supreme Court precedent that directly controls this specific issue. For three interrelated reasons, however, we conclude that the Establishment Clause does not pose a barrier to the Park Service's provision of such aid.[7]

First, the federal government has an obvious and powerful interest in preserving all sites of historic significance to the nation, without regard to their religious or secular character. The context in which this issue arises distinguishes the Program from programs of aid targeted to education, which have been subjected to especially rigorous scrutiny by the Supreme Court. *Second*, eligibility for historic preservation grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions. All sorts of historic structures—from private homes to government buildings—are eligible for preservation grants. *Third*, although the criteria for funding require a measure of subjective judgment, those criteria are amenable to neutral application, and there is no basis to conclude that those who administer the Program will do so in a manner that favors religious institutions. Thus, we believe that the provision of historic preservation grants to religious structures such as the Old North Church cannot be materially distinguished from the provision of disaster assistance to religious schools, which we have already approved, or from other aid programs that are constitutional under longstanding precedents establishing that religious institutions are fully entitled to receive widely available government benefits and services. For similar reasons, no reasonable observer would view the Park Service's provision

[7] Under the general framework of *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), a law violates the Establishment Clause if it lacks a "secular legislative purpose," has a "primary effect" of advancing religion, or results in an "excessive entanglement" between government and religion. *See also Agostini v. Felton*, 521 U.S. 203, 232–35 (1997) (reformulating the *Lemon* test by incorporating its "entanglement" prong into its "effects" prong). As in most cases involving aid to religious institutions, the central question here is whether allowing religious structures such as the Old North Church to receive historic preservation assistance would advance religion (an "effects" inquiry), and we will focus primarily on cases that bear on that question. As for *Lemon*'s "purpose" prong, it is clear that allowing a range of historic religious and nonreligious structures to receive preservation grants serves the secular purpose of preserving our cultural heritage. *See* 16 U.S.C. § 470a(e)(4) ("[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant"). As for *Lemon*'s "entanglement" prong, there is no basis to conclude that allowing active religious structures to receive aid would "excessively entangle" church and state, since there is no more governmental monitoring of aid recipients here than in other cases in which the Court has not questioned the provision of aid under *Lemon*'s entanglement prong. *Cf., e.g.*, *Agostini*, 521 U.S. at 232–35; *Mitchell v. Helms*, 530 U.S. 793 (2000).

of a Save America's Treasures grant to an otherwise eligible religious structure as an endorsement of religion.

We explain below why these factors are sufficient to sustain the Program. If there were any remaining doubt as to its constitutionality, however, that doubt would be dispelled by the Program's numerous statutory and regulatory safeguards that ensure that federal funds are not used to advance religion. In particular, the Program contains rigorous auditing requirements to ensure that grants are spent only for authorized purposes related to historic preservation, not for the conduct of worship services. Although we do not believe that such restrictions are necessary in the context of a program involving aid made available to such a wide variety of public and private institutions, their existence further supports our conclusion that there is no constitutional infirmity here.

A.

As an initial matter, we believe it is important to bear in mind the context in which this constitutional question has arisen. The Park Service has a substantial interest in facilitating the preservation of *all* sites of historic significance to the nation, without regard to their religious or secular character. This interest, moreover, distinguishes the grants here from programs of aid targeted to education, which the Supreme Court has subjected to far more rigorous scrutiny than aid to other sorts of religious institutions. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (noting "particular [establishment] concerns that arise in the context of public elementary and secondary schools"); *Mitchell v. Helms*, 530 U.S. 793, 885 (2000) (Souter, J., dissenting) (noting that "two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools"); *Nyquist*, 413 U.S. at 772. As explained in greater detail below, most of the Court's Establishment Clause decisions rendered since *Everson v. Board of Education*, 330 U.S. 1 (1947), have concerned aid provided solely to educational institutions as a class (in many cases, moreover, this aid was directed toward the educational process itself), and these decisions rest in part on the theory that aid directed solely to schools might reasonably be perceived as advancing the educational mission of those that receive it. *See, e.g.*, *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in judgment). Given that a large percentage of private schools are religious, the Court has been sensitive to the possibility that direct funding solely of schools might amount to an attempt to fund religious indoctrination. The same cannot be said where, as here, a program is available to all manner of institutions. The aid at issue here is provided in return for the benefit of public access to a broad array of historically significant properties—some public, some private, some secular, some religious. Under the Court's precedents, such programs are not subjected to the special scrutiny reserved for programs of aid targeted to schools. *See Bowen v. Kendrick*, 487 U.S. 589, 613–18 (1988).

B.

We regard it as especially significant that eligibility for historic preservation grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions. Ever since 1947, the year of its first modern Establishment Clause decision in *Everson*, the Supreme Court has indicated that religious institutions are entitled to receive "general government services" made available on the basis of neutral criteria. 330 U.S. at 17. *Everson* held that the Establishment Clause does not bar students attending religious schools from receiving generally available school busing services provided by the government. In reaching its decision, the Court explained that even if the evenhanded provision of busing services increased the likelihood that some parents would send their children to religious schools, the same could be said of other "general state law benefits" that were even more clearly constitutional because they were equally available to all citizens and far removed from the religious function of the school. *Id*. at 16. As examples, the Court cited "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," concluding:

> cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

Id. at 17–18. *See also id.* at 16 ("[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. . . . [W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.").

We believe that a Save America's Treasures grant is analogous to aid that qualifies as "general government services" approved by the Court in *Everson*. To be sure, such aid is not available to *all* citizens or buildings—and thus is not as broadly available as, say, utility services. But as we observed in the 2002 Opinion (26 Op. O.L.C. at 127), there is no principled reason why the constitutionality of an aid program should turn on whether the aid is provided to *all* citizens rather than, say, a wide array of organizations that falls somewhat short of the entire populace. There is a range of aid programs that are not as "general" as aid

provided universally, but yet are not as circumscribed as aid to education,[8] and Save America's Treasures grants admittedly fall within this middle ground. But such grants are not available only to educational institutions or, for that matter, to just a few classes of buildings. Rather, they are available to all kinds of private non-profit institutions, along with federal, state, local, and tribal governmental entities; and they may lawfully be used to rehabilitate *any* structure—be it a meeting house, a concert hall, a museum, a school, a house, a barn, a barracks, a government office building, or a church—that satisfies the generally applicable criteria for funding.[9] Accordingly, we think that the "'circumference'" of the Program can fairly be said to "'encircle[] a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.'" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J.)). As the Court explained in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Accord Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges").

Put another way, the aid here is more closely analogous to the provision of "general" government aid like that sanctioned by the Court in *Everson* (and many times since, *see, e.g.*, *Nyquist*, 413 U.S. at 781–82) than to the construction grants at issue in *Tilton* and *Nyquist*, which were available only to schools. *See Nyquist*, 413 U.S. at 782 (distinguishing more general services from construction grants on the ground that general services are "provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' that they may fairly be viewed as reflections of a neutral posture toward religious institutions" (citation omitted)); *cf.* Church Arson Prevention Act of 1996, Pub. L. No. 104-

[8] *See Mitchell*, 530 U.S. at 875 (Souter, J., dissenting) (stating that "government spending resists easy classification as between universal general service or subsidy of favoritism," and noting that *Everson* "turned on the inevitable question whether reimbursing all parents for the cost of transporting their children to school was close enough to police protection to tolerate its indirect benefit in some degree to religious schools").

[9] In this respect the Program here, viewed as a whole, is even less susceptible to religious favoritism than the FEMA program we recently considered. In the FEMA statutes, Congress made a value judgment that certain types of institutions—and only those institutions—should be eligible for federally funded rehabilitation assistance in the wake of a natural disaster. This judgment entailed a determination that certain institutions were especially worthy of support, and there was some risk (if remote) that Congress included private schools (most of which are religious) in order to channel support to religious education. There is no such risk here.

155, 110 Stat. 1392 (creating a program that provides low-income reconstruction loans to nonprofit organizations, including churches, destroyed by arson motivated by racial or religious animus). As Justice Brennan expressed the point in *Texas Monthly*: "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." 489 U.S. at 14–15 (plurality opinion) (footnote omitted).

Walz v. Tax Commission, 397 U.S. 664 (1970), strongly supports our conclusion. There the Court rejected an Establishment Clause challenge to a property tax exemption made available not only to churches, but to several other classes of nonprofit institutions, such as "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id*. at 673; *see also id*. at 667 n.1. In upholding the tax exemption, the Court relied in part upon its breadth: the exemption did "not single[] out one particular church or religious group or even churches as such," but rather was available to "a broad class of property owned by nonprofit, quasi-public corporations." *Id*. at 673. As the Court stated in reference to *Everson*, if "buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses." *Id*. at 671. Thus, just as a broad category of beneficiary institutions was sufficient to sustain the inclusion of religious institutions in the tax benefit in *Walz*—which, after all, substantially benefitted churches' *property*—we believe the breadth of eligibility for the Program here weighs heavily in favor of the constitutionality of a Save America's Treasures grant to the Old North Church.

The broad class of beneficiaries that are eligible for the Program here—including not only private non-profit groups, but state and local governmental units, Indian tribes, and numerous federal agencies, each of which may seek funding to preserve *any and all kinds* of historic structures—confirms that the Program's effect is not to advance religion. In contrast to the education-specific aid at issue in many of the foregoing cases, the historic preservation assistance provided by the Park Service serves goals entirely unrelated to inculcating religious values—namely, preservation of buildings that played an important role in our nation's history and that are (by virtue of their public or private nonprofit status) most in need of assistance. *Cf. Mitchell*, 530 U.S. at 883 (Souter, J., dissenting) ("[D]epending on the breadth of distribution, looking to evenhandedness is a way of asking whether a benefit can reasonably be seen to aid religion in fact; we do not regard the postal system as aiding religion, even though parochial schools get mail."). Indeed, although a number of churches can be expected to qualify for assistance under the Program, we do not expect that churches will

amount to a large percentage of grantees.[10] In recent years, structures preserved with funding provided by the Program include Revolutionary War barracks in Pennsylvania, a railroad complex in West Virginia, a Shaker village in New Hampshire, a courthouse in North Carolina, a theater in Massachusetts, a farmhouse and slave quarters in Maryland, a Frank Lloyd Wright home in Illinois, an art museum in Texas, a state capitol building in Nebraska, a hotel in Florida, a school in Utah, and a hospital in New York—to name just a few. The variety of structures that have been rehabilitated confirms the common sense notion that historical events happen in all sorts of places. There is no basis for concern that the Program will become a subterfuge designed to direct public money to churches, or to engage in any other sort of religious favoritism.

C.

This brings us to the third consideration important to the Program's constitutionality: the neutrality of the criteria for selecting Save America's Treasures grantees. In the Program here, government officials must make a number of subjective judgments about a structure's cultural importance. Initially, they must determine whether a structure is "nationally significant"—e.g., whether it possesses "exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States," and whether it is associated with events, persons, ideas, or ideals that are significant in American history. Guidelines at 3. Moreover, they must conclude that the structure is "threatened," that the project has "educational, interpretive, or training value," and that the project has "a clear public benefit." *Id*. Insofar as reasonable people may disagree about whether a religious structure meets these criteria, there is some potential for favoritism of religion in their application.

As noted in the 2002 Opinion (26 Op. O.L.C. at 127 n.13), we believe that the degree to which officials administering public aid have discretion to favor (or disfavor) religious institutions—and, far more important, the manner in which they exercise that discretion—are relevant to the aid's constitutionality. Ever since *Everson*, the Court has made clear that one of the core purposes of the Establishment Clause is to prevent the government from favoring religion over non-religion, 330 U.S. at 16, and aid that is made available on the basis of discretionary criteria entails a greater risk of such favoritism than, say, aid made available on a

[10] We are not suggesting that an aid program has the unlawful effect of advancing religion merely because a large number of its beneficiaries are religious in nature. The Supreme Court has repeatedly repudiated the view that the percentage of a program's religious beneficiaries is relevant to its constitutionality under the Establishment Clause. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 658 (2002) (stating that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations"); *accord Agostini*, 521 U.S. at 229; *Mueller v. Allen*, 463 U.S. 388, 391, 401 (1983); *Mitchell*, 530 U.S. at 812 n.6 (plurality opinion).

per capita basis. For example, a program that authorized government officials to dole out aid solely on the basis of their assessment of what organizations' programs would best serve "the public interest" would entail a significant risk of favoritism.

Without more, however, the fact that an organization's eligibility for aid depends in part on satisfying subjective criteria is insufficient to invalidate the aid. Provided the criteria are amenable to neutral application, the program at issue is facially valid. *See generally United States v. Salerno*, 481 U.S. 739, 745 (1987) (a facial challenge will be sustained only if "no set of circumstances exists under which the Act would be valid"). As Judge Posner has explained: "[t]o exclude [a religious organization] from . . . competition [for government contracts or assistance] on the basis of a speculative fear that [government] officers might recommend [a] program because of their own . . . faith would involve the sacrifice of a real good to avoid a conjectured bad. It would be perverse if the Constitution required this result." *Freedom From Religion Found. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003). Thus, while the exercise of religious favoritism in applying the eligibility criteria for a program would constitute an as-applied constitutional violation of the program, it would not invalidate the program on its face. *Id.* (explaining that the "danger" that determining eligibility for a program "would involve discretionary judgments possibly influenced by the religious preferences of the agency or public employees doing the rating" will not invalidate a program unless the danger has "materialized"). There is no reason to presume that, based on a neutral application of subjective criteria, religious institutions will never be qualified to receive aid.

Each of the eligibility criteria here is plainly amenable to neutral application. First, the criterion of "national significance"—which in turn depends on such factors as whether the structure has "exceptional value or quality in illustrating [the nation's] intellectual and cultural heritage," or whether it is associated with events or persons that are significant in American history—is predominantly a matter of architectural and historical significance. To be sure, there may be cases at the margins where the historians and other experts who assess applications for Save America's Treasures grants disagree about the importance of a building in our nation's history. But we understand that there are many more cases where there is little to no difference of opinion. It is hard to imagine anyone disputing, for example, that projects to preserve National Historic Landmarks such as Mount Vernon and Monticello are worthy of federal support on account of those homes' association with Presidents Washington and Jefferson. Similarly, there will be cases in which the experts will agree that a church holds a special place in our nation's history, whether because of its association with historic events (like the civil rights movement) or historic figures (like Paul Revere). Frank Lloyd Wright's Unity Temple in Oak Park, Illinois may have an active congregation and hold weekly worship services, but that does not diminish its significance as a

model of the Prairie School of architectural design or as a contribution to 20th-century American architecture generally. Nor do we think many would question the Park Service's conclusion that Old North Church is an "ideal candidate for a Save America's Treasures Grant, given its standing and importance in the history of America." Myers Letter at 3.

The second criterion that must be satisfied before an applicant may receive assistance—whether a structure is "threatened," "endangered," or otherwise has an "urgent preservation and/or conservation need" (Guidelines at 3)—is quite amenable to neutral application. Based on our review of the Guidelines and our discussions with DOI officials, we understand that Park Service officials make this assessment primarily on the basis of the physical condition of the structure and the financial resources available to the applicant. Such an inquiry is strictly secular and does not involve the government in an assessment of a structure's religious value. The same is true of the requirement that a project be "feasible." This requires only that the applicant be "able to . . . accomplis[h] [the project] within the proposed activities, schedule and budget described in the application," and to "match the Federal funds." *Id*.

