

THE RISE AND FALL OF SCHOOL VOUCHERS: A STORY OF RELIGION, RACE, AND POLITICS

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Five years ago, in *Zelman v. Simmons-Harris*, the U.S. Supreme Court upheld the constitutionality of a Cleveland program that provided school vouchers to low-income parents seeking private school alternatives for their children. *Zelman* was heralded as of great historical significance when it was decided. Yet, in the years since *Zelman*, school vouchers have made little political headway—only three jurisdictions have adopted voucher plans, and proposals have failed in over thirty-four states.

This Article examines why school vouchers have failed to garner the support that so many assumed would follow the Court's decision in *Zelman*. The explanation, I suggest, concerns religion, race, and politics. The original rationale for vouchers was what I call the "values claim"—vouchers protected the right of parents to send their child to a school that reinforced their values. Originally promoted by Catholics, the values claim was adopted by evangelical Christians concerned about the secularization of public schools after the 1960s. Although the values claim was central for most of the history of the voucher movement, in the decade leading up to *Zelman*, voucher advocates replaced the values claim with what I call the "racial-justice claim." This rationale emphasized vouchers as part of a civil rights struggle to obtain academically rigorous private education for low-income and minority parents. Redefining vouchers in this manner had political and legal advantages, and paved the way for the Court's decision in *Zelman* upholding vouchers.

Since *Zelman*, however, two trends have emerged that spell trouble for the future of the voucher movement. First, there are tensions between the values and racial-justice claims for vouchers, as the two claims lead to very different types of voucher programs that appeal to divergent political constituencies. Second, the voucher movement has been hurt by the rise of the accountability movement in education. No Child Left Behind was enacted the same year that *Zelman* was decided, meaning that the Court gave the green light to the voucher movement at exactly the same time that state and national education policy began to demand greater oversight of all schools, including private schools accepting vouchers. For schools today, accountability means less local

* Associate Professor, Georgetown University Law Center. I am grateful for the comments and assistance of Judy Areen, Peter Edelman, Heather Enlow, Arthur Evenchik, Steve Goldberg, Laura Hankins, Lauren Hayter, Wendy Heller, Kevin Hsu, Vicki Jackson, Greg Klass, Chuck Lawrence, Justin Lee, Ifeoma Nwokoye, Ginger Patterson, Nina Pillard, David Reiser, Nick Rosenkranz, Jim Ryan, Mike Seidman, Roselle Singer, Gerry Spann, Alix Tindall, David Vladek, and Todd Zywicki (whose probing inquiry at a workshop I gave on another paper sparked this project). Finally, thanks to the wonderful staff of the Edward Bennett Williams Law Library, especially Jennifer Davitt, Louise Tsang, and Rhona Williams.

control, more tests, and stricter government standards. Conservative Christians, who once led the voucher movement, reject these intrusions into school autonomy. As a result, they are less likely to support modern voucher programs.

My approach in this Article is historical, predictive, and normative. It is historical in that I trace the development of the values and racial-justice claims for school vouchers, exploring the tensions between the two claims. It is predictive because I suggest that the future of this educational reform is much less rosy than voucher supporters thought when Zelman was decided. Thus, I predict that Zelman may end up mattering much less than so many had thought it would. Finally, my approach is normative for I argue that it would be unfortunate if I am right about the demise of vouchers. While voucher defenders have vastly overstated the racial-justice claim, there is some prospect that vouchers might improve educational outcomes for low-income African American children. I argue that vouchers should be permitted at least until they can be more thoroughly evaluated to determine their impact on a group so in need of better educational opportunities.

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INTRODUCTION

In *Zelman v. Simmons-Harris*,¹ the U.S. Supreme Court upheld the constitutionality of a Cleveland program that provided school vouchers to low-income parents seeking private school alternatives for their children. Under Cleveland's voucher plan, parents could theoretically use the voucher at religious schools, secular private schools, or suburban public schools. But few secular private schools and no suburban public schools chose to join the program. So, for

1. 536 U.S. 639 (2002).

most parents, the voucher option was a religious private school.² Voucher opponents used this fact to argue that the plan amounted to state funding of religion and thus violated the First Amendment's Establishment Clause.³ *Zelman* rejected this challenge, and the opinion was widely heralded as of great historical significance. Clint Bolick, the lawyer who led the defense of school voucher programs, called *Zelman* "one of the most important constitutional cases ever."⁴ Bolick's analysis was shared by more objective observers as well. John Jeffries and Jim Ryan, for example, said that *Zelman* addressed "the most important church-state issue of our time: whether publicly funded vouchers may be used at private, religious schools without violating the Establishment Clause."⁵

Zelman did not directly affect many students. In 2002, when the case was decided, voucher plans existed in only three states, serving fewer than 20,000 students.⁶ *Zelman* was thought to be important because many assumed that once the Court held vouchers to be constitutional, states would rush to implement such plans. For many, the uncertain legality of school vouchers had been a reason not to institute voucher programs.⁷ With no remaining obstacles under federal law, voucher proponents could fairly predict that "[s]chool choice is an inevitability."⁸

Yet, in the years since *Zelman*, school vouchers have made little political headway. They have been proposed in a variety of cities and states, but have overwhelmingly been rejected. This is just as true in states run by Republicans as

2. *Id.* at 647.

3. See *id.* at 684 (Stevens, J., dissenting); Brief in Opposition for Respondents Doris Simmons-Harris et al. at 6–8, 17, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751).

4. CLINT BOLICK, *VOUCHER WARS* 157 (2003).

5. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 279 (2001); see also Stuart Taylor, Jr., *Nothing in the Constitution Bars Helping Inner-City Kids*, 34 NAT'L J. 520, 520 (2002) (describing *Zelman* as "certainly the most important church-state case in many years"); Linda Greenhouse, *Supreme Court, 5–4, Upholds Voucher System that Pays Religious Schools' Tuition*, N.Y. TIMES, June 28, 2002, at A1 (describing *Zelman* as "[t]he most important ruling on religion and the schools in the 40 years since the court declared organized prayer in the public schools to be unconstitutional").

6. The three states were Florida, Ohio, and Wisconsin. See Florida Department of Education, Opportunity Scholarship Program (July 2006), available at http://www.floridaschoolchoice.org/Information/OSP/files/Fast_Facts_OSP.pdf; School Choice Facts, Cleveland Scholarship and Tutoring Program (Dec. 2005), http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=2; School Choice Facts, Milwaukee Parental Choice Program (Nov. 2005), http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=1.

7. See, e.g., Jacques Steinberg, *Cleveland Case Poses New Test for Vouchers*, N.Y. TIMES, Feb. 10, 2002, at 1.

8. Steven Menashi, *The Church State-Tangle*, POL'Y REV., Aug. & Sept. 2002, at 37, 38 (quoting Joseph Overton of the provoucher Mackinac Center for Public Policy), available at <http://www.policyreview.org/aug02/menashi.html>. Winning the federal constitutional battle still left room for state constitutional challenges to voucher programs, and there have been many such. For a discussion, see Jill Goldenziel, *Blaine's Name In Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57 (2005).

in those led by Democrats. Since *Zelman*, only three jurisdictions have adopted voucher plans, while proposals have failed in over thirty-four states.⁹

It is tempting to think that vouchers simply need more time to gain popularity—after all, *Zelman* was only decided five years ago. While that is surely part of the explanation for the slow growth of vouchers, it is not the only one. We can see this by comparing the relatively slow pace of voucher expansion to the rapid growth of two other forms of school choice that exploded in the preceding decades. Like vouchers, home schooling and charter schools were new innovations at one point. But they both grew much faster. In 1983 only four states had laws that explicitly permitted home schooling; ten years later all fifty states had such laws.¹⁰ Charter schools have had a similarly rapid rise. The nation's first charter schools were authorized in Minnesota in 1991; by the 2004–05 school year, there were approximately 4000 charter schools in forty states and the District of Columbia.¹¹

Why have school vouchers failed to garner the support that so many assumed would follow the Court's decision in *Zelman*? To answer this question requires looking back at the evolution of the school voucher movement. In this Article, I suggest that the story is one of religion, race, and politics. It is a story of religion because religious conservatives—especially Christian conservatives—once championed school vouchers and other forms of private school choice as their leading education priority. Christian conservatives were drawn to vouchers because they sought schools that would reinforce their religious beliefs and values—what I call the “values claim” for vouchers. The values claim was central for most of the history of the voucher movement.

This is a story about race, too, for the leaders of the voucher movement made a disciplined effort to define school vouchers as part of the struggle for racial justice and educational opportunity. In so doing, they developed an alternative rationale for school vouchers—what I call the “racial-justice claim”—which emphasized the right of low-income and minority parents to send their children to academically rigorous private schools. The racial-justice claim had political and legal advantages for the voucher movement. It attracted an additional constituency—black parents—and made voucher plans less vulnerable to Establishment Clause challenges. As I will explain, however,

9. See Heritage Foundation, *Where's School Choice?*, <http://www.heritage.org/Research/Education/SchoolChoice/schoolchoice.cfm> (last visited Jan. 5, 2007). In addition to the jurisdictions that have passed voucher plans, two of the five states that had tuition-tax-credit plans at the time of *Zelman* have expanded those programs. See *id.*

10. See Margaret Talbot, *The New Counterculture*, ATLANTIC MONTHLY, Nov. 2001, at 136, 139.

11. Center for Education Reform, *National Charter School Data* (Sept. 2006), available at http://www.edreform.com/_upload/ncsw-numbers.pdf.

jettisoning the values claim that appealed to religious conservatives may have weakened the post-*Zelman* political movement for vouchers.

This is also a story about politics, for by the time *Zelman* was decided, a political consensus had emerged emphasizing the importance of “accountability” in education. Best captured by the federal No Child Left Behind legislation, the new politics of accountability increased state and federal oversight over individual schools and districts. For schools, it means less local control, more tests, stricter standards, and various other regulations imposed by governing authorities. Although No Child Left Behind does not govern private schools receiving vouchers, there is growing pressure for increased government oversight of those schools. This threat of governmental regulation is anathema to conservative Christian educators, driving them further away from a school voucher movement about which they were already increasingly ambivalent.

In Part I of this Article, I outline the evolution of the values claim for school vouchers. In the early twentieth century, the idea of giving parents public money to pay religious school tuition was advocated mainly by Catholics, who had long battled with Protestants over whose religion and values would be taught in school. Catholics lost this battle, and when they did, many left the public system. They built their own schools and sought state funding for them. State funding of private schooling had not initially appealed to Protestants but gained in popularity among a wider swath of religious voters in the 1970s and 1980s. The principal rationale was that the public schools were becoming increasingly secular and hostile to religion. Over time, courts had prohibited school prayer and the teaching of creationism. They also rejected a variety of challenges by religious parents to the secularism of school textbooks. In response to these defeats, evangelical Christians and others began to argue that parents should send their children to schools that reinforced, or at least respected, their core beliefs and values. Moreover, like the Catholics before them, they began to argue that those who made such a choice should receive some sort of government support. Otherwise, some would not be able to afford religious schools, and even those who could afford them would be forced to pay twice—once in taxes for the public schools they did not use, and again for the religious schools that they did.

As I describe in Part II, during the 1990s the values claim took a back seat as voucher advocates promoted a racial-justice claim in its place. This racial-justice claim came to define the litigation strategy in defense of vouchers, and, I argue, was essential to achieving the legal victory in *Zelman*. The racial-justice claim asserted that vouchers provided educational emancipation for poor students, mostly black, trapped in dysfunctional urban districts. Vouchers were hailed as a way for these students to gain access to schools in which they could acquire

the academic skills they needed to succeed in college and the workforce. This rationale for vouchers was a significant departure from the earlier theory that had attracted religious conservatives. Unlike the values rationale, the racial-justice claim did not assert that public schools were teaching the wrong values to children or contradicting the parents' religion. Rather, it argued that the public schools were not teaching children the necessary academic skills, and that private schools could do better. Unlike the values rationale, the racial-justice claim did not defend the rights of all families whose values conflicted with school authorities. Under this claim, the victims were a smaller group of low-income, inner-city children.

