

# READING *ZELMAN*: THE TRIUMPH OF PLURALISM, AND ITS EFFECTS ON LIBERTY, EQUALITY, AND CHOICE

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## INTRODUCTION

In June 2002, the United States Supreme Court approved an Ohio program that made available publicly supported vouchers for children in Cleveland to attend private (nonsectarian) and religious schools. Writing for a five-member majority in *Zelman v. Simmons-Harris*,<sup>1</sup> Chief Justice William Rehnquist held that the Ohio program did not violate the Establishment Clause of the First Amendment because it (1) has a valid secular purpose of providing educational assistance to poor children; (2) is neutral with respect to religion and provides assistance to a broad class of citizens; and (3) provides aid to religious institutions only as a result of independent decisions made by the parents of the school children participating in the program.<sup>2</sup> The Chief Justice further explained that the ruling was consistent with a line of judicial reasoning dating back to 1983, when the Supreme Court approved an education tax deduction adopted in Minnesota.<sup>3</sup> In a concurring opinion, Justice Sandra Day O'Connor took a broader view of First Amendment jurisprudence, indicating that the majority ruling in *Zelman* was consistent with case law that allowed tax exemptions and other forms of government aid for religious institutions.<sup>4</sup> Justice Clarence Thomas also concurred with the majority.<sup>5</sup> Citing *Brown*

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1. 536 U.S. 639 (2002). Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas.

2. *Id.* at 648–54.

3. *See id.* at 649–50, 665; *Mueller v. Allen*, 463 U.S. 388, 393–404 (1983).

4. *See Zelman*, 536 U.S. at 665–67.

5. *See id.* at 676–84.

*v. Board of Education*,<sup>6</sup> Justice Thomas emphasized that the program in question was a well-intentioned attempt by the state “to provide greater educational opportunity for underprivileged minority students.”<sup>7</sup> He further opined that incorporating the Establishment Clause to prohibit the kind of educational choice that the Ohio program provides would have the ironic effect of employing the Fourteenth Amendment to curtail liberty rights protected by the Free Exercise Clause of the First Amendment.<sup>8</sup>

In a long dissenting opinion, Justice David Souter held that the use of tax money for unrestricted support to schools with a religious mission violates the long-standing constitutional requirement of church-state separation set forth in *Everson v. Board of Education of the Township of Ewing*,<sup>9</sup> where, in 1947, the Court declared, “[n]o 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.”<sup>10</sup> Justice Souter delivered an elaborate historical analysis outlining four distinct phases of First Amendment jurisprudence, illustrating how the Supreme Court gradually abandoned the principle set forth in 1947, which proscribed aid to religion through school benefits.<sup>11</sup> In separate dissents, Justices John Paul Stevens and William Breyer warned that any policy that compromised the wall of separation erected in *Everson* increased the risk of religious strife and conflict, shredding the social fabric of American democracy.<sup>12</sup>

*Zelman*'s significance in defining (perhaps redefining is a more precise classification) the freedoms protected by the First Amendment and the range of opportunities that may be offered to school children is apparent. A closer reading of the decision, however, reveals an attempt by the various members of the Court to reach a broader conceptualization of a just society. In this Article, I will argue that the majority ruling represented

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6. 347 U.S. 483 (1954).

7. *Zelman*, 536 U.S. at 677 (Thomas, J., concurring).

8. *See id.* at 683–84.

9. 330 U.S. 1 (1947).

10. *Id.* at 16, *cited with approval in Zelman*, 536 U.S. at 687 (Souter, J., dissenting). Justice Souter was joined by Justices Stevens, Ginsburg, and Breyer. *See generally* Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163 (2002) (commenting on the closeness of the vote, the intensity of the dissent, and the apparent commitment on the part of the dissenting justices, especially Justice Souter, to overturn the decision at a later date if a new majority is assembled on the Court).

11. *See Zelman*, 536 U.S. at 689–95.

12. *See id.* at 684–86, 717–29.

a “triumph of pluralism.”<sup>13</sup> By pluralism I mean a public philosophy that values individual, group, and institutional diversity as an underlying strength of democracy. In heralding its triumph, I do not mean to suggest that the advance of pluralism occurred at the expense of other cherished democratic ideals, most notably liberty and equality. To the contrary, I intend to show that the triumph of pluralism, and its appeal as a fundamental democratic virtue, lies in the way it serves to further liberty and equality in a political and constitutional sense.

Part I analyzes the *Zelman* decision, along with its concurring and dissenting opinions, and in so doing lays out the wide range of issues that will be addressed in the remainder of the Article. Part II traces the development of relevant First Amendment and Fourteenth Amendment case law, highlighting patterns of consensus and discord in the Supreme Court at distinct points of time. It shows that, while pluralism was regarded as an essential democratic virtue even when a strong separationist interpretation of the First Amendment dominated thinking on the Court, the imposition of a post-*Everson* secularist philosophy through the 1970s nonetheless served to undermine basic notions of liberty and equality protected by the Fourteenth Amendment. Part III elaborates on the merits of the pluralist philosophy that began to take hold of the Court with the *Mueller v. Allen* decision, and explains how the formulation of public policy in a post-*Zelman* era can work to advance liberty, equality, and choice.

## I. A DIVIDED COURT

The Ohio Pilot Project Scholarship program enacted in 1995 provided financial assistance in the form of vouchers and tutoring services to students in any Ohio school district that had been “under federal court order requiring supervision and operational management” of the state.<sup>14</sup> The fiscally and educationally troubled Cleveland district, having been placed under state control by a federal court earlier that same year,<sup>15</sup> was the only one in the state to qualify under these criteria. According to the

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13. It is noteworthy that the Supreme Court more recently recognized racial diversity as a compelling government interest in approving the affirmative action plan of the University of Michigan Law School in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003). For a thoughtful appraisal of the adoption of diversity as a national goal, see PETER SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* (2003) (urging a differentiation between the governmental role in its achievement and the role of civil society).

14. OHIO REV. CODE ANN. § 3313.975(A), (B), (C)(1) (Anderson & Supp. 2002).

15. See *Reed v. Rhodes*, 1 F. Supp. 2d 705, 710 (N.D. Ohio 1998) (citing Order of March 3, 1995 (Krupansky, J.)).

statute, tuition aid was distributed to families through a lottery for up to \$2250 per student per year, with priority given to those families with lower incomes.<sup>16</sup> Both secular and religious private schools within the boundaries of the Cleveland school district were eligible to participate, with the requirement that participating schools could not discriminate among applicants on the basis of race, religion, or ethnic background.<sup>17</sup> Public school districts on the suburban fringe of the city were also eligible for participation, but none chose to do so.<sup>18</sup> State checks were made available to parents, who subsequently endorsed them over to the designated school of their choice. Students who remained in the Cleveland public schools were eligible to receive tutoring grants of up to \$360.<sup>19</sup>

In 1999, after four years of intense litigation in the state courts, the Ohio Supreme Court upheld the legality of the program against a First Amendment challenge.<sup>20</sup> A federal trial judge in the Northern District of Ohio later struck down the program,<sup>21</sup> and his decision was subsequently affirmed by a 2-1 panel of the Sixth Circuit Court of Appeals.<sup>22</sup> The appellate panel rested its ruling largely on precedent set down in the *Nyquist* case, in which the Supreme Court in 1973 invalidated a New York state law that reimbursed parents for tuition paid at religious schools.<sup>23</sup> In deference to the first prong of the *Lemon* test,<sup>24</sup> the *Nyquist* Court acknowledged that the statute in question had a secular public purpose in that it promoted pluralism and diversity among New York's educational offerings, and helped relieve the overburdened public schools.<sup>25</sup> It further noted, however, that New York lawmakers had made no effort to require the separation of secular from religious functions in sectarian schools in order to guarantee that state funds would only support the former.<sup>26</sup>

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16. OHIO REV. CODE ANN. § 3313.978(A), (C)(1) (West 2003).

17. *Id.* § 3313.976(A)(3), (4), (6).

18. *Id.* § 3313.979.

19. *Id.* § 3313.978.

20. *See Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). For a detailed analysis of the litigation that preceded the *Zelman* decision by those who had represented parents whose children participated in the Cleveland voucher program, see CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* 145–48 (2003).

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

22. *See Simmons-Harris v. Zelman*, 2000 FED App. 0411P (6th Cir.), 234 F.3d 945.

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

24. In *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), the Court set down three criteria for accepting a publicly funded program: (1) It must have a secular purpose; (2) it may not have the primary effect of advancing religion; and (3) it may not foster excessive entanglement between church and state.

25. *See Nyquist*, 413 U.S. at 773.

26. *See id.* at 783.

Moreover, the Court concluded that the availability of such unrestricted aid gave parents an incentive to send their children to religious schools.<sup>27</sup>

The appellate panel in the Cleveland case focused on a specific set of facts that were found to have bolstered the incentive argument articulated in *Nyquist*. Challengers of the Ohio voucher program observed that all but ten of the fifty-six private schools participating in the program were religious, with those forty-six schools accounting for ninety-six percent of the students who were enrolled in the voucher program.<sup>28</sup> They further argued that this distribution was a function of program design, which kept the maximum amount of the voucher so low (\$2250) that it could only cover tuition at religious schools, where the rates charged were substantially lower than those at secular private schools. Thus, they claimed, the range of choices made available under the statute was slanted to favor religious institutions.

The majority rejected the challengers' range-of-choice argument when the case came before the Supreme Court. Instead, the Court accepted evidence presented by the Ohio Attorney General and by the lawyers representing the parents of school children in the program, who showed that the range of choices made available to parents who were dissatisfied with the regular public schools in Cleveland was much broader than that provided under the voucher program.<sup>29</sup> As of 1999, more than 13,000 students in Cleveland attended twenty-three magnet schools, and an additional 1600 attended community schools (commonly known as charter schools), all of which were public schools of choice.<sup>30</sup> Moreover, it was shown that families had a financial disincentive to participate in the voucher program. While the per capita spending limit for students in the voucher program was set at \$2250, students in community (charter) schools were appropriated \$4518, and those in magnet and regular public schools received \$7746.<sup>31</sup>

Writing for the majority in *Zelman*, Chief Justice Rehnquist went to great lengths to distinguish the Cleveland program under consideration from the New York program that had been struck down in *Nyquist*.<sup>32</sup> In the

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27. See *id.* at 786.

28. *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002).

29. See Brief of State Petitioners On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the Supreme Court of the United States at 6, *Zelman v. Simmons-Harris*, 2000 FED App. 0411P (6th Cir.), 234 F.3d 945 (Nos. 00-1751, 00-1777, 00-1779) (citing *Viteritti Aff.* ¶¶ 6, 11-12, which was submitted in *Simmons-Harris v. Zelman*, 711 N.E.2d 203 (Ohio 1999)).

30. See *id.* at 8-9.

31. See *id.* at 8-10.

32. See *Zelman*, 536 U.S. at 661.

latter case, benefits were limited to private schools and the parents of children who attended them. The Cleveland vouchers were made available to a broad class of citizens “on neutral terms, with no reference to religion” as “part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district.”<sup>33</sup> Citing *Mueller v. Allen*,<sup>34</sup> in which ninety-six percent of the parents in Minnesota taking tax deductions for tuition expenses enrolled their children in religious schools, the Court dismissed arguments concerning the preponderance of religious schools participating in the Cleveland program.<sup>35</sup> *Mueller* was the first of three cases cited by the Supreme Court in which it upheld a form of aid that was made available to religious schools as a result of independent decisions made by parents or students.<sup>36</sup> The Chief Justice also cited two recent decisions in which the Court had allowed public school teachers to provide remedial instruction to children in religious schools,<sup>37</sup> and approved a federal program that provided computers and other equipment to religious as well as independent and public schools.<sup>38</sup> In other cases, the Court had accepted a neutrality standard to uphold the use of school facilities by religious groups<sup>39</sup> and the appropriation of student activities fees for a religious club.<sup>40</sup>

#### A. CONCURRING OPINIONS

In her concurring opinion, Justice O'Connor reaffirmed that the majority ruling did not represent a break with past precedents, an assertion disputed by her dissenting colleagues.<sup>41</sup> In responding to the primary-effect question under consideration, however, she seemed to place

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33. *Id.* at 653. *See also* *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (acknowledging benefits to “a broad spectrum of groups” as a measure of “permissibility”).

34. 463 U.S. 388 (1983).

35. *See id.* at 401. *But see* *Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (striking down a statute creating a school district to accommodate the special-education needs of a religious minority (Satmar Hasidim) in New York state).

36. *See* *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (approving the services of a sign language instructor to a blind child at a religious school); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 482 (1986) (upholding the use of a vocational scholarship at a religious seminary).

37. *See* *Agostini v. Felton*, 521 U.S. 203, 208–09 (1997).

38. *See* *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

39. *See* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (involving a student organization); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386–87, 397 (1993) (involving a community organization); *Widmar v. Vincent*, 454 U.S. 263, 265–67 (1981) (involving higher education facilities).

40. *See* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

41. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639, 668–69 (2002).

more significance on the actual existence of secular options for parents in the Cleveland district than had the Chief Justice.<sup>42</sup> In this sense, her assessment of the case is less doctrinal and more contextual, and the implications regarding permissibility are somewhat different. Citing previous case law, Justice O'Connor wrote:

Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid.<sup>43</sup>

Although the Chief Justice took note of the wide range of secular options made available to Cleveland parents under the auspices of the magnet and community school programs<sup>44</sup> (neither of which the appellate court accepted as relevant in considering the range of available options),<sup>45</sup> his opinion seemed to turn on the fact that parents were free to accept or reject the offer to attend religious schools with a voucher.<sup>46</sup> Thus, he made reference to the *Mueller* case, in which there were few secular options available—public or private—outside the regular public schools.<sup>47</sup> Justice O'Connor left open the possibility that she may have held differently without the presence of magnet and community schools in Cleveland. This suggests that, in reviewing future voucher programs, the Court might be expected to examine the full mix of secular and religious options available to parents in a given jurisdiction that furnishes tuition aid for children to attend religious schools. In response, however, one might also argue along the lines of Chief Justice Rehnquist's reasoning, that the very existence of a free public school system open to all satisfies the need for a viable option.

In discussing First Amendment jurisprudence outside of education, Justice O'Connor not only reviewed the relevant case law, she illustrated, with an impressive array of data, the tangible consequences that prior decisions had on public finance at the federal and state levels. She began with the 1970 Supreme Court decision upholding property tax exemptions

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42. See *id.* at 672–73.

43. *Id.* at 669 (O'Connor, J., concurring).

44. See *id.* at 655–66.

45. See *Simmons-Harris v. Zelman*, 2000 FED App. 0411P (6th Cir.), 234 F.3d 945.

46. See *Zelman*, 536 U.S. at 653–54.

47. According to the Chief Justice, “[o]ur holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.” *Id.* at 651.

for religious institutions in New York,<sup>48</sup> explaining how such benefits not only represent a substantial financial subsidy to religious institutions,<sup>49</sup> but also result in a significant loss of tax revenues by states and localities.<sup>50</sup> She cited a list of studies estimating how much money various jurisdictions had lost annually as a result of such policies: \$40 million by Colorado, \$60 million by Maryland, \$122 million by Wisconsin, and \$36 million by New Orleans.<sup>51</sup> She also noted that tax deductions for various charitable contributions resulted in a loss of federal revenue amounting to an estimated \$25 billion annually.<sup>52</sup> Justice O'Connor then went on to outline an assortment of judicially approved programs through which public dollars are channeled into religious institutions. Examples of such programs include numerous programs in public health, higher education, community development, housing, and social welfare, leading her to conclude, "[a]gainst this background, the support that the Cleveland voucher program provides is neither substantial nor atypical of existing government programs."<sup>53</sup>

Writing on his own, Justice Thomas steered the discussion back to education. By introducing the landmark *Brown* decision in his analysis, Justice Thomas engaged the larger debate that had been percolating in the policy community concerning the efficacy of choice programs in redressing educational inequality among poor and minority children. The majority opinion had mentioned the "crisis of magnitude" that existed in the Cleveland public schools, reporting that only ten percent of ninth graders could pass a proficiency test and more than two-thirds of high school students failed to graduate.<sup>54</sup> Justice Thomas presented the issue in a broader racial and social context, observing that "failing urban public schools disproportionately affect minority children most in need of educational opportunity."<sup>55</sup> He warned, "[t]he failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives."<sup>56</sup> He further cited data from Cleveland showing that religious schools are

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48. See *id.* at 665 (citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

49. See *id.* at 665–66 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983)).

50. See *id.*

51. *Id.*

52. *Id.* at 666.

53. *Id.* at 668.

54. *Id.* at 644 (citing *Reed v. Rhodes*, 1 F. Supp. 2d 705, 710 (N.D. Ohio 1998) (citing Order of March 3, 1995 (Krupansky, J.)).

55. *Id.* at 681–82 (Thomas, J., concurring).

56. *Id.* at 683.



more educationally effective than public schools. Whereas ninety-five percent of the eighth graders in Catholic schools passed a state reading test, only fifty-seven percent of their public school peers did; similarly, whereas seventy-five percent of the Catholic school students passed a math proficiency test, their public school peers had only a twenty-two percent passage rate.<sup>57</sup>

Justice Thomas's focus on education did not proceed at the expense of a pertinent First Amendment review. Like Justice O'Connor, he seemed to be fostering a more contextual analysis of the case, only his context was racial and social. "Yes," he seemed to be saying, "religion is certainly relevant, but religion isn't all that is at stake in the case before the Court." As he had in previous cases,<sup>58</sup> Justice Thomas accepted the neutrality and choice standards articulated by the Chief Justice. He further urged that, when reviewing First Amendment cases, the Court should balance Establishment and Free Exercise protections. This should remain so, of course, even when First Amendment rights are applied to the states through the Fourteenth Amendment. In that context, Justice Thomas opined, the states "should be freer to experiment" because the First Amendment was originally written to protect the states from a federal establishment.<sup>59</sup> Citing Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, Thomas further stated that, "[w]hen rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."<sup>60</sup> In his mind, applying the Establishment Clause to curtail the educational choices available to disadvantaged people would serve to constrain the liberty interest of poor families who would choose to send their children to nonpublic schools.<sup>61</sup>

#### B. DISSENTING OPINIONS

It is notable that while Chief Justice Rehnquist began his review of the case law with *Mueller* (1983), Justice Souter began with *Everson v. Board of Education of the Township of Ewing*.<sup>62</sup> *Everson*, which involved a challenge to a New Jersey law that granted parochial school children free

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57. *Id.* at 681.

58. *See infra* pp. 1136–39.

59. *Zelman*, 536 U.S. at 678–79 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 699 (1970)).

60. *Id.* at 678 (citing *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (heralding how the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the

61. *See id.* at 679–80.

62. 330 U.S. 1 (1947).

public transportation to and from school, is an interesting and complex case for a number of reasons.<sup>63</sup> It was in *Everson* that Justice Hugo Black, writing for the majority, invoked the famous Jeffersonian metaphor calling for a “wall of separation between church and state.”<sup>64</sup> Throughout the second half of the twentieth century up through the present, strict separationists have been fond of quoting from the case and using its rich imagery as a marker for determining the proper boundary between church and state. But *Everson* also provides support for those who would poke holes in the Jeffersonian wall, for in the end, the majority of the Court approved the law under review.<sup>65</sup> The Court treated school transportation as it would any other public service (such as police, fire, sanitation, or roads) to which all children are entitled, ruling that to deny children such services because of their attendance at religious schools would violate their free exercise rights protected by the First Amendment.<sup>66</sup> Justice Black’s language on the need to balance the two religion clauses is also compelling:

New Jersey cannot consistently with the “establishment of religion” clause of the First Amendment 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>67</sup>

To be sure, the 5-4 majority opinion in *Everson* provoked a strong dissent. The majority opinion was guided by the “child benefit” concept, which construed the aid in question as being given to the child rather than to the school the child attended. The dissenters stated that the statute under consideration was a form of indirect aid to religion violating the establishment ban.<sup>68</sup>

It is apparent, from reading his dissent in *Zelman*, that Justice Souter is more sympathetic with the holding of the *Everson* dissenters, whom he

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63. *See id.* at 3–4.

64. *Id.* at 16.

65. *See id.* at 18.

66. *See id.* at 17–18.

67. *Id.* at 16.

68. *See id.* at 20, 49.

also quotes in his opinion.<sup>69</sup> Nonetheless, like most strict separationists, he begins his historical analysis with the *Everson* majority.

Justice Souter marked the second phase of First Amendment jurisprudence with the *Allen*<sup>70</sup> decision of 1968, where the Court upheld a New York state law that authorized local school districts to lend textbooks covering secular subjects to children who attend religious schools.<sup>71</sup> Here, the Court found relevant that the aid was made available only for secular instructional purposes, that no aid was given directly to parochial schools, and that the direct beneficiaries were parents and children. *Allen* also sparked spirited dissents, the most vigorous coming from Justice Black, who warned that even secular textbooks “will in some way inevitably tend to propagate the religious views of the favored sect.”<sup>72</sup> As Justice Souter observed, the *Allen* decision (more specifically its dissent) was significant for introducing the concept of “divertibility.”<sup>73</sup> Divertibility rejects the notion that it is possible to separate the religious and secular functions of a religious school because the very character of such institutions imbues them with a religious mission and culture. Some would argue that even if it were possible to separate the two functions in a particular institution, the money saved for the purchase of secular materials could then be invested in religious activities and functions. This understood, the only way to protect against the diversion of public funds for supporting the religious mission of a school is to require the complete separation of church and state, which would permit no direct or indirect aid of any kind.

