

April 2001

## Racial Segregation in American Churches and Its Implications for School Vouchers

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### Recommended Citation

Robert K. Vischer, *Racial Segregation in American Churches and Its Implications for School Vouchers*, 53 Fla. L. Rev. 193 (2001).

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RACIAL SEGREGATION IN AMERICAN CHURCHES AND ITS  
IMPLICATIONS FOR SCHOOL VOUCHERS

*Robert K. Vischer\**

I.	VOUCHERS, SCHOOLS, AND RACE . . . . .	196
II.	RACIAL SEGREGATION IN AMERICAN CHURCHES . . . . .	204
III.	MARKET FORCES AND CHURCH-AFFILIATED SCHOOLS . . . . .	216
IV.	RELIGION AS A FACTOR IN SCHOOL CHOICE . . . . .	223
V.	RESPONDING TO VOUCHERS' SEGREGATIVE TENDENCIES . . . . .	229
VI.	CONCLUSION . . . . .	236

In the ever-burgeoning debate over school vouchers, the case made by voucher proponents lies not just in notions of academic achievement, but, to a significant degree, in the perception that the use of vouchers will foster civic ideals and public virtue. The civic ideals usually referred to by proponents relate to freedom and equality of opportunity arising from expanded educational options for students and their families, especially for those who otherwise lack the financial resources needed to make private school a viable option. Left largely unmentioned by proponents, however, is a civic ideal of more recent vintage—the concept of racial diversity, which, along with pluralism in general, is now widely accepted as an essential attribute of a civil society.<sup>1</sup> Even assuming that the broad implementation of vouchers in this country would lead to the improvements advertised by proponents, the impact of vouchers on racial diversity in our nation's schools, while not necessarily dispositive, is certainly a relevant consideration in the voucher debate.

The merits of vouchers are by no means new to legal scholarship. By far the most common path of inquiry is along First Amendment lines. Some writers have expressed concern with the social impact of

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1. See, e.g., Stephen Macedo, *School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 428-29 (2000).

vouchers—e.g., the potential “skimming” effect by which the most motivated and able students are removed from failing schools.<sup>2</sup> A few writers have addressed, often in passing, the possible segregative effects of vouchers. Their analysis takes one of two routes: they predict segregation on economic grounds—i.e., racial minorities are more likely to be low-income, and thus less likely to have the information network necessary to make informed choices, the motivation to transfer out of the system, or the resources to afford tuition or transportation costs not covered by the voucher<sup>3</sup>—or on racial preference grounds—that is, students and parents choose schools attended by members of their own race.<sup>4</sup> Left unaddressed thus far is the interplay of American religious life with a voucher-based system, and its effect on racial segregation in our schools.

This Article explores, at a conceptual level, the means by which school vouchers could lead to further racial segregation in education. Specifically, this Article addresses the likelihood that the widespread implementation of vouchers would increase segregation by fostering the creation and expansion of church-affiliated elementary and secondary schools. Given that churches in this country are segregated to a great extent along racial lines, this Article concludes that increased attendance at church-affiliated schools will exacerbate school segregation. Currently, two obstacles prevent school attendance patterns from mirroring the racial segregation found in our nation’s churches. First, many parents lack the funds to pay tuition at schools affiliated with their churches. Second, most churches do not operate their own schools. With the widespread implementation of vouchers, both of these obstacles could be surmounted. Parents would have money to pay tuition at church-affiliated schools, and the churches, in turn, would have the financial incentive to create and operate schools.

Part I of this Article provides a brief explanation of vouchers and a general breakdown of racial diversity in public and private schools, then gives an overview of the foreseeable interplay between vouchers and the racial composition of church-affiliated schools. Part II explores the racial segregation prevalent in Christian churches in this nation—its history, sources, and future prospects. Finding that churches’ racial divisions are entrenched, generally mutual, and rooted in several distinct sources, Part II suggests that students and parents are unlikely to cross these divisions when they have the option of attending a school reflecting their own church

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2. See JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 58 (1999).

3. See Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL’Y REV. 1, 18-20 (1992).

4. See Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 NAT’L BLACK L.J. 26, 50 (1997-98).

affiliation, as they likely would under a voucher program. Part III traces the path by which the market forces unleashed by vouchers would lead to an increase in church-affiliated schools. Part IV inquires whether students and parents would select schools based on the schools' church affiliation, or whether, given a broad spectrum of secular and religious schools, they would give greater weight to other factors. Finally, Part V proposes regulatory safeguards by which vouchers' segregative tendencies might be addressed, then analyzes the proposals based on notions of efficacy, legality, and fundamental fairness.

At the outset, it must be acknowledged that in a nation increasingly desperate to remedy the well-documented failures of many public schools, this Article's thesis may be met with a collective shrug in some circles. An unswerving devotion to racial integration at the expense of meaningful reform seems akin to losing sight of the forest for the trees, given the reality of the educational crisis facing low-income, predominantly minority students. Admittedly, the segregation that might result from vouchers is qualitatively different than the segregation that existed before *Brown v. Board of Education*.<sup>5</sup> Increasingly, the very premise of *Brown* is being questioned by educational reformers, political leaders, and jurists.<sup>6</sup> Others point out that there is no evidence that African Americans do better in an integrated school.<sup>7</sup>

Tackling the empirical evidence regarding minority performance in integrated versus segregated environments, or the cost-benefit returns of continued integration efforts in education, or the fundamental consistency between American ideals and private school vouchers, are all tasks beyond the scope of this article. Whether greater societal value should be placed on racially diverse schools than on academic achievement or the maximization of educational options—even assuming that such goals are mutually exclusive—is a question better addressed in the political arena. The purpose of this analysis is not to determine whether an increase in voluntary racial segregation is tolerable in return for voucher-driven improvements in education, nor whether such improvements are even likely. Rather, the purpose of this Article is to widen, and hopefully enrich, the voucher debate by addressing the unintended racial ramifications of the increased reliance on church-affiliated schools that is central to most voucher proposals.

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5. See VITERITTI, *supra* note 2, at 13.

6. See *infra* notes 152-54 and accompanying text.

7. See VITERITTI, *supra* note 2, at 50-51.

## I. VOUCHERS, SCHOOLS, AND RACE

There are many types of reform measures under the “school choice” umbrella. This Article’s analysis is based on voucher programs that encompass private, religious schools, which are a centerpiece of much voucher advocacy.<sup>8</sup> Under such programs, parents would receive a government voucher for a certain amount of money that they could use at any school—private or public, religious or secular—that chooses to participate. The monetary value of each voucher varies with the particular program’s terms—the voucher could reflect per-student state education expenditures, the cost of private school tuition, some portion thereof, or simply some fixed sum. What is essential to the voucher program—and what lies at the core of this Article’s analysis—is that parents receive government funds to apply toward the tuition of any school they choose.

Beyond this definitional aspect of vouchers, the substance of voucher programs can vary as widely as their framers’ imaginations. In a sense, this can be a strength, for the programs can be tailored to address potential pitfalls like racial segregation. The conundrum of regulating vouchers, however, is that their efficacy derives to a great extent from their fostering of unfettered competition among schools, encouragement of educational innovation, and empowerment of educational consumers. In that regard, regulatory safeguards—which could be used to guard against the segregative dangers of voucher programs—may negate the qualities that draw people to vouchers in the first place. Before weighing the appropriateness of these safeguards, however, it must be determined what those segregative dangers are.

Any discussion of vouchers’ segregative dangers must begin with the acknowledgment that most public school students today are already segregated.<sup>9</sup> This is largely a function of the geographical segregation found in our urban centers. In the nation’s twenty-five largest central cities, the percentage of school-age children who were white dropped from 84.5% in 1950 to 48.7% in 1980.<sup>10</sup> As a result, “[n]ationwide, one-third of minority children are racially isolated in public schools; in the Northeast, the ratio jumps to one-half.”<sup>11</sup>

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8. See, e.g., Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 313 (2000) (“We believe that ‘real’ school choice must include private, religious schools.”).

9. See VITERITTI, *supra* note 2, at 49; Frank R. Kemerer, *School Choice Accountability, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 174, 189-90 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) [hereinafter *SCHOOL CHOICE AND SOCIAL CONTROVERSY*].

10. Garnett & Garnett, *supra* note 8, at 353.

11. Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2383 (1997).

Even without the widespread adoption of voucher programs, segregation is increasing. Indeed, “most of our nation’s public schools are more segregated than they were 40 years ago.”<sup>12</sup> For example, in the fall of 1972, 63.6% of black students were in schools with less than half white enrollment; in 1986, the percentage was virtually the same; by 1997, the percentage had risen to 67.1%.<sup>13</sup>

Against this background, this Article’s premise—that potentially segregative effects are an unwelcome aspect of vouchers—may appear to be moot, or at best a matter suited only for academic debate. Put simply, how could vouchers further segregate an already segregated educational world? The simple response is that a bad situation can always be made worse. While inner-city schools are highly segregated, no one has suggested that their segregation is absolute, or that it has no room to increase. Contrary to popular perception, only 56.1% of those enrolled in public schools in central city districts are black or Hispanic.<sup>14</sup> Outside the inner city, multi-racial schools are prevalent, if not the norm. Also contrary to popular perception, most African-American public school students do not live in the inner city.<sup>15</sup>

Further, even though the most publicized academic failures are inner-city public schools, the appeal of vouchers is not limited to those schools. First, not all academically failing schools are in the inner city, and rare indeed is the school—whether urban, suburban, or rural<sup>16</sup>—in which students and their parents perceive no room for improvement in the teaching, facilities, curriculum, or general academic output of the school. The appeal of educational alternatives is not limited to the inner city. Second, academic improvement is not the only motivating factor in the decision to switch schools. Ideological, religious, or safety concerns may also drive students and their parents to opt out of a school even if it is not failing academically.

Starting from the premise that increased racial segregation in our schools is conceivable, the question is whether such an increase is more likely in a voucher-based system. Under a straightforward supply and

12. Antoine M. Garibaldi, *Four Decades of Progress . . . and Decline: An Assessment of African American Educational Attainment*, 66 J. NEGRO EDUC. 105, 106 (1997).

13. *Id.* at 107.

14. Betsy Levin, *Race and School Choice*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY, *supra* note 9, at 266, 274.

15. Garibaldi, *supra* note 12, at 106 (noting that only 30% of black public school students are enrolled in schools in large central cities with populations of more than 400,000 people) (citing Frederick D. Patterson Research Institute, 1997).

16. It should be noted that, while the demand for educational alternatives is not a function of a school’s environment, the feasibility of supplying such alternatives, even under a voucher program, will depend to some extent on the size of the student population. Because a rural school district may be unable to support more than one school, a voucher program would not be feasible.

demand framework, it is apparent that new schools will be created in response to the availability of voucher money. Among the organizations likely to have the ideological inclination to operate schools, churches are perhaps in the best position to do so relatively quickly and on a large scale. Many churches already have the physical infrastructure, a loyal consumer base, and the motivation to educate. Even without vouchers, African-American churches increasingly are seeking to create their own schools, and the number of conservative evangelical schools has risen dramatically.

That said, certainly not every school created in response to the influx of voucher money will be affiliated with a church. Private corporations and non-religious civic organizations will have ample incentive to develop schools, and presumably the supply will eventually match the demand of students and parents who are interested in non-religious educational alternatives. For several reasons, however, the concurrent development of non-religious private schools may not adequately counter the potential segregative impact of the voucher-driven increase in church-affiliated schools. First, as mentioned above, the organizational advantages enjoyed by churches may put other entities seeking to enter the market in the position of playing catch-up. And given that 85% of existing private schools are religious, religious schools will dominate the universe of alternatives available to voucher students for the foreseeable future.<sup>17</sup> Second, as discussed in Part IV below, the number of students and parents who will choose church-affiliated schools under a voucher program—even assuming the viability of secular alternatives—is formidable. The level of religious participation and centrality of religion in this country remain remarkably high, especially among African Americans.<sup>18</sup> Third, the segregative dangers of vouchers stem not from the presumption that every student will use vouchers to attend religious schools, but that those who do so will often choose a school operated by a church that is attended almost exclusively by members of their own race.

The first task in more precisely tracing vouchers' segregative tendencies is to identify what those tendencies are not. Vouchers cannot be written off as a scheme favoring whites over blacks. Adequately funded vouchers—that is, covering private school tuition and transportation costs for low-income students<sup>19</sup>—could transform the educational prospects of poor, predominantly minority students in our nation's cities. Indeed,

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17. See Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY*, *supra* note 9, at 13, 25 (1999).

18. See Barna Research Online, at <http://www.barna.org> (recounting 1999 survey finding that 83% of African Americans say their religious faith is very important to their lives, compared to 68% of whites).

19. See Levin, *supra* note 14, at 290 (arguing that schools should be prevented from charging more than the voucher amount, and that transportation should be subsidized).

African Americans' support for vouchers has skyrocketed, even without the support of their institutional leaders.<sup>20</sup> This is not surprising given the well-documented failures of inner-city public schools, which disproportionately affect African Americans,<sup>21</sup> and the early promise shown by voucher programs in improving the test scores of African-American students.<sup>22</sup> Far from pulling higher-income whites out of failing public schools, vouchers offer—at least theoretically—an escape hatch to all students regardless of race or income. Somewhat illogically, it is this widespread appeal from which the potential for segregation arises. As leaders of the African-American church perceive the educational crisis facing their congregants and begin to support school choice,<sup>23</sup> the church becomes a prime source of educational alternatives.

