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Public Law, Private School: Choice, the Constitution, and Some Emerging Issues

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Public Law, Private School: Choice, the Constitution, and Some Emerging Issues

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I. Apple Pie, the Flag — and Choice

Choice. The word has made its way into the dialogue surrounding some of the most volatile issues confronting contemporary America. For some time now, the word has played a central role in our intense national debate over reproductive freedoms. Proponents on one side of the issue have dubbed themselves, and encouraged others to dub them, "pro-choice." They have dubbed their adversaries, and encouraged others to dub them, "anti-choice." Such strategic characterizations no doubt stem from intuitions about the rhetorical power of the choice ideal. Not surprisingly, opponents of abortion have come to grasp the rhetorical dangers of the characterization slapped upon them, understanding that, in America at least, being viewed as an opponent of choice — regardless of what the choice represents — can prove a public relations nightmare. Thus, they wisely insist that their position be characterized as "pro-life" or "anti-abortion" rather than "anti-choice."[1] After all,

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In the interests of full disclosure, the reader should be aware that my scholarly interest in Choice was kindled by my involvement in the litigation over the Milwaukee Parental Choice Program. That involvement consisted of serving of counsel to Friebert, Finerty & St. John, S.C., the Milwaukee law firm representing a variety of individuals and groups who challenged the Program on state law grounds. That litigation has now run its course. Accordingly, and as will become clear, the views expressed in this article are entirely and in every respect my own, and should not be attributed to Marquette University, Friebert, Finerty & St. John, or any other individual or institution.

1. Other commentators have noted the word's use (and misuse) in non-educational contexts as well. *See* Alex Beam, *I'm Not Pro-Choice,* BOSTON GLOBE, March 6, 1991 at 27 ("In the second half of the 20th century, no word has suffered greater indignity than 'choice.' ") and MYRON LIEBERMAN, PRIVATIZATION AND EDUCATIONAL CHOICE 234 (1989) ("Opponents of abortion characterize their position as 'anti-abortion' significantly, not 'anti-choice.' "). The many uses of the word "choice" in contemporary America bring to mind George Orwell's insight: "Political language . . . is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind." George Orwell, *Politics and the English Language, in* A COLLECTION OF ESSAYS 156, 171 (1946).

choice — like apple pie and the flag — is an ideal citizens dare not oppose.[2]

In recent years, the word has begun to assume another legal, political, and cultural connotation, one associated with education rather than reproduction. In the education context, Choice has evolved into a word that means something very different to different people, something very different in different states and localities.[3] For some, Choice means that they are free to choose whether their children go to public school or private school, or receive their education at home.[4] For others, Choice means that they have a substantial influence on which public schools their children attend by choosing where to live.[5] In East Harlem, Choice means that students leaving the sixth grade can choose from a smorgasbord of two dozen junior high schools within the district, with specialties ranging from maritime skills to health services to the performing arts.[6] In Minnesota, Choice means that parents can send their children to any public elementary or secondary school in the state, regardless of whether the school is located in the district in which the family lives.[7] In Epsom, New Hampshire, Choice means that parents who send their children to a high school other than the regional public high school receive a property tax

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2. *See* Stanley M. Elam, *The 22nd Annual Gallup Poll of the Public's Attitudes Toward the Public Schools,* 72 PHI DELTA KAPPAN 41, 43 (1990) ("It seems clear . . . that the idea of public school choice is attractive, much as motherhood, freedom, and apple pie are attractive.").

3. For a brief yet useful portrait of various types of Choice plans, see John F. Witte, *Choice in American Education,* LA FOLLETTE ISSUES 4 (1990). *See also* LIEBERMAN, *supra* note 1, at 3-13.

4. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), a unanimous Supreme Court invalidated on due process grounds an Oregon law requiring children to attend public schools. Since *Pierce* all parents have had the choice — at least in theory — of sending their children to public school or private school. The Court reaffirmed its holding in Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972).

5. Traditionally, parents have exercised one form of Choice by deciding where to live. In general, however, most discussions of Choice acknowledge this fact but proceed to treat Choice as a panoply of *goverment-sponsored* plans to increase the parental voice in education. As John Witte explains:

> I will not discuss the individual school choice that occurs through the selection of residence, even though those choices are very relevant to the policy debate. Recent studies have demonstrated the importance of education and educational quality in choosing a place to live. In addition, research has shown that choice options are highly stratified by family socioeconomic status. Put bluntly, the poor exercise limited residential choice and are often struck with failed neighborhood schools.

Witte, *supra* note 3, at 4.

6. The East Harlem experience has received widespread coverage. *See, e.g.,* JOHN CHUBB & TERRY MOE, POLITICS MARKETS & AMERICA'S SCHOOLS 212-15 (1990); Ron Brandt, *On Public Schools of Choice: A Conversation with Seymour Fliegel,* 48 EDUC. LEADERSHIP 20-25 (Dec. 1990/Jan. 1991); Susan Chira, *When Schools Compete — A Special Report,* N.Y. TIMES, June 12, 1991, at A1; Connie Leslie, *Giving Parents a Choice,* NEWSWEEK, Sept. 19, 1988, at 77.

7. The Minnesota plan has been dubbed "potentially the most radical exercise of public-sector education choice in history." Witte, *supra* note 3, at 8. To date, however, it remains unclear whether significant numbers of Minnesota families will in fact exercise the unusual option offered them.

rebate of up to one thousand dollars per child.[8] In Milwaukee, Choice means that some poor families can send their children to private elementary and secondary schools free of charge, because the government will foot the bill.[9] As one commentator observed, Choice has become "the new buzzword," invoked whenever and wherever educational issues are discussed.[10]

Given these different images that Choice evokes in the educational context, the glib invocation of the word does little to advance the analytic ball. With such a variety of educational experiences lurking beneath the same semantic umbrella, the word often confuses as it seeks to clarify, obscures as it tries to illuminate.[11] A recent article in one of the nation's most influential newspapers illustrates this point. The headline informs readers that "62% of Americans Support School Choice, Poll Finds."[12] Yet the body of the article suggests something very different. Reporting the results of an annual survey concerning attitudes about the public schools, the article notes that, indeed, 62% of those surveyed support the notion that parents and students should be able to choose the *public* schools in their communities that the students will attend.[13] Different results emerged however, when those surveyed were asked about two other varieties of Choice: (1) a classic voucher system in which the government would set aside a limited amount of money for each student, to be redeemed at any public or private school, and (2) a plan in which the government subsidizes the entire cost of private education for any student who wants it.[14] In short, the survey's respondents support one variety of

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8. For a discussion of the Epsom idea, see Fox Butterfield, *Tax Rebate in New Hampshire Town Poses a Test for School-Choice Issue,* N.Y. TIMES, Jan. 30, 1991, at B6.

9. Enacted in 1990, the Milwaukee Parental Choice Program, WIS. STAT. ANN. § 119.23 (1990), provides that up to one percent of the students enrolled in the Milwaukee Public Schools may attend, free of charge to their families, private, non-sectarian schools within the city of Milwaukee. The state foots the bill by passing along to the private schools the per pupil equalization aid that otherwise would have flowed to the public schools.

10. *Theme: A+, Details: D−,* NEWSDAY, Apr. 28, 1991, at 33.

