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# Vouchsafing Democracy: On the Confluence of Governmental Duty, Constitutional Right, and Religious Mission Symposium on Law and Religion

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# VOUCHSAFING DEMOCRACY: ON THE CONFLUENCE OF GOVERNMENTAL DUTY, CONSTITUTIONAL RIGHT, AND RELIGIOUS MISSION

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## INTRODUCTION

My remarks are intended to contextualize, and, relatedly, to reconceptualize the current voucher policy debate. I will discuss several political and social trends which are generally left out of the prevailing voucher policy debate, but which have nevertheless shaped it. My hope here is to offer some thoughts about the questions raised by the proposed change in education financing, and to suggest some consequences of radical change in education policy. The discussion will proceed along three levels. In brief, what is at issue here concerns first, a new surge in privatization—a devolution of traditional government functions.<sup>1</sup> Second, at issue is the trend towards newly politicized actors in the churches, for whom the delegations constitute a religious mission. The confluence of the first and second trends raises the spectre of a breakdown of cognizable domains of state and civil society.<sup>2</sup> Third, these political and social developments occur at the same time as other theoretical developments, in particular, the breakdown in long prevailing theories of knowledge with implications for our understandings of the construction of the public and private spheres, state and civil society, reason and faith.<sup>3</sup>

Voucher policy sits at the confluence of several significant contemporary trends: governmental privatization, the churches' deprivatization, and a paradigm shift in theories of knowledge, reflected in judicial, political, and academic discourses in recent years. The contemporary voucher policy debate arises at the junction of these three trends, and they have had a constitutive role in shaping the debate. Accordingly, discussion of the proposed change in voucher policy should consider the implications

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\* Ernst C. Stiefel Professor of Comparative Law, N.Y. Law School. Paper prepared for AALS Law and Religion Panel, New Orleans, LA, January 7, 1999.

1. See *infra* notes 12-17 and accompanying text.
2. See *infra* notes 21-24 and accompanying text.
3. See *infra* note 21.

of the proposed change in policy within the salient political context in which it arises, and in light of these aforementioned developments. Exploring the context and the abiding circumstances of voucher policy suggests that what is at stake transcends the common parameters of the constitutional debate; for these generally elide the significant political and social aspects to change in education policy as well as its historical pedigree.<sup>4</sup> Ultimately, I propose that we ought to consider the myriad of normative consequences of the proposed voucher policy change, in particular, the reconceptualization of the role of religion in education in our constitutional democracy. This has implications for a reframing of the voucher debate.

### I. THE PREVAILING ACCOUNT

Voucher policy is commonly debated as a matter of efficiency in the provision of a public good. The dominant terms of debate primarily concern the economics of public education. Nevertheless, education policy implies an attendant challenge to current parameters of publicly financed education as well as to their constitutional structures. Accordingly, an implied aspect of the prevailing voucher concerns the very terms of the debate—specifically, to what extent should this be a political, as opposed to a constitutional discourse. In general, the proposed policy change is framed in economic terms, as simply a matter of market economics. The claim is that education is beleaguered in this country,<sup>5</sup> and moreover that religious institutions are thought to be highly efficient in their provision of this public good, but nevertheless perversely excluded from what is characterized as a virtual state monopoly on the provision of education.

This account of an apparent perverse exclusion of religious providers from education services is a highly reductive and distorted picture of the current voucher policy debate. The account also trivializes the voucher policy question, for it suggests that what is at stake is the appropriate allocation of public monies, and assuring equality in an “array” of education providers. Thus, from the economic perspective, voucher policy is often contended for as a matter of equal protection in the distribution of governmental monies. The focus is purely on the proper allocation of governmental benefits. From the economic perspective, the issue is the aggregation of individual choices. Under the

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4. See Christopher Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 Nw. U. L. Rev. 347 (1995).

