

A TRULY LIVING CONSTITUTION: WHY EDUCATIONAL OPPORTUNITY TRUMPS STRICT SEPARATION ON THE VOUCHER QUESTION

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*[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.*¹

—Justice William Brennan, 1985

In December, 2000, a federal appeals panel in Ohio affirmed a trial court ruling that found a school voucher program operating in Cleveland since 1995 unconstitutional.² This is just one of the many voucher cases that have worked their way through the federal and state courts over the last decade.³ But most observers who watch such litigation closely believe that this is the voucher case that will be reviewed by the United States Supreme Court, setting legal precedents that could guide judicial policy-making well into the twenty-first century. The high court signaled its interest in the case in November, 1999, when it intervened to halt an injunction that would have interrupted the program while the appeal was being heard.⁴

Few political and legal issues in America generate as much passion as vouchers. Supporters contend that vouchers provide educational opportunity to minority and poor children who are not adequately educated in public schools. Opponents argue that using public money to send children to religious schools violates the Establishment Clause of the First Amendment. At the heart of this debate are two fundamental values set deep in the American consti-

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1. William Brennan speech (October 12, 1985), *cited in* FORREST McDONALD, *Foreword to* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT*, at i, xviii (1997).

2. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

3. See JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION AND CIVIL SOCIETY* 171-78 (1999).

4. See *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999).

tutional tradition: human equality on the one hand, and religious freedom on the other. There is no inherent tension between these two cherished values. In most circumstances they can be interpreted compatibly, even harmoniously. However, when the Court attempts to apply such broad constitutional values to mediate differences over public policy, it is often forced to resort to surrogate principles as a way of formulating the translation. Often such principles are not found within the language of the Constitution itself, yet their customary application over time is so widely accepted that they provide a convenient tool to contestants on either side of an argument.

There are two such principles in hot contention within the crucible of the voucher debate: educational opportunity⁵ as a surrogate for human equality, and strict separation⁶ as a surrogate for religious freedom. Neither word—education nor separation—appears within the Constitution. Nonetheless, their points of entry into the vocabulary of legal argument are well known. The first was injected by the United States Supreme Court in 1954 through the *Brown*⁷ decision, launching a campaign in the name of human equality that was unprecedented in the history of the nation, except perhaps for the Civil War. The second was introduced by the Supreme Court in the landmark *Everson*⁸ decision of 1947, but its full impact was not realized until a series of rulings delivered in the 1970s raised the legal wall of separation between church and state to a new height.⁹

Both the egalitarian agenda pursued by the Warren Court and the subsequent separationist agenda carried out by the Burger

5. See VITERITTI, *supra* note 3, at 23-48 (discussing various policy approaches adopted over the last half century to advance the goal of equal opportunity in education).

6. Charles Glenn draws a useful distinction between “strict separation” (excluding religious themes, motivations, and organizations from everything government touches), “strict neutrality” (government should not make distinctions between religious and secular activities), and “positive neutrality” (government, under some circumstances, should give support to religious activities when they produce social benefits). CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* 74-79 (2000). What is under consideration here is a choice between a standard of “strict separation” and one of “strict neutrality.”

7. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). While this was not the first time that the Supreme Court ruled on an education question, it was here that educational opportunity was explicitly tied to the broader goal of equality.

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

9. See, e.g., *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Court involved significant assumptions of judicial power. The central argument of this essay is that the former was a more legitimate exercise of authority than the latter. *Brown* and its judicial progeny were crafted to address the fundamental dilemma of American democracy, requiring extraordinary government action. By the middle of the twentieth century, no comparable crisis existed over religious liberty. Granted, there remained controversies about the proper relationship between church and state, but the problems associated with First Amendment freedoms did not approach those of human inequality in either severity or durability.

Moreover, advancing educational opportunity represents a reasonable and powerful remedy to the problem of human inequality, whereas strict separation is neither the only nor necessarily the most effective means of protecting religious freedom. When properly designed and implemented, school voucher programs enhance the educational opportunities available to disadvantaged minority students in a way that promotes social, economic, and political equality. When measured as a mechanism to advance human equality, the opportunities created by school vouchers far outweigh any presumed threats to the First Amendment.

I

THE LEGACY OF THE WARREN COURT

Owen Fiss describes the Warren Court's impact as revolutionary.¹⁰ Prior to the Warren Court, blacks were systematically disenfranchised at the polls, excluded from serving on juries, denied counsel when accused, and refused access to public accommodations. Similarly, legislatures were habitually gerrymandered so that some votes carried more weight than others. States customarily fostered religion in the form of school prayers and other religious exercises.

A. *An Activist Agenda*

In order to appreciate fully the significance of the Warren Court's jurisprudence, we must understand it not just as a milestone on the long road to human equality, but also as a triumph of judicial politics over majoritarian politics, legal realism over constitutional originalism, and policy over precedent. It would have been impossible to launch such an egalitarian revolution on the basis of an originalist interpretation of the Constitution, since the document itself was drafted by men who in the main were comfortable

10. Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991).

with the institution of slavery¹¹ and did not believe in the equality of either blacks or women.

Even the clever technique of utilizing the Fourteenth Amendment to incorporate the Bill of Rights to combat civil rights transgressions by the states involved a heavy dose of new thinking. In his meticulous, if controversial, analysis of its origins, Raoul Berger explains that the primary purpose of the Bill of Rights was to protect the states from the federal government. Enlisting the Fourteenth Amendment to curtail the activities of the states, or delimit their legal powers, arguably amounted to a re-writing of the Constitution. Berger contends that by claiming “we cannot turn back the clock,” Chief Justice Warren converted the court into a continuing constitutional convention.¹²

In a more nuanced treatment of the question, legal historian William Nelson concludes that the intentions of the Fourteenth Amendment’s framers were more ambiguous: affirming a rhetorical commitment to equality, but at the same time acceding to the principle of self-governance by the states.¹³ According to Nelson, the framers assumed that throughout history, Congress and the courts would translate these general principles into legal doctrines and resolve the tensions between them. Undoubtedly, the courts have gleefully taken up the assignment; unfortunately, they have not resolved the tensions.

Spinning out these doctrines over the course of sixteen years would prove to be a flight of imagination by the Warren Court, unchecked by history, law, or precedent. This escapade was, for the most part, heralded by legal academia, yet it also produced its critics.¹⁴ Constitutional scholar Vincent Blasi, who was generally sympathetic to the goals of the Warren Court, remarked on how scholars who were otherwise cautious in their writing so easily disposed of originalist arguments in order to accommodate the egalitarian agenda.¹⁵ Legal historian Leonard Levy proclaimed that the Warren Court “flunked history.”¹⁶ Michael Perry comments that

11. Of the fifty-five men who attended the Philadelphia convention, at least thirty owned slaves. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 220 (1985).

12. RAOUL BERGER, *supra* note 1, at 458.

13. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 13-40, 64-91 (1988).

14. *See generally* LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

15. Vincent Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 *YALE L.J.* 176, 192 (1972).

16. LEONARD W. LEVY, *CONSTITUTIONAL OPINIONS* 193 (1986).

none of his colleagues who adopted activist positions on the judiciary ever produced a compelling legal theory refuting originalist arguments.¹⁷

The reasoning of the Warren Court was based on neither political theory nor legal history; it was instead a bold form of policy advocacy draped in the language of the Constitution. As Mark Tushnet observed, “constitutional theory played a rather small role”¹⁸ in constructing the jurisprudence of the Warren Court, for the Chief Justice was more inclined to rely on “humane instincts, not a systematic philosophy.”¹⁹

In an attempt to give order and legitimacy to the revolution unleashed from the bench, Bruce Ackerman alludes to a new form of “constitutional politics” that results in a form of constitutional amendment through the “mobilized deliberation” of people, beyond the provisions of Article V.²⁰ But the movement that Chief Justice Warren and his colleagues advanced was not a popular revolt, at least not in the beginning. To the contrary, it was counter-majoritarian. What gave the “rights revolution” its legitimacy was that it sought to protect minorities whose rights were trampled upon through legislative politics conducted at the behest of ruling majorities. As Michael Perry explains, the grand formula encapsulated in the Fourteenth Amendment was designed to place the goal of equal treatment before the law beyond the reach of ordinary shifting majorities.²¹ Earl Warren and his colleagues understood this and embraced the Amendment to mount equality on a new constitutional pedestal.

