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Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause

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FORGOTTEN FEDERAL-MISSIONARY PARTNERSHIPS: NEW LIGHT ON THE ESTABLISHMENT CLAUSE

*Nathan S. Chapman**

Americans have long debated whether the Establishment Clause permits the government to support education that includes religious instruction. Current doctrine permits states to do so by providing vouchers for private schools on a religiously neutral basis. Unlike most Establishment Clause doctrines, however, the Supreme Court did not build this one on a historical foundation. Rather, in cases from Everson v. Board of Education *(1947) to* Espinoza v. Montana Department of Revenue *(2020), opponents of religious-school funding have claimed American history supports a strict rule of no-aid.*

Yet the Court and scholars have largely ignored a practice that casts light on the historical understanding of the Establishment Clause: from the Revolution through the Civil War, the federal government partnered with missionaries to educate Native American students. At first ad hoc, the practice became a full-scale program with the Civilization Fund Act of 1819. Presidents Washington, Jefferson, Madison, and Monroe all actively participated. Intriguingly, no one objected to the partnerships on constitutional grounds. This is the first Article to place this practice in its cultural, political, and constitutional context, to consider its implications for the intellectual and political history of disestablishment, and to wrestle with its potential implications for contemporary church-state doctrine.

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> *[Samuel Worcester] entered the aforesaid Cherokee nation in the capacity of a duly authorised missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States . . . .*[1]

INTRODUCTION

Generations of constitutional scholars have studied *Worcester v. Georgia* as a landmark decision about the relative power of the federal and state governments over relations with the Native American nations.[2] But they have largely overlooked the federal-missionary partnership that gave rise to the case: Worcester was a clergy member authorized by the federal government to educate Cherokee students within the state of Georgia.[3] This oversight is somewhat understandable—the partnerships were a relatively small component of federal–Native American relations during the early republic. Moreover, at the time, they raised no constitutional objections. Yet for this reason they present a puzzle for the history of the separation of church and state: Why did a federal program that paid ministers to educate Native American students raise no objections from officials such as James Madison and Thomas Jefferson, officials who had objected so vehemently to a Virginia bill to fund churches and clergy salaries, and who had insisted on a strict application of the federal Establishment Clause?[4]

The answer, this Article argues, is that Americans throughout the late eighteenth and nineteenth centuries understood education to entail at least a modicum of religious instruction.[5] They tacitly distinguished between the governmental funding of such education and the funding of churches for purposes of separation of church and state.[6] This account dramatically revises the standard narrative of religious disestablishment that the Supreme

1 Worcester v. Georgia, 31 U.S. 515, 538 (1832).

2 *See generally* JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY (2004); *see also* GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 42–47 (2007); G. Edward White, *The Marshall Court and Cultural Change, 1815–35*, *in* 3–4 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 730–40, (1988).

3 *See Worcester*, 31 U.S. at 538.

4 *See infra* Parts III & IV.

5 *See infra* Part V.

6 *See infra* Part VI.

Court has relied upon in school funding cases since *Everson v. Board of Education* (1947),[7] a narrative repeated yet again by the dissenting Justices last term in *Espinoza v. Montana Department of Revenue*.[8] In response, the Court merely ventured that "[i]t is far from clear" that the objections to "special support for certain churches and clergy" "extend[ed] to programs that provide equal support to all private primary and secondary schools."[9] The Court could have gone further: virtually every federal official in the early republic, including James Madison and Thomas Jefferson, used federal funds to directly support schools run by religious groups.

This Article provides the first thorough analysis of the federal-missionary partnerships in their political, religious, and constitutional contexts, from the Revolution through the antebellum period. Originally, the partnerships were ad hoc. Presidents paid a trusted clergy member to serve as an ex-officio agent, spy, mediator, or educator. The partnerships turned into a full-blown federal program, however, with the Civilization Fund Act of 1819, which allocated $10,000 per year to fund instructors of "good moral character" to "introduc[e] among [the Native Americans] the habits and arts of civilization."[10] For the next fifty years, virtually all of the recipients of these funds were Christian denominations or missionaries ordained by them.[11] To varying degrees, the missionaries instructed the students in Christian morality and doctrine. With one possible exception, no one contested the program's constitutionality.[12] Among the officers who actively participated, and raised no objections, were Thomas Jefferson, James Madison, and Richard Mentor Johnson—a "who's who" of the disestablishment vanguard.[13]

So far, only a handful of scholars have studied the government-missionary partnerships.[14] Historians of federal–Native American relations have

7 330 U.S. 1, 16 (1947); Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 140 (2017).

8 140 S. Ct. 2246, 2284–86 (2020) (Breyer, J., dissenting); *see also* Transcript of Oral Argument at 22–23, 57, 59, *Espinoza*, 139 S. Ct. 2246 (No. 18-1195) (Sotomayor, J., making the same point).

9 *Espinoza*, 140 S.Ct. at 2258 n.3.

10 Act of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516, 516–17 (codified at 25 U.S.C. § 271 (2018)); *see infra* Part II.

11 *See infra* Part III.

12 *See infra* Part III.

13 *See infra* Part III.

14 This is in spite of the vastness of the literature on the history of disestablishment. DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 156–94 (2010) (providing a historiography of scholarship); Daniel L. Dreisbach, Everson *and the Command of History: The Supreme Court, Lessons of History, and the Church-State Debate in America, in* EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS 23 (Jo Renée Formicola & Hubert Morken eds., 1997) (counting over one hundred articles and monographs on the historical support for *Everson*); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1387 (noting religion clause scholars write "a hefty monograph at a rate of about one every other year").

largely ignored the disestablishment questions they raise.[15] Constitutional scholars, for their part, have drawn opposite inferences from the partnerships.[16] Douglas Laycock, for instance, has argued that the partnerships "suggest[ ] . . . that the Founders were not concerned about money that went to churches in pursuit of secular goals."[17] By contrast, Donald Drakeman, in the most thorough constitutional analysis of the partnerships to date, has argued that, if the partnerships do not violate the Establishment Clause, "it is hard to imagine what could possibly link church and state closely enough" to do so.[18] Yet no one has studied the details of the partnerships within their social, political, and constitutional setting, nor grappled with the question they raise about the development of nonestablishment norms: How could so many officials have objected to using tax dollars to fund churches and clergy without raising a constitutional eyebrow over the federal-missionary partnerships?

This Article attempts to answer this question by evaluating original historical research about the partnerships in light of scholarship on the history of federal–Native American relations, disestablishment, political theology, secularization, Christianity and race, and legal borderlands. While U.S. officials likely assumed the constitutionality of the government-missionary partnerships for overlapping reasons, including untheorized assumptions about the territorial and personal limits of the Establishment Clause, the historical evidence most directly supports the conclusion that elite white Americans shared a "social imaginary"—or social paradigm—of "civilization" that merged education, republicanism, and Christianity.[19] The vast majority of formal elementary education during the early republic entailed basic instruction in Christian morality, if not Christian doctrine. In this respect, the federal partnerships were no different than schools funded by states, local governments, and the District of Columbia.[20]

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15 *See, e.g.*, R. Pierce Beaver, Church, State, and the American Indians (1966); 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 135–36 (1984); *see also* Mark E. Brandon, States of Union: Family and Change in the American Constitutional Order (2013); Theodore Fischbacher, A Study of the Role of the Federal Government in the Education of the American Indian (May 1967) (Ph.D. dissertation, Arizona State University) (on file with author); Martha Elizabeth Layman, A History of Indian Education in the United States (1942) (Ph.D. dissertation, University of Minnesota).

16 *See, e.g.*, Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction 60–81 (1982) (reproducing government documents with little analysis); J.M. O'Neill, Religion and Education Under the Constitution 118–19 (1949); Laycock, *supra* note 7, at 144.

17 Laycock, *supra* note 7, at 144.

18 Drakeman, *supra* note 14, at 335; *see also* Vine Deloria, Jr. & David E. Wilkins, Tribes, Treaties, & Constitutional Tribulations 99–107 (1999).

19 *See* Charles Taylor, A Secular Age 146 (2007) (defining "social imaginary" as "the way we collectively imagine, even pretheoretically, our social life"); *see also id.* at 171–72 (expounding).

20 *See infra* Part V.

The Article's main contribution is to the historical development of nonestablishment norms. A number of judges and scholars have suggested that religious assessments—taxes for churches and clergy—are the paradigmatic example of what the Framers and ratifying public understood the Establishment Clause to forbid.[21] By implication the Constitution forbids a broad range of "support [for] an institution which teaches the tenets and faith of any church."[22] Since *Everson*, then, the Court has proceeded from this premise; the only question has been how broadly to define that range.[23] The federal government's direct support for mission schools suggests that U.S. officials, from the Founding through the antebellum period, operated with a relatively narrow conception of the anti-assessment principle, limited to government-forced tithes (regular payments for the operation of parish churches). Madison's well-known objections to the Virginia assessments were rhetorically broad—more than capacious enough to justify strict separation.[24] Yet apparently few officials, including Madison, believed that nonestablishment entirely foreclosed financial support for religious instruction that was incidental to a general education.[25]

The Article also wrestles with this history's implications for American constitutionalism today. Any line from the federal-missionary partnerships to contemporary doctrine must be qualified and tentative. The partnerships were a tool of the federal government's policy of assimilating Native Americans into white American political culture.[26] Though carried out against a backdrop of "violent expropriation of the western borderlands from Indians,"[27] white officials, missionaries, and some Native American leaders believed the mission schools were a benevolent (and relatively inexpensive) alternative to war.[28] As a formal matter, the schools were voluntary,[29] just as the tribes were, as a matter of law and theory, independent (yet uniquely

21 *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033–34 (2017) (Sotomayor, J., dissenting); Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 418 (2002) (concluding that "the broadly shared eighteenth-century view" was "that it was wrong to coerce payment of taxes for religious purposes against conscience"); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 745–46 (2009) (considering assessments the "paradigm case" of establishment violation); Douglas Laycock, "*Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 895 (1986) ("[T]he debates in Virginia [on the assessment bill] [are the] most important" evidence of "how the concept of establishment was understood in the Framers' generation.").

22 *Everson*, 330 U.S. at 16.

23 *See* Laycock, *supra* note 7, at 140.

24 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 295–306 (Robert A. Rutland & William M.E. Rachal eds., 1973); *see also* Lee v. Weisman, 505 U.S. 577, 622–23 (Souter, J., concurring).

25 *See infra* Part III.

26 *See infra* Parts I & II.

27 Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1008 (2014).

28 *See infra* Section II.A.

"dependent") nations capable of exercising sovereign authority to enter into treaties with the United States.[30] Even at the time, however, astute observers recognized the Native nations' independence was all too often compromised by the threat, actual or tacit, of federal, state, and private force.[31] These imbalances of power surely reduced the voluntariness of the consent of at least some Native families who participated in the mission schools.

And there is no doubt that the federal-missionary partnerships were predicated on political, cultural, and religious chauvinism, in some respects sounding in racism.[32] The government's purpose was to eliminate the aspects of Native American culture that white officials believed to be incompatible with full participation in a democratic republic.[33] In these respects, at least, the program was the product of a political culture foreign to our own, anathema to a constitutional regime that "aim[s] to foster a society in which people of all beliefs can live together harmoniously."[34]

Another challenge facing contemporary jurists is that the officials who created and implemented the partnerships did not opine on their constitutionality. As a result, the practice arguably did not generate a constitutional norm that may be readily "translated"[35] into a doctrinal principle.[36] In the language of James Madison, picked up by contemporary originalist theorists, the partnerships generated no debate or reason-giving that might amount to

29 *See infra* Section III.B. This distinguishes the antebellum programs from post–Civil War federal policies restricting Native American religious practices and forcing Native American students into boarding schools. *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 (1995); TISA WENGER, WE HAVE A RELIGION: THE 1920S PUEBLO INDIAN DANCE CONTROVERSY AND AMERICAN RELIGIOUS FREEDOM 7 (2009); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 787–805 (1997).

30 *See generally* Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. AM. HIST. 591 (2019).

31 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 528 (Eduardo Nolla ed., James T. Schleifer, trans., Liberty Fund 2010) (1835) ("Half persuaded, half forced, the Indians move away; they go to inhabit new wildernesses where whites will not leave them in peace for even ten years."); *see id.* at 547 ("[T]he Americans of the United States have achieved this double result [exterminating the Indian race and preventing it from sharing their rights] with a marvelous ease, calmly, legally, philanthropically, without shedding blood, without violating a single one of the great principles of morality in the eyes of the world. You cannot destroy men while better respecting the laws of humanity." (footnote omitted)).

32 *See, e.g.*, Derek Chang, *"Marked in Body, Mind, and Spirit": Home Missionaries and the Remaking of Race and Nation*, *in* RACE, NATION, AND RELIGION IN THE AMERICAS 135 (Henry Goldschmidt & Elizabeth McAlister eds., 2004); WENGER, *supra* note 29, at 12.

33 *See infra* Section II.A.

34 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

35 *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

36 *See, e.g.*, Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988). *But see* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1124–25 (2020) (arguing that longstanding practice is uniquely normative for constitutional law).

a "liquidation" of the meaning of the Establishment Clause.[37] What the partnerships offer instead is clarity on the breadth of the historical objection to religious assessments. But that clarity admittedly depends on the reason officials took the constitutionality of the partnerships for granted—a reason that must be inferred from the entire context of the practice.

Nevertheless, the Article argues that, translated for a constitutional regime committed to governmental religious neutrality, the partnerships have important implications for ongoing constitutional disputes. In particular, the history supports the current doctrinal principle that the government may provide funds to religious institutions for a nonreligious purpose, so long as it distributes the funds on a religiously neutral basis and according to private choice.[38] The partnerships also have implications for taxpayer standing, the distinction between "direct" and "indirect" funding, and the funding of religious education for foreign clerics.

The Article proceeds as follows. Parts I and II narrate the government's partnership with missionaries to educate Native Americans from the colonial era through the Civil War. Much of the evidence is new to the literature on the history of religious disestablishment. Parts III to V address the puzzle of why American officials who opposed religious assessments could support the missionary partnerships. Part VI discusses the implications of the partnerships for the historical development of nonestablishment norms, and Part VII discusses their implications for contemporary constitutional doctrine.

I. THE WASHINGTON POLICY: "THE INSTRUMENTS TO WORK ON THE INDIANS"

The federal government inherited and transformed a colonial legacy of government-missionary partnerships to evangelize and pacify Native peoples. The Washington administration continued the government's practice during the Revolution to employ missionaries as spies, liaisons, and educators. Whereas the colonial partnerships were shaped by colonial religious establishments, the early federal partnerships manifested no religious preference. The Jefferson administration continued the Washington policy, and in the wake of the War of 1812, the Madison and Monroe administrations increased the government's partnerships with mission efforts, leading to the Civilization Fund Act of 1819.

A. The Colonial and Revolutionary Legacy

Throughout the colonial era, the Church of England was the religion "by law established" in England, but the Crown permitted the North American colonies to maintain various competing Protestant establishments.

37 *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–20 (2019); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–21 (2001).

38 *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

According to colonial charters,[39] corporate declarations,[40] and sermons[41] from the seventeenth and early eighteenth centuries, one of the official purposes of English colonization was to convert Native Americans to Protestantism. Nevertheless, most of the colonies did little to directly support Christian evangelization. This is unsurprising: the "distinguishing feature" of Anglo–Native American relations "was replacement of the Indians on the land by white settlers."[42] English colonists usually negotiated formal land exchanges by treaty,[43] but constant encroachment on tribal lands by white settlers led to nearly two centuries of warfare, reprisals, fear, and distrust.[44]

Yet two colonial mission efforts served as models for early federal-missionary partnerships. The first effort was the well-known missions of Thomas Mayhew and John Eliot in mid-seventeenth century Puritan Massachusetts. Mayhew, the self-appointed governor of Martha's Vineyard, received minor support from the Society for the Propagation of the Gospel in New England (also known as the New England Company). Many Wampanoags converted and became missionaries to others on Nantucket and the mainland.[45] John Eliot, the minister at Roxbury, received funds and land from the Massachusetts General Court and the New England Company to establish large towns of "Praying Indians."[46] The Mayhew and Eliot partnerships inspired Congregational missionaries into the nineteenth century.[47]

The other colonial episode foreshadowed the mixed religious and political motives of the early federal partnerships. When the Iroquois nations became British subjects after Queen Anne's War, the Queen directed the

39 *See* First Charter of Virginia, (1606), *reprinted in* 7 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3783, 3784 (Francis Newton Thorpe ed., 1909); The Second Charter of Virginia (1609), *reprinted in* 7 The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America, *supra*, at 3790, 3802.

40 *See* T. Rundle, A Sermon Preached at St. George's Church Hanover Square, On Sunday February 17, 1733/4, at 21 (1733/4).

41 Beaver, *supra* note 15, at 23–24.

42 Prucha, *supra* note 15, at 11.

43 *Id.* at 16.

44 *See id.* at 13; *see also* Bernard Bailyn, The Barbarous Years 498 (2012); Peter Silver, Our Savage Neighbors: How Indian War Transformed Early America, at xviii (2008).

45 *See* Beaver, *supra* note 15, at 34–35; David J. Silverman, Faith and Boundaries 51 (2005); David J. Silverman, *Indians, Missionaries, and Religious Translation: Creating Wampanoag Christianity in Seventeenth-Century Martha's Vineyard*, 62 Wm. & Mary Q. 141, 169 (2005). *See generally* William Kellaway, The New England Company, 1649–1776: Missionary Society to the American Indians (1961).

46 Beaver, *supra* note 15, at 34–37. *See generally* Kristina Bross, Dry Bones and Indian Sermons: Praying Indians in Colonial America (2004).

47 *See* Joseph Tracy, History of American Missions to the Heathen, from Their Commencement to the Present Time 9–10, 13–14 (Worcester, Spooner & Howland, 1840).

Archbishop of Canterbury to "appoint[ ]" "two Protestant Ministers . . . with a competent allowance to dwell amongst them, in order to instruct them in the true Religion and confirm them in their duty to [her] Majesty."[48] The point was to "more effectively . . . secure their fidelity"—to the Crown, if not also to God.[49] When London underfunded the missions,[50] Sir William Johnson, the New York Superintendent of Indian Affairs, took the initiative to sponsor missionaries to the Mohawks.[51] Working closely with Chief Joseph Brant, a committed Anglican, Johnson built chapels, persuaded the New England Company to send a missionary, and prepared a new edition of the Mohawk Prayer Book.[52] The Mohawks converted to Anglicanism, becoming "a Friend and Ally at the same time; both against the remaining Heathen, and a much more dangerous Neighbour"—the Catholic French.[53]

For an Anglican colony like New York, there was little daylight between promoting the official religion and confirming political loyalty. Predictably, the missionary efforts of nonestablishment denominations in the colonies met official resistance. Georgia evicted the Moravians, a pacifist group that had been harried out of Germany,[54] for refusing to bear arms,[55] and during the Seven Years' and Revolutionary Wars, Native- and Anglo-Americans alike drove them to the Ohio territory.[56] Colonial government-missionary partnerships sought to create not only good Christians, but also trustworthy subjects.

During the Revolution, the Continental Congress set a pattern for government-missionary partnerships that would endure into the constitutional republic. The Articles of Confederation vested in Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians."[57] Three congressional-missionary partnerships, all politically strategic, were important precursors to federal practice. First, Congress funded the education of "nine or ten Indian youth" "under the care of doc-

48 Representation of the Lords of Trade Concerning New-York (Apr. 2, 1703), *in* 4 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 1035, 1037 (E.B. O'Callaghan ed., Albany, Weed, Parsons & Co., Printers 1854).

49 *Id.*

50 *See* BEAVER, *supra* note 15, at 16–17.

51 *Id.* at 19.

52 *Id.* at 20.

53 *See* Thomas Secker, A Sermon Preached Before the Incorporated Society for the Propagation of the Gospel in Foreign Parts (Feb. 20, 1740-1), *in* FRANK J. KLINGBERG, ANGLICAN HUMANITARIANISM IN COLONIAL NEW YORK 213, 224 (1940).

54 EDMUND SCHWARZE, HISTORY OF THE MORAVIAN MISSIONS AMONG SOUTHERN INDIAN TRIBES OF THE UNITED STATES 5–6 (1923); 2 ZEISBERGER'S DIARY, 1781–1789, at ix (Eugene F. Bliss trans., ed., Cincinnati, Robert Clarke & Co. 1885).

55 SCHWARZE, *supra* note 53, at 12–13.

56 1 ZEISBERGER'S DIARY, *supra* note 54, at xiii, xviii, xx–xxi; SILVER, *supra* note 44, at 265.

57 ARTICLES OF CONFEDERATION OF 1781, art. IX. Article 9 provided a caveat for "Indians, not members of any of the states" and provided that "the legislative right of any state within its own limits be not infringed or violated." *Id.* *See* Ablavsky, *supra* note 27, at 1009–13.

tor [Eleazar] Wheelock" at "a seminary for the instruction of Indian youth," later Dartmouth College.[58] Next, at General Washington's request,[59] Congress funded Reverend Samuel Kirkland's mission (and espionage) among the Tuscarora and Oneida nations.[60] The partnership with Kirkland became a cornerstone of the Washington administration's relationship with the Iroquois. Finally, Congress articulated a general policy of government-missionary partnerships, instructing the Indian commissioners "to consider of proper places, in their respective Departments, for the residence of Ministers and Schoolmasters" that "a friendly commerce between the people of the *United Colonies* and the *Indians*, and the propagation of the Gospel, and the cultivation of the civil arts among the latter, may produce many and inestimable advantages to both."[61]

Congress's efforts to evangelize and educate Native Americans were obviously culturally chauvinistic, paternalistic, and imperialistic.[62] As explained

58 Constitution of Indian Departments (Jul. 12, 1775), *in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 174, 176–77 (Worthington C. Ford ed., 1905) (appropriating $500); Report from Committee for Indian Affairs (Sept. 19, 1776), *in* 2 AMERICAN ARCHIVES ser. 5, at 1362, 1362 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1851) (appropriating, at General Schuyler's request, an additional $500); *see* Philip Schuyler, Letter from General Schuyler to Governour Trumbull (Sept. 2, 1776), *in* 2 AMERICAN ARCHIVES ser. 5, *supra*, at 125, 125.