The third main criterion for receiving assistance—whether the project has "educational, interpretive, or training value"—is somewhat more subjective, but the fact that a structure is used for religious purposes or closely associated with religious activities does not mean that its preservation lacks educational value, particularly when that value is based on its role in U.S. history. Among the thousands of items in its collection, the National Gallery of Art houses 581 works containing explicitly religious themes, including at least 107 works depicting the crucifixion of Jesus; 32 works depicting various prophetic figures such as Elijah and Jeremiah; and works such as Marc Chagall's "Jew with a Torah." *See* http://www.nga.gov/collection/srchsub.htm (subject search: religious); http://www nga.gov/search/search htm#artist (title search: crucifixion). Display of these works, many of which were created for specific religious institutions or events, may "advance" religion in the sense that exposure to any artistic work might influence the viewer. But the works are chosen on the basis of their artistic merit and historical significance, and they serve to educate the public regarding a certain genre of artistic expression or period in world history. Similarly, throughout our nation's history, religion and people of faith have influenced societal views on issues ranging from the abolition of slavery to women's suffrage to the justification for, and conduct of, war. The Supreme Court has long acknowledged that the study of religion, when presented neutrally as part of a secular program of public education (e.g., in history or literature classes), is fully consistent with the First Amendment. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963). Public school libraries are therefore free to use public money to purchase works such as the Bible, the Koran, Chaim Potak's *The Chosen*, or John Milton's *Paradise Lost* for their stacks. Such works have religious themes, but they are also significant as

historical and literary works, and providing them for students to study has a secular educational purpose and effect. Likewise, we see no reason why providing federal funds to enable the public to visit a church where significant historical events occurred necessarily has any less educational value than funding the preservation of other sites that are significant in our nation's past.

The final criterion for obtaining assistance—whether funding the project would provide "a clear public benefit"—appears quite subjective at first glance. One could argue that it is impermissible for government officials to determine that society will receive a "clear public benefit" from the government's funding of the preservation of a church that is actively used for religious purposes. Without further guideposts to assist them in making this judgment, public officials might decide to favor particular religious structures (or religious structures in general) on the ground that the activities that take place in those structures are, in their opinion, beneficial to society at large. And one of the core purposes of the Religion Clauses is to disable the government from assessing the validity of religious truths or the value of religious activities. *See generally Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–20 (1976); *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714–16 (1981).

On closer examination, however, it is clear that the officials who administer Save America's Treasures grants do not determine a project's "clear public benefit" on the basis of subjective judgments about its religious value. Rather, a project that satisfies the other criteria for receiving a Save America's Treasures grant is deemed to provide a "clear public benefit" by virtue of being open to the public—whether "for visitation," "public viewing," or "scholarly research." Guidelines at 3. Thus, the Park Service's conclusion that the public will benefit from a project is not based on an assessment of the public value of the *religious* activities or character of the church, or for that matter of any of its *current* activities; it is based on the public value of being able to view, and learn from, the building and its place in our nation's history—on its accessibility to ordinary Americans. The conclusion that viewing the structure would be beneficial to the public derives from the structure's historical value, not its religious value. That is a valid, neutral basis for funding a project.

In summary, although the requirements that applicants must satisfy to obtain a Save America's Treasures grant are somewhat subjective, they are quite amenable to neutral application. This fact, together with the diverse makeup of structures that have been preserved under the Program, indicates that the Program is not "skewed towards religion." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986).

D.

For all these reasons, we also do not believe that a reasonable observer would perceive an endorsement of religion in the government's evenhanded provision of historic preservation assistance for maintenance of a church building that holds a significant place in our nation's history. *See Mitchell*, 530 U.S. at 842–44 (O'Connor, J., concurring in judgment).[11] In a direct aid program limited to a narrower class of recipients such as schools, one could argue that if a school "uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement." *Id*. at 843. The notion is that, where the government provides education-specific aid, it is fair to say that the government is providing the assistance because of the content of the funded education. Such a presumption of governmental endorsement is not present, however, where the aid is provided to a wide array of public and private buildings because of historic events that once took place therein, and where the government is indifferent to the religious or secular orientation of the building. Moreover, we think a reasonable observer—one informed about the purpose, history, and breadth of the Program, *see Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002)—would understand that the federal government is not paying for religious activity; it is paying to preserve a structure that played a role in our development as a nation, so that the public can visit it and learn about our heritage. That is not an endorsement of religion.

Similarly, our conclusion that the Park Service may provide historic preservation grants to structures such as the Old North Church is consistent with the underlying purposes of the Religion Clauses. They are designed to minimize, to the extent practicable, the government's influence over private decisions and matters involving religion, and the Supreme Court has repeatedly explained that governmental assistance must not be structured in a way that creates a financial incentive for people to change their religious (or nonreligious) behavior. *Zelman*, 536 U.S. at 653–54; *Agostini v. Felton*, 521 U.S. 203, 230–31 (1997); *Witters*, 474 U.S. at 487–88. Under the prior system, only structures used solely for nonreligious purposes were eligible for federal preservation grants. Churches with historically significant buildings had a powerful financial incentive to eliminate their religious programs and religious speech, effectively resigning themselves to the role of museums: unless they did so, they were ineligible for any assistance. Under the new rule, by contrast, churches have no incentive to bend their practices in a secular direction to receive aid.

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[11] *See generally Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989) (the Court has, "[i]n recent years, . . . paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion"); *see also id.* at 624–32 (O'Connor, J., concurring in part and concurring in the judgment); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–08 (2000); *Agostini*, 521 U.S. at 235.

E.

Our conclusion regarding the constitutionality of providing historic preservation grants to religious structures such as the Old North Church is bolstered by the fact that the Program at issue has a number of requirements designed to ensure that the government funds only those aspects of preservation that produce a secular benefit. To begin with, under the NHPA, properties that are owned by religious institutions or used for religious purposes are eligible for Save America's Treasures grants only if they "deriv[e] primary significance from architectural or artistic distinction or historical importance," 36 C.F.R. § 60.4(a), and "[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, *provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant*," 16 U.S.C. § 470a(e)(4) (emphasis added). Thus, the Park Service may provide grants for the preservation of religious structures only insofar as such preservation protects those structures' *historically significant* components.

Other aspects of the Program ensure that Save America's Treasures grants are provided "only for the benefit of the public," Guidelines at 3, by mandating that, for fifty years, grantees keep open to the public all portions of rehabilitated structures that are not visible from the public way. *Id*. at 2 (mandating that "interior work (other than mechanical systems such as plumbing or wiring), or work not visible from the public way, must be open to the public at least 12 days a year during the 50-year term of the preservation easement or covenant"). Furthermore, grant recipients must agree to encumber the title to their property with a 50-year covenant requiring that the owners "repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places." *Id*. To ensure compliance with these requirements, Save America's Treasures grantees must keep detailed records of their expenditures and are subject to rigorous audit by the government to ensure that the Save America's Treasures grants are spent only for designated purposes. 16 U.S.C. § 470e (grantees must maintain "records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit"); Myers Letter at 3.

These statutory and regulatory requirements make clear that Save America's Treasures grants may not be used to promote religion (16 U.S.C. § 470a(e)(4)); that they may be used only to preserve the historically significant portions of eligible properties (*id*.); and that rehabilitated portions of eligible structures must

be available for public viewing (Guidelines at 3). All of this is to say that the Program does not permit direct funding of religious activity. To be sure, one could argue that where a federal grant rehabilitates a building that is not only open for public tours, but also used for religious worship, the effect is ultimately to subsidize worship. But such a subsidy is indirect and remote, and that is not what the subsidy is for; rather, the subsidy is provided solely for the benefit to the public of being able to view a structure that played an important role in the history of the United States.[12] Accordingly, we think it is more reasonable to view the grant as akin to a "fee-for-services" transaction—in exchange for an easement that ensures 50 years of public access to the historic structure, the federal government pays a portion of the cost of preserving it.[13]

III.

Some might contend that the Supreme Court's decisions in *Tilton* and *Nyquist*, which involved construction and maintenance aid to religious schools, should be read to support the conclusion that historic preservation grants to active churches would violate the Establishment Clause. For the reasons set forth below, we disagree.

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[12] Although in some contexts "direct cash aid" might raise special concerns, *see Mitchell*, 530 U.S. at 856 (O'Connor, J., concurring in judgment), we note that the Save America's Treasures grant monies are not distributed until particular, reimbursable expenses have already been incurred by the grantee (*see* Myers Letter at 3), and that the rigorous auditing and record-keeping requirements discussed in the text ensure that the funds are used only for authorized purposes. Accordingly, there is no basis for concern that the money at issue will be diverted to non-Program purposes.

[13] The variety of other ways in which the Park Service might constitutionally provide assistance that would serve to rehabilitate a structure like the Old North Church confirms that there is no strict bar to the sort of assistance at issue here. For example, suppose that the Park Service negotiated a deal pursuant to which it paid the Church a fixed sum in exchange for an agreement to remain open to the public daily and free of charge. Such a fee-for-services transaction would directly "benefit" the Old North Church, and the Church might well exact a price from the government that would cover not only the cost of allowing public tours, but of maintaining the Church for use by its parishioners. But it would be clear that the Park Service was paying only for public access to a historic structure, and we do not think there is any serious question that such a program would be constitutional. Indeed, such a fee-for-services transaction would not be materially different from other sorts of transactions that the government routinely enters into with religious organizations—e.g., land trades, *see* H.R. 1113, 108th Cong. (2003) ("To authorize an exchange of land at Fort Frederica National Monument, and for other purposes")—where the religious organization has something of value that the government wishes to obtain. The case of Ebenezer Baptist Church, where Dr. Martin Luther King, Jr. preached a number of his most famous sermons on the subject of civil disobedience and race relations, is illustrative. We understand that the Park Service made a deal with that church whereby the church agreed to lease its historic building to the Park Service for 99 years, enabling the Park Service to conduct public tours of the church. In consideration for its rights as lessee, the Park Service provided the church with an adjacent parcel of land where the church has built a new sanctuary. Thus, the church has directly benefitted—by obtaining title to a valuable plot of real property—from providing public access to a church that is historically important as a window into the role of black churches in the civil rights movement.

In *Tilton*, the Court sustained the provision of federal construction grants to religious colleges insofar as the program at issue barred aid to facilities "'used for sectarian instruction or as a place for religious worship,'" but invalidated such grants insofar as the program permitted funding the construction of buildings that might someday be used for such activities. *See* 403 U.S. at 675, 683 (plurality opinion) (citations omitted). The Court concluded that a 20-year limitation on the statutory prohibition on the use of buildings for religious activities was insufficient because "[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id*. The Court therefore held that the religious use restriction had to run indefinitely. *Id*.

Similarly, *Nyquist* involved a program that provided maintenance and repair grants to religious elementary and secondary schools. The grants at issue were limited to 50 percent of the amount spent for comparable expenses in the public schools, but the Court invalidated the program. "No attempt [was] made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes," the Court stated, and the 50 percent restriction would not necessarily prevent rehabilitation of entire religious schools. 413 U.S. at 774. The Court thus concluded that such aid would have the effect of advancing religion, in violation of *Lemon*'s second prong. *Id.*

These holdings, so far as they go, have not been expressly overruled, even where public aid is given to both religious and nonreligious schools on the basis of neutral criteria. *See Mitchell*, 530 U.S. at 856–57 (O'Connor, J., concurring in judgment). Thus, they might be thought to support a broader argument that providing historic preservation grants to restore a church building that is actively used for religious purposes would violate the Establishment Clause. Under this argument, insofar as a grant used to rehabilitate a church's building would ultimately support its use for secular *and* religious purposes—i.e., for both public tours and religious worship—such aid would be unlawful.

We are unable to adopt such a broad reading of *Tilton* and *Nyquist* for several reasons. First, as noted in the 2002 Opinion (26 Op. O.L.C. at 129), *Tilton* and *Nyquist* are in considerable tension with a more recent line of cases holding that the Free Speech Clause does not permit the government to deny religious groups equal access to *the government's own property*, even where such groups seek to use the property "'for purposes of religious worship or religious teaching.'" *Widmar v. Vincent*, 454 U.S. 263, 265 (1981). *See Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 394 (1993); *Capital Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Central Sch*., 533 U.S. 98 (2001); *see also Westside Cmty. Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990). Providing religious groups with access to property is a form of direct aid, and allowing such groups to conduct worship services plainly "advances" their religious mission. The Court, however, has consistently refused to *permit* (let

alone require) state officials to deny churches equal access to public school property on the basis of these officials' argument "that to permit its property to be used for religious purposes would be an establishment of religion." *Lamb's Chapel*, 508 U.S. at 394. Indeed, the Court has extended these cases to require equal *funding* of religious expression, reasoning that "[e]ven the provision of a meeting room . . . involve[s] governmental expenditure" for "upkeep, maintenance, and repair of the facilities." *See Rosenberger*, 515 U.S. at 842–43; *see also Prince ex rel. Prince v. Jacoby*, 303 F.3d 1074, 1085–86 (9th Cir. 2002) (extending the principles of *Rosenberger* to monetary and other benefits provided to student groups that are entitled to meet on school grounds under the Equal Access Act). Inasmuch as the Court has approved governmental expenditures for the maintenance and upkeep of facilities used for religious expression and worship, we decline to adopt a reading of *Tilton* and *Nyquist* that would create needless tension with later holdings. Indeed, insofar as the basis for treating a structure owned by a religious institution differently from a structure owned by a nonreligious institution is the religious *instruction* that takes place within its four walls—its *speech* and *viewpoint*—such discrimination directly implicates the Free Speech Clause. *See Rosenberger*, 515 U.S. at 828–31.

Furthermore, *Tilton* and *Nyquist* essentially sanction discrimination between private institutions that are identically situated but for their religious status—and in that respect are in tension with the Court's free exercise jurisprudence. The law in *Tilton* required colleges that applied for federal construction aid to provide 20 years of secular educational services in exchange for such assistance. Upon completion of their 20-year obligation, secular colleges that participated in the program were free to use buildings built with federal money for whatever purposes advanced their mission, regardless of whether such uses provided any benefit to the government. By contrast, religious colleges that earned the right to federal aid by providing the same 20 years of educational services—services that, again, were required by law to be secular—could not use a structure built with federal money to further *their* mission. In one sense, it could be argued that this was equal treatment, because neither religious nor secular colleges could use federal assistance for religious purposes. But it is more accurate to say that it was discrimination against institutions with religious worldviews: secular institutions were free to use government aid to foster their philosophical outlooks; religious institutions were not. The same can be said of the program at issue in *Nyquist*, under which secular private schools were free to use grants "given largely without restriction on usage" to advance their missions, but religious institutions were not. 413 U.S. at 774. Even after *Employment Division v. Smith*, 494 U.S. 872 (1990), such differential treatment is in considerable tension with the Free Exercise Clause. *See id*. at 877 (government may not "impose special disabilities on the basis of religious views or religious status"); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[a]t a minimum, the protections of the Free

Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 390 (1990) (to "single out" religious activity "for special and burdensome treatment" would violate the Free Exercise Clause).[14]

Finally, the Supreme Court's Establishment Clause jurisprudence has greatly evolved since the Court's decisions in *Tilton* and *Nyquist* were rendered, and many of the legal principles that supported those decisions have been discarded. In 1985, for example, the Court struck down programs under which the government provided religious and other schools with teachers who offered remedial instruction to disadvantaged children. *See Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The Court reasoned that teachers in the program might "become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." *Ball*, 473 U.S. at 385. In *Agostini*, however, the Court overruled *Aguilar* and substantial portions of *Ball*, explaining that the Court had abandoned the presumption that placing public employees in religious schools "inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. Similarly, in the 1970s the Court held that the state could not provide any "substantial aid to the educational function of [religious] schools," reasoning that such aid "necessarily results in aid to the sectarian school enterprise as a whole." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *accord Wolman v. Walter*, 433 U.S. 229, 250 (1977). In *Agostini* and *Mitchell*, however, the Court expressly abandoned that view, overruling *Meek* and *Wolman*. *See Agostini*, 521 U.S. at 225; *Mitchell*, 530 U.S. at 808, 835–36 (plurality opinion); *id*. at 837, 851 (O'Connor, J., concurring in judgment). In addition, other portions of *Nyquist* have been substantially narrowed or overruled. As the Court stated in *Zelman*, "[t]o the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid

[14] We are not suggesting that religion must always be treated the same as non-religion; that sort of formal neutrality has never commanded the support of the Supreme Court, and it would be inconsistent with the established principle that *the government* may not advance religion in ways that it is free to advance many secular ideals, *see, e.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence"); *Santa Fe*, 530 U.S. at 302 ("there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (quoting *Mergens*, 496 U.S. at 250 (plurality opinion))), as well as the principle that the government must sometimes accommodate religious practices in circumstances where it would not be required to accommodate similar secular practices, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 216–17 (1972). But where the government treats *private* parties differently on the basis of their religious status or viewpoint, such differential treatment is subject to more rigorous scrutiny. *See, e.g.*, *Rosenberger*, 515 U.S. at 828–37; *McDaniel v. Paty*, 435 U.S. 618 (1978).

directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662.