B. *An Egalitarian Focus*

Brown v. Board of Education, the centerpiece of the Warren Court’s egalitarian agenda, was a conspicuous case in point.²² As history and law failed to provide a clear rationale for rejecting the

17. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551, 602 (1985).

18. Mark Tushnet, *Judges and Constitutional Theory: A View from History*, 63 U. COLO. L. REV. 425, 439 (1992).

19. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 133 (1988).

20. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); *see also* BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

21. MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (2000).

22. The most comprehensive history of the case remains RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975). A more recent analysis, focusing on

separate but equal doctrine, the Court turned to social science. When the opinion came down, James Reston of *The New York Times* dubbed *Brown* a “sociological decision.”²³ In reaching its conclusion, the Supreme Court did not attempt to demonstrate that the authors of the Fourteenth Amendment intended to outlaw racial segregation, nor did the justices clearly state that they were overturning precedents set down in the *Plessy* case.²⁴ They relied instead on expert testimony presented by Dr. Kenneth Clark, who argued that segregation created a feeling of psychological inferiority among black children and therefore was harmful.

Clark’s studies, cited in the famous “Footnote 11,” were rather primitive.²⁵ They were based on a small sample and did not use a control group. Clark simply asked African American children to choose from an assortment of white and black dolls. When children responded that they thought the white dolls were nicer, he concluded that racial segregation generated feelings of racial inferiority. The experiments were repeated using pictures of dolls. To think that these studies provided the foundation for the most profound decision handed down by the Supreme Court in an entire century, and arguably in all time, is astounding. But the studies sufficed. They sufficed because the Court needed a reason to strike down a policy of racial segregation that was morally reprehensible, a policy that could not be justified in a country that supposedly was dedicated to the proposition that all people are created equal.²⁶

Despite its merit on moral grounds, *Brown* potentially was problematic on institutional grounds for it opened the door to an extraordinary concentration of judicial power. The style of its reasoning set the stage for a period in American law when the Court could do as it pleased so long as it could conjure up a plausible explanation for its action. As political theorist Harvey Mansfield ex-

the long-term impact of the case, is JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

23. James Reston, *A Sociological Decision*, N.Y. TIMES, May 18, 1954, at 14.

24. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding equal but separate accommodations for railway compartments); see KALMAN, *supra* note 14, at 27; see also CHARLES F. LOGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987) (providing a fuller discussion of the case); NELSON, *supra* note 13, at 185 (arguing that while the Supreme Court bowed to segregation to protect state prerogatives, it also exhibited a commitment to equal opportunity in education).

25. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 39-44 (2000).

26. *But see* Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993) (offering a more critical interpretation of the values upon which the U.S. was founded).

plains, "Liberals, for their part, have adopted an openly exploitative attitude toward a 'living constitution' that is theirs to use, manipulate, or ignore as they please They seem to have lost any sense that a constitution should embody principles, procedures, and institutions that do not go out-of-date"27

Mansfield is equally critical of conservatives who seek to accomplish their political goals through the process of constitutional amendment, treating the document as if it were a policy tool rather than the embodiment of lasting values and ideals handed down through the ages. For both groups, he laments, the Constitution is seen as "an instrument of the people, not as a control on them; it is to be used, not to be lived under."²⁸ Mansfield's perspective is interesting for a conservative thinker. While disapproving of what he sees, Mansfield's observation shares more common ground with the constitutional populism alluded to by Bruce Ackerman than with the anxieties felt by Raoul Berger and others, who fear that concentrating power in the hands of a small unelected body undermines democracy.

I remain more fearful of the former than the latter. This is so partly because history has shown that it is difficult for the Court to implement unpopular policies that do not have the support of the other branches of government.²⁹ But, more importantly, I wonder, if the courts do not protect the rights and legitimate needs of minorities, who will? If not for the presumptuous behavior of the Court in *Brown*, children might still be prohibited by law from attending certain schools on the basis of their skin color.

The unanimous decision handed down by the Supreme Court was indeed more bold than anyone might have expected at the time, but it was also a legitimate use of judicial power. It was legitimate because it addressed what Gunnar Myrdal, who testified before the Court, referred to as the great "American Dilemma,"³⁰ a dilemma that had haunted the nation since the days of slavery and continues to do so today. It sought to correct an injustice imposed upon racial minorities that could not then have been addressed

27. HARVEY C. MANSFIELD, JR., *AMERICA'S CONSTITUTIONAL SOUL* 178 (1991).

28. *Id.*

29. The point is best demonstrated by GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 82-93 (1991). Other accounts are presented in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962), and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

30. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

through majoritarian political institutions—not by the Congress, not by the state legislatures, not even by the executive branches at either level of government.

Nobody could expect the high court to solve the problem of race with one wave of the judicial wand.³¹ *Brown*, however, insightfully came to terms with the central role that education plays in furthering equality in a democratic society. Referring to education as “perhaps the most important function of state and local government,” the Court outlined education’s multiple roles in fostering citizenship, awakening cultural values, preparing for the professions, and helping a child adjust to his environment.³² Indeed, the Court declared that “it is doubtful that any child can reasonably be expected to succeed in life if he is denied the opportunity of an education.”³³ Education was referred to as “a right that must be made available to all on equal terms.”³⁴ This commitment to equality of educational opportunity as a fundamental right was the most important promise held out by the *Brown* decision.

As bold as *Brown* was in a political and institutional sense, it also was indicative of a certain moderation on the part of the Court. Although the Court sought to strike down conspicuous legal barriers to educational opportunity, it did not presume to know how to raise the academic achievement of poor children. As far as the original *Brown* decision went in outlawing *de jure* racial segregation, the “all deliberate speed” standard adopted in the second *Brown* decision³⁵ signaled that the Warren Court was prepared to move slowly and cautiously in implementing its order. The Warren Court did not assume an aggressive stance on desegregation until 1968 when, after fourteen years of official incrementalism, it charged districts that had a history of enforced separation with an “affirmative duty” to convert to a unitary system.³⁶

C. *The Burger Court’s Extension and Retreat*

It was left to the Burger Court to up the legal ante, sanctioning racial integration through a policy of quotas in student assign-

31. For an analysis of how the legislative, executive, and judicial branches subsequently implemented *Brown*’s mandate, see ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-Brown Era* (1986).

32. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

33. *Id.*

34. *Id.*

35. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

36. See *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968).

57/2000 SCHOOL CHOICE AND ESTABLISHMENT CONCERNS 97

ments, thus validating the controversial policy of forced busing.³⁷ Busing was presumptuous for at least two reasons. Not only did busing move the country from a legally and morally justified policy of nondiscrimination to one of forcing children to attend schools outside their own communities, but there was no evidence that court-enforced racial mixing would serve the educational or social interests of black children.³⁸ If segregation is psychologically damaging to minority children, what are we to think of an ordeal that obliges children to ride a bus into a hostile environment? What harm might be done to youngsters who are asked to confront conflict, ridicule, and violence on the way to school every day?