In Part III, I explore the implications of replacing the values claim with the racial-justice claim. On the one hand, the new voucher movement is more attractive to a contingent of African American parents and some of those sympathetic to their plight. On the other hand, it holds less appeal for religious conservatives. Religious conservatives had not, by and large, objected to schools on the ground that they were insufficiently academically rigorous, and they are less attracted to a movement that defines the problem in this way. Furthermore, the new voucher movement, wrapped in the mantle of racial justice, promotes school-choice programs that are targeted at low-income students in urban districts. White religious conservatives do not generally live in these urban districts and do not stand to benefit from the programs.

But even if voucher programs targeted at low-income urban districts did not appeal to religious conservatives, perhaps these limited plans would provide voucher proponents with a toehold that would position them to enact more expansive voucher plans. This was certainly the stated strategy of some voucher proponents. But I suggest a reason to question the effectiveness of this approach. I argue that the new voucher movement will have trouble attracting religious conservatives because of the rise of the accountability movement in education and its impact on voucher programs. The original movement for private school choice was grounded in the notion, shared by libertarians and religious conservatives, that private schools should be largely free of government regulation. *Zelman*, however, gave the green light to the new voucher movement at exactly the same time that state and national education policy had come to demand greater oversight of all schools, including private schools accepting vouchers. This accountability involves increased regulation of individual schools and demands that they provide information to various governmental authorities. This sort of regulation is opposed by religious groups generally and evangelical

educators specifically.¹² As a result, modern voucher programs are replete with government strings that many religious conservatives reject. This combination of circumstances has led to a modern voucher movement that has received constitutional approval, but may lack the necessary political support to thrive. Thus, I predict that *Zelman* will end up mattering much less than many had thought it would.

In addition to being historical and predictive, the analysis advanced in this Article is normative. I believe that the racial-justice claim for school vouchers has been grossly overstated by voucher advocates. But I nonetheless argue that it would be unfortunate if my prediction about the demise of vouchers proves accurate. While a central theme of this Article is that school vouchers serve the interests of groups other than blacks, I also argue that there is limited (and inconclusive) evidence that they improve educational outcomes for low-income African American children. Voucher plans should continue at least until they can be more thoroughly evaluated to determine their impact on a group so in need of better educational opportunities.

I. VOUCHERS AND RELIGION

“The virtues of men are of more consequence to society than their abilities; and for this reason, the heart should be cultivated with more assiduity than the head.”

—Noah Webster, 1788¹³

“We’re betraying our children. . . . We’ve prepared our kids to go to college and get a good job. We’re not preparing them to think and act from a biblical perspective.”

—Speaker, New Orleans Baptist Theological Seminar, 2003¹⁴

12. Evangelical Christianity has a complex history, and the term “evangelical” today does not mean the same thing to everyone. For the purposes of this Article, I adopt George Marsden’s definition: Evangelicals accept (1) “the final authority of the Bible”; (2) “the real historical character of God’s saving work recorded in Scripture”; (3) “salvation to eternal life based on Christ’s redemption”; and (4) “the importance of evangelism missions, and . . . a spiritually transformed life.” GEORGE M. MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* 4–5 (1991).

13. NOAH WEBSTER, *On the Education of Youth in America* (1788), in *A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS* 1, 26 (Boston, I. Thomas & E.T. Andrews 1790).

14. Tammi Reed Ledbetter, *Christian Schools, Homeschooling Make Gains Among Southern Baptists*, BAPTIST PRESS NEWS, Mar. 12, 2003 (quoting Glen Schultz), <http://www.bpnews.net/printerfriendly.asp?ID=15424>.

In 1995, many of the prospective Republican candidates for the upcoming presidential election addressed the Christian Coalition's annual convention. School choice was a leading issue. Pat Robertson, for example, argued that "[i]f there's choice for unborn babies, [there should be] choices for our teenagers to go to school."¹⁵ Vouchers would be a way, according to Robertson, for Christian families to afford the types of schools they wanted.¹⁶ In promoting school vouchers, Robertson was firmly within the mainstream of the Christian conservative political movement of the 1990s.¹⁷ In this Part, I explore the evolution of the values claim for school vouchers and why Christian conservatives began to find it so appealing.

A. Schools and Values: The Historical Backdrop

The values claim for school vouchers has deep historical roots; to understand it requires placing it in the context of previous disputes over who should control education. Throughout American history, the fiercest battles over schooling have not concerned how to ensure that schools were of high academic quality. Instead, the biggest disputes have involved whether schools inculcated the proper values or beliefs. This has been true since the founding era, when it was widely believed that the republic would survive only if the people had the moral fiber necessary to allow democracy to flourish. As George Washington argued in his Farewell Address, "religion and morality are indispensable supports" for democratic self-government.¹⁸

Teaching virtue required schools,¹⁹ and the nineteenth and early twentieth centuries saw the rapid proliferation of schools across the land.²⁰ The perceived need for schools to provide moral and civic training became even more important as immigration increased. By 1909, almost 60 percent of students in America's largest cities had foreign-born parents, and schools were assigned the task of

15. Kathleen Vail, *Conservatively Speaking*, AM. SCH. BOARD J., Dec. 1995, at 30, 32 (quoting Pat Robertson).

16. *Id.*

17. See Jeffries & Ryan, *supra* note 5, at 344–46.

18. President George Washington, Farewell Address to the People of the United States (Sept. 17, 1796). The well-regarded Massachusetts Constitution of 1780 stated that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality," and "these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instruction in piety, religion, and morality." MASS. CONST. OF 1780, pt. I, art. III.

19. As Congress directed in the Northwest Ordinance of 1787, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, ch. 8, § 50 (1789).

20. See WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS 45, 118, 148 (2005) (discussing growth of common schools).

Americanizing the new arrivals.²¹ As prominent educator Ellwood P. Cubberly said, schools must help people “to implant in their children, insofar as it can be done, the Anglo-Saxon conception of righteousness, law and order, and popular government.”²² The period from the late nineteenth century to the early twentieth century saw greater direct instruction in American history and government, an upsurge in patriotic exercises such as the Pledge of Allegiance and flag rituals, and the spread of state laws requiring instruction in English.²³ Some states passed laws mandating that schools teach virtue. The Minnesota Legislature, for example, required that teachers teach one virtue a day from a list of thirty-one (examples included self-respect, perseverance, and cheerfulness).²⁴ In addition, many thought that to effectively Americanize citizens, the nation’s founding narrative had to be carefully protected, and some states passed laws prohibiting schools from denigrating American heroes.²⁵

It was widely understood that schools could not teach virtue without teaching religion. But whose religion? Because of the number of Protestant sects, it would have been impossible to settle on one sect’s approach. To do so would have invited bitter conflict between Baptists, Methodists, Episcopalians, and other denominations. Accordingly, by the end of the nineteenth century, various Protestant sects agreed to teach nonsectarian Christianity.²⁶

A key component of the Protestant compromise was that Bible reading would form the basis for moral education of the nation’s children.²⁷ New Jersey Senator Frederick Frelinghuysen reflected the spirit of the age when he argued, in 1876, “Where [else] shall we go for public morals? . . . To the Koran? To Confucius? To the Mormon book of their lord? To the vain philosophy of the ancients? To mythological fables?”²⁸ But the Bible itself engendered controversy, highlighting one major problem with the Protestant compromise: Although it

21. See DAVID TYACK, *SEEKING COMMON GROUND* 74 (2003).

22. *Id.* at 26.

23. See *id.* at 28–29.

24. 2 MINN. GEN. STAT., ch. 36, §§ 177–178 (West 1883 & Supp. 1888).

25. Oregon, for example, prohibited any textbook that “speaks slightly of the founders of the republic, or of the men who preserved the union, or which belies or undervalues their work.” TYACK, *supra* note 21, at 53.

26. The 1838 report filed by the Ohio Superintendent of Common Schools to the state legislature was typical of the era: “It can not be too deeply impressed on all minds, that we are a Christian, as well as a republican people; and the utmost care should be taken to inculcate sound principles of Christian morality. No creed or catechism of any sect should be introduced into our schools; there is a broad, common ground, where all Christians and lovers of virtue meet.” Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in *MORAL AND POLITICAL EDUCATION* 87, 108 (Stephen Macedo & Yael Tamir eds., 2002).

27. See Jeffries & Ryan, *supra* note 5, at 298–99.

28. 4 CONG. REC. 5561, 5562 (1876) (statement of Sen. Frelinghuysen).

included the various Protestant branches, it was not a compromise with Catholics.²⁹ For example, Protestants had agreed that the Bible would be read without comment.³⁰ But Catholics rejected the notion that children should be encouraged to decide for themselves on the proper understanding of the Bible, arguing that interpretation by priests and the Church was required. Even more fundamentally, Catholics rejected the choice of the Protestant King James version over the Catholic Church-sanctioned Douay-Reims translation.³¹ Moreover, Catholics pointed out that the textbooks in use in many public schools were virulently anti-Catholic, with some of them suggesting that Catholics posed a threat to the nation.³²

Catholics were in the minority and tended to lose the battles over what was taught in the public schools.³³ As a result, some Catholics sought to establish schools of their own. In 1852, the First Plenary Council of Baltimore had *encouraged* local parishes to build schools.³⁴ By 1884, the Third Council *mandated* that parishes do so—"near every Church, where it does not exist, a parochial school is to be erected within two years"—and decreed that parents were "bound to send their children to the parish school" unless they obtained approval from the bishop.³⁵ In addition, some Catholics sought government funding for those schools.³⁶ Given that the state-funded public schools were in effect supporting Protestant faith and morality, Catholics reasoned, should not private schools supporting Catholic faith and morality also receive government funding?

Reflecting the central role of religion in education, the rationale for Catholic schooling throughout the nineteenth and most of the twentieth century had little to do with whether children learned to add or read. Instead, Catholics valued their schools because they taught the faith of Catholic parents. For example, in 1947 the seminal case of *Everson v. Board of Education of Ewing*³⁷ upheld the legality of a local program in New Jersey in which the school district paid the bus fare of students attending Catholic schools. Catholics defended the program on the ground that it facilitated the religious liberty of Catholic parents,

29. See Jeffries & Ryan, *supra* note 5, at 299–305.

30. As leading educator Horace Mann remarked, "[O]ur system earnestly inculcates all Christian morals; . . . in receiving the Bible, it allows it to do what it is allowed to do in no other system,—to *speak for itself*. But here it stops." HORACE MANN, TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD OF EDUCATION 116–17 (Boston, Dutton & Wentworth 1849).

31. See NOAH FELDMAN, DIVIDED BY GOD 63–64 (2005).

32. See ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING 19 (2000).

33. See Jeffries & Ryan, *supra* note 5, at 302–05.

34. See TYACK, *supra* note 21, at 169.

35. SALOMONE, *supra* note 32, at 21.

36. See Jeffries & Ryan, *supra* note 5, at 300–01.

37. 330 U.S. 1 (1947).

who sought schools “teaching moral principle and religious truth.”³⁸ In the American tradition, they argued, the state did not have the right to control or standardize the education of their children.³⁹ Accordingly, while Catholic schools might offer a different religious perspective than government-controlled schools, it was profoundly American to permit such differences.

