BLAINE'S WAKE: SCHOOL CHOICE, THE FIRST AMENDMENT, AND STATE CONSTITUTIONAL LAW

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I. INTRODUCTION 657
II. THE REACH OF BLAINE 661
A. *A Religious People* 661
B. *A Curious Separation* 665
C. *A Constitutional Amendment* 670
D. *A Profound Legacy* 672
E. *A Constitutional Order* 675
III. LITIGATION IN THE STATE COURTS 680
A. *Wisconsin* 685
B. *Ohio* 690
C. *Vermont* 695
IV. SCHOOL CHOICE AND THE FIRST AMENDMENT 699
A. *A High Wall of Intolerance* 703
B. *A Greater Accommodation* 709
C. *A Limited Freedom* 713
V. CONCLUSION 716

I. INTRODUCTION

The Supreme Court session that ended in June of 1997 could prove to be one of the most notable in years.[1] By striking down the Brady gun-control law, the Court reaffirmed "the principle of separate state sovereignty,"[2] which it has used to gradually

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1. *See generally* Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1, A18; Editorial, *The Court's Good Week*, WALL ST. J., July 6, 1997, at A14.

2. Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (holding that Congress may not impose executive functions on state officials in the implementation of laws). The

redefine the centralized federalism of the Warren Court.[3] In *Agostini v. Felton*,[4] the Court took another significant step toward lowering the high wall of separation constructed by its predecessors by overturning a twelve-year precedent[5] that prevented public-school teachers from providing remedial instruction on the premises of parochial schools. The same Court, in *City of Boerne v. Flores*,[6] struck down the Religious Freedom Restoration Act (RFRA)[7] which prohibited public authorities from substantially burdening a person's exercise of religion unless it could be demonstrated that the burden furthered a compelling governmental interest. The Court viewed RFRA as an attempt by Congress to blunt the impact of its 1990 *Employment Division v. Smith* decision[8] and, in doing so,

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Court's new direction is most recently apparent in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (limiting the extent to which States might be subject to lawsuits brought in federal court by private parties); *see also* United States v. Lopez, 514 U.S. 549 (1995) (striking down the federal Gun-Free School Zones Act, which had made it a crime to carry a handgun within a certain distance of a public school, by limiting Congress's ability to regulate state activities under the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (prohibiting Congress from requiring States to implement certain environmental standards).

The Court, however, has not hesitated to intervene when asked to review state actions that it believes undermine fundamental constitutional rights. *See* Romer v. Evans, 517 U.S. 620 (1996) (striking down, under the Equal Protection Clause, an amendment to the Colorado Constitution prohibiting any state or local body from passing a law permitting sexual orientation to be used as the basis for a discrimination suit); U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (striking down a provision in the Arkansas Constitution setting term limits for members of the United States Congress); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that, under the Commerce Clause, States are subject to the Fair Labor Standards Act, and overturning the highly controversial decision of National League of Cities v. Usery, 426 U.S. 833 (1976), which had limited the scope of the Commerce Clause). For a critical review of the cases, see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996).

3. In addition to the actions of the Warren Court, our system of federalism was also shaped through the bold legislative and executive initiatives undertaken by presidents such as Franklin Roosevelt and Lyndon Johnson. The pattern began to reverse with the election of President Richard Nixon and the jurisprudence of the Burger and Rehnquist Courts, which were much more receptive to claims of state prerogatives. *See generally* DAVID WALKER, THE REBIRTH OF FEDERALISM; SLOUCHING TOWARD WASHINGTON 39-72 (1995); Joseph P. Viteritti & Gerald J. Russello, *Community and American Federalism: Images Romantic and Real* 4 VA. J. SOC. POL'Y & LAW 683, 730-35 (1997).

4. 117 S. Ct. 1997 (1997). For a general review of the Rehnquist Court's jurisprudence regarding the First Amendment, see *infra* Part IV.B.

5. *See* Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by Agostini*, 117 S. Ct. at 2016.

6. 117 S. Ct. 2157 (1997).

7. Pub. L. No. 90-634, 82 Stat. 1345 (codified at 5 U.S.C. § 504; 42 U.S.C. § 1988, 2000bb to bb-4 (1994)).

8. 494 U.S. 872 (1990) (holding that a generally applicable law is binding even when it conflicts with the tenets of faith). For commentary, see generally Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for*

to assume legislative authority to extend the reach of the First Amendment.[9]

Although supporters of school choice have derived some comfort from the reversal heralded in the *Agostini* decision, the constitutional framework which will determine the legal permissibility of providing government aid for children to attend parochial schools is far more complex. School choice is an issue that will be determined as much by the Court's view of federalism as by its interpretation of the First Amendment. At present the most severe battles taking place with regard to the issue of school choice are occurring in the state courts. Opponents of choice are planning their legal strategies around the existence of so-called "Blaine Amendment" provisions incorporated into many state constitutions; these provisions set more rigid standards of separation between church and state than those required by the Supreme Court in its interpretation of the First Amendment. In the end, the fate of school choice will turn on the willingness of the Supreme Court to impose its own constitutional guidelines upon the States in order to protect the free-exercise rights of individuals.

The history of the original Blaine Amendment and its progeny in the States underscore one of the most incredible ironies in American constitutional law. Strict separationists often point to these local provisions as safeguards of religious freedom, using them to prevent objectionable interaction between governmental and religious institutions. In fact, the Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.[10]

But the history of First Amendment jurisprudence in America is filled with irony and paradox. The very idea of constitutionalism in Western political thought was inspired by a

Protecting Religious Conduct, 61 U. CHI L. REV. 1245 (1994); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

9. *See Boerne*, 117 S. Ct. at 2160-62.

10. I do not mean to suggest here that separationist instincts are largely motivated by religious bigotry. Nevertheless, one can not deny its influence in the historic development of the issue, nor that the relative neglect of its role on the part of legal scholars makes the story worthy of telling. One notable exception in the literature is Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38 (1992).

determination to set limits upon government by identifying provinces of individual conduct beyond the scope of state interference, thus imposing constraints upon public authority rather than upon the citizenry.[11] Our convoluted reasoning regarding the First Amendment has evolved in such a way that the courts have not only imposed unusual restrictions on individual prerogatives, but they have done so in the name of constitutionalism and freedom.[12] In no area of legal argument is this confusion more apparent than the debate over school choice.

Focusing on the issue of school choice, this Article attempts to explain the precarious position in which our unique system of federalism has placed the ideal of religious freedom. Whether the Supreme Court actually resolves the issue of school choice to the satisfaction of choice advocates will ultimately depend upon its response to three specific questions: (1) "Do States violate the Establishment Clause[13] by providing public funds for parents to send their children to parochial schools?"; (2) "Do States violate the rights of parents under the Free Exercise Clause[14] when they exclude religious schools from participation in publicly supported choice programs?"; (3) "Do parents have a constitutional right to send their children to religious schools at public expense?"

A review of the First Amendment decisions handed down by the Rehnquist Court suggests the following: (1) under certain conditions, it is constitutionally permissible to provide public support for parents to send their children to parochial schools; and (2) applying state standards specifically to exclude parochial schools from participating in school-choice programs violates

11. One of the most profound treatments of the concept is found in CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (rev. ed. 1950); *see also* NOMOS XX: CONSTITUTIONALISM (J. Roland Pennock & John W. Chapman eds., 1979).

12. For one of the most respected and balanced analyses of the subject, see generally LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d. ed. 1994) (assuming a moderately separationist position); *see also* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995) (developing an analytic model for examining the issue); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995) (arguing for greater accommodation); RONALD F. THIEMAN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996) (same).

13. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

14. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend I.

the free-exercise rights of parents who would be inclined to send their children to such schools. This pattern of decisionmaking is reinforced by the recent *Agostini* ruling. In this respect, the impact of restrictions imposed by Blaine Amendment provisions in state constitutions has been weakened. The Court, however, is a long way from establishing the fundamental right of parents to send their children to religious schools of choice at public expense. This reluctance is reinforced by the recent *Boerne* decision, which renders successful litigation on religious-rights grounds extremely difficult. In this sense, the Blaine Amendment remains a viable mechanism for obstructing school choice if state decision makers are inclined to do so.

Part II of this Article provides a historical note on the origin of the Blaine Amendment and its far-reaching impact on state-level jurisprudence regarding religion and public education. Part III reviews recent litigation in three States—Wisconsin, Ohio, and Vermont—highlighting the diversity of the legal traditions among different jurisdictions and the important role that state courts play in determining the future of school choice in America. Part IV reviews the federal case law related to school choice, tracing the history of First Amendment jurisprudence from the early part of the Twentieth Century to the present. This chronicle documents a strong accommodationist tradition that was only temporarily interrupted during the 1970s and has since been revived by the Rehnquist Court.[15]

II. THE REACH OF BLAINE

A. *A Religious People*

By the time that the Framers of the Bill of Rights sat down in 1789 to draft their momentous document, a certain kind of religious liberty had evolved in the young nation. Organized religion had penetrated all aspects of family and community life.[16] Every State except Connecticut had a constitutional provision protecting religious freedom, but what this "religious

15. Many legal scholars trace the lineage of the separationist approach on the modern Court to the *Everson* decision of 1947; however, this approach to state-church relations did not reach its full strength until the *Lemon* decision of 1971. *See infra* Part IV.A.

16. *See* Harold J. Berman, *Religious Freedom and the Challenge of the Modern State, in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSE AND THE AMERICAN PUBLIC PHILOSOPHY 44-48 (James Davison Hunter & Os Guinness eds., 1990).

freedom" meant varied from State to State.[17] The only common element of protection throughout the thirteen jurisdictions was a decided determination to refrain from establishing a single publicly supported church.[18]

But disestablishment was not synonymous with separation. Public support for religious institutions was quite common.[19] After the Revolutionary War, most States in New England maintained a local option system which allowed each locality to choose its own minister and enact taxes for his support.[20] New York, with its more pluralistic population, maintained a similar system that encouraged individuals to follow the dictates of their conscience, unless of course they happened to be Jews or Catholics.[21]

Religion played an important role in structuring the political and social milieu of the new republic.[22] The religious congregation was at the heart of the American notion of community, and was therefore a basic element of human association and civil society.[23] Although the Anglican

17. *See* BARRY A. SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 193-240 (1994) (discussing religious and civil liberty in the Eighteenth Century).

18. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990) [hereinafter McConnell, *The Origins of Free Exercise*] (arguing that popular concepts of religious liberty during the Founding era incorporated the idea of religious exemptions for widely accepted practices).

19. Each colony had actually developed its own approach to religion prior to the revolution, growing out of their own unique political and social histories. Virginia, Maryland, and the Carolinas all had established churches tied to the Anglicans until the Revolution caused the severing of those ties. New England, with its strong tradition of localism, rejected the Anglican establishment but was dominated by Congregationists. New York, once dominated by the Dutch Reformed Church, eventually became more diverse with a strong leaning towards the Anglicans. Rhode Island, Pennsylvania, Delaware, and New Jersey had no establishments. *See generally* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986) (focusing on the pre-colonial and colonial experiences).

20. Although Congregationists still dominated civic life in Massachusetts, they shared tax monies with Baptists, Quakers, Episcopalians, Methodists, and Unitarians, but with few exceptions most towns declared a preference. New Hampshire allowed towns to decide whether to select a church at all. Vermont, which joined the Union in 1791 expected all individuals to attend and support some church, either locally or otherwise. Connecticut, for all practical purposes, continued to be dominated by Congregationists, and showed little tolerance for other groups. *See* LEVY, *supra* note 12, at 31-51.

21. *See id.* at 11-16.

22. *See generally* PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY AND POLITICS IN COLONIAL AMERICA (1986) (describing the important role of religion in eighteenth-century America); ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION AND THE AMERICAN FOUNDING (1990) (same).

23. *See* SHAIN, *supra* note 17, at 69. Shain argues that late eighteenth-century Americans were not committed to a liberal or individualistic pluralism, but rather to "a

establishment was expelled by the revolution, civil authority could be brought to bear against someone who violated the religious mores of a community, such as failing to observe the Sabbath. All but two States continued to give religious tests for someone who sought public office, and membership in a Christian church was often tied to the franchise.[24] Education, not yet conceived as a state function, was usually administered by the clergy and combined with religious instruction.[25] Even much later, Tocqueville would observe that in America, "[a]lmost all education is entrusted to the clergy."[26]

The same Congress that drafted the Bill of Rights enacted legislation that established a national day of thanksgiving and prayer.[27] It also created a system of chaplains for the military and both houses of Congress to be paid for with public funds.[28] In deference to the principle of disestablishment, soon to be incorporated into the Constitution, Congress imposed a diversity standard for chaplains, requiring a multi-sectarian arrangement in the army and an agreement that each of its own houses be

plural system that exists between divergent local populations and allows for the maintenance of communal visions of a good human life." *Id.* Thus, Americans really only wanted to preserve communalism. *See generally id.* at 73-83 (depicting the crucial role of religion in the formation of civil society at the Founding); H. MARK ROELOFS, IDEOLOGY AND MYTH IN AMERICAN POLITICS: A CRITIQUE OF THE NATIONAL POLITICAL MIND 51-60 (1976) (same); SANDOZ, *supra* note 22, at 126-36 (same); Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 23-29 (1990) (same). This is by no means an American invention. The classic notion of republicanism, dating back to the Greeks, was based on a notion of community that combined religious, political, and social functions. *See* Carl J. Friedrich, *The Concept of Community in the History of Political and Legal Philosophy*, in NOMOS II: COMMUNITY 3, 3-4 (Carl J. Friedrich ed., 1959).

24. *See* McConnell, *The Origins of Free Exercise*, *supra* note 18, at 1455.

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

26. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 320 n.4 (Phillips Bradley ed., Random House 1945) (1839).

27. The day the House of Representatives endorsed the First Amendment and its Establishment Clause, it adopted a resolution to send several of its members together with several senators to ask the president "to recommend to the people of the United States a day of public Thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of almighty God." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2113 (1996) (citations omitted). President Washington proclaimed November 26, 1789, the first official American Thanksgiving holiday. *See id.*

28. *See id.* at 2104; *see also* CURRY, *supra* note 19, at 218.

tended by ministers of different faiths.[29] Then it enacted the Northwest Ordinance for governing the territories north of the Ohio River, where it declared: "Religion, morality and knowledge being necessary to good government . . . schools and the means of education shall forever be encouraged."[30] Some scholars point to these early experiences as evidence that the Framers never intended to draw a strict boundary of separation between church and state, or even to prevent government support to religious institutions, so long as support was not preferential or limited to a single established church.[31]

Until the middle of the Nineteenth Century, it was not unusual for religious schools to be supported with public funds in New York, New Jersey, Connecticut, Massachusetts, and Wisconsin.[32] In many cases it was difficult to distinguish between public and private institutions because they were often housed in the same building. Frequently the lines were purposely blurred by Democratic party politicians who sought to appease their Catholic constituents in big cities. For a brief period in the 1850s, the California legislature found it expedient to allow religious bodies to control a large portion of the school budget when the public schools were unable to accommodate the growing immigrant population in need of educational services.[33]

29. *See* Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 139-48 (1986) (discussing Congress's financing of religious activities during the early years of the republic).

30. CURRY, *supra* note 19, at 218. The language itself had actually been taken from the Massachusetts Constitution of 1780 drafted by John Adams, which was also copied into the New Hampshire Constitution of 1784. *See* DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 26-27 (1987).

31. For support of the concept that the Founders endorsed non-differentiated aid to religion, see generally CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGIOUS CLAUSES (1964); DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT (1987); ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES (1950); JOHN G. WEST, JR., THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION 11-78 (1996). *But see* LEVY, *supra* note 12, at 112-45 (arguing that the Founders meant to prohibit all aid—even nondifferentiated aid—to religion); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) (same).

