

# Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism

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## Religious Freedom and Educational Opportunity

On August 25, 1995, the Wisconsin Supreme Court issued an order temporarily enjoining the implementation of those portions of the Milwaukee Parental Choice Program that would allow parents to use a state supported voucher to send their children to sectarian schools.<sup>1</sup> Petitioners argued that the program, scheduled to begin within weeks, violated federal and state constitutional standards for the separation of church and state. This case represents one of the most significant constitutional conundrums in American jurisprudence and is poised to make its way through the state and federal judiciaries at a time when the United States Supreme Court appears to be undertaking a thorough reexamination of the meaning of the First Amendment. It also signals a new chapter in legal and political discourse that will continue to unfold as school choice programs gain increasing support among governors, state legislators, and members of Congress.

The problem posed by this case is indeed complex, requiring several levels of analysis before a just resolution can be reached. First, there is the issue of the First Amendment itself and the need to determine the proper balance between the Establishment Clause and the Free Exercise Clause in order to protect individual rights from infringement by governmental authority.<sup>2</sup> This is a perennial question, as old as the republic.<sup>3</sup> Yet our convoluted constitutional history provides few consistent or satisfactory answers to assist us in addressing contemporary First Amendment problems. Our Constitution is "a living document"; its life has been rather peripatetic and somewhat unpredictable, especially when it comes to the First Amendment. Therefore the lessons of history are of limited value in addressing contemporary questions like choice in education.

Next there is the issue of American federalism, which creates the potential for subjecting governmental acts to several levels of judicial review, along two distinct but connected legal corridors.<sup>4</sup> Although state courts have sole

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1. *Thompson v. Jackson*, No. 95-2153-OA (order granting preliminary injunction), L.C. #s 95CV1982 and 95CV1997. Similar cases are working their way through the courts in Ohio and Vermont. On March 29, 1996, a deadlocked Supreme Court remanded to a local circuit court for trial. With one Justice recused, three Justices thought the Choice Program violated the state establishment clause and three Justices thought the respondents challenging the Choice Program had not proven it invalid under either the Federal or the Wisconsin Constitutions. See *Thompson v. Jackson*, 546 N.W.2d 140 (Wis. 1996) (per curiam).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

3. For opposing viewpoints on the issue, compare Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980), with Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).

4. On the problems of interpretation inherent in judicial federalism, see Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143 (1986-87) [hereinafter *Methodology Problems*].

jurisdiction for determining whether state and local actions are permissible under their own constitutions, they often review policies on the basis of federal constitutional criteria. While federal courts have no jurisdiction regarding state constitutional matters, they may strike down state and local actions as incompatible with federal constitutional standards. In recent years the Supreme Court has adopted a more accommodationist view of the First Amendment. A review of the case law will show that the Rehnquist Court has shifted away from the strict separationist interpretation of the Establishment Clause practiced by its two predecessors and has moved towards a more generous reading of the free exercise provision.<sup>5</sup> This shift has not been followed consistently by the state courts. As a result, many provisions of state law requiring strict separation are misaligned with emergent federal constitutional standards.

Finally, there is the more immediate policy issue. Under what conditions should state aid be permitted to support sectarian education? I do not mean to suggest here that the answer to this question should be determined by extra-legal criteria. I would propose, however, that its resolution cannot be reached solely on the basis of a First Amendment analysis. The matter is more complicated and requires an analysis of constitutional provisions other than the Religion Clauses. Our constitutional history has taught us that the most profound educational questions that come before the courts turn on the Fourteenth Amendment.<sup>6</sup> School choice is both a liberty issue and an equality issue. In order to strike the proper balance between disestablishment and free exercise rights in the context of education, we must factor equal protection considerations into the analysis.

Based on the child benefit theory adopted by the Supreme Court in several major cases,<sup>7</sup> I will argue that tuition assistance provided to parents who choose to send their children to schools with religious affiliations is permissible under the United States Constitution.<sup>8</sup> Furthermore, I contend, to explicitly

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5. For comment on this historical shift, see Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993) [hereinafter *The Resurrection of Religious Freedom*]; Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581 (1995); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115 (1992) [hereinafter McConnell, *Religious Freedom*].

6. The Fourteenth Amendment states, in relevant, part that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For a historical analysis of how the Fourteenth Amendment has been applied in several areas of education, see ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* (1986) [hereinafter *EQUAL EDUCATION UNDER LAW*].

7. The "child benefit" theory was first enunciated by the Supreme Court in *Cochran v. Louisiana State Board of Educ.*, 281 U.S. 370 (1930); and later in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). It was subsequently adopted in a series of more recent cases beginning with *Mueller v. Allen*, 463 U.S. 388 (1983). See also *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

8. See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5, 13 (1987) (arguing that *Witters* decision provides constitutional basis for justifying

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exclude religious schools from choice options infringes upon the religious liberty and educational opportunity of those who would make such a choice. In particular, such exclusion places an unfair burden on poor parents who desire to incorporate religious values into the education of their children or who seek to improve their educational opportunities beyond those available in public schools. Part I traces the history of First Amendment jurisprudence and relates it to three philosophical traditions: liberalism, republicanism, and pluralism. It describes a gradual movement of the modern Court from a liberal orientation to a more pluralistic one, shifting the balance of constitutional interpretation from the Establishment Clause to the Free Exercise Clause. Part II focuses on state constitutional law. It explains the diverse approaches to separation among the states and the incidence of disharmony between state and federal standards as posing a serious threat to religious freedom as it is presently understood by the Court. Part III examines the philosophical and legal connection between First Amendment jurisprudence and the egalitarian principles set down in *Brown v. Board of Education*.<sup>9</sup> It explains the salience of school choice—as presently formulated in the policy arena—in the context of both educational opportunity and religious freedom. The final section of the Article concludes that the pluralist perspective recently adopted by the Supreme Court in interpreting the First Amendment serves to enhance both educational opportunity and religious freedom. It urges, however, that under our system of constitutional federalism, the standards adopted must be enforced among the states in order to ensure that these protections are not undermined.

### I. CONSTITUTIONAL HISTORY: BALANCING DISESTABLISHMENT AND FREE EXERCISE

#### A. *The Futile Search for Intent*

What did the Framers have in mind when they drafted the First Amendment? The question has occupied constitutional scholars for two centuries. Not only does it remain unresolved, but even to the extent that we can determine the Framers' motivations, we find that the context in which they operated was far different from that of the twentieth or twenty-first century.<sup>10</sup> Their understanding of an established religion was remote from anything we know in contemporary American society. Since education was not viewed as a federal responsibility, the Founders gave scant attention to the constitutional

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school vouchers).

9. *Brown v. Board of Educ.*, 347 U.S. 484 (1954).

10. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981) (discussing general problems of interpreting intent to resolve contemporary constitutional issues).

implications of schooling. And insofar as they contemplated the role of education in a free society, separating its content from organized religion was not a concern.

### 1. *Church and State Prior to the First Amendment*

In eighteenth-century Europe, establishment referred to the existence of an officially approved church supported by public funds, where ecclesiastic and state authority were intermingled. Establishment was exclusionary in the sense that membership in the official church was required to hold public office and to qualify for other social privileges, and discrimination against other faiths was not unusual. Owing to the distinct origin of each settlement, religious establishment was more ambiguous and diverse in colonial America.<sup>11</sup>

Prior to independence, the colonies developed several forms of establishment relationships. These ranged from a rigid emulation of the English model,<sup>12</sup> through local option and multiple establishment schemes,<sup>13</sup> to more contemporary positions forbidding any establishment.<sup>14</sup> The various compromises reached were a product of each colony's unique historical circumstances.

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11. For a historical analysis of religious establishment in colonial America, see THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 105-33 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-30 (1990) [hereinafter McConnell, *The Origins of Free Exercise*].

12. In Virginia, Maryland, and the Carolinas, the established church was supported by public monies and actually functioned as an instrument of governmental control. Office holding was confined to Anglicans, and non-believers were commonly banished. Georgia also recognized the Church of England as its established religion, but, unlike other southern colonies, excepting its exclusion of Catholics, the state displayed a certain tolerance towards other Protestant sects and even Jews.

13. In New England, with its strong predisposition towards localism, each town would choose its own minister and enact taxes to support its church. Although the decentralized democratic structure of government in Connecticut, Massachusetts, and New Hampshire allowed communities to escape political domination by the Anglican church, the system resulted in another form of favoritism. Because the populations of the towns were dominated by Congregationalists, there was little tolerance even for other Protestants. Baptists, Presbyterians, and Quakers were especially singled out for ill-treatment.

New York had a unique form of establishment among the colonies. When the English conquered New Amsterdam in 1664, the Dutch Reformed Church was already recognized as the official creed. That same year, the "Duke's Laws" disestablished the Dutch church. In its place the English government set up a multiple establishment, requiring each town to choose a Protestant church and minister that it would support with public taxes. Because the population of New York was so diverse, the outcome of local decision making was more pluralistic than in New England. Thus, New Yorkers, at least those who were not Catholics or Jews, enjoyed a considerable degree of religious freedom. For a discussion of New York's unique form of multiple establishment, see LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 11-16 (2d ed. 1994).

14. Four colonies had no form of religious establishment at all: Rhode Island, Pennsylvania, Delaware, and New Jersey. In New Jersey religious establishment would have been impractical because of the colony's diverse population. The other colonies had been specifically set up for people who had sought to escape religious persecution in other places. Roger Williams founded Rhode Island as a safe haven for religious dissenters from Massachusetts, and William Penn established Delaware and Pennsylvania for the Quakers. Given their origins, neither an official church nor intolerance fit well within the philosophical dispositions of the former three colonies.

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Separation from the Crown brought a strong reaction against the Anglican Church in those states where it enjoyed a privileged position as the official religion. For these former colonies disestablishment was a feature of political independence.<sup>15</sup> With some modification the local option system continued to prevail in New England after the war,<sup>16</sup> while the states that had maintained a more pronounced separation between church and state as colonies did not find a need to alter the relationship significantly after independence.<sup>17</sup> New York continued to abide by its principle of multiple establishment. Nevertheless, its legislature saw fit to enact a statute to remind Anglicans that they did not enjoy preferential status.<sup>18</sup>

By the time the Framers sat down to begin drafting a Bill of Rights, a clear pattern of religious toleration had begun to appear. The common element of disestablishment found among the former colonies was a decided aversion to setting up a single official church at the state level; and this instinct, pursued most aggressively against the Anglican Church, was, at least in part, inspired by revolutionary sentiment against the British. Public support for organized religion was common, with a majority of the states abiding by some form of locally determined or individualized system of choice.

By 1789 every state except Connecticut had a constitutional provision protecting religious freedom.<sup>19</sup> But these freedoms would be found disappointing by contemporary civil rights activists. Six of the state constitutions limited these rights to theists.<sup>20</sup> All but two states continued to give religious tests for those who sought public office, in effect disqualifying those who were not Christian.<sup>21</sup> In some cases membership in a Christian church was attached to the franchise, and a person could be criminally prosecuted for not properly observing the sabbath. Education, to the extent it was provided, was

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15. Every one of the five southern states broke the monopoly held by the Church of England. North Carolina was the first among them to completely end public support for religion. The others—Virginia, Maryland, South Carolina, and Georgia—adopted a policy of nonpreferential aid that taxed people to support the church of their choice. See LEVY, *supra* note 13, at 52-53.

16. In Massachusetts, while Congregationalists still dominated the scene, they would now share tax monies with Baptists, Quakers, Episcopalians, Methodists, and Unitarians. New Hampshire permitted its towns either to select a church to support with local taxes, or to select a church at all. By the time Vermont became the fourteenth state to join the Union in 1791, it had already adopted the system of local discretion that was customary in the region. Although all individuals in Vermont were expected to choose a church they would attend and support, no person would be forced to support an official church if they preferred to worship elsewhere. Connecticut, with its strong Congregationalist tradition, was the only New England state to retain a preferred establishment after the war, thus relegating the system of choice to an abstract fiction for town members who were religious minorities. See LEVY, *supra* note 13, at 31-51.

17. CURRY, *supra* note 11, at 159-61.

18. *Id.* at 161-62.

19. See McConnell, *The Origins of Free Exercise*, *supra* note 11, at 1455.

20. *Id.* at 1499.

21. LEVY, *supra* note 13, at 77.

inseparable from religious instruction.<sup>22</sup> Religion was an important component of political and social life in the new republic.<sup>23</sup> The Anglican establishment had been expelled by the revolution, but civil authority still could be brought to bear against someone who violated the religious mores of the community.

## 2. *Philosophical Foundations: Liberalism, Republicanism, Pluralism*

In 1789 the First Congress of the United States, responding to the appeals made by some of the states during the ratification process, drafted a Bill of Rights to limit the powers of the federal government. The urge to define explicit individual rights was motivated by a deep-seated suspicion of strong government, especially at the national level. Mediating the relationship between government and the individual was no easy task when it came to the issue of church and state. American attitudes throughout the states were somewhat ambivalent, given our colonial history. And there was no certain agreement among the Framers how to balance the requirements of the Establishment Clause with the aspirations of the Free Exercise Clause. Was the separation between church and state to be more rigidly defined at the national level than it had been in the states? If so, would that compromise or enhance religious freedom? Was there a real tension between the two First Amendment clauses, or were they complementary expressions of the same constitutional ideal?

The debate rages on as to what we mean by an established religion. Strict separationists will argue that an impenetrable wall of separation is needed to protect government and religion from each other.<sup>24</sup> At least with regard to the question of original intent, that position is not entirely supported by the historical record. We have already noted the intimate relationship that existed between religion and government during the eighteenth century, and that "multiple establishments" were indeed common. Soon after it began drafting a Bill of Rights, the same Congress enacted legislation that established a national day of public thanksgiving and prayer and set up a system of publicly

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22. See BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* (1960) (tracing connection between religious instruction and public schooling in colonial America); RICHARD J. GABEL, *PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS* (1937) (tracing public aid to religious schools from early years of statehood through end of Civil War).

23. For a historical overview of the important role that religion played in 18th century America, see PATRICIA U. BONOMI, *UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA* (1986); PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* (1964); ELLIS SANDOZ, *A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING* (1990); see also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 55-71 (1996). For an opposing view, see ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996) (arguing that Constitution was written on separationist principles).

24. See, e.g., LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (1967). See also MARK D. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965) (drawing distinction between theological and political rationales behind First Amendment).



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supported chaplains for the military and both houses of Congress.<sup>25</sup> The First Congress had also reenacted the Northwest Ordinance which provided for a system of schools, declaring: "Religion, morality and knowledge being necessary to good government . . . schools and the means of education shall forever be encouraged."<sup>26</sup> Contemporary scholars point to these early experiences in order to argue that the Constitution was never intended to erect a strict wall of separation or prohibit government support to religion, so long as support was not limited to one established church.<sup>27</sup>

Determining the level of protection provided by the Free Exercise Clause can be equally confounding. Does religious freedom under the Constitution encompass freedom of conscience, freedom of worship, or freedom of action? What if the requirements of one's faith impose responsibilities that undermine one's obligations to the state? Which should take precedence? Certainly the conventions of the early republic do not lead to a generous interpretation of religious rights in responding to such queries, but the record is uneven. The fact is that there was substantial disagreement among the Framers. Investigating the historical record will never provide us with clear resolutions to our present constitutional dilemmas. It can, nevertheless, help us to identify several strands of thought that undergird our constitutional structure, and thus, to develop a philosophically consistent approach to current issues.<sup>28</sup>

a. *Liberalism.* No document has been cited with more regularity as a brief for religious liberty than Jefferson's "Bill for Establishing Religious Freedom."<sup>29</sup> Presented to the Virginia General Assembly in 1777 as an attempt to

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25. In deference to the desire for disestablishment at the time, Congress imposed a diversity standard for the chaplain system that required a multi-sectarian arrangement for the army and allowed the chaplains for the respective houses of Congress to be of different faiths. For a more general discussion of Congress's financing of religious activities during the early history of the republic, see Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y. 129, 139-48 (1986).

26. Quoted in CURRY, *supra* note 11, at 218.

27. See, e.g., CHESTER J. ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964); DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* (1987) [hereinafter, *REAL THREAT AND MERE SHADOW*]; ANSON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950). For a critical review of the "nonpreferentialist" position, see LEVY, *supra* note 13, at 112-45; Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

28. For a general overview of the intellectual currents supporting these traditions, see MICHAEL LIENESCH, *NEW ORDER OF THE AGES: TIME, THE CONSTITUTION AND THE MAKING OF MODERN AMERICAN POLITICAL THOUGHT* (1988); Donald S. Luiz, *The Intellectual Background to the American Founding*, 21 TEX. TECH L. REV. 2327 (1990).

29. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but . . . all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and . . . the same shall in no wise diminish, enlarge, or affect their civil capacities.

Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in *THE COMPLETE JEFFERSON* 946, 947 (Saul K. Padover ed., 1943).

revise the state's laws, the bill is often cited as evidence of Jefferson's philosophical orientation, and a clue to discovering the Framers' original intent.<sup>30</sup> It reveals a strong determination to promote government separation from religion. Jefferson made an equally compelling argument for separation in a celebrated letter written in 1802 to the Danbury Baptist Association, when as President he refused to declare a national day of fasting and thanksgiving.<sup>31</sup> The documents, taken together, are of interest for a number of reasons. While both ring out as appeals for religious rights, they also hint at the limits of those rights and set the balance between church and state solidly on the side of the latter. The state envisioned by Jefferson would protect religious beliefs, opinions, professions, and arguments, but individual conduct would be subject to the regulation of the legislature.<sup>32</sup>

Jefferson's thinking was profoundly influenced by John Locke.<sup>33</sup> Locke was an ardent proponent of religious toleration in England.<sup>34</sup> In an Augustinian framework (albeit leading to a very different conclusion) the essence of Locke's approach to religion was a deep appreciation of two contending universes, a City of God and a City of Man, each entitled to their due.<sup>35</sup> In one world, individuals were motivated by conscience and a belief system that

30. Analyzing a series of five bills that Jefferson subsequently drafted for the Virginia legislature, Daniel Dreisbach contends that Jefferson embraced a more accommodationist view than is indicated in his "Bill for Establishing Religious Freedom." See Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159 (1990) [hereinafter, *Thomas Jefferson*].

31. Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.

Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), in *THE COMPLETE JEFFERSON* 518, 518-19 (Saul K. Padover ed., 1943).

32. See *supra* notes 28-30. Modern critics of this liberal strain in American political thought have argued that the Establishment Clause can tolerate only those religions not hostile to liberalism. They suggest that the liberal state undermines those faiths that do not subscribe to a liberal orientation toward rights and obligations. See, e.g., Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 974 (1993) (drawing on work of John Rawls and concluding, "While the government can maintain a position of neutrality among liberal religions, liberalism itself necessitates that the government must disfavor and discriminate against illiberal religions"). Defining which religions constitute illiberal ones is left to the state to determine. Such discrimination against believers can extend even to areas such as education; religious parents can be forced to educate their children in liberal precepts. See *id.* at 976-78; see also Steven Macedo, *The Politics of Justification*, 18 POL. TH. 280 (1990).

33. See WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 18-24 (1976); J.R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 59-86 (1978); Sanford Kessler, *Locke's Influence on Thomas Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231 (1983).

34. For an analysis of Locke's liberalism and his approach to religious freedom, see *The Origins of Free Exercise*, *supra* note 11, at 1430-36.

35. SAINT AUGUSTINE, *THE CITY OF GOD* (Marcus Dods ed., Hafner Pub. Co. 1948) (1872).

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was the consequence of divine inspiration; in the other, norms for behavior were established through the rational application of human intelligence in the governmental process. Owing to the diversity of faiths existing in a free society, conscience could potentially be a divisive force, if not for the capacity of governmental institutions to impose a civil order. Locke's liberalism entitled individuals to freedom of thought and conscience, but government would set the boundaries of permissible action.<sup>36</sup>

Jefferson's liberalism, which became a major influence in American constitutional thought, was more separationist and limiting than Locke's.<sup>37</sup> Locke supported the idea of one established church, financed by public taxes; Jefferson opposed any form of establishment, singular or multiple. Jefferson insisted on a public domain that was decidedly secular. The citizen might be a devout churchgoer in private life but was expected to leave those beliefs at the door when entering the councils of government. Indeed, it was the requirement that religious conviction be separated from political deliberation that made liberal democracy possible for Jefferson.<sup>38</sup> Whether one could forsake deep-seated convictions informed by conscience when considering important political and moral issues is a question that will be considered in a later part.

b. *Republicanism*. As Benjamin Barber has observed, one of the primary inclinations of "liberal democracy" is "to keep men safely apart rather than to bring them fruitfully together."<sup>39</sup> As a result it is better equipped to protect individual rights and interests than to foster citizenship and community. Complementary to and competing with liberalism at the time of the Founders was the tradition of republicanism, which today remains an influential interpretation of the post-revolutionary period.<sup>40</sup> While liberalism assumes that

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36. McConnell explains:

For Locke, the field left to untrammelled conscience could only extend to that in which the civil magistrate had no particular interest—principally, to things pertaining to the world to come. Religious liberty could only be defined negatively; any broader definition would be pointless, since the magistrate would be judge of his own powers.

*The Origins of Free Exercise*, *supra* note 11, at 1444.

37. For an exposition of the liberal position explained in the context of contemporary constitutional law, see Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992). For a more general treatment, see also LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

38. As scholar Walter Berns has argued, Jefferson sought to found the American regime on a non-religious basis; indeed, Jefferson thought that a new basis of religious toleration could not arise until the people were convinced of the falsity of religion. See Walter Berns, *Religion and the Founding Principle*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 204, 221-22 (Robert H. Horwitz ed., 3d ed. 1986).

39. BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 4 (1984).

40. For a survey of the present debate over the meaning and value of republicanism, see Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). Cf. Lance Banning, *The Practicable Sphere of a Republic: James Madison, the Constitutional Convention and the Emergence of Revolutionary Federalism*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* (Richard Beeman, Stephen Botein & Edward C. Carter II eds. 1987);

personal interests are contentious and irreconcilable with one another, republicanism is constructed on the idea of civic virtue.<sup>41</sup> A public spiritedness brings citizens together in a common pursuit of the general good, and participation in the collective experience does not diminish the individual but fulfills her.<sup>42</sup> Republicanism exerted an important influence in the thinking behind the First Amendment.<sup>43</sup> With its emphasis on civic virtue, republicanism is generally more sympathetic to religious organization and activity than is liberalism, at least liberalism as conceived in Jeffersonian terms. Although most republicans did not support the idea of an established religion, the church was perceived as a fundamental community institution through which morality could be implanted and engendered.<sup>44</sup> Religion was not feared as a force that would undermine effective government. To the contrary, republicans believed that within the structure of the ecclesiastical congregation, members would develop an appreciation for values such as self-restraint, participation, deliberation, and consensus. As George Washington chided in his farewell address,<sup>45</sup> religion should be supported and encouraged, for in the end it is good for civic society. Some modern scholars have voiced similar themes and have advocated support for religious institutions because of their ability to strengthen republican institutions.<sup>46</sup>

c. *Pluralism.* It would take the keen mind of James Madison to derive from liberalism and republicanism the essential ingredients needed to develop an approach to religion compatible with the principles of governance found within the original Constitution. Like Jefferson, Madison strongly opposed a religious

JOHN PATRICK DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984) (offering more critical interpretations of liberalism); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988).

41. See Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87 (1992). The idea of civic virtue was and is a complex one. The republican vocabulary of civic virtue drew heavily from republican Rome and provided a set of aspirational virtues to the newly independent colonies that would distinguish the free citizens of America from the tyrants and peasants of the Old World: self-discipline, simplicity, and patience, for example. See J. David Hoeweler, Jr., *Original Intent and the Politics of Republicanism*, 75 MARQ. L. REV. 863, 870-71 (1992).

42. The republican tradition in Western political thought is generally traced to the work of Machiavelli. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975).

43. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1-21 (2d ed. 1991); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 4-14 (1988); Michael W. McConnell, *Accommodation of Religion*, SUP. CT. REV. 1 (1985).

44. See BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (elaborating on influence of republican ideals in crafting of Constitution); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 46-124 (1969).

45. Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports . . . . Whatever may be conceded to the influence of fine education on minds of peculiar stature, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

George Washington, Farewell Address (Sept. 17, 1796).

46. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-62 (1991) (arguing that state establishment would further participation and community spirit).

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establishment. This was most evident in his famous “Detached Memoranda,” where he warned that the “danger of silent accumulations and encroachments by Ecclesiastical Bodies have not sufficiently engaged attention in the U.S.”<sup>47</sup> The document,<sup>48</sup> which he wrote in 1817 after leaving the presidency, was critical of national practices that set up the chaplain systems and the celebration of Thanksgiving.<sup>49</sup>

Nevertheless, Madison proved to be more accommodating to religion than Jefferson. He recognized the potential conflict a religious person might have in owing allegiance to both a divine sovereign and a worldly sovereign and came out decisively on the side of the individual religious conscience. His distinct perspective is clear in his “Memorial and Remonstrance”:

Before any man can be considered a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.<sup>50</sup>

Madison’s pluralist synthesis of republican and liberal ideals was essential to understanding not only the relationship between church and state in the new republic, but also the political theory of the government itself.<sup>51</sup> Republicans believed that political association could serve to bring out the best virtues of mankind and saw religious organization as a foundation for government; liberals feared the divisive influence that religion could have on society and looked towards government to counteract the worst instincts of men. Madison viewed religion as a positive political and social force. More importantly, Madison understood that the law must refrain from interfering with the individual’s conscience or religious self-understanding. Moderating the

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47. JAMES MADISON, DETACHED MEMORANDA (1817).

48. Is the appointment of Chaplains to the two houses of Congress consistent with the Constitution, and the pure principle of religious freedom? . . . The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. . . . Religious proclamations by the Executive recommending thanksgivings and fasts are shoots from the same root. . . . They seem to imply and certainly nourish the erroneous idea of a national religion.

*Id.*

49. Dreisbach has pointed out that as President, Madison actually re-established the practice, interrupted by Jefferson, of issuing thanksgiving proclamations. See Dreisbach, *supra* note 30, at 198. Madison had supported a similar practice when he was a member of the Virginia General Assembly, as well as a bill that would punish Sabbath breakers. See *id.* at 201.

50. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) reprinted in THE COMPLETE MADISON 300 (Saul K. Padover ed., 1953).

51. See McConnell, *The Origins of Free Exercise*, *supra* note 11, at 1479-80, 1513-17; see also, Christopher L. Eisgruber, *Madison’s Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 377-86 (1995).

republican, instrumental defense of religious liberty, Madison understood the individual's relationship with God as an "inner forum" where the state may not enter for any reason.<sup>52</sup>

While wary of the threat that factions could pose to the young nation, he understood how the growth of religious sects in number and diversity could function as a check on their power.<sup>53</sup> The more numerous and diverse ecclesiastical sects were, the more difficult it would be for a single majority to dominate and establish itself as the official church. Religious groups were among the most important political factions in eighteenth-century America. As Madison explained in *The Federalist*, Number 52, the nourishment and growth of such factions was one of the most important defenses against tyranny.<sup>54</sup>

### 3. Summary

There are very few clear lessons that can be drawn from our early constitutional history explaining the intent or the meaning of the First Amendment, other than that the Framers were determined to protect against the establishment of an official government-supported church, either singular or multiple in form. There seems to have been a strong consensus around the general principle of government neutrality,<sup>55</sup> but whether that meant complete separation or accommodation is more ambiguous. Since it was not expected that the federal government would play a role in schooling, any conclusions about original intent in this sphere are at best implicit and speculative. Among modern American philosophers of education, such as the influential thinker John Dewey, however, acceptance of the Jeffersonian model was widespread.<sup>56</sup> Certainly liberalism, republicanism, and pluralism all influenced the

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52. See Jonathan Mills, *Strict Separationisms' Sacred Canopy*, 39 AM. J. JURIS. 397, 425 (1994) (stating that Justice Black's theory of establishment derives from Madisonian understanding); see also MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION 32-35 (1987).

53. Madison's classic statement of the problem appears in *The Federalist* Number 10: "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." *THE FEDERALIST*, No. 10, at 77 (James Madison) (New American Library ed., 1961). See also DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 59-110 (1984); Peter S. Onuf, *James Madison's Extended Republic*, 21 TEX. TECH. L. REV. 2375 (1990) (discussing Madison's solution to problems of faction).

54. In a free government the security for civil rights must be the same as that for religious rights. It consists in one case in the multiplicity of interests, and in the other the multiplicity of sects. . . .  
*THE FEDERALIST*, No. 52, at 324 (James Madison) (New American Library ed., 1961).

55. On the neutrality principle, see Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

56. Dewey sought to replace religious values with ethical principles drawn from a "scientific" methodology that was meant to inculcate loyalty in a secular democracy. See *infra* Subsection III.C.1.b. (discussing Dewey's secularism).

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authorship of the Bill of Rights. Yet even the key proponents of those philosophical traditions were not consistent in their thinking over time.<sup>57</sup>

No one, however, integrated the various approaches better than Madison. He was at once sensitive to the disestablishmentarian precepts of the republic, as well as accommodating to religiously motivated behavior. His pluralism not only defines the basic structure of American government, it also has come to play an increasingly important role in constitutional interpretation by the federal courts in matters of church and state. Madison's thinking is particularly informative today in responding to the demands of an increasingly diverse society where different populations hold different values and expectations regarding the education of their children.

### B. *Judicial Interpretations*

#### 1. *Early Cases*

By the middle of the twentieth century, a First Amendment jurisprudence began to emerge that would, at least temporarily, provide some definition to the appropriate relationship between church and state and its bearing on education. The approach was more accommodationist than separationist.<sup>58</sup> It set down principles of parental rights and aid to students in parochial schools that are relevant to contemporary debates on school choice. The approach also introduced Fourteenth Amendment analysis as a relevant consideration in education cases.

a. *Parental Right to Choose.* *Pierce v. Society of Sisters*<sup>59</sup> occupies a special place in determining the legal rights of parents to choose an education for their children. The case originated from a state compulsory education law requiring children to attend public school. It was challenged by the Society of Sisters, who ran a parochial school, and the directors of the Hill Military Academy, a nonsectarian school. As Mark Tushnet explains, the statute in question had grown out of a nativist hostility toward Catholics and was an attempt to eliminate the parochial school system in Oregon.<sup>60</sup> A unanimous

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57. Even Jefferson, as President, authorized funds for the construction of a church and the support of a Roman Catholic priest on a mission to the Kaskaskia Indians. See Robert L. Cord, *Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation*, 10 HARV. J.L. & PUB. POL'Y 47, 50 (1987) (arguing for narrower interpretation of religion clauses as more consistent with their constitutional history).

58. A notable exception was the *Reynolds* case where the Supreme Court upheld a state law outlawing polygamy that was under challenge by the Mormons. Chief Justice Waite wrote: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 167 (1879).

59. 268 U.S. 510 (1925).

60. Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?* U. CHI. LEGAL F. 43 (1991); see also LLOYD P. JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL*, 1825-

Supreme Court held that a state cannot “standardize its children by forcing them to accept instruction from public school teachers only.”<sup>61</sup> To do so would unreasonably interfere with the rights of parents to control the upbringing of their children and deprive private school operators of their property rights under the Fourteenth Amendment. Responding to the liberty claims of parents, the Court further explained: “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>62</sup>

It is interesting that the Court focused its analysis on the Fourteenth rather than the First Amendment, emphasizing liberty and due process principles rather than free exercise rights.<sup>63</sup> How far might these claims be taken in a system of compulsory education? When states require children to attend school, they support that requirement by making a free public education available. If parents choose to exercise their rights to send their child to a parochial school, does that relieve the state from its financial obligation? In a subsequent series of cases the Court, in deference to Establishment Clause requirements, drew a clear distinction between public assistance made available to children or parents and aid provided directly to the parochial schools themselves.

b. *Child Benefit Theory*. In 1930 the Supreme Court in *Cochran v. Board of Education*<sup>64</sup> upheld a Louisiana law that set aside tax funds to supply text books to children in public, private, and parochial schools. At the time the courts had not yet determined that the First Amendment applied to the states through incorporation by the Fourteenth Amendment.<sup>65</sup> Therefore petitioners who challenged the state practice did not use First Amendment reasoning, but contended that the taxation was a taking of private property for public purposes without the due process guarantees of the Fourteenth Amendment. The Court disagreed:

The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter sectarian or non-sectarian, and that the books are to be furnished them for their use, free of

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1925, at 205-15 (explaining role of Masons and Ku Klux Klan in Oregon School Law of 1922) (1987); David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968) (describing fundamentalists' targeting of public schools for “100 percent Americanism”).

61. *Pierce*, 268 U.S. at 535.

62. *Id.*

63. Two years earlier the Supreme Court had applied the 14th Amendment to uphold the right of parents to maintain control over the education of their children. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

64. *Cochran v. Board of Educ.*, 281 U.S. 370 (1930).

65. This was not determined until ten years later in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). See *infra*, Subsection II.A.1.



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cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. . . . The school children and the state alone are the beneficiaries.<sup>66</sup>

The Court seemed to grant that education is indeed a legitimate public purpose, and one that could be fulfilled either through public, private or parochial institutions.<sup>67</sup> Moreover, children do not automatically forfeit their claims for public support toward an education by choosing to attend non-public schools.

Seventeen years later the Court reviewed a New Jersey case involving the reimbursement of transportation costs to parents of parochial school children. It was here that the Court specifically incorporated the Establishment Clause for application to the states. *Everson v. Board of Education*<sup>68</sup> is often quoted by strict separationists as the standard for setting the legitimate boundaries between church and state. In his famous opinion Justice Black assumed the role of legal historian. He traced the origin and intent of the First Amendment, citing practices deemed permissible or impermissible under its edicts, and invoked Jefferson's insurmountable wall.<sup>69</sup> In fact, however, the Court, adopting reasoning similar to *Cochran*, upheld the New Jersey busing program:

New Jersey cannot consistently with the 'establishment of religion' clause contribute tax-raised funds to the support of an institution which teaches the tenets of faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.<sup>70</sup>

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66. *Cochran*, 281 U.S. at 374-75.

67. In 1899 the Court upheld the constitutionality of a congressional appropriation in the District of Columbia for the construction of a Catholic hospital. The Court's unanimous opinion focused on the secular nature of the hospital's mission. *See Bradfield v. Roberts*, 175 U.S. 291 (1899).

68. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

69. The "establishment of religion" clause of the First Amendment means at least this: Neither a state or the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal government can, openly or secretly participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." *Id.* at 15-16.

70. *Id.* at 16. It should be noted that Justices Rutledge, Frankfurter, Jackson, and Burton registered strong dissents in the case, each finding the transportation aid to be impermissible under the First Amendment.

The *Everson* decision elevated the constitutional protection covering benefits appropriated to parochial school children to a new height, incorporating it under the shelter of the First Amendment and balancing the requirements of the Establishment and Free Exercise Clauses in favor of the latter. If, as Jefferson urged, the First Amendment would proscribe privileges on the basis of religious affiliation, so would it assure that one's entitlements not be abridged because of that same affiliation. To deny parochial school children the opportunity to participate in a busing program would be a form of religious discrimination.

c. *Boundaries of Accommodation.* While the *Everson* decision introduced child benefit theory to constitutional analysis through the Free Exercise Clause, it also set in motion a search to define the permissible interaction between religion and public education under the Establishment Clause. In 1948 the Court invalidated a released time program in Champaign, Illinois that allowed public school children to take up to forty-five minutes of religious instruction each week on the school premises.<sup>71</sup> The religious instructors were not employees of the school district, but because they were working on school property, were subject to the supervision of the superintendent. Even though the program was voluntary and paid for with private funds, an eight-person majority agreed that it was unconstitutional. The decision was grounded on the fact that religious instruction was being offered in a tax-supported public building.<sup>72</sup>

Four years later the Court in *Zorach v. Clauson*<sup>73</sup> affirmed the constitutionality of a similar program in the state of New York. The key difference between the two programs was that, in the latter, religious instruction was not given on the premises of the public school. A majority of the Court focused on that distinction to explain the ruling.<sup>74</sup> Of particular note in the majority opinion was the strongly articulated accommodationist language, reminiscent of the republican tradition, reminding us that "[W]e are a religious people whose institutions presuppose a Supreme Being."<sup>75</sup> Thus, we are told: "[W]hen the state encourages religious instruction or cooperates with religious

71. Illinois *ex rel.* *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

72. After restating the principles he had enunciated in the *Everson* case, Justice Black, writing for the Court, found:

Here not only are the State's tax-supported school buildings used for the dissemination of religious doctrine. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the State's compulsory public school machinery. This is not separation of Church and State.

*Id.* at 212.

73. 343 U.S. 306 (1952).

74. "The 'released time' program involves neither religious instruction nor the expenditure of public funds. . . . The case is therefore unlike *McCullum v. Board of Educ.*" *Id.* at 308-09. Justices Black, Frankfurter, and Jackson filed separate dissents. . .

75. *Id.* at 313.

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authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.”<sup>76</sup>

By mid-century the Court appeared to be moving toward a consistent approach to First Amendment jurisprudence: striking a balance between disestablishment and free exercise, validating the child benefit principle, emphasizing the distinction between direct and indirect aid, and expressing sympathy and support for religiously inspired activity, but refusing to sanction religious teaching within the environs of the public school. This emerging consensus would inform the thinking of the newly constituted Warren Court, but consistent reasoning on the High Court would be short-lived when it came to religion.

### 2. *The Modern Court*

a. *Momentary Continuity*. Through the stewardship of Chief Justice Earl Warren, the Court maintained a sympathetic viewpoint toward religious tradition and went to great lengths to assure that governmental power—particularly its own—would not be used to burden the free exercise rights of individuals. In 1961 it handed down four decisions upholding Sunday closing laws.<sup>77</sup> While recognizing that the original purpose of these statutes was to encourage church attendance, the Chief Justice found the contemporary objective to be more secular—“to set aside a day of rest and recreation.”<sup>78</sup> In response to the point made by the appellants in one case that not all religious groups observe a Sunday Sabbath, the Chief Justice responded that designating a particular day of the week for rest was necessary to achieve the secular purpose of these laws.<sup>79</sup>

In the area of education, the Warren Court continued to abide by the child benefit theory on state aid to parochial school parents but vigilantly kept religious activity out of the public schools. The Court invalidated the daily

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76. *Id.* at 313-14.

77. See *Gallagher v. Crown Koshier Mkt.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

78. *McGowan*, 366 U.S. at 448-49. Two years later the Court responded to minority religious concerns when it upheld the right of a Seventh Day Adventist in South Carolina who had been denied unemployment compensation because her religion required her to observe the Sabbath on Saturday. See *Sherbert v. Verner*, 374 U.S. 398 (1963). In defending the rights of non-Christian secularists to act out of conscience, the Court also struck down a Maryland law requiring office holders to declare a belief in God, see *Torcaso v. Watkins*, 367 U.S. 488 (1961), and recognized the rights of non-religious conscientious objectors to avoid conscription in the military. See *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). In 1972 it ruled that Amish parents who objected for religious reasons did not have to abide by compulsory education laws requiring them to send their children to school beyond the eighth grade. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

79. *McGowan*, 366 U.S. at 449-50.

recitation of a "Regents Prayer" in New York,<sup>80</sup> and the requirement of bible reading and the recitation of the Lord's Prayer in Pennsylvania<sup>81</sup>—both on the grounds that these practices violated the Establishment Clause. In the later *Schempp* case the Court set down the "purpose and effect" criteria for determining neutrality.<sup>82</sup> Petitioners later would utilize the "*Schempp* test" in challenging a textbook loan program in New York State that was made available to all school children (public, private, or parochial). Citing *Cochran* and *Everson*, the Court in *Board of Education v. Allen*<sup>83</sup> upheld the "child benefit" in question, and found that the challengers had failed to demonstrate that the "process of secular and religious training in religious schools are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."<sup>84</sup>

b. *Contrived Separation*. In ruling against the petitioners in *Allen*, the Court seemed to purport a rather dubious standard for review of state aid to parochial students. On one hand, it confirmed the rights of parents to choose a religious education for their children without penalty; on the other hand, it registered a concern for the integration of religious and secular themes at parochial schools, suggesting that if such entanglement could be demonstrated, the Court would deny assistance to the children and their parents. This reasoning sidestepped the argument that incorporation of religious values, even into secular subjects, is the essence of parochial school education. Can religious and secular viewpoints be separated in such schools? Should government impose such a requirement in order for children to receive the same "benefits" as their public school counterparts?

The concern for excessive entanglement between church and state seemed to take an expedient respite during the early days of the Burger Court in a landmark case that clarified the financial relationship between the governmental and ecclesiastic estates. In 1970, the Court in *Walz v. Tax Commission*<sup>85</sup> upheld tax exemptions for religious institutions. Writing for the majority, Chief Justice Burger rejected the idea of complete separation in favor of a more "benevolent neutrality."<sup>86</sup> In applying this standard the Court wanted to assure that religious organizations would be allowed the same privileges as other political, social, and charitable nonprofit institutions. Thus, in a concurring

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80. See *Engel v. Vitale*, 370 U.S. 421 (1962).

81. See *Abington Sch. Dist. v. Schempp* and *Murray v. Curlett*, 374 U.S. 203 (1963) (joined).

82. "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

83. 392 U.S. 236 (1968). Justice Black, who had voted with the majority in *Everson*, dissented in this case.

84. *Id.* at 248.

85. 397 U.S. 664 (1970).

86. "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.* at 669.

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opinion, Justice Harlan prescribed “an equal protection mode of analysis.”<sup>87</sup> Justice Brennan, concurring, took the traditional pluralist position in supporting the exemption, stating that “government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.”<sup>88</sup>

A year later the Court again leaned over the wall of separation in order to accommodate religion,<sup>89</sup> but also announced standards for review that would ultimately be used to undermine the religious pluralism it had recently praised. The three-part “*Lemon* test” forbids any government action that: (1) has no secular purpose; (2) has a “primary effect” of advancing religion; and (3) fosters “excessive entanglement” between church and state.<sup>90</sup> Ironically, in setting the standards the Court referred liberally to the language of *Walz*, which advised against “sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>91</sup> Taken together, the two cases represent a bold exercise in judicial contrivance. If forgiving an organization of its tax burdens does not constitute sponsorship, or at least support, then what does? Certainly the primary effect of the revenue exemption was to advance religion, albeit in a pluralist and non-preferential way. Furthermore, processing a salary supplement for teachers in parochial schools would not necessarily impose greater administrative burden on the state than would applying the tax laws to religious organizations in such a distinct manner.<sup>92</sup>

The confusion of mixed messages that emerged from the bench permitted the Justices to act with only a hint of philosophical consistency to guide their First Amendment decisions. In 1973, the famed *Nyquist*<sup>93</sup> case invalidated a complicated New York law that provided maintenance and repair grants to private schools, offered tuition allotments to the poor, and extended tax relief to other parents who sent their children to private or parochial schools. Given the case history, it was not surprising that the Court in *Nyquist* rejected direct aid to private schools. More unexpected, however, was its response to the latter provisions. Justice Powell wrote:

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87. *Id.* at 696.

88. *Id.* at 689.

89. Again writing for the Court, Chief Justice Burger explained: “Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

90. *See id.* at 614-15. The Court held that giving direct salary supplements to teachers of secular subjects in private schools was unconstitutional because it would require close oversight by the state and would therefore lead to excessive entanglement. *See id.* at 622; *see also* *Dicenso v. Robinson*, 91 U.S. 2111 (1971) (companion case).

91. *Id.* at 614-15 (*citing Walz*, 397 U.S. at 674-76).

92. In *Sanders v. Johnson*, 403 U.S. 955 (1971), decided two days after the *Lemon* case, the Supreme Court sustained a lower court decision invalidating a Connecticut statute that would have paid a portion of the salaries of private school teachers who taught secular subjects.

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

Special tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.<sup>94</sup>

Indeed, a problem in this case was that financial aid was made available only to private school parents. Nevertheless, by focusing on the second prong of the *Lemon* test—primary effect—the Court seemed to be abandoning the child benefit principle that it had endorsed in *Cochran* and *Everson*. Concentrating on primary effect ignores the reasoning developed in these two cases, which focused on whether a public good—education—was made neutrally available to all children. *Lemon* negated the significance of the distinction between direct and indirect aid, and replaced it with a superficial understanding of the nature of the parochial school.<sup>95</sup>

The *Nyquist* opinion anchored a number of decisions emerging from the Burger Court during the 1973 term that prevented both direct and indirect aid to parochial schools. In *Levitt v. Committee for Public Education and Religious Liberty*<sup>96</sup> the Court found unconstitutional the reimbursement of expenses for services required by the state. It ruled that reimbursement for such mandated functions as the administration, grading, and reporting of standardized tests was “impermissible aid to religion” because “the aid that will be devoted to secular functions is not identifiable and separate from secular activities.”<sup>97</sup> In *Sloan v. Lemon*, the Court ruled that Pennsylvania’s partial tuition reimbursement for non-public school parents had an “impermissible effect of advancing religion”<sup>98</sup> because it furnished “an incentive for parents to send their children to sectarian schools.”<sup>99</sup> Here Justice Powell, writing for the majority, ventured to conclude that the “intended consequence is to preserve and support religion-oriented institutions.”<sup>100</sup>

In just one year the Court had moved a great distance from the accommodationist principles it had espoused for more than a quarter century.<sup>101</sup> Surely, acknowledging the difficulty of segregating the religious and secular messages inherent in a parochial school education was a more reasonable and honest

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94. *Id.* at 793.

95. A year earlier the Court had denied without opinion an application to stay a district court ruling that a parental reimbursement plan in Ohio fostered excessive entanglement between government and religion. See *Essex v. Wolman*, 406 U.S. 912 (1972).

96. *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

97. *Id.* at 480.

98. *Sloan v. Lemon*, 413 U.S. 825, 830 (1973).

99. *Id.* at 832.

100. *Id.*

101. See also *Marburger v. Public Funds for Pub. Sch.*, 413 U.S. 916 (1973) (relying on *Nyquist* to grant stay on injunction); *Grit v. Wolman*, 413 U.S. 901 (1973) (relying on *Nyquist* to affirm appeal); *Cathedral Academy v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973) (companion case to *Levitt*).

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approach to the question than the confusing language of *Allen*. But the lesson communicated in the new jurisprudence was equally disturbing: If families chose to educate their children in a setting consistent with their own religious values, they would have to be prepared to forego certain financial supports made available by the state on a general basis. The wall of separation had been raised to a new height.<sup>102</sup>

c. *Ambivalent Neutrality*. The Court validated the allocation of public funds for textbooks made available to parochial students, at the same time as it took a strong stance against support for auxiliary services within the private schools.<sup>103</sup> The fine line distinctions drawn by the Burger Court in these cases defied reason. Textbook loans were deemed to be a financial benefit “to parents and children, not to the schools”;<sup>104</sup> but loaning instructional materials and equipment “has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act.”<sup>105</sup> Although it was still permissible to provide bus transportation to parochial schools, the Court found that states were under no constitutional obligation to provide the same service to public and parochial school students.<sup>106</sup> And for some reason, a bus ride to a park or museum was declared to be in violation of the Constitution when a ride to school was not. Tax relief initiatives, of course, were also viewed with disfavor—at least temporarily.<sup>107</sup>

The high wall of separation began to fall in 1980, when the Court, in a 5-4 decision, upheld a New York law that allocated funds to private and parochial schools for the administration of state examinations and the collection of school enrollment and attendance data.<sup>108</sup> In 1973 the Court in *Levitt*<sup>109</sup> had sus-

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102. The Court seemed to vary from its strict separationist approach in one 1973 case. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court upheld a South Carolina statute which involved a state authority in financing bonds for a Baptist College. Here the Court reasoned—rather remarkably for this year—that the arrangement did not violate the dictates of the *Lemon* test. However, it is worthy to note that the Court has sometimes set a different standard for separation in higher education than at the elementary and secondary level. This distinction was made particularly clear in 1971 when it upheld a federal program of grants and loans made available to sectarian colleges. Here, in drawing the distinction the Court reasoned that college students are less impressionable than younger children. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

103. In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court approved part of a Pennsylvania statute that loaned textbooks to sectarian schools, but struck down a portion of the same law that would make specialized teachers and therapists available. In *Wolman v. Walters*, 433 U.S. 229 (1977), the Court validated funding for textbook loans, standardized tests, diagnostic services, and therapeutic services, but struck down the sections of the same Ohio law providing for instructional materials and field trips. See also *Marburger v. Public Funds for Pub. Sch.*, 417 U.S. 961 (1964) (striking down parental reimbursement plan and purchase of auxiliary services).