Religion remained central in public schools for much of the twentieth century. Many students prayed and read the Bible in school, and many were taught to revere Jesus Christ. Important moments—school assemblies, sporting events, and other gatherings—were marked by prayer, which was often led by a student, teacher, or local minister. Schools acknowledged and honored God’s presence, and they used the teachings of the Bible and Jesus’ life to shape the hearts of their student charges. In some jurisdictions the effort was planned and deliberate. Often, however, it did not need to be. Honoring God in school was often a natural outgrowth of the cultural and political dominance of Protestants in America.⁴⁰

B. Conservative Christian Disenchantment With Public Schools

From the Nation’s founding to the middle of the twentieth century, public schools explicitly taught religion and values that were consistent with the nation’s Protestant majority. But this all began to change in the 1960s. In 1962, the Supreme Court held in *Engel v. Vitale*⁴¹ that school prayer was an unconstitutional establishment of religion, striking down the practice in some New York schools of beginning the day with the following prayer: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our Country.”⁴² At a high school in Abington, Pennsylvania, the school day began with a reading over the loudspeaker of a Bible passage chosen by a student. The year after *Engel*, the Court rejected this too.⁴³ These decisions left many Protestants—especially evangelicals—believing that the public schools were no longer allies in reinforcing core religious beliefs. This sparked an unprecedented backlash and laid the foundation for decades of challenges to the public schools by evangelical Christians.⁴⁴

38. Brief Amici Curiae of National Council of Catholic Men & National Council of Catholic Women at 21, 30, *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947) (No. 52).

39. *Id.* at 16–17.

40. See MARSDEN, *supra* note 12, at 10–11.

41. 370 U.S. 421 (1962).

42. *Id.* at 422.

43. See Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963).

44. See WILLIAM MARTIN, WITH GOD ON OUR SIDE 77 (1996) (“[N]othing, perhaps, generated more lasting resentment against the Supreme Court and stirred more concern among conservative Christians than the 1962 and 1963 decisions banning officially sponsored prayer and Bible reading in public schools.”).

The problem with eliminating prayer and Bible reading from school, argued prominent evangelical leaders, was that it undermined the capacity of schools to instill morality and virtue in the next generation. In *Listen, America!*, Jerry Falwell recounted his own upbringing in a public school in Lynchburg, Virginia, where students read the Bible, prayed, and attended chapel.⁴⁵ Now, "our public schools no longer teach Christian ethics, which educate children and young people intellectually, physically, emotionally, and spiritually."⁴⁶ Falwell asserted that abandoning the emphasis on Christian ethics was no small error. It meant that "[t]he human mind has been deceived, and the end result is that our schools are in serious trouble."⁴⁷ Robertson argued in the same vein that "the Supreme Court of the supposedly Christian United States guaranteed the moral collapse of this nation when it forbade children in the public schools to pray to the God of Jacob, to learn of His moral law or even to view in the classrooms the heart of the law, the Ten Commandments."⁴⁸

The school prayer and Bible-reading decisions were only the first indications that the public schools could no longer be counted on to transmit the values held by many evangelical Christians. During the 1960s and 1970s, disputes over the control and content of public education became increasingly bitter. As before, these disputes did not typically concern academic achievement. Instead, they concerned whose values and belief systems were being endorsed in schools.

School textbooks were an area of particular conflict. Fights over the selection of texts for public schools were not new—as we have seen, there had been an earlier controversy over whether to use the Protestant or Catholic Bible. What was new was that evangelical Protestants were no longer defending the establishment against Catholic insurgents, but were increasingly in the position of outsiders challenging secular authority. The highly publicized case of *Mozert v. Hawkins County Board of Education*,⁴⁹ decided in 1987, is representative of these

45. JERRY FALWELL, *LISTEN, AMERICA!* 205 (1980) ("We were taught to reverence God, the Bible, and prayer. Although, at that time, I was not a Christian . . . , I gained a respect for God, the Bible, the church, and for things that were holy. I learned all those principles in a public school.").

46. *Id.*

47. *Id.*

48. Melvin I. Urofsky & Martha May, *Introduction* to *THE NEW CHRISTIAN RIGHT*, at ix, xi (Melvin I. Urofsky & Martha May eds., 1996). James Robison, nationally syndicated television evangelist, made similar arguments: "[T]he assassinations [of public figures], acceleration of the Vietnam War, escalation of crime, disintegration of families, racial conflict, teenage pregnancies and venereal disease" can all be attributed "to the Supreme Court's ban on mandatory school prayer." DAVID BOLLIER, *LIBERTY AND JUSTICE FOR SOME* 205 (1982).

49. 827 F.2d 1058 (6th Cir. 1987). For two excellent accounts of the *Mozert* litigation, see STEPHEN BATES, *BATTLEGROUND* (1993); Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

challenges. The Hawkins County, Tennessee, school district used the Holt Basic reading series as required texts for elementary students. The dispute over the readers began when one mother, Vicki Frost, began reading her daughter's book and was disturbed by what she viewed as anti-Christian messages. She claimed that one story endorsed mental telepathy, another witchcraft, and that a third depicted women in nontraditional roles.⁵⁰ Other members of Frost's fundamentalist Presbyterian church shared her concerns, and a group came together to state their case to the school district. Their core argument was this: The passages taught children beliefs and values that directly contradicted the parents' religiously informed worldview. Therefore, forcing their children to read the texts was a violation of their right to free exercise of religion. The parents asked the school system to allow their children to use alternatives to the Holt readers. When the school board refused to accommodate the parents, they sued.

One feature of the *Mozert* challenge makes it especially useful in evaluating the development of the values rationale for school vouchers. In Establishment Clause challenges of this era, religious parents typically claimed that the predominance of secular materials amounted to the establishment of the religion of secular humanism.⁵¹ But the *Mozert* plaintiffs had a narrower Free Exercise Clause claim. Their argument was that religious parents should have the option of opting out of the portion of the curriculum to which they had a religious objection. In this sense, their request was relatively modest. Whereas Establishment Clause challenges demanded that the school system change its offerings for everyone, the Free Exercise Clause claim sought accommodation only for dissenting parents.⁵²

The *Mozert* plaintiffs did not prevail. In rejecting their claim, the *Mozert* court said that parents like the plaintiffs could leave the public schools if they were dissatisfied.⁵³ Other similar challenges typically met the same fate.⁵⁴ While

50. See Stolzenberg, *supra* note 49, at 593. Lead plaintiff Robert Mozert objected to a story about how a boy named Jim and a girl named Pat learned to make sandwiches and pudding. The story started like this: "Pat has a big book. Pat reads the big book. Jim reads the big book. Pat reads to Jim. Jim cooks." Editorial, *See Jim and Pat Cook. Jim Cooks First*, N.Y. TIMES, Mar. 13, 1986, at A26. Mozert challenged the book on the ground that it carried an implicit message—"there are no God-given roles for the different sexes"—that interfered with his ability to direct his child's religious upbringing. Robert B. Mozert Jr., Letter to the Editor, KINGSFORT TIMES-NEWS, Oct. 18, 1983.

51. See, e.g., *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987).

52. For a further discussion, see Stolzenberg, *supra* note 49, at 589–93.

53. According to the court, for parents who find ideas taught by school offensive, Tennessee provides two options: "The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home." *Mozert*, 827 F.2d at 1067.

54. See, e.g., *Smith*, 827 F.2d at 695 n.12.

many parents would continue to fight the wars over public school textbooks,⁵⁵ others did what the *Mozert* court had told them to do—they exited for religious schools that would reinforce the values taught at home. The *Mozert* plaintiffs themselves exemplify these choices. After losing their battle to exempt themselves from classes in which the Holt reading series was used, most plaintiff students ultimately left the Hawkins County schools for home schooling, private religious schools, or public schools in other counties.⁵⁶

By exiting public schools because they objected to the values being taught there, the *Mozert* plaintiffs reflected a broader trend among evangelical Christians during the 1970s, 1980s, and 1990s. Religious schooling exploded in popularity during these years.⁵⁷ The decision was often not an easy one. In the Bible, Jesus tells his followers, “Ye are the salt of the earth” and “the light of the world.”⁵⁸ For many evangelical parents, this is an injunction to remain a presence in public schools. As a Massachusetts mother explained, “We’re feeling led right now to send our kids to public school to be a positive influence. If you just took all Christians out of public anything, how is the truth going to be spread and how are people going to become Christians?”⁵⁹ But in the face of an increasingly secular school system, many evangelical leaders began to argue that public schools were too dangerous for Christian children to remain. “Be ye not unequally yoked together with unbelievers,” the Bible also admonishes.⁶⁰ After the Supreme Court declined to hear *Mozert*,⁶¹ plaintiffs’ attorney Michael Farris said, “It’s time for every born-again Christian in America to take their children out of public schools.”⁶²

55. For example, Mel and Norma Gabler have spent decades challenging textbooks that they view as anti-Christian, anti-family, or anti-American. See DIANE RAVITCH, *THE LANGUAGE POLICE* 105–07 (2003).

56. *Mozert*, 827 F.2d at 1060.

57. See Jeffries & Ryan, *supra* note 5, at 337–38.

58. *Matthew* 5:13–14.

59. CHRISTIAN SMITH, *CHRISTIAN AMERICA?* 136 (2000). An Oregon parent offered a similar rationale, arguing that “God calls us to be light and salt in the world, and I think if all Christians take their kids and put them in Christian schools, then who’s gonna be over here to be salt and light to the rest of the world?” *Id.* at 137.

60. *2 Corinthians* 6:14.

61. *Mozert*, 827 F.2d 1058, *cert. denied*, 484 U.S. 1066 (1988).

62. See Leslie Kaufman, *Life Beyond God*, N.Y. TIMES, Oct. 16, 1994, § 6 (Magazine), at 46 (quoting Michael Farris). Similarly, prominent Christian activist Beverly LaHaye advises parents to seek private options, for “[t]oo many children have been lovingly led to Christ at their parent’s knee and then thrown to the destruction of the public school system.” BEVERLY LAHAYE, *HOW TO DEVELOP YOUR CHILD’S TEMPERAMENT* 77 (1977); see also Dan Smithwick, *Nine Reasons for Not Using Public Schools*, NEHEMIAH INST., June 19, 2002, <http://www.nehemiahinstitute.com/articles/index.php?action=show&id=30> (“I think it is unwise (dangerous?) to send little-trained or untrained youth to perhaps the key battleground of Humanists (the public school classroom) and expect them to be effective in winning over unbelievers, adult or student.”).

By the end of the 1980s, the evangelical Christian critique of the public school system was fully articulated. Public schools had become so committed to secularism that they were necessarily hostile to religion. Prayer and Bible readings were banned. Children were forced to read texts that parents found offensive. Evolution was taught, and creationism was not.⁶³ Sex education was implemented.⁶⁴ Children were taught to develop their own moral responses to conflicts, rather than to follow a Biblically inspired code of ethics.⁶⁵ For many, these changes together amounted to state establishment of the religion of secularism in the public schools.⁶⁶

Other changes taking place in the public schools also concerned religious conservatives. Many of these changes involved race. In response to court-ordered desegregation in southern schools, many enrolled their children in Christian academies.⁶⁷ As evangelical leader Ralph Reed recalls, "The white evangelical church marched in the vanguard of the campaign to preserve segregation in the South."⁶⁸ Says Reed, "George Wallace may have stood in the schoolhouse door, but evangelical clergy provided the moral framework for his actions."⁶⁹ Religious conservatives who remained in public schools faced increasingly multicultural textbooks and curricula. Especially (but not exclusively) in urban districts, grassroots activism, combined with the increasing presence of African American school administrators, led to a curricular revolution—black authors were assigned, blacks were presented in textbooks, and American history was increasingly presented as severely blemished by slavery and racial discrimination.⁷⁰

Black authors figured prominently in struggles between religious conservatives and school officials over textbooks. In the mid-1970s, Kenawha County, West Virginia, was the site of a dispute that is often said to have launched the conservative movement to influence textbooks. Alice Moore, a leader of the movement, objected to a list of authors that included Gwendolyn Brooks, Dick

63. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana law requiring schools to teach creation science alongside evolution); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down Arkansas law prohibiting the teaching of evolution).