Vouchers' segregative tendencies also do not stem from any current racial disparity in the attendance patterns at church-affiliated schools. Attendance statistics illustrate the fact that, while church-affiliated schools are not as diverse as their public counterparts, their diversity is increasing rapidly. As background, about five million children, or approximately 10% of children in school, attend private schools.<sup>24</sup> Eighty-five percent of these private school students attend religious schools—50% of whom attend Catholic schools.<sup>25</sup> Attendance at conservative Protestant schools is

20. See, e.g., VITERITTI, *supra* note 2, at 5-6 (noting that non-whites with lower incomes favor vouchers more than whites with upper incomes); James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. TIMES, Dec. 27, 1997, at A1; Lee Hubbard, *Liberals Should Let Black Students Be 'Free At Last,'* HOUS. CHRON., Feb. 9, 2000, at 31 (noting African Americans' support for school choice "is off the charts—despite opposition from black leaders (who often send their children to private schools) and the NAACP"); *Ohio Court: Voucher Decision; Good News and Bad for School Choice*, CIN. ENQUIRER, June 1, 1999, at A8 (noting that as of June 1999, "nonpartisan polls have found an increase of almost 10 points in the past 18 months in the percentage of African Americans supporting vouchers to help the urban poor pay tuition at private schools"); Nina Shokraii Rees, *School Reform*, 9 AM. ENTER. 60, 61 (1998) (A 1997 poll found that 87% of African Americans between the ages of 26 and 35 support school choice.).

21. See Barnes, *supra* note 11, at 2376 ("Despite the work of civil rights lawyers, the quality of educational opportunities for black students relative to whites has improved only moderately. Black children have less access than white students to the limited number of quality public education programs, and they are significantly overrepresented in the worst."); cf. Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 396-97 (1997) (arguing that data do not suggest the decline of black students' achievement, but rather the decline of white students' relative educational advantage over black students).

22. See Jay Mathews, *Scores Improve for D.C. Pupils With Vouchers; New Study's Results Add to Election Year Debate Over Education Funding*, WASH. POST, Aug. 28, 2000, at A1 (reporting on study finding that African-American students' reading and math scores on Iowa Test of Basic Skills improved over first two years of voucher programs).

23. See HUBERT MORKEN & JO RENEE FORMICOLA, *THE POLITICS OF SCHOOL CHOICE* 123 (1999).

24. Henig & Sugarman, *supra* note 17, at 25.

25. *Id.*; VITERITTI, *supra* note 2, at 82-83 (giving figure of 51%).



growing rapidly, as such schools enrolled 14% of private school students in the 1995-96 school year.<sup>26</sup>

As for minority enrollment, 94% of African-American students—almost 7.2 million—were enrolled in public schools, but only 6%—almost one-half million—attended private schools.<sup>27</sup> In 1995, 17.1% of private school students were black or Hispanic, compared with 31.1% of public school students.<sup>28</sup> African-American students account for 16.5% of public school enrollments and 9.3% of private school enrollments.<sup>29</sup> At Catholic schools in particular, the proportion of minority students has increased markedly, rising from 10.8% of Catholic school enrollment in 1970-71 to 24% in 1995-96.<sup>30</sup> Today 25% of Catholic school students are minorities.<sup>31</sup>

While fewer minorities attend private schools than public schools, some argue that blacks and whites are substantially more integrated within private schools,<sup>32</sup> and within Catholic schools in particular. James Coleman concluded in 1982 that “the internal segregation of the Catholic sector is less than that in the public sector—substantially so for blacks and whites, slightly so for Hispanics and Anglos.”<sup>33</sup> Andrew Greeley also found that minority students are better integrated in Catholic schools than in public schools.<sup>34</sup>

Given the increasing diversity of private schools—especially Catholic schools—without vouchers, there may appear to be no reason to resist a larger role for such schools under a voucher system. Apart from the socioeconomic impact of tuition charges, there is little evidence of any widespread segregative patterns inherent in church-affiliated schools. The existence of such patterns in a pre-voucher system, however, is of limited relevance to our inquiry. Without the influx of voucher money, the full spectrum of Christian denominations—and their corresponding attractiveness to particular races—are not represented in the supply of school options. Students facing a choice of a successful Catholic school or a failing public school may choose the former by default. The student’s decision process may change significantly if she has the option of attending

26. Henig & Sugarman, *supra* note 17, at 25; Levin, *supra* note 14, at 274.

27. Garibaldi, *supra* note 12, at 106 (citing Frederick D. Patterson Research Institute, 1997).

28. Levin, *supra* note 14, at 274.

29. Garibaldi, *supra* note 12, at 106 (citing Frederick D. Patterson Research Institute, 1997).

30. SHANE P. MARTIN, CULTURAL DIVERSITY IN CATHOLIC SCHOOLS: CHALLENGES AND OPPORTUNITIES FOR CATHOLIC EDUCATORS 6 (1996).

31. VITERITTI, *supra* note 2, at 82-83.

32. See Garnett & Garnett, *supra* note 8, at 353.

33. JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 34 (1982).

34. STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 234 (2000).

a school affiliated with her own church. The true test of church-affiliated schools' segregative tendencies comes in the voucher-driven market, where a Catholic school is competing for students not against the local public school, but against other churches.

Not only do church-affiliated schools in a pre-voucher educational market fail to exhibit segregative tendencies, but initial studies of districts experimenting with vouchers seem to indicate that vouchers have *reduced* segregation in private—primarily church-affiliated—schools. For example, early evidence from the Milwaukee voucher program suggests that participating private schools are becoming more diverse. Analysis by two voucher advocates “concluded that the minority enrollment in choice schools had increased as a result of the program and that a smaller proportion of choice schools were racially isolated than was true in Milwaukee Public Schools.”<sup>35</sup> In the 1994-95 school year, when 802 students participated in the voucher program, Milwaukee private schools were 73% white and 27% minority. In 1998-99, by contrast, with 6,194 students participating, private schools were 64% white and 36% minority.<sup>36</sup>

Before any sweeping conclusions are drawn from this data, it bears noting that a primary factor in the increased diversity under the Milwaukee program appears to have resulted from “white flight,” not simply from minorities switching to the private schools at higher rates. Even with the voucher program, private school enrollment in Milwaukee declined—a decline attributable entirely to a drop in the number of white students enrolled.<sup>37</sup> Although there was an increase in minority enrollment in private schools, “the decline in white enrollment raised concern about how encouraging that diversity was if white flight was occurring.”<sup>38</sup>

While it is too early to reach a definitive conclusion about the impact of vouchers on diversity in Milwaukee private schools, is it conceivable that vouchers could actually increase diversity if made available to all students in a given metropolitan area? Given that the segregation of schools is closely tied to the geographical segregation of our cities, could vouchers promote integration by facilitating student mobility? Could vouchers break the correlation between socioeconomic status and private schooling by removing a student's financial background from the equation? For several reasons, these theoretical bases for optimism appear, at least at this stage, to lack empirical support.

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35. Alan J. Borsuk, *Vouchers Lead to Diversity, Backers Say Private Schools' Minority Rolls Rising*, MILW. J. SENT., Nov. 27, 1999, at 1.

36. *Id.*

37. See Alan J. Borsuk, *Loss of White Kids Also Takes Toll at City's Private Schools*, MILW. J. SENT., Dec. 29, 1999, at 1.

38. *Id.*

First, there is no indication that vouchers will lead students or their parents to break through the geographical barriers to integration. Students still tend to favor schools near them, and to favor schools where they are not in the minority. Evidence shows that parents want to be able to exercise choice in choosing a school located in their community, but not to send their child a long distance.<sup>39</sup> Minorities are more likely to choose schools in low-income neighborhoods, which have a higher percentage of minorities.<sup>40</sup> As for whites' enrollment choices, one study showed that the level of academic achievement in public schools had no measurable impact on private school enrollment, but minority enrollment in public schools was a significant predictor.<sup>41</sup> A study of the choice program in Montgomery, Maryland shows that whites are more likely to transfer to schools with a low percentage of minorities, and that minorities are more likely to request transfer into schools with a higher percentage of minorities and in lower-income neighborhoods.<sup>42</sup> In the public school choice context, a study of the open enrollment plans in Akron, Omaha, and Des Moines found "glaring underutilization of open enrollment by nonwhite students in all three districts," resulting in a "disproportionate number of white students transferring out of the urban district, changing the ratio of white to nonwhite students and raising the spectre of segregation."<sup>43</sup> Other observers concluded that, based on the public school choice programs in Omaha and Iowa, "[t]he evidence clearly shows that public school choice is currently reversing massive national efforts to increase integration of America's schools."<sup>44</sup>

In public school choice programs, there is potential for segregation because white parents are reluctant to send their children to schools in minority neighborhoods or to schools with substantial minority enrollments, regardless of other school factors.<sup>45</sup> Another barrier to integration in choice programs is the information gap. More affluent and

39. See VITERITTI, *supra* note 2, at 78.

40. See Jeffrey R. Henig, *School Choice Outcomes*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY*, *supra* note 9, at 68, 78-79.

41. O'Brien, *supra* note 21, at 401.

42. Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in *WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE* 95, 105 (Bruce Fuller & Richard F. Elmore eds., 1996) [hereinafter *WHO CHOOSES?*].

43. Constance Hawke, *The "Choice" for Urban School Districts: Open Enrollment or Desegregation?*, 115 *EDUC. L. REP.* 609, 620 (1997).

44. Joseph R. McKinney, *Public School Choice and Desegregation: A Reality Check*, 25 *J.L. & EDUC.* 649, 649 (1996).

45. See Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 *SETON HALL L. REV.* 937, 943 (1993); Hawke, *supra* note 43, at 620 (observing in public choice programs "the phenomenon that whites and nonwhites will gravitate to schools where there are students of the same race as their own").

educated families make their school choices based on more sophisticated data and are more aggressive in using choice programs—often these more active choosers, correlating with income and education, are white. Families with less education and lower incomes—a category in which minority families are more likely to fall—tend to rely on information provided by friends and family members who already have children in a particular school, making it less likely that they would venture into uncharted territory.<sup>46</sup>

Besides the barriers that have proven resistant to integration in other school choice contexts, the reasons for optimism about vouchers' integrative potential are relevant only in the current educational market. They are based on the presumption that the supply of schools will remain roughly the same as it is today, giving students a limited spectrum of schools from which to choose. The increased student mobility argument presumes that students will have ample motivation to travel outside their geographical area for school. This presumption might be valid if an inner-city minority student has the choice of attending a failing public school near her home or a predominantly white private school across town or in the suburbs. However, if the student also has the option of attending a predominantly minority private school near her home, the motivation to travel diminishes significantly.

The same holds true for the socioeconomic leveling that vouchers could bring. In the current school market, a low-income student who wishes to use a private school voucher will choose a school that—because it has been unable to rely on government funds for its existence—likely will have had a higher-income, predominantly white student body capable of paying tuition. Once vouchers are adopted on a widespread basis, however, the school supply will expand and diversify in response to the demand created by the available pool of government funds. Unlike the pre-voucher market, there is no assurance that students from different socioeconomic backgrounds will be drawn to the same schools when there is a full range of choices available. Opening up private schools to students of all income levels translates into increased integration only when the supply of private schools is limited. A functioning market will supply schools based on families' cultural, religious, and even racial preferences, providing new avenues for school segregation to occur.

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46. See Eisdorfer, *supra* note 45, at 943-44.

## II. RACIAL SEGREGATION IN AMERICAN CHURCHES<sup>47</sup>

Martin Luther King, Jr.'s oft-cited observation that Sunday morning at 11:00 is "the most segregated hour of the week" still holds for the vast majority of American churches.<sup>48</sup> A study based on 1998 data found that 69% of congregations are almost all white, and 18% mostly black.<sup>49</sup> Only about 10% of congregations can be considered integrated. In a recent *New York Times* survey, 90% of whites said there were few or no blacks at their religious services and 73% of blacks said their congregations had few or no whites.<sup>50</sup> In most local congregations, "we seem to be more comfortable praising the Lord when we do it with people who look like us."<sup>51</sup> As a result, "[a]cross America, most black people go to church with blacks; most whites attend with whites."<sup>52</sup> The color line reaches to the denominational level as well; of the nation's ten largest Christian denominations, four are predominantly white and four are predominantly

47. This Article focuses on Christianity because schools affiliated with Christian churches dominate the supply of church-affiliated schools in this country, and will for the foreseeable future. Jewish and Muslim schools are becoming more common. See Robin Estrin, *Jewish Schools Experience Growth*, ASSOCIATED PRESS, Aug. 1, 1998, available at 1998 WL 6702705 ("In 1960, an estimated 60,000 students nationwide attended Jewish schools. That number has more than tripled to about 190,000 students in some 650 schools."); Susan Sachs, *Muslim Schools in U.S. a Voice for Identity*, N.Y. TIMES, Nov. 10, 1998, at A3 (noting that "[i]n a sudden growth spurt, the number of Islamic schools nationwide has jumped to at least 200"). Despite this increase, however, their number pales in comparison to Catholic and Protestant schools. See Michael S. Hamilton, *We're in the Money!*, CHRISTIANITY TODAY, June 12, 2000, at 3643 (reporting that Protestant schools constitute nearly 14% of all schools); Teresa Malcolm, *Slow Rise Continues in Catholic School Enrollment*, NAT'L CATH. REP., May 5, 2000, at 11 (reporting that in the 1999-2000 school year, 2,653,038 students attended 8,144 Catholic elementary and secondary schools). More generally, even though the religious diversity of the United States is rapidly increasing, Christianity still dominates. To put it in perspective, "[f]or every Muslim, there are nearly 40 to 60 Christians; for every Buddhist, twice that number; and for every Hindu about 232 Americans who claim affiliation to Christianity." Larry Witham, *Immigration Changes Face of U.S. Religion*, WASH. TIMES, Apr. 14, 2000, at A1.