59 George Washington, Letter from General Washington to Continental Congress (Sept. 30, 1775), *in* 3 AMERICAN ARCHIVES ser. 4, at 852, 852–53 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1840) (stressing "the importance of his station . . . to the United Colonies").

60 Rev. Samuel Kirkland Continued in His Mission Among the Indians (Nov. 11, 1775), *in* 3 AMERICAN ARCHIVES ser. 4, at 1918, 1918 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1840) (providing funds for "past services," for "endeavouring to conciliate the good will of those people towards the inhabitants of the *United Colonies*," and "for the propagation of the Gospel amongst the *Indians*"); Samuel Kirkland, Copy of a Letter Intercepted from S. Kirkland to Mr. Schuyler (May 22, 1776), *in* 1 AMERICAN ARCHIVES ser. 5, at 867, 867 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1848) (illustrating Kirkland's espionage); Letter to the Reverend Mr. Kirkland, and an Address to the Mohawks (Apr. 4, 1775), *in* 1 AMERICAN ARCHIVES ser. 4, at 1349, 1349 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1837); Commissioners of the Northern Department Directed to Employ Mr. Kirkland Among the Six Nations of Indians (Jul. 18, 1775), *in* 2 AMERICAN ARCHIVES ser. 4, at 1884, 1884–85 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1839). *See generally* PRUCHA, *supra* note 15, at 40.

61 Report on the Memorial of the Rev. Mr. Sampson Occum (Feb. 5, 1776), *in* 4 AMERICAN ARCHIVES ser. 4, at 1662, 1662 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1843); *see* Speech to Captain White-Eyes (Apr. 10, 1776), in 5 AMERICAN ARCHIVES ser. 4, at 1664, 1664 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1844); Regulations for Indian Affairs in the Middle Department, Adopted (Apr. 10, 1776), *in* 5 AMERICAN ARCHIVES ser. 4, at 1663, 1663 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1844); *see also* Thomas Cushing, Letter from Thomas Cushing to the President of Congress (Aug. 11, 1776), in 1 AMERICAN ARCHIVES ser. 5, *supra* note 60, at 902, 902–03; Memorial of John Sergeant (Nov. 27, 1776), in 3 AMERICAN ARCHIVES ser. 5, at 868, 868–69 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1853).

62 *See infra* Section V.B.

below, Christianization, education, and civilizational development were inextricable facets of the cultural paradigm of elite white Americans.[63] This paradigm provided the assumptions that fueled government-missionary partnerships through the early republic.

B. The Constitutional Framework

The U.S. Constitution established a framework for the legal relationship between the Native nations, the states, and the confederacy. It allocated virtually all authority to enter into treaties and regulate "Commerce . . . with the Indian Tribes" to the federal government.[64] Within the states, "Indians not taxed" would not be counted for purposes of apportionment or federal taxes.[65] This provision probably distinguished between "Tribes" that were tributaries of the states, or "members of any of the states,"[66] as the Articles of Confederation put it, and Native nations that Anglo-Americans considered to have retained their sovereignty.[67] Yet many questions of overlapping sovereignty among the Native nations, states, and federal government persisted well into the nineteenth century.[68] So, too, did many questions regarding the scope of the Establishment Clause, which prohibited Congress from enacting any "law respecting an establishment of religion."[69] Within this indeterminate constitutional framework, the Washington administration set the pattern of practice that would lead to the Civilization Fund Act of 1819.

C. The Washington Administration

1. The Washington-Knox Framework

Under the leadership of President Washington and Secretary of War Henry Knox, the government's goals in Native American relations were to promote peace, facilitate trade, and maximize land use. The principal means were peace treaties (which sometimes included the purchase of land),[70] gifts of agricultural implements and livestock,[71] and the regulation of frontier trade by superintendents, agents, and factors at trading posts.[72] Beginning

63 *See id.*

64 U.S. CONST. art. I, § 8, cl. 3.

65 *Id.* art. 1, § 2, cl. 3.

66 ARTICLES OF CONFEDERATION OF 1781, art. IX.

67 *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014, 1058 (2015).

68 *See* LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836, at 32, 60, 90 (2010).

69 U.S. CONST. amend. I; *see infra* Part IV.

70 *See* George Washington, Washington to Senate (Sept. 17, 1789), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 53 (James D. Richardson ed., New York, Bureau of National Literature, Inc. 1897).

71 *See, e.g.*, George Washington, Washington to Senate (Mar. 23, 1792), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 114.

72 *See* PRUCHA, *supra* note 15, at 89–134.

in 1790, Congress regulated land purchases and commerce with the Native nations through a series of Intercourse Acts.[73] The Act of 1793 appropriated $20,000 per year to promote "civilization" by purchasing gifts for Native people and paying federal agents.[74] Subsequent iterations retained the provision but reduced the allocation to $15,000 per year. The 1802 version also authorized the President "to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit."[75] The details of the expenditures under these acts have largely been lost to history.[76]

Missionary partnerships were a relatively small but important part of the administration's assimilation strategy. On July 7, 1789, Knox told President Washington that he believed the civilization of the Indians to be possible and desirable, but, at the moment, "impracticable"—"an operation of complicated difficulty."[77] He suggested two approaches. The first was to give them gifts to "introduce among the Indian tribes a love for exclusive property."[78] The second was to appoint "[m]issionaries of excellent moral character to reside in their nation . . . [as] their friends and fathers."[79] "These men," he added, "should be made the instruments to work on the Indians."[80] Such a plan "would most probably be attended with the salutary effect of attaching [the tribes] to the interest of the United States."[81]

Consistent with this recommendation, on August 29, 1789, Washington instructed the federal commissioners to the southern tribes to settle a deli-

73 *See* Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as amended at 25 U.S.C. § 177 (2018)).

74 Act of Mar. 1, 1793, ch. 19, § 9, 1 Stat. 329, 331.

75 Act of Mar. 30, 1802, ch. 13, § 13, 2 Stat. 139, 143; Act of May 19, 1796, ch. 30, § 13, 1 Stat. 469, 472; Act of Mar. 3, 1799, ch. 46, § 13, 1 Stat. 743, 747.

76 *See* Fischbacher, *supra* note 15, at 49. *But see* Michael D. Breidenbach, *Religious Tests, Loyalty Oaths, and Ecclesiastical Context of the First Amendment*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 189–90 (Michael D. Breidenbach & Owen Anderson eds., 2020) (noting that then-Bishop John Carroll "reported" in 1800 "that at least two [Catholic] priests in the Native American territories received salaries from the US federal government to 'tend to their [the Native Americans'] civilisation, and teach them the advantages of the Xtian [Christian] religion.'" (alteration in original) (quoting Letter from John Carroll to James Madison (Jan. 6, 1809), LIBR. OF CONG.: JAMES MADISON PAPERS, 1723–1836, http://hdl.loc.gov/loc.mss/mjm.10_0914_0915 (last visited Oct. 30, 2020))).

77 Henry Knox, Gen. Knox, Secretary of War, to the President of the United States, in continuation (Jul. 7, 1789), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 52, 53 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832). James Madison had introduced the proposal that became the Bill of Rights on June 8, 1789. *See* 1 ANNALS OF CONG. 440–41 (1789) (Joseph Gales ed. 1834). The states ratified those constitutional amendments, including the First Amendment, on December 15, 1791.

78 Knox, *supra* note 77, at 53.

79 *Id.* at 54.

80 *Id.*

81 *Id.*

cate and important land dispute between the Creeks and the State of Georgia.[82] Incidental to the commissioners' primary objective, the President instructed them to "endeavor to obtain a stipulation for certain missionaries, to reside in the nation, provided the General Government should think proper to adopt the measure."[83] The missionaries would "be precluded from trade, or attempting to purchase any lands," but should "have a certain reasonable quantity, per head, allowed for the purpose of cultivation."[84] "The object of this establishment," wrote Washington, "would be the happiness of the Indians, teaching them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States."[85]

Two years later, in his Third Annual Address to Congress, Washington discussed Native American affairs at length. His first priority was to establish "an impartial dispensation of justice," especially with respect to land.[86] He also urged that "such rational experiments should be made for imparting to them the blessings of civilization as may from time to time suit their condition."[87] He suggested that "the Executive of the United States should be enabled to employ the means to which the Indians have been long accustomed for uniting their immediate interests with the preservation of peace."[88] Given the government-missionary partnerships of the past, this may amount to a proposal to put such partnerships on a statutory footing. In all, "[a] system corresponding with the mild principles of religion and philanthropy toward an unenlightened race of men, whose happiness materially depends on the conduct of the United States, would be as honorable to the national character as conformable to the dictates of sound policy." [89]

2. Reverend Samuel Kirkland

The most intriguing government-missionary partnership during the Washington administration was with Samuel Kirkland. A colonial board for the Society in Scotland for Propagating Christian Knowledge had appointed Kirkland to serve as a missionary in 1766.[90] As discussed above, Kirkland had

82 George Washington & Henry Knox, Instructions to the Commissioners for Treating with the Southern Indians (Aug 29, 1789), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 65, 66.

83 *Id.*

84 *Id.*

85 *Id.* I have seen no congressional evidence regarding such a plan.

86 George Washington, Third Annual Address (Oct. 25, 1791), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 95, 96.

87 *Id.* at 96–97.

88 *Id.* at 97.

89 *Id.* at 97; *see also* George Washington, George Washington's Farewell Address (Sept. 19, 1796), *in* THE SACRED RIGHTS OF CONSCIENCE 468, 468 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

90 ELEAZER WHEELOCK, KIRKLAND'S APPOINTMENT AS MISSIONARY TO THE INDIANS (June 19, 1766), *reprinted in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE 25, 25 (Joseph D. Ibbotson & S.N.D. North eds., 1922).

served at Washington's request as an intelligence agent and emissary for the Continental Congress to the Iroquois since 1775.[91]

In 1791, the administration's goal of guaranteeing the loyalty of the Iroquois coincided with Kirkland's plan to build a boarding school for Native and white American students. Kirkland wrote to Knox and Timothy Pickering, then Postmaster General and Superintendent of Indian Affairs and future Secretary of War, for the "aid and countenance of [the] Government."[92] His proposed curriculum was ambitious. In addition to reading, writing, and arithmetic, it would include instruction in "the principles of human nature, and the history of civil society, . . . laws, government, agriculture, industry, etc.—that [the students] may be able clearly to discern the difference between a state of nature and a state of civilization." [93] Additionally, Kirkland proposed that the students "be taught the principles of natural and the doctrines of revealed religion. Moral precepts and the more plain and express doctrines of Christianity should be constantly inculcated, as the minds of the youth are able to receive them."[94] Upon Knox's request, Kirkland provided a detailed "statement of the expences requisite to give efficacy to the Plan."[95]

At about the same time, Knox asked Kirkland to serve as the government's agent to persuade the leaders of the Iroquois to attend a conference in Philadelphia with President Washington. The United States wanted to ensure the tribes' friendship and, hopefully, to persuade them to mediate the hostilities between the United States and the Northwest federation.[96] Knox asked Kirkland to recruit the attendees—especially Chief Joseph Brant—to escort them to Philadelphia, and to assure the government's friendship toward them. Knox paid Kirkland's way, as well as "a reasonable compensation."[97]

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91 *See supra* subsection I.C.2.

92 SAMUEL KIRKLAND, A PLAN OF EDUCATION FOR THE INDIANS, PARTICULARLY OF THE FIVE NATIONS (Oct. 4, 1791), *reprinted in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 27, 31.

93 *Id.* at 27 (emphasis omitted).

94 *Id.*

95 Samuel Kirkland, Samuel Kirkland to Henry Knox, Secretary of War in the Administration of George Washington (Dec. 6, 1791), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 32, 32.

96 *See* DAVID ANDREW NICHOLS, RED GENTLEMEN & WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER 141–42 (2008).

97 Henry Knox, A Statement of the Measures Taken, and the Overtures Made, to Procure a Peace with the Indians Northwest of the Ohio (Dec. 20, 1791), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 226, 226; *see* Henry Knox, The Secretary of War to the Rev. Samuel Kirkland—Per Colonel Procter and Lieutenant Sedam (Mar. 7, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 229, 229 (providing $700 to be sure the Indians are "satisfactorily treated on the road"); Henry Knox, To the Rev. Samuel Kirkland—Per Mr. James M. Reed, Express (Feb. 25, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 228, 228; *see also* Henry Knox, The Secretary of War to the Rev. Samuel Kirkland (Jan. 9, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 226, 226.

The March 1792 conference between Washington and the Iroquois was deemed a success.[98] Within a month of the conference, Washington ratified an article authorizing payment of a yearly sum of $1500 for the Iroquois and Stockbridge Indians, noting that he approved of Colonel Pickering's plan for their civilization.[99] The exact disposition of these funds is unknown. Within a month, Pickering had authorized the distribution of $415 to the Stockbridge, Oneida, and Tuscarora Indians for livestock and agricultural implements.[100] The Oneida's share was paid to Kirkland.[101]

Kirkland capitalized on the federal government's financial support to also solicit funds from mission organizations and, probably, the state of New York. He wrote to the board of the American branch of the Society for the Propagation of the Gospel that "Congress had granted 1500 dollars annually for the term of 21 years, for the express purpose of introducing civilization among the five Nations," including for "a common school master in four establishments."[102] By the end of the year, the American board had recommended annual financial support for an instructor, books, stationery, and tuition.[103]

In 1793, Kirkland received a charter for the school from the Regents of the University of the State of New York.[104] With Alexander Hamilton as the star member of the board of trustees, the school was called the Hamilton Oneida Academy.[105] (It is now Hamilton College.) Located in Herkimer County, "contiguous to the Oneida Nation of Indians," the school was within the territory of the state of New York, and served white and Native American students.[106] Kirkland remained an ad hoc agent for the United States at least through 1795.[107] The record is unclear about how much money the federal

98 *See* NICHOLS, *supra* note 96, at 142.

99 Washington to Headmen of the Five Nations (Apr. 25, 1792), *in* PAPERS OF THE WAR DEPARTMENT, 1784–1800: SAMUEL KIRKLAND PAPERS, https://wardepartmentpapers.org/s/home/item/42637

100 Appropriation of Money to Indian Tribes (May 4, 1792), *in* PAPERS OF THE WAR DEPARTMENT, 1784–1800: SPECIAL FOLDER, https://wardepartmentpapers.org/s/home/item/42872

101 *Id.*

102 Samuel Kirkland, Samuel Kirkland to Peter Thacher (June 6, 1792), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 43, 43; *see also* Samuel Kirkland, Samuel Kirkland to Peter Thacher (June 30, 1792), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 45, 48.

103 Samuel Kirkland, Samuel Kirkland to Peter Thacher (June 6, 1792), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 43, 48–49.

104 Charter of Hamilton Oneida Academy (Jan. 31, 1793), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 68, 68–69.

105 Samuel Kirkland, Kirkland's Plan for the Academy (Dec. 6, 1792), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 49, 50.

106 Original Subscription Form, Hamilton Oneida Academy (Aug. 1790), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 58, 58.

107 *See* Samuel Kirkland to Timothy Pickering (Jan. 19, 1795), *in* PAPERS OF THE WAR DEPARTMENT, 1784–1800: SAMUEL KIRKLAND PAPERS, https://wardepartmentpapers.org/s/home/item/49184

government contributed to the cause, but it could not have been much: within a few years Kirkland had taken on debt to cover the school's costs, and a few years later it was completely abandoned, later resurrected by the Board of Regents.[108]

Two exchanges during the government's partnership with Kirkland shed light on how Washington and his officers did—and did not—conceive of the Establishment Clause. The first is Colonel Pickering's response to Kirkland's proposed curriculum. Pickering generally supported Kirkland's plan, claiming that he had submitted one of his own to the President the prior year. But he discouraged Kirkland from teaching "the peculiar doctrines of revealed religion."[109] By this, Pickering probably meant beliefs based on special revelation—scripture, and, perhaps, church tradition—rather than nature or reason alone. Teaching such doctrines would cause two problems, he thought. The first was that the student "would find it difficult to comprehend them."[110] The second was that "different teachers might place them in very different points of view; and such different views of the same thing (by all their teachers perhaps declared essential to salvation) would confound and discourage them; and probably make them suspect the whole to be an imposture."[111] By contrast, Pickering endorsed the idea of teaching the students "the principles of *natural* religion, and moral precepts."[112] These principles, "applicable to all people . . . will be important to explain and inculcate."[113] Along these lines, there is evidence that Secretary Knox later prohibited the use of government funds for the teaching of revealed religion "excepting [to] those Indians to whom any of its mysteries have already been unfolded."[114]

Pickering's rationale is important. He made no claim that it would be unlawful or even inappropriate for the government to support the teaching of revealed religion as part of a comprehensive education. His concern was that it would be counterproductive. Knox's proviso may reflect the same concern. Knox was a champion of the autonomy of the Native nations, so he may also have been concerned that proselytization would be out of line.[115] But since there was nothing coercive about Kirkland's proposal, Knox may have merely wanted to make the school as attractive to as many Native students as possible, including those with reservations about Christianity. Without more evidence it is impossible to say. None of the evidence, however,

108 Herbert John Lennox, Samuel Kirkland's Mission to the Iroquois 176–77 (Aug. 1932) (Ph.D. dissertation, University of Chicago) (on file with author); *see* Proceedings of the Regents of the University of the State of New York (May 22, 1812), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 107, 107.

109 Timothy Pickering, Timothy Pickering to Samuel Kirkland (Dec. 4, 1791), *in* DOCUMENTARY HISTORY OF HAMILTON COLLEGE, *supra* note 90, at 35, 35, 36–37.

110 *Id.* at 36.

111 *Id.* at 36–37.

112 *Id.* at 37 (emphasis added).

113 *Id.*

114 Lennox, *supra* note 108, at 172.

115 Thanks to Greg Ablavsky for pointing this out.

suggests that either Knox or Pickering believed there were constitutional limits on the government's support for religious education within the territory of a state.

Kirkland may have accepted Pickering's advice, at least in principle. His subsequent proposal to the Board of Regents stated that "[a]s their minds grow ripe for it (more particularly the Indian youth) let the evidences, doctrines, precepts, and sanctions of Revelation and the gospel plan of salvation by a Redeemer be unfolded to them, together with their important and intimate relation to the Supreme Being be pointed out."[116] In practice, though, Kirkland did not shy away from revealed religion. The clergy who visited the school reported that Kirkland "discoursed to the Oneidas on all the intricate points of Calvinism."[117]

A second exchange during the government's partnership with Kirkland is perhaps the most important document from Washington's hand about the bounds of the Establishment Clause. Scholars have so far ignored it. In May 1792, scarcely a month after Washington had hosted Kirkland and the Iroquois chiefs at Philadelphia, he penned a letter to John Carroll, Archbishop of the Roman Catholic Church in the United States. Carroll had apparently proposed a partnership to "instruct[ ] the Indians, within and contiguous to the United States, in the principles and duties of Christianity."[118]

Washington's response declining the request was, characteristically,[119] a model of decorum. After thanking the Archbishop for his "pious and benevolent wishes" of "securing the permanent attachment of our savage neighbors" "upon the mild principles of religion and philanthropy," he seems to distance himself from an evangelistic motive: "I have no doubt but such measures will be pursued, as may seem best calculated to communicate liberal instruction, and the blessings of society, to their untutored minds."[120]

Washington's rationale for declining the partnership shed light on his understanding of the federal government's authority over Native peoples and religion. As for the "western Indians," "[t]he war now existing" between them and the United States "prevents, for the present, any interference of this nature with them." [121] Practicability, not law, prevented such a mission.

As for those "who dwell in the eastern extremity of the United States," they are "according to the best information that I can obtain, so situated as to be rather considered as a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them as under its imme-

116 KIRKLAND, *supra* note 105, at 56.

117 ROBERT F. BERKHOFER, JR., SALVATION AND THE SAVAGE: AN ANALYSIS OF PROTESTANT MISSIONS AND AMERICAN INDIAN RESPONSE, 1787–1862, at 50 (2014).

118 George Washington, Letter to John Carroll (Apr. 10, 1792), *in* 12 THE WRITINGS OF GEORGE WASHINGTON 116, 116 (Worthington Chauncey Ford ed., New York, G.P. Putnam's Sons 1891).

119 *See* JOHN G. WEST, JR., THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION 40 (1996).

120 Washington, *supra* note 118, at 117–18.

121 *Id.* at 117. *See generally* PRUCHA, *supra* note 15, at 61–67 (regarding the war).

diate care and protection."[122] He thus recommended that it "would seem most proper" for the Archbishop to direct his "application" with respect to that group "to the government of Massachusetts."[123] Washington probably had in mind the unique situation of the Native peoples in Massachusetts. They had been "surrounded by Anglo-American communities" for generations and, unlike the nations on the frontier, "were subject to state law."[124] Washington may have been relying on tradition and their status as state taxpayers to distinguish them from "independent" tribes.[125]

Yet Washington may have also been influenced by the Establishment Clause. Some jurists today believe that at least one purpose of the Clause was to prevent federal interference with state religious establishments.[126] Massachusetts certainly had what many considered to be an establishment of religion, and it was decidedly not Catholic.[127] With respect to Massachusetts, at least, Washington may have had more than one constitutional reason to reject Carroll's proposal.