11. As two of Choice's most articulate advocates put it:

> [C]hoice means many different things to its supporters. They all claim to favor choice, but when it comes down to the specifics of actual choice plans, their superficial consensus breaks down. To the extent the movement for choice can be called a movement at all, it is an extremely fragmented and conceptually shallow one.

CHUBB & MOE, *supra* note 6, at 207. Other observers have made similar points. *See, e.g.,* LIEBERMAN, *supra* note 1, at 236; Witte, *supra* note 3, at 4 ("The term 'education choice' is variously employed to include a range of plans and policies. Experts and commentators do not fully agree on what falls within this rubric . . . .").

12. *62% of Americans Support School Choice, Poll Finds,* N.Y. TIMES, Aug. 23, 1991, at D18.

13. *Id.*

14. *Id.*

Choice, known as "public school choice," while exhibiting less enthusiasm for others. Myron Lieberman's observation, made in a related context, is therefore instructive:

> [C]hoice per se is hardly more than a slogan. To understand its actual consequences, we must consider what the choices are, who can choose, the conditions and limitations of choice, and the effects of choice on other parties, including the nonchoosers.[15]

II. Particularizing the Ideal

As suggested above, the Choice ideal conjures up dramatically different educational realities around the nation. Productive discussion of Choice thus requires careful definition of terms. Today, in the education context, Choice is a shorthand way of referring to governmental plans and policies that purport to give parents an increased voice in determining where their children will attend elementary and secondary school.[16] Within this category of plans and policies now referred to as Choice, the most important distinction is between plans that provide increased opportunities for students *within preexisting public schools* (such as the Minnesota and East Harlem plans noted above) and plans that provide opportunities for students to move, at government expense, *into otherwise private schools* (such as the Milwaukee plan).[17]

Choice plans that rely on public schools have sprung up in almost infinite number and variety. Minnesota allows parents to send their children to any public elementary or secondary school in the state, irrespective of district lines. The Minnesota plan, aptly labeled "open enrollment" or "statewide" choice, represents the ultimate in interdistrict public school choice, permitting students to select schools outside their residence districts.[18] By contrast, since 1973 East Harlem has permitted students to

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15. LIEBERMAN, *supra* note 1, at 236.

16. Witte, *supra* note 3, at 4 ("What are the common elements of choice proposals? The common programmatic element is that parents have a greater degree of choice in the selection of schools for their children.").

17. In the context of Choice, the public/private distinction merits a comment. An important dimension of the rhetorical game played by lawyers, judges, and other participants in the legal conversation regarding Choice centers on the words "public" and "private." The Wisconsin experience drove the point home. At every stage in the legal and political battle surrounding Wisconsin Choice, advocates and decisionmakers wrestled with the question of whether the schools participating in Wisconsin Choice were "public" or "private." The participants in the Wisconsin conversation assumed that important consequences flowed from the selection of one or the other of these adjectives. The terms used in the text — "preexisting public schools" and "otherwise private schools" — capture the legal status of the respective sets of schools with greater accuracy than does much of the loose talk floating around briefs and judicial decisions.

18. *See* note 7, *supra*.

select from a variety of specialized public schools within one district. The East Harlem plan is a prominent example of intradistrict choice, requiring students to stay within their districts of residence.[19] In addition, as mentioned above, the number and variety of other public school Choice plans is breathtaking.

This is not the case for Choice plans that incorporate otherwise private schools. In 1990, when Wisconsin enacted a bill to pay the costs of sending up to approximately one thousand poor Milwaukee students to private schools, that plan was in many respects the first of its kind. The widespread national attention heaped upon the Wisconsin program has served as a reminder of the distinctive nature of the program.

For many of Choice's most enthusiastic advocates, restricting Choice to preexisting public schools will do little to alleviate America's educational problems.[20] For them, it is the institutions of public education that are themselves the source of the problem. These Choiceniks have made a powerful case that many of the policy reforms trumpeted by the public education establishment as panaceas — tougher graduation requirements and more rigorous curricula for students, better pay and more stringent certification requirements for teachers, etc. — will make little difference over the long haul. To Choice proponents, these reforms fail to address the root of the problem: the organizations of public education, the institutions themselves, are structured in a manner that is inconsistent with what organizational theorists have dubbed "effective schooling." One pro-Choice manifesto has expressed that belief in the following syllogism:

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19. *See* note 6, *supra.*

20. As John Coons and Stephen Sugarman have observed:

> There are a number of reasons for including private providers in the program, and surely the idea is worth an experimental try. Private schools are the only potential source of religious education and may be the major hope for offbeat education in general. In a choice plan including both private and public schools, it is probably inevitable that the former will be less constrained legally and politically.
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> Moreover, the economic survival of private schools requires a sensitivity to family demand that a public institution finds hard to muster so long as it is protected from private competition. . . . The inclusion of private schools would also fulfill the need for a margin of extra space.

JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 153 (1978). *See also* CHUBB & MOE, *supra* note 6, at 219 (sketching their ideal system and observing that "[e]xisting private schools will be among those eligible to participate. Their participation should be encouraged, since they constitute a ready supply of often-effective schools."); LIEBERMAN, *supra* note 1, at 236 ("[E]xpanding choices within public schools does not appear to be a promising route to educational reform"). As noted above, Milton Friedman has taken the argument one step further, arguing that elementary and secondary education should be provided exclusively by private institutions, with the public sector footing the costs. *See, e.g.*, MILTON & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT (1981); Milton Friedman, *The Role of Government in Education, in* ECONOMICS AND THE PUBLIC INTEREST 123-44 (Robert Solo ed., 1955); Milton Friedman, *The Voucher Idea,* N.Y. TIMES, Sept. 23, 1973, Sec. 6 at 22.

> One, schools do indeed perform better to the extent that they possess the effective school syndrome of organizational characteristics — to the extent, in other words, that they have such general qualities as clear goals, an ambitious academic program, strong educational leadership, and high levels of teacher professionalism.
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> Two, the most important prerequisite for the emergence of effective school characteristics is school autonomy, especially from external bureaucratic influence.
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> Three, America's existing system of public education inhibits the emergence of effective organizations. This occurs, most fundamentally, because its institutions of democratic control function naturally to limit and undermine school autonomy.[21]

For many, the conclusion that flows from this syllogism is clear: in order for the system to improve, much more than incremental tinkering must be done; the institutions of public education must be forced to undergo dramatic change. The principal element of this change is to make the organizations of public education responsive to market forces — competition — in a way that, up to now, they have not been. The authors of a widely influential pro-Choice work express their vision in these remarkable terms:

> Our guiding principle in the design of a choice system is this: public authority must be put to use in creating a system that is almost entirely beyond the reach of public authority.[22]

To these proponents, a Choice plan that forecloses the option of attending previously private schools (or schools structured like them) at government expense has essentially been misnamed. It does not provide families the "choice" essential to maximizing the plan's prospects for success.[23]

Thus, despite the semantic gymnastics engaged in by many who are active in the educational arena, the core of today's pro-Choice agenda is that (1) government funds be used to pay for education (2) in schools that include what we currently refer to as private schools (3) of students including those who, absent such funds, would in all likelihood receive their elementary and secondary education in the public schools. It is this working definition of Choice that will guide us the rest of the way.