48. FUMITAKA MATSUOKA, *THE COLOR OF FAITH* 106 (1998) (acknowledging "the continuing reality that eleven o'clock on Sunday morning is the most segregated hour in our society"); Stephen L. Carter, *The Free Exercise Thereof*, 28 WM. & MARY L. REV. 1627, 1644-45 (1997) ("American religion has a long history of segregation, especially on the basis of race. Three decades ago, Martin Luther King, Jr. referred to Sunday morning at 11:00 as 'the most segregated hour of the week'—and, sadly, it still is."); Bruce Nolan, *Churches Challenged to Heal Racial Divide*, SALT LAKE TRIB., May 23, 1998, at C1 ("11 a.m. Sunday is still the most segregated hour in America.").

49. Shelia Hardwell Byrd, *Seeking Unity in Prayer*, CHI. TRIB., June 30, 2000, at B8 (quoting findings of National Congregations Study).

50. *Divided by Faith*, CHRISTIANITY TODAY, Oct. 2, 2000, at 35.

51. Gary Heinlein, *Segregation Persists in Most Churches*, TULSA WORLD, Sept. 20, 1997, at A12.

52. *Id.*

African American.<sup>53</sup> Of the ten, only Roman Catholics and Southern Baptists have significant numbers of minorities,<sup>54</sup> and even in those denominations, the minority presence is hardly overwhelming.<sup>55</sup> By contrast, the eight African-American denominations making up the Congress of National Black Churches claim to represent 65,000 churches with a collective membership of more than 20 million people.<sup>56</sup>

Just as American schools operated under the “separate but equal” mantra in the past, most white and black Americans worship in separate worlds today, with neither side exhibiting much of a sense of urgency to remedy the situation. This state of affairs has led some to use the label “Segregated Sundays” to describe “this day of brotherhood and sisterhood” on which “America rears its ugly side and once again becomes the most separated society in the world.”<sup>57</sup> And although “an increasing number of U.S. congregations have become intentionally cross-cultural,” the general consensus is that “local churches are America’s final frontier of segregated institutions.”<sup>58</sup>

How is it that 21st century Christianity has inherited an American church that is split largely along color lines? How exactly did this come to pass under a belief framework founded on the brotherhood and equality of man? Why are even those churches that have championed civil rights and integration in the political arena willing subjects to the practices of segregation in the religious arena? While a definitive answer to these questions is far beyond the scope or purpose of this article, a basic grasp of the factors giving rise to racial segregation in the church is crucial to predicting the future course of segregation in the church, as well as its impact on an education system reliant on church-affiliated schooling.

While the first black church led by a black preacher was formed between 1773 and 1775 by Baptists in Silver Bluff, South Carolina,<sup>59</sup> many blacks at that time participated in biracial Baptist and Methodist

53. *Id.*

54. *Id.*

55. There are 2.5 million African-American Catholics—about 3% of the total Catholic population and 9% of the total African-American population. Patrick W. Carey, *Preface*, in *BLACK AND CATHOLIC: THE CHALLENGE AND GIFT OF BLACK FOLK* 7 (Jamie T. Phelps ed., 1997) [hereinafter *BLACK AND CATHOLIC*]. Of the 46,000 Southern Baptist congregations, 2,000 are predominantly African-American. *Southern Baptists Enlisting Minorities*, *FLA. TIMES UNION*, June 9, 2000, at A18.

56. CNBC website, at <http://www.cnbc.org>.

57. Rick Warren, *Segregated Sundays*, *SACRAMENTO OBSERVER*, Mar. 12, 1997, at F1.

58. Edward Gilbreath, *Catching Up With a Dream: Evangelicals and Race 30 Years After the Death of Martin Luther King, Jr.*, *CHRISTIANITY TODAY*, Mar. 2, 1998, at 21, 28.

59. William H. Becker, *The Black Church: Manhood and Mission*, in *AFRICAN-AMERICAN RELIGION: INTERPRETIVE ESSAYS IN HISTORY AND CULTURE* 177, 182 (Timothy E. Fulop & Albert J. Raboteau eds., 1997) [hereinafter *AFRICAN-AMERICAN RELIGION*].

congregations.<sup>60</sup> They eventually withdrew, with black Methodists forming several denominations, including the African Methodist Episcopal Church in 1816 and the African Methodist Episcopal Zion Church in 1821<sup>61</sup>—the former being the first black church to control its own property and achieve “freedom from the jurisdiction of white denominational officials.”<sup>62</sup> Black Baptists organized the American Baptist Missionary Convention in 1840, which was the first in a series of black conventions culminating, in 1895, in the largest of all black churches, the National Baptist Convention, USA.<sup>63</sup>

By the middle of the twentieth century, the separation was nearly complete. A 1948 survey estimated that, of eight million blacks affiliated with Protestant denominations, 7.5 million belonged to separate black denominations like the A.M.E. Of the remaining half-million, 99% belonged to local congregations that were segregated. The survey’s author estimated that a mere one-tenth of one percent of black Protestants worshiped in local white churches, and conceded that this estimate was probably too high.<sup>64</sup>

The segregation of black Catholics was not so stark, if only because there were relatively few of them. A 1941 study estimated that, as of 1940, there were 296,998 black Catholics, and 63.7% of them worshiped in “colored churches.”<sup>65</sup> One reason why this percentage was not higher is that, given the small number of black Catholics, it was more difficult to form separate churches for them.<sup>66</sup> There also may have been less perceived need for separate churches, as Catholic churches were viewed more exclusively as religious centers, while Protestant churches were also viewed as social centers for the worshiping community.<sup>67</sup>

After the separate worlds became more solidified—with even some parachurch organizations splitting along racial lines<sup>68</sup>—there seemed to be a racial thaw in religious life during the Civil Rights era of the 1950s and

60. See David W. Wills, *The Central Themes of American Religious History: Pluralism, Puritanism, and the Encounter of Black and White*, in *AFRICAN-AMERICAN RELIGION*, *supra* note 59, at 7, 16.

61. *See id.* at 17.

62. Becker, *supra* note 59, at 182.

63. Wills, *supra* note 60, at 16-17.

64. JOSEPH T. LEONARD, *THEOLOGY AND RACE RELATIONS* 219-20 (1963).

65. *Id.* at 220.

66. *See id.* at 221.

67. *See id.*

68. African Americans left the National Association of Evangelicals in 1964 to form the National Negro Evangelical Association “because they felt concerns about racism and other issues, including recognition of the distinctiveness of the black church, were not being addressed.” Jim Jones, *Still Playing Catch-Up: NBEA, NAE Move Slowly to Heal Racial Rifts*, *CHRISTIANITY TODAY*, May 19, 1997, at 56.

1960s.<sup>69</sup> Religious and cultural forces, including ecumenical Protestantism and cultural pluralism, seemed to be closing the gap between the races.<sup>70</sup> However, “as the Civil Rights movement turned into the black power movement and a white backlash against black progress eclipsed white support for it, the gap seemed once again to widen.”<sup>71</sup> Since that time, “there has been a clear retreat from a direct facing of the gap between black and white as it was then so strikingly revealed.”<sup>72</sup>

Without question, one major factor in the separation of churches along racial lines is discrimination against blacks by whites. Examples are found as far back as 1787, when, as traditionally told, trustees from St. George’s Methodist Episcopal Church in Philadelphia pulled black members and local preachers from their knees during prayer because they refused to go to the gallery seats set aside for blacks. The members left the church, eventually forming the city’s first two black congregations with their own buildings.<sup>73</sup> In subsequent years, blacks were seated separately in Protestant churches and in southern Catholic churches.<sup>74</sup> Catholic churches often required blacks to wait to receive communion until after whites had done so.<sup>75</sup> Some denominations and churches went even further, sanctioning all-white congregations.<sup>76</sup>

The white power structure’s role in the segregation of the American church cannot be overemphasized. Only a few examples are cited above; as in other segments of American society, the story of discrimination against blacks in the church is long. However, it would be a mistake to conclude that the black church is simply a product of the white church’s acts or omissions. To a great extent, blacks separated themselves from the existing biracial church; they were not forced out. This self-separation<sup>77</sup> stemmed from several sources.

One cause of the self-separation traditionally emphasized is a more subtle derivation of racial discrimination by which blacks were excluded

69. See Wills, *supra* note 60, at 18.

70. See *id.*

71. *Id.* at 19.

72. *Id.* at 20.

73. See Will B. Gravely, *The Rise of African Churches in America (1786-1822): Re-examining the Contexts*, in *AFRICAN-AMERICAN RELIGION*, *supra* note 59, at 133, 136-37.

74. See LEONARD, *supra* note 64, at 227.

75. See *id.* at 234.

76. See James H. Cone, *The White Church and Black Power*, in *BLACK THEOLOGY: A DOCUMENTARY HISTORY VOL. 1: 1966-1979*, at 66, 73 (James H. Cone & Gayraud S. Wilmore eds., 1993) (“It was the white ‘Christian’ church which took the lead in establishing slavery as an institution and segregation as a pattern in society by sanctioning all-white congregations.”) [hereinafter *BLACK THEOLOGY VOL. 1*].

77. See KATHARINE L. DVORAK, *AN AFRICAN-AMERICAN EXODUS: THE SEGREGATION OF THE SOUTHERN CHURCHES* 191 (1991).



from power in biracial churches. Under this view, blacks had to form their own churches in order to exercise autonomy and leadership because “white power was the almost invariable rule of ecclesiastical as well as civil order.”<sup>78</sup> In this regard, the integration achieved by biracial churches was “false” because “all power was in the hands of white people.”<sup>79</sup> Another tradition emphasizes the black church as part of an expanding black community that was developing racially separate institutions.<sup>80</sup> Other factors behind the rise of black churches include blacks’ achievement of religious freedom, the rise of denominationalism, and the compromise over slavery in white denominations by 1820.<sup>81</sup>

While the explanations noted above focus on forces outside the black church contributing to its rise, other commentators contend that the self-separation was driven by blacks themselves, as they developed their own unique faith tradition:

The exodus was not driven predominantly by a prophetic rejection of the white person’s religion but by blacks’ distinctive appropriation of Christianity, with its emphasis on Jesus as both Moses and the apocalyptic vindicator who would bring about God’s Kingdom on earth. . . . It was a move in complete harmony with African-Americans’ distinctive experience of Christian liberation and Christian community. Whatever the negative consequences of racially separate worship and regardless of injustices of white denominations or any failures of the black church, the exodus stands as a historic affirmation of Christian experiences and values that are the centerpiece of African-American religiosity.<sup>82</sup>

Even today, commentators are quick to note that black and white Christians “separate themselves to be nourished by very different and equally valid theologies,” with whites hearing “lessons on duty and compassion that flow from their position of prosperity,” and blacks hearing “lessons of solace and deliverance to comfort them in the midst of oppression.”<sup>83</sup>

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78. Wills, *supra* note 60, at 16; see also Gravely, *supra* note 73, at 136.

79. Statement by the National Committee of Negro Churchmen, *Black Power, in BLACK THEOLOGY VOL. 1, supra* note 76, at 21.

80. See Gravely, *supra* note 73, at 138-39.

81. See *id.* at 141.

82. DVORAK, *supra* note 77, at 191.

83. Bruce Nolan, *Churches Challenged to Heal Racial Divide*, SALT LAKE TRIB., May 23, 1998, at C1.

Conversely, James Cone, a noted pioneer of black theology in this country, contends that during the self-separation, blacks “did not perceive their actions as being motivated by theological differences.”<sup>84</sup> He believes that blacks “accepted without alteration the church doctrines and politics of the White denominations from which they separated.”<sup>85</sup> Instead, the separation was based “entirely upon sociological grounds: to promote brotherhood and equality across racial lines.”<sup>86</sup>

Notwithstanding the internal group dynamics at the core of blacks’ withdrawal from white denominations and churches, there are some external forces that cannot be overemphasized in any analysis of race relations and religion. Specifically, the story of blacks and whites in religious life cannot be told without acknowledging the role of slavery. At the denominational level, slavery had a tremendous impact on “North American Protestant churches, many of whom split before the Civil War over the slavery issue and have yet to be reconciled.”<sup>87</sup> At the individual level, slavery precluded real race relations, including any meaningful religious dialogue or exchange. Because, in the colonial South at least, blacks and whites encountered each other in the context of slavery, the distance between them was “far more than just a difference in religious or cultural tradition, and therefore not a gap that could have been closed, had the attempt been made, simply by acknowledging and accepting diversity.”<sup>88</sup> To some observers, this starting point for black-white relations explains a great deal about the current difficulty bridging the racial gap in religious matters.<sup>89</sup>

Just as the complexity of the underlying causes precludes any simple remedy for the current racial segregation in religious life, so too does the widespread belief that no remedy is necessary, even among those at the forefront of the struggle for racial equality. Eugene Rivers, the pastor of inner-city Boston’s Azusa Christian Community and a leading voice on racial issues in America,<sup>90</sup> explains that “both blacks and whites identify with their particular traditions—and that’s not wrong,” but that “[i]t only becomes wrong when it promotes injustice.”<sup>91</sup> Rivers illustrates his belief

84. Cone, *supra* note 76, at 89.

85. *Id.*

86. *Id.*

87. Cheryl J. Sanders, *How We Do Church: Worship, Empowerment and Racial Identity, in GOSPEL IN BLACK AND WHITE: THEOLOGICAL RESOURCES FOR RACIAL RECONCILIATION* 143 (Dennis L. Okholm ed., 1997).