64. See MELISSA M. DECKMAN, *SCHOOL BOARD BATTLES* 10 (2004).

65. See SALOMONE, *supra* note 32, at 30.

66. See James C. Carper, *The Christian Day School Movement*, 47 EDUC. F. 135, 139–40 (1983); John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 29 (1978).

67. Jim Ryan and John Jeffries have argued convincingly that the growth of evangelical schools was driven largely by whites' desire to avoid desegregation. Jeffries & Ryan, *supra* note 5, at 328–35.

68. JUSTIN WATSON, *THE CHRISTIAN COALITION* 142 (1997) (quoting Ralph Reed).

69. *Id.*

70. See JONATHAN ZIMMERMAN, *WHOSE AMERICA?* 3, 117–18 (2002).

Gregory, Eldridge Cleaver, Langston Hughes, James Baldwin, and Malcolm X.⁷¹ Moore insisted that conservatives wanted these authors banished from the curriculum not because of their race, but rather because they espoused objectionable moral and philosophical positions. Moore complained that authors who emphasized America's flaws (such as racism) had been allowed to supplant authors dedicated to the "inculcation of Americanism."⁷² Her response highlights the intractable nature of the dispute. Given centuries of slavery, decades of Jim Crow, and ongoing contemporary racial disparities, a representative sampling of important works by black writers will necessarily produce a disproportionate share of books critical of America. So even if Moore and her allies did not seek to reduce the number of black writers per se, their objection to writers who were critical of the nation led to the same result.

Multiculturalism in public schools had now joined secularism as an object of fear for many religious conservatives. As conservative Christian disenchantment with the public schools grew, and as increasing numbers of parents looked for other options, the stage was set for the development of the values claim for school vouchers. Up to this point, the most prominent rationale for vouchers was the libertarian argument that had been advanced by Milton Friedman in 1955.⁷³ But, as I explain next, the idea of public funding for private schooling was soon adopted by religious conservatives, who linked it to their complaint that public schools no longer reflected their values.

71. See Susan Rose, *Christian Fundamentalism and Education in the United States*, in *FUNDAMENTALISMS AND SOCIETY* 452, 469 (Martin E. Marty & R. Scott Appleby eds., 1993). For a thorough account of the Kenawha County dispute, see MARTIN, *supra* note 44, at 117–43. Similarly, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982), a group of politically conservative parents sought to keep an objectionable list of books from the school library. Books by black authors figured prominently on the banned list. *Id.* at 856 n.3.

72. JOE L. KINCHELOE, *UNDERSTANDING THE NEW RIGHT AND ITS IMPACT ON EDUCATION* 31 (1983); see also MARTIN, *supra* note 44, at 124 (The stated reasons are not that the authors are black; rather, "these writers were criticized for profane or negative language, for depressing content, and for exposing children to realities from which they should be shielded.").

73. Milton Friedman proposed a full-fledged voucher system that would result in public schools being replaced with a private school system supported by tax dollars. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 127–30 (Robert A. Solo ed., 1955). A revised version of this article appears as chapter 6 in MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85 (1962).

C. The Values Claim for Vouchers

The values claim starts with the premise that parents, not the State, have the authority to direct their child's education.⁷⁴ This notion has won the respect of courts, most famously in the 1925 case *Pierce v. Society of Sisters*,⁷⁵ which protected the right of parents to send their children to private schools. In *Pierce* the Court held, "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."⁷⁶ The values claim asserts that parental rights are at their zenith when religious principle is at stake, an idea that received support in *Wisconsin v. Yoder*,⁷⁷ in which the Court allowed the Old Order Amish to remove their children from government schools after eighth grade. Given the privileged status of parents, the values claim asserts that the public schools should support, or at least not undermine, what parents teach at home. Furthermore, since the schools ultimately operate under God's authority, schools should not exclude discussion of God or public affirmations of God's presence.⁷⁸

The values claim is further predicated on the notion that schools are never neutral regarding values.⁷⁹ Some ideology, belief system, religion, or set of core values is always being taught in school. The Supreme Court has repeatedly acknowledged that schools inculcate values. In *Bethel School District No. 403 v. Fraser*,⁸⁰ the majority opinion quoted historians Charles and Mary Beard: "[P]ublic education must prepare pupils for citizenship in the Republic . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."⁸¹ *Ambach v. Norwick*⁸² upheld a statute that prohibited noncitizens

74. See Hubert Morken, *The New Common School: The Evangelical Response to Everson*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 59, 60–61 (Jo Renée Formicola & Hubert Morken eds., 1997).

75. 268 U.S. 510 (1925).

76. *Id.* at 535.

77. 406 U.S. 205 (1972).

78. See Morken, *supra* note 74, at 61.

79. See, e.g., CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE* 17 (2000) ("[P]opular schooling is the instrument that an activist government is most tempted to employ to bring about social transformation and that, having started to use, it is most likely to use ever more deliberately and extensively."); JOHN STUART MILL, *ON LIBERTY* 190–91 (London, Longman, Roberts & Green Co., 3d ed. 1864) (1859) ("A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government . . . in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.");

80. 478 U.S. 675 (1986).

81. *Id.* at 681.

82. 441 U.S. 68 (1979).

from teaching in public schools. In passages that have subsequently been cited in numerous education cases, the Court emphasized "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests," and affirmed the role of public schools in "inculcating fundamental values necessary to the maintenance of a democratic political system."⁸³

That public schools teach a set of values was true in the nineteenth century, when Protestants controlled the schools, and it is true today, when secularists do. Those who are committed to secularism in education, however, do not always see the point as clearly now that they are in control. As Michael McConnell argues, "A secular school does not necessarily produce atheists, but it produces young people who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all."⁸⁴ McConnell's argument is surely overstated—after all, many children graduate from secular schools without believing that religion is irrelevant to intellectual inquiry. But it does contain an important truth. While secularists may believe that by keeping religion out of schools they are being neutral, they are in fact taking a position on religion.⁸⁵

In response, proponents of the values claim say that parents should be able to send their children to a school that is not hostile to their fundamental beliefs. They say that parents should not have to send their children to schools that teach them that their parents are wrong.⁸⁶ But what about the *Mozert* court's answer to the dilemma of the evangelical parents? Recall that *Mozert* told parents that if they do not like what is on offer at the public school, they should go elsewhere. The values claim has two rejoinders. First, even if parents have the means, it is unfair to force them to pay once for government schools that teach values antithetical to their own and again for private school alternatives.⁸⁷

83. *Id.* at 76–77.

84. Michael W. McConnell, *Old Liberalism, New Liberalism and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 5, 23 (Michael W. McConnell et al. eds., 2001).

85. See A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 165 (1985) ("[B]anishment of religion does not represent neutrality between religion and secularism; conduct of public institutions without any acknowledgment of religion is secularism."). Michael McConnell extends this point beyond the question of religion, arguing, "Today we are more likely to see education designed to inculcate liberal progressive notions like environmentalism, feminism, safe sex, and the like, coupled with careerism and consumerism. This may seem open and multicultural—unless you happen to disagree with it." McConnell, *supra* note 84, at 22.

86. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 177–79 (1993).

87. See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 164 (1980) ("The present arrangements abridge the religious freedom of parents who do not accept the religion taught by the public schools yet are forced to pay to have their children indoctrinated with it, and to pay still more to have their children escape indoctrination."); McConnell, *supra* note 84, at 22 (Those who disagree are, "like the Catholics of the nineteenth century, faced with a choice between

Second, not all parents can afford to shoulder this double burden.⁸⁸ For those parents who cannot afford tuition, the right to send their children to private school is empty without state assistance. In effect, they are forced to have their children indoctrinated by a government system teaching values they find objectionable.

The values claim sustained the movement for private school choice from the 1970s to the early 1990s. For much of this time, the legal mechanism of choice was not vouchers, but tuition tax credits that reduced the tax liability of families that sent their children to private schools. Throughout the 1970s, the Republican Party platforms included a call for tuition tax credits, but Ronald Reagan was the first presidential candidate to push the issue aggressively.⁸⁹ Though no legislation was enacted, various plans for private school choice were introduced during the Reagan years, including voucher and tuition-tax-credit plans.⁹⁰

A key feature of these early plans—and one that was essential to capturing the support of the evangelical community—was that they left schools largely unregulated. Schools did not need to meet particular requirements in order for a parent to receive the voucher or qualify for the tax credit. Schools did not need to report data regarding academic-achievement levels, graduation rates, or test scores. Often there were few or no income limits on the programs, so middle- or upper-class parents could qualify as well, and most proposals were not limited to urban areas or low-performing school districts.⁹¹

These sorts of requirements or limitations were omitted for a good reason—they would have been inconsistent with the values rationale for private school choice. Under the values rationale, the point of private options was to satisfy a parent's desire to find a school that reinforced, or at least was not hostile to, the values taught in the home. The need to escape secularism was not limited to poor families or those living in underperforming districts.

seeing [their] children indoctrinated into a belief system [they] consider to be false and damaging, and paying for a service that other citizens get for free.").

88. See STEPHEN ARONS, *COMPELLING BELIEF* 211 (1983); Richard F. Duncan, *On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 84, at 354, 361; McConnell, *supra* note 26, at 120.

89. See HUBERT MORKEN & JO RENÉE FORMICOLA, *THE POLITICS OF SCHOOL CHOICE* 18 (1999).

90. See *id.* at 18–19.

91. For example, two federal voucher proposals had no income limits. See *Equal Educational Opportunity Act of 1983*, S. 1690, 98th Cong. (1983); *Equity and Choice Act of 1985*, H.R. 3821, 99th Cong. (1985). Two other federal proposals for tuition tax credits during the same era had limits generous enough to allow middle-class families to receive tuition assistance. A 1982 proposal would have assisted families earning up to \$75,000 (more than eleven times the poverty line). See *Educational Opportunity and Equity Act of 1982*, S. 2673, 97th Cong. (1982). A 1983 proposal would have raised the income limit to \$60,000 (more than eight times the poverty line). See *Educational Opportunity and Equity Act of 1983*, S. 528, 98th Cong. (1983). Today's voucher plans typically only include families with incomes two to three times the poverty line. See, e.g., *D.C. School Choice Incentive Act of 2003*, Pub. L. No. 108-199, 118 Stat. 126.

Moreover, under the values rationale there was no need to require religious schools to meet certain government standards or report student-achievement data. After all, the values claim was predicated on schools having a coherent Bible-based worldview that supported what the parents taught at home, not on schools achieving higher test scores for students. Similarly, under the values claim, schools did not have to be accountable to the government, because they were accountable to parents. If parents were satisfied, then the school would—and deserved to—stay in business. If parents were unhappy, they would leave, and the market would force the school to close.⁹²

Such was the state of the movement for private school choice at the beginning of the 1990s. But in the decade to follow, there would be a remarkable shift. The values rationale would be overtaken by a competing theory to justify vouchers, and the movement would gain a new public face.

II. VOUCHERS AND RACE

“Instead of conservative ideologues going solo in publicly advancing this issue, we wanted to bring in some left-of-center constituencies. Instead of lily-white faces, we wanted some people of color.”

—Eric Sondermann, Campaign Consultant,
Colorado State Voucher Initiative⁹³

“Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.”

—Chief Justice William H. Rehnquist, *Zelman v. Simmons-Harris*⁹⁴

By 2002, when the Supreme Court decided *Zelman*, the dominant argument for school vouchers rested on racial justice, not religion or values. The Court's opinion in *Zelman* does not, for example, engage the values claim discussed in Part I. Instead, *Zelman* opens with a description of the abysmal state of the Cleveland public schools. According to the Court, Cleveland had some of “the worst performing public schools in the Nation,” and the majority of its students were low-income and minority.⁹⁵ Only 10 percent of ninth graders

92. For arguments to this effect, see *infra* notes 297–299 and accompanying text.

93. MORKEN & FORMICOLA, *supra* note 89, at 48 (quoting Eric Sondermann).

94. 536 U.S. 639, 655 (2002).

