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## Liberal Hegemony - School Vouchers and the Future of the Race

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# Liberal Hegemony? School Vouchers and the Future of the Race

Harry G. Hutchison\*

The liberal-legalist order . . . will be founded on self-interested, rights-bearing, adversarial individuals and this will not be sustainable. This type of social order is likely to aggravate precisely those points of tension in society which any vibrant political process should aim at alleviating. The ultimate danger is that liberal-legalism may, paradoxically, bring about the precise end—despotism—which it is designed to avoid.<sup>1</sup>

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1. MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS* 5 (2000).

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## I. INTRODUCTION

More than a decade ago, Girardeau Spann argued that the "present Supreme Court has been noticeably unreceptive to legal claims asserted by racial minorities . . . [consistent with] the popular perception . . . [that] a politically conservative majority wishing to cut back on the protection [that] minority interests receive at majority expense now dominates the Supreme Court."<sup>2</sup> Paradoxically, the Court's recent decision affirming the constitutionality of school vouchers<sup>3</sup> as a component of a multifaceted program to provide improved educational opportunities, largely to black children in a failed school district,<sup>4</sup> implies that the "liberal" minority of the Court may be inclined to preclude programs which could protect and nurture minority interests, in a first-rate as opposed to simply a public education. Whether the liberal wing of the Court is

2. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1971 (1990).

3. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

4. *Id.* at 644. *But see id.* at 685 (Stevens, J., dissenting) ("[T]he wide range of choices that have been made available to students *within the public school system* has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education.") (emphasis in original).

correct or incorrect, their views *and* those of the majority may simply be part of a prevailing, confusing<sup>5</sup> and strained conception of the Establishment Clause of the First Amendment,<sup>6</sup> that may not only have a disparate impact on black Americans and other outsiders but may also be attached to unconscious racial subordination.<sup>7</sup>

The *Zelman* decision has led to, and was preceded by, a firestorm both within and outside the Court. “Only a few years ago, the idea of allowing parents greater freedom to choose their children’s schools was considered unnecessary, unrealistic, and even undesirable by some.”<sup>8</sup> Today, “[a]lmost everyone agrees that our schools are failing. Achievement is down, violence is up, and no amount of money seems to insulate schools from these trends.”<sup>9</sup> “Fifty-eight percent of low-income 4th graders cannot read, and 61 percent of low-income 8th graders cannot do basic math. The magnitude of this educational malpractice is staggering: of the roughly 20 million low-income children in K-12 schools, 12 million aren’t even learning the most elementary skills.”<sup>10</sup> “The repeated failure of political reforms to cure the ills of poorly performing government schools has

5. One commentator notes, “The Court’s inconsistency pervades more than just the results of the cases . . . and commentators have found the area hopelessly confused.” William P. Marshall, “*We Know It When We See It*”: *The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 496-97 (1986).

6. I concede that the “amount of academic commentary on the Establishment Clause and on the religion clauses in general has been enormous.” Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1318 n.1 (1997). Evidently, “virtually all the commentators agree that there is something seriously wrong with the Court’s approach to the resolution of Establishment Clause issues.” *Id.* at 1318-19. At least one “common thread running through this criticism is that the Court has failed to develop and articulate an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system.” *Id.* at 1319.

7. For an illuminating discussion of the possibility and power of unconscious racism, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker’s beliefs, desires, and wishes.”).

8. Matthew J. Brouillette, *The Case for Choice in Schooling: Restoring Parental Control of Education*, A MACKINAC CENTER REPORT, Feb. 2001, at 3, available at <http://www.mackinac.org/article.asp?ID=3236> (also available from the Mackinac Center for Public Policy, 140 West Main Street, P.O. Box 568, Midland, Michigan 48640).

9. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995).

10. Adam Meyerson, *Foreword* to SAMUEL CASEY CARTER, *NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS* 1 (2000).

led to widespread frustration among parents, students, teachers, and other education professionals.”<sup>11</sup>

Given the contemporary circumstances facing many minorities, and African-Americans in particular,<sup>12</sup> uncertainty continues to evolve pertaining to the efficacy of “progressive” and “liberal” educational paradigms grounded in the common public school. Although public schools have wrested dominance from locally controlled and often family oriented private community schools over the past 150-160 years of American history,<sup>13</sup> the number of black Americans age twenty-five to thirty-four with nine to eleven years of education who receive public assistance continues to hover at or above twenty percent, while the corresponding figure for whites drifts below ten percent.<sup>14</sup> Despite sporadic reports of progress, the average mathematics and reading scores for blacks continues to lag significantly in comparison with those for whites.<sup>15</sup> Meanwhile, the “size of the black underclass has grown disproportionately as well: in 1995, 45 percent of all black children [were] born at, or beneath, the poverty line.”<sup>16</sup>

Thus, “[f]ew issues are more important to the future than the education of our children, and few proposed reforms would do more to improve education than those that would create a truly vibrant, competitive, accountable and hence, choice-driven educational marketplace.”<sup>17</sup> Today, publicly financed school choice<sup>18</sup> has become the centerpiece of discussions about educational reform.<sup>19</sup> Whatever side is taken in this emerging wrangle, both opponents and proponents speak disconsolately about dangers associated with the opposing view. Danger to society. Danger to the wall of separation between church and state. Danger to African-American children who are often deprived of educational opportunity by failed or failing school systems. Danger to disadvantaged children if

11. Brouillette, *supra* note 8, at 3.

12. For example, “[t]he percentage of black children in poverty rose from thirty-nine to forty-six percent during the period from 1974 to 1993, and the percentage of the black population living in so-called ‘under-class’ areas has increased by more than fifty percent during the period from 1970 to 1990.” Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 94 (1997).

13. *See infra* Part III.A.

14. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 191 (2002).

15. *Id.* at 180-81.

16. HENRY LOUIS GATES, JR. & CORNEL WEST, *THE FUTURE OF THE RACE*, at xii (1996).

17. Lawrence W. Reed, *A New Direction for Education Reform*, IMPRIMIS, July 2001, available at <http://www.mackinac.org/print.asp?ID=3541>.

18. Admittedly, vouchers also exist in a privately financed form. In fact, the great majority of voucher programs are privately financed. *See, e.g.*, Gary Rosen, *Are School Vouchers UnAmerican?*, COMMENTARY MAGAZINE, Feb. 2000, available at [http://www.findarticles.com/cf\\_o/m1061/2\\_109/59270719/print.jhtml](http://www.findarticles.com/cf_o/m1061/2_109/59270719/print.jhtml).

19. Brouillette, *supra* note 8, at 3.

purportedly ill-informed parents are allowed to choose the educational venue for their child.<sup>20</sup> Danger, perhaps to democracy. Whatever the merits of the present debate and whatever its source, it is imperative to recall that “[d]angers to a society may be mortal without being immediate. One such danger [may be] the prevailing social vision of our time—and the dogmatism with which the ideas, assumptions, and attitudes behind that vision are held.”<sup>21</sup> This admonition contests self-congratulatory, liberal dogmatism as a basis for social policy, and likely applies with equal force to judicial decision-making, especially within the heated space occupied by the First Amendment. Within this contested terrain, commentators and judges often congratulate themselves about unverifiable insights, including the divisiveness of religious practice, the asserted yet unproven tolerance generated by the common public school, the imaginary wall of separation between church and state, and the public versus private dichotomy, which some see as a bulwark against fragmentation. While some “critical legal studies scholars and feminists [target] the public/private divide as an illusory and mystifying element of liberal legalism,”<sup>22</sup> the unverifiable insights of judges and commentators, taken either together or separately, evidently trump the interests of often excluded and subordinated Americans.

On one level this debate heralds the outworking of Hobbesian theory,<sup>23</sup> which includes but is not limited to the establishment of a “corrosive, irreconcilable, and proliferating conflict between government and family.”<sup>24</sup> As thus conceived, “[m]odern democratic states have themselves become weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among

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20. See Susan Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405, 1429-30 (1983).

21. THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY* 1 (1995); see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 739 (1985) (“It is simply self-congratulatory to suppose that the members of our own persuasion have reached their convictions in a deeply reflective way, whereas those espousing opinions we hate are superficial.”).

22. See Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1080 (2000).

23. JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 4 (1993) (stating that the lesson of Hobbesian theory for us is that the modern state is weak because it aims too high and has grown too large).

24. STEPHEN ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING*, at vii (1986); see also William Ross, *The Contemporary Significance of Meyers and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000) (“The appropriate relationship between government and parents in the education of children is an issue that has created recorded controversy since Plato advocated the communal rearing of children.”).

themselves.”<sup>25</sup> If this conception is persuasive, then it follows that the “modern state has recreated in a political form that very state of nature from which it is the task of the state to deliver us.”<sup>26</sup> These conflicts are not simply economic in origin.<sup>27</sup> “All modern democracies, but especially the United States, have transformed the state into an arena of doctrinal conflicts, wherein . . . contending political movements vie for supremacy.”<sup>28</sup> Part of this struggle includes the difficulty of incorporating both minorities and adherents to non-homogenizing beliefs within a republic. Although it may be possible to create a picture of a pluralist democracy that may be presupposed by *Carolene Products*,<sup>29</sup> distinctive argument for minority rights as part of a republic in which myriad pressure groups, each typically representing a fraction of the population, bargain with one another for mutual support, such an approach fails to deal adequately with minority groups who find themselves in politically ascendant coalitions much less often than otherwise comparable groups.<sup>30</sup> While pluralists imply that judicial protection can rightly be defended on a countermajoritarian basis,<sup>31</sup> this theory remains ineffective when and if the courts themselves are captured and captivated by the prevailing operational dogma. This possibility leads inexorably to the principle of minority acquiescence, which requires the minority to lose even when the majority is deeply wrong.<sup>32</sup> It therefore remains far from clear that the interests of either ethnic or religious minorities are likely to prevail if and when the terms of the voucher debate or any other debate are dominated by liberal rhetoric and/or republican faith.<sup>33</sup>

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25. GRAY, *supra* note 23, at 4.

26. GRAY, *supra* note 23, at 4.

27. GRAY, *supra* note 23, at 4.

28. GRAY, *supra* note 23, at 4.

29. *United States v. Carolene Prods.*, 304 U.S. 144 (1938).

30. Ackerman, *supra* note 21, at 720.

31. Ackerman, *supra* note 21, at 720.

32. Ackerman, *supra* note 21, at 719.

33. What constitutes liberal theory and rhetoric exceeds the scope of this enterprise.

It is possible that we simply know it when we see it. In any case, liberalism resists easy categorization but, generally, it seems to encompass concern for individual rights and human autonomy. On Brian Bix’s account, “[l]iberals and libertarians ground their theories of justice on an analysis which treats people as essentially atomistic: in this view, an individual is, essentially, just a metaphysical will, an ability to choose any form of good, any set of values . . . . The conventional [liberal] view of society is that government is there to protect individual rights . . . and to resolve disputes between individual claims.” BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 105 (1999). What it looks like within the contested area of First Amendment jurisprudence includes, but is not cabined by, attempts to limit the reach of religion; to insist that government be neutral among competing moral and theological visions, that political authority be justified without reference to religious sanction, and that religion should be confined to private life and be deprived of a public role. *See, e.g.*, Michael J. Sandel, *Freedom of Conscience or Freedom of Choice*, in *ARTICLES OF FAITH, ARTICLES OF PEACE: THE*

On another level, this often baffling debate mirrors the metaphoric quality of Ralph Ellison's pathbreaking book *Invisible Man*.<sup>34</sup> African-Americans and other outsiders inhabit a world led largely by individuals and groups who loudly affirm their profound concern for the true interests of blacks while simultaneously demurring when the opportunity arises to deal with such concerns in a visible as opposed to an idealistic way. This metaphoric quality incontestably applies to endless Supreme Court elucidations about the meaning of religious liberty—especially when and if the Court asserts that the possibility of improved educational opportunities for African-Americans must be thwarted by the purported disestablishmentarianism of the Founders. We must confront the odd, even “remarkable spectacle of these nine characters, swishing around in priestly robes in a building resembling a Greek temple and engaged in the endless exegesis of a sacred text—and then having the chutzpah of insisting that there is no establishment of religion in America.”<sup>35</sup> Some of the ground of the debate may reflect pervasive fundamentalism.<sup>36</sup> It is far from clear that such fundamentalism is solely a vice of the religious.<sup>37</sup> “The social psychology of all fundamentalism, religious or secular, holds no great enigmas. Its core motive is what Erich Fromm called the ‘escape from freedom’—the flight into an illusionary and necessarily intolerant certitude from the insecurities of being human.”<sup>38</sup> Agents of public orthodoxy struggle to provide meaning by

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RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 74-92 (James Davison Hunter & Os Guinness eds., 1990) (assessing liberal theory). I concede that some observers contend that both republicanism and liberalism coexisted for some time in American history and that republicanism has made a comeback. Nevertheless, an accurate depiction of republicanism must admit its historical association with elitism and exclusionary limits on citizenship. See, e.g., Sherry, *supra* note 9, at 133-37. Whether republicanism can be seen as separate from liberalism is debatable. For instance, one republican writer implies, “Society must indoctrinate children so they may be capable of autonomy . . . [as part] of the liberal and republican tradition.” Sherry, *supra* note 9, at 158-59. Another commentator contends that “the jurisprudential republican revival, operating as it does ‘at the border between constitutional law and political theory’ has produced to date a ‘watery’ hybrid, which resembles liberalism almost as much as it represents a new approach.” Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 992 (1990) (quoting Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1733 (1989)). Importantly Alain Finkelkraut suggests that it is possible to confuse self-congratulatory egoism with human autonomy, which requires maturity as opposed to adolescence. See, e.g., ALAIN FINKIELKRAUT, *THE DEFEAT OF THE MIND* 122, 122-30 (Judith Friedlander trans., 1995).

34. RALPH ELLISON, *INVISIBLE MAN* (1952).

35. Peter L. Berger, *Afterword* to ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 33, at 114, 117.

36. *Id.* at 120.

37. *Id.* at 120.

38. *Id.* at 121.



confronting and suppressing the forces of private dissent.<sup>39</sup> Accordingly, the public school system, often widely acclaimed as the bulwark of American democracy, retains and accretes its power by stifling expression of difference.<sup>40</sup> One observer, less committed to the dogmatism and fundamentalism that often exemplifies American life, implies that increased school choice, including vouchers and charter schools, may lead to both competition and diversity.<sup>41</sup> Indeed, she states that the “three lines—between public and private, non-profit and profit, secular and religious—are newly up for grabs in the contest of school reform.”<sup>42</sup> She also contends, “Universally available inadequate schooling [offers] a tragic sort of equality.”<sup>43</sup> It is far from obvious that those committed to the dogmatism of the prevailing liberal order are receptive to these views. Nowhere is such dogmatism more evident than in the debate about school choice in general, and school vouchers in particular.

One perceptive supporter of educational choice prefers tax credits to vouchers, because in “the long run, vouchers may not diminish the role of government and politics in education.”<sup>44</sup> Vouchers, apparently, are merely one way and perhaps not the best way of structuring and improving school choice. Nonetheless, the debate over vouchers likely anticipates the potential debate over other and perhaps better school choice options. Vouchers are currently at issue in several states, including Florida,<sup>45</sup> Illinois,<sup>46</sup> Wisconsin,<sup>47</sup> and Ohio. Public

39. ARONS, *supra* note 24, at vii.

40. ARONS, *supra* note 24, at vii.

41. Minow, *supra* note 22, at 1062-94.

42. Minow, *supra* note 22, at 1063. In other contexts, the “federal and state governments have actually long worked through non-profit providers. Governments enter into contracts engaging non-profits to provide specific services. . . . These patterns are more pronounced now as direct governmental provision has diminished and as non-profit providers, including religious providers, depend on increasing percentages of public aid. By 1993, government sources provided 65 percent of the revenues of Catholic Charities and 75 percent of the revenues of the Jewish Board of Family and Children’s Services.” Minow, *supra* note 22, at 1063.

43. Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 257 (1999).

44. Reed, *supra* note 17, at 7.

45. See, e.g., Robert Holland, *Vouchers Motivate Florida Educators*, SCHOOL REFORM NEWS, June 2000 (published by the Heartland Institute, 19 South LaSalle St., Suite 903, Chicago, IL 60603), available at <http://www.heartland.org/Article.cfm?artId=10976>.

46. See, e.g., George A. Clowes, *State-Federal Conflict on Vouchers*, SCHOOL REFORM NEWS, Jan./Feb. 2001 (published by the Heartland Institute, 19 South LaSalle St., Suite 903, Chicago, IL 60603), available at <http://www.heartland.org/archives/ia/janfeb01/education.htm>.

47. George A. Clowes, *WI Democrats Vote Again to Slash Vouchers*, SCHOOL REFORM NEWS, June 2002 (published by the Heartland Institute, 19 South LaSalle St., Suite 903, Chicago, IL 60603), available at

policy arguments deployed either in favor of or against vouchers are likely to be repackaged and assembled in favor of or against other forms of enhanced school choice. However problematic vouchers may be, the voucher debate, and hence the school choice debate, is often tainted and influenced by unreliable claims.

For example, one commentator contends that the *Zelman*<sup>48</sup> holding is contrary to the idea that a democracy has always had an unchallengeable “duty to teach all its children,”<sup>49</sup> evidently through a system of public education. That claim is problematic, (1) because the current system of public education (as part of the common public school approach) came to dominate the provision of education more than 100 years after the founding of the United States,<sup>50</sup> and (2) because the notion that “democracy” has an obligation to teach all its children unavoidably suggests subordination.<sup>51</sup> On the other hand, one voucher proponent contends that the Supreme Court’s decision in *Zelman* has the “greatest potential

<http://www.heartland.org/Article.cfm?artId=9282>.

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

49. Mary McGroarty, *Life, Liberty and the Pursuit of Folly: The Bush Administration and Supreme Court Do Their Worst*, PITTSBURGH POST-GAZETTE, July 6, 2002, at A13. Other largely unsubstantiated arguments include the assertion that:

voucher plans harm public education because they take needed money away from public schools; disproportionately benefit wealthy students because vouchers cover only a fraction of the cost of private education; offer no real assistance to those students whose families have the least information and money; and raise the possibility of providing state funds to schools that may discriminate on the basis of factors like race, religion, disability, and/or socio-economic status.

Harlan A. Loeb & Debbie N. Kaminer, *God, Money, and Schools: Voucher Programs Impugn the Separation of Church and State*, 30 J. MARSHALL L. REV. 1, 5 (1996). This argument, aimed at unrestricted voucher plans as well as those in operation in Milwaukee and Cleveland, fails to deal either directly or accurately with the concerns of African-Americans and other outsider groups and ultimately reaches a questionable conclusion. On the other hand, Thomas Sowell suggests, “One of the most hypocritical objections made by opponents is that vouchers pay so little that they can only be used in religious schools. If that is the critics’ real concern, why don’t they advocate raising the amount of money per voucher?” Thomas Sowell, *Court Helps Reject Phony Arguments on School Vouchers*, THE DETROIT NEWS, July 17, 2002, at 12A.

50. The one common school movement was itself part of an alleged educational reform movement. The goals of this movement were to be achieved by politicizing the educational system, encouraging the adoption of compulsory public education and shifting responsibility for education from the family to the state. From the 1840s through the next 100 years the common public school movement sought to institutionalize a system of government-established, government-funded, and government-run schools acceptable to the majority. Harry Hutchison, *Private Schools: Let Competition Heat Up*, in EDUCATIONAL CHOICE FOR MICHIGAN 47, 61 (Lawrence Reed & Harry Hutchison eds., 1991).

51. For an argument in favor of such domination purportedly for the purpose of creating responsible republicanism, see Sherry, *supra* note 9, at 156-72.

for benefiting American Society.”<sup>52</sup> Not only is it much too early to tell, but the creation of vouchers has the potential to encourage government intrusion in the form of regulation in what were otherwise truly private schools. This possibility has the capacity to eviscerate the distinctiveness of private schools and enhance government power at the expense of both diversity in educational approaches and of meaningful community input into the provision of education, which remains unfettered by the imprecatory regulations of the liberal state.

In the face of this squabble which is largely attached to “liberal principles,” and in light of the possibility that “conditions for blacks and other people of color [may] worsen,”<sup>53</sup> Richard Delgado echoes Reinhold Niebuhr’s 1930s insight that racism persists “because the self-interest of majority groups prevents a full embrace of the racial outsider.”<sup>54</sup> He notes that recently scholars of color on both the left and what can be called the neoconservative right<sup>55</sup> “share deep dissatisfaction with the moderate-liberal civil rights policies this nation has been pursuing since the days of *Brown v. Board of Education*.”<sup>56</sup> Despite their differences, they “have a vision of the search for racial justice, and law’s role in it, that differs sharply from the conventional one.”<sup>57</sup> Patricia Williams, “a Criticalist, writes that law teaches us not to know what we know—to ignore and falsify our own lives. Similarly, conservatives such as [Stephen] Carter and [Shelby] Steele write that law falsifies our experience by denying us agency—by teaching us that we are weak, victimized, inferior, and must rely on preferences and handouts to get ahead.”<sup>58</sup> Notably and radically, “[b]oth groups reject white idealism and generosity as reliable wellsprings for advancing the cause of black justice.”<sup>59</sup> Instead, mobilization, disruption and the rejection of white altruism, coupled with hard work and the creation of something more reliable than goodwill form the basis of what can be called “independence” from, and a lack of confidence in, liberal discourse.<sup>60</sup> Both sets of writers “use stories, irony and humor to puncture self-serving majoritarian myths”<sup>61</sup> attached to the liberal order. Hence, “both groups agree that racism [paternalism?] persists in our society, in

52. Sowell, *supra* note 49, at 12A.

53. Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1560 (1991).

54. Davison M. Douglas, *Reinhold Niebuhr and Critical Race Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 149, 151 (Michael McConnell et al. eds., 2001).

55. Delgado, *supra* note 53, at 1548.

56. Delgado, *supra* note 53, at 1553-54.

57. Delgado, *supra* note 53, at 1554.

58. Delgado, *supra* note 53, at 1555.

59. Delgado, *supra* note 53, at 1556.

60. Delgado, *supra* note 53, at 1556-57.

61. Delgado, *supra* note 53, at 1557.

the face of liberalism's optimistic claims of progress and forecasts of a rosy future."<sup>62</sup>

It is in that spirit that this Article deploys an outsider-premised-fairness perspective, enriched by Critical Race Theory ("CRT") insights, reformist views of disparate impact and other non-majoritarian observations to inspect the school voucher debate. This Article challenges fundamental and often self-congratulatory conceptions of neutrality (religious hostility?) associated with the liberal state's centrally imposed conceptions of the First Amendment, which some would either erect or sustain to thwart the subversive possibility of African-American educational independence. Occasionally, the perspective of this essay may even be intensified by conservative insights. Taken together, this analysis breathes life into Niebuhr's much earlier claim that outsiders, "such as the African-American, must 'develop both economic and political power to meet the combination of political and economic power which confronts him.'"<sup>63</sup>

Black Americans are among the nation's strongest supporters of vouchers as a device to improve educational options<sup>64</sup> because, in addition to the plausible educational improvements they desire, they, in contrast to many whites, are apparently animated by "the deadly danger [of] raising children without the aid of the tight moral cocoon that religions of genuine power can still offer."<sup>65</sup> On the other hand, since religious instruction in public schools failed to change American attitudes toward slavery before the Civil War,<sup>66</sup> it may be risky to contend that religious instruction, even in private schools, is always a good thing. Still, experiments with school vouchers, especially if widespread and unburdened by government bureaucracy, have the capacity to diminish (at least at the margin) the agglomerations of power necessary for maintaining the prevailing liberal political order and its contribution to the sustained economic marginalization of outsiders.<sup>67</sup> Daniel Farber contends, "CRT prompts a recognition of the urgency

62. Delgado, *supra* note 53, at 1559.

63. Douglas, *supra* note 54, at 158.

64. See Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES, *supra* note 54, at 25, 52.

65. *Id.* More broadly, "[r]eligious beliefs and practices helped link faith to action not only for blacks but for white West Virginia coal miners, whose prayer meetings, biblical interpretations, and sacred songs strengthened their bond in the struggle for better working conditions. Similarly, Latin American organizers used religious symbols in faith-based communities to interpret and legitimize political action." LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 81 (2002).

66. WARD M. MCAFEE, *RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S*, at 36-37 (1998) (Old abolitionist Gerrit Smith recalled that in the early days of the crusade against slavery, he called on public-school students to join the cause with little result.).

67. To take one example, consider minimum wage laws. See, e.g., Hutchison, *supra* note 12, at 93-134.

of America's racial problems and an uncompromising search for real solutions rather than comforting stop-gaps."<sup>68</sup> Vouchers and school choice prompts us to move beyond the rather stale dispute among the experts about how to reform failing public schools, and to instead concentrate on a debate that places the tangible concerns of African-Americans and other outsiders at the center of any resolution of the dispute about how Americans should be educated in the future.

This Article will out of necessity be somewhat messy, characterized by unavoidably overlapping analysis as a result of both the absence of clarity in Establishment Clause jurisprudence and the complexity of racial stigma in our society. I will neither explicate the meta-interpretative diversity associated with Establishment Clause exegesis nor provide a convincing meta-ethic on school vouchers. Although I am concerned about the exclusionary and subordinating effects of the existing public school system, I take no definitive public policy position in favor of school vouchers.<sup>69</sup> I am, however, prepared to take a position on both the terms of the school choice debate and the effects of rejecting educational experimentations, which may benefit outsiders. Because "the causes of poverty within the black community are both *structural* and *behavioral*,"<sup>70</sup> and because the available evidence provides an inferential connection between education and poverty, I contend that the reigning legal and political theory as embedded in, and as explicated by the constitutional jurisprudence of the *Zelman* dissenters, and as exemplified by other commentators, fails to address adequately racial disparity and neglects to consider adequately the victims of the current public school hegemony. Hence, the legitimacy of much of the current opposition to school vouchers remains indefensible from an outsider perspective.

This conclusion is energized less by the chasm between structuralists and behaviorists (whether they are politically liberal or conservative)<sup>71</sup> than by what Cornel West calls "the most basic issue facing black America: *the nihilistic threat to its very existence*."<sup>72</sup> His intuition specifies: "This threat is not simply a matter of relative economic deprivation and political powerlessness. . . . It is primarily a question of speaking to the profound sense of psychological depression, personal worthlessness, and social despair so widespread in black America."<sup>73</sup> Although victimhood may confer power, it may also vitiate the

68. Daniel Farber, *The Outmoded Debate*, 82 CAL. L. REV. 893, 894 (1994).

69. For a brief but excellent summary of some of the arguments which support school vouchers, see Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847 (1999). *But see* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999).

