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# School Choice, the First Amendment, and Social Justice

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# SCHOOL CHOICE, THE FIRST AMENDMENT, AND SOCIAL JUSTICE

NICOLE STELLE GARNETT & RICHARD W. GARNETT\*

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*In the District of Columbia . . . one out of every three students drop out before they finish high school. A new study done: three-fourths of the nation's schoolchildren are unable to compose an organized, coherent essay. All across the country—New York, Chicago, Los Angeles, New Orleans—the Catholic school system, more than half of those students are non-Catholic, most of them black, many of them with a single mom. They have decided the public schools don't work for their kid, and they want to stop the experimentation on their child. And they have chosen to send their kid to a Catholic school, even though they're non-Catholic. And 99 percent of them go on to college. Why don't those poor, minority moms with their kids, who could not possibly deal with the chaos of public school, deserve a break?*

*Tim Russert, questioning Vice-President Gore on NBC's "Meet The Press"*<sup>1</sup>

## I. INTRODUCTION

An interesting exchange occurred during the December 19, 1999 appearance of Senator Bradley and Vice-President Gore on NBC's "Meet The Press." During a discussion on "education"—they were both "for it," of course—the Vice-President managed to dumbfound Bradley with his unyielding opposition to school choice. Here is an excerpt:

MR. RUSSERT: Let me turn to education. Senator Bradley, . . . [y]ou supported a[n] experimental program of vouchers throughout the country. As president, would you support tuition tax credits and vouchers?

MR. BRADLEY: The answer is, Tim, that—no. And I will tell you why. I have supported vouchers on an experimental basis on a number of occasions over 18 years. I do not believe that vouchers are the answers to the problems of public education. . . . Every time I voted for vouchers, I voted for it as an experimental basis and I also said that I would not take any public money that was set aside for schools. This would be new money in order to do this experiment. . . . There are experiments out there in the country today and those experiments are in Cleveland and Milwaukee. . . . And if those experiments demonstrated that the quality of public education

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1. *Meet the Press: Vice-President Al Gore and Former Senator Bill Bradley Discuss Numerous Political Topics* (NBC television broadcast, Dec. 19, 1999) [hereinafter *Meet the Press*].

was improved because of the competition, I think that it would be very difficult to turn your back on that evidence . . . Well, I'd like to ask Al, if the experiments demonstrated that the quality of public education was improved, does that mean that you would not even consider vouchers?

VICE PRES. GORE: You know, I favor competition, Bill. I favor competition within the public school system. I favor more choice for parents to send their children to whatever school they want to send them to. But the reason I oppose vouchers, Tim, is because even if you say it's not going to come from public school budgets, it does because history shows, experience shows there's a set amount of money that communities have been willing to spend on education. And if you drain the money away from the public schools for private vouchers, then that hurts the public schools. Now, Bill, every time . . .

MR. BRADLEY: What does that mean? *What does that mean?*<sup>2</sup>

The Vice-President went on to insist that, while unalterably opposed to school choice (yet somehow, at the same time, in favor of "more choice for parents to send their children to whatever school they want to send them to"), he nonetheless supports "truly revolutionary improvements" like "testing all new teachers," "rigorous peer review of current teachers," "closing down failing schools [and] reopening them under a new plan," "reducing the class size," and "wiring every classroom and library to the Internet."<sup>3</sup> We are now through the looking glass, where "testing teachers" and "closing failing schools" are "revolutionary improvements," but educational choice for parents and freedom for children are anathema.

As if to supply the drama that even a relatively interesting presidential debate cannot manage to provide, the next day Judge Solomon Oliver of the United States District Court for the Northern District of Ohio ruled that the experimental choice program in Cleveland, mentioned above by Senator Bradley, was an unconstitutional establishment of religion.<sup>4</sup> Judge Oliver

2. *Id.* (emphasis added).

3. *Id.*; cf. Floyd H. Flake, *Gore's Achilles Heel*, N.Y. TIMES, Mar. 12, 2000, at A15 (noting that "Mr. Gore did not answer [the] question in any real way. That won't do.")

4. See *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834 (N.D. Ohio 1999). The court stayed its order pending review by the Court of Appeals for the Sixth Circuit. The case is set for briefing in the Spring of 2000. For a useful introduction to the Cleveland Scholarship and Tutoring Program, see generally Margaret A. Nero, Case Comment, *The*

answered the question posed by “Meet The Press” moderator Tim Russert about the “single moms” who “have decided the public schools don’t work for their kid, and . . . want to stop the experimentation on their child.”<sup>5</sup> Russert asked, “Why don’t those poor, minority moms with their kids, who could not possibly deal with the chaos of public school, deserve a break?”<sup>6</sup> Here is why, according to Judge Oliver:

Because of the overwhelmingly large number of religious versus nonreligious schools participating in the Voucher Program, beneficiaries cannot make a genuine, independent choice of what school to attend. A program that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools.<sup>7</sup>

That is, by offering low-income children in Cleveland a chance to escape that city’s troubled public schools, the State of Ohio was, in effect, bribing kids to submit to government-sponsored religious indoctrination. The State had failed to dragoon enough non-religious schools into sharing with religious schools the mission of serving these children.

As we intend to suggest with the title of this Article, the identification of school choice as a “conservative” or “religious right” issue is difficult to square with the fact that the push for school choice seems to come as much from a passion for social justice as from the simple economism of the stereotypical Chamber-of-Commerce or green-eye-shade Republican. School choice is not a typical political issue:

The politics of education reform are a mystery. Millionaire businessmen and conservative activists invoke civil rights ideals to demand equality, freedom, and diversity in education—while liberals join union bosses and anti-religious activists in support of a government monopoly. Strange days indeed, when the NAACP’s and ACLU’s *opponents* are black

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*Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause*, 58 OHIO ST. L. J. 1103 (1997).

5. *Meet The Press*, *supra* note 1.

6. *Id.*

7. *Zelman*, 72 F. Supp.2d at 865.

schoolchildren singing "We Shall Overcome" on the courthouse steps.<sup>8</sup>

Maybe these are, in the words of a regular Sports Illustrated feature, sure "signs that the Apocalypse is upon us."

Consider Labor Day weekend, 1999: not many hours before Detroit's scandalously neglected school-children were to return to school, thousands of public-school teachers and education bureaucrats took to the streets of Detroit to protest, among other things, a new requirement that they show up for work on a regular basis.<sup>9</sup> A few days earlier, Judge Oliver was dubbed the "voucher vulture"<sup>10</sup> when he preliminarily enjoined the Cleveland school-voucher program just before the start of the new school year. Judge Oliver handed down his decision after only a few weeks' consideration of the case, notwithstanding the ruling of Ohio's own Supreme Court that the choice program satisfied First Amendment requirements.<sup>11</sup> (Private citizens and religious groups stepped in quickly to help children stay in their

8. Richard W. Garnett, *The Justice of School Choice*, WKLY. STANDARD, Dec. 13, 1999, at 34, 34 (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)); see also Emily Van Dunk, *Exploring the Market for School Choice*, EDUC. WK., Sept. 16, 1998, at 39, 40 (describing coalition of school-choice conservatives and political liberals in Cleveland and Milwaukee).

9. See Editorial, *Enforce the Strike Law*, DET. NEWS, Aug. 31, 1999, at A8 ("[T]eachers objected to accountability measures . . . such as refusing raises to teachers who are repeatedly absent from class . . ."); Robyn Meredith, *On Eve of New School Year, Detroit Teachers Vote to Strike*, N.Y. TIMES, Aug. 31, 1999, at A14 ("[T]he 11,500 member union was seeking . . . the elimination of certain policies, including what teachers called too-rigid attendance requirements."). Interestingly, at the same time the Detroit teachers were planning their strike, Michigan's State Board of Canvassers approved the petition of a Michigan pro-choice group called Kids First! YES!, which is aiming to remove a 30-year old anti-voucher provision from that State's constitution. See Mark Hornbeck, *Voucher Petitions Approved: Campaign Drive Next for Ballot Plan to Allow Tax Dollars for Private, Religious Education*, DET. NEWS, Aug. 25, 1999, at B1. As of February 2000, Kids First! had collected enough signatures to get its proposal on the ballot. See *Group Gets Voucher Proposal*, CHI. TRIB., Feb. 22, 2000, at 3.

10. Editorial, *Voucher Vulture: Judge's Last-Minute Ruling Will Throw Families, Schools into Needless Fear and Confusion*, PLAIN DEALER (Cleveland), Aug. 25, 1999, at 10B ("A federal jurist who is supposed to serve the public good served no one very well yesterday. By issuing his ruling on Cleveland's voucher-school experiment less than 18 hours before schools were to open, U.S. District Judge Solomon Oliver Jr. created chaos not only for voucher families, but for the entire Cleveland system.")

11. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999); William Claiborne, *Cleveland's School Voucher Program Halted*, WASH. POST, Aug. 25, 1999, at A2; Dirk Johnson, *Many Cleveland Parents Frantic as Voucher Ruling Limits Choice*, N.Y. TIMES, Aug. 26, 1999, at A11 ("This can't be true, it just can't be," [one mother] recalled saying, over and over. . . . "It was like somebody stabbed me in the heart."); Editorial, *Suffer the Children*, WALL ST. J., Aug. 26, 1999, at A17 ("Is there no limit to the mind-numbing hostility toward religion displayed by America's courts? Apparently not. On the very day before school was set to start, [Judge Oliver] thought nothing of throwing the lives of 3,800 Cleveland children into disarray by blocking the city's landmark voucher program.")

chosen schools.)<sup>12</sup> And President Clinton chose, for his Labor Day photo-op, to stand in front of a crumbling and overcrowded school in Norfolk, Virginia, as union leaders Sandra Feldman and John Sweeney—whose special-interest groups have consistently resisted meaningful reforms—stood beaming behind him.<sup>13</sup> Yet we are left with Tim Russert's question: Why don't "poor, minority moms with their kids, who could not possibly deal with the chaos of public school, deserve a break?"<sup>14</sup> As a recent pro-voucher convert put it: "As a parent of an urban public high-school student, I flinch at anything that drains resources from public schools. But I have choices. Keeping [choices] from others because of a vague threat seems increasingly hard to justify."<sup>15</sup> Arthur Levine, President of Columbia University Teachers College, put the matter more bluntly:

Throughout my career, I have been an opponent of school voucher programs. . . . However, after much soul-searching, I have reluctantly concluded that a limited school voucher program is now essential for the poorest Americans attending the worst public schools. . . . Today, to force children into inadequate schools is to deny them any chance of success. To do so simply on the basis of their parents' income is a sin.<sup>16</sup>

Americans care about education (or so they tell pollsters).<sup>17</sup> So do politicians. The country spends billions annually to teach its children, and even supposed fiscal hawks believe more should

12. See John Bacon et al., *Ohio Voucher Supporters Raise Funds for Students*, USA TODAY, Aug. 31, 1999, at 3A.

13. See John M. Broder, *Clinton as Laborer in Campaign for Schools*, N.Y. TIMES, Sept. 7, 1999, at A16. For more on how the teachers unions have stifled meaningful reform in American education, see generally, for example, MYRON LIEBERMAN, *THE TEACHER UNIONS* (1997); MYRON LIEBERMAN, *MARKET SOLUTIONS TO THE EDUCATION CRISIS* (Cato Inst. Policy Analysis No. 75, 1986); Diane Ravitch & Joseph P. Viteritti, *New York: The Obsolete Factory*, in *NEW SCHOOLS FOR A NEW CENTURY* 17 (Diane Ravitch & Joseph P. Viteritti eds., 1997); Thomas Toch et al., *Why Teachers Don't Teach*, U.S. NEWS & WORLD REP., Feb. 26, 1996, at 62.

14. *Meet The Press*, *supra* note 1.

15. Geneva Overholser, *Coming Around on Vouchers*, WASH. POST, Sept. 20, 1999, at A15.

16. Arthur Levine, *Why I'm Reluctantly Backing Vouchers*, WALL ST. J., June 15, 1998, at A28.

17. See Dan Balz & Claudia Deane, *McCain, Bradley Gain in N.H. Poll; Outsider Role Plays Well With Voters*, WASH. POST, Dec. 17, 1999, at A1 ("On issues, preserving Social Security and Medicare, improving education and keeping the economy going are the top three concerns of voters nationally . . .").



be spent on education.<sup>18</sup> Yet many Americans think they do not come close to getting their money's worth.<sup>19</sup> Everyone seems to agree that change—"truly revolutionary improvements," in the Vice-President's words—is needed. But it is hard to see how meaningful reforms in public education are possible so long as the universe of options is constrained by special interests' political muscle, by myths about a common-school tradition,<sup>20</sup> and by a misguided suspicion toward religious schools.<sup>21</sup>

It is not a new idea, but school choice's appeal is growing.<sup>22</sup> An increasing number of policymakers, education experts, politicians, and, perhaps most important, low-income parents,<sup>23</sup>

18. See Eric Pianin & Helen Dewar, *Bipartisan Vote in House Clears Spending Plan*, WASH. POST, Nov. 19, 1999, at A1 ("[T]he Republicans boasted of more spending for education . . . than requested by the President.").

19. See, e.g., ANDREW J. COULSON, MARKET EDUCATION 102 (1999) ("A 1995 survey of New York State residents do not believe that the public school system is giving them a good value for their money.").

20. See, e.g., Ted Forstmann, Editorial, *Break Up the Education Monopoly*, WALL ST. J., Sept. 9, 1999, at A26 ("The U.S., we are led to believe, was founded upon a system of government-provided education; tinker with it, and you tinker with the underpinnings of our democracy. In reality, government-delivered education—a.k.a. 'public education'—wasn't established until roughly a century after our country's founding. The system it replaced—the system of education our country was founded upon—was characterized above all by diversity, competition and choice."). For more on America's attachment to the "common school" myth, the common-school movement's roots in anti-immigrant and anti-Catholic prejudice, and how the legal and rhetorical legacies of this prejudice continue to shape the school-choice debate, see, for example, CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925* (1987); VITERITI, *supra* note 8, at 145-79.

21. See, e.g., Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 385 (1999) (describing place of anti-Catholicism and negative stereotypes about Catholic education in the development of modern Establishment Clause doctrine).

22. In 1999, Florida enacted a law giving students at poorly performing schools vouchers to pay for tuition at private schools. See *Arguments on Vouchers Fill the Air; Lawyers in Circuit Court Debated Whether Tax Money Can Be Used to Pay Private Schools*, ORLANDO SENTINEL, Feb. 25, 2000, at D4. Fifty-eight children attended private schools with vouchers the first year of the program. See *id.* The Florida Education Association and Florida's branch of the NAACP, among others, challenged the law as violating the Florida and U.S. constitutions. See *id.* Recently, a Florida trial court struck down the program on state-constitutional grounds. See Jodi Wilgoren, *Florida Case Casts Shadow of Doubt Across the Future of School Vouchers*, N.Y. TIMES, Mar. 19, 2000, at A18. In New Mexico, Governor Gary Johnson supports a plan to give vouchers, worth approximately \$3,200 each, to parents to send their children to public, private, or religious schools. See Loie Fecteau, *Senate Panel Tables Voucher Plan Despite Pleas*, ALBUQUERQUE J., Feb. 11, 2000, at A10. Thus far Johnson has met resistance in the state legislature. See *id.* In Michigan, a proposition is likely to be on the ballot in November that would alter the state constitution to allow tax dollars to pay for private-school tuition. See Karen Schulz, *Voucher Group Certain of Spot on Fall Ballot*, GRAND RAPIDS PRESS, Feb. 24, 2000, at A1.