32. *See* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 166-67 (1983). In 1835, Lowell, Massachusetts, initiated an experiment that actually incorporated the Catholic schools into the public-school system. *See* 2 ROBERT H. LORD ET AL., THE HISTORY OF THE ARCHDIOCESE OF BOSTON IN THE VARIOUS STAGES OF ITS DEVELOPMENT 313-20 (1944).

33. This only lasted for five years. In 1855, the state legislature, under pressure from a strong anti-Catholic lobby, passed a law to end public funding for religious schools. *Bible* reading, however, was still permitted in the public schools. *See* TYACK ET AL., *supra* note 30, at 90-91.

B. *A Curious Separation*

There is nothing inherently undemocratic about providing public funds for children to attend religious schools. The practice is quite common in Western nations, where it is perceived as an expression of religious liberty to enable parents to educate their children in accord with the dictates of their faith.[34] The existence of dual (or multiple) educational systems is understood to be a safeguard against intrusive governmental power in the upbringing of children; the right to choose is cherished as an essential feature of self-government. Since 1992, even socialist Sweden has begun to provide government support to private and religious schools in response to pleas from religious and language minorities.[35]

Although schools play a crucial role in imparting and nourishing the civic values that bolster a healthy democracy,[36] most free societies do not accept the premise that only government-owned and -operated schools are capable of fostering these essential values. Indeed, maintaining a government monopoly over such an important societal function presents certain risks in a free society, especially in a democratic order that purports to value social, political, and religious pluralism.[37] These hazards are painfully evident in the history of the American common school.

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34. Among the countries where government-supported choice programs exist are Australia, Belgium, Canada, Denmark, France, Germany, Great Britain, the Netherlands, New Zealand, Spain, and Sweden. *See generally* JOHN E. CHUBB & TERRY M. MOE, A LESSON IN SCHOOL REFORM FROM GREAT BRITAIN (1992); DENIS P. DOYLE, FAMILY CHOICE IN EDUCATION: THE CASE OF DENMARK, HOLLAND AND AUSTRALIA (1984); CHARLES L. GLENN, CHOICE OF SCHOOLS IN SIX NATIONS: FRANCE, NETHERLANDS, BELGIUM, BRITAIN, CANADA, WEST GERMANY (1989); Estelle James, *The Public/Private Division of Responsibility for Education: An International Comparison, in* 1 COMPARING PUBLIC AND PRIVATE SCHOOLS (Thomas James & Henry M. Levin eds., 1988).

35. *See* Miron Gary, *Free Choice and Vouchers Transform Schools*, EDUC. LEADERSHIP, Oct. 1996, at 77.

36. There is a good deal of historical and contemporary evidence documenting the important role that education plays in fostering a viable democratic society. *See generally* NORMAN NIE ET AL., EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA (1996) (presenting recent survey research on the positive connection between education and civic activity); LORRAINE SMITH PANGLE & THOMAS L. PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS (1993) (explaining how education was perceived among Western political thinkers in both a European and American context).

37. Karl Popper, critiquing Plato's prescriptions for state education, argues that public control over education can be used as a tool by the ruling class to extinguish the very pluralism supposedly sought after. Platonic education instead smoothes all differences in beliefs and extinguishes all loyalties, except loyalty to the state, leaving only docile

The American common school was founded on the pretense that religion has no legitimate place in public education. But in reality it was a particular kind of religion that its proponents sought to isolate from public support. The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers.[38] The entire concept of a free, universal, secular education was in fact an institutional hypocrisy perpetrated by the political establishment.[39]

Take, as a case in point, the record of the nation's first public-school system in Massachusetts. When Horace Mann, the commonwealth's secretary of education, gave his first annual report to the newly created Board of Education in 1837, he advocated strict religious neutrality and called for the "entire exclusion of religious teaching"[40] from public schools. In actuality, however, the curriculum in Mann's schools required daily reading from the King James version of the *Bible*, which he represented as a neutral act that would allow individuals to discover the truth—his, of course—on their own.[41] The recital of

human cattle to populate the state. *See* K. R. POPPER, 1 THE OPEN SOCIETY AND ITS ENEMIES 40-47, 131 (1945).

38. For a critical look at the evolution of the common school, particularly in Massachusetts, see generally CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988) [hereinafter GLENN, THE MYTH OF THE COMMON SCHOOL]; *see also generally* FREDERICK M. BINDER, THE AGE OF THE COMMON SCHOOL, 1830-1865 (1974) (focusing on Boston); STANLEY K. SCHULTZ, THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860 (1973) (same).

39. Mark DeWolfe Howe describes nineteenth-century American government as a "de facto Protestant establishment." MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 31 (1965).

40. Horace Mann, *First Annual Report to the Board of Education* (1837), *cited in* GLENN, THE MYTH OF THE COMMON SCHOOL, *supra* note 38, at 70-71.

41. In his final report to the Board of Education in 1848, Mann admitted: "Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible, and in receiving the Bible it allows it to do what it is allowed to do in no other system, to speak for itself." Horace Mann, *Twelfth Annual Report to the Board of Education* (1848), *cited in* 2 STOKES, *supra* note 31, at 57.

On another occasion in 1840, he instructed a group of public-school teachers in Boston on how best to deal with their classroom charges, urging that they:

> train them up to the love of God and the love of man: to make the perfect example of Jesus Christ lovely in their eyes; and to give to all so much of the religious instruction as is compatible with the rights of others and with the genius of our government.

Horace Mann, *What God Does and What He Leaves for Man to Do in the Work of Education* (1840), *cited in* GLENN, THE MYTH OF THE COMMON SCHOOL, *supra* note 38, at 163.

prayers and the singing of hymns were also regular school activities.[42]

One cannot separate the founding of the American common school and the strong nativist movement that had its origins at the Protestant pulpit. By the time Mann had opened the doors of his first school in 1837, a network of Protestant newspapers was in circulation delivering their distinctly anti-Catholic message. Indeed, it was under the influence of Reverend Lyman Beecher's inflammatory sermons that an angry Boston mob burned down the Ursuline Convent in 1834 because Catholics had protested Bible reading and prayer recitals in public schools.[43]

The experience in Massachusetts was indicative of the national mood.[44] Although Massachusetts was the only State to pass a law mandating Bible reading in public schools during the Nineteenth Century, between seventy-five and eighty percent of the schools in the country voluntarily followed the practice.[45] When a group of Catholics in Maine challenged the expulsion of fifteen-year-old Bridget Donahue for refusing to read the Protestant *Bible* in class, the state's highest court ruled in 1854 that being required to read the King James version of the *Bible* is

42. In 1852, the Massachusetts legislature, after a controversy precipitated by Catholics protesting a Bible reading requirement in the Cambridge public schools, passed the nation's first compulsory-attendance law. The bill had been advocated by the anti-Catholic Know-Nothing party. On that occasion an editorial appeared in the COMMON SCHOOL JOURNAL which read:

> The English Bible, in some way or other, has, ever since the settlement of Cambridge, been read in its public schools, by children of every denomination; but in the year 1851, the ignorant immigrants, who have found food and shelter in this land of freedom and plenty, made free and plentiful through the influence of these very Scriptures, presume to dictate to us, and refuse to let their children read as ours do, and always have done, the Word of Life. The arrogance, not to say impudence, of this conduct, must startle every native citizen, and we can not but hope that they will immediately take measures to teach these deluded aliens, that their poverty and ignorance in their own country arose mainly from their ignorance of the Bible.

The Bible in Our Common Schools, 14 COMMON SCH. J. 9 (1852), *quoted in* Thomas James, *Rights of Conscience and State School Systems in Nineteenth-Century America*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 126-127 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) [hereinafter James, *Rights of Conscience*].

43. *See* RAY A. BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 41-47 (1938).

44. *See* David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening of the West*, 36 HARV. EDUC. REV. 447 (1966) (presenting a case study of Oregon in the mid-Nineteenth Century to demonstrate the role of the clergy in the development of the American common school).

45. *See* TYACK ET AL., *supra* note 30, at 164.

not an infringement of religious freedom.[46] This was the first of twenty-five similar suits (fifteen by Catholics) brought in nineteen States through 1925, only five of which resulted in favorable rulings for the plaintiffs.[47] Pleas by Catholics to eliminate the *King James Bible* from public-school curricula were joined increasingly by Jews and Protestants who were also offended by the custom.

Most judges at the time refused to recognize the *Bible* as a sectarian book, even though only one version was put to use in the classroom.[48] Protestantism had been so entrenched within the mainstream of American culture that it was difficult for many people to understand the concerns of religious minorities. The common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority.[49] As historian David Tyack and his colleagues explain:

> Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches. They had trouble conceiving of moral education not grounded in religion. The argument ran thus: "To survive, the republic must be composed of moral citizens. Morality is rooted in religion. Religion is based upon the Bible. The public school is the chief instrument for forming moral citizens. Therefore, pupils must read the Bible in school."[50]

The history of the common-school movement is a telling story of the risks incurred when a ruling majority is allowed to establish a monopoly over the educational process and to impose its values upon everyone else's children.[51] As one nineteenth-century observer commented, "We have made a sort of God of our common-school system. It is treason to speak a

46. *See* Donahue v. Richards, 38 Me. 376, 409 (1854).

47. *See* OTTO TEMPLAR HAMILTON, THE COURTS AND THE CURRICULUM 113 tab.1 (1927); *see also* TYACK, ET AL. *supra* note 30, at 163.

48. *See* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1102-04 (1997) [hereinafter Tarr, *The New Judicial Federalism*].

49. On the role of the common school as an agent for American socialization, see generally LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION (1951).

50. TYACK ET AL., *supra* note 30, at 162.

51. *See generally* James, *Rights of Conscience*, *supra* note 42, *passim* (depicting how majority rule was exercised at the expense of minorities).

word against it."[52] Under these conditions, the rights and concerns of minorities become easily dismissed, ignored, or trampled upon—often unknowingly, sometimes intentionally—but always with severe consequences. Without alternatives for the education of their children, minorities must frequently accept the majority's world view.[53]

By the middle of the Nineteenth Century, the Catholic population in America had increased sufficiently to demand an alternative. Church leaders in cities like New York, Chicago, Philadelphia, Boston, Cincinnati, Baltimore, San Francisco, and St. Paul began to lobby their state legislatures for public funds to develop their own educational systems.[54] This activity provoked a display of majoritarian politics of unprecedented brutality—all under the inverted banner of religious freedom. When Bishop Hughes of New York entered the fray in 1842 to demand public support for Catholic schools, his residence was destroyed by an angry mob, and militia were summoned to protect St. Patrick's Cathedral.[55] When Catholics in Michigan proposed a similar school bill in 1853, opponents portrayed their plan as a nation-wide plot hatched by the Jesuits to destroy public education.[56] Parochial school advocates in Minnesota were accused of subverting basic American principles.[57] When the Know-Nothing Party gained control of the Massachusetts legislature in 1854, it drafted one of the first state laws to prohibit aid to sectarian schools, and simultaneously instituted a Nunnery Investigating Committee.[58] This same Massachusetts body that counted twenty-four Protestant clergymen among its members also tried to pass

52. *Industrial Education*, 19 SCRIBNER'S MONTHLY 785-86 (1880), *quoted in* LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 23 (1987).

53. *See generally* POPPER, *supra* note 37.

54. *See generally* JORGENSON, *supra* note 52, at 20-158. The most dramatic of these battles took place in New York when Bishop Hughes took charge of the resistance. The story is eloquently told in DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 27-76 (1974); *see also* MICHAEL FELDBERG, THE TURBULENT ERA: RIOT AND DISORDER IN JACKSONIAN AMERICA 9-32 (1980) (discussing the Bible riots in Philadelphia); Vincent P. Lannie & Bernard Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1844*, 8 HIST. EDUC. Q. 45, *passim* (1968) (same); JAMES W. SANDERS, THE EDUCATION OF AN URBAN MINORITY: CATHOLICS IN CHICAGO, 1833-1965, at 21-23, 33 (1977).

55. *See* RAVITCH, *supra* note 54, at 75.

56. *See* JORGENSON, *supra* note 52, at 102.

57. *See id.* at 103.

58. *See id.* at 88.

legislation that would limit the franchise and the right to hold office to native-born people.[59]

C. *A Constitutional Amendment*

In 1872, the local school boards of Cincinnati, Chicago, and New York, moved by Catholic protests, voted to prohibit Bible readings and religious exercises in their public schools.[60] The political ascent of the growing "Catholic menace" in urban centers spurred Protestant churches to join with newly formed nativist groups to launch a two-pronged campaign to preserve Bible study in public-school curricula and to deny government support to sectarian institutions.[61]

In September of 1875, President Ulysses S. Grant responded to mounting political pressure when he publicly vowed to "[e]ncourage free schools, and resolve that not one dollar be appropriated to support any sectarian schools."[62] Grant followed his pledge with a message to Congress proposing a constitutional amendment that would deny public support to religious institutions. This dramatic move would align the Republican party with the anti-Catholic wing of the public-school lobby, delineating the contours of the bitter partisan debate that was to follow.[63]

In order for Grant's proposal to be realized, it would need a Congressional sponsor. That role was enthusiastically filled by Congressman James G. Blaine of Maine, who aspired to obtain the Republican party nomination to succeed Grant as president and who fully appreciated the wide political appeal of the

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59. *See id.*

60. *See* Green, *supra* note 10, at 46-47. The Cincinnati decision was actually upheld by the Ohio Supreme Court which ruled that, "[u]nited with religion, government never rises above the merest despotism . . . [and] the more widely and completely they are separated, the better it is for both." Board of Educ. of Cincinnati v. Minor, 23 Ohio St. 211, 248 (1872).

61. These groups included the Order of the American Union, the Alpha Association, and the American Protective Association. *See* JOHN HIGMAN, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 28-30 (1955); *see also* BILLINGTON, *supra* note 43.

62. Green, *supra* note 10, at 47. Grant had also proposed at the time that all church properties, except cemeteries, be subject to taxation. *See* Marie Carolyn Klinkhamer, *The Blaine Amendment of 1875: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 17 (1957).

63. For an analysis of how nativism and anti-Catholicism fueled the evolving partisan debate over the Blaine Amendment following Grant's speech, see Klinkhamer, *supra* note 62, at 15.

nativist and anti-Catholic rhetoric that accompanied the President's proposal.[64] Although he would never secure passage of his controversial amendment in Congress, Blaine left a lasting mark on American constitutional discourse concerning church-state issues. Blaine would live in perpetuity as a symbol of the irony and hypocrisy that characterized much future debate: employing constitutional language, invoking patriotic images, and repeatedly appealing to individual rights as a distraction from the real business at hand—undermining the viability of schools run by religious minorities.

Blaine claimed to be correcting a "constitutional defect."[65] At that time, the Fourteenth Amendment had not yet incorporated the Establishment Clause to apply against the States.[66] Blaine was troubled that "states were left free to do as they pleased."[67] He may have been correct on the incorporation question, but Blaine's amendment also read something into the Constitution for which there was no legal precedent.[68] No federal court had ever ruled, at that point in time, that it was unconstitutional for a government agency to provide direct or indirect aid to religious institutions, as his amendment sought to do. Blaine, however, effectively made his political point.

Blaine's transparent political gesture against the Catholic Church provoked considerable press commentary. *Catholic World* issued a criticism of "politicians who hope to ride into power by

64. Blaine's proposal read as follows:

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

Cited in JORGENSON, *supra* note 52, at 138-39.

65. F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1789*, 4 WASHBURN L.J. 183, 188 (1965) (quoting from an open letter from Representative Blaine to an important Ohio political figure, printed in N.Y. TIMES, Nov. 29, 1875, at 2).