III. Why Now?

The intellectual roots of Choice can be traced back a long way.[24] As scholars of educational history have observed, Adam Smith urged that

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21. CHUBB & MOE, *supra* note 6, at 23.
22. CHUBB & MOE, *supra* note 6, at 218.
23. *See, e.g.*, COONS & SUGARMAN, *supra* note 20, at 153.
24. This paragraph borrows heavily from COONS & SUGARMAN, *supra* note 20, at 18-22.

government provide funds for parents to purchase educational services for their children in the open market, engendering competition and responsiveness.[25] Tom Paine refined Smith's argument on this side of the Atlantic, suggesting that the government expand the educational opportunities available to less affluent families through what contemporary scholars have called "a negative income tax scaled progressively in favor of the poor."[26] John Stuart Mill elaborated on Paine's idea, contending that parents be legally required to provide an adequate education for their children but, when they could not, that government be required to pick up what the parents could not afford.[27] Milton Friedman brought the Choice idea into the late twentieth century, arguing that government should stop providing education and, instead, begin providing funds that would enable all parents to choose where their children would receive an education.[28]

The intellectual firepower of Choice's ancestors is impressive. But the wave of Choice fervor sweeping through America in the late twentieth century has only a little to do with an intellectual renaissance. That fervor stems, rather, from a timely confluence of developments — cultural, economic, and political — each of which has helped move different but overlapping constituencies behind the Choice banner. Among these developments are: (1) widespread concern about the quality of elementary and secondary public education; (2) diminished confidence in the effectiveness of government and, hand in hand, increased faith in the comparative ability of private institutions; (3) growing apprehension of international threats to American economic superiority, from Japan and elsewhere; (4) persistent pressure to ease tax burdens, especially those on the middle class; and (5) resentment on the part of parents who want to provide their children education delivered through religious institutions that opting for such an alternative forfeits economic benefits accruing to families using public education. A brief discussion of these five developments, seen through the eyes of those Americans who share the particular concerns, will illustrate the point.

Concern 1: Public Education Is Failing

The first and most important development fueling the Choice movement is the widespread national concern that the public schools are doing

25. ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan ed., Modern Library 1937) (1776).

26. THOMAS PAINE, THE RIGHTS OF MAN (Everyman's Library 1966) (1791).

27. JOHN STUART MILL, ON LIBERTY (Stefan Collini ed., Cambridge University Press 1989) (1859).

28. For some of Friedman's many works that contain his thoughts on the role of government in education, see *supra* note 20.

a poor job.[29] To many, declining scores on the Scholastic Aptitude Test from the mid-sixties to the early eighties served as a convenient manifestation of that poor job.[30] More recently, the Gallup Poll's annual survey of attitudes toward the public schools reveals that more than half of those surveyed (51%) assigned grades of C, D or "Fail" to their local public schools, and even a greater percentage (69%) assigned those grades to the public schools around the nation.[31] Not surprisingly, such views lead many to believe that the nation's public schools do not deserve their quasi-monopoly on government funds for education.

Concern 2: Private Institutions Can Do It Better

A majority of Americans, as noted above, believe that public educators — both in their community and around the nation — are doing a poor job. These sentiments go hand in hand with two other views that have become increasingly popular: that government does a poor job at many activities and services and, correspondingly, that the private sector can do it better. Privatization — the transfer to the private sector of activities and services previously undertaken or supplied by government — has become a watchword of the eighties and nineties. In the educational context, Choice represents another chapter in the book of privatization. The allure of privatization thus adds considerable fuel to the move toward Choice.[32]

Concern 3: America's Continued Success in the International Economy Depends on Improving the Quality of Education Its Children Receive

Like many other public policy issues, national concern about education ebbs and flows in a cyclical pattern. The issue moves center stage for a brief moment and then fades, only to return sometime later. Two scholars of Choice have suggested that the Choice movement of the eighties and nineties can be understood as the product of the most intensely focused national attention on education since the post-Sputnik panic of the late

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29. Chubb and Moe put it well: "[T]he stinging criticisms and widespread unrest that began in the 1980s have generally been oriented by a distinctive, more narrowly focused theme: that the academic quality of the public schools is unnecessarily low." CHUBB & MOE, *supra* note 6, at 6.

30. *Id.* at 7-8.

31. Elam, *supra* note 2, at 51. Curiously enough, however, parents consistently give higher grades to the public schools their children attend than to other public schools, either locally or nationally. *Id.* at 51. Of the respondents who assigned such low grades to public schools in general, seventy-two percent gave the public school attended by their oldest child an A or B. *Id.*

32. Indeed, much of the scholarly literature crafted by Choice advocates — including CHUBB & MOE, *supra* note 6, and LIEBERMAN, *supra* note 1 — explicitly adopts the premise that, for one reason or another, private institutions are able to educate young Americans more effectively than can public institutions.

fifties and early sixties.[33] At that time, the space race triggered national paranoia about broader issues of technological progress and national security. More recently, the oil embargo and a decline in American competitiveness in international markets has produced similar fears. In each case, intense national soul-searching quickly led to an indictment of the educational system.

Concern 4: Choice Will Save Taxpayer Dollars

Only an ostrich can be unaware of the American public's shrill clamor for tax relief. Proposition 13, California's renowned 1978 initiative, led to a host of citizen and government sponsored efforts to reduce taxes. Closely connected with the three previous concerns, therefore, is a fourth, related to the tax burdens imposed on Americans, particularly middle class Americans. Those who seek to reduce the tax burden through Choice have argued that each student who enrolls in public school brings with her a set amount of government funds collected from a combination of federal, state, and local taxes. Throughout the nation's public schools, per pupil expenditures average approximately five thousand dollars.[34] Suppose, the argument runs, that a government subsidy to every student in an amount of three thousand dollars would induce large numbers of parents to move their children from public to private school. Such a subsidy would save taxpayers two thousand dollars for each student who moves to private school. As a result, less tax revenue would be directed to public education, and the tax burden would be eased.[35]

Concern 5: The Current System Unfairly Punishes Families Who Choose to Educate Their Children in Religious Schools

Every state has a compulsory education requirement. For a variety of reasons, many parents want their children to receive their elementary or

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33. CHUBB & MOE, *supra* note 6, at 6-8.

34. NATIONAL CTR. FOR EDUC. STATISTICS, 1 THE CONDITION OF EDUCATION 88 (1991).

35. Sketching this argument does not mean to suggest that it is analytically sound. In fact, the argument has serious flaws. One is that its proponents conveniently neglect to mention that a full-scale Choice program, by including more students than those currently attending public school, could end up costing taxpayers more than education currently costs. Another is the persistent refusal by its advocates to acknowledge the difference between fixed costs and marginal costs. As Myron Lieberman notes, with more than a little understatement, "comparisons of public to private school efficiency are characterized by intense controversy over the facts and their policy implications." LIEBERMAN, *supra* note 1, at 221.

This article says only that one justification advanced by Choice advocates is that it will reduce the costs of government and, accordingly, taxpayers' contributions to those costs. For this reason, the National Taxpayers Union, an organization devoted to reducing the costs of government, has endorsed Choice in general and certain Choice plans in particular. *Id.* at 365 n.28.

secondary education in schools affiliated with religious institutions. Some parents believe the teachers are superior. Some believe the curriculum is richer. Some believe their children will receive more individualized attention. Some believe the education imposes a discipline and rigor lacking in the public schools. Some believe the friends their children will make there will be less prone to engage in drugs, crime, premarital sex, and other undesirable conduct. Some believe that the absence of God in public education will weaken their children's religious identities. Some believe their families will have a greater voice in steering the school's future course.