Perhaps more important, recent Supreme Court decisions have brought the demise of the "pervasively sectarian" doctrine that comprised the basis for numerous decisions from the 1970s, such as *Tilton* and *Nyquist*, and the 1995 Opinion of this Office. As noted above, that doctrine held that there are certain religious institutions in which religion is so pervasive that *no* government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose. That doctrine, however, no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell*, *see* 530 U.S. at 825–29 (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, *see id*. at 857–58 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of *actual* diversion of public support to religious uses to invalidate direct aid to schools and explaining that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause"). *See also Columbia Union Coll. v. Oliver*, 254 F.3d 496, 502–04 (4th Cir. 2001) (explaining that the pervasively sectarian test is no longer valid in light of the holdings of six Justices in *Mitchell*). Justice O'Connor has rejected the view that aid provided to religious primary and secondary schools will invariably advance the schools' religious purposes, and that view is the foundation of the pervasively sectarian doctrine.

For all of these reasons, the reach of *Tilton* and *Nyquist* cannot be extended beyond their narrow holdings. And, for the reasons set forth in Part II, those holdings plainly do not control the question we address.

IV.

For the foregoing reasons, we conclude that the Establishment Clause does not prevent the Department of the Interior from providing historic preservation grants to the Old North Church or to other active houses of worship that satisfy the generally applicable criteria for funding under the Program.

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The Know-Nothing Party in Massachusetts

THE RISE AND FALL OF A PEOPLE'S MOVEMENT

John R. Mulkern

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Excellency and other "great officers of the State" had donated their mite to the promotion of the fledgling American wine industry by polishing off a couple of bottles of domestic champagne. At about the same time, junketing legislators in another test of the ingenuity of man ran up bar bills at state expense.[45]

Those legislators who had backed the liquor law soon learned that people were upset with the idea that selling a glass of ale rated a sentence in the House of Corrections. A rally to protest the new law attracted a crowd of ten thousand to Faneuil Hall to listen to speeches denouncing the law as a gross violation of the basic rights of free men. With the exception of the Nunnery Committee, no other action taken by the Know-Nothing government caused so much controversy or provoked such a public outcry.[46]

Temperance had proved as nettlesome a problem for "Sam" as it had earlier for the Whigs. But on another social issue, all legislators were agreed: The swelling numbers of poverty-stricken Irish Catholic immigrants settling in Massachusetts cried out for state action.

The virus of intolerance that Know-Nothingism had contracted at birth coursed through the executive and legislative branches of government; and it erupted during the 1855 session in the form of a state-sponsored attack on the civil and political rights of the foreign-born and Roman Catholics that went beyond anything found anywhere else in the country.

In its drive to preserve cultural purity, Know-Nothing government indulged a mean and petty spirit that manifested itself in a callous disregard for minority rights and sensibilities. Making matters worse was the virtual absence of opposition within the one-party government to all but the most extreme nativist demands. This enabled "Sam" to launch a political assault against the Irish Catholic minority that exceeded even the stated goals of the American Republican and Native American parties of the 1840s.[47] Governor and legislature teamed up to relieve the state courts of their power to entertain applications for naturalization; to mandate a daily reading from the King James Bible in the public schools (which was offensive to Roman Catholics); to uphold "the honor of the American flag" by disbanding Irish militia units; to dismiss Irish state workers; to ban the teaching of foreign languages in the public schools; to discontinue international exchanges of books, by which the Commonwealth received public documents and scholarly material from abroad; to expunge a Latin inscription from its place above the desk of the speaker of the house; and to issue a resolve calling on the federal government to extend the residency requirement for naturalization from five to twenty-one years and to limit public office to native-born citizens.[48] More ominous were the proposed state constitutional amendments (which passed both houses with overwhelming majorities) aimed at depriving Roman Catholics of their right to hold public office and at restricting office and the suffrage to male citizens who had resided in the country for no less than twenty-one years.[49]

Pledged to separation of church and state, the Know-Nothing temporal arm lashed out at the rights of the state's Roman Catholic minority. The epitome of the Bay State's "Protestant Crusade" was the Nunnery Committee. Petitions to the

General Court, expressing concern that in "certain institutions within this state, known as convents, nunneries . . . [women] are forever barred from leaving . . . however much they desire to do so . . . [and] that acts of villainy, injustice, and wrong are perpetrated with impunity within the walls of said institutions as a result of their immunity from public inspection," prompted the legislators (or so they claimed) to establish by unanimous vote the "Joint Special Committee on the Inspection of Nunneries and Convents." A bizarre mix of concern for quality education, prurient curiosity piqued by centuries-old gossip, and a puritan penchant for minding other people's business, the Nunnery Committee, as it was popularly called, had a twofold mission: to assess the quality of parochial school education and to pry into Catholic institutions suspected of holding women against their will or of housing concealed "arms and instruments of war."[50] The Committee was the creature of a populist government that set fewer limits than had its predecessors on the power of the state and that sanctioned an unwarranted intrusion into the private lives of people. It was a charge laden with the potential for abuse.

So, too, for that matter, was the Coalition's pauper removal law by which the Know-Nothing administration during 1855 realized for the Commonwealth a savings "of at least one hundred thousand dollars" by ridding the state of more than thirteen hundred charity cases, the preponderance of whom were immigrants. Governor Gardner boasted that implementation of sound business practices had made possible these savings, and he urged extreme caution in bestowing "Christian charity" on unfortunate foreigners, lest the Commonwealth become "the receptacle of the vicious, the degraded, and the insane." The official organ of the American party was less circumspect, commending the Board of Alien Commissioners for having shipped some three hundred of "these leeches upon our taxpayers beyond [the] sea where they belong."[51] Among the "leeches" was an impoverished widow with her American-born infant and inmates from state asylums who were dumped dockside in Liverpool without any further provision for their care. A sea voyage home, the commissioners reported, would prove "conducive" to the recovery of many of them, since homesickness was the principal cause of their malady.[52]

Abuses like these aroused the ire of Peleg W. Chandler, a Whig holdover on the board. Chandler issued a separate report in which he likened the pauper removal law to the Fugitive Slave Law in its callous disregard of human rights and accused the Know-Nothing government of practicing a double standard, whereby it drove helpless foreigners out of the state, on the one hand, and provided sanctuary for runaway slaves on the other. "A black man is no better, and is entitled to no more security as to personal rights . . . than a white man," Chandler wrote.[53] Such criticism fell on deaf ears. "Sam" accelerated the removal of broken-down Irishmen and women from state institutions and sent hundreds of them "across the Atlantic with less ceremony and formality—with less of recorded and documentary evidence—than goes to the sending of a tub of butter, or a barrel or apples, from Fitchburg to Boston."[54]

DEBATES

IN THE

MASSACHUSETTS CONSTITUTIONAL CONVENTION

1917-1918

CHAPTERS I TO XV

BOSTON
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32 DERNE STREET
1919

him, nobody is trying to use any influence on me on this subject. I took the advice of a better lawyer than I was, to save any question. There is nothing dark or hidden in that matter.

In short, this amendment provides:

First. — Against the appropriation of money raised by taxation or otherwise for the support of public schools to the support of any school which is not a common school.

Second. — Against the grant or appropriation of public money or property of any kind for the purpose of founding, aiding or maintaining any college, hospital, institution or undertaking which is not under public control, with the exceptions above stated, and against such grant under any circumstances for founding or aiding any church, religious denomination or society.

At this time when the Commonwealth needs the support and good will of every person within its bounds it is no time to work up race or religious prejudice. Let us hope, therefore, that the Convention will settle this much discussed question along these broad lines, complete the work of the 1853 Convention and once for all close the discussion of this subject.

I have exceeded the time I indicated, gentlemen, for which I crave your pardon. [Applause.]

Mr. BENNETT of Saugus: There are several points in regard to this matter on which I should like further information. Unless I am wrong, it seems to me that this proposition here, this resolution, contains three separate and different amendments, one of which I favor, one of which I oppose, and on one of which I am in doubt, although generally I have been in favor of it.

The first proposition is to prevent the appropriation of public money for sectarian educational institutions. The second proposition is to prevent the appropriation of public money for sectarian hospitals and other institutions than schools. The third proposition is to prevent the appropriation of money for a variety of public purposes to private institutions.

Now, I am very much opposed to that. I do not see why we have not got the right to appropriate money for the textile schools, for instance, which have been quite a feature in Massachusetts in the last few years, under private guidance and private control. I fail to see why it is not a good thing to appropriate public money for those and any other similar institutions. Why, in regard to many functions for the benefit of the Commonwealth we are very ardently taking entirely opposite grounds. We have just voted down a resolution to permit the State to engage in the sale of merchandise or engage in manufacturing. We have just voted that down because we want private parties to do it.

Now, am I wrong in thinking that we have taken opposite ground there to what is proposed here? The State Highway Commission proposes to build a piece of State highway. Before the State goes in and builds it it does now, or used to, ask for contracts, first from the locality, the towns and cities, through which it passes, and next from private contractors. The city of Boston, or at any rate most cities, make contracts for a great variety of public purposes.

Now, there are not only textile schools but there are the private hospitals. I think they have exempted libraries here, but there are

the public hospitals in various towns and cities, run on the bequests of private persons and supported largely by private beneficence, but aided by appropriations of the towns and cities. It seems to me that this would do away with that.

Now, when it comes to sectarian hospitals and other similar institutions we have an entirely different proposition. I always voted for appropriations for Carney Hospital; and, in spite of some excitement and some hostility by certain orders and certain people of a different way of thinking, I never had the slightest difficulty in explaining it. I never had the slightest difficulty and it never was made a political issue. I never had the slightest difficulty in explaining that that hospital was performing service which the State would have had to perform, and less efficiently, if that hospital had not done it.

Now, it seems to me I ought to have a chance to vote differently on those matters. When we come to sectarian schools it seems to me that I am in favor most decidedly of that portion of this report, because I believe in the public school system, and I believe that it has been almost the principal cause of the progress of this Nation, in that it has become what it has.

I had a gentleman visiting me the other day from Iowa, who said he was brought up in a community of Poles, or people of Polish extraction, and he said almost invariably in the third generation you could not tell them from Yankees, from natural born Americans, except that they had more children. That is the only way you can tell them. They came over here more or less dirty, immoral and thriftless, and in the third generation they were changed to native Americans. And, as I say, they differed from them then only in that particular, which I think is almost the fundamental cause of this principle coming in here at all, namely, that some races increase faster than others.

Now, Mr. Chairman, I would like to get a chance, unless I am entirely misinformed, to vote on these three propositions separately. It seems to me I am entitled to have that chance. It not only seems to me I am entitled to have that chance, but it seems to me that the voters are entitled to have that chance at the polls, to vote upon them separately. I listened with as much care as possible to the reading of the chairman of the committee on Bill of Rights from the proceedings of the Convention of 1853, and it seemed to me that they were confronted with precisely the questions that we are confronted with, and that they most deliberately decided that they would not go into the prevention of the Commonwealth having work performed in the most efficient and most economic manner, and they rejected that proposition. They would not go into the question of public appropriations for hospitals, and for certain special institutions of learning, as textile schools, and they defeated that proposition. And, if I understood the gentleman correctly, what they did is precisely what I hope we will do, — prevent any appropriations of public money for minor sectarian educational institutions, and cut off the rest of it.

Mr. Chairman, I trust the matter may shape itself in that way. I think we are entitled to have it shape itself that way. I make no reflection upon the condition of affairs which brought about this wonderful combination in this amendment, but I cannot help having a little suspicion on the subject when I remember how ardently a very able gentleman in this body always has opposed appropriations for the

Institute of Technology and other similar institutions. The Institute of Technology has become very rich. How about textile schools, how about shoemaking schools, how about tailors' schools, dressmakers' schools, what not? In this manifold system of technical training into which we are now coming, what are we going to do about that? I understand we are going to cut it if it goes through, we are going to cut it off neck and crop. I do not believe the people will do it.

Now, I have been impressed with the sincerity of utterance of the chairman of this committee (Mr. Curtis), and I am not going to say that I think this amendment is put in this way for the purpose of killing the whole proposition. And my judgment may be wrong, very likely it is, but if I wanted to kill the whole proposition at the polls it seems to me that I could not do a cuter thing than to put these three entirely different propositions together in one. I hope, Mr. Chairman, that we shall have some way of getting at this and having these three separate.

On Tuesday, the 24th of July, Mr. Edwin U. Curtis of Boston, chairman of the committee on Bill of Rights, announced that the committee had unanimously agreed upon a form of amendment which he offered as a substitute for the measure originally reported by the committee. In explanation of the reasons for the changes recommended Mr. Curtis said: —

Mr. EDWIN U. CURTIS: In reading over the resolution this morning the committee discovered that in line 22, after the word "learning", these words should have been printed: ", whether under public control or otherwise,". They were read by the secretary as we had made the amendment.

Mr. Chairman, it is with great pleasure that I announce to the Convention that the resolution as now presented represents the unanimous opinion of the committee on Bill of Rights. [Applause.] I want to say, however, that there are certain gentlemen on the committee who reserve their right to vote as they may please on certain amendments that may be offered. The committee made the following changes. Gentlemen have the old resolution for reference.

Referring to Document No. 306, line 23, the committee struck out the word "religious", and put in the word "denominational." In the same line, the committee struck out the word "taught", and inserted the word "inculcated".

There were many people who were of the opinion that the wording of Resolution No. 306 practically made our schools atheistic or agnostic, hence the change.

In line 26, the committee struck out the words "conducted according to law", believing that any institution that was not conducted according to law would be properly cared for by the Attorney-General.

In line 30, the committee inserted the words "or Federal authority or both". That was because the Agricultural College has certain relations to the United States government, and we feared that the contributions of the United States government to the college might be interfered with if we did not add those words. These words also will take care of any question of the contribution of the United States government to the Soldiers' Home.

In line 35, the committee struck out the word "public", as needless repetition.

After the word "construed", the last word in line 40, the committee struck out everything, and substituted what appears in the substitute resolution offered.

I would say, Mr. Chairman, that there may be errors of punctuation that should be corrected; undoubtedly there are. The committee, as I have said, have had no opportunity to correct the proof. If there are such errors they undoubtedly will be corrected by the committee on Form and Phraseology.

Mr. ANDERSON of Newton: I ask leave, Mr. Chairman, to withdraw the minority report. [Applause.] I think it is a matter of congratulation to all of us that we have at least reached a point of unanimity. However, I wish to say that my assent to the report is in some sense a qualified one; and, as the committee already understands it, I want the Convention to understand exactly what my assent means. It means that I will vote for the committee's amendment in the form it now bears, or in a more satisfactory form, in the final vote at every stage. I reserve my right to vote against it as soon as it is amended in a form unsatisfactory to me. I also reserve my right to support all amendments or substitutes which seem to me to improve the committee's amendment or put it in better shape. In these particulars I reserve the right to dissent.

Some object to that and say that I should have gone further. But while I was a dissenter, I was perfectly free; I did not need to go any further than I chose to go. I have gone a long way. I have gone so far as to say what I never said before, that I should vote for the Curtis amendment, for the majority amendment, and I have done this accepting the very great handicap of the hostility of friends of the private institutions which are cut off by this measure.