66. In 1833, Justice Catron wrote that the Federal Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of individual states." Barran v. Baltimore, 32 U.S. (7 Pet.) 243, 243 (1833). In 1845, the Court specifically addressed the First Amendment issue ruling: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws." Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609 (1845).

67. O'Brien, *supra* note 65, at 188.

68. *See* Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 942, 944 (1951) (discussing the incorporation issue).

awakening the spirit of fanaticism and religious bigotry among us."[69] The *St. Louis Republican* observed, "The signs of the times all indicate an intention on the part of the managers of the Republican party to institute a general war against the Catholic Church."[70] Even *The Nation*, which was sympathetic to Blaine's legal position, conceded that:

> Mr. Blaine did indeed bring forward . . . a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as everyone knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.[71]

Blaine's amendment received strong support in both houses of Congress, but fell four votes short of the required two-thirds majority in the Senate to pass.[72] The movement it propelled, however, would prove to be largely successful. Its principles were incorporated into the Republican national party platform, a solid plank in its campaign against "Rum, Romanism and Rebellion."[73] Although Congress did not have the super-majority of votes needed to pass a constitutional amendment, it was able to muster a sufficiently strong legislative majority to affect the continuing national debate over aid to religious schools.

D. *A Profound Legacy*

By the middle of the Nineteenth Century, Congress had extended its influence to schools throughout the States and Territories. Following victory in the Civil War, Reconstruction-Era Republicans seized the opportunity to influence the development of education in the South in accord with their own political priorities.[74] By century's end its leaders had come to understand that federal aid could be used as a wedge for manipulating public policy. Most States west of the Mississippi were receiving more than ten percent of their education

69. CATH. WORLD, Feb. 1876, at 707, 711, *quoted in* Green, *supra* note 10, at 53, 54.

70. Green, *supra* note 10, at 44 (quoting ST. LOUIS REPUBLICAN, as quoted in the N.Y. TRIB., July 8, 1975, at 4).

71. THE NATION, March 16, 1876, at 173, *quoted in* Green, *supra* note 10, at 54.

72. The vote was 180-7 in the House of Representatives and 28-16 (27 members not voting) in the Senate. *See* Meyer, *supra* note 68, at 942, 944.

73. *See* KIRK PORTER & DONALD JOHNSON, NATIONAL PARTY PLATFORMS, 1840-1964, at 53-55 (1966).

74. *See* TYACK ET AL., *supra* note 30, at 133-153.

revenues from federal grants, and in return they submitted to expanding federal guidance.[75] Particularly vulnerable to the Republican agenda were those new territories seeking statehood. As a matter of course, they would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval. This kind of mandate appeared in the enabling legislation of 1889 that divided the Dakota's into two separate States and admitted Montana and Washington into the Union as well.[76] Likewise, New Mexico was granted statehood only on the explicit condition that it adopt a similar provision in its constitution.[77] These were not rude thrusts of congressional power; continued Republican domination in Washington, D.C., was testimony to the fact that the spirit of Blaine had possessed the nation.

This was also a period of busy activity in the state capitals. Many legislatures were in the process of reconsidering their own rules of governance, and Blaine's presence seems to have been felt throughout the deliberations. By 1876, fourteen States had enacted legislation prohibiting the use of public funds for religious schools; by 1890, twenty-nine States had incorporated such provisions into their constitutions.[78]

New York is a conspicuous case in point. It had neither been part of the old Confederacy, nor a new territory seeking statehood. It had, however, been a place where the nativist-Catholic tensions of the Nineteenth Century reached a high

75. *See id.* at 22.

76. *See* Act of February 22, 1889, ch. 180, 25 Stat. 676 (1889); *see also* Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-69 (1988) (tracing the Washington Constitution to the Blaine Amendment).

The Washington Constitution, drafted in 1889, requires that "[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." WASH. CONST. art. IX, § 4.

The North Dakota constitution, also adopted in 1889, called for a "system of public schools" that is "free from sectarian control." N.D. CONST. art. 8, § 1.

77. *See* TOM WILEY, PUBLIC SCHOOL EDUCATION IN NEW MEXICO 27-31 (1965); *see generally* ROBERT LARSON, NEW MEXICO'S QUEST FOR STATEHOOD, 1846-1912 (1968).

78. *See* Green, *supra* note 10, at 43. Although many States had adopted such statutory provisions by mid-century, during the 1870s, constitutional amendments were enacted in Colorado, Illinois, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, and Texas. *See* JORGENSON, *supra* note 52, at 114.

level of acrimony.[79] As early as 1844, its legislature had passed a law prohibiting aid to religious schools.[80] Then in 1894, the restriction was etched into the state constitution, proscribing both direct and indirect aid.[81] As late as 1880, when William Grace was elected the first Catholic mayor of New York City, the *New York Times* speculated with considerable angst that the public schools might now become "romanized."[82] Even now, opponents of school choice in New York point to the "Blaine Amendment" in the state constitution as a legal defense for their position.[83] As recently as 1967, the "Blaine Amendment" emerged as the major issue of controversy at a state constitutional convention after its opponents unsuccessfully attempted to have it abolished.[84]

Today, the legal restrictions imposed by States to curtail aid to religious schools and their students remain quite powerful. In a recent survey of state constitutional provisions and judicial interpretations, Frank Kemerer found the States divided evenly into three classifications: seventeen were restrictive, fourteen

79. *See* RAVITCH, *supra* note 54, 27-76. These battles occurred because of Catholic and Jewish opposition to the use of the Protestant *Bible* in public schools, and Catholic attempts, supported by Tammany Hall, to get funding for their own school system.

McSeveney cites two incidences that are illustrative. In one, a letter to *The New York Times*, the writer—signed "an American"—urged the removal of Catholic and Jewish teachers from "our Protestant schools." SAMUEL T. MCSEVENEY, THE POLITICS OF DEPRESSION: POLITICAL BEHAVIOR IN THE NORTHEAST, 1893-1896, at 270 n.18 (1972) (quoting N.Y. TIMES, Dec. 7, 1893).

In another letter, Dr. John A.B. Wilson of the Eighth Street Methodist Church delivered a sermon denouncing the Catholic Church as "everywhere and always the enemy of civil liberty." N.Y. TRIBUNE, July 16, 1894, *quoted in* MCSEVENEY, *supra* note 79, at 271 n.25.

80. *See* Act of May 7, 1844, ch. 320, sec. 12, 1844 N.Y. Laws 490, 492.

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

N.Y. CONST. art. IX, § 4 (adopted 1894; amended 1938 and renumbered art. 11, § 4; amended 1962 and currently renumbered art. 11, § 3); *see also* PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 171-73, 183-84 (1996); MCSEVENEY, *supra* note 79, at 63-86.

82. *See* JORGENSON, *supra* note 52, at 121.

83. *See* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 150-52 (1996) [hereinafter Viteritti, *Choosing Equality*].

84. *See* Henrik N. Dullea, *Charter Revision in the Empire State: The Politics of New York's Constitutional Convention* 338-73 (1982) (unpublished Ph.D. dissertation, Maxwell School of Citizenship and Public Affairs, Syracuse University) (describing the events at the 1967 convention); Lewis B. Kaden, *The People: No! Some Observations on the 1967 New York State Constitutional Convention*, 5 HARV. J. ON LEGIS. 343 (1968) (same).

were permissive, and nineteen were uncertain.[85] Of the seventeen in the restrictive category, fourteen are in the West, where new States joined the Union subsequent to the appearance of the Blaine amendment and its influence in Congress.[86] According to Kemerer, five state constitutions specifically prohibit either direct or indirect aid to sectarian schools;[87] twelve impose more general restrictions on aid;[88] and Michigan actually proscribes the use of vouchers or tax benefits for those attending either private or parochial schools.[89] Many of these same jurisdictions also are included in a category that limits the use of government money to public schools, of which there are thirteen in all.[90] Taken as a whole, these measures reflect the confluence of political forces that erupted when strong nativist sentiment was joined with the common-school movement at the turn of the century to stem the growth of religious schools and their support with state funds.

E. *A Constitutional Order*

The most distressing episode to emerge from the post-Blaine era took place in Oregon. In 1922, the voters of that State approved an initiative requiring all children between the ages of eight and sixteen to attend public schools, effectively making private schools unlawful. The initiative was the product of a campaign organized by the Ku Klux Klan and the Scottish Rite Masons.[91] The Masons argued that compulsory public education would ensure the "'growth and higher efficiency of our public schools'" and accused the Roman Catholic hierarchy of wanting

85. *See* Frank R. Kemerer, *State Constitutions and School Vouchers*, EDUC. L. REP., Oct. 2, 1997, at 1, 37.

86. *See id.*

87. These include Florida, Georgia, Montana, New York, and Oklahoma. *See id.* at 5-6.

88. These include California, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Minnesota, Missouri, North Dakota, South Dakota, and Wyoming. *See id.* at 7.

89. Article 8, Section 2 was added to the Michigan Constitution by referendum in 1970 following an advisory opinion of the Michigan Supreme Court that upheld a state statute that would have authorized public funds to non-public schools for the teaching of secular subjects. *See* MICH. CONST. art. 8, § 2; *see also* Kemerer, *supra* note 85, at 4.

90. In addition to Michigan, these include Alabama, California, Colorado, Connecticut, Delaware, Kentucky, Massachusetts, Nebraska, New Mexico, Pennsylvania, Texas, and Wyoming. *See* Kemerer, *supra* note 85, at 15-16.

91. For accounts of the episode, see JORGENSON, *supra* note 52, at 205-15; Thomas J. Shelley, *The Oregon School Case and the National Catholic Welfare*, 75 CATH. HIST. REV. 441, *passim* (1989); David B. Tyack, *The Perils of Pluralism: The Background of the* Pierce *Case*, 74 AM. HIST. REV. 74, *passim* (1968) [hereinafter Tyack, *The Perils of Pluralism*].

to abolish public schools.[92] For some reason, the Klan—whose members believed in the superiority of white Protestants and the inferiority of blacks, Jews, Catholics, and immigrants—had come to the conclusion that forcing all of these groups to attend school together under the supervision of public authority would fortify American democracy. Private schools meant private ideas, and that was considered dangerous. Compulsory education in state-run schools could avert the risks imposed by pluralism. The perpetuation of sectarian institutions would lead to the destruction of public schools: the foundation of a free society, the sacred "temples of liberty" in America. As King Kleagle, Pacific Domain of the Knights of the Ku Klux Klan explained:

> To defend the common school is the settled policy of the Ku Klux Klan and with its white-robed sentinels keeping eternal watch, it shall for all time, with the blazing torches as signal fires, stand guard on the outer walls of the temple of liberty, cry out the warning when danger appears and take its place in the front rank of defenders of the public schools.[93]

The new law was opposed on several fronts: by blacks and Jews who feared the majoritarian tyranny that might be imposed when bigots controlled school boards; by Catholics, Lutherans, and Seventh-Day Adventists who sought to educate their children in their own schools in accord with their own religious convictions; and by Presbyterian, Unitarian, and Congregational ministers who simply believed that the restriction was unconstitutional. No major denominational body endorsed the effort, nor were public-school leaders at the forefront, but many other Protestant ministers supported the law.[94]

The Oregon measure was eventually challenged by the Sisters of the Holy Names of Jesus and Mary, who ran a number of parochial schools, and the directors of the Hill Military

92. NEW AGE, Oct. 1922, at 603, *quoted in* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION AND THE CONSTITUTION, 1917-1927, at 153 (1994).

93. Luther Powell, *Preface* to GEORGE ESTES, THE OLD CEDAR SCHOOL 9 (1922), *cited in* Tyack, *The Perils of Pluralism*, *supra* note 91, at 74. The Masons were somewhat split on the issue of closing down private schools, but most shared the belief that educating children in public schools "along standardized lines" would furnish a much-needed uniform outlook on national issues and a sense of patriotism. *Id.* at 77-8; *see also* JORGENSON, *supra* note 52, at 207-8.

94. *See* JORGENSON, *supra* note 52, at 205-07, 210-13; *see also* Tyack, *The Perils of Pluralism*, *supra* note 91, at 86-90 (documenting the array of groups that aligned against the measure).

Academy, a non-sectarian private school.[95] They succeeded in obtaining an injunction in a federal district court preventing the State from enforcing the law.[96] When that decision was appealed to the United States Supreme Court by the attorney general of Oregon, the result was one of the most significant rulings in the history of American education. In *Pierce v. Society of Sisters,*[97] a unanimous Court rejected the idea of a state educational monopoly and affirmed the fundamental right of parents to educate their children according to their own preferences:

> The fundamental theory upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.[98]

The *Pierce* episode was only one example of the religious intolerance and ethnic prejudice that had spread across the country through the early part of the Twentieth Century. Two years earlier the Supreme Court had struck down in *Meyer v. Nebraska*[99] a Nebraska law which made it illegal to teach in a language other than English at either public or private schools.[100] Twenty similar measures existed in other States.[101] All were designed with the same purpose in mind: to harass sectarian schools which often provided instruction to immigrant communities in their native language. The *Meyer* suit was

95. Amicus briefs supporting the plaintiffs were submitted by the American Jewish Committee, the Domestic and Foreign Ministry Society of the Protestant Episcopal Church, and the North Pacific Union Conference of the Seventh-Day Adventists. *See* JORGENSON, *supra* note 52, at 209.

96. In rather strong language, the district court declared, "The Act could not be more effective for utterly destroying the business and occupation of the complaints' schools . . . if it had been entitled 'An Act to prevent parochial and private schools from teaching in the grammar grades . . . .'" JORGENSON, *supra* note 52, at 214 (citations omitted).

97. 268 U.S. 510, 535 (1925).

98. *Id.* at 535. The unanimous decision, handed down prior to the incorporation of First Amendment protections, was based upon the liberty and due process principles of the Fourteenth Amendment.

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

100. *See id.* at 401-03.

101. *See* JORGENSON, *supra* note 52, at 206.

brought by a Lutheran school teacher who had been criminally convicted for conducting a class in German.[102]

Together the *Pierce* and *Meyer* decisions would serve to establish the fundamental right of parents to have their children educated in schools that reflected their own values, and the commensurate right of parochial schools to exist as viable alternatives available for parents. But the promise of choice implied by the two rulings would prove to be somewhat empty. Recognizing the provision of educational services as a legitimate public purpose, the Court in neither case refuted the authority of States to require children to attend some school, either public or private (sectarian or secular).[103] Nevertheless the entire funding arrangement that was then in place begged a crucial question concerning school choice.

The problem was that only those who chose to attend government-run schools were being guaranteed public support. Although the State's legal monopoly was broken, a system of government incentives remained in place to coax students into the public schools. Those parents who sought to educate their children in accord with their own religious values had to forfeit government support. Meanwhile, these same parents were expected to pay taxes to finance the public schools. Although they might choose an education reflecting their own values, in doing so they would be forced to assume a financial burden not shared by others. If they could not shoulder the costs personally, then no practical choice existed. In this sense, the choice—now accepted as a legitimate right—was conditioned by economics. If the precepts of one's faith were inconsistent with the teachings that prevailed in public schools—as was often the case—then the individual's right of conscience, his or her free-exercise rights, were significantly compromised.

In a political system where every parent has both an obligation and a right to send their children to school, and where the government supports the choice of those who select public schools, are those who desire instruction in a religious setting entitled to similar support? This problem that was originally

102. *See* ROSS, *supra* note 92, at 30-133 (chronicling the growth of anti-German sentiment that led to the case).

103. "No question is raised concerning the power of the state reasonably to regulate all schools . . . to require that all children of proper age attend some school . . . ." *Pierce*, 268 U.S. at 534.

framed as a nineteenth-century political debate between Catholics and Protestants would persist into the Twentieth Century. Indeed, it would become a perennial constitutional issue. Five years after the *Pierce* decision, the Supreme Court handed down another ruling that would prove instructive on the question of school choice even much later as the nation approached the threshold of the Twenty-first Century.