95. *Id.* at 644. For an argument that *Zelman* ignored the U.S. Supreme Court's role in creating the hyper-segregated conditions that marked Cleveland and other urban districts, see Charles

passed a basic proficiency test, two-thirds dropped out or failed out before graduating, and those who graduated could not compete academically with students from other Ohio schools.⁹⁶ Vouchers were a response to this educational tragedy, an attempt to rescue a generation of Cleveland's urban poor.⁹⁷

In this Part, I explore the rise of the racial-justice claim for school vouchers. Voucher advocates had political and legal reasons to portray their movement as about race and educational opportunity, rather than religion and values. Politically, voucher leaders sought to expand their constituency beyond libertarians and religious voters, and they chose minority residents in low-income areas as the most promising allies. Legally, voucher defenders realized that their best response to an Establishment Clause challenge was to portray vouchers as advancing quality schooling, not religious freedom. These interrelated themes came together to produce a voucher movement with a public face, intellectual rationale, and legal defense that were quite different from those of the values-oriented movement that preceded it. For voucher supporters, the outcome was victory—at least temporarily. But was the victory won fairly? At the end of this Part, I evaluate the merits of the racial-justice claim for vouchers, concluding that although voucher advocates have overstated their case, vouchers are nonetheless worth pursuing on an experimental basis until we can learn more about their academic impact.

A. The Political Strategy

The evolution of the school-voucher movement began with politics. Despite the efforts of conservative Christians and others in the 1980s and early 1990s, vouchers and tuition-tax-credit proposals failed much more often than they passed.⁹⁸ Voucher proponents sought new allies, and they turned to the minority community. There were many reasons to believe that this approach would succeed. Although they did not use the terms “school choice” or “vouchers,” African American parents since Reconstruction had shown a willingness to consider options outside of government-run systems in an effort to secure

Lawrence, *Choose Justice: Vouchers, Charters, Illusive Equality and the Illusion of Choice* (June 2006) (unpublished paper, on file with author).

96. *Zelman*, 536 U.S. at 644.

97. *Id.* at 655; see also *Davis v. Grover*, 480 N.W.2d 460, 477 (Wis. 1992) (Ceci, J., concurring) (“The Wisconsin legislature, attuned and attentive to the . . . seemingly insurmountable problems confronting socioeconomically deprived children, has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair.”).

98. See TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 360–69 (2001).

better quality schools for their children.⁹⁹ And more recently, in the few instances in which vouchers had been successful—small programs in Cleveland and Milwaukee, for example—minority political leaders had been involved. Moreover, polling data suggested that black and Hispanic parents looked especially favorably on vouchers, as did poorer parents and those from disadvantaged school districts.¹⁰⁰ The polling also showed that Americans as a whole were most supportive of voucher plans that were targeted toward low-income families.¹⁰¹ Finally, a number of influential education writers, including Joseph Viteritti and Diane Ravitch, had made compelling arguments that low-income parents had a moral claim to the type of educational choice taken for granted by middle-class families.¹⁰²

As the quotation from the Colorado strategist that opens this Part indicates, some voucher advocates were quite candid about their strategy. John Coons and Stephen Sugarman, two of the intellectual deans of the voucher movement, argued that school-choice coalitions “must include and feature actors who are identified publicly with groups that advertise their concern for the disadvantaged. The leadership must visibly include racial minorities of both sexes and prominent Democrats.”¹⁰³ What should conservatives do as minorities assume these new leadership roles? According to Coons and Sugarman, “[T]he conservative commitment to the project is necessary but should remain mute until the coalition has secured leadership whose party affiliation, social class or race—preferably all three—displays what the media will interpret as concern for the disadvantaged.”¹⁰⁴

99. This is my central argument in James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287 (2005).

100. See MOE, *supra* note 98, at 217. Polls conducted in 2000 by David Bositis of the Joint Center for Political and Economic Studies provided additional nuance to the question of how African Americans viewed vouchers. According to Bositis, 57 percent of African Americans and 49 percent of the general population supported vouchers. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECONOMIC STUDIES, 2000 NATIONAL OPINION POLL: POLITICS 9 (2000). Among blacks, the most supportive groups were those under the age of thirty-five (75 percent), black Republicans (69 percent), and those from households with children (74 percent). *Id.* Blacks over the age of fifty (44 percent) and those with no children in the household (49 percent) were the least supportive. *Id.*

101. See MOE, *supra* note 98, at 320.

102. Joseph Viteritti's fullest elaboration of this theme can be found in JOSEPH P. VITERITTI, *CHOOSING EQUALITY* (1999). He has since continued to pursue the argument. See, e.g., Joseph P. Viteritti, *Empower the Poor*, BOSTON REV., Oct./Nov. 2003, at 13, 14 (“[W]hy should poor people have to send their children to schools that most middle-class people would never contemplate for their own? That is the underlying moral question of the debate.”). Diane Ravitch offers a compelling claim for school choice in Diane Ravitch, *Somebody's Children: Educational Opportunity for All American Children*, in NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION (Diane Ravitch & Joseph P. Viteritti eds., 1999).

103. JOHN E. COONS & STEPHEN D. SUGARMAN, *MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES* 85 (1999), available at http://www.pacificresearch.org/pub/sab/educat/making_choice.

104. *Id.*

Paul Peterson, another leading voucher advocate, agreed with the Coons-Sugarman reasoning. According to Peterson, the traditional battle over vouchers was a form of “trench warfare” that pitted conservatives against liberals.¹⁰⁵ “There’s only one force out there that’s probably going to change the story, and that’s black families,” argued Peterson.¹⁰⁶ “The reason is that if black families say this is something that’s really important to them, it’s going to change the calculations of all the politicians who have lined up on one side or another.”¹⁰⁷ To facilitate the involvement of African American families in the voucher movement, longtime advocate Howard Fuller helped to establish the Black Alliance for Educational Options (BAEO) in the summer of 2000. At the time, “Fuller told reporters his aim was to ‘change the face of the voucher movement.’”¹⁰⁸ BAEO board member and New York congressman Floyd Flake called vouchers the “new wave of civil rights.”¹⁰⁹

For vouchers to appeal to African Americans, however, the values claim could not be the chief argument. This was so for two reasons. First, the African American struggle for school reform has overwhelmingly focused on improving the academic quality of schools, not on changing the values taught in them.¹¹⁰ Sometimes blacks have discussed the values taught in school, but when they have done so they have stressed values as a way to improve academic outcomes, not as an end in themselves. For example, the movement to create Afrocentric schools often talked the language of values, claiming that black students should be assigned works by black authors and be taught about Africa’s historical greatness.¹¹¹ But this focus on values is different from that of evangelical Christians. Evangelicals want values to be taught in school in order to save souls and guide moral behavior, not to raise test scores. African American educators

105. John E. Coons et al., *The Pro-Voucher Left and the Pro-Equity Right*, 572 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 114 (2000).

106. *Id.* (quoting Paul Peterson).

107. *Id.*

108. Emily Pyle, *Class Warfare*, TEX. OBSERVER, May 9, 2003, at 5.

109. *Id.*

110. *Brown v. Board of Education*, 347 U.S. 483 (1954), was itself an effort to gain access to higher quality schools. Robert Carter, *A Reassessment of Brown v. Board*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 21, 24 (Derrick Bell ed., 1980) (arguing that quality education was “indispensable” if poor black families “were to have any chance or hope of escaping the depressing fate of their forebears”).

111. See Kofi Lomotey, *Independent Black Institutions: African-Centered Education Models*, 61 J. NEGRO EDUC. 455, 458–60 (1992). For a thoughtful discussion of the history of Afrocentric education and its impact on other forms of ethnocentric schooling, see Nina K. Buchanan & Robert A. Fox, *Back to the Future: Ethnocentric Charter Schools in Hawai’i*, in THE EMANCIPATORY PROMISE OF CHARTER SCHOOLS: TOWARD A PROGRESSIVE POLITICS OF SCHOOL CHOICE 77, 78–81 (Eric Rofes & Lisa M. Stulberg eds., 2004).

who preach Afrocentrism do it because they believe that making schooling more relevant and boosting students' self-esteem will help them learn.¹¹²

There is another reason why the values claim could not be the principal argument in winning African American support for vouchers. This is because African Americans had already largely prevailed in their struggle to have school curricula reflect their values. Civil rights leaders and black educational activists fought a long battle, first against textbooks that were overtly racist and later against curricula that simply ignored black authors.¹¹³ These activists were highly successful. Especially in urban districts, black authors are widely available to students. As Jonathan Zimmerman writes, "Thanks to several generations of grassroots black activists, students of color now learn as much (if not more) about Frederick Douglass, Booker T. Washington, and Martin Luther King Jr. as they do about Andrew Jackson, Theodore Roosevelt, or John F. Kennedy."¹¹⁴ The issue in many urban districts today is not that there are insufficient books by minority authors. Tragically, it is that too few children can read them.

The racial-justice claim for vouchers, then, would need to be tied to educational quality, not values or religious freedom, and would therefore require some evidence that private schools were more effective than public ones at teaching academic skills.¹¹⁵ The first evidence for this came from a 1982 study by James Coleman suggesting that students who attended Catholic high schools academically outperformed their counterparts in public schools.¹¹⁶ A study based on the same survey found that Catholic schools had positive effects for minority students.¹¹⁷ Because of the high regard in which the educational research community held Coleman, this study received substantial attention.¹¹⁸ Yet it was also criticized on grounds of selection bias, an issue endemic to education research.¹¹⁹ In this context, selection bias means that the students in Catholic schools might be different from students in public schools, and this difference—rather than the

112. See Lomotey, *supra* note 111, at 455–56.

113. See ZIMMERMAN, *supra* note 70, at 107–29.

114. *Id.* at 3.

115. The values rationale for vouchers had not required the same sort of empirical analysis. While a few researchers documented the extent to which the Bible and religion had been taken out of schools, see MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 124–26 (4th ed. 2002) (citing studies), the values rationale depended mainly on the common-sense observation that many schools were teaching values that some parents found offensive.

116. JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT* 176–78 (1982).

117. See ANDREW M. GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* (1982).

118. See Cindy Currence, A 'Catholic Schools Effect' Is Reaffirmed By Its Champions, *Coleman and Greeley*, *EDUC. WK.*, Nov. 14, 1984, at 1; Mike Wilson, *Sociologist Gives Catholic Schools Highest Grade*, *MIAMI HERALD*, June 30, 1983, at 13PB.

119. See, e.g., Susan G. Foster, *Studies Dispute Coleman's Finding on Blacks in Private Schools*, *EDUC. WK.*, Sept. 8, 1982, at 8.

Catholic schools' educational environment—might explain why the Catholic-school students perform better. Obvious differences between the students in Catholic and public schools might be race, class, or academic aptitude. More subtle differences might be how much the family or the student values education. More research would be needed to determine whether the Catholic schools themselves really made the difference, or whether student or family characteristics explained why the students in Catholic schools did better.¹²⁰

Eight years later, another study comparing public and private schools captured even greater attention than Coleman's work. *Politics, Markets, and America's Schools*, by John Chubb and Terry Moe,¹²¹ concluded that private schools are more effectively organized than public schools and produce better academic outcomes. Chubb and Moe were influential advocates for school vouchers, ambitiously claiming that school choice "has the capacity *all by itself* to bring about the kind of transformation that, for years, [educational] reformers have been seeking to engineer in myriad other ways."¹²² But the Chubb-Moe study was criticized for selection bias, just as Coleman's had been.¹²³

Overcoming the selection-bias criticisms would require a random-assignment study, of the kind often conducted in medical research. In the voucher context, this would require a scenario in which a group of students applied for private school vouchers, and a lottery assigned vouchers to some but not to others. The lottery winners would go to private schools, and the lottery losers would stay in public schools. Researchers would then track the academic outcomes of the two groups over time and compare them to determine which type of school was better.