The concept of divertibility, later converted to the principle of “nondivertibility” and its implicit requirement of complete separation, was translated into judicial doctrine in *Lemon*, which struck down a program that supplemented the salaries of teachers of secular subjects in private and religious schools during Justice Souter’s second phase of analysis.<sup>74</sup> As Justice Souter approvingly observed, *Lemon* gave rise to a post-*Allen* body

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69. According to Justice Souter, “New Jersey’s use of tax-raised funds forced a taxpayer to ‘contribut[e] to the propagation of opinions which he disbelieves in so far as . . . religions differ,’; it exposed religious liberty to the threat of dependence on state money, and it had already sparked political conflicts with opponents of public funding . . . .” *Zelman v. Simmons-Harris*, 536 U.S. 639, 689–90 (2002) (Souter, J., dissenting) (internal citations omitted) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 45, 53–54 (1947)).

70. *Id.* at 690 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968)).

71. *Allen*, 392 U.S. at 238.

72. *Id.* at 252 (Black, J., dissenting).

73. See *Zelman*, 536 U.S. at 688.

74. See *id.* at 691–93 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 620, 625 (1971)).

of case law that on the whole was far more separationist than anything that had preceded it.<sup>75</sup>

Even so, the application of the strict separationist rule and its corollary principle of nondivertibility was not entirely clear. On the one hand, the Court struck down programs that reimbursed parochial schools for administrative costs for teacher-prepared tests in compulsory subjects;<sup>76</sup> on the other, it approved a similar program utilizing standardized tests.<sup>77</sup> It prohibited state funding for staff and materials in auxiliary services such as counseling, guidance, and speech,<sup>78</sup> yet it allowed aid for diagnostic speech, hearing, and psychological testing.<sup>79</sup> The net effect of the decisions that came down from the Burger Court during the 1970s was to raise the wall of separation to a height never before reached.<sup>80</sup> The last leg of the three legged-stool (including *Everson* and *Lemon*) on which the Court rested the wall of separation was the *Nyquist* case, which held that aid provided to parents through a tax deduction was legally no different from providing direct aid to religious schools.<sup>81</sup> *Nyquist* is the case that the Sixth Circuit relied on most to strike down the Cleveland voucher program.

Justice Souter's third phase of analysis began with the *Mueller* decision, and tracked the line of decisions on which Chief Justice Rehnquist anchors the opinion of the Court in *Zelman*. According to Justice Souter, during this period the Court abandoned its concern for divertibility in favor of a standard that approved aid when (1) it is not likely to provide substantial benefits to religious institutions, (2) it is offered evenhandedly without regard to religion, and (3) it is channeled to religious institutions as a result of the free choices made by private individuals.<sup>82</sup> The latter two criteria (neutrality and choice) reflect the reasoning of the *Zelman* majority; the first—what we might call “substantiality”—introduces a distinct criterion in the dissent that is overlooked in the celebration of fidelity to precedent found in the majority and concurring

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75. See *id.* at 691–92.

76. See *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973). Also examine the companion cases applying these rules: *Marburger v. Public Funds for Public Schools*, 413 U.S. 916 (1973) (regarding reimbursement for educational materials), and *Grit v. Wolman*, 413 U.S. 901 (1973) (regarding tax credits for school expenses).

77. See *Wolman v. Walter*, 433 U.S. 229, 255 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793, 808 (2000).

78. See *Meek v. Pittenger*, 421 U.S. 349, 369 (1975), *overruled by Mitchell*, 530 U.S. at 808.

79. See *Wolman*, 433 U.S. at 244.

80. See JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 135–38 (1999).

81. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 790–91 (1973).

82. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 693–96 (2002) (Souter, J., dissenting).

opinions. Thus, according to Justice Souter, *Zelman* represents a new departure from precedence.<sup>83</sup>

What Justice Souter had in mind here is the majority opinion written by Justice O'Connor in *Agostini v. Felton*, in which the Court, as recently as 1997, held, "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause."<sup>84</sup> Although neutrality was one of the criteria applied by the Court to assess the constitutionality of a program where public school teachers provided remediation for children on the premises of their religious schools, so was the supplemental nature of the aid.<sup>85</sup> The supplemental nature of the aid in question was also a relevant consideration in *Mitchell v. Helms*,<sup>86</sup> in which the Court in 2000 approved direct federal assistance to religious schools in the form of computers and other equipment.<sup>87</sup> It was not a serious consideration in *Zelman*. In this sense, Justice Souter is correct: neither divertibility nor substantiality appear to stand as viable standards for review in *Zelman* as long as neutrality and choice are present.<sup>88</sup> Thus, in his mind (and in those of his three cosigners), *Zelman* ushers in a fourth phase of First Amendment jurisprudence.

In the final analysis, Justice Souter also rejected the holdings of neutrality and independence of choice put forward by the *Zelman* majority.<sup>89</sup> He agreed with the judgment of the Sixth Circuit panel, that the tuition limits imposed by the law provided families with an incentive to attend religious schools, and accepted as evidence the preponderance of religious schools participating in the program.<sup>90</sup> Calling the desperate predicament of Cleveland parents a "Hobson's Choice," Souter held, "[f]or the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."<sup>91</sup> He further pointed out that two-thirds of the students using a voucher were not of the faith identified with the institutions they chose, positing it as additional evidence that the

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83. *See id.* at 695.

84. *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

85. *See id.* at 229–30.

86. 530 U.S. 793 (2000). In a concurring opinion, Justice O'Connor held that actual diversion is "constitutionally impermissible" when funds are provided directly to a religious institution, rather than reaching that institution as a result of an independent choice made by a parent or student. *See id.* at 857 (O'Connor, J., concurring).

87. *See id.* at 835–36.

88. *See Zelman*, 536 U.S. at 695–96.

89. *See id.*

90. *See id.* at 703.

91. *Id.* at 707 (Souter, J., dissenting).

law in question steered children into religious schools.<sup>92</sup> Justice Souter closed his dissent with an impassioned plea for a strict separation of church and state, as demanded in *Everson*.<sup>93</sup> Quoting from the writings of Thomas Jefferson and James Madison, he referred to the Cleveland voucher program as a violation of conscience that would effect a “corrosive secularism” in religious schools.<sup>94</sup>

What is most remarkable about the dissents filed by Justices Stevens and Breyer is their emphasis on how choice, in the form of voucher programs, would foster political discord and tear the social fabric underlying American democracy. Drawing on experiences from the Balkans, Northern Ireland, and the Middle East, as well as American history, Justice Stevens wrote, “[w]henver we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.”<sup>95</sup>

Justice Breyer observed, “the Establishment Clause concern for protecting the Nation’s social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program.”<sup>96</sup> He recalled previous rulings by the Court against school-sanctioned prayer and Bible reading as recognizing the need to curb the “anguish, hardship and bitter strife that could come when zealous religious groups struggl[e] with one another to obtain the Government’s stamp of approval.”<sup>97</sup> He too dabbled in history, making the argument that as our country grows more socially and religiously diverse, the need to enforce the separation of church and state becomes more imperative; the risk of not doing so, the argument proceeds, is even more dangerous than it was at the time of the Founding.<sup>98</sup> This is a very intriguing argument on the part of Justice Breyer, perhaps more political than legal, but nonetheless worthy of attention. It reveals an underlying notion, shared at least by Justice Breyer and his cosigners, of how to bolster a strong democracy in

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92. *See id.* at 703–04.

93. *Id.* at 711–12.

94. *Id.* at 712.

95. *Id.* at 686 (Stevens, J., dissenting).

96. *Id.* at 717 (Breyer, J., dissenting). Justices Stevens and Souter joined Justice Breyer.

97. *Id.* at 717–19 (quoting *Engel v. Vitale*, 370 U.S. 421, 429 (1962)). Justice Breyer also makes reference to *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (against school prayer at graduation), and *School District of Abington Township v. Schempp*, 374 U.S. 203, 307 (1963) (outlawing Bible reading). *See also* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (rejecting a policy permitting student-led, student-initiated prayer at a football game); *Wallace v. Jaffree*, 473 U.S. 38, 38–42, 60–61 (1985) (invalidating a statute that authorized a voluntary moment of silence for meditation and voluntary prayer).

98. *See Zelman*, 536 U.S. at 723.

America during the twenty-first century. I will take up the question at a later point.

## II. CONSTITUTIONAL INTERPRETATIONS

A reading of the *Zelman* opinions reveals two distinct perspectives on the First Amendment. One calls for a complete separation of church and state to protect religious freedom. The other would have government treat religious institutions evenhandedly, the same as it does other private institutions. But an appreciation of *Zelman* and its implications takes us beyond considerations of church and state. *Zelman* is also a window for addressing significant legal and political questions concerning parental rights, educational opportunity, constitutional federalism, and, more broadly, the civic attributes that foster a robust democracy. These questions require an exploration of the Fourteenth Amendment, both as an instrument for applying the First Amendment against the states, and as a mechanism for assuring equal protection of the law. Let us consider each in turn.

### A. THE FIRST AMENDMENT

Writing for an anthology on the topic of citizenship and faith, constitutional scholar Michael McConnell has described two models of equality, the first being that of the “secular state,” the second that of the

<sup>99</sup> The underlying assumption of the first is that a secular public philosophy is neutral toward religion; individuals are allowed to practice religion freely in private, but are expected to put aside their sectarian beliefs when acting in their capacity as citizens.<sup>100</sup> The underlying principle governing the second model is to allow individuals of all religious persuasions to be full citizens of the commonwealth in a way that least compromises their religious convictions.<sup>101</sup> McConnell favors the second model over the first.<sup>102</sup> What passes for “neutrality” in the secularist state, he contends, is really an ideological preference for some modes of thinking and lifestyles over others—in other words, rationalism over conscience.<sup>103</sup> In his mind, the secularist state treats religious people

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99. Michael W. McConnell, *Believers as Equal Citizens*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90, 100 (Nancy L. Rosenblum ed., 2000) [hereinafter OBLIGATIONS OF CITIZENSHIP].

100. *See id.* at 100–01.

101. *See id.* at 104–05.

102. *See id.* at 100.

103. *See id.* at 104.

as “second class citizens,” while the pluralist state “affirms the equality of all citizens . . . without privileging any particular ideology or mode of persuasion.”<sup>104</sup>

In her introduction to the same anthology, political theorist Nancy Rosenblum refers to the first approach as “privatization.”<sup>105</sup> As she describes it, privatization requires that “religions must go without official recognition and imprimatur in the form of guaranteed representation or access to government power, legal jurisdiction over members, or authority over their civil status.”<sup>106</sup> Although preferring privatization to McConnell’s pluralist state, Rosenblum is mindful that when compared to other democratic nations, the requirements of church-state separation in the United States are rather severe.<sup>107</sup> She explains that while all democracies follow a degree of separation, some extend legal recognition and support to a variety of religions in a pluralistic fashion; others go so far as to recognize a single established religion while respecting the rights of others to practice (or abstain from practicing) religion as they see fit.<sup>108</sup> It was not always this way in the United States, however, and, given Justice O’Connor’s empirical review in *Zelman*, privatization does not appear to be in complete effect presently. The history of religious freedom in America, and its definition, is far more complex.

That the First Amendment was written to prevent the federal government from establishing a national church is rarely disputed. Nonetheless, its authors also perceived the First Amendment and other protections outlined in the Bill of Rights as mechanisms for preserving highly cherished state prerogatives against federal incursions. Among these was the practice of intermingling government and religion. In 1789, at least six of the thirteen states allowed some form of government support to churches; four went so far as to limit office holding to either Christians or Protestants.<sup>109</sup> Even on a national level, the intermingling of religion

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104. *Id.* at 104–05.

105. Nancy L. Rosenblum, *Pluralism, Integralism, and Political Theories of Religious Accommodation*, in OBLIGATIONS OF CITIZENSHIP, *supra* note 99, at 3, 10.

106. *Id.*

107. *See id.*

108. *See id.* at 10–11.

109. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–33 (1998); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 23 (1999). For thorough analyses of religious practices during the U.S. founding, see JOHN G. WEST, THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION 11–78 (1996); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1–78 (1994) [hereinafter LEVY, THE ESTABLISHMENT CLAUSE]; THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).



and government was quite common. The Northwest Ordinance adopted by the First Congress specifically made provisions for the religious education of the Native American population.<sup>110</sup> Subsequently, President Thomas Jefferson signed a treaty with the Kaskaskia Tribe that appropriated funding for the upkeep of a minister and a church. The treaty was approved by the U.S. Supreme Court in an opinion written by Chief Justice John Marshall.<sup>111</sup> In 1899, the High Court permitted federal financing for the construction of religiously affiliated hospitals.<sup>112</sup> Then, in 1908, it upheld the federal government's administration of a trust fund for Native Americans that used tribal money to educate children in religious schools.<sup>113</sup>

Through the middle of the nineteenth century, it was common practice for religious schools in New York, New Jersey, Connecticut, Massachusetts, and Wisconsin to be supported by state-generated revenue.<sup>114</sup> In 1835, Lowell, Massachusetts initiated a plan that actually incorporated the Catholic schools into the public school system.<sup>115</sup> Between 1850 and 1855, the California legislature let religious organizations control a large part of the school budget because the state relied on religious schools to educate the burgeoning immigrant population.<sup>116</sup>

The initial challenges to end public support for religious schools were as much, if not more, political as they were legal. The battles were fought out most dramatically by Protestants and Catholics, with the former insisting on the recital of Protestant prayers and hymns and the reading of the King James version of the Bible in the public schools, and the latter, in resistance, demanding funding for their own schools. Not very far beneath the surface of these ugly religious wars lay a political and class animosity. On one side were mostly Irish immigrants belonging to the urban political machines controlled by Democrats. On the other was the more established Republican Protestant elite, which stoked the fires of religious bigotry

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110. See *An Ordinance for the Government and the Territory of the United States North West of the River Ohio*, reprinted in *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY* 119, 125 (Frederick D. Williams ed., 1989).

111. See *Worcester v. Georgia*, 31 U.S. 515, 587–88 (1832).

112. See *Bradfield v. Roberts*, 175 U.S. 291, 296–97 (1899).

113. See *Quick Bear v. Leupp*, 210 U.S. 50, 81–82 (1908).

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

115. See ROBERT H. LORD, JOHN E. SEXTON & EDWARD T. HARRINGTON, *HISTORY OF THE ARCHDIOCESE OF BOSTON: IN THE VARIOUS STAGES OF DEVELOPMENT, 1604–1943*, at 574–77 (1944).

116. See DAVID TYACK, THOMAS JAMES & AARON BENAVIDE, *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954*, at 90–91 (1987).

*Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998).

120. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 335–59 (2002) (describing the shift in strategy from amendment to interpretation).

121. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

122. See *id.* at 280–82.

Whatever the modern decisions may be thought to represent, whether for good or ill, they can not persuasively be attributed to original understanding, except perhaps at a level of generality largely devoid of meaning. They do not derive from the “intent of the Framers” or from any “constitutional moment” . . . . In terms of the conventional sources of “legitimacy” in constitutional interpretation, the Supreme Court’s Establishment Clause decisions are at least very venturesome, if not completely rootless.<sup>123</sup>

Now, an assessment of constitution making and interpretation need not be as cynical as it appears in the Jeffries and Ryan commentary. Not every debate over the definition of religious liberty has been as sinister as the one precipitated by Congressman Blaine. Very often, political argument, even in its most intense form, flows from convictions that are based on high principle. When the Supreme Court is asked to resolve such contests, unlike other institutions of government it is expected to explain its determinations accordingly, with doctrines that can be tied to original intent, precedent, or some greater public good. Jeffries and Ryan’s characterization of the Court’s decisions as rootless might be understood as an overstated attempt to reconcile a patterned incoherence in thinking over time. The problem is not one of rootlessness. The problem is that most judicial (and political) reasoning on the subject of religion flows from two roots that take us in entirely different directions simultaneously: one toward the secular state, the other toward the pluralist state. At different periods of time, the Court has leaned in one direction more than the other, but even when its governing majority appeared to be charting new precedent-setting paths—as it did in *Everson*, *Lemon*, and *Mueller*—it seemed to be speaking in two voices simultaneously. As Justice Souter suggests in *Zelman*, *Everson* is a good place to start when trying to explain this body of case law, but not for the reasons he offers.

#### 1. *Everson v. Everson*

*Everson*<sup>124</sup> is instructive because it provides us with one of the most profuse illustrations of legal double-talk to ever come down from the Supreme Court. Writing for the majority, Justice Black authored a stirring and forceful rationale for the secular state, all the while handing down a decision that required the equal treatment of children who attend religious schools. The child-benefit concept from which he drew to allow New Jersey to offer transportation to parochial school children was not

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123. *Id.* at 281.

124. 330 U.S. 1 (1947).

inventive. It was based on precedent dating back to 1930, when the Supreme Court approved a Louisiana statute that supplied textbooks to children in public, private, and religious schools.<sup>125</sup> The Court ruled:

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 nonsectarian, and that the books are to be furnished them for their use, free of 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>126</sup>

For the Court to reject transportation services in New Jersey, after approving textbooks in Louisiana, would have been a serious reversal of precedent, even in the context of an Establishment Clause challenge, since transportation is much more removed from the educational process than are textbooks.<sup>127</sup> Thus, the Court not only upheld the law but the majority explained its decision in terms of the free exercise rights of the parochial school children.<sup>128</sup> At the same time, Black's clarion call for strict separation provided a rationale that the *Everson* dissenters would call on in future rulings.<sup>129</sup> *Everson* applied the Fourteenth Amendment to incorporate the Establishment Clause so that it could be used against the states to implement a secularist interpretation of the First Amendment. Seven years earlier, the Supreme Court had incorporated the Free Exercise

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125. See *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930).

126. *Id.* at 374–75. It is important to note that this case was not a First Amendment challenge since the Establishment Clause had not yet been incorporated under the Fourteenth Amendment; rather, challengers claimed that the law in question was an inappropriate use of tax money to produce a private benefit.

127. Philip Hamburger and others have speculated that Justice Black may have decided this case as he did to defuse charges against him of anti-Catholicism, which dated back to his prior association with the Ku Klux Klan in Alabama, as well as diminish the uproar caused by this association when he was nominated for the Supreme Court ten years earlier. See HAMBURGER, *supra* note 120, at 422–34. See also ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 71–121, 233–63 (1994) (describing Black's affiliation with the Klan and the controversy it caused when he was nominated to the Court); Michael W. McConnell, *Religious Freedom at a Crossroads*, in THE BILL OF RIGHTS IN THE MODERN STATE 115, 121–27 (Geoffrey R. Stone et al. eds., 1992) (describing Justice Black's anti-Catholic attitudes).

128. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

129. In his dissent to the ruling in *Everson*, Justice Jackson commented, [M]uch of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in education matters. *Id.* at 19 (Jackson, J., dissenting).

Clause as an instrument for protecting individuals from incursions on their religious liberty by the states.<sup>130</sup> *Everson* would now set the Court on a different course in defining the full meaning of the First Amendment and its relevance to the states.

This was not the first time the Court invoked the Jeffersonian metaphor.<sup>131</sup> It had applied the term in 1878 to uphold the conviction of Mormon George Reynolds for violating a federal law against bigamy.<sup>132</sup> Yet never before had the Court employed the metaphor in such bold terms as if to suggest that the Constitution requires a complete separation of church and state. This is the invention of *Everson*. This is the claim that many scholars have found to be without basis in the Constitution itself,<sup>133</sup> perhaps explaining why strict separationists, like Justice Souter and his cosigners in *Zelman*, begin their historical analysis with *Everson*.

Within a year after the New Jersey decision, the Supreme Court, along with Justice Black, began its circuitous march toward a more secularist state. The *McCullum* decision,<sup>134</sup> handed down in 1948, took the church-state discussion in another direction, nonetheless leading to a more secularist world view. *Everson* was concerned with state aid to religious institutions; the underlying premise in the inquiry was that taxpayers' rights are compromised when they are forced to support a religious activity. *McCullum* was concerned with removing religion from the public school environment. It invalidated a released-time program in Champaign, Illinois that allowed children to voluntarily receive religious instruction on the premises of their public school, with such instruction paid for by private sources.<sup>135</sup> Writing for an eight-person majority, Justice Black insisted that

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130. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). See also Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity under Constitutional Federalism*, 15 YALE L. & POL'Y. REV. 113, 142–49 (1996) (describing the process of incorporation with regard to the First Amendment).

131. The metaphor is originally attributed to Roger Williams. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 5–6 (1965). See generally EDWARD S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* (1967) (writing on the life and beliefs of Roger Williams).

132. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

133. This is the central theme of the Hamburger book. See HAMBURGER, *supra* note 120, at 454–63. See also Jeffries & Ryan, *supra* note 121, at 284–97 (arguing that the concept is based largely on a Virginia statute that was modified for adoption by the Establishment Clause); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (tracing the history of church–state relations back to colonial times).

134. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

135. See *id.* at 211–12.

the use of a public school facility violated the separation mandate he had outlined in *Everson*.<sup>136</sup>

In a separate concurring opinion, Justice Felix Frankfurter argued that the released-time program was divisive in that it (1) undermined the function of the public school in instilling a uniform set of public values, and (2) accentuated feelings of separatism between the majority of students who participated in the program and the minority who did not, contributing toward a sense of religious persecution among the latter.<sup>137</sup> Thus, he reasoned, “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.”<sup>138</sup> He suggested that by “sharpen[ing] the consciousness of religious differences” the program created a psychological climate for religious segregation and persecution.<sup>139</sup>

There are several aspects of the *McCollum* decision, and especially Justice Frankfurter’s concurring opinion, that demand attention. Not only did Justice Frankfurter define a unique role for public schools in forging a common national identity, he sought to grant public schools a measure of constitutional protection for shaping that identity. Further, not only did this philosophical secularist portray religion as a divisive force, he—in the manner of Justices Souter’s and Steven’s *Zelman* opinions—saw it as the Court’s role to quell disagreement that might arise from the religious practices and convictions of a diverse people. While Justice Frankfurter expressed concern with the subjective impressions that released time would have on the minority of students who did not choose to take it, he paid little heed to how his strict prohibition against released time might affect the free exercise rights of the majority who desired it. Not all of Justice Frankfurter’s colleagues shared his viewpoint juxtaposing the religious self-identification of the majority with the religious persecution of the minority. In fact, Justice Robert Jackson wrote a concurring opinion that differed with Frankfurter on this point.<sup>140</sup>

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136. Justice Black wrote:

Here not only are the State’s tax-supported public 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 use of the State’s compulsory public school machinery. This is not separation of Church and State.

*Id.* at 212.

137. *See id.* at 226–28.

138. *Id.* at 231 (Frankfurter, J. concurring).

139. *Id.* at 228.

140. Justice Jackson wrote,

Four years after the *McCollum* ruling was handed down, the Court—with Justices Black, Frankfurter, and Jackson dissenting—approved a released-time program in New York, in which religious instruction was provided off the premises of public schools.<sup>141</sup> In the same ruling, the majority went on to acknowledge the important and positive role that religion plays in American life. It noted,

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.<sup>142</sup>

Justice Frankfurter's opinion in *McCollum* nonetheless planted the germ that would eventually evolve into the "endorsement test" later applied by the Court to eliminate officially sponsored religious activities within the public schools.<sup>143</sup> Although the Court was positioning itself for a series of decisions that would prohibit financial aid to religious schools while secularizing public schools, it can hardly be claimed that the Court was moving toward such a strict form of secularization as to entirely discourage official recognition of religious traditions or practices. In 1961, with Chief Justice Earl Warren at the helm, the High Court handed down four decisions upholding Sunday closing laws.<sup>144</sup> Two years later, the Warren Court sided with a Seventh Day Adventist in South Carolina, who had been denied unemployment compensation for missing work when her religion required her to observe the Sabbath on Saturday rather than Sunday.<sup>145</sup>

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A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways: First[,] [w]hen a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. . . . But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.

*Id.* at 232–33 (Jackson, J., concurring) (internal citations omitted).

141. The Court stated, "This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. . . . The case is therefore unlike *McCollum v. Board of Education* . . ." *Zorach v. Clauson*, 343 U.S. 306, 308–09 (1952).

142. *Id.* at 313–14.

143. See cases involving official school prayer and other forms of worship. *Supra* note 97.

144. See *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Pennsylvania); *Gallagher v. Crown Kosh Super Mkt., Inc.*, 366 U.S. 617 (1961) (Massachusetts); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (Pennsylvania); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Maryland).

145. See *Sherbert v. Verner*, 374 U.S. 398, 399–402 (1963). The Court also protected the rights of secularists to act out of conscience. See also *United States v. Seeger*, 380 U.S. 163 (1965) (recognizing

Then, in 1968, with Justice Black dissenting, the *Allen* Court upheld the textbook loan program in New York state.<sup>146</sup> Throughout the 1960s, the Court adopted neither a wholly secular nor wholly pluralist notion of religious freedom. The most significant dichotomy in First Amendment thinking was yet to come.

## 2. *Lemon v. Walz*

After *Everson*, *Lemon v. Kurtzman*<sup>147</sup> was the most significant separationist decision ever handed down by the United States Supreme Court. *Lemon* purported to provide a set of standards that would guide future First Amendment reviews, which it did, but in a confused and incoherent way.<sup>148</sup> Even as the Court attempted to set criteria that would more precisely define the degree of separation demanded by Justice Black in *Everson*, Chief Justice Warren Burger, writing for the Court, explained, “[o]ur 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.”<sup>149</sup> *Lemon*, moreover, came on the heels of *Walz v. Tax Commission*,<sup>150</sup> which approved tax exemptions for religious institutions.<sup>151</sup>

In writing for the Court in *Lemon*, Chief Justice Burger cited *Walz* extensively, and *Walz*’s admonition against “sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>152</sup> *Walz*, nonetheless, was the most profound act of accommodation to religion ever undertaken by the judiciary. Writing for the Court in *Walz*, Chief Justice Burger had rejected the idea of strict separation in favor of a “benevolent neutrality.”<sup>153</sup> Urging that the Court must treat religious institutions the same as it does other nonprofit organizations, Justice Harlan prescribed “an equal protection mode of analysis” on the tax question.<sup>154</sup> Justice Brennan went further in articulating a pluralist rationale for the decision, noting that

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the rights of nonreligious conscientious objectors to avoid military conscription); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down a Maryland law requiring office holders to declare a belief in God). The ruling in *Seeger* was upheld in *Gillette v. United States*, 401 U.S. 437 (1971), and *Welsh v. United States*, 398 U.S. 333 (1970).

146. See *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968).

147. 403 U.S. 602 (1971).

148. See *id.* at 614–15.

149. *Id.* at 614.

150. 397 U.S. 664 (1970).

151. See *id.* at 679.

152. *Lemon*, 403 U.S. at 614–15 (citing *Walz*, 397 U.S. at 668).

153. *Walz*, 397 U.S. at 669, 676.

154. *Id.* at 696 (Harlan, J., concurring).



the “government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.”<sup>155</sup>

As early as 1963, the Supreme Court had employed “purpose and effect” criteria to outlaw prayer in public schools.<sup>156</sup> In addition to applying these standards, *Lemon* rejected subsidizing parochial school teachers of secular subjects because the program under review would have required extensive oversight by the state to guard against the use of public funds for sectarian purposes, leading to impermissible “entanglement.”<sup>157</sup> In this way, the Court introduced the third prong of its prohibitive three-prong test. Thus, the Court not only acknowledged the pertinence of divertibility as a concern in reviewing aid to religious schools but it also acknowledged the difficulty in administering divertibility as a clear standard for review.

However, like *Allen*, *Lemon* sidestepped the larger issues regarding divertibility. Even though some, perhaps most, academic subjects are secular in content, the values and culture that define faith-based institutions are religious by design. In this more general sense, no part of the religious school curriculum is truly separable. Moreover, all funding is divertible. Any self-generated money saved in the support of secular activities can be readily directed toward the religious mission of a faith-based institution. The only real protection against the diversion of public funds is complete separation of church and state, a strict prohibition against all aid to religious schools and the individuals who attend them. If diversion is to be avoided, even the child-benefit concept is somewhat problematic because it can free up funds for contributions from parents whose children attend religious schools. The Burger Court made it conspicuously clear, however, even as it raised the Jeffersonian wall to new heights, that complete separation was not in the offing.

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155. *Id.* at 689 (Brennan, J., concurring). *Contra* Richard W. Garnett, *A Quiet Faith?: Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. R. 771 (2001) (arguing that, because the possibility of a tax exemption restricts political expression and activity, religious people are limited in the way they can live out their faith, which is, in effect, a form of privatization).

156. *See* *Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

157. *Lemon*, 403 U.S. at 614–15. *See also* *DiCenso v. Robinson*, 403 U.S. 602 (1971) (companion case to *Lemon*); *Sanders v. Johnson*, 403 U.S. 955 (1971) (sustaining, two days after *Lemon*, a lower court decision that had invalidated a Connecticut statute that would have paid a portion of the salaries of private school teachers who taught secular subjects). A year later, the Court denied, without opinion, an application to stay a district court ruling holding that a parental reimbursement plan in Ohio fostered excessive entanglement between government and religion. *See* *Essex v. Wolman*, 406 U.S. 912 (1972).

<sup>159</sup> but that loaning instructional equipment had “the unconstitutional primary effect of advancing religion.”<sup>160</sup> Such inconsistency pervaded the Court’s First Amendment jurisprudence throughout the 1970s. Although states were permitted to provide parochial school students with transportation to school, they were not allowed to allot public funds to give students a ride to a public park or museum.<sup>161</sup> Nor were states required to provide the same bus service to and from school for students who attend public and religious schools.<sup>162</sup> Then, in 1985, again noting possible entanglements, the Court ruled that public school teachers could not offer government-supported remedial services to disadvantaged children on the premises of religious schools.<sup>163</sup> As a result of this ruling, public school districts were forced to spend millions of dollars to rent or build temporary quarters that were set up outside parochial school buildings so that poor children could receive remedial instruction through the federal Title I program.<sup>164</sup>

All this judicial nit-picking over aid to religious schools appeared rather silly after *Walz* had approved tax exemptions for religious institutions. If tax relief is not a form of divertible support, then nothing is. *Walz* was a pluralistic decision that demanded the equal treatment of religious institutions. As Justice Harlan explained it, religious institutions were entitled to tax relief because other charitable institutions received it. Equality trumped divertibility in *Walz*, and the financial consequences were much greater than anything that was at stake in the post-*Lemon* cases. In this sense, *Nyquist* was somewhat reconcilable with *Walz*. As a program of aid that was available only to nonpublic schools and the families that

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158. See *supra* notes 76–79.

159. *Meek v. Pittenger*, 421 U.S. 349, 360 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243–44 (1968)).

160. *Id.* at 363.

161. See *Wolman v. Walter*, 433 U.S. 229, 252–55, *overruled by Mitchell*, 530 U.S. at 808.

162. See *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 888 (1974).

163. See *Aguilar v. Felton*, 473 U.S. 402, 408 (1985). See also *Sch. Dist. v. Ball*, 473 U.S. 373, 397–98 (1985) (striking down a Michigan provision for remedial and enrichment programs that supplemented the core curriculum of religious schools). Both of these decisions, however, were overturned by *Agostini v. Felton*, 521 U.S. 203, 208–09, 218 (1997).

164. New York City reportedly spent sixteen million per year to remove children, during the school day, from their regular school buildings for remediation, and eventually challenged the decision to avoid these costs. See Mark Walsh, *N.Y.C. Seeks to Overturn Limits on Title I at Religious Schools*, EDUC. WK., Feb. 28, 1996, at 1; Joseph Berger, *Limit on Remedial Education is Appealed*, N.Y. TIMES, Aug. 31, 1996, at 25.

patronized them, the New York law under review in *Nyquist* arguably violated the equal treatment imperative that *Walz* had embraced.<sup>165</sup> It supposedly lacked neutrality, although it was arguably neutral in that it made aid available to both religious and nonreligious private schools. As Justice Lewis Powell, writing for the *Nyquist* Court, explained, “[s]pecial tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court.”<sup>166</sup> To the contrary, other programs involving testing, remediation, transportation, and support services that had come under review did not concern special benefits for students in nonpublic schools; they involved services that were routinely available to public school children.

The *Nyquist* Court purported to “fully recognize . . . the validity of the State’s interest in promoting pluralism and diversity among its public and <sup>167</sup> but not in a way that it would have the effect of advancing religion. Citing Justice Black’s majority opinion in *Everson* demanding separation, and his dissenting opinion in *Allen* warning against diversion, the *Nyquist* Court found that the tuition relief in question provided parents with a state-sponsored incentive to send their children to religious schools and thereby to practice religion.<sup>168</sup> In contrast to the later *Mueller* case, the *Nyquist* majority specifically rejected the argument that parochial school parents had the option to send their children to free public schools as a reasonable alternative to religious schools.<sup>169</sup> In a companion case striking down a partial tuition reimbursement in Pennsylvania, the Court again held that the statute had the “impermissible effect of advancing religion” because it furnished “an incentive to parents to send their children

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165. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The New York law in question involved three types of benefits: maintenance and repair grants for private schools, tuition allotments to low-income families whose children attend private and parochial schools, and tuition tax relief for parents whose children attend private and parochial schools. *Id.* at 762–67. See also *Franchise Tax Bd. v. United Americans for Pub. Sch.*, 419 U.S. 890 (1974) (affirming tax relief initiatives); *Byrne v. Pub. Funds for Pub. Sch. of N.J.*, 442 U.S. 907 (1979) (affirming tax relief initiatives).

166. *Nyquist*, 413 U.S. at 793. See also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (approving federal aid to public and private universities); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding a South Carolina law involving a state authority’s approval of the issuance of revenue bonds for a Baptist college); *Tilton v. Richardson*, 403 U.S. 672 (1971) (approving a federal program of grants and loans made available to sectarian colleges).

167. *Nyquist*, 413 U.S. at 773.

168. See *id.* at 784–87.

169. See *id.* at 783, 795, 813–14.

to sectarian schools.”<sup>170</sup> This was the thinking that the Sixth Circuit panel relied on to strike down the Cleveland voucher program.<sup>171</sup>

### 3. From *Mueller* to *Rosenberger*

The first sign of a clear change in constitutional interpretation came in 1980, when the Court, once more overlooking divertibility, upheld a New York law that appropriated funds to public and private schools for the administration of state examinations and the collection of enrollment and attendance data.<sup>172</sup> It was *Mueller v. Allen*,<sup>173</sup> however, that set new precedent by introducing the concept of parental choice as a justification for indirect aid to religious schools in the form of a tax deduction.<sup>174</sup> Writing for a 5-4 majority, Justice Rehnquist reasoned that because “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>175</sup> He further suggested a relaxation of the primary-effect prong of the *Lemon* test.<sup>176</sup> While conceding that First Amendment inquiries had been guided by the three-part test of *Lemon*, he declared that it was “no more than [a] helpful [signpost]” in addressing Establishment Clause challenges.<sup>177</sup>

During the same term as *Mueller*, the Court upheld Nebraska’s longstanding practice of paying a chaplain (the same Presbyterian minister for sixteen consecutive years) to open its legislative sessions with a prayer.<sup>178</sup> Putting aside concerns for nonpracticing minorities who might be offended by the custom, the majority described the practice as “a tolerable acknowledgement of beliefs widely held among the people of this

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170. See *Sloan v. Lemon*, 413 U.S. 825, 830, 832 (1973). One could reasonably argue, however, that parents in this case had the option of using the available aid at either a religious or nonreligious private school.

171. See *Simmons-Harris v. Zelman*, 2000 FED App. 0411P (6th Cir.), 234 F.3d 945.

172. See *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 648 (1980). In 1973, the Court had rejected a similar law because of the difficulty in separating the school’s secular from its religious functions. See *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 482 (1973). See generally Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994) (charting the transformation of the law regarding the religious clauses).

173. 463 U.S. 388 (1983).

174. See *id.* at 399.

175. *Id.* (internal citation omitted).

176. See *id.* at 392–402.

177. *Id.* at 393 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)). Rehnquist’s dissent in *Jaffree* was even stronger with regard to *Lemon*, contending that the three-point test “has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results.” *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985).

178. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

country.”<sup>179</sup> A year later, in *Lynch v. Donnelly*,<sup>180</sup> Chief Justice Burger declared that neither the *Lemon* test nor any other “fixed per se rule” was solely operative in reviewing First Amendment cases.<sup>181</sup>

In the same case, Justice O’Connor proposed an alternative “endorsement test.”<sup>182</sup> Much along the lines that Justice Frankfurter had outlined in *McCullum* (though with different effect), Justice O’Connor explained, “[e]ndorsement 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.”<sup>183</sup> This is exactly what the Court had done a year earlier when it approved the legislative chaplain in Nebraska.<sup>184</sup> While it claimed in *Lynch* to be concerned with the subjective impressions that minorities might have in such a situation, in actuality the weight of its thinking favored the prerogatives of individuals to practice their religion more freely, though in a nonpreferential way. *Lynch* was, after all, an accommodationist decision. It approved a holiday display in a public square that included Christian, Jewish, and secular decorations.<sup>185</sup> In 1992, Justice Kennedy introduced an even less restrictive “coercion” standard that would grant government wider latitude as long as it did not act to coerce someone to participate in or support religion.<sup>186</sup> This gradual revision of the endorsement concept was another manifestation of an emerging pluralist philosophy on the Court, dropping privatization in favor of the equal treatment of religious institutions and those who patronize them.<sup>187</sup>

*Mueller* was also the foundation for two subsequent choice-like decisions that preceded *Zelman*, neither of which dealt with divertibility as a significant legal complication.<sup>188</sup> When the Court in *Witters v.*

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179. *Id.*

180. 465 U.S. 668 (1984).

181. *Id.* at 678.

182. *See id.* at 688.

183. *Id.* (O’Connor, J., concurring).

184. *See Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

185. *See Lynch*, 465 U.S. at 670–72.

186. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992).

187. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 674 (2002) (disapprovingly tracing the emergence of an egalitarian perspective on First Amendment interpretation).

188. In another decision in 1988, the Court ruled that federal funds appropriated under the Adolescent Family Life Act could be granted to Catholic organizations that discouraged abortion and adolescent sex. *See Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

*Washington Department of Services for the Blind*<sup>189</sup> unanimously permitted a blind student to attend a Bible college on a public scholarship, it was not especially bothered by the pervasively religious nature of the program. Choice was again the trump card.<sup>190</sup> When the Court in *Zobrest v. Catalina Foothills School District*<sup>191</sup> approved the assignment of a publicly funded sign language instructor for a child at a parochial school, it was not especially disturbed knowing that the student might be getting instruction in religious subjects.<sup>192</sup> Here, neutrality was the trump card.<sup>193</sup> The lack of a focused concern with divertibility in the latter two decisions obviated the potential risk of entanglement that was so crucial in *Lemon*.

*Witters* was significant for two other reasons. First, it was in this case that Justice Powell, the author of *Nyquist*, articulated a set of standards for reviewing aid to religious schools that would be applied throughout the following decade, up to *Zelman*. In a concurring opinion, he outlined three criteria for permissibility: (1) the program must be neutral on its face regarding religion; (2) funds must be equally available to public and private schools; and (3) aid provided to religious institutions results from the private choices of individuals.<sup>194</sup> Second, *Witters* also left the door open for a state-level review on the basis of state law. Although the Supreme Court found that the aid in question did not violate the First Amendment, it acknowledged the right of the state to set its own standard of review utilizing its own constitutional and statutory criteria,<sup>195</sup> which the state judiciary subsequently did.<sup>196</sup>

*Mueller* also served to ground a string of decisions concerning access and speech, each of which materially contributed to the textured conversation about religion. All spoke the language of neutrality, projecting a vision for a pluralist constitutional framework that was

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189. 474 U.S. 481 (1986).

190. Although he recognized that some of the aid generated by the Washington program under review would make its way into religious programs, Justice Marshall, writing for the Court, resolved that the benefit is "only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487. This directly contradicted the *Lemon* and *Allen* rulings.

191. 509 U.S. 1 (1993).

192. *See id.* at 3.

193. Writing for the Court, Chief Justice Rehnquist held, "[w]hen the government offers a neutral service on the premises of a sectarian school as a part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the *Id.* at 10 (internal citation omitted). This directly contradicted *Aguilar* and *Ball*. *See supra* note 163.

194. *See Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 490-92 (1986) (Powell, J., concurring). Justice Powell was joined by Chief Justice Burger and Justice Rehnquist.

195. *See id.* at 489.

196. *See Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1122 (Wash. 1989).

becoming ever more apparent. When the Court upheld the constitutionality of the Equal Access Act<sup>197</sup> in *Board of Education of the Westside Community Schools v. Mergens*,<sup>198</sup> it ruled that when a public school prevents a student religious club from meeting on campus under the same terms as other student organizations, the school violates students' freedom of association and free exercise rights, as well as the Fourteenth Amendment.<sup>199</sup> To do so, the Court added, would "demonstrate not neutrality but hostility toward religion."<sup>200</sup> Three years later, the Court found that denying the use of a public school building to a faith-based organization wanting to show a film series with a religious message is a violation of free speech rights.<sup>201</sup>

The funding and free speech issues were joined in *Rosenberger*,<sup>202</sup> when the University of Virginia withheld student activity fees from a campus newspaper that conveyed a religious message. The Supreme Court found the policy to be a form of "viewpoint discrimination."<sup>203</sup> Writing for the Court, Justice Kennedy explained the need to respect "the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"<sup>204</sup> The *Rosenberger* decision was indicative of a major change in philosophical perspective that had occurred since the days of the Burger Court. While post-*Lemon* case law focused on the Establishment Clause to define religious freedom in a separatist way, the post-*Mueller* jurisprudence more deliberately examined

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197. 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.

198. 496 U.S. 226 (1990).