23. See, e.g., COULSON, *supra* note 19, at 17-21 (gathering data on parents' support for school choice and vouchers); James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. TIMES, Dec. 27, 1997, at A1 (citing a 1997 Gallup poll showing that 72% of black parents supported school vouchers); Floyd H. Flake, *How Do We Save Inner-City Children?*,

believe that real school choice is the best hope for increasing educational opportunity and equality for all.<sup>24</sup> For example, the parents of 1.25 million low-income children—"almost 1 out of every 50 schoolchildren in America"<sup>25</sup>—trapped in failing public schools responded recently to Ted Forstmann and John Walton's offer of forty thousand private-school scholarships.<sup>26</sup> Recipients of a grant were required to put up \$1,000 of their own money to supplement the scholarship. As Forstmann put it, "That's \$5 billion that poor families were willing to spend simply to escape the schools where their children have been relegated."<sup>27</sup> Many believe that only educational freedom can save public education from the government schools.<sup>28</sup>

This Article is intended to be a primer on the legality and morality of educational choice—"School Choice in a Nutshell," if you will.<sup>29</sup> We are resigned to being pre-empted by the tireless work of grassroots activists, the choices of voters, and the decisions of judges. Still, we hope, in somewhat polemical fashion, to establish two basic claims. First, school choice,

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POL'Y REV., Jan-Feb. 1999, at 48; Jeff Jacoby, *The Poor Favor School Choice*, BOSTON GLOBE, Dec. 27, 1999, at A19 ("[A]mong Milwaukee residents with very low incomes, a whopping 81 percent favor vouchers."); Michael W. Lynch, *Rampaging Toward Choice*, REASON, Jan. 2000, at 24, 26 ("Polls show that school choice is far more popular with minorities than with whites, and most popular with low- and modest-income minorities."); Nina Shokrai Rees, *School Reform*, AMER. ENTERPRISE, Nov-Dec. 1998, at 60, 61 (citing a 1997 poll which found that 87% of African Americans between the ages of 26 and 35 support school choice). *But see* William Raspberry, *A Little Knowledge Can Be a Meaningless Thing*, WASH. POST, Nov. 29, 1999, at A23 (suggesting that parents' support for school choice is generally uninformed).

24. According to a recent study by Policy Analysis for California Education, 7.8 million children—15%—took advantage of public-school choice in 1999, and another 10%—5.8 million children—of children attend private schools. *See* POLICY ANALYSIS FOR CAL. EDUC., SCHOOL CHOICE: ABUNDANT HOPES, SCARCE EVIDENCE OF RESULTS add. (1999) (citing national data from the National Center for Education Statistics).

25. Jacoby, *supra* note 23.

26. *See* Forstmann, *supra* note 20. For more on Forstmann and Walton's project, see *Children's Scholarship Fund* (visited Feb. 28, 2000) <<http://www.scholarshipfund.org>>.

27. Jacoby, *supra* note 23.

28. It is important to distinguish public education—the provision by the government of access to quality education—from government-run public schools. *See* COULSON, *supra* note 19, at 391 ("What kind of school system can best fulfill the public's educational goals? . . . Many people retain a certain fondness for public schooling . . . . But is that fondness really for the *institution* of public schooling, or for the *ideals* of public education?").

29. West Publishing Company puts out the "Nutshell" series of small, concise summaries of different legal subjects. *See, e.g.*, JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL (1995). These books have saved many law students who could not be bothered with, for example, their International Business Transactions assignments during the N.C.A.A. basketball tournament.

properly understood, is constitutional. And second, school choice is both sensible and just.

In the end, we believe “school choice . . . is essential to achieving equality of opportunity for American children, rich or poor. School choice treats the poor as citizens of equal dignity; it promotes the independence upon which constitutional government depends; and it empowers parents to transmit their values to their children.”<sup>30</sup> It is educational choice, not government monopoly, that best resonates with America’s constitutional ideals, its cultural diversity and commitment to pluralism, and its tradition of religious freedom. It is choice, not monopoly, that “promise[s] to invigorate public life, create more capable citizens, bring together the races, and make good on the Constitution’s promises.”<sup>31</sup>

## II. SCHOOL CHOICE AND THE FIRST AMENDMENT

There is little point to thinking and arguing about whether we ought to expand parental choice in education if the Constitution says we cannot. And so, we first outline the basic argument that, contrary to Judge Oliver’s December 1999 ruling in the Cleveland choice case,<sup>32</sup> the United States Constitution<sup>33</sup>—specifically, the First Amendment’s “Establishment Clause”<sup>34</sup>—

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30. Garnett, *supra* note 8, at 36.

31. *Id.*; see also VITERITTI, *supra* note 8, at 180-208.

32. See Simmons-Harris v. Zelman, 72 F. Supp.2d 834 (N.D. Ohio 1999).

33. Of course, the various states’ constitutions may or may not speak to school choice. See, e.g., Simmons-Harris v. Goff, 711 N.E.2d 203, 211-16 (Ohio 1999) (concluding that the Cleveland choice program did not violate the Ohio constitution); Jackson v. Benson, 578 N.W.2d 602, 620-28 (Wis. 1998) (concluding that the Milwaukee choice program did not violate the Wisconsin constitution); Wilgoren, *supra* note 22 (noting that Florida voucher program violates Florida constitution). In fact, it is likely that the states’ constitutions—many of which contain relatively new provisions that were inserted into law specifically to prevent students from using public money to attend Catholic schools—will, in the long run, pose more significant barriers to choice-based reform than will the First Amendment. See generally Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657 (1998) (discussing Blaine amendments in state constitutions and the stricter standards of separation between church and government in many states).

34. Professor Mary Ann Glendon and others have observed that the First Amendment would perhaps have been better read as containing one Freedom of Religion Clause, and not two, warring, clauses, one dealing with free exercise and the other with non-establishment. See Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 492 (1991) (“A single coherent provision that on its face seemed to protect freedom of religion by forbidding Congress to establish religion or otherwise burden free exercise became two ‘clauses’ with free exercise regularly subordinated to a broad notion of nonestablishment.”); see also Thomas v. Review Bd., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) (“The . . . cause of the tension [between the Free Exercise and

permits governments to enact, fund, and administer meaningful school-choice programs.<sup>35</sup>

### A. *Real School Choice*

Before discussing the constitutionality of "school choice," it is necessary to define what "school choice" is. As Vice-President Gore's December 1999 remarks on "Meet The Press" illustrate, the term has more than one meaning.<sup>36</sup> The public overwhelmingly supports the admittedly vague concept of increased choice in education, but it is not always clear that the public knows what it is supporting.<sup>37</sup> It is no surprise, then, that everyone manages to be for something that can plausibly be called "school choice." For example, President Clinton, Vice-President Gore, and a few free-thinking teachers unions claim to support "controlled choice"<sup>38</sup> measures like charter schools,<sup>39</sup>

Establishment Clauses] is our overly expansive interpretation of both Clauses. By broadly construing both clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.")

35. There have been dozens of scholarly and other articles discussing the constitutionality of school-choice programs, and we have been influenced by many of them. See, e.g., Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1999); Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375 (1999); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on 'Equal Access' for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243 (1996); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999). The upshot of all this scholarship seems to be an emerging consensus that "the Court would uphold an educational voucher scheme that would permit parents to decide which schools, public or private, their children should attend." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-10, at 1223 (2d ed. 1988).

36. *Meet The Press*, *supra* note 1 ("I favor more choice for parents to send their children to whatever school they want to send them to.")

37. See Raspberry, *supra* note 23.

38. VITERITTI, *supra* note 8, at 58.

39. See, e.g., Marilyn Brown, *Whatever Else They Are, Charter Schools Are Hot*, TAMPA TRIB., Nov. 21, 1999, at 6; *Charter Schools to Receive Aid; Clinton Lauds Idea, Grants \$95 Million*, WASH. POST, Aug. 29, 1999, at A12; June Kronholz, *Gore 10-Year, \$115 Billion Schools Plan Includes Aid for Teachers in Poor Areas*, WALL ST. J., Dec. 17, 1999, at A16 ("Mr. Gore also called for tripling the number of charter schools, which are publicly funded schools that aren't part of the regular school-district bureaucracy."); Ed Mendel, *Top Teachers Union Backing of New Charter School a Rarity*, SAN DIEGO UNION-TRIB., Oct. 4, 1999, at A3.

magnet schools,<sup>40</sup> and both intra-district and inter-district public-school choice.<sup>41</sup> In his 1999 State of the Union address, President Clinton boasted, “[w]hen I became president, there was one independent public charter school in America. With our support, there are 1,100 today. My budget assures that early in the next century, there will be 3,000.”<sup>42</sup> Although this support is probably best understood as political cover for opposition to more meaningful choice-based reforms,<sup>43</sup> controlled-choice measures like charter schools are up and running in many states, raise few constitutional questions, and could be the only politically feasible alternatives to the current education monopoly.

It is also true that “controlled choice” reforms—charter schools in particular—appear to be working in the few states where they are permitted to be what they are touted as: truly independent and experimental public schools.<sup>44</sup> Unfortunately, charter schools are more often undermined by the same unreasonable regulatory burdens they were created to circumvent.<sup>45</sup> As a result, most charter-school laws fail to create

40. See, e.g., Thomas Toch et al., *Schools that Work: Magnet Schools that Limit Admissions Are a Proven Way to Educational Excellence, but They Raise Some Difficult Questions About Equity*, U.S. NEWS & WORLD REP., May 27, 1991, at 58.

41. See generally VITERITTI, *supra* note 8, at 53-79 (canvassing various controlled-choice measures and their results).

42. Editorial, *Charter Hypocrisy*, WALL ST. J., Oct. 20, 1999, at A26. The President made essentially the same promise in his 2000 address.

43. See VITERITTI, *supra* note 8, at 71 (“For Democratic politicians aligned with teachers unions and other education groups, [charter schools] represented a convenient compromise on choice . . .”).

44. See, e.g., Daniel Golden, *Common Prayer: Old-Time Religion Gets a Boost at a Chain of Charter Schools*, WALL ST. J., Sept. 15, 1999, at A1 (noting that approximately 400,000 children are enrolled in charter schools and describing one chain of “back to basics” charter schools); Robert Maranto & Scott Milliman, *In Arizona, Charter Schools Work*, WASH. POST, Oct. 11, 1999, at A25; Dennis McCafferty, *The Best Little School in Texas—and Maybe America*, USA WEEKEND, Nov. 21, 1999, at 16. For more on charter schools generally, see, for example, BRYAN C. HASSEL, *THE CHARTER SCHOOL CHALLENGE* (1999); Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L.J. 69; David Osborne, *Healthy Competition: The Benefits of Charter Schools*, NEW REPUBLIC, Oct. 4, 1999, at 31.

45. See, e.g., *Charter Hypocrisy*, *supra* note 42 (“When it comes to actual treatment of the nation’s fledgling charter schools, the Clinton Administration follows another policy: It tortures them.”); Garnett, *supra* note 8, at 35 (“What [Joseph P. Viteritti] calls ‘Potemkin bills that pretend to be serious reforms but lack the essential ingredients of strong laws’ and disingenuous lawsuits have often succeeded in hamstringing charter schools with the same regulations that cripple the public schools.”); Editorial, *The Secret War on Charters*, N.Y. POST, May 2, 1999, at 54.

genuine competition.<sup>46</sup> By competing with government-run schools, charter schools can force them to reform, but “only if the conditions are right: if there are enough charter schools, if diverse groups can create them, if they can get charters from somebody other than the local monopoly, if they take significant money away from the monopoly, and if they are free [from] district bureaucracy.”<sup>47</sup> In most places, these conditions are not met.<sup>48</sup>

In any event, charter schools could never be enough. We believe that “real” school choice must include private, religious schools.<sup>49</sup> Even if it were true that charter schools, magnet schools, and public-school-only choice programs could supply the competition necessary to inspire government schools and union bureaucracies to adopt “truly revolutionary improvements,”<sup>50</sup> our constitutional and civil ideals, our pluralistic traditions, and our professed commitment to religious liberty would still require more.

Putting aside the question of whether a real choice program would have to be universal,<sup>51</sup> or could instead be limited to low-income children<sup>52</sup> or children attending poorly performing

46. See HASSEL, *supra* note 44 (“Fifteen of the first 35 charter laws allow local school boards to veto applications. Fifteen make charter schools part of their local school districts, denying them legal independence. Only 17 of the laws permit full per-pupil operating funding to follow the child from a district to a charter school; fewer than five allow capital funding to follow the child. And many laws restrict the number of charter schools that can open, the types of people and organizations that can propose charter schools, or both.”); VITERITTI, *supra* note 8, at 71-72.

47. Osborne, *supra* note 44, at 33.

48. See *id.*

49. On the importance, both from a practical and a theoretical standpoint, of including religious schools in any school-choice program, see VITERITTI, *supra* note 8, at 82-86.

50. And they probably cannot. See MYRON LIEBERMAN, PUBLIC EDUCATION: AN AUTOPSY 1-3 (1993) (comparing reform of public education in the United States to *perestroika* in the former Soviet Union).

51. See, e.g., Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955).

52. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 205 (Ohio 1999) (“The scholarships are ninety percent (for students with family income below two hundred percent of the maximum income level established by the superintendent) or seventy-five percent (for students with family income at or above two hundred percent of that level) of the lesser of the actual tuition charges or an amount to be established by the superintendent not to exceed \$2,500.”); *Jackson v. Benson*, 578 N.W.2d 602, 608 (Wis. 1998) (noting that under the original Milwaukee choice program, eligible students were required to come from a family whose income was not more than 1.75 times the federal poverty level); VITERITTI, *supra* note 8, at 219-20; John E. Coons, *School Choice as Simple Justice*, FIRST THINGS, Apr. 1992, at 15, 20.

government schools,<sup>53</sup> we believe that a school-choice program is legally permissible if it (1) makes public funds available to parents to spend on their children's education (2) at any school—government-run or private, religious or secular—that meets certain baseline, religion-neutral criteria. A state might say, for instance, "School districts in this state currently spend \$5,000 per public-school pupil. From now on \$4,000 of that \$5,000 will belong to the child's parents and will follow the child (at the parents' direction) to whatever school those parents select, even a religious school, provided the school satisfies certain education-related, religion-neutral eligibility criteria."<sup>54</sup> As we discuss below, not only would such a proposal not violate the First Amendment, the Constitution in fact probably requires states with private school-choice programs to include religious schools in parents' menu of options. To do otherwise would be to discriminate against religious schools and parents who choose them, which is just as unconstitutional as "establishing religion."<sup>55</sup>

### B. *The United States Constitution and Religion*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>56</sup> What does a constitutional provision that appears merely to prohibit the federal government from

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53. See *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 836 (N.D. Ohio 1999) (noting that Ohio program was designed to "address an educational crisis in Cleveland's public schools" and was therefore open to students living in the District); *Florida Begins Voucher Plan for Education*, N.Y. TIMES, Aug. 17, 1999, at A15 ("Only children in schools deemed failures by the state, based on student test scores, are eligible.").

54. See, e.g., *Goff*, 711 N.E.2d at 209 (participating schools in the original Cleveland program not allowed to "discriminate on the basis of religion or teach hatred on the basis of religion"); *Jackson*, 578 N.W.2d at 608 (noting that under original Milwaukee plan, participating schools were required to "comply with the anti-discrimination provisions imposed by 42 U.S.C. Sec. 2000d and all health and safety laws or codes that apply to Wisconsin public schools" and also "had to meet on an annual basis defined performance criteria and had to submit to the State certain financial and performance audits"); cf. *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539, 545 (Vt. 1999) (holding that, under Vermont's tuitioning system, private schools that receive public money are required to comply with certain rules requiring, among other things, "that the school has the resources required to meet its stated objectives, including financial capacity, faculty who are qualified by training and experience in the areas in which they are assigned, and physical facilities and special services that are in accordance with any state or federal law or regulation") (internal citation omitted).

55. See generally, e.g., *Volokh*, *supra* note 35, at 365-73 (reviewing Free Exercise, Free Speech, and Equal Protection Clause cases disallowing the government from discriminating against religion).

56. U.S. CONST. amend. I.

setting up an official church (and perhaps also from meddling with the states' own official churches)<sup>57</sup> have to say about state and local governments' decisions to provide their citizens with tuition vouchers to private and religious schools?

There is little point here in trying to determine the meaning or identify the grand unifying theory of the Religion Clause, or to describe the history of its wild ride through the *United States Reports*.<sup>58</sup> The Clause might well have been intended to be little more than a jurisdictional device—a way of clarifying that religion, speech, and assembly were subjects that the states, and not the United States, were competent to address—without any substantive content or “deep theory” at all.<sup>59</sup> Yet the search for the “big idea” continues. Some contend, for example, that the First Amendment requires “neutrality,”<sup>60</sup> or “non-discrimination,”<sup>61</sup> toward religion. Others argue that the Religion Clause lays down a strict rule of “separation” between government and religion, or of “no aid” to religion.<sup>62</sup> And, in the Supreme Court, different Justices have in recent years found in the Clause prohibitions against “endorsement”<sup>63</sup> of religion and the “coercion”<sup>64</sup> of religious belief or expression.

57. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991) (“The establishment clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law ‘respecting an establishment of religion’ also prohibited the national legislature from interfering with, or trying to dis-establish, churches established by state and local governments.”).