In *Cochran v. Board of Education*[104] the Supreme Court upheld a Louisiana law that made textbooks available to children with public funds, whether they attended public, private, or parochial schools. It was here that the Court began to develop its "child benefit theory," drawing a significant distinction between government aid that benefits individuals and aid that benefits the institutions they attend.[105] Coupled with the parental right to choose pronounced in earlier rulings, child benefit theory would prove to be a valuable conceptual tool for school-choice activists in the 1990s. The concept allowed them to reconcile the fundamental right of parents to choose with a modern jurisprudence that forbade government support to religious institutions. Eventually, it would also serve in sorting out a confounding set of judicial precedents promulgated by the Supreme Court over a ten-year period beginning in 1971.[106]

During the 1970s a Supreme Court jurisprudence prevailed that equated disestablishment with separation: aid to religious schools, whether direct or indirect, was viewed as offensive to religious liberty. These unusual intellectual contrivances, uniquely American in character, would offer a constitutional justification for provisions in many state charters that had been crafted under the haunting influence of Blaine. These decisions

104. 281 U.S. 370 (1930).

105. The appropriations were made for the specific purpose of purchasing school books for the use of school children in the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made .... True, these children attend some school, public or private, the latter sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations .... The school children and the state alone are the beneficiaries (citation omitted).

Id. at 374-75.

106. This line of judicial reasoning began with Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (setting forth a three-point test for reviewing permissible interaction between religious institutions and government), and it was bolstered by Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 796-98 (1973) (striking down a New York law that provided tax relief for parochial school parents). *See infra* Part IV.A.

were also a source of confusion for well-intentioned policymakers and legislators at the state level who looked to the Supreme Court for guidance on how to resolve the legally complicated question of school choice. Being more sympathetic to parental rights and more accepting of the analytic distinction between individual and institutional benefits, the Rehnquist Court would embrace an approach to the First Amendment that is more accommodationist on state aid. This approach, to be discussed at length in Part IV.B., would allow the Court to establish a set of constitutional standards for the States that is less separationist and more attuned to the free-exercise rights of individuals.

III. LITIGATION IN THE STATE COURTS

One of the more striking features of religion clause jurisprudence among the fifty States is the enormous diversity of standards that prevail. In part, this condition results from the distinct political and legal traditions that have shaped the constitutional history of each State. It also stems from the varying inclinations of state judiciaries to abide by the guidelines set by the Supreme Court of the United States, a precarious endeavor for even the best-intentioned judges given the inconsistency that has governed federal interpretations of the First Amendment.

The lack of a constitutional consensus that persists between the States and the federal government presents nothing inherently troublesome, as it is merely a natural outgrowth of American federalism. In fact, such differences have become more pronounced over the last fifteen years as state courts have used their own constitutions to define rights more broadly than the Supreme Court has in interpreting the federal Constitution, a result which the Constitution certainly permits.[107] The problem

107. And in fact, Justice Brennan, in response to his perception of the Burger Court's counter-retrenchment, requested States to do exactly that:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit independent protective force of state law–for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). For further insight into Justice Brennan's view on state

arises when state judiciaries take it upon themselves to abridge federally defined rights, an impermissible result.[108] First Amendment jurisprudence is ripe for such transgressions, prompted either by a misinterpretation of federal standards of protection or by a blatant determination to flout federal standards.

The proclivity of American courts to equate disestablishment with separation and to interpret separation as a strict bar to any interaction—direct or indirect—between religious organizations and government has fed the problem. A judicial practice once sanctioned by the Supreme Court as a form of religious neutrality, strict separation now raises serious questions concerning the free-exercise rights of individuals as the Supreme Court moves towards a more accommodationist interpretation of the First Amendment. Nevertheless, some States continue to abide by more restrictive standards and specifically exclude parochial school students from social benefits distributed on a supposedly universal basis.

The empirical research available on the subject of church-state jurisprudence in state courts is not plentiful. Nevertheless, the available research reveals that state decisions do not always parallel Supreme Court reasoning. One survey found that courts in nearly half of the States have indicated that they do not consider Supreme Court rulings on the First Amendment binding in interpreting their own constitutions.[109] Through prior judicial decisions, twelve States have indicated that they have stricter standards of separation.[110] Several have openly rejected

constitutional jurisprudence, see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as the Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

For additional commentary on the role of state courts in defining and re-defining legal rights, see generally SUSAN FINO, THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM (1987); John Kinkaid, *Forward: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913 (1995); Stewart G. Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Tarr, *The New Judicial Federalism*, *supra* note 48, *passim*; *see also* Viteritti, *Choosing Equality*, *supra* note 83, at 142-60 (focusing on the First Amendment).

108. The power of the federal judiciary to review state action can be traced back to the Marshall Court. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824); *see generally* GERALD GUNTHER, CONSTITUTIONAL LAW 13-20 (13th ed. 1997) (discussing judicial review in a modern context).

109. Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 634 (1985).

110. These include Alaska, California, Delaware, Hawaii, Idaho, Michigan, Minnesota, Missouri, Nebraska, South Dakota, Virginia, and Washington. *See id.* at 641.

the "child benefit theory" suggesting that it promotes form over substance.[111] Some state courts have struck down programs that provide transportation and textbooks to parochial students, even in the face of decisions by the federal judiciary allowing such programs.[112]

Consider the State of Washington, which directly modeled its constitution's religion clause on the Blaine Amendment.[113] In 1949, two years after the United States Supreme Court upheld a similar New Jersey program in *Everson v. Board of Education of the Township of Ewing*,[114] a Washington state court struck down a busing program that included parochial school children. The court in *Visser v. Noosack Valley School District No. 506*[115] directly and unambiguously distinguished its standard from the more accommodationist position of the Supreme Court:

> Although the decisions of the United States supreme court [sic] are entitled to the highest consideration as they bear on related questions before the court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools.[116]

In 1973, the Washington Supreme Court specifically dealt with the issue of school vouchers when it struck down a program that provided grants for economically needy students to attend

111. *See, e.g.*, Gaffney v. State Dep't of Educ., 220 N.W.2d 550, 556 (Neb. 1974) (holding that a loan of textbooks to students of private schools violates the First Amendment).

112. State rulings outlawing textbook loans were handed down in California, Massachusetts, Michigan, Nebraska, Oregon, and South Dakota; those prohibiting transportation services include Alaska, Delaware, Hawaii, Idaho, Oklahoma, and Washington. *See* G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 98-99 (1989) [hereinafter Tarr, *Church and State*].

113. *See* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, U. PUGET SOUND L. REV. 411, 413-418 (1985) (surveying the state case law in the context of Blaine); Utter & Larson, *supra* note 76, *passim* (tracing the Washington Constitution to the Blaine Amendment).

114. 330 U.S. 1 (1947).

115. 207 P.2d 198 (Wash. 1949).

116. *Id.* at 205 (citations omitted). Prior to this case the state court had voided a universal transportation program that had been offered to parochial school children. *See* Mitchell v. Consolidated Sch. Dist. No. 201, 135 P.2d 79 (Wash. 1943).

schools of their choice.[117] It refused to concede that excluding parochial schools from the universal choice program raised problems with regard to the free-exercise rights of religious families, or that the system of financial incentives discriminated against religious organizations.[118]

In 1984, the Washington Supreme Court rejected a blind student's use of a vocational rehabilitation grant at a Bible college, claiming that it would violate both the state and federal constitutions.[119] This decision was overruled on federal constitutional grounds by the United States Supreme Court,[120] but in the same ruling the High Court left the door open for the Washington judiciary to reconsider the case solely on the basis of its own constitution.[121] The Washington Supreme Court took up the case again in 1989, and, citing "sweeping and comprehensive" prohibitions in its constitution against using government funds for religious instruction, it again invalidated the student's eligibility.[122]

Although the Washington judiciary has been most bold in flouting federal constitutional guidelines on the aid issue, it is not the only State that has set stricter standards of separation. In 1987, the Massachusetts Supreme Judicial Court issued an advisory opinion on a proposed bill that would have provided tax deductions for the parents of parochial school students. The bill was similar to a Minnesota statute that had been approved by the United States Supreme Court four years earlier in *Mueller v. Allen*.[123] Rejecting the child-benefit argument, the Massachusetts Court ruled that "[i]f aid has been channeled to the student

117. *See* Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1989) ("[A] direct financial grant which enables a needy student to pay tuition and thereby remain in private school obviously supports the school.").

118. *See id.* at 978 n.2 ("The question is not whether a student may attend a religious school, but whether the state may subsidize that attendance. No element of coercion has been suggested by respondents, and the free-exercise clause is not involved in these cases.") (citations omitted).

119. *See* Witters v. State Comm'n for the Blind, 689 P.2d 53 (Wash. 1984).

120. Here again the Court stressed that the benefit enjoyed by the religious institution is "only the result of the genuinely independent and private choices of aid recipients." Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986).

121. *See id.* at 489 ("[T]he state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution.") (citation omitted). One might argue that this is not a good test case for school choice because it dealt with the unusual circumstance of a student using a state grant specifically for religious instruction designed to prepare him for a career in the ministry.

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

123. 463 U.S. 388 (1983).

rather than to the private school, the focus still is on the effect of the aid, not on the recipient."[124] In 1992, the Supreme Court of New Hampshire wrote an advisory opinion to its state legislature on a proposal that would have partially reimbursed private and parochial school families for tuition expenses, opining that the proposal violated the state constitution which prohibits appropriations "towards the support of the schools of any sect or denomination."[125]

The relationship between federal and state jurisprudence is not entirely characterized by tension. Alan Tarr found that on occasion some States, such as Wisconsin, New Jersey, and New York, have actually revised their state constitutions in order to better align them with evolving federal standards.[126] Nor is it uncommon for parochial school students to receive some form of state aid. Another survey shows that forty-two States offer some form of assistance, usually in the form of transportation, textbooks, educational materials, health services, or meal programs.[127]

Only three States—Wisconsin, Ohio, and Vermont—have provided aid in the form of tuition vouchers or scholarships, and they are the focus of the forthcoming analysis.[128] These States, or their constitutions, are not among the most restrictive regarding state aid, nor are they particularly antagonistic toward federal

124. Opinion of the Justices to the Senate, 514 N.E.2d 353, 356 (Mass. 1987). In 1970, the Massachusetts Supreme Judicial Court had issued an advisory opinion rejecting a proposed bill that would have granted $100 to every pupil in the State whether she attended a public, private, or parochial school. *See* Opinion of the Justices to the House of Representatives, 259 N.E.2d 564 (Mass. 1970).

125. Opinion of the Justices (Choice in Education), 616 A.2d 478, 480 (N.H. 1992) (citing N.H. CONST. pt. I, art. 6).

126. In 1947, after the United States Supreme Court upheld a New Jersey statute that provided bus transportation for parochial school students, the state constitution was amended to allow for the same services. After state courts in Wisconsin and New York struck down transportation programs for parochial school children on state constitutional grounds, the legislatures in those States enacted constitutional amendments allowing the practice. *See* Tarr, *Church and State, supra* note 107, at 96-97.

127. *See* JOSEPH E. BRYSON & SAMUEL H. HOUSTON, THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS, 1969-1986, at 54 (1990).

128. In July of 1997, parents in Maine filed a suit in state court challenging the exclusion of religious schools from its rural choice program. *See* Carol Innerst, "Maine School-Choice Program Might Not Have Enough Options; Four Families Sue to Have Religious Schools Added to Plan," WASH. TIMES, July 31, 1997, at A5.

In April 1998, a trial court issued a four-page ruling upholding the exclusion of sectarian schools from the school-choice program on the grounds that their inclusion would violate both the federal and state constitutions. *See* Bagley v. Maine Dep't of Educ., No. CV-97-484 (Apr. 20, 1998).

standards. Even in those cases where their courts drifted from the more accommodationist standards emanating from the Supreme Court, they often did so under the pretense of alignment. Nevertheless, a review of the case law in these jurisdictions is instructive. This review shows the unique, and somewhat loose, standards existing among the States, the subtle differences between federal and state standards that are used to obstruct parental choice, and why federal judicial intervention is needed to clarify the meaning of religious freedom under our system of federalism.

A. *Wisconsin*

The Wisconsin Legislature passed its first school-choice law in 1990.[129] The legislation provided economically disadvantaged children in Milwaukee with government-supported scholarships to attend nonsectarian private schools.[130] The bill was a direct response to the critical condition that infected the Milwaukee public-school system, an attempt to provide a decent education to poor children who were trapped in failing public institutions.[131] Given America's unsuccessful record of performance in providing adequate educational services to economically disadvantaged children (especially in the inner-city), the need to foster better educational opportunities for the poor is the most compelling public-policy argument in favor of school choice.[132] Although it has attracted less attention in a legal culture where rights of conscience claims have been centered around the Establishment Clause, the religious freedom issue adds a second dimension to the constitutional

129. WIS. STAT. § 119.23 (1995-96).

130. In order for a family to qualify for participation, its total income could not exceed 1.75 times the federal poverty level. *See* WIS. STAT. § 119.23 (2)(a)1 (1995-96).

131. In 1989 less than 45 percent of Milwaukee public high school students were graduating within six years, and 36 percent of those who did graduate did so with a "D" average. *See* Davis v. Grover, 480 N.W.2d 460, 470 (Wis. 1992); *see also* DANIEL MCGROARTY, BREAK THESE CHAINS: THE BATTLE FOR SCHOOL CHOICE *passim* (1996) (providing a political case history of the program with further documentation on the poor performance of the Milwaukee Public Schools); Paul E. Peterson & Chad Noyes, *School Choice in Milwaukee, in* NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION 123 (Diane Ravitch & Joseph P. Viteritti eds., 1997) [hereinafter NEW SCHOOLS FOR A NEW CENTURY] (providing a political analysis of the legislation and an evaluation of program effectiveness).

132. *See generally* Diane Ravitch, *Somebody's Children: Educational Opportunity for All Children, in* NEW SCHOOLS FOR A NEW CENTURY, *supra* note 131, at 251; Viteritti, *Choosing Equality, supra* note 83, at 187; Joseph P. Viteritti, *Stacking the Deck for the Poor: The New Politics of School Choice*, 14 BROOKINGS REV. 10 (1996).

argument. Without an effective school-choice program to help them, poor families do not have the same chance to educate their children according to the teachings of their faith as the middle class enjoys. The system of public incentives functions to foreclose that possibility.

In its initial form, the Milwaukee Choice Program was the target of two legal challenges, both of which it sustained. In the first, choice opponents claimed that the program violated a provision in the state constitution calling for the creation of a "uniform" system of schools.[133] In 1992, in *Davis v. Glover*,[134] the Wisconsin Supreme Court upheld the statute under the "public purpose doctrine," finding that the program was a limited experiment designed to improve the educational opportunities of poor children.[135] In 1993, the Landmark Legal Foundation brought a second challenge in federal court, claiming that the exclusion of parochial schools from the program violated the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In 1995, a federal district court in *Miller v. Benson*[136] focused on the fact that the state program made payments directly to the schools rather than to students, and thus it rejected the plea to expand the program to religious schools.[137]

Shortly after the *Miller* decision in 1995, Governor Tommy Thompson signed an amended version of the school-choice law that increased the total number of scholarships, allowed vouchers to be issued in the name of parents and then signed over to schools, and permitted the participation of religious schools.[138] The last provision was the primary basis for the recent legal challenge that went to the State's highest court. Plaintiffs

133. The Wisconsin Constitution requires that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . ." WIS. CONST. art. X, § 3.

134. 480 N.W.2d 460 (Wis. 1992).

135. *See id.* at 463 ("Sufficient safeguards are included in the program to ensure that participating private schools are under adequate governmental supervision reasonably necessary under the circumstances to attain the public purpose of improving educational quality."). For an analysis of the case, see James B. Egle, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459 (1992).