199. *See id.* at 231–35.

200. *Id.* at 248. Also, in 1981, the Court held that it is unconstitutional for a university to ban religious assemblies at a public university. Rejecting claims of unconstitutional endorsement, the Court found that providing access to the religious groups "'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.'" *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

201. *See Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993).

202. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

203. According to the Court,

It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude . . . another political, economic or social viewpoint. . . . The University's denial of WAP's request for third-party payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid.

*Id.* at 831–32.

204. *Id.* at 841. (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)).

religious issues in a broader context—involving not only the Free Exercise Clause, but also the rights of speech, assembly, due process, and equal protection—leading to greater accommodation.

Justice Thomas took *Rosenberger* as an opportunity to file a more sweeping criticism on the state of Establishment Clause jurisprudence, which he described as being in “hopeless disarray.”<sup>205</sup> With a bold reference to *Walz*, he turned his attention to the prime source of dissonance that characterized cases dealing with aid to religious institutions since *Lemon*,

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 the back end of the taxation process, the financial aid to religious groups is undeniable.<sup>206</sup>

For more than a decade *Walz* had been the giant elephant standing in the courtroom every time the question of direct or indirect aid came up for consideration. Few on the bench or in the bar seemed to see it for what it was. In *Rosenberger*, Justice Thomas implored his colleagues to take notice and end a long period of denial. His provocative observation about the illogic of First Amendment reasoning would force the conversation on the Court in new directions, and set the stage for an exchange that would later take place between him and Justice O’Connor in the *Mitchell* case.

#### 4. *Agostini*, *Mitchell*, and *Zelman*

*Agostini v. Felton*<sup>207</sup> not only overturned a twelve-year precedent that prevented public school teachers from providing government-supported remedial instruction on the premises of religious schools, it explicitly declared, “*Aguilar* is no longer good law” because it “is not consistent with our subsequent Establishment Clause decisions . . . .”<sup>208</sup> This meant that the Court had consciously undergone a fundamental rethinking of church-state relations. In evaluating the program, *Agostini* modified the purpose and effect criteria set down in *Lemon* and asked whether the aid (1)

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205. *Id.* at 861 (Thomas, J., concurring).

206. *Id.* at 859–60.

207. 521 U.S. 203 (1997).

208. *Id.* at 203. In *Agostini* the Court specifically focused on *Witters*, *Zobrest*, and *Rosenberger* in citing new controlling precedents. *See id.* at 216.



resulted in government indoctrination of religion, (2) defined its recipients by reference to religion, and (3) created excessive entanglement.<sup>209</sup> Writing for the Court, Justice O'Connor confirmed the significance of the neutrality principle that had been operable in prior cases, but at the same time, she indicated that the supplementary nature of the aid in question was also a relevant consideration.<sup>210</sup> This latter point once again appeared irreconcilable with *Walz*, and a reintroduction of the entanglement concern also seemed to be at odds with more recent case law. These and other apparent inconsistencies would be taken up in *Mitchell v. Helms*,<sup>211</sup> although not in an entirely satisfactory way.

The *Mitchell* case is distinguishable from *Agostini* in that it involved direct aid to religious schools in the form of library and media materials and computer software and hardware.<sup>212</sup> Here six justices agreed to explicitly overturn two prior decisions,<sup>213</sup> but there were strong disagreements among the six. Writing for a plurality, Justice Thomas sought to finally reconcile the conflicts he began to describe in *Rosenberger* by introducing neutrality as the primary standard for reviewing aid.<sup>214</sup> Citing *Agostini*, *Zobrest*, *Witters*, and *Mueller* (but surprisingly not *Walz*), he opined, “[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion.”<sup>215</sup>

Justice Thomas further suggested that the possible diversion of public funds to the religious mission of participating schools was “not relevant to the constitutional inquiry.”<sup>216</sup> Referring to the sign language instructor approved for the Catholic school student in *Zobrest*, he explained “the private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even

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209. *Id.* at 234–35.

210. The Court held “that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause.” *Id.*

211. 530 U.S. 793 (2000).

212. *See id.* at 801.

213. *See id.* at 805–06. These prior decisions were *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977).

214. Justice Thomas was joined in the plurality opinion by Chief Justice Rehnquist and Justices Scalia and Kennedy.

215. *Mitchell*, 530 U.S. at 809.

216. *Id.* at 834. He further asserted, “Respondents’ ‘no divertibility’ rule is inconsistent with our more recent case law and is unworkable.” *Id.* at 820.

when the interpreter translated classes on Catholic doctrine.”<sup>217</sup> He made a similar observation with regard to the seminary student who received a scholarship in the *Witters* case and to the aid recipients in *Mueller*.<sup>218</sup> Although Justice Thomas conceded that independent choice was a consideration in the prior cases, unlike the *Zelman* majority he viewed choice only as a way of determining neutrality, which was decisive in his mind.<sup>219</sup> In *Mitchell*, he was not treating choice as a separate condition of legality so long as neutrality was proven. From this point, Justice Thomas proceeded to reject the distinction between direct and indirect aid, ultimately relying on the neutrality principle to allow approval of the aid in question.<sup>220</sup>

Justice Thomas then shifted his analysis to a historical commentary, tracing opposition to aid to sectarian schools to anti-Catholic sentiment in the nineteenth century. Mentioning Congressman Blaine by name, he denounced this “shameful pedigree” and explained that the term “sectarian” was once a code for Catholic, and a way to mask a “pervasive hostility” toward the Church and its members.<sup>221</sup> He ended by asserting, “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. The doctrine, born of bigotry, should be buried now.”<sup>222</sup>

In a concurring opinion signed by Justice Breyer, Justice O’Connor took exception to the plurality’s treatment of the neutrality and divertibility principles.<sup>223</sup> With regard to the first, she found, “we have never held that a government-aid program passes constitutional muster *solely* because of

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217. *Id.* at 811.

218. *See id.* at 813.

219. *See id.* at 814–16.

220. Justice Thomas stated,

Although some of our earlier cases . . . did emphasize the distinction between direct and indirect aid, the purpose of this distinction was merely to prevent “subsidization” of religion . . . . [O]ur more recent cases address this purpose not through the direct/indirect distinction but rather through the principle of private choice . . . . If aid to schools, even “direct aid,” is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally and figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any “support of religion.”

*Id.* at 815–16.

221. *Id.* at 828–29.

222. *Id.* at 829.

223. Justice O’Connor stated,

Although the expansive scope of the plurality’s rule is troubling, two specific aspects of the opinion compel me to write separately. First, the plurality’s treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs. Second, the plurality’s approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.

*Id.* at 837–38 (O’Connor, J., concurring).

the neutral criteria it employs as a basis for distributing aid.”<sup>224</sup> With regard to the second, she responded that, “our decisions ‘provide no precedent for the use of public funds to finance religious activities.’”<sup>225</sup> Addressing Justice Thomas’ references to *Witters* and *Zobrest* on the divertibility matter, she explained that approval was based on the understanding that “aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use.”<sup>226</sup> Thus, in her mind, choice was essential to settling the divertibility problem.<sup>227</sup> When there is a situation in which public money is used to support a religious program, there is an important distinction between a per capita supplement made to a school and indirect aid given to citizens who can decide how to direct the funds. Also, as in *Agostini*, Justice O’Connor was persuaded by the supplementary nature of the allocation in the *Mitchell* case, not only as a means to measuring the proportionality of the amount, but in limiting the expenditure of funds for the purpose of supplantation.<sup>228</sup>

All these fine line distinctions seemed to beg the more fundamental questions previously raised by Justice Thomas without fully addressing the challenges that he put forward. Beyond the irreconcilable issue of *Walz* was the question of choice itself—read as indirect aid—as a condition of legality. Why should it matter whether aid first passed through the hands of parents or children in determining whether it is constitutional for public money to be channeled into a religious education program? The fact remains that all children who attend religious schools do so as a matter of choice. Even if funding were made available to faith-based schools on a per capita basis, the amount of aid given to each school would be a function of attendance, each dollar triggered by the independent decisions of parents and children who choose a school. Under the neutrality principle, government endorsement would be present only if the government assigned children to religious schools against their will. In the United States, no one attends a religious school against his or her will. It is always a matter of

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224. *Id.* at 839.

225. *Id.* at 840 (O’Connor, J. concurring) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995)).

226. *Id.* at 841.

227. She continued,

[W]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student’s private decision.

*Id.* at 842.

228. Justice O’Connor stated, “As in *Agostini*. . . the aid must be supplementary and cannot supplant non-Federal funds.” *Id.* at 867.

choice. On the contrary, the reason why school choice programs have been developed in Ohio, Wisconsin, Florida, and most recently Colorado, is to relieve children from the burden of being forced to attend public schools against their will.

But what is neutrality? In a dissenting opinion signed by Justices Stevens and Ginsburg, Justice Souter traced the evolution of the concept, and the three distinct ways it has been applied in interpreting the First Amendment.<sup>229</sup> According to his analysis, the Court (though divided) first used the neutrality principle in *Everson* to command equality of treatment among religions and between religion and nonreligion in the disbursement of general benefits, such as police and fire services—and, in the *Everson* case, transportation. Then, in *Allen*, the Court (again divided) used the term to derive a desired balance between the state as an ally of, or adversary to, religion, and at the same time, applied a test to assure secular primary intent and effect as conditions of permissible aid. Finally, beginning with *Nyquist*, the Court (still divided) used neutrality to require “evenhandedness” in the disbursement of benefits to secular and religious recipients, assigning less significance to the nature of the benefit.

As in *Zelman*, Justice Souter proved to be an insightful, intellectual historian in his *Mitchell* dissent. But it was the *Zelman* decision per se that fully established the validity of Justice Souter’s analysis. By explicitly adopting the dual criteria of neutrality (as evenhandedness) and choice in reviewing aid to religious schools, the *Zelman* Court, for all practical purposes, peeled away prior considerations of divertibility and supplementality.<sup>230</sup> Although the direct-indirect distinction could not be fully reconciled with the neutrality principle or the reality that all children who attend religious schools do so as a matter of choice, it merely served to set a procedural requirement for the way funds would be directed, keeping the neutrality rule intact and requiring equal treatment by the government

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229. He stated,

[W]e have used the term in at least three ways in our cases, and an understanding of the term’s evolution will help to explain the concept as it is understood today, as well as the limits of its significance in Establishment Clause analysis. “Neutrality” has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it.

*Id.* at 878 (Souter, J., dissenting).

230. It should be noted that, in her concurring opinion in *Zelman*, Justice O’Connor described the aid in question as not being substantial, but did not explicitly define what she meant by substantiality. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002). *See also supra* note 32. Compared to the other type of assistance to religious institutions to which she referred in her analysis, the aid in question was not substantial. However, for the students receiving direct and indirect aid in Cleveland, it arguably was substantial. Either way, substantiality did not stand in the way of her approval.

of religious institutions and their members. And, following the exchange between Justices O'Connor and Thomas in *Mitchell*, it was with more than a little irony that she was the one who introduced *Walz* in the *Zelman* case to explain its legal significance and financial consequences.<sup>231</sup>

The implicit erosion of judicial anxiety over fusing the secular and religious functions of faith-based institutions served to eliminate the arbitrary and unenforceable standard that was applied in *Allen* in concert with the more persuasive child-benefit concept. By recognizing the possibility, probability, and permissibility of blending secular and religious functions, the *Zelman* Court tacitly granted parochial schools the right to define themselves as they would, without financial penalty, as faith-based institutions with a religious mission. This new paradigm of interpretation was more consistent with a pluralist vision of the Constitution and American democracy.

#### B. THE FOURTEENTH AMENDMENT

Historically, the post-Civil War Amendments marked a turning point in the constitutional balance of power between the federal and state governments. In the nineteenth century this newly centralized authority was exercised most conspicuously to end slavery,<sup>232</sup> to grant citizenship to former slaves,<sup>233</sup> and to eliminate race as a determinant of voting rights.<sup>234</sup> It was the Fourteenth Amendment's Due Process and Equal Protection Clauses, however, that carried the nationalization of individual rights through the twentieth century.<sup>235</sup> What in hindsight now appears like a legal revolution was actually a more gradual process. When the Bill of Rights was first adopted in 1791, it was generally assumed that the original

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231. *Id.* at 665.

232. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

233. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

234. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

235. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See generally* MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 4 (1999) ("[I]n the guise of interpreting the Constitution, the Supreme Court is actually usurping prerogatives that under the Constitution belong to one or more other branches or agencies of government.").

ten amendments were meant to limit the powers of the national government only. This understanding was confirmed by the Supreme Court in a decision written by Chief Justice Marshall in 1833.<sup>236</sup>

In his authoritative history of the Fourteenth Amendment, William Nelson depicts its writing as an artful compromise shaped by a dual sensitivity to the need to affirm legal equality for all people, while at the same time recognizing the jealously guarded self-governance of the states.<sup>237</sup> In the famous *Slaughter-House Cases* of 1872,<sup>238</sup> the Supreme Court rebuffed an attempt to breathe new substantive rights into the Due Process Clause when it struck down an antimonopoly law in Louisiana designed to promote free enterprise.<sup>239</sup> The Court's thinking began to change in 1905, when it ruled that a New York labor law governing the maximum hours for bakery workers was a violation of the economic and property rights of employers and employees.<sup>240</sup> For some time thereafter, a divided Court adopted a selective approach to incorporation, rousing debates among its members. On one side was Justice Black, who sought to nationalize the Bill of Rights aggressively; on the other were Justices Frankfurter and Cardozo, who counseled judicial restraint.<sup>241</sup> Justice Black's position would ultimately prevail, but haltingly and only with the passage of time.

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236. According to the Court, "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states." *Barron v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833). See AMAR, *supra* note 109, at 140–62 (discussing the *Barron* case).

237. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 13–40, 64–91 (1988). See also William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) (critiquing Charles Fairman's article); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (making an originalist argument against incorporation).

238. 83 U.S. 36 (1872).

239. See *id.* at 60–61. See also NELSON, *supra* note 237, at 155–74 (speaking of the emergence of the uniform doctrine).

240. See *Lochner v. New York*, 198 U.S. 45, 53 (1905).

241. Compare *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) ("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 *Palco v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that the Due Process Clause only incorporates those rights that were "implicit in the concept of ordered liberty") (Cardozo, J.). See also 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) (urging caution in nationalizing the Bill of Rights).

## 1. Due Process and Incorporation

When the Supreme Court was first confronted with the idea of incorporating the religion clauses through the Fourteenth Amendment in 1845, it ruled “[t]he 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.”<sup>242</sup> Since education was not yet conceived of as a legal right, the topic did not emerge as a constitutional question until the twentieth century.

In 1920, Robert T. Meyer, a fifth-grade teacher at the Zion South School in Hampton County, Nebraska, was convicted of violating a state law that prohibited teaching in any language other than English.<sup>243</sup> The Lutheran school was part of a network of private institutions set up to accommodate German-speaking immigrants.<sup>244</sup> The Nebraska law was one of thirty-seven state statutes existing at the time that barred teaching in a foreign language.<sup>245</sup> These laws were the by-product of postwar anti-German sentiment and nativist hysteria that had consumed the nation, prompting discrimination against immigrants from all parts of Europe.<sup>246</sup> When Meyer appealed his conviction to the U.S. Supreme Court in 1923, it was reversed on the ground that the Nebraska law had violated his liberty rights protected by the Due Process Clause. While acknowledging the state’s legitimate interest in fostering a common civic identity,<sup>247</sup> the Court found that the state had “materially” interfered “with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”<sup>248</sup> Justice James Clark McReynolds, writing for the 7-2 majority in *Meyer*, elaborated further to offer a broad definition of liberty protected by the

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242. See *Permoli v. Municipality No. 1*, 44 U.S. 589, 609 (1845).

243. See *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923). The story of the *Meyer* case is well told in WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917–1927*, at 1–133 (1994).

244. See ROSS, *supra* note 243, at 17–18.

245. See *id.* at 61.

246. See *id.* at 58–60.

247. According to the Court,

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error.

*Meyer*, 262 U.S. at 402.

248. *Id.* at 401. See also *Farrington v. Tokushige*, 273 U.S. 284 (1927) (striking down an excessively burdensome Hawaii law governing foreign language schools).

Fourteenth Amendment.<sup>249</sup>

In 1925, the Supreme Court again applied the Fourteenth Amendment, this time to strike down an Oregon law that required all children in the state to be educated in public schools.<sup>250</sup> The law was passed by means of a state referendum sponsored by the Ku Klux Klan and the Scottish Rite Masons.<sup>251</sup> These groups believed that compulsory education in state-run public schools was a more efficient and effective way to inculcate American values.<sup>252</sup> The law was also a convenient ploy to force Catholic schools, which the sponsoring organizations found threatening to their way of life, to close.<sup>253</sup> The law was challenged by the Sisters of the Holy Names of Jesus and Mary, who ran a number of parochial schools, and the directors of the Hill Military Academy, a nonsectarian private school.<sup>254</sup> This time writing for a unanimous Court, Justice McReynolds declared:

The fundamental theory upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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>255</sup>

Taken together, *Meyer* and *Pierce* underscored the constitutionally protected right of parents to have their children educated in schools that reflected their own values, as well as the commensurate right of religious and private schools to coexist as viable alternatives to public schools.<sup>256</sup> These decisions were pluralist in purpose and spirit in that they rejected

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249. Liberty denotes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399.

250. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

251. For historical analyses of *Pierce*, see ROSS, *supra* note 243, at 148–73; JORGENSEN, *supra* note 117, at 205–15; David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 74, 77 (1968).

252. Tyack, *supra* note 251, at 77.

253. See *id.* at 84–86.

254. See *id.* at 92.

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

256. For a sympathetic analysis of the cases, especially from the perspective of parental rights, see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996). See also Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000) (arguing that there is a connection between parents' constitutional right to educate their children and the subsidiarity principle).



government attempts to impose a philosophical and social orthodoxy through education in the public schools. Choice advocates have celebrated the pair of rulings as a victory for educational freedom, and indeed they were. But time would prove them to be a hollow victory at best. The funding arrangement formalized in the states discriminated against families who chose nonpublic schools by supporting only those children who attended public schools. This not only furnished families with a state-supported incentive to patronize public schools, but for all practical purposes, left the nonpublic school option available only to parents who were willing and able to pay their own way while also paying taxes to support public schools.

Fifteen years passed before the Supreme Court incorporated the Free Exercise Clause by overturning a conviction of a Jehovah's Witness in Connecticut who had failed to acquire a license for religious solicitation.<sup>257</sup> Although decided on First Amendment grounds, the *Cantwell* ruling was consistent with *Meyer* and *Pierce* in protecting the individual rights of religious minorities so that faith was not burdened by the government. The same was true for the earlier *Cochran* decision,<sup>258</sup> which invoked the child benefit concept to uphold the right of parochial school children in Louisiana to receive textbooks from the state, and which implicitly affirmed the legitimacy of nonpublic and parochial schools.<sup>259</sup> But the legal calculus changed in 1947 when the *Everson* Court incorporated the Establishment Clause.<sup>260</sup> After *Everson*, the Court used the First Amendment as a way to juxtapose the rights of religious people against the presumed rights of others, ordinarily defined as citizens who opposed the use of their tax money to directly or indirectly support religious instruction that was not of their own choosing.

Even as it acknowledged the right of parochial school children to receive equal benefits in the form of transportation, the *Everson* Court portrayed the religion clauses as being in a state of tension.<sup>261</sup> *Walz* aside, it became common for the post-*Emerson* Court to trump free exercise claims with findings of religious establishment,<sup>262</sup> and the substantive due

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257. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

258. *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930).

259. See *id.* at 375.

260. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

261. See *id.* at 16.

262. One notable exception was *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invoking the Free Exercise Clause to excuse the Amish from a state compulsory education law). Here, the Court ruled that “however strong the State’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests,” and further that “[t]his case involves the

(a preliminary draft).

at <http://www.ksg.harvard.edu/pepg/pdf/WNConfPDF/BolickWN02-16.pdf>

children who attended parochial schools violated a state constitutional ban against state support for religious worship.<sup>267</sup> In 2002, a Florida judge ruled that its statewide voucher program violated a state constitutional prohibition against taking money from the public treasury to aid “any church, sect, or religious denomination, or . . . sectarian institution.”<sup>268</sup>

These state restrictions are not without limits. Three weeks after the Supreme Court decided *Zelman*, the U.S. Court of Appeals for the Ninth Circuit reversed a lower court ruling involving a student in Washington whose state scholarship was revoked after the student revealed that he would be majoring in religious studies.<sup>269</sup> The Washington Higher Education Coordinating Board (“HECB”) based its action on the same provision of the state constitution that was at issue in the *Witters* case, as well as on relevant statutory law.<sup>270</sup> Citing *Zelman*, the appeals panel ruled 2-1 that HECB’s policy lacked neutrality and violated the free exercise rights of the student.<sup>271</sup> Acknowledging the state’s interest in setting its own standards for review, the court explained, “a state’s broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal constitution.”<sup>272</sup> This decision is now under appeal.<sup>273</sup>

The authority of the federal judiciary to review state action can be traced back to the Marshall Court.<sup>274</sup> State courts, however, are reserved powers to write their own laws as long as they do not contradict federal laws or individual rights protected by the U.S. Constitution.<sup>275</sup> States also retain the authority to expand rights protected under the U.S.

