

## THE ENLIGHTENMENT CASE FOR VOUCHERS

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The Free Exercise and Establishment Clauses of the United States Constitution stand as monuments to the Enlightenment era's defense of freedom of individual conscience and expression. They represent a considered judgment rejecting government enforced orthodoxy of opinion. They also implicitly declare that society best flourishes through competition between frameworks of thought generated by individuals and institutions outside the ambit of official control. Thus, it is curious that the Establishment Clause is regularly invoked to condemn school vouchers—programs that make it easier for people of all incomes and backgrounds to express their competing world views by sending their children to the schools of their choice.

In this essay, I argue that a system of vouchers conforms to the principles of the Framers better than our current system, in which all publicly funded primary and secondary schools are publicly controlled. Vouchers preserve the ability of all individuals to choose to educate their children in privately operated schools, whether religious or secular. Such choice more effectively empowers the exercise of religious freedom in raising children than a system that forces parents to pay twice—once for a public school they reject and once for a school that acts *in loco parentis* consistently with their values.

Through the free choices of individuals, vouchers also preserve a healthy competition between religious and secular ideas about education that, like other forms of competition, provides a decentralized route to social progress. The alternative of public control over all education leads to a monopoly over contestable social norms, perilously close to the establishment of orthodoxy that the Establishment Clause was designed to prevent. In short, public funding of education without public control over the content of the religious or secular ideas that are the components of education better resembles the kind of spontaneous order of norms that the Framers favored than does a system of public funding and control where

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individuals are penalized through taxation for seeking an education infused with their own ideals.<sup>1</sup>

My argument moves in three stages. First, I will very briefly sketch some of the Framers' principles. I rely on the Framers not only because the original meaning of the Constitution is relevant to its interpretation, but also because the Framers' ideas are an excellent expression of the Enlightenment or classical liberal principles that should remain our touchstone for political ordering. Second, through a series of hypotheticals, I show that the legitimate goals of government involvement in education are fulfilled by voucher programs that are neutral between sectarian and secular schools. Finally, I will suggest that the opposition to vouchers can be traced to educational goals that oppose the Framers' views, such as those of Jean-Jacques Rousseau. Rousseau thought that the state must exercise substantial control over the ideological content of education in the name of equality and democracy. This goal necessarily subordinates the liberty of opinion that the religion clauses were designed to preserve.

## I

### THE ESTABLISHMENT CLAUSE RECONSIDERED: AGAINST COLLECTIVIZATION OF OPINION

When framing the Constitution, the Founders were influenced by theories of natural rights. Indeed, one way of understanding the Constitution is that it shaped the structure of government to facilitate the exercise of natural rights and to prevent the government from impairing them.<sup>2</sup> The Founders shared a common belief that individuals have a natural right to religious exercise. James Madison, the drafter of the Bill of Rights, in fact saw the free exercise of religion as a kind of property right inhering in individuals. "[Property] in its particular application means that dominion which one man claims and exercises over the external things of the

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1. By spontaneous order I am referring to Friedrich Hayek's concept of order created by "the decentralized processes in which countless [voluntary] interactions between ordinary individuals produce results pleasing to each, but which could not be obtained by the command of any centralized political order." Richard A. Epstein, *Hayekian Socialism*, 58 MD. L. REV. 271, 275-76 (1999).

2. See John O. McGinnis, *The Partial Republican*, 35 WM. & MARY. L. REV. 1751, 1763 (1994).

world, in exclusion of every other individual.”<sup>3</sup> Paraphrasing the philosopher John Locke, he continued:

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have right; *and which leaves to every one else the like advantage.*

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. . . .