5. See NATIONAL COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

prevailing view, the relevant question is reduced to the aggregated sum of the implicated individual choices. This way of framing the problem adheres to the fiction that what is at stake are individual interests, as opposed to those of the civil society and the state. This fiction is sustained by the constitutional doctrine.

This conceptualization has also shaped the constitutional analysis of the issue. The fiction of analyzing school financing from a perspective outside of the salient institutional actors dates back to the earliest Supreme Court case law on the matter. In the landmark case of *Everson v. Board of Education*,<sup>6</sup> despite a highly separationist opinion, the Court nonetheless upheld aid to parochial schools in the form of busing, on the view that the financing inured to the individual child—the so-called “child benefit” theory. The doctrine developed in this direction for a time, with parochial aid sustained on the “child benefit” theory.<sup>7</sup> Whereas in cases where aid was invalidated, the Court drew the distinction on the putative basis of “indirection,” contending in dicta that aid to religious institutions would present an Establishment Clause problem.<sup>8</sup> The relevant inquiry was whether aid was “neutral” and “indirect,” (*i.e.*, whether it went to “individuals” rather than religious “institutions”). Only occasionally was the account challenged, and concerns of an institutional nature raised.<sup>9</sup> Finally, in the latest doctrinal elaboration, “indirection” is no longer the salient inquiry; instead, the proposed inquiry concerns the identity of the institution aided and the extent to which it is “pervasively sectarian.”<sup>10</sup> This inquiry, therefore, allows some threshold level of aid, whether or not institutions are characterized as religious.

For some time, the inquiry as framed suggests that the salient constitutional issue is one of individual rights, and in particular to choices in education. The prevailing constitutional inquiry reinforces the established enlightenment-era antinomies of the individual versus corporate actors. But this approach is not up to the task of responding to the emergent political and social realities of the proposed change in the balance of power between governmental and civil society regarding the provision of education services. The reigning conceptualization involves something of a fiction insofar as it ignores critical consequences of the pol-

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6. 330 U.S. 1 (1946).

7. See *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

8. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 770 (1973).

9. See *Aguilar v. Felton*, 473 U.S. 402 (1985).

10. See *Agostini v. Felton*, 521 U.S. 203 (1997).

icy. The appropriate inquiry ought to comprehend discussion of the ramifications of the shift in policy and in particular for the relevant political actors of the carrying out of core government functions. These questions ought not be discussed exclusively in law and economic terms, regarding efficiency in the allocation, and equality in the distribution, without exploring the broader consequences of the proposed change in the institutions and processes involved in education. The dominant structure of the voucher policy debate, as well as that of the constitutional doctrine, elides the social meaning of the sources and allocation of funding and the effect of the proposed change on institutional developments relating to the debate. Current developments should have significant consequences affecting the deliberation of the issue. The voucher debate raises central issues about the effect of change in financing for the social institutions and processes committed to the reproduction of knowledge. These changes also affect the current status and developments in theories of knowledge. The voucher issue should be re-contextualized, and evaluated in light of its numerous political and social ramifications.

## II. WHEN PUBLIC EDUCATION GOES PRIVATE

Consider some of the contemporary trends towards the privatization of traditional government functions. The proposed change in school financing policy presents a challenge to the prevailing forms of financing of public education in this country. Devolution, the move towards the privatization of governmental duties, is not limited to public education; there is a move afoot to privatize many government functions. In a number of states throughout the country, new programs have been created that involve a substantial shift from the public to the private sector, and that provide for public financing to private schools, including parochial schools. It so happens that throughout the country, the majority of private schools have a religious affiliation. Illustrations of the ongoing attempts to privatize governmental functions concerning education are evident in the move to substantial aid in this direction.<sup>11</sup> There are various examples, notably in Wisconsin and Ohio, where voucher experiments are now in place allowing state monies to support religious schools in their provision of education.<sup>12</sup> A Milwaukee program entitled

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11. See, e.g., *Mueller*, 463 U.S. at 388 (an example of a tuition deduction policy upheld by the U.S. Supreme Court).

12. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

"Parental Choice" allows enrollment in any private school in the city, including religious schools.<sup>13</sup> In Ohio, a pilot scholarship program supports attendance in "alternative schools," including religious schools.<sup>14</sup>

Education has long been considered the arch governmental function in this country. Public education is the recognized engine of American culture. This understanding has been repeatedly affirmed in our constitutional doctrine:<sup>15</sup>

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditure for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.<sup>16</sup>

The voucher debate sits at the juncture of two trends. First, there is the privatization of the public sector, and in particular, the privatization of the traditional public function of education. Second, there is the simultaneous and somewhat complementary trend of the deprivatization of the churches, and their move towards greater involvement in the public sphere. The two trends converge in the voucher debate. A question arises, therefore, about the extent to which these two trends are related.

The above institutional and policy changes are also connected to significant changes in theories of knowledge, in particular, relating to religion's role in those theories. The change proposed in these areas is framed again in terms of market economics, *i.e.*, of the apparent need to restore religious claims to public deliberations and policy. Both the challenge to the reigning framework of theories of knowledge, and the proposed voucher policy change are characterized in terms of market economics. The ramifications of this move toward radical privatization of government have only begun to be addressed. These developments raise the potential of substantial conflict over which values will be promoted in the public sphere. This aspect of the debate is more fully discussed further on.

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13. See WIS. STAT. ANN. § 119.23(2)(a) (West 1997).

14. See OHIO REV. CODE ANN. § 3313.974(G) (Banks-Baldwin 1997).

15. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

16. See *id.* at 493.

### III. THE PUBLIC CHURCHES: ON THE DEPRIVATIZATION OF RELIGION

This Part explores the trend towards the deprivatization of religion in public life. In his recent book, *Public Religions in the Modern World*, Jose Casanova contends that in the contemporary moment, we are experiencing a massive impetus towards the deprivatization of religion.<sup>17</sup> In earlier writing, I characterized this surge in participation as a form of “engagement,” contending that this was part of a contemporary challenge to and reconsideration of the hitherto prevailing enlightenment-era arrangements characteristic of much of the developed world.<sup>18</sup> There is a rejection of the reigning structures that have long organized understandings of religious and secular life: state and civil society; the private and the public domains; religion and secularism; faith and reason; belief and action. At century’s end, the enlightenment’s organizing framework, categories, and structures are more and more tested through the penetration of the private and the public, and the chiseling away at the categories of faith and reason. As a result, there are several moves here at once: the privatization of the hitherto public sector discussed in Part II, and an apparently correlative deprivatization of the function of hitherto private actors. A related ambiguity concerns change in the jurisdiction and concerns of the state *vis à vis* civil society.

This is a global shift, though particularly true of countries in political transition. Casanova’s research comprehends Spain, Poland, Brazil, and Catholicism, as well as evangelical Protestantism in the United States. My own work has concerned the momentum of these developments in the United States, which in prior writings I characterize as “engagement” in public life.<sup>19</sup>

Of particular relevance to the contemporary voucher policy discussion is the “deprivatization” of religion and education. Deprivatization assumes multiple forms, involving various forms of public financing, but also other involvement in other functions of the public domain. Both of these forms of establishment in the public sphere affect religion in public education.<sup>20</sup> The two trends identified above, of the vivid interpenetration of the public and private spheres and of the state and civil society, imply

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17. See JOSE CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994).

18. See Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993).

19. See *id.* at 784-802.

20. See *Widmar v. Vincent*, 454 U.S. 263 (1981); see also *Lee v. Weisman*, 505 U.S. 577 (1992); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

an attendant reconceptualization of accepted understandings of the prevailing separationist understanding. The trend toward privatization and the delegation of state functions points to a chiseling away of the supposed differentiation in the role of the state and civil society. The emergence of the so-called "public" churches is part of a broader rethinking of the function and role of the public sphere. In the area of education, this is made manifest by the two senses of the move to the "public" church: both as beneficiary of public financing and as active participant in the functions of the public sphere.