Ironically, the same Court that moved so aggressively on racial integration set the clock back a full generation when it declared in *Rodriguez* that “the Equal Protection Clause does not require absolute equality or precisely equal advantages”³⁹ in education. The reasoning offered in the landmark school finance case was an “absence of any evidence that the financing system discriminates against a definable category of ‘poor people.’”⁴⁰

At that juncture, the Burger Court was in the process of reexamining the activist legacy of its predecessor, or at least its activism on one front. As Justice Powell explained, “every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under the federal system.”⁴¹ What really transpired was the exchange of one form of judicial activism for another: a calculated retreat from the campaign for

37. See *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 25 (1971). For a sympathetic analysis of the case, see BERNARD SCHWARTZ, *Swann's Way: THE SCHOOL BUSING CASE AND THE SUPREME COURT* (1986). For opposing viewpoints on the busing debate, see GARY ORFIELD, *MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY* 119-50 (1978) (in favor); LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 17, 258-281 (1976) (against). Unfortunately, while court action managed to end *de jure* school segregation, it never succeeded in ending *de facto* segregation. See DAVID ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 171-73 (1995).

38. See William B. Stephan, *The Effects of School Desegregation: An Evaluation Thirty Years After Brown*, in *ADVANCES IN APPLIED SOCIAL PSYCHOLOGY* (M. Saxe & L. Saxe, eds., 1986); Judith R. Porter & Robert E. Washington, *Black Identity and Self-Esteem*, 5 *ANN. REV. OF SOC.* 53-74 (1979); NANCY ST. JOHN, *SCHOOL DESEGREGATION* (1975). The Court later took a more moderate position in 1974 by rejecting an inter-district busing plan involving suburban districts in the area of Detroit, when it could not be proven that the districts in question were culpable in promoting or perpetuating segregation in the city. *Milliken v. Bradley*, 418 U.S. 717 (1973).

39. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

40. *Id.* at 25.

41. *Id.* at 44.

human equality once carried under the banner of the Fourteenth Amendment, only to be succeeded by a new form of activism launched under the banner of the First Amendment that would widen the gulf of separation between church and state.

D. The Warren Court on Church and State

As with its original stance on desegregation, the Warren Court assumed a moderate position on First Amendment questions. Among its more notable education decisions were two that struck down school prayer.⁴² The Warren Court also invalidated an Arkansas law that prohibited the teaching of evolution in public schools.⁴³ These decisions have served as sound judicial precedents, still honored by the Court today.⁴⁴

On the issue of aid to children attending parochial schools, the Warren Court was decidedly accommodationist in the one ruling it handed down. In the *Allen*⁴⁵ case, the Court upheld a textbook loan program that involved children who attended religious schools. Emphasizing the benefits provided to children in a textbook case from 1930,⁴⁶ and citing *Everson*,⁴⁷ where the Court had permitted transportation assistance to parochial school children, the *Allen* ruling differentiated between the secular benefit that children derive from using a textbook in school and the religious aspects of the parochial school curriculum.⁴⁸ Three years earlier, Congress had passed the Elementary and Secondary Education Act,⁴⁹ a cornerstone of President Lyndon Johnson's "Great Society" program, leading to the greatest expenditure of federal education dollars ever. Without serious legal protest, the law explicitly adopted the "child benefit" concept to assure that parochial school

42. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963).

43. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

44. Perhaps it is worth noting that the Court, in four separate instances in 1961, approved Sunday closing laws. *Gallagher v. Koshers Market*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys From Harrison-Allentown Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961). The Warren Court also showed concern for religiously observant people by supporting the claim of a religious observer who was denied unemployment compensation for her refusal to observe the Sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963).

45. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

46. *See Cochran v. La. St. Bd. of Educ.*, 281 U.S. 370, 375 (1930).

47. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

48. *Allen*, 392 U.S. at 243-47.

49. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

children who met set income criteria would be permitted to participate in remedial programs.⁵⁰

By the time Earl Warren retired in 1969, a “broadly conceived egalitarianism” based upon the Fourteenth Amendment had become the most highly valued doctrine in American constitutional law.⁵¹ A broadly accommodationist approach to the First Amendment had emerged, striking a balance between disestablishment and free exercise. The approach validated the child benefit principle and recognized a significant distinction between direct and indirect aid, while remaining vigilant not to sanction religious activity and teaching within the public schools. This would soon change.

II THE EXCESSES OF THE BURGER COURT

One of the most significant legacies of the Burger Court is its effect in raising the wall of separation between church and state to a height that was unparalleled in the history of the nation.⁵² Like the Warren Court’s application of the Equal Protection Clause, the Burger Court’s use of the Establishment Clause was adventurous and blunt. However, the Burger Court proceeded without an equivalent benefit of political legitimacy.

A. *Historical Background of the First Amendment*

The First Amendment was adopted not just for the purpose of preventing the new federal government from establishing a national church, but also to protect important state prerogatives.⁵³ In 1789, at least six states had some form of government support for churches, and at least four others limited office-holding to either Christians or Protestants.⁵⁴ It was widely understood that the Estab-

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

51. See Philip B. Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1963). For a more sympathetic treatment of this phenomenon, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 205-13 (1985) and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-78 (1977).

52. One dramatic exception to this pattern in education occurred when the Court relieved, under very specific circumstances, the burden of Amish parents to abide by compulsory education laws on the basis of their religious beliefs. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

53. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998).

54. *Id.* at 32-33; see also LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 23 (1999) (claiming that five states either permitted or had established religions).

lishment Clause would have no bearing on the manner in which the various states dealt with religious institutions. As late as 1875, Congressman James Blaine of Maine, a hostile campaigner against the Catholic Church, attempted to correct this “constitutional defect” by proposing an amendment that would have prohibited the states from giving financial aid to religious schools.⁵⁵

Even on a national level, it hardly can be said that the authors of the First Amendment were ardent separationists. The Northwest Ordinance adopted by the First Congress provided for the religious education of the Native American population.⁵⁶ Subsequently, President Thomas Jefferson signed a treaty with the Kaskaskia tribe, providing funding for the upkeep of a minister and a church.⁵⁷ The Supreme Court approved the treaty in an opinion written by Chief Justice John Marshall.⁵⁸ The First Congress also instituted the appointment of congressional chaplains and began the practice of having the president issue a Thanksgiving Proclamation to the Almighty, a task which President Washington carried out with great enthusiasm.

Contemporary separationists are drawn to Jefferson’s famous metaphor of the “high wall” of separation between church and state as if it were an authoritative source for understanding the meaning of the First Amendment.⁵⁹ Jefferson, however, was not a party to the deliberations that produced the Bill of Rights and in fact was out of the country when it was written. His thoughts on religion were hardly representative of his time, or of the men who participated in the drafting.⁶⁰ And despite his separationist views, Jeffer-

For a more thorough analysis, see generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986) and LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1-78* (1994).

55. See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 670-72 (1998).

56. See An Ordinance for the Government of the Territory of the United States North West of the River Ohio, *reprinted in* THE NORTHWEST ORDINANCE app. at 125 (Frederick D. Williams ed., Michigan State University Press 1989).

57. ROBERT L. CORD, *THE SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 261-63 (1982).

58. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

59. The phrase “wall of separation” is originally attributable to Roger Williams. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 5-6 (1965).

60. See generally JOHN FERLING, *SETTING THE WORLD ABLAZE: WASHINGTON, ADAMS, JEFFERSON AND THE AMERICAN REVOLUTION* (2000) (arguing that Jefferson’s role in the founding of the nation has been exaggerated by historians and popular writers).