70. GATES, JR. & WEST, *supra* note 16, at xiii.

71. CORNEL WEST, RACE MATTERS 11-20 (2001).

72. *Id.* at 12 (emphasis in original).

73. *Id.* at 12-13.

capacity for self-governance.<sup>74</sup> School choice and vouchers may provide an opportunity for inner-city parents to address nihilism and victimhood responsibly on terms that are less reliant on subordination to the prevailing majoritarian norms, and more dependent on the possibly diverse answers that black Americans and other outsiders wish to provide to the question of human meaning in a postmodern, pluralist, and yet non-ideologically diverse world. Such an approach may begin to redress the injustice of the current educational system.

An approach animated by any form of “justice”<sup>75</sup> must proceed against a largely skeptical backdrop that includes unresolved debates over both the veracity and basis of justice claims. While Socrates claimed that “justice was not a human creation but had its origin in external reality, . . . Thrasymachus disagreed; he insisted, ‘Justice is nothing else than the interest of the stronger.’”<sup>76</sup> If Thrasymachus’ conception of justice is correct, the interest of outsider groups will likely flounder amidst contemporary commitments to liberal faith and “progressive” principles. Nevertheless, given the existing difficulties that confront “Black America,” the educational deficits within the inner cities of America, and the intense and apparently growing support for vouchers among blacks<sup>77</sup> and other outsiders, it is a propitious time to interrogate the voucher question from a perspective that is animated both by concern for the “future of the race” and by the inference that dependence on liberal answers inexorably contributes to the conclusion that “[r]ace, our most enduring problem, is likely to remain, for now, as intractable as ever.”<sup>78</sup>

Part II of this Article develops what can be called an outsider-premised-fairness methodology by combining CRT’s culturally-informed-intent approach to racial disadvantage with the reformist’s version of the effects test as seasoned by other non-majoritarian approaches, including public choice theory,<sup>79</sup> to

74. Sherry, *supra* note 9, at 149.

75. If we take distributive justice as an example, Aristotle apparently said, “justice is equality, as all men believe it to be.” Gregory Vlastos, *Justice and Equality*, in THEORIES OF RIGHTS 41, 41-42 (Jeremy Waldron ed., 1984). But is equally clear that he like Plato and others before him believed that “a just distribution is in general an unequal one.” *Id.* Apparently what he meant by equality was some form of geometrical equality or proportionality. Hence a just, fair and equal distribution for persons of unequal worth would have to be unequal. A complex and comprehensive conception of justice will not be offered here.

76. Albert W. Alschuler, *A Century of Skepticism*, in CHRISTIAN PERSPECTIVES, *supra* note 54, at 94, 99.

77. See, e.g., Kurt L. Schmoke, *Why School Vouchers Can Help Inner-City Children*, 20 THE MANHATTAN INSTITUTE CIVIC BULLETIN 1-5 (August 1999), available at [http://www.manhattan-institute.org/html/cb\\_20.htm](http://www.manhattan-institute.org/html/cb_20.htm).

78. Delgado, *supra* note 53, at 1560.

79. James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3, 6 (James D. Gwartney & Richard E. Wagner eds., 1988) (“Public choice scholars seek to

examine the terms of the vouchers from the perspective of African-Americans and other outsider groups in the United States. Part III inspects what Martin Loughlin identifies as the liberal order.<sup>80</sup> This includes a brief inspection of the historical evolution of the common public school and the concomitant creation and exclusion of outsider groups, including Irish Catholics and African-Americans, by dominating ideologies that may have been transmuted by time, yet retain the power to subordinate. While this approach provides necessary background for examining the *Zelman* decision and its related arguments, I also explore the appeal of school choice to a group that seems particularly disenfranchised: African-Americans. Undoubtedly, part of the appeal of school choice, beyond the creation of choice itself, is the possibility of creating a community with values and methodologies which may be distinct from those inculcated within the dominant (homogeneous?) school system.<sup>81</sup> While experimentation is often thwarted by those committed to public school orthodoxy, school choice experimentation may allow outsiders to address peculiar problems in distinctive and hopeful ways.<sup>82</sup> Lastly, I examine the defense of public schools, the professed concern for strife, and the attempt to silence outsiders and others by branding school choice supporters as racist. This inspection provides a basis with which to challenge both the Court and contemporary commentary from the perspective of outsiders.

Part IV applies conventional analyses to inspect the Supreme Court's arguments for and against vouchers. The terms of the voucher debate apparently implicate the Establishment Clause in the clash between consistency and inconsistency in constitutional adjudication, the need for neutrality, the possibility of coercion and the stated need to save private religion from corruption by public monies. Although there is clearly a dispute between the dissenters and the majority of the Court, there is some agreement (however unjustifiable) on the question of whether public education should be reified as a necessary building block for democracy. Part V directly applies outsider-premised-fairness analysis to question various organizing themes that are embedded in the Court's approach to the Establishment Clause. I contend that

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explain how political processes actually work. They do not view government as some organic entity that always makes decisions in the public interest.").

80. LOUGHLIN, *supra* note 1, at 5.

81. For an examination of this possibility, see ARONS, *supra* note 24, at 178-85, 192. See also Sharon Keller, *Something to Lose: The Black Community's Hard Choices About Educational Choice*, 24 J. LEGIS. 67 (1998); Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993).

82. See, e.g., Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2377 (1997) (commenting on the attempt to set up male academies to help at-risk black males). Such experimentation is more likely to find a receptive opportunity within the context of private education.

liberal political theory, the ruling orthodoxy on matters of social justice and the First Amendment, “gives insufficient weight to history—especially to the enduring and deeply rooted racial disparity in life chances characteristic of American society,”<sup>83</sup> and therefore unjustifiably weighs Establishment Clause jurisprudence against outsiders. I argue, accordingly, that the voucher dispute must be properly situated to place the interests of outsiders at the core, not the periphery, of the debate.

## II. DEVELOPING AN OUTSIDER-PREMISED-FAIRNESS PERSPECTIVE

Cass Sunstein contends that many of the most important clauses of the Constitution, despite their disparate historical roots, are united by a common theme: “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”<sup>84</sup> Evidently, these underlying evils, called “naked preferences,” are largely ruled out by the Constitution.<sup>85</sup> Assuming the correctness of this view, how then does the United States, and more particularly, how does the Supreme Court, deal with the possibility that government power and resources will be captured by factions through indirect but no less powerful forms of subordination that may be fueled by either conscious or unconscious racism? While there are doubtlessly several answers, an outsider-premised-fairness methodology provides a helpful response. The United States has “progressed” from “separate-and-unequal,” to “separate-but-equal” to *Brown v. Board of Education*,<sup>86</sup> which apparently terminated three and a half centuries of *de jure* and *de aequitate* racial segregation and discrimination and has now commenced an era of formal equal opportunity.<sup>87</sup> Formal equal opportunity (“FEO”) evidently “requires that all Americans, regardless of race or color, are to have equal legal status. . . . [and thus] envisions a society in which the races are symmetrically situated.”<sup>88</sup> Apparently, this doctrine presumes that there are no outsiders and that pre-existing disparities are unlikely to affect either the social or economic relations of groups in the future. On the other hand, “CRT favors an asymmetrical ideal of racial equality which rejects race-blindness in favor of an ‘empowerment’ model that permits taking affirmative steps to achieve

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83. LOURY, *supra* note 14, at 7.

84. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

85. *Id.* at 1689-90.

86. 347 U.S. 483 (1954).

87. Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 792-795 (1994).

88. *Id.* at 795.



a level playing field”<sup>89</sup> for individuals and groups who have historically been subordinated and excluded from full participation in what America has to offer. Critical Race theorists “endorse extensive sociolegal tradeoffs favoring people of color, including deployment of a culturally informed intent test.”<sup>90</sup> When it inspects “seemingly neutral areas of law, CRT is thus able to find ‘concepts of “race” and racism always already there.’”<sup>91</sup> CRT is animated by the belief that “liberalism” and white “idealism” may be rather limp instruments for advancing the cause of African-American justice.<sup>92</sup> In fact, liberalism and idealism may indirectly preclude justice. To be sure, “CRT has not abandoned the fundamental political goal of traditional civil rights scholarship: the liberation of people of color from racial subordination.”<sup>93</sup> In accordance with that goal, CRT assumes that “America’s cultural identity, values, and meanings cannot be separated from its past and present social relations of domination and power.”<sup>94</sup> In effect, it applies public choice theory’s suspicion that people are the same when they act publicly and privately<sup>95</sup>—that is, people are motivated by self-interest which yearns to exclude and subordinate others. This yearning may be animated by either a craving for enhanced status production<sup>96</sup> or by pure economic or political self-interest. Thus, CRT, like public choice scholarship, is inherently suspicious of majority and majoritarian assumptions and claims, especially when attached to dominant programs or policies. CRT deploys an analysis that proceeds from an outsider perspective that is historically, sociologically and culturally informed.

While so-called classical-liberal reformists (“reformists”) “believe in the principle of Formal Equality of Opportunity [] to combat racial discrimination . . . both Critical Race theorists (“race crits”) and classical-liberal reformists

89. *Id.* at 790; *see also* Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 898 (1995) (contending that CRT is committed to the struggle against racism, “particularly as institutionalized in and by law”).

90. Hutchison, *supra* note 12, at 99.

91. Hutchison, *supra* note 12, at 94; *see also* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 750 (1994).

92. *See, e.g.*, Delgado, *supra* note 53, at 1547-60.

93. Harris, *supra* note 91, at 750.

94. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2132 (1992).

95. Gwartney & Wagner, *supra* note 79, at 7; *see also* Richard L. Stroup, *Political Behavior*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 45, 45 (David R. Henderson ed., 1993) (“The fact of scarcity, which exists everywhere, guarantees that people will compete for resources. Markets are one way to organize and channel this competition. Politics is another. People use both markets and politics to get resources allocated to the ends they favor.”).

96. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1083-84 (1995).

... demand more than FEO to deal with racism."<sup>97</sup> Race critics concede that FEO reacts well to "the most obvious and grotesque forms of racism, whereas most forms of racism are deeply embedded in the framework of our society."<sup>98</sup> The analysis, therefore, must go further by creating a culturally informed standard of intent, because "[i]t is not simply supremacist attitudes (substantive) but it is also individual or institutionalized behavior (procedural) that have the effect of subordinating persons of color"<sup>99</sup> to the prevailing racial hegemony. Reformists, on the other hand, concentrate on an examination of the effects of allegedly racist laws and policies and not simply asserted intent (neutral or otherwise) in order to find discrimination.<sup>100</sup> When used in conjunction with each other, these two modes of analysis, along with occasional public choice views, provide an insightful framework for assessing whether school vouchers can plausibly be supported from an outsider-premised-fairness perspective,<sup>101</sup> and whether resistance to vouchers can be seen as defensible given the contemporary terms of the debate.

First, this examination proceeds from a viewpoint that calls for an investigation of sociolegal insights derived from economics, history, culture and analogous international patterns to assess the level of supremacist attitudes and subordinating behavior attached to the common public school.<sup>102</sup> This examination is driven to ascertain whether public schools can be seen as a truly egalitarian, neutral device that unifies the country from the vantage point of African-Americans and other outsiders, or whether it is attached either directly or indirectly to racist ideology or conscious or unconscious racial motivation.<sup>103</sup> Second, consistent with the view that greater deference should be given to the concerns of minorities,<sup>104</sup> evidence that the proponents of public schools (judicial or otherwise) have knowledge or should have knowledge of any discriminatory effects of the common public school would effectively challenge the asserted neutrality and fundamentalism of Establishment Clause jurisprudence and associated commentary as a barrier to school choice experimentation. Effectively, this approach provides an interpretative critique<sup>105</sup> of widely accepted

97. Hutchison, *supra* note 12, at 99.

98. Brooks & Newborn, *supra* note 87, at 798.

99. Hutchison, *supra* note 12, at 99 (citing Brooks & Newborn, *supra* note 87, at 798).

100. Hutchison, *supra* note 12, at 99.

101. For an argument that fairness to outsider groups should constitute the central concern of civil rights policy, see Brooks & Newborn, *supra* note 87, at 838.

102. For an introduction to this approach in the context of minimum wages, see Hutchison, *supra* note 12, at 102-03.

103. For a discussion of this approach, see Lawrence, *supra* note 7, at 322.

104. See Hutchison, *supra* note 12, at 102-03.

105. For an introduction to an interpretivist approach to the determination of cultural meaning, see Lawrence, *supra* note 7, at 358-62.

Establishment Clause principles, including the overriding principle of “complete official neutrality,”<sup>106</sup> as well as various operational principles<sup>107</sup> and subsidiary doctrines<sup>108</sup> that can be deployed, when and if the courts are so inclined,<sup>109</sup> to thwart programs and policies that attempt to place the interest of outsiders at the center of this ongoing debate. This approach challenges the social vision that reinforces and contributes, either collectively or individually, to the social, political and economic enervation of people of color by “liberal” institutions<sup>110</sup> such as the common public school, while concurrently scrutinizing the terms of the debate.

The deployment of this methodology does not suggest that prevailing views, however connected to fundamentalism, are evil or always erroneous,<sup>111</sup> or for that matter that those CRT views and viewpoints, which are driven by identity and difference (especially mandatory ones) are inevitably correct.<sup>112</sup> That, after all, would be an escape into a new and different kind of fundamentalism. CRT, reformist, and other non-majoritarian views are crucial because they directly dispute prevailing views that may otherwise simply be sealed off from “discordant feedback from reality.”<sup>113</sup> CRT and reformist views are one tool, among many, for examining the terms of the debate over school vouchers while remaining animated by the future of the race.

106. Sedler, *supra* note 6, at 1338-42.

107. Sedler, *supra* note 6, at 1343-51. The operational principles include, among other things, the *Lemon* Test, the “Religious Purpose” Principle, the “Advancing Religion” Principle, and the “Excessive Entanglement” Principle. Sedler, *supra* note 6, at 1343-51.

108. Sedler, *supra* note 6, at 1351-59.

109. See Jesse H. Choper, *The Unpredictability of the Supreme Court's Doctrine in Establishment Clause Cases*, 43 WAYNE L. REV. 1439, 1440 (1997) (When the Supreme Court does not “like a result to which a principled analysis leads, they simply decline to reach it.”).

110. For an excellent perspective on this possibility, see Delgado, *supra* note 53, at 1553-59. Patricia Williams “tells of being taught . . . to combat raw power with images of powerlessness,” while Shelby Steele suggests when victims bind themselves to victimization, they may become dependent on social means for change, and he urges us to break this dependency. Delgado, *supra* note 53, at 1558.

111. SOWELL, *supra* note 21, at 1.

112. For a cautionary view on the limits of difference in an American venue, see JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 65-90 (1995). “[T]he language of opposition now appears as a cascading series of manifestos that tell us we cannot live together, we cannot work together . . . we are not Americans who have something in common.” *Id.* at xii; see also Harry Hutchison, *From Bujumbura to Mogadishu: Ethnic Solidarity, African Reality, American Implications*, 31 GEO. WASH. J. INT’L L. & ECON. 141 (1997) (reviewing KEITH B. RICHBURG, *OUT OF AMERICA: A BLACK MAN CONFRONTS AFRICA* (1997)).

113. SOWELL, *supra* note 21, at 1.

### III. THE LIBERAL ORDER, THE COMMON PUBLIC SCHOOL AND THE SUBVERSIVE POWER OF ALTERNATIVES

Stephen Arons rightly contends that “so long as the law requires that contests for control of school socialization be decided by political majorities, there will always be dissenters whose beliefs and world views have been banned from the schools in violation of the Constitution.”<sup>114</sup> Understanding the liberal order and its tentacles in the common public school movement provides a useful prism through which to examine the terms of the *Zelman* Court’s decision and holding. What the liberal order or theory is, and what its constitutive elements consist of, are surely open to debate.<sup>115</sup> It is possibly nothing more than a seductive movement that captures “leaders as acolytes enthralled by their own . . . enslavement”<sup>116</sup> to talismanic rhetoric that presumes the “coherence . . . of public culture in a liberal democratic community.”<sup>117</sup> Evidently, “liberalism is associated with a particular way of life . . . [and] goes to great lengths . . . to hide the fact that it imposes a specific moral outlook on its citizens.”<sup>118</sup> One commentator observes:

Liberal theory of course, is a theory; it need not be psychologically accurate; it need not deal with people as they are; it can consider people as they should be. So when [commentators] . . . [suggest] that liberalism[] should set out to combat illiberal religions, we should take [them] quite seriously. [They are] uninterested in constructing the state for the benefit of the people. [They] would rather construct the people for the benefit of the state. That is the reason that liberal theory focuses so heavily on public education.<sup>119</sup>

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114. ARONS, *supra* note 24, at 2. One burgeoning response is the exponential growth of homeschooling which began sometime around fifty to sixty years ago as a liberal, not a conservative, alternative to the public school. Homeschooling is apparently growing at about fifteen to twenty percent per year and has “traditionally provided havens for those who dissent from the public school curriculum.” Patricia M. Lines, *Homeschooling Comes of Age*, 140 THE PUBLIC INTEREST 74, 75 (2000).

115. See *supra* Part I.

116. MARVA J. DAWN, POWERS, WEAKNESS, AND THE TABERNACLING OF GOD 6 (2001).

117. Bernard Yack, *Liberalism Without Illusions: An Introduction to Judith Shklar’s Political Thought*, in LIBERALISM WITHOUT ILLUSION: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 1, 3 (1996).

118. This rhetoric enforces and informs liberal morality. See, e.g., Thomas F. Powers, *The Transformation of Liberalism, 1964-2001*, 145 THE PUBLIC INTEREST 59, 69 (2001).

119. Carter, *supra* note 64, at 25; see also JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY 348 (John Wilkinson trans., 1964) (Evidently in such an increasingly totalitarian world, public education does not aim to educate for the benefit of the child, but aims to

While such subordinating views are not limited to the United States,<sup>120</sup> judges and courts committed to this perspective may be animated by the desire to create an indivisibly homogenous “doctrine that protects public education from private power in much the same way that it presently separates church and state.”<sup>121</sup> While Gerrit Smith, the old abolitionist, argued that “[d]ividing the task of educating the nation’s youth among schools teaching different creeds and ideologies posed no threat . . . to the health of the republic,”<sup>122</sup> contemporary America has largely surrendered to the pull of centralizing public school ideologies. Bruce Ackerman, who defends neutrality among competing visions of the good life, exemplifies this centralizing tendency. He states: “We have no right to look upon future citizens as if we were master gardeners. . . . [Hence, a] system of liberal education provides children with a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.”<sup>123</sup> That is an inherently unreliable claim, (1) because, exactly like political and judicial neutrality, “educational neutrality is [not] possible,”<sup>124</sup> and (2) because this theory contains an implicit, if not explicit, commitment to one conception (both procedurally and substantively) of the good. Critical Race Theory has always implied, and some republicans now concede, “The liberal values of neutrality, tolerance, and rationality are themselves non-neutral: other value systems may be based on believing in a ‘faith that is innocent of alternatives’ rather than adherence to particular views that are seen as ‘subjective,

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form the child as an instrument of society. Public schools then become instruments of adaptation and conformity. “What looks like the apex of humanism is in fact the pinnacle of human submission: children are educated to become precisely what society expects of them.”).

120. For example, Egerton Ryerson as superintendent of schools for Upper Canada (now Ontario) for almost three decades commencing in the 1840s “did more to advance the government take-over of education than any other Canadian . . . . The motivation behind [his] . . . activity was his profound belief that his fellow citizens, like many errant sheep, were incapable of looking after themselves and needed to be herded and watched over by a vigilant government . . . . Rather than trying to make the state serve the will of the people, Ryerson aimed to convince the people to follow the will of the state. ‘Government operates on mind’ . . . as ‘a minister of God’ showering its blessings on its subjects.” Andrew J. Coulson, *Market Education and the Public Good*, in *CAN THE MARKET SAVE OUR SCHOOLS?*, at 53, 54-55 (Claudia R. Hepburn ed., 2001), available at <http://www.fraserinstitute.ca/shared/readmore.asp?sNav=pb&id=270>.

121. James Wilson, *Why a Fundamental Right to a Quality Education Is Not Enough*, 34 *AKRON L. REV.* 383, 397 (2000).

122. MCAFEE, *supra* note 66, at 37.

123. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 139 (1980) (cited in Sherry, *supra* note 9, at 157).

124. Sherry, *supra* note 9, at 158.

contestable matters of opinion.”<sup>125</sup> “Upon reflection, th[e] failure [of liberal neutrality] should not be surprising. . . . There is no neutral vantage point that can permit the theorist or judge to transcend . . . competing positions.”<sup>126</sup> Nevertheless, liberalism continues to be unwilling to accommodate itself to the possibility that valid systems of meaning exist outside of the narrow, fractured cocoon of various versions of purported neutrality.<sup>127</sup> What then is a public education? How has it been made to operate consistently with liberal values in the face of a variety of threats to its philosophical and practical dominance? How are liberal values that often focus on human autonomy to be defended in a post-modern, post-Enlightenment world comprised of rival, even anti-foundational conceptions of human meaning? To set the stage, a brief inspection of the historical evolution of the common public school and its capacity to create outsiders is in order.

### A. *The Historical Evolution of the Common Public School*

Writing in 1960, historian Bernard Bailyn “argued that American educational historiography was sadly deficient. . . . The typical history of education course found in universities . . . had become a ‘form of initiation’ . . . to illustrate the purportedly glorious achievements of public schools.”<sup>128</sup> Instead of being a humanitarian reform, “[t]he battle for tax-supported compulsory schooling was a recurring story of political power, social control, and the growth of a powerful, unresponsive bureaucracy. . . . [consumed by] various social goals . . . such as ‘Americanizing’ immigrants, teaching a proper respect for government, and inculcating the values of the dominant class.”<sup>129</sup>

The defenders of the common public school approach have, therefore, failed to appreciate adequately that “[e]ach generation of Americans, from the very first handful in the seventeenth century to the hundreds of millions in the twentieth century, has sought to create a social order in which equity and justice, as they understood it, would prevail.”<sup>130</sup> The vigor of the “Pilgrims in Massachusetts and the settlers in Virginia were matched . . . by the ceaseless struggles of the

125. Sherry, *supra* note 9, at 158 (quoting Nomi Maya Stolzenberg, “*He Drew a Circle that Shut Me Out*”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 587 n.26 (1993)).

126. J. JUDD OWEN, RELIGION AND THE DEMISE OF LIBERAL RATIONALISM: THE FOUNDATIONAL CRISIS OF THE SEPARATION OF CHURCH AND STATE 7 (2001).

127. Carter, *supra* note 64, at 53.

128. George H. Smith, *Nineteenth-Century Opponents of State Education: Prophets of Modern Revisionism*, in THE PUBLIC SCHOOL MONOPOLY: A CRITICAL ANALYSIS OF EDUCATION AND THE STATE IN AMERICAN SOCIETY 109, 109 (Robert B. Everhart ed., 1982).

129. *Id.* at 109-10.

130. JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 3-4 (1976).

Jeffersonians and Jacksonians and of the sectionalists and unionists of the nineteenth century.”<sup>131</sup> Indeed, “[e]ach individual and each group brought to this quest the varied backgrounds and experiences that defined their own objectives and fostered differences in methods as well as goals.”<sup>132</sup> This diversity led, inevitably, to either private schooling or locally controlled public schools<sup>133</sup> without the necessity of either state or federal government control and without the need to make the people follow the will of the state. Although the specter of privatization<sup>134</sup> is often raised against school choice and vouchers, it is plain that private, not public schools, are the historical norm in the United States.<sup>135</sup>

The founding of the republic was arguably consistent with Lockean values. Similarly, America’s initial approach to education was largely consistent with Locke’s version, which was principally “nonphilosophic, directed not toward contemplation and questioning but toward a more reliable transmission of family values, including the family property.”<sup>136</sup> “By 1720, Boston had more private schools than taxpayer-financed ones, and by the close of the American Revolution, many Massachusetts towns had no tax-funded schools at all.”<sup>137</sup> Persuasive evidence suggests that “most parents preferred private schools to the government ones.”<sup>138</sup> In general, “[w]herever colonial governments showed an interest in promoting schools, private schools were also eligible for government funding. There was no discrimination against schools that provided a religious education.”<sup>139</sup> “At the time of the framing of the Bill of Rights, there were virtually no state schools. In the early years of the Republic, public support for education generally took the form of grants to private schools, many of which were religious in nature.”<sup>140</sup> What was classified as public education (whether privately run or not) “began as an extension of the home, rather than a dramatic

131. *Id.* at 4.

132. *Id.*

133. Confusingly, the term “public school” was often used with reference to private, even religious schools. *See, e.g.*, LLOYD P. JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925*, at 6-7 (1987).

134. *See* William D. Anderson, Note, *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 *GEO. L.J.* 1869 (1994).

135. This approach evidently echoed the Voluntaryists’ and dissenters’ position that began in England by “defenders of individual rights and foes of oppressive government. . . . Education [they concluded] is best promoted by freedom.” Smith, *supra* note 128, at 119-20.