104. *Meek*, 421 U.S. at 360 (quoting *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968)).

105. *Id.* at 363.

106. See *Leutkemeyer v. Kaufman*, 419 U.S. 888 (1974).

107. See *Franchise Tax Bd. v. United Americans for Pub. Sch.*, 419 U.S. 890 (1974); *Byrne v. Public Funds for Pub. Sch.*, 442 U.S. 907 (1979) (mem.).

108. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

109. *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

tained a determination that a similar New York statute was unconstitutional, pointing to the difficulty in separating secular and religious functions. Now such activity would be found to be primarily secular.<sup>110</sup> The decision appeared to be a victory for accommodationists, except that it was attenuated on the faulty reasoning originally articulated in *Allen*.<sup>111</sup> It inferred that it was possible to isolate secular activities from the religious environment that permeates a sectarian school, or indeed that it was necessary to do so in order to pass constitutional muster.

In 1983, the Court upheld a Minnesota law that granted a tax deduction to parents for expenses incurred for tuition, textbooks, or transportation, whether their children attended public, private, or parochial schools. *Mueller v. Allen*<sup>112</sup> would prove to be a landmark decision for several reasons. Not only did it validate tax relief for parochial school parents, but in drawing a distinction between direct aid and indirect aid, it reinforced the notion of parental choice. As Justice Rehnquist wrote for the 5-4 majority, where, as here, "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval'. . . can be deemed to have been conferred on any particular religion, or on religion generally."<sup>113</sup> Recognizing that most parents who had taken advantage of the Minnesota law had children in Catholic schools, Rehnquist suggested a relaxation of the "primary effect" prong of the *Lemon* test. While admitting that judicial inquiries in this area have been "guided . . . by the three-part test," he declared that it is no more than "a helpful signpost in dealing with Establishment Clause challenges."<sup>114</sup>

In revitalizing the child benefit theory, the Court continued to draw an opaque boundary of separation that would prompt scrutiny of state aid directly

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110. 444 U.S. at 657.

111. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

112. *Mueller v. Allen*, 463 U.S. 387 (1983). During the same term the Court upheld Nebraska's practice of paying a chaplain to open its legislative sessions with a prayer, describing the practice as "a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Remarkably, the Court did not find it problematic that the legislature had chosen to use the same Presbyterian minister for sixteen consecutive years.

113. *Mueller*, 463 U.S. at 399.

114. *Id.* at 393 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)). A year later Chief Justice Burger declared that neither the *Lemon* test nor any other "fixed per se rule" was appropriate in reviewing First Amendment cases. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). In the same case, Justice Sandra Day O'Connor proposed an alternative "endorsement test" asserting that government violates the Establishment Clause when it endorses or disapproves of religion. She further explained: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.*

In 1992 Justice Kennedy introduced a less rigorous coercion standard that granted government greater latitude in accommodating religion and restricted activity that either coerced someone to participate in or to support a religion, or that granted direct benefits to a religion. *See Lee v. Weisman*, 505 U.S. 577 (1992).



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allocated to nonpublic schools. Even though *Regan*<sup>115</sup> previously sustained the reimbursement of expenses for state-required programs, the Court refused to allow a general appropriation to parochial schools for programs described as secular.<sup>116</sup> In 1985 the Court also invalidated New York's practice of providing federally supported instructional services to poor children on the premises of parochial institutions.<sup>117</sup> The Court seemed gradually to be inching its way toward a clearer set of standards for interpreting the First Amendment and its relevance to education.

### 3. *An Emerging Pluralism*

Perhaps Justice Rehnquist sent his strongest message disapproving the *Lemon* standard and its inherent separatism—as enshrined by the Court in *Everson*—when he dissented in *Jaffree*. Playing the part of constitutional historian, the future Chief Justice claimed, “[t]here is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson*.”<sup>118</sup> Furthermore, he explained, the *Lemon* test merely repeats the historical error, promoting a body of case law that “has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results. . . .”<sup>119</sup> The Rehnquist Court would eventually adopt a less ambivalent approach to religious accommodation, extending the principles articulated in *Mueller* to define the permissible financial relationship between government and nonpublic schools.

a. *Financial Aid*. In 1986 a unanimous Supreme Court held in *Witters v. Washington Department of Social Services*<sup>120</sup> that the First Amendment was not offended when a blind student used a public scholarship to attend a bible college. The reasoning in *Witters* focused on the fact that, unlike the situations in *Nyquist* and *Sloan*, the financial aid in question here was made available to all students, not just those in sectarian schools. Justice Marshall, writing for the majority, indicated that while some of this aid would find its way to religious schools, the benefit is “only a result of the genuinely independent and private choices of aid recipients.”<sup>121</sup> In a concurring opinion, Justice Powell

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115. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

116. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). The Court had actually upheld a government subsidy for private colleges as long as the funds were not used for religious purposes. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). The Court also maintained a strict disapproval of any activity within public schools that could be considered religious in nature. *See Stone v. Graham* 449 U.S. 39 (1980) (invalidating Kentucky statute requiring that Ten Commandments be posted on walls of public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down Alabama's moment of silence, meditation, and prayer).

117. *See Aguilar v. Felton*, 473 U.S. 402 (1985). This decision is currently being challenged. *See infra* note 301.

118. 472 U.S. at 106.

119. *Id.* at 112.

120. *Witters v. Washington Dep't. of Soc. Servs.*, 474 U.S. 481 (1986).

121. *Id.* at 487.

outlined three factors that set a new standard for reviewing cases of state aid to religious schools and their students: (1) The program is neutral on its face regarding religion; (2) Funds are equally available to public and private schools; and (3) Any aid to sectarian institutions is the result of private choices by individuals.<sup>122</sup>

In 1993 the Court in *Zobrest v. Catalina Foothills School District*<sup>123</sup> reversed a Ninth Circuit decision to uphold the right of a Catholic high school student to receive the service of a sign language interpreter under the provisions of the Individuals with Disabilities Act. Petitioners would have denied this handicapped student the same services that were available to public school children because his parents had chosen to send him to a school with a religious affiliation. Citing *Mueller* and *Witters*, Chief Justice Rehnquist and a majority of the Court disagreed: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed towards religion,' . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause."<sup>124</sup>

To the extent that it has seized upon the idea of individual choice, the Rehnquist Court has constructed a more compelling rationale for accommodation than it does in purporting a false dichotomy between the secular and religious aspects of parochial schooling. The hallmark of the Rehnquist Court, however, has been to advance religious tolerance based on the precept that the Establishment Clause not be misapplied to encumber or disadvantage individuals or groups because of their religious orientation. This Court strives to assure that religious affiliation will not serve to deny entitlements to some that are made available to all as a matter of general public policy. This approach is evident beyond the field of education,<sup>125</sup> manifesting itself most apparently in a jurisprudence that has emerged in conjunction with those First Amendment freedoms that do not exclusively apply to religion.

b. *Speech, Assembly, and Access.* In 1991 the Supreme Court upheld the constitutionality of The Equal Access Act<sup>126</sup> when it ruled that public schools must permit student religious clubs to meet on campus under the same terms

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122. *Id.* at 490-92.

123. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

124. *Id.* at 2467.

125. In 1988, for example, the Court ruled that federal funds appropriated under the Adolescent Family Life Act could be granted to Catholic organizations that discouraged adolescent sexual activity and abortion. *See Bowen v. Kendrick*, 487 U.S. 589 (1988). *See also* LEVY, *supra* note 13, at 217-20.

126. The Equal Access Act, 20 U.S.C. § 4071 (a)(1994), prohibits any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

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as other non-curricular organizations.<sup>127</sup> To do otherwise, the Court reasoned, would violate freedom of association and free exercise rights as well as the Fourteenth Amendment, and “demonstrate not neutrality but hostility toward religion.”<sup>128</sup> Three years later in *Lamb’s Chapel v. Center Moriches School District*,<sup>129</sup> the Court determined that it violates free speech when a public school denies the use of its facilities to a church wishing to show a film with a religious viewpoint.

The funding and free speech issues were merged most intimately in *Rosenberger v. Rectors of the University of Virginia*.<sup>130</sup> In this recent case a public university refused to allow student activities fees to be used by a student organization for the publication of a newspaper with a Christian message because it “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”<sup>131</sup> Citing both *Lamb’s Chapel* and *Widmar*, the Supreme Court in a 5-4 decision found that the plaintiffs had been the victims of viewpoint discrimination in violation of free speech protected by the First Amendment.<sup>132</sup>

Justice Kennedy, writing for the majority, distinguished “between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>133</sup> Because the newspaper in question was produced by a private student organization, it was covered by the latter. Since the funding sought by the group was made available to a wide variety of student organizations, including religious organizations, the program was deemed to be religiously neutral.<sup>134</sup> In fact, the Court ruled, to scrutinize and disqualify documents on the basis of religious content not only jeopardizes

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127. See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). As early as 1981, the Supreme Court ruled that it was unconstitutional for a university to ban religious assemblies at a public university. Rejecting the separationist claims made by the university to justify the exclusion, the Court ruled that providing equal access “‘would no more commit the University . . . to religious goals’, than it is ‘now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,’ or any other group eligible to use its facilities.” *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

128. *Mergens*, 496 U.S. at 248.

129. *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

130. *Rosenberger v. Rectors of the Univ. of Va.*, 115 S. Ct. 2510 (1995).

131. *Id.* at 2515.

132. Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the state the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the state to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression.

*Id.* at 2520.

133. *Id.* at 2522.

134. “We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse . . . . The government program here is neutral toward religion.” *Id.* at 2521-22.

neutrality, but is "a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion."<sup>135</sup>

In a concurring opinion Justice Thomas launched an extended critique of "Establishment Clause jurisprudence," which he described as being "in hopeless disarray."<sup>136</sup> He pointed to the great irony inherent in the *Walz* decision, which allows tax exemptions for religious institutions while the Court agonizes over the prospect of direct aid to such organizations.<sup>137</sup> The underlying message of Thomas's opinion, echoing that of the majority, struck a note that would serve to amplify the distinction between the Rehnquist Court's interpretation of the Establishment Clause and that of the Burger Court: "The Clause does not compel the exclusion of religious groups from government benefit programs that are generally available to a broad class of participants."<sup>138</sup>

These speech, assembly, and access cases reflect the Court's growing concern for equality of treatment for religious persons and organizations, which complements the school cases described earlier. Just as religious parents can not be burdened because of their faith in educating their children in schools of their choice, so, too, religious citizens generally cannot be denied access to resources otherwise available to all.

*c. Implications for Choice.* Michael McConnell has criticized both the Warren and Burger Courts for embracing the idea of a secular state, exhibiting a hostility to, or at least an indifference toward, people of faith and the churches to which they belong.<sup>139</sup> The resulting jurisprudence promoted a freedom from religion rather than a freedom of religion.<sup>140</sup> A review of the case law indicates that the observation carries more validity with regard to the Burger Court than its predecessor.<sup>141</sup> In fact one of the remarkable features of the new pluralism evolving from the loosely aligned Rehnquist majority<sup>142</sup> is a return to certain constitutional precedents that governed the Supreme Court during the stewardship of Chief Justice Earl Warren. Not only has the

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135. *Id.* at 2525.

136. *Id.* at 2532.

137. A tax exemption in many cases is economically and functionally indistinguishable from a direct monetary subsidy. In one instance, the government relieves religious entities (along with others) of a generally applicable tax; in the other, it relieves religious entities (along with others) of some or all of the burden of that tax by returning it in the form of a cash subsidy. Whether the benefit is provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable.

*Id.* at 2531-32.

138. *Id.* at 2532.

139. See McConnell, *Religious Freedom*, *supra* note 5, at 115-17, 168-69.

140. See *id.* at 127-34 (arguing that Supreme Court has frustrated general purpose of religion clauses to further religious liberty).

141. See JOSEPH E. BRYSON & SAMUEL H. HOUSTON JR., *THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS, 1969-1986*, at 51-130 (1990).

142. In addition to Chief Justice Rehnquist, this majority appears to include Justices Kennedy, O'Connor, Scalia, and Thomas.

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presumption of strict separation begun to subside, but religious organizations are viewed more positively as institutions that are valued for their contribution to the civic culture.<sup>143</sup>

The Rehnquist Court has not always demonstrated a consistent First Amendment philosophy. For example in 1990, it held that religious believers are not entitled to exemptions from generally applicable governmental requirements.<sup>144</sup> This decision not only contradicts a well-established constitutional tradition<sup>145</sup> but also weakens the momentum of a Court that has aggressively sought to protect the free exercise of religion.<sup>146</sup> While Rehnquist's earlier opinions revealed a nonpreferentialist philosophy that might have opened the door for direct aid to religious institutions,<sup>147</sup> the Court has not indicated strong movement in that direction thus far. To the contrary, it has interpreted the Establishment Clause in a way that generally inhibits the direct flow of public funds to parochial schools.<sup>148</sup> Indirect aid, however, is another matter. Not only has the Court given its approval of such assistance, it has actually developed a set of guidelines that can be used by policymakers at the

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143. This more accommodating approach to religion is also evident in the other branches of government, reflecting a changing political mood in the nation. In 1993 Congress passed and President Clinton signed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (1994), which prohibits the government from substantially burdening a person's exercise of religion unless it can be demonstrated that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (1994). This statute has received a mixed response in the lower courts. For example, in *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D.Tex. 1995), a district court judge ruled that RFRA is a legislative attempt to usurp judicial power and overturn the standards set in the *Smith* decision. In *Belgard v. Hawaii*, 883 F. Supp. 510 (D.Haw. 1995), a judge ruled that the RFRA is constitutional pursuant to Congress's enforcement power under § 5 of the 14th Amendment. The potential impact of RFRA is difficult to assess until the Supreme Court rules on it. So long as it exists, however, it will be easier to initiate litigation against state action that specifically excludes religious institutions from participating in publicly supported choice programs.

144. See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that generally applicable law not directed at particular religious groups is binding even where law conflicts with tenets of faith). For commentary on this important and controversial case, see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

145. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Gillette v. United States*, 401 U.S. 437 (1971); *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 333 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

146. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), the Court limited the reach of *Smith* and upheld the right of Santerians to perform animal sacrifices in their religious ceremonies, ruling that laws lacking general applicability must be justified by demonstrating that they satisfy a compelling governmental interest.

147. This was evident in *Jaffree*, where he proposed that the Establishment Clause "did [not] prohibit the Federal Government from providing nondiscriminatory aid to religion." 472 U.S. 38 at 106. See, LEVY, *supra* note 13, at 113-14; McConnell, *Religious Freedom*, *supra* note 5, at 145-47.

148. In 1994 the Court ruled that the creation of a school district with boundaries that were coterminous with the boundaries of a religious community was unconstitutional because it had the effect of endorsing and promoting particular religious beliefs. *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). The Court also refused to permit a public school to have prayers delivered by a clergyman as part of a commencement ceremony. *Lee v. Weisman*, 505 U.S. 577 (1992).

federal, state, and local levels.<sup>149</sup> This approach can be summarized in terms of three basic points: (1) that aid is given to an individual parent or child, rather than to an institution; (2) that any benefit accrued by an institution is the result of individual choices made by the parent or student; and (3) that aid is appropriated on a religiously neutral basis to those who attend public schools as well as those who attend private and parochial schools.

In order to understand the philosophy that undergirds these standards, we must focus upon the rights guaranteed the individual, rather than the threat that institutions can pose to these rights. These principles flow from the Court's interpretation of the Free Exercise Clause and an understanding that the actual individual rights spun from it should have greater weight than the potential threat of Establishment Clause violations. Like the remainder of the Bill of Rights, this jurisprudence is concerned with the primacy of the individual, *i.e.*, the ability of individuals to practice their faith as they choose without any encumbrances—direct or indirect—from the state. It is a subtle but profound difference in emphasis. For the Court to reverse this priority is like the hen who protects the nest but loses the egg. Absent a compelling state interest, there is no constitutional reason, even under the Establishment Clause, to limit religiously motivated action. Taking a similar position on the proper balance between the two constitutional prescriptions, Professor Laurence Tribe has observed:

Whenever both religion clauses are potentially relevant . . . the dominance of the free exercise clause follows from the principles underlying both clauses . . . . In the context of these general values, we must consider whether a nation committed to religious pluralism must, in the age of the affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience . . . it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers.<sup>150</sup>

## II. THE CONSTITUTION AND THE STATES

### A. *Defining the Relationship*

Perhaps the greatest anxiety haunting those who attended the Constitutional Convention involved the question of federalism. Indeed, the very idea of the Convention was provocative, with representatives of "sovereign states"

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149. *But see* Steven K. Green, *The Legal Argument Against Private School Choice*, 62 UNIV. CIN. L. REV. 37 (1993) (arguing that current jurisprudence would still invalidate most choice programs).

150. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1204 (2d ed. 1988); *see also* Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Jurisprudence*, 61 NOTRE DAME L. REV. 311 (1986) (arguing that religion clauses should be read to foster equal protection of common goal of religious liberty).

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assembling to decide upon a new "Law of the Land."<sup>151</sup> Anti-federalists feared that the new arrangement would lead to the demise of the states.<sup>152</sup> Particularly troubling was the structure of the judicial branch, which would be both powerful and independent.<sup>153</sup> When the final bargain was struck, it appeared that those favoring a strong central government had prevailed. But the power of the national government would be tempered by bedrock principles such as popular sovereignty and reserved powers, and eventually by the drafting of a Bill of Rights.<sup>154</sup> Philip Kurland describes federalism as "the most original contribution to constitutionalism made by the Founders in Philadelphia."<sup>155</sup> But Kurland is not convinced that the original balance established between the central and state governments was very secure.<sup>156</sup>

### 1. *Incorporation and the Fourteenth Amendment*<sup>157</sup>

On several occasions prior to the passage of the Civil War amendments, the Court had indicated that the Bill of Rights had no bearing on state govern-

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151. The Supremacy Clause of the Constitution reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., art. VI, § 2.

152. For extended commentary on the antifederalist position, see STEVEN BOYD, *THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND THE CONSTITUTION* (1979); JACKSON T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788* (1961); HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981).

153. See Gary L. McDowell, *Federalism and Civic Virtue: The Antifederalists and the Constitution*, in *HOW FEDERAL IS THE CONSTITUTION?* 122 (Robert A. Goldwin & William A. Schambra eds., 1987).

154. See WOOD, *supra* note 44, at 519-64, 593-618.

155. Philip B. Kurland, *Federalism and the Federal Courts*, 2 *BENCHMARK* 17, 17 (1986).

156. For a short but comprehensive discussion of contemporary arguments for and against the American federalist system, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

157. There remains some debate among scholars whether the Fourteenth Amendment was intended to incorporate the Bill of Rights for enforcement against the states. See, e.g., MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (sympathizing with incorporationist viewpoint); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 116-60 (1994) (offering balanced treatment of various perspectives). *But see* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L. J.* 1193 (1992) (offering more critical interpretations of incorporation).

Although the primary motivation behind the Amendment's passage was to protect blacks after the Civil War, there was no mention of race in its wording; therefore the door was left ajar for a broader interpretation of civil rights. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988) (providing detailed account of original thinking behind Fourteenth Amendment and its subsequent evolution through judicial interpretation). On the other hand, since the purpose behind the Bill of Rights was to limit the powers of the federal government, one might reasonably argue that to apply these curbs against the states would have been counterproductive. At stake was the very meaning of federalism for the young nation. Original intent notwithstanding, the Supreme Court has addressed the issue decisively, if not quite as expeditiously. Cf. Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 *VILL. L. REV.* 3, 11 (1979) ("[I]ncorporation of the religion clauses is a fait accompli; whether it was effected by *ipse dixit* or by reason no longer matters"). See generally William J. Brennan, *The Bill of Rights and the States*, 36 *N.Y.U. L. REV.* 761 (1961).

ments.<sup>158</sup> Even after the passage of the Fourteenth Amendment, the Court was slow to recognize its potential as a vehicle for extending individual rights to the states, choosing instead to adopt a policy of selective incorporation.<sup>159</sup> In 1937 Justice Cardozo, writing for the majority, declared that the Due Process Clause only incorporates those rights that were "implicit in the concept of ordered liberty."<sup>160</sup> The Court did not expressly hold that these rights included the free exercise of religion until 1940,<sup>161</sup> and the Establishment Clause was not incorporated until significantly later.<sup>162</sup> Nevertheless, the Court maintained a selective approach to incorporation thereafter.<sup>163</sup> Although the Court, in principle, has maintained a selective approach to incorporation, in practice it has managed to cast the net of federal protection over all but a few provisions of the Bill of Rights against infringement by the states.<sup>164</sup>

## 2. *The Blaine Amendment*

In December 1875, Congressman James Blaine of Maine proposed a Constitutional amendment that would prohibit the states from allocating funds to support parochial schools.<sup>165</sup> The proposal received strong backing in both

158. In 1833 Chief Justice Marshall wrote that the Federal Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of individual states." *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 243 (1833). In 1845, the Court specifically addressed the First Amendment issue: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws." *Permoli v. City of New Orleans*, 44 U.S. 589, 609 (3 How.) (1845).

159. See *Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1872); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Gitlow v. New York*, 268 U.S. 652 (1925). The turning point in the case law came in 1905, when the Supreme Court used the 14th Amendment to overturn a labor statute in *New York. Lochner v. New York*, 198 U.S. 45 (1905). See NELSON, *supra* note 157, at 197-200.

160. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). These would encompass "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" and are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (citation omitted).

161. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

162. See *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

163. See *Adamson v. California*, 332 U.S. 46 (1947). It was in this case that Justice Black offered his famous dissent on incorporation under the 14th Amendment:

One of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the Framers and the backers of the Fourteenth Amendment proclaimed its purpose to be to overrun the constitutional rule that case had announced.

*Id.* at 71-72 (Black, J., dissenting) (citations omitted). For an opposing view from the Court, see Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

164. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 396-421 (12th ed., 1991).

165. No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so



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Houses of Congress but fell four votes short of the required two-thirds majority in the Senate to succeed.<sup>166</sup> Legal historians often point to the episode as further evidence that the Fourteenth Amendment had not extended the Establishment Clause to the states, for if it had, the Blaine Amendment would not have received such serious consideration.<sup>167</sup> In an open letter to the *New York Times*, Blaine described his effort as an attempt to correct a “constitutional defect;” since the First Amendment was designed only to prevent Congress from establishing a religion, “states were left free to do as they pleased.”<sup>168</sup> One might also argue, however, that as the proposed amendment failed to generate enough support to pass, there was strong sentiment throughout the country to let the states decide such issues for themselves without intrusion from the federal government.<sup>169</sup>

What Diane Ravitch, in her seminal history of New York City’s education system, has described as the first of the “Great School Wars” was already in full swing in several American cities where immigration had swelled the ranks of the Catholic population.<sup>170</sup> Church leaders in Philadelphia, Boston, Baltimore, and New York City resisted the blatant Protestantism that had dominated the public school curriculum in the form of prayers, hymns, and bible reading (the King James version, of course)<sup>171</sup> and eventually began to set up their own schools. As Catholic political power accumulated in cities, so did appeals

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devoted be divided between religious sects or denominations.

JORGENSEN, *supra* note 60, at 138-39 (quoting Blaine Amendment).

166. The vote was 180-7 in the House of Representatives and 28-16 (27 Members not voting) in the Senate. See Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 942, 944 (1951).

167. For a historical analysis of the issue, see Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992).

168. F. William O’Brien, *The States and “No Establishment”*: Proposed Amendments to the Constitution Since 1789, 4 WASHBURN L.J. 186 (1965).

169. Behind the constitutional question was a more volatile political issue tied to the electoral stakes of the Republican and Democratic parties and to a growing anti-Catholic sentiment that politicians sought to exploit. Blaine himself had used the proposal to launch a campaign for the Republican presidential nomination. For an analysis of the partisan political motivations behind the Blaine Amendment, see Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Public Action*, 42 CATH. HIST. REV. 15 (1955).

In a message presented to the Congress earlier in 1845, President Ulysses Grant, capitalizing on the worst nativist impulses that were infecting the nation, announced his support for a similar amendment: prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever.