88. Wills, *supra* note 60, at 14-15.

89. *Id.* at 15 (“Given the vast difference in religious standpoint and the utter disparity in power with which their encounter began, it is scarcely surprising that black and white then and now have found it difficult to tell a shared, religiously meaningful story about their common fate.”).

90. See Gilbreath, *supra* note 58, at 26.

91. *Id.* at 28.

that “[p]rogressive modern evangelicals confuse reconciliation with integration”<sup>92</sup> through the following illustration:

Now, I love my [predominantly white] Calvinist brothers, but let’s get beyond this notion that somehow I’ve got to sit in your one-hour service where you can hear a mouse yawn, or that the Calvinistic children have to come to my high-octane black service that lasts for four hours. We don’t have to be together around everything to be reconciled. We may need to look at *Brown v. Board of Education* again. Could there have been circumstances under which *separate* could have been *equal*?<sup>93</sup>

The late Spencer Perkins, an author on racial justice and the son of racial-reconciliation pioneer John Perkins, observed that “[t]he church is segregated now because that’s what we like.”<sup>94</sup> Whereas “[i]n King’s era, churches were segregated because whites didn’t want to be around blacks,” Perkins believed that “[t]oday we both choose to be separate.”<sup>95</sup> Expressing widely held sentiments, one pastor of a black church explained: “Our spirits are one in Christ Jesus, but we are different. We shouldn’t be integrated because we have our own culture. Whites are welcome to come, but our churches shouldn’t have to change.”<sup>96</sup>

Not only do many blacks and whites not object to segregation in the church, but some believe that it is essential to church growth. The Homogenous Unit Principle (HUP) theory underlies much of evangelical missions and church growth work since the 1970s. The HUP theory is based on the notion that people like to become Christians without crossing racial, linguistic, or class barriers. The general consensus among HUP adherents is, put simply, that “it is easier for churches to develop around just one kind of people.”<sup>97</sup> Given that the great majority of America’s 330,000 churches are already homogenous, “[w]hat Church Growth people object to is the unfounded guilt generated by pressures to become heterogeneous.”<sup>98</sup> Further, “[t]he HUP theory assumes that ‘the most

92. Wendy Murray Zoba, *Separate and Equal*, CHRISTIANITY TODAY, Feb. 5, 1996, at 14.

93. *Id.*

94. Gilbreath, *supra* note 58, at 28.

95. *Id.*

96. Marquita Smith, *Some Blacks Prefer Church Segregated*, BATON ROUGE ADVOC., Feb. 22, 1997, at 1F.

97. BRUCE W. FONG, RACIAL EQUALITY IN THE CHURCH: A CRITIQUE OF THE HOMOGENEOUS UNIT PRINCIPLE IN LIGHT OF A PRACTICAL THEOLOGY PERSPECTIVE 9 (1996).

98. *Id.* at 11-12.

segregated hour' phenomenon is true," and that "the reality of it may not be wrong."<sup>99</sup>

For some, the separation of the races in religious life goes deeper than worship styles or cultural comfort, reflecting the essential uniqueness of racial experiences and identities. This strain of separateness is clearest in the black theology movement, through which African Americans have carved out an approach to religious thought distinct from the theological traditions of the white establishment. The unique brand of theology reflects the fact that "[s]ince the first Africans set foot on this soil, people of African descent have had a singularly unique experience in the New World."<sup>100</sup> The pioneer of black theology, James Cone, explained:

Black theology will not spend too much time trying to answer its critics, because it is accountable only to the black community. Refusing to be separated from that community, black theology seeks to articulate the theological self-determination of blacks, providing some ethical and religious categories for the black revolution in America.<sup>101</sup>

Black theology is not some freestanding, strictly academic discourse, but arises from the underlying differences—whether real or perceived—between the Christianity of African Americans and that of the white establishment.<sup>102</sup> While in some ways black theology is a product of the existing racial segregation in the church, in other ways it is a force in solidifying and expanding that segregation. In one of the more extreme representations of the latter, James Harris admonished:

Regretfully, some black churches have modeled themselves after the white church. Their worship services are characterized by brevity, quietness, anthems, and a general degree of formality. These blacks see this worship style as a form of sophistication that reflects compatibility with their educational level. However, I believe that black theology would wake these Christians up to the reality of their heritage, and help them to be proud of the struggles that their parents and foreparents endured for the sake of liberation. . . . These

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99. *Id.* at 66.

100. James H. Evans, Jr., *Toward an African-American Theology*, in *BLACK THEOLOGY: A DOCUMENTARY HISTORY VOL. 2: 1980-1992*, at 26, 27 (1993) [hereinafter *BLACK THEOLOGY VOL. 2*].

101. JAMES H. CONE, *A BLACK THEOLOGY OF LIBERATION* 10 (2d ed. 1986).

102. See Evans, *supra* note 100, at 27 ("Black theology differs from traditional theology in much the same way that African-American Christianity differs from the Christianity of Europe and the North Atlantic.").

enlightened, sophisticated, intelligent, successful blacks practice a European version of black religion.<sup>103</sup>

While the separation of whites and blacks in religious life is the deepest and most fully explored historically, the segregation of the American church is not solely a black/white issue. Even in the popular media, it is often observed that “socioeconomic homogeneity is the hallmark of religion in America,”<sup>104</sup> and that separation is the theme across the full spectrum of ethnicities: “Even at congregations whose members consider themselves liberal on racial matters, Sabbath day is monochromatic. For the most part, whites worship with whites, and blacks with blacks. Special congregations arise to serve Koreans and Vietnamese, just as separate spiritual enclaves once arose for Irish, Italian, Portuguese and Polish immigrants.”<sup>105</sup>

Perhaps not surprisingly, minority ethnic groups have carved out their own niches in American Christianity. Many Latinos, traditionally adherents of Catholicism, have established their own group identity within the church—both physically<sup>106</sup> and ideologically.<sup>107</sup> More recently, Latinos have been leaving Catholicism in droves, often joining evangelical or Pentecostal churches that cater to Latinos.<sup>108</sup> Asian Americans—especially Korean Americans and Vietnamese Americans—have established strong

103. James H. Harris, *Black Church and Black Theology*, in *BLACK THEOLOGY VOL. 2*, *supra* note 100, at 94.

104. Tom Ehrich, *Exclusive Congregation Stunts Growth*, *CLEVELAND PLAIN DEALER*, Apr. 12, 1997, at 4E.

105. *Id.*

106. See, e.g., William Branigin, *The Myth of the Melting Pot: America's Racial and Ethnic Divide*, *WASH. POST*, May 25, 1998, at A1 (“In many places, new Hispanic immigrants have tended to cluster in ‘niche’ occupations, live in segregated neighborhoods and worship in separate churches.”).

107. See Orlando O. Espin, *Popular Catholicism: Alienation or Hope*, in *HISPANIC/LATINO THEOLOGY: CHALLENGE AND PROMISE* 307, 312 (Ada Maria Isasi-Diaz & Fernando F. Segovia eds., 1996) (“Popular Catholicism stands out as one of the very few social [public and private] spaces that have been able to preserve some high degree of protectionism for Latinos, albeit oftentimes symbolic. The all too frequent pastoral indifference of so many in the anglophone church toward Latinos turned out to be an opportunity for Latino popular Catholicism to reaffirm its historical roots as laity-run and—oriented and as parallel to the institutions and ordained ministries of the church. Though explicitly self-identifying as Catholic, popular religion has had a long tradition of autonomy (and at times defiance) vis-à-vis the institutions and ministers of the church and, occasionally, of prophetic opposition to them.”).

108. See Cindy Rodriguez, *Newfound Fold; Catholic Church Losing Latino Parishioners to Burgeoning Urban Evangelical Churches*, *BOSTON GLOBE*, Sept. 26, 1999, at B1; Larry B. Stammer, *Leadership Power Struggles*, *L.A. TIMES MAG.*, Dec. 19, 1999, at 28 (noting 1998 survey found that 1 in 10 Latino Catholics leave the Church every year, and that those joining another church opt for evangelical or Pentecostal congregations).

and vibrant ethnic churches in this country.<sup>109</sup> Both Latinos and Asian Americans have also developed their own distinctive approaches to Christian theology.<sup>110</sup>

To many observers, the separate worlds in which the races worship in America appear unbridgeable. “[T]he gap between the races—a gap involving both the interpretation of the American experience and the degree of empowerment within it—remains one of the foundational realities of our national religious life.”<sup>111</sup> While much progress has been made over the past few decades in other areas of our common existence, religion seems immune to such progress. One obvious reason is that religion lies beyond the reach of legislative and judicial efforts to combat the remnants of discrimination.<sup>112</sup> Another obstacle is that the churchgoing experience is more than purely spiritual—where race arguably can be put to the side—as it also is a matter of cultural preference—where race still matters a great deal to many. These cultural differences need not surface in expressions of superiority, but may involve group tendencies in matters of worship style, communication, or fellowship.<sup>113</sup> Such differences can

109. See Anselm Kyongsuk Min, *From Autobiography to Fellowship of Others: Reflections on Doing Ethnic Theology Today*, in JOURNEYS AT THE MARGIN, TOWARD AN AUTOBIOGRAPHICAL THEOLOGY IN AMERICAN-ASIAN PERSPECTIVE 135, 148-49 (explaining important role of Korean-American churches for Korean-Americans) [hereinafter JOURNEYS AT THE MARGIN]; Andrew Sung Park, *Church and Theology: My Theological Journey*, in JOURNEYS AT THE MARGIN: *supra*, at 161, 163 (Peter C. Phan & Jung Young Lee eds., 1999) (“The multiplication of Korean-American churches may mean, among other things, that Asian immigrants and Asian Americans are not as malleable into this society as their European counterparts. Complete assimilation into the dominant church and culture is neither ideal nor viable for Asian Americans.”).

110. See Min, JOURNEYS AT THE MARGIN, *supra* note 109, at 147 (“The theological challenge for Korean Christianity is precisely to retrieve and incorporate the best of the Western tradition into its own theological reconstruction . . . . The other challenge is to retrieve the best of the Korean tradition of religions and cultures . . . as active sources or loci of theological insights for an authentically Korean Christianity.”); Peter C. Phan, *Introduction: An Asian-American Theology: Believing and Thinking at the Boundaries*, in JOURNEYS AT THE MARGIN, *supra* note 109, at XV (“In a genuinely Asian theology, both social analysis and introspection are employed, so that both the ‘agape’ of Christianity and the ‘gnosis’ of non-Christian religions are brought together to produce a truly liberative theology for Asians.”).

111. Wills, *supra* note 60, at 20.

112. MATSUOKA, *supra* note 48, at 117 (“Unlike civil society and the legal environment, people are free to do as they wish in the church, and so people travel more slowly in their freedom than they do when they are legally brought together . . . .”); see also Sanders, *supra* note 87, at 143 (noting that Christian denominational racism “seems virtually unaffected by the civil rights struggle and the removal of legal barriers to racial integration in other social institutions”).

113. See MATSUOKA, *supra* note 48, at 117 (“To complicate the situation, the challenge of breaking down the dividing walls of hostility is about culture as much as race. In addition to racism, an issue of ethos—worship ethos, for example—is involved, one where the spiritual dimension of the church mixes with the cultural. Thus the most segregated time of the week still remains Sunday morning.”).

prove insurmountable, even for those who, on a theoretical level, would disavow any suggestions of racial segregation in church.

Along with the myriad factors affecting individual choices of church attendance, the segregation of the American church is difficult to undo at the group level. Churches do not simply represent a collection of individual spiritual convictions and beliefs, but also real-world political and social views, where black and white churches historically have found themselves on opposite sides of the fence.<sup>114</sup> Even where progress is made, the progress often underscores the width of the remaining gap. For example, while the National Black Evangelical Association and the National Association of Evangelicals are attempting "racial healing," those involved readily acknowledge that "merger of [the] two groups does not seem likely."<sup>115</sup>

At the same time, perhaps the practical differences separating the churches are overstated. Bruce Fong, a Chinese-American evangelical Christian, notes that he has attended ethnically segregated churches,

Yet, while they were ethnically segregated, they sang the same songs, participated in the same kind of activities, observed the ordinances of the church in roughly the same manner, they read the same books written by the same authors, and they gave high regard to the same nationally known Bible teachers and speakers. There are some minor differences like the kind of food served at a church meal, or an occasional phrase distinctive to ethnic origins, or the traditions at festive occasions such as a wedding. However, by in large those differences weigh lightly against what the church would describe as its essential commitment, namely, its theological heritage.<sup>116</sup>

This focus on commonality underlies the efforts made by individual churches to transcend racial and ethnic boundaries. While some of these churches have successfully sustained a multicultural environment,<sup>117</sup> it is far too early to suggest that these efforts signal a systemic breakdown of segregation in the church.

Another source of optimism is based on the broader hope that, as historically marginalized groups gain acceptance in American society, the

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114. See generally ANDREW MICHAEL MANIS, *SOUTHERN CIVIL RELIGIONS IN CONFLICT: BLACK AND WHITE BAPTISTS AND CIVIL RIGHTS, 1947-1957* (1987).