58. For a comprehensive account, see GERALD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987).

59. See STEVEN D. SMITH, *FOREORDAINED FAILURE* 17-34 (1995); Steven D. Smith, *The Religion Clauses in Constitutional Scholarship*, 74 NOTRE DAME L. REV. 1033, 1037-42 (1999).

60. E.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997); cf. Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality and Free Speech Values—A Critical Analysis of “Neutrality Theory” and “Charitable Choice,”* 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243 (1999).

61. E.g., Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) (re-casting “neutrality” as “non-discrimination”).

62. Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 285 (1999) (criticizing “no-aid separationism”).

63. E.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772 (1995) (O’Connor, J., concurring) (“[T]he endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds . . .”) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (O’Connor, J., concurring in part and concurring in the judgment)).

64. *Lee v. Weisman*, 505 U.S. 577, 593-99 (1992).



In *Everson v. Board of Education*, Justice Hugo Black put the gloss on the Establishment Clause that has probably, for better or worse, most influenced the shape of the school-choice debate:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”<sup>65</sup>

There is little doubt that Justice Black would have recoiled from the prospect of public monies trickling their way to Catholic schools through a choice program.<sup>66</sup> Still, the question remains: even using Black’s terms, does the “wall of separation” between “Church and State” mean that governments are constitutionally disabled from harnessing the potential of religious schools as one tool among many for promoting the common good?

Treat that as a rhetorical question. No doubt the debate over the meaning and purpose of the Establishment Clause will keep the law reviews in business for years to come. Although we are inclined to think that the Constitution was not intended to require discrimination against religion, religiously motivated choices, religious institutions, or religious schools,<sup>67</sup> we do not

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65. 330 U.S. at 15-16 (citation omitted). The historical account on which Justice Black relied in applying the Establishment Clause to the question presented in *Everson*—may public schoolbuses be used to transport children to parochial schools?—has been widely criticized and likely reflects Justice Black’s own biases as much as the Clause’s true meaning. For a contrary account of the history of the First Amendment Religion Clause, see *Wallace v. Jaffree*, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting).

66. Hugo Black was a great justice. He also, unfortunately, harbored deep prejudices against Catholics. See ROGER K. NEWMAN, HUGO BLACK 87, 104, 137 n.\*, 521 (1994).

67. See Volokh, *supra* note 35, at 351 (“[M]y sense of the Framers’ worldview is that they did not think the government was required to discriminate against religion.”); see

need, for present purposes, to decide what, if anything, the Establishment Clause “really” means. Instead, it is probably enough, in this context, to apply what could be called the “no way in hell” test. That is, is there any reason to think that the First or Fourteenth Amendments were originally intended or understood to mean, or should today be understood to mean, that funds once in the possession of the government may not later be spent by private citizens to educate their own children at a religiously affiliated school? The “no way in hell” test yields a fairly clear answer.

### C. *Three-Prong Tests and Late-Night Horror Films*

In any event, whatever might be the “deep theory” of the Establishment Clause, the constitutional test employed in aid-to-religious-schools cases appears to be fairly well settled.<sup>68</sup> In *Lemon v. Kurtzman*,<sup>69</sup> the Supreme Court considered whether states could reimburse private and religious schools for the cost of teachers’ salaries, textbooks, and other secular educational materials. After surveying the “cumulative criteria developed by the Court over many years,” and building on Justice Black’s opinion in *Everson*, the Court identified the three “prongs” of what would come to be known as the *Lemon* test for alleged Establishment Clause violations: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”<sup>70</sup>

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also Northwest Ordinance of 1787, Art. III, in 1 DOCUMENTS OF AMERICAN HISTORY 131 (Henry Steele Commager ed., 9th ed. 1973) (“Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment) (“The Establishment Clause does not license government to treat religion and those who teach or practice it... as subversive of American ideals and therefore subject to unique disabilities.”).

68. See Esbeck, *supra* note 60, at 287 (“The *Lemon* test is the doctrinal formula most often resorted to in the lower federal and state courts.”).

69. 403 U.S. 602 (1971).

70. *Id.* at 612-13 (citations omitted). As it happened, the programs at issue in *Lemon* flunked the test’s third prong: the Court decided that the programs were unconstitutional because “comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure” that the teachers whose salaries were subsidized did not “inculcate religion” to their students. *Id.* at 619. The Court seemed especially troubled by the facts that many of the teachers who benefitted under the programs were nuns and that Catholic schools were, after all, “integral part[s] of the religious mission of the Catholic Church” and “a powerful vehicle for transmitting the Catholic faith to the next generation.” *Id.* at 615-16 (citation omitted).

The *Lemon* test has been applied haphazardly, to put it kindly, by the Supreme Court ever since the case was decided.<sup>71</sup> Justice Scalia has compared the test to a horror-movie ghoul that repeatedly crawls back from the grave to terrify young children<sup>72</sup> (a particularly apt image given the use of the test in Judge Oliver's decision striking down the Cleveland program). Still, there is little question that, at least in the lower courts, *Lemon's* "prongs" remain the doctrinal ordeal any state's real school-choice program must endure, at least until the Supreme Court tries its hand again.<sup>73</sup>

#### D. *The School-Choice Constitutional Canon*

Just as any aid-to-students-at-religious-schools cases will almost certainly involve application of the "*Lemon* test," they will also require, in the application of that test, the now-familiar judicial march through the Supreme Court decisions<sup>74</sup> that currently comprise the school-choice constitutional canon.<sup>75</sup>

##### 1. *Everson v. Board of Education*<sup>76</sup>

*Everson* involved a government program under which the parents of children attending Catholic schools—just like parents of students attending non-religious schools—were reimbursed for their children's bus fares. Although Justice Black constitutionalized Jefferson's vague and unhelpful "wall of

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71. The Court's unpredictable invocations of the test have prompted Justice Scalia to complain that "[w]hen we wish to strike down a practice [the *Lemon* test] forbids, we invoke it . . . [and] when we wish to uphold a practice it forbids, we ignore it entirely . . ." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment). The status of the *Lemon* test is less than clear. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down nondenominational high school graduation prayer without applying *Lemon*); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding government assistance to handicapped child in a Catholic school, without applying or even citing *Lemon*); cf. *Agostini v. Felton*, 521 U.S. 203 (1997) (modifying the test's "entanglement" prong and concluding that entanglement is not a separate inquiry but is instead an "aspect" of the inquiry into a program's "effect"); *Lamb's Chapel*, 508 U.S. at 395 (applying *Lemon* test and holding that public-school district could not deny church group access to public-school facilities); see also Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

72. See *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment) (comparing *Lemon* to a "ghoul in a late-night horror movie").

73. See Esbeck, *supra* note 60, at 287.

74. We have provided here only the most general sketch of the relevant decisions. These cases are certainly not as straightforward as the following summaries suggest.

75. See, e.g., *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 844-60 (N.D. Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 611-17 (Wis. 1998).

76. 330 U.S. 1 (1947).

separation" metaphor,<sup>77</sup> he also insisted that, while government may not prefer religion, it also may not discriminate against citizens "because of their faith, or lack of it," in the administration of public-welfare programs and the disbursement of public benefits.<sup>78</sup>

The *Everson* Court concluded that the bus fares of parochial-school students were paid by the State "as a part of a general program under which it pays the fares of pupils attending public and other schools."<sup>79</sup> The Court conceded that "children are helped to get to church schools" and that "there is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."<sup>80</sup> But the Court insisted that the same could be said when policemen protect religious-school pupils from traffic hazards, or when government provides religious schools with sewer lines and fire protection.<sup>81</sup> The Court concluded:

Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.<sup>82</sup>

## 2. *Board of Education v. Allen*<sup>83</sup>

A little more than twenty years later, the Court returned to the religious-school-aid question in a case concerning New York's policy of loaning state-approved textbooks in secular subjects to all junior-high and high-school students—including students in

77. *Id.* at 16.

78. *Id.*

79. *Id.* at 17.

80. *Id.*

81. *See id.*

82. *Id.* at 18.

83. 392 U.S. 236 (1968).

religious schools.<sup>84</sup> Relying on *Everson*, the Court upheld the program, emphasizing that (1) “no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools”; and (2) “[o]nly secular books may receive approval.”<sup>85</sup> The Court also noted that the law at issue—like the program in *Everson*—conferred, under a general program, a benefit on *all* children, not just children attending religious schools.<sup>86</sup> Once again, the Court admitted that “[p]erhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.”<sup>87</sup>

### 3. *Committee for Public Education and Religious Liberty v. Nyquist*<sup>88</sup>

In *Nyquist*—generally treated by anti-voucher litigators as the constitutional equivalent of a “smart bomb”<sup>89</sup>—New York set up several financial-aid programs, including one that provided partial tuition reimbursement for low-income parents of students attending nonpublic schools.<sup>90</sup> The Court concluded that these programs, unlike those upheld in *Everson* and *Allen*, violated the Establishment Clause because, in *Lemon*-speak, they had the “impermissible effect of advancing the sectarian activities of religious schools.”<sup>91</sup> The aid permitted in *Everson* and *Allen* “assist[ed] only the secular functions of sectarian schools,” and conferred only an “indirect and incidental” benefit to the schools’ religious functions, but the tuition-reimbursement programs at issue in *Nyquist* were thought to directly “subsidize and advance the religious mission of sectarian schools.”<sup>92</sup>

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84. *Allen* is best understood against the backdrop of New York’s longstanding “school wars,” one wave of which was raging at the time of the decision. See generally DIANE RAVITCH, *THE GREAT SCHOOL WARS* 280-378 (describing the New York City School Board’s attempts in the late 1960s to reorganize and decentralize the city’s public schools).

85. *Allen*, 392 U.S. at 243-45.

86. See *id.* at 243.

87. *Id.* at 244.

88. 413 U.S. 756 (1973).

89. In the 1980s video game “Defender,” a “smart bomb” could be deployed when death was imminent to destroy every nasty, threatening item on the screen.

90. See 413 U.S. at 761-69.

91. *Id.* at 794.

92. *Id.* at 775, 779-80.

Furthermore, the Court held, this was true even though the programs' benefits—tuition reimbursement and tax relief—went directly to parents, not to schools: “[T]he effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions.”<sup>93</sup>

The Court then qualified its decision in one of the more important footnotes in the *United States Reports*,<sup>94</sup> noting that “*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools.”<sup>95</sup> The Court took care to reserve the question “whether the significantly religious character of [a] statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,”<sup>96</sup> such as the federal G.I. Bill, which paid for education at both public and private colleges and universities.

#### 4. *Mueller v. Allen*<sup>97</sup>

Ten years later, in 1983, a Court markedly less wary of religion approved a Minnesota law that conferred on taxpayers generally a deduction for the costs of tuition, textbooks, and transportation for dependent children at elementary and secondary schools.<sup>98</sup> Like Justice Black in *Everson*, then-Justice

93. *Id.* at 783.

94. *Cf.* Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (When identifying “fundamental” substantive-due-process rights, “[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (regarding “discrete and insular” minorities whose interests call for heightened judicial scrutiny).

95. *Nyquist*, 413 U.S. at 782 n.38. The benefits at issue in *Nyquist*, remember, were available only to parents who chose to send their children to nonpublic schools.

96. *Id.*

97. 463 U.S. 388 (1983).

98. *Id.* We have omitted from this discussion several cases involving public assistance to religious schools and their students, including *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants to religious colleges not unconstitutional); *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (loans to religious schools of “instructional material” like “maps, charts, and lab equipment” held unconstitutional because the aid was “massive” and its effect was the “direct and substantial advancement of religious activity”); and *Wolman v. Walter*, 433 U.S. 229, 247-48 (1977) (guidance counseling and remedial-education services to religious school students permitted to be provided off-site, but loan of “instructional materials” directly to parents of religious-school students held unconstitutional). These cases have had less explicit impact in recent school-choice

Rehnquist relied on the deduction's availability to all parents, whether their children attended public, private, or religious schools.<sup>99</sup> The fact that the Minnesota program "neutrally provide[d] state assistance to a broad spectrum of citizens"<sup>100</sup> distinguished it from the programs invalidated in *Nyquist*.

Two points about *Mueller* are crucial. The Court emphasized that any government assistance the deduction provided to religious schools was channeled "through individual parents."<sup>101</sup> Therefore, "under Minnesota's arrangement public funds become available *only as a result of numerous private choices of individual parents of school-age children*."<sup>102</sup> The Court continued, "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled *by the private choices of individual parents*, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."<sup>103</sup> Second, the aid in question—a tax deduction—was available to *all* parents; it was "neutral" toward religion. This neutrality was not undermined by the fact that, as it happened, most of the tax deductions under the program were taken by parents of children in religious schools. The Court refused to transform Minnesota's neutral law into an unconstitutional establishment of religion simply because many, rather than a few, private citizens elected religious schools for their children.<sup>104</sup>

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cases. Also, their fate is far from certain. The Supreme Court might well overturn or limit them in the currently pending case of *Mitchell v. Helms*, No. 98-1648. See Brief for Petitioners at 45 ("Meeh and Wolman's prohibition on the provision of instructional materials and equipment to students in religious schools... is predicated on an interpretation of the Establishment Clause that has no grounding in the purposes of the First Amendment and was an unexplained departure from then-controlling precedent"). Similarly, there is little point to discussing *School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985), where the Court invalidated government programs that provided remedial-education services to special-needs children in religious schools, given that these decisions were largely overruled in *Agostini v. Felton*, 521 U.S. 203 (1997).

99. See *Mueller*, 463 U.S. at 397.

100. *Id.* at 398-99.

101. *Id.* at 399.

102. *Id.* (emphasis added).

103. *Id.* at 400 (emphasis added).

104. See *id.* at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law... [T]he fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of no importance in determining the constitutionality of the statute permitting such relief."); see also *Agostini v. Felton*, 521 U.S., 203, 229-30 (1997). But see *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 852 (N.D.

5. *Witters v. Washington Department of Services for the Blind*<sup>105</sup>

In *Witters*, the Supreme Court, in a unanimous decision by Justice Marshall, built on *Mueller* and upheld government aid under a program quite similar to the basic school-choice model.<sup>106</sup> Larry Witters was practically blind, yet was studying to become a Christian minister at a private Christian college. He applied for financial assistance with his education through a Washington program for the disabled, but was rejected because program officials, and later the Washington courts, decided that providing Mr. Witters with the same assistance provided generally to other disabled students would violate the First Amendment.

The Court disagreed—again, unanimously. Echoing Justice Rehnquist in *Mueller*, Justice Marshall<sup>107</sup> wrote that the First Amendment permitted Washington to treat Mr. Witters like any other applicant, notwithstanding his dream of being a minister, because “[a]ny aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients,”<sup>108</sup> and any “decision to support religious education is made by the individual, not by the State.”<sup>109</sup> As it had in *Mueller*,<sup>110</sup> the Court relied expressly on *Nyquist*’s footnote thirty-eight, emphasizing that the terms and criteria of the Washington program itself were neutral respecting religion, and thus benefits were “made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.”<sup>111</sup>

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Ohio 1999) (“Consideration of the number and percentage of sectarian schools participating in the Voucher Program is not forbidden by *Mueller*.”).

105. 474 U.S. 481 (1986).

106. See *Jackson v. Benson*, 578 N.W.2d 602, 615 (Wis. 1998).

107. How often does one get to mention Justice Marshall “echoing” Justice Rehnquist?

108. *Witters*, 474 U.S. at 487.

109. *Id.* at 488.

110. Justice Marshall dissented in *Mueller*, and did not even mention the case in his opinion for the Court in *Witters*. But five Justices, in concurring opinions, observed that, given *Mueller*, “state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* test, because any aid to religion results from the private choices of individual beneficiaries.” *Id.* at 490-91 (Powell, J., concurring).

111. *Id.* at 487 (quoting *Commission for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 n.38 (1973)); see also *Mueller v. Allen*, 463 U.S. 388, 398 (1983).