The opportunity for such a study arose when philanthropists decided to privately fund scholarship programs for low-income students in three cities—New York, Washington, D.C., and Dayton, Ohio.¹²⁴ In 1998, William Howell and Paul Peterson published preliminary findings from these trials.¹²⁵ Howell and Peterson

120. A variety of theories have been put forward to explain why Catholic schools might make the difference: (1) high expectations for all students; (2) rigorous curriculum; (3) nurturing community; (4) development of strong African American identity; and (5) clear emphasis on character development. See Janice E. Jackson, *Forward to GROWING UP AFRICAN AMERICAN IN CATHOLIC SCHOOLS*, at ix, x–xi (Jaqueline Jordan Irvine & Michèle Foster eds., 1996).

121. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

122. *Id.* at 217.

123. See Amy Stuart Wells, *Choice in Education: Examining the Evidence on Equity*, 93 TCHRS. C. REC. 137, 138 (1991).

124. See Jacques Steinberg, *Voucher Program for Inner-City Children*, N.Y. TIMES, June 10, 1998, at B11.

125. See PAUL E. PETERSON ET AL., INITIAL FINDINGS FROM AN EVALUATION OF SCHOOL CHOICE PROGRAMS IN WASHINGTON, D.C. (1998) (presented to the Annual Meeting of the American Political Science Association).

supported vouchers, and their findings were intriguing. They found that attending a private school did not have an overall impact on student test scores in the three cities they studied.¹²⁶ They also found no private school impact for Hispanic or white students.¹²⁷ However, they did find that switching to a private school improved the test scores of African American students.¹²⁸ The Howell-Peterson study was not immune from criticism. Some researchers who reanalyzed the data concluded that even the black students did not benefit from vouchers.¹²⁹ Howell and Peterson also had to contend with one obvious question: Why would private schools make a difference for one race but not others? Maybe, they hypothesized, the public schools that blacks attend are especially bad, or perhaps there is something destructive about black urban culture that Catholic schools are especially good at remedying.¹³⁰

Despite these questions, voucher supporters endorsed the Howell-Peterson conclusions with enthusiasm.¹³¹ At first blush, this seems odd. How could voucher proponents rest their case so heavily on a study that was conducted by sympathetic researchers, but which found no overall private school impact and none for white or Hispanic students? The answer lies in the voucher movement's new focus on inner-city blacks. The Howell-Peterson findings suggested that private schools helped black students. That alone was enough to support the racial-justice claim.

Defining school vouchers in racial-justice terms had a profound impact on the debate. As an example, consider law professor Rosemary Salomone. In 2000, as the *Zelman* case was working its way to the Supreme Court, Salomone wrote that she had long been "an avowed separationist on church-state matters," and, naturally, a voucher opponent.¹³² Yet she had recently changed her view. What changed her mind? Not the values claim that religious adherents faced schools that undermined their beliefs. Not the libertarian claim that the public system needed to be dismantled through private competition. Salomone instead

126. WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP* 145-46 (2002).

127. *Id.*

128. *Id.*

129. See, e.g., Alan B. Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 AM. BEHAV. SCIENTIST 658, 683-85 (2004) [hereinafter Krueger & Zhu, *Another Look*]; Alan B. Krueger & Pei Zhu, *Inefficiency, Subsample Selection Bias, and Nonrobustness: A Response to Paul E. Peterson and William G. Howell*, 47 AM. BEHAV. SCIENTIST 718, 726-27 (2004); Paul E. Peterson & William G. Howell, *Efficiency, Bias, and Classification Schemes: A Response to Alan B. Krueger and Pei Zhu*, 47 AM. BEHAV. SCIENTIST 699, 702 (2004).

130. HOWELL & PETERSON, *supra* note 126, at 164-66.

131. See, e.g., Jeff Archer, *Black Elementary Students May Reap Most Gains from Vouchers*, EDUC. WK., Mar. 8, 2000, at 9; Cheryl Wetzstein, *Vouchers Raise Scores of Blacks*, WASH. TIMES, May 9, 2002, at A10.

132. SALOMONE, *supra* note 32, at xi.

saw the schooling struggles of her nanny, a single parent from the Caribbean whose disabled child was trapped in the grip of a dysfunctional, low-performing public school monopoly.¹³³ When Salomone looked at the urban Catholic schools in New York City, she saw that they performed better and were not religiously dogmatic. These Catholic schools, according to Salomone, “were more immediately concerned with saving [students] from the crack addicts on the corner than with saving their souls.”¹³⁴ Vouchers now had her support.

This, then, was the new frame for the voucher movement: academically rigorous religious schools teaching the urban poor to read, write, and see a future. It was a strategy that placed voucher opponents on the defensive, especially those whose sympathies lay with people like Salomone’s nanny. As voucher critic Gordon MacInnes asked, “Is it fair to deny educational opportunities to low-income children with motivated parents in order to maintain a ‘better mix’ of strivers and nonstrivers in public schools?”¹³⁵ While MacInnes still opposed vouchers, he admitted that this was an “uncomfortable question.”¹³⁶

B. The Legal Strategy

If advocates had a political incentive to frame vouchers as a means of promoting educational opportunity, the legal imperative was even greater. By 2002, voucher advocates could not defend the program with the religious-liberty arguments that had been advanced in *Everson* more than fifty years before.¹³⁷ Despite much debate about the proper test for evaluating Establishment Clause challenges, the constitutionality of a program providing government money to be used at religious schools would depend (in whole or in part) on whether the purpose or effect of the program was to advance religion.¹³⁸ The

133. *Id.* at xi–xii.

134. *Id.* at xii. Arthur Levine, President of Teacher’s College, reports a similar conversion. According to Levine, despite a lifetime of opposing school vouchers, “after much soul-searching, I have reluctantly concluded that a limited school voucher program is now essential for the poorest Americans attending the worst public schools.” Arthur Levine, *Why I’m Reluctantly Backing Vouchers*, WALL STREET J., June 15, 1998, at A28. For a summary of prominent liberals who became voucher supporters, see Richard D. Kahlenberg & Bernard Wasow, *What Makes Schools Work?*, BOSTON REV., Oct./Nov. 2003, at 6.

135. GORDON MACINNES, *KIDS WHO PICK THE WRONG PARENTS AND OTHER VICTIMS OF VOUCHER SCHEMES* 5 (1999).

136. *Id.*

137. See *supra* note 38 and accompanying text.

138. I am not suggesting that the “purpose” or “effect” test is settled. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is highly controversial. But a law’s purpose and effect remain highly relevant even among some of the alternatives to *Lemon*. For example, Justice O’Connor’s “endorsement” test ultimately asks whether the law in question has the purpose or effect of endorsing a particular religion or religion in general. *Wallace v. Jaffree*, 472 U.S. 38, 69–70 (1985) (O’Connor, J., concurring).

values rationale for vouchers would face severe pressure under this analysis. After all, it would not be lost on courts that most of those who objected to the values taught by the public schools did so for the same reason the *Mozert* parents objected to the Holt reading series—because of religion. Voucher plans enacted to protect the rights of parents to find schools that comported with their values were risky in light of the Court's hostility to laws that appeared to be religiously motivated.¹³⁹

For vouchers to survive, the Court needed to see them as advancing academic achievement, not religious freedom. This was especially true as long as Justice O'Connor remained the swing vote on Establishment Clause cases. The chief architect of the legal defense of school vouchers, Clint Bolick, consulted a team of leading Establishment Clause scholars that included former law clerks for Justice O'Connor. They agreed that Justice O'Connor would want to uphold a law if she believed it was an effective way to help poor, minority children trapped in terrible schools.¹⁴⁰

This was excellent advice. The racial context has long mattered in Establishment Clause cases. In *Norwood v. Harrison*,¹⁴¹ for example, the Court reviewed a Mississippi program in which the state bought textbooks and distributed them for free to students in public and private schools. The Court treated *Norwood* as an easy case, striking down the program. But why was *Norwood* so easy? After all, just five years earlier, in *Board of Education of Central School District No. 1 v. Allen*,¹⁴² the Court had said that New York could provide free textbooks to students in private religious schools. And had not *Everson* upheld a New Jersey program that paid the bus fare for parochial school students?¹⁴³ The difference was racial context. As the Court noted, the recipients in *Norwood* were 107 all-white private schools that had been created simultaneously with court orders to desegregate the public schools.¹⁴⁴ "However narrow may be the channel of permissible state aid to sectarian schools," said the Court, "it permits a greater degree of state assistance than may be given to

139. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 592 (1987) (rejecting Louisiana law requiring schools to teach creation science because it "embodies the religious belief that a supernatural creator was responsible for the creation of humankind"); *Wallace*, 472 U.S. at 57 n.43 (striking down Alabama period-of-silence statute in part because of the religious motivations of the bill's sponsor); *Epperson v. Arkansas*, 393 U.S. 97, 107–08 (1968) (faulting anti-evolution law because it was grounded in the "fundamentalist sectarian conviction" that evolution conflicts with the Book of Genesis).

140. Clint Bolick recounts this strategy session in *Voucher Wars*. BOLICK, *supra* note 4, at 109–10. Although I served as one of Justice O'Connor's law clerks, I did not attend this meeting.

141. 413 U.S. 455 (1973).

142. 392 U.S. 236 (1968).

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

144. *Norwood*, 413 U.S. at 459–60.

private schools which engage in discriminatory practices that would be unlawful in a public school system.”¹⁴⁵ In short, the Mississippi program was struck down because the beneficiaries were private schools created to avoid *Brown*’s integration mandate.¹⁴⁶

Voucher advocates had also received good advice about what would influence Justice O’Connor. Long before *Zelman* was litigated, Justice O’Connor in particular had indicated that her view in Establishment Clause cases would be influenced by her assessment of the equities. In *Aguilar v. Felton*,¹⁴⁷ the Court had rejected a New York practice in which public school teachers provided remedial instruction to low-income students attending religious schools. Justice O’Connor’s dissent made clear that her sympathies were with the low-income students, who, she said, were the losers in the case. For “almost two decades,” she noted, “New York City’s public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion.”¹⁴⁸ In taking that assistance away, “[t]he Court deprives [the children] of a program that offers a meaningful chance of success in life.”¹⁴⁹ Concluded Justice O’Connor, “For these children, the Court’s decision is tragic.”¹⁵⁰

Given Establishment Clause doctrine as well as the particular inclinations of the pivotal justice, the legal goal for Bolick and his team was evident—jettison the values and libertarian rationales, and in their place develop a theory of vouchers as a tool for racial justice. Bolick’s first victory in this effort was convincing the *Wall Street Journal* to editorialize against the Milwaukee school superintendent for failing to implement a newly enacted voucher plan for low-income students.¹⁵¹ In “Blocking the Schoolhouse Door,” the *Journal* compared the Milwaukee school superintendent to segregationist Arkansas governor Orval Faubus and Alabama governor George Wallace:

Arkansas Governor Orval Faubus called out the National Guard in 1957 to prevent black children from attending all-white Central High School. In 1963, George Wallace stood in the schoolhouse door to block two black students from enrolling in the school of their choice. Now, in 1990,

145. *Id.* at 470.

146. For a discussion of *Norwood*, see Klint Alexander & Kern Alexander, *Vouchers and the Privatization of American Education: Justifying Racial Resegregation from Brown to Zelman*, 2004 U. ILL. L. REV. 1131, 1142–44.

147. 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

148. *Id.* at 431 (O’Connor, J., dissenting).