These developments invite change in the theorizing concerning the relation of religion and politics, thus challenging the antithetical conceptualization and dichotomization of religious versus secular reasoning and deliberation.<sup>21</sup> The reconceptualization of the public and the private sectors, and the move away from secularization to a reconsideration of the basic categories of the enlightenment framework,<sup>22</sup> is fueled by a number of different movements such as critical legal studies and feminism. Consider, too, the role of the new religious movements in this trend. It is a move I have termed "critical religion theory," referring to the role of organized religious scholars and institutions in challenging the prevailing theoretical discourse.<sup>23</sup> In this regard, the voucher debate involves a reconsideration of many of the prevailing enlightenment categories: private/public; state/civil society; religious/secular; individual/collective; belief/action. The challenge to the meaning of "private" and "public" religions and to the role of civil society will raise numerous controversial questions of policy and constitutional law.

Accordingly, the voucher debate involves the confluence of the various developments discussed above: of change in the conceptions of governmental functions and duties, in particular concerning education, as well as the coincident change in the churches' view of their religious rights and obligations in the public sphere. Any discussion of changed voucher policy ought to be conducted in light of these interrelated developments.

Moreover, the developments discussed above should also be historicized. That is, evaluating contemporary developments such as the new public engagement outside of a historical context is misleading. Once history is incorporated in the analysis, it becomes clear that the "deprivatization" of religion is only the latest turn. Historicizing the question a bit would make clear

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21. See *infra* note 24.

22. See generally STEPHEN CARTER, *THE CULTURE OF DISBELIEF* (1993).

23. See, e.g., *id.*; MICHAEL J. PERRY, *LOVE AND POWER* (1991).



that the new trend is not merely a response to supposed contemporary secularization. An historical analysis would go beyond immediate history to incorporate previous history, namely, the extent to which there was a prior role for the churches in education. This history is illuminating for the current debate for it helps to explain the current status of the school financing question. Indeed, the history suggests that the churches' exclusion from public education was not arbitrary circumstance. Indeed, previous history suggests that there were problems posed by the churches' role in education services, in particular, by the extent to which these services were permeated by religion. In light of this history, the current, proposed devolution of governmental functions to actors and institutions that assume such delegations—as a matter of religious right and duty—raises profound questions of constitutional law and policy, as well as at the level of the symbolic union of church and state. In addition, at the functional level there are problems of the risk of unconstitutional delegations.<sup>24</sup>

Properly understood, the central question here concerns the move by churches to participation in state functions. From an historical vantage point, consider the appropriateness of delegations of governmental power to churches that are in the process of deprivatizing. Just as government is in the process of devolution, the disestablished modern religion is in the process of "re-establishing" itself.

Indeed, once the contemporary problem is recast, and understood to raise an historical issue, resolution of the constitutional questions, as in the abortion issue, may well be a matter of settled law, and hence ultimately of a rule of law.<sup>25</sup> If past history serves as any guide, the churches' historical role in education in this country suggests there is reason for concern in the merging of the missions of church and state. Indeed, it is just this history that led to the prevailing constitutional regime, and to the elaboration of the principle of separation. To what extent might there be another reconciliation possible today? It is to this question that I now turn.

#### IV. VOUCHER POLICY AND LIBERAL EDUCATION

Let us now consider the subsequent constitutional question: When its governmental functions are delegated to churches, what claim might a liberal democracy make? When churches provide education it is, first and foremost, a matter of their reli-

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24. For the leading case, see *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

25. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

gious duty and constitutional right. To what extent is this compatible with contemporary governmental devolution? What might be the constitutional parameters? What are the constitutional risks of such delegation? The prevailing political and judicial deliberations have elided the more profound questions of what are the normative consequences of delegation to these institutions. Our discussion of vouchers in the public sphere ought to focus on the normative consequences of the proposed institutional changes, including the implications for common education given the country's traditions. History would be a place to begin our analysis of this question. But it would only be a point of departure. To what extent might the proposed change in the relevant institutional providers change the goals of education? What impact might institutional design have on education?