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.<sup>4</sup>

It is important for understanding the religion clauses of the Constitution that Madison views secular and religious expression as essentially parallel rights. The congruent treatment of religious and secular expression is not surprising because Madison and other Framers had an Enlightenment view of religion: like secular forms of inquiry, religion helps in the search for truth and good moral norms.<sup>5</sup> To me this view reflects the Enlightenment’s greatest social discovery: social progress is possible when individuals are free to advance both secular and religious norms in a world where government’s role is limited to preventing their suppression by force. The norms that survive this market test then have some claim to being beneficial, at least for those who adopt them.<sup>6</sup> A world of norm

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3. James Madison, *Property*, NATIONAL GAZETTE (Mar. 27, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 266-68 (Robert Rutland et. al. eds., 1983). I discuss this quotation at length in John O. McGinnis, *The Once and Future Property Based View of the First Amendment*, 63 U. CHI. L. REV. 49, 66 (1996).

4. Madison, *supra* note 3, at 266.

5. See Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1, 12 (1991) (suggesting that the Framers viewed religion and secular means of inquiry as complementary rather than antagonistic).

6. Of course, some might argue that the values of the norms that emerge are not good for others. In general, we do not allow the government to regulate the opinions and values of citizens on the grounds that they may be harmful to others, unless the harm is very direct. My own view, discussed elsewhere, is that beneficial social norms are likely to arise from the free flow of information within a social order that protects markets and punishes violence and fraud because individuals will have an interest in gaining a reputation for providing accurate and useful information since they will then seem more trustworthy and effective—two characteristics that markets reward. See McGinnis, *The Once and Future Property Based View*

competition also has advantages for real diversity: it does not impose uniform norms on individuals with diverse preferences, temperaments, and endowments.<sup>7</sup>

Though religious norms previously dominated the Enlightenment, these principles of freedom helped secular norms to compete with religious norms. In our secular society, however, we need to remind ourselves that religious norms also broaden the competition by offering values and structures that secular norms cannot. Norms backed by religions offer a particularly useful framework of precommitments that some people may need to flourish.<sup>8</sup> For instance, premarital chastity may well be a good norm for society, or at least in the long-term interest of some people in society, but at any particular moment it is fighting against strong immediate human impulses. Accordingly, it may take a prior religious structure and associations to allow this norm the strength to compete effectively against others. These types of norms can be particularly important in education as well: modern social science has suggested that study habits are as useful as knowledge in making students successful and productive members of society.<sup>9</sup> Some people through the centuries have benefited from a religious framework in developing sound habits. If these norms perform such a useful function,

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*of the First Amendment, supra* note 3, at 129-31 (showing low-cost information can ease the enforcement of contracts); *see also* John O. McGinnis, *The Natural Roots of the Free Speech Principle* (suggesting that reciprocal exchange of beneficial information is an aspect of man's evolved nature) (manuscript on file with author).

7. If, as some assert, we are experiencing rapid technological changes, private associations are even more useful in aiding society to discover the appropriate norms to address such changes. Under these circumstances, private associations are even more beneficial because, like markets, they accumulate information dispersed throughout the land. *Cf.* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1646 (1996) (reporting that decentralization is particularly necessary for economies in complex, technologically advanced societies). If social norms change in some measure as social facts change, private associations are in a better position to gather the knowledge to respond to these changes.

8. Indeed, considered objectively (that is, outside any particular religious viewpoint), religions have flourished precisely because they offer more efficacious frameworks for certain social norms than secular organizations. Of course, it may well be that these frameworks succeed because they comport with natural law. On the differences between the perspective of spontaneous order and natural law, *see* Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship between Natural and Customary Law*, 40 AM J. JURIS. 209 (1995).

9. *See Good Study Habits and Academic Performance: Findings from the NAEP 1994 U.S. History and Geography Assessments*, NAEP FACTS (U.S. Dept. of Educ./Nat'l Ctr. for Educ. Stat., Wash. D.C.), August 1997, at 3; NAT'L CENTER FOR EDUCATION STATISTICS, *THE CONDITION OF EDUCATION* 34 (2000).

the First Amendment, including the religion clauses, should be a vehicle for assuring that the government facilitate access to the institutions that are the producers of these norms.