Finally, Washington turned to the "[t]he Indians of the Five Nations."[128] "[I]n their religious concerns," he explained, they were "under the immediate superintendence of the Reverend Mr. Kirkland." [129] Kirkland, of course, was Washington's agent. He may have thought multiple missionary-agents would risk confusion or dilution of the government's agenda. Or he may have shared the widespread suspicion of the political loyalties of the Catholic Church. In any case, he obviously did not believe the Constitution categorically prohibited partnering with a missionary. He may have thought that the Establishment Clause cautioned against the federal interference with the Massachusetts religious establishment, but he clearly believed that the Constitution in at least some cases permitted the federal government's support of religious instruction as part of a comprehensive education.

3. Reverend John Heckenwelder

Though perhaps the model,[130] Kirkland was not Washington's only missionary-agent. In the spring of 1792, Secretary Knox instructed Judge Rufus

122 Washington, *supra* note 118, at 117.

123 *Id.*

124 Ablavsky, *supra* note 67, at 1054.

125 *See id.* at 1054–55; *see also* U.S. CONST. art. I, § 2, cl. 3.

126 *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–54 (2004) (Thomas, J., concurring in the judgment); AKHIL REED AMAR, THE BILL OF RIGHTS 32–34 (1998); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 20–21 (1995); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle,* 27 ARIZ. ST. L.J. 1085, 1089–92 (1995); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 629–30 (2006).

127 *See, e.g.*, 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 1054 (1971).

128 Washington, *supra* note 118, at 117.

129 *Id.*

130 NICHOLS, *supra* note 96, at 122.

Putnam to negotiate peace with the Native nations north of the Ohio River.[131] At Putnam's request, Knox asked John Heckenwelder, a Moravian missionary to the Delaware in western Pennsylvania and Ohio, to accompany Putnam, and offered to pay Heckenwelder's way.[132]

By November 8, 1792, Putnam had concluded a treaty of peace with the Wabash and Illinois.[133] At Washington's direction, Knox informed the Senate of the treaty, enclosing a speech Heckenwelder had made to the Native nations. [134] Among other things, Heckenwelder had encouraged them "not to look to what has passed, but to come forth and speak to this Great Chief [Washington], who will, with your assistance, remove all that is bad, and make every thing clear and light again. Rise, therefore, and don't lose this fine opportunity."[135] A year later Knox called on the missionary to accompany the U.S. commissioners to the western nations and again "use his influence towards a peace."[136]

On November 6, 1792, about six months after his letter to Archbishop Carroll and only two days before Knox delivered Heckenwelder's message to Congress, President Washington delivered his fourth annual address to Congress. Among other things, he proposed "[t]o enable, by competent rewards, the employment of qualified and trusty persons to reside among [the Native nations] as agents," and urged Congress to develop "an eligible plan . . . for promoting civilization among the friendly tribes."[137] Given the immediate context, Washington likely had an expansion of the missionary partnerships in mind.

D. The Jefferson Administration

Thomas Jefferson never personally proposed a government-missionary partnership. This is perhaps unsurprising: Jefferson had a low view of what

131 *Id.* at 142.

132 Henry Knox, Instructions to Benjamin Lincoln, of Massachusetts, Beverley Randolph, of Virginia, and Timothy Pickering, of Pennsylvania (Dec. 4, 1763), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 340, 341; Henry Knox, The Secretary of War to Mr. John Heckenwelder (May 18, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 233, 233; *see also* Henry Knox, The Secretary of War to Mr. John Heckenwelder, at Bethlehem (May 21, 1792), 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 234, 234.

133 Henry Knox, Wabash and Illinois Tribes (Nov. 8, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 319, 319.

134 *See* John Heckewelder, Address to the Delaware Indians (Oct. 5, 1792), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 319, 319.

135 *Id.* at 320.

136 Henry Knox, Instructions to Benjamin Lincoln, of Massachusetts, Beverley Randolph, of Virginia, and Timothy Pickering, of Pennsylvania (Dec. 4, 1763), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 340–341; *see also* NICHOLS, *supra* note 96, at 147.

137 George Washington, Speech to Both Houses of Congress (Nov. 6, 1792), *in* 12 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 118, at 205, 208.

Pickering had called "revealed religion."[138] In general, he preferred to leave religious doctrine out of education.[139] He had always believed agriculture and private property were the key to Native American progress.[140] He repeatedly urged Congress to provide for their education in the agricultural arts[141] and supported the federal government's purchase of their land for parceling into lots suitable for raising livestock and crops.[142] By the end of his administration, he went so far as to repudiate "the ancient and totally ineffectual [plan] of beginning [the process of assimilating the Native Americans] with religious missionaries."[143]

Nevertheless, Jefferson's administration provided money for at least one missionary school and, pursuant to a treaty, funded the construction of a Catholic Church and the salary of a priest. In spite of his leadership against religious assessments in Virginia and general anticlericalism, Jefferson never raised a constitutional objection to the government-missionary partnerships.[144]

1. Gideon Blackburn and the Cherokees

The Presbyterian General Assembly gave $200 to Gideon Blackburn, then serving as a frontier pastor, to spend two months conducting a mission to the Cherokee nation.[145] President Jefferson decided to invest in the enterprise. Secretary of War Henry Dearborn wrote to U.S. agent Colonel Return J. Meigs:

> The President of the United States is of opinion that in conformity with the intentions of the Government respecting the melioration of the present situ-

138 *See* WEST, *supra* note 119, at 56–57.

139 *See, e.g.*, ALAN TAYLOR, THOMAS JEFFERSON'S EDUCATION 40, 53, 188 (2019).

140 *See* PRUCHA, *supra* note 15, at 139.

141 *See* Thomas Jefferson, First Annual Message (Dec. 8, 1801), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 314, 314; Thomas Jefferson, Gentlemen of the Senate and of the House of Representatives (Jan. 18, 1803), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 340, 341; Thomas Jefferson, Third Annual Message (Oct. 17, 1803), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 345, 347; Thomas Jefferson, Fourth Annual Message (Nov. 8, 1804), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 357, 359–60; Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 366, 368; Thomas Jefferson, Seventh Annual Message (Oct. 27, 1807), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 413, 416; Thomas Jefferson, Eighth Annual Message (Nov. 8, 1808), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 70, at 439, 442.

142 NICHOLS, *supra* note 96, at 194.

143 Thomas Jefferson, Letter from Thomas Jefferson to John Jay (Apr. 7, 1809), *in* 5 THE WRITINGS OF THOMAS JEFFERSON 440 (H.A. Washington ed., New York, Derby & Jackson 1859).

144 *See infra* Section III.C.

145 Dorothy C. Bass, *Gideon Blackburn's Mission to the Cherokees: Christianization and Civilization*, 52 J. PRESBYTERIAN HIST. 203, 206, 209 (1974); *see also* Lester Lamon, *Gideon Blackburn: A Contemporary's Perspective*, 62 J. PRESBYTERIAN HIST. 354, 354–55 (1984).

> ation of our Indian Neighbours, some aid ought to be afforded to the laudible plan contemplated by the Religious Society, and particularly by Mr. Blackburn.[146]

Dearborn told Meigs to help Blackburn negotiate the details of a school with the Cherokee chiefs and to build a school house. He also authorized Meigs to provide up to $200–300 annually to help the school.[147] At the same time, though, Dearborn informed Blackburn that he would "have no claim on the United States, for compensation for your services, other than what may from time to time be deemed advisable."[148]

With the Cherokees' approval, Blackburn established a school in Highwassee, Georgia.[149] Students focused on reading, writing, math, and memorizing hymns. Advanced students learned the entire *Westminster Shorter Catechism*.[150] A year after the initial federal allocation, Secretary Dearborn instructed Colonel Meigs "to afford [Blackburn] the aid of three or four hundred dollars per annum" if the agent was "fully convinced of the utility of the school."[151] According to the most fulsome historical review, "[a]lthough the records for the subsequent years are incomplete, this money probably did continue to be available annually."[152] Blackburn continued the mission, expanding it to include another school at Sale Creek, Tennessee, until 1810.[153]

2. The Kaskaskia Treaty

Treaties between the United States and Native nations often included a provision in which the federal government promised money for education (among other things) in exchange for tribal land. In 1803, the government agreed to provide the Kaskaskia tribe, "the greater part" of which "have been baptised and received into the Catholic church, to which they are much attached" with an annual annuity of $100 for seven years "towards the support of a priest . . . who will engage to perform . . . the duties of his office, and also to instruct as many of [the Kaskaskia] children as possible, in the rudiments of literature."[154]

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146 Bass, *supra* note 145, at 209–10 (quoting Henry Dearborn, Letter from Henry Dearborn to R.J. Meigs (July 1, 1803), *in* RECORDS OF THE OFFICE OF THE SECRETARY OF WAR, LETTERS SENT, INDIAN AFFAIRS, 1800–1824 (1963)).

147 *Id.* at 210.

148 *Id.* (quoting Henry Dearborn, Letter from Henry Dearborn to Gideon Blackburn (July 1, 1803), *in* RECORDS OF THE OFFICE OF THE SECRETARY OF WAR, LETTERS SENT, INDIAN AFFAIRS, 1800–1824, *supra* note 146).

149 *Id.* at 211–12.

150 *Id.* at 212.

151 *Id.* at 216 (quoting Henry Dearborn, Dearborn to Meigs (Nov. 1, 1804) *in* RECORDS OF THE OFFICE OF THE SECRETARY OF WAR, LETTERS SENT, INDIAN AFFAIRS, 1800–1824, *supra* note 146).

152 *Id.* at 216.

153 *Id.* at 219.

154 Thomas Jefferson, Letter from Thomas Jefferson to the Senate (Oct. 31, 1803), *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 77, at 687, 687–88.

The provision appears to do what Jefferson had successfully opposed in Virginia in the 1780s: use tax dollars to fund the salary of a clergy member and to build a church.[155] Jefferson may have distinguished the two on the ground that the expenditure was attributable to the Kaskaskias, not the government.[156] More than a century later, the Supreme Court advanced this rationale to uphold such a treaty provision.[157]

Yet this reasoning is not entirely convincing. A treaty reflects an agreement between two parties, not one. The United States agreed to use its money to fund a priest and church in exchange for land just as much as the Kaskaskias instructed the United States, as a trustee, to do so. Furthermore, there is no direct evidence that Jefferson justified the expenditures on the formal distinction between a treaty and legislation.

Perhaps the most convincing rationale for Jefferson's acquiescence to the provision may be that, unlike the Virginia assessments, the treaty did not coerce taxpayers to support religion against their consciences. At the time, the federal government's revenue was mostly from the sale of land and taxes on consensual activities such as trade. By contrast, state governments imposed religious assessments on all taxpayers and used the funds solely to support clergy and churches. The government would probably use money raised by the sale of land ceded by the treaty to make the payments. This would therefore entail no governmental coercion of individual conscience, Jefferson's chief objection to religious assessments.[158] Yet this is pure conjecture; the most intriguing thing about the Kaskaskia treaty is that there is no evidence Jefferson contemplated the provision's constitutionality one way or another.

E. The Madison and Monroe Administrations

The Second Great Awakening was perhaps the most important social development in the United States of the early nineteenth century. Democratic sentiment merged with religious piety.[159] Personal, evangelical, and enthusiastic forms of Protestantism flourished and denominations proliferated.[160] Within and across denominations, evangelicals established a variety of benevolent societies, including societies devoted to mission work.[161]

As the nation settled into a newfound sense of security after the War of 1812, mission societies grew more ambitious. The catalyst for missions to

155 *See infra* Part IV.

156 *See, e.g.*, Nathan S. Chapman, *The Establishment Clause, State Action, and* Town of Greece, 24 WM. & MARY BILL RTS. J. 405 (2015).

157 *See* Quick Bear v. Leupp, 210 U.S. 50, 77, 81 (1908).

158 *See infra* Part IV.

159 *See generally* NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989).

160 MARK A. NOLL, AMERICA'S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN 165–208 (2002).

161 *See, e.g.*, DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 164–70 (2007).

Native groups was the American Board of Commissioners for Foreign Missions ("American Board"), a New England–based Congregational association that self-consciously sought to emulate the Mayhew and Eliot missions of the seventeenth century.[162] In 1816, the Board commissioned Cyrus Kingsbury to be its first missionary to the Cherokee nation.[163] On his journey south, Kingsbury stopped in Washington to "communicate[ ] the design of the Board to the Heads of Departments."[164]

Secretary of War William H. Crawford told Kingsbury that he would direct Colonel Meigs, the U.S. agent to the Cherokees, "to erect a comfortable school-house, and another for the teacher and such as may board with him" and to "furnish two ploughs, six hoes, and as many axes, for the purpose of introducing the art of cultivation among the pupils."[165] Crawford also promised to direct "from time to time, to cause other school-houses to be erected, as they shall become necessary, and as the expectation of ultimate success shall justify the expenditure."[166] The houses and furnishings would remain public property "to be occupied and employed for the benefit of the nation."[167] "The only return which is expected by the President is an annual report of the state of the school, its progress, and its future prospects."[168] Crawford emphasized that Congress would be watching; if the mission was successful, "the means of forwarding your beneficent views will be more directly and liberally bestowed by that enlightened body."[169]

Apparently, all concerned shared the cooperative spirit. While in Washington, Kingsbury spoke repeatedly with Colonel Meigs and with several Cherokee leaders. Kingsbury reported that Meigs "may be relied upon, as a firm and substantial friend to the object of the mission" and that the "Indians also appeared to be pleased with the design."[170]

The American Board of Commissioners' committee was delighted with the mission's promising start and optimistic about its potential. While the

162 *See* WILLIAM E. STRONG, THE STORY OF THE AMERICAN BOARD 35 (1910); JOSEPH TRACY, HISTORY OF THE AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS 34–35 (New York, M.W. Dodd 2d ed. 1842).

163 Arthur H. DeRosier, Jr., *Cyrus Kingsbury—Missionary to the Choctaws*, 50 J. PRESBYTERIAN HIST. 267, 270 (1972).

164 AM. BD. OF COMM'RS FOR FOREIGN MISSIONS, FIRST TEN ANNUAL REPORTS OF THE AMERICAN BOARD OF COMMISSIONERS FOR FOREIGN MISSIONS 134 (Boston, Crocker & Brewster 1834); JOSEPH W. PHILLIPS, JEDIDIAH MORSE AND NEW ENGLAND CONGREGATIONALISM 206 (1983).

165 William Crawford, Letter from William Crawford to Cyrus Kingsbury (May 14, 1816), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 478, 478 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834); AM. BD. OF COMM'RS FOR FOREIGN MISSIONS, *supra* note 164; *see* Cyrus Kingsbury, Copy of a Letter from C. Kingsbury to the Secretary of War (May 2, 1816), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra*, at 477, 477.

166 Crawford, *supra* note 164.

167 *Id.*

168 *Id.*

169 *Id. See generally* DeRosier, *supra* note 163.

170 AM. BD. OF COMM'RS FOR FOREIGN MISSIONS, *supra* note 164, at 135.

government made no comment about the evangelical nature of the enterprise, the American Board's religious objectives were clear. "[T]he present plan" was

> [t]o establish schools in the different parts of the tribe under the missionary direction and superintendence, for the instruction of the rising generation in common school learning, in the useful arts of life, and in Christianity, so as gradually, with the divine blessing to make the whole tribe English in their language, civilized in their habits, and Christian in their religion.[171]

A few years later, while lobbying Congress to enact the Civilization Fund Act of 1819, President Monroe visited the establishment. According to a letter from the supervising instructor, President Monroe:

> was pleased to express his approbation of the plan of instruction, particularly as the children were taken into the family, taught to work, &c. He thought this the best, and perhaps the only way, to civilize and christianize the Indians; and assured us he was well pleased with the conduct and improvement of the children.[172]

Dissatisfied with the log cabin the missionaries were erecting for the female students, Monroe "advised that we put another kind of building in place . . . a good two story house, with brick or stone chimneys, glass windows, &c., and that it be done at the public expense."[173] With that, Monroe directed Colonel Meigs "to pay the balance of [the missionaries'] account, for what you have expended on these buildings, and also to defray the expense of the house, you are now about to build."[174] Like prior government-missionary partnerships, the Madison and Monroe administration partnerships were ad hoc: politically strategic, denominationally opportunistic, and focused on promoting Christianity as one component of a comprehensive education into white American culture.

II. The Civilization Fund Act of 1819

Washington's strategy of using missionaries to assimilate Native peoples reached its institutional fulfillment with the Civilization Fund Act of 1819. Until its repeal in 1873, the Act authorized the President to spend $10,000 per year to "employ capable persons of good moral character" to teach Native students basic literacy and agriculture. [175] Virtually all of the money went to Christian mission associations. No one contested its constitutionality.

171 *Id.*; *see also* Robert Sparks Walker, Torchlights to the Cherokees: The Brainerd Mission 22 (The Overmountain Press 1993) (1931).

172 Am. Bd. of Comm'rs for Foreign Missions, *supra* note 164, at 240.

173 *Id.*

174 *Id.*

175 Act of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516, 516.

A. Legislative History

The architect of the Act was Thomas McKenney, Superintendent of Indian Affairs and ardent evangelical.[176] Upon reading a report of a Moravian mission to the Cherokee nation, he hatched a plan for Congress to enter the field.[177] McKenney sent circulars to the benevolent associations and private persons dedicated to "meliorating the condition of the Indians," recommending they petition Congress for a bill to fund missionary efforts.[178] The Act was the result of their lobbying.[179] The Civilization Fund program thus belongs alongside other recent histories exploring the legal ramifications of the social and political movements spurred by the Second Great Awakening.[180]

This evangelizing spirit combined with the growing belief among federal officials that assimilation into white political culture was the only way for the tribes to survive. In his 1817 address to Congress, President Monroe argued that "it is our duty to make new efforts for the preservation, improvement, and civilization of the native inhabitants."[181] Beyond reducing their land to the amount necessary for an agricultural society, he urged Congress to consider "whether other provisions, not stipulated by treaty, ought to be made for these tribes, . . . particularly for their improvement in the arts of civilized life."[182]

A House of Representatives committee agreed. "In the present state of our country," it determined, "one of two things seems to be necessary: either that those sons of the forest should be moralized or exterminated. Humanity would rejoice at the former, but shrink with horror from the latter."[183] The committee was not proposing that the federal government either educate or exterminate the Native peoples; it was acknowledging the constant threat posed to them by white frontiersmen. According to the prevailing Enlighten-

176 PRUCHA, *supra* note 15, at 148. *See generally* HERMAN J. VIOLA, THOMAS L. MCKENNEY: ARCHITECT OF AMERICA'S EARLY INDIAN POLICY: 1816–1830 (1974).

177 1 THOMAS L. M'KENNEY, MEMOIRS, OFFICIAL AND PERSONAL 33–35 (New York, Paine & Burgess, 2d ed. 1846); *see also id.* at 313–15 (letter from Moravian missionary to McKenney).

178 *Id.* at 35.

179 *See, e.g.*, 33 ANNALS OF CONG. 426 (1818); 33 ANNALS OF CONG. 170 (1819); PRUCHA, *supra* note 15, at 150 ("[McKenney] and his missionary friends lobbied earnestly for the measure . . . ."); William McLean, Report to the House of Representatives (Mar. 23, 1824), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 458 ("The passage of this law was called for by many of the people in the most populous and influential sections of our country" and "a religious community.").

180 *See, e.g.*, JOHN W. COMPTON, THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION (2014); Kellen Funk, *Shall These Bones Live? Property, Pluralism, and the Constitution of Evangelical Reform*, 41 LAW & SOC. INQUIRY 742 (2016) (reviewing COMPTON, *supra*).

181 31 ANNALS OF CONG. 16 (1817).

182 *Id.*

183 Henry Southard, Trade, Intercourse, and Schools (Jan. 22, 1818), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 150, 151.

ment-era theory of social progress,[184] the remedy was a combination of education and religion:

> Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plough; and, as their minds become enlightened and expand, the Bible will be their book, and they will grow up in habits of morality and industry, leave the chase to those whose minds are less cultivated, and become useful members of society.[185]

The committee therefore proposed a bill to establish trading houses and to organize and encourage schools on the frontier.[186] The program would support existing mission schools and use the profits from the factory system to endow new ones. After amending the bill to omit the payments to missionary schools and limit the total annual expenditure for new schools to $10,000, the House dropped the payment provision altogether. The reason is unclear, but one scholar suggests that the plan of using profits from the factory system was simply inconsistent with the policy of offering goods to Native Americans without a markup to undercut private traders.[187]

The following year, McKenney "stimulated a flood of petitions to Congress from religious groups."[188] In his annual address, President Monroe clarified what he believed to be the stakes for the Native nations. The only way "to prevent their extinction," let alone to promote "civilization," was for the United States to exercise "complete and undisputed" "control" over them.[189] "The hunter state will then be more easily abandoned, and recourse will be had to the acquisition and culture of land, and to other pursuits tending to dissolve the ties which connect them together as a savage community, and to give a new character to every individual."[190] He urged Congress to enact "some benevolent provisions" if "expedient and practicable."[191]

On Friday, February 19, a Senate committee reported the bill that would become the Civilization Act.[192] McKenney had recommended $100,000 per year, which he said was "little enough since we got the Indians' land for an average of $2^{3}/_{4}$ cents the acre."[193] As reported, the bill called for the more politically viable allocation of $10,000. [194]

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184 *See* PRUCHA, *supra* note 15, at 135–36.