6. *Zobrest v. Catalina Foothills School District*<sup>112</sup>

The momentum was building. In 1993, relying heavily on *Mueller* and *Witters*, the Court upheld the use of federal-program funds, disbursed under a general, neutral program designed to assist children with disabilities, to pay for a sign-language interpreter in an Arizona Catholic school. Chief Justice Rehnquist, the author of the opinion in *Mueller*, returned in *Zobrest* to the earlier case's key points. He stated, "By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school *only as a result of the private decision of individual parents.*"<sup>113</sup> The Chief Justice then noted, "The service at issue in this case is part of a general government program that distributes benefits neutrally to any [qualified] child . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."<sup>114</sup>

7. *Agostini v. Felton*<sup>115</sup>

Although decisions like *Mueller*, *Witters*, and *Zobrest* suggested that the Court was moving from suspicion of religion toward neutrality, earlier precedents continued to block efforts at education reform. In 1985, for instance, the Court had ruled in *Aguilar v. Felton* that the First Amendment did not permit public-school teachers to provide federally funded remedial-education services "on site" in parochial schools.<sup>116</sup> Apparently, these teachers—though public employees—were not to be trusted (especially given the temptations posed by the presence of crucifixes in the classroom) with the task of sticking to secular matters. The Court believed that the monitoring necessary to keep the teachers in line would itself create unconstitutional "entanglement" between government and religion.<sup>117</sup> But the children still needed help, and many jurisdictions had settled on the expensive and cumbersome solution of providing special-education services to religious-school students in "mobile

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112. 509 U.S. 1 (1993).

113. *Id.* at 10 (emphasis added).

114. *Id.*

115. 521 U.S. 203 (1997).

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

117. *Id.* at 412.

instructional units,” a euphemism for “vans converted into classrooms.”<sup>118</sup>

Twelve years later, in *Agostini*, the Court finally said that enough was enough. Writing for the majority, Justice O’Connor repudiated the notion that public-employees’ presence in a religious-school classroom “inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion”<sup>119</sup> and rejected the rule that “all government aid that directly aids the educational function of religious schools is invalid.”<sup>120</sup> The Court was not distracted by the question of whether the special-education services constituted “direct” or “indirect” aid. Instead, it emphasized that the federal-program benefits (1) were disbursed according to neutral criteria, without regard to religion, and (2) reached religious institutions as a “result of the private decision of individual parents [and] could not be attributed to *state* decisionmaking.”<sup>121</sup>

The seven cases discussed above could reasonably be said to be the federal constitutional-law “canon” for school-choice questions.<sup>122</sup> On the one hand are the basic principles of neutrality and independent choice, which are rooted in *Everson* and *Allen* and have been translated and reaffirmed in the more recent *Mueller-Witters-Zobrest-Agostini* line of cases.<sup>123</sup> On the other hand is *Nyquist*, with its insistence that public funding of individuals’ educational choices can, in some cases, have the

118. *Agostini*, 521 U.S. at 213.

119. *Id.* at 223.

120. *Id.* at 225.

121. *Id.* at 226 (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)) (emphasis in *Agostini*). It will be interesting to see whether the Court applies *Agostini*’s modified *Lemon* test in *Santa Fe Independent School District v. Doe*, No. 99-62, or *Mitchell v. Helms*, No. 98-1648.

122. Many states’ constitutions contain provisions that speak to the inclusion of religious schools in school-choice programs. See *infra* notes 184-192.

123. The Court’s 1995 decision in *Rosenberger v. Rectors of the University of Virginia*, 515 U.S. 819 (1995), likewise emphasized that “the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Id.* at 839; cf. *Board of Regents v. Southworth*, No. 98-1189, 2000 WL 293217, at \*1 (U.S. Mar. 22, 2000) (holding that First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech, so long as allocation of the funds to student groups is done on a viewpoint-neutral basis).

“effect” of “advancing religion.”<sup>124</sup> The Court hedged this position, though, when it stated that it “need not decide whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.”<sup>125</sup> The question is, are today’s choice programs such a “form of public assistance”?

### E. *Examples from the Heartland*

#### 1. *Jackson v. Benson*<sup>126</sup>

Two recent decisions involving the nation’s two leading school-choice experiments illustrate nicely the basic structure of the standard Establishment Clause argument and the “battle of the precedents” just mentioned. First, in the summer of 1998, the Wisconsin Supreme Court in *Jackson v. Benson* rejected an Establishment Clause challenge to the pioneering Milwaukee Parental Choice Program<sup>127</sup> (which, as amended, included religious schools) in what was widely viewed as a bell-weather opinion for the constitutional future of school choice. The Court concluded that, in *Lemon* terms, the program “does not violate the Establishment Clause because it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive entanglement between the state and participating sectarian private schools.”<sup>128</sup>

The Court quickly and easily established that the Milwaukee choice program had a “secular purpose.”<sup>129</sup> Turning to the

124. 413 U.S. 756, 782 n.38 (1973).

125. *Id.*

126. 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S.Ct. 466 (1998).

127. WIS. STAT. § 119.23 (1999), amended by 1995 WIS. ACT 27, §§ 4002-4009 (1999). For details on the program, see *Jackson*, 578 N.W.2d at 608-10.

128. *Jackson*, 578 N.W.2d at 611.

129. *Id.* at 612. This first part of the *Lemon* test is, generally speaking, easy to satisfy. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.”); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (“Little time need be spent on the question” of whether a tax deduction scheme for parents who sent their children to nonpublic schools served a secular purpose because “governmental assistance programs [to nonpublic schools] have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon*

question of the program's "effects" and whether it "either advances or inhibits religion,"<sup>130</sup> the Wisconsin Justices stated that:

Although the lines with which the Court has sketched the broad contours of this inquiry [into a statute's effects] are fine and not absolutely straight, the Court's decisions generally can be distilled to establish an underlying theory based on neutrality and indirection: state programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion.<sup>131</sup>

To illustrate the importance of these two principles, the Wisconsin Court then reviewed the canonical cases summarized above<sup>132</sup> and a few others.<sup>133</sup> It gleaned from these cases a general rule:

[S]tate educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.<sup>134</sup>

The Court concluded that the Milwaukee program was "precisely such a program."<sup>135</sup>

Applying the canon's neutrality and indirection principles, the Wisconsin Court observed that eligibility for benefits under the Milwaukee choice program was determined on the basis of criteria having nothing to do with religion.<sup>136</sup> That is, Wisconsin had *not* said, "all those children attending Catholic schools get a voucher," or "all children who believe in God will receive tuition assistance," but had instead said, "all poor children who live in

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framework"); *cf.* *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose).

130. *Jackson*, 578 N.W.2d at 612.

131. *Id.* at 613.

132. *See id.* at 613-17.

133. *See, e.g., Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819 (1995).

134. *Jackson*, 578 N.W.2d at 617.

135. *Id.*

136. *See id.*

Milwaukee get a choice.”<sup>137</sup> Similarly, unlike the situation in *Nyquist*, participating schools were identified not on the basis of religion—“all schools that are Bible-believing may participate in the voucher program”—but could be religious or non-religious.<sup>138</sup> The program, therefore, “satisfie[d] the principle of neutrality required by the Establishment Clause.”<sup>139</sup>

The program also met the requirement of intervening, independent private choice—the “indirection” requirement—because “aid flows to sectarian schools only as a result of numerous private choices of the individual parents of school-age children.”<sup>140</sup> Thus the Milwaukee program “places on equal footing options of public and private school choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children’s benefit.”<sup>141</sup> Finally, the Court concluded that the Milwaukee program did not create “excessive governmental entanglement” with religion, through monitoring requirements or otherwise.<sup>142</sup>

## 2. *Simmons-Harris v. Zelman*<sup>143</sup>

The United States Supreme Court declined to review the *Jackson* decision. That decision stands as a clear, common-sense resolution of the Establishment Clause question presented by authentic school-choice programs.<sup>144</sup> *Jackson* can be contrasted with the recent decision in Ohio, *Simmons-Harris v. Zelman*, in which Judge Solomon Oliver held that the Cleveland school-choice program violated the Establishment Clause, notwithstanding the contrary decision that same year by the

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137. *Id.* at 618 (“A student qualifies for benefits under the [program] not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a poor family and is a student in the embattled Milwaukee Public Schools.”).

138. *See id.*; cf. Comm. for Pub. Educ. and Religious Liberty v. *Nyquist*, 413 U.S. 756, 782 n.38 (1973).

139. *Jackson*, 578 N.W.2d at 618.

140. *Id.* at 618. The Wisconsin Court was not distracted by the fact that the “State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools.” *Id.* (“[T]he importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path.”).

141. *Id.* at 619.

142. *Id.*

143. 72 F. Supp.2d 834 (N.D. Ohio 1999). The decision is now on appeal to the United States Court of Appeals for the Sixth Circuit.

144. The Supreme Courts of Ohio and Arizona employed analyses similar to the Wisconsin Court’s in recent Establishment Clause decisions. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

Supreme Court of Ohio.<sup>145</sup> The Ohio Supreme Court held, after reviewing the “canon” in detail,<sup>146</sup> that Cleveland’s school-voucher program satisfied the *Lemon* test and therefore did not violate the Establishment Clause.<sup>147</sup> The court rejected the idea that *Nyquist* still creates a “bright-line” rule against government aid that “directly aids the educational function of religious schools.”<sup>148</sup> Instead, it emphasized, citing *Witters*, *Mueller*, and *Zobrest*, that the Cleveland program was “general,” that “its benefits are available irrespective of the type of alternative school the eligible students attend,” and that “funds cannot reach a sectarian school unless the parents of a student decide, independently of the government, to send their child to that sectarian school.”<sup>149</sup>

Six months later Judge Oliver, in an explosion of judicial chutzpah, rejected this reasoning, striking down a reenacted Cleveland choice program that was in all relevant respects identical to the one the Ohio Supreme Court had said complied with the Establishment Clause.<sup>150</sup> Judge Oliver observed that the Supreme Court “has generally held that a government cannot provide scholarship assistance to students which supports religious instruction or indoctrination, [*Nyquist*],” but has also “approved of scholarship assistance where the aid to students is provided as part of a program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be benefitted.”<sup>151</sup> Generally available aid is allowed because in “such circumstances, aid ultimately supports the educational program of a religious institution only as the result of the private choice of the aid recipient. Consequently, there is no religious indoctrination attributable to the government.”<sup>152</sup> True enough.

Despite concluding that the Cleveland program has a “secular purpose,”<sup>153</sup> the district court likened the Cleveland program to

145. See *Simmons-Harris*, 711 N.E.2d 203. Like the program upheld in Milwaukee, the Cleveland school-choice program does not discriminate against religious schools.

146. See *id.* at 207-10.

147. See *id.* at 211. The Court did hold, though, that the program violated certain provisions of the Ohio Constitution, having nothing to do with religion. See *id.* at 213.

148. *Id.* at 208 (quoting *Agostini v. Felton*, 521 U.S. 203, 225 (1997)).

149. *Id.* at 209.

150. See *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834 (N.D. Ohio 1999).

151. *Id.* at 843-44.

152. *Id.*

153. *Id.* at 847.

the program considered in *Nyquist* by observing that “while both public and private schools are eligible, only private schools have chosen to participate in the Program, and the vast majority of them are parochial.”<sup>154</sup> The court also emphasized that, as in *Nyquist*, there ““has been no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.””<sup>155</sup> These two facts, Judge Oliver concluded, “make [the Cleveland program] indistinguishable for Establishment Clause purposes from the tuition reimbursement program in *Nyquist*” and, in his view, “[i]t can fairly be said that because the Program does not make aid available generally without regard to the nature of institution benefitted, the Voucher Program results in government-sponsored indoctrination.”<sup>156</sup> The district court thus found the Program invalid notwithstanding its facial neutrality and the fact that parents, not the government, decide whether once-public funds will be used to pay religious-school tuition.

After finding “government-sponsored indoctrination” in a program that merely provides assistance to parents who wish to remove their children from troubled public schools, the district court’s precedent-narrowing march through *Mueller*, *Witters*, *Zobrest*, and *Agostini* was little more than a formality. *Mueller* was distinguished on the ground that parents in *Mueller* who enjoyed the tax deduction had a genuine, “significant” choice between religious and non-religious schools.<sup>157</sup> In Cleveland, though, given the failure of more private non-religious schools and public schools to participate in the program, the parents’ choice to attend religious schools was somehow suspect, or less “independent.”<sup>158</sup> The court disregarded *Witters* for similar reasons. In *Witters*, the choice to use program funds to attend

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154. *Id.*

155. *Id.* at 847-48 (quoting *Commission for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 (1973) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971))).

156. *Id.* at 849. The court also found it significant that, under the Cleveland program, “[e]ven though parents must endorse their checks to the schools, the aid is given directly to participating schools.” *Id.*

157. *Id.* at 851.

158. *Id.* at 850-54. The district court relied on the number and percentage of religious schools participating in the program as a basis for invalidating the program, notwithstanding the fact that the *Mueller* Court “indicated that it would not base the constitutionality of a program on the consideration of yearly statistical evidence reflecting the extent to which nonsectarian schools might benefit from the tax deduction.” *Id.* at 851-52.

religious schools was “genuine” (“as a practical matter, [Mr. Witters] had a great many more nonreligious options”<sup>159</sup>), while “students in the Voucher Program have no meaningful choice between attending sectarian schools and nonsectarian schools.”<sup>160</sup> The same was true of *Zobrest*. Not only did that case involve real (as opposed to illusory) parental choice, but the court also insisted that the Cleveland Program, unlike the presence of a sign-language interpreter in religion classes, “result[s] in indoctrination.”<sup>161</sup> And finally, the court avoided *Agostini* on the ground that the federal program at issue there did not send funds into the “coffers” of religious schools<sup>162</sup> and the government benefits “would have no effect on a student’s choice of what school to attend because the services could be utilized at any school.”<sup>163</sup> Unlike the Cleveland Program, the federal program at issue in *Agostini* involved independent parental choice, created no “incentives” to attend religious schools, and did not result in religious “indoctrination.”<sup>164</sup>

In the end, the Cleveland Program ran afoul of the two principles Judge Oliver discerned in *Nyquist*. It “result[ed] in government-sponsored indoctrination” because the aid did not “flow[] to religious schools as a result of the genuine and independent choices of beneficiaries.”<sup>165</sup> And it “create[d] incentives for students to attend religious schools.”<sup>166</sup>

Judge Oliver, unlike the Wisconsin and Ohio Supreme Courts, misunderstood the significance of private choice in the relevant cases. It cannot be true that the constitutionality of a program,

159. *Id.* at 855.

160. *Id.* at 855-56 (“Unlike in *Witters*, nearly all state aid under the Voucher Program will flow to religious institutions. It cannot be said that this aid flows to those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious.”).

161. *Id.* at 857.

162. Why is it that Catholic schools are thought by courts to have “coffers,” as opposed to, say, “bank accounts”?

163. *Id.* at 859. This argument seems wrong. Religious schools are made at least marginally more desirable to parents if they know that their learning-disabled children will not lose valuable and helpful government assistance.

164. *Id.* at 858-59. The district court also explained why the Supreme Court’s *Rosenberger* decision did not help the Cleveland Program. *See id.* at 860.

165. *Id.* at 864. The court added, “[b]y the very nature of the Program, parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate.” *Id.* at 863-64. We note here, perhaps belatedly, the increasing criticism of the Court’s long-time use of the term “sectarian” to refer to Catholic schools. *See generally, e.g.,* Richard A. Baer, *The Supreme Court’s Discriminatory Use of the Term ‘Sectarian,’* 6 J.L. & POL. 449 (1990).

166. *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834, 864 (N.D. Ohio 1999).



which everyone admits has the valid governmental purpose of improving poor children's educational opportunities, hinges on whether a reviewing judge believes that parents' choices to send their children to religious schools, as opposed to non-religious alternative schools, display the requisite indicia of genuineness. The crucial point, as the Wisconsin Court recognized, is that parents, not government, make the decision to channel program funds to religious schools. Given an intervening private choice—whether or not a court views the choice as sufficiently “genuine” to be worthy of constitutional respect—it should not matter whether the religious schools a parent chooses engage in something called “indoctrination.” It should not matter because parents, not the government, are choosing that “indoctrination.” Nor should the fact that public schools have, thus far, failed to take up the state on its offer to help poor children affect the analysis. The public schools' decisions not to participate should, perhaps, be criticized, just as the religious schools' decisions should be praised. But these decisions are not relevant to the constitutional question.

Imagine that several poorly run government schools from neighboring districts and a dozen or so lousy non-religious private schools had chosen to participate in the Cleveland Program. Judge Oliver would no longer be able to use the bare number of religious schools to say that the parents' choices were less than genuine. Would he have then argued that the choices were insufficiently independent because the only alternatives to religious schools were schools that were no better, or perhaps even worse, than the government schools? What other factors, in Judge Oliver's view, may a court consider as it unpacks the independence of parents' choices? Should Catholic parents' choices to select Catholic schools, because they are religiously motivated, be considered less-than-genuine? Of course not.