## II REALIZING LIBERTY IN A WORLD OF GOVERNMENT SUPPORT FOR EDUCATION

In a world where the government is not involved in education, it is relatively easy to realize freedom of opinion and spontaneous order in education. In such a world, those who would want to send their children to religious schools (or non-religious private schools) could do so without any impediment since the government would not take the money from individuals that they would use for this purpose.

There may be good reasons for the government to attempt to direct more funds to education than individuals would spend if left to their own devices. In this section I explore the rationales for expanded governmental involvement in education, such as capturing positive externalities and increasing equality. I show that public schools are not necessary to realize such secular government goals. Through a series of hypotheticals, I suggest that even if the programs that realize these secular goals result in more money flowing to religious schools, they do not for that reason violate the Establishment Clause.

The first reason for government involvement in education is that over time it has been seen as a collective good. Education is thought, in economic terms, to have positive externalities.<sup>10</sup> In other words, since education creates a network of people with a human capital that is cumulatively powerful, education produces a greater consumer surplus and people who are better able to take part in democratic governance. Thus, we all benefit from the education of others. Given our information-based society, the benefits flowing outwards from the educated individuals themselves are al-

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10. See MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 63 (1996) (describing externalities as costs or benefits that are not voluntarily assumed in market transactions). We describe costly externalities as negative externalities and beneficial externalities as positive externalities. Private associations without coercive power cannot readily address externalities because of free riding problems. See J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 935 (1996) (showing that free riding makes it necessary for government to supply collective goods like property rights).

most certainly greater than at the time of the Framers. As with other activities with positive externalities, individuals may invest too little in education since education has some benefits that cannot be individually captured.

One way of capturing these positive externalities would be simply to mandate that individuals spend a certain percentage of their income on each child's education. Such mandates would no doubt result in more money going to religiously oriented schools than would occur in the absence of the mandates. Yet it would be wrong to see these mandates as violating the Establishment Clause. The mandates would have a secular purpose—generating a stronger network of human capital. Moreover, the mandates would continue to allow individuals to express their opinions by associating with educational institutions of their choice. This exercise of choice leaves to everyone else the “like advantage,” to quote Madison.<sup>11</sup>

The Founders' general way of thinking about governmental powers shows that this is the way they would have resolved our mandate hypothetical. As Chief Justice Marshall's opinion in *Gibbons v. Ogden* suggests, the founding generation thought of powers in terms of purposes, not effects.<sup>12</sup> States' health and safety legislation, said Marshall, might affect interstate commerce but that did not make such legislation a regulation of commerce so long as its purpose was genuinely to improve health or safety—subjects over which the states retained regulatory authority.<sup>13</sup> Applying this perspective to the Establishment Clause suggests that the clause deprives the government only of the power to take action which has the purpose of collectivizing religious opinion. In contrast, a government constrained by the Establishment Clause retains all traditional welfare powers even if their exercise affects religious establishments.

As well as wanting to generate cumulative human capital, society might choose to have a system that provides equal resources for education. Given the disparities of wealth, individuals required to fund their own children's education would either provide different amounts of input into the education or be forced to spend very disparate proportions of their income for education. Thus, we

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11. For discussion of this quotation, see *supra* notes 3-4 and accompanying text.

12. See *Gibbons v. Ogden*, 22 U.S. Wheat. 1, 203-04 (1824).

13. For further discussion of the logic of Chief Justice Marshall's framework, see John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 538 (2000).

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might permit individuals below a certain income to take a tax credit for the amount they spend. Once again, this program has a secular purpose, does not collectivize opinion, and thus does not appear to violate the Establishment Clause.