Green, *supra* note 167, at 52. Neither Blaine nor Grant prevailed.

170. Ravitch traces the outbreak of the first struggle for power over the New York City schools to the 1840s. See DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973*, at 3-76 (1974) [hereinafter *THE GREAT SCHOOL WARS*].

171. Stephen Green, in his historical essay, explained the rather distinct approach to disestablishment which was common during the period: “Reading from the Protestant Bible was considered nonsectarian—despite Catholic and Jewish assertions otherwise—and not seen as a violation of either the free exercise or establishment clauses.” Green, *supra* note 167, at 69.

before state legislatures for aid to parochial schools.<sup>172</sup> At the same time voluntary associations began to crop up in order to preserve the religious aspects of the public school curriculum and to protect the common culture from the growing Catholic menace.<sup>173</sup> The Blaine Amendment was a product of that sentiment<sup>174</sup> and, even after its defeat, found its way onto the Republican national party platform and a campaign against "Rum, Romanism, and Rebellion."<sup>175</sup>

Despite its defeat in Congress, the Blaine Amendment and the antipathy it engendered toward non-Protestant religions would leave a significant legacy in the states and territories of the United States. In 1894 New York became the first state in the nation to enact a Blaine Amendment in its constitution prohibiting direct or indirect aid to parochial schools.<sup>176</sup> In 1899 Congress passed enabling legislation that would divide the Dakotas into two states and permit them, along with Montana and Washington, to draft constitutions but would require that each constitution adopt language similar to that of the Blaine Amendment.<sup>177</sup> New Mexico achieved statehood only on the condition, set by Congress, that it adopt a strong constitutional provision precluding state aid to private schools.<sup>178</sup> By 1876 fourteen states had enacted legislation prohibit-

172. See JORGENSEN, *supra* note 60, at 20-158.

173. See generally RAY A. BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938); J. HIGMAN, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955).

174. Green has noted a number of journalistic responses to the political discourse surrounding the Blaine Amendment. *The Catholic World*, for example, criticized "politicians who hope to ride into power by awakening the spirit of fanaticism and religious bigotry among us." Green, *supra* note 167 at 53, 54 (quoting *The President's Message*, CATHOLIC WORLD, Feb. 1876, at 707, 711). *The Nation*, which was sympathetic to the Blaine Amendment, admitted:

Mr. Blaine did, indeed, bring forward . . . a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.

Green, *supra* note 167, at 54 (quoting THE NATION, Mar. 16, 1876, at 173).

The *St. Louis Republican* carried an article warning, "The signs of the times indicate all an intention on the part of the managers of the Republican party to institute a general war against the Catholic Church." Green, *supra* note 167, at 44.

175. KIRK PORTER & DONALD JOHNSON, *NATIONAL PARTY PLATFORMS, 1840-1964*, at 51-52 (1966).

176. Neither the state nor any subdivision thereof shall use the property or credit or any public money . . . directly or indirectly in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denomination tenet or doctrine is taught.

N.Y. CONST. art. IX, § 3 (as passed in 1894). New York actually had a similar law on the books since 1844. 1844 N.Y. LAWS, ch. 320 § 12.

177. Act of Feb. 22, 1899, ch. 180, 25 Stat. 676 (1889). See Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-69 (1988).

178. See ROBERT LARSON, *NEW MEXICO'S QUEST FOR STATEHOOD, 1846-1912* (1968); THOMAS WILEY, *PUBLIC SCHOOL EDUCATION IN NEW MEXICO* (1965).

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ing the use of public school funds for religious schools; by 1890 twenty-nine states had adopted constitutional requirements along the same lines.<sup>179</sup>

It is one of the great ironies of American constitutional history that the Blaine Amendment, which erupted out of a spirit of religious bigotry and a politics that sought to promote Protestantism in public schools, eventually became an emblem of religious freedom in some states. The turn of the century witnessed numerous attempts by Protestant clergymen to eliminate parochial schools by enacting rigid state inspection laws and compulsory education requirements that students could fulfill only by attending public schools.<sup>180</sup> The outcome of these ugly conflicts varied, depending upon the history, culture, and traditions that shaped politics in each of the state capitols.

### 3. *Judicial Federalism*

Religious freedom in America is the product of a dynamic process of interaction between the federal government and the states, defined at various points in time by constitutional principles, legislative enactments, and judicial interpretations. The Warren Court was especially aggressive at utilizing the Equal Protection Clause to expand human rights in areas such as education, criminal procedure, and reapportionment.<sup>181</sup> When the judicial activism of the Warren Court gave way to the more restrained and conservative Burger Court,<sup>182</sup> this turnover led to a call for a "new federalism" among civil rights proponents in the states. One of the loudest sirens was sounded by a member of the Warren Court majority itself, Justice William Brennan.<sup>183</sup> His voice was accompanied by a chorus of scholars who urged the state judiciaries to seize the moment and fill the perceived void left by the once activist High Court.<sup>184</sup>

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179. See Green, *supra* note 167, at 43.

180. See JORGENSEN, *supra* note 60, at 159-86 (documenting battle over state inspection laws in Massachusetts), 187-201 (regarding Bennett law in Wisconsin), 201-04 (regarding Edwards law in Illinois), 205-15 (discussing Oregon School Law and legislative activity in Washington, Ohio, and California).

181. For a sympathetic review of the Warren Court, see ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968). For more critical assessments, see ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* (1970).

182. For an overview of the Burger Court, see *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

183. See William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) ("For a decade now, I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach") [hereinafter *The Bill of Rights and the States*].

184. See Shirley S. Abramson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985); Robert F. Williams, *In the Supreme Court's Shadow:*

Notwithstanding the good intentions of state-based reformers, there was an irony to the new judicial federalism they rallied, since it was state governments who had initially driven the Warren Court to rescue equality in the areas of education, criminal justice, and voting. Some scholars more realistically recognized the state judiciaries' institutional inertia and incapacity to take the lead on important cases, particularly those involving pivotal constitutional issues.<sup>185</sup> Others saw the response to the Burger Court as a political reaction motivated by ideology.<sup>186</sup> Still others greeted the passing of the Warren Court as an opportunity to recapture the notion of state sovereignty that was lost during its intergovernmental revolution.<sup>187</sup>

The new judicial federalism proved especially confounding on issues of church and state. Given that the Burger Court had generated considerable confusion over, if not a retreat from, the protection of religious freedom, what would it mean for the states to fill the void? Unlike other rights guaranteed by the Constitution, securing religious liberty is a matter of striking the proper balance between the Establishment and Free Exercise Clauses—a zero sum equation. What might increased state activism reap today in the context of the Rehnquist Court's First Amendment jurisprudence? Rebuilding the wall of separation being chipped away by the Court would not necessarily enhance the free exercise of religion, and might in fact hinder it, depending upon one's perspective.

A survey completed by Bryson and Houston in 1990 indicated that forty-two states provide some kind of direct or indirect financial support to schools with religious affiliations.<sup>188</sup> Among these, thirty states give assistance in the form of transportation and/or textbooks and materials.<sup>189</sup> Nine states have lunch programs,<sup>190</sup> and thirteen provide health services to students.<sup>191</sup> Another survey indicates that twenty-one state constitutions proscribe state aid, support, or maintenance for religious schools;<sup>192</sup> and three expressly ban even

*Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

185. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986).

186. See Earle M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233 (1989).

187. See Gary McDowell, *Rediscovering Federalism: State Constitutional Law and the Restoration of State Sovereignty*, 21 RUTGERS L.J. 797 (1991). For further commentary on the phenomenon of judicial federalism and its impact, see Donald E. Batterson, Comment, *A Trend Ephemeral? Eternal? Neither? A Durational Look at the New Judicial Federalism*, 42 EMORY L.J. 209 (1993); Ronald K.L. Collins, *The Once New Judicial Federalism and its Critics*, 64 WASH. L. REV. 5 (1989).

188. See BRYSON & HOUSTON, *supra* note 141, at 54.

189. According to the survey, 27 states provide transportation, 17 offer textbooks, and 6 provide other instructional materials. See *id.* at 59.

190. See *id.* at 61.

191. See *id.*

192. See Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 633 (1985) [hereinafter *Beyond the*

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indirect assistance.<sup>193</sup> How does one explain the apparent discrepancies between constitutional stipulations and actual practice in some states? The key to understanding the standards that prevail in various jurisdictions is found in constitutional interpretation by the state courts.<sup>194</sup> These determinations are not always consistent with the guidelines that have been set by the Supreme Court.

### B. *The States Speak*

While the Court has, for the most part, taken a negative view on direct public assistance to sectarian institutions, it has permitted aid to parents who choose to send their children to parochial schools so long as such aid is appropriated on a religiously neutral basis. This approach is consistent with an emerging pluralist philosophy on the Court, which not only seeks to accommodate individual religious viewpoints, but is also vigilant in assuring that practice based on such convictions is not unduly burdened by a government-imposed secularism. Not every state has abided by this general standard. Some state courts have imposed aid restrictions that are much more limiting towards religious schools and the individuals who choose them.

At one time or another courts in nearly half the states have issued pronouncements indicating that they do not consider the Court's decisions to be binding in interpreting their own constitutions.<sup>195</sup> Several have specifically rejected the "child benefit theory."<sup>196</sup> Federal rulings to the contrary, many state courts have, from time to time, invalidated public assistance to private or parochial school students in the form of transportation<sup>197</sup> or textbooks.<sup>198</sup> Since federal standards do not require such support, these decisions are not necessarily unconstitutional so long as they do not discriminate against parents or children on the basis of religious considerations. Nevertheless, as Alan Tarr has pointed out, some states have actually revised their constitutions in order

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*Establishment Clause*].

193. *See id.*

194. For an overview of the evolution of state-based jurisprudence, see CHESTER JAMES ANTIEU ET AL., *RELIGION UNDER THE STATE CONSTITUTIONS* (1965); G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989).

195. *See supra* note 192, at 634. Twelve have specifically indicated that they have stricter standards of separation in their own constitutions. *See id.* at 641.

196. *See Beyond the Establishment Clause, supra* note 192, at 636. One Nebraska court described the child benefit principle as "a contention that ignores substance for form, reality for rhetoric, and would lead to total circumvention of the principles of our Constitution and the First Amendment." *Gaffney v. State Dep't of Educ.*, 220 N.W.2d 550, 556 (Neb. 1974).

197. *See Tarr, supra* note 194, at 99.

198. *See id.* at 98-99.

to adjust to more permissive federal criteria.<sup>199</sup> In so doing, they have provided better insurance against state action that could possibly infringe upon free exercise rights protected by the First Amendment.

Although it is not possible within the context of this article to perform a complete survey of constitutional standards that have been adopted by the fifty states, a selective review can be informative in demonstrating the kind of inconsistency that persists both among the states, and between the states and the standards set by the Court. Focusing particularly on the subject of state aid to religious schools, this Article will briefly consider the case law in six jurisdictions: New York, Washington, Massachusetts, Pennsylvania, Wisconsin, and the Commonwealth of Puerto Rico. The review, although far from comprehensive, offers some insight into how our system of judicial federalism has resulted in conflicting interpretations of religious freedom that require attention and sometimes remedy by the federal government.

### 1. *New York*

New York is one state whose church-state jurisprudence has been characterized by a long-standing historical dialogue between its constitution, its legislature and its courts. This dialogue, nevertheless, has been inconclusive in determining how the issue of educational choice would actually be received if it were to become a serious policy consideration.<sup>200</sup> As early as 1844, the state legislature passed a statute prohibiting public aid to schools teaching religious doctrine,<sup>201</sup> and in 1894 this mandate was carved into the state constitution to proscribe both direct and indirect aid to such institutions.<sup>202</sup>

The impact of New York's Blaine Amendment would be felt in a number of decisions that made their way through the state courts during the next half century. In 1904 the Court of Appeals revisited the orphan asylum issue, ruling that the state constitution does not allow the state to support institutions that exist for sectarian purposes.<sup>203</sup> In 1912 an Appellate Division Court invalidat-

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199. In 1947, after New Jersey's highest court upheld bus transportation for parochial students, the state included such a provision in its new constitution; New York and Wisconsin amended their constitutions likewise after state courts (New York in 1938, Wisconsin in 1962) struck down such programs on the basis of state constitutional interpretation. *See id.* at 96-97.

200. *See generally* Note, *Textbook Loans to Parochial Schools*, 32 BROOK. L. REV. 362 (1966); Recent Decisions, *New York State Constitution Prohibits Purchase and Loan of Textbooks to Students of Sectarian Schools: Board of Education, East Greenbush v. Allen*, 31 ALB. L. REV. 152 (1967).

201. *See* Act of May 7, 1844, ch. 320, § 12, 1844 N.Y. Laws 490, 492. In 1848 the legislature passed a law that would permit orphan asylums run by the Catholic Church in Brooklyn to receive municipal government funding. The law was subsequently struck down by the Kings County Supreme Court on the grounds that the Catholic institutions were ineligible to qualify for funds created to support common schools. *See* *People v. Board of Educ.*, 13 Barb. 400 (N.Y. Sup. Ct. 1851).

202. *See supra* note 176. *See generally* SAMUEL T. MCSEVENY, *THE POLITICS OF DEPRESSION: POLITICAL BEHAVIOR IN THE NORTHEAST, 1893-1896*, at 63-86 (1972).

203. *See* *Sargent v. Board of Educ.*, 64 N.E. 722 (N.Y. 1904).

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ed the practice of providing textbooks to students who attend parochial schools.<sup>204</sup> Although recognizing that the aid was furnished to the students rather than to the schools, the court held that the policy violated the Blaine Amendment prohibition, finding that the assistance was “if not directly in aid of the parochial schools . . . certainly . . . indirect aid.”<sup>205</sup>

In 1938 the New York State Court of Appeals confronted head on the “child benefit theory” that the Supreme Court had expounded<sup>206</sup> eight years earlier, when it struck down a state statute that provided public funding for the transportation of all elementary and secondary school children, including those attending religious schools. In *Judd v. Board of Education* the Court of Appeals found the child benefit theory to be “utterly without substance,”<sup>207</sup> and went on to conclude: “Free transportation of pupils induces attendance at the schools. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls or directs it.”<sup>208</sup> The court held that the statute, insofar as it authorized the use of public funds for transportation to or from any sectarian school, was “repugnant to our fundamental law.”<sup>209</sup>

The state legislature responded to *Judd* by amending the state constitution to make an exception allowing transportation aid to all children in the state, regardless of their choice of school.<sup>210</sup> Rather than provide clarity to the legal standard in New York, the amendment to the Blaine provision would become a source of confusion. By focusing specifically on transportation aid as an exception to the “indirect aid” rule, the new charter provision appeared to be excluding all other forms of student aid. The state’s highest court, however, has read the constitution differently.

In 1967 the Court of Appeals, by a 4-3 margin, upheld a law that required local school districts to purchase textbooks and make them available on loan to all children in the state, including those attending nonpublic and parochial schools.<sup>211</sup> Here the court found that the purpose of the law in question was

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204. See *Smith v. Donahue*, 202 A.D. 656 (N.Y. App. Div. 1922).

205. See *id.* at 719.

206. See *Judd v. Board of Educ.*, 15 N.E.2d 576 (N.Y. 1938).

207. *Id.* at 582.

208. *Id.*

209. *Id.* at 217.

210. The new provision reads:

Neither the State nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, *but the legislature may provide for the transportation of children to and from any school or institution of learning.*

N.Y. CONST., art XI, § 3 (emphasis added).

211. *Board of Educ. v. Allen*, 20 N.Y.2d 109, *aff’d*, 392 U.S. 236 (1968).

to benefit school children rather than the institutions they attend. The majority went on to hold:

It is thus clear beyond cavil that the constitution does not demand that every friendly gesture between church and state shall be discountenanced. The so called 'wall of separation' may be built so high and so broad as to impair both the state and the church, as we have come to know them.<sup>212</sup>

While some strict separationists may have feared that *Allen* might broaden the aid made available to parochial school students in the state, many accommodationists did not share that reading. As the decision was being written, an animated battle was being fought at a constitutional convention to repeal the Blaine Amendment once and for all.<sup>213</sup> The repeal effort failed, and the Blaine Amendment is still part of the New York Constitution. It is unclear how the courts would respond to school-choice legislation that would provide tuition relief to parents who want to send their children to religious schools.

## 2. Washington

The Washington Constitution is a direct descendent of the Blaine Amendment. Since the federal enabling act that authorized its first constitutional convention in 1889 mandated the adoption of strict separationist provisions,<sup>214</sup> the framers of the document complied by requiring that: "All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence."<sup>215</sup> The establishment clause reads very much like the Blaine Amendment itself.<sup>216</sup> Moreover, these words set a standard for judicial decisionmaking in Washington that remains in place today.<sup>217</sup>

In 1943 a state court voided legislation that provided universal transportation for school children.<sup>218</sup> Then in 1949, two years after the Supreme Court in *Everson*<sup>219</sup> upheld a similar program in New Jersey, a Washington court

212. *Id.* at 116 (quoting *Zorach v. Clauson*, 100 N.E.2d 463, 467 (1951)).

213. For an account of the proceedings, see Lewis B. Kaden, *The People: No! Some Observations on the 1967 New York State Constitutional Convention*, 5 HARV. J. LEG. 343 (1968); Henrik N. Dullea, *Charter Revision in The Empire State: The Politics of New York's Constitutional Convention 339-428* (1982) (unpublished Ph.D. dissertation, Maxwell School of Citizenship and Public Affairs).

214. See *supra* note 177.

215. WASH. CONST. art. IX, § 4 (1889).

216. It states: "No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art. I § 11 (1889, amended 1958).

217. See Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 413-18 (1985) (surveying law through 1980s).

218. See *Mitchell v. Consolidated Sch. Dist. No. 201*, 135 P.2d 79 (Wash. 1943).

219. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).



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again struck down a busing program that included parochial school children. Addressing its differences with *Everson* directly, the state court said:

Although the decisions of the United States Supreme Court are entitled to the highest considerations they bear on related questions before the court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support of* such schools.<sup>220</sup>

The Washington Supreme Court addressed the issue of education vouchers directly in *Weiss v. Bruno*.<sup>221</sup> The program in question provided children in economic need with grants to attend schools of their choice including parochial schools. The court found the program to be in violation of the state and federal constitutions and refused to recognize the difference between direct and indirect aid.<sup>222</sup> It declined to concede that prohibitions against children or parents who have a preference for sectarian schools might impair their free exercise rights: "The question is not whether a student may attend a religious school, but whether the state may subsidize that attendance. No element of coercion has been suggested by respondents, and the free exercise clause is not involved in these cases."<sup>223</sup>

This is the same court that in *Witters v. State Commission for the Blind*<sup>224</sup> later denied a scholarship to a blind student who wanted to attend a bible college. In addition to rejecting the aid on state constitutional grounds, the court in this case found that the program in question violated the *Lemon* test. The U.S. Supreme Court ultimately overturned the Washington court's decision.<sup>225</sup>

### 3. Massachusetts

Although Massachusetts has never had a voucher program in operation involving sectarian schools, the wording of its constitution and opinions rendered by its courts on bills being considered by the state legislature indicate that it would not be receptive to the idea. The constitution prohibits direct aid to religious schools and institutions,<sup>226</sup> but it also specifically allows higher

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220. *Visser v. Nooksack Valley Sch. Dist.* No. 506, 207 P.2d 198, 205 (Wash. 1949).

221. *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973).

222. "A direct financial grant which enables a needy student to pay tuition and thereby remain in private school obviously supports the school." *Id.* at 978.

223. *Id.*

224. *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989).

225. *Witters v. Washington Dep't of Soc. Servs.*, 474 U.S. 263 (1986).

226. No grant, appropriation or the use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary

education grants to private colleges or students,<sup>227</sup> and the direct support of health organizations serving certain handicapped populations.<sup>228</sup>

Even a permissive reading of the constitution in the state where the idea of the common school took shape<sup>229</sup> indicates a strong disinclination to provide support for nonpublic schools. Whether such proscriptions would include aid to students or parents to offset tuition costs has been the subject of judicial scrutiny on several occasions. In 1970 the Supreme Judicial Court of Massachusetts unanimously opined that a bill to appropriate \$100 to each public and private school student in the state to defray a portion of education expenses would violate the state constitution.<sup>230</sup> Because parents would have simply signed over a voucher to the schools their children attended, the path of indirect aid to the school rather than the parents was rather clear.

The high court of Massachusetts later considered another bill before the state legislature, this one involving a tax deduction program modeled after the Minnesota statute, which the Court approved in *Mueller v. Allen*.<sup>231</sup> Here the court, ruling on the basis of the state constitution, rejected the distinction between direct and indirect aid, arguing: "If aid has been channeled to the student rather than to the private school, the focus still is on the effect of the aid, not on the recipient."<sup>232</sup>

#### 4. *Pennsylvania*

School choice has been an active item on the political agenda in Pennsylvania since 1991, and current Governor Tom Ridge has pledged to continue

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school, or charitable or religious undertaking which is not publicly owned and under the exclusive control order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both.

MASS. CONST. art CIII, § 2.

227. "Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher education institutions or to students or parents or guardians of students attending such institutions." *Id.*

228. Nothing herein contained shall be construed to prevent the Commonwealth, or any political subdivision thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb, or blind not more than the ordinary and reasonable compensation for the care or support actually rendered. . . . or institutions to such persons as may be in whole or in part unable to support or care for themselves.

MASS. CONST. art XVIII, § 3.

229. See JORGENSEN, *supra* note 60, at 159-86.

230. Opinion of the Justices to the House of Representatives, 259 N.E.2d 564 (Mass. 1970). In its opinion, the court discussed its earlier advice that the purchase of secular education services from parochial schools was a form of constitutionally prohibited public aid. *See id.* at 566.

231. 463 U.S. 388 (1983).

232. Opinion of the Justices to the Senate, 514 N.E.2d 353, 356 (Mass. 1987). In 1992 the Supreme Court of New Hampshire also issued an advisory opinion to the state legislature indicating that a proposed program to reimburse a portion of the tuition for students in private and parochial schools would violate the portion of the state constitution that prohibits payment "towards the support of the schools of any sect or denomination." Opinion of the Justices (Choice in Education), 616 A.2d 478, 480 (N.H. 1992) (citing N.H. CONST. pt. I, art. 6).

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supporting it until a bill emerges from the state legislature.<sup>233</sup> The Pennsylvania courts have never had an opportunity to consider the question, so any thoughts about how the courts would resolve the issue would be purely speculative. Pennsylvania's constitution, like that of most states, prohibits direct aid to sectarian institutions.<sup>234</sup> Like the Massachusetts Constitution, however, the Pennsylvania Constitution distinguishes between higher education and elementary and secondary education.<sup>235</sup> The courts in the state have given legal significance to the difference between direct aid and indirect aid, but with a caveat.

In *Rhodes v. School District of Abington Township*<sup>236</sup> the Pennsylvania Supreme Court upheld the busing of parochial school children on the grounds that the program being supported by the state had no religious significance.<sup>237</sup> The Supreme Court denied certiorari.<sup>238</sup> In a subsequent case the Pennsylvania high court again validated a transportation program that included parochial school students.<sup>239</sup> While the court acknowledged the "indirect and incidental" benefits accrued by the private institutions, it ruled that: "the limitations provided in Article III, Sections 15 and 29 apply only when state funds flow to the sectarian school or institution."<sup>240</sup>

Opponents of school choice point to the factual differences between the case where "no state monies reach the coffers of these church-affiliated schools,"<sup>241</sup> and the case of vouchers, where funds ultimately would reach schools, arguing that only the latter would violate the state constitution.<sup>242</sup> In the meantime supporters of choice legislation in the state legislature have proposed amending the state constitution so that scholarship aid is no longer designated permissible only with regard to higher education.<sup>243</sup>

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233. See *Conn., Pa. Governors Renew Push for Vouchers*, EDUC. WK., Nov. 15, 1995, at 22.

234. "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." PA. CONST. art. III, § 15.

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No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made . . . in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

PA. CONST. art. III, § 29. It is important to note the controlling distinction here between secular institutions that offer general educational programs and theological seminaries that train people for the ministry.

236. 226 A.2d 53 (Pa. 1967).