57/2000 SCHOOL CHOICE AND ESTABLISHMENT CONCERNS 101

son understood that the Constitution limited the power of the federal government and was not intended to interfere with the common arrangements found in the states.⁶¹

As gifted as he was, the gentleman from Monticello was a study in contradictions. The same individual who wrote so eloquently on human equality in the Declaration of Independence believed that blacks were naturally inferior⁶² and had a condescending attitude toward women.⁶³ The same man who was an early advocate of universal education recommended that only the brightest students be educated beyond their primary years.⁶⁴ Jefferson was also the original anti-originalist on constitutional issues. Insisting that “the earth belongs to the living,” he believed that people of every generation should draft their own constitutions.⁶⁵ Nevertheless, he would have been horrified by the prospect of letting nine unelected judges rework the document on their own.⁶⁶

Madison is another matter. James Madison, the chief architect of our Constitution, was an avowed originalist who, unlike his fellow Virginian, hoped that the new system of government would offer stability to the politically volatile circumstances of the late eighteenth century.⁶⁷ He was also a separationist of sorts, having somewhat inconsistent views on church and state. Though he railed against the use of congressional chaplains in his famous *Memoranda*,⁶⁸ he supported the practice as president. He reinstated the Thanksgiving Proclamation after his predecessor, Jefferson, had suspended it. Indeed, Madison joined Jefferson in opposing a Virginia proposal that would have supported “teachers of the Christian religion,”⁶⁹ but this hardly qualifies him as a strict separationist.

61. See JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 192 (1998).

62. GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 129-40 (1991); RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW* 53-76 (1984).

63. FERLING, *supra* note 60, at 35-36. The complexity of Jefferson’s personality and character is nicely captured in JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* (1996).

64. See SHELDON, *supra* note 62, at 62-67.

65. See MATTHEWS, *supra* note 62, at 22-23.

66. See *id.*

67. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 339-65 (1997).

68. James Madison, *Detached Memoranda* (1817), in 5 *THE FOUNDERS’ CONSTITUTION* 103-05 (Philip B. Kurland and Ralph Lerner eds., 1987).

69. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in *THE COMPLETE MADISON: HIS BASIC WRITINGS* 299 (Saul

I am more inclined to see Madison as a non-preferentialist, not just because of his inconsistency on the issue of separation, but because of his more central concern about the fate of religious minorities.⁷⁰ Madison was fully aware that the proposal put forward by his fellow Virginians was the result of a growing majoritarian consensus concerning the need for strong religious associations as a foundation for civic life in the fledgling nation. The proposal's supporters—who counted George Washington, John Marshall, and Patrick Henry among their numbers—feared that the demise of the Anglican establishment would weaken the vitality of local communities. This led Madison to suspect that a new informal establishment might emerge. Likewise, in opposing congressional chaplains, he expressed doubts that religious minorities—Catholics and Quakers, in particular—would ever have a turn to serve. He worried over how the system would work with regard to outsiders.

We may argue about whether Madison was a strict separationist or a non-preferentialist,⁷¹ but we can be certain that Madison had an overarching concern for the rights and interests of minorities. He hoped minorities would be protected by a robust political pluralism⁷² and a diversity of religious membership. He believed that the more interest groups there were within the polity, the less likely it was that tyranny would prevail; the larger the number of religious sects thriving within society, the weaker the threat of oppression.⁷³ Unlike strict separationists who perceive religious organizations as a potential threat to democracy, Madison felt that a robust religious pluralism would protect individual freedom.

It was not until 1940 that the Supreme Court incorporated the Free Exercise Clause under the protection of the Fourteenth Amendment,⁷⁴ and seven years later, through *Everson v. Board of Ed-*

K. Padover ed., 1953); also see GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF JAMES MADISON*, 32-33 (2001).

70. See VITERITTI, *supra* note 3, at 121-26. For a spirited dissent, see also Jack N. Rakove, *Once More into the Breach: Reflections on Jefferson, Madison and the Religious Problem*, in *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* 233-62 (Diane Ravitch & Joseph P. Viteritti eds., 2001) [hereinafter *MAKING GOOD CITIZENS*].

71. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 112-19 (1994); see generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

72. See THE FEDERALIST NO. 10 (James Madison); see also DAVID EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST*, 59-110 (1984).

73. *Id.*

74. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

ucation,⁷⁵ that the Court incorporated the Establishment Clause. As mentioned, the child benefit concept had been adopted in 1930. Prior to that, the *Pierce*⁷⁶ and *Meyer*⁷⁷ decisions confirmed the right of parents to control their children's educations and to have them educated in schools that reflect familial values. The high wall of separation did not become a legal reality until the 1970s when the Burger Court hoisted it to a new level.

B. *The First Amendment Decisions of the Burger Court*

The First Amendment jurisprudence of the Burger Court was anchored by two decisions that strict separationists regularly cite in their briefs against aid to religious schools. *Lemon*⁷⁸ set down a three-part test designed to determine when interaction between government and religious institutions violates the Establishment Clause. The standards were so loosely defined that they became a blunt tool for the Court to do as it pleased regarding the First Amendment. It used this power later in *Nyquist*,⁷⁹ declaring that when government provides assistance for parents to send their children to sectarian schools, it must be concluded that "the purpose and inevitable effect are to aid and advance those religious institutions."⁸⁰ It was a remarkable leap of logic, especially in light of the child benefit concept, for the Court to surmise that whenever assistance is made available to children who attend religious schools, it is tantamount to aid given to the institutions. Equally preposterous was the Court's incentive theory, which presumed that the use of public funds partially to reimburse the costs of private school tuition provides an incentive to attend such schools, even when the opportunity involves no obligation and public school options exist simultaneously.⁸¹

75. 330 U.S. 1 (1947); *See generally* VITERITTI, *supra* note 3, at 129-33 (discussing the early First Amendment decisions of the U.S. Supreme Court).

76. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1930).

77. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

78. *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971). The three-part test prohibited government action that (1) has no "secular purpose," (2) has a "primary effect" of advancing religion, and (3) fosters "excessive entanglement" between church and state.

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

80. *Id.* at 793.

81. *Sloan v. Lemon*, 413 U.S. 825, 832 (1973); *See* Joseph P. Viteritti, *School Choice and American Constitutionalism*, in *CHARTER SCHOOLS, VOUCHERS AND PUBLIC EDUCATION* (Paul E. Peterson & David Campbell eds., 2001) (challenging the incentive theory).

Taken in its entirety, the First Amendment case law handed down by the Burger Court was confused and incoherent. *Lemon* came down just two years after *Walz*, which approved tax exemptions for religious institutions, with the Chief Justice rejecting the idea of complete separation in favor of a “benevolent neutrality.”⁸² If tax exemptions for churches and other religious institutions do not advance their interests and their financial viability, then it is difficult to imagine what does. In crafting the *Lemon* opinion, nonetheless, Chief Justice Burger drew liberally from *Walz* as an authoritative source. While warning against “sponsorship, financial support and active involvement of the sovereign,”⁸³ Chief Justice Burger counseled that “total separation is not possible in such an absolute sense.”⁸⁴

But it was toward total separation that the Court seemed to be moving, if in a fatuously clumsy way. The fine line distinctions drawn in its opinions defied reason. In one response to the child benefit concept, it held that textbook loans are a benefit “to parents and children, not to schools,”⁸⁵ while in another it ruled that loaning instructional equipment had “the unconstitutional primary effect of advancing religion.”⁸⁶ Although it was still permissible to provide parochial school students with transportation to school, public funds could not be used to give the same students a ride to a museum or a park.⁸⁷ Nor, although the First Amendment permitted it, were the states obliged to provide transportation services to parochial school students on an equal basis with their public school peers.⁸⁸ And while it was permissible to offer tax exemptions to religious institutions, no state income tax reductions could be made available to parents who sent their children to religious schools.⁸⁹

On the whole, the First Amendment jurisprudence of the Burger Court was based on neither logic nor precedent. If anything, it was based on a metaphor, a metaphor borrowed by Jefferson from

82. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

83. *Lemon v. Kurtzman*, 403 U.S. at 614-15 (1971), *citing* *Walz v. Tax Comm'n*, 397 U.S. at 674-76.