Of course, a tax credit is of no use to those who earn too little to pay taxes.<sup>14</sup> Thus, the government may want to impose a progressive tax to provide the funds for education and yet still permit parents to choose the schools of their choice. It is difficult to see why the introduction of a tax structure for equalizing funding should cause Establishment Clause problems on our theory. Collective funding is not the same as collectivization of opinion. As with mandates, the equalizing tax scheme leaves to “everyone the like advantage”—even those who would like to send their children to entirely secular schools. The existence of clauses in the Constitution that address collectivization of material property reinforces this point. If collective funding of education has a constitutional problem, it would be with an aggressive reading of the Takings Clause,<sup>15</sup> because that is the clause arguably designed to prevent the state from making use of an individual’s material resources for the collective good.<sup>16</sup>

Once again, the collective funding mechanism has a social welfare purpose unrelated to establishing a religion. The result may be a greater flow of money to schools run by religious educational establishments than there might have been in the absence of law, but mandates would result in a more substantial flow as well. Both laws have a secular purpose and have an incidental effect on religious establishments. Thus under the *Gibbons* theory of governmental powers, the provision of educational assistance through a progressive tax scheme would pass constitutional muster, just like the charitable tax deduction, which also hugely advantages religious institutions.

Notice that I have not yet discussed public schools. Public or, to be more accurate, government controlled schools, are not necessary to generate human capital and equalize educational inputs—two legitimate secular purposes. Of course, a system of vouchers would result in more funds for religious schools than a public school system, but, as we have seen, this cannot furnish a neutral

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14. A refundable tax credit would benefit those who do not need to pay taxes, at the cost of complexity and with a serious risk of eligible recipients failing to collect.

15. U.S. CONST. amend. V.

16. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

principle to hold voucher systems unconstitutional. Mandates would result in more funds for religious schools than if the state made no provision for education at all, and they are plainly not unconstitutional for this reason.

I offer these hypothetical schemes to emphasize the peculiarity of believing that the presence of government schools or the possibility of using them to achieve the goals of equity and generating a network of human capital should change a straightforward analysis of vouchers and the secular purposes that justify them. First, why should the Establishment Clause require a particular economic structure—command and control—to accomplish the educational policy ends of capturing externalities and advancing equality of opportunity? It is particularly odd to use a clause born of the Enlightenment to entrench as a constitutional matter a service delivery structure disfavored by many Enlightenment thinkers. Theorists of political economy like John Stuart Mill have made the point that government can redistribute wealth without fundamentally interfering with private operations and that such approaches may better achieve equality without introducing inefficiencies.<sup>17</sup>

In fact, government operation of schools depends on many of the same notions of centralized planning that have been wholly repudiated in the government's operation of other aspects of the economy. Like other state-run enterprises that lack real competition, government schools cannot be held as accountable for their poor performance as private institutions. When the history of the Twentieth Century is written, some of our worst government schools may in fact be remembered as a softer version of statism only in that they are imposed on individuals who were too young to revolt against their outrages.<sup>18</sup>

Second, if one did believe that the Establishment Clause bore on the question of whether a voucher or command and control system of public education was preferable, it is the latter system that

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17. See JOHN STUART MILL, *ON LIBERTY* 70-86 (Norton Critical ed. 1975) (1859); JOHN STUART MILL, *UTILITARIANISM, LIBERTY, & REPRESENTATIVE GOVERNMENT* 366-76 (Dent & Sons ed. 1936) (1861).

18. Of course, some public schools are fairly effective in spite of government control for two reasons. First, some schools—particularly suburban schools—face jurisdictional competition because the affluent parents can move to adjoining suburbs if the schools are not good. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 91 (1962); MILTON FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 157-58 (1980). Second, schools—particularly those in small communities—draw good values from their communities. Their teachers are products of mediating institutions like churches and synagogues and thus schools receive some benefits from the surrounding vigor of their civil societies.



creates more interference with the rights of individuals to enjoy “property in their opinions” and with the spontaneous order created by the exercise of these rights. In government schools, the government expresses opinions and attempts to shape habits and values—the very kind of action that implicates a transcendental world view. These are the kind of opinions that Madison believed are the right of the individual to express freely. Schools controlled by the government and run with tax dollars facilitate the collectivization of opinion that the Establishment Clause was designed to prevent.