185 Southard, *supra* note 183, at 151; *see also* John C. Calhoun, Progress Made in Civilizing the Indians (Jan. 15, 1820), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 200, 201.

186 H. JOURNAL, 15th Cong., 1st Sess. 169 (1817).

187 PRUCHA, *supra* note 15, at 150.

188 *Id.*

189 33 ANNALS OF CONG. 17 (1818).

190 *Id.*

191 *Id.*

192 33 ANNALS OF CONG. 246–47 (1819); *see also id.* at 273, 546; 34 ANNALS OF CONG. 1427, 1432 (1819).

193 VIOLA, *supra* note 176, at 41–43.

194 *Id.*

The only reported debate on the bill occurred in the House on March 2. Mr. Barbour moved on grounds of "expediency" to eliminate the provision of the bill authorizing the President to employ persons of good moral character as educators.[195] Although he was not "at all opposed to the object which the bill had in view," Barbour doubted whether it "was . . . calculated to effect" that object.[196] The House rejected the motion 78 to 25 and passed the bill without further debate.[197]

B. The Act and Regulations

The Act had two sections. The first set forth the purpose of the program, authorized the President to implement it, and gave parameters. The Act's purpose was "providing against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization."[198] The Act authorized the President "to employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined."[199] The President was to exercise this authority "where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent."[200] The provision also gave the President authority to prescribe instructions and rules "for the regulation of their [the teachers'] conduct."[201]

The second section appropriated $10,000 annually for the project and called for an annual accounting to Congress.[202] The money was appropriated out of general funds rather than from a treaty annuity or profits from the sale of Indian land.

While the law did not formally require the use of clergy members or even persons espousing religion, Secretary of War John Calhoun wasted no time recruiting missionaries for the task. He wrote that "[t]he President was of opinion that the object of the act would be more certainly effected by applying the sum appropriated in aid of the efforts of societies, or individuals, who might feel disposed to bestow their time and resources to effect the object contemplated by it."[203] To that end, Calhoun sent a circular letter to "those individuals and societies, who have directed their attention to the civi-

195 34 ANNALS OF CONG. 1435 (1819).

196 *Id.*

197 *Id.*

198 Act of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516, 516.

199 *Id.*

200 *Id.*

201 *Id.* § 1, 3 Stat. at 517.

202 *Id.* § 2, 3 Stat. at 517.

203 Calhoun, *supra* note 185, at 200; *see also* John C. Calhoun, Circular Letter (Sept. 3, 1819), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 201.

lization of the Indians."[204] The letter directed "[s]uch associations or individuals who are already actually engaged in educating the Indians, and who may desire the co-operation of the Government, [to] report to the Department of War, to be laid before the President" information about their existing or planned operations, goals, number of students, and mode of instruction.[205] Such information would help the President determine whether to work "in co-operation" with the group or individual "and to make a just distribution of the sum appropriated."[206] The government circulated the letter "to all missionary agencies actually engaged in educational work among the frontier Indians."[207]

Not long afterward, Calhoun published a letter laying out further "regulations" "to govern the future distribution" of funds to program participants.[208] The letter said that the government would pay "two-thirds of the expense of erecting the necessary buildings."[209] It also provided that the President would allocate "to each institution which may be approved of by him, a sum proportionate to the number of pupils belonging to each, regard being had to the necessary expense of the establishment and the degree of success which has attended it."[210] In modern nonestablishment terms, the program would be "formally neutral" with respect to religion.[211] It would focus on effectiveness, measured in terms of "number of pupils" and "degree of success," rather than spreading a certain version of the gospel. In an era of religious growth and denominational schisms, this form of neutrality was probably a political necessity.

What might count as "success?" The letter made it clear that recipients had a "duty . . . to impress on the minds of the Indians the friendly and benevolent views of the Government towards them, and the advantage to them in yielding to the policy of Government, and co-operating with it in such measures as it may deem necessary for their civilization and happiness."[212] According to Calhoun, "it is impossible that the object which it has in view can be effected, and peace be habitually preserved, if the distrust of the Indians as to its benevolent views should be excited."[213] The recipients, though Christian missionaries, would also be the agents of the United States, and the government would expect that their religious evangelism, whatever form it may take, would not contravene the program's main goal: to make the students and their parents more amenable to the United States' interests.

204 Calhoun, *supra* note 185, at 200.
205 Calhoun, *supra* note 203, at 201.
206 *Id.*
207 Fischbacher, *supra* note 15, at 56.
208 John C. Calhoun, Letter from John Calhoun to Department of War (Feb. 29, 1820), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 273.
209 *Id.*
210 *Id.*
211 *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–02 (1990).
212 Calhoun, *supra* note 208.
213 *Id.*

To upend Thomas More's dying words, the missionaries would be God's good servants, but the United States' first.[214]

C. Early Implementation

1. Reverend Jedidiah Morse's Report

To implement the Act, Calhoun turned to the Reverend Jedidiah Morse for information about the Native cultures and the existing mission schools. Morse was a recently retired Massachusetts Congregationalist minister, a well-known geographer, and a leading organizer of various benevolent associations, including the American Board of Commissioners.[215] After conversations with Morse and Calhoun over the course of two months,[216] President Monroe authorized $500 from the civilization fund for Morse to tour the frontier and "devise the most suitable plan to advance [Native] civilization and happiness."[217] Calhoun instructed him "to ascertain the actual condition of the various tribes which you may visit, in a religious, moral, and political point of view."[218] Calhoun would report on their physical situations, their views toward education, and the extent to which their "moral condition" had been corrupted by trade, and opine on how to promote "the object of the Government in civilizing the Indians."[219]

Along with his commission from the United States, Morse was "acting under commissions from the Hon. and Rev. Society in Scotland for propagating Christian Knowledge, and the Northern Missionary Society in the State of New-York."[220] From start to finish, Morse's project embodied the government-missionary partnership from the colonial era through the early republic. After touring the northern tribes, he delivered his 496-page report to Calhoun, who presented it to Congress on February 8, 1822.

2. Early Expenditures and Political Challenges

Congress initially took a keen interest in the administration of the civilization funds. Within a year of the Act's passage, the House of Representatives asked for an accounting.[221] Secretary Calhoun provided the House with a copy of the circular he had sent to the mission societies, a summary of the existing missionary schools among the Indians, and assurance that the circu-

214 *See* PETER MARSHALL, HERETICS AND BELIEVERS: A HISTORY OF THE ENGLISH REFORMATION 224 (2017).

215 *See* PHILLIPS, *supra* note 164, at 196–99.

216 *Id.* at 208; *see* John C. Calhoun, Copy of A Letter from the Secretary of War to the Rev. Jedediah Morse (Feb. 7, 1820), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 273, 274.

217 Calhoun, *supra* note 215, at 273.

218 *Id.*

219 *Id.*

220 JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES, ON INDIAN AFFAIRS 11 n.* (New Haven, S. Converse 1822).

221 *See* Calhoun, *supra* note 185, at 200–01.

lar letter would "enable the President to apply, early in this year [1820], the sum appropriated."[222] He provided far more detail when the House asked for an update two years later.[223] In addition to a copy of the regulations for compliance, he listed the dates, names, amounts, and purposes of each expenditure for the years 1820–21, totaling $16,605.80. [224] At that time, there were "eleven principal schools," "three subordinate ones, in actual operation," and three "in a state of preparation."[225] A handful of the payments went to U.S. agents, but most went directly to school superintendents (missionaries), and all of them were for the support of missionary schools (with the exception of the payments to Rev. Morse for his tour and report).[226]

Calhoun also informed the House that some of the payments went to schools that were within the states rather than "Indian country."[227] He admitted that this may not comply with "a rigid construction of the rules adopted for the expenditure of the appropriation," but concluded that "there was not a sufficient number of schools in the Indian country, at the time the allowances were made, to absorb the whole appropriation." [228] The school at Cornwall, Connecticut, was well known, led by the influential New England clergyman Jeremiah Evarts.[229] The one at Great Crossings, Kentucky, was under the patronage of Senator and future Vice President Richard Mentor Johnson and operated by the Baptist Board for Foreign Missions.[230] The expenditures within the states did not seem to raise a constitutional eyebrow. In 1824 there was a short-lived attempt to officially expand the program into the states.[231] It was not until 1848, well after removal, that Congress expressly provided that no funds under the Civilization Act "shall be expended for any such object elsewhere than in the Indian country."[232]

Around the same time, it appears that there may have been some complaints about the program and an effort to shut it down, but their source and nature are unclear. From the responses of Calhoun and the missionary societies that sent memorials to support the program, it would appear that the

222 *Id.* at 200.

223 *See* John C. Calhoun, Expenditures for the Civilization of the Indians (Jan. 19, 1822), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 271, 271–74 [hereinafter Calhoun, Expenditures]; *see also* John C. Calhoun, Condition of the Several Indian Tribes (Feb. 8, 1822), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 275, 275 [hereinafter Calhoun, Condition].

224 Calhoun, Expenditures, *supra* note 223, at 273.

225 Calhoun, Condition, *supra* note 223, at 275.

226 *See* Calhoun, Expenditures, *supra* note 223, at 272–73.

227 *Id.* at 271.

228 *Id.*

229 *See id.* at 272–73; JOHN A. ANDREW III, FROM REVIVALS TO REMOVAL: JEREMIAH EVARTS, THE CHEROKEE NATION, AND THE SEARCH FOR THE SOUL OF AMERICA 86–87 (1992).

230 *See* Calhoun, Expenditures, *supra* note 223, at 272; *see also infra* Part III.

231 *See* 41 ANNALS OF CONG. 124, 130 (1824).

232 Act of July 29, 1848, ch. 118, § 2, 9 Stat. 252, 264. The statute made it clear the prohibition did not apply to expenditures pursuant to a treaty. *Id.*

concern was about the program's efficacy, perhaps raised by persons with designs on tribal lands.[233]

In 1824, on the motion of Representative Thomas W. Cobb, the House considered "the expediency" of repealing the Act.[234] Along with religious associations,[235] the House Committee on Indian Affairs strongly opposed the resolution. It concluded that the "measures which have been adopted for the disbursement of the annual allowance made by this law" were "very judicious."[236] In five years, the Act had supported three existing missions, the establishment of eighteen new schools, "more than eight hundred" students, school houses, and, "in most cases, convenient dwellings for the teachers."[237] At that time, the support was spread among schools operated by ten separate Christian denominations or benevolent associations. Three groups had multiple schools—the American Board, the Baptist General Convention, and the United Foreign Missionary Society of New York—while seven others, including the Catholic Bishop of New Orleans and the Methodist Ohio Conference, had received or been promised support.[238] The Committee further noted that the partnerships had spurred "[h]undreds of . . . associations" to "collect donations, with the view of aiding the humane purposes of the Government," multiplying the program's "benefits."[239]

The Committee likewise argued that prior efforts to civilize the Natives had failed because of the mistaken belief that "it was only necessary to send missionaries among them to instruct them in the Christian religion" without

233 *See* Calhoun, Condition, *supra* note 223, at 275; William J. Williams, Civilization of the Indians (Jan. 28, 1822), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 274, 274 ("[W]e . . . pray that they will not suffer a plan which has commenced with such fair prospects of success to be ruined in the morning of its increase; that the Indians may be saved from the cruel destiny which avarice stands ready to inflict . . . ."); *see also* James Monroe, Civilization of the Indians (Feb. 23, 1822), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 325, 325 (responding to a request for an account of the $15,000 appropriate per year under the Act of 1802 "to promote civilization among friendly Indian tribes"); C.G. Hueffel, Letter from Society of the United Brethren for Propagating the Gospel Among the Heathen to James Monroe (Sept., 1822), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 372, 372 (responding to request by Senate to account for the lands granted to the "Christian Indians" under the act of June 1, 1796).

234 Fischbacher, *supra* note 15, at 57. Fischbacher also reports a challenge in the Senate, but does not provide a citation. *See id.* at 58.

235 Stephen Van Rensselaer, Memorial of the American Board of Commissioners for Foreign Missions (Mar. 3, 1824), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 446, 446 (arguing that the program of civilization might divert God's wrath against the United States for its multiple "sins" against the tribes).

236 William McLean, Letter from William McLean to the House of Representatives (Mar. 23, 1824), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 457, 457–58.

237 *Id.*

238 *See* John C. Calhoun, Extract of a Letter from the Secretary of War to the Hon. John McKee, *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 459, 459 [hereinafter Calhoun, Extract]; *see also* John C. Calhoun, Civilization of the Indians (Jan. 24, 1824), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 443, 443.

239 McLean, *supra* note 236, at 458.

adding "the institutes of education and instruction in agriculture" "to their missionary labors." [240] By contrast, "[t]hese are combined in the exertions now making; and, from the good which has been done, the most pleasing anticipations of success are confidently cherished."[241]

The centerpiece of the Committee's case against repeal was the "almost universal[ ]" "feeling" of "various denominations of professing Christians . . . that our Indians may become civilized."[242]

> It may be said, emphatically, that the passage of this law was called for by a religious community. They were convinced of the correctness of the policy in a political point of view, and, as Christians, they felt the full force of the obligations which duty enjoined. Their zeal was tempered by reason. No fanciful schemes of proselytism seem to have been indulged. They formed a correct estimate of the importance of their undertaking, and pointed to the most judicious means for the accomplishment of their wishes. Since the passage of the law, hundreds and thousands have been encouraged to contribute their mite in aid of the wise policy of the Government.[243]

The Committee contrasted this "noble and Christian motive" with "a sectarian zeal," which "would be less entitled to serious consideration."[244] The Committee therefore emphasized the program's political support across all Christian denominations, distinguishing between the laudable goal of "civilization" and the less "considera[ble]" one of "proselytism."[245]

Secretary Calhoun also opposed repealing the Act. He noted that the societies had "incurred heavy expenses, under the expectation of a continuance of the aid which they have received from the Government," and that the tribes "also have become much interested in these establishments, and would, no doubt, feel greatly disappointed if they are not continued."[246] Repealing the Act would "be productive of serious loss to these societies, but of the most injurious effects to our Indian relations."[247] The challenge to the Act failed. No one at any point argued that it violated the Constitution or a nonestablishment norm.

It is important to keep in mind that the funds appropriated by the Civilization Act were a relatively small portion of federal expenses for Indian affairs. For instance, in 1823, the fiscal year before the House considered repealing the Act, the government spent $11,135.33 in civilization funds;[248] about that much on presents to Native Americans; and about three times that

240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.*
244 *Id.* at 458–59.
245 *Id.* at 458–59.
246 Calhoun, Extract, *supra* note 238, at 459.
247 *Id.*
248 It appears that the government usually sent the money to the missionary associations, which then paid the salaries of missionaries. Sometimes the government paid the missionaries directly. *See* JAMES S. KABALA, CHURCH-STATE RELATIONS IN THE EARLY AMERICAN REPUBLIC, 1787–1846, at 20 (2013).

much for the salaries of agents and subagents.[249] By contrast, the government spent nearly $80,000 to run the Indian Department and paid over $180,000 in tribal annuities pursuant to treaty.[250]

And the federal funds accounted for a small portion of the total money received by the mission societies for schools. In 1824, the government paid $12,708.48 to societies in civilization funds and $8750 in annuities.[251] That year the societies received over $170,000 in private donations, including donations of property, improvements, and stock.[252] Overall, $10,000 was not a large sum for education during the early republic; a 1795 New York law appropriated $50,000 per year for five years to cities and towns to support existing privately run schools.[253]

Given the relatively small expenditures, one might be tempted to dismiss any constitutional concern about the government-missionary partnerships as de minimis.[254] Yet even a de minimis use of taxpayer money to support churches runs contrary to the rationale of those who opposed religious assessments. As Madison argued in his influential *Memorial and Remonstrance*, "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[255] The small size of the program does not explain why it did not attract constitutional complaints.

3. Administering Religion

According to the Act, the President was to allocate funds for schools where "instruction can be introduced with [the Indians'] own consent."[256] Initially, according to Jedidiah Morse, all of the tribes except the Creeks were enthusiastic about the program. The administration did not hesitate, however, to encourage the nations to receive missionaries. Sometimes the government heavy-handedly appealed to religious obligation; such pressure would probably be considered coercive under contemporary doctrine,[257]

249 John C. Calhoun, Disbursements in the Indian Department (Feb. 21, 1824), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 443, 443–45.

250 *Id.* at 445.

251 John Cocke, Condition of the Indians (May 20, 1826), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 667; Thomas L. McKenney, Statement Showing the Amount Paid by the Government to Missionaries (Apr. 20, 1826), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 669.

252 Cocke, *supra* note 251, at 667.

253 *See* STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 46–47 (2012).

254 *See* Mitchell v. Helms, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring in the judgment); Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv., 399 F.3d 351, 358 (D.C. Cir. 2005).

255 MADISON, *supra* note 24, 295–306; *see infra* Part IV.

256 Act of Mar. 3, 1819, ch. 85, § 1, 3 Stat. 516, 516.

257 *See* Lee v. Weisman, 505 U.S. 577, 599 (1992).

and would certainly raise concerns about governmental entanglement with religious organizations.[258]

One Choctaw chief ran into something of a conflict of interest. He hosted the local mission school at his house. When he began also hosting booze-fueled parties there, the instructor shuttered the school.[259] The missionary had been seeking treaty funds to expand operations in Choctaw territory, but informed Superintendent McKenney that it would be best to allocate the money elsewhere.[260]

Unwilling to give up on the mission, McKenney appealed to the Choctaw chiefs that "your great father [the President] has seen with pain that the doors of the school at [the chief's house] are shut! He approves of what the teacher of that school has done."[261] "It is the doing of the Great Spirit, and these missionaries are his agents. Take care how you quarrel with his kindness to you. He may leave you to yourselves again; and dark and dismal will be your land, if he does."[262]

As the government deployed religious arguments to support the missions, it expected the missions to propagandize for the government. In 1828, McKenney wrote to Reverend Henderson, a Baptist missionary operating an academy for Choctaw and Creek children, instructing him that

> you should especially examine and correct their letters [to their families], and make them tend to the great objects of the Government, in giving them a country, a home, and a Government, and laws, &c., &c., on which alone their *very existence* depends. . . . You know how to advise them to shape their course in appealing to the prejudices of their parents.[263]

Such governmental oversight at least verged on impermissible "entanglement" with religion by today's doctrinal standards.

D. Removal, Reliance, and the End of the Program

Over the course of the 1820s, enthusiasm for the program cooled. Some observers, including McKenney, grew to believe that the task of civilization was impossible on the frontiers.[264] The tribes there faced the age-old problems of unscrupulous traders and land-greedy whites. Voluntary removal, in exchange for land, grew in popularity.

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258 *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

259 CYRUS KINGSBURY, MR. KINGSBURY TO THE INDIAN OFFICE (Sep. 28, 1825), H.R. DOC. NO. 26-109, at 13 (1841).

260 *Id.*

261 THOMAS MCKENNEY, INDIAN OFFICE TO CHOCTAW CHIEFS (Oct. 21, 1825), H.R. DOC. NO. 26-109, at 15 (1841) [hereinafter MCKENNEY, CHOCKTAW CHIEFS]; *see* THOMAS MCKENNEY, INDIAN OFFICE TO MR. HENDERSON (Feb. 7, 1828), H.R. DOC. NO. 26-109, at 34–35 (1841) [hereinafter MCKENNEY, MR. HENDERSON].

262 MCKENNEY, CHOCKTAW CHIEFS, *supra* note 261, at 15.

263 *See* MCKENNEY, MR. HENDERSON, *supra* note 261, at 34–35.

264 VIOLA, *supra* note 176, at 219; M'KENNEY, *supra* note 177, at 247.

In 1826, Secretary of War James Barbour presented a letter to the House of Representatives framing an argument for removal with a denunciation of the injustice of the nation's Indian policy.[265] "Missionaries," he wrote, "are sent among them to enlighten their minds, by imbuing them with religious impressions."[266] As a result, "some of them have reclaimed the forest, planted their orchards, and erected houses, not only for their abode, but for the administration of justice and for religious worship."[267] Yet "when they have so done, you send your agent to tell them they must surrender their country to the white man, and recommit themselves to some new desert, and substitute, as the means of their subsistence, the precarious chase for the certainty of cultivation."[268] "They see that our professions are insincere; that our promises have been broken; that the happiness of the Indian is a cheap sacrifice to the acquisition of new lands . . . [.]"[269] Barbour nevertheless recommended voluntary removal on generous terms.[270] In presenting a report prepared by McKenney, Barbour later assured Congress that the missionaries "with but one exception" were "favorable to the removal" so long as the government continued to "require[ ]" "their labors" and "reimburse[ ]" "the money they had laid out" for "the erection, by the Government, of schools west of the Mississippi."[271]

Thomas McKenney was disappointed that the Removal Act of 1830 did not provide more benefits for the relocated Natives.[272] He hoped to persuade Congress to revise the program, but Jackson removed him from office.[273] The forced removal of the Cherokees later in the decade was, of course, morally and legally indefensible. The missionaries, along with the vast majority of the evangelical community, opposed it, but the Native peoples understandably blamed them along with the government.[274]

The missionary schools generated less congressional interest in subsequent years, but they remained important to the government's Indian policy.[275] The Commissioner of Indian Affairs' annual report of 1849 was

265 *See* James Barbour, Preservation and Civilization of the Indians (Feb. 3, 1826), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 646, 646–648.