The constitutionality of a choice program should not depend on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations. That education has long been a special mission of religious groups is not legally relevant. For Establishment Clause purposes, the question is whether the government is favoring religion, not whether parents are choosing it. The Ohio Legislature is not responsible for the fact that most schools that have chosen to participate in the choice program are religious; the legislature

decided, using non-religious criteria, to increase parents' options. The relative attractiveness of parents' non-religious options should not distort the constitutional analysis.

Several other courts, in addition to those in Wisconsin and Ohio, have weighed in recently on the Establishment Clause questions presented in the school-reform debate. The Arizona Supreme Court, relying heavily on *Mueller*, upheld a state tax credit of up to \$500 for donations to "school tuition organizations" (some of which were created for religious schools).<sup>167</sup> Like the federal district court in Ohio, however, both the United States Court of Appeals for the First Circuit and the Supreme Court of Maine held in 1999 that the Establishment Clause required Maine to exclude religious schools from its school-choice-like "tuitioning program."<sup>168</sup> The Supreme Court of Vermont also held that Vermont not only could, but was required to, exclude religious schools from its similar "tuitioning" program, but this requirement was justified on state, rather than federal, constitutional grounds.<sup>169</sup> Although the Supreme Court declined review in each of these cases, Judge Oliver's decision in *Zelman* in the Cleveland case is currently on appeal before the Sixth Circuit and, if the decision were affirmed, would likely be reviewed by the Court, requiring yet another battle between *Nyquist* and the *Mueller* lines of cases.

*F. The Bottom Line: Private Citizens' Preferences for Religious Schools, and Equal Treatment by Government of Religious Schools, Do Not "Establish" Religion*

The First Amendment limits government conduct; it has nothing to say about private action (other than to suggest that private assembly, speech, and worship are worth protecting by

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167. See *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); see generally Ralph D. Mawdsley, *State Tax Credits for Private Education: The Arizona Experience* in *Kotterman v. Killian*, 136 EDUC. L. REP. 647 (1999) (describing Arizona tax-credit plan and *Kotterman* decision in detail). As they did in Ohio, school-choice opponents in Arizona have opted to try their luck again, this time in federal district court. See *Winn et al. v. Killian*, No. CIV 00-0287 (D. Ariz. filed Feb. 15, 2000) (complaint on file with author).

168. *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S.Ct. 364 (1999).

169. *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (Vt. 1999), *cert. denied*, 120 S.Ct. 626 (1999). Similarly, a Florida trial court ruled that Florida's choice program violated that State's constitution. See *Wilgoren*, *supra* note 22.

limiting government).<sup>170</sup> Constitutionality depends on the actor, not the action:

The very same conduct can be either constitutionally protected or constitutionally forbidden, depending on whether those who engage in it are acting in their 'private' or their 'public' capacities. If a group of people get together and form a church, that is the free exercise of religion. If the government forms a church, that is an establishment of religion. One is protected; one is forbidden.<sup>171</sup>

Americans are permitted (in fact, they are constitutionally entitled)<sup>172</sup> to teach their children that Catholicism is true; the government, however, is not permitted an opinion on whether Catholicism is true.<sup>173</sup> On which side of the line is school choice?

The Wisconsin Supreme Court got it right in *Jackson*: school-choice programs that include religious schools are constitutional because they satisfy the Supreme Court's two basic requirements of "neutrality" and "indirection."<sup>174</sup> That is, the "beneficiaries" of such programs are not identified by the government on the basis of religion.<sup>175</sup> Even if religious schools benefit from school

170. See, e.g., *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). See generally, e.g., JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* (1996) (arguing that religious freedom is protected because religion is a good thing).

171. Michael W. McConnell, "*God Is Dead and We Have Killed Him!*": *Freedom of Religion in the Post-Modern Age*, 1993 *BYU L. REV.* 163, 184.

172. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that, while the state has the power to reasonably regulate schools, it cannot force parents to send their children to public schools rather than private). But see *JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998) (suggesting that, in some cases, teaching "repressive" forms of religious belief to children should be regarded as harmful and calling for extensive regulation of religious schools' curricula).

173. See, e.g., *United States v. Ballard*, 322 U.S. 78, 86-89 (1944) (stating that government lacks power to judge truth of religious beliefs); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

174. *Jackson v. Benson*, 578 N.W.2d 602, 613 (Wis. 1998).

175. See *id.* (citing *Bowen v. Kendrick*, 487 U.S. 589 (1988)) (rejecting challenge to program that provided funds to religious and secular institutions for sex-education and other programs); *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976) (upholding state statute that provided funds to qualifying colleges and universities—religious and secular—on the basis of neutral criteria); *Hunt v. McNair*, 413 U.S. 734 (1973) (rejecting attack on state law that provided certain benefits to all in-state institutions of higher education, regardless of religious affiliation); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding federal law that provided grants to "all colleges and universities regardless of any affiliation with or sponsorship by a religious body"); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding government provision

choice, they benefit indirectly. Only if an individual citizen decides to send his child to a religious school does the school benefit.<sup>176</sup>

There are two, common-sense constitutional explanations for these requirements: private decisions to attend religious schools are not government decisions, and equal treatment of religious schools by government is not “establishment” of religion.<sup>177</sup> First, when we decide to send our children to Catholic schools, no one would suggest that in doing so we would unconstitutionally “establish” Catholicism. How could we? Only the government can “establish” religion. What is more, our decision would not “establish” religion even if we were both government employees who received all our income from the government, if we paid the tuition out of government benefits received under A.F.D.C. or the Social Security program, or if our decision were made possible by the government’s generous decision to subsidize our lifestyle decisions through the home-mortgage deduction.<sup>178</sup> The same is true with an education voucher. It is unconstitutional for the government to “establish” religion, but it is not unconstitutional for the government to give money to citizens, even if those citizens turn around and give the money to churches, as long as the government does not use religion to decide whom it will benefit. The decision favoring religion is private, and the government’s role is entirely neutral.

Second, when the government allows freedom of educational choice, when it refuses to discriminate against religious schools or to single out religion, religious expression, and religious belief for special disadvantage,<sup>179</sup> it is respecting, not

of secular textbooks for use in both public and private schools); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (permitting state to provide busing services to both public and private school children on an equal basis).

176. See *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 850 (1995); *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947).

177. See *Volokh*, *supra* note 35.

178. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (comparing the use of government funds in *Witters* to study for the ministry to “a State’s issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution”); *Witters*, 474 U.S. at 486-487.

179. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not . . . impose special disabilities on the basis of religious views or religious status.”); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (“[G]overnment may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits.”).

undermining, First Amendment commands.<sup>180</sup> Even *Lemon* states that the government may neither advance *nor inhibit* religion.<sup>181</sup> The government and its programs must be disinterested, not hostile or suspicious,<sup>182</sup> when it comes to the religiously inspired conduct and choices of its citizens.<sup>183</sup> School-choice programs like those enacted in Wisconsin and Ohio satisfy this requirement; Judge Oliver's opinion, we believe, does not.

### G. Two More Wrinkles: State Constitutions and Regulatory Strings

The United States Constitution permits states to enact "real" school-choice programs. It also requires states that decide to experiment with educational choice to treat religious schools no worse than they treat private non-religious schools.<sup>184</sup> But at least

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180. Many courts and commentators have recognized that not only does the First Amendment's Establishment Clause not require discrimination against religious expression and institutions, it forbids it, as do the Free Exercise and Free Speech Clauses of the First Amendment, and the Fourteenth Amendment's Equal Protection Clause. *See generally*, e.g., Paulsen, *supra* note 35; Michael Stokes Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Litigation*, 61 NOTRE DAME L. REV. 311 (1986); Volokh, *supra* note 35, at 365-373; *see also*, e.g., *Rosenberger*, 515 U.S. 819 (declaring that state university that funded student activities generally could not single out religious newspaper for denial of funds); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (following *Widmar* in elementary-school context); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that if college opens classrooms to secular meetings it must open them to religious meetings); *KDM ex. rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1052 (9th Cir. 1999) (Kleinfeld, J., dissenting) (arguing that it was unconstitutional to refuse to provide a disabled student, who attended a parochial school, with a "vision specialist" to which he was entitled under a federal program); *Columbia Union College v. Clarke*, 159 F.3d 151, 155-57 & n.1 (4th Cir. 1998) (excluding religious schools from a general education-funding program presumptively violates the Free Speech and Free Exercise Clauses); *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir. 1998) (excluding religious schools from general federal program "discriminated against children who attended private religious schools" and such discrimination violates the Free Exercise and Free Speech Clauses, as well as the Equal Protection Clause); *Hartmann v. Stone*, 68 F.3d 973, 977-79 (6th Cir. 1995) (excluding religious day-care centers from general program that permits child-care providers to use government housing on military bases is discrimination that violates the Free Exercise Clause). *But see*, e.g., *Stout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep't*, 782 A.2d 127 (Me. 1999); *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (Vt. 1999).

181. 403 U.S. 602, 612 (1971). For a detailed list of other Supreme Court decisions to the same effect, see Volokh, *supra* note 35, at 367-368 n.55.

182. *See*, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religion, than it is to favor them."); Volokh, *supra* note 35, at 369-370 nn. 57, 58 (citing cases where the Court has condemned hostility toward religion).

183. *See*, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

184. *See id.*

two more obstacles stand in the way of school choice. First, even if the federal Constitution's broadly worded Establishment Clause permits choice, many states' constitutions contain provisions that were designed specifically to prevent public money from ever finding its way to religious—particularly Catholic—schools.<sup>185</sup> And second, even were there no state or federal legal obstacles to including religious schools in choice experiments, there are many who believe that the regulatory strings which inevitably follow government financial assistance would require religious schools to compromise, dilute, or abandon their vital and distinctive religious missions. To these critics, the potential benefits to poor children of school choice are not worth the risk to religious schools.<sup>186</sup>

### 1. State-Constitution Problems

In the mid-nineteenth century, there was, in fact, a dominant religion—a “de facto Protestant Establishment,”—among America's policymaking elites.<sup>187</sup> From Horace Mann's first school in 1837, which he hoped would employ “true religion” to save the souls of superstitious foreigners and turn them into good republican citizens, to the first compulsory-attendance laws enacted in Massachusetts in 1852, the roots of today's government education monopoly are firmly planted in the culture and ideology of nineteenth-century mainline American Protestantism.<sup>188</sup> The underbelly of Mann's earnest Christian republicanism was the anti-Catholicism of the “Know Nothings,” the fire-breathing rhetoric of Reverend Lyman Beecher, who in 1834 goaded a Boston mob to burn down a Catholic convent, and Massachusetts' almost comical “Nunnery Investigation Committee.”<sup>189</sup>

Anti-Catholic leaders were incensed when Catholics responded to the increasing use of compulsory-attendance laws and “non-sectarian” (*i.e.*, Protestant) religious instruction with

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185. See VITERRITI, *supra* note 8, at 17-18; Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

186. Our colleague Charles Rice has made this argument. See CHARLES RICE, *THE WINNING SIDE* (1999).

187. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 31 (1965).

188. See generally VITERRITI, *supra* note 8, at 145-79.

189. See *e.g.*, RAY A. BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860* (1938); John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, J. AM. HISTORY, June 1997, at 97.

their own parish-based schools, and they began to demand public money for these schools on a basis comparable to the "common" schools. Enter Representative James G. Blaine of Maine, who "fully understood the wide political appeal of the . . . anti-Catholic rhetoric that accompanied [President Grant's] agenda and intended to take full advantage of it."<sup>190</sup> He introduced a constitutional amendment designed to fix a "defect" in the United States Constitution, namely, the lack of a prohibition on aid to religious schools.<sup>191</sup> Blaine's effort to change the federal constitution failed, barely, but he left an important political legacy:

[Blaine's] name would live in perpetuity as a symbol of the irony and hypocrisy that characterized much future debate over aid to religious schools: employing constitutional language, invoking patriotic images, appealing to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools.<sup>192</sup>

Though Blaine failed to amend the Constitution, his efforts bore fruit elsewhere. Republicans in Congress used their majority status to force Blaine-type constitutional provisions on new states. Like-minded legislators in other states amended their own constitutions. By 1890, twenty-nine states had "baby Blaine" amendments in their constitutions.<sup>193</sup> Consequently, even after the Supreme Court confirms, as it surely will, that the Establishment Clause permits non-discriminatory school choice, reformers will then confront, and indeed have already confronted in several states,<sup>194</sup> the Know-Nothing policies that are today embedded in many state constitutions.<sup>195</sup>

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190. VITERITTI, *supra* note 8, at 152.

191. *Id.* (quoting James G. Blaine, Letter, N.Y. TIMES, Nov. 29, 1875, at 2).

192. VITERITTI, *supra* note 8, at 153.

193. *See id.* at 154. As recently as 1970, Michigan passed a referendum that forbade giving vouchers or tax benefits to anyone who attends a private or parochial school. *See id.* at 169.

194. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999); Chittenden Town Sch. Dist. v. Department of Ed., 738 A.2d 539 (Vt. 1999); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); Heytens, *supra* note 185.

195. *See generally* Joseph Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998). Some have suggested that the historical facts surrounding the enactment of many of the states' "baby Blaine amendments"—in particular, the apparent animus toward Catholics that inspired these

## 2. Regulation of Private Schools

What about the “strings”? The concern that school-choice programs might require religious schools to water down their religious character, or subject these schools to increased government control, has caused many religious-freedom advocates to oppose vouchers.<sup>196</sup> “Sure they’re constitutional,” the argument goes, “but they are not worth the cost.” After all, many believe that religious colleges and universities have compromised their religious missions in order to attract and retain federal funding.<sup>197</sup> Similar concerns have been voiced concerning agencies that provide “faith-based” social services—such as drug-treatment programs, crisis-pregnancy counseling, and the like.<sup>198</sup> These concerns are not unfounded. Many voucher opponents—and some who support vouchers but also welcome increased regulation of religious schools—have made it clear that they intend to make sure that any religious schools that receive public funds are subjected to increased oversight.<sup>199</sup>

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enactments—could provide the basis for an argument that the amendments themselves violate the United States Constitution. See, e.g., Jeremy Rabkin, *Partisan in the Culture Wars*, 30 MCGEORGE L. REV. 105, 109 (1998) (“What is the difference between a state Blaine amendment and the Colorado amendment rejected in *Romer v. Evans*?”). There is litigation currently pending that challenges the Massachusetts provisions on these grounds. See *Boyette v. Galvin* (No. 98-CV-10377) (D. Mass. filed Mar. 3, 1998) (complaint on file with author) (challenging Massachusetts’ 1854 “Anti-Aid” Amendment (a precursor to the Blaine Amendment(s))); Editorial, *Erasing Historic Error*, BOSTON HERALD, Mar. 7, 1998, at 12. The Massachusetts lawsuit challenges Amendment Article 18, as Amended by Amendment Articles 46 and 103 of the Massachusetts Constitution, and also parts of Article 48, as amended by Amendment Articles 81 and 108. While the suit goes forward, the parents and others are gathering signatures in an attempt to modify the 1854 amendment through initiative.

196. See, e.g., Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 375, 395-96 (1999) (“[S]ectarian schools which accept government funding may well be required to reduce or eliminate discrimination based on faith commitments in selecting students, and perhaps in selecting faculty as well.”); see also Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 363-65 (1999) (discussing the “argument that school choice is unconstitutional because it might hurt religious schools by bringing government oversight and regulation and thus destroying religious schools’ independence”).

197. See, e.g., JAMES T. BURTCHAELL, *THE DYING OF THE LIGHT* (1998).

198. See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997) (“For faith-based providers to retain their religious character, programs of aid must be written to specially exempt them from regulatory burdens that would frustrate or compromise their religious character. Not only is this essential to attracting their participation, but it is in the government’s interest for these providers to retain the spiritual character so central to their success in rehabilitating the poor and needy.”).