149. *Id.*

150. *Id.*

151. BOLICK, *supra* note 4, at 27.

Herbert Grover, Wisconsin's Superintendent of Public Instruction, is openly trying to block a law that will allow 1,000 low-income black children in Milwaukee to use vouchers to attend a private school of their choice.¹⁵²

In his book recounting the history of the voucher litigation, Bolick recalls his satisfaction that "[f]or the first time in a major national media outlet, the civil rights banner was unfurled over school choice."¹⁵³ And so it went. The voucher team bussed children to courthouses to put a sympathetic face on the litigation and attempt to influence judges.¹⁵⁴ They attacked President Clinton for the hypocrisy of opposing school vouchers while sending his daughter to an elite private school in Washington, D.C.¹⁵⁵ Aware that "[l]ike everyone else, judges read newspapers and watch television," voucher defenders endorsed an aggressive public opinion campaign to complement their legal strategy.¹⁵⁶ They sought favorable news stories and legal commentary from outlets like *60 Minutes*, the *New York Times*, the *Los Angeles Times*, National Public Radio, and *The New Republic*.¹⁵⁷ While the *Zelman* litigation was pending before the Sixth Circuit Court of Appeals and the Supreme Court, the BAEF launched an extensive advertising campaign, with headlines such as "School Choice is Widespread—Unless You're Poor."¹⁵⁸

The racial-justice strategy culminated in the brief that Bolick and his team filed in *Zelman v. Board of Education*.¹⁵⁹ is literally the first and last case they cite.¹⁶⁰ The brief gives only the slightest mention to the libertarian and values claims that predated the racial-justice argument. Indeed, the libertarian and values claims together merit only a clause: "The origins of the modern parental choice movement trace to religious-school advocates and the free-market economics of Milton Friedman"¹⁶¹ Having dispensed with that history, the brief gives prominence to the racial-justice theme—"but more recently, parental choice has evolved into a central component of the broader

152. Editorial, *Blocking the Schoolhouse Door*, WALL STREET J., June 27, 1990, at A1.

153. BOLICK, *supra* note 4, at 27.

154. *See id.* at 94, 176.

155. As Bolick told the *New York Times*, "Bill Clinton, the self-described advocate of public schools, finds that not a single public school in D.C. is adequate for his daughter And we'd like to see other parents, particularly low-income parents, have the same choice as Bill Clinton." Thomas L. Friedman, *Clintons Pick Private School in Capital for Their Daughter*, N.Y. TIMES, Jan. 6, 1993, at A14 (quoting Clint Bolick).

156. BOLICK, *supra* note 4, at 111.

157. *See id.* at 39, 111–12, 176.

158. *Id.* at 157.

159. 347 U.S. 483 (1954).

160. Brief on the Merits at 4, 49, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1779).

161. *Id.* at 19.

quest for education reform and educational equity.”¹⁶² Providing what would become the foundation for Justice Rehnquist’s opinion for the Court, the petitioners offer a litany of statistics documenting the dire educational prospects for low-income minority children in inner-city school districts, and cite studies showing that private schools, including religious schools, achieve better academic results with similar students.¹⁶³ The brief hits its rhetorical high note at its conclusion, where it analogizes the voucher and school desegregation movements one final time:

Many of the themes in this case reflect those raised 47 years ago in *Brown v. Board of Education*. There, children were forced to travel past good neighborhood schools to attend inferior schools because the children happened to be black; today, many poor children are forced to travel past good schools to attend inferior schools because the schools happen to be private. In the quest to fulfill the promise of equal educational opportunity, we must enlist every resource at our disposal.¹⁶⁴

For the NAACP Legal Defense and Educational Fund, Inc. (LDF), this use of *Brown* was frustrating. In their amicus brief, they called the analogy “manipulative,” “insulting,” and “so unlikely as to be nearly frivolous.”¹⁶⁵ For almost fifty years, LDF had worked to implement *Brown* through the courts. Yet the advocates of integration had been losing ground. After about two decades of substantial school desegregation, segregation began to increase in the 1980s and was still on the rise at the time of *Zelman*.¹⁶⁶ Moreover, the Supreme Court had been ruling against the LDF since the 1970s, limiting the scope, means, and duration of desegregation orders.¹⁶⁷ Even worse, the Court had done so in cases in which its rulings limited the educational options of inner-city black children—the same group the *Zelman* petitioners now invoked in defense of school vouchers.¹⁶⁸ Why should the sorry state of the Cleveland school system justify vouchers when the

162. *Id.*

163. *Id.* at 19–26.

164. *Id.* at 49.

165. Brief of the NAACP Legal Defense & Educational Fund, Inc. & the NAACP as Amici Curiae in Support of Respondents at 2–3, 6, 7, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751).

166. See Erica Frankenberg, Chungmei Lee & Gary Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 30 (Jan. 2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>.

167. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237 (1991); *Milliken v. Bradley*, 418 U.S. 717 (1974).

168. In *Milliken*, for example, the Court rejected a district court remedy that would have allowed mostly black children in Detroit schools to attend suburban schools. *Milliken*, 418 U.S. at 738–45.

educational catastrophe in Detroit or Kansas City had not been enough to sustain desegregation remedies in *Milliken v. Bradley*¹⁶⁹ or *Missouri v. Jenkins*?¹⁷⁰

Despite these protestations, it soon became clear how effectively Bolick and his team had reframed school vouchers as a racial-justice issue. A few days after *Zelman* was decided, President Bush hailed the decision at a “Rally on Inner City Compassion” in downtown Cleveland.¹⁷¹ In *Brown*, said Bush, the Court had “declared that our nation cannot have two educational systems, and that was the right decision.” *Zelman* was similar, he said. “Last week, what’s notable and important is that the court declared that our nation will not accept one education system for those who can afford to send their children to a school of their choice and [another] for those who can’t, and that’s just as historic.”¹⁷² Nor was President Bush alone in comparing *Brown* and *Zelman*. Secretary of Education Rod Paige, for example, argued:

Brown v. Board of Education changed American education forever. I know because I grew up in the South when schools were segregated. With *Brown*, education became a civil rights issue, and the decision introduced a civil rights revolution that continues to this day. *Zelman v. Simmons-Harris* holds the same potential. It recasts the education debates in this country, encouraging a new civil rights revolution and ushering in a “new birth of freedom” for parents and their children everywhere in America.¹⁷³

Some went even further. Whereas the prevailing narrative relied on analogies to the pre-*Brown* era, some eschewed the Jim Crow references in favor of an even greater tragedy in American history—slavery. Michael Uhlmann argued that before *Zelman*, poor and minority children were “indentured to the last plantation, which is what the public schools in many of our major cities have become. *Zelman* provides a constitutionally protected escape route and makes it possible for poor parents to obtain funding for the journey.”¹⁷⁴ Secretary Paige used similar language, claiming that school vouchers provide “educational emancipation,” and allow students to “throw off the chains of a school system that has not served them well.”¹⁷⁵

169. 418 U.S. 717.

170. 515 U.S. 70.

171. Dana Milbank, *Bush Urges Wide Use of School Vouchers*, WASH. POST, July 2, 2002, at A1.

172. *Id.*

173. Rod Paige, *A Win for America's Children*, WASH. POST, June 28, 2002, at A29; see also George F. Will, *Implacable Enemies of Choice*, WASH. POST, June 28, 2002, at A29 (“[W]ith *Zelman*,] socially disadvantaged children had their best day in court since *Brown v. Board of Education* in 1954.”).

174. Michael M. Uhlmann, *Zelman: The Court Gets it Right*, FIRST THINGS, Jan. 2003, at 9, 11.

175. Rod Paige, U.S. Sec’y of Educ., *A Time for Choice: Remarks at the Heritage Foundation* (Jan. 28, 2004), available at <http://www.dcpwatch.com/vouchers/040128.htm>.

C. The Racial-Justice Claim: Does It Have Merit?

The evolution of the voucher movement—from the libertarian arguments of Friedman, to the values claims of religious conservatives, to the racial-justice arguments in *Zelman*—naturally gives rise to questions about the sincerity of its latest incarnation. After all, southern states in the 1960s and 1970s used “freedom of choice plans” to avoid complying with *Brown*’s mandate.¹⁷⁶ In light of this background, the question for many today is: Will vouchers help black students, or are they a plot to achieve another agenda (such as the values agenda)?¹⁷⁷ As my discussion of the LDF’s *Zelman* brief indicates, the notion that a racial-justice claim could be made for vouchers was aggressively challenged in the years of litigation. And it is still challenged today. In this Subpart, I offer some thoughts on whether the racial-justice claim has any merit.

It is essential to distinguish between two separate questions. The first is: Do vouchers achieve an agenda other than helping low-income African Americans? The second is: Will vouchers help low-income African American students? The first question is easily answered—yes. As Part I of this Article demonstrates, there is a religious constituency for vouchers that is motivated by the values claim. They want the opportunity to send their children to schools that teach religion and values consistent with their worldview. There are other constituencies that favor vouchers as well, including libertarians and secular conservatives attracted to market-based competition. For some in these groups, the racial-justice claim was simply an expedient way to enhance the legal and political viability of vouchers.

The second question—do vouchers advance the interests of black children?—is more complicated. For those moved by the racial-justice claim, whether vouchers deserve support turns on the answer. The issue was hotly disputed in the *Zelman* litigation, and to resolve it I explore the arguments made there.

Consider the anti-voucher arguments advanced by leading civil rights organizations. Most do not withstand scrutiny. One of the central arguments of the LDF was that voucher plans could not claim *Brown*’s mantle because they served too few students. According to the LDF, “[O]nly a small fraction of the African American and other minority students . . . can be selected . . . to attend non-public facilities under the Legislature’s program. This is so despite the fact that the purpose of the program, according to [petitioners], is to help solve the

176. Forman, *supra* note 99, at 1288.

177. See, e.g., Howard Simon, *Disguising School Vouchers as Civil Rights Issue Should Fool No One*, PALM BEACH POST, Oct. 5, 1998, at A17.

massive educational problems in that city.”¹⁷⁸ The argument that vouchers are not part of the solution to an urban district’s educational woes because they serve too few students is ironic coming from a civil rights organization. After all, civil rights organizations and their allies in the teachers’ unions typically take the lead in fighting voucher programs, and fight to keep them small in the event that they are enacted.¹⁷⁹ Having kept the voucher program small, they cannot turn around and argue that smallness is the problem.

Moreover, a movement can claim the civil rights mantle even if it immediately impacts only a small number of students.¹⁸⁰ Legal and political victories for small numbers can matter for other reasons. They may be of symbolic importance. Or they may benefit only a few now, but more later. Finally, maybe only a few will ever benefit, but those few have a powerful moral claim. Civil rights organizations have a long history of fighting for causes that, while small in scale, are nonetheless celebrated. Only 2000 students attended the Mississippi freedom schools started by the Student Non-Violent Coordinating Committee and the Congress of Racial Equality.¹⁸¹ Yet few in the civil rights community think this diminishes their historical legacy. Only nine students passed the barricades at Central High School in Little Rock, yet *Cooper v. Aaron*¹⁸² matters quite a lot. Of course, there are differences between *Cooper* and *Zelman*.¹⁸³ But both cases involved tiny numbers. A legitimate critique of *Zelman* on civil rights grounds, therefore, cannot be found in the argument that only a few directly benefit.

Doubters of the racial-justice claim for vouchers also focused on the fact that groups other than blacks would be the true beneficiaries. This theme—that the racial-justice claim for vouchers really cloaked other motivations—is quite

178. Brief of the NAACP, *supra* note 165, at 9–10. According to Ted Shaw, then LDF Associate Director-Counsel, vouchers are “not the answer for the vast majority of black students, who will remain in the public schools with no systemic reform and no systematic commitment of resources.” Linda Greenhouse, *Win the Debate, Not Just the Case*, N.Y. TIMES, July 14, 2002, at C4 (quoting Ted Shaw).