It may be argued that the ideological content of government schools is not religious in nature and thus does not violate the Establishment Clause or other constitutional provisions because there is no parallel clause that prohibits the collectivization of opinions on behalf of a secular ideology. But whether many public schools press views that are in a broad sense religious is a matter of dispute. To be sure, the ideology of the government schools does not mention God, but the Supreme Court itself has said that transcendental views do not have to mention God to be understood as religious.<sup>19</sup> As Michael McConnell has argued, today’s public school ideology seems to be a “a vaguely leftist stew of environmentalism, moral relativism, and gender and race egalitarianism.”<sup>20</sup> Some elements of this stew are hard to distinguish in their structure and truth claims from theological tenets. For instance, some diversity claims seem to be articles of metaphysical faith and thus are not unlike some religious beliefs.<sup>21</sup> To this lapsed classicist, the strand of environmentalism holding that the environment should be the transcendent value reflects pantheism—one of the world’s oldest religious typologies.<sup>22</sup> That elites who support public schools do

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19. See *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (listing as religions many systems that contain no reference to God, including Secular Humanism).

20. Michael W. McConnell, *Government, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 850 (1999) (suggesting the public schools have been captured by a distinctive educational culture that stresses environmentalism and egalitarianism).

21. We need diversity training to create “a gorgeous mosaic” or to “celebrate the diversity of the human spirit.” These slogans trade on innocuous American traditions of ethnic pride represented by some parades and social clubs. At a deeper level, however, the advocates of diversity claim that this approach to education is necessary because it mirrors the nature of things. In instituting diversity programs, their advocates often imply that we are honoring a metaphysical truth about humanity itself.

22. I hasten to add that moderate environmentalism of the kind that simply asks individuals and corporations to pay for the costs of pollution does not resemble pantheism.

not see these views as religious does not render them secular or even rational. In ancient Rome, pagans distinguished their set of beliefs, which they labeled “natural,” from Christianity, which they ridiculed as a cult.<sup>23</sup>

But even if one does not believe that the ideology of public schools itself constitutes an establishment of religion, the publicly controlled schools create permanent tensions with other constitutional values. We would be concerned on free speech grounds if citizens were taxed thousands of dollars to support an institute that propagated secular ideological views with which they disagreed, even if they did not have to attend those institutions. Why does that concern vanish when we require parents to spend thousands of dollars for public schools which may instill in their children values with which they disagree?

Finally, publicly controlled schools also create tensions with the Free Exercise Clause. The exclusion of religious practices from government schools generates problems for parents who send their children to government schools and yet believe that their religious practices must sanctify their entire lives and cannot accept a division that secularizes school hours. To take an extreme example, the Satmar Hassidim want their children to speak Yiddish, to observe strict separation of the sexes, and to wear clothes that many other children would consider silly.<sup>24</sup> Given these tenets, it is impossible, or at least impractical, for their children to attend a government school with children of other faiths present. Even in less extreme cases, the tension between the need for the sanctification of the daily life of the believer and the complete secularization of the public school (or at least its neglect of particular religious beliefs) generates pressures for religious observance during school ceremonies and activities—observance that might indeed violate the Establishment Clause.<sup>25</sup> The voucher option dissolves this tension between the Establishment Clause and the Free Exercise Clause by permitting parents to choose a school that does not have this division.

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23. See Robin Lane Fox, *Pagan Lessons for Modern Tories*, FIN. TIMES, Dec. 24, 1990, at I10 (discussing pagan reaction to Christianity).

24. See *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 691, 688 (1994) (describing religious practices of Satmar Hassidim).

25. For instance, it generates pressures for school prayers at football games, like those struck down by the Supreme Court in *Santa Fe Independent School Dist. v. Doe*, 120 S.Ct. 2266 (2000).