Whatever the reasons, satisfying the compulsory education requirement through religious-affiliated schools currently poses a range of problems. First, many families who might opt for the religious alternative simply cannot afford to do so. Such families often end up sending their children to public schools that, in their opinion, are inadequate for their needs. Second, those who manage to afford the religious alternative are often forced to shell out substantial monies for that education, over and above the taxes they pay to support other people's children in the public school. Such a system, they claim, is simply unfair.[36]

Taken to its limit, Choice offers hope to those who believe the American system of education has unfairly punished families who want their children educated in religiously-affiliated schools. For such families, political and constitutional obstacles continue to loom large. Thanks to Chief Justice Rehnquist's stewardship and some recent personnel changes, however, the Supreme Court is busy making the constitutional obstacles smaller each day. In addition, although substantial political obstacles do remain, two successive national administrations have directed their energies toward weakening those obstacles.

In recent years, therefore, at least five overlapping constituencies have emerged, expressing at least five different justifications for their pro-Choice sentiments. Public education has failed America. The private sector can do the job more effectively. The international marketplace demands that our students do better than they have been doing. Taxes are too high. The current educational system discriminates against religion, and that's just not fair.

The increasing appeal of Choice can be attributed in some measure to the increasing numbers of Americans who find themselves in agreement with one or more of these propositions. But there is at least one additional

36. For one variation of this argument, see Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling,* 15 HARV. C.R.-C.L. L. REV. (1980).

element in the mix, one often neglected by education scholars: used wisely, Choice can be a wonderful issue for elected officials and those who aspire to be elected officials.[37]

First, Choice offers political leaders the opportunity to talk about an issue that virtually all Americans care about — education. Choice enables political leaders to do this in a distinctively American way: by appealing to the virtue of competition. Given the importance of education, the pro-Choice politician says, we ought to let public schools and private schools compete for students on the open market. Whatever school earns your family's business deserves the governmental funds that go along with that business.

Second, Choice offers elected officials the opportunity to expand their electoral bases, to hook up with new constituencies while protecting long-standing ones. Politicians of the right now have an opportunity to win the votes of racial minorities, the urban poor, and others looking to escape the problems of public education while, at the same time, bolstering their support among the more affluent who already send their children to private schools. Politicians of the left now have an issue that appeals both to the have-not inner city folks who dream of giving their children decent educations and the middle-class suburbanites who would prefer to send their children to private school with the state footing the bill. Used properly, Choice can be a politician's dream.

Third, Choice carries with it a preassembled villain, a perfect dumping ground for blame and well-rehearsed hostility. No, the villain is not communism, the criminal element, or even Saddam Hussein, but a villain almost as useful to the politician: teachers unions and the other forces of public education. For good reason, these forces of public education represent the most committed and best financed opponents of Choice initiatives. Pro-Choice politicians worth their salt have learned that blaming the educational establishment for the troubles of public education and directing constituent anger at teachers unions and their representatives can prove effective, at least in the short run.[38]

Beyond Choice's distinctive political appeal is the fact that the two most recent occupants of the Oval Office have lent their support to the cause. The Reagan administration twice introduced Choice initiatives designed to

37. *See* Peter K. Rofes, *Two Classes of Students: Choice and the Constitution*, 19 EDUC. CONSIDERATIONS 46, 49 (1991).

38. A good example of this phenomenon is Wisconsin state legislator Annette (Polly) Williams, recently characterized as "the political godmother" of Wisconsin Choice. *See* Paul Taylor, *Milwaukee's Controversial Private School Choice Plan Off to Shaky Start*, WASH. POST, May 25, 1991, at A3.

benefit the children of poor families.[39] Each effort was strangled by a hostile Congress. George Bush, the self-proclaimed "education president," has likewise tried to place the federal government's imprimatur on Choice. In December 1990, the Bush administration's Department of Education instituted the Center for Choice in Education, making clear that Choice was an important political priority. The central aspect of the Bush administration's educational agenda has been to increase the opportunities of American families to send their children to private schools, including private religious schools. As in prior administrations, however, a Congress controlled by the opposition party (a party that enjoys strong support from the forces of public education) has thwarted these efforts. In January 1992, for instance, the Senate rejected a Bush administration Choice proposal that would have targeted federal funds to poor families in six regions throughout the nation. The proposal would have allowed the families to send their children to private schools, including private religious schools.[40] Despite this setback, the Bush administration continues to demonstrate its enthusiasm for Choice in other ways, issuing ringing endorsements of state-sponsored Choice efforts such as Wisconsin Choice.

IV. Enter the Constitution

Within our federal system, education — especially elementary and secondary education — is governed principally by the institutions of state government. Over the years, however, the role of the national government in educational matters has grown considerably, as it has in so many other areas.

One way that national authority is brought to bear on state educational institutions is through the enforcement of the Constitution of the United States. Today, no activity taking place in the public school is free of the Constitution's strictures. When students wear armbands to school as a way of protesting their nation's activities abroad and then refuse their principal's request to remove them, the Constitution is implicated.[41]

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39. For a discussion of the Reagan Administration's efforts, *see* LIEBERMAN, *supra* note 1, at 247-48, 367 n.10; Bruce S. Cooper, *The Uncertain Future of National Education Policy: Private Schools and the Federal Role, in* THE POLITICS OF EXCELLENCE AND CHOICE IN EDUCATION (William L. Boyd & Charles T. Kerchner eds., 1988); Wayne Riddle, *Vouchers for the Education of Disadvantaged Children: Analysis of the Reagan Administration Proposal,* 12 J. EDUC. FIN. 9-35 (Summer 1986).

40. *See* Clifford Krauss, *Senate Rejects Bush Plan to Aid the Poor Who Use Private Schools,* N.Y. TIMES, Jan. 24, 1992, at A9.

41. *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (invalidating discipline imposed on public school students for wearing black armbands to protest Vietnam War absent showing that expression disrupted school operations).

When students are compelled to hand over their purses to an assistant principal patrolling their lavatory, the Constitution is implicated.[42] When a teacher informs students that they are to stand for a moment of silence to be devoted to meditation or prayer, the Constitution is implicated.[43] When a student is suspended, the Constitution is implicated.[44]

In each of the circumstances set forth above, the Constitution is implicated because the public school is just that — a *public* school. The authorities responsible for students in such a school are government employees acting in their capacity as government employees. Because the individual rights provisions of the Constitution exist first and foremost as limits on government,[45] these constitutional constraints are triggered in the public schools.

By contrast, the role played by the Constitution in Choice programs that include otherwise private schools remains a source of much dispute and speculation. The Wisconsin experience provides an opportunity to probe the dispute and assess the speculation.