That is a very grave handicap. I think probably I know its extent as well as any man in the Convention. I have made a special investigation along that line. I have a long list of private institutions which will need to be more or less reorganized or readjusted if this amendment should pass. I feel that I am taking a very grave and great chance in giving my assent to this majority report. But as we go along in life, we are compelled to take chances, sometimes great chances, and I am willing to do so this morning. I cannot deny that I do it with the greatest reluctance and with the greatest doubt; and yet I have made up my mind, in the interests of harmony and good will, that I am ready to take the handicap.

Now, I have said publicly that I never should support what I then called the Curtis amendment. Why did I say that? I never gave but one great reason, either in my campaign for this Convention or in the Convention. Of course I have had subordinate reasons which I still hold, but I mean one main reason; and that is, that I was afraid that this amendment would be beaten at the polls. It will have against it all of the sincere friends of sectarian appropriations; it will have against it all of the friends of the private institutions; it will have against it all those who do not approve on any ground, theoretical or otherwise, of the new policy which this resolution, to which I have now assented, involves.

Moreover, the one thing that I felt most keenly, it had no promise of really active support. By that I do not mean to say that every member of the committee was not perfectly sincere. And, as I under-

stand it, every member of the committee is willing to make a few speeches for this amendment. But when I looked around the table in the committee-room yesterday, I wondered who would be a father to it, who would sit up with it nights, who would nurse it through the measles and the whooping cough, carry it over the rough places and finally see it "across" on election day. I asked the committee whether any of them were willing to do this but I did not get any reply except from the chairman, whose response I very highly appreciated.

Why, then, do I change and now say that I will support under certain conditions the report of the committee?

First, because it is a different report from the one which I said I never should support. It has been changed in what seem to me important particulars. I am ready to say right here, and fairly and squarely, that so far as I can see at the present time it gives to the opponents of sectarian appropriations all that they want, and consequently on that ground I have given my assent to this report.

The second reason I did this was because I knew that every day I stood in opposition to this report, which I felt that I might be called upon to support at the polls, I really was injuring its chances before the people, and consequently I changed in order that I should not play into the hands of some persons, — I will not say members of this Convention, — who are supporting this report because they want to see it killed. I did not want to play into their hands a moment longer than I possibly could help.

In the third place, I had another reason, and this was the compelling reason, a reason which never has been made known before. Without this reason I should not have been able to have signed this report. I have received from the highest quarters assurances of active support for this amendment by men who wield large influence and newspapers that wield large influence in this Commonwealth; and I felt that I could trust in the honor of the gentlemen who made me those assurances. I now think that, with those guarantees, with the unanimous report of this committee, and I hope a unanimous vote of the Convention, the handicap of the private institutions will be overcome. I think it is reasonable to suppose that it may be.

Now, as I am on my feet, I think I should like to tell the Convention in a sort of historical review something of the story and motives of the movement that has made such a discussion as this possible in the Convention. We are taking part to-day in an age-long and world-wide debate on the subject of the relations of church and State. It is a very difficult question. I never knew how difficult it was until I began to investigate. It is wonderful how many cross currents of life are involved in it. It would be a difficult even if it were not a delicate question, and it is delicate because it involves the religious feelings and prejudices and sometimes the passions of men, and, more than that, because all through this present situation run all sorts of political ambitions. I am sure, however, that all of us desire to have this question permanently taken out of politics, where it ought never to have been. The Convention of 1853 ought to have seen to that. And when we have a proper separation of church and State, it will have disappeared, and forever.

I am glad that we have such advantages at the present time in

solving this question; that we have in this Convention the beginnings of mutual understanding, which are of the very highest promise for the future of this State. I feel that we all agree, or almost all agree, up to a certain point. We all agree on religious liberty. We all agree on the separation of church and State, in theory at least, and I think that the great majority of us agree on the application of the separation of church and State to appropriations of public funds.

In the ancient world and in the heathen world and in Christian Europe, the custom has been the union of church and State, but even in Europe whenever countries have become republican, as in France and Portugal, they have entered almost immediately upon the course of the separation of church and State. In France and Portugal it was done in an unnecessarily rough and crude way, — but nevertheless it was a part of their democracy, their high valuation of the individual, which compelled them to it. And if I can understand anything from the confused reports that come from Russia, I believe that the separation of church and State already is in process in that new republic. Republicanism and the separation of church and State necessarily go together.

It is the glory of the Commonwealth of Massachusetts that on its soil Roger Williams, away back in 1636, proclaimed this doctrine of religious liberty, — religious liberty for the other man as well as for himself. On account of his denial of the right of the State to compel any act in the sphere of religion, — not because he was opposed to religion, but because he felt that religion was a personal matter and that voluntary religion was the only religion worth talking about, — the Commonwealth of Massachusetts, whose history in this matter, as I shall show, has not been such that we can be proud of it, banished Roger Williams at the beginning of winter, and if the Indians had not been more kind to him than his Christian brethren he would have perished in the snow. He went down to Rhode Island, and there he established a State where every one had full religious liberty; and such a motley crowd of Turks and Jews and Baptists and Catholics and Quakers, and every sort of people with strange ideas as got together, there probably never was seen before on the face of the earth. It was the asylum of everybody who had independence enough to maintain his own opinions against his neighbors in the sphere of religion. They had a terribly hard time of it, but they held to the doctrine that every man had a right to think and act as he pleased in the sphere of religion, without any State compulsion.

When the United States formed its Constitution it followed the lead of the State of Rhode Island, influenced also by the toleration which was found in Maryland and Pennsylvania, but refused to imitate the other Colonies, which had State churches. Consequently, we find in the first amendment to the Constitution of the United States the words:

> Congress shall make no law regarding an establishment of religion, or prohibiting the free exercise thereof.

Now, with Roger Williams out of the Colony in 1636, there still remained people in Massachusetts who wanted to live here and yet wanted to have and to speak their own opinions on the subject of religion. The result was that for more than a hundred years, up to

the time of the Convention of 1780, there was constant agitation and religious persecution in this State. Quakers were hanged in this city because they were Quakers, and Baptists were whipped in this city because they were Baptists, and Episcopalians and Catholics and Presbyterians and every other kind of folk were persecuted in various ways because they did not belong to the established order. This fight against the established church had gone along pretty well before the Convention of 1780 assembled, and in that Convention this was the greatest question debated. The result of that discussion was the second and third articles of our Bill of Rights. I have heard recently some distinguished men quoting the third article as though it was part of the law of the State, but it has long since been repealed and amended by the eleventh amendment to the Constitution. A more involved, uncertain and inconsistent article is not to be found in a State Constitution than that third article of the Bill of Rights. It simply shows how small progress our fathers made toward settling that great question in the Convention of 1780.

The agitation continued, because very little after all had been gained by that third article, and in the Convention of 1820, again, this was one of the principal questions debated; and an amendment, which went much further than the third article of the Bill of Rights, was put before the people and was beaten by them.

However, there had been so much interest stirred up in this matter that in 1833 an amendment was passed by the Legislature and the people, which finally, in the most grudging and back-handed manner, abolished the State church in Massachusetts.

That was the result of the labors of 150 years. Some of you think that this agitation which we have witnessed in this State, which has gone on for over 17 years, is long; but I assure you, gentlemen, if you do not settle this question now, some of us, like our fathers, are ready to go on with it for our natural lives and hand it down to our sons and grandsons.

I might say right here, bringing it in perhaps a little illogically, that there are three or four stages in reference to this matter of the relations of church and State. First, there is the union of church and State, where the State supports the church to the extent that it persecutes, forces and compels all those who do not do as the State and the church have agreed shall be done in the sphere of religion. Then comes the next stage, where the State and the church say: "Our laws are right, you ought to obey them, but you are so stiff-necked that you will not, and consequently we will allow you certain privileges." That is toleration, which every red-blooded man spurns. Then we come to religious liberty, when it is conceded by everybody that everybody else, so far as the State is concerned at least, has a perfect right to think and to act in the sphere of religion as he pleases; and this religious liberty, mind you, never can be guaranteed except by the complete separation of church and State.

This separation of church and State is of two kinds, however. In some countries, — and I think that many of us could think of such countries at the present time, — it is a separation where the State is hostile to the church, and where the State practically persecutes the church in some particulars because it is hostile to it. But the other kind of separation of church and State is that which we have had in

America, which we have enjoyed for a hundred years with the greatest satisfaction both to the State and to the church, — a friendly separation, — where the State is friendly to the church and the church is friendly to the State, where they keep their affairs apart for their mutual benefit, and yet coöperate for the highest good of the people.

Now, in the Convention of 1853 this question came up again. Why? Because the matter of appropriations, of the use of money, had not been settled. This question of sectarian appropriations is a question of religious liberty. Religious liberty says that the State shall compel no act in the sphere of religion; therefore the State cannot compel a man to pay his good money in taxation for the support of a religion, or of the schools and institutions of a religion, in which he does not believe. It is intolerable that the Catholic, for instance, in this State, should be forced by the State, as he too often has been forced in the past and as he still may be forced under the present Constitution, to pay his good money in taxation for the propagation of the Protestant religion in the schools and institutions which that religion has established; and it is equally intolerable that the State should force a Protestant to pay his good money in taxation for the support of the institutions and schools in which the Roman Catholic religion is propagated; and it is equally intolerable, — I say equally intolerable, — that the Jew or the agnostic should be forced by the State to pay his good money in taxation for the support of institutions in which either of these forms of religion is propagated.

Now, the Convention of 1853 attended only to the matter of public schools. How well they attended to it may perhaps be brought out later in the debate, and I will not debate that now. But the question concerning higher institutions of learning, societies and undertakings, certainly was left open and consequently the matter comes before us again in 1917.

About the year 1899 or 1900 a group of men in this State made up their minds that this thing ought finally to be put right. They had good reasons for their movement at that time. All they had to do was to look around them and observe what was going on in the States of New York and Pennsylvania, in order to see what very soon would be done here, if the matter was left wide open. Consequently, they joined together for the purpose of putting this great principle of religious liberty, guaranteed by the separation of church and State, in the matter of appropriations and taxation, into the Constitution of Massachusetts. They were high-grade men who did this thing. Their leader was Professor Henry S. Nash, of the Episcopal Divinity School in Cambridge, and men of that sort. After a while they drew about them some of the very finest men in this State. Of course they had an organization, and I want to say something about that organization, as it has been very much slandered and very much misunderstood.

I wish to say, in the first place, that it is not a secret society in any way, shape or manner; and in the second place, that it has no dues, that the members never have paid a cent, and that the officers never have received any money; and that those who have done the work of the movement have sacrificed, — some of them have sacrificed all they had, some of them have mortgaged their future, — in order that this great principle might be put into the Constitution. I want to say, too, that it is not an A. P. A. society. The distinctive principle of the

A. P. A. is that a Catholic, holding allegiance to the Pope, cannot be a good American citizen. We absolutely repudiate that sentiment. We do not believe it at all. We do not believe in discriminating against our friends of any sect or creed because of their religious views or feelings. That never ought to be taken into consideration, it seems to me, when a man is running for public office in this State. I have had the great privilege of voting again and again for my friends of the Catholic faith, and when this Convention was chosen, I voted for one man, and I think I voted for two of that faith, to represent me here.

Now, I want to have you understand thoroughly the character and animus of this movement. It has been a high class movement. It has been a movement whose motto has been "Speaking the truth in love;" and we feel that we have been justified in all that we have done; that on the whole, — notice what I say, — that on the whole the results of the agitation have been helpful; and there is no State in the Union at the present time which so thoroughly believes, I think, in religious liberty and in the separation of church and State, even so far as sectarian appropriations go, as this State, just because of this agitation.

We introduced into the House of Representatives an amendment to the Constitution whose first sentence reads:

> No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof.

That is part of the first amendment to the Constitution of the United States. We put it in because the Commonwealth of Massachusetts in 1789, dominated by the State church, rejected that first amendment to the Constitution, along with Connecticut and Georgia; and we thought it was only a right atonement at this late day that this State should place that amendment in its own Constitution:

> No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the State or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used for the purpose of founding, maintaining or aiding by appropriation, payments for services, expenses, or in any other manner any church, religious denomination, or religious society or any institution, school, society, or undertaking which is wholly or in part under sectarian or ecclesiastical control.

I thought during my campaign, and I still think, that that is a perfectly plain amendment. It has a single purpose. Any man who runs can read and see what it means. There is nothing unfair in it, I am convinced, after the most thorough consideration of that matter. I was surprised to hear from a friend of mine, an opponent of this amendment, that a certain church thought that the words "sectarian or ecclesiastical" were aimed at it. I wonder how that possibly could be. They thought that that was an insult, and an intended insult. I wonder which word contained the insult. Was it sectarian? Why, certainly that great church is not sectarian; no one ever supposed that it was. Is it ecclesiastical? Certainly that great church is ecclesiastical; but there are other churches that are ecclesiastical, — all churches are ecclesiastical. No insult was intended.

It is perfectly fair. It gives to everyone all his rights before the law, as it seems to me. Still, we are not debating that amendment and we do not need to go any further to show the spirit in which we have come to this place.

Mr. ANDERSON of Newton: I listened with the greatest interest to the debate of last Friday morning and felt as it proceeded that we were losing the force of the broad stream of our agreement in the sands of a desert of minor differences. I think that we ought this morning, once more, perhaps, to go over the whole matter and to appraise the purpose and the value of the proposal of the committee on Bill of Rights.

I understand that it is the custom of this assemblage to yield for questions, although it is not at all the uniform custom of Congress, but I am going to ask that, because I am trying to present a balanced argument, I may not be interrupted for questions until the end; then I shall be very glad to answer any which may be asked of me.

I do not need to go over what I said the other day about this being a world-wide and age-long controversy in which we are engaged. I do not need to review the two hundred years of conflict in this State which finally resulted in 1833 in the eleventh amendment, which in a backhanded but effective way finally disestablished the State church in this Commonwealth. This was a great step in advance, but still in 1833 a great deal was left undone. For while it is intolerable to men who prize religious liberty to be taxed for the support of a State church, it is only one whit less intolerable for them to be taxed against their will for the support of the schools and institutions of a church.

In 1853 a part of this subject which was left unfinished in 1833 was taken up, *i.e.*, the matter relating to the public schools, and the extremely awkward eighteenth amendment to the Constitution, which never had passed the scrutiny of a committee as far as I can find out, was finally passed. As I understand it, that amendment says effectually, though not plainly, that public money is to go to public schools only, and public schools mean the common schools of the Commonwealth. To that statement, — and the amendment should have ended there, — there was added the following phrase:

> and such money shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school.

That was a very dangerous addition. It is very difficult to find out what it does mean, but the English of it is simply this: That $200,000 might be appropriated to the Methodist denomination, we will say, and that if only $195,000 of it was used for its own schools and $5,000 for something else it would be all right. And I apprehend that the reason that the Supreme Judicial Court in its 1913 opinion divided four to three on the subject whether appropriations could be made to a religious denomination or religious sect was this very sentence, and three of the members of the Court, relying probably on this sentence, declared that under certain circumstances appropriations might still be made to a religious sect. This dangerous situation is cured in the report of the committee on Bill of Rights by saying that no appropriation shall ever be made to a religious denomination or religious society.

The Convention of 1853, however, lacked both in courage and in vision, but especially in vision. They did not see how important it was to clear up this whole question, and they dealt only with public

common schools, leaving higher educational and charitable institutions entirely out of the question. And on that account since 1853 there have been various movements in this State in this sphere. Some of these movements have been on a lower and narrower plane and some of them have been on a higher and broader plane, but all have insisted that the doctrine of the separation of church and State should apply to all appropriations to sectarian institutions of whatever kind.

Now I want to say to some men in this Convention who have been so busy with other affairs, and rightly, that they have not known what has been going on in this matter in this State, that this is a very popular issue. Why, before our committee on Bill of Rights there appeared the Methodist bishop, who told us in no uncertain terms that all of his people, practically without exception, favored the prohibition of sectarian appropriations. A representative of the Congregational denomination appeared and read us a resolution which was passed by their State assembly, — I do not know just what the name of it is, — with only a few dissenting votes, in which it stood absolutely for this principle of the prohibition of sectarian appropriation. The representative of the Unitarians came in and said practically the same thing. I remember very well that two years ago in the Baptist State Convention they passed a resolution to the same effect unanimously and with cheers. I have been attending that Convention for seventeen years and I never heard any resolution in that Convention cheered before or since; but that one was greeted with cheers.