84. *Id.* at 614.

85. *Meek v. Pittenger*, 421 U.S. 349, 360 (1975), quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968), *overruled by* *Mitchell v. Helms*, 120 S. Ct. 2530, 2540 (2000).

86. *Id.* at 363.

87. *See* *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by* *Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

88. *Leutkemeyer v. Kaufman*, 419 U.S. 888, 889 (1974).

89. *Franchise Tax Bd. v. United Americans for Pub. Sch.*, 419 U.S. 890 (1974).

Roger Williams and enshrined by Justice Black in *Everson*, that was not directly traced to the original thinking of the Framers. It was another exercise in judicial audacity, perhaps equal in reach to that of the Warren Court. However, the Burger Court's stretching of the Establishment Clause to mean strict separation did not have the same legitimacy as the Warren Court's stretching of the Fourteenth Amendment to demand equality of educational opportunity. While the connection between educational opportunity and human equality is clear and verifiable, there is no such causal link between strict separation and religious freedom. To the contrary, given the constitutional requirement to satisfy the Free Exercise Clause while safeguarding against religious establishment, it is at least arguable that a relaxed form of separation is more prudent.

III THE REHNQUIST COURT

The high wall of separation erected in the 1970s began to crumble in 1980 when the Burger Court upheld a New York law that provided private and parochial schools with funding to administer exams and collect other data required by the state.⁹⁰ Then in 1983 the Supreme Court, in *Mueller v. Allen*,⁹¹ approved a Minnesota statute that granted a tax deduction to parents for tuition, textbooks, and transportation. *Mueller* was a landmark decision on several counts. In validating tuition relief to parochial school parents, it made a distinction between direct aid and indirect aid, thus reinstating the child benefit concept. Writing for the majority, Associate Justice Rehnquist explained that “[w]here . . . aid to parochial schools is . . . only . . . a result of decisions of individual parents[,] no ‘imprimatur of state approval’ . . . can be deemed to have been conferred.”⁹²

Gone was the ill-conceived presumption that aid to attend a religious school is an incentive to practice religion or that the advancement of religion is the necessary intent and result of such aid. Portending his eventual tenure as Chief Justice, Rehnquist opined that the time had come to relax the “primary effect” prong of *Lemon*.⁹³ In a subsequent dissenting opinion, Rehnquist challenged the historical premise that was a cornerstone of the Burger Court's First Amendment jurisprudence, declaring “[t]here is simply no

90. *Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 648 (1980).

91. 463 U.S. 388 (1983).

92. *Id.* at 399.

93. *Id.* at 393.

historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*.⁹⁴ Furthermore, he emphasized, the *Lemon* test merely repeats the historical error, leading to case law that "has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results."⁹⁵

Between 1986 and 1995, the Rehnquist Court handed down a series of key rulings that signaled a dramatic reversal of previous case law. These include cases allowing a student to use a government scholarship to attend a bible college,⁹⁶ letting a parochial school student receive the services of a government subsidized sign language interpreter,⁹⁷ and permitting a student club at a public university to advance a religious message in a school newspaper.⁹⁸ In the course of its deliberations, the emerging Rehnquist majority seemed to be moving toward a more neutral position on aid to parochial school children, refraining from treating religious institutions with the suspicion characteristic of its predecessor. Early on, Justice Powell set down a three point standard that would guide the Court's thinking on the subject of school aid. In order to pass constitutional scrutiny, such aid would need to (1) be facially neutral regarding religion (not favoring religion in general, any particular religion, or non-religion); (2) be equally available to public and private school students; and (3) be allotted to sectarian institutions only as a result of independent decisions made by parents.⁹⁹

If there were any doubt that the Rehnquist Court was rethinking the standards that guided the First Amendment jurisprudence of its predecessor, two more recent cases remove that doubt. In *Agostini v. Felton*,¹⁰⁰ a 5-4 majority overruled a 1985 decision¹⁰¹ that

94. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

95. *Id.* at 112.

96. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

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

98. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995). In 1988, the Court ruled that federal funds could be given to Catholic organizations that discourage sexual activity and abortion. *Bowen v. Kendrick*, 487 U.S. 589 (1988). In 1991 it ruled that public schools must permit student religious clubs to meet under the same terms as other non-curricular organizations. *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990). In 1993 it ruled that a public school could not deny access to a group wanting to use its facilities to show a religious film after school hours. *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993).

99. *Witters*, 474 U.S. at 490-92 (Powell, J., concurring). For a critical, and notably unbalanced, look at the Rehnquist Court's First Amendment jurisprudence, see TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 155-78 (2000).

100. 521 U.S. 203 (1997).

57/2000 SCHOOL CHOICE AND ESTABLISHMENT CONCERNS 107

prevented public school teachers from providing remedial services to parochial school children on the premises of their own schools. Affirming the principle of neutrality,¹⁰² the majority found “more recent cases have undermined the assumptions upon which . . . *Aguilar* relied.”¹⁰³ Justice O’Connor’s opinion did not directly reject the *Lemon* standard, and it appeared to leave the door open for future challenges regarding aid that is not supplementary in nature. *Agostini*, nonetheless, was a deliberate confirmation of the Court’s more accommodationist thinking.

Three years later, a 6-3 majority overturned two prior holdings that had prohibited religious schools from receiving federal assistance in the form of computer equipment and other materials.¹⁰⁴ In a far-reaching opinion written for the four-person plurality, Justice Thomas focused on the central criterion of neutrality, dismissing the distinction between direct and indirect aid as arbitrary, and indicating that funding is permissible even when it advances the religious mission of a school. He declared, “[t]he ultimate beneficiaries . . . are the students” and added that “this is so regardless of whether individual students lug computers to schools or, as . . . more sensibly provided, the schools receive the computers.”¹⁰⁵ To bring home the point, Justice Thomas explained that “exclusion of religious schools [from a general aid program] would raise serious questions under the Free Exercise Clause.”¹⁰⁶

In a more moderate opinion also signed by Justice Breyer, Justice O’Connor took exception to Justice Thomas’s application of neutrality as a primary criterion for review, but then suggested that funds diverted toward the religious mission of the school might not be problematic in private choice programs where aid is indirect and “wholly dependent on the student’s private decision.”¹⁰⁷

Despite disagreements in reasoning among the six Justices who determined *Helms*, a decisive majority was formed to overturn precedents that had stood in the way of aid to religious schools.

101. *Aguilar v. Felton*, 473 U.S. 402 (1985). *Agostini* also overturned *Grand Rapids v. Ball*, 473 U.S. 373 (1985) (holding that Michigan could not provide funds for remedial and enrichment programs that supplemented the core curriculum of religious schools).

102. 521 U.S. at 232 (“[I]t is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion.”).

103. *Id.* at 222.

104. *Mitchell v. Helms*, 120 S. Ct. 2530 (2000). *Mitchell* overruled *Meek v. Pettinger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 329 (1977).

105. *Mitchell*, 120 S. Ct. at 2553.

106. *Id.* at 2555 n.19 (plurality opinion).

107. *Id.* at 2559 (O’Connor, J., concurring).

Whether this means that the Court is poised to approve vouchers may still be debatable in the eyes of some philosophical separationists. When one views *Agostini* and *Helms* in the context of the case law that has come down over the last twenty years, it is difficult to find merit in the separationists' claims. But rather than address the question of what the Court might do when it reviews the Ohio appeal, it would be more productive to devote the remaining pages of this essay to the question of what the Court should do.