136. Diana Schaub, *Can Liberal Education Survive Liberal Democracy*, 147 *THE PUBLIC INTEREST* 45, 48 (2002).

137. Brouillette, *supra* note 8, at 6.

138. Brouillette, *supra* note 8, at 6.

139. Brouillette, *supra* note 8, at 6.

140. Brief of Amicus Curiae Cleveland City Council Woman Fannie Lewis at 7, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779).

separation from it.”<sup>141</sup> “Between 1800 and 1830, New York provided public funds to Presbyterian, Episcopalian, Methodist, Quaker, Dutch Reformed, Baptist, Lutheran, and Jewish schools, to an African Free School, and to the ‘Free School Society,’ a nonsectarian charitable school that was the forerunner of the public school system.”<sup>142</sup>

While common public schools did not become widespread until the 1850s, the first common public school was built well before the nineteenth century “in the Puritan commonwealth of Massachusetts to inculcate the Calvinist Puritan religion in the colony’s young.”<sup>143</sup> However, “[a]s the Puritans’ commonwealth acceded to the development of trade and the influx of other religious sects, enforcement of the Massachusetts school laws grew lax, and private schools soon sprang up to teach the more practical commercial subjects.”<sup>144</sup> Evidently, “[p]rivate education was widely demanded in the late eighteenth and nineteenth centuries in Great Britain and America.”<sup>145</sup> Although many contemporary observers oppose the possibility that value inculcation is a matter that is best left up to parents, who exercise educational choices on behalf of their children,<sup>146</sup> American history implies that the “private supply of education was highly responsive to . . . demand, with the consequence that large numbers of children from all classes of society received several years of education.”<sup>147</sup> Private education was also “quite successful. Literacy in the North rose from 75 percent to between 91 and 97 percent between 1800 and 1840, the years prior to compulsory schooling and governmental provision and operation of education.”<sup>148</sup>

“The American public school emerged in the early nineteenth century amid significant social and economic changes.”<sup>149</sup> While the government takeover of education gathered momentum during the 1830s and 1840s<sup>150</sup> as part of a move to entrench anti-Catholic bigotry,<sup>151</sup> it “did little to increase educational access

141. Schaub, *supra* note 136, at 49.

142. Brief of Amicus Curiae, *supra* note 140, at 7-8.

143. Brouillette, *supra* note 8, at 5.

144. Brouillette, *supra* note 8, at 6.

145. Brouillette, *supra* note 8, at 7 (quoting Barry W. Poulson, *Education and the Family During the Industrial Revolution*, in *THE AMERICAN FAMILY AND THE STATE* 138 (Joseph R. Peden & Fred R. Glahe eds., 1986)).

146. See, e.g., Sherry, *supra* note 9, at 160-61.

147. Brouillette, *supra* note 8, at 7 (quoting Poulson, *supra* note 145, at 168).

148. Brouillette, *supra* note 8, at 7. Boston became the first American city to have a completely government-financed school system from the primary to the secondary level in 1818. Brouillette, *supra* note 8, at 7-8.

149. MCAFEE, *supra* note 66, at 9.

150. See, e.g., Brouillette, *supra* note 8, at 9-10.

151. See, e.g., DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973; A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE* 7, 20-21 (1974).



for children. Rather, it simply shifted the responsibility of education from the family to the state."<sup>152</sup> It prepared the circumstances for the takeover of educational curricula by cultural elites. "Ever since its inception, the public school system has represented a [potential] government monopoly over mass education and therefore represents education from a particular perspective."<sup>153</sup> Members of the dominant hierarchy, whether they constitute a numerical majority or not, "have the power to impose . . . assumptions and norms on others and to call those assumptions and norms neutral. But that power alone does not make them so."<sup>154</sup> It is accordingly appropriate to consider whether and how the government school movement creates racial or other outsiders either through direct exclusion or through other forms of suppression and degradation.

### B. Creating Outsiders

Before I scrutinize the capacity and tendency of public schools to create outsiders, it is important to qualify this discussion by noting that we have never had truly public education in the United States.<sup>155</sup> It is true that "[w]e have education of all sorts, but none of it is public, at least if you mean by 'public' that ordinary people have access to the institutions, as in the case of the library, the museum, the streets, [and] the courts."<sup>156</sup> What currently exists as a form of publicly funded education in America is a system where people buy their way into a system.<sup>157</sup> "We have our voucher: it's called the deed to our house, and we buy our way in to a good school."<sup>158</sup> "The poor, by contrast, have conscription. They are sent off to a school not of their choosing but according to their address."<sup>159</sup>

With that proviso, it is useful to examine two rather distinct groups who have been disadvantaged by the common public school and its accompanying ideology: Irish Catholic Americans and African-Americans. Despite their differences, the American government school movement experienced persistent difficulty in either educating or respecting both groups.

Horace Mann, as president of the State Senate in Massachusetts, "was instrumental in establishing the Massachusetts Board of Education in 1837. . . .

152. Brouillette, *supra* note 8, at 10.

153. James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, in ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 33, at 54, 69.

154. W. Burette Carter, *What's Love Got To Do with It? Race Relations and the Second Great Commandment*, in CHRISTIAN PERSPECTIVES, *supra* note 54, at 133, 147.

155. John E. Coons et al., *The Pro-Voucher Left and the Pro-Equity Right*, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 98 (2000).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 99.

[and served] as the board's first secretary . . . until 1848."<sup>160</sup> Evidently, he succeeded because he offered a form of nonsectarianism (Protestantism),<sup>161</sup> which he adroitly utilized to raise fears of sectarianism in others.<sup>162</sup> Correspondingly, John Blaine, the Speaker of the House of Representatives and leading Protestant reactionary during the nineteenth century, led a malicious and cynical effort to further his political career at the expense of Catholic immigrants.<sup>163</sup> This effort took the form of an attempt "to amend the Constitution to prohibit aid to 'sectarian' schools (while affirming the practice of Bible reading in the 'public' schools). . . . [M]any States adopted 'little Blaine amendments' . . . [which] remained an effective bar to aid to private schooling in most States."<sup>164</sup> The generalized Protestant character of the common public schools was enough to unify most Protestants in support of government schooling. This "unity" was "bolstered in part by Protestants' reaction to increased Catholic immigration and the attempt by Catholics to gain tax support for their parochial schools."<sup>165</sup> "[S]ome believed that little could be done to 'salvage adult immigrants, irretrievably indolent and immoral as they allegedly were,' [but] that their children 'could ostensibly be saved from the twin ailments of Irish birth and Catholic faith by the "great remedy" of Protestant public schooling."<sup>166</sup> While the so-called "common schools of the eighteenth century were . . . [local] community schools in the sense that they took on the doctrinal coloration of the communities which supported them, . . . [the] nineteenth century . . . developed to produce a different kind of 'common school' [as part of the surging centralized conception of state run schools] . . . [As American Catholics noted during the nineteenth century,] 'public schools appeared to be increasingly neutral *against* Roman Catholicism."<sup>167</sup> Apparently, Irish Catholics and others were to be reclaimed from their imaginary "deficiencies" by a process of superordinate homogenization that precluded real educational choice.

The education available to America's blacks during the colonial and pre-Civil War era failed to live up to South Africa's scrawny standards.<sup>168</sup> While the South African government established government authorized and supported

160. Brouillette, *supra* note 8, at 9.

161. Brouillette, *supra* note 8, at 10.

162. Brouillette, *supra* note 8, at 10.

163. Marvin Olasky, *Breaking Through Blaine's Roadblock*, WORLD MAGAZINE, Aug. 24, 2002, at 14-17.

164. Brief of Amicus Curiae, *supra* note 140, at 9.

165. Brouillette, *supra* note 8, at 10.

166. Brouillette, *supra* note 8, at 10 (quoting ANDREW J. COULSON, MARKET EDUCATION: THE UNKNOWN HISTORY 75 (1999)).

167. ANDREW M. GREELEY & PETER H. ROSSI, THE EDUCATION OF CATHOLIC AMERICANS 2-3 (1966).

168. GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY 259 (1981).

institutions, which were evidently open on a nondiscriminatory basis, American blacks were largely excluded from white-supported educational institutions (especially publicly funded ones).<sup>169</sup> The American version of the common public school system continued to reify the subordination of blacks through racially dis-integrated schools, if any education was allowed at all,<sup>170</sup> and through a public education that “is still inferior in the majority of cases to that received by [w]hites.”<sup>171</sup> Within the educational arena, educational reformers followed the grim lead of Thomas Jefferson, Horace Mann and other reformers on racial questions. Jefferson, “[w]hen musing on the future of Africans in this country, . . . expressed the view that blacks should be free, but he was certain that ‘the two races, equally free, cannot live in the same government’ . . . [and] that blacks . . . are ‘inferior to the whites in the endowments both of body and mind.’”<sup>172</sup> Similarly, Mann, “an acknowledged leader in the common public school movement, accepted racial segregation in education and admonished educators who spoke out publicly”<sup>173</sup> against segregation. No doubt these views are consistent with the prevailing majoritarian and superordinate position of the time, and may contribute to superordination<sup>174</sup> in the future. One observer notes:

[T]he idea of a common school education in the United States was conceived and promoted for white children who, presumably, would undergo a leavening experience that would give them a sense of equality. . . . Black children, however, were denied such an opportunity because it was assumed that they were incapable of benefiting from such an experience and because white society had defined for them an inferior role in which education was really not necessary anyway.

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169. *Id.* The situation for blacks deteriorated sharply once the British took over from the Dutch. *Id.*

170. *See, e.g.,* FRANKLIN, *supra* note 130, at 78-79; *see also* FREDRICKSON, *supra* note 168, at 274-75 (In one state, for example, “the average white child of school age received twelve times as much from the school fund as the average [black] child.”).

171. Coulson, *supra* note 120, at 69.

172. Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 394-95 (1990); *see also* FRANKLIN, *supra* note 130, at 15 (While “Jefferson insisted he was strongly anti-slavery, his antipathy toward the institution never took him to the point of freeing his own slaves or of using his enormous prestige to oppose slavery unequivocally in word or deed.”).

173. Hutchison, *supra* note 50, at 62.

174. One observer notes that “societies sort out their social groups into superordinate and subordinate positions based on cultural, political, and economic characteristics . . . ‘superordinate’ [signifies] ‘that collectivity within a society which has preeminent authority to function both as guardians and sustainers of the controlling value system, and as prime allocators of rewards in the society.’” Thomas J. LaBelle, *A Comparative and International Perspective on the Prospects for Family and Community Control of Schooling*, in *THE PUBLIC SCHOOL MONOPOLY*, *supra* note 128, at 275, 276.

Thus, they were officially denied every opportunity for an education in the slave states, while in the free states they were largely excluded from the schools.<sup>175</sup>

This mesmerizing devotion to hierarchy and exclusion compelled some states to intervene to preclude independent private schools from educating black pupils.<sup>176</sup> *Plessy v. Ferguson*<sup>177</sup> predictably strengthened the “separate but equal” doctrine, which made its initial “appearance in a pre-Civil war decision of the Massachusetts Supreme Court,”<sup>178</sup> where the court sustained the exclusion of a black child from the elementary school nearest to her residence because it was an all-white school.<sup>179</sup> Other than in New Orleans, racial co-education was never really tried in the southern part of the United States<sup>180</sup> until after 1954, as “the Radical [post-Reconstruction] regimes [that] established the South’s first authentic public education systems . . . were too eager to win support for any kind of public schooling . . . to jeopardize the effort by enforcing integration and arousing the bogey of ‘social equality.’”<sup>181</sup> It is probable that contemporary public schools continue to contribute to this bleak pattern of exclusion and state sanctioned separation and therefore pose a threat to full, fair and free educational opportunities for diverse groups of outsiders today. This riveting pattern is neither surprising nor unique to the United States.<sup>182</sup>

Conversely, private schools “have become vastly more integrated during the past four decades, and, according to recent research, now offer a more genuinely integrated environment than do public schools.”<sup>183</sup> Furthermore, when urban private schools are compared to public schools serving the same low-income minority student population, they “spend far less per student than public schools, are better maintained, [are] safer, enjoy superior classroom discipline, and raise

175. FRANKLIN, *supra* note 130, at 78-79.

176. FRANKLIN, *supra* note 130, at 53-54.

177. 163 U.S. 537 (1896).

178. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 567 (3d ed. 1977).

179. *Roberts v. City of Boston*, 59 Mass. 198 (1 Cush 1849); *see also* DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 155-63 (4th ed. 2000).

180. FREDRICKSON, *supra* note 168, at 260.

181. FREDRICKSON, *supra* note 168, at 260.

182. LaBelle, *supra* note 174, at 280-82 (reviewing the comparative evidence of Pre-Mandela South Africa, Great Britain and the United States).

183. Coulson, *supra* note 120, at 69. Voluntary seating arrangement in the school lunchroom may be an important indicator of school integration. Coulson, *supra* note 120, at 69-70. “Students in private (particularly religious) schools were much more likely to chose lunch partners of other races than were students in public schools.” Coulson, *supra* note 120, at 69-70. On the possible effect of desegregation on the academic achievement of black children, see Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 WAYNE L. REV. 1693, 1717-19 (1987).

student achievement above the level achieved in government schools.”<sup>184</sup> In sum, not only are public schools poor educational performers in an urban setting, not only do they have a disproportionately adverse effect on blacks and other outsiders, they also apparently continue to hinder the full and truly voluntary integration of blacks within urban school districts.

Stigmatization consists of forcing the injured individuals (African-Americans) to wear a badge or symbol that degrades them in the eyes of society<sup>185</sup>—separation and segregation may be such a symbol.<sup>186</sup> Segregation may simply be a cultural stereotype that produces unconscious racism.<sup>187</sup> Nonetheless, despite the fact that state sponsored and enforced segregation has been an instrument of humiliation both within and outside of state sponsored schooling, it may be difficult to prove that either integration or integrationism has always been a blessing for people of color.<sup>188</sup> Even though not all African-Americans acknowledge Stanley Crouch’s admonition that “we can never forget that our fate as Americans is, finally, collective, and that we fail our mission as a democratic nation whenever we submit to any sort of segregation that would remake the rules,”<sup>189</sup> and in spite of the fact that full integration may not be mandated by the Constitution, parents and students should be free to choose this option unimpeded by the *modus operandi* of the current public school monopoly.

The history of Irish Catholic and African-American exclusion confirms an essential CRT and reformist deduction: the importance of race and society’s placement of groups and individuals in particular racial categories for the purposes of degradation, subordination and mandatory homogenization. Because race and the social construction of race likely retain explanatory power as either a quintessential or background component of judicial and political decisions, we should be deeply suspicious of efforts to frame the voucher debate solely or largely on First Amendment or other related grounds. While a full resolution of the debate about the semiotics of race exceeds the scope of this essay, one notable Irish-Hispanic scholar suggests that race ostensibly refers to a “group of people loosely bound together by historically contingent, socially significant

184. Coulson, *supra* note 120, at 69.

185. Lawrence, *supra* note 7, at 349-53.

186. Lawrence, *supra* note 7, at 350.

187. Lawrence, *supra* note 7, at 343.

188. See, e.g., Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993); see also Barnes, *supra* note 82, at 2385 (One reason for African-American ambivalence about integration lies in the fact that racial isolation is primarily seen as harmful only for minorities as opposed to *all* students.). In addition, Barnes argues that shipping black children to predominantly white environments has often proven detrimental to the well-being of African-Americans. Barnes, *supra* note 82, at 2389; see also BELL, *supra* note 179, at 155-99.

189. STANLEY CROUCH, *THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE: THE LONG AND SHORT OF IT*, 1990-1994, at 44 (1995).

elements of their morphology and/or ancestry.”<sup>190</sup> America’s experience with Irish-Americans, African-Americans and other outsider groups<sup>191</sup> demonstrates that “[r]ace may be America’s single most confounding problem, but the confounding problem of race is that few people seem to know what race is.”<sup>192</sup> Suffice it to say, racial groups are comprised of individuals who share certain publicly observable traits and may also be socially connected with other groups and individuals.<sup>193</sup> Racial classifications are not simply physical or biological concepts—“*what is ‘essential’ here is that these physical traits [and in the case of the Irish, religious traits] are taken to signify something of import within an historical context.*”<sup>194</sup> In any case, when a substantial overlap exists between groups that share observable traits and others who are socially connected, then substantial investment in status production, including the subordination of other groups through inferior education and other devices, is likely to occur.<sup>195</sup> The development and preservation of racial categories enhances the status of groups that are associated with, or that can be seen as part of, the majority.<sup>196</sup> Raising the status of outsider groups through improved education, or by allowing outsiders a role in eliminating the racial separation that generally occurs in public schools, may constitute a threat to status-oriented majoritarian or elite groups. This threat provides an often-undisclosed basis for opposing experiments which may provide opportunities for lower-status groups to enhance their economic and social position. Law may have a role in preventing the loss of status by some groups by reinforcing the racial subordination of others,<sup>197</sup> thus affirming the intriguing possibility that race must be seen as a political category and a basis for action.<sup>198</sup>

Beyond the status question, many of the waterless claims made in support of the public education system and against vouchers or other forms of school choice unconsciously neglect or deliberately distort disturbing facts that are

190. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

191. For a discussion of images of outsiders, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, in CRITICAL RACE THEORY: THE CUTTING EDGE 217, 218 (Richard Delgado ed., 1995).

192. López, *supra* note 190, at 5-6.

193. McAdams, *supra* note 96, at 1084.

194. LOURY, *supra* note 14, at 21.

195. McAdams, *supra* note 96, at 1084.

196. It may also explain the desire of immigrants who did not consider themselves white in their native countries to choose to be labeled white in the United States. See, e.g., Solomon Moore & Robin Fields, *In Identifying Themselves, Immigrants Change the Face of Whiteness*, THE DETROIT NEWS, Aug. 10, 2002, available at <http://www.detnews.com/2002/census/0208/10/census-558702.htm>.

197. López, *supra* note 190, at 3.

198. GUINIER & TORRES, *supra* note 65, at 65.

related either directly or tangentially to the absence of a viable education system within largely black communities. Ethnic groups with above-average levels of education—Jews, Chinese, Japanese—also have higher-quality education and are thus disproportionately represented in the more selective colleges, and specialize in more demanding and higher paying disciplines. Groups with below-average levels of education—blacks, Puerto Ricans, and Mexicans—experience lower quality education and tend to be more poorly represented in better paying occupations.<sup>199</sup> While one observer challenges the claim that there is necessarily a direct connection between income and education,<sup>200</sup> he concedes that since the era of “affirmative action,” black males with less than twelve years of schooling and less than six years of work experience have seen their income fall in relation to that of white males from seventy-nine percent to sixty-nine percent during the same period, whereas black males who had completed college and had more than six years of work experience have seen their income rise from seventy-five percent of the income of their white counterparts to ninety-eight percent during the same period.<sup>201</sup> This evidence may imply that the benefits of affirmative action flow disproportionately to the more highly educated members of outsider groups.<sup>202</sup> Despite the possible benefits of affirmative-action which apparently flow toward educated blacks, it is important to understand that while “young black men were murdered at the rate of about 45 per 100,000 in 1960 [six years after *Brown v. Board of Education*], by 1990 the rate was 140 per 100,000. By contrast, in 1990 for young white men the rate was 20 murder victims per 100,000.”<sup>203</sup> Given that approximately sixty-eight percent of the prisoners in state correctional institutions do not have a high school degree,<sup>204</sup> education, or the absence of it, will presumably continue to be a factor in the national and inner city crime rate and the concurrent incarceration rate of black men. Meanwhile, black poverty swells.<sup>205</sup>

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199. THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* 196 (1983).

200. *Id.* at 198.

201. *Id.* at 200-01.

202. It is possible that in societies where preferences are available, more highly skilled members of preferred groups garner a disproportionate share of the benefits while “less skilled members of the preferred group incur disproportionate shares of the cost.” Harry Hutchison, *Review Essay: Towards a Transnational Conception of the Antiphonal Group Rights Wrangle*, 7 *IND. INT’L & COMP. L. REV.* 245, 260-61 (1997). If this claim is true, one can argue that if group-oriented policies are to be morally justifiable, the benefits of such remedial preference programs should be made to predominately flow to the less skilled, less educated and less fortunate among us.

203. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 20 (1997).

204. *Zelman v. Simmons-Harris*, 536 U.S. 639, 683 n.8 (2002) (Thomas, J., concurring).

205. GATES, JR. & WEST, *supra* note 16, at xii.

The breakdown of public education alone cannot explain all of these effects, nor can it fully explain the attraction of vouchers to black Americans.<sup>206</sup> Nevertheless, the ills which snag American public education breathe life into Glenn Loury's assessment of Gunnar Myrdal's mid-twentieth century analysis, which implies numerous and vicious circles of cumulative causation—self-sustaining processes in which the failure of blacks to make progress justified for whites the very prejudicial attitudes that, when reflected in social and political action, served to ensure that blacks would not advance.<sup>207</sup> Loury intimates that a subtler version of this process is at work among us today as he lays “bare the deeper, structural causes of African-American disadvantage.”<sup>208</sup> In the face of this bleak picture, we must nonetheless remain skeptical of the contention “that [an] adequate [public?] education can solve our most pressing social and political problems.”<sup>209</sup> Nevertheless, while eliminating the social and economic disadvantages African-Americans currently experience is unlikely to be the prime catalyst for political or judicial action in the United States, the much needed removal of state sponsored disadvantage, in the form of subordinating ideology, should be a vital factor in judging the legitimacy of opposition to programs that may improve the educational life of black Americans and other outsider groups.

### C. *In Defense of Common Public Schools?*

Among the contentious and dogmatic claims that foreshadow, explicate and infuse the *Zelman* decision are the following: (1) the need for alternative forms of educational delivery would be eviscerated if public schools were supplied with smaller classes and more financial resources,<sup>210</sup> (2) vouchers empower poorly

206. See, e.g., Carter, *supra* note 64, at 52; see also *supra* Part I.

207. LOURY, *supra* note 14, at 6. It is possible that various school reform efforts spearheaded by educators and seconded by labor unions have not had a salutary effect on students from low-income ethnic neighborhoods. See, e.g., THOMAS SOWELL, *MARKETS AND MINORITIES* 112-13 (1981). On the other hand, the available evidence implies a positive economic return to education for blacks, Hispanics and whites. See, e.g., *id.* at 22-23. During the period under consideration, however, Hispanic males averaged less total education than either blacks or other whites but received a higher rate of return than either on what education they received. *Id.*

208. LOURY, *supra* note 14, at 7.

209. Wilson, *supra* note 121, at 387. By contrast with this unproven assumption, two authors point out many of the appalling images of blacks replete with a “parade of Sambos, mammies, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African-Americans . . . [were produced by] authors-cartoonists, writers, filmmakers, and graphic designers—individuals, certainly, of higher than average education.” Delgado & Stefancic, *supra* note 191, at 218.

210. See, e.g., Wilson, *supra* note 121, at 388. *But see* Reed, *supra* note 17. See also *infra* Part III.C.1 (inspecting the relationship between increased spending and educational performance).



informed and non-expert individuals (black parents?) to make poor choices;<sup>211</sup> (3) anyone who supports private school choice in general or vouchers in particular is a “racist;”<sup>212</sup> and (4) “America’s [educational, social and political] success has been built on our ability to unify our diverse populations”<sup>213</sup> through enforced homogenization.

Before responding to these disparate charges directly, it is important to note that, taken together or individually, these assertions disregard the true object of education. They also expose an underlying debate over who, or what, is best positioned to nurture a child. If the common public school “challenges parents’ exclusive right to control their children’s destinies and to use children to preserve and express parents’ status and class,”<sup>214</sup> as one observer imagines, then it is possible that the creation of school vouchers challenges the idea that both public schools and the state should either become or remain the preeminent source of meaning for all of America’s students.<sup>215</sup> Despite this challenge, and despite the possibility that “forced homogeneity in the public schools [must] ultimately fail,”<sup>216</sup> it is vital to recall that it is the *student’s* education, not the maintenance or the erosion of the existing system of public education, that is at issue. The indirect provision of public funds to private schools, which remain free of complete control by public educational bureaucrats, brings this issue into sharper focus despite the litany of charges that accompany and inflame the debate.

211. See Minow, *supra* note 22, at 1081-82 (citing Rose-Ackerman, *supra* note 20, at 1412-20).

212. See Mackinac Center for Public Policy, *MEA Lobbyist Calls Advocates of Educational Choice “Racist”*, at <http://www.mackinac.org/mea/iii.htm>. The Michigan Educational Association, a component part of the National Education Association, America’s largest teachers union, apparently, has engaged in other questionable behavior. For instance, in a publication titled, *Far Right/Extremist Attacks on Public Education*, the MEA attempts to marginalize Christian parents who speak up for their children’s interest by portraying them as part of a national conspiracy to end religious and academic freedom. See Mackinac Center for Public Policy, *MEA Demeans People of Faith*, at <http://www.mackinac.org/mea/vii.htm>.

213. National Education Association, *Vouchers* (2002), available at <http://www.nea.org/issues/vouchers> (also available from the National Education Association, 1201 16th Street NW, Washington, DC 20036).

214. Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1112 (1992).

215. That is after all, why defenders of the status quo often refer to school choice supporters as “racists” or engage in other efforts aimed at intimidation. See *infra* Part III.C.2.

216. MCAFEE, *supra* note 66, at 37.

### 1. Saving Public Schools by Providing More Resources and Smaller Classes?

The contention that richly funded public schools characterized by smaller classes will result in a high quality education for everyone, including those disadvantaged by the existing system, is a dubious public policy claim that confuses the voucher debate. One commentator contends that in “a time of shrinking state revenues and substantial cuts in federal educational assistance, it makes little sense to expropriate precious resources from the public schools and give them to private schools.”<sup>217</sup> Conversely, the evidence has largely debunked these policy claims. “In the five years since 1997-98, revenues per student have increased by more than a fifth (20.6 percent), . . . [and] other new data . . . suggest total expenditures per student could be even higher. . . . Taxpayers are ‘paying prep school prices for public schools.’”<sup>218</sup> Lawrence Reed reports, “Scholars have studied the relationship between per-student spending and achievement test scores since the publication of ‘Equality of Educational Opportunity’ (better known as ‘The Coleman Report’) in 1966.”<sup>219</sup>

[Professor] James Coleman, a leading sociologist, concluded that factors such as per-pupil spending and class size do not have a significant impact on student achievement scores. Economist Erik Hanushek and others have replicated Coleman’s study and even extended it to international studies of student achievement. The finding of over 30 years of their research is clear: More money does not equal better education. There are schools, states, and countries that spend a great deal of money per pupil with poor results, while others spend much less and get much better results.<sup>220</sup>

“Between 1970 and 1997, total revenues for [America’s] public schools increased from \$44.5 billion to over \$305 billion. Yet scores on the SAT . . . have dropped by 27 points at the same time.”<sup>221</sup> In a bizarre confirmation of the law of unintended consequences, a federal judge in 1985 directed the Kansas City, Missouri school district to devise a “‘money-is-no-object’ educational plan

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217. Steven Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 39 (1993). *But see* Chester E. Finn, Jr. & Marci Kanstoroom, *Improving, Empowering, Dismantling*, 140 THE PUBLIC INTEREST 64 (2000) (suggesting the power of reformist proposals that would empower principals).

218. George A. Clowes, *Spending on Public Schools Soars*, SCHOOL REFORM NEWS, Aug. 2002 (published by the Heartland Institute, 19 South LaSalle St., Suite 903, Chicago, IL 60603), available at <http://www.heartland.org/Article.cfm?artID=1022>.