Discussion of the relationship of institutional providers to education raises the question of what exactly is the normative good here. Is the goal a better common education, or is it a greater breadth in education choices? Policy analysts and scholars have been divided on this question, but what has been largely missing is adequate discussion of the normative consequences of the proposed institutional shift if voucher policy is to be adopted. While the challenges to common education may be over-determined (*e.g.*, feminist, postmodern, critical theory, fundamentalist) and while these actors may well agree upon challenge to the prevailing structures and categories of the public and the private, and the state and civil society, those who challenge common education would nevertheless differ on almost everything else, as their agendas imply radically conflicting notions of the proposed normative project.

Consider the ramifications of institutional change for common education. There are profound questions here regarding the sorts of reconciling principles that would be available for the project of a common education. To what extent are churches viable partners in this endeavor? What are the available mediating constitutional principles? Once again, it may be helpful to historicize this inquiry a bit. Historical considerations illuminate the provenance of the prevailing framework now apparently open to challenge. The historical precursor to the current form of the public schools as we know them is religious divisiveness, particularly over text.<sup>26</sup> This history helps to illustrate that in this country, the separation principle was never an ideal but a mediating principle. It constitutes a pragmatic compromise to have some sort of education in common, while maximizing freedom

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26. See generally DIANE RAVITCH, *THE GREAT SCHOOL WARS* (1974).

of choice within the prevailing enlightenment framework preservative of a certain sort of public sphere. Accordingly, if the attempt is to somehow adhere to the goal of education in common, and the goal is excellence in education, then the shift discussed above to private institutions and processes ought to be somehow divorced from the ultimate educational vision. But then the relevant question becomes, at a time of increasing church engagement in the public realm, whether there are principles available to do the work of minimizing the delegation risks discussed above. Moreover, there are many normative questions here which have not been fully addressed. These dilemmas imply deciding what claim our constitutional democracy might plausibly make upon private institutional actors who perform critical governmental functions, in the name of preserving common education in a liberal republic. Theorists who have addressed the question have identified critical dilemmas involving race-, religion-, and gender-based discrimination.<sup>27</sup>

Beyond the question of the potential effects of policy change upon education, when the affirmative good sought by the change in policy is multiplicity in education, there are further questions about this normative goal. There are many sorts of diversities, including race, ethnic, religious, economic, and class-based. To what extent are these various diverse educations desirable in a heterogeneous republic? There is the potential for moral relativism, intolerance, and identity politics. How are we to reconcile the need to teach tolerance and a skeptical outlook in a heterogeneous republic, with religious education committed to perpetuating diverse identities?

#### CONCLUSION

The prevailing system of public education has been associated with a particular epistemology that is secular and universalizing. At the constitutional level, the dominant epistemic regime is associated with the principle of separation of church and state. For a long time, this regime was considered the best possible compromise for a large heterogeneous republic. The proposed changes in education policy would involve multiple epistemes and ethical schemes. What claim can a liberal democracy reasonably make when education is delegated to the private sector?

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27. Cf. Michael McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123; AMY GUTMANN, *DEMOCRATIC EDUCATION* (proposing a "non-repression principle"). See also *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* 37 (Charles Taylor & Amy Guttman eds., 1992).

The proposed changes in education policy involve the methods and institutions of the transmission and reproduction of knowledge, and as such, potentially would have profound epistemic and normative repercussions for our liberal constitutional democracy. My suggestion in these remarks is that the debate over vouchers ought to be deliberated in these terms, and ought to engage these broader questions of public policy.