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267. See *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 541–42 (Vt. 1999). The state tuition program had provided assistance for children who lived in towns without a high school to attend private and, prior to 1994, religious schools. In prohibiting religious schools from participating in 1999, the state supreme court acknowledged one of its own prior decisions, which upheld aid to religious schools under the First Amendment of the United States Constitution. See *Campbell v. Manchester Bd. of Sch. Directors*, 641 A.2d 352, 356–57, 361 (Vt. 1994).

268. See *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079, at \*1 (Fla. Cir. Ct. Aug. 5, 2002). The decision is being appealed.

269. See *Davey v. Locke*, 299 F.3d 748, 750 (9th Cir. 2002).

270. See *id.* at 751.

271. See *id.* at 759–60.

272. *Id.* at 759 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993)).

273. *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3589 (May 19, 2003) (Mem.).

274. For cases asserting the right of the federal judiciary to review state action, see generally *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Cohens v. Virginia*, 19 U.S. 264 (1821); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

275. See *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

Constitution.<sup>276</sup> A more assertive judicial federalism was encouraged by civil rights activists in the 1970s and 1980s, when it appeared that the Burger Court was retreating from guarantees adopted by the more liberal Warren Court, especially in the area of criminal procedure.<sup>277</sup>

But what does it mean to expand rights protected under the religion clauses? The new judicial federalism came about at a time when the Burger Court was instituting more restrictive guidelines under the Establishment Clause, and many of the states had already adopted a more separationist approach. Now, the same Rehnquist Court that abides by a neutrality principle on the aid question has also revealed a strong sympathy for the devolution of power to state governments.<sup>278</sup> But does a more secularist policy on the part of the states represent an expansion of federal rights? Those individuals who do not want their tax funds directly or indirectly distributed to religious institutions most certainly would agree that it does. However, to deny religious institutions and their members general public benefits is arguably a violation of both liberty and equality.

## 2. Equal Protection: *Plessy*, *Brown*, and *Rodriguez*

Unlike Due Process, interpretations of the Equal Protection Clause were not associated with the expansion of substantive rights during the first half of the twentieth century. The latter's role was less ambitious than that

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276. See *PruneYard Shopping Cent. v. Robins*, 447 U.S. 74, 81 (1980).

277. One of the strongest advocates of this new judicial federalism was Justice William J. Brennan, Jr. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as the Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (arguing for an aggressive application of state constitutions for the enhancement of individual rights). See also Robert F. Williams, *The Emergence of State Constitutional Law: Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985) (describing how state constitutions were increasingly applied to reverse a perceived retreat by the Burger Court in the enforcement of civil rights).

278. For a discussion of federalism in the Rehnquist Court, see generally JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 1-14 (2002); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Judicial Discovery*, 90 CAL. L. REV. 485, 507-26 (2002); Linda Greenhouse, *The Nation: 5-to-4, Now and Forever; At the Court, Dissent over States' Rights is Now War*, N.Y. TIMES, June 9, 2002, at 3. It should be noted, however, that notwithstanding its strong sympathy for state prerogatives on issues of federalism, the Rehnquist Court has intervened to outlaw state actions that it found in violation of fundamental constitutional rights. See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (striking down an antisodomy statute involving homosexual partners); *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating gender discrimination in admissions at the state military academy); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an amendment in the state constitution of Colorado that would have prohibited any state or local body from passing a law permitting sexual orientation to be used as a basis for a discrimination suit); *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1986) (holding that, under the Commerce Clause, states are subject to the Fair Labor Standards Act).

of its more muscular brother, and customarily read with more restraint by the Court.<sup>279</sup> Then came *Brown v. Board of Education*.<sup>280</sup> The immediate impact of *Brown* was to reject the “separate but equal” doctrine laid down in *Plessy v. Ferguson*,<sup>281</sup> and to outlaw de jure school segregation in the South.<sup>282</sup> Neither the *Plessy* Court nor the *Brown* Court accepted inequality as a matter of principle. The *Plessy* Court had assumed that the separate facilities made available to blacks on railroad cars were similar to those of whites.<sup>283</sup> Likewise, the *Brown* Court assumed that the educational facilities made available to black and white children were comparable,<sup>284</sup> even though the level of service enjoyed by the two populations varied substantially.<sup>285</sup> The *Brown* Court concluded instead that “[s]eparate educational facilities are inherently unequal”<sup>286</sup> because to deny children access to schools on the basis of their race “generates a feeling of inferiority” among minorities.<sup>287</sup> There are few passages in

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279. See generally *Ry. Express Agency v. New York*, 336 U.S. 106 (1949) (distinguishing between the effects of the Due Process and Equal Protection Clauses).

280. 347 U.S. 483 (1954). For the most comprehensive history of *Brown v. Board of Education*, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975). See also JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001) (assessing the long-term impact of the case).

281. 163 U.S. 537 (1896). For a broad analysis of the case, see CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL HISTORICAL ANALYSIS* (1987).

282. See *Plessy*, 163 U.S. at 493.

283. William Nelson points out that, three years after *Plessy*, the Court indicated that it would not allow a local school board to create a separate institution for whites without creating a comparable one for blacks if the determination were made out of “hostility to the colored population because of their mummings v. Richmond County Bd. of Educ., 175 U.S. 528, 545 (1899), cited in NELSON, *supra* note 237, at 187. There were also a number of higher education cases handed down between *Plessy* and *Brown* that are worth noting. In 1938, the Supreme Court struck down a Missouri plan that provided legal training for African Americans in out-of-state schools, concluding that “separate but equal” facilities must be provided within the state boundaries to meet the *Plessy* standard. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938). In 1950, the Court invalidated the use of a separate law school for African Americans in Texas, finding that the facilities were not equal to those in an all-white law school set up by the state. *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950). On the same day as *Sweatt*, the Court found that the separation of blacks from whites in the same graduate schools in Oklahoma did not permit the two races to be educated on equal terms, anticipating the *Brown* ruling that “separate is inherently unequal.” *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637,

284. Thus, the Court asked, “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.” *Brown*, 347 U.S. at 493.

285. See generally JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935*, at 148–237 (1988) (explaining that the historical purpose of educational segregation was to reinforce the racial caste system).

286. *Brown*, 347 U.S. at 493, 495.

287. *Id.* at 494.

American law or literature that so eloquently define the centrality of education in American life, and the absolute necessity of educational opportunity as a premise of our democratic aspirations:

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 required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is the 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.<sup>288</sup>

The list of attributes associated with education is comprehensive and diverse—good citizenship, acculturation, socialization, professional development, social integration, and overall success. The mandate articulated by the unanimous Court is unambiguous, declaring equality of educational opportunity to be nothing less than a right. As Supreme Court decisions go, *Brown* was bigger than life because it inspired a revolution in civil rights that affected nearly every aspect of the American existence. On the basis of the Equal Protection Clause, *Brown* established legal precedent for subsequent decisions that would outlaw discrimination in parks, buses, golf courses, beaches, and other public facilities.<sup>289</sup> *Brown* set the political stage for Congress to enact legislation that would prohibit discrimination in public accommodations, education, employment, and voting.<sup>290</sup>

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288. *Id.* at 493.

289. *See, e.g.,* *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches). *See also* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 27–74, 157–80, 217–302 (2000) (providing an overview of the Court's jurisprudence in *Brown* and its impact on future litigation).

290. *See generally* ROSEMARY C. SALOMONE, *EQUAL PROTECTION UNDER THE LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* (1986) (detailing executive and legislative initiatives undertaken in the spirit of *Brown*); DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945–1980* (1983) (providing a critical look at federal policies); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (arguing that judicial decisions did not result in significant change until they were bolstered by action from the other branches of government).

Through *Brown*, the Fourteenth Amendment became a bold instrument for the assumption of judicial power. As the Warren Court became more aggressive at implementing its political and social agenda, some legal scholars accused it of exceeding its constitutional authority, of legislating from the bench.<sup>291</sup> Many who were sympathetic with the decision, and the extension of civil rights that it engendered, questioned whether the ruling stood on solid legal ground with regard to the original intent of the Fourteenth Amendment, or with any prior case law from the Supreme Court.<sup>292</sup> Even Justice Warren remarked, when writing for the Court, “we can not turn the clock back to 1868.”<sup>293</sup> The most compelling justification for *Brown* was a moral one because racial segregation could not be squared with basic notions of American democracy.<sup>294</sup> If a rationale could not be found in history or precedent, then it was up to the Court to either concoct one on the basis of social justice, or make a mockery of the document the Court purported to interpret. As Justice Harlan protested in his *Plessy* dissent, “[w]e boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens.”<sup>295</sup>

Though powerful in effect, the ambitious egalitarian agenda precipitated by the Warren Court advanced within strict boundaries. One boundary was set by the Burger Court in *Rodriguez*. In 1971, the California Supreme Court had invalidated the state’s school finance formula, finding that it discriminated against poor people, thereby violating the Equal Protection Clause of the Fourteenth Amendment.<sup>296</sup> The decision seemed reasonable at the time in light of *Brown*’s declaration that education “is a right which must be made available to all on equal

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291. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58–65 (1955); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 1–19 (1977).

292. See, e.g., Mark V. Tushnet, *Following the Rules Laid Down: A Critique of “Interpretivism,” and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Vincent Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 1176 (1972). One notable exception is Michael McConnell, whose investigation of the legislative history of the Fourteenth Amendment finds evidence that its authors believed that school segregation was unconstitutional. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

293. *Brown*, 347 U.S. at 492.

294. See Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). As documented in the monumental study by GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY* (1994), the more general problem of racial inequality likewise could not be reconciled with American democracy.

295. *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896).

296. See *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971).

terms.”<sup>297</sup> Because, as in almost all states, school funding in California was dependent on local property taxes, poor districts had less money for education.<sup>298</sup>

Two years later, the U.S. Supreme Court, reviewing a school finance scheme being challenged in Texas, found that there was an “absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people.”<sup>299</sup> Beyond the Court’s factual findings, the ruling presented a more significant statement of principle. While acknowledging that a unanimous Court in *Brown* had recognized that “education is perhaps the most important function of state and local *Rodriguez* Court reasoned that “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”<sup>300</sup> The five-person majority concluded that “[e]ducation, of course, is not among the rights afforded explicit attention under our Federal Constitution. Nor do we find any basis for saying it is implicitly protected.” Further, the Court held that, “the Equal Protection Clause does not require absolute equality or precisely equal advantages.”<sup>301</sup> The denial that education is a fundamental right was a direct confutation to the *Brown* mandate. The rejection of equal treatment as a governing principle in education returned the Court to a standard of review that predated not only *Brown* but also, in a sense, *Plessy*, provoking strong dissents from Justices Byron White (joined by Douglas and Brennan) and Thurgood Marshall (joined by Douglas).<sup>302</sup>

The *Rodriguez* decision was in part a reflection of the new approach to federalism adopted by the Burger Court, which was philosophically reluctant to engage the federal judiciary in local affairs to the extent that the

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

298. See JOHN E. COONS, WILLIAM H. CLUNE, III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 39–40 (1970); ARTHUR E. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATION OPPORTUNITY 127–30 (1968).

299. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

300. *Id.* at 29–30 (citing *Brown*, 347 U.S. at 493).

301. *Id.* at 24, 35.

302. The Court retreated from this position in 1982, when it protected the educational rights of undocumented aliens. Acknowledging the *Rodriguez* finding that public education is not a constitutional right protected by the Constitution, the Court found,

But neither is [education] merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. . . . In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

*Plyler v. Doe*, 457 U.S. 202, 221 (1982).



Warren Court had.<sup>303</sup> But this is what the rights revolution was all about. The Warren Court exploited the Fourteenth Amendment as a lever for imposing a new jurisprudence precisely because the states had trampled on individual rights it believed were fundamental to the American legal framework. It is difficult to accept, even on the ground of federalism, that given its role as an enabler, some notion of educational equality is not part of that larger constitutional scheme. But *Rodriguez* said it was not, and its effect has been substantial.

The second boundary set around the Warren Court's egalitarian agenda was more implicit than explicit, but all the while more powerful—it was the First Amendment, or at least the Burger Court's interpretation of the religion clauses. In the same way that the post-*Everson* Court overshadowed claims of free exercise and due process through an excessive preoccupation with religious establishment, the Court, with few exceptions, similarly paid little heed to the equal protection rights of religious minorities. As the definition of suspect classifications was eventually extended beyond race to include gender, alienage, and illegitimacy, the Establishment Clause jurisprudence that dominated the pre-*Mueller* Court prevented it from including religious groups within such a category of protection.<sup>304</sup> It seems paradoxical that the Establishment Clause, incorporated through one part of the Fourteenth Amendment, was invoked to undermine the free exercise protections guaranteed in another part of the First Amendment, not to mention the liberty and equal protection rights more broadly defined under the same Fourteenth Amendment. But that is exactly what happened for an entire decade.

### C. JUDICIAL CONVENTIONS AND PUBLIC POLICY

By “judicial conventions,” I mean those habits of the Court, either loosely or firmly tied to precedent, that are difficult to harmonize with more fundamental values of American jurisprudence. We have come across a number of these conventions in our analysis thus far, some of

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303. Thus, Justice Powell, writing for the Court, warned “every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system.” *Rodriguez*, 411 U.S. at 44.

304. One secularist, arguing against the application of egalitarian claims to protect religious minorities, has declared that “[r]eligious minorities are not uniquely vulnerable to political inequality, and religious discrimination in the United States has not been noticeably worse than discrimination on the basis of political ideology, immigrant status, or language, let alone race.” Feldman, *supra* note 187, at 677.

which are more benign than others.<sup>305</sup> First among them, apparent in *Zelman*, is the identification of choice (formulated as indirect aid) as a core requirement with neutrality for determining the legality of unrestricted public assistance to religious institutions or their members. As we saw above, a per capita direct aid program administered neutrally would have the same effect as the voucher program, excluding assistance in the form of grants to religious schools that are not tied to enrollment, but at the same time, recognizing that all children who attend religious schools in this country do so as a matter of choice. Tying permissibility to a voucher with a specific student's name forces the Court to focus on the stream of funding rather than its purpose. This occurs particularly when choice, if combined with neutrality, eliminates divertibility as a meaningful constitutional category. From the perspective of voucher advocates, this procedural convention is inconsequential because, by definition, it has the effect of establishing neutrality as a single standard for assessing school choice programs. It renders some psychological comfort to those in need of tangible evidence that the recipient of aid is the child and not the school, but little relief for those who are philosophically predisposed toward a secular state—especially at a time when the Court has moved toward a more pluralist model.

A second procedural convention deals with various manifestations of judicial federalism. Here, the effects of discord between judicial practice and constitutional values are more consequential. We first saw this when the *Witters* Court granted the state of Washington authority to set stricter standards of separation than those prevailing on a national level. As a result of this federal deference to local discretion, the state supreme court in Washington proceeded to disqualify a blind college student from receiving a neutrally administered scholarship purely on the basis of his decision to attend a religious institution.<sup>306</sup> While secularists in Washington were confident that the state court was exercising legitimate authority to prevent indirect aid to a religious school, the action by the state court also served to encumber the constitutional right of the seminary student to choose a school that reflected his own values and aspirations. The differences between federal and state standards are so basic that they cannot coexist within a single constitutional framework. If the Supreme Court seeks to move the nation toward a more pluralistic vision of American democracy, as it appears to be doing in *Zelman*, it cannot allow the states to undermine

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305. Among the more pernicious was the *Plessy* ruling that institutionalized the “separate but equal” doctrine for fifty-eight years. See *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896).

306. See *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1122 (Wash. 1989).

that vision with a more secularist construct of their own. The choice between the two constitutional models is fundamental and cannot be left to local discretion, even under a judicial regime that has exhibited sensitivity to state prerogatives.

This problem is again evident in *Rodriguez*, where, in a bow to federalism, the Supreme Court contradicted the egalitarian principle outlined in *Brown* and let the states referee disputes over school finance schemes in their jurisdictions. One can certainly appreciate the reluctance of the federal courts to become involved in the complicated details of school funding plans, especially when the empirical relationship between school spending and school performance is questionable.<sup>307</sup> However, there may be occasions in which spending disparities are so large that they require federal intervention, or run the risk of rendering *Brown* meaningless in its call for educational equality. In settling finance disputes, courts are put in the position of having to weigh two sets of powerful claims: the right of wealthier families, and the school districts in which they reside, to spend more of their own money on their children's education against the right of poorer families living in other districts to acquire a decent education for theirs.

Most states have attempted to resolve this dilemma responsibly. First, under compulsory education laws enacted by the states, education has been deemed both an individual right and a state responsibility. Under a more recent wave of litigation on behalf of school finance reform, many state judiciaries have moved away from the requirement that equal funding be provided to schools and students in all districts to a more moderate standard of "adequacy."<sup>308</sup> If it is not economically and politically feasible to provide all children with the same education that can be afforded to those residing in the wealthiest districts, the reasoning goes, perhaps it is possible to guarantee every child the education needed to live a productive

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307. See generally GARY BURTLESS, DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (1996) (exploring the relationship between spending and performance, both in school and after school in terms of earnings); Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVALUATION & POL'Y ANALYSIS 141, 141 (1997) (stating that "there is no strong or consistent relationship between variations in school resources and student performance"). But see Larry V. Hedges, Richard D. Laine & Rob Greenwald, *A Meta Analysis of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RESEARCHER 5 (1994) (finding that spending does influence outcomes).

308. See Peter Erlich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (tracking the change in thinking).

life. Defining adequacy has not been an easy proposition either, but the more serious obstacle to reform faced in the more than forty states where litigation has been brought is political, not conceptual. Victories won by reformers in the courthouse have often been compromised or lost in the statehouse, where powerful suburban legislators have been successful in opposing plans that would lead to a drastic reallocation of funding from their districts to poorer urban districts.<sup>309</sup> In jurisdictions where the state courts and legislatures have allowed serious funding disparities between the rich and the poor to prevail, federal courts are the only places left to seek relief. Unfortunately, up until the present time, *Rodriguez* effectively has precluded the federal judiciary from correcting these financial injustices.

The final judicial convention taken up here reflects the previous adopted conventions. It returns us to the subject of school choice, or, more specifically, a public policy trend that, for all practical purposes, makes religious education available only to those families with the financial means to pay private school tuition. Given the unsatisfactory academic performance of the public schools to which disadvantaged minority children typically are given access, this practice determines both the quality and the nature of the education they may enjoy. While this convention appears to be unraveling with *Zelman*, it is still worth noting because its effects remain operable in all but four states (Wisconsin, Ohio, Florida, and Colorado) where publicly supported voucher programs exist; and these four programs are quite limited.<sup>310</sup> The policy of making school choice a function of income is so widely accepted among the American people that few have seriously considered its impact on rights that the Supreme Court has at one time or another defined as fundamental. We are familiar with these rights by now: the right of parents to have their children educated in schools that reflect their own values, as outlined in *Meyer* and *Pierce*, and the right of all children to receive an education on equal terms, as outlined in *Brown*. These rights were never intended to be absolute. Nonetheless, in a democracy, rights ought not to be conditioned by economics. Unfortunately, their enjoyment is so conditioned in this country, and the culprit responsible is a familiar one to us: It is the Establishment Clause, or at least the post-*Lemon* Court's reading of it, that has institutionalized the secular state.

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309. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2059–63 (2002); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543 (1998).

310. The Florida and Colorado programs are currently being challenged in the state courts on the basis of their state constitutions.

### III. THE MERITS OF PLURALISM

Inspired by Isaiah Berlin's seminal essay on liberty,<sup>311</sup> political theorist William Galston recently crafted a defense of pluralism as an essential component of the modern liberal state.<sup>312</sup> Rooted in the classical liberal tradition of John Locke, John Stuart Mill, and Adam Smith, Berlin's notion of freedom rests on two master ideas—negative liberty<sup>313</sup> and value pluralism<sup>314</sup>—that would allow individuals to choose among competing conceptions of a good life to the maximum degree possible, unimpeded by the state. Recognizing an inherent diversity among people and their life preferences, Galston advocates a liberal polity that is “parsimonious in specifying binding public principles” and pursues a policy of “*maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity.”<sup>315</sup> In his mind, autonomy and diversity are complementary, for “[t]he exercise of autonomy yields diversity, while the fact of diversity protects and nourishes autonomy.”<sup>316</sup>

Like Berlin, Galston is careful to note that the desirable limits of public authority are not absolute. Warning that, “freedom for wolves has often meant the death to the sheep,”<sup>317</sup> Berlin, for example, rejects a selfishly motivated laissez faire capitalism that is so unrestrained it results in the oppression of some by others and in the ultimate loss of freedom. Likewise, Galston explains that value pluralism is not the same as value relativism; there is a distinction between good and bad, and there are zones of legitimate intervention by the government through which it can define

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311. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118–72 (1969) [hereinafter *FOUR ESSAYS*].

312. See WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 3 (2002) (defending “a liberal theory of politics that is pluralist rather than monist . . . comprehensive rather than freestanding or ‘political’”).

313. According to Berlin, “I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others.” BERLIN, *supra* note 311, at 122.