136. 878 F. Supp. 1209 (E.D. Wis. 1995).

137. *See id.* at 1216 ("The present state of First Amendment law compels this court to hold that the plaintiffs' request to expand the current Choice program to make tuition reimbursements directly payable to religious private schools who admit eligible Choice program school-children would violate the Establishment Clause.").

138. *See* 1995 WIS. ACT § 4002, amending WIS. STAT. § 119.23(2)(a) (1995-96).

claim that the amended law violates both the Establishment Clause and a provision of the Wisconsin constitution that proscribes the use of public funds to benefit religious organizations.[139] Anticipating the possible rejection of their First Amendment claim, plaintiffs also argue that the Wisconsin judiciary generally applies the separation standard "independently and more strictly than its federal counterpart."[140] When Judge Paul B. Higgenbotham handed down his decision for the trial court in January 1997, he agreed that the Wisconsin Constitution "provides an independent and more prohibitive basis for review . . . than is provided by federal jurisprudence of the Establishment Clause of the First Amendment."[141] Though the judge was careful to reach his conclusions solely on state constitutional grounds, his ardent disagreement with evolving federal standards was clear from his strongly worded opinion, which focused on the manner of payment and his own reading of the program's beneficiaries. Under the new procedures, a check payable to the order of the parent is sent directly to the school chosen by the parent with the requirement of a dual endorsement by the parent and the school. Reviewing the procedure, Judge Higgenbotham found that "[i]t can hardly be said that this does not constitute direct aid to sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept the myth."[142]

139. The Wisconsin Constitution reads: "Nor shall any person be compelled to attend, erect or support any place of worship . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." WIS. CONST. art. I, § 18. The court previously had rejected the claim of plaintiffs in this case that the program violated the "uniformity" clause of the state constitution. *See* Jackson v. Benson, No. 96 CV 1889, slip op. at 46-50 (Wis. Cir. Ct. Jan. 15, 1997).

140. *See* Brief for Respondents at 14, 22, Thompson v. Jackson, No. 95-2153-OA, L.C. No. 95CV1997 (Wis. Aug. 25, 1995).

141. Jackson v. Benson, No. 95 CV 1982, slip op. at 17 (Wis. Cir. Ct., Jan. 15, 1997). On petition from the Governor, the Supreme Court of Wisconsin had accepted original jurisdiction over the proceedings and issued a preliminary injunction against expanding the program either to involve more students or to include parochial schools. *See* Thompson v. Jackson, No. 95-2153 OA, L.C. Nos. 95CV1982 & 95CV1997 (Wis. Aug. 25, 1995) (order granting preliminary injunction). In March 1996, the Supreme Court of Wisconsin deadlocked in a three-to-three vote, with one member recusing herself, and remanded back to the Dane County Circuit Court presided over by Judge Higgenbotham. *See* Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

142. Jackson v. Benson, No. 96 CV 1889, slip op. at 28 (Wis. Cir. Ct. Jan. 15, 1997).

Although Judge Higgenbotham conceded that it may actually be "sound public policy"[143] to offer alternatives to poor children in Milwaukee's floundering public schools and that students would indeed benefit from the program, the fact that religious organizations would also benefit—in his mind, they would receive the primary benefit of the program—determined the case. He bolstered his conclusion with a line of reasoning, commonly argued by choice opponents, which suggests that aid to parochial school students functions as an incentive for students to attend the same religious schools, but simultaneously fails to recognize the structure of incentives that exists when government-run schools enjoy a monopoly over public support.[144]

Judge Higgenbotham's decision was upheld in a 2-1 ruling by a state appellate court in August of 1997. The appellate panel also reached its conclusion on the basis of state constitutional law.[145] The panel operated under the same assumption as the trial judge that the Wisconsin Constitution requires a more rigid separation between church and state than that found in the First Amendment,[146] an assumption not entirely supported by case law in Wisconsin. Unlike Washington, for example, where the record reveals a strict separationist philosophy, propelled by a ready contempt for federal standards, the case law history in Wisconsin is varied and more harmonic with federal standards.[147] If the state standards appear to change over time, these fluctuations respond at least in part to changing federal standards that the Wisconsin judiciary strives to follow.

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143. *Id.* at 3.

144. "The religious schools would be the primary beneficiaries of the government aid. The parents of students attending these schools would certainly gain benefit. Indeed such aid provides an inducement to parents to send their children to religious schools." *Id.* at 29.

145. "[B]eginning our analysis of the state constitutional issue enhances the economy of the effort.... [A] conclusion that the program fails under Article I, Section 18 [of the Wisconsin Constitution] will obviate a separate First Amendment analysis." Jackson v. Benson, 213 Wis.2d 1, 8 (Wis. Ct. App. 1997).

146. "[I]t is apparent that the authors of the Wisconsin Constitution intended to much more specifically curtail what the State may do in its interactions with religion than did the drafters of the Bill of Rights." *Id.* at 12.

147. The Wisconsin Supreme Court was one of the first in the Union to prohibit Bible reading in the classroom. *See* Weiss v. District Bd. of Sch. Dist. No. 8, 44 N.W. 967 (Wis. 1890). In 1919, the Wisconsin Supreme Court upheld a program that allowed returning veterans to use their benefits at either a high school or a college with a religious affiliation. *See* State *ex rel.* Atwood v. Johnson, 175 N.W. 589 (Wis. 1919).

Opponents of school choice in Wisconsin often cite two cases to support their legal arguments. In 1962, the state supreme court invalidated a program that provided bus transportation to parochial school children.[148] Ten years later, the same court invalidated a contract in which a Catholic university provided non-religious instruction at a state dental school.[149] On closer examination, these cases furnish weak support for the arguments against choice. Although the first decision seemed to contradict an earlier United States Supreme Court ruling upholding a similar busing program in New Jersey,[150] its effect was dulled the following year when the State passed a constitutional amendment permitting transportation services for parochial-school students. The amendment underscored the harmonizing tendency of state policymakers in Wisconsin. The 1972 decision was reached on both state and federal grounds by applying a "primary effect" test that was consistent with federal standards at the time.[151]

Subsequent cases in Wisconsin suggest a movement in the direction of greater accommodation in accord with changing federal standards. In 1974, the Wisconsin Supreme Court upheld a law in which religious schools were compensated on a contractual basis for services provided to handicapped children.[152] This time, the court applied the "primary effect" test to reach a different conclusion than it had two years earlier, and it ruled that "the mere contracting for goods or services for a public purpose with a sectarian institution is appropriate state action."[153] When the same judicial body approved the expenditure of public funds for a religious display that it deemed to be "neutral," it explained by stating, "We interpret [the Wisconsin Constitution] in light of United States Supreme Court cases interpreting the Establishment Clause."[154]

148. Here the court noted that the First Amendment "lends itself to more flexibility of interpretation" than the Wisconsin Constitution. State *ex rel.* Reynolds v. Nusbaum, 115 N.W.2d 761, 769-70 (Wis. 1962).

149. *See* State *ex rel.* Warren v. Nusbaum, 198 N.W.2d 650 (Wis. 1972).

150. *See* Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947).

151. *See* State *ex rel.* Warren v. Nusbaum, 198 N.W.2d 650, 659 (Wis. 1972).

152. *See* State *ex rel.* Warren v. Nusbaum, 219 N.W.2d 577 (Wis. 1974).

153. *Id.* at 583; *see also* Wisconsin Health Facilities Auth. v. Lindner, 280 N.W.2d 773 (Wis. 1979) (upholding use of public funds to support improvement of health facilities operated by religious organizations).

154. King v. Village of Waunakee, 517 N.W.2d 671 (Wis. 1994).

In 1996, the Wisconsin Supreme Court handed down another significant ruling when it supported the right of the Amish to refrain from obeying a law that required the posting of traffic emblems on horse-drawn buggies, which they claimed violated their religious customs.[155] Here the ruling rested on state constitutional grounds, and the court emphasized that "[T]he Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision."[156] What differentiates this case from others where state courts have sought to distinguish their standards from federal guidelines, is that here the state court was striving to extend the definition of legal rights for claimants. The result was not an abridgment of federal constitutional rights, but rather a broader protection of religious liberty, which is entirely permissible under our system of federalism.[157]

While the appellate panel's decision in the school-choice case was being taken to Wisconsin's highest court, the original 1995 injunction remained standing. This effectively excluded parochial schools from participation until June 1998 when the Supreme Court reversed the lower-court decisions upholding the program on both federal and state constitutional grounds.[158]

B. *Ohio*

The Ohio school-choice law enacted in 1995[159] is similar in intent to its Wisconsin counterpart in that its goal is to provide relief to economically disadvantaged children who are trapped in a failing public-school system. With this program, Ohio makes needs-based scholarships available to students in Cleveland,[160]

155. *See* State v. Miller, 549 N.W.2d 235 (Wis. 1996).

156. *Id.* at 239.

157. *Compare Miller*, 549 N.W.2d 235, *with* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that a generally applicable law is binding even when it conflicts with one's faith).

158. *See* Warner v. Benson, 578 N.W.2d 602 (Wis. 1998). In this decision, a 4-2 majority (one judge recused himself from the case) of the state supreme court ruled that the program allocating scholarships to students attending sectarian institutions was permissible under the First Amendment because (1) the funding was appropriated on a neutral basis; and (2) the funds directed to parochial schools got there as a result of individual choices made by parents. The court also rejected any claims that were made on the basis of state constitutional law.

159. OHIO REV. CODE ANN. §§ 3313.974-3313.979 (Anderson 1997).

160. Priority is given to students participating in the program who have total family incomes that do not exceed 200 percent of the federally determined poverty level. *See* OHIO REV. CODE ANN. § 3313.978(A) (Anderson 1997).

where the performance of the school district has proven to be so educationally and managerially inept that in 1995 a federal court ordered the system to be put under the control of the state superintendent of education.[161] The method of reimbursement is also similar to that of Wisconsin; checks are made payable to the parent and sent to the school, and a parent's endorsement is required before it can be cashed. Unlike the Wisconsin law, the Ohio statute permitted participation by religious schools from the outset. Public schools on the suburban fringe of Cleveland were also eligible to participate on a voluntary basis, but none have expressed an interest in doing so.

When the law was first reviewed at the trial level by Judge Lisa Sadler in July of 1996, its legality was upheld on both federal and state constitutional grounds.[162] A unanimous appellate court overturned her decision in May of 1997.[163] After a comprehensive review of federal jurisprudence—some of which supported the appellate court's findings and some of which did not[164]—the appellate panel concluded that the program in question violated the Establishment Clause.[165] To reach this conclusion, the court engaged in a remarkable exercise in legal reasoning which centered around the concept of "neutrality." The court focused on two major pieces of evidence as proof that the program did not meet the requirement of facial neutrality. The court first found fault with the non-participation of public schools, an astounding observation because the non-participation of government-run schools was a matter of choice rather than eligibility.[166] None of the public schools on the periphery of Cleveland that were eligible to participate in the program were willing to get involved. The court expressed dismay that the suburban districts were not compelled by law to

161. *See* Reed v. Rhodes, No. 1:73 CV 1300 (N.D. Ohio, Mar. 3, 1995) (order).

162. *See* Gatton v. Goff, Nos. 96CVH-01-193 & 96CVH-01-721 (Ohio Ct. Common Pleas, Franklin County July, 31, 1996).

163. Simmons-Harris v. Goff, Nos. 96APE08-982 & 96APE08-991 (Ohio Ct. App. May 1, 1997), *available in* 1997 WL 217583.

164. *See id.* at *4-*10 (reviewing the case law).

165. "Because the scholarship program provides direct and substantial, non-neutral aid to sectarian schools we hold that it has the primary effect of advancing religion in violation of the Establishment Clause." *Id.* at *10. The court obviously did not accept the argument that the program was a form of indirect aid.

166. "While the scholarship program facially suggests neutrality, we cannot ignore the fact that not a single public school chose to participate in the program for the 1996-97 school year." *Id.* at *7.

participate.[167] The court apparently believes it is preferable for poor students to commute to suburban public schools where they are shunned, rather than allow them to attend private and religious schools in their own communities where they are welcome.

What about public schools in Cleveland? Students could clearly choose to remain in them. Under the terms of the program, economically disadvantaged children remaining in the Cleveland public schools are eligible for special tutorial grants. This fact, however, did not satisfy the judicial panel. According to the court, this second factor provides a system of incentives that compromises the neutrality of the program. As the court explained:

> Given the well-documented educational failure of the Cleveland City School District, which is the Pilot Program's *raison d'etre*, it cannot be seriously argued that sending a child to a private sectarian school at state expense, and providing a child attending a Cleveland City School District school with tutoring at state expense are even remotely equivalent benefits.
>
> Because the scholarship program offers vastly greater benefits to parents who send their children to private, mostly sectarian schools, . . . the Pilot Program creates an impermissible incentive for parents to send their children to sectarian schools.[168]

Perhaps if the parochial schools of Cleveland were as bad as the court believes the public schools to be, the court would then permit poor children to choose their own schools. According to the court's reading, however, even this prospect is unlikely given the two religion clauses within the state constitution.[169] The court cites a significant body of case law which indicates that the provisions are "coextensive" with First Amendment

167. "[I]t was within the state's power to assure the neutrality of the scholarship program by compelling public school participation in the program." *Id.*

168. *Simmons-Harris*, Nos. 96APE08-982 & 96APE08-991, at *9.

169. "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship; and no preference shall be given, by law, to any religious society." OHIO CONST. art. I, § 7.

"The general assembly . . . will secure a thorough and efficient system of common schools throughout the State; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." OHIO CONST. art. VI, § 2.

protections,[170] but goes on to find their protection to be "at least as great as that provided by the Establishment Clause."[171]

The Ohio Court of Appeals cited federal case law supporting the notion that States are permitted to "construe their state constitutions as providing different or even greater constraints on government action than those found in the United States Constitution."[172] It also gave considerable attention to the *Witters* case, noting with approval how the Supreme Court found that the Bible student's claims did not conflict with the Establishment Clause while still leaving the door open for an independent state review;[173] and how the Washington court on remand invalidated the student's use of public funds under the provisions of the state constitution.[174] These considerations go to the basic question of whether, and under what conditions, the Supreme Court would impose its evolving standard of individual religious rights upon the States; or, more pertinently, the important distinction between the States' legal prerogative to expand upon the Supreme Court's definition of rights and the States' lack of authority to diminish these rights.

Whether Ohio's highest court sustains the appellate ruling will ultimately depend on its reading of the Ohio Constitution and its own case law, both of which vary significantly from those in Washington. Ohio has a strong constitutional tradition of accommodation. The same article in the state constitution that forbids the government to compel anyone to support a particular form of worship or to favor one over another continues to read:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[175]

170. *Simmons-Harris*, Nos. 96APE08-982 & 96APE08-991, at *11-12.

171. *Id.* at *12.

172. *Id.* at *11 (citing California v. Greenwood, 486 U.S. 35, 43 (1988) (holding under the Fourth Amendment that defendant had no reasonable right to privacy in garbage placed outside house for collection)).

173. *See id.* at *6 (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)).

174. *See id.* at *11 (citing Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989)).

175. OHIO CONST. art I, § 7.

These familiar words are taken directly from the Northwest Ordinance, adopted by the first Congress to govern the territory from which the State of Ohio was eventually carved.[176] Originally crafted by John Adams as part of the Massachusetts Constitution of 1780, this language is the product of an age when religious congregations served as a foundation for civil society, and most education was conducted under the supervision of the clergy.[177] Nothing in the modern record of the court suggests that the Ohio judiciary would seriously entertain allowing direct aid to parochial schools. Precedent exists, however, for the court to look favorably upon a publicly supported voucher program that enables parents to choose schools reflecting their own religious values.