IV CONTEMPORARY REALITIES

Brown not only impressed the goal of human equality upon the conscience of the American people, but also explicated what role education plays as a foundation for democracy, economic prosperity, social mobility, and cultural integration. Notwithstanding deficient social science grounding of the merits of racial integration, these broader claims rest on solid empirical footing. Not only is educational achievement correlated with employment and income,¹⁰⁸ it is also the most reliable predictor of civic involvement.¹⁰⁹ Whether a person votes, becomes engaged in community affairs, or joins a voluntary organization in her local neighborhood is very much dependent on her level of educational achievement. Despite the progress that has been made through the Voting Rights Act in removing legal obstacles to black participation in elections, full political equality cannot be attained without guaranteeing everyone the same opportunity for a decent education.¹¹⁰ Education is also correlated with social variables such as health, delinquency,

108. See, e.g., Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 1, 6 (Christopher Jencks & Meredith Phillips eds., 1998) [hereinafter TEST SCORE GAP]; William R. Johnson & Derek Neal, *Basic Skills and the Black-White Earning Gap*, in TEST SCORE GAP, *supra*, at 480-500; Susan E. Mayer, *From Earning to Learning*, in EARNING AND LEARNING: HOW SCHOOLS MATTER 3 (Susan E. Mayer & Paul E. Peterson eds., 1999) [hereinafter EARNING AND LEARNING]; Christopher Winship & Sanders D. Korenman, *Economic Success and the Evolution of Schooling and Mental Ability*, in EARNING AND LEARNING, *supra*, at 49-78.

109. NORMAN H. NIE ET AL., EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA 1-38 (1996); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 18, 186-87 (2000).

110. See Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7 (Bernard Grofman & Chandler Davidson eds., 1992); Joseph P. Viteritti, *Unapportioned Justice: Local Elections, Social Science, and the Evolution of the Voting Rights Act*, 4 CORNELL J.L. & PUB. POL'Y 199, 203-14 (1994).

teenage pregnancy, and family structure.¹¹¹ It is virtually impossible to overstate the importance of education in determining the life's prospects for a young person.

Unfortunately, nearly half a century since *Brown*, Americans have not made sufficient progress in closing the achievement gap between the races.¹¹² On average, a black twelfth grader in the United States has the same level of reading proficiency as a white eighth grader.¹¹³ While there appeared to be encouraging indications that the gap was beginning to close during the 1980s, more recent evidence from the United States Department of Education suggests that the divide began to grow again during the following decade.¹¹⁴ The gravity and persistence of the problem is so severe that it led two prominent social scientists to conclude that “[i]f racial equality is America’s goal, reducing the black-white test score gap would probably do more to promote this goal than any other public strategy that commands broad public support.”¹¹⁵

A. Religion Today

While religion has often been at the center of the “culture wars” that have racked the nation and its schools,¹¹⁶ it can hardly be said that these passionate battles match racial inequality as a fundamental dilemma of American democracy. Furthermore, there is no evidence that enforcing a strict separation between church and state will ameliorate the problems at hand. Many of the disputes recently occurring in schools have focused on the question of school prayer. The Rehnquist Court, in accord with the rulings handed down by the Warren Court decades ago, has acted decisively in such conflicts. The Court has protected the rights of indi-

111. See, e.g., Hirokazu Yoshikawa, *Long Term Effects of Early Childhood Programs on Social Outcomes and Delinquency*, FUTURE OF CHILDREN, Winter 1995, at 51, available at http://www.futureofchildren.org/lto/03_lto.pdf.

112. See DIANE RAVITCH, LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS 19-50, 130-61 (2000) (explaining how elitism has deep roots in an education profession that consigns many children to inferior treatment).

113. STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 19 (1997).

114. Kate Zernike, *Gap Widens Again on Tests Given to Blacks and Whites*, N.Y. TIMES, August 25, 2000, at A14.

115. Jencks & Phillips, *supra* note 108, at 3-4.

116. See generally ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY AND COMMON EDUCATION (2000) (discussing competing secular and religious visions of public education); BARBARA GADDY ET AL., SCHOOL WARS: RESOLVING OUR CONFLICTS OVER RELIGION AND VALUES (1996); STEPHEN BATES, BATTLEGROUND: ONE MOTHER’S CRUSADE AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 1, 40-64 (1993).

viduals to participate in prayer, but at the same time prohibited school officials from encouraging or endorsing prayer.¹¹⁷ While it is not always easy to distinguish between student-led and institutionally-endorsed religious services, the fact is that standards have been set, and the courts are attempting to enforce them fairly.

But perhaps a more effective safeguard against such individual and institutional abuses is the wider American political culture which, on the whole, does not support efforts that would place public authority behind religion. Americans are among the most avid churchgoers in the world, and a high percentage admit that religion is important to them.¹¹⁸ Observers since Tocqueville have found that houses of worship are the backbone of civil society in the United States, and there is evidence that such claims remain valid.¹¹⁹

While Americans are still religious, the nature of their religiosity is not the same as it was when the Founders wrote the Constitution. The demographic homogeneity that could once give rise to a dominant religious consensus, suppress small religious minorities, and alarm Madison, has given way to a robust religious pluralism that would have delighted the principal author of our Constitution. In 1776, eighty percent of all religious congregations in America had roots in British Protestantism.¹²⁰ By the end of the twentieth century a different picture appeared, with increasing numbers of Catholics, evangelicals, Jews, and a wide variety of Protestant de-

117. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

118. Recent surveys show that 96% of Americans believe in God, 80% believe in life after death, 60% claim that religion is very important to them, 40% attend church weekly, 51% pray outside of church, and 60% say grace before meals. PEW RESEARCH CENTER, *THE DIMINISHING DIVIDE . . . AMERICAN CHURCHES*, AMERICAN POLITICS 24, 27 (1996) available at <http://www.people-press.org/relgrpt.htm>. Putnam, however, found that church attendance declined between 25%-50% between 1960 and the late 1990s. Robert D. Putnam, *Community-Based Social Capital and Educational Performance*, in *MAKING GOOD CITIZENS*, supra note 70, at 81; see also ANDREW KOHUT ET AL., *THE DIMINISHING DIVIDE: RELIGION'S CHANGING ROLE IN AMERICAN POLITICS* 23-29 (2000). R

119. See William A. Galston & Peter Levine, *America's Civic Condition: A Glance at the Evidence*, 15 BROOKINGS REV. 23, 25 (1997), reprinted in *COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA* 30, 33 (E.J. Dionne, Jr. ed., 1998); PUTNAM, supra note 109, at 65-79; ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290-94 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1835). R

120. Richard 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). These were dominated by Congregationalists (668 congregations), Presbyterians (588), Baptists (497), Episcopalians (495) and Quakers (310). This data is drawn from ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA: 1776-1790*, at 29 (1992).