219. Reed, *supra* note 17, at 4.

220. Reed, *supra* note 17, at 4-5.

221. Brouillette, *supra* note 8, at 43.

to improve the education of black students and encourage desegregation.”<sup>222</sup> “Kansas City spent more money per pupil, on a cost-of-living adjusted basis, than any other of the 280 largest school districts in the United States . . . [with] field trips to Mexico and Senegal, and higher teachers’ salaries. The student-to-teacher ratio was the lowest of any major school district in the nation at 13 to 1.”<sup>223</sup> Predictably, “[b]y the time the experiment ended in 1997, however, costs mounted to nearly \$2 billion, test scores did not rise, and there was less student integration rather than more.”<sup>224</sup>

On the other hand, the evidence from voucher programs shows both educational progress and improved educational satisfaction for low-income African-Americans.<sup>225</sup> In addition, another study based on a three-pronged approach, that (a) focused on history, (b) examined trends in the kinds of systems that worked either well or poorly across many different cultural settings, and (c) inspected the educational outcomes when a given society abandoned one system of education in favor of another, revealed that the current public education system, however richly funded, will fail to deliver the results everyone desires.<sup>226</sup> Andrew J. Coulson applied this three-pronged approach to a dozen civilizations, including Greece in the fifth century B.C., the early medieval Muslim empire, nineteenth century America and modern Japan.<sup>227</sup> The conclusion: “[f]ree education markets, in which parents choose their children’s schools and schools must compete with one another to attract and serve those children, consistently outperform all other approaches to school governance.”<sup>228</sup> Hence, the background claim that the increased provision of resources inevitably results in better public schools and therefore obviates the need to directly debate and to consider school choice remains highly speculative at best. At worse, it represents an attempt on dubious public policy grounds to thwart the promising educational innovations, evidently, preferred by outsiders. Moreover, the imaginative claim that vouchers will devastate public school funding remains unproven.<sup>229</sup>

222. Brouillette, *supra* note 8, at 43.

223. Brouillette, *supra* note 8, at 43.

224. Brouillette, *supra* note 8, at 43.

225. Kirk A. Johnson & Krista Kafer, *What the Harvard/Mathematica Study Says About Vouchers and Low-Income African-American Students*, available at <http://www.heritage.org>.

226. ANDREW J. COULSON, WITH CLEAR EYES, SINCERE HEARTS AND OPEN MINDS 22 (2002), available at <http://www.mackinac.org/article.asp?ID=4447> (also available from the Mackinac Center for Public Policy, 140 West Main Street, P.O. Box 568, Midland, Michigan 48640).

227. *Id.* at 22-23.

228. *Id.* at 23.

229. To take the Cleveland program as an example, if total public funding for education remains the same and voucher recipients leave the public school system for a private school, the amount of dollars available on a per pupil basis might actually increase within the public school system, since the voucher amount is significantly less

## 2. Will Vouchers Empower Poor Black Parents to Make Poor Choices?

Implicit in this charge is the presupposition that the government will make better school selection choices than parents—particularly poor minority parents.<sup>230</sup> “Common sense and experience, however, tell us that most parents . . . make good decisions with their children’s best interests in mind.”<sup>231</sup> Some parents may make poor decisions, but this is not a sustainable argument for denying choice to everyone and especially to outsiders.<sup>232</sup> The notion that disadvantaged African-Americans and other outsiders must be protected from bad choices ignores evidence that poor or uneducated parents are just as capable as higher-income, better-educated parents of distinguishing between good and bad schools.<sup>233</sup> At best, the underlying charge, as Minow implies, is simply a form of paternalism.<sup>234</sup> At worse, the underlying charge implies a sustained commitment to a dominating conception of choice that allows affluent parents who have the resources to choose good school districts, while insisting on conscription for disadvantaged parents and students. Although less temperate observers may draw even more menacing conclusions from this contention,<sup>235</sup> in actuality, this charge disregards the possibility that real school choice may provide:

[A] sense of ownership to the teachers, parents, and students, thereby restoring morale and renewing commitment and creativity to the educational process. Student aspirations to graduate increase, as do parent and student satisfaction levels with the chosen school. Thus school choice may effectively establish and maintain beneficial school communities and cultures, thereby contributing indirectly to students’ academic and personal growth.<sup>236</sup>

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than the State of Ohio’s contribution to public schools. Thus the contention that vouchers will devastate public school remains questionable. For details of the Cleveland program, see *infra* Part IV.

230. Brouillette, *supra* note 8, at 41.

231. Brouillette, *supra* note 8, at 41.

232. Brouillette, *supra* note 8, at 41.

233. Brouillette, *supra* note 8, at 41.

234. See Minow, *supra* note 22, at 1081-82.

235. It is possible that less temperate observers may be tempted to conclude that this charge is a mild form of Munchausen by proxy—pain is inflicted on outsiders through a dominating and ineffective education system by elites. Outsiders are prevented from escaping the public school system. Then more pain in the form of an ineffective education is inflicted on their children. Meanwhile education bureaucrats and their defenders heroically re-enter the fray with reworked but no less ineffective remedies.

236. Kevin Banasik, Book Review, 31 HARV. J. ON LEGIS. 519, 523 (1994) (reviewing PETER W. COOKSTON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF*

## 3. School Choice and Racism?

It is manifest that this charge, calculated to defend public schooling, brushes aside the existence, and the genesis of, such Supreme Court cases as *Brown v. Board of Education*<sup>237</sup> and *Plessy v. Ferguson*.<sup>238</sup> Although it has been asserted that “[t]he extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously,”<sup>239</sup> that claim, like many similar ones, neglects what *Plessy* and *Brown* make obvious: separation, segregation and even racism (as well as democracy?) were perhaps affirmed officially and unofficially in public education by the common public school movement and in other contexts as well. David Berliner, Dean of Education at Arizona State University, imagines, “Voucher programs would allow for splintering along racial and ethnic lines . . . . [V]oucher programs could end up resembling the ethnic cleansing occurring in Kosovo.”<sup>240</sup> Reality is quite different. Contrary to the extravagant claims made by many of the opponents of vouchers and public school defenders, the common public school participated and contributed to racial fragmentation and subordination,<sup>241</sup> including the origination of the “separate-but-equal” doctrine, whereas private schools were and are less committed to, and retain less power to, enforce dominant myths. They were, and are, therefore freer to enroll a diverse student body.<sup>242</sup> Cleveland’s experience confirms this fact.<sup>243</sup> Hence, the deeply embedded contention that public as opposed to private education acts as a source of racial harmony and that it fosters racial integration is, at best, doubtful. At worst, the common public school is historically linked and ideologically dedicated to hierarchy and subordination, as well as conscious and unconscious racism. Since the racial stigmatization of African-Americans and other outsiders is reinforced by economic and social deprivation, the practice of precluding low-income African-Americans from exiting failing and highly segregated public schools fortifies racial stigma and self-confirming stereotypes. Together, they

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AMERICAN EDUCATION (1994)).

237. 347 U.S. 483 (1954).

238. 163 U.S. 537 (1896).

239. Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1697 (1990).

240. DANIEL MCGROARTY, TRINNIETTA GETS A CHANCE: SIX FAMILIES AND THEIR SCHOOL CHOICE EXPERIENCE 133 (2001).

241. See *supra* Part III.B.

242. Brouillette, *supra* note 8, at 36-37.

243. MCGROARTY, *supra* note 240, at 133 (“Nearly a fifth of the participants in [the Cleveland program] attend private schools that have a racial composition that resembles the average racial composition of the Cleveland area. Only 5.2% of public school students attend similarly integrated schools.”).

“exert[] an inhibiting effect on the extent to which African-Americans can realize their full human potential.”<sup>244</sup>

Nevertheless, the intuition that school choice is a racist vehicle is a serious charge. It deserves an answer. This charge likely reflects the belief that if it can be effectively alleged that racists support vouchers then the voucher idea will be seen as a racist initiative. Moreover, a majority of members of current racial outsider groups (including blacks) favor school choice, including vouchers,<sup>245</sup> because private schools are vastly more integrated than public schools, and because such schools apparently provide a better education for disadvantaged children than public schools. Therefore, the claim that “anyone who supports school choice is a racist” must evidently be offered as a dubious deontological claim that blacks and outsiders are simply more inclined to racism than whites. Perforce, the determination of racial outsiders to champion school-choice alternatives exposes them to two dire possibilities: they can suppress their preferences and continue to tolerate poor schools, or they can defy sustained subordination by demanding school choice while being exposed to the risk that they, and other supporters of vouchers, will be identified as “racists” by the highly compensated<sup>246</sup> protectors of the existing public school monopoly. But in a nation in which some liberal theorists have singled out religious motivation “as belonging to the set of evil state motives, like racial bigotry,”<sup>247</sup> one should not be surprised to find that African-American and other school choice supporters are branded bigots by those who would advance liberal/republican hegemony at the expense of African-American priorities. This should startle no one. Just as Horace Mann imposed his Protestant brand of “nonsectarianism” while concomitantly accusing his opponents of sectarianism, contemporary defenders of the often exclusionary common public school accuse their opponents of being infected with a virus that may well apply to them.

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244. LOURY, *supra* note 14, at 5.

245. *See, e.g.*, Schmoke, *supra* note 77 (explaining that parents want academic excellence for their children and want to know that there is someone who is accountable for achieving high academic standards), available at [http://www.manhattan-institute.org/html/cb\\_20.htm](http://www.manhattan-institute.org/html/cb_20.htm).

246. For example, in the State of Michigan, employees of the largest teacher’s union, the Michigan Education Association earn salaries more than twice as high as the average teacher according to U.S. Department of Labor data. *See MEA Employee Salaries Well Above Teachers’: Highly Paid Union Officials Oppose Cost-Saving Measures for Schools*, MICH. EDUC. DIGEST, Sept. 21, 2001, available at <http://www.mackinac.org/pubs/mer/article.asp?ID=3735>.

247. Carter, *supra* note 64, at 53.

#### 4. Seeing Salvation and National Unity in the Form of Public Education?

Racial stratification and disparity between blacks and whites in terms of wages, mortality and unemployment has likely worsened over the past quarter-century.<sup>248</sup> At the same time, an increasingly homogenized, so-called common public education has often been depicted as part of an American story “led by benevolent and disinterested reformers, from the darkness of ignorance to the light of equal opportunity through free public education,”<sup>249</sup> and the Supreme Court has rightly rejected the notion that the state retains the power to standardize its children through public education.<sup>250</sup> However, it is possible to understand “the common school movement and ‘progressive’ school reformers themselves as agents of a ruling business elite that effectively subjugated working-class and especially immigrant children through a form of cultural imperialism.”<sup>251</sup> This conclusion underscores the observation that “[t]hroughout history, governments have used their established schools to repress members of ill-regarded groups, whether religious, ethnic, or racial.”<sup>252</sup> On the other hand, while the history of private education with respect to the education of outsiders is often chilling, it is plain that private schools as part of the “free educational markets have consistently allowed a harmonious coexistence of different moral, religious, and pedagogical views in a way that government schools have not and, by their very nature, cannot.”<sup>253</sup>

To repeat, American public schools owe a good deal of their founding philosophy to Thomas Jefferson, Horace Mann, and other educational reformers.<sup>254</sup> These purportedly “peaceful legislators of reason”<sup>255</sup> “believed that rational empiricism and enlightened moralism should be substituted for explicitly Christian doctrines which at the time were guiding many families, schools, and churches.”<sup>256</sup> Public education today, not unlike public education 150 years ago,<sup>257</sup> represents education from a particular perspective.<sup>258</sup> In essence, decentralized and privately ordered social norms<sup>259</sup> were swapped for mandatory

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248. LOURY, *supra* note 14, at 4.

249. Woodhouse, *supra* note 214, at 1005.

250. See *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

251. Woodhouse, *supra* note 214, at 1005.

252. Coulson, *supra* note 120, at 68.

253. Coulson, *supra* note 120, at 68.

254. Hutchison, *supra* note 50, at 61.

255. FINKIELKRAUT, *supra* note 33, at 10.

256. Hutchison, *supra* note 50, at 61.

257. Hunter, *supra* note 153, at 69.

258. Hunter, *supra* note 153, at 69.

259. For a perceptive discussion of the jurisprudence that supports decentralization

homogenesis in the form of government-established and government-funded norms derived from government-run schools, which were made acceptable to the majority.<sup>260</sup> One insightful anti-slavery commentator anticipated the deficiencies of this approach. He “rejected the argument that the public school was necessary to create a common American nationality from disparate elements. That popular notion . . . served to make social conformity into the highest American value. Such a degraded ideal was [not an] adequate basis on which to build a vibrant culturally diverse nation.”<sup>261</sup> He concluded that attempts to eliminate heterogeneity by force within the public school context must backfire<sup>262</sup>—“a coerced union engenders restless longings for disunion, a union in which there is the conscious freedom to separate is likely to be a contented and happy one.”<sup>263</sup> Historically, the creation of coercively homogenized public schools grounded in ostensibly enlightened and consilient<sup>264</sup> elucidations of human meaning developed into an exclusionary bulwark against the influx of largely Catholic

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and private ordering of social norms in contradistinction to centralized democracy, see John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 487-97 (2002).

260. Hutchison, *supra* note 50, at 61.

261. MCAFEE, *supra* note 66, at 37.

262. MCAFEE, *supra* note 66, at 37.

263. MCAFEE, *supra* note 66, at 37. This is not an argument against harmony but an argument in favor of a distinctly different way to achieve it.

264. For a defense of the Enlightenment, see, e.g., EDWARD O. WILSON, *CONSilIENCE: THE UNITY OF KNOWLEDGE* (1998) and Edward O. Wilson, *Resuming the Enlightenment Quest*, 22 WILSON Q. 16 (Winter 1998). *But see* Richard Rorty, *Against Unity*, 22 WILSON Q. 28 (Winter 1998). For argument that the vocabulary of Enlightenment rationalism, although vital to the beginnings of liberal democracy, has become an obstacle to the preservation and progress of democratic societies giving rise to the need to reformulate the hopes of the liberal society in a nonrationalist and nonuniversalist way, see RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 44-69 (1989). *But as I have hinted at elsewhere, “the notion of [human] ‘progress’ remains dubious.” See* Harry G. Hutchison, *The Semiotics of Labor Law, Trade Unions and Work in East Asia: International “Labor Standards” in the Mirror of Culture?*, 14 EMORY INT’L L. REV. 1451, 1457 n.24 (2000); *see also* Robert K. Merton, *Foreword to ELLUL*, *supra* note 119, at viii (“Progress then consists in progressive de-humanization—busy, pointless, and, in the end, suicidal submission to technique.”).



immigrants<sup>265</sup> and the children of ex-slaves. Evidently, as Arons demonstrates, this effort to compel belief continues today.<sup>266</sup>

Nevertheless, just as the German romantics challenged the Enlightenment appeal to the notion of universal reason in the name of culture,<sup>267</sup> there is reason to question the appeal of public school systems derived from Enlightenment penumbras to all parents and children everywhere. The liberal state's imposition of a centralized conception of the good in the form of public schools evidently fails to consider the possibility that, "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."<sup>268</sup> Conversely, "[p]ublic schools [today] . . . are not . . . directly dependent on, and beholden to, their local constituencies—because these local constituencies are not the main source of their funds. Public education, then, is . . . likely to reflect the interests of the secular bureaucracy of the modern state from which it derives and on which it depends."<sup>269</sup> The imposition of Jeffersonian beliefs, other like-minded values or even opposing views, likely reflects "the vested interests and cultural orientation of a larger category of cultural elites—not only those who design educational curricula but other arbiters of social taste and opinion (such as journalists, lawyers, professors, and so on)"<sup>270</sup> as opposed to local or community constituencies.

While most centralized state common public schools today are unlikely to offer either Jeffersonian or Mannian morality, they must offer some kind of ideology or morality, whether congruent with the Humanism of Charles Francis Potter or some other organizing theory of meaning.

Potter, one of the signers of the *Humanist Manifesto I* wrote:  
 "Education is thus a most powerful ally of Humanism, and every

265. Hutchison, *supra* note 50, at 61; *see also* GREELEY & ROSSI, *supra* note 167, at 2-7.

The historical roots of the Catholic school lead back mainly to the nineteenth century, when the commitment of the American population to mass public schooling began to be formed. The 'common schools' of the eighteenth century were . . . community schools in the sense that they took on the doctrinal coloration of the communities which supported them . . . . In the early nineteenth century two trends developed to produce a different kind of 'common school' . . . . To the American Catholic hierarchy of the nineteenth century, the public schools appeared to be increasingly neutral *against* Roman Catholicism.

GREELEY & ROSSI, *supra* note 167, at 2-3.

266. ARONS, *supra* note 24, at 190-221.

267. FINKIELKRAUT, *supra* note 33, at 10.

268. McGinnis, *supra* note 259, at 506 n.96.

269. Hunter, *supra* note 153, at 69.

270. Hunter, *supra* note 153, at 69.

American public school is a school of Humanism. What can the theistic Sunday Schools, meeting for an hour once a week, and teaching only a fraction of the children, do to stem the tide of a five-day program of humanistic teaching?"<sup>271</sup>

Whether these views are secular ideology or merely an article of faith, it is vital to note that "ideology can operate to replace, or play the role of religion; . . . the liberal belief in the autonomy of consciousness is revealed as an undisclosed commitment in mainstream jurisprudence."<sup>272</sup> It remains possible that the "official formulation of truth, proper behavior, and acceptable belief in [public] schools has never attained a coherence sufficient to prove the existence of a [secular] conspiracy to mold children in a single image."<sup>273</sup> The liberal order and liberal belief may not always constitute a single or uniform set of beliefs—in fact, liberalism is constituted by often-contradictory beliefs and opinions. Nevertheless, just as common public schools were transformed by time and circumstance to become neutral *against* Catholics, today's common public schools, as a central component of the liberal state, must become neutral *against* other competing forms of belief. A group or family that asserts diverse

belief[s], values, [and] world view[s] . . . is a dissenting family, not only because they reject the dominant ethic of majority culture or have been attacked by the bureaucratized agents of that culture but because they seek to create meaning where they perceive only pervasive alienation and voracious skepticism. Whatever the differences of values among these families [religious or not], they have in common the sense that the assumptions of majority culture [in the form of public schools] have lost their power of explanation and prediction and that that culture is confused, self-contradicting, or collapsing.<sup>274</sup>

Liberalism and democracy are apparently "legitimized incursions of the state into family affairs based on the utilitarian view that such incursions reflected majority rule. The rights of the family, particularly on religion, were to be sacrificed for the good of the community."<sup>275</sup> Here again, the public school system creates another group of outsiders—those individuals who might be interested in either a religious or nonreligious (but dissimilar to the one on offer from the state) kind of education for their children. This conclusion may contribute to the view that

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271. Hunter, *supra* note 153, at 70.

272. David S. Caudill, *Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea*, in CHRISTIAN PERSPECTIVES, *supra* note 54, at 109, 110.

273. ARONS, *supra* note 24, at x.

274. ARONS, *supra* note 24, at 192.

275. Hutchison, *supra* note 50, at 62.

the liberal “conception of democracy is failing not only people of color,”<sup>276</sup> but others as well. But as public choice theory implies, such a failure, as a form of pathological behavior that favors the strong at the expense of others, is consistent with the history of all majoritarian democracies.<sup>277</sup>

#### IV. ANALYZING THE *ZELMAN* DECISION

School vouchers “have generated a vigorous debate in the media and in the legislative chambers.”<sup>278</sup> “Given the gravity of the policy issues”<sup>279</sup> at stake, it would have been astonishing if the Court had declined to rule on the validity of the Cleveland Pilot Project Scholarship Program (“Pilot Project”). The Ohio State Legislative initiative implicates the “government’s claim to the power and competence to draw and police a line between religious and [secular] expression.”<sup>280</sup> The Pilot Project arguably raises “provocative questions about the nature of religious faith[,] . . . the meaning of religious freedom, the ideological ambitions of the contemporary liberal state, and the roles played in civil society by religious and other associations that mediate between persons and government.”<sup>281</sup> It also raises questions concerning the capability of Establishment Clause jurisprudence to accommodate outsiders.

The State of Ohio established a Pilot Project calculated to provide educational choices to families with children who reside in the Cleveland City School District. The “school district meets none of the State’s 27 minimum performance standards. . . . Despite per-pupil outlays of roughly \$7,000—twice the state average, and well above the national average—more than two-thirds of the district’s students drop or flunk out before their graduation.”<sup>282</sup> Moreover, “Cleveland’s school dropout rates are linked to high rates of unemployment, drug and alcohol abuse, teen pregnancy, welfare dependency, infant mortality, and crime. These problems are especially pronounced for racial minorities. . . . [M]ore than 55 percent of black men living in Cleveland are unemployed.”<sup>283</sup> “There are substantial reasons both in educational theory and in the experience of other areas to believe that school choice will improve the performance not only of students who choose alternative schools, but of those who choose public

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276. GUINIER & TORRES, *supra* note 65, at 96.

277. See, e.g., Gwartney & Wagner, *supra* note 79, at 25-26.

278. Recent Case, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), 114 HARV. L. REV. 2201, 2201 (2001).

279. *Id.* at 2201.

280. Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 773 (2001).

281. *Id.* at 773-74.

282. Brief of Amicus Curiae, *supra* note 140, at 1.

283. Brief of Amicus Curiae, *supra* note 140, at 1-2.

schools which are forced to compete. . . . The question here, however, is not whether that prediction is correct . . . but *whether it can be put to the test.*"<sup>284</sup>

Nonetheless, the Sixth Circuit held that the Pilot Project violated the Establishment Clause as "both the majority and the dissent strained to fit the facts of the case into the Supreme Court's Establishment Clause precedents and thus failed to confront the novel issue posed by the case."<sup>285</sup> One commentator suggests that the quintessential issue is "how to evaluate a voucher program that is not clearly designed to favor sectarian schools but that overwhelmingly benefits those schools, and in which the presence or absence of genuine parental choice is uncertain."<sup>286</sup> That is, of course, simply one way of posing the issue. Because "[t]he debate over the proper interpretation and meaning of the Establishment Clause is often influenced, at least in part, by the particular commentator's 'separationist' or 'accommodationist' agenda,"<sup>287</sup> alternative ways of framing the pertinent issue are available. One such formulation is how the Establishment Clause can accommodate the wishes of African-Americans and other outsiders driven by exigent circumstance to seek alternative sources of education when, and if, the current public schools system has been found so deficient that a federal court has mandated a state takeover.

#### *A. Background of the Cleveland Initiative: Favoring Low-Income Families*

The Cleveland City School District enrolls more than 75,000 pupils. It is undisputed<sup>288</sup> that the "majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school."<sup>289</sup> For "more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation."<sup>290</sup> In fact, in "1995, a Federal District Court declared a 'crisis of magnitude' and placed the entire Cleveland school

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284. Brief of Amicus Curiae, *supra* note 140, at 3 (emphasis added).

285. Recent Case, *supra* note 278, at 2201.

286. Recent Case, *supra* note 278, at 2201.

287. Sedler, *supra* note 6, at 1318 n.2.

288. In fact, Justice Stevens' dissent explicitly concedes this fact yet both ignores and denies the relevance of the "severe educational crisis that confronted the Cleveland City School District." *Zelman v. Simmons-Harris*, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting).

289. *Id.* at 644.

290. *Id.*

district under state control.”<sup>291</sup> “It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program.”<sup>292</sup>

The Pilot Project grants tuition assistance to parents based on financial need with the neediest receiving larger assistance.<sup>293</sup> This case differs “from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds.”<sup>294</sup> The Pilot Project includes:

two basic kinds of assistance to parents of children . . . . First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent’s choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school. The tuition aid portion of the [Pilot Project] is [intended] to provide educational choices to parents who reside in [the Cleveland City School District]. Any private school,

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291. *Id.* The school district had “failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. . . . Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.” *Id.*

292. *Id.*; OHIO REV. CODE ANN. §§ 3313.974-3313.979 (Anderson 2002).

293. *Zelman*, 536 U.S. at 644-45.

Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. For these lowest income families, participating private schools may not charge a parental copayment greater than \$250. For all other families, the program pays 75% of tuition costs, up to \$1,875, with no copayment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate. . . . The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Students from low-income families receive 90% of the amount charged for such assistance up to \$360. All other students receive 75% of that amount.

*Id.* at 646 (internal citations omitted). Apparently, adjacent schools would receive between \$4,750 and \$6,544 per program students. *Id.* at 646 n.1.

294. *Id.* at 663 (O’Connor, J., concurring). On the other hand, the program provides only \$8.2 million in total assistance, which “pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions.” *Id.* at 665 (O’Connor, J., concurring).

whether religious or nonreligious, may participate . . . so long as the school is located within the appropriate boundaries.<sup>295</sup>

The school's participation is subject to its agreement "not to discriminate on the basis of race, religion or ethnic background or to . . . teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>296</sup> In addition, "[a]ny public school located in a school district adjacent to the covered district may also participate in the program."<sup>297</sup> Funding for participating public schools located in adjacent school districts includes "a \$2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student."<sup>298</sup> As an apparent safeguard, "[a]ll participating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent."<sup>299</sup>

Although the Pilot Project has operated within the Cleveland City School District since the 1996-1997 school year, none of the adjacent districts have elected to participate.<sup>300</sup> A majority of the 3,700 scholarship program students enrolled in religiously affiliated schools, while approximately 1,400 public school students received tutorial aid.<sup>301</sup> The Court found that the program "is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover."<sup>302</sup> Apparently, "[t]hat undertaking includes programs governing community and magnet schools."<sup>303</sup> Both the district court and the court of appeals disallowed the program since it "had the 'primary effect' of advancing religion in violation of the Establishment Clause."<sup>304</sup>

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295. *Id.* at 645 (internal citations omitted).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 645-46.

300. *Id.* at 647.

301. *Id.*; see, e.g., *id.* at 700 (Souter, J., dissenting).

302. *Id.* at 647.

303. *Id.* "Community schools are funded under state law but are run by their own school boards, not by local school districts. These schools enjoy academic independence . . . . They can have no religious affiliation and are required to accept students by lottery. During the 1999-2000 school year, there were 10 start-up community schools in the Cleveland City School District with more than 1,900 students enrolled. . . . Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. . . . As of 1999, parents in Cleveland were able to choose from among 23 magnet schools which together enrolled more than 13,000 students." *Id.* at 647-48.

304. *Id.* at 648.