237. See *id.* at 64.

238. See *Worrell v. Matters*, 389 U.S. 846 (1967) (mem.).

239. See *Springfield Sch. Dist. v. Department of Educ.*, 397 A.2d 1154 (Pa. 1979).

240. *Id.* at 1168, 1171.

241. *Id.* at 1171.

242. See John P. Jones, *Pennsylvania's Choice: "School Choice" and the Pennsylvania Constitution*, 66 TEMP. L. REV. 1289, 1304 (1993).

243. See *id.* at 1302-03.

## 5. *Wisconsin*

The Milwaukee Choice Program, currently being litigated in state court, was the first in recent history to provide economically disadvantaged children with an opportunity to attend private or parochial schools at public expense.<sup>244</sup> The original choice plan enacted by the Wisconsin Legislature in 1990 had been restricted to "nonsectarian" private schools in the City of Milwaukee.<sup>245</sup> Under this plan the state paid a tuition credit directly to schools attended by eligible students. This version of the program sustained two legal challenges. It was first challenged in state court on the grounds that it violated a provision of the Wisconsin Constitution requiring the creation of a "uniform" system of schools.<sup>246</sup> The Wisconsin Supreme Court upheld its constitutionality under the "public purpose doctrine," finding that it was a limited experiment designed to improve the educational opportunities of disadvantaged children.<sup>247</sup>

In 1993 the Landmark Legal Foundation, in federal court, challenged the exclusion of parochial schools from the program as an abridgement of their free exercise rights under the First Amendment and of their equal protection rights under the Fourteenth Amendment.<sup>248</sup> The district court rejected these claims, focusing particularly on the method of payment of the program which allots funds directly to the school.<sup>249</sup> In 1995 the Wisconsin legislature, at the

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244. Vermont also has a school choice program which requires local school districts without high schools to pay tuition for students to attend either an approved private school or a public high school of choice in another district up to an amount equal to the state average of per pupil spending. In 1994 the Vermont Supreme Court ruled that tuition reimbursement for a child to attend a sectarian school of choice outside the state did not violate either the state or the Federal Constitution. *See Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (Vt. 1994). In August 1997 a local school board sued the Vermont Department of Education when the Department refused to reimburse the board for tuition paid at a local Catholic high school. *See Mark Walsh, VI. District Provides Latest Test in Battle over Religious Vouchers*, EDUC. WK., Sept. 18, 1996, at 16.

245. WIS. STAT. ANN. § 119.23(2)(a). For case histories of the Wisconsin choice program, see DANIEL MCGROARTY, *BREAK THESE CHAINS: THE BATTLE FOR SCHOOL CHOICE* (1996); Paul E. Peterson & Chad Noyes, *School Choice in Milwaukee*, in *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* (Diane Ravitch & Joseph Viteritti eds., forthcoming 1997).

246. *See Davis v. Grover*, 480 N.W.2d 460, 463 (Wis. 1992) The Wisconsin Constitution requires that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable." WIS. CONST. art. X, § 3. The statute was also challenged on the basis that it was a private law, but this claim was also rejected by the court. *See* 480 N.W.2d at 462.

247. The court ruled: "Sufficient safeguards are included in the program to ensure that participating private schools are under adequate governmental supervision reasonably necessary under the circumstances to attain the public purpose of improving educational quality." 480 N.W.2d at 463. *See also* James B. Egle, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 501-09 (discussing Wisconsin's uniformity clause challenge).

248. *See First Amended Complaint, Miller v. Benson*, 878 F. Supp. 1209 (E.D.Wis. 1995) (No. 93-C-1063).

249. "The present state of First Amendment law compels this court to hold that the plaintiffs' request to expand the current Choice Program to make tuition reimbursements directly payable to religious private schools who admit eligible Choice Program school-children would violate the Establishment Clause." 878 F. Supp. at 1209, 1216.

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urging of Governor Tommy Thompson, amended the law to provide that vouchers be paid directly to parents rather than the schools, and to eliminate the restriction against religious institutions.<sup>250</sup>

Plaintiffs in the current case<sup>251</sup> claim that the program, in its present form, offends the Wisconsin constitution, which prohibits drawing money from the state treasury to benefit a religious organization or compelling anyone to support a place of worship.<sup>252</sup> They argue that the Wisconsin Constitution imposes stricter standards of separation than the First Amendment.<sup>253</sup> For instance, the Wisconsin Supreme Court invalidated a statute requiring school districts to provide bus service for students in parochial schools,<sup>254</sup> despite the Supreme Court's decision in *Everson*<sup>255</sup> permitting a similar practice in New Jersey. The state court held that the federal Establishment Clause "lends itself to more flexibility of interpretation" than the Wisconsin Constitution.<sup>256</sup>

Subsequent case law, however, paints another picture of the Wisconsin legal landscape. In 1974, in the wake of the *Lemon* ruling,<sup>257</sup> a state court upheld a law providing for the procurement of special education services from private and sectarian organizations, ruling: "[C]ontracting for goods or services for a public purpose with a sectarian institution is appropriate state action. It is only when such a contract has a primary effect of advancing a religion that the constitutional prohibitions come into effect."<sup>258</sup> The court concluded that "the primary effect" of this statute is "the providing of special education services to the handicapped children of Wisconsin, a secular purpose."<sup>259</sup>

More recently the Wisconsin high court has tended to follow the evolving standards of the Supreme Court in interpreting its own constitution, explaining, "[W]e interpret and apply Art 1, sec. 18 [of the Wisconsin Constitution] in light of United States Supreme Court cases interpreting the Establishment Clause."<sup>260</sup>

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250. See 1995 Wis. Legis. Serv. Act 27, sec. 4004 § 119.23(4) (West).

251. *Thompson v. Jackson*, No. 95-2153-OA, L.C. #s 95CV1982 and 95CV1997 (Wis. Aug. 25, 1995).

252. "[N]or shall any person be compelled to attend, erect or support any place of worship, . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." Wis. CONST. art I, § 18.

253. See Brief for Respondents at 14, 22, *Thompson v. Jackson*, No. 95-2153-OA, L.C. #s 95CV1982 and 95CV1997 (Wis. Aug. 25, 1995) (arguing that Wisconsin courts apply state establishment clause "independently and more strictly than its federal counterpart").

254. See *State ex rel. Reynolds v. Nusbaum*, 115 N.W.2d 761 (Wis. 1962).

255. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

256. 115 N.W.2d at 769-70. The effect of this decision on the busing of parochial school students was soon reversed by an amendment to the state constitution. See Wis. CONST. art. I, § 23.

257. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

258. *State ex rel. Warren v. Nusbaum*, 219 N.W.2d 577, 583 (Wis. 1974) (footnote omitted).

259. *Id.* at 585.

260. *King v. Village of Waunakee*, 517 N.W.2d 671, 683 (Wis. 1994) (quoting lower court). See also *Freedom from Religion Found., Inc. v. Thompson*, 476 N.W.2d 318, 320-21 (Wis. Ct. App. 1991) (looking to Supreme Court rubric in interpreting establishment clause of Wisconsin constitution).

Wisconsin may now be a state in which strict separationists will receive support for their pleas neither at the federal nor state level. Their legal strategy—to initiate litigation in the state rather than the federal courts—may reveal a recognition on their part, however, that the federal judiciary is moving more rapidly towards a sympathetic position on school choice than their state counterparts, even in a jurisdiction such as Wisconsin where the political and judicial climate has been sensitive to religious interests.

On March 29, 1996, an equally divided court (one justice having recused herself) returned the case to trial at the Dane County Circuit Court.<sup>261</sup> By the time the case makes its way back to the Wisconsin Supreme Court, Chief Justice Roland B. Day, who voted against the Choice Program on the grounds that it violated the state constitution, will have retired. His replacement on the bench will be N. Patrick Crooks, who is philosophically aligned with Governor Thompson and is considered more likely to support the Choice Program.<sup>262</sup>

#### 6. *Puerto Rico*

In 1993 the Commonwealth of Puerto Rico enacted the Special Scholarship and School Choice Act.<sup>263</sup> Tied to major reforms within the public school system, the comprehensive school choice program entitled families with an income of \$18,000 or less to a voucher worth \$1,500 that they could use either in a public, private, or parochial school.<sup>264</sup> By the 1994-95 school year 16,899 students had opted to participate in the program. In November 1994, the Commonwealth Supreme Court halted the portion of the program that allowed children to attend private or parochial schools at public expense. The court ruled that these provisions violated the Commonwealth Constitution, which outlaws the use of tax monies to support nonpublic schools.<sup>265</sup>

Here was a situation in which the scholarship voucher generated a payment of funds directly to the schools, thereby establishing a practice that would have been questionable even under existing federal standards. Nevertheless, this court unambiguously claimed that it was not being governed by federal standards in its decision. Writing for the majority, Justice Hernandez Denton rejected outright the proposition that the Commonwealth's constitution "mirrors

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261. See *Thompson v. Jackson*, 546 N.W.2d 140 (Wis. 1996) (per curiam).

262. See Mark Walsh, *Court Deadlocks on Religious-School Vouchers*, EDUC. WEEK, Apr. 10, 1996, at 5.

263. See Law 71.

264. See AHEAD OF THE LEARNING CURVE, EMPOWERING TEACHERS, STUDENTS AND PARENTS: HOW PUERTO RICO IS REFORMING PUBLIC EDUCATION, OFFICE OF THE ADVISOR TO THE GOVERNOR ON EDUC. AFFAIRS, January, 1994 [hereinafter AHEAD OF THE LEARNING CURVE].

265. "No public property or public funds shall be used for the support of schools or educational institutions other than those of the state." P.R. CONST. art. II, § 5.

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the First Amendment's Establishment Clause as interpreted by the U.S. Supreme Court."<sup>266</sup> He explained further:

Section 5 prohibits the state from providing any benefits, assistance or support to private schools. Of course, indirect and incidental public benefits that accrue to private schools are not prohibited (e.g., fire and police protection), for they are available to all citizens. But a private school is prohibited from receiving public services or assistance that support its educational mission.<sup>267</sup>

The court denied the possibility of separating the secular aspect of a parochial school's curriculum from its overall religious mission. In a bold move to define its own standards of separation differently than those enunciated by the United States Supreme Court, it cited as authority the Washington State Supreme Court's decision in *Weiss v. Bruno*<sup>268</sup> (already rejected by the U.S. Supreme Court), which also struck down a voucher system.<sup>269</sup>

Of particular interest here, however, is the dissenting opinion filed by Justice Negron Garcia,<sup>270</sup> who approached the issue from the perspective of the liberty and equality rights of poor parents and accused the majority of perpetuating a stratified system of education:

The essence of the constitutional right to an education, as a precondition of liberty, is the right to choose within a pluralistic system of possibilities. By forcing poor students to public schools, we are saying that private education is only for the well-off; we deprive them of the possibility to educate their children.<sup>271</sup>

Justice Garcia's opinion is significant for at least two reasons. First, it expresses an appreciation for the religious pluralism embraced by the Rehnquist Court—a theme that will undoubtedly be heard in future Court decisions. Second, by introducing liberty and equality concerns, it has identified the context for future constitutional deliberations about school choice and plausibly a just resolution to the ongoing debate.

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266. *Teachers Ass'n v. Torres*, Dkt. No. KAC-93-1268 (1003) (1994).

267. *Id.*

268. *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973) (en banc).

269. In a concurring opinion, Justice Alonso asserted that the voucher program would "siphon off" the best students and needed tax dollars from the financially strapped public schools: "It is difficult to conceive of a more urgent and important government duty than to address the root causes of our educational difficulties. Part of this task must be to devote as many resources as possible to public education without diverting educational funds to inappropriate governmental activities." *Torres*.

270. Another dissenting opinion was offered by Justice Robello Lopez, who disagreed with the majority's strict interpretation of the Commonwealth Constitution: "The term 'support' in section five does not prohibit or obstruct the government from providing funds or vouchers to children to attend private schools, even if they are religious. What is prohibited by section five is that the government substitute private education for the public school system." *Id.*

271. *Id.*

### 7. *Summary Comments*

A review of the case law in just a small sampling of states reveals the variety of standards that are applied in interpreting the First Amendment and its relationship to state constitutional law. The courts in Wisconsin and Pennsylvania, for example, appear to be sympathetic to the direction in which the Supreme Court is moving, yet it remains to be seen how these state courts would rule on the issue of school choice. New York has exhibited a similar leaning, although it continues to enshrine the Blaine Amendment within its constitution as if it were a symbol of religious freedom. The courts in Washington, Massachusetts, and Puerto Rico are less ambiguous about their intent to adopt their own standards and flout the rulings of the Court; such cases point to a serious constitutional dilemma calling for a remedy by the federal judiciary under the Supremacy Clause of the Constitution.

Diversity is expected under our system of judicial federalism. It is problematic, however, when state courts impose limitations on the free exercise of religion that transgress constitutional guidelines set down by the Court. Our system of federalism permits states to define state rights more broadly than analogous federal rights but not to abridge those liberties that are protected by the Constitution. Judicial activism at the state level is a welcome phenomenon only to the extent that it makes for a freer society. By erecting a higher wall of separation between church and state, jurisdictions like Washington, Massachusetts, and Puerto Rico are actually treading on the free exercise rights of individuals, which the Supreme Court has decided are guaranteed by the First Amendment. Furthermore, in the context of school choice, such transgressions not only jeopardize First Amendment protections but also infringe on the equal educational opportunity to which all people are entitled.

## III. EQUALITY, CHOICE, AND RELIGIOUS FREEDOM

### A. *Defining Equality: Brown's Legacy*

*Brown v. Board of Education*<sup>272</sup> was the most important Supreme Court decision of the twentieth century. It was the means by which the Warren Court embraced the Fourteenth Amendment as an instrument for promoting racial equality in the states,<sup>273</sup> and it set the stage for a political agenda in Congress

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272. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). There is a voluminous literature on the *Brown* decision and its effects. One of the most detailed treatments of the case is RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

273. *Brown* sparked a series of decisions that dealt with various forms of racial segregation. *See, e.g.*, *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Atlanta*, 350 U.S. 879



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that brought about a civil rights revolution.<sup>274</sup> *Brown*, unlike any judicial proclamation before or since, perceptively explained the central role that education plays in a free society—as a source of civic virtue, as a means of acculturation, as a vehicle for social mobility, and, ultimately, as a guarantor of full equality.<sup>275</sup> Under its mandate, a decent education is nothing less than a right to which all were entitled. *Brown* articulated a set of ideals in education that would seem to be rooted in the soul of a free people—desegregation of the races and equal opportunity for all. Forty years later, public schooling in America has achieved neither.

### 1. *Judicial Activism*

The immediate impact of the *Brown* decision was to supersede the “separate but equal” doctrine that stood for more than a half-century as a result of *Plessy v. Ferguson*.<sup>276</sup> A unanimous Court in *Brown* rejected de jure segregation outright by declaring “separate [is] inherently unequal.”<sup>277</sup> Based upon social science evidence submitted by Kenneth Clark and others,<sup>278</sup> the Court accepted the idea that the separation of students on the basis of skin color is psychologically damaging to black children and “generates a feeling of inferiority.”<sup>279</sup> While the “all deliberate speed” principle announced in *Brown*

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(per curiam) (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

274. For a critical history of the changing federal role in education after *Brown*, see DIANE RAVITCH, *THE TROUBLED CRUSADE* 114-82 (1983) [hereinafter *THE TROUBLED CRUSADE*].

275. The Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

*Brown*, 347 U.S. at 493.

276. *Plessy v. Ferguson*, 163 U.S. 537 (1896). For an analysis of the case, see CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987). William Nelson gives considerable attention to the *Plessy* decision in his probing history of the Fourteenth Amendment, where he describes it as one of the most pivotal yet misunderstood episodes in our judicial experience. See NELSON, *supra* note 157, at 185. He argues that while the Supreme Court at the time had bowed to segregation in order to protect state prerogatives under federalism as it was then understood, the Court had also evidenced a commitment to equality of educational opportunity under that separatism. See *id.* He points out that three years after *Plessy*, the Court had indicated that it would not sanction an action by a local school board creating an institution for whites without creating a comparable one for blacks, if the determination was made out of “hostility to the colored population because of their race.” *Id.* at 187 (citing *Cummings v. Richmond County Bd. of Educ.*, 175 U.S. 528, 545 (1899)).

277. *Brown*, 347 U.S. at 495.

278. *Id.* at 494 n.11. These assertions have been a source of great debate within the social science community. See, e.g., *THE COURTS, SOCIAL SCIENCE AND THE JUDICIAL PROCESS* (Betsy Levin & Willis D. Hawley eds., 1977).

279. *Brown*, 347 U.S. at 494.

*It*<sup>280</sup> in 1955 left an initial impression that the Court would move cautiously in implementing desegregation, subsequent decisions proved otherwise.<sup>281</sup> If there ever were an assault on the original federalist structure balancing national and state power, it occurred during the next two decades as the federal courts became intimately involved in elementary and secondary education.<sup>282</sup> Until then, schooling had been almost exclusively within the province of state and local control.

In a 1973 desegregation case involving Denver, Colorado, the Court raised the stakes on the racial balancing question further, when it ruled that states that had not historically maintained dual school systems defined by race could be required under certain circumstances to take affirmative action to integrate.<sup>283</sup> And in 1976 Justice Rehnquist, writing for a 6-2 majority, delivered an opinion that reversed two lower court decisions, allowing the Pasadena Board of Education to adopt its own voluntary integration plan, freeing it from four

280. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

281. Beginning in 1968, the Court moved from its original desegregation strategy to enforcing a policy of affirmative integration. *See, e.g., Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (ruling that school districts with history of *de jure* segregation were "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system"). Three years later, the Court expanded *Green* and allowed a limited policy of quotas in student assignments. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971). The Court also held that remedies imposed in such cases must fit the violations, thereby setting limits on lower court action. *See id.* at 16.

Contrary to the principle of racial neutrality that had been enshrined in *Brown*, the Court began to use racial classifications as criteria for deliberate governmental action. *See* Joseph P. Viteritti, *Unapportioned Justice: Local Elections, Social Science and the Evolution of the Voting Rights Act*, 4 CORNELL J.L. & PUB. POL'Y 199 (1994) (discussing use of racial criteria for apportionment of election districts). The Court's aggressive posture on the question of school integration produced one of the most controversial public policies in the history of the nation, involuntary busing to achieve racial balance. For two well-argued but divergent commentaries on busing, *see* LINO GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976) (opposing busing); GARY ORFIELD, *MUST WE BUS: SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978) (supporting busing).

282. For an overview of the case law, *see* EQUAL EDUCATION UNDER LAW, *supra* note 6, at 38-77.

283. *See Keys v. School Dist. No. 1*, 413 U.S. 189, 203 (1973) (ruling that finding of intentional segregative policy in portion of school district could be grounds for presuming intentional segregation in entire district).

There was a measure of moderation that seemed to be taking hold on the Court even in the Denver decision, however. As desegregation litigation began to work its way north, the Court for the first time imposed an "intent" standard that would require plaintiffs to demonstrate that segregation was a product of purposeful governmental action, endowing the distinction between *de jure* and *de facto* segregation with legal significance. *Id.* at 208. A year later, with Chief Justice Burger writing the majority opinion in a 5-4 ruling, the Supreme Court refused to endorse an interdistrict integration plan involving 54 school districts surrounding Detroit because it could not be demonstrated that the suburban jurisdictions had a hand in producing racial isolation in the city. *See Milliken v. Bradley*, 418 U.S. 717, 745 (1974). In *Milliken*, the Court found no interdistrict remedy was required "[w]ith no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect." *Id.* One year earlier, the Court, in a one-sentence opinion, struck down Richmond, Virginia's interdistrict busing plan. *Bradley v. State Bd. of Educ.*, 411 U.S. 913 (1973) (*per curiam*).

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years of judicial supervision.<sup>284</sup> The *Pasadena* decision presaged the jurisprudence of the Rehnquist Court.<sup>285</sup>

*Brown* and its judicial progeny not only invalidated, but also virtually eliminated de jure segregation in the United States. Given the preponderance of dual systems that existed prior to 1954, it was a monumental achievement. Today seventy percent of school districts with enrollments above 27,000, and forty percent of districts with enrollments above 10,000 have implemented some form of desegregation program.<sup>286</sup> These jurisdictions include three-fourths of the black and Hispanic school-children in the nation.<sup>287</sup>

But if school desegregation has succeeded in America, racial integration in elementary and secondary education has proven to be a measured failure. In his comprehensive review of the existing data, David Armor found that while black-white imbalance improved substantially between 1968 and 1989,<sup>288</sup> there was only a slight improvement in the degree to which minority and white students were actually exposed to each other in a school setting.<sup>289</sup> Although the racial profile of individual schools now more closely resembles the composition of their respective districts, the opportunity for minority and white students to attend school together has actually improved only minimally.<sup>290</sup>

The most persuasive, though controversial, explanation for the resegregation phenomenon is known as "white flight."<sup>291</sup> Between 1968 and

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284. *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 429 (1976).

285. In 1991, the Court ruled in an Oklahoma City case that judicial supervision of desegregation is only a temporary measure and could be terminated if a school district shows a good faith effort to comply with the law and eliminates the vestiges of past discrimination "to the extent practicable." *Board of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991); see also *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (holding unanimously that suburban district in Georgia not responsible for correcting racial imbalance resulting purely from demographic factors). Most recently, in 1995, the Supreme Court ruled in a longstanding Kansas City case that student performance could not be used as a measure for determining whether a school district has achieved unitary status. See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2055 (1995).

286. See DAVID ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 166 (1995).

287. This amounts to 6.8 million out of a total of 9.1 million. See *id.*

288. Using a "dissimilarity index" that measures profiles of individual schools against the profile of the districts in which they reside, Armor found changes from 67% in 1968, to 51% in 1972, to 43% in 1980, where it has remained constant. For Hispanics, for whom segregation was a less severe problem in the post-*Brown* era, the dissimilarity index changed from 53% in 1968, to 42% in 1972, to 40% in 1980, where it has remained constant. See *id.* at 171.

289. Exposure rates measure the degree to which students actually attend school with students of another race. For black students, exposure rates fluctuated from 43% in 1968, to 54% in 1972, to 47% in 1989. For Hispanics, it changed from 70% in 1978 to 51% in 1989. See *id.* at 172-73.

290. Using other data, Gary Orfield and his colleagues have come to somewhat different conclusions in studying desegregation trends for the same period. They, too, found that the most progress occurred between 1968 and 1972; however, they also identified a more significant problem emerging with Hispanic segregation. See GARY ORFIELD & FRANKLIN MONFORT, *COUNCIL OF URBAN BDS. OF EDUC., STATUS OF SCHOOL DESEGREGATION: THE NEXT GENERATION* (1992); GARY ORFIELD ET AL., *COUNCIL OF URBAN BDS. OF EDUC. & NATIONAL SCH. DESEGREGATION RESEARCH PROJECT, STATUS OF SCHOOL DESEGREGATION, 1968-1986* (1989).

291. Among the early studies on the subject are JAMES S. COLEMAN ET AL., *TRENDS IN SCHOOL SEGREGATION, 1968-1973* (1975) [hereinafter *TRENDS IN SCHOOL SEGREGATION*]; and REYNOLDS FARLEY & C. WURDUCK, *POPULATIONS STUDIES CTR. OF THE UNIV. OF MICH., CAN GOVERNMENTAL*

1979 the proportion of white students enrolled in large public school systems declined from seventy-three percent to fifty-two percent.<sup>292</sup> Therefore, even though individual schools within these systems are now more representative of the general school population, there is less intermingling of the races. Great disagreement exists among social scientists regarding the degree to which integration efforts, and especially busing, contributed to white flight.<sup>293</sup> We need not resolve that issue in this study, however. The important lesson to be drawn here is that de facto segregation continues to exist in most large school systems. That point is incontrovertible.

## 2. *Congressional Initiatives: Fiscal Federalism and Educational Opportunity*

*Brown* stimulated political and legislative action that would more completely define the equal education opportunity standard articulated in the original decision.<sup>294</sup> If aggressive action by the federal judiciary were not sufficient to redefine the role of the national government in education, the generous but conditional infusion of federal funds certainly would complete the task. As a result of the Elementary and Secondary Education Act (ESEA),<sup>295</sup> federal spending in education increased from one billion to two billion dollars between 1965 and 1966, and to nearly three billion dollars by the end of the decade.<sup>296</sup> ESEA was a cornerstone of President Lyndon Johnson's Great Society Program and his "War on Poverty." Under Titles I and II of ESEA,

POLICIES INTEGRATE PUBLIC SCHOOLS? (1977).