115. Jones, *supra* note 68, at 56.

116. FONG, *supra* note 97, at 13.

117. See *id.* at 156-57 (noting church on Chicago's west side in 96% black neighborhood with 30% white members); MATSUOKA, *supra* note 48, at 106 (giving individual examples).

justification for separate churches will lessen.<sup>118</sup> History does not lend much support to this optimism. While most would agree that racism and discrimination have lessened since the 1950s and 1960s, segregated worship has not lessened in any real sense. This likely reflects the complexity of racial segregation in the church, as discussed above. Because the rise and continued survival of the black church is not solely a function of white discrimination, the black church will not suddenly cease to exist—or even diminish in importance—in response to acts of reconciliation by the white establishment. For better or worse, the roots of separation run deeper.

Although outright acts of discrimination, coupled with the white establishment's more subtle refusal to share authority with black worshippers, played a significant role in the establishment of separate churches by blacks, the rise of black churches cannot be interpreted solely as a reaction to blacks' exclusion by whites. For purposes of this Article's analysis, the significance is that black and white churches cannot be unified simply by white acts of repentance, contrition, or even reconciliation. While such acts would no doubt help to bridge the gap between the two worlds, the churches' separation is a two-way street, with churches on both sides resisting the notion that unification is necessary or even prudent. While a few churches are making concerted efforts to bring the two worlds together, the depth and breadth of the separation's roots make a significant unification unlikely for the foreseeable future. The all-encompassing nature of the segregation—entailing differences in worship, tradition, theology, and community functions—makes it less likely that students will cross racial barriers in choosing a church-affiliated school, especially if a school affiliated with their own church is a viable option.

Reasonable minds can and do differ as to whether racial integration should be a priority in American churches. Defenders of the status quo contend that notions of group-based compromise, while essential in the wider public square, are inapplicable where the differences are over religious meaning and worship. Because church attendance reflects an individual's most intimate values, thoughts, and practices, and because churches embody groups' cultural and historical identities, the argument can be made that a certain degree of homogeneity in churches is understandable, even inevitable. Even those who argue that Christianity should not be a religion of separation would agree that, in a church setting, racial integration should not be coerced.

Maybe racial segregation is tolerable in church, but what about in school? Even assuming the validity of the historical, cultural, and

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118. See FONG, *supra* note 97, at 155 (“[W]hen the external focus of the host society subject a particular group to racism or discrimination, the initiation of their own culturally oriented church is understandable.”).



theological justifications for racially segregated churches, the same arguments do not translate well when applied to schooling. As a nation, we historically have looked to schools and churches to fulfill vastly different purposes. Should the same forces that have separated the races when it comes to matters of faith be allowed to influence the educational environment? Before that question can be answered, of course, the influence itself must be identified, and its path traced.

### III. MARKET FORCES AND CHURCH-AFFILIATED SCHOOLS

In their frequently cited defense of school choice, *Politics, Markets, and America's Schools*, John Chubb and Terry Moe provide an insightful synopsis of the market approach to schooling:

A market system is not built to enable the imposition of higher-order values on the schools, nor is it driven by a democratic struggle to exercise public authority. Instead, the authority to make educational choices is radically decentralized to those most immediately involved. Schools compete for the support of parents and students, and parents and students are free to choose among schools. The system is built around decentralization, competition, and choice. . . . [B]ureaucratic control and its clumsy efforts to measure the unmeasurable are simply *unnecessary* for schools whose primary concern is to please their clients.<sup>119</sup>

Skepticism abounds over the prospect of unleashing the market forces represented by school vouchers, especially to the extent that they are allowed to operate unfettered among lower-income students and their families.<sup>120</sup> After all, the free market has not served the poor well in other areas.<sup>121</sup> Without proper safeguards, critics fear that "any educational improvement that a market approach might bring comes at a price: the creation of an underclass of disfavored and underfunded schools."<sup>122</sup> More broadly, many wonder whether the profit orientation of businesses is fundamentally inconsistent with schools' mission to educate each and

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119. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 189 (1990).

120. See Hershkoff & Cohen, *supra* note 3, at 25 ("Unless an education market is regulated with the needs of the poorest consumers in mind, choice programs will offer little real choice to those who enter the market with little money to pay."); O'Brien, *supra* note 21, at 404 ("[V]ouchers would provide limited empowerment that would free individuals who already enjoy advantage to maximize that advantage. Both logic and historical experience suggest that vouchers will exacerbate existing inequity.").

121. See VITERITTI, *supra* note 2, at 10.

122. Hershkoff & Cohen, *supra* note 3, at 25.

every student.<sup>123</sup> Another issue attracting concern is whether socioeconomic strata will reestablish themselves in the market for the information needed to make effective school choices, especially given that social networks are highly segregated by race and class.<sup>124</sup>

As noted by Chubb and Moe, under a market approach to education, schools must compete for students, and thus must please the parents. As a result, some have forecast rather gloomily that “schools may begin providing more parent services rather than educational improvements to attract students and the money that follows them.”<sup>125</sup> Even worse, under a true market theory, schools could appeal to racist tendencies.<sup>126</sup>

Yet another source of discontent with the market’s entry into education stems from the perceived implications for democracy. It is on this ground that the most extreme indictments of the market approach are made. Michael Engel goes so far as to predict that “[i]f the market prevails as the model for organizing U.S. education, the possibilities for strengthening a democratic society and developing a democratic citizenry are ended.”<sup>127</sup> In a more nuanced critique, Molly Townes O’Brien argues that vouchers represent the embrace of education for advantage rather than education for citizenship.<sup>128</sup> Even those who see market incentives as the key to educational reform acknowledge that “we need to deploy categories of

123. See Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255, 301 (1995) (“Reliance on pure market theory reveals just how naive its advocates are concerning the unequal power relationship between the average (or below average) consumer and the omnipotent big business.”).

124. See Aldana, *supra* note 4, at 43-44 (“[S]ocial science research shows that low-income and less educated families know little about program options, have limited access to information about those options, and are not as likely to make good decisions about school placement for their children if unaided.”); Kemerer, *supra* note 9, at 176 (noting that in the Milwaukee voucher program, the percentage of parents whose primary sources of information about schools were friends and relatives doubled any other source). However, some argue that as school choice becomes part of a community’s culture, the level of information will improve and the information gap between the classes will narrow. See *id.*

125. Smith, *supra* note 123, at 278 (giving examples of shuttle service to piano lessons or soccer practice, dinner or breakfast, and even a school in British choice program that offered discount on shower units).

126. See *id.* at 279 (“Currently, under the market theory, the possibility exists that schools will covertly cater to the desires of racist parents and entice white students away from inner-city districts, creating or enhancing segregation on the district-wide level.”).

127. MICHAEL ENGEL, *THE STRUGGLE FOR CONTROL OF PUBLIC EDUCATION: MARKET IDEOLOGY VS. DEMOCRATIC VALUES* 7 (2000).

128. See O’Brien, *supra* note 21, at 398 (“American public schooling labors under the incompatible goals of its constituency: (1) to provide an egalitarian education for participatory citizenship, with the accompanying likelihood of increased (upward) social mobility and political empowerment; and (2) to provide educational credentials suited to a competitive economy, with the power to confer competitive advantage and to protect existing social and economic status.”).

analysis rich enough to describe and assess the political and moral dimensions of those reforms.”<sup>129</sup>

While these various suspicions of the market are legitimate, if often overstated, this Article is concerned with more subtle ways in which the market could facilitate racial segregation, even through parents who are religiously devout and who would bristle at any suggestion of racism. The segregative danger of vouchers flows directly from one of vouchers’ key attributes—the responsiveness of the market to consumer demand. It is widely advertised by voucher advocates—and acknowledged by voucher opponents—that “[i]f families are empowered (with vouchers or tax credits) to act from their particular preferences and definitions of high quality, the array of schools and service providers will diversify and become more accountable.”<sup>130</sup> As was recognized early on by Milton Friedman, the founder of the modern school voucher movement, the demand created by vouchers will cause a wide variety of new schools to be created.<sup>131</sup> Indeed, the creation of new schools is at the core of school choice theory. Chubb and Moe criticize previous choice plans for failing to free up the supply side of schooling by decontrolling the emergence of new and different types of schools, and instead restricting choice to the existing set of schools.<sup>132</sup> “Taken seriously, choice is not a system-preserving reform,” insist Chubb and Moe, but rather “a revolutionary reform that introduces a new system of public education.”<sup>133</sup>

Proponents also rely on vouchers’ propensity for school creation to rebut arguments that vouchers will simply lead private schools to raise their tuition, ensuring that socioeconomic stratification will continue. While “[s]ome stratification is inevitable,” they contend that “the private school market will ensure parents have a wide selection of quality educational institutions from which to choose.”<sup>134</sup> And those who reject the “skimming” criticism of vouchers—*i.e.*, that the best students will be admitted to private schools, leaving the rest of the students in public schools that become even worse as a result<sup>135</sup>—argue that failing schools

129. MACEDO, *supra* note 34, at 22.

130. Bruce Fuller, Richard F. Elmore & Gary Orfield, *Policy-Making in the Dark: Illuminating the School Choice Debate*, in WHO CHOOSES?, *supra* note 42, at 9.

131. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 91 (1962); VITERITTI, *supra* note 2, at 215.

132. CHUBB & MOE, *supra* note 119, at 207.

133. *Id.* at 217.

134. Douglas A. Edwards, Comment, *Cleveland and Milwaukee’s Free Market Solution for the “Pedantic Heaps of Sophistry and Nonsense” That Plague Public Education: Mistakes on Two Lakes?*, 30 AKRON L. REV. 687, 708 (1997).

135. See Hershkoff & Cohen, *supra* note 3, at 24 (“In the education context, the departure of elites that is facilitated through parental choice deprives the public schools of their most influential constituents . . . . When public schools lose their ‘educational connoisseurs’ to a competing private

will be forced to close because the power of the poor to choose another school will cause the creation of new schools designed to meet specific needs.<sup>136</sup>

The creation of new schools is so essential to the purpose of vouchers that some voucher proponents—otherwise operating under strict market principles—recognize a role for the government in spurring school creation. In light of fears that consumer demand alone might not be sufficient to create the needed supply of reliable, distinctive, and coherent schools,<sup>137</sup> some proponents favor giving choice schools access to publicly owned and subsidized space.<sup>138</sup> They also argue that organizations capable of creating new schools should be developed through workshops, school-development schools, school pairing, and staff circulation.<sup>139</sup>

As schools compete for students, naturally many, if not most, voucher schools will target certain groups of consumers, rather than trying to be everything to everyone. In this regard, insight can be gained from the current efforts of charter schools to “appeal to a particular class of consumers who cannot find the product they want in the regular public schools.”<sup>140</sup> Critics charge that, in order to survive market competition, charter schools must restrict themselves to specific, targeted groups of educational consumers—they cannot provide a common setting for group interaction.<sup>141</sup> Church-affiliated schools are tailor-made for this competition, as their congregations constitute an existing pool of loyal consumers, and their particular religious identities readily target a wider pool of like-minded consumers.

That is not to say that every school created in response to vouchers will be church-affiliated. Of course, there will be significant demand for new and innovative secular schools.<sup>142</sup> But in light of churches’ existing

school system, they lose precisely those consumers who ‘might otherwise have fought deterioration.’”) (quoting ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 51 (1970)).

136. See VITERITTI, *supra* note 2, at 114; cf. Smith, *supra* note 123, at 279 (“[U]nder the market theory, some schools will deteriorate and eventually close if they fail to improve. Unfortunately, the students who attend those schools which are in the process of deterioration are receiving a less-than-equal education during the time in which the market ‘naturally’ works and takes its toll.”).

137. See Paul T. Hill, *The Supply-Side of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY*, *supra* note 9, at 140, 144.

138. See *id.* at 168.

139. See *id.* at 166.

140. ENGEL, *supra* note 127, at 86.

141. See *id.* at 89.

142. See Steffen N. Johnson, *A Civil Libertarian Case for the Constitutionality of School Choice*, 10 *GEO. MASON U. CIV. RTS. L.J.* 1, 27 (1999-2000) (“A voucher program that covers the cost of educating students is likely to cause new schools to spring up, and many (perhaps most) of these schools will be secular alternatives of comparable quality.”).

building facilities, their readily available pools of potential students, and their religious motivation to educate children, churches will be a major source of new schools in a voucher-based system. Many churches, especially churches with lower-income, predominantly minority congregations, have simply lacked the financial resources to launch their own schools. Assuming that vouchers are not accompanied by significant regulatory barriers to school creation, the broad implementation of vouchers may very well provoke an explosion of schools affiliated with such churches.

African-American churches are likely to be at the forefront of the wave of voucher schools. Choice advocates understand that, in order to increase political demand for vouchers, voucher programs must start and flourish where African Americans and Latinos have their own movements and their own schools.<sup>143</sup> Churches are among the existing facilities in African-American communities pointed to by choice advocates as prime locations for new schools. Extensive physical infrastructures are unnecessary, as many advocates recommend a one-room schoolhouse approach for church-affiliated schools. "To begin, all that is required is a sponsoring pastor, a church facility, one teacher, the teacher aids, curriculum, materials, private scholarships, and students."<sup>144</sup> Further, the museums, civic associations, and other cultural institutions that often start charter schools are not as prevalent in poorer neighborhoods, but churches are.<sup>145</sup>

More fundamentally, the church has traditionally been the center of the African-American community.<sup>146</sup> Because the role of the African-American church is not limited to the spiritual, but encompasses the health of the

143. See MORKEN & FORMICOLA, *supra* note 23, at 131.

144. *Id.* at 219.