V. Choice in Practice: The Milwaukee Parental Choice Program

In 1990, Wisconsin moved into the vortex of the nation's educational debate by enacting into law the much ballyhooed Milwaukee Parental Choice Program (hereafter "Wisconsin Choice" or "the Program").[46] Wisconsin Choice enables a limited number of poor Milwaukee families to send their children to private nonsectarian elementary and secondary schools located within the city, with the state footing the bill.[47]

Within a few weeks of its enactment, the Program became embroiled in litigation in the Wisconsin state courts. The litigation, the first round of which has run its course, concerned narrow issues of state constitutional law rather than issues generally applicable to Choice and the Constitution.[48]

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42. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (requiring public school to demonstrate that its searches and seizures of students satisfy reasonableness standard).

43. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating Alabama statute providing period of silence in all public school "for meditation or voluntary prayer").

44. *See* Goss v. Lopez, 419 U.S. 565 (1975) (requiring public schools to afford notice and hearing to students facing disciplinary suspensions).

45. The Civil Rights Cases, 109 U.S. 3 (1883).

46. WIS. STAT. ANN. § 119.23 (1990).

47. *Id.*

48. The litigation began in May 1990, when opponents of Wisconsin Choice petitioned the Wisconsin Supreme Court to accept the case under its powers of original jurisdiction. Petitioners claimed that Wisconsin Choice, and the process by which it has been enacted, violated the Wisconsin Constitution in three discrete ways. First, petitioners contended that the Legislature violated Article IV, Section 18 by including Wisconsin Choice as part of the multisubject budget bill rather than as a

Nevertheless, Wisconsin Choice and some of the early commentary about it provides a useful starting point for three important constitutional questions. First, what role does federal constitutional protections play in the private schools that participate in a Choice plan? Second, is a Choice program that includes nonsectarian private schools but excludes religious private schools inconsistent with equal protection principles? Finally, is a Choice program that limits participation to a small class of poor families violative of the equal protection rights of excluded families?

A. The Constitution in Schools of Choice: The Wisconsin Solution and a New Range of Problems

Following the Program's enactment in April, 1990, the Superintendent of Public Instruction promulgated a form to be filed by any school seeking to participate in order to satisfy the statutory requirements.[49] The form set forth requirements that each participating school promised to satisfy in order to accept students and receive state monies under the Program. Some of the requirements (concerning, for instance, health and safety laws and Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race) merely repeated the statutory conditions for school eligibility.[50] Others, however (including the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in educational

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separate, freestanding piece of legislation. Second, petitioners argued that Wisconsin Choice violated Article X, Section 3 by creating government-financed elementary and secondary schools that were not required to satisfy the character of instruction requirements mandated by the Legislature for other government-financed elementary and secondary schools throughout the state. Third, petitioners claimed that Wisconsin Choice violated the public purpose doctrine by diverting public funds to what they deemed essentially unregulated private schools. Needing four votes to have the court hear the case as an original matter, petitioners received three. Chaney v. Grover, No. 90-1200-OA (June 26, 1990).

Shortly after the Wisconsin Supreme Court refused to hear the case as an original matter, private schools seeking to participate in the program instituted an action in state circuit court. The schools sought to prevent the Superintendent of Public Instruction from imposing conditions on their participation in the program that the Legislature had not imposed. *See infra* text accompanying notes 50-53. Petitioners in the original action intervened in the circuit court, raising the state constitutional issues noted above. The circuit court rejected each of the intervenors' state constitutional challenges and limited to some extent the Superintendent's effort to impose additional requirements on participating schools. Davis v. Grover, No. 90-CV-2576 (Aug. 6, 1990).

On appeal, a unanimous court of appeals reversed, holding that the Legislature violated Article IV, Section 18 by enacting Wisconsin Choice as part of the multisubject budget adjustment bill. Davis v. Grover, 464 N.W.2d 220 (Wis. Ct. App. 1990).

Finally, in February 1992, a sharply divided Wisconsin Supreme Court reversed, upholding Wisconsin Choice in all respects. Davis v. Grover, 166 Wis. 2d 501 (1992).

49. The Form is officially titled "Notice of School's Intent to Participate."

50. *Id.* at 2.

programs, and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of handicap), went beyond the express legislative mandates.[51] With respect to these latter strictures, the form indicated that the Superintendent was imposing them because students in the Milwaukee Public Schools had such "rights" and when students left a public school to enter a Choice school the "rights" accompanied them into these private schools.[52] The Program's supporters claimed that the Superintendent, a vocal opponent of Choice, was trying to regulate the Program to an early grave; its opponents countered by defending the requirements as a way to ensure that participating schools could be held accountable for their use of public funds.

One set of "rights" that the form indicated remained with Choice students even after they left the Milwaukee Public Schools was described as follows:

> All federal and state constitutional guarantees protecting the rights and liberties of individuals including freedom of religion, expression, association, against unreasonable search and seizure, equal protection, and due process.[53]

This statement was dramatic evidence that the Department of Public Instruction considered the legal status of Choice students to be the same as the legal status of students remaining in the Milwaukee Public Schools. To the Department, Choice students remained public school students, legally equivalent to the thousands of students staying behind in the Milwaukee Public Schools. To the Department, therefore, Choice students — like other public school students — remained entitled to all the guarantees that traditionally operated against the government. The problem with the Department's position was that Choice students, unlike students remaining in the Milwaukee Public Schools, were not attending schools run by the government.

To no one's surprise, the form's promulgation triggered a firestorm of protest. Six schools seeking to enter the Program refused to complete the form.[54] They chose instead to notify the Superintendent in writing of their

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51. *Id.* at 3.

52. Part II of the The Form begins with the following reminder to schools seeking to participate:

> This section identifies some of the rights that Milwaukee Public School students currently have. These rights continue to belong to these students when they enter this program. Please realize that the possibility exists that students have other rights that are not listed here. The administrator's signature at the end of this section means that the school will ensure the rights of students that are listed and/or rights that are determined to be student rights.

Id. at 3.

53. Form, *supra* note 49, at 3.

54. In its opinion, the circuit court notes these facts. Davis v. Grover, No. 90-CV-2576, slip op. at 5.

intent to participate.[55] When the Superintendent refused to certify them as participants in the Program for failure to complete the form, they brought suit in the circuit court, claiming that the Superintendent had exceeded his authority.[56] The court ultimately consolidated that suit with one brought by opponents of the Program, placing all the legal issues in one forum for resolution.[57]

On the issue of whether Choice students retained in their new Choice schools the federal and state constitutional rights they had in the Milwaukee Public Schools, the circuit court answered with a definitive "yes."[58] A good deal less definitive was the court's justification for that conclusion. The court opined that because Wisconsin Choice was a "public school program" — a term it did not pause to explain — it was appropriate to require participating schools to honor the constitutional rights of students in that program.[59] Put another way, the court seemed to conclude that, with respect to the Choice students (but not the more traditional "private" school students) in their midst, the once private Choice schools had been transformed into public schools, therefore subject to constitutional limits that ordinarily attach only to public institutions.

The peculiar anomalies created by the Superintendent's efforts to impose constitutional constraints on schools participating in Wisconsin Choice are explored in a previously published article.[60] These anomalies all stem from the fact that, after the court's decision, each school participating in Wisconsin Choice was obligated to observe federal and state constitutional limits vis-a-vis some of its students — those matriculating through Wisconsin Choice — but not others — the traditional private school students whose parents pay tuition. This in turn gives rise to at least three problems. First, the constitutional protections supposedly accruing to Choice students as a result of the court's decision are likely to be trivialized (or ignored entirely) in an educational context in which they are owed to the few and not the many. A school that is free to expel most of its

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55. *Id.*

56. *See* discussion *supra,* note 48.