292. ARMOR, *supra* note 286, at 170.

293. Using a multiple regression model, Armor offers persuasive evidence of the causal relationship between desegregation and white flight. *See id.* at 186; *see also* CHRISTINE ROSSELL, THE CARROT OR THE STICK FOR DESEGREGATION POLICY (1990) [hereinafter THE CARROT OR STICK]; FINIS WELCH & AUDREY LIGHT, NEW EVIDENCE ON SCHOOL DESEGREGATION (U.S. Comm'n on Civil Rights No. 92, 1987); Franklin D. Wilson, *The Impact of School Desegregation Programs on White Public-School Enrollment, 1968-1976*, 58 SOC. OF EDUC. 137 (1985).

294. For an overview of the legislative history, see EQUAL EDUCATION UNDER LAW, *supra* note 6, at 56-69.

In 1957 Congress passed the first major civil rights act since Reconstruction, 42 U.S.C. § 1975, which created the United States Civil Rights Commission. The Justice Department instituted a newly empowered Civil Rights Division, *see* Att'y Gen. Order No. 155-57 (Dec. 9, 1957). In 1964 Congress enacted the most far-reaching civil rights act of the century. 42 U.S.C. § 1981-2000. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42-71, 157-69 (1991) (arguing that significant school desegregation in South did not occur until passage of this act). Title IV of the Act authorized the Attorney General to initiate desegregation suits and appropriated grants to state and local governments to support desegregation efforts. 42 U.S.C. § 2000c-6 (1995). Title VI denied federal assistance to any school district engaged in racial discrimination. *See id.* § 2000d-1 (1995). The significance of the latter stipulation would become more apparent over the next year, when federal dollars became part of the national strategy to promote equal opportunity in education.

295. Elementary and Secondary Education Act, Pub. L. No. 89-10 (codified as amended in scattered sections of 20 U.S.C.). *See* STEPHEN K. BAILEY & EDITH K. MOSHER, ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW 37-71 (1968) (on legislative history of ESEA).

296. *See* P. Michael Timpane, *Federal Aid to Schools*, 38 LAW & CONTEMP. PROBS. 491, 495 (1974).

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funds were directed to children specifically on the basis of socioeconomic need.<sup>297</sup> Implicit in the design was a new federal approach to educational equality, which would go beyond racial desegregation and commit financial resources for improving the educational achievement of disadvantaged populations.

The ESEA legislation explicitly provided that children attending private and parochial schools would not be excluded from eligibility.<sup>298</sup> Although funds would be administered through the public schools, educationally and economically deprived students attending nonpublic schools would be permitted to participate through audio-visual devices, television and radio programs, mobile teaching units, and dual-enrollment programs.<sup>299</sup> No part of the funds, however, could flow directly to nonpublic schools or be used to compensate their teachers. ESEA very consciously represented a legislative enactment of the "child benefit theory." Children in need would be permitted to receive benefits from the program regardless of which schools they attended, whether public, private, or parochial. The concept was adopted both to address the needs of disadvantaged populations and to accommodate First Amendment considerations of separation.<sup>300</sup> Nevertheless, the administration of the program was significantly altered in 1985 when the Court ruled that public school districts could not send their teachers into parochial schools to provide secular instruction.<sup>301</sup>

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297. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children.

Elementary and Secondary Education Act of 1965, § 201, 79 Stat. 27 (repealed 1978).

298. See 79 Stat. 30, 20 U.S.C.A. § 241e(a)(2) (West 1990) (repealed 1978).

299. Prior to the passage of ESEA, federal assistance was provided to sectarian institutions through the GI Bill, the National Defense Education Act, the National Science Foundation Act, college housing loans, the National School Lunch Act, and the Hill-Burton Hospital Reconstruction Act. See BAILEY & MOSHER, *supra* note 295, at 33. For a review of postwar educational initiatives by the federal government, see THE TROUBLED CRUSADE, *supra* note 274, at 3-42.

300. See EUGENE EIDENBERG & ROY D. MOREY, AN ACT OF CONGRESS: THE LEGISLATIVE PROCESS AND THE MAKING OF EDUCATION POLICY 75-95 (1969).

301. See *Aguilar v. Felton*, 473 U.S. 402 (1985). This decision barred New York and other districts from sending public school teachers into parochial schools, requiring school districts to rent additional space to deliver services. In New York City, where the decision is about to be challenged, the extra costs amount to \$16 million per year. The current challenge has the support of the U.S. Secretary of Education and, given the present composition of the Supreme Court, is expected to succeed. See Joseph Berger, *Limit on Remedial Education is Appealed*, N.Y. TIMES, Aug. 31, 1996, at 25; Mark Walsh, *N.Y.C. Seeks to Overturn Limits on Title I at Religious Schools*, EDUC. WK., Feb. 28, 1996, at 1, 12.

In 1972, shortly after the Court approved busing as a remedy for racial integration,<sup>302</sup> the Emergency School Aid Act was passed.<sup>303</sup> While the law appropriated federal funds to assist school systems implement desegregation plans, congressional debate on the bill reflected a growing public sentiment against busing. Two years later the Equal Educational Opportunities Act<sup>304</sup> was signed into law, declaring that all school children "are entitled to equal educational opportunity without regard to race, color, sex, or national origin."<sup>305</sup> This time, Congress and the President wanted to communicate that equal educational opportunity does not necessarily include extraordinary governmental action to mix students by race. The Act clearly stated that a failure to achieve racial balance was not necessarily illegal.<sup>306</sup> The Act also specifically prohibited the federal courts from imposing busing as a remedy for segregation unless less intrusive alternative approaches had proven to be ineffective.<sup>307</sup>

The legislative die had now been cast against busing. Between 1974 and 1980 it became commonplace to amend education appropriations bills in order to reject the policy of transporting children great distances in order to accomplish a racial agenda. This legislative practice was upheld by the District of Columbia Circuit Court of Appeals.<sup>308</sup> The Supreme Court itself had already indicated that it was prepared to take a more moderate approach to integration, as evident from decisions concerning Detroit<sup>309</sup> and Pasadena.<sup>310</sup> After social science research introduced the concept of "white flight" to the dialogue on desegregation, voluntary choice and magnet school programs became increasingly popular. One of the first such plans was implemented with court approval in the city of Milwaukee in 1979.<sup>311</sup>

### 3. *Separate and Unequal*

American justice would no longer tolerate public policy at the national, state, or local levels that would intentionally separate school children on the basis of race. But there was a practical limit to what policy makers and judges could do to effectuate integration. In James Coleman's controversial assessment

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302. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

303. 20 U.S.C. § 1601-19 (1972) (repealed 1978).

304. 20 U.S.C. § 1701 (1994).

305. *Id.*

306. See 20 U.S.C. § 1704 (1994).

307. See 20 U.S.C. § 1755 (1994). Among those remedies deemed acceptable in the new law were magnet schools and the revision of attendance zones. The law was resolute in prescribing "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. § 1701(a)(2) (1994).

308. See *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

309. See *Milliken v. Bradley*, 418 U.S. 717 (1974).

310. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

311. See *Armstrong v. Board of Sch. Dirs.*, 471 F. Supp. 800 (1979).

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of educational opportunity in America in 1966,<sup>312</sup> he documented that black and white children attend separate schools, a fact that social scientists like David Armor have shown is true today.<sup>313</sup> The Coleman report's most lasting impact is that it introduced the factors of resources and achievement as critical issues for consideration, thus advancing the discussion on educational equality beyond race.<sup>314</sup> Notwithstanding Coleman's own conclusions,<sup>315</sup> a contemporary examination of the factors he underscored three decades ago demonstrates rather persuasively that minority children attend schools that are both separate and unequal and that this evident inequality bears significant consequences with regard to educational achievement.

a. *Resources.* Despite the massive infusion of federal dollars into education, school finance remains primarily a matter of state and local concern. In 1994 only seven percent of all primary and secondary school revenues were derived from federal sources.<sup>316</sup> The distribution of educational resources is generally determined by local decision makers guided by complex formulas that are written by state legislatures.<sup>317</sup> By the late 1960s a substantial research literature had begun to emerge showing disparities in spending between property-rich school districts and poor districts, leading to calls for reform.<sup>318</sup>

In 1971 the California Supreme Court invalidated the state school finance formula because it discriminated against the poor and thereby violated the Equal Protection Clause of the Fourteenth Amendment.<sup>319</sup> It seemed like a reasonable interpretation of the U.S. Constitution in the wake of *Brown*, which

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312. See JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) [hereinafter *EQUALITY OF EDUCATIONAL OPPORTUNITY*].

313. See ARMOR, *supra* note 286.

314. See James S. Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968).

315. Coleman found resource allocations between racially defined groups to be similar, and concluded that neither race nor resources were directly related to achievement. He identified family background as the critical variable in determining educational outcomes, an assertion that led to much debate among social scientists. See, e.g., CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972) ("Unless a society completely eliminates ties between parents and children, inequality among parents guarantees some degree of inequality in the opportunities available to children."); ON *EQUALITY OF EDUCATIONAL OPPORTUNITY* (Frederick Mosteller & Daniel P. Moynihan, eds., 1972) (papers deriving from Harvard University Faculty seminar on the Coleman report).

316. Even at its peak in 1980, only 9.8% of all education dollars were derived from the federal government. See Allen Odden et al., *The Story of the Education Dollar*, PHI DELTA KAPPAN (1995).

317. See WALTER GARMS ET AL., *SCHOOL FINANCE: THE ECONOMICS AND POLITICS OF PUBLIC EDUCATION* (1978).

318. Two of the early and influential works were ARTHUR WISE, *RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1968); JOHN COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

319. See *Serrano v. Priest*, 5 Cal.3d 584 (1971).

had deemed educational equality a fundamental right.<sup>320</sup> *Serrano* sped the hopes of reformers throughout the nation. Yet, it was a short-lived victory.

Two years later in *San Antonio Independent School District v. Rodriguez*,<sup>321</sup> the U.S. Supreme Court rejected the argument that the Fourteenth Amendment provided grounds to strike down the school finance system of Texas. The Court reasoned that "the Equal Protection Clause does not require absolute equality or precisely equal advantages."<sup>322</sup> In reaching its conclusion the Court noted "the absence of any evidence that the financing system discriminates against a definable category of 'poor people.'"<sup>323</sup> Demonstrating the Court's growing reluctance to intrude into local affairs, Justice Powell, writing for the majority, observed that "every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system."<sup>324</sup>

Even though the Court left the door open for factual proof of discrimination in financing, the *Rodriguez* decision seemed to dissipate any hopes that the federal courts could be relied upon to remedy inequality in school spending. Less than two weeks after that decision, the New Jersey Supreme Court struck down the school finance formula<sup>325</sup> of that state as a violation of the "thorough and efficient" clause of its own constitution.<sup>326</sup> Based on a historical analysis of the reasons for the clause's adoption, the court determined in *Robinson v. Cahill*: "[W]e do not doubt that an equal educational opportunity for children was precisely in mind."<sup>327</sup> The case gave sustenance to a generation of litigation that sought to remedy disparities in school spending on the basis of state constitutional challenges.<sup>328</sup> The effort has resulted in limited success.

Since the *Rodriguez* decision, school-finance cases have been decided in twenty-eight states.<sup>329</sup> Half have resulted in decisions calling for greater

320. Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

321. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

322. *Id.* at 24.

323. *Id.* at 25.

324. *Id.* at 44.

325. See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

326. The New Jersey Constitution requires a "thorough and efficient system of free public schools for the instruction of all the children of the state." N.J. CONST. art. VIII, § 4.

327. 303 A.2d at 294.

328. See Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129 (1992); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989).

329. See Douglas S. Reed, *The People v. The Court: School Finance Reform and the New Jersey Supreme Court*, 4 CORNELL J.L. & PUB. POL'Y. 137, 138 (1994).



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equity.<sup>330</sup> Even in those instances where the courts have been sympathetic to challenges, it is problematic to effect the changes that would be required for a fair distribution of resources.<sup>331</sup> School finance formulae generally reflect the power structure of the jurisdictions that produce them. To redesign these plans in favor of poor people without political influence is a political paradox that would be especially difficult to overcome during times of severe fiscal stress.

One should not assume that each of the twenty-eight formulae that have been challenged is deserving of revision; or, as *Rodriguez* suggests, that any sign of inequality in spending is inherently unfair. It is reasonable, however, to assume that, at some level, the disparity of resources made available to rich and poor populations violates the principle of equal opportunity. Empirical evidence demonstrates that large disparities exist.<sup>332</sup> School finance reform could be the window through which state judicial activists, cast in the Brennan mold,<sup>333</sup> might expand the legal definition of equal education.<sup>334</sup> Thus far the response of the state courts has been disappointing.

b. *Achievement*. There is no hard evidence of a direct empirical relationship between education spending and student achievement. Coleman made this point thirty years ago,<sup>335</sup> and more recent research continues to demonstrate that resources must be utilized effectively both at the administrative and school levels before increased dollars lead to improved performance.<sup>336</sup> It still seems reasonable to presume, however, that it is better to have more money than less, and that if resources are applied efficiently and effectively—that is, a larger percentage of the budget flows to the classroom, staff is properly motivated,

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330. See *id.* at 138-39.

331. See Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735 (1995); G. Alan Hickrod, *The Effect of Constitutional Litigation on Educational Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180 (1992); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991).

332. See, e.g., MYRON SCHWARTZ & JAY MOSKOWITZ, *FISCAL EQUITY IN THE UNITED STATES* (1988); Linda Herbert et al., *School Finance Inequities Among the States: The Problem from a National Perspective*, 19 J. EDUC. FIN. 231 (1988).

333. See *The Bill of Rights and the States*, *supra* note 183.

334. Scholars have identified three distinct waves of school finance litigation: the first, beginning with *Serrano*, was based on the Equal Protection Clause in the Federal Constitution; the second followed in the wake of *San Antonio* and was based upon state constitutional guarantees of equal protection. The third stage, beginning in 1989, was based upon the education clauses in state constitutions; this stage focuses on the adequacy or sufficiency of funds provided to students or school districts. See Michael Heise, *State Constitutions, School Finance Litigation and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 520-35 (1991).

335. See EQUALITY OF EDUCATIONAL OPPORTUNITY, *supra* note 312.

336. See ERIC HANUSHEK ET AL., *MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS* (1994); Odden, *supra* note 316.

and instructional standards are high—an increase in resources will eventually improve actual learning.

One cannot so easily honor the common-sense presumption that racial integration improves performance. There is no compelling reason to believe that merely mixing white and black children in a classroom, especially under the duress of involuntary busing, helps black students. Though studies of the subject abound,<sup>337</sup> there is no conclusive evidence that racial mixing necessarily contributes to academic performance. Rather, powerful empirical evidence shows continuing significant disparities in the academic achievement levels of minority and white children across the country. Reviewing data produced for the U.S. Department of Education's National Assessment of Educational Progress between 1973 and 1992, Diane Ravitch found that while the achievement gap between minority and white students has narrowed somewhat, significant differences in academic performance still remain.<sup>338</sup>

So from a racial—and implicitly a socioeconomic—perspective, the condition of education in America can be described in two words: *separate* and *unequal*.<sup>339</sup> However one defines educational equality, whether in terms of racial integration or resource allocations, one cannot disregard the proficiency with which schools accommodate the learning needs of children. If American education has any hope of living up to the promise of *Brown*, if it wishes to achieve some semblance of equal opportunity, then it must resolve the gap in learning between minority and white children.

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337. See, e.g., ARMOR, *supra* note 286, at 91-98; THOMAS COOK ET AL., U.S. DEP'T OF JUSTICE, SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT (1984); NANCY ST. JOHN, SCHOOL DESEGREGATION (1975); Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW. & CONTEMP. PROBS. 17 (1978).

338. See DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION 72 (1995). Ravitch explains that NAEP scores are a more reliable barometer than SAT scores because, while SAT scores measure performance of a select college-bound population of students, NAEP data is based on scientifically selected national samples that remain comparable over time. See *id.* at 71. For an overview of the national performance data, see *id.* at 59-97.

When the test scores of 17-year-olds were compared on a 500 point scale in 1992, the gap between black and white students was 26 points in mathematics and 37 points in reading; similarly, the gap in reading between whites and Hispanics was 26 points. See *id.* at 72. Moreover, at each proficiency level in mathematics, the scores for black and Hispanic 12th graders were similar to those of white 8th graders. See *id.*

Similar disparities are evident for the Scholastic Aptitude Test (SAT) scores among college-bound seniors in 1996. On the verbal test where the overall average score was 505, the average score for whites was 526, while for blacks it was 434, and for Mexican Americans, Puerto Ricans and other Hispanics it averaged 455, 452, and 465 respectively. COLLEGE-BOUND SENIORS, 1995 PROFILE OF SAT PROGRAM TEST TAKERS, COLLEGE ENTRANCE EXAMINATION BOARD AND EDUCATIONAL TESTING SERVICE (1996). In mathematics, where the overall average was 508, whites averaged 523, blacks averaged 422, and Mexican Americans, Puerto Ricans, and other Hispanics averaged 459, 445, and 466, respectively. See *id.*

339. For a dramatic journalistic treatment of the subject, see JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

## Religious Freedom and Educational Opportunity

### B. *The Salience of Choice*

#### 1. *Contemporary Approaches*

The idea of choice in education is not novel. It has had a manifold history, according to the circumstances under which it was instituted and the ends it sought to accomplish. Opponents recall the establishment of all-white southern academies under the banner of choice when, in the wake of *Brown*, it became unlawful to perpetuate segregated public schools.<sup>340</sup> The practice was voided by the Court in 1964.<sup>341</sup> Choice has also been used as a vehicle for school integration—a relatively effective one—based on volunteerism and the creation of high-quality magnet schools.<sup>342</sup> This Article will consider three contemporary manifestations of the idea: the public school model, the market model, and what we will call the “equal opportunity model.”

a. *The Public School Model.* Beyond their objective of racial integration, public school choice programs have functioned effectively as mechanisms to extend educational options available to parents and children. Typically, they allow students to select schools geographically farther than those schools ordinarily available to them. Cambridge, Massachusetts instituted the first city-wide controlled choice plan in 1981.<sup>343</sup> District Four in New York’s East Harlem has implemented one of the most celebrated public choice programs in an inner-city community,<sup>344</sup> and in 1985, Minnesota adopted the first statewide inter-district choice program.<sup>345</sup> By 1991, ten states had enacted choice legislation,<sup>346</sup> and today, twenty states have some kind of public school choice program.<sup>347</sup>

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340. See JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 104-06 (1994).

341. See *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (declaring freedom of choice plan where obstacles to choice were placed in path of black parents and children unconstitutional).

342. See ARMOR, *supra* note 286, at 13-16, 180-94, 211-34; LAURI STEEL ET AL., *AMERICAN INSTS. FOR RESEARCH, MAGNET SCHOOLS AND DESEGREGATION, QUALITY, AND CHOICE* (1993); ROSSELL, *THE CARROT OR STICK*, *supra* note 293; Christine H. Rossell, *Controlled Choice Desegregation Plans: Not Enough Choice, Too Much Control*, 31 *URB. AFF. REV.* 43 (1995).

343. See Robert S. Peterkin & Dorothy S. Jones, *Schools of Choice in Cambridge, Massachusetts*, in *PUBLIC SCHOOLS BY CHOICE* (Joe Nathan ed., 1989) (describing Cambridge controlled choice plan, which allows students to select schools on first come, first-served basis so long as space exists and assignment has positive effect on racial balance in that school grade).

344. See SEYMOUR FLIEGEL, *MIRACLE IN EAST HARLEM: THE FIGHT FOR CHOICE IN EAST HARLEM* 97-114 (1993).

345. See Tim L. Mazzoni, *Analyzing State School Policy-Making: An Arena Model*, 13 *EDUC. EVAL. & POL’Y. ANAL.* 115 (1991).

346. See PETER W. COOKSON, *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 39 (1994). See generally *id.* at 38-50, 139-52.

347. See ALLYSON M. TUCKER & WILLIAM F. LAUBER, *HERITAGE FOUND., SCHOOL CHOICE PROGRAMS: WHAT’S HAPPENING IN THE STATES* 5-6 (1995).

The basic shortcoming of such choice programs is that school districts serving disadvantaged populations with the greatest need for expanded opportunities often provide students with the least desirable options from which to choose. In Massachusetts, for example, where voluntary inter-district choice has existed since 1991, only twenty-five percent of the districts participate and those participating include none of the twenty-nine districts on the suburban rim of Boston.<sup>348</sup> Technically, New York City has had a city-wide school choice plan since 1991.<sup>349</sup> In reality choice exists in only six of thirty-two districts and, even in those districts where it has been adopted, space in desirable schools is extremely limited.<sup>350</sup>

Further evidence indicates that under certain conditions, public school choice can exacerbate existing inequalities. When limited options exist, the most articulate and aggressive parents are often the most effective school shoppers. The result is that middle-class students with high achievement levels exit failing schools and leave behind the poorer performers.<sup>351</sup> Other research, however, indicates that the outcome of choice programs and the determination of their beneficiaries depends on the objectives and design of the program.<sup>352</sup> Thus, gross generalizations about who benefits from school choice programs can be misleading.

b. *The Market Model.* One of the earliest appeals for choice in education emerged from the field of economics, when Nobel Laureate Milton Friedman proposed a publicly supported voucher system for American schools.<sup>353</sup> Friedman envisioned a free-market model of schooling with a limited governmental role, concerned primarily with maintaining minimum standards for teaching and learning. Under this plan primary and secondary education would be provided mainly by private institutions. Parents could select any school—private or parochial—that met minimum standards. Friedman thus hoped to weaken the government monopoly over publicly supported education, replacing it with a more competitive system that would force failing institutions to close and provide incentives for high performance in the others.<sup>354</sup>

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348. See ABIGAIL THERNSTROM, *SCHOOL CHOICE IN MASSACHUSETTS* 67 (1991).

349. See Josh Barnabel, *Board of Education Votes a School Choice Program*, N.Y. TIMES, Jan. 14, 1993, at B3.

350. Interview with Raymond Damonico, Executive Director of the Public Education Association, New York City (June 12, 1996).

351. See Robert G. Croninger & Julia B. Smith, *Equity and Choice in Detroit, in WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE* 73-74 (Richard Elmore & Bruce Fuller, eds., 1996).

352. Valerie J. Martinez et al., *The Consequences of School Choice: Who Leaves and Who Stays in the Inner City*, 76 SOC. SCI. Q. 485, 495-500 (1995).

353. See Milton Friedman, *The Role of Government in Education, in ECONOMICS AND THE PUBLIC INTEREST* 123, 127-33 (R.A. Solo ed., 1955).

354. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980).

## Religious Freedom and Educational Opportunity

The market model again moved to center stage in the choice debate when John Chubb and Terry Moe published their landmark study on schooling in America.<sup>355</sup> Chubb and Moe analyzed extensive data sets on student achievement and examined the organizational variables that contribute to high performance, documenting the superiority of private and parochial institutions over their public school counterparts.<sup>356</sup> Political scientists by training, Chubb and Moe offered a scathing indictment of the bureaucratic and political systems that undermine sound education.<sup>357</sup> They took particular aim at organized interests like teachers' unions who stood as a major obstacle to reform in public education. Their critique of American democracy, and their endorsement of the market model, has provoked a strong reaction among other social scientists.<sup>358</sup> Antagonists fear that even if a voucher system based on the market model could succeed on an experimental basis, on a larger scale, it would skim the best students from government-run institutions and eventually lead to the demise of public education.<sup>359</sup>

### 2. *The Equal Opportunity Model*

The "equal opportunity model" is a variation of the market approach. It is similar in that it includes a private school option and has the potential to create more competition among educational institutions. Unlike a pure market model, however, it does not seek to eliminate public schooling, and its target population is limited to only a small segment of the school community—the poor. In the latter sense, this approach also minimizes the possibility of elitism or the phenomenon of skimming.