145. See VITERITTI, *supra* note 2, at 206.

146. See *id.* at 198; see also Larry L. Hunt & Matthew O. Hunt, *Regional patterns of African American church attendance: Revisiting the semi-involuntary thesis*, 78 SOCIAL FORCES 779, 780 (1999) (discussing the semi-involuntary institution thesis, which "suggests that segregation has shaped two major forces that mobilize involvement in the black church, especially in the historical mainline denominations: (1) the *structural absence* of secular outlets for achievement that has indirectly made the black church the community context in which status, leadership, and respectability can be achieved, and (2) the *cultural presence* of powerful community moral pressures to support the institution that provides both material and spiritual nourishment to the black community"); Michele M. SimmsParris, *What Does it Mean to See a Black Church Burning? Understanding the Significance of Constitutionalizing Hate Speech*, 1 U.P.A. J. CONST. L. 127, 130-31 (1998) ("In African-American history, 'the church' has long stood at the center of Black communities establishing itself as the pre-eminent source for religious enrichment and secular development. . . . For many African-American Christians, despite their denominational differences, Black churches have always represented a triumvirate of religion, community, and home."); Barna Research Online, at <http://www.barna.org> (recounting 1996 survey finding that 63% of African Americans identify pastors of black churches as the most important leaders in the African-American community).

community in all its aspects,<sup>147</sup> it is well within the church's mission to respond to the educational crisis faced by its members.

Even without vouchers being available, there is a groundswell of support in the African-American community for private schools designed specifically to serve that community. The number of black independent schools is skyrocketing—by 1993, there were 350 such schools enrolling more than 52,700 students.<sup>148</sup> Many of these are connected to black churches,<sup>149</sup> and black pastors are aligning with choice leaders to tap resources to help start and maintain schools.<sup>150</sup> Understandably, leaders from the African-American community who support vouchers do not hope simply for African-American students to be taken from failing public schools to existing, predominantly white private schools, but to schools that are designed for, and operated by, members of their own community.<sup>151</sup>

These developments are occurring against a background of what appears to be a rising tolerance for racially segregated schools. The traditional interpretation of *Brown v. Board of Education*—as recognizing that separate schools are inherently unequal—is coming under increasing scrutiny from voices ranging from Supreme Court justices,<sup>152</sup> to legal scholars,<sup>153</sup> to parents and educators.<sup>154</sup> Many of these voices find a

147. See SimmsParris, *supra* note 146, at 133 (“The interwoven fabric of the secular and ecclesiastical within many Black religious institutions created a base upon which African-Americans could organize politically and persist spiritually. Black churches were not only given to the teachings of Christianity but they were faithfully relied upon to address the specific issues which affected their members.”).

148. VITERITI, *supra* note 2, at 202.

149. See *id.*; Sharon Brooks Hodge, *Black Churches Lead Way in Education Reform*, HEADWAY, Apr. 30, 1997, available at 1997 WL 12296207 (reporting that “[t]he emergence of black Christian schools comes in part as a response to the increasing number of frustrated parents across the country who are pulling their children out of public schools”).

150. See MORKEN & FORMICOLA, *supra* note 23, at 11.

151. See *id.* at 202 (noting that Polly Williams, leader of the Milwaukee voucher movement, wants independent black schools—“we run our own schools”); *id.* at 216 (noting two African-American leaders in Indianapolis who want their own schools, and do not want to have to send students to Catholic schools).

152. See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (“It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior.”); see also Michael Heise, *Assessing the Efficacy of School Desegregation*, 46 SYRACUSE L. REV. 1093, 1102 (1996) (“Where Justice Marshall finds insult in one-race schools, Justice Thomas (and perhaps Scalia) find insult in the assumption that one-race schools are constitutionally unacceptable.”).

153. See Barnes, *supra* note 11, at 2387-88 (Instead of “more fruitless school desegregation litigation,” Barnes “would reinterpret the constitutional imperative of *Brown* as requiring equal access to quality educational programs. Thus, a school district that did not purposefully assign students based on their race would fall within the zone of defensibility, if not actual compliance, with the mandate of *Brown* if it made concerted efforts to raise substantially the quality of

common cause in the school choice movement, believing that it “may be the one movement capable of responding to the needs of diverse communities with a message we all understand: that ‘separate but equal’ in public institutions is impermissible only when involuntarily imposed.”<sup>155</sup> Even for those who are leery of racially exclusionary schools, the prospect of schools that merely have segregative tendencies is more palatable.<sup>156</sup>

Most African-American churches have been slow to start their own schools, waiting to see if courts allow vouchers before making that kind of investment.<sup>157</sup> Even if vouchers pass constitutional muster, however, that is no guarantee that they will be a permanent fixture in American education. After all, some proponents view vouchers as a stopgap measure designed to spur public school reform.<sup>158</sup> If churches suspect that voucher funds will be cut off after only a few years, they will be understandably reluctant to make the initial investments necessary to start schools.

However, any notion that vouchers are a temporary solution is belied by the long-term vision of voucher advocates,<sup>159</sup> as well as simple logic. As discussed above, vouchers depend on the creation of new schools for their success. Once the market creates new private schools to meet the demand, those new schools will not unilaterally wither even if the public schools do improve.<sup>160</sup> Given that a school’s academic performance is not always—or

educational opportunities afforded to black children in their own neighborhoods.”); Garnett & Garnett, *supra* note 8, at 354 (“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.”).

154. See Hawke, *supra* note 43, at 619 (“A growing number of African-American parents and educators believe that segregated schools can instill within black children valuable qualities and characteristics such as a sense of belonging, self worth, spirit, purpose, and self control that predominantly white schools do not provide.”).

155. Barnes, *supra* note 11, at 2397-98.

156. See Smith, *supra* note 123, at 299 (“Academies which provide for the needs of young, African-American boys can be made available, but open to whites and students of other minorities (and girls) on an equal basis. In all likelihood, such schools will have a high percentage of African-American male students, thereby providing the preferred environment and focusing the curriculum on the appropriate subject matter areas.”).

157. See MORKEN & FORMICOLA, *supra* note 23, at 205.

158. Cardinal O’Connor, for example, favored Catholic school scholarships in New York through partnering among the government, businesses, and the church. He viewed such scholarships as a temporary stopgap until the public schools could be fixed. See *id.* at 159.

159. See *id.* at 292 (acknowledging that, “Public education, for all practical reasons, cannot be abandoned overnight because there is nothing with which to replace it. The education ‘business’ that might develop in the future will have to grow incrementally.”).

160. The presumption that public schools will significantly improve under the rigors of the market is by no means a given. See, e.g., Hershkoff & Cohen, *supra* note 3, at 23-24 (“Modern society is full of examples . . . of instances in which the creation of private alternatives has not improved the corresponding public good. . . . To the contrary, experience shows that the introduction of increased market choice often does little more than exacerbate ‘a growing inequity

even usually—dispositive of families' school choices,<sup>161</sup> academic improvements in a public school will be insufficient motivation to return for a significant portion of students who leave the school through vouchers. Some of the key factors underlying families' embrace of private schools—such as religious instruction or gender exclusiveness—cannot be replicated by public schools, regardless of how reform-minded they become in the wake of vouchers. If the market does not blunt the desire for vouchers, the political prospects of cutting off vouchers after they have taken root in the public appear questionable, to say the least. In any event, the permanence of vouchers is less critical for churches than for other organizations, especially profit-oriented entities, that would contemplate entering the school market. With their existing facilities, consumer base, and reputation in the community, churches will be in the best position to enter the market with only a minimal financial investment.

#### IV. RELIGION AS A FACTOR IN SCHOOL CHOICE

This Article's entire inquiry has, up until this point, been built on the presumption that, when it comes to choosing a school, religion matters. The segregative tendencies of vouchers will depend, to a great extent, on the degree to which a school's religious affiliation influences students and their parents to choose that school. If participants in a voucher program would, regardless of their own church affiliation, choose an academically effective secular school over an academically effective religious school, there will be little demand for churches to create schools, and little segregative impact from the church-affiliated schools that are created. As with the argument that vouchers will facilitate student mobility, perhaps the presumption that vouchers will lead to increased attendance at religious schools is based on the current limited school supply. To the extent that participants favor secular schools over otherwise equivalent religious schools, perhaps the voucher market will provide an adequate supply of secular schools so that no one will have to choose a religious school for lack of a viable alternative. For our purposes, the question is whether students and their parents, when given a full spectrum of educational alternatives, will use vouchers to attend church-affiliated schools because of that church affiliation. Of equal importance is whether students and their parents will decide not to attend church-affiliated schools because of that affiliation.

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in basic social community services.”) (quoting Robert P. Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 16).

161. See Levin, *supra* note 14, at 280-81 (citing studies showing that racial and socioeconomic traits of school have more influence in school transfer decisions than academic superiority does).



It is not entirely obvious that parents and students choose religious schools because the schools are religious—especially given the current limited supply of schooling options. Many students no doubt attend Catholic schools in particular because of the schools' perceived academic superiority.<sup>162</sup> In fact, 17% of Catholic school students are not Catholic.<sup>163</sup> Perhaps because of the growing dissatisfaction with public schools, the proportion of non-Catholics attending Catholic schools has grown dramatically since 1970, when less than three percent of Catholic school students were non-Catholic.<sup>164</sup> Much of this growth is attributable to the increased number of African Americans attending Catholic schools, most of whom are Protestant.<sup>165</sup> This phenomenon has historical roots, as Catholic schools established for African Americans were attended by more non-Catholics than Catholics.<sup>166</sup>

Although academic considerations do play a role in the decision to attend private schools, observers are nearly uniform in concluding that religious considerations exert an extraordinary influence.<sup>167</sup> In his landmark 1982 study, Coleman concluded unequivocally that "religious concerns have been, and continue to be, probably the strongest motivating force in parents' decisions to send their children to private schools."<sup>168</sup> Similarly, a 1986 study found that religion/spirituality was the most common reason given by parents as to why they preferred private over public schools.<sup>169</sup> In current choice programs encompassing religious schools, religion is among the top reasons parents choose a school.<sup>170</sup> When parents participating in New York's scholarship program were asked what the key factors were in choosing a school, the top three responses were teacher quality (83% of parents), religion (83%), and safety (81%).<sup>171</sup> Detroit-area residents gave two non-academic reasons as the most important factors in choosing a

162. James Coleman's study concluded that Catholic schools do a better job of education than public and non-Catholic private schools. COLEMAN, *supra* note 33, at 179-84; *see also* VITERITTI, *supra* note 2, at 80-81; Henig, *supra* note 40, at 92, a conclusion supported by other scholars. *See* VITERITTI, *supra* note 2, at 84; Garnett & Garnett, *supra* note 8, at 344-47.

163. VITERITTI, *supra* note 2, at 82-83.

164. William Sander, *Studies Vouch for Private Schools*, CHI. SUN-TIMES, Jan. 5, 1999, at 21.

165. *See id.*

166. *See* V.P. Franklin, *First Came the School: Catholic Evangelization Among African Americans in the United States, 1827 to Present*, in *GROWING UP AFRICAN-AMERICAN IN CATHOLIC SCHOOLS* 47, 59 (1996) [hereinafter *GROWING UP AFRICAN-AMERICAN*].

167. *See* VITERITTI, *supra* note 2, at 113 (concluding that parents are attracted to the religious aspect of schools); *id.* at 167 (concluding that poor people, especially, support school choice in part because they place high value on religion).

168. COLEMAN, *supra* note 33, at 43.

169. E. VANCE RANDALL, *PRIVATE SCHOOLS AND PUBLIC POWER: A CASE FOR PLURALISM* 134 (1994).

170. *See* Kemerer, *supra* note 9, at 176.

171. VITERITTI, *supra* note 2, at 97.

school: school safety and whether the schools support their ethical and moral values.<sup>172</sup> Anecdotal evidence abounds from current voucher programs reflecting the importance of religion to participants' decisions,<sup>173</sup> and to a certain extent, the importance is reflected in the schools chosen by participants.<sup>174</sup>

The fact that schools are church-affiliated, of course, does not mean that they substantively reflect the values or teachings of the church on a day-to-day basis. If schools are "religious" only in that they promote an inoffensive brand of civic morality, perhaps the particular church affiliations of the schools will be immaterial to students and their parents. If there is little substantive religious difference among church-affiliated schools, then the incentive to choose based on the particular affiliation is minimal. Non-religious factors would determine school choices, preventing the student population from being split along lines of church affiliation and race.

For better or worse, this does not appear to be the case for existing religious schools, nor for religious schools likely to be created under a voucher system. A fundamental feature of any religious school—at least any school that is substantively religious in a meaningful way—is an overarching set of values that informs every function and purpose of the school.<sup>175</sup> As a practical matter, it is impossible to disentangle the vision of morality and absolute truth that is embodied in a particular school's curriculum, faculty, extracurricular activities and overall environment from the religious community of which the school is a part. As Stephen Macedo explains, "schools close to particular moral or religious communities reinforce *that* community's morality . . . . It is hardly surprising that schools serving more cohesive communities may have an easier time generating trust among students, teachers, and indeed parents."<sup>176</sup>

172. See Valerie E. Lee, et al., *Equity and Choice in Detroit*, in WHO CHOOSES?, *supra* note 42, at 82.

173. See VITERITI, *supra* note 2, at 103-04 (quoting Milwaukee parent who wanted religion in her child's school, and noting that other parents transferred their child out of a voucher school when it dropped religion); Macedo, *supra* note 1, at 439 (observing that none of the 6,300 children enrolled in the Milwaukee voucher program, most of whom are in Catholic, Protestant, or Islamic schools, are opting out of mandatory religious exercises).