*B. Establishment Clause Jurisprudence*

Unavoidably, this Subsection's analysis of the Establishment Clause overlaps Part V's thematic outsider-premised-fairness approach. In any case, both the majority and the dissent endeavored to determine "whether the government acted with the *purpose* of advancing or inhibiting religion [and] whether the aid has the '*effect*' of advancing or inhibiting religion."<sup>305</sup> This line of attack has always been a thorny and confusing exercise. It is, nevertheless, faithful to the belief that the Constitution fails to tell judges or anyone else "where the secular ends and the sectarian begins in education."<sup>306</sup> Consistent with this claim, "in *Torcaso v. Watkins*, Justice Black indicated that nontheistic religions were protected by the first amendment, listing ethical culture and secular humanism as examples."<sup>307</sup> Furthering this perspective, "Justice Harlan suggested the significance of these holdings for the establishment clause: 'any . . . exceptions [granted for free exercise purposes] in order to satisfy the Establishment Clause of the First Amendment would have to be sufficiently broad to be religiously neutral.'<sup>308</sup> Laurence Tribe contends that "the notion of religion in the free exercise clause must be expanded beyond the closely bounded limits of theism to account for the multiplying forms of recognizably legitimate religious exercise . . . [but] in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required for establishment clause purposes lest all 'humane' programs of government be deemed constitutionally suspect,"<sup>309</sup> thus raising the question of whether the Pilot Project, which reflects an affirmative and increasingly pervasive state, must be quashed because it is insufficiently "humane."

The *Zelman* Court states, "There is no dispute that the program . . . was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."<sup>310</sup> The dissent concurs.<sup>311</sup> For instance, Justice Souter attests that the "record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them."<sup>312</sup> The contested terrain

305. *Id.* at 648-49 (emphasis added).

306. *Illinois ex rel. McCollum v. Bd. of Educ. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 237-38 (1948) (Jackson, J., concurring).

307. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 832 (1978) (discussing *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

308. *Id.* at 832-33 (quoting *Welsh v. United States*, 398 U.S. 333, 358 n.9 (1970) (Harlan, J., concurring in the result)).

309. *Id.* at 827-28.

310. *Zelman*, 536 U.S. at 649.

311. *Id.* at 686-717 (Souter, J., dissenting).

312. *Id.* at 686 (Souter, J., dissenting). Justice Breyer and Justice Stevens both decline to deny the secular purpose of the challenged program.

is cabined by this question: “whether the Ohio program . . . has the forbidden ‘effect’ of advancing or inhibiting religion.”<sup>313</sup> The dissent variously maintains that any aid to religious schools cannot be seen as neutral, remains skeptical that even neutrality is sufficient to withstand judicial scrutiny and fears the possible corruption of religious institutions through the infusion of public funds and accompanying regulations. Perforce, the Pilot Project constitutes a coercive and disabling entanglement that engenders strife requiring judicial invalidation. The Court disagrees.

The Court maintains that it has “drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”<sup>314</sup> Whether it has always preserved the consistency it desires is debatable. The Court states, “While our jurisprudence with respect to the constitutionality of direct aid programs has ‘changed significantly’ over the past two decades . . . our jurisprudence with respect to true private choice programs has remained consistent and unbroken.”<sup>315</sup> The Court cited its earlier decision holding that where “the program ‘distributes benefits neutrally to any child qualifying as “disabled”’ . . . [i]ts ‘primary beneficiaries’ . . . were ‘disabled children, not sectarian schools.’”<sup>316</sup> Accordingly, “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”<sup>317</sup> Perforce, any government assistance that reaches a religious institution does so

313. *Id.* at 649.

314. *Id.*

315. *Id.* Justice Rehnquist, for the court states: “Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.” *Id.* Among other things, the Court cites *Mueller v. Allen*, 463 U.S. 388 (1983) (rejecting an Establishment Clause challenge to a Minnesota program that authorized tax deductions for various educational expenses including private school tuition costs, even though the great majority of the program’s beneficiaries (ninety-six percent) were parents of children in religious schools); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986) (Examining the program as a whole, “[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of genuinely independent and private choices of aid recipients.”); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (rejecting an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools). *Zelman*, 536 U.S. at 649.

316. *Zelman*, 536 U.S. at 651 (quoting *Zobrest*, 509 U.S. at 10, 12).

317. *Id.* at 652.



only as a result of the deliberate choices made by individual recipients.<sup>318</sup> Any actual, apparent or alleged endorsement of a religious message is largely “attributable to the individual recipients, not the government, whose role ends with the disbursement of benefits.”<sup>319</sup> In essence, the Pilot Project has an undisputed secular purpose, honors neutrality and only provides benefits to religious institutions by virtue of the private choices made by individuals. Thus, it could be said, that when the Court determines whether religion is inhibited or advanced by a contested government practice, it is looking into the meaning of a practice already assumed by culture.<sup>320</sup> The Court concludes, “the program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. . . . The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance”<sup>321</sup> when they participate in private schools.

This conclusion is hardly correct because the program expresses a broad *preference* for non-private (meaning largely nonreligious) schools—it provides *greater* financial assistance to community schools, magnet schools and to participating adjacent schools than participating private schools. Despite its decision to validate the Pilot Project, the majority nonetheless favors the common public school. Thus, the contention that the program neutrally funds children in private or public school is unproven. In fact, the Court is compelled to concede this point.<sup>322</sup> Nonetheless, despite the financial preference granted to public community and magnet schools, the majority opinion is doubtlessly correct when it contends that “[t]here are no ‘financial incentive[s]’ that ‘ske[w]’ the program toward religious schools.”<sup>323</sup> The fact that forty-six of the fifty-six participating schools are religious is, therefore, dismissed as irrelevant.<sup>324</sup> Because the “constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools

318. *Id.*

319. *Id.*

320. Lawrence, *supra* note 7, at 359.

321. *Zelman*, 536 U.S. at 653.

322. The opinion notes that Pilot Project creates financial disincentives for religious schools. *See id.* at 654.

323. *Id.* at 653 (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986)). On the other hand, “Justice Souter suggests the program is not ‘neutral’ because program students cannot spend scholarship vouchers at traditional public schools.” *Id.* at 654 n.3. He apparently ignores the fact that public schools in Cleveland already receive more than \$7,000 in public funding per pupil of which more than \$4,100 is attributable to the state. *Id.* at 654 n.3. Accordingly, scholarship recipients who attend private school receive little more than fifty percent of the state funding available to program students who receive tutoring aid and remain enrolled in traditional public schools. *Id.*

324. *Id.* at 655.

are run by religious organizations, or most recipients choose to use the aid at a religious school,<sup>325</sup> it is also irrelevant that ninety-six percent of the participating students attend religious schools.<sup>326</sup> Furthermore, the Court rejects the argument that even if the program provides no financial incentive for parents to choose a religious school, the program nevertheless creates a perception in the public mind that the State is endorsing religious practices and belief,<sup>327</sup> because any levelheaded onlooker must be conscious of the history and context underlying the challenged program.<sup>328</sup>

Observers familiar with the full history and context of the Pilot Project would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.<sup>329</sup> For all these reasons the Court rejects the assertion that the Pilot Project coerces parents into sending their children to religious schools.<sup>330</sup> It consequently scraps the contention that because more religious schools, as opposed to nonreligious ones, currently participate in the Pilot Project, the program must discourage the participation of private nonreligious schools. Indeed, the dominance of private religious schools within the private school market of both Cleveland and Ohio preceded the enactment of the Pilot Project.<sup>331</sup>

Because the Court found a secular purpose, and because the program did not favor religious schools, the Court effortlessly eviscerated the respondents' reliance on *Committee for Public Education and Religious Liberty v. Nyquist*.<sup>332</sup> Two reasons are offered: (1) the program challenged in *Nyquist* involved a New York program that supplied a package of benefits *exclusively* to private schools animated by the desire to provide financial support for nonpublic, sectarian

325. *Id.* at 658. Significantly, “[e]xperience in Milwaukee, which since 1991 has operated an educational choice program similar to the Ohio program, demonstrates that the mix of participating schools fluctuates significantly from year to year based on a number of factors, one of which is the uncertainty caused by persistent litigation. . . . Since the Wisconsin Supreme Court declared the Milwaukee program constitutional in 1998 . . . several nonreligious private schools have entered the Milwaukee market and now represent 32% of all participating schools . . . [and] the number of program students attending nonreligious private schools increased from 2,048 to 3,582; these students now represent 33% of all program students.” *Id.* at 660 n.5 (internal citations omitted).

326. *Id.* at 659.

327. *Id.* at 654.

328. *Id.* at 655.

329. *Id.*

330. *Id.* at 654-59. *But see id.* at 698-99 (Souter, J., dissenting).

331. *Id.* at 656-57. Apparently, eighty-two percent of Cleveland's participating private schools are religious schools and eighty-one percent of Ohio's private schools are religious. *Id.* at 657.

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

institutions,<sup>333</sup> and (2) the *Nyquist* program was “far removed from the program challenged here . . . [where] ‘some form of public assistance . . . [was] made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.’”<sup>334</sup> Accordingly, neither the rule of, nor the concern of *Nyquist*, involving the invisible specters of “divisiveness” and “religious strife,” are present here.<sup>335</sup> Moreover, the “program has ignited no divisiveness or strife other than this litigation.”<sup>336</sup>

### C. Concurring Views

Both Justice O’Connor and Justice Thomas joined the decision of the Court, writing separately to emphasize certain decisive considerations. Justice O’Connor’s concurrence concentrates chiefly on the Establishment Clause. Justice Thomas prefers to supply context, including the pressing need to provide improved educational opportunities for underprivileged minority students. This context enlarges his perspective on Establishment Clause jurisprudence.

Justice O’Connor supplies two arguments. First, she verifies that “when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence,”<sup>337</sup> the *Zelman* holding and decision fails to constitute a dramatic break from the past.<sup>338</sup> Second, Justice O’Connor affirms that when parents of voucher students in religious schools exercise true private choice, the proper inquiry “should consider all reasonable educational alternatives to religious schools that are available to parents.”<sup>339</sup> To do otherwise underestimates “how the educational system in Cleveland actually functions.”<sup>340</sup> Justice O’Connor’s concurrence, consistent with Martha Minow’s observation, points out that government dollars already reach a diverse group of religiously affiliated organizations in very substantial amounts<sup>341</sup> “without restrictions on its subsequent use.”<sup>342</sup> Justice O’Connor notes that “the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs.”<sup>343</sup> If this is true, should the Court be more sensitive about government funds reaching religious institutions and providing aid and assistance

333. *Zelman*, 536 U.S. at 661.

334. *Id.* (quoting *Nyquist*, 413 U.S. at 783 n.38).

335. *Id.* at 662 n.7.

336. *Id.* at 661. On the possibility of religious strife, see *infra* Part V.A.

337. *Id.* at 663 (O’Connor, J., concurring).

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

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

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

341. *Id.* at 666-67 (O’Connor, J., concurring).

342. *Id.* at 667 (O’Connor, J., concurring).

343. *Id.* at 668 (O’Connor, J., concurring).

to predominately black students in a failed public school system unless the Court is predisposed to prop up the common public school and the set of dominant values and assumptions for which it stands? Justice O'Connor believes such sensitivity is not warranted. The Pilot Project is at least as neutral as countless other government programs, which indirectly aid religious institutions.<sup>344</sup>

Turning to the question of neutrality, Justice O'Connor concludes that the neutrality of the program "should be gauged not by the opportunities it presents but rather by its effects."<sup>345</sup> She resolves that determining whether a program is neutral should turn on whether government aid is "made available to both religious and secular beneficiaries on a nondiscriminatory basis."<sup>346</sup> She discards the assumption that neutrality is vitiated when and if the recipient religious institutions enjoy an alleged cost advantage over competing public institutions.<sup>347</sup> She also refutes the contention that the Pilot Project's tuition assistance unjustly encourages low-income students to attend a religious school because that claim takes no notice of the fact that "these students [would] receive nearly double the amount of tuition assistance under the community schools program . . . [and] none of the community schools is religious."<sup>348</sup>

In his concurring opinion, Justice Thomas begins with Frederick Douglass' declaration that "education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free."<sup>349</sup> While the veracity of that statement may have been self-evident when it was spoken, it remains doubtful that what passes for contemporary education, both within America's inner cities and elsewhere in the country, justifies those sentiments today. Conversely, it remains incontestably true that "urban children have been forced into a system that continually fails them."<sup>350</sup> Turning to the Establishment Clause, Justice Thomas examines the text which states, "Congress shall make no law respecting an establishment of religion."<sup>351</sup> Despite its proscription against congressional conduct, one can plausibly conclude that "[o]n its face, this provision places no limit on the States with regard to religion."<sup>352</sup> This conclusion reflects the view

344. *Id.* at 670 (O'Connor, J., concurring). Justice O'Connor states, "There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious school[s]." *Id.* (O'Connor, J., concurring).

345. *Id.* (O'Connor, J., concurring).

346. *Id.* (O'Connor, J., concurring).

347. *Id.* at 672 (O'Connor, J., concurring).

348. *Id.* (O'Connor, J., concurring).

349. *Id.* at 676 (Thomas, J., concurring). This perspective may echo Stephen Carter's intuition that the current liberal order has been transmuted from its Enlightenment based concern with the question, what is best for man to this question what is best for me? Carter, *supra* note 64, at 46.

350. *Zelman*, 536 U.S. at 676 (Thomas, J., concurring).

351. *Id.* at 678 (Thomas, J., concurring).

352. *Id.* (Thomas, J., concurring).

that the Establishment Clause, as originally enacted, protected individuals, states, and by extension, their citizens from the imposition of an established religion by the government of the United States.<sup>353</sup> Justice Thomas concedes that the Clause possibly constrains state action under the Fourteenth Amendment, but what action is constrained is far from clear.<sup>354</sup> One view suggests that the Fourteenth Amendment “added greatly to the dignity and glory of American citizenship, and to the security of personal liberty.”<sup>355</sup> Parenthetically, it is equally clear that the United States Supreme Court, in 1896, thought the Fourteenth Amendment was simply too frail an instrument to prevent the state of Louisiana from requiring “equal but separate accommodations” for black and white passengers.<sup>356</sup>

In any case, Justice Thomas accepts Justice Harlan’s conclusion that when “rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.”<sup>357</sup> On Justice Thomas’ account, “it may well be that state action should be evaluated on different terms than similar action by the federal government.”<sup>358</sup> This perspective favors federalism by encouraging free experimentation, so long as the state adheres to “neutrality.”<sup>359</sup> Thus, the religious liberty right protected by the Fourteenth Amendment, as incorporated by the Establishment Clause, cannot be deployed to “oppose neutral programs of school choice.”<sup>360</sup> In order to fully appreciate this approach, he provides context (the educational crisis in Cleveland) while dismissing the assertion that parents are coerced to enroll their children into religious, largely Catholic, schools.<sup>361</sup>

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353. *Id.* (Thomas, J., concurring). One observer explains that “the Bill of Rights did not apply to the states, and at the time of its adoption, six of the thirteen states maintained religious establishments. Far from prohibiting these arrangements, the First Amendment was enacted in part to protect state religious establishments from federal interference.” Sandel, *supra* note 33, at 74, 79.

354. *Zelman*, 536 U.S. at 678-80 (Thomas, J., concurring). For a discussion of the doctrine of incorporation that examines the combination of the First Amendment’s freedom of speech provision and the Fourteenth Amendment, see JOHN H. GARVEY, WHAT ARE FREEDOMS FOR?, at 223-39 (1996). “There can be little doubt that those who wrote the first amendment intended it to apply only to the federal government.” *Id.* at 223.

355. *Zelman*, 536 U.S. at 678 (Thomas, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting)).

356. *Plessy*, 163 U.S. at 543-44.

357. *Zelman*, 536 U.S. at 678 (Thomas, J., concurring).

358. *Id.* (Thomas, J., concurring).

359. See, e.g., McGinnis, *supra* note 259, at 509 (“Federalism not only sustains civil associations, its very structure builds into political life some of the advantages of spontaneous order.”).

360. *Zelman*, 536 U.S. at 680 (Thomas, J., concurring).

361. *Id.* at 680-81 (Thomas, J., concurring).

Contextually, he admits that “[r]eligious schools, like other private schools, achieve far better educational results than their public counterparts,”<sup>362</sup> though he contends that such success “is in the end beside the point, because the State has a constitutional right to experiment with a variety of different programs to promote educational opportunity.”<sup>363</sup> Justice Thomas questionably supports the majoritarian notion that “one of the purposes of public schools was to promote democracy and a more egalitarian culture.”<sup>364</sup> He is correct in his observation that “failing urban public schools disproportionately affect minority children most in need of educational opportunity.”<sup>365</sup> Significantly, if one presumes that the expressed desires of blacks are important, it is useful to note that at the time of the Reconstruction blacks considered public education “a matter of personal liberation and necessary function of a free society.”<sup>366</sup> Also relevant is the conclusion that most low income parents, as well as a majority of black and Hispanic parents, support vouchers,<sup>367</sup> because the “failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination’s effects.”<sup>368</sup>

#### *D. Dissenting Views*

Justices Stevens, Souter, and Breyer wrote separately to express their disagreement with the holding in *Zelman*. The three dissenting views express disparate points, but act as mirror images on one issue: the potential divisiveness of the Pilot Project. While I will not offer a critique of all of his views, I will initially examine the primary content of Justice Stevens’ argument before considering the claims of his colleagues.

Justice Stevens dismisses as irrelevant three aspects of the Pilot Project: (1) the educational crisis confronting parents and students, (2) the broad range of choices that are made available to students within the public school system, and (3) “the voluntary character of the private choice to prefer a parochial education over a” public school education.<sup>369</sup> Crucially, Justice Stevens yearns to remain oblivious to the plight of African-Americans even though this animates outsiders’ desire for the creation of independent choice to change their existing educational circumstances. His dissent requires context. Although Justice Stevens remains

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362. *Id.* at 681 (Thomas, J., concurring).

363. *Id.* (Thomas, J., concurring).

364. *Id.* at 681-82 (Thomas, J., concurring).

365. *Id.* at 681 (Thomas, J., concurring).

366. *Id.* at 682 (Thomas, J., concurring).

367. *Id.* at 682 n.7 (Thomas, J., concurring).

368. *Id.* at 683 (Thomas, J., concurring).

369. *Id.* at 684-85 (Stevens, J., dissenting).

unwilling to interpret the Constitution flexibly to provide African-Americans and other outsiders with an opportunity for experimentation which may improve their educational circumstances, some Critical Race scholarship suggests that many liberals (including Justice Stevens) are quite willing to interpret the Fourteenth Amendment flexibly to reify “race conscious” affirmative-action programs and policies<sup>370</sup> which may “confer a benefit on white elite groups”<sup>371</sup> while “perpetuat[ing] the existing racial hierarchy.”<sup>372</sup> Because race conscious remedies were designed by members of dominant groups, and they produce rather scarce results and retain a “dubious lineage,”<sup>373</sup> it is doubtful that they necessarily and primarily serve the purposes of outsiders. Instead, such remedies vindicate elite ideals.<sup>374</sup> This assessment raises questions about Justice Stevens’ ability to interpret separate sections of the Constitution in a consistent manner, but consistency may be possible. Justice Stevens can plausibly deploy an inflexible interpretation of the Establishment Clause to thwart any educational experimentation, which may benefit blacks in a way that is consistent with a flexible interpretation of the Fourteenth Amendment and which extends race conscious remedies, because *both* approaches may provide primary benefits to white elite groups.

Justice Stevens’ third point is an effective admission that the program fails to coerce parents into sending their children to private religious schools. Next, Justice Stevens (like Justices Breyer and Souter) contends that his resistance to the Pilot Project is animated by his “understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another.”<sup>375</sup> That raises the question: “Does his evolving worldview, social analysis, and moral vision enable us to understand and endure this ‘first century of world wars’ . . . in which nearly 200 million fellow human beings have been murdered in the name of some pernicious ideology?”<sup>376</sup> Those deaths, unattached as they are to religious disputes, are, perhaps unintentionally, minimized by and subordinated to Justice Stevens’ worldview. He also contends, “Whenever we remove a brick from the wall that was designed to separate

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370. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 n.1 (1995) (Steven, J., dissenting).

371. See Delgado, *supra* note 53, at 1559.

372. See Delgado, *supra* note 53, at 1559.

373. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1222 (1991).

374. Delgado, *supra* note 53, at 1559.

375. *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2000) (Stevens, J., dissenting).

376. GATES, JR. & WEST, *supra* note 16, at 56 (in that extent referring to W.E.B. Du Bois).

religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.”<sup>377</sup>

### 1. Justice Souter’s Views

Justice Souter attempts to substantiate Justice Stevens’ claims. He concedes that if there “were an excuse for giving short shrift to the Establishment Clause, it would probably apply here.”<sup>378</sup> But, “there is no excuse [as]. . . . Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these.”<sup>379</sup> In his lengthy dissent, Justice Souter defends a form of constitutional uniformity and consistency. Whether consistency or uniformity are to be commended as part of a decision of principle, and whether judges are “commanded to do so by a norm of political morality [that] Dworkin calls ‘integrity,’”<sup>380</sup> is a subject beyond the scope of this Article. Suffice it to say that not all legal commentators accept “that consistency across judicial decisions is a good in itself.”<sup>381</sup> Few areas of constitutional decision-making can be so characterized by confusion and disorder as Establishment jurisprudence, which has simply developed through “the process of constitutional litigation. . . . Because the process of constitutional litigation consists of case-by-case adjudication of specific issues, it is not a process that readily lends itself to the development of a comprehensive underlying theory or broad, general propositions.”<sup>382</sup>

Nevertheless, Justice Souter argues for the settled nature of the so-called “modern era of establishment doctrine,”<sup>383</sup> which ostensibly signifies that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”<sup>384</sup> He maintains that the Court cannot consistently leave *Everson v. Board of Education of Ewing*<sup>385</sup> on the books and approve the Ohio Pilot Project.<sup>386</sup> He contends that *Everson* commenced the modern era of Establishment doctrine by holding that “no tax in any amount . . . can be levied

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377. *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

378. *Id.* (Souter, J., dissenting).

379. *Id.* (Souter, J., dissenting).

380. See Christopher J. Peters, *Participation, Representation, and Principled Adjudication*, 8 LEGAL THEORY 185, 185 (2002).

381. *Id.* at 186.

382. Sedler, *supra* note 6, at 1323.

383. *Zelman*, 536 U.S. at 687 (Souter, J., dissenting).

384. *Id.* (Souter, J., dissenting) (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947)).

385. 330 U.S. 1 (1947).

386. *Zelman*, 536 U.S. at 688 (Souter, J., dissenting).



to support any religious activities or institutions.”<sup>387</sup> Yet he admits that a divided Court, twenty years after *Everson*, “upheld a New York law authorizing local school boards to lend textbooks in secular subjects to children attending religious schools.”<sup>388</sup> The Justices were nonetheless able to transcend their differences through

consistency *in the way* the Justices went about deciding the case. . . . Neither side rested on any facile application of the “test” or any simplistic reliance on the generality or evenhandedness of the state law. Disagreement concentrated on the true intent inferrable behind the law, the feasibility of distinguishing in fact between religious and secular teaching in church schools, and the reality or sham of lending books to pupils instead of supplying books to schools. . . . The stress was on the practical significance of the actual benefits received by the schools.<sup>389</sup>

It remains doubtful that the purported unbreakable separation between church and state that Justice Souter traces to *Everson* is sustainable if one scrutinizes the record of government involvement and support of private religious institutions since that case was decided.<sup>390</sup> Indeed, Justice Souter plainly contradicts *Everson*, which “upheld public reimbursement to parents for the expense of bussing their children both to public schools and to Catholic parochial schools.”<sup>391</sup>

Despite the apparent value of *Everson*, Justice Souter now insists that the pertinent cases can be broken down into four categories.<sup>392</sup> The current and

387. *Id.* at 687 (Souter, J., dissenting).

388. *Id.* at 690 (Souter, J., dissenting) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)).

389. *Id.* at 691 (Souter, J., dissenting) (quoting *Mitchell v. Helms*, 530 U.S. 793, 876 (2000) (Souter, J., dissenting)) (emphasis added). Justice Souter asserts that taxpayer funding of religious institutions has “already sparked political conflicts with opponents of public funding.” *Id.* at 690 (Souter, J., dissenting) (citing *Everson*, 330 U.S. 1). This is a rather frail argument unless unanimity is the standard for analyzing political conflict.

390. See *supra* Part IV.C (Justice O’Connor & Martha Minow’s observations).

391. Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 261-62 (1968).

392. The first three categories include: (1) the period from 1947-1968 sustaining the notion that no aid through school benefits were allowable; (2) “[t]hereafter for some 15 years, the Court [attempted] to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary”; and then (3) commencing in 1983 the concern over divertibility gave way to “approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient’s religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual.”

fourth stage is subjected to stinging criticism. This stage is one in which the substantiality of government aid has “no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are” nothing less than an example of verbal formalism.<sup>393</sup> It would seem that we have descended from a realistic assessment of proposed government aid, with the objective of adherence to the principle that no aid reach religious institutions, to a mostly formalistic inquiry that fails to do justice to the actual facts.<sup>394</sup> The procession down this boulevard led inexorably to “cases emphasizing the form of neutrality and private choice over the substance of aid to religious uses, but always in circumstances where any aid to religion was isolated and insubstantial.”<sup>395</sup> In disagreeing with the Court’s assessment in *Zobrest* and *Witters*, which “involved one student’s choice to spend funds from a general public program at a religious school,”<sup>396</sup> Justice Souter concentrates on neither the asserted beneficiary (disabled students) nor the program at issue. Instead, Justice Souter plainly concentrates on the *effect* that the exercise of private, voluntary choice has on the indirect and even incidental beneficiary<sup>397</sup>—the religious institution. In his view, even if the aid to private religious institutions is non-substantial, the program likely violates the Establishment Clause because even non-substantial aid advances religion.

#### a. Neutrality?

The “majority’s twin standards of neutrality and free choice . . . cannot convincingly legitimize the Ohio scheme.”<sup>398</sup> First, neutrality means “evenhandedness toward aid recipients.”<sup>399</sup> Thus, if the scheme at issue provides different levels of assistance depending on the ultimate recipient of aid, then the scheme becomes doubtful. Justice Souter implies that “the voucher provisions, allowing for as much as \$2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.”<sup>400</sup> The neutrality of the Ohio

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*Zelman*, 536 U.S. at 688 (Souter, J., dissenting).

393. *Id.* at 688-89 (Souter, J., dissenting).