57. *Id.*

58. Davis v. Grover, No. 90-CV-2576, slip op. at 21-22. As the circuit court put it,

> I also agree that it is appropriate to require participating schools to comply with . . . [the] . . . individual rights and liberties guaranteed by state and federal constitutional provisions. However, in these and other areas of regulation, the manner in which compliance is secured or assured is germane. If the superintendent requires guarantees of these participating schools in the same manner as he requires it of public schools and other public school programs or activities, it is unobjectionable. What he may not do is make those burdens more onerous for this Program than for others.

59. The circuit court observed that ". . . the Parental Choice Law is a public school program." *Id.* at 21.

60. Rofes, *supra* note 37.

students without affording them traditional due process protections may come to believe that it can dispense with those protections when it seeks to expel Choice students as well. Second, the Choice school that faithfully seeks to live up to the court's decree is likely to engender confusion and resentment among non-Choice students and their parents, ultimately redounding to the disadvantage of Choice students themselves. Non-Choice students and their parents might begin to wonder why Choice students receive more favorable treatment from teachers and administrators. Finally, the court's conclusion fails to take account of the fact that, especially in the school environment, constitutional freedoms are as much group freedoms as individual freedoms. The freedom of a student journalist not to have her article censored unreasonably by administrators means little if her peers on the masthead do not have the same freedom. In sum, requiring teachers and administrators to honor constitutional freedoms for some students but not others may seem like a workable solution from judicial chambers. But from a classroom or a principal's office the solution spells trouble.

Above and beyond the administrative and pedagogic problems created by the circuit court's conclusion is the fact that the conclusion itself rests on a premise that cannot withstand scrutiny. In effect, the circuit court concluded that the Superintendent had the power to impose constitutional requirements on private schools seeking to participate in Wisconsin Choice because such schools, by receiving public monies for the few Choice students they enrolled, were really public schools. This conclusion flowed from a Wisconsin statute defining public schools as "the elementary and high schools supported by public taxation."[61]

The circuit court's analysis invites two comments. First, the court fails to explain why the per pupil expenditures flowing to participating Wisconsin Choice schools should be viewed as support for the schools rather than for the disadvantaged families whom the Program empowers to move from public school to private school. Second, the court's analysis, taken at its word, would transform most private schools into public schools, not just those private schools participating in a program like Wisconsin Choice. Professor Dennis Encarnation has estimated that, nationally, more than twenty-six percent of the typical private school's income comes from some type of governmental aid.[62] That being the case, the circuit court's simplistic conclusion would work a dramatic change in the law governing private schools, making constitutional guarantees applicable to

61. Davis v. Grover, No. 90-CV-2576, slip op. at 20.

62. Dennis Encarnation, *Public Finance and Regulation of Nonpublic Education: Retrospect and Prospect, in* PUBLIC DOLLARS FOR PRIVATE SCHOOLS 175-95 (Thomas James & Henry M. Levin eds., 1983).

most. What is especially ironic is that the court accomplishes this feat at a time when constitutional winds are blowing in precisely the opposite direction.[63]

B. Excluding Religious Schools: An Equal Protection Problem?

In the first full-length law review treatment of the legal issues implicated by Wisconsin Choice, Timothy Blank boldly proclaims that the Program's exclusion of religious schools may deprive those schools (as well as parents who want their children to attend such schools and the children themselves) of their Fourteenth Amendment right to equal protection.[64] The claim has much in common with arguments surfacing with increasing frequency in conservative intellectual and religious circles. It merits careful attention.

Stripped to its basics, Blank's argument contains two steps. First, he contends that, today, the Establishment Clause may no longer bar participation by religious schools in programs such as Wisconsin Choice.[65] Second, and assuming the Establishment Clause would not be held to prohibit the *inclusion* of religious schools in Wisconsin Choice, Blank claims that no governmental interest sufficient to satisfy the ends requirement of Equal Protection anaylsis supports their *exclusion*, regardless of the level of scrutiny employed.[66]

A critique of Blank's argument should begin by acknowledging what many contemporary educators refuse to acknowledge: Blank's first proposition — that the current Supreme Court, applying its view of Establishment Clause principles, is likely to sustain a Choice program that includes religious schools — has substantial force.[67] The current Chief Justice has

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63. Since arriving at the High Court in 1972, Justice William Rehnquist has singlehandedly declared war on state action precedent. The result has been that, today, the Court refuses to allow constitutional constraints to be triggered as easily as in the past. For a useful discussion of state action, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to 18-7 (2d ed. 1987). My colleague Alan Madry has written a timely and provocative piece about the role (now Chief) Justice Rehnquist has played in the transformation of state action doctrine. *See* Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments,* 65 S. CAL. L. REV. 781 (1992).

64. TIMOTHY T. BLANK, Note, *The Milwaukee Parental Choice Program, Its Policies, and Its Legal Implications,* 1 REGENT U. L. REV. 107, 147-56 (1991).

65. *Id.* at 147-52.

66. *Id.* at 152-56.

67. For a paradigmatic example of a scholar who refuses to read the writing on the classroom wall, see Robert J. Bruno, *Constitutional Analysis of Educational Vouchers in Minnesota,* 53 WEST'S EDUC. L. REP. 9 (1989). The thrust of Bruno's article is that a Minnesota Choice proposal that was to have included religious schools violates all three prongs of Lemon v. Kurtzman, 403 U.S. 602 (1971), and thus amounts to an unconstitutional establishment of religion. *Id.* at 11-24. Bruno's analysis, to say the least, is very much Bruno's analysis: he demonstrates little interest in what the members of the High Court have to say about Establishment Clause matters. In fact, it takes Bruno a mere two

made it abundantly clear that, in his opinion, the Court's separationist tendencies have been rooted principally in bad constitutional history.[68] Regardless of whether that perspective is right or wrong, it has earned considerable support from colleagues.[69] The recent appointment of Clarence Thomas, moreover, suggests that the Chief Justice is getting still more reinforcement for the accommodationist approach to Establishment Clause cases.[70]

The uncertainty surrounding the future of *Lemon v. Kurtzman*[71] only strengthens the point. In *Lemon,* the Court concluded that to withstand invalidation on establishment grounds a governmental action must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not excessively entangle government and

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paragraphs to support his conclusion that "THERE IS NO SECULAR LEGISLATIVE PURPOSE IN USING PRIVATE RELIGIOUS SCHOOLS TO ACCOMPLISH PUBLIC EDUCATION." *Id.* at 12-13 (emphasis in original).

68. Chief Justice Rehnquist's most elaborate statement of his position can be found in this dissent in Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). In that dissent, Rehnquist reviews the history out of which the Establishment Clause emerged and contends that such history proves that the majestic "wall of separation' metaphor the Court bought into in Everson v. New Jersey, 330 U.S. 1 (1947), was merely a figment of Thomas Jefferson's imagination. Rehnquist concludes his review of history by observing that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in Everson." 472 U.S. at 106. The dissent goes on to note that the controversial Establishment Clause test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), merely repeats the historical error perpetuated in *Everson,* engendering a body of case law that "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results. . . ." 472 U.S. at 112. For a fine account of Chief Justice Rehnquist's role in Establishment Clause jurisprudence, see DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS (1991).