174. In the Cleveland voucher program, while 82% of participating schools were church-affiliated, 96% of the students in the program chose to enroll in those schools. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 836-37 (N.D. Ohio 1999).

175. See Steven K. Green, *Private School Vouchers and the Confusion Over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47, 53 (1999-2000) ("The growing attraction of religious education stems from their value-integrated approach to education, not just on the occasional catechism or Bible studies.").

176. MACEDO, *supra* note 34, at 263.

Given the explicit religious missions of most church-affiliated schools, coupled with the integration of those missions with the schools' day-to-day operations,<sup>177</sup> it is unlikely that students or parents would perceive the religious aspects of the schools as immaterial to the educational environment. Further, given the significant differences in churches' approaches to religious doctrine, worship, church history, the roles of children, and myriad social issues, it is equally unlikely that students or parents would view the religious aspects of the educational environment as interchangeable among schools affiliated with different churches.

The inseparability of churches' religious missions from the everyday function of their affiliated schools is evidenced by the schools' stated priorities and purposes. Chicago's Catholic schools, for example, have acknowledged their evangelical mission even as they seek public funding.<sup>178</sup> It is generally acknowledged that inner-city Catholic schools serve as an important base for evangelizing the African-American community.<sup>179</sup> Even as Catholic schools embrace diversity, there is resistance to any notion that the schools' religious mission should be compromised:

Diversity does not mean we let go of our standard, which is to form other-centered men and women who can make a difference in this world, but that we use what our students bring—their home culture and their funds of knowledge—and we gently but deliberately invite them to live their lives according to the Gospel. For us to do anything less would be to sell out on our mission of being Catholic schools.<sup>180</sup>

This tendency may be even more pronounced in Catholic schools with substantial non-Catholic student bodies. A study by the National Catholic Education Association found that in low-income, predominantly minority Catholic schools, requirements for attendance at religious services and retreats are more stringently enforced than in middle-income, non-minority Catholic schools.<sup>181</sup> The study also found that faculty members at low-

177. See Green, *supra* note 175, at 54 ("The vast majority of religious schools are pervasively sectarian by virtue of their religious mission and integrated programs.").

178. See MORKEN & FORMICOLA, *supra* note 23, at 161-62.

179. See Jamie T. Phelps, *African American Catholics: The Struggles, Contributions and Gifts of a Marginalized Community*, in BLACK AND CATHOLIC, *supra* note 55, at 20 ("One reason given for the closing of Catholic schools and churches in the inner city is the fact that most of the population in the community and schools are non-Catholic; yet in the past these schools and churches have been the base for the church's evangelizing efforts among African Americans.").

180. MARTIN, *supra* note 30, at 32-33.

181. Darlene Eleanor York, *The Academic Achievement of African Americans in Catholic Schools: A Review of the Literature*, in GROWING UP AFRICAN-AMERICAN, *supra* note 166, at 11,

income Catholic schools tend to consider religious instruction and participation as important as academic instruction.<sup>182</sup> Given that the students at low-income, predominantly minority Catholic schools are often not Catholic, it is reasonable to believe that more rigorously enforced Catholic-oriented requirements may make them more likely to switch to schools affiliated with their own religious tradition in the event that such schools became available.

Further evidence of religion's importance in the school choice debate is found in the propensity of voucher proponents to frame the debate as one of religious freedom.<sup>183</sup> In that regard, they are not arguing simply for access to the best possible education, but for access to *religious* education. The religious nature of the education is not just an incidental aspect—it is at the core of the voucher debate.

Even those arguments that are not explicitly based on religious freedom often invoke parents' need to pursue their children's education in a setting that reflects their own sense of morality.<sup>184</sup> In one of the more compelling invocations of this theme, Joseph Viteritti argues:

If there is anything to be learned from a century and a half of school wars waged around the confrontation between the public values of a ruling majority and the private values of political minorities, it is the inherent danger of giving the larger group absolute authority over the education of the smaller group without providing the latter with meaningful alternatives that reflect their own moral standards.<sup>185</sup>

It goes without saying that many people's senses of morality will be directly informed by their religious beliefs, making the religious nature of the school highly relevant, and leading many students and parents to choose church-affiliated schools over public schools. Further, those favoring church-affiliated schools are likely to draw distinctions among such schools. They likely will be attracted to schools that reflect their sense of morality, and, if such schools are available, are unlikely to attend—or to continue attending—schools reflecting a sense of morality that does not correspond as closely with their own.

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182. *Id.*

183. *See, e.g.*, Johnson, *supra* note 142, at 3 (“[I]t is the *exclusion* of religion from vouchers that is discriminatory, and the principal argument that vouchers are unconstitutional rests on the proposition that the Constitution not only permits, but requires, such discrimination.”).

184. *See, e.g.*, RANDALL, *supra* note 169, at 125 (noting that private schools allow parents to raise kids according to their own belief system).

185. VITERITTI, *supra* note 2, at 166.

There are, of course, factors besides religion that could lead to increased segregation in a voucher-based system. The potential impact of two of these factors—culture and geography—may be difficult to disentangle from the impact of religious preferences, in that both will contribute to a high percentage of African-American students choosing schools affiliated with African-American churches. Amy Stuart Wells argues that African Americans will respond to school choice differently than whites, with some participating in hopes of improving their educational prospects, but some refusing to participate because they do not believe choice will make a difference, or out of resistance to the dominant white culture.<sup>186</sup> Wells interviewed African-American students in St. Louis who chose not to attend suburban, predominantly white schools, and concluded that “what city students were really choosing was the sense of kinship and shared culture represented by their all-black school.”<sup>187</sup> According to Wells, their motivations for staying in city schools minimized the importance of school quality.<sup>188</sup>

To the extent that the importance of shared culture is a factor in the school choice decisions of African-American students and parents, vouchers’ segregative tendencies will be magnified. As discussed above, because of the African-American church’s centrality in the community and the lack of institutional alternatives, the church likely will be a primary source of voucher schools in the African-American community. Accordingly, church-affiliated schools will be the preferred choice of many students and parents seeking a school embodying their shared culture. Even for those families who do not attend church and do not consider religion to be an important aspect of education, schools affiliated with African-American churches may be the only private schools worth considering.

Geography is also a factor in the school choice decision. Evidence shows that parents want to be able to choose a school located in their community, not to send their child a long distance.<sup>189</sup> For those parents inclined to choose a church-affiliated school, this suggests that they are more likely to choose a school affiliated with a church in their neighborhood, rather than a church-affiliated school across town. Because churches in minority neighborhoods will be predominantly minority, and churches in white neighborhoods will be predominantly white, the choice of religious schools will simply reinforce the geographical boundaries of segregation in our communities. Further, especially in lower-income, minority neighborhoods, the only non-public school options may very well

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186. Amy Stuart Wells, *African-American Students’ View of School Choice*, in *WHO CHOOSES?*, *supra* note 42, at 28.

187. *Id.* at 33.

188. *Id.*

189. See VITERITTI, *supra* note 2, at 78.

be church-affiliated schools, which will likely reflect the skewed racial compositions of their congregations and neighborhoods. In this regard, vouchers will not exacerbate the current geographical segregation in many urban areas, given that the student composition of public schools is based on the same geographical boundaries. The relevance of geographical preferences to a voucher program in a city with highly segregated neighborhoods, rather, is that they appear to effectively negate any integrative tendencies arising from the increased student mobility which vouchers are said to facilitate. Of course, in areas with lower levels of neighborhood-based segregation, the segregative impact of vouchers will be more pronounced.

#### V. RESPONDING TO VOUCHERS' SEGREGATIVE TENDENCIES

If racially integrated schools are to remain an ideal worth pursuing in this country, are there any circumstances under which private school vouchers can be consistent—or at least not inconsistent—with that priority? Barring the end of racial segregation in Christian churches or a diminished role for religious considerations in families' school choices, how can voucher programs be structured so as to minimize the segregative dangers outlined above? Unlike so many other battles over segregation, vouchers' divisive effects are not amenable to constitutional challenge.<sup>190</sup> And while private schools participating in voucher programs can be required to follow anti-discrimination laws, the schools themselves cannot be held responsible—legally or otherwise—for the segregative impact brought on by private actors' religion-based choices. There are, however, two regulatory avenues through which the issue can be addressed, but both are significantly flawed. The first guards against vouchers' segregative tendencies directly by regulating the choices of educational consumers. This category includes regulations aimed at maximizing the choices of students and parents—thereby minimizing institutional obstacles to integration—as well as regulations limiting those choices—thereby enforcing certain levels of integration at schools accepting vouchers. The second avenue is less direct, addressing the problem by regulating the operations of the voucher schools themselves. This category includes curricular and admissions requirements that would indirectly guard against the religious segmentation of students by deterring the market entry of many church-affiliated schools, and by minimizing the religious aspects of

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190. Any segregative impact of voucher programs would likely be attributable to parental choice, not government action. As the Supreme Court has recognized, "where resegregation is a product not of state action but of private choices, it does not have constitutional implications." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992); see also *Aldana*, *supra* note 4, at 56.

the educational operations of church-affiliated schools that choose to accept vouchers.

For all of the school choice proposals floating around the debates over educational reform, there are even more regulations designed to remedy real or perceived dangers arising from those proposals. Acting as a counterweight to the excesses arising from an unfettered market, regulations are a required element of voucher programs that, as Stephen Macedo explains,

should not simply strive for “academic achievement” (though that is quite important), but also strive for equal educational opportunity, and the pursuit of inclusion and mixing across boundaries of religion, race, class, and other important divisions. Constitutional concerns about allowing public monies to flow to religious schools should be assuaged by public regulations that help insure that schools receiving public monies are conforming with the public values of a diverse republic.<sup>191</sup>

The proposed safeguards that are most in line with the spirit of freedom and autonomy underlying the voucher movement are those seeking to ensure that all students and parents are empowered to make meaningful school choices. While they do not address the crux of the dangers outlined in this Article, such provisions are laudable to the extent that they guard against segregation by default. For example, programs to ensure that minority and disadvantaged communities are provided with adequate information about choice<sup>192</sup> can ensure that members of those communities purposefully and knowingly choose a school, rather than automatically enrolling in the school that is nearby or attended by members of their social networks. Similarly, vouchers should cover transportation costs for low-income students, and participating suburban school districts should be required to accept inner-city voucher students if they have space available; these measures would at least give students the opportunity to transcend geographical barriers to equal education.<sup>193</sup>

Given the class-based information gap and geographical segregation of our cities, these measures are essential to giving lower-income, inner-city students the ability to overcome the segregated status quo. Nevertheless, such provisions miss the heart of the problem because, while maximizing the decisionmaking power of students and their parents, it is often the choices of students and parents that pose the greatest segregative

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191. Macedo, *supra* note 1, at 441.

192. See Aldana, *supra* note 4, at 44.

193. See Macedo, *supra* note 1, at 436.

dangers.<sup>194</sup> At this stage in our nation's history, unfettered private choice is not the surest path to an integrated society.

Undoubtedly the more effective mechanism for guarding against segregation is through restricting consumers' ability to make segregative choices. In this regard, "controlled choice" has been raised as a possible solution to the segregative dangers stemming from public school choice programs. The two types discussed most frequently are racial balance controls on student enrollment to keep the racial makeup of each school in a given school district approximately equal to the makeup in the district as a whole; and anti-tipping controls<sup>195</sup> to keep whites from fleeing a school district.<sup>196</sup> While strict numerical restrictions on student enrollment would undoubtedly ensure a certain level of integration, the means by which it would be accomplished raises a distinct set of problems.<sup>197</sup> Because vouchers are widely viewed as a path to a better education for inner-city minority students who could not otherwise afford to escape public schools, reserving a certain number of coveted enrollment slots for white students—regardless of whether they even want to attend the school or can afford to pay the tuition without vouchers—would face significant public resistance.<sup>198</sup> Even more problematically, the use of race-based classifications to maintain racial balance under voucher programs would almost certainly be rejected by the courts. If there is no judicial finding of past discrimination by a school district, such classifications will not survive strict scrutiny.<sup>199</sup> Akron's school system limited student transfers under its choice program in order to maintain racial balance, and the court

194. See Eisdorfer, *supra* note 45, at 956 ("The reality is that the choices of white and minority families are still influenced by considerations of race, and that in the absence of controls, school choice leads to racial segregation in all but the most exceptional school districts.").

195. In enacting an "anti-tipping" control, the school board attempts to predict the level of minority enrollment in a particular school that will trigger white flight, then takes steps to ensure that the minority enrollment does not reach that level. See Aldana, *supra* note 4, at 53-54.

196. See Eisdorfer, *supra* note 45, at 945.

197. See VITERITI, *supra* note 2, at 58-60.

198. See *id.* at 58, 60 ("Most parents, black and white, seem to value choice as a route to a better education, rather than for racial balancing.").