### III THE IDEOLOGICAL ROOTS OF THE GOVERNMENT SCHOOL

One response to concerns about the public control over the ideology of education is to assert baldly that such control is necessary to mold children into the valuable citizens of tomorrow—the kind of people who have the right views about the environment, diversity, or whatever else is perceived as the pressing issue of the day. With this justification the purpose of government schools is revealed not as solving a problem of externalities or inequality—legitimate goals—but as an ideological one that embraces the very collectivization of opinion which Madison’s essay warns us against. Unsurprisingly, this view of education has more in common with European Continental philosophers like Jean-Jacques Rousseau than with the Framers. It was Rousseau in *Discourse on Political Economy* who attacked private education, because it would simply transmit to children the “prejudices”<sup>26</sup> that their fathers gained in the course of their private associations. Rousseau is brutally explicit about his preference for the state over the family in education: “It is a matter of greater importance to the state than to the fathers, for in the natural course of things, the father’s death soon robs him of the natural fruits of this education, but the homeland still feels its effects. The state remains and the family dies out.”<sup>27</sup> For Rousseau, education by the state is necessary to guarantee the primacy of the state: “[I]f children are steeped in the laws of the state and the precepts of the general will . . . they will . . . never [will] anything but what society wills.”<sup>28</sup> Like many modern advocates of govern-

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26. JEAN JACQUES ROUSSEAU, *DISCOURSE ON POLITICAL ECONOMY* reprinted in *ROUSSEAU’S POLITICAL WRITINGS* 73 (Julia Conaway Bondanella trans., Alan Ritter & Julia Conaway Bondella eds., 1988).

27. *Id.*

28. The passage is worth quoting in full:

Public education, under the rules prescribed by the government and under the magistrates established by the sovereign, is, therefore, one of the fundamental principles of popular or legitimate government. If children are brought up in common in the bosom of equality, if they are steeped in the laws of the state and the precepts of the general will, if they are taught to respect them above all things, if they are surrounded by examples and objects which constantly remind them of the tender mother who nourishes them, of the love she bears for them, of the inestimable benefits they receive from her, and of what they owe her in return, *let us not doubt that they will thus learn to love each other as brothers, never willing anything but what society wills*, substituting the actions of men and citizens for the vain and empty prattle of sophists, and one day becoming the defenders and fathers of the homeland whose children they will have been for so long.

ment schools, Rousseau thought such control would redound to the benefit of democracy and equality.<sup>29</sup>

As a historical matter, it is relatively easy to show that Rousseau, rather than the Framers, was the font of the Progressive movement's advocacy of government education as a way to extirpate prejudices and mold a citizenry fit for democracy, but that is a matter for another day.<sup>30</sup> What is important to recognize is that the government school is rooted in this ideological interest because government control is unnecessary to advance equality of educational funding and to generate human capital. Ultimately, the defense of government controlled education is still marked by Rousseau's fear of values transmitted through families and private associations and Rousseau's interest in expanding state power. Seen from this perspective, indoctrinations into various forms of political correctness in many public schools today are not aberrations of government education. From the Rousseauian viewpoint, such indoctrinations are government education's essence—an attempt to wrest children from the inspiration of particular churches and homes and make them the kind of deracinated and homogenized individuals that will fit more easily into common purposes defined by the state. Rousseau, at least, was honest about these objectives. Modern advocates cloak their demand for centralized control over education under the progressive slogans of diversity and tolerance.

Of course, even under a voucher system, advocates of progressive education could open schools to offer a distinctive curriculum and philosophy. Indeed, those who felt that politically correct values should be at the center of education would be free to operate their schools, admitting any student who would come. Thus, insofar as the ideology of the modern public school is one that would actually attract students, it should have nothing to fear.<sup>31</sup>

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*Id.* at 73-74 (emphasis added).