266 *Id.* at 647.

267 *Id.* at 647.

268 *Id.*

269 *Id.*

270 *Id.* at 648–49.

271 Thomas McKenney, McKenney to Department of War, Office of Indian Affairs (Dec. 27, 1826), *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 165, at 699, 700. The exception was Reverend Findley of Ohio. *Id.*

272 Act of May 28, 1830, ch. 148, 21 Stat. 411; *see also* M'KENNEY, *supra* note 177, at 160.

273 He believed Jackson removed him because he refused a bribe from Sam Houston, one of Jackson's friends. *See* M'KENNEY, *supra* note 177, at 30, 206–07, 209.

274 *See* BERKHOFER, *supra* note 117, at 102.

275 For a more thorough account of the administration of the civilization funds from the 1830s to the 1870s, see Fischbacher, *supra* note 15, at 55–72.

typical in attributing the "moral and social revolution"[276] among the Native peoples principally to the efforts of "missionary societies of various religious denominations, and conducted by intelligent and faithful persons of both sexes, selected with the concurrence of the Department."[277] By them, the Commissioner noted, "the Indian youth are . . . carefully instructed in the best of all knowledge, religious truth, their duty towards God and their fellow beings."[278] The denominational diversity of the missionaries supported by the fund, if anything, increased over the course of the program.[279] Except for a couple of years in the 1850s when Congress allocated an extra $5000 for the civilization fund,[280] Congress made no other changes to the fund until it repealed the Civilization Fund Act in 1873.[281] The repeal coincided with the abolition of the treaty system, and thus the end of Indian "independence."[282]

E. Postscript on President Grant's "Peace Policy" and Anti-Sectarianism

The civilization program was not the last of the nineteenth century government-missionary partnerships. After decades of graft and incompetence among Indian agents,[283] President Grant sought to reform the government's Indian relations.[284] A central strategy of his "Peace Policy" was to appoint Christian missionaries, nominated by their denominational associations, to be the federal agents to the tribes. In theory, the missionaries would be less corruptible than their predecessors and more likely to promote peace and civilization. Officials made it clear that Christianization was one of the pro-

276 DEP'T. OF THE INTERIOR, OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 22 (Washington, Gideon & Co. 1849).

277 *Id.* at 21.

278 *Id.*; *see also id.* at 10; DEP'T. OF THE INTERIOR, OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 3 (Washington, Gideon & Co. 1851); DEP'T. OF THE INTERIOR, OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 17 (Washington, A.O.P. Nicholson 1855).

279 *See* DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 28 (Washington, Government Printing Office 1861).

280 *See* Act of May 5, 1858, ch. 32, 11 Stat. 285; Act of Mar. 3, 1857, ch. 90, 11 Stat. 182.

281 Act of Feb. 14, 1873, ch. 138, 17 Stat. 437, 461; Act of July 15, 1870, ch. 296, 16 Stat. 335, 359.

282 *See* Fischbacher, *supra* note 15, at 46, 67.

283 *See* DEP'T. OF THE INTERIOR, OFF. OF INDIAN AFFS., REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 1 (Washington, Government Printing Office 1865); HENRY E. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION, 1860–1890, at 27, 40, 76, 79 (1963); Abraham Lincoln, Second Annual Message (Dec. 1, 1862), *in* 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3327, 3333 (James D. Richardson ed., New York, Bureau of National Literature 1897).

284 BEAVER, *supra* note 15, at 123–28.

gram's goals.[285] Legal scholars have given more attention to the Peace Policy program than to the prior government-missionary partnerships.[286]

The Peace Policy program deserves a more thorough constitutional analysis than this Article can provide.[287] For now, it is enough to note the Peace Program's most glaring novelty: the government used missionaries not only as teachers and informal emissaries, but also as its exclusive agents to the Native nations. The Department selected agents from a pool of candidates nominated by Christian associations. Agents had always had a great deal of authority over the relationship between the tribes and outsiders, including missionaries.[288] But now the agents would also represent the mission associations. This predictably led to strife among the participating associations and complaints about the program, especially where the government appointed an agent of one denomination to a tribe that had traditionally had a relationship with another denomination (and especially when one was Catholic and the other Protestant).[289] The government ultimately adopted a rule of freedom for the missionaries—any group could establish a mission among any nation.[290] This rule was formally neutral, and could, in theory, protect missionaries (if not the tribes) against the intermeddling of a U.S. missionary-agent.

Grant's strategy was short-lived. The Garfield administration stopped appointing missionary-agents, and in 1882, President Arthur's Secretary of the Interior, H.M. Teller, repudiated the practice.[291]

What ultimately killed the government's ad hoc partnership with mission schools among the tribes was the same thing that ended financial support for "sectarian" schools across the nation—a groundswell of nativist opposition to any governmental support for the Catholic Church.[292] The National League for the Protection of American Institutions, which championed federal and state constitutional amendments prohibiting the funding of religious schools, specifically targeted the funding of schools among the Native nations.[293]

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285 *See id.* at 152–56; DEP'T. OF THE INTERIOR, OFF. OF INDIAN AFFS., SIXTY-SECOND ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 6 (Washington, Government Printing Office 1893); DRAKEMAN, *supra* note 14, at 312–13.

286 *See, e.g.*, DELORIA & WILKINS, *supra* note 18, at 100–04; DRAKEMAN, *supra* note 14, at 311–14; Dussias, *supra* note 29.

287 For a narrative of the program, see BEAVER, *supra* note 15, at 123–68.

288 *See, e.g.*, BERKHOFER, *supra* note 117, at 89–91.

289 *Id.* at 157–61; *see* BEAVER, *supra* note 15, at 157–61.

290 BEAVER, *supra* note 15, at 161 (quoting Secretary of Interior Schurz) ("In future, in all cases, except where the presence of rival organizations would manifestly be perilous to peace and order, Indian reservations shall be open to all religious denominations, providing that no existing treaty stipulations would be violated thereby." (quoting 77 MISSIONARY HERALD 129 (1881))).

291 *Id.* at 151.

292 *Id.* at 163–68. For discussion of the anti-Catholic, nativist movement, see, e.g., GREEN, *supra* note 253, at 71–77; PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193–251 (2002).

293 BEAVER, *supra* note 15, at 166–67.

The group sent a report to every Protestant denomination showing that in recent years nearly two-thirds of the missionary-agent funds had gone to support Catholic schools.[294] The Protestant churches withdrew their support for the program and, though Congress failed to pass the "Blaine Amendment,"[295] it did enact a law stating it "to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."[296] With the exception of annuity payments according to a tribe's direction,[297] this put an end to the nineteenth-century's government-missionary partnerships.[298]

In sum, the Civilization Fund Act institutionalized the federal government's partnership with Christian missionaries to educate and assimilate Native students. The statute was facially neutral between religion and nonreligion, but it was motivated in part by religion and in practice all the funds went to Christian missionaries. No one throughout this period distinguished between a "religious" or a "secular" purpose or effect for the program. The government's overarching objective was to assimilate Native Americans into white American political culture, and many officials embraced Christianization as a means to that end.

III. The Widespread Assumption of the Partnerships' Constitutionality

Historians have concluded that no one challenged the constitutionality of the government-missionary partnerships.[299] Yet several episodes underscore the pervasiveness of the assumption that the partnerships were constitutional, including two that scholars have not noticed. One involves the only argument against the constitutionality of the partnerships, the proverbial exception that proves the rule.

A. The Attempt to Repeal the Civilization Act

As discussed above, a member of Congress proposed repealing the Civilization Fund Act in 1824.[300] The records of the proposal are thin, but they suggest that it was based purely on a belief that the program was not "expedient."[301] No one argued that it violated constitutional or political norms against church-state relations.[302] In fact, the House Committee on Indian

294 *Id.* at 167.

295 *See, e.g.*, Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).

296 Quick Bear v. Leupp, 210 U.S. 50, 52 (1908) (quoting Act of June 7, 1897, ch. 3., § 1, 30 Stat. 62, 79).

297 *Id.* at 77, 81.

298 Beaver, *supra* note 15, at 168.

299 *See* Deloria & Wilkins, *supra* note 18, at 96–97; Drakeman, *supra* note 14, at 334–35; Kabala, *supra* note 248, at 22–25.

300 *See supra* subsection II.C.2.

301 *See supra* subsection II.C.2.

302 *See supra* subsection II.C.2.

Affairs defended the Act on the ground that it had been "called for" by "a religious community" out of a "noble and Christian motive," not "sectarian zeal."[303] The point, it seems, was that there was widespread political support for what elite white Americans understood to be a humanitarian as well as a political project.

B. Richard Mentor Johnson Embraces the Program

Scholars have also noted that Richard Mentor Johnson, who had been instrumental in defeating a movement to end the Sunday mails on Establishment Clause grounds, appeared to wholeheartedly embrace the Civilization Fund partnerships.[304]

In 1829, Senator (later Vice President) Richard Mentor Johnson of Kentucky brought the house down in the Senate with an oration against stopping the Sunday mail merely because a religious group asked for it.[305] Doing so "would establish the principle, that the Legislature is a proper tribunal to determine what are the laws of God." [306] "To prevent a similar train of evils in this country," he argued, "the constitution has wisely withheld from our Government the power of defining the divine law." [307] Professor David Currie praised the speech for anticipating "the whole modern understanding of the establishment clause."[308]

Yet Johnson thoroughly embraced the government-missionary partnerships. Beginning as early as 1820, he hosted a missionary school for Choctaws, other Native students, and local whites on his property at Great Crossings in Scott County, Kentucky. The school was originally funded by the Civilization Fund Act, but was subsequently funded by Choctaw-designated annuities under the Treaty of Doak's Stand (1820) and the Treaty of Dancing Rabbit Creek (1825).[309] The Choctaw chiefs wanted a school outside of Indian country, so with the help of the U.S. agent, they agreed to allow Johnson to host it.

With the War Department's consent, Johnson engaged Reverend Thomas Henderson, "under the direction of the Baptist General Conven-

303 *See supra* subsection II.C.2.

304 *See* DRAKEMAN, *supra* note 14, at 305–07; KABALA, *supra* note 248, at 19–22.

305 On the nationwide debate about the Sunday mail, see generally Oliver W. Holmes, *Sunday Travel and Sunday Mails: A Question Which Troubled Our Forefathers*, 20 N.Y. HIST. 413 (1939); Richard R. John, *Taking Sabbatarianism Seriously: The Postal System, the Sabbath, and the Transformation of American Political Culture*, 10 J. EARLY REPUBLIC 517 (1990); James R. Rohrer, *Sunday Mails and the Church-State Theme in Jacksonian America*, 7 J. EARLY REPUBLIC 53 (1987).

306 5 REG. DEB. app. at 25 (1829).

307 *Id.*; Richard M. Johnson, Sunday Mails, *in* AMERICAN STATE PAPERS: POST OFFICE DEPARTMENT 211, 211 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834).

308 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 327 (2001); *id.* at 329 (commenting that "[t]here are times when one feels proud to be an American").

309 *See* T. HARTLEY CRAWFORD, H.R. DOC. NO. 26-109, at 1–2 (1841).

tion,"[310] to run the school, "a teacher of . . . moral character, a preacher of the gospel, of industrious habits and dignified manners."[311] Johnson's plan was to "have as many white children to be taught with [the Choctaw children], to learn them to speak the English language, as well as to learn them to read, &c."[312] The whole project was closely regulated by the Department of War.[313] The government continued to make payments to support Johnson's school (the Choctaw Academy) until roughly 1841—more than ten years after Johnson's Senate discourse on the Sunday mails.[314] Though Johnson was intimately familiar with the prevailing nonestablishment norms of the day, it apparently never occurred to him that the government-missionary partnerships might violate them.

C. Jefferson and Madison Critique the Civilization Program

Another episode, unexplored by scholars, underscores the extent to which even rigorous nonestablishmentarians accepted the constitutionality of the partnerships. In February 1822, shortly after he presented his Civilization Act Report to Secretary Calhoun,[315] Reverend Jedediah Morse organized the "American Society for Promoting the Civilization and General Improvement of the Indian Tribes within the United States."[316] The Society's "Constitution" provided that all retired presidents of the United States would be "ex-officio" "Patrons of this Society."[317] Morse sent a copy to each of them for their consent.[318]

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310 THOMAS L. MCKENNEY, INDIAN OFFICE TO MR. HENDERSON, H.R. DOC. NO. 26-109, at 29–30 (1841).

311 RICHARD M. JOHNSON, COLONEL JOHNSON TO THE WAR DEPARTMENT, H.R. DOC. NO. 26-109, at 10 (1841).

312 *Id.*; *see also* RICHARD M. JOHNSON, COLONEL JOHNSON TO THE INDIAN OFFICE, H.R. DOC. NO. 26-109, at 19 (1841).

313 *See* H.R. DOC. NO. 26-109, at 21–24 (1841); *see also* THOMAS L. MCKENNEY, INDIAN OFFICE TO MR. HENDERSON, H.R. DOC. NO. 26-109, at 27–28 (1841); *see* THOMAS L. MCKENNEY, INDIAN OFFICE TO MR. HENDERSON, H.R. DOC. NO. 26-109, at 35–36 (1841); LEWIS CASS, DEPARTMENT OF WAR TO REV. THOMAS HENDERSON, H.R. DOC. NO. 26-109, at 55 (1841).

314 *See* H.R. DOC. NO. 26-109, at 175–79 (1841).

315 *See supra* subsection II.C.1.

316 *See To James Madison from Jedidiah Morse, 16 February 1822*, NAT'L ARCHIVES: FOUNDERS ONLINE, at nn.1, 3 (Jedidiah Morse) https://founders.archives.gov/documents/Madison/04-02-02-0402 (last visited Sep. 9, 2020).

317 *Id.* at n.2 (quoting THE FIRST ANNUAL REPORT OF THE AMERICAN SOCIETY FOR PROMOTING THE CIVILIZATION AND GENERAL IMPROVEMENT OF THE INDIAN TRIBES IN THE UNITED STATES 4 (New Haven, S. Converse 1824)).

318 *See id.*; *From John Adams to Jedidiah Morse, 2 March 1822*, NAT'L ARCHIVES: FOUNDERS ONLINE [hereinafter *Adams to Morse*] (John Adams), https://founders.archives.gov/documents/Adams/99-02-02-7601 (last visited Sept. 6, 2020); *To James Madison from Thomas Jefferson, 25 February 1822*, NAT'L ARCHIVES: FOUNDERS ONLINE [hereinafter *Jefferson to Madison*] (Thomas Jefferson), https://founders.archives.gov/documents/Madison/04-02-02-0406 (last visited Sept. 9, 2020).

Jefferson and Adams both declined for the same reason: the Society would mimic the government without having its authority, and would probably get in the government's way.[319] As Jefferson explained to Madison, the Society would

> comprehend all the functionaries of the government executive, legislative & Judiciary, all officers of the army or navy, governors of the states, learned institutions, the whole body of the clergy who will be 19/20 of the whole association, and as many other individuals as can be enlisted for 5.D. apiece. For what object? One which the government is pursuing with superior means, superior wisdom, and under limits of legal prescription.[320]

While Jefferson showed his well-known bias against the clergy, his objection had nothing to do with nonestablishment norms. He rather thought the whole scheme to be "presumptuous & of dangerous example" because it proposed to do the government's job.[321] Adams felt the same.[322] Their objections likely had more to do with a concern about an "*imperia in imperio*," or a private organization aping governmental sovereignty, than one about nonestablishment.[323]

Madison was less hyperbolic. He accepted the "honorary relation" out of his "esteem[ ]" for "the objects of the Institution," namely, the assimilation of the tribes.[324] He also explained to Jefferson why he thought it harmless to accept the honorary title. The whole project, he believed, was doomed; the proposed Society was too large and its members would have "repulsive," or contrary, ambitions.[325] Madison was right: the Society dissolved within two years.[326]

In sum, the episode confirms that Jefferson and Madison, the two most influential spokesmen for what modern scholars would call a strict separation of church and state, saw no constitutional problem with the government-missionary partnerships. In office, they personally supported ad hoc partner-

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319 *See Adams to Morse*, *supra* note 318; *Jefferson to Madison*, *supra* note 318.

320 *Jefferson to Madison*, *supra* note 318.

321 *Id.*

322 *See Adams to Morse*, *supra* note 318 ("The President, Senate, & <*Heads*> House of Representatives, are the Constituted Authorities for conducting all our Foreign relations, And their power and means are fully adequate to the service.").

323 *See* Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 J.L. & RELIGION 263, 269 (2017) ("[M]any American commentators saw all religious groups—not just Roman Catholics—as chief rivals to republican sovereignty."); Daniel J. Hulsebosch, Imperia in Imperio*: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 LAW & HIST. REV. 319, 34041 (1998).

324 *From James Madison to Jedidiah Morse, 26 February 1822*, NAT'L ARCHIVES: FOUNDERS ONLINE (James Madison), https://founders.archives.gov/documents/Madison/04-02-02-0408 (last visited Sept. 9, 2020).

325 *From James Madison to Thomas Jefferson, 5 March 1822*, NAT'L ARCHIVES: FOUNDERS ONLINE (James Madison), https://founders.archives.gov/documents/Madison/04-02-02-0410 (last visited Sept. 19, 2020).

326 *See* PHILLIPS, *supra* note 164, at 212–13.

ships, and in private they preferred the Civilization Fund program to a purely private endeavor to coordinate missions to the Native Americans.

D. An Intriguing Challenge in Congress

Scholars have overlooked the only episode, to my knowledge, which may plausibly be construed as an Establishment Clause challenge to the Civilization Fund program. The challenge fizzled, proving the rule that officials widely assumed the partnerships were constitutional.

On February 8, 1822, "Mr. Baldwin presented a petition of a Missionary Society of Pennsylvania," asking for land near "each principal Indian settlement."[327] The goal was "to aid the object of extending the knowledge of the christian religion, and the arts of civilized life among the Indians."[328] After a complaint about the potential "increase" in the "expenses of the Indian Department," a Mr. Wright of Maryland lodged an extensive objection, convoluting religious, policy, and constitutional grounds.[329]

Wright's religious argument was that "[t]he God who created those Indians" "had inscribed on their hearts his law."[330] Relying on scripture, he maintained that "[i]t would be a libel on the Creator to say that he had exacted from his creatures an obedience to his law without inscribing his law on their hearts."[331] Proselytization, on this view, is contrary to God's will because it presumes that God has not provided each person with natural access to religious truth. To support this assertion, Wright argued that "those people [the Native Americans] are as religious; that they worship with as much ardor and zeal the great unknown Spirit, as any other sect whatever."[332] This led to his policy point: "[W]e do no good by converting them from their faith, because we unhinge their principles at the same time."[333] Proselytization is neither necessary, nor humanitarian, nor, in the end, effective. Indeed, Wright suspected that "[t]hese missionaries, sent among the Indians, . . . were little better than spies among them to learn how to cheat them."[334] Wright was the genuine humanitarian.

Wright wrapped his religious and policy arguments in proto-nonestablishment concerns. He "protested, *totis viribus*, against any legislation" "connected with religion."[335] Indeed, "[a]ny measures taken by this government to change their [the Native Americans'] religion, would be in the teeth of the

327 *Seventeenth Congress*, COLUMBIAN CENTINEL (Boston), Feb. 9, 1822, at 2.

328 *Id.*

329 *Id.* This appears to be Robert Wright, who served as a member of the Seventeenth Congress, March 4, 1821, to March 3, 1823. He was not a member of Congress when it enacted the Civilization Fund Act of 1819, nor when someone in the House proposed its repeal in 1824.

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.*

Constitution."[336] The government "might as well" send missionaries "into Maryland, or any other State, to convert the people, as among the Indians—Congress having as much right to regulate the religion of the one as of the other."[337] His argument boils down to the view that the Constitution gives Congress no authority over matters touching religion.

Wright's argument generated no debate. Baldwin, who had submitted the Missionary Society's petition, "declined entering into this sort of discussion," and the House referred the petition to the Committee on Indian Affairs.[338] There the historical trail ends.

Wright's objection was not to the Civilization Fund program, but it might as well have been—all of his arguments apply with equal force to directly funding missionaries.[339] Several aspects of his arguments are worth noting. On the surface, they depended on notions of religious sociology that sound modern, but were buttressed by somewhat heterodox Christian arguments. Though unusual for his day, Wright's opinions illustrate the pervasiveness of the assumption that reasoning about public policy should, or at least could, proceed from Christian premises. Yet Wright's constitutional arguments were quite aside from his religious and policy points. Wright was not alone in thinking that the Constitution gave the federal government no power over religion—this had been a refrain of those who promoted ratification, and many probably understood the Establishment Clause to entrench that commitment.[340]

In the end, the most important aspect of Wright's argument was that no one agreed. No one else opposed federal support for missionaries on the ground that the Constitution did not give Congress power over religion. The other members of the House did not even dignify his argument with a rebuttal.

IV. A Short History of Religious Disestablishment

Why didn't the government-missionary partnerships catalyze an Establishment Clause objection? According to one scholar, the partnerships were the "one major exception to the general rule that church-state issues inevitably ignite controversy."[341] This is especially puzzling since nonestablishment

336 *Id.*

337 *Id.*

338 *Id.*

339 President Madison vetoed a land grant to "the Baptist Church at Salem Meetinghouse, in the Mississippi Territory" in 1811, on the ground that the grant "comprise[d] a principle and precedent for the appropriation of funds of the United States, for the use and support of religious societies, contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment." 11 Annals of Cong. 366 (1811); *see also* James Madison, To the Baptist Churches on Neal's Creek and on Black Creek, North Carolina, *in* 2 Letters and Other Writings of James Madison 511–12 (Philadelphia, J.B. Lippincott & Co. 1865).