Now I have nothing from the Episcopal church, but in going about the State and talking about this matter I never have found an Episcopal clergyman who was not in favor of the prohibition of sectarian appropriations. And I never have found any Protestant clergyman nor any Jew who has not been in favor of that prohibition. And almost all of those who claim to have no religion or who are agnostics, if you talk with them on the subject, will say it is perfectly right to prohibit sectarian appropriations. I believe that five-sixths of the people of this State believe in the principle of the prohibition of sectarian appropriations.

We have a society called the Minute-Men, not a secret society; it has no dues or salaries; it is distinctly not an A. P. A. society, but an association in which the broadest and most liberal men have gathered together. It was founded by Mr. Batcheller and since then a large body of the most distinguished men in this State have entered it. It has only one object, — not, let me tell you, not necessarily, narrowly, to put through one particular amendment called the anti-sectarian amendment, but merely to put this principle of the prohibition of sectarian appropriations in some way into the Constitution of Massachusetts. Now one hundred thousand voters of this State have signed the cards of this association and at one time in the recent history of the State sixty thousand votes were cast for this principle in one of the Republican primaries and one hundred and seven votes were cast for this principle, — and I think we could say a good many more votes than that if we take merely the principle into consideration, — in the House of Representatives. It is a large, popular movement.

Now I did not believe that fully until after my election to this Con-

stitutional Convention. Please pardon a personal reference but I want to tell you how I learned a good deal. I never had been in politics before and so, of course, I learned a good deal anyway in a good many different directions. But I made up my mind that I would test the popularity of this movement. I had been told that there was a great popular demand for this principle and I said: "I am going to test it." I was an utterly unknown man politically, hardly known beyond my own ward in Newton, and I knew perfectly well that my personality would not command five hundred votes in the district. But I said: "We will test the principle now and we will put it forward from beginning to end." And so from the very first night of the campaign to the last I attached my name to the anti-sectarian amendment prohibiting sectarian appropriations. I spoke of it every time I spoke at all, I advertised it in the newspapers, I sent circulars heralding it all about the district, and this was the issue which finally gave me in the district 9,620 votes. Now that shows how strong the issue is when it is presented in a calm and fair manner. I advocated it as the way to a solid peace in this State, and that is the thing which I came to this Convention to help on if I could, — a solid peace in this State.

Any one who has been here in the State House for the last two months knows very well that there is more popular interest in this matter than in any other. Our hearings were crowded; we had to go to one of the very largest rooms in this building in order to accommodate the people who came day after day to hear.

Now the reason that this is a popular issue, the reason there is a great popular movement for it, is easy to understand. In the first place, it involves the religious liberty of the individual. It is a part of religious liberty that the State can force no act in the sphere of religion, and that on the ground that religion is a private matter between a man and God; that it has its seat in the inner sanctuary of the personality, and that to force a man on the subject of religion, to force him to any act in that sphere, is to force him in those things which he holds deepest and most sacred, is to violate his personality in the grossest and crudest way. And if that is true, it applies to appropriations for sectarian purposes, for the State under this principle has no right to force a Catholic to pay his good money in taxation for the support of Protestant institutions; the State has no right to force the Protestant to pay his good money for the support of Catholic institutions; the State has no right to force the Jew or the agnostic to pay his good money for the institutions of any religion in which he does not believe. I do not know, gentlemen of the Convention, how much you prize your liberties. I lived for one year in Germany and the most of that time in the city of Berlin, and ever since I lived there I have prized my liberty. [Applause.] And I tell you that eternal vigilance is the price of liberty.

In the second place, the reason for the popularity of this issue is that the prohibition of sectarian appropriations is just as good for the church as it is for the State. We are not opposed to religion because we say that the State shall not give appropriations to religious bodies or institutions. We are helping religion by that proposition. It has been the history from the very beginning that it has been good both for the church and for the State that they should be separate;

not separate as though the State hated the church or the church was opposed to the State, but in a perfectly friendly manner, with an understanding of the two different spheres in which the affairs of the State and the affairs of the church move.

Two illustrations of that: When Christianity had its first great victory in the Roman Empire and the Emperor Constantine became at least favorable to Christianity, in that very hour of their greatest victory, the Christians committed their greatest mistake. For the State and the church then for the first time were united and religious questions became the great political questions of the new Christian Roman Empire, so that all of the political troubles for a hundred years gathered around the question whether a man was an Arian or not. And it was just as bad for the church, for one of the first things that happened was that the Emperor went into the church council and presided and political influence began to do its work of degradation and deterioration in the church.

Here is another illustration of it: In France, up to about thirteen or fourteen years ago, the French Catholic church had been feeding out of the public treasury for centuries, with the exception of a brief period, and the result was, as a distinguished Catholic member of this Convention said the other day in my presence, that it became almost as fragile as a house of cards. When the *Concordat* was denounced in a way that I myself could not approve, but when at last the separation between church and State occurred, the members of the Roman Catholic church in France, a great many of them at least, thought that the church was done for, that without public money it could not subsist. What has been the real result? The real result has been that in these fourteen years the Roman Catholic church in France has become stronger than it ever was before. It has increased in faith, increased in courage, increased in independence, increased in popular favor as never before in all the history of the country. Never was such a distinct good done to the Roman Catholic church in France as when separation of church and State was effected, although there was some injustice in the way in which it was done. Consequently I wish to say that I believe that we are not doing anything against religion, but that we are doing a great thing for religion in taking the position that we do not believe in appropriations for sectarian purposes.

The next reason why ours is a popular issue is this: It takes the last irritating debatable question out of the politics of this State. This has been an irritating debatable question for many, many years, and has been debated more or less during all this time. It has caused a friction in the State which never ought to have existed. It has caused division in the State when there should have been none. It has filled different parties with suspicion when there should not have been any suspicion. And one of the most difficult things that we have to overcome in this Convention is the mutual suspicion which this one thing has bred in this State. If the men who come from communities where it has not been much discussed do not believe that this is a question of immense importance I will say to them that they should ponder the Haverhill riot, in which this smouldering fire burst into flame for a few days. We do not wish to discuss that riot now,

but we desire to do something here to-day that will make it absolutely impossible that any such things shall ever occur in this State again.

When you go into the railroad train, you sometimes get a cinder in your eye and it feels extremely uncomfortable. So you put it up here, and it is just as uncomfortable here as it was there. So you put it over in the right-hand corner of your eye and you begin to weep and feel that you must somehow get it out. You put it down here and it is just exactly as irritating. What is the matter? The matter is that a cinder does not belong in the eye; take it out; take it out! And that is just what we wish to do by our proposal, — to take this irritating, debatable question out of politics forever. In accordance with the great American scheme of the separation of church and State, it never ought to have been in politics. I hope that this is the last Convention in this State in which the matter will ever be debated.

And lastly, it prevents an unseemly scramble for public spoils. Suppose we knew nothing of this teaching in this State, suppose we were back in the old days when all things were free and open, why, we would have an assault on the Legislature for spoils by the different denominations, and you know just what that would mean. All would be on the same level to all appearances, but nevertheless there would be contentious jealousies, each trying to outdo the other in the amount that it would get out of the public treasury, and no one of them would have any real ground for its demand.

Why, then, does not our report contain merely the simple issue of the prohibition of sectarian appropriations? The reason is this: Some of our Catholic friends, who believe in religious liberty and the separation of church and State even to the point of taxation and appropriations, looking at the old anti-sectarian amendment, thought that its defining words "under sectarian or ecclesiastical control" did not cover the whole case. They felt that they did exclude all Catholic schools and institutions from public aid, but that they did not so exclude all Protestant institutions and schools, for they pointed out that some schools and institutions, which seemed to them virtually but not formally Protestant, just escaped coming within the operation of the clause "under sectarian or ecclesiastical control," and declared that it was impossible so to define them as to bring these schools and institutions under its prohibitory force. They therefore felt that the old anti-sectarian amendment was unfair to them and in a manner discriminated against them. I did not understand this when I began my contest, and did not fully appreciate it until very recently. I want you all to know the truth that those who framed the older amendment supposed it to be perfectly fair and as general in its application as in its terms, and that in the campaign for this Convention we had no other idea. Indeed I still believe that the old amendment is fair, that the point that it does not cover all possible Protestant institutions, while technically correct perhaps, is merely technical, and that the old amendment would work out no injustice to anyone in practice.

Still the fact remained that our Catholic friends did hold the view that the old amendment was unfair, and some of them were deeply suspicious that it was intended to be unfair. Some of them therefore, under the leadership of my friend from the fifth ward (Mr. Lomasney) hit upon the really brilliant idea that all Catholic and non-Catholic

sectarian schools and institutions would be covered by the term *private*, and that a prohibition of appropriations to all private institutions would solve the problem beyond all question.

Now when I came to understand this a short time ago; what was I to do? Was it not the part of fairness and of wisdom to allow them to have their way in such a case and thus forever allay their suspicion that we intended to take any slightest advantage of them? Was it not better to coöperate with men who agreed with us on our principle, were willing to give us all we asked and who differed with us only in a matter of definition, rather than to antagonize them by insisting on what seemed unfair and obnoxious to them? I am free to say that I had other compelling reasons for signing the report of the committee and so making it unanimous, but the desire to act in such a way as to bring in an era of harmony and mutual confidence was one of the strongest motives I had in that act.

And I am free now to say what I never have said before, that the amendment reported unanimously by the committee on Bill of Rights is under the circumstances the very best solution of this whole controversy, and it is the best because it is a true compromise, in which no one gains a victory over the other, but each gains a victory over himself; in which all parties make real concession and all gain real advantages, and yet without the slightest sacrifice of principle. And it should be pointed out that a compromise of such fairness, entered into in a spirit of mutual understanding and good will, is liable to stay in the Constitution, if once inserted in it by the vote of the people. I am heart and soul in favor of the proposal of the committee on Bill of Rights. [Applause.] I believe that it gives to those who wish to put the principle of the prohibition of sectarian appropriations into the Constitution all that they ever asked. For weeks I have been looking for that supposed "joker" in this measure. I have not found it. At first there were one or two things I thought were "jokers." I asked that they might be amended and I found that they were mere inadvertencies, because my opponents, — now my friends, — were perfectly willing to amend them; no opposition at all.

Now I believe in the sincerity, Mr. President, of every one of my colleagues on this committee. I am sure of that sincerity in my own mind. I repudiate the idea which was given us by the gentleman from Haverhill (Mr. George) that this is a political scheme. [Applause.] It is nothing of the sort. Presented to you as it is, it is a monument of self-sacrifice, of the broadest good will and patriotism that has yet been presented to this Convention.

And now after I have said that, I am going to say something else. Let me tell you in all frankness that if this Convention or the people reject this best solution of this question, this unanimous report of our committee, on account of the hostility of the friends of the private institutions, it may be necessary to urge upon the people the next best thing, the old anti-sectarian amendment. For there are tens of thousands of citizens of all parties who will not rest until they have put the good old American doctrine of the separation of church and State in all its length and breadth into the Constitution of Massachusetts. The method of doing this recommended unanimously by the committee on Bill of Rights is, in my opinion, the best. Let us hope that both the Convention and the people will have the wisdom and the vision so

start they might find it possible, upon the principles they have adopted in the case of the libraries, also to except these schools.

There is just one thing stands in the way of that, Mr. President, and having said that I am through. No academy which does not in all respects truly stand in its curriculum, in its public services of any sort, precisely upon the same basis as the high schools, ought to be excepted. If the amendment of the gentleman from Deerfield (Mr. Boyden) does not confine the giving of public money to academies, to such academies, it ought to be made to confine it; but I submit, it does. If you are to except libraries because they do help the education of the people, though they are partly private in control, if there are academies that conform in all respects to the conditions of our high schools then those academies ought somehow to be given what they have had during these years. The towns should have the assistance that they have had in the money that is privately given to these academies. It is a sad state of affairs, Mr. President, for such academies, and it seems to me for us, if we could not, cannot, work out an amendment which will shut out all possible sectarianism of any sort, and at the same time keep these forty high schools which have some private assistance, as well as the other high schools which have no private assistance.

Mr. WASHBURN of Middleborough: I sought this morning to obtain recognition for the purpose of asking a question in relation to a matter which has been somewhat obscured by the subsequent discussion, but which has been now revived by the remarks of the gentleman from Amherst (Mr. Churchill). I want to ask the gentleman from Deerfield (Mr. Boyden) before I vote on his resolution, if he knows just how many academies are affected by his amendment, and where they are located?

Mr. SAWYER of Ware: No one denies that the passage of this resolution will work some hardship to some of these academies and to some institutions. No one denies that there is a good deal of plausibility in the arguments that they put forth for their own institutions. Mr. President, we have a large question here before us. We have a question which resolves itself into a triple division, whether we shall pass an anti-sectarian amendment; or whether we shall pass an amendment which makes a change in our public policy, — it is a public question and a question of public policy; or whether we shall modify that.

We would be warranted in passing a resolution to prohibit sectarian appropriations only if facts and figures showed to us there was a sectarian menace to the State. Since 1860 we have had in round figures, $19,000,000 given to private institutions: $2,000,000 have been to miscellaneous enterprises, $10,000,000 have been for educational institutions, $7,000,000 for charitable institutions. The sectarian institutions, or institutions under ecclesiastical control in part or in whole, have received only a very small amount from that whole appropriation. Now, it is needless to go around the bush. We understand that a strictly thoroughgoing anti-sectarian amendment is aimed at the Catholic church. Out of that $19,000,000 that church which that amendment aims at has received but $49,000. It received not one cent of the $10,000,000 that went to educational institutions, and of the $7,000,000 that went to charitable institutions it received

$49,000. It received $10,000 for the House of the Good Shepherd, $9,000 for the House of the Guardian Angel, $20,000 in the eighties for Carney Hospital and $10,000 in 1899 for Carney Hospital.

I was a pastor in Brockton in 1899, and I can testify to the popularity of the Carney Hospital at that time. From my own parish several of my parishioners went to that hospital by choice, and they had only good words to say for it; and yet, Mr. President, when that resolve was brought into the Legislature, or when they asked for a $10,000 appropriation, — or their friends did, — in 1899, there arose such a protest against it that the next year the anti-sectarian amendment made its appearance, and each year since then it has been in your Legislature. It has not received any considerable vote. I think in all the years the highest vote it received was sixteen.

We can say, then, that there is no menace from this sectarian source. We can safely say, then, there is no menace from this source, or from any other of our religious bodies, seeking to raid the treasury. Therefore if the only question before us is to pass an amendment that shall deal with the churches there is no need of any amendment whatsoever. Not only does the past show no need of it, but I can testify that the temper of your Legislature, and the temper of your State government, is such that no such appropriation would get by any Legislature or get by the Executive Chamber in any Governor's year.

So, Mr. President, the question that is really before us is whether or not we shall change our public policy, whether or not there is something alarming in the menace of private institutions, *other* than ecclesiastical or sectarian institutions. Taking the period wherein we have the figures, from 1860, dividing it into halves, we find that for the first half of that time the appropriations for private institutions were a little over $5,000,000 and for the second half of that time they were over $12,000,000. This shows a startling increase. Now, I want to call to the attention of this Convention that in 1911, a Governor of this State called the attention of this State to this increase, and at a conference held in the Governor's chamber, when these very resolves to appropriate $100,000 a year for the Massachusetts Institute of Technology and $50,000 a year for the Worcester Polytechnic Institute were under discussion, Governor Foss stated that he believed it was a poor public policy, a poor business policy, for the State to appropriate money and turn it over to people to spend who were in no way responsible to the State and made no report necessarily to it. He went so far that there was a fear in some circles that he might veto those propositions. If any of you will go back to the legislative history of the time you will see that the resolve provides for certain scholarships to be given to certain Senators, and that there were certain other measures and promises taken to secure its passage. This claim, then, that the friends of the Massachusetts Institute of Technology and the Worcester Polytechnic Institute make, that they have an ethical obligation on the State, is not entirely well-founded, when we understand the means that were taken to wrench those appropriations originally from the State.