57/2000 SCHOOL CHOICE AND ESTABLISHMENT CONCERNS 111

nominations.¹²¹ Immigration from Asia and the Middle East has also introduced a growing population of Muslims, Buddhists, and Hindus to the American mosaic.¹²²

This being said, the great majority of Americans—whatever their religion, whether they are of faith or not—prefer to keep their religion a private matter, and harbor what Alan Wolfe aptly describes as a “quiet faith.”¹²³ While eighty-four percent of the people interviewed in Wolfe’s survey expressed a belief in God, the same group held that religion does not belong in politics.¹²⁴ Notwithstanding the rhetoric of the last presidential campaign, public life in America, and especially in our schools, is decidedly secular.¹²⁵ Scholars such as Stephen Carter have insisted that American culture has become so secularized that it has marginalized religion and is insensitive to the views and beliefs of strict religious observers.¹²⁶

Many activists, who are concerned about the coercive effect that school prayer has on non-believers and religious minorities, turn a deaf ear to deeply religious people whose sensibilities are offended by a secular curriculum that undermines beliefs about abortion, birth control, creationism, and other matters of faith. They fail to recognize that for many deeply religious people, devotion and daily prayer are not forms of proselytizing but a way of life. The secularist culture that dominates the public school curriculum works for the great majority of us who can “treat religion as a hobby,” or can separate faith from the mainstream of our lives, but

121. The number of congregations is: Southern Baptist Convention (440,565), United Methodist Church (36,361), National Baptist Convention (33,000), Roman Catholic Church (22,728), Church of God in Christ (15,300), Churches of Christ (14,000), Assemblies of God (11,884), Presbyterian Church (11,328), Church of Jesus Christ of Latter Day Saints (11,000), Evangelical Lutheran Church (10,396), Jehovah’s Witnesses (10,671), African Methodist Episcopal Church (8,000), Episcopal Church (7,415), United Church of Christ (6,110), Lutheran Church - Missouri Synod (6,099), Church of God - Tennessee (6,060), American Baptist Churches (5,839), independent Christian Churches (5,579), Church of Nazarine (5,135), Seventh Day Adventist Church (4,363), Christian Church (Disciples of Christ) (3,840), United Pentecostal Church (3,790), Baptist Bible Fellowship (3,600), Jewish Congregations (3,416). Ostling, *supra* note 120, at 21.

122. One source estimates 3.8 million Muslims, 1.9 million Buddhists, and 800,000 Hindus in the United States. *Id.* at 22-23.

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

124. *See id.* at 46, 54-56.

125. WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 63-97 (1995).

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

for the deeply religious it is a compromise of conscience. The deeply religious person who does not have the financial means to afford a religious education in a private school has no choice but to accept the compromise. Law and popular culture have entered into a creative collaboration in education to fashion a religious liberty that works well for all but those who are deeply religious.

The United States is one of the few modern democracies that does not provide publicly supported options for parents who prefer to have their children educated in schools that reflect their religious values.¹²⁷ Other countries view such choices as a manifestation of religious freedom rather than a threat. There is no direct or unavoidable link between strict separation and religious freedom. To the contrary, a more porous boundary that does not confine people to disagreeable places would be a great relief to the tensions that are aroused in the present culture wars. If devout observers could educate their children in a religious environment without financial penalty, then only extreme zealots or mischief makers would feel the need to incorporate officially sanctioned prayer and other religious activities into the public schools. The great majority of Americans would not stand for such practices.¹²⁸

It is not my objective in this essay, however, to argue for choice on the grounds of religious freedom, although I believe there is a

127. Among the nations that provide some form of public support for education in sectarian schools are Australia, Belgium, Canada, Denmark, England, France, Germany, Holland, Iceland, Israel, Scotland, Spain, Sweden, and New Zealand. For specific case studies, *see generally* STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* (1997) (comparing the United States, the Netherlands, Australia, England, and Germany); Charles L. Glenn, *Religion and Education: American Exceptionalism? in MAKING GOOD CITIZENS*, *supra* note 70, at 297 (focusing on France, Germany, Belgium, and the Netherlands); GLENN, *supra* note 6, at 56-60, 110-12, 120-63 (dealing more generally with France, Germany and the Netherlands); Miron Gray, *Free Choice and Vouchers Transform Schools*, 54 *EDUC. LEADERSHIP* 77, 77-80 (1996).

128. The point is illustrated in a recent survey conducted by Public Agenda. A large majority of Americans believe that religion has a positive influence on morality, human behavior, and the ability of people to interact with each other productively. They also believe that religion would help politicians become more honorable and ethical, and that public schools have gone too far in excluding religion. The large majority, however, is also proud of America's religious diversity and believes there is a need to respect and accommodate this diversity in schools and public settings. When asked, most Americans, including Evangelical Christians, expressed preference for allowing a less intrusive moment of silence in school rather than prayer or a reference to God or Jesus. STEVE FARKAS ET AL., *PUBLIC AGENDA, FOR GOODNESS' SAKE: WHY SO MANY WANT RELIGION TO PLAY A GREATER ROLE IN AMERICAN LIFE* (2001), *available at* <http://pewforum.org/publications/reports/goodness-sake.pdf>.

strong case to be made.¹²⁹ I merely want to note here that there are viable and perhaps better alternatives to strict separation as a way to protect religious freedom and reduce ideological conflict within school settings. The most compelling argument for choice is an egalitarian one. The dramatic defeat of voucher referenda in California and Michigan last November has led many opponents to insist that there is no substantial political constituency for school choice in America. Actually, most polls show the American public evenly divided on the subject,¹³⁰ and more penetrating research shows that support increases when people are informed about the issue.¹³¹ But as with the struggle for equality fought a generation ago, school choice is not a majoritarian issue. Because its principal constituency is composed of disadvantaged minorities, it will be a difficult battle to win on the political front.

B. Voucher Studies

There is no consensus among social scientists as to whether poor children reap academic benefits from vouchers.¹³² Methodological squabbles among researchers have focused on evaluations of the public voucher programs in Milwaukee¹³³ and Cleveland¹³⁴ and a host of private scholarship programs¹³⁵ across the country.

129. See VITERITTI, *supra* note 3, at 117-80.

130. See *id.* at 5-9.

131. See TERRY M. MOE, SCHOOLS, VOUCHERS AND THE AMERICAN PUBLIC (forthcoming 2001).

132. See VITERITTI, *supra* note 3, at 92-113 (offering an overview of public and private experiments and the relevant evaluations); Jeffrey R. Henig, *School Choice Outcomes*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY AND LAW 68-107 (Stephen D. Sugarman & Frank R. Kemerer eds., 2000) (reviewing the empirical research surrounding the academic benefits of voucher programs).

133. See, e.g., JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM 112-56 (2000); Jay P. Greene et al., *School Choice in Milwaukee: A Randomized Experiment in Learning from School Choice* 335-56 (Paul E. Peterson & Bryan Hassel eds., 1998), Paul E. Peterson & Chad Noyes, *School Choice in Milwaukee*, in NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION 123 (Diane Ravitch & Joseph P. Viteritti eds., 1997); Cecilia Elena Rouse, *Lessons From the Milwaukee Choice Program*, POL'Y OPTIONS, July-Aug. 1997, at 43.

134. Jay P. Greene et al., *Lessons from the Cleveland Voucher Program*, in LEARNING FROM SCHOOL CHOICE, *supra* note 133, at 357; KIM K. METCALF ET AL., IND. CTR. FOR EVALUATION, EVALUATION OF THE CLEVELAND SCHOLARSHIP PROGRAM: SECOND YEAR REPORT (1997-1998) (1998), available at <http://www.indiana.edu/~iuce/documents/2ndClevelandRpt.pdf>.

135. Private Vouchers (Terry Moe ed., 1995) (covering early programs in Milwaukee, San Antonio, Indianapolis, and New York City); R. Kenneth Goodwin et al., *Comparing Public Choice and Private Voucher Programs in San Antonio*, in LEARNING

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The more positive assessments indicate that disadvantaged children have attained modest but statistically significant gains in basic skills; conversely, the more negative assessments indicate that voucher recipients perform at about the same level as their public school peers. These evaluations are quite limited. Most of the assessments involve programs that have been in place for just a few years and do not take into account the fact that voucher programs are underfunded. Children who participate in voucher programs do not receive the same level of financial support as their public school peers.¹³⁶ In order for voucher programs to be properly assessed, or more importantly, in order for them to work effectively and fairly, all children must receive the same level of funding, no matter what schools they choose to attend. Opponents have cited such disparities as a flaw in their schemes,¹³⁷ but then those same opponents do battle in the state legislatures to preserve them.