340 *See, e.g.*, Hamburger, *supra* note 292, at 105–07, 106 n.40.

341 Drakeman, *supra* note 14, at 334.

norms were initially forged in debates over the propriety of assessing taxpayers to support churches and clergy—a policy strikingly similar to federally funded missions.

This Part begins the inquiry by providing a brief history of American disestablishment. The next Part situates the partnerships within that history.

During the era of the government-missionary partnerships, America was undergoing a renegotiation of the relationship between religion and government. The Establishment Clause was only one artifact of that renegotiation; most of the disputes over religious disestablishment through the nineteenth century arose in the states,[342] most of which had inherited various institutional and legal attributes of religious establishment from the colonial era.[343]

The Establishment Clause itself was relatively uncontroversial.[344] Its drafting and ratification generated little discussion.[345] This lack of controversy was likely due to widespread agreement about the provision's core meaning. Scholars have poured over historical materials to reconstruct this meaning; their best efforts, in my view, suggest that Americans largely understood the Clause to prohibit a national religion.[346] Some may have also understood the Clause to make it clear that the federal government was prohibited from interfering with a state religious establishment.[347]

The First Amendment drafters and ratifiers had plenty of experience with a religious establishment: England had one, many of the colonies had had one, and many states continued to have one into the nineteenth century. As Michael McConnell has argued, Americans would have understood six

342 Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37, 50 (1991) (arguing that "the battle over disestablishment in the states" was one of "two great defining controversies" of the religion clauses, along with "the long Protestant-Catholic conflict in the wake of the Reformation").

343 *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 493. *See generally* GREEN, *supra* note 253, at 45–92 (discussing the development of the no-funding norm in 1820s–40s); HAMBURGER, *supra* note 292, at 219–29 (same); KABALA, *supra* note 248 (devoting only one chapter to the federal government); Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307 (2014) (exploring state limits on church property).

344 DRAKEMAN, *supra* note 14, at 327.

345 For a thorough review of the historical evidence, see Esbeck, *supra* note 343, at 525–96.

346 *See, e.g.*, DRAKEMAN, *supra* note 14, at 329–30; Esbeck, *supra* note 343, at 494–95.

347 Some scholars have argued that the Clause's exclusive or principal point was to reinforce federalism, a reading which makes incorporating it against the states under the Fourteenth Amendment potentially anachronistic (unless Americans understood the Clause differently in 1868 than they did at the Founding). *See supra* note 126. While some Americans probably believed the Clause would be useful as an extratextual argument against national interference with a state religious establishment, the historical evidence strongly supports the conclusion that Americans understood the Clause to prohibit the federal government from establishing a national church like the Church of England. *See* DRAKEMAN, *supra* note 14, at 329–30 (rejecting federalist reading); Esbeck, *supra* note 343, at 494 (same).

practices to be hallmarks of an "establishment of religion": government control over the doctrines, structure, and personnel of a state church;[348] mandatory attendance at religious worship services in the state church;[349] government financial support for religion in the form of land grants and religious taxes;[350] prohibition of worship in nonestablished churches;[351] the use of the state church for civil functions;[352] and the condition of political participation on membership in the established church.[353] If the Establishment Clause did nothing more than clarify for concerned Antifederalists that the federal government had no authority to institute these legal requirements and practices, or to interfere with state establishments, its function was significant.[354]

Despite this core meaning, the outer bounds of a law "respecting an establishment of religion" was from the beginning somewhat "vague."[355] Some officials believed that nonestablishment of religion prohibited more than the foregoing hallmarks of the English establishment. Americans in the early republic and throughout the nineteenth century developed and deployed an idiom[356] of disestablishment interconnected with concepts such as liberty of conscience,[357] the threat of *imperium in imperio*,[358] and the separation of church and state.[359] Most of these concepts developed in arguments about the propriety of certain practices at the state level, but there were notable disputes about federal practices, too, such as presidential proc-

348 Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131–44 (2003).

349 *Id.* at 2144–46.

350 *Id.* at 2146–59.

351 *Id.* at 2159–69.

352 *Id.* at 2169–76.

353 *Id.* at 2176–81.

354 *Contra* DRAKEMAN, *supra* note 14, at 331–32 (implying that the Clause's lack of controversy suggests that Americans did not expect it to accomplish much).

355 U.S. CONST. amend. I; *see* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("While the concept of a formally established church is straightforward, pinning down the meaning of a 'law respecting an establishment of religion' has proved to be a vexing problem."); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013) (discussing textual vagueness); Esbeck, *supra* note 343, at 495–96 ("[W]ithin a modest range, the word 'establishment' meant different things to different figures at the political center of the formative law-making process.").

356 On the notion of an "idiom" as a normative language for political dispute, see J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 7–10 (1985); 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, at xi (1978); Mark A. Noll, *British Methodological Pointers for Writing a History of Theology in America*, *in* SEEING THINGS THEIR WAY: INTELLECTUAL HISTORY AND THE RETURN OF RELIGION 202, 203–06 (Alister Chapman, John Coffey & Brad S. Gregory eds., 2009).

357 *See* Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1464–71.

358 *See supra* note 323 and accompanying text.

359 *See generally* HAMBURGER, *supra* note 292.

lamations of days of prayer,[360] legislative prayer,[361] and especially the Sunday mail.[362] All of these debates contributed to the development of norms of disestablishment, some of which became embodied in state and federal law—especially through state constitutional amendments prohibiting the funding of religious education.[363] Thus the periphery of nonestablishment norms included objections to a variety of relationships between government and religion, some of them new to the American constitutional situation, others holdovers from the colonial era. Some of those issues, especially the propriety of religious instruction in publicly funded schools, evolved significantly during the period of the federal-missionary partnerships.[364]

The government's funding of missions to the Native nations is most closely analogous to two practices that generated disestablishment objections at different times and places within the early republic. The first were religious assessments. As discussed briefly above, several states inherited the colonial practice of assessing all taxpayers a flat amount to support a local church or clergy member. The details of religious assessment programs differed by state. Some states allowed the taxpayer to choose which denomination would receive the assessment. Yet even when taxpayers could choose the church that would receive the proceeds of their taxes, the assessments still amounted to government-forced tithes.

In 1886, Virginia evangelicals, led by Madison and Jefferson, famously defeated a proposed assessment bill. The Supreme Court has elevated this episode to the "defining event of disestablishment"[365] and some judges and scholars argue that assessments reflect "the paradigm case" of what the Founding generation understood the Establishment Clause to forbid.[366]

Yet there was another practice that bears a resemblance to the government-missionary partnerships: government-funded elementary education.[367] In the earliest days of the constitutional republic, most schools were funded by parents[368] and virtually all of them included not only Bible reading but

360 *See Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 561 (Elizabeth Fleet ed., 1946); *From Thomas Jefferson to Samuel Miller, 23 January 1808*, NAT'L ARCHIVES: FOUNDERS ONLINE (Thomas Jefferson), https://founders.archives.gov/documents/Jefferson/99-01-02-7257 (last visited Sept. 9, 2020) (arguing that the Constitution prohibits the president from recommending a public day of fasting).

361 *See Madison's "Detached Memoranda," supra* note 360, at 558–59; *see also* KABALA, *supra* note 248, at 168–78 (focusing on the 1833 dispute in New York).

362 *See generally* Holmes, *supra* note 305; John, *supra* note 305; Rohrer, *supra* note 305.

363 *See* GREEN, *supra* note 253, at 53–71.

364 *See generally id.*

365 McConnell, *supra* note 348, at 2156; *see* Everson v. Bd. of Educ., 330 U.S. 1, 11–12 (1947).

366 *See supra* note 21 and accompanying text.

367 *See generally* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860 (Eric Foner ed., 1983).

368 *See* CHARLES L. GLENN, THE AMERICAN MODEL OF STATE AND SCHOOL: AN HISTORICAL INQUIRY 86–87 (2012).

religious instruction.[369] Early in the nineteenth century, states began to subsidize existing schools, many of them denominational.[370] Many Protestants united around the "common school" movement that shifted most of the state's education resources into schools that taught the basics of Protestant doctrine and morality.[371]

By the 1830s–40s, Americans began to dispute the propriety of funding religious education. In some states, Protestants supported the government funding of "nonsectarian" schools that taught basic Christian principles but objected to government funding of denominational schools.[372] Motivated in large part by nativism and anti-Catholicism,[373] Protestants hoped common schools would enculturate Catholic immigrants.[374] Catholics sought government funding for their schools because the publicly funded "nonsectarian" schools were essentially Protestant.[375] Some places, such as New York City, funded Catholic schools too.[376] The Protestant-generated "no-funding" principle gained steam through the nineteenth century, culminating in state constitutional prohibitions on funding sectarian institutions.[377] Yet Bible reading and generic Christian instruction persisted in many public schools into the twentieth century.[378] And, as discussed above, no one challenged the religious character of the government-missionary partnerships.

V. The Missionary Partnerships as Governmental Support for Education

Where do the government-missionary partnerships fit into the historical development of nonestablishment norms? Were they essentially religious assessments that went uncontested? If so, why didn't anyone contest them? Or were they more like elementary schools funded by the states and the District? Although overlapping reasons may account for why U.S. officials did not challenge the partnerships' constitutionality, the main reason was a

369 *Id.* at 68–70.

370 *See id.* at 92–94, 113.

371 *See id.* at 69–70 (discussing religion in the common schools); *id.* at 85 (discussing success of the common schools); Timothy L. Smith, *Protestant Schooling and American Nationality, 1800–1850*, 53 J. Am. Hist. 679 (1967).

372 *See* Glenn, *supra* note 368, at 104–07.

373 *See, e.g.*, Green, *supra* note 253, at 71–77; Hamburger, *supra* note 292, at 191–92.

374 *See* Glenn, *supra* note 368, at 112–14, 121.

375 *See* Green, *supra* note 253, at 54–68.

376 *See* Glenn, *supra* note 368, at 94.

377 *See* Green, *supra* note 253, at 69–71; Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493 (2003).

378 *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (holding that school-sponsored Bible reading is unconstitutional); Comment, *Reading the Bible in Common Schools*, 12 Yale L.J. 102 (1902). *But see* R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education*, 86 J. Am. Hist. 1581 (2000) (arguing that Bible reading in nonsectarian schools during the nineteenth century was far from universal and was considered a separate matter from religious instruction in general).

widely held paradigm of social progress that required education and at least a modicum of Christianization to facilitate republicanism.

A. "Indian Affairs" Exceptionalism

Perhaps U.S. officials did not challenge the constitutionality of the government-missionary partnerships because of some combination of factors related to "'Indian affairs'—a catch-all analog of 'foreign affairs' that encompassed treatymaking, land title, trade, and war and peace with Native nations."[379] In particular, Indian affairs involved several aspects of federal power that raised (and continue to raise) questions about the Constitution's scope.

The scope of federal jurisdiction over Native peoples and Indian country was unclear. A handful of Native nations were considered tributaries of the states in which they were located; their members were taxpayers absorbed into the body of state citizens. What distinguished them from others within the state was their racial and cultural identity. Most of the larger Native nations, however, lived in Indian country within a state or federal territory. The early administrations maintained that these nations were sovereigns independent of the states and foreign states but dependent on the United States.[380] The Supreme Court subsequently articulated the same doctrine.[381] The result was that states exercised no jurisdiction within Indian country, and the federal government exercised limited legislative and judicial jurisdiction under the Indian Commerce Clause and pursuant to treaties.[382] Native nations, for their part, insisted on sovereignty within their territories, whether they were within a state or federal territory.[383]

Furthermore, it was unclear whether the Bill of Rights even applied with full force in federal territories.[384] The Northwest Ordinance included provisions like those in the Bill of Rights, but, notably, not an Establishment

379 Ablavsky, *supra* note 27, at 1004; *see* DELORIA & WILKINS, *supra* note 18, at 107 (arguing that officials did not think the Bill of Rights applied to Indian affairs).

380 Ablavsky, *supra* note 67, at 1064–65; *see* Thomas Jefferson, Notes for a Conversation with George Hammand (Dec. 10, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 717, 717 (John Catanzariti ed., 1990).

381 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see* Ablavsky, *supra* note 30, at 611–12.

382 *See* FORD, *supra* note 68, at 32, 60, 90.

383 Ablavsky, *supra* note 30, at 594 ("Both Native nations and the United States, then, were engaged in a similar intellectual project of extrapolating Eurocentric legal rules to North America's borderlands.").

384 *See, e.g.*, Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1637–38 (2019); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1200–01 (1996). *See generally* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

Clause.[385] Instead, it provided that "Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[386] Perhaps the government-missionary partnerships to Native nations within the Northwest Territory reflected Congress's belief that it could act as a state legislature in the territories, unbound by the Establishment Clause.[387] Yet this would not account for the partnerships to Native groups who resided within the states.

Native peoples likewise did not enjoy the full legal privileges of white Americans.[388] The federal government only counted the members of the "tributary tribes" for purposes of apportionment and taxes.[389] Into the early republic, state law permitted whites to hold Native Americans alongside African Americans as slaves.[390] In addition, the federal government restricted naturalization to "free white person[s] . . . of good character."[391] U.S. citizenship became a carrot for treaty negotiations.[392] Some questioned whether noncitizens, within the states or not, enjoyed any constitutional rights.[393] Native Americans were quasi-foreigners living on quasi-foreign territory; perhaps the Establishment Clause was not understood to reach the government's relationship with them.

The legal status of Native Americans was bound up with white perceptions of race. Racial opinions varied during the early republic and changed over time.[394] After the Revolution, many white elites probably agreed with Thomas Jefferson that Native Americans were naturally the equal of whites, but their culture, laws, morality, and religion were inferior to those of white

385 *See, e.g.*, An Ordinance for the Government of the Territory of the United States North West of the River Ohio art. I, 32 J. CONT'L CONG. 334, 340 (U.S. Gov't Printing Office 1936) (1787).

386 *Id.* art. III.

387 *See* SMITH, *supra* note 126, at 28; Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1121–23 (1998).

388 Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1059 (2018) ("[L]egal belonging was explicitly conditioned on would-be citizens' membership in dominant racial, ethnic, and gender categories.").

389 Ablavsky, *supra* note 67, at 1054–55; *see* U.S. CONST. art. I, § 2, cl. 3 (excepting "Indians not taxed" from the "their respective Numbers" of the states relevant for taxation and apportionment); ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 (exempting tribes that were "members of any of the states" from federal control).

390 Gregory Ablavsky, Comment, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 U. PA. L. REV. 1457, 1459–60 (2011).

391 Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103; *see* Act of Apr. 14, 1802, ch. 28, 2 Stat. 153, 153 (replacing 1790 law but retaining the "free white" requirement).

392 *See* FORD, *supra* note 68, at 146–47.

393 Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927–43 (1991).

394 *See* SILVER, *supra* note 44, at xx–xxi; Ablavsky, *supra* note 388, at 1066; Alden T. Vaughan, *From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian*, 87 AM. HIST. REV. 917, 919 (1982).

American society.[395] This was the class of white Americans—government officials, national politicians, clergy, and publishers—that paternalistically "spoke of their duty to help people of color complete their journey toward 'civilized' status."[396] Other whites, especially settlers who had been involved with war against Native nations,[397] were more hostile to Native Americans and increasingly opposed to their assertions of territorial sovereignty.[398] These sentiments hardened and spread after the War of 1812 with the rise of Jacksonian politics and pseudoscientific ideologies of race.[399] Even elite whites preferred policies of racial segregation—even between whites and ethnic Native Americans that had completely assimilated to white culture.[400] Perhaps whites simply could not imagine that Native Americans could have the same rights they enjoyed.

Any of these territorial or personal aspects of Indian affairs may have accounted for why no one objected to the government-missionary partnerships. But the historical evidence complicates this conclusion. First, no one suggested that the partnerships would have been unconstitutional had they been done elsewhere or with other people. The scant evidence that anyone even considered the constitutionality of the government-missionary partnerships suggests the opposite: that it was at least imaginable that the Establishment Clause forbade the government from interfering with Native religious liberty.[401]

Second, the Indian affairs objections are an ill fit for the evidence. Some of the mission schools, including the one Senator Johnson hosted on his land in Kentucky, were within the "ordinary jurisdiction"[402] of a state.[403] Some had white as well as Native American students.[404] Most of the schools were within Indian country, and the vast majority of the students were Native American, but no one suggested the program's constitutionality turned on location, legal status, or race.

Third, the conclusion that there was an extraterritorial or noncitizen exception to the Establishment Clause is premised on a debatable presumption that the Establishment Clause exclusively, or principally, operates to pro-

395 NICHOLAS GUYATT, BIND US APART: HOW ENLIGHTENED AMERICANS INVENTED RACIAL SEGREGATION 7–8 (2016).

396 *Id.*

397 SILVER, *supra* note 44, at xix.

398 *See* FORD, *supra* note 68, at 188–96.

399 *See id.*; Vaughan, *supra* note 394, at 953.

400 *See* GUYATT, *supra* note 395, at 29; *see also* DAVID J. SILVERMAN, RED BRETHREN: THE BROTHERTOWN AND STOCKBRIDGE INDIANS AND THE PROBLEM OF RACE IN EARLY AMERICA 7 (2010).

401 *See supra* Section III.D. As discussed above, the House of Representatives apparently did not deem the allegation worthy of response, but the evidence does not suggest why.

402 *See* FORD, *supra* note 68, at 32, 34.

403 *See supra* Section III.B.

404 *See supra* Section I.A (Wheelock school in Connecticut).

tect individual rights, rather than as a structural restraint.[405] There is no question that white Americans during the early republic debated the extent to which noncitizens were entitled to constitutional rights.[406] But the Establishment Clause in many respects protected individual religious liberty by restraining the government from entering into particular relationships with religious associations, such as controlling religious doctrine and personnel, providing land grants and funds directly to churches, and using a state church for civil functions.[407] It is unclear that such a structural restraint would have been understood to be inapplicable to government based on location or personhood.[408] Indeed, in 1811, President Madison vetoed bills that would have supported churches in the District of Columbia and the Mississippi Territory on the ground that the support would violate the Establishment Clause.[409]

Fourth, virtually every state and the District of Columbia funded elementary schools that incorporated prayers, Bible reading, or Christian catechesis.[410] Furthermore, the Reconstruction Congress partnered with missionaries to educate the freedmen.[411] Something more global than Indian affairs exceptionalism accounts for the presumed constitutionality of the federal-missionary partnerships.

B. A Pre-Secular Paradigm of Social Progress

The most straightforward reading of the evidence is that Americans, from the early republic through the antebellum era, simply assumed that the Constitution permitted government funding of religious instruction as part of a comprehensive education. This consensus was not the product of con-

405 *See* AMAR, *supra* note 126, at 20–21; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 11–12 (1998).

406 Neuman, *supra* note 393, at 927–43 (providing a typology of constitutional arguments); *see also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 254–60 (1997) (analyzing the Alien Act debate). *See generally* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

407 *See supra* Part IV.

408 *See* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 169 (2007) (discussing Article I, Section 9's prohibition on drawing money from the treasury "but in Consequence of Appropriations made by Law" as a limit on the power of the President and Senate to create binding domestic law through treaty (quoting U.S. CONST. art. I, § 9, cl. 7)).

409 11 ANNALS OF CONG. 351 (1811) (vetoing a bill to incorporate an Episcopal church in the District of Columbia); 11 ANNALS OF CONG. 366 (1811) (vetoing a bill to give land to a Baptist Church in the Mississippi Territory).

410 GLENN, *supra* note 368, at 92–96; *id.* at 89 (discussing the District of Columbia); *see also* LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 4–9 (1987); KAESTLE, *supra* note 367, at 57, 166–67.

411 *See* ROBERT C. MORRIS, READING, 'RITING, AND RECONSTRUCTION: THE EDUCATION OF FREEDMEN IN THE SOUTH, 1861–1870, at 3, 49–59 (1981); JOE. M. RICHARDSON, CHRISTIAN RECONSTRUCTION: THE AMERICAN MISSIONARY ASSOCIATION AND SOUTHERN BLACKS, 1861–1890, at 4, 41–46, 75–83 (1986).

sidered judgment, public debate, or express principle; it was the result of a widely shared "social imaginary"[412] of "civilization" that understood education, republicanism, and Christianization to be interdependent and mutually reinforcing.[413] Anglo-Americans tacitly assumed this intellectual framework for evaluating social progress.[414] It would not have crossed their minds to have pursued a program of benevolence toward Native peoples that was not aimed at "civilization," nor to use any means other than education and Christianization.

Three facets of this social imaginary contributed to widespread agreement on the propriety of the federal government's civilization program: the relationship between religion and republicanism; the pervasive acceptance of Christian morality; and the imagining of Native Americans as "savages."