394. *See id.* at 693 (Souter, J., dissenting).

395. *Id.* at 694 (Souter, J., dissenting).

396. *Id.* at 695 (Souter, J., dissenting).

397. *See Rosenberger v. Rector and Visitors*, 515 U.S. 819, 878-79 (1995) (Souter, J., dissenting).

398. *Zelman*, 536 U.S. at 695-96 (Souter, J., dissenting). This contention may be consistent with Robert Sedler’s view that the Establishment Clause’s overriding principle of neutrality rarely determines the outcome of the case. *See Sedler, supra* note 6, at 1340-41.

399. *Zelman*, 536 U.S. at 696 (Souter, J., dissenting).

400. *Id.* at 697 (Souter, J., dissenting).

program is not determined by the fact “that the better part of total state educational expenditure goes to public schools.”<sup>401</sup> On the contrary, since public school students are only eligible for tutorial assistance of less than \$400, while voucher recipients receive up to \$2,250, a sum which may be available to both religious and nonreligious private schools, the program, *a fortiori*, favors private, and therefore largely religious, schools. Such a program cannot be seen as neutral.

An objective examination of the facts implies that this claim is falsifiable—at least on one level. Justice Souter snubs the more than \$4,000 the state provides per pupil for Cleveland students who choose to attend public schools. Indeed, if Justice Souter’s claim is correct, the State of Ohio could effortlessly demonstrate neutrality by withdrawing all direct aid to public schools and replacing it with a system of equal vouchers for use in both public and private schools directed by parental choice. This evenhanded alternative might reduce public funding of public schools. On another level, Justice Souter is absolutely correct. The existing Pilot Project is not neutral in the amount of monies provided for students at private and public institutions. Thus, if the term “private school” effectively signifies a religious one, as he evidently believes, then he is right to argue that the program is not neutral, *because* it discriminates *against* students of religious schools in favor of those in secular or public ones. But that is not his argument—he maintains that vouchers are simply a more generous scheme.<sup>402</sup> In effect, Justice Souter’s conception of neutrality requires the state to be neutral *against* religious institutions.<sup>403</sup>

#### b. Free Choice Versus Coercion?

Justice Souter states that the “majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools.”<sup>404</sup> This is the wrong question. The correct question is “whether the private hand is genuinely free to send the money in either a secular direction or a religious one.”<sup>405</sup> This formulation ignores the fact that parents are free to receive a full voucher (\$2,250), which can be used at adjacent public schools in addition to the full amount of per pupil state funding

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401. *Id.* (Souter, J., dissenting).

402. *See id.* at 698 (Souter, J., dissenting).

403. It is possible that “a doctrine of religious freedom must be neutral to background beliefs, but background beliefs are necessarily already at work in any doctrine of religious freedom. . . . [thus] ‘the quest for neutrality . . . is an attempt to grasp an illusion.’” OWEN, *supra* note 126, at 7.

404. *Zelman*, 536 U.S. at 698 (Souter, J., dissenting).

405. *Id.* at 699 (Souter, J., dissenting).

attributable to each additional student.<sup>406</sup> Parents are also free to send their children to magnet schools, which receive \$7,097 in state aid, or community schools, which receive \$4,518 in state funding.<sup>407</sup> Justice Souter contends that, no matter how many alternatives exist, if the majority of private school alternatives are religious, then choice cannot be “true or real or genuine.”<sup>408</sup> In fact, “even a genuine choice criterion is [not] up to the task of the Establishment Clause when substantial state funds go to religious teaching;”<sup>409</sup> but even assuming *arguendo* that it is, it fails utterly here because 96.6% of all voucher recipients go to religious schools.<sup>410</sup> “Choice” is not as it seems, but merely an illusion grounded in state-sponsored coercion,<sup>411</sup> because: (1) almost two-thirds of the families using vouchers to send their children to religious schools did not embrace the religion of those schools,<sup>412</sup> (2) most families made it clear that “they had not chosen the schools because they wished their children to be proselytized in a religion not their own,”<sup>413</sup> (3) parents chose these religious schools because of enhanced educational opportunity,<sup>414</sup> and (4) it is true that “[f]or the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious.”<sup>415</sup>

### c. Compelled Religious Funding and Other Objections

Having dispensed with “choice” as a criterion in an electrifying and ultimately disappointing analysis, Justice Souter takes his dissent up a notch. First, the substantial aid criterion precludes the program.<sup>416</sup> Second, the decision to uphold the Pilot Project was in “defiance of every objective supposed to be served by the bar against establishment.”<sup>417</sup> Taking up the magnitude of the aid offered by the program, Justice Souter states that “‘it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role’ as the object of aid . . . comes in ‘substantial amounts.’”<sup>418</sup> Thus

406. *Id.* at 645. As yet, no adjacent public schools have participated in the Pilot Project. *Id.* at 647.

407. *Id.* at 664 (O’Connor, J., concurring).

408. *Id.* at 701-02 (Souter, J., dissenting).

409. *Id.* at 703 (Souter, J., dissenting).

410. *Id.* (Souter, J., dissenting).

411. *Id.* at 707 (Souter, J., dissenting). Since most alternative schools are religious the resulting “choice” is simply a matter of coercion. *See id.* (Souter, J., dissenting).

412. *Id.* at 704 (Souter, J., dissenting).

413. *Id.* (Souter, J., dissenting).

414. *Id.* (Souter, J., dissenting).

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

416. *Id.* at 708 (Souter, J., dissenting).

417. *Id.* (Souter, J., dissenting).

418. *Id.* (Souter, J., dissenting) (quoting *Meek v. Pittenger*, 421 U.S. 349, 365 (1975)).

the amount of aid, \$8.2 million per year in voucher assistance coupled with additional assistance available to private schools in the form of funds for textbooks, reading and math tutors<sup>419</sup> and other expenses, suggests a wide scope within which “substantial amounts of tax money are . . . systematically underwriting religious practice and indoctrination.”<sup>420</sup> However, he evidently ignores beliefs that are attached to the existing public school system unless they are expressed in theistic language.<sup>421</sup>

#### d. Saving “Private” Religion From Its Own Corruption

Saving religion from its own corruption in the form of money and regulation is surely an important task. Whether that is the task of the Constitution is debatable. Justice Souter, however, is indisputably correct when he notes that the Pilot Project’s regulations preclude religious schools from discriminating on the basis of religion and thus “may not give admission preferences to children who are members of the patron faith.”<sup>422</sup> It is possible that “a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job.”<sup>423</sup> These prohibitions bring into play Stephen Carter’s admonition “that religious freedom is nothing if it is not the freedom to be different. The different meanings of life that religions at their best supply translate into different ways of living—in short, into diversity—if the state allows believers sufficient space.”<sup>424</sup> Doubtlessly, there is little conflict with the liberal theory embedded in educational bureaucracies, posed by those faith traditions, religious or not, which *surrender* to the pull of the world.<sup>425</sup> On the other hand, those that exercise the “power of resistance, . . . those who insist on teaching different meanings from those imposed by the state, even in the face of public disapproval,”<sup>426</sup> constitute a subversive challenge to the state while perhaps providing both instrumental and normative benefits to disenfranchised outsiders.

The distribution of money, as Justice Souter rightly intimates, has a potentially adverse effect on the plausible benefits of educational experimentation. If the State of Ohio is looking to private schools to provide curricular alternatives for profoundly disadvantaged pupils, public money may perversely discourage it. In light of the fact that “money has barely begun to

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419. *Id.* at 709 (Souter, J., dissenting).

420. *Id.* at 711 (Souter, J., dissenting).

421. *Id.* at 711-12 (Souter, J., dissenting); *see supra* Part III.C.4.

422. *Id.* at 712 (Souter, J., dissenting).

423. *Id.* at 712-13 (Souter, J., dissenting).

424. Carter, *supra* note 64, at 36.

425. *See* Carter, *supra* note 64, at 35.

426. Carter, *supra* note 64, at 35.

flow,"<sup>427</sup> this point is particularly relevant given both the number of religious institutions offering educational alternatives and the diversity of practice grounded in the differing ideas about "community" that they bring to the table. "[W]hen government aid goes up, so does reliance on it; the only thing likely to go down is independence."<sup>428</sup> When will dependence "become great enough to give the State of Ohio an effective veto over basic decisions on the content of the curriculums,"<sup>429</sup> like its current control over decisions taken by public schools today? This is a serious question. It is doubtful that the Pilot Project provides a comprehensive answer.

## 2. Justice Breyer's Dissent

Justice Breyer's dissent broods disconsolately over "the risk that publicly financed voucher programs pose in terms of religiously based social conflict."<sup>430</sup> He provides an explication of the claim that the provision of school vouchers is simply a recipe for potential social conflict,<sup>431</sup> while admitting that "Great Britain and France have in the past reconciled religious school funding and religious freedom without creating serious strife."<sup>432</sup> He begins by quoting both the constitutional admonition that "'Congress shall make no law respecting an establishment of religion,' and a guarantee[] that the government shall not prohibit 'the free exercise thereof.'"<sup>433</sup> Justice Breyer states, "These Clauses embody an understanding, reached in the [seventeenth century] after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to 'worship God in their own way,' and allows all families to 'teach their children and to form their characters' as they wish."<sup>434</sup> A fair commitment to this Lockean and Baylean outlook<sup>435</sup> suggests support for parental liberty.<sup>436</sup> But Justice Breyer,

427. *Zelman*, 536 U.S. at 714 (Souter, J., dissenting).

428. *Id.* at 715 (Souter, J., dissenting).

429. *Id.* (Souter, J., dissenting).

430. *Id.* at 717 (Breyer, J., dissenting).

431. *Id.* at 718-26 (Breyer, J., dissenting).

432. *Id.* at 725 (Breyer, J., dissenting).

433. *Id.* at 717-18 (Breyer, J., dissenting).

434. *Id.* (Breyer, J., dissenting) (quoting C. RADCLIFFE, *THE LAW & ITS COMPASS* 71 (1960)).

435. See, e.g., A. J. Conyers, *Rescuing Tolerance*, *FIRST THINGS*, Aug./Sept. 2001, at 43, 43-44 (discussing John Locke and Pierre Bayle's conception of tolerance), available at <http://www.firstthings.com/ftissues/ft0108/articles/conyers.html>.

436. See, e.g., Schaub, *supra* note 136, at 47 ("In his educational treatise, *Some Thoughts Concerning Education*, he [Locke] recommends that children be kept as much as possible in the company of their parents."). Evidently "[n]either Locke nor Bayle was a secular humanist in the sense intended by revisionist historiography. Both were deeply religious Christians, who argued for universal toleration as the expression of respect for

inconsistent with the historical record of both the founding of the country and seventy years of subsequent American experience, disagrees.

Admittedly, Justice Breyer, echoing Justice Souter, writes eloquently about the “anguish, hardship and bitter strife that could come when zealous religious groups struggl[e] with one another to obtain the Government’s stamp of approval.”<sup>437</sup> He cites with both approval and passion *Lemon v. Kurtzman’s* explanation that “political debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the First Amendment’s religion clauses were] . . . intended to protect.”<sup>438</sup> Yet he fails to grapple with an important possibility explicated by *The Federalist*: various pathologies emerge from majoritarian democracies.<sup>439</sup> These pathologies inevitably lead to conflict. Thus, it is right to be concerned about divisiveness or the exacerbation of tension, but it is a mistake to suggest that its prime, or only source is religious. Justice Breyer, like most Americans, seems to “have confidence in [the history of] majoritarian democracy, but that confidence runs counter to the lessons of history.”<sup>440</sup> Democracy, evidently, “cannot exist as a permanent form of government. It can only exist until a majority of voters discover that they can vote themselves largess out of the public treasury.”<sup>441</sup> It is doubtful that only voters who wish to take advantage of the opportunity to send their children to private, even religious, schools have discovered this possibility.<sup>442</sup>

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the inalienable right to conscience; that respect was, in their view, necessary to purify religious belief of its corruption by the state coercion of established churches and, at the same time, to make possible an independent and practical sense of ethics.” DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 118-19 (1986).

437. *Zelman*, 536 U.S. at 718 (Breyer, J., dissenting).

438. *Id.* at 719 (Breyer, J., dissenting) (discussing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

439. See, e.g., Gwartney & Wagner, *supra* note 79, at 25-26.

440. Gwartney & Wagner, *supra* note 79, at 26.

441. Gwartney & Wagner, *supra* note 79, at 26.

442. “Public choice theory . . . has cast doubt in various ways on the coherence and efficacy of collective decision making. In particular, public choice theory has shown that cohesive groups, called special interests, may be able to exercise political power out of proportion to their numbers to obtain resources and status for themselves.” McGinnis, *supra* note 259, at 503. This observation likely applies to the countless number of special interest groups who wish to capture the public school monopoly for their purposes. These special interest groups likely include but are not limited to public school teacher unions.

V. TOWARD AN OUTSIDER-PREMISED-FAIRNESS ANALYSIS OF THE  
TERMS OF THE *ZELMAN* DEBATE

The blues is a music about human will and human frailty, just as the brilliance of the Constitution is that it recognizes grand human possibility with the same clarity that it does human frailty, which is why I say it has a tragic base. Just as the blues assumes that any man or any woman can be unfaithful, the Constitution assumes that nothing is lasting—nothing, that is, other than the perpetual danger of abused power.<sup>443</sup>

When Justice Stevens poses this question: “Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a ‘law respecting the establishment of religion;’”<sup>444</sup> when Justice Souter states that “[n]o tax in any amount, large or small can be levied to support any religious activities or institutions;”<sup>445</sup> when Justice Breyer’s concerns over religiously-based social conflict and the threat to the Nation’s social fabric compel the invalidation of the Pilot Projects;<sup>446</sup> when Justice Thomas argues, “one of the purposes of public schools was to promote democracy and a more egalitarian culture . . . [and] public education [may be] ‘a matter of personal liberation and a necessary function of a free society;’”<sup>447</sup> and when the Court asserts, “Program benefits are available to participating families on neutral terms with no [p]reference to religion,”<sup>448</sup> when in fact the State of Ohio provides private schools with fewer resources than comparable public schools, then Establishment Clause exegesis may supply short shrift to the interests of outsiders in any educational experimentation that may benefit their children. Although any attempt to uncover fully the values of the *Zelman* Court may be condemned to failure, it seems clear that both wings of the Court, and in particular, the dissenting opinions, provide a mystifying array of claims, counterclaims and statements that while robustly argued, are primarily pretext for a decision that represents a foregone conclusion. The pertinent claims can be organized thematically in these three categories: (A) defending democracy by defending the centralizing function of public schools; (B) vouchers as a form of

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443. CROUCH, *supra* note 189, at 10.

444. *Zelman v. Simmons-Harris*, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting).

445. *Id.* at 687 (Souter, J., dissenting) (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947)).

446. *Id.* at 718 (Breyer, J., dissenting).

447. *Id.* at 681-82 (Thomas, J., concurring) (quoting JAMES D. ANDERSON, *EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, at 18 (1988)).

448. *Id.* at 653.



compelled funding of religious indoctrination; and (C) government endorsement of religion.

*A. Defending Democracy by Defending the Centralizing Function of Public Schools*

Some members of the Court evince support for the claim that a largely public education is necessary for the preservation of both democracy and social harmony. As we have seen, both the dissent<sup>449</sup> and the concurrence<sup>450</sup> are drawn to such views. This stance, apparently against Herder's preference for actual diversity of views,<sup>451</sup> is congruent with the republican notion that requiring a "common culture serves as the background against which rational deliberation can take place."<sup>452</sup> As thus conceived, endorsing and then mandating a "[c]ommon culture is the act of assimilation itself. . . . The choice to be American is a large part of the glue that holds society together."<sup>453</sup> Evidently, compelling a centralized version of culture is critical to the deliberation of citizens and our own cultural tradition, and must be given presumptive authority.<sup>454</sup> This contention should be qualified. First, Western universalism, when confronted with global cultural diversity, tends to respond with imperialism.<sup>455</sup> Although that conclusion may not fully apply to a nation state like the United States for several reasons, it is probable that the subordination of outsiders is sustained by (1) mandatory injections of culture that are inescapably attached to the liberal order and its exclusionary history in the form of the public schools when accompanied by compulsory school attendance requirements, and (2) the exclusion of alternative forms of educational experimentation. Second, while it may be true that the "interpretation of human action often requires a background theory of the cultural conventions that shape our consciousness, including law and . . . language,"<sup>456</sup> as Terry Eagleton illumines,

"Culture" is said to be one of the two or three most complex words in the English language . . . . "Culture" at first denoted a thoroughly

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449. *Id.* at 717-25 (Breyer, J., dissenting).

450. *Id.* at 681 (Thomas, J., concurring).

451. *See, e.g.*, FINKIELKRAUT, *supra* note 33, at 9 ("From the beginning or, to be more precise, from the time of Plato to that of Voltaire, human diversity was judged in the court of fixed values. Then came Herder, who turned things around. He had universal values [culture] condemned in the court of diversity.").

452. Sherry, *supra* note 9, at 163.

453. Sherry, *supra* note 9, at 163.

454. Sherry, *supra* note 9, at 164.

455. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 318 (1996).

456. RICHARDS, *supra* note 436, at 22.

material process, which was then metaphorically transposed to affairs of the spirit. The word thus charts within its semantic unfolding humanity's own historic shift from rural to urban existence.<sup>457</sup>

Thus, culture, however defined, may have several different meanings. Whatever our common culture is, it evidently must be imposed on all other cultures currently present within the American population.<sup>458</sup> But such an imposed ethos, as an “[intimation] of shared meanings . . . divined by prophetic or traditionalist avatars of the spirit of the people, [is] never checked against actual opinions, least of all those of the most disadvantaged . . . people.”<sup>459</sup> For Suzanna Sherry, our common culture consists of a “common commitment to the political idea and values contained in the Constitution and the Bill of Rights and elaborated by those (like Thomas Jefferson, Abraham Lincoln, and Martin Luther King, Jr.) who have extended and articulated the definition of our civic culture in each generation.”<sup>460</sup> While no convincing basis is offered to determine who, what and how our purportedly common culture is to be attained in the future, or how such a culture was attained in the past, it is apparent that liberal iconography is assigned a lead role in this current and forthcoming liberal/republican world.<sup>461</sup> Consistent with this outlook, religious strife presumably vitiates “our common culture” and its homogenetic ally—public schools.

Justice Stevens, like Justices Breyer and Souter, avers that his Establishment Clause jurisprudence and antagonism to vouchers is grounded in his concern for the possibility of religious strife.<sup>462</sup> Plainly, this appeal to empirical and consequentialist considerations, in the capable hands of Charles Taylor, might reflect the nuanced deliberation that “[o]ur understanding of the place of religion in a free society is bedeviled by our different understandings of freedom,”<sup>463</sup> and that while God may no longer be inescapable, that does not mean that we live in a society from which God has been expelled.<sup>464</sup> In the hands of less skilled

457. TERRY EAGLETON, *THE IDEA OF CULTURE* 1 (2000).

458. Sherry, *supra* note 9, at 165-66.

459. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 115 (1990).

460. Sherry, *supra* note 9, at 165-66.

461. Some proponents of the homogenized view imply that to “argue for a common culture is not to propose an exclusionary [one].” Sherry, *supra* note 9, at 166. But it is likely the fate of liberal political theory within the United States to be attached to an exclusionary history in the past and to ensure an exclusionary future.

462. *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

463. Charles Taylor, *Religion in a Free Society*, in *ARTICLES OF FAITH, ARTICLES OF PEACE*, *supra* note 33, at 93, 94.

464. Bruce Ellis Benson, *What It Means To Be Secular: A Conversation With Philosopher Charles Taylor*, *BOOKS & CULTURE*, July/Aug. 2002, at 36, available at <http://www.christianitytoday.com/bc/2002/004/14.36.html>.

observers, such concerns are often not only superficial, but profoundly deficient in several ways. First, such claims discount a good deal of history which suggests that many people migrated to what is now the United States in order to create distinct religious communities, which sought to, and often did exclude others. Moreover, such indictments discard the evidence that “the secular ideological wars of the twentieth century killed far more people than all the religious wars of history combined,”<sup>465</sup> namely, the nearly sixty-one million deaths produced by the Soviet Union’s imposition of communism (an apparently nonreligious faith) as well as the nearly twenty million killed by the Nazis.<sup>466</sup> Even so, “secular ideologies are not banned from the liberal public square because of their dangers.”<sup>467</sup>

The death camps in the Soviet Gulag or at Treblinka were neither grounded in contemporary or ancient theological disputes, nor disputes about the veracity of rival conceptions of eschatological hermeneutics. Rather, they were grounded in class, ideology and race. Evidently, Nietzsche, who hastened the creation of post-modern society and embraced the death of God in modern and post-modern culture, correctly anticipated democide<sup>468</sup> and other evils. “If God is dead, then man has completely lost his orientation. There is no human dignity, no equality, no rights, *no democracy, no liberalism* and no good and evil.”<sup>469</sup> Thus, modern liberal thinkers such as Marx and others appear “extraordinarily superficial, railing against religion on the one hand while remaining firmly attached to ideals of justice and equality on the other. . . . [I]f God is dead, then nothing at all can be taken for granted—and absolutely everything is permitted,”<sup>470</sup> including the state imposition of meaning. The concentration on religious conflict ignores, either unconsciously or deliberately, the fact that twentieth century strife, however deplorable, is largely derived not from a religious viewpoint per se, but from the need to impose particular views. It is possible that even the need to impose particular views may be historically and emotionally linked to the Enlightenment and its modern and post-modern heirs, even if “the liberal

465. Carter, *supra* note 64, at 52.

466. See, e.g., R.J. Rummel, *How Many Did Communist Regimes Murder?* (Nov. 1993) (unpublished essay), available at <http://www.hawaii.edu/powerkills/COM.ART.HTM> and <http://www.enterstageright.com/archive/articles/0598commurder.htm>.

467. Carter, *supra* note 64, at 52.

468. See e.g., Rummel, *supra* note 466, at 1. Democide “means for governments what murder means for an individual under municipal law. It is the premeditated killing of a person in cold blood, or causing the death of a person through reckless and wanton disregard for their life.” Rummel, *supra* note 466, at 1.

469. Damon Linker, *Nietzsche’s Truth*, FIRST THINGS, Aug./Sept. 2002, at 50, 54 (emphasis added), available at <http://www.firstthings.com/ftissues/ft0208/articles/linker.html>.

470. *Id.*

Enlightenment model of the autonomous self has lost much of its hold on current thinking, [and has been] displaced by an antifoundational and largely Nietzschean postmodernism."<sup>471</sup>

The second analytic deficiency associated with the contention that strife will rise and democracy diminish if the government funds school choice is derived from the understanding that some opponents of vouchers adhere to a centralized conception of democracy, with its centralized view of how to produce social norms. This conception overlooks other "constitutive structures that provide alternate mechanisms of [social norm] production."<sup>472</sup> The voucher wrangle likely reflects a contest between a social order constructed from below, in the form of spontaneous exchange, as against a stability imposed by the government from above.<sup>473</sup> The centralized state, when confronted with disparate conceptions of the good, fearful of any real or imagined strife which could emerge in the absence of a strong sovereign, enters the fray to preclude a Hobbesian state of nature by "protect[ing] the individual from brutish forces to which he would be subjected without the protection of the state."<sup>474</sup> Thus, when private religious schools grew during the nineteenth and twentieth centuries, importing teachers from the Old Country, teaching students in German, Polish, Italian or Czech,<sup>475</sup> such a movement "posed a particular threat to a cherished agent of social equality and acculturation—the common school movement."<sup>476</sup>

Perforce, "[t]he majoritarian structure of [public] schooling, by requiring the attempt at coercive consensus, inevitably violates freedom of belief and expression; but the combatants in these conflicts have refused to recognize this contradiction."<sup>477</sup> This attempt to elevate social conformity as America's highest value is incompatible with the "notion of a vibrant culturally diverse nation."<sup>478</sup> This conclusion is consistent with the intuition that "[r]acial minorities, along with the nonwealthy, constitute the group most systematically deprived of liberty

471. Elizabeth Mensch, *Christianity and the Roots of Liberalism*, in CHRISTIAN PERSPECTIVES, *supra* note 54, at 55, 72.

472. See, e.g., McGinnis, *supra* note 259, at 496.

473. McGinnis, *supra* note 259, at 527-59.

474. Robert B. Everhart, *Introduction* to THE PUBLIC SCHOOL MONOPOLY, *supra* note 128, at 7.

475. Woodhouse, *supra* note 214, at 1005.

476. Woodhouse, *supra* note 214, at 1005.

477. ARONS, *supra* note 24, at 74. Conversely and confusingly, Sherry contends that the claim that "there is no common culture is a version of the broader philosophical claim . . . that truth is subjective and reality constructed." Sherry, *supra* note 9, at 167. She argues that this claim is evidently attached to cultural relativism and highly contingent conceptions of reality. Sherry, *supra* note 9, at 167. Yet, as any student of history and truth can tell us, even democracy is a highly contingent reality as evidenced by its rarity and all too frequent demise.

478. MCAFEE, *supra* note 66, at 37.

in schooling under current conditions.”<sup>479</sup> Nevertheless, while “[m]odern educators argue that state intervention was, and remains, necessary in order to unify American society,”<sup>480</sup> and even though it is consistently asserted that “government schooling has been key to bringing together various racial, religious, and political groups . . . based on the experiences of the 1800s [and contemporary America, these beliefs are] not only wrong but . . . exactly backwards.”<sup>481</sup> “When government imposes the content of schooling it becomes the same deadening agent of repression from which the Framers of the Constitution sought to free themselves.”<sup>482</sup> Properly understood, the invocation of strife reduction as a component of the dissent’s formalistic conception of the Establishment Clause creates a bulwark against educational innovation and affirms a predisposition favoring centralized public education as the appropriate strife management vehicle. This commitment plainly disregards Justice Black’s opinion in *Everson*, which held that the “[First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”<sup>483</sup> Nonetheless, the dissent remains an unwaveringly committed adversary to educational innovation that favors African-Americans when, and if, religious schools are part of a comprehensive framework.