Now, was Governor Foss wise? Is it wise to continue our policy of taking public funds, turning them over to private enterprises and institutions not elected by the people, not appointed by any elective officers of the people, but entirely private enterprises and institutions?

Why, Mr. President, we who have been in the Legislature know how it is. Here is an enterprise in a town that A, B, C and D, four or five representatives come from. They want to get an appropriation out of the public treasury. Another town has an institution; it wants a thousand dollars out of the public treasury. Here is another town of the same character. They come together and they get thirty or forty votes in a block, and each votes for the other's appropriation that is desired, and any one else in the Legislature who will dare to stand up and oppose those appropriations incurs the enmity of the whole thirty or forty votes. The Governor in his chamber, if he vetoes the thing, incurs the enmity of them all. The result is that there is a hold-up. The Legislature is forced to make the appropriation. Now, have we got courage enough to stop it here? The gentleman from Haverhill (Mr. George) said that the committee lacked courage when it reported the resolution upon the calendar rather than the sectarian resolution. Mr. President, I believe that it showed a fine courage when it reported that resolution rather than the original one.

Why, Mr. President, take the matter of the local fair, — county fair if you like. They come forward with boards of their own election; they are not responsible to the State and are not elected by the State or any political division, and yet they come up here yearly and get thousands and thousands of dollars for their private enterprise, and they have a lobby sufficiently strong that no one dares to oppose them. I have sat on the committee in this Legislature that was appointed partly for the purpose of reorganizing the State Board of Agriculture, and I saw the committee forced way down. I know that every Governor who has been elected for several terms has called attention to the scandal of that board and asked that it be reorganized, and yet they never have got very far with it.

When they say that this resolution offered here by the committee is a resolution for which there is no demand and no need in our practice, and is a makeshift or a cowardly attempt to evade something else, why, Mr. President, they do not properly understand the facts. I trust that this Convention, composed, as it is, of delegates who are not seeking reëlection, will have the courage to stand here and vote in a little different way from what sometimes others, who are seeking reëlection, feel that they are compelled to vote; that we will go ahead and accept the report of your committee.

Now, Mr. President, there is just one other thing, and that is this: We came to this Convention expecting to face a delicate situation and a delicate question. This anti-sectarian issue has developed in the last three or four years, and developed very naturally. As I have said, the anti-sectarian amendment came in first in 1900 and never got any considerable vote, but in 1913 this State elected its first Catholic Governor. Mr. President, he was an estimable gentleman. His record as Governor shows the people of the State to have been warranted in electing him. Your greeting to him on this floor on the first day of this Convention showed that he has your respect when you see him. And yet, Mr. President, there were certain forces in the State that felt his election was a great menace, and so that helped to the securing of a following for this anti-sectarian amendment. Now, it happened that there were also on the State ticket three other men whose religion was of the Catholic persuasion. This was a further opportu-

nity for certain forces to see red. And it happened also, Mr. President, that owing to the Progressive political movement in the State this House for the first time in many years was divided, and that the majority party did not hold control, but was dependent upon receiving the vote of some of the Progressives if it would organize the House and appoint the committees. It is a matter of legislative history that the exigencies of political trading then organized the House. The committee on Constitutional Amendments was so organized that there would be a favorable report for this anti-sectarian amendment, to give it standing in the House and to secure a vote for it; thus, Mr. President, this issue was thrust upon us and a certain member of the Republican party ran for Governor upon the issue.

We have felt that for the last three or four years we have faced a delicate situation. We feared when we came to this Convention that there might develop a condition that would send a question to our people that would bring forth dissension. What happened? Mr. President, you yourself took the move that was a bold move but after all has proved to be a wise move. You made as the chairman of this committee that handles this matter of Bill of Rights a man who, though of the minority party of the great metropolitan city of Boston, had been elected mayor, and who had proved himself to be a popular mayor and showed that he had an understanding of the feelings and ideals of the various races, the various religions. Mr. President, you then put upon that committee some of the most active men of both sides of this question. You put upon that committee men of all classes and all religions, and you left it to them as intelligent, wise, honest and sincere men to get together, and you were not disappointed. They got together, and they have reported into this Convention a resolution that takes the whole question out of the realm of religious controversy, that removes it from religious dissension, that will send forth to the people a question that means a change of public policy and not an attack upon any religious faith or order. It seems, Mr. President, that your committee having acted so wisely, and having done so well, it is our duty, our moral obligation as members and delegates of this Convention, to support them and to send the resolution that they report, out to the people without these amendments that are sought to be attached to it.

Mr. President, it was said here the other day that the academies and that the Massachusetts Institute of Technology and the Worcester Polytechnic Institute had a moral obligation from the State for the continuance of their grants. Why, instead of that, they have a moral duty toward the State, in order to relieve us from the delicacy of the present situation, that they should withdraw those amendments; they should not press for them but should unite with us that we may have a harmonious and united stand in the Convention and before the people, that there may be harmonious and united action on the part of the people.

Why, Mr. President, we are in the midst of a great foreign war. It would seem that somehow it takes a war to always answer these movements that arise against the great bulk of Catholic citizens in our State. We remember the Know Nothing movement of 1853, how then they told us that we could not trust these citizens, how in the war of 1861 to 1865 they went forth and shed their blood side by

just taken his seat if this phase of the question has been discussed before the committee on Bill of Rights.

Mr. POWERS: I am not sure whether it was discussed there or not. It was not called to my attention until some two weeks ago. It was brought to my attention by the chairman of the Board of Education, and he was very anxious that this motion should be pressed here in the interest of State education.

Mr. PELLETIER of Boston: Would not the effect of this amendment be to throw this whole question into the hands of the Legislature?

Mr. POWERS: I should say it would not have the slightest effect, for the very reason that it relates only to public education, and public education under State authority, and that is just what the committee is attempting to work out, — that all public education shall be under State authority, — and this amendment is entirely in line with what the committee is seeking to accomplish.

Mr. LOMASNEY: If this amendment prevails does it not really interfere with the school-committees' operations and their control in every school district in this State?

Mr. POWERS: My reply to that is that this amendment does not interfere with anything. It simply leaves the Legislature to determine what authority shall be exercised by the State in State appropriations, and it seems to me that the local school boards can well afford to leave the matter with the Legislature. I feel quite sure that the Legislature will do nothing that is hostile to local education.

Mr. LOMASNEY: If it does not do anything why should we pass it?

Mr. POWERS: The reason for that is this: It does not affect the present situation, but it leaves the Legislature free to determine what conditions may be imposed upon State appropriations.

Mr. LOMASNEY: Does it not allow the Legislature to give the Board of Education control over these total expenditures of the money given by the State, and supervise it, and absolutely control the school-committee in the different districts of this State?

Mr. POWERS: I cannot agree to that proposition. I do not think it does that.

Mr. LOMASNEY: I should like to ask the meaning of these words: " . . . or of such State authorities as the Legislature may direct."

Mr. POWERS: That has reference to State appropriations and not to local appropriations. That is the purpose of the amendment: That the Legislature may impose conditions as to the manner in which moneys appropriated by the Legislature for local aid may be expended. And it would be a very remarkable proposition, Mr. President, if the State were not to have control over its own appropriations, which it makes for the benefit of a local community.

Mr. CUMMINGS of Fall River: I desire to call the attention of the Convention to a question which fairly arises from this resolution and which thus far has not been discussed. That question relates to the authority of the Legislature in the future to exempt religious, educational and charitable institutions from taxation. At present those institutions are exempt, and there is constitutional authority for the Legislature making the exemption; but if this amendment is adopted by the people I doubt very much, without pretending to answer the question and speaking under correction, whether there will be any longer authority in the Legislature to exempt these institutions from

taxation. I ask the attention of the Convention, especially of the lawyers, but also of every member, to the opinion of the Justices of the Supreme Judicial Court upon a question of taxation which was referred to them by the Senate, in 1908, and to which, among other things, they made this answer; and I hold it of so much importance that I believe it is a duty to bring to the attention of the Convention what the Justices replied. Speaking of taxation in general, they said (195 Mass. 608):

> There are other provisions under which the Legislature has acted, relative to particular subjects which involve taxation or exemption from taxation. The third article of the Declaration of Rights, and Article XI of the amendments which was substituted for it, recognize the importance of the public worship of God, and of instruction in piety, religion and morality, as promoting the happiness and prosperity of a people and the security of a republican government. Accordingly, taxation for these purposes is authorized. As taxation to procure property for such uses is permitted, exemption of property so procured is legitimate, under the special provisions of the Constitution touching this subject. We have also constitutional requirements for the encouragement of literature and science, the diffusion of education among the people, and the promotion of "general benevolence, public and private charity" and other kindred virtues. As taxation of the people may be imposed for these objects, property used for literary, educational, benevolent, charitable or scientific purposes may well be exempted from taxation.

The exemption is based upon this idea, and this idea only, that since taxation may be imposed for the protection and fostering of these institutions, therefore exemption may be allowed, and when taxation may not be imposed to foster and protect these institutions exemptions may not be allowed. When the authority to aid by taxation is gone the right to exempt from taxation is gone.

We should vote upon this matter with our eyes open to this peril; that if we adopt this resolution, — and again I speak hesitatingly, because I have not had the opportunity to consider the matter so fully as I should wish, — if this resolution is adopted we expose these institutions to taxation because we take away the excuses for exemption, that they are to be protected, fostered and aided by the Commonwealth. I may say that the opinion of our late colleague, Attorney-General Malone, was to the same effect. There was the authority to aid these institutions, and that authority to tax to aid them was also the authority to exempt. Now, let us not act blindly, but know that if we pass this resolution we are exposing these institutions to taxation.

Mr. President, if this resolution is to be submitted to the people, — and the signs are unmistakable that it will be submitted, — it should be offered to them in its least objectionable form. Therefore, I urge the proposal of the committee on Form and Phraseology, striking out the eighteenth amendment. I attempted, perhaps imperfectly, to tell the Convention that the reënactment of that amendment was not necessary, — that amendment which is irritating to a body of people who are discontented, but are not clamorous, not protesting, not remonstrating. The Catholic people are not doing any of those things. They are not here causing any confusion by protests or petitions. In the multitude of petitions which were handed in by the churches, religious conferences and ministerial meetings in support of this resolution, I wish you to remember that there was not one that came from a Catholic conference or a Catholic church. The Catholics refuse to take responsibility, and will refuse to take it, for this resolution,

and for anything that comes out of it. If these institutions which have been aided in the past are to be denied aid in the future, let no man stand up and say that it was because of Catholic petitions or Catholic remonstrances. There is no amendment sectarian or anti-sectarian offered by the Catholics.

That reminds me, too, of the remarks of the gentleman from Waltham (Mr. Webster) that some of us, who wanted to stay where we find ourselves under the Constitution, were extremists, and that he and his friends were taking the middle of the road. Well, it is a small matter, — the characterization of our position, — whether you call us extremists or not; but it is an extraordinary statement to make, that the men who are content with the provisions of the Constitution as they have existed for a hundred and thirty-seven years are extremists, and the men who call upon us to pass the most drastic constitutional amendment that ever has been offered, — I do not think its like is found in any State, — are the middle-of-the-road men. The men who deny all aid to private institutions might well be characterized as the extremists, if the characterization meant anything.

Again, I urge on the Convention to accept the amendment to the resolution relative to the grants of public money to the Worcester Polytechnic Institute and to the Massachusetts Institute of Technology. Whether the State is under a legal obligation and a just obligation, — and our court has decided that it will recognize no other, — or a moral obligation, or a political obligation, there is an obligation in honor, and Massachusetts should not repudiate her honor. When the State says to trustees: "If you go out and raise a million dollars, and if you go out and raise half a million dollars, and if you grant us so many scholarships, the Legislature will make you annual appropriations of a fixed amount for ten years," and the trustees do it, and then we withdraw the promise made by the State, it makes a man believe that the Convention is obsessed. It is not creditable to the State to do that, and the value of this resolution, if it otherwise has any value, will not be impaired by respecting an obligation that in honor Massachusetts is bound to respect.

I believe also that the amendment offered by the gentleman from Quincy (Mr. Blackmur), giving us the right to use private hospitals and to aid them, should be accepted, and, again, the acceptance of this amendment will not impair the usefulness of this resolution, if otherwise it is valuable.

Mr. President, the gentleman from Northampton (Mr. Feiker) asked a pertinent question which should be answered before we vote, and which has not been answered. He asked if anybody claimed that, in all the appropriations for one hundred and odd years which have been made to private institutions, ostensibly not for the private institutions' sake but for the sake of the Commonwealth, any part had been misappropriated, any part had been misapplied, or that the appropriations had not brought back fruits a thousandfold; and no one has made that claim. The gentleman's question remains unanswered, and it may be taken for granted that there is no answer other than the one he indicated when he asked the question, — that Massachusetts must acknowledge the public service rendered by these institutions and their honest administration of public funds.

Why then are we taking this course if that is true? The gentleman

from Ware (Mr. Sawyer) said, and if I misquote him I ask to be corrected: "We may as well admit that the anti-sectarian amendment is aimed at the Catholic Church." It is true this is not the original anti-sectarian resolution, but it also is true that the gentleman from Newton (Mr. Anderson), who introduced the anti-sectarian resolution, said in the course of his argument that there were a hundred thousand minute-men who stood to advocate and advance his amendment. He told us that if we did not take this amendment he would give us the anti-sectarian amendment; and that, even though the Catholics supported this amendment at the polls, if it was defeated we must take the other, — he would give us the other, — and you sat here and applauded. Are we taking it because we are afraid of the threat?

I am not here asking for aid for religious institutions. I do not want the State tied up with any church. I am not here asking for aid for the teaching of religion in any school. I do not want the State money spent to teach creed or doctrine. I stand just where you stand who are the most ardent champions of the separation of church and State, and I want to be counted with you in that separation; but when the gentleman from Newton (Mr. Anderson) told us what a benefit it was to the church in France that the Concordat had been repealed, that the contract which was made in reparation for the spoliation and confiscation of church property had been cancelled and repealed, and that the church benefited by the repeal, you applauded that too. The repeal of the Concordat was not intended to help the church, it was a part of the policy of persecution of the church, adopted and mercilessly carried out by the government of France and intended to destroy religion, but it failed. It would have been better to tell the whole story. France is our ally, and we honor her for her superb and glorious defence of human liberty. She is our ally, and I would not say one word to throw a shadow upon her glory, — not a word. But tell the whole truth. It is no discovery that the gentleman made, that religion prospers under persecution. No matter whose religion, Catholic or Protestant or Jew, it never was in the power of violence, of human violence, to bayonet a man's faith. You cannot stamp faith out that way. What men honestly believe, God Almighty protects from the violence of men; persecution cannot destroy it; and it is a saying as old as religion itself, as old as the church in any event, that the blood of the martyrs is the seed of the church. It is no discovery that religion prospered under persecution. But tell what it was that was done. It was not simply the repeal of the Concordat, or the taking out of the Bible from public institutions. It was the horrible, the blasphemous boast of the Minister of Education that the government had driven out the Divine Founder of Christianity from the hospitals, from schools, from military camps, from the courts, and that it would drive Him out of France. It was the confiscation of church estates, the banishment of the religious, the blotting out of the name of God from the children's school-books, all these things combined, that aroused the faith of France and brought back religion in all its fullness and in all its strength. The church will not suffer, religion will not suffer from persecution; religion will be protected. I therefore ask this Convention, which applauded an act that was a part of the persecution, to ask itself this question: When until now, and where

The Commonwealth of Massachusetts

BULLETINS

FOR THE

CONSTITUTIONAL CONVENTION

1917–1918

VOLUME II

Bulletins 17 to 37

SUBMITTED TO THE CONSTITUTIONAL CONVENTION BY THE COMMISSION TO COMPILE INFORMATION AND DATA FOR THE USE OF THE CONSTITUTIONAL CONVENTION

BOSTON
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BULLETIN No. 17

APPROPRIATIONS FOR SECTARIAN AND PRIVATE PURPOSES

CONTENTS.

the imperative necessity of preserving the public school system in its integrity and of guarding it from attack or change by explicit mandate. Public schools never have been understood to include higher institutions of learning like colleges and universities. All moneys raised by taxation for the purpose of expenditure within the sphere of the public or common schools, as these words generally have been understood, must be disbursed exclusively for the support of such schools and cannot be diverted to any other kind of school maintained in whole or in part by any religious sect. But there is no constitutional prohibition against appropriations for higher educational institutions, societies or undertakings under sectarian or ecclesiastical control. Merrick *v.* Amherst, 12 Allen, 500; Jenkins *v.* Andover, 103 Mass. 94.