314. Again, Berlin stated,

Pluralism, with the measure of “negative” liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures, the ideal of “positive” self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.

*Id.* at 171.

315. GALSTON, *supra* note 312, at 20.

316. *Id.* at 21. See also WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989) (arguing the same).

317. BERLIN, *Introduction*, in *FOUR ESSAYS*, *supra* note 311, at xlv.

the requirements of civic unity and order.<sup>318</sup> He mentions with approval, for example, the controversial *Bob Jones University* ruling, in which the Supreme Court sanctioned the disapproval of a school policy against interracial dating by allowing the Internal Revenue Service to revoke the institution's tax exemption.<sup>319</sup> As the Court stated, the nation's commitment to racial equality far outweighed the university's free exercise claims.<sup>320</sup>

Galston distinguishes his framework from that of others who would define the range of legitimate intervention more broadly for the sake of promoting and protecting a common civic culture, especially when considering the proper governmental role in education.<sup>321</sup> These scholars, with whom Galston disagrees, also identify with the liberal tradition. Their justification for supporting a more aggressive governmental role against the rights of parents to determine how their children will be schooled is based on a fear that some parents—religious fundamentalists in particular—would choose to educate their children according to illiberal principles, inhibiting their children's potential to grow into autonomous beings and productive citizens of the liberal state. Such arguments have been used for mounting opposition, or at least reservations, to public policies that support school vouchers. On this specific point, Galston argues, “the ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of expressive liberty.”<sup>322</sup>

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318. Galston defines the minimum conditions of order as clear and stable property relations, the rule of law, a public authority with the capacity to enforce the law, an economy that does not divide the population permanently between a thin stratum of the rich and the numerous poor, and a sense of membership in the political community strong enough (in most circumstances, anyway) to override ethnic and religious differences.

GALSTON, *supra* note 312, at 65.

319. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). See also *Runyon v. McCrary*, 427 U.S. 160 (1976) (prohibiting a private school from denying admission on the basis of race); *Norwood v. Harrison*, 413 U.S. 455 (1973) (prohibiting a state textbook loan to private schools that engage in racial discrimination).

320. See *Bob Jones*, 461 U.S. at 603–04.

321. See generally STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987) (promoting a broader governmental role). Recall, also, Justice Frankfurter's opinion in *McCullum v. Board of Education*, 333 U.S. 203, 231 (1948).

322. GALSTON, *supra* note 312, at 102. See also WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 251–55 (1991) (providing a more explicit treatment of the argument); BERLIN, *supra* note 317, at liii–liv (discussing education as an essential condition of liberty, and the tension between the rights of parents to choose and the state's obligation to provide universal schooling).

While it is not the purpose of this Article to define the scope of public responsibility in educating children to be good citizens, certain observations are in order in assessing its relevance to the voucher debate, or, more specifically, the question of whether tax money should be used to pay tuition at religious schools. First, the function and obligation to educate children for democratic citizenship is not necessarily limited to public schools. Especially when the government provides direct or indirect aid to private or religious schools, it is certainly reasonable for public authorities to set minimum standards that include civic education.<sup>323</sup> Most nonpublic schools already have strong civic education components, and there is some evidence that nonpublic schools in this country are more effective at cultivating democratic values than their public counterparts.<sup>324</sup> As a matter of fact, the United States stands outside the norm among modern democracies in the way it has restricted support for education to government run schools.<sup>325</sup> In most advanced democracies, the opportunity to send one's children to a faith-based school with public support is understood as an expression of religious freedom rather than a threat to democratic values.

While many Americans still hold on to the nineteenth century presumption (which was not unanimously held at the time) that only a government-run system of common schools is capable of molding our pluralistic population into one civically engaged people, the evidence is not supportive. Results of tests administered by the U.S. Department of Education indicate that only twenty-six percent of American high school students have a proficient knowledge of the principles that underlie the Constitution and a basic understanding of how the government works; only ten percent have a proficient knowledge of American history.<sup>326</sup> In a comparative study involving twenty-eight nations, American students did

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323. See Rosemary C. Salomone, *Common Education and the Democratic Ideal*, in *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* 213–31 (Diane Ravitch & Joseph P. Viteritti eds., 2001) [hereinafter *MAKING GOOD CITIZENS*] (arguing for certain aspects of common education as an alternative to common schooling); SALOMONE, *supra* note 262, at 197–271.

324. See David E. Campbell, *Making Democratic Education Work*, in *CHARTERS, VOUCHERS, AND PUBLIC EDUCATION* 241, 244–46 (Paul E. Peterson & David E. Campbell eds., 2001).

325. See CHARLES GLENN & JAN DE GROOF, *FINDING THE RIGHT BALANCE: FREEDOM, AUTONOMY AND ACCOUNTABILITY IN EDUCATION* (2002) (reviewing educational policies in twenty-eight countries or communities).

326. See Diana Jean Schemo, *Students, Especially 12<sup>th</sup> Graders, Do Poorly on History Tests*, *N.Y. TIMES*, May 10, 2002, at 26; David J. Hoff, *Beyond Basics, Civics Eludes U.S. Students*, *EDUC. WK.*, Nov. 24, 1999, at 1. See generally William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 *ANN. REV. POL. SCI.* 217 (2001) (discussing the essential role of civic education).

no better than average in demonstrating their knowledge of politics or positive attitudes toward democracy.<sup>327</sup>

If Americans really believe that only government-run schools are equipped to advance a healthy democracy, then all children should be forced to attend public schools, not just those who cannot afford private schools. Requiring that students attend public schools would certainly be fairer than the current arrangement, which suggests one thing but enforces another. Such a broad compulsory policy, however, is not likely to command much support in a society that has accepted the perpetuation of nonpublic schools and the right of parents to send their children to them. The question at hand is whether the government should provide people with the financial means to exercise that right, or, conversely, whether real choice should be conditioned by economics. Even some moderate pluralists, who would support the right of parents to choose a religious education for their own children, would object to the use of public money for it on the ground that it would violate the rights of taxpayers who are not sympathetic to one or another religious perspective. That argument has been around for a long time, and it is widely endorsed. We need to examine it more closely.

#### A. TWO GENTLEMEN FROM VIRGINIA

Thomas Jefferson and James Madison are cited with such regularity by proponents of the secular state—including the dissenting justices in *Zelman*<sup>328</sup>—that it would constitute scholarly negligence to overlook the merits of their arguments when making what is seemingly the opposite case. That being said, drawing on the wisdom of the eighteenth century to resolve disputes in the twenty-first can be venturesome. Jefferson, for one, probably would not have approved of the endeavor. “The earth belongs to the living,” he proclaimed, suggesting that each generation should draft its own constitution and not be bound by the rules of the past.<sup>329</sup> What is more, while we are in his debt for his authorship of the *Declaration of Independence* and volumes on American civic life and ideals at the

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327. See Judith Torney-Purta, *What Adolescents Know About Citizenship and Democracy*, 59 EDUC. LEADERSHIP, Dec. 2001/Jan. 2002, at 45.

328. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 (2002) (Souter, J., dissenting). Justice Souter, who was joined by Justices Stevens, Ginsburg, and Breyer in his dissent, cited both Jefferson and Madison.

329. See RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW* 22–23 (1984).



founding,<sup>330</sup> he was not directly involved in writing the Constitution or the Bill of Rights.<sup>331</sup> Madison, to the contrary, not only was the principal author of the original document and its first ten amendments, he also had hoped that the Constitution would provide stability for the new nation and continuity through the ages.<sup>332</sup> Although close friends and confidants, the two Virginians hardly were in agreement with each other on all issues,<sup>333</sup> nor were they entirely consistent in their respective thinking over time.

### 1. Jeffersonian Liberty

Jefferson was the more enigmatic of the two personalities. Though brilliant, he was full of contradictions.<sup>334</sup> The same man who wrote so eloquently on equality in the *Declaration* and was an early champion of universal education believed that only the brightest students should be educated beyond the primary years.<sup>335</sup> His attitudes toward church-state relations were hardly representative of his time or of his contemporaries who drafted the Constitution, but his writings on religion demand our attention because they articulate a point of view that so many of our own generation take seriously.<sup>336</sup>

President Jefferson wrote his famous letter to the Danbury Baptists after refusing to honor the tradition (begun by George Washington and

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330. See JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* (1998) (focusing on the political thought of Jefferson). *But see* JOHN FERLING, *SETTING THE WORLD ABLAZE: WASHINGTON, ADAMS, JEFFERSON, AND THE AMERICAN REVOLUTION* (2000) (arguing that Jefferson's role in the founding has been exaggerated by historians and popular writers); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997) (finding that the writing of the document was more of a collaborative process than is generally thought).

331. Jefferson's *Bill for Establishing Religious Freedom*, written for the Virginia Legislature in 1779, however, provided language for the First Amendment and a number of other state legislatures. See McConnell, *supra* note 133, at 1431.

332. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 310–16, 339–65 (1996).

333. See GARY ROSEN, *AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING* 128–41 (1999) (comparing the two men and their thinking).

334. The complexity of Jefferson's personality is well captured in JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* (1996).

335. See GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF JEFFERSON* 62–67 (1991). Of course, there was also the problem of slavery and Jefferson's attitudes concerning the inferiority of blacks. See *id.* at 129–40; MATTHEWS, *supra* note 329, at 53–76.

336. See Daniel L. Dreisbach, *Thomas Jefferson and Bills Numbers 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) (finding that between 1776 and 1786 Jefferson had drafted a number of bills in the Virginia legislature that are far more accommodationist than his other writings).

John Adams) of declaring a National Day of Thanksgiving and Prayer.<sup>337</sup> According to the account given by legal historian Philip Hamburger, the Baptists did not seek complete separation from the state legislature when they invited President Jefferson to express his views; rather, they sought relief from the Congregationalist establishment that put them at a distinct disadvantage in Connecticut and all of New England.<sup>338</sup> Thus, while Jefferson called for separation to protect religious liberty, the Baptists, as most religious dissenters at the time, rejected separation and sought disestablishment in order to achieve religious equality.<sup>339</sup> Two days after he issued his letter to the Baptists, President Jefferson attended his first church service in the House of Representatives, which he continued to do regularly for the next seven years.<sup>340</sup> When James Madison succeeded Jefferson as President, he reinstated the custom of issuing a Thanksgiving Proclamation. Although this and similar acts of ceremonial deism could conceivably leave atheists and other nonbelievers feeling like outsiders, as noted by Justice Frankfurter in his *McCullum* opinion,<sup>341</sup> these customs have been widely accepted by the American people and courts.<sup>342</sup> Jefferson and *Everson* aside, complete separation of church and state was never the order of the day in the mainstream of American political culture.

Jefferson's *Bill for Establishing Religious Freedom*, cited by Justice Souter in *Zelman*,<sup>343</sup> is more relevant to the voucher question. There, Jefferson declared, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and

337. Thomas Jefferson stated,

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 sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting the establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

THOMAS JEFFERSON, *To Messrs. 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) [hereinafter THE COMPLETE JEFFERSON].

338. See HAMBURGER, *supra* note 120, at 144-89. See also James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 775, 782 (1999); Daniel L. Driesbach, "Sowing Useful Truths and Principles": *The Danbury Baptists, Thomas Jefferson, and*, 39 J. CHURCH & ST. 455, 469 (1997).

339. HAMBURGER, *supra* note 120, at 144.

340. *Id.* at 162.

341. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231-33 (1948).

342. *But see* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996) (questioning such practices).

343. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 (2002) (Souter, J., dissenting).

tyrannical.”<sup>344</sup> But again, the result achieved in fitting the present situation into the Jeffersonian position is not entirely seamless. Even with the demise of the Anglican establishment in “Old Dominion” by 1779, members of various faiths were not afforded equality of treatment, as the *Zelman* Court would require. We will leave that consideration aside for the moment, however, in order to examine the basic principle at stake. Let us assume for now that all denominations would be equally eligible to receive public contributions. How might that affect the rights of the atheist or the nonbeliever forced to contribute to the public fund? I would posit first that there is a significant difference between public contributions to a church, or other house of worship, and public contributions to a school run by a religious organization where religious teaching is part (even if a large part) of the curriculum.

While it is arguable from the point of view of the religious observer that the neutrality principle (defined as evenhandedness) promises equality of treatment with regard to competing religious groups, church contributions still impose a financial obligation on the nonbeliever that cannot as easily be associated with a recognizable secular purpose from which he or she benefits (other than pluralism and its presumed effects on civic vitality)—thus, the compromise of religious freedom, or, more precisely, freedom from religion by those who choose not to practice. Education, on the contrary, is a well-recognized secular function; so much so that it is compulsory throughout the states. The nonobserver has no choice but to pay for its support. The question before us is whether the nonobserver should be compelled to pay for it when it is provided in a religious setting, which states already recognize as a legitimate route for fulfilling compulsory education requirements. This question is a bit more complicated, but not as daunting as it may appear.

As a matter of fact, the average cost of sending a child to a religious school is considerably lower than the cost of public school.<sup>345</sup> In the

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344. THE COMPLETE JEFFERSON, *supra* note 337, at 446–47.

345. According to the National Center for Education Statistics, the average per capita expenditure for students in public schools during the 2000–01 school year was \$7079. THE NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF EDUC., at <http://nces.ed.gov/fastfacts/display.asp?id=66>. National cost figures for public schools are not available by grade level. Per capita expenditures for Catholic schools, which enroll approximately half the nonpublic school population, are available by grade level: elementary schools, \$3505; high schools, \$5571. DALE McDONALD, ANNUAL REPORT ON CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS: UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOL STATISTICS 2001–2002 (2002). Data made available to the author from the Missouri Synod Lutheran Schools (the denomination with the second highest enrollment after Catholic schools) indicate that 281,605 students attended their schools in the 2000–01 school year. The estimated costs are broken down as follows: \$1946 for early childhood; \$3751 for elementary; \$6359

Cleveland program, for example, religious schools received a maximum of \$2250 per student in public funding, whereas public schools were allocated \$7746 per student.<sup>346</sup> To argue that the choice program imposed a financial burden on any taxpayer would be ludicrous, unless one accepts the proposition that public schools should still receive funding for students who have opted to be educated elsewhere. The net result should have been a taxpayer saving. From this, it appears that one way to prevent nonbelievers from assuming the costs of religious choices made by others is to cap the amount of the voucher so that it does not exceed the per capita cost of sending the same child to a public school. I do not mean to suggest that the resolution of a 225-year-old constitutional dilemma comes down to an argument over price, but calculating the relative costs of public and religious schools is crucially relevant to determining the burden that choice puts on the nonbeliever.

The Jeffersonian argument is admittedly more than this. At issue is the investment of tax dollars, however many or few, in the religious mission of an institution that is not in accord with every citizen's sympathies. The answer to this question is more philosophical than financial, although the two are related. Such anxiety on the part of nonbelievers is the price paid for living in a pluralist state, where parents enjoy the opportunity to educate their children in schools that reflect their own values. Such opportunities—defined as rights in *Meyer*, *Pierce*, and *Yoder*—are especially justifiable when they do not impose tangible burdens on the general citizenry. A publicly supported voucher program that allows all parents to choose is fairer, more egalitarian, if you may, than the present arrangement that practically limits choice to the economically advantaged. The essential fairness of the voucher program outweighs the discontent of the unburdened nonbeliever.

## 2. Madisonian Pluralism

It was on the strength of Jefferson's argument in the *Bill for Establishing Religious Freedom* that James Madison opposed a law brought before the Virginia Legislature in 1785 that would have instituted a tax assessment for funds to support "Teachers of the Christian Religion." Although contemporary secularists, including the dissenting justices in *Zelman*, are fond of citing the familiar *Memorial and Remonstrance*,

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for secondary school. Costs were expected to rise by five percent over the following year. While cost figures are not available for fundamentalist schools, their expenditure levels are generally thought to be lower than those of Catholic schools.

346. See *supra* note 31 and accompanying text.

analogizing the text to the present voucher discussion is once again problematic. The bill, presented by Patrick Henry, was supported by a coalition of distinguished patriots that included George Washington and John Marshall. Concerned that the disestablishment of the Anglican Church had led to a decline in public morality and in the civic spirit that they associated with good character, the bill's proponents saw it as a way to advance both religion and democracy. Madison was joined by Thomas Jefferson and George Mason in his opposition to the proposal. In all likelihood, the *Zelman* Court would have also struck down such a bill because the aid in question was limited to Christian teachers. The bill not only lacked neutrality, it was a *Nyquist* type of proposal (implicitly rejected by the *Zelman* Court) taken to an extreme. It involved support not for students at religious schools but for the clergy itself. Therefore, it does not provide a philosophical precedent for striking down a Cleveland-type voucher program any more than the *Nyquist* ruling did. Nonetheless, Madison's thoughts in *Memorial and Remonstrance* are instructive to contemporary antagonists in the choice debate.

Madison was more sympathetic than Jefferson to the free exercise rights of religious observers when weighed against the prerogatives of state authority. As he explained in the same *Memorial and Remonstrance*, a person's first allegiance must be to the Creator, and only secondarily is it owed to the state.<sup>347</sup> I am more inclined to view Madison as a nonpreferentialist on the First Amendment than as a strict separationist, although authorities on the subject would certainly differ with my interpretation.<sup>348</sup> Legal historian Jack Rakove, among others, in disagreeing with my interpretation, points to a document drafted by Madison in which Madison referred to religion as one of the "vices of the

<sup>349</sup> As a member of the Virginia Legislature, however,

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347. According to Madison,

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.

JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments 1785*, reprinted in THE COMPLETE MADISON: HIS BASIC WRITINGS 300 (Saul Padover ed., 1953). See McConnell, *supra* note 133, at 1449–55.

348. See Jack N. Rakove, *Once More into the Breach: Reflections on Jefferson, Madison, and the Religion Problem*, in MAKING GOOD CITIZENS, *supra* note 323, at 233, 247–58; LEVY, THE ESTABLISHMENT CLAUSE, *supra* note 109, at 112–19; Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 885 (1986).

349. Rakove, *supra* note 348, at 249–50.

Madison also supported legislation punishing Sabbath breakers.<sup>350</sup> Notwithstanding his negative attitude toward religion and its effects in some instances, I find a nonpreferentialist interpretation of Madison's thinking on the subject more compatible with the overall egalitarianism that shapes his political philosophy.

Madison had a deep concern for minorities and the treatment they might suffer at the hands of political majorities.<sup>351</sup> This concern was in play when he wrote *Memorial and Remonstrance* for Madison feared that his well-meaning colleagues were moving toward the institution of an informal Christian establishment. No longer under the yoke of the British clergy, this home-grown version of government-sponsored religion would not treat all people the same. Although citizens were permitted to specify the Christian denomination to which their tax surcharge would be directed, Jews, Muslims, deists, and agnostics were not permitted to direct their funds to their own congregations. Quakers and Menonists were exempted because they had neither churches nor a clergy.<sup>352</sup>

I do not mean to suggest that Madison would have been more sympathetic to the obnoxious bill in question if it were administered evenhandedly because the evidence indicates the contrary.<sup>353</sup> The point is that, given the Christian predisposition prevalent at the time and place in which he lived, it would have been difficult for Madison to separate any accommodation between church and state from the preferential status that some groups enjoyed over others; and additionally, Madison was worried about how religious minorities would fare. This anxiety is present again in the *Detached Memoranda*, written in his retirement, where Madison objected to the Thanksgiving Proclamation and the appointment of congressional chaplains—both of which he supported when in the White House. With regard to the latter practice, he wrote:

The establishment of the chaplainship to Congs is a palpable violation of equal rights . . . . The tenets of the chaplains elected [by the majority] shut the door of worship agst the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a

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350. RAKOVE, *supra* note 332, at 311.

351. *Id.* at 290–91, 335–36.

352. See Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions From Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 803 (2002). Thus, Madison wrote, "As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions." MADISON, *supra* note 347.

353. Blasi, *supra* note 352, at 792.

Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.<sup>354</sup>

As another measure of Madison's inclination on the religion question, one might consider his first public act after returning to Virginia from Princeton. In 1776, as a twenty-five-year-old delegate to the Virginia Constitutional Convention, he drafted language designed to guarantee religious freedom. As an alternative to a proposal made by George Mason calling for toleration, Madison formulated an egalitarian prescription, which read, "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."<sup>355</sup> Again, in constructing an early draft of the First Amendment, he proposed to guarantee the "full and equal rights of conscience."<sup>356</sup> One does not need to dismiss Madison's later warnings against the excesses of religious zealotry, or political passions of any sort for that matter, in order to understand his fundamental egalitarianism. Indeed, accepting the former is essential to appreciating the latter. The genius of Madison's statecraft was his facility for converting the base instincts of human beings into a formula for democratic governance. His scheme defines the framework of our Constitution, and it is well known.

Madison's solution to the havoc of factionalism is pluralism, which he hoped to achieve through ratification with the creation of an "extended republic."<sup>357</sup> As he outlined it in *Federalist Paper No. 10*, the threat of majority tyranny can be remedied by a diverse political landscape composed of many competing groups and interests.<sup>358</sup> A thriving pluralism would make it difficult for any one group to dominate politics; the dynamic of conflict among them would make the formation of ruling majorities temporary and fleeting so that the majority might be recomposed from one

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354. James Madison, *Detached Memoranda* (1817), in *THE FOUNDERS CONSTITUTION* 103, 104 (Philip B. Kurland & Ralph Lerner eds., 1987).