1. Christianity and American Republicanism

Elite white Americans differed on the specifics of politics and religion, but throughout the early republic they agreed that "the health of a republic required the exercise of virtue by its citizens."[415] While republicanism and religion had been somewhat opposed in English and continental political discourse, "[i]n the thirteen colonies that became the United States, republican and Protestant convictions merged as they did nowhere else in the world."[416] As a result, "[b]y the early decades of the nineteenth century, it had become a matter of routine for American believers of many types to speak of Christian and republican values with a single voice."[417] A broad commitment to the development of "virtue," as a general matter, allowed elite white Americans to embrace and merge "several not altogether compatible ideals," such as classical Machiavellianism, biblical piety, and a more

412 TAYLOR, *supra* note 19, at 146, 172–74. A social imaginary is something like a "paradigm" for social engagement. *See generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

413 The canonical study of American "civilization" is CHARLES A. BEARD & MARY R. BEARD, THE AMERICAN SPIRIT (1942). For discussions of the notion of civilization in the early republic and through the Second Great Awakening, see *id.* at 98–276; PRUCHA, *supra* note 15, at 146; TAYLOR, *supra* note 19, at 455–56. *See generally* RAY ALLEN BILLINGTON, LAND OF SAVAGERY, LAND OF PROMISE: THE EUROPEAN IMAGE OF THE AMERICAN FRONTIER IN THE NINETEENTH CENTURY (1981); BERNARD W. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN (1973).

414 Influenced by the French Enlightenment, a handful of antebellum Americans maintained that Christianity was not a prerequisite for a proper education and experimented with nonreligious education or utopian communities. *See, e.g.*, Samuel Harrison Smith, *Remarks on Education*, *in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 167, 170, 211 (Frederick Rudolph ed., 1965). *See generally* GLENN, *supra* note 368, at 52–53. These ideas were "too radical and too comprehensive for most people." Carl F. Kaestle, *Ideology and American Educational History*, 22 HIST. EDUC. Q. 123, 134 (1982).

415 NOLL, *supra* note 160, at 90.

416 *Id.* at 73.

417 *Id.*

"gendered" understanding of virtue as "the ethics of female, domestic, private morality."[418]

Such Americans "agreed that vibrant religion is necessary for the survival of the social order—and ultimately—representative democracy."[419] Consider the sentiments of John Adams:

> One great Advantage of the Christian Religion is that it brings the great Principle of the Law of Nature and Nations, Love your neighbour as yourself, and do to others as you would that others should do to you, to the Knowledge, Belief, and Veneration of the whole People. . . . No other Institution for Education, no kind of political Discipline, could diffuse this kind of necessary Information, so universally among all Ranks and Descriptions of Citizens.[420]

Examples of such sentiments among the reading class from the Founding era through the mid-nineteenth century could be multiplied ad infinitum.[421] The unique American merger of Christianity and republicanism, not only in theory but in ardent political and religious practice, was one of the overriding themes of Alexis de Tocqueville's study of American politics in the 1830s.[422]

One implication of this commitment, as the Adams quote suggests, was that the diffusion of Christian morality among the people was necessary for the republic's success as a political project. Religious morality, through education, was thus a *sine qua non* of the development and advance of this conception of American civilization.

2. Natural Versus Revealed Religion

Within this social imaginary, Americans often disagreed about whether an education in "revealed" religion, as opposed to "natural" religion, was necessary. The distinction was important, but it elides the fundamental unity of the overarching social imaginary's assumption that Christian morality was essential to republicanism.

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418 *Id.* at 90.

419 WEST, *supra* note 119, at 15.

420 *Id.* at 51 (quoting John Adams, August 14, 1796, Sunday, *in* DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 240–41 (L.H. Butterfield ed., 1964) (diary entry)).

421 *See, e.g.*, *id.* at 27 ("[V]irtue and piety are inseparably connected . . . [and] to promote true religion is the best and most effectual way of making a virtuous and regular people." (alterations in original) (quoting JOHN WITHERSPOON, AN ANNOTATED EDITION OF LECTURES ON MORAL PHILOSOPHY 159 (Jack Scott ed., 1982) (Lecture XIV))); *id.* at 44 (discussing Wilson's view); Washington, *supra* note 89 ("[R]eason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.").

422 *See* 2 TOCQUEVILLE, *supra* note 31, at 476 ("Americans mix Christianity and liberty so completely in their mind that it is nearly impossible to make them conceive one without the other; and, among them, this is not one of those sterile beliefs that the past bequeaths to the present and that seem more to vegetate deep in the soul than to live."); *see also* NOLL, *supra* note 160, at 53–92.

The language of natural and revealed religion (and natural and revealed morality) was suffused throughout the early republic. In theory, natural religion or morality amounted to the requirements of morality that one could comprehend through the use of reason alone. "Revealed" religion or morality included those demands of ethics that one could comprehend only through revelation, principally the Christian scriptures.

Complicating this distinction was the fact that "[e]vangelicals such as [John] Witherspoon and [John] Jay, no less than champions of the Enlightenment such as [Thomas] Jefferson and [Benjamin] Franklin, concurred that the morality of revelation is largely coincident with the morality of reason and conscience."[423] Consider again John Adams: Christianity uniquely "brings the great Principle of the Law of Nature and Nations, Love your neighbour as yourself, and do to others as you would that others should do to you, to the Knowledge, Belief, and Veneration of the whole People."[424] For Adams, whatever may have been revealed in Christianity was simply a pedagogical supplement to the natural faculties of reason and conscience. In the vein of Thomas Hobbes, then, many Americans believed the doctrines of Christianity, whatever their accuracy about supernatural affairs, to be *useful* for fostering the public morality necessary to sustain a republic. As the exchange between Colonel Pickering and Reverend Kirkland shows, Americans disagreed about the utility of introducing students to revealed religion. Yet such differences of opinion raised no nonestablishment concerns—at least with regard to the education of Native Americans.[425]

3. Civilization and "Savages"

Benjamin Franklin referred to frontier settlers as "Christian white savages."[426] The phrase perfectly captures the racial and cultural ambiguity of the elite white American conception of civilization during the early republic. Whites could be savages, outside the bounds of civilization, for lack of education and republican virtue—even when they were "Christian." Likewise, most elite whites believed that Native Americans were "by nature equal to the white man"[427] and could assimilate to white culture through education.[428] But even "Christian white savages" were distinguished by race, just as

423 WEST, *supra* note 119, at 75.

424 *Id.* at 51 (quoting Adams, *supra* note 420).

425 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622–23 (1971). *But see* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1670 (2006); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1254 (2000).

426 NICHOLS, *supra* note 96, at 13 (quoting EDMUND S. MORGAN, BENJAMIN FRANKLIN 131 (2002)).

427 PRUCHA, *supra* note 15, at 136.

428 *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 62–69 (Richmond, J.W. Randolph 1853); SHEEHAN, *supra* note 413, at 6 ("Although the years from the Revolution to removal produced ample diversity in politics and ideology, on the question of the Indian and his relationship to civilization they were substantially Jeffersonian."); *see also*

Native Americans, so long as they remained "Indian," were not entirely within the pale of civilization. The border between whites and nonwhites may have been somewhat permeable, but nevertheless served as a default for social ordering.[429] Civilization was defined in part by what it was not, and for most Euro-Americans, its antithesis was epitomized by Native American folkways and religion.[430]

A distinction between Christian and non-Christian peoples, inherited from medieval and early modern law in the West, influenced the law of nations into the late eighteenth century.[431] Over time the distinction evolved into one between civilized and uncivilized nations. Civilized nations were bound to deal with others according to the law of nations but could disregard that law when dealing with groups that were uncivilized or that violated the law of war.[432] According to Emer de Vattel, the Swiss treatise writer who most influenced U.S. statesmen and lawyers during the early republic,[433] the Native nations of North America were distinguished from the "civilised empires" of the Incas and Aztecs.[434] As Gregory Ablavsky has shown, "Anglo-Americans readily adopted this habit of excluding their Native neighbors from the ranks of the 'civilized nations'"[435] even as they sought the United States' full inclusion in the western league of nations.[436] Native nations, for their part, used the logic of the law of nations to argue for their independent sovereignty.[437]

PRUCHA, *supra* note 15, at 136 ("[A]mong the responsible and respected public figures in the first decades of United States development, there was a reasonable consensus that was the underpinning of official policy toward the Indians.").

429 *See* GUYATT, *supra* note 395, at 29.

430 SHEEHAN, *supra* note 413, at 101–05. *See generally* BILLINGTON, *supra* note 413; ROY HARVEY PEARCE, SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND (1967).

431 FORD, *supra* note 68, at 14; *see also* L.C. GREEN & OLIVE P. DICKASON, THE LAW OF NATIONS AND THE NEW WORLD 4–63 (1989); ROBERT A. WILLIAMS, JR. ,THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 88–92 (1990); Gavin Loughton, *Calvin's Case and the Origins of the Rule Governing 'Conquest' in English Law*, 8 AUSTRALIAN J. LEGAL HIST. 143, 175–76 (2004); Anthony Pagden, *Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians*, *in* 20 THEORIES OF EMPIRE, 1450–1800, at 159, 159–78 (David Armitage ed., 1998).

432 *See* EMER DE VATTEL, THE LAW OF NATIONS § 81, at 129–30 (Béla Kapossy & Richard Whatmore eds., 2008).

433 *See* PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814, at 11 (1993); *see also* Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 67 (1999).

434 VATTEL, *supra* note 432, § 81, at 129–30; *see* Ablavsky, *supra* note 30, at 607–08; *see, e.g.*, Deborah A. Rosen, Border Law: The First Seminole War and American Nationhood 131–33 (2015) (examining the use of this logic to justify the Seminole War).

435 Ablavsky, *supra* note 30, at 607.

436 *Id.* at 607–08.

437 *Id.* at 594.

For some white Americans, these differences, previously based on religion, then on political organization, were also based on race.[438] Some believed Native Americans were racially inferior to whites. Most elite whites, though, believed them to be naturally equal to whites, but held back by an inferior culture. Thus the civilization program was intended, in part, to facilitate their assimilation into white society.

While the characterization of Native Americans as "savages" undoubtedly fueled the government-missionary partnerships, the mission schools were little different from any program of elementary education throughout the antebellum period—including those funded by states and local governments. Mission schools may have been, on the whole, more denominationally devout than most government-funded schools,[439] but states also funded denominational schools through the middle of the nineteenth century.[440] And the common schools, though not explicitly denominational, promoted a generic form of Protestantism.[441] By today's standards, the government-missionary partnerships may seem like efforts of "[c]ultural [g]enocide,"[442] but they reflected the standard Enlightenment view of human progress coupled with uniquely American views of Christian republicanism and the natural equality of Native peoples.[443]

VI. Lessons for the History of Disestablishment

Comprehending the federal-missionary partnerships as the result of an elite white American social and political consensus about the demands of education and republicanism sheds light on the development of nonestablishment norms in the early republic and through the antebellum period.

A. The Scope of Objections to Governmental Funding of Religious Instruction

Most importantly, the partnerships clarify the scope of historical concerns about religious assessments. A number of scholars have suggested that the opposition to assessments—especially Madisonian and Jeffersonian rhetoric—should be understood as the baseline from which nonestablishment jurisprudence should proceed.[444] For instance, Madison's rhetoric against

438 *See supra* Section V.A.

439 *See* William G. McLoughlin, Cherokees and Missionaries, 1789–1839, at 150 (1984) (noting that the Baptists and Methodists "brought to the Cherokees, as they did to other areas of the frontier, a more democratic, informal version of Christianity than that of the Moravians and the American Board").

440 *See supra* notes 410–11.

441 *See supra* notes 410–11.

442 *See* George E. Tinker, Missionary Conquest: The Gospel and Native American Cultural Genocide 8, 9 (1993) (arguing that it would not have been "culturally possible" for missionaries who equated Christianity and civilization to see their mission as "[c]ultural [g]enocide").

443 *See* Sheehan, *supra* note 413, at 114.

444 *See, e.g.*, Koppelman, *supra* note 21, at 745–46 (arguing that assessments are the "paradigm case" of what the Establishment Clause was understood to forbid); Laycock,

the Virginia assessments would support a broad prohibition on the government's "cognizance" of "Religion,"[445] forced "support of any one [E]stablishment,"[446] and the "employ[ment] [of] Religion as an engine of Civil policy."[447] Accordingly, some have concluded that "the broadly shared eighteenth-century view" was "that it was wrong to coerce payment of taxes for religious purposes."[448] The Supreme Court relied almost exclusively on the assessment debates to claim in *Everson v. Board of Education* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[449] Professor Laycock may be correct that the Court's asserted "absolutes were never true, not even in *Everson* itself,"[450] but the assessment controversy, viewed in isolation, seems to support it, as Justice Sotomayor recently argued in her dissenting opinion in *Trinity Lutheran*.[451]

The government-missionary partnerships dramatically limit this reading of the assessment controversy. As Professor Laycock has recently argued, the history of government-missionary partnerships "suggests—I do not say proves—that the Founders were not concerned about money that went to churches in pursuit of secular goals."[452] I think the partnerships suggest considerably more than that.

Neither Madison nor Jefferson, to say nothing of the evangelicals who actually drove the opposition to the Virginia assessments, had any problems with the missionary partnerships.[453] Acceptance was deep and widespread, not only during the Founding, but through the Civil War.[454]

Laycock says that the constitutionally salient fact was that the partnerships were in pursuit of "secular goals."[455] That is half-right; it relies on an anachronistic characterization of the partnerships. Americans through the antebellum period did not think in terms of "religious" versus "secular" "pur-

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supra note 21, at 895 ("[T]he debates in Virginia were [the] most important" evidence of "how the concept of establishment was understood in the Framers' generation.").

445 *See, e.g.*, MADISON, *supra* note 24, at 299 ("Religion is wholly exempt from [Civil Society's] cognizance.").

446 *Id.* at 300 ("[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]").

447 *Id.* at 301 (arguing that the notion that "the Civil Magistrate . . . may employ Religion as an engine of Civil policy" is "an unhallowed perversion of the means of salvation"); *see also id.* ("[T]he establishment proposed by the Bill is not requisite for the support of the Christian Religion.").

448 Feldman, *supra* note 21, at 418.

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

450 Laycock, *supra* note 7, at 138.

451 *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2032–35 (2017) (Sotomayor, J., dissenting).

452 Laycock, *supra* note 7, at 144.

453 *See supra* Section III.C.

454 *See supra* Parts II & III.

455 *See* Laycock, *supra* note 7, at 144.

poses" and "effects."[456] They did distinguish between revealed and natural religion as two different topics (respectively, doctrine and morality).[457] But the idea of the secular as a disenchanted public sphere lay in the future.[458]

Understood in this context, the purposes and effects of the government-missionary partnerships were neither purely "secular" nor purely "religious." The objective was "civilization," understood as assimilation to a complex of interrelated social norms, including agricultural development, liberalization of property rights, and Christianization.[459] Some government officials praised religious instruction for its own sake, but this is also misleading; it was never conceptually distinguishable from the broader motive of assimilation.

This clarifies the scope of the objections to religious assessments during the early republic. They were not directed at a vague notion of governmental "support" of "religion" as the Court and many scholars have often claimed. Laycock is closer to the mark when he says that the objections to assessments were directed to "earmarked tax[es] to support the religious functions of churches—most commonly the salaries of clergy, and sometimes also the construction of church buildings."[460] But even this elides the similarities between the partnerships and churches; both involved governmental funds going to religious associations who used those funds to pay the salary of ordained clergy members and construct buildings used for worship.

Since they did not provide an explanation, it is impossible to know exactly why assessment opponents accepted the mission partnerships. The most straightforward explanation is that, for some reason, white Americans perceived assessments to be a more direct imposition on conscience than payments to missionaries. This may have been because the money used for missionaries was not raised from individual taxes designated for that purpose. Indeed, the federal government imposed no direct taxes on individuals during the early republic. So all the funds spent on the missions were raised from the sale of land, treaties, or use and ownership taxes. Another explanation may be the difference between tithes and benevolent giving within Christian morality.[461] Tithes are generally considered more mandatory, and benevolent giving more discretionary. Both, however, would have been understood as governed by conscience.

In the end, these are speculations. What is clear is that Madison and others opposed assessments and accepted mission schools. Assessments threatened "the conviction and conscience of every man," to ascertain "'that

456 *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2024 n.3; Lemon v. Kurtzman, 403 U.S. 602, 618–19 (1971).

457 *See supra* subsection V.B.2.

458 *See, e.g.*, TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 13, 23–24 (2003) (identifying "nineteenth-century romanticism" as the source of "disenchantment" and the use of "secular" with mid-nineteenth-century English freethinkers and social reformers).

459 *See generally supra* Parts I & II.

460 *See* Laycock, *supra* note 7, at 142.

461 *See generally* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. (forthcoming 2020).

Religion or the duty which we owe to our Creator and the manner of discharging it'";[462] government funding of religious instruction as part of a comprehensive education did not. This is why the movement to end religious assessments in Connecticut and Massachusetts in the early nineteenth century had no connection—socially, politically, or conceptually—to subsequent debates in Massachusetts, New York, and elsewhere about "sectarian" schooling.[463]

B. Do the Partnerships Support "Nonpreferentialism"?

This does not mean, however, that the government-missionary partnerships prove that Americans understood the Establishment Clause to permit "nonpreferentialism." A number of scholars have argued that the early history, including the government-missionary partnerships, suggest that the Founding generation believed the Establishment Clause permitted the government to support religion over nonreligion so long as it remained neutral among religious groups.[464] At one level, the partnerships clearly support this position. One of the purposes of the Civilization Fund program was to promote Christianity. Virtually all of the funds went to Christian missionaries who used them to engage in Christian instruction. In this sense, the program was not neutral between religion or nonreligion, nor even among "religions" writ large—it was a form of Christian nonpreferentialism.

Yet this reading ignores two important facts. The first is that the program was formally neutral, not only among religions but between religion and nonreligion. No statute or regulation required an applicant for funds to be Christian or even religious. Given that many officials obviously understood the program to promote the Christianization of Native people, this formalism is all the more important. It suggests that officials were at least concerned about the implications, whether political or legal, of formally favoring religion. Moreover, it suggests a tacit openness to allowing nonreligious teachers to participate in the program.

Second, the view that the program should be understood to support a nonpreferentialist construction of the Establishment Clause ignores the pro-

462 MADISON, *supra* note 24, at 299 (quoting VA. DECLARATION OF RIGHTS art. XVI (1776)); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 908 (2019).

463 *Compare* 2 MCLOUGHLIN, *supra* note 127, at 1043–50, 1189–1263 (discussing the end of assessments in Connecticut and Massachusetts), *with* GREEN, *supra* note 253, at 69–71 (discussing the school wars).

464 As of 1997, Daniel Dreisbach counted more than a hundred books and articles disputing the point. *Cf.* Dreisbach, *supra* note 14, at 24. Leading proponents of "nonpreferentialism" include 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 592 (Boston, Charles C. Little & James Brown, 2d ed. 1851); O'NEILL, *supra* note 16, at 9–10; Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 14–15 (1949); CORD, *supra* note 16, at 112. *See generally* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

gram's social context. As discussed above, white Americans could not conceive of education or assimilation into Western society that did not teach, at a minimum, the natural religion of Christianity. Furthermore, as a practical matter the only groups available were Christian; there simply were no comparable non-Christian educational associations in the antebellum period.[465] Congress passed the Civilization Fund Act of 1819 during the early years of the Second Great Awakening, when evangelical (and increasingly Catholic) associations were mobilizing to combat a range of perceived social ills.[466] The partnerships' effective Christian nonpreferentialism reflected the (by our standards narrow) religious pluralism of society at the time, not an assumption about the scope of the Constitution. The program's distribution of funds to virtually every existing Christian denomination is as consistent with neutrality between religious and nonreligious education as it is with Christian nonpreferentialism.

In fact, understood in historical context, the partnerships' neutrality illustrates the striking effect of disestablishment. The colonial and revolutionary partnerships were not neutral among Christian groups. Anglican colonies favored Anglican missionaries, congregationalist colonies favored Presbyterians, and no one (outside of perhaps Pennsylvania) trusted the pacifist denominations.[467] The revolutionary Congress sponsored a Congregationalist missionary as a counterbalance to the Anglicans' influence among the Iroquois.[468] From the Washington administration forward, the federal government was more evenhanded. Under the Civilization Fund Act, the government even sponsored Catholic missionaries, something that would have been unthinkable to the British colonists and likely would not have passed political muster in many states.

What accounted for the uniformity of support for an initiative of such religious diversity (measured by the standards of the day)? Most likely a commitment to nonestablishment, coupled with a unique social imaginary that equated Christianity, in general, with social progress. The Establishment Clause prohibited favoring one Christian group over another. Yet the diverse Christian groups that increasingly fought over state funding for education did not complain about the program's relative religious pluralism. Apparently, within the emerging white American social imaginary, Christianity, of any sort, was socially, politically, and religiously superior to non-Christianity of any sort. Put differently, white Americans appear to have been more tolerant of government support for denominational proselytization when the students were "foreign," "nonwhite," or insufficiently "Christian" to start with. For denominationalists, the price of the Establishment Clause was not a strict prohibition on funding religious instruction, but rather the evenhanded

465 *See* Laycock, *supra* note 7, at 143–44 ("There were no [Founding-era] programs in which government broadly funded some private activity that both churches and secular organizations engaged in.").

466 *See supra* Section I.E.

467 *See supra* Section I.A.

468 *See supra* Section II.C.

funding of competing, sometimes mutually exclusive, Christian doctrines. By today's standards of religious neutrality, the funding clearly favored Christianity over other religions. In historical context, though, the program was strikingly neutral among disparate and competitive religious groups.