More scientific studies using larger data sets and rigorous controls show that inner city poor children in particular benefit academically when they attend parochial schools. James Coleman, in his landmark studies conducted in the 1980s, referred to this phenomenon as a "Catholic school effect."¹³⁸ Recent research has

FROM SCHOOL CHOICE, *supra* note 133, at 275, 284-293; David J. Weinschrott & Sally B. Kilgore, *Evidence from the Indianapolis Voucher Program*, in LEARNING FROM SCHOOL CHOICE, *supra*, at 307, 327-34; William G. Howell et al., PROGRAM ON EDUCATION POLICY AND GOVERNANCE, HARVARD UNIV., TEST-SCORE EFFECTS OF SCHOOL VOUCHERS IN DAYTON, OHIO, NEW YORK CITY, AND WASHINGTON, D.C.: EVIDENCE FROM RANDOMIZED FIELD TRIALS (2000), *available at* <http://www.ksg.harvard.edu/pepg>; David Myers et al., Mathematica Policy Research, Inc., No. 8404-036, SCHOOL CHOICE IN NEW YORK CITY AFTER TWO YEARS: AN EVALUATION OF THE SCHOOL CHOICE SCHOLARSHIP PROGRAM (2000), *available at* <http://www.ksg.harvard.edu/pepg>; PAUL E. PETERSON ET AL., PROGRAM ON EDUCATION POLICY AND GOVERNANCE, HARVARD UNIV., AN EVALUATION OF THE HORIZON SCHOLARSHIP PROGRAM IN THE EDGEWOOD INDEPENDENT SCHOOL DISTRICT, SAN ANTONIO, TEXAS: THE FIRST YEAR, PROGRAM ON EDUCATION POLICY AND GOVERNANCE (1999), *available at* <http://www.ksg.harvard.edu/pepg>.

136. For example, data obtained from the Ohio Department of Education shows that Cleveland children who attend regular public schools are allocated \$7,746 per capita in public funds, children attending public charter schools are allocated \$4,519 per capita, and children participating in the experimental voucher program receive \$2,250. *See* Aff. of Joseph P. Viteritti ¶ 7, *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834 (N.D. Ohio 1999) (Nos. 1:99 CV 1740, 1:99 CV 1818) (on file with *N.Y.U. Annual Survey of American Law*).

137. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000).

138. JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT 195 (1982); JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES xxiv (1987). Coleman's study also provoked controversy and methodological debates. *See, e.g.*, Jay Noell, *Public and Catholic Schools: A Reanalysis of Public and Private Schools*, 55 SOC. OF EDUC. 123, 123 (1982); Arthur S. Gold-

57/2000 SCHOOL CHOICE AND ESTABLISHMENT CONCERNS 115

shown that minority students who attend inner city Catholic high schools have higher graduation and college attendance rates than their public school peers.¹³⁹ While these reports are not without criticism, they have even been accepted by some of the more skeptical observers of the voucher phenomenon.¹⁴⁰ These studies are certainly far more scientific than the studies the United States Supreme Court accepted in *Brown* to launch a national effort to desegregate schools.

In the end, however, school choice is not an empirical question. The notion that a panel of objective scholars will some day produce conclusive evidence to predict the educational and social consequences of a vigorous voucher program is sheer fantasy.¹⁴¹ School choice is an issue about values. It is about granting disadvantaged people opportunities that heretofore have been limited to the middle class. Middle class parents can exercise choice because they have the residential mobility to live in communities where there are decent schools or have the economic means to afford a private education. Poor parents have neither. Perhaps the most significant information that has emerged from the various public and private experiments is the feedback we get from parents who have a direct stake in the issue. Two findings are consistent throughout. First, there is a great demand for choice among African American and Hispanic parents who do not ordinarily have it at their disposal. Second, the great majority of those disadvantaged parents who have enjoyed some measure of choice from participation in experiments believe that their children are better off because of it. The first conclusion is evident not only from the public opinion polls that continually show strong support for choice within minority communities,¹⁴² but also from the long waiting lists of applicants associated with such programs. In 1999, when the

berger & Glen G. Cain, *The Causal Analysis of Cognitive Outcome in the Coleman, Hoffer, and Kilgore Report*, 55 SOC. OF EDUC. 103 (1982). But see ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 57-59 (1993) (generally validating Coleman's findings).

139. Derek Neal, *The Effects of Catholic Schooling on Educational Achievement*, 15 J. LAB. ECON. 98, 100-01 (1997); William N. Evans & Robert M. Schwab, *Finishing High School and Starting College: Do Catholic Schools Make a Difference?*, 110 Q.J. ECON. 941, 943-49 (1995); William Sander & Anthony C. Krautman, *Catholic Schools, Dropout Rates and Educational Attainment*, 33 ECON. INQUIRY 217, 219-24 (1995).

140. Henry M. Levin, *Educational Vouchers: Effectiveness, Choice and Cost*, 17 J. POL'Y ANALYSIS & MGMT. 373-79 (1998).

141. See Joseph P. Viteritti, *School Choice: Beyond the Numbers*, EDUC. WK., Feb. 23, 2000 at 38, 44, http://www.edweek.org/ew/ew_printstory.cfm?slug=24viteritti.h19.

142. VITERITTI, *supra* note 3, at 5-9.

Children's Scholarship Fund announced that it was going to hold a lottery to provide 40,000 partial scholarships to low income children, 1.25 million students applied nationally.¹⁴³ These applications were from poor families who were willing to forego a free public education and pay the balance of tuition to improve the educational opportunities of their children.

Despite the wrangling over test scores among researchers, parents of students who participate in public and private voucher programs consistently report high levels of satisfaction with the education their children receive.¹⁴⁴ When asked what they like about the programs, compared to the public schools their children once attended, they refer to the higher academic standards, the higher expectations set for their children, feelings of security and physical well being, and the strong sense of values. While social scientists who probably never sent their children to failing inner city schools quibble over whether choice will benefit the poor, minority parents who have seen education from both sides of the public-private divide believe that they already know the answer. The question is, why shouldn't we empower these parents to do what they think is best for their own children? Why shouldn't poor parents have choices similar to those who have the means to afford a private or parochial education? Why should poor children be consigned to chronically failing schools when there are desirable alternatives?

C. *A Matter of Simple Justice*

Some critics of school choice argue that poor parents do not always know what is best for their children and that selecting a school requires information, knowledge, and judgment that is typically beyond their grasp. However, there is strong empirical evidence that poor parents act as intelligent decisionmakers when given the opportunity to make educational choices on behalf of their children.¹⁴⁵ They know that the schools their children regularly get assigned to are not good schools, and they understand enough about the other options to choose wisely when given the chance. Certainly some parents are better equipped to act in the interests of their children than others, and more wealthy parents

143. Anemona Hartocollis, *Private School Choice Plan Draws a Million Aid-Seekers*, N.Y. TIMES, Apr. 21, 1999, at A1.

144. See *supra* notes 127, 129-30.

145. See MARK SCHNEIDER ET AL., CHOOSING SCHOOLS: CONSUMER CHOICE AND THE QUALITY OF AMERICAN SCHOOLS 63-83 (2000) (providing a rigorous empirical analysis of parent behavior in four metropolitan school districts).

57/2000 SCHOOL CHOICE AND ESTABLISHMENT CONCERNS 117

enjoy significant advantages. A system of education that practically denies poor parents the opportunity to choose compounds these advantages and perpetuates inequality of opportunity. In the end, making school vouchers available to poor families so that they can have access to the same educational opportunities as others is a matter of simple justice. As a unanimous United States Supreme Court proclaimed in 1954, education "is a right that must be made available to all on equal terms."