199. School districts operating under a court-ordered desegregation plan would have an easier time surviving strict scrutiny because the district likely would need to obtain court approval before implementing a choice program, and because a history of segregation would help establish a compelling government interest. See Hawke, *supra* note 43, at 615-16; see also Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 SETON HALL L. REV. 921, 935 (1993) ("[A] public school district's use of racial ceilings, such as those now used in Chicago and elsewhere, is problematic and will need to survive strict judicial scrutiny. A school board's legitimate concerns over white flight appear sufficient to constitute a compelling governmental interest, but it is not clear how any school board can sufficiently narrow and tailor its racial ceilings.").



struck it down, ruling that such a measure violated students' equal protection rights.<sup>200</sup>

Moreover, controlled choice concepts usually are applied where a public school district adopts a policy allowing students to freely transfer among the district's schools. Racial ceilings are implemented to ensure that enrollment shifts do not lead to white flight, or otherwise increase the segregation of an existing student population. In the voucher context, by contrast, controlled choice would amount to racial quotas for schools created in response to vouchers because those schools have no existing student populations. Whereas controlled choice under an open enrollment or transfer program merely prevents a currently enrolled student from transferring, controlled choice under a voucher program would affirmatively require that a certain number of white or black students enroll at each school. Given that the new voucher schools will have no history whatsoever—much less a history of unlawful segregation—conditioning the schools' receipt of voucher funds on their ability to enroll students in accordance with racial quotas would face a steep constitutional climb.

Many of these constitutional and political pitfalls would be avoided under a regulatory scheme that targeted voucher schools' operations rather than voucher students' choices. Such regulations would not be subject to judicial scrutiny, as most would merely enforce long-accepted secular educational standards against schools participating in voucher programs. Politically, submission to some level of regulation would likely be seen as a reasonable price to exact from private schools in exchange for their receipt of public funds.

Indeed, some increased regulation of voucher schools seems unavoidable. Public school defenders have been quick to point out that the absence of private school regulation comes with a societal price. Because they are "subject only to market forces and population demographics," private schools "are not required to accept students who seek to enroll and can terminate the enrollment of admitted students at any time and without cause."<sup>201</sup> Voucher opponents predict that students with special needs—whether because of physical or mental disability or behavioral problems—would be relegated to public schools while less challenging students escaped to private schools, exacerbating the current educational inequities.

Regardless of how well-intentioned or innocuously framed the regulatory proposals might be, many private schools themselves take a hard line in opposing any government incursions on their autonomy.<sup>202</sup>

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200. *Equal Open Enrollment Ass'n v. Bd. of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996).

201. Carol L. Ziegler & Nancy M. Lederman, *School Vouchers: Are Urban Students Surrendering Rights for Choice?*, 19 *FORDHAM URB. L. J.* 813, 824 (1992).

202. *See, e.g., Heise, supra* note 152, at 1111 ("[T]he prospect of losing autonomy might deter

Evangelicals especially are fearful of giving up the religious independence of their schools if they are given public funds.<sup>203</sup> The Association of Christian Schools International—by far the largest Protestant school organization—favors vouchers only if there is no accompanying regulation of student selection or retention,<sup>204</sup> and no regulation of schools' operational policies or curriculum.<sup>205</sup> The Association also opposes the Milwaukee voucher program's provision allowing students to opt out of chapel.<sup>206</sup> Most conservative Protestant schools have refused to accept students under Milwaukee's voucher program because they worry that the restrictions will undermine their ability to maintain the religious atmosphere they want.<sup>207</sup>

Even apart from schools' reluctance to give up their autonomy, any suggestion of attaching "strings" to vouchers raises the prospect that those strings would defeat the purpose of the vouchers in the first place. After all, much of the attractiveness of private schools stems from qualities—e.g., administrative efficiency, academic achievement, selective admissions, religious instruction, or stricter behavior codes—that depend on the absence of government regulation. Further, vouchers have come to represent the promise of educational freedom for students and parents; even where that freedom exacerbates societal ills like racial segregation, many voucher proponents oppose as a matter of principle any government constriction of that freedom. As a result, it is by no means conceded that private schools should be subjected to government regulation by virtue of their participation in voucher programs.<sup>208</sup> Some proponents, such as Chubb and Moe, acknowledge the need for a minimal level of regulation, but argue that it should be limited to the criteria now employed by many states in accrediting private schools—graduation requirements, health and safety standards, and teacher certification.<sup>209</sup>

Although substantively unobjectionable, regulations that would increase the operational costs of private schools—even the teacher certification requirement supported by Chubb and Moe—would have a significant impact on the viability of many existing private schools, as well as the creation of new schools. If vouchers require teacher certification, for

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those schools that could afford to participate in a publicly funded voucher program.”).

203. See MORKEN & FORMICOLA, *supra* note 23, at 169.

204. See *id.* at 172 (noting that the Association does approve of policies prohibiting discrimination based on race, sex, and national or ethnic origin).

205. See *id.*

206. See *id.*

207. See Macedo, *supra* note 1, at 440.

208. See RANDALL, *supra* note 169, at 127-40, 146-48.

209. CHUBB & MOE, *supra* note 119, at 219. Further, Chubb and Moe would allow religious schools to participate, “as long as their sectarian functions can be kept clearly separate from their educational functions.” *Id.*

example, existing schools would have to get rid of uncertified teachers or face dire consequences: "Families that have been sacrificing thousands of dollars each year would find it hard to justify spending those thousands on private tuition at a school that doesn't even have certified teachers, when they can get a free ride at a school that does."<sup>210</sup> Schools with non-certified teachers "would face a grim choice: fire the successful (but uncertified) teachers and hire new teachers simply because they have the state's certificate, or else go broke next year."<sup>211</sup> Such "strings" attached to vouchers would "completely change the economics of small private schools."<sup>212</sup> Many small church-affiliated schools could be forced out of operation, and others dissuaded from entering the market in the first place.

Other regulations, while not increasing the operational costs of fledgling schools, would nevertheless have a substantial impact on the viability of church-affiliated schools by threatening the schools' religious identities. Cleveland's voucher program, for example, prohibits discrimination on the basis of religion in admitting voucher students.<sup>213</sup> A legal mandate to admit students that do not even pretend to share the faith on which a school's existence and operation are based is an awkward proposition for many religious schools. Macedo's defense of the nondiscrimination requirement can hardly be reassuring to defenders of the schools' distinctive religious identities, as he argues that admitted students of other faiths will

bring with them additional public pressures to create a welcoming and nondiscriminatory atmosphere for children of all faiths or no faith at all. . . . The school's affiliation with the particular religious sponsoring religious community may be somewhat muted, even attenuated, or at least revised as a consequence: religious references in the curriculum may become more ecumenical, or else perhaps robust expressions of sectarianism will tend to be confined to certain voluntary aspects of the curriculum.<sup>214</sup>

While others doubt the incompatibility of traditional educational regulations and schools' religious autonomy,<sup>215</sup> there is no doubt that

210. Scott W. Somerville, *The History and the Politics of School Choice*, 10 GEO. MASON U. CIV. RTS. L.J. 121, 130 (1999-2000).

211. *Id.*

212. *Id.*; see also Heise, *supra* note 152, at 1111 ("Some private schools might not be able to afford to participate in a voucher program if the costs associated with increased regulation exceed a program's financial benefits.").

213. See Macedo, *supra* note 1, at 436.

214. *Id.*

215. See Johnson, *supra* note 142, at 41 (rejecting argument that vouchers risk church-state

voucher programs can be structured so as to reduce churches' religious incentives to enter the educational market. Prohibitions on religion-based discrimination in admissions may make it more difficult for start-up schools to establish their religious identities. Provisions allowing students to opt out of religious activities—a feature of Milwaukee's voucher program—enhances church-affiliated schools' appeal to non-religious students and their families. Extensive graduation requirements would leave little time in the school day for religious studies or activities. These are just a few examples; the point is that, once a church-affiliated school has chosen to accept government funds, there are myriad ways in which the government can influence the religious identity of the school without mounting a direct—and likely unconstitutional—challenge.

Of course, the mere fact that such government influence is possible does not make it desirable. While such measures would help prevent the further church-based segmentation of the educational system by deterring the creation of new church-affiliated schools, the existing supply of such schools would remain skewed toward those churches with either enough financial resources to operate schools without voucher funds or a tradition of religious schooling sufficiently rooted to accept regulations without losing their distinctive identities. The exclusion of churches without such resources or traditions—especially lower-income, minority churches—would itself represent a blow to diversity.

Even those who are skeptical of vouchers are equally leery of regulatory attempts to mold all voucher schools into secular, bureaucracy-driven, interchangeable institutions. After all, at a certain point the heavily regulated private school becomes largely indecipherable from the target of vouchers' transformative purposes—the public school. The key is finding a balance—that is, a degree of regulation that avoids the exclusionary and divisive excesses of the market but protects the innovation, independence, and religious identities of private schools that make them worth choosing in the first place. Certainly reasonable academic standards should be enforced; if an institution that would create or operate a voucher school is deterred from doing so by minimal graduation requirements or teacher certification, students may very well be better off for the market's loss. The maximization of school choices available to voucher students cannot be the only objective of educational policy; equal emphasis must be placed on the assurance that students will emerge from a voucher program equipped to succeed in society.

More broadly, school districts should not concede defeat to the market forces of “niche” schooling and societal segmentation. School districts can

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entanglement because the argument “presumes that vouchers necessarily must be structured so as to induce religious schools to ‘secularize’ their curricula”).

and should do more than rely on regulations to blunt the impact of the public's embrace of private voucher schools; they should strive to win back the public itself. By creating new schools and revamping existing schools, the government should strive to offer schools with top-flight academics, safe environments, and a meaningful sense of community and civic purpose—attributes that attract students and parents on both sides of this nation's racial divide.

## VI. CONCLUSION

As Frank Kemerer points out, “[l]iberal democracies have always viewed education as the primary mechanism through which the state could reduce inequalities caused by family circumstances.”<sup>216</sup> Voucher proponents are quick to respond that the current educational system solidifies such inequalities because only the wealthy can pay to escape our nation's failing public schools. Under an adequately funded voucher system, all students would have—at least theoretically—an equal opportunity to attend a school that works.

Even assuming that all students currently attending a failing public school would face qualitatively better educational prospects under a voucher system, there are reasons to be skeptical of vouchers that have nothing to do with academic performance. Unleashing market forces in the educational system would likely jolt many public schools into overdue reforms, but it would also cause American schools to more closely reflect a segmented American society. Unfettered consumer choice, coupled with the voucher-driven creation of new schools, is a recipe for education based on group status. These tendencies are strengthened by the predictable expansion of church-affiliated schools—especially in the African-American community—and the continuing racial segregation of the Christian churches with which they are affiliated.

Notwithstanding current trends to the contrary,<sup>217</sup> there remains a formidable stable of arguments as to why segregated schools are detrimental for the students affected, as well as for society as a whole.<sup>218</sup> The prospect that vouchers may exacerbate the racial and religious segmentation of American schools must give even voucher proponents pause. Even without vouchers, there is hardly an abundance of social

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216. Kemerer, *supra* note 9, at 188.

217. See *supra* notes 148-56 and accompanying text.

218. See, e.g., Eisdorfer, *supra* note 45, at 947-48 (discussing segregation rendering impossible the teaching of interracial cooperation and tolerance, and rendering unequal education because minorities are isolated from the mainstream and are unable to test themselves against members of white majority); O'Brien, *supra* note 21, at 402-03 (suggesting that “given the historic subjugation of African-Americans, majority-minority schools are likely to continue to have lower status, regardless of the quality of the education offered or the facilities”).

cohesion or intergroup communication in this country, and one would be hard-pressed to contend that vouchers would help matters.<sup>219</sup> Whether such a risk is, on balance, worth vouchers' perceived academic benefits is a question that should be answered before the widespread implementation of voucher programs is undertaken.

Admittedly, school vouchers would not *preclude* schools from pursuing integration. Indeed, Robin Barnes, in advocating charter schools, notes that "[f]or those who believe that integration is important to some socially desired end, the opportunity to develop a truly innovative multiracial educational program exists."<sup>220</sup> She then notes opportunities to choose field trips and school outings over access to the Internet.<sup>221</sup> As the notion of common pursuits is swept aside by market principles, integration is reduced to just another marketing niche. Under a voucher program, a school may, for whatever reason, be inclined to market itself as the "multiracial" or the "integrated" school, and such sentiments may attract enough students for the school to compete with others offering religious instruction, a gender-exclusive environment, or unlimited access to the Internet. In the world of choice, integration—while by no means disfavored—is relegated to a matter of individual preference.

The religious component of the interplay between vouchers and segregation cannot be overemphasized. As a practical matter, American churches' inability to rise above society's racism and cultural separatism makes them fertile ground for the further segregation of American schools. Given the nature of segregation in the church—rooted in historical racism, maintained through widening cultural differences, entrenched by divergent worship approaches and theologies, and largely tolerated by both sides—church-affiliated schools are unlikely to overcome the racial divisions of the churches operating them, especially to the extent that students' own religious backgrounds are represented in the educational market.

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219. See ENGEL, *supra* note 127, at 69 (arguing that school choice erodes social cohesion and intergroup communication necessary to sustain democratic values); MACEDO, *supra* note 34, at 263 (arguing that common schools are needed because the "health of our political society requires that we learn how to negotiate cultural boundaries and promote wider sympathies among citizens"); O'Brien, *supra* note 21, at 406 ("If choices about school attendance and school policy are made privately and individually, and are seen as part of parental responsibility, the opportunity to engage the diverse polity in inclusive political dialogue is diminished.").

220. Barnes, *supra* note 11, at 2405.

221. *Id.*