69. At the very least, Justices White, O'Connor, Scalia, and Kennedy seem to agree with the Chief Justice that the *Everson* wall of separation was a judicial overreaction. *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Edwards v. Aguillard, 482 U.S. 578, 610-40 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 90-91 (1985) (White, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). In addition, Justice Thomas will almost surely join this group in giving states more freedom to aid religious institutions. *See infra* note 70. *See also* Lee v. Weisman, ___ U.S. ___, 120 L.Ed.2d 467, 509-519 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.).

70. In a 1985 interview with *Policy Review,* Clarence Thomas responded to the question "Do you favor President Reagan's initiatives for school prayer and discipline?" with the following:

> Discipline is absolutely critical. It is a first step to learning.
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> As for prayer, my mother says that when they took God out of the schools, the schools went to hell. She may be right. Religion is certainly a source of positive values, and we need as many positive values in the schools as we can get.

Black America Under the Reagan Administration, POL'Y REV. (Fall 1985) at 38. Without putting too much emphasis on this remark, there is nevertheless every reason to believe that Justice Thomas will cast his lot with the accommodationists on the Court.

71. 403 U.S. 602 (1971).

religion.[72] Writing prior to the enactment of Wisconsin Choice, several thoughtful scholars concluded that Choice plans could include religious schools and nevertheless pass Establishment Clause muster, even under the relatively strict, separationist principles of *Lemon.*[73] In the past few years, however, those separationist principles have lost some of their most vigorous High Court adherents, who in turn have been replaced by justices more inclined to uphold governmental efforts to accommodate religion than to insist that religion stay out of government and government out of religion. In short, Choice supporters have reason to be optimistic: the prospects look good for an Establishment Clause jurisprudence increasingly receptive to governmental aid that finds its way to religious schools.

The problem with Blank's argument, then, is not his suggestion that a carefully structured Choice program could include religious schools and survive an Establishment Clause attack. That argument has more merit than many scholars are willing to acknowledge. The problem is with where Blank believes such a claim gets him.

Blank contends that if Establishment Clause principles *permit* religious schools to be included in a Choice program, then equal protection principles *require* them to be included. Put another way, Blank suggests that the only acceptable governmental interest served by the exclusion of religious schools from programs such as Wisconsin Choice is the interest in forestalling programs that violate the Establishment Clause. Take away that concern, Blank argues, and no other acceptable interest remains.[74]

In an effort to buttress the argument, Blank turns to the Ninth Circuit's decision in *Christian Science Reading Room Jointly Managed v. City of San Francisco.*[75] In that case, a publicly-owned and -operated airport sought to terminate a month-to-month lease with a religious organization. The district court found that the airport's decision stemmed solely from its concern that the leasing of public property to religious organizations violated the Establishment Clause.[76] On appeal, the Ninth Circuit held that the airport's Establishment Clause concerns were unfounded and that the leasing of public property to religious organizations is not inconsistent with Establishment Clause principles.[77] Out of this conclusion emerged the second aspect of the court's holding: that, because leasing public prop-

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72. 403 U.S. at 612-13.

73. Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools — An Update,* 75 CAL. L. REV. 5 (1987); J. Catherine Rapinchuk, Note, *The Increasing Judicial Rationale for Educational Choice: Mueller, Witters and Vouchers,* 66 WASH. U. L.Q. 363 (1988).

74. Blank, *supra* note 64, at 152-56.

75. 784 F.2d 1010, *modified on other grounds,* 792 F.2d 192 (9th Cir. 1986), *cert. denied,* 479 U.S. 1066 (1987).

76. 784 F.2d at 1013.

77. 784 F.2d at 1015.

erty to religious organizations is not inconsistent with Establishment Clause principles, refusing to so lease — *when the only reason for the refusal is the goverment's desire to ensure that its actions do not violate the Establishment Clause* — fails to further any governmental objective at all, and thus violates even the least stringent Equal Protection requirements.[78]

Blank seeks to use the Ninth Circuit's decision in *Christian Science Reading Room* to support his claim that Choice programs that exclude religious schools (such as Wisconsin Choice) violate the Establishment Clause. Indeed, Blank cites the case to support his claim that "[a]bsent a constitutional prohibition . . . there seems little reason for prohibiting religious schools from participating in a choice program."[79] As noted above, however, the Ninth Circuit's decision suggests nothing of the sort. As the court made clear:

> We do not decide whether a policy barring rental of airport space to religious groups could be adopted for other reasons. We do not even preclude the possibility that such a policy might under some circumstances, constitute a legitimate way of ensuring compliance with the United States and California Constitutions. We hold only that where the Airport adopted its new policy in order to remedy violations of the United States and California constitutions that it thought existed, but in fact there were no violations to be remedied, it cannot be said that the policy (or its classifications) furthers the governmental purpose in any way . . . . Unless and until the Airport again decides to adopt a specific policy regarding the rental of space to religious organizations, it will not be possible for a court to determine . . . whether a constitutionally valid reason for doing so exists.[80]

Blank's misuse of the Ninth Circuit's decision is rooted in a refusal to acknowledge that govermental interests other than compliance with federal anti-establishment principles could be served by a decision to exclude religious schools from participation in Choice programs. At least two such interests come readily to mind.

First, a state legislature might choose to exclude religious schools because it fears that to include them, though perhaps permissible under *federal* constitutional law, would expose the program to a *state* constitutional challenge. Such a legislative decision would be understandable, perhaps even necessary, in a state whose highest court has construed its state constitution as propounding a more powerful anti-establishment principle than the Rehnquist Court construes the federal Constitution as propounding. Contrary to Blank's cursory analysis, it seems difficult to imagine that the Rehnquist Court, animated as it is by a zealous commit-

78. 784 F.2d at 1016.
79. Blank, *supra* note 64, at 155.
80. 784 F.2d at 1016.

ment to federalism, would find such a state interest insufficient to satisfy Equal Protection. After all, to invalidate a Choice program on such grounds is to toss out the baby of state experimentation with the bathwater of underinclusiveness. No state has yet come close to enacting a Choice program that includes religious schools, for reasons that have as much to do with politics as with constitutional law.[81] If these developments tell us anything, it is that a state limited to the options of a Choice program that includes religious schools and no Choice program at all is likely to choose the latter.

Second, a state legislature might choose to exclude religious schools for reasons having nothing at all to do with federal or state constitutional mandates. State legislators could well conclude that despite the impressive educational benefits conferred by many religious schools, it is simply unwise as a matter of public policy to provide substantial financial assistance — regardless of whether such assistance be deemed direct or indirect — to schools whose mission includes the self-conscious inculcation of religious values and beliefs. Legislators might conclude that opening up their voucher program to the state's relatively small number of nonsectarian private schools is a good thing, because it diversifies the pool of schools available, thereby stimulating competition and increasing parental options. Legislators might also conclude, however, that including the many religious private schools in the pool is not a good thing, because the state does not wish to subsidize the religious aspects of religious education and there may be no effective way to include them in the program but keep from doing so.