The third deficiency associated with the dissent’s perspective is the absence of historical or international evidence that strife will necessarily be enhanced or that democracy will likely be vitiated by public support of independent religiously affiliated educational institutions, especially when funding occurs via individual choice. On the contrary, both historical and contemporary international evidence refutes these claims. For example, it has been demonstrated that classical Athens, perhaps the “most democratic state in history prior to the foundation of the [United States] republic did not require democracy or anything else to be taught in its schools.”<sup>484</sup> Indeed, “it did not require the existence of schools.”<sup>485</sup> Although Athens “was plagued by some of the same social blights that have afflicted modern nations, . . . [the] freedom extended to education, and permitt[ed] families complete discretion over their children’s schooling. Government played no role in the funding, regulation, or provision of education. . . . Independent elementary schools were created in response to public demand.”<sup>486</sup> On the other hand, Sparta, Athens’ chief rival during its

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479. ARONS, *supra* note 24, at 218.

480. Brouillette, *supra* note 8, at 10.

481. Brouillette, *supra* note 8, at 10.

482. ARONS, *supra* note 24, at 190.

483. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947) (cited in *Zelman v. Simmons-Harris*, 536 U.S. 639, 669 (2002) (O’Connor, J., concurring)).

484. Coulson, *supra* note 120, at 61.

485. Coulson, *supra* note 120, at 61.

486. Coulson, *supra* note 120, at 61.

golden age, deployed schools as a force for minimizing dissension and enforcing “harmony” among the citizenry.<sup>487</sup> Unlike Athens, where virtually every aspect of child-rearing was the right and responsibility of parents, in Sparta, it was the prerogative of the government.<sup>488</sup> Evidently, “all the male children . . . were separated from their families and taken to live in school dormitories. . . . Parents had no direct say in the education or upbringing of their children, having to cede their responsibilities and desires to this single, monolithic state system.”<sup>489</sup> This approach had its advantages. “Sparta’s brutal state school system did produce a very effective military, and its totalitarian ability to homogenize children kept dissension within the populace to a minimum . . . at the expense of virtually every human freedom we take for granted today.”<sup>490</sup> The disparate experiences of Athens and Sparta demonstrate that democracy can be compatible with educational freedom and state control over education can be compatible with a form of homogenization born of totalitarianism.

Moreover, in 1917 the Netherlands “enacted a constitutional amendment guaranteeing full-blown choice. Any responsible group, public or private, is guaranteed the right to private education.”<sup>491</sup> Significantly, “[d]iscrimination in funding is precluded. Public schools and private schools are treated equally with regard to funding . . . [and in] regulating private schools, ‘due regard must be paid to their own freedom in accordance with their religious beliefs.’”<sup>492</sup> As a consequence, although nearly seventy percent of Dutch children attended public schools in 1920, today more than seventy percent attend private schools.<sup>493</sup> Apparently, neither harmony nor democracy has been diminished by government funded school choice.<sup>494</sup>

Furthermore, it is clear that contemporary American religious institutions have consistently and regularly received funds in very substantial amounts without restrictions on subsequent use,<sup>495</sup> and without producing strife or vitiating democracy.<sup>496</sup> As Choper makes obvious, federal and state funds were “being

487. Coulson, *supra* note 120, at 61.

488. Coulson, *supra* note 120, at 61.

489. Coulson, *supra* note 120, at 62-63.

490. Coulson, *supra* note 120, at 63.

491. Hutchison, *supra* note 50, at 68.

492. Hutchison, *supra* note 50, at 68.

493. Hutchison, *supra* note 50, at 68.

494. An additional inference may plausibly be drawn from the Canadian experience with a putatively public school system coexisting peaceably along with a Catholic School system for more than 100 years without provoking strife.

495. See *supra* Part IV.C; see also *Zelman v. Simmons-Harris*, 536 U.S. 693, 666-68 (2002) (O’Connor, J., concurring) (Religious hospitals, which account for eighteen percent of all hospital beds nationwide, rely on Medicare funds for thirty-six percent of their revenues.).

496. See *supra* Part IV.C (discussing Justice O’Connor’s concurrence).

allocated [as far back as 1948], in no less than 350 instances, to American parochial schools. . . . And it is reasonable to assume that increased public concern with education has caused that number to grow significantly."<sup>497</sup> Conversely, as we have seen, private schools, including religious ones, affirmatively reduce racial, ethnic and economic stratification through improved voluntary integration, and enhance educational achievement, thus diminishing economic disparity between outsiders and majority groups. The result in itself diminishes degradation in the form of stigmatization by which the "dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, . . . and excluding them from participating in that community as equals."<sup>498</sup>

Nevertheless, many commentators and judges have been taken with the apparently utilitarian claims that "vouchers pose a serious threat to values that are vital to the health of American democracy [and that] [t]hese programs subvert the constitutional principle of separation of church and state."<sup>499</sup> This contention, whether bounded by what the Constitution says or by Dworkin's interpretive theory of what he and they might wish it to say,<sup>500</sup> is often associated with the speculative necessity of eliminating strife, and forms a major component of the "neither inhibiting or advancing religion" strand of Establishment Clause jurisprudence. Any reasoned evaluation of this claim must note its haunting similarity to an earlier charge: the largely indefensible claim that vouchers contribute to racial division. Both claims are stranded by the absence of empirical evidence. Indeed, Lawrence Tribe cites *Nyquist* with approval for the proposition that the prospect of division "may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decision of the Court."<sup>501</sup> A comprehensive inspection of the corpus of evidence obtainable demonstrates that this often self-congratulatory "division and social stratification" claim, in the hands of the dissent, either animating or grounded in opposition to school choice, is simply a predisposition that is calculated to shield public education from the alternatives. Taken together or individually these various and related charges expose as irrational this component of the terms of the voucher debate. Such irrationality "can inspire human beings to harm

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497. Choper, *supra* note 391, at 262.

498. Lawrence, *supra* note 7, at 350.

499. Anti-Defamation League, *School Vouchers: The Wrong Choice for Public Education*, available at <http://www.adl.org>.

500. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 17 (1991) (Dworkin adopts an apparently open perspective that suggests the Constitution should be interpreted as the best Constitution in accord with what the interpreter's larger vision of what the Constitution should be like.).

501. TRIBE, *supra* note 307, at 868 (quoting Comm. for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 797-98 (1973)).

themselves and others.”<sup>502</sup> The dogmatism associated with an overarching commitment to public education and the exclusion of public support for private education is justified on grounds that a reasoned examination demolishes. Properly understood, the choice movement, including home schooling, “is not some sort of militia movement . . . —a radical withdrawal of the disaffected—but rather a first step toward the reconstitution of civil society.”<sup>503</sup> Therefore, agitation about the alleged destructive effect that vouchers might have on America’s democratic ethos is largely a self-serving exaggeration.<sup>504</sup> Contrary to both the *Zelman* dissent and much current commentary, the contemporary evidence suggests that for a number of reasons private schools do a much better job than public schools in educating pupils for citizenship.<sup>505</sup>

A comprehensive and culturally informed inspection of the historical and sociological evidence demonstrates that the purported neutrality of public schools and the purported contribution of public schools to harmonized democracy have inescapably been fused, ironically enough with racist oppression and apartheid-like exclusion, and thus contribute to social stratification and separation. This fusion of horizons<sup>506</sup> predictably fails to educate students for a defensible form of citizenship that refrains from compelling belief. If the Supreme Court ignores the quantum of evidence available, reasonable observers may be compelled to conclude that the reification of public schools and the denial of funds to largely African-American and Hispanic outsiders for alternative forms of education may well be linked to unconscious racism. In light of the overwhelming evidence of the disproportionately adverse effects of the public education paradigm on outsiders, both the Court and the commentators should be aware of these effects. The urge to invalidate school choice on implausible grounds effectively constitutes a decision to preserve the racially stigmatizing effects of public schools for future generations. Accordingly, the reformist contention that we should evaluate the *effects* of policies and not simply the asserted intent, neutral or otherwise, reveals that the liberal wing’s Establishment Clause jurisprudence fails to place the concern for fairness to outsider groups at the center of this debate—instead such concerns are deemed irrelevant.<sup>507</sup> Thus, when examining

502. Yack, *supra* note 117, at 2 (summarizing Shklar).

503. Schaub, *supra* note 136, at 50.

504. Rosen, *supra* note 18, at 8.

505. Rosen, *supra* note 18, at 8.

506. My debt to Hans Georg Gadamer should be obvious. See, e.g., Michael Zuckert, *John Rawls, Historian*, CLAREMONT REVIEW OF BOOKS, Fall 2002, at 23, 24, available at <http://www.claremont.org/writings/crb/fall2002/zuckertrawls.html>.

507. It may be that the liberal wing of the Court takes it as background justification some form of utilitarianism which has as its goal the fulfillment of as many preferences of as many citizens as possible. Therefore the preferences of outsiders are outweighed by the desires and preferences of the majority. See, e.g., Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153-54 (Jeremy Waldron ed., 1984).



putatively neutral institutions and putatively dispassionate Establishment Clause jurisprudence, CRT and reformist methodology are capable of finding racism and superordination already there.

*B. Vouchers as a Form of Compulsory Funding of Indoctrination?*

John McGinnis, rather optimistically, insists that the United States Supreme Court has recently been taken with

a jurisprudence of social discovery . . . [that] allows religious ideas on character-building and other social norms to compete with secular ideas and norms. In making the issue of coercion turn on parents rather than children, the Court treats parents as the relevant decision makers and, as elsewhere in current jurisprudence, strengthens the nuclear family as a constitutionally protected association.<sup>508</sup>

If true, school vouchers may continue to find protection while providing a space in which religious norms and values can compete against centrally imposed state sponsored norms.<sup>509</sup> Similarly, the *Rosenberger* Court reinforced the conclusion that “religious associations enjoy the opportunity to apply for funds that the government makes available to secular organizations for expressive purposes.”<sup>510</sup> The Court held that refusing to fund a “magazine because of its religious content was impermissible viewpoint discrimination.”<sup>511</sup> The Supreme Court “rejected the argument that the university had avoided viewpoint discrimination by excluding the whole subject matter of religion and not picking and choosing among different religions.”<sup>512</sup> But it is precisely that kind of discrimination which can skew the debate.<sup>513</sup> Thus, the Court wrote:

Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. . . . It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.<sup>514</sup>

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508. McGinnis, *supra* note 259, at 553.

509. McGinnis, *supra* note 259, at 549-50.

510. McGinnis, *supra* note 259, at 553.

511. McGinnis, *supra* note 259, at 553.

512. McGinnis, *supra* note 259, at 553.

513. McGinnis, *supra* note 259, at 553.

514. *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 831-32 (1995).

Thus, John McGinnis maintains, “The Court’s conclusion in this regard is absolutely crucial if religiously backed norms are to compete with secular norms in the modern world.”<sup>515</sup> While this perspective may yet prove accurate, and while *Rosenberger’s* requirement that sectarian institutions have access to government funds on equal footing with secular institutions<sup>516</sup> is an attractive paradigm, it is far from obvious that the Establishment Clause jurisprudence of either wing of the Court is completely open to any educational experimentation that may benefit outsider groups.<sup>517</sup> To do so would effectively mean that government can no longer disfavor norm production attached to religious educational institutions. Instead, aid would be available on a basis that favors no one.

By contrast, Justice Souter, in his search for the Founders’ intent, reminds us that Jefferson concluded it is objectionable on freedom of conscience grounds for anyone to be “compelled to . . . support any religious worship, place or ministry whatsoever.”<sup>518</sup> Thus, one possible conception of the original intent of the Founders implies that they were committed to a “no-aid” rule and a strict separation between the state and religion.<sup>519</sup> While any reliance on Jefferson as a Founder is questionable,<sup>520</sup> it is equally true that Jefferson determined that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”<sup>521</sup> That language could be taken

515. McGinnis, *supra* note 259, at 554.

516. *See, e.g.*, McGinnis, *supra* note 259, at 554.

517. Recall the majority of the Court overlooked the Pilot Project’s explicit preference for public education in the form of a disparity in funding that favors public schools. *See supra* Part IV.B.

518. *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 (2002) (Souter, J., dissenting) (quoting *A Bill for Establishing Freedom*, in 5 THE FOUNDERS’ CONSTITUTION 84 (P. Kurland & R. Lerner eds., 1987)).

519. In reality the “First Amendment never created a wall between religion and government, despite the prevalence of that metaphor.” Minow, *supra* note 22, at 1086. While Justice Souter relies on both Jefferson and Madison to buttress his separationist position, “[b]oth the majority and the dissenters in *Everson v. Board of Education* . . . accepted this approach, but the very fact that Justices who agreed on the [alleged] governing principle could divide so closely on the result suggests that the principle evoked by the image of a wall furnishes less guidance than metaphor.” TRIBE, *supra* note 307, at 820.

520. *See, e.g.*, Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1585 (1989). *See also infra* note 535 and accompanying text.

521. Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 373 (1998) (citing THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY, at xvii (Merrill D. Peterson & Robert C. Vaughan eds., 1988)).

to apply to nonreligious opinions as well as religious ones;<sup>522</sup> hence, following Locke and Bayle, that language breathes life into a correlative right to object to public funding of nonreligious ideas and value-laden opinions on freedom of conscience grounds.<sup>523</sup> Such a conception, as Choper demonstrates, is consistent with the Establishment Clause's "paramount purpose . . . to safeguard freedom of worship and conscience—in a word to protect religious liberty."<sup>524</sup> Moreover, Justice Souter and the dissent's attachment to an idealistic "no-aid" standard must be seen against the evidence that "[e]arly [American] theorists generally held that a good society *required* religion and its attendant morality, so that, when they used the term *separation of church and state*, they were not defending an ideal but launching an attack on those who *denied* such a self-evident truth."<sup>525</sup> Accordingly, separation of church and state as an ideal came to America during the nineteenth century. "But it did not come as the triumph of reason; it was instead the product of Protestant nativism seeking to wage war against Catholicism."<sup>526</sup>

In reality, Jefferson and Madison's perspectives on Establishment Clause concerns, which were consistent with John Locke and Pierre Bayle's conception of religious tolerance in general, contradicted one another, and at times contradicted themselves.<sup>527</sup> For instance, Thomas Jefferson, reversing his earlier opposition, permitted seminaries at the University of Virginia.<sup>528</sup> Jefferson understood that "a government that is ostensibly neutral or indifferent to theological truth does not have a neutral effect on the theological opinions of its

522. Arguably such an approach is consistent with *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 831-32 (1995). See also McGinnis, *supra* note 259, at 553-54.

523. See, e.g., RICHARDS, *supra* note 436, at 89-95. "Locke and Bayle give conscience a moral interpretation and weight associated with their conception of the proper respect due to the highest-order interest of persons in their freedom (the origination and revisibility of claims) and rationality (practical and epistemic rationality)." RICHARDS, *supra* note 436, at 90.

524. Choper, *supra* note 391, at 267; see also Harry G. Hutchison, *Diversity, Tolerance, and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 WAYNE L. REV. (forthcoming March 2004) (arguing that freedom of conscience norms can be revitalized by inspecting international human rights).

525. Alan Wolfe, *Why Separation of Church and State Is Still a Good Idea*, BOOKS & CULTURE, Sept./Oct. 2002, at 6, available at <http://www.christianitytoday.com/bc/2002/005/7.6.html>.

526. *Id.*; see also Robert H. Bork, *Getting Over the Wall*, 149 THE PUBLIC INTEREST 108, 108 (2002) (reviewing PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002)) ("Philip Hamburger . . . demonstrates conclusively that separation of church and state was no part of the intention underlying the First Amendment's Establishment Clause.").

527. RICHARDS, *supra* note 436, at 116-128 & 159.

528. OWEN, *supra* note 126, at 170.

citizens.”<sup>529</sup> Indeed, Phillip Hamburger notes that Jefferson’s “separation of church” language differs significantly from the language of the First Amendment.<sup>530</sup> Arguments about the Founders’ intent thus enjoy selective appeal. “Justice Hugo Black . . . appealed to . . . historical understandings when they supported his convictions about correct interpretation of the liberal clauses of the First Amendment, including the religion clauses; but he and the Court abandoned such history in other areas when it did not similarly support their views.”<sup>531</sup> Justice Souter’s analysis falls prey to that same willingness to interpret the Founders’ intent selectively. While he is surely right to argue that Jefferson found it objectionable on freedom of conscience grounds for anyone to be compelled to support religious worship,<sup>532</sup> and that Madison suggested that taxing citizens “to establish religion is antithetical to the command that the minds of men always be wholly free,”<sup>533</sup> this selective approach, nevertheless, constitutes an unnecessarily crabbed conception of both Jefferson and Madison’s purported “no-aid” approach, which was aimed at a more complex conception of freedom of conscience than Justice Souter admits.<sup>534</sup> Indeed, the claim that we should rely on Jefferson to ascertain the Framers’ intent is suspect, because he participated in neither the First Constitutional Convention nor the First Congress.<sup>535</sup>

But of course there is more. In relying on James Madison, Justice Souter overlooks Madison’s conception of the Free Speech Clause of the First Amendment, which arguably “takes the Constitution back to its historical roots.”<sup>536</sup> This neglect is telling. Evidently, “James Madison, the drafter of the First Amendment, saw free speech and free exercise as two sides of the same coin: property rights that needed special protection against the state.”<sup>537</sup> The term “property” includes “that dominion which one man claims and exercises

529. OWEN, *supra* note 126, at 170.

530. HAMBURGER, *supra* note 525, at 2.

531. RICHARDS, *supra* note 436, at 122-123.

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

533. *Id.* (Souter, J., dissenting) (quoting *Mitchell v. Helms*, 530 U.S. 793, 871 (2000) (Souter, J., dissenting)).

534. Justice Souter does concede that “[a]s a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause.” *Id.* at 711 n.22 (Souter, J., dissenting). Apparently, for Justice Souter, issues of conscience are not implicated if secular ethical or nontheistic values are imposed on a populace that is unwilling to surrender its conscience to the state.

535. *Adams & Emmerich*, *supra* note 520, at 1584-85 (stating that Jefferson served as minister to France from 1785 to 1789).

536. McGinnis, *supra* note 259, at 554.

537. McGinnis, *supra* note 259, at 554.

over the external things of the world, in exclusion of every other individual.”<sup>538</sup>  
Hence, on Madison’s account:

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a 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 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 individual, 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>539</sup>

It appears that Justice Souter and his fellow dissenters have adopted a conception of the Establishment Clause that demonstrates partiality for a perspective which he favors, while disallowing a comprehensive Madisonian conception, which he nevertheless claims to support.

Further mystifying this debate is the perception that “[w]hat constitutes aid or support[] is ‘obviously a sophisticated and not a simple literal concept’”<sup>540</sup> employed for the purposes of ascertaining government support of indoctrination. Laurence Tribe helpfully points out that because a “‘no-aid’ formulation remains indeterminate because of the obvious difficulty of specifying precisely what constitutes ‘aid,’” and because its alter-ego, strict separation fails to offer “much guidance in determining what manner or degree of economic benefit constitutes impermissible ‘aid’ to religion, the Supreme Court has increasingly sought refuge in the elusive and variable notion of ‘neutrality.’”<sup>541</sup> In Justice Souter’s hands, neutrality may not simply be a refuge but a weapon against both religion itself and a broad conception of conscience that seems consistent with the intent of the Founders. John McGinnis clarifies: “So long as the government acts neutrally in permitting religious and nonreligious associations to participate in its programs, the government acts constitutionally because, in Madison’s words, such a program ‘leaves to everyone . . . the like advantage’ in holding his opinions and propagating his view.”<sup>542</sup> “Government action for *religious*

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538. James Madison, *Property*, NATIONAL GAZETTE, Mar. 27, 1792, reprinted in THE PAPERS OF JAMES MADISON 1751-1836, at 266-68 (Robert A. Rutland et al. eds., 1983) (cited in McGinnis, *supra* note 259, at 554-55).

539. *Id.*

540. Choper, *supra* note 391, at 261.

541. TRIBE, *supra* note 307, at 820.

542. McGinnis, *supra* note 259, at 555.

purposes is highly suspect;<sup>543</sup> government programs that have a secular purpose are not. Because the *Zelman* dissenters effectively concede the secular purpose of the Pilot Project, and because “governmental action for *secular* purposes does not fall within the core of the establishment clause’s concern,”<sup>544</sup> the assertion that vouchers are a form of compulsory indoctrination becomes improbable.<sup>545</sup>

Moreover, without solving the puzzle of neutrality and without entering into the debate as to what constitutes a religious faith, for purposes of exclusion from the public square, we need to determine what Justice Souter and his fellow dissenters do not: what to make of faiths or other ethical constructs that decline to express a belief in a theistic God. For instance, John Dunphy, writing for *The Humanist*, argued:

I am convinced that the battle for humankind’s future must be waged and won in the public school classrooms by teachers who correctly perceive their role as the proselytizers of a new faith: a religion of humanity. . . . These teachers must embody the same selfless dedication as the most rabid fundamentalist preachers for they will be ministers of another sort, utilizing a classroom instead of a pulpit to convey humanist values.<sup>546</sup>

Paul Blanshard wrote that “the most important factor moving us toward a secular society has been the educational factor. Our schools may not teach Johnny to read properly, but . . . school . . . tends toward the elimination of religious superstition.”<sup>547</sup> Similarly, Professor Ray Billington believes that the concept of God is man-made and accordingly proposes a “religion without God” based on relationships, nature and the arts.<sup>548</sup> Furthermore, “some 1960s radicals . . . eye the schools as their last best hope . . . [and are] not shy about [their] desire to use the schools to bring about radical social change.”<sup>549</sup> What might these nontheistic views mean for the provision of aid and the application of law on the subject of Establishment Clause jurisprudence? It is surely possible that the courts could simply “articulate a constitutional double standard or apply the functional definition of religion to the no establishment clause just as they have

543. Choper, *supra* note 391, at 268.

544. Choper, *supra* note 391, at 269.

545. The clear evidence that state aid follows the uncoerced choice of parents who select either a public or private education for their children also buttresses this conclusion. See *supra* Part IV.B.

546. John H. Dunphy, *Public Education*, THE HUMANIST, Jan./Feb. 1983 (cited in Hunter, *supra* note 153, at 70).

547. Paul Blanshard, *Three Cheers for our Secular State*, THE HUMANIST, Mar./Apr. 1976, at 17, 25 (cited in Hunter, *supra* note 153, at 70).

548. RAY BILLINGTON, RELIGION WITHOUT GOD (2002).

549. ALAN WOLFE, MARGINALIZED IN THE MIDDLE 140 (1996).

to the free exercise."<sup>550</sup> One observer implies that if the latter methodology is chosen, it "would mean that secularistic faiths and ideologies would be rigorously prohibited from receiving even indirect support from the state, which—needless to say—would have enormous implications for public education."<sup>551</sup> An alternative approach would imply that the Free Exercise Clause "should enjoy constitutional priority, and the traditional understanding of the Antiestablishment Clause should give way, whenever it seriously compromises free exercise values. For example, if antiestablishment prohibitions on state funding of parochial school education compromise the free exercise of parents, such prohibitions should give way."<sup>552</sup> Basically because of these implications, "many progressive constitutional scholars . . . therefore vigorously reject consistency in favor of . . . a 'double standard'—a functional definition of religion for free exercise purposes and a substantive definition for no establishment purposes."<sup>553</sup> Laurence Tribe, for instance, has reasoned that, without such a double standard "every humane government program could be 'deemed constitutionally suspect.'"<sup>554</sup> Although such an approach seems both inconsistent with a broad conception of both Jefferson's and Madison's views, and manifestly inconsistent with Jefferson's decision permitting seminaries at the University of Virginia,<sup>555</sup> when and "if the courts adopt such a double standard; what possibly could provide a set of fair ground rules for value-grounded debate?"<sup>556</sup> Although answers are obtainable,<sup>557</sup> the liberal wing of the Court fails to provide any. Hence, Justice Souter's and the liberal wing of the Court's apparent absolutism<sup>558</sup>

550. Hunter, *supra* note 153, at 72.

551. Hunter, *supra* note 153, at 72; *see also* SOWELL, *supra* note 21, at 179 ("As public schools have increasingly become militant dispensers of indoctrination with fashionable avant-garde attitudes, various religious individuals and groups have objected.").

552. RICHARDS, *supra* note 436, at 132; *see also* Choper, *supra* note 391, at 260-341.

553. Hunter, *supra* note 153, at 72.

554. Hunter, *supra* note 153, at 72.

555. OWEN, *supra* note 126, at 170.

556. Hunter, *supra* note 153, at 72.

557. One approach might be to accept Carter's notion that all of these disputes are ultimately disputes between competing faiths. Accordingly, faith in science or reason cannot claim any epistemological superiority over any religious faith, because each faith presupposes its own epistemology—its own standard of evidence and rationality—which cannot be made susceptible to rational scrutiny. Stephen Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 993-95 (1987); *see also* Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 997 (1987) (Liberalism cannot genuinely cherish religious belief because liberalism, itself, is informed by a faith in reason as a faculty that operates independently of any particular world view.); OWEN, *supra* note 126, at 7.

558. The absolutism approach would "invalidate any governmental support to

pays homage to *Lemon v. Kurtzman*<sup>559</sup> and its conception of the purported separation between church and state,<sup>560</sup> yet (1) overly formalistically understates Jefferson's opposition to the compulsory funding of all opinions that citizens might disbelieve, while broadly failing to consider Madison's approach to true freedom of conscience; and (2) fails to appreciate that a *consistent* examination of the No Establishment Clause implicates nontheistic and secular faiths as well. While it is possibly true that "[s]ecularism is not the future[,] it is yesterday's incorrect vision of the future,"<sup>561</sup> the liberal wing's views taken together or separately, confirm that the very existence of the *Lemon* test renders the ideal of an impenetrable wall of separation between church and state archaic.<sup>562</sup> Finally, the liberal branch could have found constitutional principles to validate the Pilot Project, if they had been so inclined.<sup>563</sup>

### C. Government Endorsement of Religion?

Laurence Tribe, citing *Wooley v. Maynard*,<sup>564</sup> states "that individuals cannot be made the involuntary vehicles of views with which they disagree, so the experience of living in a political community which *endorses* or affirmatively supports religious positions and with which one disagrees may be regarded as a peculiar offense to freedom of conscience."<sup>565</sup> He makes this argument without understanding that one's "freedom of conscience" can also be offended by deontological claims expressed in nonreligious language. Evidently, enthusiastic religious advocacy in the political realm cannot be condemned consistently with the Free Exercise Clause; on the contrary, it is the enlistment of the official apparatus of politics to obtain religious ends, as opposed to secular ends, that is

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certain institutions controlled by a church or religious organizations '[e]ven if a completely secular part of [the institution's services] could be isolated.'" Choper, *supra* note 391, at 269-70 (quoting GEORGE L'ANOUÉ, PUBLIC FUNDS FOR PAROCHIAL SCHOOLS?, at 32 (1968)) (alterations in original).