199. See JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS* 147 (1998).



We agree that school choice might not be worth the good it promises if the price of reform were the loss of distinctively religious schools, or if religious schools were either required or tempted by vouchers to homogenize and to become religious only in an institutional-affiliation sense.<sup>200</sup> Then again, the current system already places significant pressures on religious parents, who cannot afford to do otherwise, to compromise their beliefs by reluctantly sending their children to government schools that they perceive as increasingly hostile to traditional religion.<sup>201</sup> Perhaps the better argument is that any secularizing strings would themselves be unconstitutional if they required religious schools to compromise their religious mission as a condition of participating in an otherwise neutral school-choice program—that is, as a condition of avoiding anti-religious discrimination. The Supreme Court has made it clear that the government may not attach “unconstitutional conditions” to protected conduct, and it has made equally plain the rule that the government may not single out religious institutions for special disadvantage as a condition of participating on an equal basis in neutral government-benefit programs.<sup>202</sup>

Still, the concerns about “strings” are reasonable. Distinctively religious institutions are vital to a healthy civil society. These institutions can play that role only if they are independent of government control. Religious institutions “are the giant rocks on which civil society rests.”<sup>203</sup> No one should treat lightly any threats to that foundation. We are cautiously optimistic that sound constitutional interpretation will yield clear reaffirmations of the rule that religious schools are not required to purchase equal treatment by abandoning religion. To be sure,

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200. It is not necessarily true, of course, that voucher programs will require increased regulatory strings as the “price of admission” (unless they are forced to do so through litigation). In *Milwaukee*, for instance, the program did not permit participating schools to discriminate on the basis of race, color, or national origin; and it required schools to permit voucher students to “opt out” of religious activities, but it did not forbid religion-based admissions by the schools. See *Jackson v. Benson*, 578 N.W.2d 602, 607-09 (Wis. 1998). The “no racial discrimination” requirement should not be problematic for any religious school. The “opt out” requirement, however, might be.

201. See Volokh, *supra* note 35, at 364-65.

202. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (holding that Tennessee constitutional provision barring “ministers of the Gospel or priests of any denomination whatever” from serving as delegates to state constitutional convention violated Free Exercise Clause). See generally Paulsen, *supra* note 35 (arguing that excluding religious institutions and believers from otherwise generally available public-benefit programs is unconstitutional).

203. VITERITI, *supra* note 8, at 208.

the government will quite reasonably assert an interest in making sure that education funds are being spent to educate,<sup>204</sup> and that the public good is being well-served through sound performance and achievement in religious schools. But this interest should not extend—and may not extend—to overriding the religious mission and teaching of religious schools.

Real school choice is constitutional. States and districts may, consistent with the First Amendment, experiment with choice in education, but should not permit those experiments to diminish the rich diversity our religious schools offer. What is more, not only is it permissible to enact school-choice programs in order to create hope and opportunity in poor neighborhoods, encourage improvements in public schools through competition, and empower parents by respecting their capacities to act in their children's best interests, but it is also the right thing to do.

### III. SCHOOL CHOICE AND SOCIAL JUSTICE

Although school choice is often framed as a “conservative” issue—despite the refreshingly strange bedfellows that make up the pro-choice coalition—many are coming to see that school choice is as much a matter of simple, social justice as a rallying cry for economic libertarians or social conservatives.<sup>205</sup> In fact, as Joseph Viteritti argues convincingly in his recent book, it is school choice, not monopoly, that holds out the greatest promise for achieving some of our most cherished social-justice goals: racial integration, equal educational opportunity, and religious freedom.<sup>206</sup>

#### A. *The Failure of Government-Run Schools*

America's public schools are failing the children who need them the most—children caught in a tragic cycle of poverty, dependency, and despair. For these children, a quality education represents their best, perhaps only, hope for a better

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204. See, e.g., Paul West, *Bush Unveils School Plan*, BALT. SUN., Mar. 29, 2000, at 1A (“Bush has called for the overhaul of federal aid to schools that serve poor students, so-called Title I schools. He would provide vouchers to parents of children at Title I schools that fail to measure up.”).

205. See, e.g., VITERITTI, *supra* note 8, at 209-12; Coons, *supra* note 52, at 20; Overholser, *supra* note 15; Paul E. Peterson, *A Liberal Case for Vouchers*, NEW REPUBLIC, October 4, 1999, at 29.

206. See VITERITTI, *supra* note 8.

life. Unfortunately, attending a public school all too often tramples that hope.<sup>207</sup> It is widely recognized that America's public schools are failing to serve many poor and minority students. For example, as Stephen and Abigail Thernstrom recently observed, "Today's typical black twelfth grader scores no better on reading tests than the average white in the 8th grade, and is 5.4 years behind the typical white in science."<sup>208</sup> Among Hispanic students, the high-school dropout rate is three-and-a-half times higher than that of non-Hispanic whites and twice that of black students.<sup>209</sup>

In some cities, student performance falls below even these shameful levels. By many measures, the District of Columbia operates the worst public-school system in the nation.<sup>210</sup> During the 1996-1997 school year, the District administered tests in basic subjects and assigned all students one of four scores: "below basic," "basic," "proficient," or "advanced." A score of "proficient" indicated performance "at grade level." On these tests, seventy-eight percent of fourth-grade students performed at the "below basic" level in reading and eighty percent scored "below basic" in math.<sup>211</sup> Even more disturbing is the fact that students' scores got worse, across the board, the longer they remained in the District's public education system.<sup>212</sup> It appears that the best thing that can be done for the District's students is to take them out of the District's schools.

Not surprisingly, students who fall so far behind are less likely to complete their education. In Washington, D.C., fifty-three percent of all students drop out after the tenth grade.<sup>213</sup> And the track record of the public schools in Milwaukee—the city with the nation's largest school-choice program—is arguably even worse. Of the 6,874 students who entered the Milwaukee Public

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207. See Lynch, *supra* note 23, at 31 ("A 1997 report from the D.C. Control Board on the city's schools concluded that 'the longer a student stays in the District's public school system, the less likely they are to succeed.'").

208. STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 19 (1997).

209. See VITERITTI, *supra* note 8, at 52.

210. The District's students perform far worse than all other students on the National Assessment of Education Progress exam. See U.S. DEPARTMENT OF EDUCATION, NAEP 1996 MATHEMATICS REPORT CARD FOR THE NATIONS AND THE STATES 28, 30 (1997); NAEP 1996 SCIENCE REPORT CARD FOR THE NATIONS AND THE STATES 25-26 (1997).

211. See NINA SHOKRAII ET AL., *A COMPARISON OF PUBLIC AND PRIVATE EDUCATION IN THE DISTRICT OF COLUMBIA* 3 (1997).

212. See *id.*

213. See VITERITTI, *supra* note 8, at 92.

Schools as freshmen in 1992, only 2,434, or 34%, graduated four years later. One Milwaukee high school graduated only 42 of its 318 entering freshman—a graduation rate of only 13%.<sup>214</sup>

Numbers like these inspire demands for reform—for “revolutionary” change—from even the most loyal boosters of public schools. In the end, though, these “revolutionary” proposals invariably come down to the same old thing: demands for more money for government-run schools and bureaucracies. In 1999 alone, Congress allocated \$1.2 billion for 100,000 new public-school teachers; \$200 million to finance “school-community partnerships” that keep schools open after hours; \$75 million to train teachers to use technology in the classroom; \$566 million for the Safe and Drug Free Schools initiatives; \$50 million to hire new bilingual-education teachers; \$120 million to finance new college-preparation and awareness programs; and \$75 million toward revising teacher-licensing policies and practices.<sup>215</sup> These stump-speech gems clearly reflect the wish of many Americans for a return to a mythical era of American public education, when—we are told—the public schools successfully accepted the challenge of preparing a diverse population for the rigors of adult life, inculcating sound civic virtues, and shaping the *unum* that was to emerge *e pluribus*.<sup>216</sup>

The public schools’ troubles undoubtedly stem from many causes, but it is hard to blame them on a lack of funds. The resources available to public schools have increased dramatically even as the performance of these schools has declined; inflation-adjusted per-pupil spending on public education at the elementary and secondary levels has quadrupled since 1950.<sup>217</sup> Why has all this spending not purchased results?<sup>218</sup> In fact, spending more money on education rarely leads to improvements in student performance,<sup>219</sup> and student

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214. Enrollment and Graduation Numbers for the Class of 1996 (internal Milwaukee Public School document, on file with authors).

215. *FY2000 Major New Initiatives and Funding Opportunities* (visited Mar. 6, 2000) <<http://www.ed.gov/icits/FY1999>>.

216. As was described above, the homogenizing motives of the public schools’ earliest champions were somewhat less inspiring.

217. See VITERITI, *supra* note 8, at 42.

218. One review of close to 400 studies of student achievement found no relationship between student resources and achievement. See Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, EDUC. EVALUATION & POL’Y ANALYSIS, Summer 1997, at 141-64.

219. See VITERITI, *supra* note 8, at 41. Public-school districts nationwide employ an average of 42 teachers for every administrator, while Washington, D.C. employs only 16

performance is often at its worst in districts with the highest per-pupil expenditures.<sup>220</sup>

Given these horror stories, those who insist that more money is all it would take to improve the prospects of public-school students sound eerily like those greying campus radicals who insist that communism could work, if only it were tried. And this smattering of statistics barely scratches the surface of the problem. Whatever good things might be said about the public schools in Overland Park, Bethesda, or Winnetka, the schools from which poor children are hoping to escape via choice are failing. Indeed, they are damaging those children. We can wait and see how things go with Vice-President Gore's proposed "revolutionary changes," we can resign ourselves to the Sisyphus-like task of shoring up a failed system with more well-intentioned money—during which time we will have to explain to the parents of today's fourth graders that they will just have to wait<sup>221</sup>—or we can try something else.

### B. *The Promise of School Choice and the Catholic-School Effect*

Senator Bradley was right when he observed that there is no simple panacea to the problems that plague American public education.<sup>222</sup> But it is difficult, and becoming even more difficult, to deny that religious schools are succeeding where government schools are failing. In 1982, using Department of Education data collected from 60,000 students at 1,016 public and private schools, James Coleman and his colleagues found that, even after controlling for students' family background,

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and spends twice as much on its central board of education and three times as much on the superintendent's office than peer school districts. See SHOKRAH ET AL., *supra* note 211, at 4. Barely 50% of the District's education expenditures go toward instruction (compared to a still-unimpressive national average of 62%). See *id.* Despite high funding levels, 12% of District classrooms started the 1996-97 school year without textbooks and 20% started without adequate supplies. See Valerie Strauss & Sari Horowitz, *Students Caught in a Cycle of Failure*, WASH. POST, Feb. 20, 1997, at A1.

220. Again, the hapless District of Columbia public schools spent \$7,655 per pupil in fiscal year 1996—26% above the national average, and significantly higher than the average for other large urban districts. See SHOKRAH ET AL., *supra* note 211, at 4; VITTERII, *supra* note 8, at 89.

221. See *Meet the Press*, *supra* note 1; Lynch, *supra* note 23, at 32 ("Rose Blassingame, testifying before the House Budget Committee in October [1999], provided the appropriate response to the fix-the-schools argument. After apologizing for being self-interested, Blassingame told the congressmen about how she had heard a commentator on the radio say it would take six or seven years to fix D.C.'s schools. Said Blassingame, 'Franciscoe doesn't have that long.'").

222. See *Meet the Press*, *supra* note 1.

private schools produced better cognitive outcomes; provided safer, more disciplined and more racially integrated learning environments; offered more academically focused courses (as opposed to vocational education); and produced students with higher “self esteem” than did public schools.<sup>223</sup> Coleman’s work focused in large part on Catholic schools, which currently enroll about fifty-one percent of all private-school students.<sup>224</sup> Coleman found that “performance of children from parents with differing educational levels is more similar in Catholic schools than in public schools as well as being generally higher.”<sup>225</sup> He further observed that “a similar result holds for race and ethnicity. The achievement of blacks is closer to that of whites, and the achievement of Hispanics is closer to that of non-Hispanics in Catholic schools than in public schools.”<sup>226</sup> Furthermore, attending a private school generally, and a Catholic school in particular, had a positive effect on the educational aspiration of students from divergent backgrounds. Indeed, “in the public schools, the educational plans of children with college-educated parents diverge more sharply from those of children with high-school educated parents than is true in any other type of school. And the divergence is least in Catholic schools.”<sup>227</sup>

Father Andrew Greeley, a sociologist and Catholic priest who has studied the performance of minority students attending Catholic schools for over thirty years, agreed. His analysis of the Department of Education’s 1980 “High School and Beyond” longitudinal study of high-school students found that students of all races attending Catholic schools showed superior performance.<sup>228</sup> The results were most striking for underprivileged and minority students. Not only did their achievement in Catholic schools surpass that of minority students in public schools, but the differences were the greatest for the most disadvantaged students—those from poor families, whose parents had a limited education, and who did not qualify for special academic curricular programs.<sup>229</sup> Greeley identified a

223. VITERITTI, *supra* note 8, at 80-81.

224. *See id.* at 82-83.

225. JAMES COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT 144 (1982).

226. *Id.*

227. *Id.* at 158.

228. *See* ANDREW GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS 1-11 (1982).

229. *See id.* at 108 (1982).

“Catholic school effect” that reduced the empirical connection between demographic status and academic success.<sup>230</sup>

Choice opponents have swatted lamely at Catholic schools’ success. Putting aside unseemly objections such as, for example, the claims that Father Greeley, as a Roman Catholic priest, could not possibly be objective,<sup>231</sup> and that whatever benefits the Catholic schools provide are somehow outweighed by the harmful effects on children of Catholic religious doctrine,<sup>232</sup> the skeptics more often assert that the “Catholic-school effect” identified by Greeley results more from “selection bias” than from the schools’ own merits. This so-called “cream skimming” argument asserts that Catholic schools succeed because they are able to accept only the best students, leaving low achievers to languish in the public schools.<sup>233</sup> But this assertion not only ignores researchers’ efforts to control for such bias, but also flies in the face of the evidence that low-income, inner-city minority students appear to benefit the most from Catholic schooling. As Greeley observes, “the Catholic school effect cannot be explained or even reduced by taking into account the fact that Catholic schools selectively recruit from college educated families and from students inclined toward academic programs.”<sup>234</sup>

The benefits of religious schools are not fleeting but have real cash value; the Catholic-school effect produces dramatic results down the line. University of Chicago economist Derek Neal analyzed the effect of Catholic secondary schooling on college graduation rates and future wages of minority students living in

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230. See, e.g., William N. Evans and Robert M. Schwab, *Finishing High School and Starting College: Do Catholic Schools Make a Difference*, 105 Q.J. OF ECON. 941, 944 (1995) (concluding that there is “a great deal of support for the argument that Catholic schools are more effective than public schools”); Sol Stern, *The Invisible Miracle of Catholic Schools*, 6 CITYJ. 14 (1996).

231. See VITTERITI, *supra* note 8, at 83.

232. See DWYER, *supra* note 199, at 19-44.

233. See, e.g., Paul E. Peterson, *A Liberal Case for Vouchers*, NEW REPUBLIC, Oct. 4, 1999, at 29 (describing, and criticizing, the “cream skimming” argument).

234. GREELEY, *supra* note 228, at 108. Recent studies confirm this conclusion, and suggest instead that Catholic schools’ success is due to their fostering of a sense of community and caring, the assumption that all children are capable of learning, and a value system premised on the assumption of the fundamental equality and dignity of all. See ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* (1993). But see DWYER, *supra* note 199, at 19-44 (arguing that the Catholic Church in its schools takes an “aggressive approach to controlling individual thought and behavior” and that Catholic schools, like “Fundamentalist” Christian schools, often harm children by discouraging critical thinking).

urban areas.<sup>235</sup> Neal found that attendance at a Catholic school dramatically increased the probability of high-school graduation for urban minorities.<sup>236</sup> Furthermore, Neal found that African-American and Hispanic students attending urban Catholic schools were more than twice as likely to graduate from college than their public-school counterparts.<sup>237</sup> Neal concluded that Catholic education translated into future wage gains in the labor market: minority students who attend urban Catholic schools can expect to earn at least eight percent more than their public-school counterparts.<sup>238</sup>

### C. *Can School Choice Capture the Catholic-School Effect?*

We know that Catholic and other private, religious schools do well serving the children who are most harmed by public schools' failures. As author Tom Wolfe put it, "I'm not Catholic, but I have eyes."<sup>239</sup> Is there a way to tap into the benefits of the Catholic-school effect through school choice? Since 1989, the Milwaukee Parental Choice Program has given low-income students the financial means to leave the troubled Milwaukee public schools for the participating private or religious schools of their choice.<sup>240</sup> In 1996, economist Paul Peterson and his colleagues compared the performance of students randomly selected to participate in the choice program to a comparable group of students who were (due to over-subscription) randomly rejected.<sup>241</sup> Peterson and his colleagues disputed the earlier

235. See DEREK NEAL, EFFECT OF CATHOLIC SECONDARY SCHOOLING ON EDUCATIONAL ATTAINMENT (National Bureau of Econ. Research Working Paper No. 5353, 1995).

236. The probability that an inner-city minority student would graduate from high school increased from 62% to at least 88% when that student moved from public to Catholic secondary school. See *id.* at 22.