In sum, Choiceniks who received half a loaf in Wisconsin Choice must do better than Blank does if they are to persuade courts that Equal Protection principles require them to get the whole loaf. The constitutional pendulum has swung far in the past two decades, but not that far.

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81. In 1991, the Pennsylvania Senate gave its approval to a plan that included religious schools. But the plan died in the House of Representatives, where it was tabled in part as a result of state establishment clause concerns. Michael deCourcy Hinds, *School Voucher Plan Stalls in Pennsylvania,* N.Y. TIMES, Dec. 13, 1991, at A30. In New York, the Board of Regents defeated a plan that would have provided vouchers — redeemable at both secular and religious private schools — to the parents of approximately five thousand public school students. Sam Howe Verhovek, *Regents Reject Voucher Plan for Tuition,* N.Y. TIMES, July 27, 1991, sec. 1 at 25. In California, supporters of an initiative that would provide tuition vouchers to be used at both secular and religious private schools are fighting, with little success, to have it placed on the ballot. Robert Reinhold, *School Vouchers Dealt a Setback,* N.Y. TIMES, June 28, 1992, sec. 1 at 20; William Trombley, *Voucher Backers Claim Success: They Say Initiative to Use Public Funds for Private Schools Has Enough Signatures to Qualify for November Ballot,* L.A. TIMES, Apr. 24, 1992, at A3. Colorado appears to be one of the few states in which a Choice initiative that includes private religious schools will make it to the voters in the foreseeable future. William Celis III. *School Choice Plan on Ballot in Colorado Puts State in Spotlight,* N.Y. TIMES, Sept. 16, 1992, at B10.

C. Restrictions on Student Participation: An Equal Protection Problem?

As noted above, Wisconsin Choice has started small, and in two respects: eligible schools and eligible students. Insofar as schools are concerned, participation is available only to private, nonsectarian schools located in the city of Milwaukee.[82] As for students, the Program is available only to those who live in Milwaukee and who, in the prior school year, were not enrolled in school, were enrolled in public school, or were enrolled in Wisconsin Choice.[83] In addition, the Program is open only to students whose family incomes do not exceed a specified statutory standard.[84]

All in all, Wisconsin Choice is a modest undertaking. Yet this modest undertaking has set in motion a flurry of activity — by politicians and lawyers, journalists and ordinary citizens — that is anything but modest. This paradox requires an explanation.

Participants and observers alike view Wisconsin Choice as the first step in the transformation of the government's role in elementary and secondary education. Despite occasional protestations to the contrary, both proponents and opponents — in Wisconsin and around the nation — acknowledge that Wisconsin Choice is a foothold from which, when the time is propitious, further privatization of education is likely to be launched. Few observers are naive enough to believe that the drama played out in Wisconsin has much to do with whether it's a good idea for the government to pay the costs of sending a few hundred impoverished children to private school. The forces of public education would not have spent their members' money seeking to bring the Program to its knees if all that were at stake was the education of a few hundred disadvantaged urban kids each year. Not for a moment. Likewise, the President of the United States would not be touting the Program's virtues at every opportunity if he viewed his administration's educational agenda as having been accomplished with the Program's enactment. Hardly.

Wisconsin Choice matters so much to so many precisely because its current incarnation has the potential to evolve into something more significant. In place of a program confined to small numbers of students and schools, Choiceniks glimpse a future in which all elementary and secondary school students have the option of attending, with government funds, any of a wide variety of schools — public or private, secular or sec-

82. WIS. STAT. ANN. § 119.23(2)(a).

83. *Id.*

84. The statute provides that "total family income . . . not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget. WIS. STAT. ANN. § 119.23(2)(a)(1).

tarian. As they are learning from legislative experiences around the nation, however, that goal cannot be accomplished, at least not now and at least not in one large leap.[85] Instead, several smaller steps are required.

For many years now, pro-Choice scholars have suggested that the first of these steps be to do precisely what Wisconsin Choice does: increase the educational options of disadvantaged children.[86] The way to implement such an idea is to create a classification scheme that makes student eligibility dependent on family income, as does Wisconsin Choice. Such a scheme makes Choice available to the few but not the many. That, after all, is one source of Wisconsin Choice's political appeal: Who would dare oppose this modest effort to increase the educational options available to a limited number of poor urban families?[87]

The restrictions the Program places on student eligibility, though politically appealing, may nevertheless be constitutionally problematic. These restrictions — residence in Milwaukee, the family income ceiling, the ineligibility of students who spent the prior academic year in private school — may, when viewed in combination with how the Program has shaken out in its first two years, give rise to the conclusion that the legislature intended to enhance the educational opportunities of racial minorities only.[88] In the Program's first two years, for instance, approximately ninety-five percent of the students enrolled were racial minorities.[89] Together, these facts may give rise to the conclusion that, although the classification is, on its face, neutral as to race, it was (and continues to be) in fact racially grounded. That conclusion, even if true, does not necessarily mean that the Program runs afoul of equal protection principles.[90] But it does mean that the Program could be characterized as

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85. *See* discussion *supra* note 81.

86. *See, e.g.*, COONS & SUGARMAN, *supra* note 20; Friedman, *supra* note 20.

87. Choice advocates often reply to this quasi-rhetorical question with another quasi-rhetorical question: Who except the self-interested forces of public education?

88. This conclusion is strengthened by the fact that, by wrapping Wisconsin Choice into the multisubject budget bill, the legislature devoted strikingly little attention to it.

89. John F. Witte, *First Year Report: Milwaukee Parental Choice Program* (Nov. 1991) at 3. Professor Witte's report notes that, in academic year 1990-91, 94% of the participating students (approximately 321 of 341) were African-American or Hispanic. That figure increased to 96% the following year, with approximately 540 of the 562 students identifying themselves as African-American or Hispanic.

90. Since Korematsu v. United States, 323 U.S. 214 (1944), the Court has explicitly invoked strict equal protection scrutiny when evaluating challenges to race-based classifications. As *Korematsu* itself makes clear, however, this does not necessarily mean that the scheme will be invalidated. Justice Black, writing for the Court, put it this way:

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

323 U.S. at 216.

a kind of reverse discrimination scheme, the kind of scheme that a majority of the current Supreme Court views with disfavor and skepticism.[91]

VI. Conclusion

Choice represents the dawn of a new era in American education. This new era brings with it a host of new questions, many of which implicate the Constitution of the United States. May constitutional constraints be imposed on otherwise private Choice schools? May religious schools, consistent with the Constitution, be included in Choice programs? If religious schools may be included, may they be excluded? Are Choice programs that disproportionately benefit minority students to be viewed as race-conscious affirmative action programs?

Prior generations of Americans have struggled to be faithful to our nation's fundamental principles. As we work to find answers to these difficult and tempestuous questions, we, too, will strive to be faithful to those principles.

91. At this time, the author is unaware of anyone discussing the prospects of Wisconsin Choice being viewed as an affirmative action program designed to grapple with the problems of racial minorities in urban education. Should that characterization stick, however, the Program's defenders will have to confront the current Court's hostility to race-based measures that seek to ameliorate the effects of prior societal discrimination. *See, e.g.,* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating ordinance requiring prime contractors awarded city contracts to set aside at least 30% of the dollar amount of each contract to "minority business enterprises" in part because city failed to show there had been identifiable discrimination in the city's construction industry).