559. 403 U.S. 602 (1971).

560. *Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting); *id.* (Souter, J., dissenting).

561. David Brooks, *Kicking the Secularist Habit: A Six-Step Program*, THE ATLANTIC MONTHLY, March 2003, available at <http://www.theatlantic.com/issues/2003/03/brooks.htm>

562. BELL, *supra* note 179, at 234.

563. One possibility is the adoption of what McGinnis calls the Rehnquist Court's jurisprudence of social discovery that encompasses the extension of protection equally to nonreligious and religious groups and which seeks to ensure that the Establishment Clause, Free Exercise Clause and Free Speech Clause of the First Amendment "work harmoniously rather than conflict with one another." McGinnis, *supra* note 259, at 558-59.

564. 430 U.S. 705 (1997).

565. TRIBE, *supra* note 307, at 869 (emphasis added).



of underlying concern.<sup>566</sup> While this technique likely represents an unjustifiably asymmetrical conception of the First Amendment, which constrains government support of religious but not nonreligious opinion, endorsement is a major strand of the liberal wing's opposition to school vouchers. Such an approach can neither be squared with the *Rosenberger* Court's conclusion that religious and secular norms must have equal access to government funds, nor be justified by any reasoned conception of "neutrality." To the extent that the state or the Court is captivated with this view, it must inevitably take sides.

This conclusion is buttressed by understanding Justice Souter's contention that the availability of public monies may lead to a contest among religious groups for support, and opposition from those who fail to share the views of a given denominational or religious group. He essentially maintains that this contest is more urgent than other similar contests that are often grounded in pathological behavior and which plainly afflict all or most majoritarian democracies.<sup>567</sup> Justice Souter argues, for example, that not "all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools . . . [n]or will every secular taxpayer be content to support Muslim views on differential treatment of the sexes."<sup>568</sup> Conversely, he overlooks an equally controversial question: why should any of these groups be required to support any ethical or moral views which they disapprove, even if the objectionable views are couched in secular language? Justice Souter fails to answer this question directly. Instead, he offers an indirect response. Apparently following Rawls,<sup>569</sup> he insists that diverse viewpoints should be kept "relatively private."<sup>570</sup>

566. *TRIBE*, *supra* note 307, at 869.

567. *See, e.g.*, Gwartney & Wagner, *supra* note 79, at 26 (Democracy cannot exist as a permanent form of government; it can only exist until a majority of voters discover that they can vote themselves largesse out of the public treasury.).

568. *Zelman v. Simmons-Harris*, 536 U.S. 639, 716 (2002) (Souter, J., dissenting).

569. Joseph M. Knippenberg, *Liberalism and Religion: The Case of Kant*, 30 *POLITICAL SCIENCE REVIEWER* 58, 59 (2001) (Rawls articulates a conception of public reason which evidently "'excludes the religious by drawing the boundaries of public reason so that comprehensive religious doctrines fall outside them for the most part' or that the bifurcation of public and private reason marginalizes those 'for whom it is a matter of religious conviction that they ought to strive for a religiously integrated existence.'").

570. *Zelman*, 536 U.S. at 716 (Souter, J., dissenting). In actuality, Rawls' views are perhaps more complex than those of Justice Souter. Rawls contends that religious matters should be removed from consideration by public reason altogether. *See* OWEN, *supra* note 126, at 108 (citing Rawls). Yet Rawls "sets as one of the primary tasks of the book *Political Liberalism* the full inclusion of 'nonliberal and religious views.'" OWEN, *supra* note 126, at 165; *see also* JOHN RAWLS, *POLITICAL LIBERALISM*, at xl (1996). Public reason "neither criticizes nor attacks any comprehensive doctrine, religious, or nonreligious, except insofar as that doctrine is compatible with the essentials of public

Justice Stevens concludes that the Court must remain oblivious to (1) “the severe educational crisis that confronted the Cleveland City School District,”<sup>571</sup> and the plight of low-income and largely African-American students, (2) “the wide range of choices that have been made available to students,”<sup>572</sup> and (3) “the voluntary character of the private choice to prefer a parochial education over an education in the public school system.”<sup>573</sup> In addition, Justice Souter contends that the program, which provides \$2,250 in student aid to pupils who attend private schools<sup>574</sup> and more than \$4,000 in state aid to those who attend public schools, favors private school and endorses religion, when the program’s only preference is for low income families who are eligible for greater assistance than others.<sup>575</sup> Moreover, Justice Breyer adverts to the dangers posed by vouchers to the social fabric of the nation in the form of religious conflict without understanding the corresponding dangers posed by the increasing racial fragmentation and despair nurtured by public schools. These claims, taken together, suggest that the dissent ignores the full history and context of the program, and its contention that the Pilot Project endorses either religion or religious indoctrination becomes implausibly formulaic. The cultural meaning of the Pilot Project, properly understood as a device to improve educational opportunities for disadvantaged children, is inconsistent with the assertion that the State of Ohio has constructed a program that endorses religion.

Conversely, Justice Souter’s professed concern for saving private religion from baseness is largely consistent with Alan Wolfe’s understanding of the Connecticut Baptists of 1803, who sought “to preserve religion’s special mission against worldly corruption.”<sup>576</sup> This apprehension is arguably the converse of the government endorsement claim and remains a vital and justifiable concern, because money accompanied by suffocating regulation may subvert the educational vitality that apparently contributes to the superior performance of private educational institutions. While this concern may not necessarily implicate all school choice proposals, it nonetheless deserves serious attention as part of a reasoned debate about school vouchers. Nevertheless, it is likely that even this

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reason and democratic polity.” John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997). *But see* OWEN, *supra* note 126, at 165 (“Many political theorists appear to be most comfortable in supposing that identity is so very complex and changing that none of the various components can be said to dominate. But it seems to me that, in general, the religion that accepts its place in such a scheme—democratically abstaining from any undue claims to authority—has already been transformed by liberalism.”).

571. *Zelman*, 536 U.S. at 684 (Stevens, J., dissenting).

572. *Id.* at 685 (Stevens, J., dissenting).

573. *Id.* (Stevens, J., dissenting).

574. *Id.* at 705 (Souter, J., dissenting).

575. *Id.* at 687 (Souter, J., dissenting).

576. Wolfe, *supra* note 525, at 6.

anxiety cannot justifiably in fact serious consideration of voucher experimentation given the countervailing weight that reasonable observers must attach to the educational dilemma confronting outsiders in our society. Accordingly, “[p]ermitt[ing] that sector of the population arguably most in need of the educational benefits offered by religious institutions to avail itself of those opportunities need not be seen as advancing religion particularly where the voucher programs are neutral as to particular religions,”<sup>577</sup> unless one is predisposed to the opposite view.

*D. Precluding School Choice, Reifying Racial Stigma and  
Vindicating Intolerance?*

It has been briskly argued that the “great ideological struggle between capitalism and socialism, waged throughout the [past] century, has now apparently been resolved with a victory for economic and political liberalism. In the political sphere, the end of the twentieth century signals the ultimate triumph of liberal democracy.”<sup>578</sup> Whether this development will ultimately expand human freedom or restrain the freedom enjoyed by politically and socially marginalized groups is open to debate. In an era which celebrates choices and which evidently chooses to see human beings as simply a bundle of preferences,<sup>579</sup> those who resist this climax of history in either its normative or instrumental sense, even when animated by the desire to lessen the economic and social deprivation of outsiders, may find their desires and preferences excluded from the public square by prevailing adjudicatory norms. This observation justifies John Stuart Mill’s conclusion that “the benefits of constitutional democracy in government are not adequate to protect [disfavored groups and] individuals from the coercive power that can be exercised [or authorized] by a majority.”<sup>580</sup>

Therefore, despite the possibility that the “law of the Establishment Clause is irreducibly complex,”<sup>581</sup> it is possible that all or part of the “Supreme Court can better be understood as serving the veiled majoritarian function of promoting popular preferences [and negative stereotypes] at the expense of minority interests.”<sup>582</sup> Supporting this view, a “‘self-confirming stereotype’ is a statistical generalization about some class of persons regarding what is taken *with reason* to be true about them as a class, but cannot be readily determined as true or false

577. BELL, *supra* note 179, at 234-35.

578. LOUGHLIN, *supra* note 1, at 3.

579. See Carter, *supra* note 64, at 45.

580. PHILLIP E. JOHNSON, THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE 149 (2002).

581. John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451, 1452 (1997).

582. Spann, *supra* note 2, at 1974.

for a given member of the class.”<sup>583</sup> “Observers, by acting on generalization, set in motion a sequence of events that has the effect of [sustaining] their initial judgment.”<sup>584</sup> This approach “encourages the reproduction through time of racial inequality because, absent some [ameliorative policy] . . . [such as educational experimentation], the low social conditions of many blacks persist, [hence] the negative social meanings ascribed to blackness are thereby reinforced.”<sup>585</sup> Since the liberal wing’s Establishment Clause jurisprudence fails to deal in a tangible way with the concerns of outsiders, its arguments and conclusions, in effect, both contribute to, and sustain the bleak pattern of exclusion and subordination that is demonstrably fastened to the common public school. Either unconsciously or inadvertently, the liberal branch’s approach impedes the development of social and economic capital within outsider communities<sup>586</sup> by preserving racial stereotypes and stigma<sup>587</sup> in the form of public school conscription that tends to fortify poor educational performance and segregation.<sup>588</sup> Hence, the divergence between Establishment Clause “principles” and operative racial marginalization corresponds to a distinction without a difference.

The liberal wing contends that voluntary parental choice constitutes state sponsored coercion; claims that a program which provides twice as much state funding to public schools as opposed to private schools is insufficiently neutral and thus “coercively” favors private schools; and dogmatically asserts that a “no-

583. LOURY, *supra* note 14, at 23.

584. LOURY, *supra* note 14, at 23.

585. J.L.A. Garcia et al., *Race & Inequality: An Exchange*, FIRST THINGS, May 2002, at 32, 36 (reviewing GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY ( 2 0 0 2 )* ), *a v a i l a b l e a t* <http://www.firstthings.com/ftissues/ft0205/articles/raceexchange.html>.

586. Evidently, “much of the nation’s social capital—community connections of trust and reciprocity—is spiritual capital produced by community-severing religious leaders, volunteers, and institutions.” John J. Dilulio, Jr., *The Three Faith Factors*, 149 *THE PUBLIC INTEREST* 5064 (2002) (“Roughly speaking, nearly half of America’s stock of social capital is religious or religiously affiliated . . . religion helps people to internalize an orientation to the public good. Because faith has such power to transform lives, faith-based programs can enjoy success where secular programs have failed.”). The liberal wing of the Court by precluding government funds may diminish social capital formation within largely African-American or outsider communities.

587. The creation of stigma is not simply limited to race. “[P]ublic-school policy can be used as a means of stigmatizing some beliefs and [for] establishing others.” ARONS, *supra* note 24, at 193.

588. This perspective is arguably consistent with Derrick Bell’s conclusion that “[a] major function of racial discrimination is to facilitate the exploitation of black labor, to deny us access to benefits and opportunities that would otherwise be available, and to blame all the manifestations of exclusion-bred despair on the asserted inferiority of the victims.” Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 *VILL. L. REV.* 767, 767 (1988).

aid” criterion simplistically precludes choice when a more sophisticated approach vindicates the religious liberty right of parents.<sup>589</sup> These disparate contentions, framed as principles, should surprise no one. Although at least three members of the conservative wing of the Court are willing to posit a true neutrality principle that would permit all forms of aid to religions, as long as they were part of a larger program,<sup>590</sup> it remains doubtful that either the liberal branch or the entire Court has ever developed effective principles. Thus, when the Justices “do not like the result to which a principled analysis leads, they [may] simply decline to reach it.”<sup>591</sup> This approach has its advantages—the Court can announce a principle and subsequently amend it through “subsidiary doctrines.”<sup>592</sup> As we have seen, the liberal wing’s devotion to “principle” obligates them to remain invisible to the plight of African-Americans and other outsiders; it implies that justice is nothing else than the interest of the stronger. This technique contradicts Socrates’ perspective on justice, but breathes life into Ellul’s intuition that “juridical technique, neutral in itself, serves, the ends of those with power . . . [and over time] the state becomes the judge of law and is no longer judged by it.”<sup>593</sup> Liberal justice in the mirror of its asserted aspirations and principles, just as Thrasymachus predicted, finds the state sporting rather diaphanous clothes.

While it is doubtful that the existing common public school paradigm can be squared intelligently with the First Amendment’s goal of protecting the individual’s right to practice religion, free from governmental interference,<sup>594</sup> it

589. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 683-84 (2002) (Thomas, J., concurring); Choper, *supra* note 391, at 304-08.

590. Choper, *supra* note 109, at 1448.

591. Choper, *supra* note 109, at 1439-40.

592. Choper, *supra* note 109, at 1442.

593. Jacques Ellul suggests:

First law becomes detached from the norm of justice and reduced to technical rules applied in a logical manner to all areas of life as a form of r glementation . . . . Second, juridical technique, neutral in itself, serves, the ends of those with power. Third, the state becomes the judge of law and is no longer judged by it fourth because there ceases to be a common measure between law and man in society, law ceases to be observed and respected . . . . Fifth, there often arises an attempt to revive natural law artificially but this cannot be done as the relation between man and law has, in concrete social reality, been broken.

Andrew Goddard, *The Life and Thought of Jacques Ellul With Special Reference to his Writings on Law, Violence, the State and Politics*, 1995, at 172-73 (unpublished doctoral thesis, University of Oxford) (on file with the Bodleian Library, University of Oxford) (translated from French).

594. Hutchison, *supra* note 50, at 62. For a luminous discussion of these and other issues, see Hunter, *supra* note 153, at 68-71. See also *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 830 (1995) (“[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other

is possible that, in spite of the existence of America's actual cultural diversity, the common public school system promotes and enforces "an Icarian flight of the mind" in the form of the homogeneous intellectual and moral uniformity craved by Edward Wilson and others.<sup>595</sup> Conversely, as John Gray adverts,

[T]hough the fact of cultural diversity is noted often enough, its political implications are rarely explored. We find the reason for this strange neglect, I believe, in a doctrine that is held in common by most modern political thought. It is this modern doctrine or heresy—the heresy that political orders ought to embody or express the cultural identity of homogeneous moral communities.<sup>596</sup>

It is beyond a penumbra of doubt<sup>597</sup> that both public schools and "American democracy [are] today constituted by elites who are charged with policy deliberation."<sup>598</sup> Therefore the school system is predictably incompatible with a principled conception of pluralism, diversity or neutrality that contains even a diminutive quantum of liberty,<sup>599</sup> and without which intolerance must inevitably prosper. Because some voucher proponents prefer to allow parents and children to choose an alternative source of morality and meaning derived at least in part from private schools, whether religious or nonreligious, this ongoing debate implicates the subversive power of religion and other alternative sources of meaning against an idealized liberal hegemony (morality). When elite commentators (driven either by majoritarianism or by special interests) insist on conformity to prevailing viewpoints by alleging that the common public school is necessary for the maintenance of democracy, school vouchers and other choice options implicate the clash between the desires of inner-city parents and those who prefer to confine inner-city parents and their children to captivity in the existing educational bureaucracy.<sup>600</sup> Consistent with this perspective, resistance

contexts."); *Davey v. Locke*, 299 F.3d 748, 755 (2002).

595. See, e.g., WILSON, *supra* note 264, at 14 ("The dream of intellectual unity first came to full flower in the original Enlightenment, an Icarian flight of the mind that spanned the seventeenth and eighteenth centuries. A vision of secular knowledge in the service of human rights and human progress, it was the West's greatest contribution to civilization.").

596. GRAY, *supra* note 23, at 253-54.

597. My debt to H.L.A. Hart should be obvious. H.L.A. HART, *THE CONCEPT OF LAW* 119 (2d ed. 1994).

598. GUINIER & TORRES, *supra* note 65, at 169; see also Yack, *supra* note 117, at 8-9 (summarizing Judith Shklar) ("[T]he predominant opinions in any society will inevitably reflect the views of the social and intellectual elites who have the greatest access to public modes of expression.").

599. See Hunter, *supra* note 153, at 70 (citing the views of Charles Francis Potter).

600. TERRY M. MOE, *SCHOOLS, VOUCHERS AND THE AMERICAN PUBLIC* 164 (2001) ("The appeal of private schools is especially strong among parents who are low in

to state funding of the creation of private schools is driven by the conclusion that alternative institutions may subvert the centralized conceptions of the state that are embedded within the public school framework. Thus, the charge that “private schools will . . . restrict academic freedom according to their particular worldview”<sup>601</sup> finds reality and actuality, paradoxically enough, *in* the public schools. Homogeneity is accordingly substituted for actual diversity, true pluralism, and a defensible form of neutrality that declines to compel belief. This paradigm thus appears to operate as a form of:

[t]otalitarianism [that] has been well described as the ultimate invasion of human privacy. But this invasion of privacy is possible only after the social context of privacy—family, church, association—have been atomized. The political enslavement of man requires the emancipation of man from all the authorities and membership[s] . . . that serve, in one degree or another, to insulate the individual from external political power.<sup>602</sup>

Although one observer imagines that school vouchers “will potentially increase private power’s direct influence over the education of millions of students,”<sup>603</sup> currently and for the foreseeable future, all powerful public education monopolies fail to educate the most disadvantaged students and enhance racial stigma. Public education, therefore, efficiently operates to ensure the retention of private power by those students and insider groups who are already economically advantaged in the (majoritarian and special interest) contest for economic, political and social power. This conclusion breathes new life into the assertion that “American liberal thought has had predictably deleterious consequences—ones that would not have surprised the authors of the *Federalist Papers*”<sup>604</sup> as well as the claim that “[i]ntra-group esteem allocation permits groups to overcome certain collective action problems that would otherwise make conflict impossible. At the same time, the desire for esteem provides a new objective of group conflict—competition over social status.”<sup>605</sup> While opposition

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income, minority, and live in low performing districts: precisely the parents who are the most disadvantaged under the current system.”).

601. Green, *supra* note 217, at 40.

602. ROBERT A. NISBET, *THE QUEST FOR COMMUNITY* 202 (1953) (cited in GARVEY, *supra* note 353, at 153); *see also* Carter, *supra* note 64, at 988 (“Without this faith in the ability of individual humans to recreate themselves and their world through dialogue, without this trust in the power of reason to move others to action, liberalism becomes an impoverished philosophy: either a simple-minded majoritarianism, in which preferences are aggregated formally . . . or a variant of Leninism.”).

603. Wilson, *supra* note 121, at 398.

604. GRAY, *supra* note 23, at 239.

605. McAdams, *supra* note 96, at 1083.

to vouchers and school choice is ostensibly grounded in poignant concern for outsiders and their children, as well as in a principled conception of the Constitution, outsiders are nevertheless confronted with deprived schools and correlatively disadvantaged social circumstances that constitute a threat to their very existence. Their future, and the future of the “race,” must be held captive to an insistent and deadly liberal embrace.

When students and parents can exit the public school system, educational bureaucrats listen and react.<sup>606</sup> When exit remains impossible, they must either submit or drop out. To be sure, a limited number of voucher plans currently exist and thus offer alternatives. Intriguingly, the early evidence provides encouraging results for black parents and students who are currently trapped in underperforming schools.<sup>607</sup> However intriguing, given the existing shortage of alternative schools available within many, if not most, inner-cities, it seems plain that the difficulty in creating and developing new schools may be a quintessential component of, and one of the most significant impediments to, a successful voucher program. Since litigation may constitute a significant barrier to the entry of new alternative schools,<sup>608</sup> voucher opponents are likely to generate litigation and its accompanying uncertainty.<sup>609</sup> A great deal of this litigation, as well as much of the decision making, will likely be grounded in strained conceptions of the First Amendment.<sup>610</sup> This raises the disquieting possibility that reliance on the First Amendment is simply a talisman, which precludes a reasoned debate about school choice.<sup>611</sup>

606. MYRON LIEBERMAN, *PRIVATIZATION & EDUCATIONAL CHOICE* 150 (1989).

607. See, e.g., MCGROARTY, *supra* note 240, at 127-32 (finding significant education gains for the Milwaukee voucher program and positive gains for the Pilot Project).

608. Robert Holland, *Researchers Call for Larger Voucher Experiments*, *SCHOOL REFORM NEWS*, July 2002 (citing PAUL E. PETERSON & WILLIAM G. HOWELL, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* (2002)), available at <http://www.heartland.org/Article.cfm?artID=880>.

609. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002); see also McConnell, *supra* note 69, at 847 (“Defenders of the status quo—most particularly, teachers’ unions—have responded with lawsuits contending that educational choice programs that include religious schools violate the Establishment Clause of the First Amendment.”).

610. Recent Case, *supra* note 278, at 2201.

611. On this possibility, see F. H. Buckley, *Behind The Wall*, *CRISIS, POLITICS, CULTURE & THE CHURCH*, Dec. 2002, at 53-54 (book review). Buckley makes the following point: Church-state separationists, in opposing parental free choice in the form of vouchers rest their case on pedagogic and nationalist arguments. The pedagogic claim asserts that parental free choice would weaken public schools, particularly within the inner cities, by diverting funds to private and religious schools. Given the weakness of this argument, the enemies of vouchers are more likely to rely on the argument from nationalism. They claim that state aid to parochial schools trenches on constitutional



In light of the possibility that the voucher idea has positive consequences for outsider groups, it is difficult to be neutral about the largely non-neutral debate surrounding this idea. Undeniably, the pursuit of convincingly neutral principles, in the context of this debate, may prove to be an elusive search for an illusion.<sup>612</sup> Conversely, when the voucher debate is properly situated to place the interests of outsiders at the core and not the periphery of this dispute, reliable evidence reveals that school choice and educational experimentation have both the purpose and probable effect of increasing the economic, political and social power of black Americans. This deduction diminishes the credibility of “judicial [and other] claims to neutrality”<sup>613</sup> when expediently attached to resistance to school choice programs and ideas. Indeed, the school-choice movement, including tax credits, privately funded vouchers and home schooling,<sup>614</sup> if instrumentally successful, may provide a basis for African-American and outsider independence from liberal hegemony. Perforce, those committed to the centralizing ideology associated with the common public school movement should rightly be concerned about this subversive possibility.

## VI. CONCLUSION

What might have been is an abstraction remaining a perpetual possibility only in a world of speculation. What might have been and what has been point to one end, which is always present. Footfalls echo in the memory down the passage which we did not take.<sup>615</sup>

Although “[t]he histories of liberal political thought and revealed religion have been inextricably intertwined since the birth of liberalism,”<sup>616</sup> the problem liberalism confronts today, when attached to “our ‘constitutional faith’ and . . . liberal principles as our ‘civil religion’ . . . [is that] the liberal state cannot adjudicate rationally or impartially among the various faiths, as it claims to do, if it itself rests on one of the competing faiths.”<sup>617</sup> Accordingly, “[w]e cannot

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institutions that define what it is to be an American. *Id.* at 53.

612. OWEN, *supra* note 126, at 7.

613. Wilson, *supra* note 121, at 385.

614. Ylonda Gault Cavines, in a recent article indicates that of America’s two million homeschooled children, 150,000 are black whereas five years ago, blacks comprised only one percent of the total. *See A Rainbow Coalition*, WORLD MAGAZINE, Sept., 14, 2002, at 12.

615. T.S. Eliot, *Burnt Norton*, in THE COMPLETE POEMS AND PLAYS: 1909-1950, at 117, 117 (1952).

616. Knippenberg, *supra* note 569, at 58.

617. OWEN, *supra* note 126, at 2. It is far from obvious that Owen fully accepts the claim that liberalism rests on faith. *See* OWEN, *supra* note 126, at 2-14. *But see* MICHAEL WALZER, ON TOLERATION 78-79 (1997) (“Nonetheless, a campaign on [civil

simply embrace liberalism as a faith, as a civil religion, and then speak intelligibly of the separation of church (faith, religion) and state.”<sup>618</sup> Moreover, “if liberalism deserves to be called a ‘civil religion,’ then the separation of church and state is in danger of becoming incoherent and disestablishment of becoming meaningless.”<sup>619</sup> This conclusion implicates the liberal wing’s exoneration of public schools as well as its belief that the plight of outsiders must remain an irrelevant and an invisible background fact in its deliberations.

While majority culture, in the form of the common public school movement, has misplaced its power of explanation and prediction and is now confused, self-contradicting and self-congratulatory, the liberal-legalist order must inevitably capitulate to the seductive allure of majoritarian fundamentalism, and thus impose its values on those who are unwilling to surrender to its centralizing impulse. The liberal order, evidently, cannot appreciate “*Einfühlung*, the capacity to sympathetically ‘feel oneself’ into the views of those whose outlook differs profoundly from one’s own.”<sup>620</sup> It appears that a veil of invincible ignorance<sup>621</sup> has unhappily, yet unavoidably, captured and infused liberal rhetoric and republican faith.

Thus, “when the last of earth [is] left to discover . . . at the source of the longest river,”<sup>622</sup> once the concluding chapter of the American republic has been chronicled, it is doubtful that the pertinent documents, historical artifacts, judicial opinions or collective memory will serve to vindicate such contingencies as actual diversity of belief, democracy, liberty, or the hopes and dreams of outsiders. Rather, such documentation will likely corroborate Delgado’s grim forecast that race, our most enduring problem, remains as stubborn as ever as well as Loughlin’s intuition that the ultimate danger is that liberal-legalism may bring about the exact end—despotism—which it was intended to avert. A state that freezes out the aspirations of African-Americans and other outsiders, including members of outsider faiths, and then demands that we send our children to public schools which tenaciously reify subordination, while striving “to wean them from our faith, has no serious claim on our allegiance.”<sup>623</sup>

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religion’s] behalf is an act of intolerance, an act likely to provoke resistance and to multiply division among (and also within) the different groups.”)

618. OWEN, *supra* note 126, at 2.

619. OWEN, *supra* note 126, at 2.

620. Book Review, *FIRST THINGS*, Oct. 2002, at 79 (reviewing ISAAH BERLIN, *FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY* (2002)), available at <http://www.firstthings.com/ftissues/ft0210/reviews/briefly.html#freedom>.

621. This phrase reflects my long conversation with Professor Barry Knister.

622. T.S. Elliot, *Little Gidding*, in *THE COMPLETE POEMS AND PLAYS*, *supra* note 614, at 138, 145.

623. Carter, *supra* note 64, at 53.