The idea was originally formalized by two legal scholars, John Coons and Stephen Sugarman.<sup>360</sup> It is particularly germane to the subject of inquiry in this article for two reasons: first, it supports the philosophical premises underlying most contemporary legislative proposals either under serious consideration or already enacted; second, it represents a public policy that can help resolve the learning gap between minority and white students.<sup>361</sup> The

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

356. *See id.*

357. *See id.* at 26-68, 142-229.

358. *See* HENIG, *supra* note 340; KEVIN B. SMITH & KENNETH J. MEIER, *THE CASE AGAINST SCHOOL CHOICE* (1995).

359. *See* Mary Jane Guy, *The American Common Schools: A Nation at Risk*, 21 J. L. & EDUC. 569 (1992). For a more general overview, see COOKSON, *supra* note 346; AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY* (1993).

360. *See* JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); JOHN E. COONS & STEPHEN D. SUGARMAN, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321 (1971).

361. *See* Stephen D. Sugarman, *Part of the Solution Rather Than Part of the Problem: A Role for American Private Elementary and Secondary Schools in the 1990s*, 31 WM. & MARY L. REV. 681 (1990); Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, U. CHI. LEGAL F. 171 (1991).

equal opportunity model of school choice is a manifestation of the child benefit theory applied with a social conscience.<sup>362</sup>

a. *Theory into Practice.* We no longer need to discuss private school choice in the abstract. It exists in laws emerging from state legislatures and in proposals under serious consideration at the state and national levels. Most of these programs or live proposals are specifically designed to benefit poor communities and to provide them with the economic means to attend private institutions.<sup>363</sup> Most also include a public school option, giving public schools a chance to compete for students, and eliminating any risk of favored treatment for private institutions.<sup>364</sup>

At present scholarship programs have been enacted in two states—Wisconsin and Ohio—as well as the Commonwealth of Puerto Rico. In both Wisconsin<sup>365</sup> and Ohio,<sup>366</sup> the enabling legislation was passed at the urging of minority parents who had become frustrated with the poor quality of public schools available to their children and who wanted to improve their educational opportunities by gaining access to private schools. In Wisconsin, eligibility is restricted to children in Milwaukee whose family incomes do not exceed 175% of the federal poverty level.<sup>367</sup> In Ohio, participation is limited to students in Cleveland, and applications from low-income students are given priority.<sup>368</sup> As mentioned above, the choice plan enacted in Puerto Rico was targeted at families with an annual income not exceeding \$18,000.<sup>369</sup>

362. One of the most compelling essays on the subject is Diane Ravitch, *Somebody's Children: Expanding Educational Opportunities For All Children*, 12 BROOKINGS REV. 4 (1995).

363. See Joseph P. Viteritti, *Stacking the Deck for the Poor: The New Politics of School Choice*, 14 BROOKINGS REV. 10 (1996) (describing recent forms of choice programs in policy arena).

364. As we have seen from our review of the case law, favoring private or parochial schools with resources that are not made available to public institutions could run afoul of the Constitution. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). For an illustration of a law conceived in the spirit of the equal opportunity model to promote educational equity and pass constitutional review, see John E. Coons & Stephen D. Sugarman, *The Scholarship Initiative: A Model State Law for Elementary and Secondary School Choice*, 21 J. L. & EDUC. 529 (1992).

365. See Peter Applebome, *Milwaukee Faces Debate on Vouchers*, N.Y. TIMES, Sept. 1, 1995, at A12; Richard A. Melcher & Michele Galen, *Milwaukee's Lesson Plan*, BUS. WK., Apr. 17, 1995, at 70.

366. Carol Innerst, *Cleveland Experiments With School Vouchers*, WASH. TIMES, July 4, 1995, at A4 (noting that support of Fannie Lewis, black Cleveland legislator, was important in securing passage of school choice legislation).

367. Applebome, *supra* note 365. A recent report by the former superintendent of schools in Milwaukee indicates that a majority of the eligible students come from neighborhoods with the highest concentrations of poverty, 40% are from families headed by a single family, 75-80% are minorities, and they have below average achievement scores when compared to other Milwaukee public school students. HOWARD L. FULLER & SAMMIS B. WHITE, WIS. POL. RES. INST., EXPANDED SCHOOL CHOICE IN MILWAUKEE: A PROFILE OF ELIGIBLE STUDENTS AND SCHOOLS (1995).

368. The constitutionality of the Cleveland Scholarship and Tutoring program was upheld by a state trial court on July 31, 1996, and is currently under appeal. Mary B.W. Taylor, *Ohio Upholds Public Funding of Private and Religious Schools*, N.Y. TIMES, Aug. 1, 1996, at A19.

369. See AHEAD OF THE LEARNING CURVE, *supra* note 264.

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School choice has also garnered serious support from the governors of Connecticut,<sup>370</sup> Pennsylvania,<sup>371</sup> Texas<sup>372</sup> Massachusetts,<sup>373</sup> Minnesota,<sup>374</sup> and California.<sup>375</sup> All favor the appropriation of resources to parents on the basis of economic need in order to allow disadvantaged children to attend the private or parochial schools of their choice. A pilot program proposed for New Jersey would have made vouchers available to all students in Jersey City, a predominantly poor minority district where the public school system has recently been put under state receivership.<sup>376</sup> Legislation has been introduced in Congress that would give tuition scholarships to students in the District of Columbia with a family income that does not exceed 185% of the federal poverty level.<sup>377</sup> Income-based choice proposals have also been introduced in the state legislatures of Arizona, Illinois, Maryland, and New Mexico.<sup>378</sup>

In programmatic form, school choice has come a long way from the market model originally espoused by Milton Friedman in 1955. Rather than a scheme to eradicate public schools, choice in its contemporary format might more aptly be described as an initiative designed to reshape the landscape of American education so that it is more responsive to the needs of the poor. Or, one might say that choice in its present incarnation has been crafted to provide minorities

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370. The plan proposed by Governor John Rowland would provide scholarship money to families who are economically eligible for federal school lunch programs. See Jonathan Rabinovitz, *Governor Renews Call on Vouchers for Schools*, N.Y. TIMES, Sept. 7, 1995, at B6.

371. Governor Tom Ridge's plan would offer equal opportunity grants available on the basis of family income with a gradually accelerated maximum: \$15,000 during the first year of operation, \$20,000 in the second, and \$25,000 in the third, increasing up to \$70,000 by the year 2000. See Laura Miller, Pa. *Governor Unveils Details of Statewide Voucher Plan*, EDUC. WK., May 17, 1995.

372. A bill was passed in the Texas Senate in 1995 that would have provided scholarships for 350,000 low-income families, but it failed in the House of Representatives. See BLUM CENTER, MARQUETTE UNIV., EDUCATIONAL FREEDOM REPORT 4 (1995) [hereinafter BLUM CENTER REPORT].

373. In November, 1995, Governor Weld proposed an educational voucher plan for low-income families and an amendment to the Massachusetts Constitution that would allow parochial school students to participate. See *id.* at 3.

374. In November, 1995, Governor Arne Carlson announced his intention to propose a pilot voucher program for Minneapolis and St. Paul. The awards would be granted on a sliding scale according to income, with an eventual earnings cap of \$41,600 for a family of four. See Dane Smith, *Carlson Proposes School Vouchers*, STAR TRIB. (Minneapolis, St. Paul), Nov. 16, 1995, at 1A.

375. In his annual State of the State message in January, 1996, Governor Pete Wilson proposed opportunity scholarships for students who attend schools that score in the bottom five percent statewide on standardized tests. *California Chief Proposes School Choice Plan*, N.Y. TIMES, Jan. 10, 1996, at A1.

376. See Kimberly J. McLarin, *Jersey City Weighs Effect of Vouchers for Schools*, N.Y. TIMES, Nov. 28, 1994, at B6.

377. See Robert C. Johnston, *D. C. Budget Bill Includes School Voucher Plan*, EDUC. WK., Nov. 8, 1995, at 19. The proposed 1995 "Low Income School Choice Demonstration Act" would allow any child eligible to participate in the national school lunch program to receive a voucher to attend a public or private school of choice. The same act would authorize grants to from to twenty low-income school districts to establish voucher-based school-choice programs. See BLUM CENTER REPORT, *supra* note 372, at 4.

378. See BLUM CENTER REPORT, *supra* note 372, at 1-3.

and the poor with alternatives to a system of public education that for them has proven to be both separate and unequal.

b. *Parochial Schools*. There are a number of reasons why parochial schools, especially Catholic institutions, are pertinent to the equal opportunity model of school choice. First there is the constitutional issue regarding the First Amendment, which this Article addressed earlier, and which will be further discussed in the next section. Next there is the issue of sheer volume.<sup>379</sup> Approximately forty-six percent of all private elementary school students and fifty-one percent of private high school students in the United States attend Catholic institutions.<sup>380</sup> The ratio in large cities with concentrations of black and Hispanic students is higher.<sup>381</sup> If private schools are factored into the national commitment to close the learning gap suffered by racial minorities, then Catholic institutions will figure prominently in determining the outcome.

I do not mean to suggest here that choice should be valued as a way of channeling public funds into Catholic schools. I focus on Catholic schools because they provide the most compelling evidence available on how choice can improve the educational opportunities of disadvantaged children. As will be explained below, choice can serve as a vehicle for the creation and growth of a variety of new institutions—private, parochial, and even public. Choice can help foster the growth of existing institutions in the minority community, such as those which have recently begun to appear under the sponsorship of black Protestant churches. For now, however, the strongest evidence in support of the choice alternative is found in Catholic schools.

The evidence on Catholic schools is both voluminous and impressive. James Coleman and his colleagues produced the first comprehensive study in 1982, finding that Catholic schools were less racially segregated and were associated with higher cognitive achievement than public schools.<sup>382</sup> The study became highly controversial. Reputable social scientists re-analyzing the data claimed that much of the achievement associated with Catholic schools is the result of a self-selection process that brought the best students to their doors.<sup>383</sup>

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379. As of 1990-91, 2,555,932 students attended Catholic schools. DON MCLAUGHLIN ET AL., U.S. DEP'T OF EDUC., PRIVATE SCHOOLS IN THE UNITED STATES: A STATISTICAL PROFILE, 1990-91, (NCES 95-330 1995).

380. National Ctr. for Educ. Statistics, Digest of Education Statistics (1994).

381. Catholic schools are predominantly urban, with 61% located in cities of more than 100,000 inhabitants; 22% are found in areas where the population is more than 25% black; 15% are found in areas where the population is more than 25% Hispanic. ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD 73 (1993).

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

383. See Arthur S. Goldberger & Glen G. Cain, *The Causal Analysis of Cognitive Outcomes in the Coleman, Hoffer, Kilgore Report*, 55 SOC. EDUC. 103 (1982); Jay Noell, *Public and Catholic Schools: A Reanalysis of the 'Public and Private Schools,'* 55 SOC. EDUC. 123 (1982).



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During the same year as the Coleman study, Andrew Greeley completed a report demonstrating that Catholic schools were particularly successful in raising the achievement scores of the most disadvantaged minority youth.<sup>384</sup> Subsequent research by Coleman, Greeley, and their associates confirmed their earlier findings.<sup>385</sup>

The most comprehensive analysis of Catholic education to date was published by Bryk, Lee, and Holland in 1993.<sup>386</sup> It supported the previous research indicating that Catholic schools surpass public schools in academic achievement and that they are particularly outstanding in accommodating the educational needs of the urban poor.<sup>387</sup> Not only had these institutions demonstrated a capacity to close the learning gap between black and white, rich and poor, they did so in less segregated settings than in public education.<sup>388</sup>

The greatest contribution of Bryk and his colleagues was their explanation of how Catholic schools manage to excel. Striking down the myth that Catholic schools are selective or exclusive, they attributed student performance to the very characteristics of the schools themselves, which read like a classic analogue from the effective schools literature.<sup>389</sup> But the real story of Catholic education has to do with its structure of values: the sense of community, the ethos of caring, and the fundamental belief that all children are educable at the highest level.<sup>390</sup>

Catholic education advances the egalitarianism envisioned by the Court in *Brown*. Borrowing from a term first used by Coleman, Bryk and his associates concur that "Catholic schools better approximated the common school ideal,"<sup>391</sup> assimilating the poor, the alienated, and the culturally distinct into the mainstream of American life. They convey values that are the foundation of a democratic society: compassion, tolerance, and commitment to justice.<sup>392</sup>

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384. See ANDREW M. GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* (1982); see also JAMES G. CIBULKA ET AL., *INNER-CITY PRIVATE ELEMENTARY SCHOOLS: A STUDY* (1982) (analyzing data of effectiveness of inner-city private elementary schools.)

385. See JAMES S. COLEMAN & THOMAS HOFFER, *PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES* (1987); Thomas Hoffer et al., *Achievement Growth in Public and Private Schools*, 58 SOC. EDUC. 74 (1985).

386. See BRYK ET AL., *supra* note 381.

387. See *id.* at 247, 272-94.

388. See *id.* at 73, 289.

389. These include such factors as high standards, a core academic curriculum, decentralized governance, strong leadership, parental involvement, an orderly environment, and dedicated teachers. See *id.* at 81-168, 245-328; see also Ronald Edmonds, *Effective Schools for the Urban Poor*, 37 EDUC. LEADERSHIP 15 (1979) (describing characteristics of effective school).

390. See BRYK ET AL., *supra* note 381, at 126-48, 272-96; see also PAUL T. HILL ET AL., *RAND CORP., HIGH SCHOOLS WITH CHARACTER* (comparing values of Catholic schools with comprehensive high schools and magnet schools).

391. BRYK ET AL., *supra* note 381, at 57.

392. See *id.* at 134-35.

Although many children who attend them are not Catholic, Catholic schools are religious institutions.<sup>393</sup> Their value premises spring from the Bible and its interpretation through an ecclesiastical hierarchy of dogma.<sup>394</sup> One might reasonably argue that their record provides us with an illustrative case study of the compatibility of theologically based education and the republican ideals of civic virtue. Nevertheless, as sectarian institutions, their governmental funding is contestable under the federal and state constitutions.

### C. *Values in Education*

It is the very character of these sectarian schools that raises constitutional questions. The value premises underlying their curriculum are based on an understanding of a higher order of being, defined through theological teachings about the relationship between that which is human and that which is divine.<sup>395</sup> Separationists have effectively argued that public support of such institutions is a violation of the Establishment Clause of the First Amendment. While the Court has accepted their arguments and proscribed direct support, the Rehnquist Court also has been sympathetic to the idea of providing aid to parents who would choose religious schools for their children.<sup>396</sup> This jurisprudence is indicative of a more pronounced inclination of the Court to enforce aggressively the free exercise rights of individuals in interpreting the First Amendment.

Some state courts have adopted stricter standards of separation in interpreting their own constitutions, and occasionally even the U.S. Constitution, holding that public support of either a direct or indirect kind must be limited to government run schools.<sup>397</sup> The central question raised in this Article is whether such strict separationist interpretations advanced by some of the state courts violate the Court's standards of religious freedom. The answer to this question requires an appreciation for the essential role that values play in education: how they shape the overall character of both public and parochial schools and how they may influence the decisions that parents make in choosing schools for their children. Answering affirmatively, this Article will argue that the strict separationist position is based on faulty assumptions about the nature of public education and a fundamental misunderstanding of what it means for a person to have religious convictions.

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393. Approximately 13.2% of the students in Catholic schools are not Catholic. See Telephone interview with Mary Jo Wilkins, National Catholic Education Association (1996).

394. See *id.*

395. For an exploration of the meaning of religious consciousness, see MIRCEA ELLADE, *THE SACRED AND THE PROFANE* (1950).

396. See *supra* Subsection I.B.3.

397. See *supra* Section II.B.

## Religious Freedom and Educational Opportunity

### 1. *The Myth of the Common School*<sup>398</sup>

Public schooling in the United States grows out of a liberal tradition, betraying both a tolerance for and a suspicion of religious belief. Describing its basic tenets in a Jeffersonian context, we have already noted that behind the high wall of separation was a predisposition towards government authority over religiously motivated conduct.<sup>399</sup> This inclination was a result of a rationalism that emerged from the European Enlightenment<sup>400</sup> and a genuine desire to preserve the public order. Religious thought was not given an elevated position in the intellectual scheme of liberalism because, unlike the scientific discoveries of the era from which it sprung, it was a matter of faith, and could not be verified by empirical evidence.<sup>401</sup> And since religious freedom could lead to dissension among the populace, the influence of religious thought had to be kept in check to protect against a complete breakdown of civil society. Of course, liberalism was an act of faith in itself, founded on an exaggerated confidence in the power of human inquiry, the potential of science, the pretence of objectivity, and, in our own generation, the sacred position of the common school.

a. *Mann's Protestantism.* Until the mid-nineteenth century, it was not unusual for the government to support church-run schools in New York, New Jersey, Connecticut, Massachusetts, and Wisconsin.<sup>402</sup> The common school was to correct that, in the name of the republic. Open to all, public education was to take the unwashed masses who immigrated from Europe and instruct them at public expense in literacy, morality, and civic virtue.<sup>403</sup> As Horace Mann expounded in the *Twelfth Annual Report to the Boston School Committee*: "It may be easy to make a Republic, but it is very laborious to make Republicans."<sup>404</sup> Mann and other common school advocates swore allegiance to religious neutrality, calling for "the entire exclusion of religious teaching"<sup>405</sup>

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398. This heading is taken from the title of a book on the history of public education in Massachusetts, CHARLES L. GLENN, *THE MYTH OF THE COMMON SCHOOL* (1988).

399. See *supra* Subsection I.A.2.a.

400. See JOHN GRAY, *LIBERALISM* 9-25 (2d ed. 1995). For a history of the period and an analysis of its influence on Western thinking, see PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION* (1977).

401. See AMY GUTMAN, *DEMOCRATIC EDUCATION* (1987); Susanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995).

402. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 166-67 (1983).

403. See LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION* 29-47 (1951). See generally *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MAN* 59-112 (Lawrence A. Cremin ed., 1957) (excerpting 12 annual reports prepared by Mann for Boston School Committee).

404. See CREMIN, *supra* note 403, at 70-71.

405. Horace Mann, *First Annual Report to the Board of Education* (1837), cited in GLENN, *supra* note 398, at 163.

from within its walls. But, in fact, Mann and his collaborators were committed to incorporating religion into the curriculum.<sup>406</sup> By 1840 he would publicly explain to a group of his teachers how best to instruct the children within their charge, urging that they “train them up to the love of God and the love of man: to make the perfect example of Jesus Christ lovely in their eyes; and to give to all so much of the religious instruction as is compatible with the rights of others and with the genius of our government.”<sup>407</sup>

Mann’s “religious neutrality” involved a daily reading of the King James Bible in the classrooms of the common school, a practice that was potentially offensive to Catholics, Jews, and even certain Protestant sects. Mann truly believed that if teachers and students read the Bible, his Bible, without comment, it was a neutral act that would permit them to discover its truths on their own.<sup>408</sup> In reality the common school was an instrument for the propagation of a mainstream Protestant morality,<sup>409</sup> drenched in a nativist philosophy that prepared the nation for the Blaine Amendment and the mentality it fostered throughout the states.<sup>410</sup> This chauvinism motivated Catholic leaders to seek public support for the establishment of their own school system.<sup>411</sup>

b. *Dewey’s Secularism.* One of the most influential thinkers on American education in the twentieth century, John Dewey was resolute in his determination to rid public schools of any religious influence. A devout secularist steeped in the liberal tradition,<sup>412</sup> Dewey had a celebrated contempt for organized religion, its otherworldliness, and its “servile acceptance of imposed dogma.”<sup>413</sup> He was thoroughly persuaded of the power of scientific inquiry to derive the moral and pedagogical truths that belonged in the schools, and he dismissed religious teaching as a worthless and counterproductive endeavor.<sup>414</sup>

406. Thus, his *First Report* continues, “Entirely to discard the inculcation of the great doctrines of morality and of natural theology has a vehement tendency to drive mankind into opposite extremes.” GLENN, *supra* note 398, at 163.

407. HORACE MANN, *WHAT GOD DOES AND WHAT HE LEAVES FOR MAN TO DO IN THE WORK OF EDUCATION* (1840), *cited in* GLENN, *supra* note 398, at 163.

408. For a general history of the common school phenomenon, see FREDERICK M. BINDER, *THE AGE OF THE COMMON SCHOOL, 1830-1865* (1974).

409. See generally GLENN, *supra* note 398, at 146-206; STANLEY K. SCHULTZ, *THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860*, at 103-56 (1973).

410. See *supra* Subsection II.A.2.

411. See *THE GREAT SCHOOL WARS*, *supra* note 170, at 3-78.

412. For a sympathetic intellectual biography of Dewey, see ALAN RYAN, *JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM* (1995).

413. JOHN DEWEY, *A COMMON FAITH* 7 (1934), *cited in* McConnell, *Religious Freedom*, *supra* note 5, at 123 [hereinafter *A COMMON FAITH*]; see also JOHN DEWEY, *DEMOCRACY AND EDUCATION* 219-30, 326 (1916).

414. Writing on religion, Dewey claimed there is “nothing left worth preserving in the notions of unseen powers, controlling human destiny to which obedience, reverence and worship are due.” *A COMMON FAITH*, *supra* note 413, at 7.

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Dewey's "pragmatism" enlisted the educational process as a force for social change; but his work would be distorted by latter-day progressives who used the pretence of scientific objectivity and authority to impose their own orthodoxy within the profession, eventually provoking criticism from Dewey himself.<sup>415</sup> Through the century the educational system retained a steadfast secularism that was a hallmark of Dewey's liberalism.<sup>416</sup> Nor would professionals forsake the cultural mission embraced by both Mann and Dewey: the inculcation of societal values for the sake of civic harmony. In the grip of a rigid bureaucratic system developed by turn of the century reformers,<sup>417</sup> secular humanism became an oppressive force for those minorities who were not like-minded. Worst yet, given the political nature of public schooling in America, those interests powerful enough to wrest control of the bureaucracy enjoyed inordinate influence over decisionmaking.<sup>418</sup> Stephen Arons, one of the first legal scholars to address the problem of the public school culture, warned:

The history of conflict over school orthodoxy changed profoundly with the advent of compulsory attendance laws. Once the audience became virtually captive and the control became majoritarian, it was necessary for a variety of social groups to contest with each other over whose values and world view would be adopted by the local public school. Parents began to be viewed by educators as presumptively incompetent; and schooling became less an issue of individual development and family aspiration and more an issue of social needs and group values.<sup>419</sup>

To support his observation, Arons relates three case studies touching on disputes ranging from curriculum control, to home education, to government control over private schools.<sup>420</sup> But the examples are legion. Stephen Bates tells the story of a group of fundamentalist parents in Tennessee who did not want their children exposed to certain literature adopted by the local school

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415. See JOHN DEWEY, *EXPERIENCE AND EDUCATION* (1938). On the history of the Progressive Movement in education, see LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957* (1961).

416. See STEVEN C. ROCKEFELLER, *JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM* (1991).

417. On the history of the reform movement, see RAYMOND E. CALLAHAN, *EDUCATION AND THE CULT OF EFFICIENCY* (1962); PAUL E. PETERSON, *THE POLITICS OF SCHOOL REFORM, 1870-1940* (1985); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974).

418. For an analysis of school politics at the local level and its negative impact on the poor, see JOSEPH P. VITERITTI, *ACROSS THE RIVER: POLITICS AND EDUCATION IN THE CITY* (1983). For a more general treatment of the political environment surrounding policy making at the local, state and federal levels, see FREDERICK WIRT & MICHAEL KIRST, *SCHOOLS IN CONFLICT* (3d ed., 1992); see also, CHUBB & MOE, *supra* note 355, at 26-68, 142-229 (discussing institutional perspective, context, and school organization).

419. STEPHEN ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* xi (1983).

420. See *id.*

board.<sup>421</sup> Stephen Carter has given an account of how the Board of Education in New York City distributed condoms to students against the will of their parents and in violation of their religious beliefs.<sup>422</sup> In the New York case, parents were not even initially granted the opportunity to opt out of the program if it offended their faith; the Board of Education—or four of its seven members—had decided that it knew what was in the best interest of these students. The problem of clashing values within public education became more obvious as the public school population grew more diverse.<sup>423</sup> Beyond the issue of an underlying systemic philosophy lies the extraordinary power of individual educators to mold the young impressionable minds of students who sit before them as a captive audience.<sup>424</sup> Public education is value laden, and the values that it attempts to instill under the guise of a public philosophy are not always supported by the entire community it presumes to serve.