355. See Blasi, *supra* note 352, at 802 (citing Madison's egalitarian prescription). See also JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 61–91 (1998); GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF JAMES MADISON* 27–36 (1991) (elaborating on Madison's thinking regarding religion).

356. Aviam Soufier, *The Fullness of Time*, in *OBLIGATIONS OF CITIZENSHIP*, *supra* note 99, at 245, 252.

357. RAKOVE, *supra* note 332, at 35–36, 42–56; SHELDON, *supra* note 355, at 53–78.

358. Madison stated, "Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens." *THE FEDERALIST NO. 10*, at 56–65 (James Madison).

issue to the next.<sup>359</sup> And so it would be with religion. The way to guard against the oppression of minority religions is to promote a robust religious pluralism. As Madison explains in *Federalist Paper No. 52*:

In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . .<sup>360</sup>

Familiarity with the Madisonian prescription that frames our Constitution, and with the political system it created, makes a reading of Justices Stevens' and Breyer's dissents in *Zelman* especially wondrous. Each portrayed religion as a source of conflict,<sup>361</sup> and Madison would have agreed. Justices Stevens and Breyer, however, found the growing diversification among religious groups in America a threat to the democratic system—a threat that should be corrected by state-enforced secularism in education. Madison would have celebrated the growing pluralism as a sign of health in the democratic system, the energy of which could be channeled into positive public purposes.<sup>362</sup> He accepted political conflict and disagreement as axioms of democracy and would have been troubled by any effort by the government to apply its power to diminish discord that could be mediated in a lawful way.

## B. PUBLIC POLICY AFTER *ZELMAN*

The *Zelman* decision marks the near culmination of a series of judicial rulings handed down by the Rehnquist Court defining a pluralist vision of American democracy—only yet to be completed by a subsequent ruling that would prohibit the states from enforcing standards that undermine the principles of religious freedom and equality of treatment that the

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359. See generally DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 7, 59–110 (1984) (studying “why and how *The Federalist* proposes to combine liberalism with a ‘strictly republican’ form of government”); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 4–33 (1956) (discussing Madisonian democracy); Peter S. Onuf, *James Madison’s Extended Republic*, 21 *TEX. TECH L. REV.* 2375 (1990) (describing the context in which Madison wrote *Federalist No. 10*).

360. *THE FEDERALIST* NO. 51, at 347, 351–52 (James Madison).

361. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 685–86, 716–17 (2002).

362. See generally WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* (2003) (tracing the reluctant acceptance of religious diversity by the American people from the early nineteenth century to the present); SCHUCK, *supra* note 13, at 264–71 (reviewing the literature on religious diversification in America); Richard N. Ostling, *America’s Ever-Changing Religious Landscape*, in *WHAT’S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?* 17 (E.J. Dionne, Jr. & John J. Dilulio, Jr. eds., 2000) (offering empirical evidence of how Americans have become more religiously diverse since the founding).



Constitution protects.<sup>363</sup> Apart from judicial precedent, the standards adopted by the *Zelman* Court—neutrality and choice<sup>364</sup>—make for good public policy because they prove, upon examination, to be eminently reasonable. Their reasonableness becomes most evident when we explore the alternatives.

There are two alternatives to following the neutrality standard with regard to religion. One would favor religious institutions and their members over others, which is not permitted by the First Amendment, and more particularly, by the Establishment Clause. The other would disfavor religious institutions in comparison to others, which would violate the purposes for which the First Amendment, and especially the Free Exercise Clause,<sup>365</sup> was written. While one can enjoy varying degrees of choice in a free society, the alternative to choice is to have no choice at all, which undermines the kind of negative freedom that one should take for granted in a liberal democracy.<sup>366</sup> What is especially troubling about the prevailing arrangement in American education is that it makes choice a function of income, violating both liberty and equality. The point of voucher programs, like the one implemented in Cleveland, is to allow disadvantaged families to enjoy a level of religious and educational freedom that resembles that enjoyed by their more privileged neighbors.

Designing choice programs that promote various forms of liberty and equality is a rather complicated matter for many reasons, not the least of

363. See McGinnis, *supra* note 278 (arguing that the Rehnquist Court has pursued a coherent jurisprudence that invigorates decentralization and the private ordering of social norms celebrated by Tocqueville). But one should not mistake the Rehnquist Court's neutrality for unlimited accommodation to religious institutions. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Church of Lakumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (recognizing limits to religious rights protected by the First Amendment).

364. See *Zelman*, 536 U.S. at 652.

365. Michael A. Paulsen explains that the two clauses must be understood as cohorts protecting the same essential liberty:

[T]he establishment clause protects religious liberty; it safeguards much the same interests as the free exercise clause, but in a slightly different way. The free exercise clause defines the important individual liberty of religious freedom while the establishment clause addresses the limits of allowable state classifications affecting this liberty. The two clauses, naturally enough, address a single, central value from two different angles: The free exercise clause forbids government proscription; the establishment clause forbids government prescription. Stated narrowly, government can neither keep persons from exercising certain religious beliefs nor may it make them exercise any religion.

Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTREDAME L. REV. 311, 313 (1986).

366. As Berlin argues, "[w]e assume the need of an area for free choice, the diminution of which is incompatible with the existence of anything that can properly be called political (or social) liberty." BERLIN, *supra* note 317, at xxxvii.

which is the possible tension generated by these fundamental values and the methods for realizing them. Although it is neither necessary nor possible to address all the details of a prospective choice policy, some considerations are in order to complete the present project.

### 1. School Choice: Liberty or Equality?

Ever since the idea of a common school system was conceived, schools have been battlegrounds for people with competing political and social values; and religion was, more often than not, at the center of the debates. In Horace Mann's day, the problem had to do with the promulgation of a nondenominational Protestantism through prayers, hymns, and Bible reading.<sup>367</sup> By the time James Blaine was elected to Congress, it turned into a more overt anti-Catholic bigotry.<sup>368</sup> The gradual emergence of a secular culture in and out of school would eventually exorcise American education of such demons, if not of the continuing battles over religion in the classroom.<sup>369</sup>

The first great debate in the twentieth century took place in 1925, when John Scopes, a teacher in Tennessee, was convicted of violating a state law that prohibited the teaching of evolution in the public schools.<sup>370</sup> Even then, religious dogmatism of the sort that punished Scopes was out of step with the overall sentiment of the nation. When the Supreme Court, beginning with *Everson*, took it upon itself to complete the job of secularizing the public schools, it proceeded with broad public support.<sup>371</sup> True, the culture wars would continue through the twentieth century.<sup>372</sup> But as Madison would have predicted, the American people had become too religiously and culturally diverse to allow any one group to take charge and repeat the excesses of the nineteenth century. Notwithstanding the rise

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367. See CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* 166 (1988); STANLEY K. SCHULTZ, *THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860*, at 4-9 (1973).

368. See RAVITCH, *supra* note 117, at 30-32; JORGENSEN, *supra* note 117, at 146-58; RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 1-32 (1938).

369. See generally WARREN A. NORD, *RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* 39-97 (1995) (tracing the secularization of American life and education).

370. See EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* (1997) (a broad analysis of the Scopes trial).

371. See Jeffries & Ryan, *supra* note 121, at 318-27.

372. The term is attributed to JAMES DAVIDSON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* xi (1991). See also JONATHAN ZIMMERMAN, *WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS* 131-211 (2002); JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA* (1999); BARBARA H. GADDY, T. WILLIAM HALL & ROBERT J. MARZANO, *SCHOOL WARS: RESOLVING OUR CONFLICTS OVER RELIGION AND VALUES* (1996) (focusing on religion in the public schools).

of the Christian Coalition and the nation's general move to the right of the political spectrum, by the time *Zelman* appeared before the Supreme Court, certain big questions had been settled: officially sponsored student prayer, graduation prayer, Bible reading, and silent meditation were prohibited in public schools, as were religious classes and the posting of the Ten Commandments, and laws banning the teaching of evolution or mandating the teaching of creationism.<sup>373</sup>

Secularism, however, brought new problems. While ridding God from the classroom was accepted by the preponderance of parents who sent their children to public schools, secularism was out of step with the values and lifestyles of devout religious observers who were unable to separate religion from the routines of daily life, or who were offended by teachings ordinarily followed by others.<sup>374</sup> What was to be done with children whose families believed that prayer and religious observance are essential to a proper upbringing? How would public schools address the needs of families who found that teaching evolution or sex education violated the doctrines of their faith?

One of the most celebrated confrontations to occur in American education in the last fifteen years involved Christian fundamentalist parents in Tennessee, who protested against materials their children were required to read in school because the readings promoted ideas that contradicted their religious values.<sup>375</sup> More recently, in the wealthy hamlet of Bedford Village, New York, parents objected to aspects of a "New Age" curriculum that they claimed was religious in content and offensive to their own beliefs.<sup>376</sup>

Recognizing that all schools convey values, and that some people's values are not reflected in the curriculum, many libertarians and religious fundamentalists have turned to choice as a way to safeguard their religious

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373. See Jeffries & Ryan, *supra* note 121, at 290.

374. See VITERITTI, *supra* note 80, at 161–68.

375. In this case, the parents requested that their children be accommodated with alternative readings. The school board declined, and its decision was upheld by a federal appeals court. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). For an analysis of the case, see STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* 233–302 (1993); Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993) (analyzing the problem of assimilation in a liberal society through the prism of *Mozert v. Hawkins County Board of Education*).

376. In this case, the school board modified the curriculum after an embarrassing media-saturated trial in federal court. See *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2001); SALOMONE, *supra* note 262, at 142–96.

and philosophical freedom.<sup>377</sup> As schools grow more secular, the demand for the availability of a choice that includes religious options becomes more compelling. What is more, providing religious observers and other dissenters with educational options outside the public schools would alleviate the social conflict sparked by forcing them to function in a secular environment that is hostile to the demands of their conscience. Many libertarians have been attracted to the voucher proposal put forward by economist Milton Friedman.<sup>378</sup> While he appreciated how choice could enhance the moral freedom of voucher recipients, Friedman was primarily concerned with achieving economic freedom. The two goals, however, are highly compatible.

A disciple of Adam Smith, the Nobel Laureate sought to break up the monopoly that government-run schools held over public funding allotted to education and replace it with a system of schools that were publicly financed but privately run. Friedman believed that allowing parents to spend education dollars as they saw fit would lead to a diversification of education providers, and that such diversification, combined with choice, would maximize parental freedom. Friedman also predicted that the competition engendered by his market-based plan would eventually force low-performing schools to close and improve the overall quality of education in America. As he understood it, school choice would have a particularly beneficial impact on poor children who were stuck in failing public schools.<sup>379</sup>

Friedman's voucher proposal would also give rise to a different line of reasoning, which had a more egalitarian purpose. This approach was first elaborated by John Coons and Stephen Sugarman, two law professors from the University of California at Berkeley. Coons and Sugarman had produced seminal research on spending disparities between rich and poor school districts, which was instrumental in launching the campaigns for

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377. One of the first libertarian arguments appears in STEPHEN ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* (1983). See also STEPHEN ARONS, *SHORT ROUTE TO CHAOS: CONSCIENCE, COMMUNITY, AND THE RECONSTRUCTION OF AMERICAN SCHOOLING* 9 (1997) (recognizing that "the most valuable education is based upon goals generated not by governments, but by individual learners and teachers and by the families and communities of which they are a part").

378. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955) (examining justified and unjustified government interventions in education). See also MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962) (discussing the role of competitive capitalism as a system of economic freedom, and economic freedom as a necessary condition for political freedom).

379. See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 150-88 (1980).

school finance reform in California and in the rest of the nation.<sup>380</sup> They identified school choice as one possible mechanism for resolving the educational disparity between the rich and poor because, as they saw it, vouchers would provide disadvantaged families with educational options beyond the low-performing public schools where they customarily sent their children.<sup>381</sup> In subsequent writings, Coons and Sugarman explained how choice could function to promote liberty and allow parents to educate their children in settings that were compatible with their own values.<sup>382</sup> What the two Berkeley professors defined as political freedom would furnish even poor people with the opportunity to live their lives as they saw fit—whether their moral code was shaped by religion or some other philosophical orientation. Where Friedman acknowledged a certain tension between his notions of freedom and equality, Coons and Sugarman found the two values to be complementary ingredients essential to forming life in a pluralist democracy.<sup>383</sup>

The egalitarian approach to choice gained new momentum when Wisconsin and Ohio enacted their school voucher laws. Passed with the support of African American activists in Milwaukee (1990) and Cleveland (1995), the nature of these legislative victories demonstrated that the constituency for school choice was no longer limited to conservative or libertarian advocates.<sup>384</sup> Many black parents supported choice as a mechanism for escaping chronically failing urban schools. Some forty

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380. See COONS, CLUNE & SUGARMAN, *supra* note 298.

381. See JOHN E. COONS & STEPHEN D. SUGARMAN, MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES (1999); Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171 (1991); John E. Coons & Stephen D. Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321 (1971). See also Thomas Nechyba & Michael Heise, *School Finance Reform: Introducing the Choice Factor*, in CITY SCHOOLS: LESSONS FROM NEW YORK 367 (Diane Ravitch & Joseph P. Viteritti eds., 2000) (exploring the option of providing vouchers to the parents of school children assigned to underperforming schools, who could then redeem the vouchers at any eligible public or private school, religious or otherwise); Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 796 (1995) (arguing that “private school vouchers provide an effective remedy for violations of students’ state education

382. See JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978). See also John E. Coons, *Intellectual Liberty and the Schools*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 495 (1985) (examining the extent to which the U.S. system of education and individual liberty can be reconciled).

383. Coons subsequently defined equality as “the capacity of every rational person to advance in moral self-perfection through diligent intention of correct behaviors towards other persons.” JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 13 (1999).

384. See generally BOLICK, *supra* note 20, at 15–107; FREDERICK M. HESS, REVOLUTION AT THE MARGINS: THE IMPACT OF COMPETITION ON URBAN SCHOOL SYSTEMS 72–166 (2002) (describing the political dynamics in each city).

years after the Supreme Court handed down the *Brown* decision, most African American and Latino children still were not receiving a decent education, and the learning gap between the races was unacceptably steep.<sup>385</sup>

The *Zelman* Court had opened its opinion with an account of the Cleveland public schools' failure to reach the large majority of poor African American children in the city, describing the situation as though it were emblematic of a larger national problem.<sup>386</sup> Justice Thomas more explicitly introduced the unfulfilled promise of *Brown* as a matter worthy of judicial concern.<sup>387</sup> Some exuberant choice supporters, to the consternation of civil rights veterans who oppose choice, have gone so far as to claim that *Zelman* is the most important Supreme Court decision since *Brown*.<sup>388</sup> Nobody seems to be suggesting that *Zelman* is more important, or even as important, as *Brown*, and the question of what ruling should be ranked next is certainly debatable.<sup>389</sup>

Wherever one comes down on the latter question, a central observation appears valid: The focus of the choice debate has moved from a discussion about the First Amendment to a discussion about education. However one slices it, race, not religion, remains the great dilemma of American democracy in the twenty-first century.<sup>390</sup> As a unanimous Supreme Court declared in 1954, there can be no hope for resolving the dilemma of racial inequality until we resolve the persisting problem of inequality in educational opportunity and achievement. Nearly a half-century of experimentation with various educational and social programs has demonstrated that there is no easy answer to this gnawing problem. Yet, to the extent that school choice offers some evidence that it

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385. See Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in *THE BLACK-WHITE TEST SCORE GAP 1* (Christopher Jencks & Meredith Phillips eds., 1998); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 352–66 (1997) (both documenting a chronic learning gap between the races).

386. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

387. See *id.* at 680–84.

388. Linda Greenhouse, *Win the Debate, Not Just the Case*, N.Y. TIMES, July 14, 2002, § 4, at 4.

389. Notably, Chief Justice Warren himself believed that the accumulated impact of the voting rights cases (fifteen in all) handed down during his tenure was the most significant legacy of the Warren Court. See G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 337 (1982).

390. See generally Joseph P. Viteritti, *Risking Choice, Redressing Inequality*, in *MAKING GOOD CITIZENS*, *supra* note 323, at 326–43 [hereinafter *Risking Choice, Redressing Inequality*] (explaining the connection between educational inequality and social and political inequality); Joseph P. Viteritti, *A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation on the Voucher Question*, 57 N.Y.U. ANN. SURV. AM. L. 89 (2000) [hereinafter *Why Educational Opportunity Trumps Strict Separation*] (arguing that addressing the problem of educational inequality must take precedence over demands for strict separation between church and state).

might be part of a larger solution, it can rightfully be seen as a tool for advancing equality.<sup>391</sup> Even as social scientists continue to debate the evidence to determine whether vouchers or choice will advance the educational performance of disadvantaged minority children, giving poor parents the choices that others have assumed as theirs speaks to the more fundamental values of liberty and equality.<sup>392</sup> The evidence shows that, as poor and minority parents come to understand the concept of choice, the great majority want it for their children.<sup>393</sup>

## 2. The Devil and God in Details

Despite large areas of agreement that allow libertarians and egalitarians to coalesce in support of school choice, there are subtle differences between the two camps that have significant implications in the policy realm. As a general rule, libertarians are less inclined to rely on government to regulate education under a choice regime, whereas egalitarians are more apt to demand a governmental role to assure that their social and political goals are met.<sup>394</sup> What role should the government assume? The question does not call for an absolute rule of thumb. It is difficult to envision a program that claims to have a genuine public purpose absent any governmental role; yet, in a liberal pluralist state that seeks to maximize both freedom and equality, we must be cautious in what we ask

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391. See WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* 140–67 (2002) (summarizing the research on voucher programs, which shows modest but statistically significant improvements in test scores among African American children who participate in public and private voucher programs); BRIAN P. GILL, P. MICHAEL TIMPANE, KAREN E. ROSS & DOMINIC J. BREWER, *RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS* 69–114 (2001). See also Jeffrey Grogger & Derek Neal, *Further Evidence on the Effects of Catholic Secondary Schooling*, in *BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS* (William G. Gale & Janet Rothberg Pack eds., 2000); William N. Evans & Robert M. Schwab, *Finishing High School and Starting College: Do Catholic Schools Make a Difference?*, 110 Q. J. ECON. 941 (1995); William Sander & Anthony C. Krautmann, *Catholic Schools, Dropout Rates and Educational Attainment*, 33 ECON. INQUIRY 217 (1995) (indicating that low-income African American students who attend Catholic high schools are more likely than their public school peers to graduate and attend college).

392. See Joseph P. Viteritti, *School Choice: Beyond the Numbers*, EDUC. WK., Feb. 23, 2000, at 1.

393. See TERRY M. MOE, *SCHOOLS, VOUCHERS AND THE AMERICAN PUBLIC* 193–255 (2001).

394. Compare, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990); ANDREW J. COULSON, *MARKET EDUCATION: THE UNKNOWN HISTORY* (1999); and Milton Friedman, *The Market Can Transform Our Schools*, N.Y. TIMES, July 2, 2002, at A21 (taking a libertarian position), with COONS & SUGARMAN, *supra* note 381; Diane Ravitch, *Somebody's Children: Educational Opportunity for All American Children*, in *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* (Diane Ravitch & Joseph P. Viteritti eds., 1997); and VITERITTI, *supra* note 80, at 1–16 (taking an egalitarian position). For a comparison, see Joseph P. Viteritti, *Defining Equity: Politics, Markets, and Public Policy*, in *SCHOOL CHOICE: THE MORAL DEBATE* 13 (Alan Wolfe ed., 2003) [hereinafter *Defining Equity*].

government to regulate. Drawing the appropriate boundary for government involvement/interference can be more challenging than it first appears, even when we begin with certain basic value premises.

A debate that ensued between Stephen Macedo and Michael McConnell in the *Chicago-Kent Law Review*<sup>395</sup> is instructive. Macedo is a liberal political theorist who reluctantly supports giving vouchers to poor children in order to allow them to escape failing public schools. McConnell is a conservative legal scholar and voucher supporter who, as we have seen, identifies with a pluralist view of the liberal state.<sup>396</sup> Writing on the voucher question, Macedo insists:

[T]he flow of public monies to religious schools and nonprofit institutions should come with “strings attached” designed to insure that public purposes are served. The predictable result will be that some religious institutions and communities will have to compromise their special mission in order to enjoy access to public funds.<sup>397</sup>

Macedo is convinced that some sectarian schools will need to redefine themselves so that they become more attuned to the public values needed to mold individuals into good citizens. He contends that McConnell harbors a form of multiculturalism that neglects the common civic culture crucial to fostering a healthy democratic society.<sup>398</sup> For Macedo, religious schools that participate in government-sponsored voucher programs must become, in a word, more “public.”<sup>399</sup> McConnell retorts that Macedo, in insisting that the nation must be governed by common beliefs and values enforced by public authority, is endorsing a new form of “establishmentarianism.”<sup>400</sup> He asserts,

It is possible, liberals have taught, for people of widely divergent values and commitments to live together in harmony, so long as they mutually forswear the use of public power or private violence to induce their fellow citizens to conform. All must agree to live and let live. We need not agree on much more than that.<sup>401</sup>

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395. Symposium, *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289 (2000).