237. Neal found that 27% of Black and Hispanic Catholic school graduates who enrolled in college went on to graduate, compared to only 11% of urban public high school students. See *id.* at 27.

238. See *id.* at 31.

239. John Burger, *Tom Wolfe: Catholic Schools Are the Right Stuff*, NAT'L CATH. REG., Mar. 19-25, 2000, at 3.

240. See *Jackson v. Benson*, 578 N.W.2d 602, 607-08 (Wis. 1998).

241. See Jay P. Greene et al., *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation* (Aug. 30, 1996) (paper prepared for presentation before the Panel on the Political Analysis of Urban School Systems at the Aug.-Sept. 1996 meetings of the American Political Science Association, San Francisco, Cal.) (visited Apr. 3, 2000) <<http://data.fas.harvard.edu/pepg/op/evaluate.htm>>.



findings of researcher John Witte<sup>242</sup> and argued that Witte's determination that the Milwaukee program had not improved student achievement resulted from methodological flaws. Peterson and his colleagues found that participating students experienced significant improvements in, for example, both reading and math:

When properly analyzed, these data indicate that choice students, when they remain in the choice program for three to four years, learn more than those not selected. The results indicate that the reading scores of choice students in years three and four, were, on average 3 and 5 percentile points higher, respectively, than those of the control group. Math scores were, on average 5 and 12 percentile points higher, respectively. . . . These gains are not trivial. If similar success could be achieved for all minority students nationwide, it could close the gap separating white and minority test scores by somewhere between one-third and more than one-half.<sup>243</sup>

Shortly after the publication of the Peterson study, its findings were confirmed in part by Cecilia Elena Rouse of Princeton. Rouse also compared the test scores of students selected for the program to those of applicants who were not selected.<sup>244</sup> She concluded that participation in the choice program increased the math achievement scores of low-income, minority students by about one to two percentage points per year.<sup>245</sup> Additionally, she found that students who attended a private school for some period of time, but later returned to the Milwaukee public schools, continued to out-perform other public-school students. Indeed, the returning students' math test scores increased an

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242. See John F. Witte, Achievement Effects of the Milwaukee Voucher Program (Jan. 4-6, 1997) (paper presented to the 1997 American Economics Ass'n Annual Meeting, New Orleans, La.); see also John F. Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVALUATION & POL'Y ANALYSIS 229 (1998).

243. Greene et al., *supra* note 241.

244. Rouse's sample, however, was slightly broader than Peterson's. She included *all* students who applied for the program, regardless of whether they ultimately enrolled if selected. Peterson excluded those students who were selected but chose not to enroll. See CECILIA ELENA ROUSE, PRIVATE SCHOOL VOUCHERS AND STUDENT ACHIEVEMENT: AN EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAM 4 (National Bureau of Econ. Research Working Paper No. 5964, 1997).

245. See *id.* at 2.

additional 1.3 percentage points per year above other students in the public schools.<sup>246</sup>

The jury is out on the question of whether small, pilot, school-choice programs can consistently produce the kind of marked improvements in participating students' performances that the Catholic-school effect would suggest are possible. It will likely be some time before one can speak confidently about the effects of the Milwaukee and Cleveland choice programs on children's education, on the religious mission of Catholic schools, and on the now-competing government schools. But given what we already know about the failure of urban public schools, the success of Catholic schools, and the early indicators from choice programs, there seem to be no good reasons not to press ahead.<sup>247</sup>

#### D. *Can School Choice Succeed Without Religious Schools?*

School choice is attractive because, among other reasons, it could potentially tap into the Catholic-school effect, thereby bringing new hope to many disadvantaged students. Moreover, the remarkable success of Catholic schools demonstrates why real school choice must mean full school choice.<sup>248</sup> Partial measures like charter schools and public-school-only choice will inevitably fall short because they shut out religious schools. This is not to say, of course, that the baby steps proposed by public-school-choice and charter-school advocates are no better than the status quo. What has come to be known as "the Miracle in East Harlem" shows the amazing power of parental choice, even when it is limited to public schools. In the early 1970s, Harlem's District Four was home to some of the worst-performing schools in New York City, with only sixteen percent of students reading at grade level.<sup>249</sup> By 1987, that figure had leaped to sixty-three percent.<sup>250</sup> In the interim, a frustrated central administration

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246. *See id.* at 3. Rouse was unable to replicate the positive results for reading scores set forth in the earlier study. Instead, she found that "results for reading scores were quite mixed." *Id.* at 32.

247. *See* Paul E. Peterson, *School Choice: A Report Card*, VA. J. SOC. POL'Y & L. 47, 72-73 (1998) ("Despite the rhetoric and scare tactics, choice critics have failed to offer much evidence that school choice will balkanize America.").

248. *See* VITERITTI, *supra* note 8, at 82-86.

249. *See* RAYMOND DOMONICO, MODEL FOR CHOICE: A REPORT ON MANHATTAN'S DISTRICT 4 (Education Policy Paper, Manhattan Institute, 1989).

250. *See id.*

bent to the will of several inspired educators who promised to turn the district around by nurturing alternative schools built around curricular "themes," permitting parents to choose among these options rather than assigning students based upon geography alone.<sup>251</sup> In 1998, an extensive evaluation of the program found that, since 1974, reading and math scores had improved significantly in comparison to the other districts in the city, even after controlling for socioeconomic variables.<sup>252</sup> The researchers identified choice as the key causal factor, concluding that poor parents are intelligent shoppers who choose schools that reflect their personal values and the unique needs of their children.<sup>253</sup>

Early experience in the states that permit "charter schools"—public schools that are, in theory, permitted to operate with relative autonomy from the central school bureaucracy<sup>254</sup>—provides additional support for the argument that some choice is better than none. North Carolina's first charter school, the Healthy Start Academy, has ten classrooms in a church basement, divided by paper-thin walls.<sup>255</sup> One hundred sixty-eight of its one hundred seventy students are black.<sup>256</sup> Eighty percent of the students qualify for free lunches; seventy-five percent come from single-parent homes.<sup>257</sup> When Healthy Start's second graders enrolled in the fall of 1997, they scored in the thirty-fourth percentile of the five million children who took the nation-wide Iowa Test of Basic Skills.<sup>258</sup> By the following May, they scored in the seventy-fifth percentile.<sup>259</sup> The test scores of Healthy Start's kindergartners rocketed even higher, rising from the forty-second percentile to the ninety-ninth.<sup>260</sup> "When I announced these scores at an assembly, moms were crying," Healthy Start's principal recalls, "grandmas and grandpas were

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251. See VITERITI, *supra* note 8, at 61.

252. See Mark Schneider et al., *Shopping for Schools: In the Land of the Blind, the One-Eyed Parent May Be Enough*, 42 AM. J. POL. SCI. 769 (1998).

253. See *id.*

254. See *supra* note 46 and accompanying text.

255. See Deroy Murdock, *Numbers Game: North Carolina Educators May Shut Down the Successful Healthy Start Charter School Because It Enrolls Too Many Blacks*, REASON, Oct. 1998, at 58, 58.

256. See *id.*

257. See *N.C. Charter School Ranks High for Math, Reading*, NEWS & REC. (Greensboro, NC), June 19, 1999, at B13.

258. See Murdock, *supra* note 255.

259. See *id.*

260. See *id.*

crying and yelling. Theirs were kids who never heard anything good from schools."<sup>261</sup> The following year, Healthy Start improved this record; its kindergartners and second-graders scored in the ninety-ninth percentile.<sup>262</sup> Third graders, all of whom were new to the school that year, ranked in the eighty-first percentile.<sup>263</sup>

Notwithstanding these success stories, the fact remains that in our most troubled neighborhoods, religious schools have consistently succeeded in breaking down the economic and racial barriers that still divide students in our public schools, turning underprivileged and disaffected youngsters into aspiring young scholars. Excluding religious schools from a choice program means placing schools like Milwaukee's Messmer High School out of financial reach for the students who need them most. Messmer, an independent Catholic high school in inner-city Milwaukee, has succeeded with the students who are most at risk of failure. The overwhelming majority of Messmer's students are Latino or African-American; most of them are poor; many come from broken homes; and some have been expelled from public schools for gangs, drugs, and violence.<sup>264</sup> Yet, thanks to the no-nonsense, tough-love philosophy of their principal, Brother Bob Smith, ninety-eight percent of Messmer students graduate on time.<sup>265</sup> Eighty percent of those who graduate go on to attend college<sup>266</sup> in a city where less than thirty-five percent of students who attend public schools graduate from high school in four years.<sup>267</sup> Leaving aside the question of whether the Constitution permits religious schools like Messmer to be excluded from otherwise generally available choice programs,<sup>268</sup> it seems clear that choice will work best only if students have a chance to choose religious schools.

School choice is often called an "experiment." Granted, not all experiments are worth conducting, but this one is. The

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261. *Id.*

262. *See id.*

263. *See id.*

264. *See* Daniel McGroarty, *A Prayer for Better Education*, WALL ST. J., Oct. 1, 1993, at A10.

265. *See id.*

266. *See id.*

267. *See id.*

268. *See supra* note 57 and accompanying text.

weight of the evidence shows that choice in education can improve the opportunities for those who most need it. Any effort to exploit the potential of school choice that rules out the tremendous benefits of our nation's religious schools might improve the current system, but it will likely fall well short of what could be attained. But real school choice—nondiscriminatory, religion-neutral, pluralism-embracing school choice—seems to work. Can we be sure? Probably not: “[T]heoretically the effect of market competition is measurable empirically, but no, we cannot fully assess it under the existing plans.”<sup>269</sup> Still, in Professor Joseph Viteritti's words, “the most compelling argument for choice remains a plea for fairness. We don't need numbers to prove that.”<sup>270</sup>

#### E. *Religious Schools, Racial Integration, and the Promise of Equality*

The success of Messmer and other inner-city Catholic schools led James Coleman and his colleagues to observe that:

Catholic schools more nearly approximate the “common school” ideal of American education than do public schools, in that the achievement levels of students from different parental educational backgrounds, of black and white students, and of Hispanic and non-Hispanic white students are more nearly alike in Catholic schools than in public schools. In addition the educational aspirations of students from different parental backgrounds are more alike in Catholic than in public schools.<sup>271</sup>

This is a crucially important observation. One of the more common arguments against school choice is that it would exacerbate racial separatism and undo four decades of integration efforts, running contrary to our ideal of the public school as an important part of the project of building a cohesive and united America.

It is an ugly fact that, after *Brown*, many whites fled the public schools for all-white “academies,” not because the public schools were failing, but because they did not want their children to attend school with blacks.<sup>272</sup> The apparent historical connection

269. Joseph P. Viteritti, *School Choice: Beyond the Numbers*, EDUC. WK., Feb. 23, 2000, at 38, 44.

270. *Id.*

271. COLEMAN ET AL., *supra* note 225, at 185.

272. *See, e.g.*, VITERITTI, *supra* note 8, at 30-31.

between the flight from public to private schools, as well as the connection in many people's minds between vouchers and the increasingly white, southern Republican Party, causes many to oppose today's choice proposals as little more than Jim Crow in new clothes.<sup>273</sup> Conjuring up images of the "white academies" formed during the period of massive Southern resistance to forced integration, choice opponents assert that school choice will lead to the "resegregation" of American education by enabling white students to flee failing public schools for lily-white private schools.<sup>274</sup>

In fact, though, the evidence indicates that school choice would likely result in more students learning in more integrated settings. Indeed, it is hard to see how choice could result in more segregation. Nearly half a century after the Supreme Court's *Brown* decision declaring *de jure* segregation unconstitutional, the classrooms in most central-city public-school districts remain overwhelmingly segregated.<sup>275</sup> In the twenty-five largest central cities in the United States, the percentage of school-age children who were white dropped from 84.5% in 1950 to 48.7% in 1980.<sup>276</sup> Nationwide, a majority of children who attend public schools do so in a segregated setting.<sup>277</sup> Although it is true that private schools enroll fewer minority students than public schools, within individual schools, blacks and whites are substantially more integrated than in the private sector. Thus, as Coleman and his colleagues observe, policies making private schools financially accessible to low-income students would integrate schools both racially and economically: "Such policies could bring more blacks, Hispanics, and students from lower income backgrounds into private schools, thus reducing between-sector segregation, and

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273. See, e.g., Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 *YALE L. & POL'Y REV.* 1 (1992) (describing Southern segregation academies as the first schools of choice); Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 *TENN. L. REV.* 359 (1997).

274. See Hershkoff & Cohen, *supra* note 273; O'Brien, *supra* note 273.

275. See Jeffrey Rosen, *The Lost Promise of Integration*, *N.Y. TIMES*, Apr. 2, 2000, § 4, at 1 (reporting data showing that "black students became increasingly isolated in the 1990s").

276. See MYRON LIEBERMAN, *PUBLIC EDUCATION* 176 (1993).

277. See VITERITTI, *supra* note 8, at 49. The suggestions of some choice critics that one cannot reconcile choice with diversity therefore appear misguided. It seems more consistent with the data to argue that one cannot have diversity without choice. Cf. Rosen, *supra* note 275.

these students would be moving from a sector of high racial segregation into a sector of low racial segregation.<sup>278</sup>

Furthermore, recent research suggests that school choice would not only result in minority students moving to more integrated learning environments, but it would also increase the type of integration that truly counts—social interaction between students of different racial and ethnic groups. In a paper delivered to the American Political Science Association in 1998, Jay Greene and Nicole Mellow found that students attending private schools were more likely to voluntarily socialize with students of different races than their public-school counterparts.<sup>279</sup> Greene and Mellow observed the lunchroom groupings of 4,302 students (2,864 public-school students and 1,438 private-school students).<sup>280</sup> They found that, in private-school lunchrooms, 63.5% of the students ate in integrated groups.<sup>281</sup> In public schools, only 49.7% of all students ate in integrated groups.<sup>282</sup>

It is undoubtedly true that some, perhaps many, black parents would choose to send their children to private schools that work—without regard to their racial makeup. Some might even prefer to send their children to majority-black schools that emphasize racial pride. In our view, though, choice opponents should not be too quick to dismiss these preferences as illegitimate. Consider the bizarre, Alice-in-Wonderland plight of Durham's Healthy Start Academy. Soon after the release of its remarkable test results (discussed above), Healthy Start found itself caught in a political squabble that focused on everything but the well-being of its students. State administrators

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278. COLEMAN ET AL, *supra* note 225, at 184; see also JAY P. GREENE, BUCKEY INST., CHOICE AND COMMUNITY: THE RACIAL, ECONOMIC, AND RELIGIOUS CONTEXT OF PARENTAL CHOICE IN CLEVELAND (1999) (describing research indicating that private schools attended by voucher recipients in Cleveland are more integrated than Cleveland's public schools); *Milwaukee School-Choice Program Racially Mixed*, AMERICA, Feb. 26, 2000, at 5, 5 ("A Wisconsin audit shows that the racial composition of students participating in the Milwaukee Parental Choice Program is almost exactly the same as that of the Milwaukee public schools.").

279. Jay P. Greene & Nicole Mellow, *Integration Where it Counts: A Study of Racial Integration in Public and Private School Lunchrooms* (visited Mar. 20, 2000) <<http://www.schoolchoices.org/roo/jay1/htm>>.

280. See *id.*

281. See *id.* Green and Mellow considered a lunchroom group "integrated" if at least one of five students was of a different race. See *id.*

282. See *id.*

threatened to close the school because it was “too black.”<sup>283</sup> Proponents of this drastic action claimed that Healthy Start ran afoul of the charter-school law’s “diversity” clause.<sup>284</sup> While the clause ostensibly was enacted to placate fears that charter schools would become a new generation of white-flight academies, the opposite occurred. Thirteen of the thirty-four charter schools that opened in North Carolina in 1997 were disproportionately black (compared to their districts).<sup>285</sup> By the following year, at least twenty-two of the State’s sixty charter schools ran afoul of the charter law’s diversity clause, which requires charter schools to “reasonably reflect” the demographics of the district that they serve because of their disproportionately minority student bodies.<sup>286</sup> Obviously, it was not affluent white parents who were searching for an educational alternative to the public schools.

In any event, not only do religious schools better comport with our integration ideals, but, as Joseph Viteritti recently argued,<sup>287</sup> school choice offers the best hope for achieving the promise of equality that the Supreme Court embraced in *Brown*. The Court in *Brown* was clear: “It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.”<sup>288</sup> Although the Supreme Court would later decline to extrapolate from *Brown* a public obligation to provide equal education to rich and poor,<sup>289</sup> litigation and activism in some states, aimed at equalizing educational opportunities, has led to significant changes in the financing of public education.<sup>290</sup> But if, as it appears, the answer to the lack of equality in education is not simply more funding, it could be that empowering low-income and minority parents to

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283. Murdock, *supra* note 255.