Reasonable people could disagree as to whether Dewey's secularism was more threatening to the spirit of democracy than was Mann's Protestantism, or the ever-present possibility of an insensitive or opinionated school board. But to focus on such a futile debate would distract us from the important lesson to be learned. The point here is more profound. When individuals have the power to determine the values that should be taught to other people's children, it is a potentially threatening condition in a free society. Whether the orientation of the school master is driven by faith, science, philosophy, ideology, ignorance, arrogance, or raw prejudice, it has the same consequence for the parent whose principles are being undermined by public authority.

## 2. *Misconstruing Religion*

Let us consider further the predicament of a religious minority whose child attends public school. Take, for instance, the Orthodox Jewish parents in New York City whose daughter or son is required to attend a sex-education class that condones behavior the family believes to be immoral.<sup>425</sup> What alternative do the parents have but to subject their children to teachings that contradict their religious convictions? According to *Pierce*,<sup>426</sup> although compulsory

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421. See STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993).

422. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 171 (1993).

423. See, e.g., Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, YALE L. & POL'Y. REV. (1996) (arguing that 'common school' is incapable of accommodating diverse religious and philosophical orientations that emerge in pluralist society).

424. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* 52-55 (1983); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Religious Orthodoxy": Value Training in the Public Schools*, U. ILL. L. REV. 15 (1987).

425. See George Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863 (1988) (analyzing tensions between religious freedom and public education).

426. *Pierce v. Society of Sisters*, 268 U.S. 510, 518-19 (1925).

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education laws are permissible under the Constitution, parents may not be required to educate their children in a public school. Therefore, if the parents are offended by the values conveyed by a school, they can leave. If they do not have access to a public school to their liking—one that does not undermine the religious principles they want instilled in their children—they may choose a private institution.

Of course, for those parents who make a decision to leave the public school, the choice usually comes at a cost: They will have to take financial responsibility for the private or parochial school tuition expense. In other words, to avoid subjecting their children to lessons in a government-run institution that undermine their religious principles, the parents must assume a burden that is not imposed on the majority. One might say that this minority's religious freedom is circumscribed the moment it chooses to act according to its conscience. How can we in a society that claims to protect religious freedom explain or justify the limit imposed on the religious liberty of these individuals? What state interest has been protected or advanced by the presumptuous school board?

As noted above, the liberal approach to religious freedom entertains a serious distinction between the rights of conscience and religiously motivated activity.<sup>427</sup> Religion is to be tolerated, but not supported. When taken to excess—and who knows when that occurs—religious devotion can create dual loyalties among the populace and compromise the well-being of the state. Liberalism assumes a basic tension between the City of God and the City of Man, and when the state serves as arbiter between the two, it is expected to favor the latter. Neither this assumption nor this predisposition have merit.

a. *Civic Virtue*. Opponents of school choice often argue their case from the liberal position. They claim that government support to parents who opt out of public schools jeopardizes not only public education, but the commonwealth itself, since the state relies on public schools to inculcate a public philosophy.<sup>428</sup> Their assessment of the role of public education is a fair one, but their memories have failed them. They do not seem to recall that public education in America has betrayed a historic bias, at one time mainstream Protestant and nativist, at another secular and anti-religious, and at others beholden to those who act on their own behalf but articulate their political agenda in terms of the public interest.<sup>429</sup> Moreover, public education has largely failed the poor, investing them with a system of schooling that is separate, unequal and ineffective.<sup>430</sup>

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427. See *supra* Subsection I.A.2a.

428. See *Guy, supra* note 359.

429. See *supra* Subsection III.C.1.

430. *Id.*

The suggestion here from choice critics is that educating children in private institutions does not contribute to public-spiritedness, or what republicans call civic virtue.<sup>431</sup> The research on Catholic schools does not support that assertion; to the contrary it shows that these schools impart values that are supportive of the democratic ideal.<sup>432</sup> There is nothing inherently antagonistic between religion and civic virtue.<sup>433</sup> American democracy was developed by and among a people who were deeply religious.<sup>434</sup>

Tocqueville, perhaps the most insightful student of American culture, and an admirer of the constitutional separation of church and state, observed more than 150 years ago that religion, by helping to overcome the excessive individualism toward which free societies are prone, cultivates a sense of caring for one's fellows that promotes the republican spirit.<sup>435</sup> Empirical studies conducted by contemporary scholars indicates a strong association between church membership and civic virtue. Just a decade ago, Robert Bellah and his associates, completing a massive five-year investigation of American values found, "Religion is one of the most important of the many ways in which Americans 'get involved' in the life of their community and society."<sup>436</sup> The empirical literature from political science is replete with evidence of how various intermediary social institutions, including ecclesiastic ones, prepare individuals with the skills for meaningful participation in political life.<sup>437</sup> Of particular note is a landmark study on civic volunteerism led by Sidney Verba.<sup>438</sup> Verba's team identified a strong connection between religious involvement and civic involvement.<sup>439</sup> Describing church organizations as the least stratified, most democratic of our social units,<sup>440</sup> they found that religious institutions play an especially crucial role in "enriching the stockpile of participatory factors for those who are otherwise disadvantaged."<sup>441</sup> In this sense, the church functions as a force for advancing political and social equality.

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431. See *supra* Subsection I.A.2b.

432. See BRYK ET AL., *supra* note 381, at 134-35; HILL ET AL., *supra* note 390.

433. See James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153, 159-60 (1991) (arguing that religious schools with strong values may fill important void in society where family structure is so vulnerable).

434. See *supra* Subsection I.A.1 and accompanying notes.

435. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 408-14 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966).

436. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 219 (1996).

437. See SIDNEY VERBA & NORMAN H. NIE, *PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY* (1972).

438. See SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995).

439. See *id.* at 75-79.

440. See *id.* at 243-46, 317.

441. *Id.* at 519.



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Few need to be reminded of the important role that the church has historically played in black society—not only as a refuge from the abuses of slavery, but as an engine that propelled the civil rights movement.<sup>442</sup> Its central place in the black community remains a fact of everyday life. As Eric Lincoln and Lawrence Mamiya knowingly remark, “The Black Church has no challenger as the cultural womb of the black community.”<sup>443</sup> It has given birth to community-service centers, day-care centers, crisis-intervention centers, soup kitchens, nursing homes, low-income housing, credit unions, banks, insurance companies, and, perhaps most relevantly to the present discussion, schools.

What a hopeful presence such schools must be, when perceived as an alternative to failing public schools in the inner city. Lincoln and Mamiya pointed to an elementary and junior high school run by the Concord Baptist Church in Brooklyn and the elementary academy operated by the Bethel A.M.E. Church in Baltimore as examples.<sup>444</sup> We might add to the list the private schools founded by the Rev. Richard Tolliver in Chicago’s Washington Park neighborhood,<sup>445</sup> and by the Rev. Floyd Flake in St. Albans, Queens.<sup>446</sup> Unfortunately the growth of such innovative ventures is stifled by the strict separationist public policy implemented in most states that prohibits aid to parents who would choose these schools for their children.<sup>447</sup>

I do not mean to suggest here that the allocation of public funds for poor children to attend schools of their choice is warranted purely on utilitarian grounds. My objective here is to refute the utilitarian argument against choice, which portrays it as a threat to the civic virtue that is supposed to be conveyed through public schooling. In a broader sense, the point is to explain that choice can serve to advance the egalitarian values cherished within our democratic system. But in the final analysis, choice is an issue that pertains to a more fundamental constitutional question.

b. *Matters of Conscience.* One might argue for school choice on the grounds that it will improve the educational opportunities of the poor, or that it may contribute to strengthening an institution that performs such a vital role

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442. See JOHN H. FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* (4th ed., 1988); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984); HART M. NELSEN & ANN K. NELSEN, *THE BLACK CHURCH IN THE SIXTIES* (1975).

443. C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE* (1990).

444. See *id.* at 190-91.

445. See Flynn McRoberts, *Academy is Reborn By Faith*, CHI. TRIB., May 7, 1995, §2, at 1.

446. See Somini Sengupta, *Meshing the Sacred and the Secular*, N.Y. TIMES, Nov. 23, 1995, at B1.

447. See, e.g., Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, U. CHI. LEGAL F. 171, 189 (1991) (arguing that subsidized private choice can be effective tool for black Protestant clergy who might be inclined to participate more directly in education of their congregations).

in addressing our most persistent social dilemma.<sup>448</sup> In the end, however, choice is very much an issue of religious freedom, one that we cannot understand without appreciating the true meaning of religious life. Liberalism forces us to treat religion as a private matter,<sup>449</sup> an unreasoned prejudice,<sup>450</sup> a "hobby" as Stephen Carter has described it.<sup>451</sup> The liberal approach assumes that individuals can marginalize religious convictions from the general course of life, keep conscience in its place, and live around it rather than through it. It is no wonder that some commentators, observing public life in America, have claimed that our politics is hostile to religion.<sup>452</sup>

The assertion of a divisible conscience makes no sense for the minority who is serious about religion. For them, whether they be Christian Fundamentalists, Mennonites, Moslems, Native Americans, or devout members of "mainstream" Judeo-Christian congregations, religion is all-encompassing. It is a way of life.<sup>453</sup> We have already considered the unfortunate predicament of the religious minority whose child attends public school, and the burden imposed by the state through the power of the school board. For the deeply religious family whose life is guided by doctrines of faith, the situation is even more grave. For some of these families, it is not possible to separate religious upbringing from education. Education is the route through which religious and moral values are imparted to the child. Therefore, the selection of a sectarian school is not merely a matter of preference, it is a matter of conscience. It is a way of practicing one's faith.

While the interconnection between education and religion is sometimes difficult to appreciate within a secular society, it was fully understood during the founding era, when education was generally assumed to be the responsibility of the ecclesiastic congregation.<sup>454</sup> The Supreme Court, through its interpretation of the Establishment Clause, has prohibited government support for religious institutions. But when the state withholds public support from individuals whose religious convictions require them to educate their children according to their faith, it imposes severe burdens on their free exercise rights. When the state denies such support to religious minorities who are poor, who otherwise cannot afford to bear the cost of a secular education, it virtually

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448. The term is borrowed from GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

449. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

450. See Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585 (1992).

451. Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 (providing critical examination of liberal position).

452. See, for example, RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

453. See George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707 (1993).

454. See BAILYN, *supra* note 22.

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forecloses the opportunity for them to educate their children according to the requirements of their conscience.

### IV. CONCLUSION: INTEGRATING LIBERTY WITH EQUALITY

Beginning with *Brown*, the principle of equality, as applied through the Equal Protection Clause of the Fourteenth Amendment, has emerged as an important instrument for weighing and advancing educational opportunity for disadvantaged minorities in twentieth-century America.<sup>455</sup> This Article has shown that school choice, as it is presently manifested in the policy realm, can serve as an effective link between the unfulfilled aspirations of *Brown* and educational practice at the school level.<sup>456</sup> Providing poor children with the economic means to attend private institutions expands the educational horizons for a class of children whom public education has failed. It gives them access to learning that was previously available only to those who could afford to pay for it. It begins to sever the tie between family income and educational opportunity.

Extending choice to sectarian institutions raises serious constitutional questions regarding the proper balance between the Establishment Clause and the Free Exercise Clause of the First Amendment. The Supreme Court has developed a jurisprudence, based upon the child benefit theory, that allows us to resolve the dilemma by distinguishing between direct aid to religious institutions and aid to individuals who might choose to attend these institutions.<sup>457</sup> Contrary to the principle set down by the Burger Court in the second prong of the *Lemon*<sup>458</sup> test, this new jurisprudence is more directed toward protecting the religious freedom of individuals than determining whether the protection of such liberties to the fullest extent might incidentally benefit a particular religious organization or denomination. This emerging constitutional jurisprudence does not presuppose a tension between the flourishing of religion and the general public interest.

At the same time a jurisprudence continues to thrive in many states that imposes stricter standards of separation than those propounded by the Court, raising the prospect that religious institutions will be excluded from participation in choice programs. The prototype of this case now exists in Wiscon-

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455. See *supra* Section III.A. (tracing evolution of equality principle in education).

456. See *supra* Subsection III.B.2. (describing equal opportunity model of school choice).

457. See *Zobrest v. Catalina Foothills*, 509 U.S. 1 (1993); *Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

458. *Lemon v. Kurtzman*, 403 U.S. 602, 668 (1971). The purpose and effect standard was actually just set down in *Abington School District v. Schempp*, 374 U.S. 203 (1963). For indications of the Rehnquist Court's retreat from the *Lemon* standard, see *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361 (1984); *Mueller v. Allen*, 463 U.S. 388 (1983).

sin,<sup>459</sup> but such challenges will become more common as school choice legislation is enacted in the states. The restrictive policy imposed by some of the state courts has the potential of creating a constitutional crisis—one that we can fully comprehend only by intermingling First Amendment with Fourteenth Amendment reasoning.

According to the *Pierce*<sup>460</sup> decision, parents have a right to decide upon the kind of education given to their children. Like *Brown*, however, *Pierce* is an empty promise if economics is the ultimate factor in determining the kinds of choices parents have. The choice of a religious-based education should not only be made available to those who have the means to afford it. Poor parents who are religious ought to have an opportunity to raise their children in a religious tradition that is supported by the schools their children attend. Parents should not be forced to compromise their values for fear of losing public support for a function as essential as education. The freedom to practice religion as one sees fit ought to be made available to all on an equal basis.

#### A. *The Limits of Liberalism*

Disestablishment is one of the most lasting accomplishments of Jeffersonian liberalism. While it required some time to take full effect, the Bill of Rights eventually put an end to the intermingling of ecclesiastic power with government power in colonial America.<sup>461</sup> Liberalism, however, reached its practical and philosophical limit as applied to schooling in the nineteenth and twentieth centuries, when the principles it adopted were promoted on the basis of contradictory and faulty premises. While on the one hand liberalism employed the public school as a conduit for public values, on the other hand, it defended the content of its curriculum on the grounds of moral neutrality.<sup>462</sup> It negated the contribution that mediating institutions, especially religious ones, could make toward developing a civic culture. In the end liberalism fostered a religious tolerance that protected all but those who were deeply religious; it tended to dismiss the objections of conscience put forward by the most unconventional religious groups, leaving vulnerable the very minorities most deserving of the constitutional protection promised by the Bill of Rights.<sup>463</sup>

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459. See *Thompson v. Jackson*, No. 95-2153-OA, L.C. #s 95CV1982 and 95CV1997 (Wis. Aug. 25, 1995).

460. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923).

461. See *supra* Section I.A (regarding early history of religious freedom in America). Incorporation through the 14th Amendment was a gradual process, see *supra* Subsection II.A.1., and was not applied specifically to the Establishment Clause until the *Everson* decision. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

462. See *supra* Subsection III.C.1.

463. See *supra* Subsection III.C.2.a.

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If twentieth-century liberalism was grounded on contradictory philosophical premises, the Court was culpable in perpetuating these theoretical illusions.<sup>464</sup> To the extent that the Court lent support to religious schools, it did so on the pretense that one could separate the instructional and sectarian components of their curricula,<sup>465</sup> even though on other occasions it had found the secular and religious missions of these institutions hopelessly intertwined.<sup>466</sup> The Court swore allegiance to religious freedom and equal educational opportunity, but at times it created legal obstacles that would virtually deny the poor access to quality schools because of the schools' religious orientation.<sup>467</sup>

While those educators behind the common school movement understood the power of the classroom in promoting civic virtue, they also exhibited a certain naivete. They were so entrenched in their own ideological inclinations that they were incapable of recognizing how their pedagogy was biased against those who were not believers. Nor could they foresee how schools immersed in the political process could fall prey to the agenda of powerful interests. In the end the greatest flaw in the common school ideology was its failure to perceive how indoctrination according to a government-determined orthodoxy, whether religious or secular,<sup>468</sup> undermined the democratic ethos it had hoped to engender.

### B. *The Triumph of Pluralism*

Students of democracy as early as Tocqueville,<sup>469</sup> and as recent as Stephen Carter,<sup>470</sup> have identified the important role that religious organizations have played in mediating between government and citizen. By providing "an independent moral voice,"<sup>471</sup> the church, synagogue, or mosque counterbalances the power of an aggressive state. As Madison explained it, a robust religious pluralism is a bulwark of the republic and a defense against tyranny.<sup>472</sup> Madison's vision of a thriving pluralism furnishes us with a

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464. See Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in RELIGIOUS LIBERTY IN THE SUPREME COURT 483 (Terry Eastland ed., 1993) (describing inadequacy of liberal jurisprudence in understanding religious forms of behavior).

465. See *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

466. See *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971) (finding that religious and secular missions are "inextricably intertwined"); *Wolman v. Walter*, 433 U.S. 229, 250 (1977) (noting "impossibility" of separating two).

467. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825, 828 (1973); *Essex v. Wolman*, 406 U.S. 912 (1972).

468. Under the neutrality principle the Supreme Court has at times specifically ruled against imposing a "religion of secularism." See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952).

469. TOCQUEVILLE, *supra* note 435, at 417-18.

470. CARTER, *supra* note 422, at 33-43.

471. *Id.* at 36-37.

472. See *supra* Subsection I.A.2.c.

political theory that shapes a jurisprudence of religious freedom, one that integrates the liberty interests of the Free Exercise Clause with the egalitarian concerns of the Equal Protection Clause. Notwithstanding *Employment Division v. Smith*,<sup>473</sup> this jurisprudence is taking shape in the decisions emergent from the Rehnquist Court.

One might uncover the foundation for this pluralistic approach to the Constitution in *Walz*,<sup>474</sup> where Justice Harlan prescribed "an equal protection mode of analysis"<sup>475</sup> and praised religious organizations for their unique contribution to the "pluralism of American society."<sup>476</sup> Or we might turn to the majority opinion in *Mueller*,<sup>477</sup> where then-Justice Rehnquist praised the Minnesota tax credit which "fairly equalize[d] the tax burden."<sup>478</sup> Nevertheless, there is a greater consistency evident among the decisions of the Rehnquist Court itself. As one legal scholar analyzes the case law, the Court has replaced a separationist model of religious freedom with an equality model.<sup>479</sup>

Two rules are inherent in the equality model: first, that all religions be granted equal status by government; secondly, that religion and non-religion be treated the same.<sup>480</sup> The case pattern supporting this model is evident in the financial aid decisions of the Rehnquist Court, beginning with *Witters*,<sup>481</sup> calling for equal treatment for students attending sectarian institutions. The pattern is also apparent in the Court's free speech cases beginning with *Mergens*,<sup>482</sup> which applied Fourteenth Amendment reasoning to uphold the Equal Access Act. The equality rule most recently came into play in *Rosenberger*,<sup>483</sup> a case involving both free speech and financial aid.

A review of these decisions leads to the conclusion that the Court would uphold a policy of school choice involving sectarian schools provided that certain requirements are met: that funds are allocated to the child rather than the institution, that both public and nonpublic schools are permitted to

473. *Employment Div. v. Smith*, 494 U.S. 872 (1990). See *supra* notes 137-38. The *Smith* decision is understood to have overturned the strict scrutiny standard set by the Court in *Sherbert*, 374 U.S. 398 (1963), which required any law interfering with a religious practice to satisfy a compelling government interest. In 1990 Congress passed the Religious Freedom Restoration Act (RFRA) 42 U.S.C. § 2000bb (1994), which restored the compelling interest standard. The constitutionality of this law is being challenged. See *Belgard v. Hawaii*, 883 F.Supp. 510 (D. Haw. 1995) (holding RFRA constitutional). But see *Flores v. City of Boerne*, 877 F.Supp. 355 (W.D. Tex. 1995) (deeming RFRA unconstitutional).

474. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

475. *Id.* at 696.

476. *Id.* at 689.

477. *Mueller v. Allen*, 463 U.S. 388 (1983).

478. *Id.* at 396.

479. See *Esbeck*, *supra* note 5, at 614-22.

480. *Id.* at 616.

481. *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986). See generally *supra* Subsection I.B.3.a.

482. *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). See generally *supra* Subsection I.B.3.b.

483. *Rosenberger v. Rectors of the Univ. of Va.*, 115 S. Ct. 2510 (1995).

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participate, and that all religious institutions are treated the same. A school choice policy that makes public assistance available on the basis of financial need would provide the poor with an unprecedented opportunity to receive a quality education and to exercise religious freedom in whatever way they saw fit. It would promote full equality.

### C. *The Imperatives of Federalism*

In 1987 a group of students in the state of Washington sued in federal court after their high school refused them permission to form a religious club. They argued that school officials had violated the Equal Access Act (EAA), as well as the Free Speech, Free Exercise, Free Association, Equal Protection, and Due Process Clauses of the Constitution. The district court<sup>484</sup> and court of appeals<sup>485</sup> both denied relief on the grounds that the Washington state constitution bars religious organizations from meeting on school premises. The Supreme Court, however, vacated the decision and remanded it for reconsideration in light of *Mergens*.<sup>486</sup> After the district court again failed to provide relief for a second time,<sup>487</sup> the court of appeals overturned its decision.<sup>488</sup>

Citing the Supremacy Clause of the Constitution, the Ninth Circuit Court of Appeals ruled that the EAA preempts state law.<sup>489</sup> Focusing on the legislative intent behind the EAA, the court did not find it necessary to deal with the constitutional claims of the plaintiffs. The lesson in federalism to be drawn from the case, however, is clear. The court noted, "Many states have establishment clauses that are more restrictive than the federal establishment clause."<sup>490</sup> It concluded, nevertheless: "State constitutions can be more protective of individual rights than the federal Constitution. . . . However, states cannot abridge rights granted by federal law."<sup>491</sup>

One might add: nor may the states abridge rights protected by the federal Constitution. State practices that exclude sectarian institutions from participation in school choice programs on the basis of their religious affiliation run afoul of the standards established by the Supreme Court and impose an unfair burden on those parents who might be inclined to choose those schools. Such provisions impose a particularly harsh burden on the free exercise rights of the poor. When placed under judicial scrutiny, they should be struck down.

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484. See *Garnett v. Renton Sch. Dist.* No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987).

485. See *Garnett v. Renton Sch. Dist.* No. 403, 865 F.2d 1121, *modified*, 874 F.2d 608 (9th Cir. 1989).

486. *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

487. See *Garnett v. Renton Sch. Dist.* No. 403, 772 F. Supp. 531 (W.D. Wash. 1991).

488. See *Garnett v. Renton Sch. Dist.* No. 403, 987 F.2d 641 (9th Cir. 1993).

489. *Id.*

490. *Id.* at 646.

491. *Id.*

#### D. *Summary*

Public education plays an essential role in American society in promoting a set of core values that perpetuate our system of democracy. Nevertheless, history demonstrates that at times the public schools have been controlled by leaders who are either indifferent, insensitive, or inhospitable to certain religious minorities. School administrators of this sort, who act in the name of government, are the very ones from whom we need a constitutional shield if we are to exist as a free people. The same system of public schooling, which at times has betrayed an ugly religious or anti-religious bias, has failed generations of poor and minority children who have come to it in pursuit of a decent education.

In the final analysis, the resolution of the choice issue in education must be informed by an appreciation of what constitutionalism means within a free society. Our Constitution, and especially its Bill of Rights, was written to protect individuals from excessive governmental power. These protections, originally designed with the federal government in mind, were eventually applied to the states by incorporation through the Fourteenth Amendment. The First Amendment was crafted to ensure that the religious rights of individuals would not be compromised by public authority. The Establishment Clause serves that purpose only to the extent that it advances the free exercise rights of individuals; when disestablishment is invoked to burden free exercise rights, it undermines the very Constitution of which it is a part. While our federalism permits the states to define rights more broadly than analogous constitutional rights, it cannot tolerate the abridgement of those rights by the states.

By allowing government to provide financial aid to parents whose children attend sectarian schools, the Court has discovered a way to accommodate individual religious freedom without violating the disestablishment precepts of the First Amendment. In this sense, school choice is a celebration of our constitutionalism: allowing religious minorities to educate their children in accordance with the principles of their faith without foregoing the benefit of a free education; making such alternatives available to all, regardless of economic considerations; providing poor children with access to private institutions when public schools are unable to accommodate their educational needs; integrating our commitment to religious freedom with our aspiration for educational opportunity; and, in the end, promoting both religious and educational equality for all people.