An Ohio court in 1968 opined 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."[178] In the same opinion, the court states:

> We think it clear that the reference in Article I, Section 7 (of the Ohio constitution) to the encouragement of 'schools and the means of instruction' immediately following references to religious denominations, makes it clear that the word 'schools' contained in this constitutional provision is not limited to publicly owned and operated schools.[179]

The Ohio judiciary has been particularly sympathetic to the idea of parental sovereignty when it comes to matters of education. In its 1976 *State v. Whisner* decision,[180] the Ohio Supreme Court, echoing the principles originally articulated in *Pierce*, referred to a "natural law" precept in the state constitution[181] establishing the fundamental right of parents "to direct the upbringing and education of their children in a manner . . . they deem advisable."[182] This key ruling is one of several opinions in which the Ohio judiciary interpreted its own

176. *See* CURRY, *supra* note 19, at 218.

177. *See supra* Part II.A.

178. Honohan v. Holt, 244 N.E.2d 537, 541 (Ohio Ct. Common Pleas, Franklin County 1968).

179. *Id.* at 544.

180. 351 N.E.2d 750 (Ohio 1976).

181. OHIO CONST. art. I, § 7 (stating that "[a]ll men have a natural and indefeasible right to worship Almighty God . . . .").

182. *Whisner*, 351 N.E.2d at 769-70.

constitution in tandem with federal guidelines. The Ohio judiciary pointedly notes that the state legislature could construe any permissible differences between the two in a way that expands, rather than contracts, the definition of individual rights.[183]

All this leads to the conclusion that the Ohio Supreme Court could very well overrule the appellate panel's decision. Until a determination is made, the attorney general's office has been granted a stay of execution pending appeal, allowing the program to continue temporarily in operation.[184]

C. *Vermont*

Vermont has the oldest school-choice law in the nation. In 1969, its legislature passed a statute that permits students in towns that do not maintain a high school to attend a public or private school outside the district and to pass the costs on to the State.[185] As of 1997, ninety-one school districts were participating in the "tuitioning" program, allowing students to attend high school in other Vermont towns or in places as far away as New Hampshire, Massachusetts, Maine, Connecticut, Pennsylvania, Illinois, and Michigan.[186] Until recently, many students attended sectarian schools because the "tuitioning" statute does not prohibit the participation of religious institutions.[187] In 1996, however, the State's department of education terminated all general state aid to the Chittenden Town School District after

183. *See also* Protestants and Other Americans United for the Separation of Church and State v. Essex, 275 N.E.2d 603 (Ohio 1971) (distribution of public funds for guidance, testing, and counseling in non-public schools); Preterm Cleveland v. Voinovich, 627 N.E.2d 570 (Ohio Ct. App. 1993) (physicians to provide specified information to women seeking abortions); *In re* Landis, 448 N.E.2d 845 (Ohio Ct. App. 1982) (marital separation agreement requiring parent to pay children's tuition at sectarian school); Honohan v. Holt, 244 N.E.2d 537 (Ohio Ct. Common Pleas, Franklin County 1968) (transportation of private religious school students at public expense).

184. *See* Beth Reinhard, *Cleveland's Voucher Program Renewed for 2 Years*, EDUC. WK., July 9, 1997, at 17.

185. The law reads:

> The electorate authorizes the school board to close an existing high school and to provide for the high school education of its pupils by paying tuition in accordance with law. Tuition for its pupils shall be paid to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state . . . .

VT. STAT. ANN. tit.16, § 822 (1990 & Michie Supp. 1997).

186. *See* Mark Walsh, *Vt. District Provides Latest Test in Battle Over Religious Vouchers*, EDUC. WK., Sept. 18, 1996 at 1, 16.

187. *See Whisner*, 351 N.E.2d at 750.

the Board of Education in the district approved the use of public funds to pay for the tuition of fifteen students attending Mount Saint Joseph Academy, a Catholic high school. The state education department declared the payment unconstitutional. The Chittenden Board disagreed and initiated litigation in state court. In July of 1997, a trial court presided over by Judge Alden T. Bryan upheld the decision of the education department.[188] That ruling is currently under appeal.

Despite this recent aberration, Vermont has one of the most accommodationist legal traditions in the entire country. Its Ministerial Act of 1783 created taxing authority for the purpose of "enabling towns and parishes to erect proper houses for worship, and support ministers of the gospel."[189] This type of local option scheme was customary in New England during the early years of the republic.[190] It's century-old constitution is notable today for its open embrace of religious institutions, especially in the context of education. The document merits quoting at length as an illustration of the State's accommodationist ethos:

> Laws for the encouragement of virtue and prevention of vice and immorality ought to be kept constantly in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious or charitable purposes, shall be encouraged or protected in the enjoyment of privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.[191]

Little in the history of the State suggests that its judiciary has sought to adopt an independent set of constitutional standards from those articulated by the Supreme Court in its interpretation of the First Amendment. To the extent that the Vermont courts have distinguished their standards of review from those of their federal counterparts, it has struck a more

188. *See* Chittenden Town Sch. Dist. v. Dep't of Educ., No. SO478-96 RcC (Rutland County Super. Ct., Vt. June 27, 1997).

189. *Quoted in id.* at 10.

190. *See supra* note 20 and accompanying text (tracing the current local option system in New England back to colonial times).

191. VT. CONST. ch. II, § 68.

permissive attitude towards establishment and has established stronger protections around free-exercise rights.[192] Overall, harmony has characterized Vermont's approach to federal jurisprudence.

Until 1961, the common practice was to allow students participating in the tuitioning program to attend parochial schools if they chose to do so. In *Swart v. South Burlington Town School District*,[193] however, the Vermont Supreme Court held that the practice violated the Establishment Clause of the First Amendment by applying more restrictive guidelines it understood to be emerging at the federal level.[194] This pronouncement would dictate the scope of school choice in Vermont until 1994, when a second ruling came down from the state supreme court. In *Campbell v. Manchester Board of School Directors*,[195] the court allowed the town of Manchester to reimburse a family for tuition paid to an Episcopalian school. *Campbell* was a deliberate re-examination and reversal of *Swart*, occasioned by the more accommodationist posture that had begun to prevail on the U.S. Supreme Court: "[The Swart] holding was based on the First Amendment jurisprudence as it then stood.... [J]urisprudence has evolved greatly since 1961.... Thus, we must examine the difficult constitutional issues anew in light of more recent teachings."[196]

Encouraged by the *Campbell* decision, other Vermont districts began to consider the prospect of allowing religious schools to participate in the tuitioning program. The Middle Town Springs School Board actually developed a policy statement on reimbursement, which it sent to the State's department of education for review. In March of 1995, the state commissioner replied with a legal opinion approved by the state attorney

192. *See* State v. DeLaBruere, 577 A.2d 254 (Vt. 1990) (indicating that the Vermont Constitution affords greater protection for the free exercise of religion than does the First Amendment); Vermont Educ. Bldg. Finance Agency v. Mann. 247 A.2d 68 (Vt. 1968) (indicating the Establishment Clause restrictions are greater than those in the Vermont Constitution).

193. Swart v. South Burlington Town Sch. Dist., 167 A.2d 514 (Vt. 1961) (finding that Vermont Constitution establishment restrictions are greater than those in the First Amendment).

194. In an apparent concession to federal standards over the State's own, the court ruled, "In the domain of religious liberty, the resolute history of the First Amendment seems the more demanding. Following the pattern established below, we search the question from the federal aspect." *Id.* at 518.

195. 641 A.2d 352 (Vt. 1994).

196. *Id.* at 357.

general,[197] which was subsequently distributed to every school district superintendent in the State.[198]

The commissioner's statement declared that tuition reimbursement for students at sectarian institutions is not permitted under the Vermont Constitution and the Establishment Clause of the First Amendment.[199] It also issued a new policy requiring that all payments for private-school tuitions must be made directly to the participating institution and forestalled any reimbursement procedures that would use parents as a conduit.[200] The pronouncement of this policy marked the first time in the 126-year history of the tuitioning program that any public body—administrative or judicial—had offered an opinion indicating that it mattered whether tuition payments were directed to the parent or the school. The significance of the opinion was unmistakable: given the current reading of the First Amendment followed by the Supreme Court, the revised manner of payment would make the program more vulnerable to judicial invalidation.[201]

Direct aid became the pivotal question upon which Judge Bryan based his trial court decision upholding the state commissioner's policy of excluding religious institutions from participation in the choice program.[202] The Rutland County judge refused to entertain the plea that singling out sectarian schools for ineligibility had serious implications regarding religious liberty.[203] Dismissing the financial incentives and penalties imposed by the exclusionary policy, Judge Bryan noted

197. *See* Opinion of the Comm'r of Educ., State of Vermont (March 22, 1995).

198. *See* Memorandum of Transmittal, Vt. Dep't of Educ. (March 29, 1995).

199. *See id.*

200. *See id.*

201. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986) (upholding provision of state vocational rehabilitation assistance to a blind person attending a religious college on the condition that aid was given to the student rather than the school).

202. "The sole issue for our consideration in this declaratory judgment action is whether tuition payments made by tuitioning towns directly to sectarian schools are constitutional under the Vermont and United States Constitutions." Chittenden Town Sch. Dist. v. Dep't of Educ., No. SO478-96 RcC, at 2 (Rutland County Super. Ct., Vt. June 27, 1997).

203. [P]laintiffs have attempted to characterize this as an issue of "choice," and they claim that their rights under the First Amendment Freedom of Exercise Clause and Free Exercise aspects of the Vermont Constitution are being violated .... We disagree with that characterization .... This is not a case of the state impinging upon the practice of a sincere religious belief.

Id. at 5.

that "[a]ll Vermont parents have the right to choose to send their children to parochial schools."[204] Likewise, the trial court judge dismissed the principles set down by Vermont's highest court in *Campbell*, which in fact seemed to be more consistent with the accommodationist language contained in the state constitution.[205]

The court eventually meandered into a discussion of policy issues underlying the school-choice debate and registered a concern that "[n]ew sectarian schools of all kinds, perhaps on the fringe of the religious mainstream, seeing the potential for financial support, would open their doors."[206] It went on to warn of "debates over the school budget" that "will intensify and divide over religious lines."[207] These remarks go to the core of the constitutional issue that has driven the church-state debate in America since the Nineteenth Century: our tolerance for religious minorities, which the Free Exercise Clause is supposed to ensure, and the vitality of religious pluralism, which nourishes the democratic process. The Framers never intended to resolve these questions with a state-imposed consensus over religious belief or a government-controlled monopoly over education.

IV. SCHOOL CHOICE AND THE FIRST AMENDMENT

The American constitutional system was constructed on the premise that robust religious pluralism is a sound foundation for democratic government. Madison's famous prescription in *Federalist No.10* that numerous and diverse factions in a republic would lessen the threat of majority tyranny has become an axiom of faith in American political theory.[208] Less attention has

204. The court continued, "Merely by taking the position that the Establishment Clause prohibits the taxpayer from funding of a child's education, the state is not interfering with the right of parents to choose a religious education for their children." *Id.* at 5-6.

205. "We recognize that this conclusion is at odds with the Vermont Supreme Court's decision in *Campbell*.... We question the reasoning of *Campbell*. On the facts, *Campbell* seems a departure from the core principles of the Establishment Clause." *Id.* at 46-47.

206. *Id.* at 41.

207. *Chittenden*, No. SO478-96 RcC, at 41.

208. "Extend the sphere and you take in a variety of parties and interests; you make it less probable that the majority of the whole will have a common motive to invade the rights of other citizens." THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). For discussions of Madison's prescription for resolving problems of factions, see DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* 59-110 (1984); Peter S. Onuf, *James Madison's Extended Republic*, 21 TEX. TECH L. REV. 2375, 2382-87 (1990).

been given, however, to Madison's understanding that religious groups were among the most significant political factions in eighteenth-century America, whose proliferation and multiformity were so essential to the political pluralism he envisioned. In *No. 52*, he wrote:

> In a free government the security of civil rights must be the same as that for religious rights. It consists in one case in the multiplicity of interests, and in the other the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . .[209]

If there is one episode in the American experience that validates Madison's concerns, it is the early history of the common school where the dominant political majority was able to employ publicly supported, government-run schools as a vehicle for promoting its own religious beliefs. This majority simultaneously exercised its political power in the national and state legislatures to curb the influence of religious minorities whom they scorned. Although this manifestation of religious intolerance reached its height with the Blaine Amendment, the lessons of the story still pertain. The religious orthodoxy of mainstream Protestantism has been replaced with an ethos of secularism that at times has been similarly insensitive to, and contemptuous of, the beliefs of sectarian minorities.

Under the influence of philosophers like John Dewey, twentieth-century American educators finally did embark on a serious campaign to rid the public-school curriculum of religious influence; however, at least in Dewey's mind, the movement was less motivated by religious tolerance than by an avid contempt for religiously motivated beliefs.[210] Dewey's philosophical "pragmatism" allowed little room for matters of faith, which he dismissed as a form of superstition unfit for the classroom.[211] Dewey was also convinced that public schools could

209. THE FEDERALIST NO. 52, at 324 (James Madison) (Clinton Rossiter ed., 1961).

210. *Cf.* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN EDUCATION, 1876-1957, at 115-26 (1961) (providing a historical analysis of Dewey's influence in the progressive education movement).

211. For Dewey, instruction should be based upon scientific "truths" that are verifiable through empirical evidence. *See* JOHN DEWEY, A COMMON FAITH 28 (1934) (arguing that "the claim on the part of religions to possess a monopoly of ideals and of the supernatural means by which alone, it is alleged, they can be furthered, stands in the way of the realization of distinctively religious values inherent in natural experience"); JOHN DEWEY, DEMOCRACY AND EDUCATION 219-230, 236 (1916) (illustrating Dewey's views on the respective roles of religion and science in education); STEVEN C. ROCKEFELLER, JOHN

serve as an engine for social change.[212] In this sense, Dewey shared a common perspective with Horace Mann that has remained an essential feature of the public-school curriculum: a conviction that government-run schools can and should be used to impart societal values agreed upon through a process of political consensus.[213]

Although the secular consensus arrived at by the governing majority is not always motivated by an outward hostility for religion, it is often characterized by insensitivity to the concerns articulated by people of faith.[214] Note, for example, the case of the school board which decides to require a form of sex education that promotes the use of condoms to prevent pregnancy and disease. Although such a program might be condoned by a majority of parents as promoting positive social objectives, it could also offend others whose religious values are compromised by the recommended practices.

Until recently, offended parents in New York were not even given the option to remove their children from such a program.[215] It was a policy choice imposed on all students who attended city schools, or more precisely, on students whose parents lacked the financial means to choose a private institution that reflected their own values. The New York case is one of many examples of offensive actions taken by presumptuous school boards.[216] Such instances are likely to grow in number as decisionmakers in the public-school monopoly

DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM *passim* (1991) (commenting on Dewey's perspective).

212. *See generally* JOHN DEWEY, EXPERIENCE AND EDUCATION (1938).

213. *See* BRIAN S. CRITTENDEN, PARENTS, THE STATE AND THE RIGHT TO EDUCATE 129-33 (1988).

214. *See* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 865-73 (1988) (discussing tensions between religion and secularism in public education).