284. *Id.*

285. See David J. Dent, *Diversity Rules Threaten North Carolina Charter Schools That Aid Blacks*, N.Y. TIMES, Dec. 23, 1998, at B8.

286. *Id.*

287. See VITERITTI, *supra* note 8, at 25-28.

288. *Id.* at 493.

289. San Antonio Pub. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 (1973) (“The Equal Protection Clause does not require absolute equality or precisely equal advantages.”).

290. See VITERITTI, *supra* note 8, at 37-42; James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 (1999); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999).



act in their children's best interests is the surest way to make good on *Brown's* promise.

#### F. *School Choice, Civic Virtue, and the Common-School Ideal*

It is also sometimes argued that school choice, whatever its perceived educational benefits, would be unduly "privatizing." It is said that private and religious schools, unlike our public schools, encourage and perpetuate narrowness, sectarianism, and a lack of public and civic engagement.<sup>291</sup> These arguments often build on negative stereotypes about religious, especially evangelical and "fundamentalist," Christian schools.<sup>292</sup> The fear is that school choice would exacerbate the "bowling alone" phenomenon of withdrawal from public life that has troubled many commentators.<sup>293</sup> If such charges were true, they would weigh heavily against educational choice. But they are not:

Recent survey data from the U.S. Department of Education show that Catholic, Protestant, and nonreligious private schooling and home schooling families are consistently *more* involved in a wide spectrum of civic activities than are families of public school children. From voting to volunteering to visiting the local library, private and home schooling families are very much out in their communities and involved in the affairs of public life. Private schooling, it turns out, is anything but privatizing.<sup>294</sup>

Similarly, many opponents argue that school choice represents the abandonment of an American ideal—the mythic "common school."<sup>295</sup> This argument is predicated on the idea

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291. See, e.g., AMY GUTTMAN, *DEMOCRATIC EDUCATION* 121 (1987) (Education must "convert children away from the intensely held beliefs of their parents."); see also BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); DWYER, *supra* note 199; STEPHEN MACEDO, *LIBERAL VIRTUES* (1990). For detailed critiques of these arguments, see, for example, Stephen G. Gilles, *Hey Christians! Leave Your Kids Alone!*, 16 CONST. COMMENTARY 149 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

292. See, e.g., DWYER, *supra* note 199, at 16-19; ALAN PESHKIN, *GOD'S CHOICE: THE TOTAL WORLD OF A FUNDAMENTALIST CHRISTIAN SCHOOL* (1986); SUSAN ROSE, *KEEPING THEM OUT OF THE HANDS OF SATAN: EVANGELICAL SCHOOLING IN AMERICA* (1988).

293. See, e.g., Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995); Robert D. Putnam, *The Strange Disappearance of Civic America*, 24 AM. PROSPECT 34, 34 (1996).

294. Christian Smith & David Sikkink, *Is Private School Privatizing?*, FIRST THINGS, April 1999, at 16, 16.

295. Peter Beinart, *Degree of Separation*, NEW REPUBLIC, Nov. 3, 1997, at 6, 6; Ralph Benet, Editorial, *Educational Separatism is Destructive*, SAN DIEGO UNION-TRIB., Oct. 27,

that, by educating people from all backgrounds and inculcating a shared set of American values, the public schools provide the glue that holds our diverse polity together. Thus, public education is a critical component of our grand experiment with democracy. By ceasing the struggle to preserve the ideal of the common school, the argument goes, Americans resign themselves to the inevitable Balkanization of their diverse and multi-cultural society.

But it is crucial to remember that public or civic engagement does not require involvement in government-run institutions. As Tocqueville emphasized, and many “civil society” thinkers have re-discovered, a “thick” and vibrant democracy requires mediating institutions, voluntary associations, and other vehicles for other-directed activity and commitments to serve as buffers between the individual and the state.<sup>296</sup> Those who fear that private schools undermine civil society conflate civil society with the state. In fact, civil society is well served by private schools. The Department of Education’s 1996 National Household Education Survey received information from 9,393 parents of school-age children in a wide variety of schools about their membership in community organizations, volunteer activities, voting habits, political involvement, activism, and attendance at public lectures and speeches: “The results reveal a consistent pattern: Catholic schooling families, other Christian schooling families, nonreligious private schooling families, and home schooling families are consistently *more* involved in all of the civic activities examined than are families with children in public schools.”<sup>297</sup>

### G. *School Choice, Empowerment, and the Dignity of the Poor*

School choice first hit policy wonks’ radar screens in 1955—one year after the Supreme Court’s decision in *Brown*—when economist Milton Friedman proposed replacing the public-school system with a universal system of publicly

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1993, at B5; James W. Ceaser & Patrick J. McGuinn, *Civic Education Reconsidered*, PUB. INTEREST, Sept. 22, 1998, at 84, 91.

296. See Smith & Sikkink, *supra* note 294, at 17 (“American democracy thrives on the widespread participation of its citizens in a host of *different kinds* of associations that mediate between the individual and the state, often even when those associations are not manifestly political or liberal; . . . the experience of association and participation itself tends to socialize, empower, and incorporate citizens in ways that stimulate democratic self-government, even if they involve some particularity and conflict in the process.”).

297. *Id.* at 18.

funded vouchers.<sup>298</sup> Although Friedman's free-market ideology has proved a useful incubator for the school-choice idea, the case for school choice cannot be reduced to a purely utilitarian one. Instead, school choice will work largely because it enlists the very individuals who are most in tune with the needs of young students—their parents.

In recent years, the public schools' defenders have taken to laying much of the blame for the failure of urban public education at the feet of poor parents. They attribute, for example, the public schools' abysmal performance to a lack of parental involvement in their children's education.<sup>299</sup> Ironically, those who assert that parental involvement is the key to public-school reform also claim that poor parents are too irresponsible to make sound decisions about their children's education. The assertions that poor parents are lost without the paternalistic guidance of the "experts" in a school district's central administration building is not only insulting but also disregards basic common sense. Surely parents, even disadvantaged parents, know their children's needs better than bureaucrats do.

Parents welcome responsibility; they are tired of being subjects.<sup>300</sup> Consider the remarkable enthusiasm generated by privately funded programs that provide private-school scholarships to low-income children.<sup>301</sup> Recall also that John Witte, who was commissioned by the State of Wisconsin to evaluate the effectiveness of Milwaukee's school-choice program, concluded that the experiment did not significantly improve student performance.<sup>302</sup> (Again, however, his conclusions have been criticized by others.)<sup>303</sup> Witte also concluded that "[c]hoice creates enormous enthusiasm among parents, [although]

298. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solo ed., 1955).

299. See *NBC Nightly News: Interview with National Educational Association President Bob Chase* (NBC television broadcast, June 9, 1998).

300. In the 1999 poll conducted by the Joint Center for Political and Economic Studies, only 39.7% of African-Americans rated their public schools as excellent or good, compared to 59.0% of the population as a whole. See DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECONOMIC STUDIES, 1999 NATIONAL OPINION POLL: EDUCATION 5 (1999).

301. See, e.g., *WSF Announces: 1,000 New Scholarships for 1998!*, WASH. SCHOLARSHIP FUND NEWS (Washington Scholarship Fund, Washington, D.C.), Dec. 1997, at 1; *Washington Scholarship Fund, History* (visited Feb. 29, 2000) <<http://www/wsf-dc.org>>; Forstmann, *supra* note 20.

302. See John F. Witte et al., *Fifth-Year Report: Milwaukee Parental Choice Program* (visited Mar. 2, 2000) <<http://www.lafollette.wisc.edu/outreach/pubs/fifthyear/executive.htm>>.

303. See generally Greene et al., *supra* note 241.

student achievement fails to rise.”<sup>304</sup> Witte failed to appreciate that the “enormous enthusiasm among parents” generated by choice is intrinsically valuable. These newly “enthusiastic” parents and their children were, prior to the enactment of the Milwaukee Parental Choice Program, the outsiders—the experimental subjects—in American education. Their children were trapped in substandard schools. Their efforts to voice frustrations fell on the deaf ears of entrenched bureaucrats. The teachers unions and their allies used them as convenient scapegoats when asked to explain the public schools’ spiraling decline. But when Governor Tommy Thompson signed the legislation creating the Milwaukee Parental Choice Program, he transformed the lives of these parents by giving them—perhaps for the first time—the ability to control their children’s destiny.

John Coon’s short 1992 piece “School Choice as Simple Justice,” cuts to the heart of the matter.<sup>305</sup> He passionately makes the case that choice in education should not and cannot be treated as just another free-market fad, a “tool of supply side economics,” an “efficiency device aimed primarily at economic growth.”<sup>306</sup> He wrote:

[T]he case for choice in education goes much deeper than market efficiency . . . . Shifting educational authority from government to parents is a policy that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family; it is a shift that also promises a harvest of social trust as the experience of responsibility is extended to all . . . .

. . . .

Choice . . . needs to be loved for its own sake, or at least for a reason more noble than its capacity to make life better for the producers. In fact, there are larger reasons for believing in choice—reasons equal in dignity to those that underlie our great constitutional freedoms.<sup>307</sup>

Our nation’s poor are too often treated, even by the most well meaning education bureaucrats and committed public-school teachers, more as problems to be solved than as persons, more as clients than as co-citizens. “How can *we* better help *them*?” is

304. *Id.* at 1.

305. Coons, *supra* note 52, at 15.

306. *Id.*

307. *Id.*

the question tooften posed. Too often, plan after plan is hatched to limit underprivileged parents' influence over children, while expanding the government's. Inevitably, as Coons observed, "parents learn that they are not trusted; they are not taken seriously. Society tells them instead that even utter strangers are better judges of the school that is most suitable for their child."<sup>308</sup>

### H. *Religious Freedom and Parental Expression*

A common theme in today's political debate—consider the issue of campaign finance reform—is that the poor lack a voice in the public arena. Yet we often forget that parents' educational choices are often as expressive, both to their children and to the world, as any other kind of speech:

Schools that are freely chosen are the proxies for parental ideas that seek entry into the public dialogue. Today those who can afford to do so often choose a school precisely because it preserves and projects a certain deposit of belief. . . . The school is a loudspeaker for those who freely support it with their presence and wish to cooperate in its message.

The non-rich are presently denied this medium of expression. They are conscripted for schools that impose upon them a narrow curriculum produced by a political process.<sup>309</sup>

Many of those who oppose choice know this; indeed, it is sometimes why they oppose choice.<sup>310</sup> They recognize that the education of children is not neutral; it cannot and should not be a purely technical task. Education shapes and forms the citizens that today's students will become. Those who claim for the state the moral authority to control the formation of its citizens prefer, like Horace Mann, James Blaine, and Thomas Dewey before them, that the state rather than poor parents—and especially rather than poor religious parents—monopolize that coercive authority.<sup>311</sup>

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308. *Id.* at 16.

309. *Id.* at 17.

310. "Critics of choice . . . assert that, by expressing their preferences in education, the poor will foment ideas that are dangerous to society." *Id.* at 19.

311. *See id.* at 19 ("The machinery of public monopoly was chosen specifically by brahmins like Horace Mann and James Blaine to coax the children of immigrants from the religious superstitions of their barbarian parents. Today that antique machinery

Surely of all the mediating, teaching, and values-inculcating institutions, the family is primary, both in time and in importance.<sup>312</sup> Just as groups must be able to control their message to the world, free from unjustified government intrusion into their membership, rituals, and commitments, so should the decisions of parents to control and shape their family's character formation be unfettered by intrusive and unwarranted government second-guessing. Denying educational choice, as a means of controlling the messages transmitted to other people's children, is intellectual kidnapping.<sup>313</sup> It is not the proper business of a truly liberal state.<sup>314</sup>

Given our professed constitutional commitment to religious liberty, granting the state a monopoly on the content of the educational message children receive is particularly troubling.<sup>315</sup> Indeed, courts and commentators sometimes fail to remember that *Meyer* and *Pierce*, which were decided at a time of hostility to the culture, language, and religion of many immigrants,<sup>316</sup> were meant to safeguard the rights of religious and ethnic minorities. These decisions serve as clear statements of parents' rights to build a family culture and shape the character of their children.

As Joseph Viteritti observes, "[t]he calculus of religious liberty in a free society is determined by the measure of religiously motivated thought and action that is insulated from public authority."<sup>317</sup> Real school choice expands that measure. It

continues its designated role, and if this function was ever benign, it has long since ceased to be so.").

312. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (noting important role of the family in "promot[ing] a way of life through the instruction of children").

313. See *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (noting that the law at issue would "deprive parents of a fair opportunity to procure for their children instruction which they think important and we cannot say is harmful"); see generally Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996) (arguing that the coercive funding of public schools interferes with parental educative speech).

314. See, e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) ("Disapproval of a private speaker's statement does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others.").

315. As some of the Supreme Court's decisions illustrate, the fundamental "liberty" rights of parents to direct and control their children's upbringing will in many cases complement religious-freedom rights protected by the Free Exercise Clause. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

316. See, e.g., VITERITTI, *supra* note 8, at 151-56 (1999).

317. *Id.* at 165.

appreciates that, for many parents and children, education is a religious, and not merely a secular or civil, enterprise. The perceived secular and, at times, overtly anti-religious tone of public education requires these parents to pay what is essentially a tax on their religious objections. They pay tuition to a private school in addition to the taxes they already pay to support government schools. The imposition of burdens on religious belief, the drive toward homogenization, and the undermining of minority religious views are illiberal, as well as unnecessary. Choice, on the other hand, frees more religious expression from public authority by enhancing choice and expression generally.

#### IV. CONCLUSION

The constitutional arguments against school choice are misplaced. Religious schools and institutions are entitled to the same respect accorded government schools. We know that those who are not being served by public schools want choice, but are opposed by those who—whether for reasons of economic self-interest, attachment to common-school myths, or misguided constitutional interpretation—insist that poor children must continue to be thrown over the trench walls like so much cannon fodder. Indeed, the most common anti-school-choice argument goes something like this: “We can’t permit school choice, because vouchers will take children, and therefore money, away from the public schools, where both are desperately needed.”<sup>318</sup>

In response to this argument, Eugene Volokh has observed that the Constitution “does not have a You May Not Hurt Government-Run Schools Clause.”<sup>319</sup> What is more, it is not at all clear, given that vouchers under school-choice programs are invariably worth less than the cost of public-school education,<sup>320</sup> that the public schools are hurt (at least financially) when a child manages to escape. In any event, one would hope that, for those who care about the well-being of children, the governing consideration would be what is best for children, not what is best for public schools:

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318. *Meet the Press*, *supra* note 1 (Vice-President Gore speaking).

319. Volokh, *supra* note 35, at 360.

320. *See id.* at 361-62 & n.41.

Students shouldn't be means to the end of improving government schools—government schools should be a means to the end of improving each student. Good students aren't just tools that are available for the government to use in order to improve the quality of its schools (or even to improve the quality of education of other, not-so-good students). It's wrong to deprive the good students of educational choices so they can remain trapped in government schools for the government schools' benefit. Even if there are good arguments for not helping parents who choose to send their kids to private schools, "we need your kid at the government school to make the school better"<sup>321</sup> is not one of them.

As William Raspberry asks, "[I]ook at it from the viewpoint of those parents who grab so avidly for the chance to get their children into better schools: Should they be required to keep their children in dreadful schools in order to keep those schools from growing even worse?"<sup>322</sup> No. The claim that "we need your child to prop up the public schools" is, from a moral point of view, no more palatable, and should be no more convincing, than any other hostage-taking argument.<sup>323</sup>

School choice is merely the educational-policy equivalent of the "Golden Rule." The children of the poor should not be required or even consigned to attend schools that policy-makers would not permit their own children to attend. The children of the poor should not be treated as pawns or their interests sacrificed to appease an outdated, and increasingly harmful, monopoly. Public funds are collected and should be spent to advance the educational interests of children, not the special interests of government-employee unions. School choice is not "sectarian" or "conservative." It is not just about profit, efficiency, or competition. It is about justice.

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321. *Id.* at 361.

322. William Raspberry, *Not Enough Lifeboats*, WASH. POST, Mar. 9, 1998, at A19.

323. See, e.g., IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Ladd trans., Macmillan 1985) (1797) ("[A] human being can never be manipulated merely as a means to the purposes of someone else . . .").