396. See McConnell, *supra* note 99, at 100.

397. Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 418 (2000).

398. *Id.* at 425.

399. See *id.* at 442.

400. Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466–67 (2000).

401. *Id.* at 454.



At the risk of offending both Macedo and McConnell, I would suggest that the two are not as far apart in their prescriptions as they might think. Their differences can, at least in part, be attributed to their distinct outlooks on religion, or more specifically, the religious groups to whom they direct their remarks. Macedo's suspicions appear shaped by his attention to religious groups that are somewhere outside the norm in their beliefs and behaviors, the very ones that, in McConnell's words, might be inclined to "use public power or private violence to induce their fellow citizens to conform."<sup>402</sup> McConnell's perspective is shaped by his focus on the mainstream, the great majority of religious organizations that accept the democratic values inherent in our common civic culture. Perhaps this observation raises another interesting question about whether public policy should be fashioned to accommodate those who live their lives within the norm or in response to those outside of it.<sup>403</sup> But, before that question can be addressed, it is important to emphasize two other points.

The first is that, rather than serving to undermine civic values, the weight of evidence indicates that religious institutions have historically served as a foundation for civic life in America.<sup>404</sup> Alan Wolfe has discovered that most Americans prefer to practice a "quiet faith",<sup>405</sup> that is, while Americans are more likely than citizens in other democratic countries to express a belief in God and to attend church regularly, they are reluctant to impose their religious views on their neighbors, and are disinclined to support denominational leaders or groups that would.<sup>406</sup> The picture that emerges from Wolfe's research portrays Americans of faith as tolerant democrats rather than religious zealots. Acknowledging the nation's disturbing experience with religious extremists, Wolfe also has made the relevant historical observation that, over time, American democracy has tended to "soften" ideological fervor among ardent believers, more so than such fervor has functioned to "harden" American democracy.<sup>407</sup> Of course

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402. *Id.*

403. See Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 401 (1995) (interpreting Madisonian theory to argue that programs benefiting mainstream religions are more constitutionally suspect than those benefiting peripheral ones).

404. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 65–69 (2000); William A. Galston & Peter Levine, *America's Civic Condition: A Glance at the Evidence*, in *COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA* 30, 33–34 (E.J. Dionne, Jr. ed., 1998).

405. ALAN WOLFE, *ONE NATION, AFTER ALL* 56 (1998).

406. See *id.* at 39–87, 275–322.

407. Alan Wolfe, *Schooling and Religious Pluralism*, in *MAKING GOOD CITIZENS*, *supra* note 323, at 279, 285.

there still may be some groups—religious or other—who would use vouchers to operate private schools that advocate undemocratic ideas, preach hatred, or embrace intolerance. While exceptional, such institutions present a problem that must be dealt with. We will return to that question in the next sub-Part.

A second point that needs to be emphasized, also alluded to earlier, is that public education—more particularly, a public commitment to provide each child with a free education at public expense—was adopted to fulfill a fundamental public purpose. When Thomas Jefferson first wrote on the subject in 1779, he explained that an educated citizenry is a prerequisite for democratic governance.<sup>408</sup> This is exactly the purpose that Horace Mann had in mind when he opened the doors to his public school in Massachusetts more than a half century later.<sup>409</sup> Generations of empirical research have demonstrated an indisputable connection between education and various forms of civic involvement.<sup>410</sup> The full meaning of education and its significance in modern society was expounded upon by Chief Justice Earl Warren, when he wrote for the unanimous Supreme Court in the *Brown* decision.<sup>411</sup> In today's world, educational achievement can be correlated with nearly every positive social indicator, whether it be employment, income, health, or family stability. As the Court said then, education is essential for living a good, productive life, and for that reason it should be treated as a right in a society that aspires to be just. Unfortunately, not all citizens have been favored with the benefits so important for the enjoyment of that right, and the distribution of these benefits is highly correlated with race and income.

Public policy must be fashioned both to accommodate those who live within the mainstream of American life and in response to those on the margins, whether marginalization is a function of individual or social determination. In a pluralist state, choice policy must be designed to

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408. Thomas Jefferson, *A Bill for the General Diffusion of Knowledge* (1779), reprinted in *CRUSADE AGAINST IGNORANCE: THOMAS JEFFERSON ON EDUCATION* 83–84 (Gordon C. Lee ed., 1961). See also Lorraine Smith Pangle & Thomas L. Pangle, *What the Founders Have to Teach Us About Schooling and Democratic Citizenship*, in *REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION* 21 (Lorraine M. McDonnell et al. eds., 2000) (describing the thinking of the founders on the connection between a sound education and a healthy democracy).

409. See generally LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION* (1951) (regarding the origins of educational concepts and institutions).

410. See Robert D. Putnam, *Community-Based Social Capital and Educational Performance*, in *MAKING GOOD CITIZENS*, *supra* note 323, at 58 (citing empirical data); NORMAN H. NIE, JANE JUNN & KENNETH STEHLIK-BARRY, *EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA* 2–5, 12–22 (1996) (citing the research literature).

411. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

promote both liberty and equality. But, once again, this is not an easy assignment because there are tensions inherent in an agenda that tries to do both.

No issue divides libertarian and egalitarian proponents of choice more sharply than the determination of the scope of a newly designed program.<sup>412</sup> Libertarians tend to favor universal voucher plans that would provide vouchers for all families. Egalitarians generally support targeted voucher programs that make vouchers available only to disadvantaged families. Both approaches have merit.

One obvious advantage of a universal voucher program is that it is fairer than the present system, which allows choice only for those with the private means to exercise it. Ironically, even though conceived as a libertarian scheme, a universal voucher plan serves an egalitarian agenda when considered in the context of the existing arrangement. Truer to its libertarian purposes, a universal voucher plan also gives each family a chance to opt out of a public school, for whatever reason it chooses (religious, philosophical, instructional), without assuming the cost of private school tuition. This way, choice becomes unburdened. Universal plans also accelerate the flow of funds into the private sector. This infusion of resources not only increases competition, it also serves to diversify the range of educational options available to families at a more rapid pace than targeted programs.

On a practical level, however, the operation of a universal voucher plan has a significant drawback. Under the present system, which restricts public funding to government-run schools, there are a limited number of private and religious institutions available to accommodate those who would choose to exit public schools.<sup>413</sup> There is a real shortage of capacity, measured in terms of empty classroom seats on the supply side of the choice ledger. Under these circumstances, a universal-choice plan might result in competition among parents in search of desirable options, rather than among schools to recruit more students. Middle-class parents who are better informed, have more resources, and are better equipped to manipulate the system would have a distinct advantage over poorer families.<sup>414</sup> Therefore, universal vouchers could have a disparate impact,

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412. See *supra* note 394.

413. Presently, nine out of ten students in the United States attend public schools. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, *Digest of Education Statistics 1999* (Mar. 2001).

414. There is empirical evidence to support this claim. See EDWARD B. FISKE & HELEN F. LADD, *WHEN SCHOOLS COMPETE: A CAUTIONARY TALE* (2000) (examining school choice in New Zealand);

mimicking the stratified effect of the current arrangement, though to a lesser degree.

Targeted vouchers would reach those families most in need. While a targeted voucher program might not be able to accommodate all the families who need or want a voucher (because of a limited supply of desirable options), it is not as likely to have a stratifying effect. As choice proceeds more robustly, additional options should become available. Until then, choice would have to be made available to the disadvantaged on the basis of a lottery, as it is now in most public and private voucher programs.

This much assumed, we must still come to terms with the implicit trade-off of selecting a targeted plan over a universal plan. The downside of a targeted plan is that it forces those not covered by the qualifying terms of the program (say, for example, income) to assume the cost of choosing a school outside the public sector that better reflects their own priorities and values. This is no worse than the existing arrangement, but it still leaves a burden on those who would exercise educational and religious liberty. The advantage of a targeted program, of course, is that it furnishes an opportunity to those who do not have the personal means to exercise choice. It is more redistributive in nature. While many of the poorer families who exercise the option to leave the public schools might be acting on the basis of philosophical or religious motivations, the evidence suggests that they are more likely motivated by the desire to see their children receive an effective education, which would allow them to live a productive and rewarding life.<sup>415</sup> They want their children to escape public schools that are academically deficient. Recognition of the distinct motivations behind different populations of voucher users and of the probable outcomes to be expected from universal, as opposed to targeted, programs highlights the inherently libertarian nature of the former type of program as compared to the egalitarian nature of the latter.

The justification for selecting the latter approach over the former is twofold. First, the adoption of a targeted program designed to promote the educational opportunities of poor people does not, in any significant way, diminish the educational freedom of those who are wealthier. Second, and more importantly, the need to provide effective schooling for the poor, a disproportionate number of whom are identifiable by race, is so

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WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (Bruce Fuller & Richard F. Elmore eds., 1996) (examining programs in the United States).

415. See HOWELL & PETERSON, *supra* note 391, at 168-84; GILL, TIMPANE, ROSS & BREWER, *supra* note 391, at 128-37.

fundamental to our aspirations for a just, democratic society that equality must take precedence. For the very same reason that educational opportunity trumps secularism (defined as strict separation of church and state) in the choice debate, equality must trump freedom in designing such programs.<sup>416</sup>

A second area of dispute between libertarians and egalitarians concerns economics. When Coons and Sugarman wrote their choice proposal in 1978, they took exception to a feature in the Friedman plan that would have parents pay a share of the tuition costs above the amount of the voucher.<sup>417</sup> They warned that such a provision might impose an unbearable financial burden on the poor and serve to exclude some deserving students from participation. Their point is well taken. We already have some evidence indicating that private voucher programs that pay only a portion of the tuition costs do not succeed in reaching the poorest of the people who cannot afford to pay any amount—although these programs certainly provide educational opportunities for many disadvantaged children who would otherwise not have them.<sup>418</sup> Therefore, as a matter of policy, private and religious schools that participate in voucher programs must be required to accept the voucher in full payment of tuition costs. This, however, raises another question regarding what the appropriate voucher amount should be.

In the *Zelman* case, voucher opponents had argued that the low amount of the voucher (\$2250) provided students with an incentive to attend religious schools, where tuition rates are lower compared to other private schools.<sup>419</sup> The more serious problem with the amount of the voucher is that it is so much smaller than the amount that would have been spent on its user if that same student had remained in public school (as much as \$7746 for public schools).<sup>420</sup> Aside from the problem of providing a reverse incentive that might discourage parents from choosing the nonpublic schools they prefer, the Ohio policy is a blatant violation of financial equity. A targeted voucher program designed to improve educational opportunities for poor children should not discriminate financially against the children who subscribe to it.

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416. See Viteritti, *Risking Choice, Redressing Inequality*, *supra* note 390, at 326–43; Viteritti, *Why Educational Opportunity Trumps Strict Separation*, *supra* note 390, at 89–117.

417. See Viteritti, *Defining Equity*, *supra* note 394, at 19–20.

418. See Terry M. Moe, *Private Vouchers*, in *PRIVATE VOUCHERS* 1, 23–26 (Terry M. Moe ed., 1995).

419. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 646, 650, 653–54 (2002).

420. *Id.* at 647.

Students who participate in state-supported voucher programs should enjoy financial parity with their peers attending public schools in the same school district. However, the amount of the voucher should not be allowed to exceed the level of per capita spending operable at the participating private or parochial school, which in the great majority of cases is lower than the per capita spending at local public schools.<sup>421</sup> The latter stipulation would prevent participating private and religious schools from reaping a windfall beyond the cost of educating the child. However, pegging the cap to costs rather than tuition (the latter of which is usually lower) would also save the school from absorbing a portion of the costs incurred for educating the student—a responsibility that belongs to the state.

Under no circumstances should the amount of a voucher exceed the per capita amount spent on public school students in a given school district. On a practical level, such a policy would prove both economically and politically unfeasible. As a matter of principle, such a policy would pose two problems. First, it would violate the principle of financial parity (although a case could easily be made for a more generous compensatory spending arrangement for disadvantaged families). Second, such a policy would impose an excessive burden on taxpayers; and more problematically, if an overpriced voucher were used at a religious school, it would raise a legitimate claim among taxpayers, following the Jeffersonian argument, that they are being forced to subsidize religious education. That would be unacceptable on First Amendment grounds.

Based on the line of reasoning adopted by the courts in the last generation of school finance cases, each state should be expected to define the level of spending needed to provide children with an adequate education,<sup>422</sup> with the added proviso that parents have choice regarding the education. The standard of public funding, therefore, would apply to all children (excluding private and parochial school children who do not qualify for a voucher on the basis of need). This approach would assure disadvantaged families a level of equity that has not been realized in either school-finance remedies or existing voucher programs.

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421. See *supra* note 345 (detailing the respective costs).

422. See Erlich, *supra* note 308; Heise, *supra* note 308.

### 3. Choice and Pluralism

Choice and pluralism are complementary attributes.<sup>423</sup> In order for choice to be meaningful, a diversity of educational options with distinct characteristics must be available to families. In order to enjoy the benefits of a pluralistic setting, families must have easy access to the array of educational options available. While it is reasonable and necessary for the government to impose certain expectations on programs with a definable public purpose, government involvement should not be so intrusive that it interferes with institutional prerogatives that permit schools to function in accord with their own legitimate values.

In defining the appropriate relationship between government and private or religious schools that participate in voucher programs, there are four areas of public policy that are especially worthy of consideration—if not in detail, at least to the extent of establishing some overall guiding principles. These include student eligibility, academic accountability, program content, and personnel policy.

First, let us speak to that aspect of the public-purpose doctrine that would incorporate private and religious schools into a plan designed to enrich the academic offerings available to poor children who, if not for the enactment of a voucher program, would be consigned to the low-performing public schools their parents deem unsatisfactory. This, though it fulfills certain libertarian objectives for participants, might be considered the more egalitarian aspect of a choice program. As a matter of public policy, religious schools that agree to participate in government-supported programs should be required to accept student applicants without regard to religion.<sup>424</sup> The general principle guiding applications and admissions of the target population should be the same as that which pertains to public schools in the same governmental jurisdiction (with the possible exception of liberalizing eligibility based on geographical residence).

Private and parochial schools that participate in voucher programs should also be expected to meet certain academic standards commensurate with the public purposes of the program. For example, they should be

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423. See GALSTON, *supra* note 312, at 3; KYMLICKA, *supra* note 316, at 127.

424. Existing civil rights laws already prohibit discrimination on the basis of race and ethnicity, and the Supreme Court has acted to apply such laws to religious institutions. See *supra* note 319. While a somewhat more complex question, the law does permit single-sex schools to exist as an option for those who desire them. On the latter, see ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 150–87 (2003).

required to administer the same or comparable standardized tests required of public schools to assure that students acquire basic academic skills (for example, reading, writing, mathematics, and science). They should also be required to inculcate the values, knowledge, and skills needed for responsible citizenship in a democratic society.<sup>425</sup> And they should specifically be prohibited from inculcating ideas that contradict values commensurate with life in a pluralist democracy. Any school that does not meet these academic and civic standards should be declared ineligible for participation in a publicly funded choice program.<sup>426</sup> The great majority of private and religious schools already do so.

Those that do not meet such standards might be inclined to view such requirements as an infringement on their institutional autonomy. Some religious schools might even consider such standards a violation of the entanglement prohibition set down in the *Lemon*<sup>427</sup> ruling. These are, however, reasonable expectations in return for the receipt of public funds (directly or indirectly) under the public-purpose doctrine. They are also consistent with the relaxed rules of engagement (entanglement) adopted by the *Zelman* Court and prior case law that call for neutrality in the regulation of religious and secular institutions.<sup>428</sup>

Now let us speak to the second public purpose that is at stake in forging a choice policy—the advance of pluralism. While this objective is more closely aligned to the libertarian part of our social agenda, a program that targets choice to the poor admittedly also has an egalitarian dimension to it. In order to advance pluralism, religious schools must be permitted to incorporate faith-based values in their teaching and programs as they see fit, as long as these values do not violate the standards broadly outlined above. The participation of pervasively religious schools in a publicly supported choice program will be less problematic in a post-*Zelman* world, when legislators and judges are no longer legally obliged to engage in the ambiguous and self-defeating process of discriminating between secular and religious functions.

A more delicate question concerns whether voucher recipients should be obliged to engage in religious training and exercises. When I first considered this issue years ago, I argued that children should not be

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425. See Galston, *supra* note 326.

426. I would similarly propose that any public school that does not meet these standards should lose its funding.

427. See *supra* note 24.

428. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).



required to participate in such activities.<sup>429</sup> I reasoned then that children who choose faith-based schools for academic enrichment, rather than for the religious teachings that may go with it, should be accommodated with an opt-out provision.<sup>430</sup> Having reconsidered the question in the context of a post-*Zelman* pluralist paradigm, I no longer believe that an opt-out provision should be required of participating religious schools (although some might still be willing to allow it). Such a provision, if forced, could compromise the value structure of faith-based institutions. This is especially true in circumstances where a majority of the students attending a religious school do not ascribe to the faith of the institution. While the approach I am advocating may seem unfair to the nonbeliever, those who would disagree with the recommendation miss a key point. Families that do not want to have their children educated in a particular religious tradition do not have to send them to schools associated with that tradition, and doing so would probably be ill-advised under any circumstances. Such is the essence of choice. More importantly, the goal of a pluralist society should be to grant parents a range of options, which include a variety of religious ones. These choices must be genuine. Public policy should not be designed to dilute religious institutions of their meaning, or convert them into secular institutions.

In a better world, school districts would offer a range of public school options—such as the charter and magnet schools that exist in Cleveland and many other localities—so that private and religious schools are not the only alternatives to failing, unsafe, or otherwise undesirable public schools.<sup>431</sup> As the *Mueller* and *Zelman* Courts ruled, however, the existence of multiple public options should not be a condition for allowing private and religious options as an alternative to the lack of choice now prevailing in most school districts. Yes, more choice is better than some choice, but some choice is better than none.

In a pluralist world, personnel policy must also be guided by parameters that maximize institutional autonomy and self-actualization. Here, the burning question is whether religious institutions should be allowed to restrict their hiring to individuals of their own faith. The law and the courts have already spoken on this. Title VII of the Civil Rights

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429. See VITERITTI, *supra* note 80, at 222.

430. *Id.*

431. See *id.* at 57–79 (describing the evolution of various forms of public school choice). See also THE CHARTER SCHOOL LANDSCAPE (Sandra Vergari ed., 2002); CHESTER E. FINN, JR., BRUNO V. MANNO & GREGG VANOUREK, CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION (2000) (describing the development and operation of charter schools).

Act of 1964 permits such an exemption for religious institutions,<sup>432</sup> and this provision of the law has been upheld unanimously by the United States Supreme Court.<sup>433</sup> As Justice Brennan explained at the time, religious groups, in the interest of autonomy, must be permitted to “select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.”<sup>434</sup> It is reasonable for institutions that are founded on the basis of certain values, and that define their purpose (at least in part) as the inculcation of those values, to employ individuals who are sympathetic to these same values. Public authority should be applied cautiously and sparingly in instances where intervention may interfere with the internal operation of private religious institutions or undermine their teaching.<sup>435</sup> In principle, religious institutions should be given a wide range of latitude to set policies consistent with their beliefs, and to select personnel that are likely to administer these policies effectively. In a pluralist society, such institutions must be furnished with sufficient freedom, within limits, to be what they would be for themselves and their members.

### CONCLUSION

The *Zelman* decision is the most recent in a growing body of Supreme Court jurisprudence that advances a pluralist vision of American democracy. It is well grounded in the history and traditions of the American civic culture. The pluralist vision is rooted in the writing of James Madison, the Constitution’s principal architect, and was never far from public consciousness, even in the shadow of the post-*Everson*, post-*Lemon* secularism that once required the government to treat religious institutions differently from the way it treated others. The appeal of the

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432. 42 U.S.C. § 2000e-1(a) (2000).

433. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *See also* *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (involving a nonreligious organization).

434. *Amos*, 483 U.S. at 341 (Brennan, J., concurring) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)). *Cf.* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (upholding the enforcement of an antigender discrimination law in Minnesota against an organization deemed to have an economic purpose).

435. Certainly, there is a range of sensitive issues that fall under the broad umbrella of personnel policy in which the religious values of an institution might clash with the individual rights of an employee. These questions cannot be dismissed lightly and deserve more careful consideration than can be given within the scope of this Article. *See generally* Nancy L. Rosenblum, *Amos: Religious Autonomy and the Moral Uses of Pluralism*, in OBLIGATIONS OF CITIZENSHIP, *supra* note 99, at 165–67; Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 115–22, 137–57 (1981); Laycock, *supra* note 434.

2003]

*READING ZELMAN*

1187

pluralist promise is that it serves to mediate, if not entirely resolve, tensions that arise in a society aspiring to realize liberty and equality simultaneously, with little compromise to either. The merits of pluralism are especially appreciable in the context of the voucher question. When properly designed, school choice allows parents to align their children's education with their own values, and it serves as a public vehicle for enhancing the educational opportunities of disadvantaged children who have been denied the benefits of a good education.