29. Insofar as the state replaced God in the view of some followers of Rousseau, education for the state is even more obviously the same as religious education.

30. For a general discussion of the way Rousseau has affected American constitutional thought, see John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 WM. & MARY. L. REV. 177, 196 (1999).

31. In the discussion at NYU Law School, the most commonly expressed fear was that vouchers would force the states to fund schools with terrible beliefs, like white supremacy. First, the government could certainly enforce its neutral nondiscrimination law on employment, which would be a substantial barrier to creating a white supremacist school. But more importantly, there is no evidence that there is a substantial current demand for schools to teach such bad values. For deep bio-

In the final analysis, the opposition to vouchers seems to me in tension not only with the original understanding of the First Amendment but with the Framers' values more generally. The Framers believed that a good society was not shaped by government but by the mediating institutions, like churches and private secular associations, that constitute civil society. As James Wilson said, "civil society must have existed . . . before civil government could be regularly formed and established. Nay, 'tis for the security and improvement of such a [condition], that the adventitious one of civil government has been instituted."<sup>32</sup> Wilson also warned against sacrificing civil society to the "idol of government."<sup>33</sup>

Providing citizens with the option of vouchers nurtures the kind of civil society the Framers envisioned. Good values and social norms arise spontaneously as individuals choose to associate with existing institutions, particularly religious institutions, that they think will make them and their children more valuable members of civil society. But vouchers would also lead to an increase in supply of non-religious private schools because private schooling would no longer have to be subsidized by religious alms to be competitive. This would empower those who want to establish schools centered around other values, such as academic rigor or artistic creativity. As contemporary private schools demonstrate, such diverse institutions would nevertheless tend to inculcate some common values, like good citizenship and concern for the community, because these are likely to make students more useful and broadly effective.

#### IV CONCLUSION

This century has witnessed a struggle between the state and more competitive forms of social ordering. In this struggle, state control of the education of the young has generally been sold as the

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logical reasons, parents want their children to succeed. They are therefore less likely to send their children to schools that would make them less effective in society than they are to espouse outlandish views themselves. A white supremacist school is not an effective one in a society in which government does not subordinate individuals through state sponsored discrimination. At the very least, voucher opponents should drop their opposition for a trial period to see if these extravagant fears are realized. I was surprised by the concern expressed at the conference that even parents without extremist views would make bad choices for their children. Again, for basic reasons of biology, the presumption should be that the average parent cares for his child more than the average bureaucrat does and is likely to make choices more conducive to the child's welfare.

32. 1 THE WORKS OF JAMES WILSON 238 (Robert McCloskey ed., 1967).

33. *Id.* at 239.

soft way of creating social equality and public virtue. Now that the hard-edged way—state control over the economy—has been discredited, the public school is one of the last ideological redoubts of the advocates of state control. Thus the real debate between those who would like the government to monopolize publicly funded education and the advocates of vouchers is between two different visions of the social order—one that sees government as sustaining sound social norms and one that sees government as simply facilitating an infrastructure where individuals exercising their “property in opinions”<sup>34</sup> generate good social norms. The first is a top-down social vision akin to that celebrated by Rousseau and advocated by the Progressives. The latter not only comports with the hard-won lessons of this century about the comparative advantages of the market over the state, but also with the wisdom of the Framers. The system of vouchers is also likely to improve education, particularly for the poor and minorities.<sup>35</sup> Nevertheless, to my way of thinking, an even stronger argument on behalf of vouchers is that they provide a system of education worthy of a free people who welcome competition in the social norms that will shape the next generation.

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34. James Madison, *Property*, NATIONAL GAZETTE (March 27, 1792), reprinted in THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).

35. See Joseph P. Viteritti, *A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation of the Voucher Question*, 57/2001 N.Y.U. Ann. Surv. Am. L. (2000). James Madison, *Property*, NATIONAL GAZETTE (March 27, 1792), reprinted in THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983).