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

216. In August 1997, a group of Jewish parents resorted to litigation in federal court when school officials in Alabama required their children to remove their Yarmulkes and bow their heads during the recital of Christian prayers. *See Parents of Jewish Students Sue Alabama School System*, EDUC. WK., Sept. 10, 1997, at 4; *see generally* STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING (1983) (providing case studies of conflict between parental values and public policy promulgated by education authorities); STEPHEN E. BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS (1993) (same); Rosemary C. Salomone, *Struggling with the Devil: A Case Study of Value in Conflict*, 32 GA. L. REV. (forthcoming 1998) (same). For an extended essay on the school as a battleground over values, see BARBARA B. GADDY ET AL., SCHOOL WARS: RESOLVING OUR CONFLICTS OVER RELIGION AND VALUES (1996).

impose their values on an increasingly diverse population of students, whether they come from Catholic, Jewish, Protestant, Muslim, or Hindu homes.[217] When listening to school officials defend their sex-education curriculum on the basis of secular neutrality, one is reminded of Horace Mann's insistence that reading the *King James Bible* is a neutral act.[218] Both arguments were out of touch with the sentiments of religiously motivated parents but nevertheless were authoritatively imposed on them through the political process.

Notwithstanding the Supreme Court's pronouncements in *Pierce*[219] and *Meyer*,[220] we live in a time when "liberal" scholars from prestigious universities impudently put forward arguments to validate government actions that purposely undermine parental prerogatives to control the upbringing of their children.[221] In a widely read and cited book, Amy Gutmann of Princeton conceives of public education as a social mechanism to "convert children away from the intensely held [religious] commitments of their parents."[222] Such assertions have provoked serious debate in the academe,[223] and the governmental practices they engender have given rise to a popular literature determined to abate "the assault on parenthood" imposed by the liberal state.[224] The same discussions also serve to underscore the enormous risks that ensue from the unchecked power of a government-run educational monopoly in a free society. In a response to Gutmann and others, William Galston explains:

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217. *See* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169 (1996) (arguing that the common school may be incapable of accommodating diverse religious and philosophical orientations that exist in a pluralist society).

218. *See* GLENN, THE MYTH OF THE COMMON SCHOOL, *supra* note 38 at 169.

219. Pierce v. Society of Sisters, 268 U.S. 510 (1925); *see supra* text accompanying notes 97-98.

220. Meyer v. Nebraska, 262 U.S. 390 (1923); *see supra* text accompanying notes 99-100.

221. *See, e.g.*, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 160-63 (1980); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 470-72, 485-91 (1995); *see generally* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995).

222. AMY GUTMANN, DEMOCRATIC EDUCATION 121 (1987).

223. *See* Stephen G. Gilles, *On Educating Children: A Parental Manifesto*, 63 U. CHI. L. REV. 937, *passim* (1996) (arguing for parental rights from both a philosophical and legal perspective); *see also* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 241-56 (1991) (written from the perspective of liberal political theory).

224. *See, e.g.*, DANA MACK, THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY (1997).

> Perhaps the most poignant problem raised by liberal civic education is the clash between the content of that education and the desire of parents to pass on their way of life to their children. Few parents, I suspect, are unaware of or immune to the force of this desire. What could be more natural? If you believe that you are fit to be a parent you must also believe that at least some of the choices you have made are worthy of emulation by your children, and the freedom to pass on the fruits of those choices must be highly valued. Conversely, who can contemplate without horror totalitarian societies in which families are compelled to yield all moral authority to the state?[225]

Indeed among the great tests that will determine whether the nations of the former Soviet Bloc are capable of transforming themselves into free societies is their capacity to evolve new forms of schooling outside the structure of the powerful government bureaucracies which have controlled education for more than a half century. Complicit with the ideal of a healthy civil society in these former totalitarian regimes is the prospect of religious freedom that allows people to form associations that congeal around diverse sets of values generated beyond the framework of government. As Charles Glenn has observed in his comprehensive survey of these burgeoning democracies in Eastern and Central Europe, many families are striving to realize their new-found political independence with the formation of religious and independent schools—institutions that reflect their own parental values.[226] Their struggle is a difficult one, as it occurs within a political culture that has been shaped around the norm of compliance.

A. *A High Wall of Intolerance*

Two hundred years ago the authors of the Bill of Rights set down a principle of religious freedom designed to eliminate the prospect of an established church: an unacceptable arrangement that would integrate political and ecclesiastic power so as to curtail the free-exercise rights of religious minorities. The religious establishment that motivated their action was fostered by an aristocratic foreign government whose yoke they had fought a revolution to lift. A century later,

225. GALSTON, *supra* note 223, at 251-52.

226. *See generally* CHARLES L. GLENN, EDUCATIONAL FREEDOM IN EASTERN EUROPE (1995) (providing case studies of the former Soviet Union and the Eastern Bloc nations).

Catholics and other religious minorities waged a second religious war. This time the battle was fought against a domestic ruling majority that had attempted to impose a religious orthodoxy of its own. This time the war resulted in only a limited victory, partially explained by the clever manipulation of constitutional principles and symbols to thwart the intent of the Framers.

In the present century, the struggle has taken a new twist. By and large, Americans remain a religious people who value the freedom of conscience their forebears fought so hard to attain.[227] But now, that liberty is being threatened by a secular order that could undermine the free-exercise rights of religious people. Once again the transgression, in typically American fashion, is being committed in the name of constitutionalism. Once again, at least to the extent that the debate revolves around the issue of school choice, the outcome is of particular consequence for the more disadvantaged members of society.[228]

This is not merely an academic debate over abstract legal principles. In the previous Part,[229] we observed how courts in three States engaged in an imaginative interpretation of legal doctrines and precedents to limit the choices available to poor parents desiring a religious education for their children. This creative process of "constitution-making" was orchestrated in concert with confusing and inconsistent standards set down by the United States Supreme Court. Although it would not occur until the latter half of the Twentieth Century, the High Court

227. A recent study by The Pew Research Center for the People and the Press documents a high level of religiosity among Americans: 59 percent claim that religion is very important in their life; 72 percent believe in God; and 39 percent go to church at least once a week. *See* The Pew Research Center for the People and the Press, The Diminishing Divide: American Churches, American Politics (June 25, 1996).

228. Although the school wars of the Nineteenth Century were focused around the religious interests of white immigrant populations, today the issue has a more prominent racial dimension. This racial dimension results not only because of the scope of school-choice proposals that target the urban poor, but also because of the very significant role that churches play in minority communities. There is a large body of social-science evidence documenting this phenomenon. The recent Pew Research Center study found that black Americans are more likely than any other religious group to connect religious activity with political activity and social issues. *See id.* at 31; *see also generally* C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE (1990) (discussing the social and political significance of the black church); HART M. NELSEN & ANN K. NELSEN, THE BLACK CHURCH IN THE SIXTIES (1975) (same); SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 519 (1995) (establishing a strong empirical connection between church activism and civic activism among the disadvantaged).

229. *See supra* Part III.

eventually came to play a leading role in the act of interpretation that would translate disestablishment into separation and promote the idea that any public action which benefits a religious institution jeopardizes religious freedom—no matter how incidental its benefits or how it advances individual free-exercise rights.

It was not until *Cantwell v. Connecticut*,[230] decided ten years after enunciating the child-benefit principle in *Cochran v. Board of Education*,[231] that the Supreme Court incorporated the Free Exercise Clause under the protections of the Fourteenth Amendment. It was seven years after that, in *Everson*,[232] when the Establishment Clause was made fully applicable to the States through incorporation. As might be anticipated, it is the latter decision that has attracted more attention from strict separationists. What draws them to the opinion is Justice Black's application of the famous Jeffersonian metaphor (originally attributable to Roger Williams) calling for a "wall of separation" between church and state:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a State nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.... In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[233]

What separationists neglect to emphasize about the landmark *Everson* decision is the fact that the Court upheld the

230. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that the "liberty" embodied in Fourteenth Amendment embraces liberties guaranteed by First Amendment).

231. 281 U.S. 370 (1930).

232. Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947).

233. *Id.* at 15-16 (citation omitted). Daniel Dreisbach, analyzing a series of five proposals Jefferson put before the Virginia legislature, points out that Jefferson was more an accommodationist than is commonly believed. *See* Daniel Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159 (1990) (arguing that Jefferson held a more accommodationist view of church-state relations). *But see* Walter Berns, *Religion and the Founding Principle*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 204 (Robert H. Horowitz ed., 3d ed. 1986) (arguing that the Founders meant for religion to be subordinate to the state).

constitutionality of a program that reimbursed parochial school parents for transportation costs incurred by their children. Here, as in *Cochran* seventeen years earlier, it drew a significant distinction between benefits appropriated to parents (or children) and benefits granted to religious institutions these pupils attended.[234] Moreover, the Court specifically identified attendance at a sectarian school as a form of religious exercise protected by the First Amendment that could not be encumbered by the state. The Supreme Court did not move fully into a separationist mode of reasoning on state aid until it formulated the "*Lemon* test" in 1971; but even here the thought pattern was convoluted and confusing.[235]

It was in the *Lemon v. Kurtzman*[236] ruling that the Supreme Court set down three criteria for reviewing First Amendment cases, prohibiting any government action that: (1) has no secular purpose; (2) has a "primary effect" of advancing religion; or (3) fosters "excessive entanglement" between church and state.[237] The principles inherent in *Lemon* appeared at an odd time in the evolution of the Court's jurisprudence. Although the Court had employed "purpose and effect" criteria to outlaw

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

Everson, 330 U.S. at 16.

235. *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). In the meantime the Court had handed down a number of decisions suggesting an accommodationist leaning, but by no means showing total consistency on the issue of separation. *See* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a released-time program offered outside the public-school building); McCollum v. Board of Educ., 333 U.S. 203 (1948) (invalidating a released-time program for religious instruction on public-school premises); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (invalidating the recitation of the Lord's Prayer in Pennsylvania schools); Engle v. Vitale, 370 U.S. 421 (1962) (striking down the recitation of a "Regents Prayer" in New York schools); Gallagher v. Crown Kosher Mkt., 366 U.S. 617 (1961) (upholding Sunday closing laws); Braunfeld v. Brown, 366 U.S. 599 (1961) (same); Two Guys from Harrison-Allentown Inc. v. McGinley, 366 U.S. 582 (1961) (same); McGowan v. Maryland, 366 U.S. 420 (1961) (same).

236. 403 U.S. 602 (1971).

237. *See id.* at 614-15. Here the Court ruled that giving salary supplements to private-school instructors engaged in teaching secular subjects requires close oversight, and therefore involves "excessive entanglement." *See also* Dicenso v. Robinson, 403 U.S. 602 (1971) (companion case); Sanders v. Johnson, 403 U.S. 955 (1971) (upholding lower court decision invalidating public payment to private-school teachers for teaching secular subjects).

school prayer in *Abingdon School District v. Schempp*[238] in 1963, five years later it upheld the "child-benefit" principle in a New York state case involving a textbook loan program encompassing public, private, and parochial school children.[239]

The year before *Lemon*, the same Supreme Court in *Walz v. Tax Commission of New York*[240] upheld tax exemptions to religious institutions, with Chief Justice Burger rejecting the idea of complete separation in favor of a "benevolent neutrality,"[241] and Justice Brennan declaring that "government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities."[242]

The *Lemon* opinion itself refers approvingly to the *Walz* ruling and the latter's warning against "sponsorship, financial support, and active involvement of the sovereign in religious activity."[243] Chief Justice Burger, writing for the majority in *Lemon*, explained that the Court's prior holdings "do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[244]

Facially, the three-part test presented in *Lemon* provides a vague standard for assessing government programs that relate to religious institutions. The language outlining the second and third prongs of the *Lemon* test is especially imprecise. How can one determine whether the "primary effect" of a governmental action is to benefit a religious organization? What does "excessive entanglement" really encompass? For strict separationists, any publicly supported program that results in an incidental benefit to a religious institution might be deemed offensive, and any interaction between church and state could be declared "excessive."

In 1973, the Supreme Court invalidated a New York law that offered tuition allotments to the poor and tax relief to other

238. 374 U.S. 203 (1963).

239. *See* Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968) (citing *Everson* and *Cochran* as precedent).

240. 397 U.S. 664 (1970).

241. *Id.* at 669.

242. *Id.* at 689 (Brennan, J., concurring).

243. *Lemon*, 403 U.S. at 614-15 (citing *Walz*, 397 U.S. at 674-76).

244. *Id.* at 614.

parents whose children attended parochial schools.[245] Completely rejecting the child-benefit concept which it had accepted in prior rulings, the majority in *Committee for Public Education and Religious Liberty v. Nyquist*[246] concluded that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions."[247] Taken together, the *Lemon* and *Nyquist* rulings would serve as the philosophical foundation for a series of decisions negating the legal distinction between direct and indirect aid.[248] In outlawing a Pennsylvania program of partial tuition reimbursement, the Court completely lost sight of the benefits that might accrue to parents and children. The majority was so preoccupied with separation that they engaged in speculation on the motivations behind the law in question, discerning that the statute was "intended . . . to preserve and support religion-oriented institutions."[249]

Throughout the remainder of the 1970s, the Supreme Court issued a wide-ranging set of pronouncements that did not appear to flow from a consistent formulation of philosophical principles.[250] Nevertheless, the decade of decisions that emerged from *Lemon* and *Nyquist* would provide legal precedent for those inclined to erect a high wall of intolerance against school choice. These precedents would influence the outcome of

245. *See* Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

246. 413 U.S. 756 (1973).

247. *Id.* at 793.

248. *See* Sloan v. Lemon, 413 U.S. 825, 830, 832 (1973) (ruling that a partial reimbursement of tuition "had an impermissible effect of advancing religion" because it provided an "incentive for parents to send their children to sectarian schools"); Levitt v. Committee for Public Educ. and Religious Liberty, 413 U.S. 472, 480 (1973) (striking down the reimbursement of costs to parochial schools incurred by administering state-mandated functions as "impermissible aid to religion"). For specific applications of these rules, see the following companion cases, Marburger v. Public Funds for Public Schools, 413 U.S. 916 (1973) (reimbursement of educational materials); Grit v. Wolman, 413 U.S. 901 (1973) (tax credits for school expenses).

249. *Sloan*, 413 U.S. at 832.

250. *See* Wolman v. Waters, 433 U.S. 229 (1977) (approving funds for textbook loans, standardized tests, diagnostic tests, and therapeutic services, but striking down provisions in the same Ohio law supporting instructional materials and field trips); Meek v. Pettenger, 421 U.S. 349 (1975) (approving the part of a Pennsylvania law that loaned textbooks, but invalidating the part that would make specialized teachers available); Hunt v. McNair, 413 U.S. 734 (1973) (upholding a South Carolina statute financing bonds for a religious college); *see also* Byrne v. Pub. Funds for Public Sch., 442 U.S. 907 (1979) (rejecting tax relief programs); Franchise Tax Board v. United Americans for Public Schools, 419 U.S. 890 (1974) (same).

litigation on both the federal and state levels. As the decisions handed down recently by the state courts in Wisconsin,[251] Ohio,[252] and Vermont[253] demonstrate, the principles enunciated in *Lemon* and *Nyquist* would remain an important part of the continuing legal dialogue long after the Supreme Court had returned to standards that were consistent with the more accommodationist intentions of the Framers.

B. *A Greater Accommodation*

Signs of a retreat began to appear on the Supreme Court in 1980 when it approved a New York statute that allocated funds to private and parochial schools for administering exams and collecting data required by the state education commissioner.[254] It was not until the 1983 decision in *Mueller v. Allen*,[255] however, that the Court handed down a landmark decision approving a Minnesota provision granting a tax deduction to parents for costs they incurred for tuition, textbooks, and transportation.[256] The *Mueller* ruling, which would guide all future deliberations by the Court on matters concerning state aid to religious schools, proved to be significant on several counts: its reintroduction of the distinction between direct and indirect aid,[257] its relaxation of the "primary effect" rule,[258] and its overall rejection of the *Lemon* test as a rigid formula for judicial review.[259]

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251. *See* Jackson v. Benson, 213 Wis.2d 1 (Wis. Ct. App. 1997).

252. *See* Simmons-Harris v. Goff, No. 96APE08-982 & No. 96APE08-991 (Ohio Ct. App. May 1, 1997).