So far as the second question relates to the appropriation of public money for aiding any church, religious denomination or religious society, it presents more difficulty. The Chief Justice and Justices Morton, Braley and DeCourcy are of opinion that such an appropriation is prohibited by the Constitution and its Amendments, while Justices Hammond, Loring and Sheldon incline to the opposite conclusion. It has been said repeatedly that answers given by the justices to questions propounded by the Legislature have not the binding force of decisions of the court, but are the opinions of the individual justices acting as constitutional advisers to a co-ordinate department of the government. The doctrine of *stare decisis* does not apply to them, but they are open to reconsideration and revision. Commonwealth *v.* Green, 12 Allen, 155, 164; Opinion of the Justices, 5 Met. 596, 597; Opinion of the Justices, 126 Mass. 557, 566. Whether under these circumstances the existing provisions of the Constitution "adequately prohibit" the appropriation of money raised by taxation for these purposes so that there is no "necessity for the adoption of an amendment" to this end, presents a legislative question rather than a question of law.[1]

3. Proposals of Further Amendment.

There has been considerable feeling in the State that the existing provisions of the Constitution are not sufficiently definite and comprehensive. In 1900 petitions in aid of the following proposed amendment were received by the Legislature: —

ARTICLE OF AMENDMENT.

No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the State or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used, for the purpose of founding, maintaining or aiding by appropriation, payment for services, expenses, or in any other manner, any church,

[1] Opinion of the Justices (1913), 214 Mass. 599, 601.

religious denomination or religious society, or any institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control.

This amendment, which is popularly known as the Anti-Sectarian Amendment, has been before the Legislature every year from 1900 to 1916 inclusive except the years 1905 and 1906. In every year except 1914 and 1915, the proposed amendment was either referred to the next General Court or the petitioners were given leave to withdraw. The first roll call on the amendment occurred in 1912, when reconsideration of the adoption of the committee's recommendation of leave to withdraw was refused by a vote of 16 to 170.[1]

On January 21, 1914, the same form of amendment was introduced on petition. On April 22 it came up in the House for a third reading. Mr. Lomasney of Boston moved that the resolve be amended by striking out all after the words "religious society," and inserting in place thereof the words "or any college, educational or other institution, school, infirmary, hospital or undertaking which is not a State, county, city or

[1] The vote was as follows:

Yeas: W. W. Baker, A. W. Bartlett, Sanford Bates, C. L. Carr, J. H. L. Coon, Joseph Craig, B. D. Gifford, F. P. Greenwood, J. A. Hart, C. T. Holt, W. R. Meins, A. H. Silvester, J. S. Smith, H. M. Storm, G. P. Webster, H. G. Wells. Total, 16.

Nays: Henry Achin, Jr., E. C. R. Bagley, J. H. Baker, John Ballantyne, J. F. Barry, F. D. Bartlett, W. A. L. Baseley, J. V. Beal, H. C. Beaman, J. W. Bean, W. A. Bellamy, A. H. Bicknell, E. H. Bigelow, A. E. Bliss, C. M. Blodgett, William Booth, J. G. Brackett, J. H. Brennan, J. J. Brennan, J. P. Brennan, M. J. Brophy, D. J. Buckley, J. D. Burns, O. W. Butler, M. J. Carbary, J. J. Carmody, P. B. Carr, J. F. Cavanagh, A. B. Clark, W. P. Clark, J. H. Cogswell, S. I. Collins, J. D. Connors, L. M. Conwell, M. H. Cotter, C. H. Cox, J. J. Creed, Courtenay Crocker, C. A. Crowley, T. S. Cuff, J. A. Curtin, G. T. Daly, Thomas Davies, J. L. Donovan, G. P. Drury, W. S. Duncan, J. F. Dwyer, J. F. Eagan, H. M. Eames, G. W. W. Edson, C. W. Eldridge, G. H. Ellis, W. B. Fay, J. B. Fellows, Edward Fisher, Daniel Fitzpatrick, J. T. Flanagan, F. W. Ford, J. E. Fowle, Gerrett Geils, Jr., C. L. Gifford, W. H. Gifford, G. W. Gordon, Isaac Gordon, F. J. Grady, W. J. Graham, J. F. Griffin, B. F. Haines, E. M. Hall, C. W. Harding, L. F. Hardy, E. F. Harrington, E. R. Hathaway, T. R. Hawley, Martin Hays, M. A. Henebery, W. P. Hickey, F. M. Hill, C. W. Hobbs, Jr., H. W. Holbrook, Alexander Holmes, C. H. Howe, F. W. Hurlburt, J. M. Hurley, J. E. Kearns, M. S. Keenan, Michael Kelly, W. W. Kennard, L. R. Kiernan, W. S. Kinney, James Kittle, H. B. Knowles, F. X. LeBœuf, Joseph Leonard, W. J. Leslie, G. W. Libbey, E. F. Lilley, M. M. Lomasney, P. I. Lombard, W. J. Look, J. E. Lyman, J. P. Maguire, J. C. Mahoney, J. W. Martin, Jr., A. J. McCulloch, E. J. McDermott, E. E. McGrath, J. H. McInerney, S. B. McLeod, W. M. McMorrow, T. J. Meade, J. F. Meaney, John Mitchell, C. H. Morgan, Frank Mulveny, W. J. Murray, W. J. Naphen, A. N. Newhall, C. A. Norwood, C. R. O'Connell, F. D. O'Donnell, W. A. O'Hearn, J. H. O'Keefe, C. A. Orstrom, C. B. Packard, J. H. Parker, Jr., J. A. Parks, H. H. Parsons, N. B. Parsons. J. H. Pendergast, W. E. Piper, F. H. Pope, A. F. Priest, J. E. Quinn, G. F. Reardon, J. J. Reed, M. J. Reidy, L. O. Rieutord, J. L. Saltonstall, J. C. Sanborn, E. E. Sargent, Alexander Sedgwick, Benjamin Sharp, J. H. Sherburne, C. D. Smith, J. G. Stevens, W. L. Stone, B. F. Sullivan, W. H. Sullivan, W. J. Sullivan, E. A. Sweeney, D. W. Teehan, Alfred Tewksbury, H. E. Thompson, N. A. Tufts, E. W. Tyler, C. L. Underhill, J. R. Wallace, H. W. Warner, R. M. Washburn, T. W. White, I. E. Willetts, H. J. Winslow, E. A. Witt, Roger Wolcott, J. I. Wood, N. P. Wood, H. D. Wright, O. L. Wright. Total, 170.

town institution established by statute, ordinance or by-law of the State, county, city, town, village or other civil division."

Mr. Bates of Boston raised the point of order that the amendment was not germane to the subject-matter considered by the committee. The Speaker ruled as follows: —

The petition calls for an amendment of the Constitution prohibiting sectarian legislation and the support of sectarian institutions from public funds. Under the amendment, institutions which are not in any respect sectarian would be brought within the prohibition of the constitutional amendment. The object of the rule that "No motion or proposition on the subject different from that under consideration shall be admitted under color of amendment" is to prevent the passage of legislation of which interested parties have had no notice. A number of institutions in this Commonwealth would be affected by the proposed amendment. They have had no notice that legislation affecting them was pending and no opportunity to be heard. The amendment, therefore, comes within both the letter and spirit of the rule forbidding amendments and bills outside of the scope of the petition. The Chair, therefore, rules that the point of order is well taken.

On the main question the yeas and nays were ordered, at the request of Mr. Lomasney of Boston; and the roll having been called the House refused to order the resolve to a third reading. The vote was 87 yeas to 134 nays.[1]

[1] The vote was as follows:

Yeas: E. S. Abbott, H. L. Andrews, O. E. Arkwell, W. M. Armstrong, C. N. Atwood, I. F. Batchelder, Sanford Bates, E. E. Belding, E. P. Bennett, E. H. Bigelow, E. C. Bodfish, H. E. Bothfeld, Arthur Bower, E. K. Bowser, A. J. Bradstreet, G. E. Briggs, Frederick Butler, A. G. Catheron, G. D. Chamberlain, C. A. Chandler, J. W. Churchill, S. I. Collins, D. H. Cook, C. H. Cox, H. E. Cummings, E. N. Dahlborg, C. R. Damon, A. M. Darling, Alfred Davenport, Samuel Davis, F. S. Delafield, W. H. Dolben, G. E. Dow, G. P. Drury, G. H. Ellis, G. W. Faulkner, F. B. Felton, A. N. Fessenden, E. G. Fosgate, H. E. Frost, F. P. Greenwood, H. P. Gurney, W. N. Hackett, B. F. Haines, John Halliwell, J. L. Harrop, J. F. Hatch, Jr., Albert Holway, J. B. Hull, Jr., F. W. Hurlburt, V. F. Jewett, W. W. Kennard, C. A. Kimball, Richard Knowles, J. O. Knox, C. A. LeGro, F. O. Lewis, F. E. Lincoln, S. L. Little, H. F. Long, W. J. Look, F. W. Lucke, J. M. Lyle, F. H. Magison, A. E. McCleary, G. F. Morse, Jr., A. N. Newhall, J. N. Osborne, H. B. Parker, Immanuel Pfeiffer, Jr., E. F. Phillips, W. H. Poole, W. F. Prime, E. J. Sandberg, H. H. Sears, Fitz-Henry Smith, Jr., J. S. Smith, R. M. Smith, W. O. Souther, Jr., J. F. Stone, J. G. Tilden, J. E. Tolman, N. A. Tufts, G. P. Webster, T. E. P. Wilson, Herbert Wing, H. D. Wright. Total, 87.

Nays: Henry Achin, Jr., T. J. Ahern, J. A. Anderson, J. J. Bacigalupo, J. T. Bagshaw, J. F. Barry, J. L. Barry, J. E. Beck, P. H. Boyle, J. W. Brennan, Vincent Brogna, D. J. Buckley, M. H. Burdick, F. H. Burke, F. W. Burke, J. F. Carman, W. E. Carney, Maurice Caro, Edward Carr, Peter Carr, A. A. Casassa, T. J. Casey, D. J. Chapman, E. E. Chapman, E. S. Cobb, James Coffey, T. C. Collins, W. L. Collins, T. J. Cooley, R. R. Costine, M. H. Cotter, J. J. Courtney, W. D. Cowls, W. N. Cronin, F. W. Cross, J. E. Cuddy, Jr., J. J. Cummings, P. J. Curley, G. E. Curran, R. W. Currier, J. A. Curtin, E. J. Dailey, John Doherty, J. F. Doherty, J. A. Donoghue, J. L. Donovan, T. E. Dowd, W. F. Doyle, F. B. Edgell, John Ennis, F. S. Farnsworth, J. T. Flanagan, M. R. Flynn, J. J. Gilbride, W. L. F. Gilman, T. A. Glennon, J. L. G. Glynn, A. G. Greaney, J. F. Griffin, E. M. Hall, B. F. Hanrahan, L. M. Harlow, E. F. Harrington, S. H. Har-

In 1915 the same resolve was again introduced on petition. The following proposal of amendment, which is popularly known as the Lomasney amendment, was also introduced on petition: —

ARTICLE OF AMENDMENT.

No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the State or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used for the purpose of founding, maintaining or aiding by appropriation, payment for services, expenses, or in any other manner any church, religious denomination, or religious society, or any college, educational or other institution, school, infirmary, hospital or undertaking, which is not a State, county, city or town institution established by statute, ordinance or by-law of the State, county, city, town, village or other civil division.

A motion to substitute the Lomasney amendment for the Anti-Sectarian amendment was rejected by a vote of 111 to 116, and the latter was then refused a third reading by a vote of 107 yeas to 115 nays.[1] At this session also the following pro-

rington, G. F. Hart, Martin Hays, T. A. Henry, W. E. Hickey, M. A. Higgins, J. J. Kelley, J. T. Kenney, M. B. Kenney, J. R. Kiggins, Joseph LaFlamme, C. S. Lawler, F. X. LeBœuf, M. M. Lomasney, J. J. Lydon, J. H. Lynch, H. J. Mahoney, J. C. Mahoney, D. C. Manning, F. A. Manning, G. E. Mansfield, J. W. Martin, Jr., O. T. Mason, J. S. McDonough, M. H. McGaughey, C. H. McGlue, M. F. McGrath, J. H. McInerney, E. F. McLaughlin, H. J. McLaughlin, P. J. McManus, W. M. McMorrow, John Mitchell, Frank Mulveny, D. A. Murphy, E. P. Murphy, J. J. Murphy, W. J. Naphen, K. L. Nash, T. A. Niland, J. T. O'Dowd, A. F. Ogden, Chauncey Pepin, J. E. Phelan, C. W. Proctor, H. L. Ray, J. J. Reilly, F. B. Rich, Robert Robinson, W. M. Robinson, W. F. Russell, J. D. Ryan, C. B. Sanborn, R. D. Sawyer, J. F. Sheehan, C. E. Stanwood, M. E. Streeter, D. F. Sullivan, J. F. Sullivan, L. R. Sullivan, M. T. Sullivan, P. F. Tague, J. J. Twohig, G. J. Wall, H. W. Warner, J. E. Warner, C. H. Waterman, C. H. Webster, T. W. White, H. A. Wilson, G. M. Worrall. Total, 134.

[1] The vote was as follows:

Yeas: E. S. Abbott, J. W. Allen, C. H. Annis, W. M. Armstrong, H. H. Atwood, S. H. Bailey, Edmund Baker, P. H. Ball, A. W. Barker, A. P. Beardsley, Joseph Belcher, Jacob Bitzer, T. W. Blanchard, A. E. Bliss, H. E. Bothfeld, Arthur Bower, F. J. Brown, A. E. Burr, J. F. Carman, A. G. Catheron, G. D. Chamberlain, A. M. Chandler, E. E. Chapman, J. W. Churchill, F. F. Clauss, A. W. Colburn, B. G. Collins, S. I. Collins, D. H. Cook, T. J. Cooley, B. H. Crosby, F. W. Cross, E. F. Davis, Samuel Davis, T. H. Day, W. A. Dodge, A. C. Dowse, G. P. Drury, C. A. Ericson, F. B. Felton, H. F. Field, H. C. Foster, H. E. Frost, C. B. Frothingham, A. T. Fuller, H. F. Furness, H. C. Gates, J. S. Gates, J. M. Gibbs, S. P. Graves, F. P. Greenwood, E. H. Hall, John Halliwell, J. L. Harrop, Albert Holway, J. B. Hull, C. N. James, V. F. Jewett, W. W. Kennard, R. T. Kent, Richard Knowles, J. O. Knox, A. F. Lamb, G. B. Leonard, F. O. Lewis, G. A. Lindberg, H. F. Long, F. H. Lucke, J. M. Lyle, F. E. Lyman, J. E. MacPherson, J. L. Mather, J. B. McLane, S. H. Mildram, W. E. Monk, G. F. Morse, Jr., A. N. Newhall, J. P. Nickerson, Francis Norwood, J. N. Osborne, J. C. Perry, J. H. Perry, Immanuel Pfeiffer, Jr., J. T. Potter, M. L. Quinn, W. C. Renne, S. B. Root, G. O. Russell, E. J. Sandberg, J. A. Saunders, A. M. Sinnott, FitzHenry Smith, Jr., J. S. Smith, R. M. Smith, W. O. Souther, Jr., C. E. Stanwood, J. F. Stone, M. E. Streeter, W. E. Tarbell, J. E. Tolman, S. W. Weare, Thomas Weston, Jr., H. L. White, E. H. Whitney, G. A. Whitney, H. C. Woodill, G. M. Worrall. Total, 107.