C. Voluntariness

Finally, the partnerships suggest that Americans through the antebellum period believed that government-funded religious instruction should be, at least as a formal legal matter, voluntary. The Civilization Fund Act expressly provided that the funds would be spent only on programs which garnered the "consent" of Native peoples.[469] During the antebellum period, Native students were not legally obligated to attend federally funded schools upon threat of punishment.[470]

Obviously, the quality of this consent must be understood in light of the power differential between Native nations and the United States and the backdrop of white efforts—usually states or settlers—to coerce Native peoples out of their land and disparage their legal entitlements. Yet the Native nations considered themselves, and were viewed by the United States, to be sovereigns capable of entering into treaties and therefore of meaningful, legally binding consent. Many of them negotiated for ongoing payments for churches, clergy, or religious instruction.[471] Likewise, at least some of them actively sought mission schools funded by the "civilization" program.[472] To be sure, U.S. officials could be heavy-handed with efforts to incentive participation with the schools.[473] This did not raise any constitutional eyebrows.

Such a formal notion of voluntariness would almost certainly not pass muster under constitutional doctrine today. At a minimum, the government may not condition receipt of a valuable nonreligious public welfare benefit—elementary education—on religious exercise. Today this would constitute a "substantial[ ] burden" on religious exercise under the Religious Freedom Restoration Act, if not the Free Exercise Clause.[474] To the extent a school was effectively coercive because the parents felt obligated against their will to send their children, it would also violate contemporary Establishment Clause doctrine governing prayer and Bible reading in public schools.[475] Even con-

469 Act of March 3, 1819, ch. 85, § 1, 3 Stat. 516, 516 (codified as amended at 25 U.S.C. § 271 (2018)); *see supra* Section II.B.

470 *See supra* Sections II.C–D.

471 *See supra* subsection I.D.2.

472 *See supra* Section II.A.

473 *See supra* subsection II.C.3.

474 *See, e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2018) (adopting the "compelling interest test as set forth in Sherbert v. Verner"); Sherbert v. Verner, 374 U.S. 398, 403–04, 409–10 (1963) (holding that a state violates the Free Exercise Clause by denying unemployment benefits on the basis of religion).

475 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding that a government-sponsored nonsectarian prayer at a public middle school graduation ceremony violated the Establishment Clause).

sidering the schools as private religious institutions that were partially funded by the federal government, the program may not have survived under the Court's funding doctrine. Without giving parents any other schooling option (such as one that valued and respected Native religions), the program was a far cry from one of "true private choice."[476] In short, if the program were a model for contemporary constitutional doctrine regarding voluntariness, it would work a sea change in virtually all of the most important religious liberty doctrines and permit an intolerable degree of coercion in matters of religion. Note, however, that these concerns were not unique to the federal-missionary schools—they would have applied equally to many forms of government-funded elementary schooling in the antebellum era.

Yet, like the program's "neutrality," the degree to which it incorporated a norm of consent, especially for a class of persons who were systematically denied the full and equal rights of citizenship, is somewhat remarkable. The government may have committed itself to formal consent for diplomatic purposes. The policy was also consistent with the Protestant-inflected American notion of liberty of conscience, which maintained that one must personally accept religion for it to have any spiritual effect. Yet as a whole there is little to suggest that the partnerships were "sometimes little short of forcing the Native Americans to choose between extermination and converting to Christianity."[477] Their commitment to formal legal consent reflected a development in the history of religious liberty, though it would not satisfy modern sensibilities.

Ultimately, consent is not the facet of the program that sheds the most light on the historical development of nonestablishment norms. What the program illustrates is that the federal government had a longstanding and widely accepted commitment to funding religious instruction as part of a formal education. Whatever the nature of parental consent, this alone clarifies the boundaries of the historical objection to governmental funding of religion.

VII. Translation

Since *Everson v. Board of Education*, the Supreme Court has relied heavily on Founding-era history to construct Establishment Clause doctrine.[478] More recently, though, its reliance on history in funding cases has waned.[479] The current rationale for the Court's funding doctrine is more a distillation of precedent than an application of the historical understanding of nonestablishment.[480] In fact, it has been the dissenting Justices who have relied on history to argue that the Establishment Clause prohibits the Court's current

476 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

477 Drakeman, *supra* note 144, at 334.

478 *See supra* notes 7–13.

479 *Compare, e.g.*, *Zelman*, 536 U.S. at 653–54 (upholding a voucher program), *with* Town of Greece v. Galloway, 572 U.S. 565, 575–77, 591–92 (2014) (relying on Founding-era history to uphold clergy-led prayer before town meeting).

480 *See, e.g.*, *Zelman*, 536 U.S. at 649.

Free Exercise doctrine requiring evenhanded funding for religious organizations that provide some "secular" social goods.[481]

At the outset, it should be reemphasized that relying on the federal-missionary partnerships to shape contemporary constitutional doctrine requires an "act of translation."[482] The partnerships were premised on a social imaginary that has long splintered into competing views of social progress. The Court's current approach to Establishment Clause doctrine rightly takes account of the nation's religious pluralism; as the Court declared two terms ago, "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously."[483] Even a contextually sensitive account of the partnerships must acknowledge that, while they were remarkably religiously pluralistic for their era, and many Native Americans supported them, a similar program today would be unconstitutional. They were neutral neither among religions nor between religion and nonreligion as contemporary doctrine rightly requires, nor were they programs of "true private choice"—Native American students had virtually no other options for government-funded education.[484] Historical practice may inform constitutional construction without determining its contours.

With that important caveat, this Part wrestles with the best way to translate the federal-missionary partnerships for contemporary law. It begins with a theoretical question: What should constitutional interpreters make of longstanding governmental practice that did not generate constitutional reasoning, and therefore may not yield a clear constitutional principle? It then turns to briefly consider the possible implications of the partnerships for constitutional doctrine and policy.

A. Uncontested Practice and Constitutional Construction

One challenge of translating the government-missionary partnerships for constitutional law is to decide what the history is evidence *of*. Since the partnerships went virtually unopposed through the antebellum period and were eventually terminated on policy grounds, they produced no contestation about the meaning or scope of the Establishment Clause. Without debate about the partnerships' constitutionality, the historical material provides no express rationales that might animate, limit, or define a constitutional principle.[485]

481 *See* Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2284–86 (2020) (Breyer, J., dissenting); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2032–35 (2017) (Sotomayor, J., dissenting).

482 *See* Lessig, *supra* note 35, at 1190.

483 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

484 For a recent case that arguably approximates the partnerships, see *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 424–25 (8th Cir. 2007) (invalidating a state-funded residential program for prison inmates because it was neither sufficiently religiously neutral nor one of true private choice).

485 *See, e.g.*, McConnell, *supra* note 36, at 362.

Put differently, it is unclear how the practice should affect the contemporary construction of the Establishment Clause because it was not based on an articulation of the Clause's meaning. Assume, for instance, that the Establishment Clause was originally "vague" with respect to governmental funding of religion.[486] The partnerships are not evidence of the "liquidat[ion]," or clarification, of that provision.[487] As conceived by James Madison, liquidation of a constitutional provision requires evidence of the political community's "deliberate"[488] resolution of a contested constitutional issue.[489] "Legislative precedents," he argued, were "entitled to little respect" "without full examination & deliberation."[490] The federal-missionary partnerships' constitutionality was barely mentioned, much less deliberated.

Moreover, the partnerships changed over time. The early partnerships were ad hoc; they could not have been entirely religiously neutral because they were not open to all applicants. Unlike the colonial governments, the federal government did not favor an established denomination, but the practice was still not facially neutral. The Civilization Fund program, by contrast, was facially neutral and religiously diverse by the standards of the day, but it did not begin until 1819—a generation after the enactment of the Establishment Clause. While some important figures in the early articulation of nonestablishment norms apparently embraced the program, its neutrality may not reflect the constitutional understanding of the constitutional drafters or the ratifying public.[491]

There are, I think, at least three options for the contemporary salience of the partnerships. The first is that they amount to a "practice" that many officials took to be constitutional.[492] Jurists sometimes rely on practice, even

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486 *See supra* Part V; *see, e.g.*, Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1122 n.22 (2015) ("If the communicative content is vague or open textured, then the underdetermination is fixed and constitutional construction will be required to fill in the legal content of constitutional doctrine.").

487 *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (quoting James Madison, Letter from James Madison to Spencer Roane (Sep. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)); Baude, *supra* note 37, at 13–20; Nelson, *supra* note 37, at 10–21; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910, 940–41 (1985).

488 James Madison, Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 9 THE WRITINGS OF JAMES MADISON 442, 443 (Gaillard Hunt ed., 1910); James Madison, Letter from James Madison to N.P. Trist (May, 1832), *in* 9 THE WRITINGS OF JAMES MADISON, *supra*, at 478, 480.

489 Baude, *supra* note 37, at 16–18.

490 James Madison, To Spencer Roane (May 6, 1821), *in* 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 317, 320 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony, eds., 2013).

491 Most contemporary originalists focus on the original legal meaning or public understanding, not the drafters' private intentions. *See, e.g.*, ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 16–17 (2017). As Larry Solum has argued, in most cases there may not be much difference. *See* Solum, *supra* note 486, at 1135.

492 *See* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 43 (3d ed. 2017).

when its constitutionality was not expressly articulated, as one "modality" of constitutional construction.[493] Doing so would be consistent with this tradition, but it would be unsatisfying as a tool for determining the original or even later historical meaning of the constitutional text.

Another option is to view the partnerships as part of a "tradition" of government-funded religious instruction in elementary schools. Marc DeGirolami has recently argued that jurists do, and should, rely on traditions arising from longstanding community practice when determining constitutional norms.[494] Indeed, the Supreme Court has expressly relied on a version of this reasoning to uphold legislative prayers and certain government-funded religious symbols.[495] The main problem is that there is not an unstinting practice of government-funded religious instruction—even when viewed at the highest level of abstraction. Widespread funding of private religious schools ended with the Blaine Amendment movement of the late nineteenth century,[496] and public-school-led prayer and Bible reading have been unconstitutional since 1962.[497] Like resorts to "practice," arguments from "tradition" are unlikely to yield a constitutional *principle* that might guide the constitutional evaluation of different practices.

Yet, precisely because they were taken for granted, the partnerships shed light on the historical understanding of nonestablishment. As discussed above, they qualify the scope of the objections to assessments, illustrate the extent of religious neutrality, and show a nascent, though incomplete, commitment to voluntariness. Concluding that an undisputed practice sheds less light on the historical meaning of a constitutional provision than one that generated controversy is somewhat perverse, elevating the constitutional salience of practices disputed by a handful of officials over those that were universally accepted, in this case over a long period of time.

What unreasoned practices cannot do, however, is suggest a clear principle.[498] I suggest, therefore, that uncontested and long-standing practices, like the partnerships, can support or undermine certain contemporary constructions of constitutional meaning, but they cannot dictate one.[499] Put differently, they can shed light on the historical understanding of a constitutional provision, light that may help to approximate its original meaning or a plausible contemporary construction, but they cannot be said to have *fixed* any constitutional meaning in the past. They are vulnerable to

493 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 39–59 (1982).

494 *See* DeGirolami, *supra* note 36, at 1124 (arguing that longstanding practice is uniquely normative for constitutional law).

495 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019); Marsh v. Chambers, 463 U.S. 783, 786–792 (1983).

496 *See supra* Sections II.D–E.

497 *See* Engel v. Vitale, 370 U.S. 421, 424 (1962); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963).

498 *See* McConnell, *supra* note 36, at 362.

499 *See* Baude, *supra* note 37, at 25; Lawrence B. Solum, Essay, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–02 (2010).

contrary arguments, not only from text, but also from competing historical practices, especially those based on express constitutional rationales.

For instance, if the Establishment Clause clearly forbade government funding of schools that include religious instruction, the partnerships would be evidence that the government violated the Constitution, not evidence that officials believed them to be constitutional. Likewise, if the government had ended the partnerships because officials, after examination and deliberation, concluded that they were unconstitutional, their prior, unreflective, existence should be entitled to less weight as evidence of the Constitution's historical meaning.

In this case, there is no contrary textual or historical evidence. The Establishment Clause was vague with respect to school funding. And the partnerships are consistent with state and local funding of religious instruction as part of a broader education throughout the antebellum era. They ended from lack of political support, not because Americans concluded that the Establishment Clause prohibited them. In fact, the contemporaneous attempt to amend the Constitution to prohibit the funding of religious schools strongly suggests that Americans believed the Establishment Clause did not already prohibit such funding.

B. Contemporary Doctrine

1. The Principal Doctrine

The partnerships support the prevailing principle, articulated in *Zelman v. Simmons-Harris*, that the Establishment Clause permits funding of religiously neutral programs of "true private choice."[500] Under this principle, the Court has upheld programs that provide school vouchers,[501] tax deductions for expenses related to private school (including tuition),[502] and the extension of special health programs to students at private religious schools.[503] Lower courts have extended the principle to funding of religious halfway houses[504] and AmeriCorp Education Awards for teachers in religious schools.[505] The partnerships provide historical support for the constitutionality of such programs.

2. The Direct/Indirect and Religious/Secular Distinctions

Contemporary doctrine is murkier when the government provides money or educational materials (like books) *directly* to religious schools. The issue is whether the school uses the support for religious instruction. The

500 Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).
501 *Id.* at 652.
502 Mueller v. Allen, 463 U.S. 388, 403 (1983).
503 Witters v. Wash. Dep't. of Servs. for the Blind, 474 U.S. 481, 488–89 (1986).
504 Freedom from Religion Found. v. McCallum, 324 F.3d 880, 882 (7th Cir. 2003).
505 Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv., 399 F.3d 351, 355 (D.C. Cir. 2005).

Court has reasoned that when the government gives money or books directly to parents, who then use them at religious schools, any religious instruction is attributable to the parents.[506] But the same is not necessarily true, Justices O'Connor and Breyer maintained in a controlling opinion, when the government provides money and books directly to schools—even if it does so on a per capita basis.[507] Likewise, they argued, direct support has a higher risk that a reasonable observer would conclude that the government was endorsing religious instruction, raising another possible establishment concern.[508]

The Court has recently signaled a willingness to reconsider the bright line between direct and indirect aid. In *Trinity Lutheran*, the Court held that the Free Exercise Clause forbids a state from excluding a church from funding for a preschool playground simply because it is a church.[509] The decision effectively means that the Establishment Clause does not prohibit such funding. The Court insisted, however, that its holding applied only to funds for "playground resurfacing" and not to "religious uses of funding."[510] (Justice Breyer, without mentioning his prior reticence about direct funding, joined the opinion of the Court.)[511] So the current doctrine permits limited direct funding of religious schools, but only for purely "secular" purposes, and perhaps only for public goods related to the health and safety of students.[512]

The history of the government-missionary partnerships supports this doctrinal trajectory. The program involved direct funding on a per capita basis: the amount of funding was based on the number of students who voluntarily attended the schools. The history would thus support extending the *Zelman v. Simmons-Harris* doctrine to permit direct support so long as it is neutral and based on the free decisions of parents and students.

The most difficult aspect of the partnerships to translate into contemporary doctrine is due to the contemporary distinction between "religious" and "secular" "uses of funding."[513] Despite being anachronistic and conceptually problematic, the distinction between religious and secular purposes and effects has a long pedigree in Establishment Clause doctrine and the Court is unlikely to abandon it.

Nevertheless, the Court will eventually decide how strict the prohibition on "religious uses" of government support ought to be. The history of the government partnerships provides support for a standard that takes account

506 Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

507 Mitchell v. Helms, 530 U.S. 793, 842–43 (2000) (O'Connor, J., joined by Breyer, J., concurring in the judgment); *see also Witters*, 474 U.S. at 487–88.

508 *Mitchell*, 530 U.S. at 842–43 (O'Connor, J., joined by Breyer, J., concurring in the judgment).

509 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

510 *Id.* at 2024 n.3.

511 *See id.* at 2026–27 (Breyer, J., concurring in the judgment).

512 *See id.*; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947) ("[C]utting off church schools from" "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.").

513 *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

of the vagaries inherent in the conceptual distinction between secular and religious: the support is constitutional when its ultimate aim is the provision of a religiously neutral public good, a service that persons of any or no religion can recognize as valuable. For most white Americans through the nineteenth century, education was inseparable from a modicum of religious instruction. By contemporary lights, that is no longer the case—most American education is now nonreligious, and even religious schools must ordinarily comply with religiously neutral academic standards.

The partnerships therefore undermine the argument in the dissenting opinions in *Espinoza* and *Trinity Lutheran* that the Establishment Clause prohibits support for public goods provided by religious groups.[514] The history neither supports nor undermines the Court's ultimate conclusion in those cases that the Free Exercise Clause *requires* states to extend such funding to religious groups, but it does undermine resistance to that claim on the basis of Madison and Jefferson's objections to religious assessments.

3. Taxpayer Standing

The partnerships also call into question the Court's longstanding exception to ordinary standing doctrine for Establishment Clause claims. Ordinarily, being a taxpayer, alone, is insufficient for standing to challenge governmental expenditures.[515] Based in part on the history of religious assessments, however, the Court has long maintained an exception for challenges under the Establishment Clause.[516] Again, the state of the current doctrine is somewhat unclear because the Justices cannot agree on a standard, but there is significant support for at least a modest exception for those challenging legislatively determined expenditures.[517] The Court has held, though, that there is no standing to challenge a tax credit for private school expenditures because "[w]hen the government declines to impose a tax . . . there is no . . . connection between [the] dissenting taxpayer and alleged establishment."[518] Even a case narrowing the exception thus relies on the rationale that violating taxpayer conscience is a justiciable harm.

As the government-missionary partnerships narrow the scope of the objections to religious assessments, they likewise narrow the scope of the historical support for taxpayer standing under the Establishment Clause. The history certainly supports the notion that there is a constitutionally cognizable harm in forcing taxpayers to pay tithes, even to their own churches; but that history dissolves when applied to using general revenue to fund the provision of public services, even by religious organizations. There may be pru-

514 Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2284–86 (2020) (Breyer, J., dissenting); *Trinity Lutheran*, 137 S. Ct. at 2032–35 (Sotomayor, J., dissenting).

515 *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 480–89 (1923); *see also* Miller v. Cal. Comm'n on the Status of Women, 198 Cal. Rptr. 877 (1984), *appeal dismissed*, 469 U.S. 806 (1984).

516 Flast v. Cohen, 392 U.S. 83, 103–06 (1968).

517 *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 604–05 (2007).

518 Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 141–42 (2011).

dential reasons to conclude that taxpayers should have standing to challenge governmental support for religious instruction, but they are not rooted in nonestablishment norms of the early republic.

4. Funding Foreign Religious Education

Finally, the history in this Article also sheds light on a contemporary funding practice that has received far less attention from courts and scholars. The Department of State occasionally funds foreign programs designed "to promote a liberal and tolerant interpretation of Islam."[519] For instance, in 2004, the U.S. Embassy in Afghanistan funded a local reform magazine opposing illiberal interpretations of Islam, paid for twenty-five "mullahs" to travel to the United States to attend a program called "Democracy and Civil Society," and provided funds "for restoration of the Mullah Mahmood Mosque in Kabul."[520]

Officials undoubtedly believe such expenditures promote important secular goods such as democracy and security—for Afghanis and Americans alike. Indeed, the State Department expenditures share much in common with the nineteenth century partnerships. They target one group of non-U.S. citizens often considered to pose a national security threat for religious reeducation. Some may dismiss the program as a de minimis establishment violation[521] or a case of foreign affairs exceptionalism[522]—as some dismiss the nineteenth-century partnerships.[523] Yet the partnerships support the constitutionality of such programs.

Perhaps more importantly, the funding sheds light on the extent to which the United States, for all its pluralism and commitment to religious neutrality, continues to propagate a social imaginary of "civilization."[524] That social imaginary is more tolerant than it was in the nineteenth century, but it is no less confident in its righteousness, humanitarianism, and utility.[525]

CONCLUSION: OF POLITICS, EDUCATION, AND SOCIAL PROGRESS

This Article has unearthed a forgotten aspect of federal governance that bears directly on contemporary disputes about public policy and constitutional law. From the Founding through Reconstruction, the federal govern-

519 BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *International Religious Freedom Report 2004*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/j/drl/rls/irf/2004/35513.htm (last visited Oct. 29, 2020).

520 *Id.*

521 Mitchell v. Helms, 530 U.S. 793, 861 (2000) (O'Connor, J., concurring in the judgment).

522 Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018).

523 *See, e.g.*, DELORIA & WILKINS, *supra* note 18, at 97–107; DRAKEMAN, *supra* note 14, at 334–35.

524 *See, e.g.*, SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 40–48 (2011).

525 *See id.* at 192–98.

ment partnered with missionaries to educate Native American students to assimilate them into white American political culture. Despite many constitutional objections to religious assessments during the period, no one objected to the partnerships. The reason, this Article has argued, is that elite white Americans took it for granted that civilization entailed education, and education entailed instruction in Christianity. The practice sheds light on the historical development of nonestablishment norms and has important implications for constitutional doctrine today.

Yet perhaps what is most sobering about the federal-missionary partnerships is not the way in which they reflect white America's former chauvinism, which is hardly surprising, but the way in which they lay bare the cultural, political, and epistemological assumptions of any government-funded educational program. The partnerships were consistent with a broader movement to use elementary education to construct a distinctively American political culture. Although public education today must remain religiously neutral, it is doubtful that any public educational regime could remain neutral with respect to political norms. Put differently, all public schooling is a matter of civilizational construction; the questions are which civilization to construct, how best to construct it, and which cultural and social costs to tolerate.

These questions still lurk under the surface of American disputes about how to distribute public resources to promote one or another kind of schooling. The details have changed, but public education's role as a battleground for cultural and political self-definition, and as a mechanism for social control, has not. As William Faulkner wrote, "[t]he past is never dead. It's not even past."[526]

526 WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (2011) (1951).