253. *See* Chittenden Town Sch. Dist. v. Dep't of Educ., No. SO478-96 RcC (Rutland County Super. Ct., Vt. June 27, 1997).

254. *See* Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980). The court had found a similar program unconstitutional in *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973). *But see* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 117 S. Ct. 1997 (1997) (striking down a general allocation to parochial schools for secular programs); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by Agostini*, 117 S. Ct. 1997.

255. 463 U.S. 388 (1983).

256. *See id.* at 402-03; *see also* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska's paying a chaplain to open legislative sessions with a prayer).

257. Writing for the majority, then-Justice Rehnquist declared, "aid to parochial schools is available only as a result of decisions of individual parents." *Mueller*, 463 U.S. at 399.

258. In suggesting that the "primary effect" test be relaxed, the Court in this case actually recognized that most parents who would take advantage of the tuition provision had children in Catholic institutions. *See id.* at 400-01.

259. In his opinion for the Court, then-Justice Rehnquist referred to the three-part test as merely a "helpful signpost." *Id.* at 394. A year later Chief Justice Burger announced that neither the "*Lemon* test" nor any "fixed per se" rule was sufficient in

What seemed paramount to the Court in distinguishing *Mueller* from the earlier *Nyquist* case, was that, in the former, aid was made available only to private-school parents (and their children), but, in the latter, aid was made available to a broad class of beneficiaries. This consideration would also figure into the Court's reasoning in *Witters v. Washington Department of Services of the Blind*,[260] where it found that the use of state aid by a blind student to attend a Bible college in Washington was permissible under the First Amendment. Taken in conjunction with the child-benefit concept, this principle of neutrality has emerged as a key element in the Court's thinking during the "post-*Lemon*" era, which began in the early 1980s and has continued to grow more accommodationist regarding state aid to religious schools.[261]

As articulated by Justice Powell in his concurring opinion in *Witters*, financial aid appropriated by the state can be deemed constitutional if it meets three criteria: (1) the aid is neutral on its face regarding religion; (2) funds are equally available to students attending private and public schools; and (3) any aid to religious schools results from the private decisions of individuals.[262] Although *Witters* left the door open for the States to set their own more restrictive standards for separation, subsequent decisions by the Rehnquist majority suggest that, notwithstanding its devolutionary approach to federalism,[263] the Court has moved towards a more affirmative understanding of individual rights on the question of church-state separation.

In its 1991 *Board of Education of the Westside Community Schools (District 66) v. Mergens*[264] decision, the Supreme Court upheld the

reviewing First Amendment cases. Lynch v. Donnelly, 465 U.S. 668, 678-79 (1984). In the same case, Justice O'Connor suggested an alternative "endorsement test" that defined endorsement as "send[ing] a message to nonadherents that they are outsiders, not full members of the political community." *Id.* at 688 (O'Connor, J., concurring). In a dissenting opinion in a later case, then-Justice Rehnquist wrote that the *Lemon* test "has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results . . . ." Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

260. 474 U.S. 481 (1986).

261. Writing for the majority, Justice Marshall pointed out that the benefit derived by sectarian schools is "only a result of genuinely independent and private decisions of aid recipients." *Id.* at 487.

262. *See id.* at 490-92 (Powell, J., concurring).

263. *See supra* note 3.

264. 496 U.S. 226 (1990).

Equal Access Act,[265] finding that student religious organizations must be given the same opportunity to meet on public-school premises as other non-curricular groups.[266] Resting its holding on free-exercise and freedom-of-association grounds, as well as the Fourteenth Amendment, the Court found that to deny access to the aggrieved group would "demonstrate not neutrality but hostility toward religion."[267] Three years later in *Zobrest v. Catalina Foothills School District*,[268] the Court reversed a federal appellate court decision by upholding the right of a Catholic high-school student to receive the services of a sign-language interpreter paid for with public funds.[269]

Mergens and the 1993 case of *Lamb's Chapel v. Center Moriches Union Free School District*[270] provided precedent for resolving *Rosenberger v. Rectors and Visitors of the University of Virginia*,[271] a 1995 case in which the University of Virginia refused to permit a student organization to use college activity fees for publishing a newspaper with a religious message.[272] The Court found that the students who were denied access to university funds were victims of viewpoint discrimination,[273] and it confirmed a definition of

265. Pub. L. No. 98-377, 98 Stat. 1302 (codified as amended at 20 U.S.C. §§ 4071, 4071 note, 4072-74 (1994)). The Equal Access Act prohibits:

> any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (1994).

266. *Mergens*, 496 U.S. at 253; *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (ruling that it violates free speech for a public school to deny the use of facilities to a group wanting to show a religiously oriented film); Widmar v. Vincent, 454 U.S. 263, 274 (1981) (finding it unconstitutional to ban religious assemblies at a public university); *see generally* Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from* Lamb's Chapel, 24 N.M. L. REV. 1 (1994).

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

268. 509 U.S. 1 (1993).

269. *See id.* at 13-14. A year earlier Justice Kennedy introduced a less rigorous "coercion" standard that would restrict government activity that either coerced an individual to participate in or support a religion, or granted a direct public benefit to a religion. *See* Lee v. Weisman, 505 U.S. 577 (1992).

270. 508 U.S. 384 (1993).

271. 515 U.S. 819 (1995).

272. *See id.* at 822-23.The University's refusal was based on the claim that the newspaper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 827.

273. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude . . . another political, economic or social viewpoint . . . . The University's denial of WAP's request for third-party

neutrality which required government to treat religious and non-religious organizations alike.[274] Citing *Mergens*, Justice Kennedy's majority opinion explained that "[t]he program respects the critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"[275]

Justice Thomas used *Rosenberger* as a vehicle to engage in a more extensive critique of Establishment Clause jurisprudence. Describing a condition of "hopeless disarray,"[276] he noted the contradictions evident in a situation where the *Walz*[277] decision allows tax exemptions for religious institutions and where the Court agonizes over the prospect of government aid to the same institutions.[278] He closed his comments by reasserting that the "[Establishment] Clause does not compel the exclusion of religious groups from government programs that are generally available to a broad class of participants."[279]

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payments in the present case is based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid.

Id. at 831-32.

274. We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse .... The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious devise with the purpose of aiding a religious cause.

Id. at 839-40 (citations omitted).

275. *Id.* at 841 (quoting Board of Educ. of the Westside Community Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990)).

276. *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring).

277. Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970); *see also supra* text accompanying notes 240-42.

278. Justice Thomas goes on to say:

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

Rosenberger, 515 U.S. at 859-60 (Thomas, J., concurring) (footnotes omitted).

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

C. *A Limited Freedom*

Over the last fifteen years, the body of case law handed down by the Supreme Court suggests that the Establishment Clause was not designed to place religious organizations at a disadvantage when it comes to the allocation of public benefits, and that treating religious organizations in a different (discriminatory) fashion from other institutions raises serious questions regarding the rights protected by the Free Exercise Clause. This principle of neutrality was affirmed in *Agostini v. Felton.*[280] *Agostini* not only deliberately overturned the strict separationist principles that had prevented public employees from providing secular instructional services on the grounds of a parochial school,[281] but it also signaled once more that the Court had undergone a fundamental rethinking of church-state jurisprudence.[282]

Some strict separationists would argue that the emerging jurisprudence of the Rehnquist Court represents a recent or temporary aberration from more fundamental principles of separation; but, in actuality, the opposite is true. Decisions handed down by the Supreme Court over the last fifteen years have been based upon a solid constitutional tradition reflecting the more sympathetic instincts of the Framers on matters regarding religious institutions, just as were the earlier decisions in *Pierce, Meyers,* and *Cochran.* Even in the recent *Boerne* decision, where the Court refused to accept the strict standard of review that Congress had attempted to impose in First Amendment cases, the Court reaffirmed its determination to disallow state actions that interfere with the constitutional rights of religious minorities and endorsed the principle that parents have a right to control the education of their children.[283]

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280. 117 S. Ct. 1997 (1997). Describing the rules affecting the remedial services provided, the Court found approvingly, "[I]t is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion .... The services are available to all children who meet the Act's requirements, no matter what their religious beliefs or where they go to school." *Id.* at 2014.

281. "*Aguilar* . . . [is] no longer good law." *Id.* at 2016.

282. "*Aguilar* has in any event been undermined by subsequent Establishment Clause decisions, including *Witters, Zobrest,* and *Rosenberger.*" *Id.* at 2007 (citations omitted).

283. The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were in cases where other constitutional protections were at stake. In *Wisconsin v. Yoder,* for example, we invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That

Taken as a whole, the body of case law handed down by the Rehnquist Court has serious implications with regard to school choice. Certainly, the high wall of separation erected by the Supreme Court during the 1970s has been breached. Nevertheless, the rights of religious minorities remain vulnerable to the machinations of state-level decisionmakers who use their authority to undermine the interests of individuals and institutions with religious orientations. To be sure, the underlying principle of *Pierce*[284] remains intact: people of faith may send their children to schools that are consistent with their religious values. Nevertheless, because parents with religious inclinations must personally assume the financial burden for tuition at private schools, the option remains conditioned by economics. *Pierce* is a hollow promise for the economically disadvantaged family whose religious convictions are offended by the public-school curriculum or the family whose religious beliefs require them to educate their children in an institution that reinforces their beliefs and convictions.

The severity of the situation—the limited nature of the religious freedom that poor people enjoy—becomes more clear when we return to the three original questions raised at the beginning of this Article on the legality of school choice. Let us take them here in the order that they were presented. First, does providing public funds for parents to send their children to parochial schools violate the Establishment Clause of the First Amendment? Based upon decisions handed down since *Mueller*,[285] and especially the criteria defined in *Witters*, the answer appears to be "no" so long as three conditions are met: (1) The aid is facially neutral regarding religion; (2) funds are equally available to students attending public and private schools; and (3) any aid to religious schools results from the private decisions of individuals. Although these criteria suggest a relaxing of the "primary effect" rule of the *Lemon* test, they also imply a set of limitations on choice that become more apparent when we take up the latter two questions.

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case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education.

City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997) (citations omitted).

284. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); *see also supra* note 98.

285. Mueller v. Allen, 463 U.S. 387 (1983); *see also supra* notes 255-59 and accompanying text.

As to the second question,[286] it is unlikely that the Supreme Court, under the standard of neutrality it has adopted, would permit the States to exclude religious schools or their pupils from participating in programs that distribute public benefits on a general basis. Even though this Court has been sympathetic to the prerogatives of state governments in defining the proper boundaries of federalism, it has not hesitated to intervene in cases where it finds that the States have trampled upon rights protected by the Constitution.[287] In this sense efforts to exclude parochial schools from choice programs in Wisconsin, Ohio, and Vermont remain constitutionally suspect. Even so, for state policymakers determined to limit the choices made available to religious parents, the existing criteria established by the Supreme Court serve as a legal road map through which they can pursue their secularist agenda. One method of obstruction involves the overall design of such programs. By excluding all private schools from publicly supported choice programs, opponents can effectively limit the parental prerogatives outlined in *Pierce* to only those parents with the economic resources to act according to their own priorities.[288] As noted above, thirteen States have provisions limiting the expenditure of government funds to public schools.[289]

Another method of hindering school-choice initiatives concerns the administrative details of those programs, specifically the manner of payment. Under present doctrine, the legality of choice programs depends on whether the checks are issued in the name of a parent or the name of a school. As the cases detailed above (especially the Vermont case) demonstrate,[290] opponents have exploited this distinction of procedure over principle to obstruct the implementation of choice programs. They will continue to do so unless the Supreme Court determines that the administrative mechanism through which payments are made is no longer allowed to trump the fact that payment to a school is only a function of the

286. Do States violate the free-exercise rights of parents when they exclude religious schools from participation in publicly supported choice programs?

287. *See supra* note 2.

288. Approximately twenty States have inter-district choice programs that limit student options to public schools. *See* NEW SCHOOLS FOR A NEW CENTURY, *supra* note 131, at 9-10.

289. *See supra* notes 88-89.

290. *See supra* Part III.

choice made by a parent. Until that time, the payment issue remains a serious impediment.[291]

This brings us to the last of the questions posed at the beginning of this Article: Do parents have a constitutional right to send their children to religious schools at public expense? Notwithstanding the more accommodationist posture recently assumed by the Supreme Court, there is nothing of record to suggest that the Court is prepared to recognize school choice as a matter of constitutional principle. Perhaps the Religious Freedom Restoration Act would have made it easier to secure such a right in the courts if it had not been struck down by *Boerne*. The perpetuation of a government-run educational monopoly, supported by a system of financial disincentives against private and parochial school attendance, does constitute an extraordinary burden on religious practice that is not justified by any significant public benefit. So long as ways remain available for state policymakers to limit the opportunities for all parents to send their children to a school that they believe is most suitable for the welfare of their children, whether religious or otherwise, it cannot be claimed that all parents enjoy the same opportunities to choose.

V. CONCLUSION

Our Constitution was crafted by individuals with a deep commitment to religious freedom. Although their model of government was designed to prohibit the formal union between public and ecclesiastic authority, their notion of religious liberty did not require a complete separation of church and state. They believed that a robust religious pluralism could serve as a foundation for democracy, and until the early part of the Nineteenth Century, it was not unusual for States to provide direct aid to religious schools run by the clergy of various faiths.

The relationship between government and religious schools changed with the development of the common-school movement. Created under the pretense of separation, the

291. Justice O'Connor noted that the Court arrived at its decision in *Witters* "only after emphasizing that 'vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice.'" Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 848 (1995) (O'Connor, J., concurring) (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).

common school became a vehicle for the Protestant ruling establishment to impose its religious teachings on immigrant populations who did not share their beliefs. The confluence of the common-school movement and nativist political sentiment generated a political consensus for the withdrawal of government aid to religious schools, culminating with the proposed Blaine Amendment. Although the Amendment was never enacted by Congress, its principles became incorporated into many state constitutions, where it has been construed to bar both direct and indirect aid to sectarian institutions. Joined with a strong secularist philosophy that has come to dominate the public-school curriculum, these state constitutional provisions have enabled local education authorities to act in ways that at times compromise the values of religious minorities and create a dilemma for the poor.

In the early part of the Twentieth Century, a federal jurisprudence emerged that extended the protections of the First Amendment to the States. Although the modern Court has generally rejected direct aid to religious schools, it has recognized, from the early years of this century, the important legal distinction between government aid to religious institutions and aid to students who might choose to attend such institutions. The same Court has recognized the fundamental right of parents to control the upbringing and education of their children.

For a brief period during the 1970s, the Supreme Court handed down a series of decisions setting prohibitive standards of separation between church and state and rejecting government action that might incidentally benefit a religious institution. Coupled with the "Blaine Amendment" provisions contained within state constitutions, these decisions have provided a body of legal precedent that undermines the opportunity of parents to have their children educated in accordance with their religious convictions. These rules of separation have imposed especially heavy burdens on religious minorities who cannot afford the costs of a private religious education, and they have promoted a system of public incentives against sectarian schools. The result is an unusual institutional arrangement for a democratic society that supposedly prizes religious pluralism and freedom.

Over the last fifteen years, the Supreme Court has adopted a more accommodationist approach to separation, reaffirming the distinction between direct and indirect aid and the right of parents to determine the most appropriate education for their children. As a result, it is reasonable to expect that the Court would look favorably upon government initiatives that provide aid for children to attend religious schools and would frown on choice programs that specifically exclude religious schools from participation.

There is no reason to believe, however, that the Court is prepared to apply the First Amendment to establish the right of parents to send their children to religious schools at public expense. Consequently, the ability of parents in most States to pursue an education consistent with their faith remains a function of economics and legislative fiat. Except for those fortunate instances where state politics align with the interests of the disadvantaged, poor children have no choice but to attend government-run institutions, whether or not those institutions appropriately accommodate their educational needs and individual values.