Nays: Henry Achin, Jr., J. T. Bagshaw, J. L. Barry, W. J. Barry, J. J. Benson, J. J. Brennan, T. H. Brennan, D. J. Buckley, George Bunting, F. W. Burke, F. E. Cady, M. J. Carbary, Maurice Caro, Peter Carr, A. A. Casassa, D. W. Casey, A. S. Clapp, James Coffey, M. H. Cotter, J. J.

posal of amendment was introduced and the petitioners were given leave to withdraw: —

ARTICLE OF AMENDMENT.

No money raised by taxation or derived from the public funds of any town, city, county, or of the State itself shall ever be appropriated for the support or maintenance of any institution either educational, charitable, or otherwise unless the land, buildings, equipment, and other property of such institution are owned and the institution itself is managed and controlled by the town, city, or county making such appropriation or by the State.

Nothing in this article shall be so construed as to prevent a town, city, county or the State from appropriating money in payment for services rendered by a privately controlled hospital, or as invalidating any contract or agreement already made between the Commonwealth and any existing institution.[1]

In 1916 both the Anti-Sectarian and the Lomasney amendments were again introduced and both were referred to the next General Court. In 1917 the Lomasney amendment was introduced and referred to the next General Court.

NOTE. — Since the preparation of the foregoing account the Constitutional Convention submitted to the people an amendment dealing with appropriations for private institutions, and it was adopted November 6, 1917. The text may be found *post*, 35.

Courtney, G. H. Creighton, W. N. Cronin, J. T. Crowley, P. J. Curley, G. E. Curran, E. J. Dailey, J. F. Doherty, P. J. Donaghue, W. J. Donahoe, J. J. Donahue, J. A. Donoghue, J. L. Donovan, T. E. Dowd, D. F. Duggan, F. B. Edgell, C. C. Emery, J. G. Faxon, M. R. Flynn, W. J. Foley, C. F. Garrity, T. J. Giblin, J. P. Good, E. F. Harrington, G. F. Hart, M. A. Higgins, J. J. Kearney, J. J. Kelley, T. R. Kelley, F. X. LeBœuf, J. N. Levins, E. E. Lincoln, M. M. Lomasney, J. H. Lynch, F. W. MacKenzie, J. P. Mahoney, M. F. Malone, F. A. Manning, F. A. Marcella, J. E. Maybury, J. F. McCarthy, C. H. McGlue, Joseph McGrath, E. F. McLaughlin, H. J. McLaughlin, W. M. McMorrow, M. J. McNamee, John Mitchell, J. L. Monahan, A. J. Moore, E. G. Morris, H. E. Mullen, T. B. Mulvehill, Frank Mulveny, D. A. Murphy, E. P. Murphy, J. J. Murphy, J. J. Murphy, D. W. Murray, P. E. Murray, Jr., K. L. Nash, E. H. Nutting, J. A. Oakhem, J. T. O'Dowd, A. F. Ogden, P. C. Paradis, J. H. Parker, Chauncey Pepin, E. H. Perry, J. E. Phelan, W. F. Prime, G. J. Rabouin, C. R. Read, D. F. Reardon, J. J. Reilly, Robert Robinson, W. M. Robinson, C. F. Rowley, W. F. Russell, J. D. Ryan, Alfred Santosuosso, R. D. Sawyer, C. B. Seagrave, J. F. Sheehan, J. H. Sherburne, M. J. Sherry, D. J. Sullivan, J. F. Sullivan, L. R. Sullivan, W. H. Sullivan, E. P. Talbot, G. J. Wall, J. E. Warner, G. B. Waterman, H. A. Wilson, W. E. Wolfe. Total, 115.

[1] *House Journal for 1915*, 120, 936; *House Documents for 1915*, No. 952.

HISTORY OF THE

Archdiocese of Boston

In the Various Stages of Its Development

1604 *to* 1943

IN THREE VOLUMES

By

ROBERT H. LORD
JOHN E. SEXTON
EDWARD T. HARRINGTON

With a Foreword by

HIS EMINENCE
WILLIAM CARDINAL O'CONNELL
Archbishop of Boston

VOLUME III

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CHAPTER VI

The War and Post-War Years — I
(1914-1922)

I

If the first seven years of Cardinal O'Connell's régime had been a time of marvelous prosperity and progress for the Archdiocese of Boston, the ensuing period witnessed, indeed, continued and remarkable progress, but a progress achieved under vastly more difficult conditions. The arrest of immigration, the rise of a new anti-Catholic movement, the ever-growing shadow of the European war, the unprecedented strain of America's participation in that war, the malaise and disillusionment and the economic crisis of the years immediately following the conflict — such were some of the features of this new period.

With the outbreak of the struggle in Europe, immigration to the United States at once sank to the most modest proportions, and by 1918 and 1919 it had virtually ceased altogether. With the restoration of normal communications, it rose again in 1920 to 246,295, and an inrush of 805,228 in the following year showed that, without restrictions, the pre-war movement would be resumed and would probably be exceeded, in view of the eagerness of the masses in war-torn Europe to flee to the Land of Promise in the West. But that very fact called forth redoubled efforts on the part of all those elements that had long been striving to restrict the immigrant flood, particularly that from Eastern and Southern Europe. As a result, Congress passed the Act of May 19, 1921, which limited the number of aliens of any transatlantic nationality that might be admitted into this country in any fiscal year to three per cent of the number of foreign-born persons of such nationality who were resident in the United States at the time of the census of 1910. In the following year immigration fell off to little more than

300,000. The new policy, adopted in 1921 as an emergency measure, was later to be made a permanent and even more restrictive system. Whatever its general merits may have been, one obvious result was that the Catholic Church in this country was no longer to enjoy that enormous and almost unparalleled growth in numbers which unrestricted immigration had provided throughout the previous seventy-five years.

That growth during the time when immigration was at its peak seems to have been the chief cause of a new anti-Catholic movement, the fifth in the history of the Republic and one which forms the intermediate link between the A.P.A.'s of the 1890's and the Ku Klux Klan in the 1920's. Other contributing causes were such manifestations of increasing Catholic strength as the centenary celebrations of 1908 in four important dioceses, the many great national Catholic gatherings of those years, the appointment of three American Cardinals. In Massachusetts the fears always latent in certain circles were aroused by the prospect that if matters continued as they were going, the Catholics would soon form a clear majority of the State's population, and by the fact that Catholics were already rising to higher and higher positions in political life. It was not only that many of our chief cities now commonly elected Catholic mayors — in Boston, for instance, that position was held from 1910 to 1913 by John F. Fitzgerald, and from 1914 to 1917 by James M. Curley. But in 1912 a Catholic was for the first time elected Lieutenant Governor, in 1913 Governor, and in 1918 Senator from Massachusetts (the victor in all these elections being the Hon. David I. Walsh).

The beginnings of the new anti-Catholic campaign have been traced back to the year 1908.[1] *A propos* of the Catholic Missionary Congress of that year in Chicago, first one and then a large number of Evangelical ministers' associations came forth with pronouncements that, in brief, declared the Catholic Church a menace to American institutions. Professional Cath-

[1] *Final Report of the Commission on Religious Prejudices* (Supreme Council, Knights of Columbus: Chicago, 1917), pp. 56 ff. Cf., also, on the whole movement: Michael Williams, *The Shadow of the Pope* (New York, 1932), pp. 112-122.

olic-baiters and rabble-rousers, who had for a decade found business in their line very dull, once more began to prosper. In 1911 a veteran in the profession founded, at Aurora, Missouri, a weekly called *The Menace*, which for twenty years was to conduct a campaign of hate and furious abuse against the Church, and which during its early years rolled up such fabulous profits as called forth a horde of imitators (including several journals in Boston). There was a new burgeoning of anti-Catholic secret societies. The most important of them were the Guardians of Liberty, founded at Washington in 1911 by Thomas E. Watson, of Georgia, General Nelson A. Miles (of Spanish-American War fame), and others; the American Minute Men, the Pathfinders, the Covenanters, and the Knights of Luther. By 1914, when the campaign approached its height, there were said to be sixty anti-Catholic journals published in the United States; tons of anti-Catholic tracts and other "literature" were being distributed; scores, or, as some claimed, hundreds of anti-Catholic lecturers were "enlightening" the public, and anti-Catholic legislation of some sort had been proposed in over forty State legislatures.

In Massachusetts the movement made itself chiefly felt by the small flood of petitions for such legislation which, especially in the years 1914 to 1917, were regularly presented at each session of the General Court by groups of ministers, "patriotic societies," and excited women. One such proposal was that all private schools should be placed under the supervision of the State Board of Education. Another was to tax all religious institutions, including rectories, schools, and convents. A hardy perennial was the convent inspection bill, which, in 1915, for instance, proposed to establish a State committee of ten to investigate and inspect all "private charitable institutions, nunneries, convents and other religious institutions, asylums, seminaries, and schools maintained by religious denominations." [2] That these proposals were regularly smothered in the Legislature showed that the great majority of Massachusetts citizens had no desire to go back to the days of the Know-Nothings or the A.P.A.

[2] *Pilot*, April 3, 1915.

But that a vast number of Massachusetts citizens were still haunted by certain apprehensions about Catholicism was shown by the history of another proposed measure, the Anti-Aid Bill. This was intended to prevent forever the appropriation of any public funds to assist any "sectarian" (i.e., Catholic) educational or charitable institution. It, too, emanated from anti-Catholic ministerial circles and from the secret societies — it was the favorite project of the Guardians of Liberty and of the Minute Men. But by dint of incessant propaganda and an adroit appeal to the deep-rooted American fear of "a union between Church and State," it won the support of many influential people who prided themselves ordinarily on their freedom from religious prejudice. At bottom, it appealed to the emotions of those who feared that, once the Catholics had become the majority in the Commonwealth, as it was assumed they might be in another ten years, they would begin to demand for their institutions some part of the public funds which for nearly three hundred years had been so generously accorded to institutions of an openly or veiled Protestant character. Proposed almost annually in the General Court from 1900 on, the Anti-Aid Bill never got as far as a roll-call until 1912. But from that time onward, it was for five years defeated by ever closer votes. Finally, it was brought up in the Constitutional Convention of 1917, and, in order to make it less objectionable to Catholics, was widened into a proposal to forbid the appropriation of public funds for the support of any private institution. In this form it was accepted by the Convention as an amendment to the Constitution, and, after a contest, ratified by the voters. To Catholics this was rather a bitter pill. It was but too obvious that the measure originated in animus against their Church, and that it was based, not upon anything that Catholics had done — for out of nearly $17,000,000 of public funds granted to private institutions since 1860, only $49,000 had gone to Catholic institutions; nor upon anything that Catholics were then doing — for they were not asking anything for their institutions at that time; but solely upon gratuitous and uncharitable assumptions as to what they might do in the future. To them it was bound

to appear that the amendment was, as the *Boston Transcript* [3] had said of the undiluted Anti-Aid Bill, "unnecessary and unwise and unkind."

Apart from this episode, at all events, the anti-Catholic campaign in Massachusetts, as elsewhere, seemed to die away with the entry of the United States into the World War.

II

At his first Consistory, on September 8, 1914, Pope Benedict XV had urged the faithful everywhere to pray fervently for the end of the war in Europe, and had announced his own determination to do all that lay within his power to help the world back to peace. With the words of the anguished Pontiff still ringing in his ears, Cardinal O'Connell returned to Boston, filled with horror and pity over what was going on abroad and determined, likewise, to do whatever lay within his power to further the cause of peace. At that moment the whole American public, from President Wilson down, seemed unanimous in the passionate desire both to see the speedy end of the slaughter and destruction in Europe and to avoid any entanglement of this nation in the conflict. In accordance with a request of the President to all religious bodies, October 4, 1914, was designated here as "Peace Sunday." Throughout the Archdiocese that day all the Masses were offered for peace, and all the sermons were on "The Blessings of Peace." Speaking for the first time in public on the European conflict, His Eminence at the Cathedral described the horrors of war, emphasized how great a blessing it was that the United States was still at peace, and urged his hearers to uphold the peace efforts of the Holy Father and to pray constantly for the restoration of peace to all mankind. Quite in line with the President's injunctions of that period – to be "impartial in thought as well as in action" – the Cardinal exhorted his people not to discriminate between the warring nations, but to think of all as brothers. The true basis for peace, he concluded, could be found only in the

[3] Quoted from *The Pilot* of April 17, 1915.

THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917

Its Causes, Forces and Factions; Its Conflicts and Consequences; Mention of Every Proposed Amendment; Primary Votes for Elected and Defeated Candidates; the Campaigns for Ratification of the Anti-Aid and the I. & R. Amendments; Events Leading to the Supreme Court's Decision that the Re-arranged Constitution Is Not the Real Constitution, Including Arguments of Counsel and the Main Points of the Decision; Valuable History Outside of Official Record

BY

RAYMOND L. BRIDGMAN

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CHAPTER III

The Anti-Aid Amendment

More time was spent by the convention on the amendment which came to be called the anti-aid amendment than upon any other subject of the convention, except the initiative and referendum amendment. Foremost, in company with that amendment, in the causes of the convention, its adoption was regarded by many as sufficient justification for the convention as a whole. Early in the debates it was known as the anti-sectarian amendment, but the changes made in it led to the change in its popular name.

Unadvisable as it is to follow, for historical purposes or for general information, the numerous complexities of the passage of the measure through the convention, yet the main features of this vital development for the history of Massachusetts may well be recorded for the public information.

Legislative struggles over the appropriation of public money for sectarian institutions had stirred religious prejudices for many years. Hot passion had been shown repeatedly in opposing quarters before legislative committees. Partisan feeling was intense in some quarters in view of the meeting of the convention.

First of all propositions on the subject filed in the convention was that of Martin M. Lomasney of Boston, as follows:

"*Resolved*, that no law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the state, or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used for the purpose of founding, maintaining or aiding by appropriation, payment for services, expenses, or in any other manner, any church, religious denomination or religious society, or any college, educational or other institution, school, infirmary, hospital or undertaking which is not a state, county, city or town institution established by statute, ordinance or by-law of the state, county, city, town, village or other civil division; provided, however, that in case of war,

epidemic or public disaster the Legislature may appropriate money to any infirmary, hospital or other institution for the relief of soldiers, sailors or other persons suffering therefrom."

Samuel W. George of Haverhill offered a form which had the same purpose. But the real combative interest centered in the amendment offered by Frederick L. Anderson of Newton, for it was supposed to embody the views of those who were especially desirous of preventing appropriations of public money to Roman Catholic institutions. This form was like that presented to the Legislature previously, and was as follows:

"No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof, nor shall the state or any county, city, town, village or other civil division use its property or credit or any money raised by taxation or otherwise, or authorize either to be used for the purpose of founding, maintaining or aiding by appropriation, payment for services, expenses or in any other manner any church, religious denomination or religious society or any institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control."

Over the Lomasney and the Anderson forms the contending forces in the convention locked horns. These two members represented the opposing sides at the opening of the hearing before the committee on the Declaration of Rights. Chairman Edwin U. Curtis of the committee warned the speakers at the outset that they must confine their remarks to moderate language. A crowd filled the committee room, but the proceedings were not interrupted by any unseemly demonstration. Edwin H. Hughes, resident bishop of the Methodist Episcopal Church, spoke for complete separation of church and state and the hearing was prolonged for several sessions by numerous speakers from many points of view.

As a step toward the solution of the problem, Chairman Curtis of the committee brought forward a form of amendment which retained the first part of the existing provision (Article XVIII of the amendments) and added the following:

"And no grant or appropriation of public money, property or credit shall be made or authorized for the purpose of founding, maintaining or aiding any school, college or other educational