179. See, e.g., John Tierney, Editorial, *Let Your People Stay*, N.Y. TIMES, Feb. 21, 2006, at A19.

180. Indeed, in a system as massive as our K–12 education system nationwide, many widely lauded reforms are small. Teach For America, a program in which college graduates from our nation’s top universities go into teaching at schools serving low-income students, was widely praised when it began, despite sending only 500 teachers into six school districts. Teach For America, Our History, http://www.teachforamerica.com/about/our_history.htm (last visited Jan. 5, 2007). Even today, with roughly 4400 corps members, only 2.5 million of our nation’s schoolchildren have been reached by a Teach For America teacher. *Id.*; THOMAS D. SNYDER & ALEXANDRA G. TAN, U.S. DEPT OF EDUC., DIGEST OF EDUCATION STATISTICS, 2004 (2005), available at <http://nces.ed.gov/programs/digest/d04/index.asp>.

181. Forman, *supra* note 99, at 1295–1300.

182. 358 U.S. 1 (1958).

183. For anyone who doubts this, I recommend MELBA PATTILLO BEALS, WARRIORS DON’T CRY (1994). Melba Beals’s account of the ruthless violence and terror inflicted upon her and the other eight black children who desegregated Central High School is one of unequalled heroism. Today’s sacrifices for better schooling, no matter how valiant, do not compare.

natural given the history I have outlined here. For if one thing is clear, it is that there were indeed multiple motivations for vouchers historically, and that the racial-justice claim was adopted because it would benefit the voucher movement politically and legally. But to identify other motivations for vouchers does not end the debate. The fact is that there were black parents in Cleveland, Milwaukee, and elsewhere who rejoiced when vouchers became available, and believed that their children's lives were saved by the opportunities private school made available. That other interests in society might benefit as well does not diminish the benefit to these families.

This should be evident to civil rights organizations. Consider *Brown* itself. At the time *Brown* was litigated, the United States was engaged in the Cold War with the Soviet Union, which included the struggle for the hearts and minds of newly independent Third World nations. The status of Negro Americans was central in that struggle, with the Soviets arguing to great effect that U.S.-style democracy was tainted by segregation. As Derrick Bell has pointed out, lawyers for the NAACP and the federal government argued to the Court that ending segregation would enhance America's image in the world.¹⁸⁴ Mary Dudziak has demonstrated that the Justice Department and other agencies believed that segregation harmed U.S. foreign relations.¹⁸⁵ In other words, *Brown* served interests others than those of African Americans. In the same vein, consider *Grutter v. Bollinger*,¹⁸⁶ in which the Court upheld the University of Michigan Law School's affirmative action plan. *Grutter* served the interests of two of the most powerful segments of U.S. society—multinational corporations and the U.S. military.¹⁸⁷ But this does not mean that affirmative action does not also help blacks or any other minority group.

Therefore, whether white conservatives had interests in supporting vouchers in *Zelman* must be kept distinct from the issue of whether vouchers help black children. If vouchers in fact help blacks, then the motives of religious conservatives or libertarians are of little concern. The racial-justice claim for vouchers comes down to a question that is quite simple to state but extraordinarily difficult to answer: Do vouchers produce educational benefits for black children? Answering this requires two discrete inquiries: (1) the impact of vouchers on the educational attainment of the children who receive them; and (2) the impact of

184. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

185. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 90 (2000); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988).

186. 539 U.S. 306 (2003).

187. *Id.* at 330–31 (citing Brief for 3M et al. as Amici Curiae at 5; Brief for General Motors Corp. as Amicus Curiae at 3–4; Brief for Julius W. Becton, Jr., et al. as Amici Curiae at 5).

the voucher program on the students who remain in the public schools. Those are both empirical questions, about which we—unfortunately—know too little.

Regarding the impact of vouchers on the educational achievement of students who have received them, I have already discussed the Howell-Peterson findings, which are themselves hotly contested.¹⁸⁸ There are a few other studies on the same issue, but they point in opposite directions and none is conclusive. Jay Greene has found that Milwaukee students using vouchers to attend private high schools have a significantly higher graduation rate than students attending Milwaukee public schools.¹⁸⁹ On the other hand, two random-assignment studies of the Cleveland voucher program reveal that differences in achievement gains between voucher students and public school students are, in general, statistically insignificant.¹⁹⁰ However, one of the Cleveland studies found some evidence that a voucher advantage appears in certain subjects by the sixth grade; further longitudinal research in Cleveland is underway to explore whether the voucher advantage is sustained.¹⁹¹ Most recently, the Department of Education analyzed the results of the National Assessment of Educational Progress (NAEP) and found that while private school students generally scored better than public school students, the difference was due largely to the fact that private school students come from wealthier families. Once controls for demographic variables such as race and class were introduced, the private school advantage disappeared.¹⁹² Finally, there are ongoing evaluations of a number of existing voucher

188. See Krueger & Zhu, *Another Look*, *supra* note 129, at 693–95; *supra* text accompanying notes 125–131.

189. JAY P. GREENE, SCH. CHOICE WIS., GRADUATION RATES FOR CHOICE AND PUBLIC SCHOOL STUDENTS IN MILWAUKEE (2004). Like much of the research in this area, Jay Greene's findings suffer from the fact that his was not a random-assignment study. *Id.* at 5. Greene partially remedies this weakness by comparing students in the voucher program to those in selective-admission Milwaukee public schools, and finds that the students in the voucher program (who were not selectively admitted) nonetheless are more likely to graduate high school than even the students in the selective-admission public schools. *Id.* at 6.

190. See CLIVE R. BELFIELD, THE EVIDENCE ON EDUCATION VOUCHERS (2006); JONATHAN PLUCKER ET AL., CTR. FOR EVALUATION & EDUC. POLICY, EVALUATION OF THE CLEVELAND SCHOLARSHIP AND TUTORING PROGRAM: TECHNICAL REPORT 1998–2004 (2006) (official longitudinal study of the Cleveland Scholarship and Tutoring Program).

191. See PLUCKER ET AL., *supra* note 190, at 167.

192. See HENRY BRAUN ET AL., U.S. DEP'T OF EDUC., COMPARING PRIVATE SCHOOLS AND PUBLIC SCHOOLS USING HIERARCHICAL LINEAR MODELING (2006); see also CHRISTOPHER LUBIENSKI & SARAH THEULE LUBIENSKI, CHARTER, PRIVATE, PUBLIC SCHOOLS AND ACADEMIC ACHIEVEMENT: NEW EVIDENCE FROM NAEP MATHEMATICS DATA 3 (2006) (finding, after controlling for student characteristics, that public school students did as well as or better than private school students on the mathematics portion of the National Assessment of Educational Progress (NAEP)).

programs, including a longitudinal study of the Washington, D.C., plan, and there is some hope that these will reveal additional information to guide policy.¹⁹³

The question of how voucher plans affect students who remain in the public schools has received somewhat less attention from researchers. Although many continue to worry that vouchers will undermine the public school systems by taking money from the public system or attracting the most advantaged students and families,¹⁹⁴ these claims have not been proven.¹⁹⁵ Caroline Hoxby has argued that the evidence supports the opposite conclusion—according to her, public schools respond to competition by improving their performance.¹⁹⁶ Greene reached similar conclusions in a study of Florida schools, arguing that the threat of vouchers in that state caused public schools to improve.¹⁹⁷ However, others have argued that the improvements in Florida's public schools came from the pressures of its accountability system, not from the voucher threat.¹⁹⁸

In sum, for both of the questions I identified as central, the jury is still out. We do not yet know, with any certainty, the impact of vouchers on either the students who receive them or the public schools those students leave behind. The results to date certainly suggest that voucher advocates dramatically oversold the racial-justice claim—if vouchers were truly “educational emancipation,” one would expect to see robust benefits immediately. But changing educational outcomes does not come easily, or quickly. Vouchers are relatively new, and longitudinal studies that track the impact of a reform over time by definition cannot be completed quickly. Because of the rhetorical claims of voucher advocates, it is tempting to dismiss vouchers if they do not have a revolutionary impact on test scores. But an educational reform might be worthwhile even if it produces more modest student gains. And it is too soon to declare that vouchers will provide no benefit. Given the absence of definitive evidence, and in light of the popularity of the programs with inner-city black parents, vouchers

193. See PATRICK WOLF ET AL., U.S. DEP'T OF EDUC., EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM: SECOND YEAR REPORT ON PARTICIPATION (2006) (official longitudinal study of the District of Columbia Opportunity Scholarship Program).

194. See *Bush v. Holmes*, 919 So. 2d 392, 408–09 (Fla. 2006).

195. Many opponents of charter schools raised these same concerns, and I have suggested elsewhere that these fears have not been borne out. See James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. (forthcoming May 2007).

196. Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 SWEDISH ECON. POL'Y REV. 9 (2003).

197. Jay P. Greene & Marcus A. Winters, *When Schools Compete: The Effects of Vouchers on Florida Public School Achievement* (Ctr. for Civic Innovation, Educ. Working Paper No. 2, 2003), available at http://www.manhattan-institute.org/pdf/ewp_02.pdf.

198. See David N. Figlio & Cecilia Elena Rouse, *Do Accountability and Voucher Threats Improve Low Performing Schools?*, 90 J. PUB. ECON. 239, 253–54 (2006).

remain a worthy experiment—if only to allow further research to determine whether vouchers will produce academic benefits.

In addition to evaluating existing voucher plans, we should consider more ambitious plans that would facilitate socioeconomic integration by allowing low-income students access to suburban schools.¹⁹⁹ The political obstacles to such programs have been well-documented: Many suburban voters are determined to maintain the exclusivity of their schools.²⁰⁰ This issue is highlighted in *Zelman*—despite the fact that suburban districts could participate in the Cleveland program, none chose to do so. In his argument to the Court, Bolick refrained from explaining why, saying, “One can only speculate why suburban public schools declined to open their doors to inner-city Cleveland school-children.”²⁰¹ But though he was unwilling to admit it to the Court, Bolick knew exactly why. As he wrote a year after winning the case, “[T]he reason was obvious: many of the families in the suburban public schools had escaped the inner city, and they didn’t want the ‘problems’—that is, poor minority school-children—following them. So the doors to suburban public schools remained closed to children in the scholarship program.”²⁰² And yet, despite the obstacles, there are various examples of programs in which suburban districts have allowed some amount of class integration of their schools.²⁰³ As I have argued elsewhere, those who find the racial-justice claim compelling should work to design voucher plans that achieve the sort of race and class integration envisioned in *Brown*.²⁰⁴

199. See Forman, *supra* note 99, at 1314–19.

200. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2045 (2002).

201. Brief on the Merits, *supra* note 160, at 37.

202. BOLICK, *supra* note 4, at 92.

203. See RICHARD D. KAHLENBERG, *ALL TOGETHER NOW* 228 (2001).

204. See Forman, *supra* note 99, at 1314–19.

III. VOUCHERS AND ACCOUNTABILITY

"The fact that many Black leaders and elements within the Democratic party traditionally opposed to vouchers are coming to favor the idea means that vouchers may pass, but not *without* the kind of mischievous provisions regarding tuition, curriculum, hiring and admissions that are already quite typical without their input."

—Douglas Dewey,²⁰⁵ Children's Scholarship Fund, New York City

"[I]n the end, the supplier always controls the addict."

—Stephen Carter,²⁰⁶ Professor, Yale Law School

Jettisoning the values rationale for vouchers in favor of a racial-justice claim may have added an important political constituency and been necessary to sustain vouchers legally, but it came with a high pricetag. Voucher advocates have long assumed that vouchers targeted at low-income black students would be a way to "build beachheads" for broader scale voucher programs.²⁰⁷ Recall too the Coons-Sugarman suggestion that conservatives "remain mute"—not forever, but until minorities and their allies had been visible long enough to influence how the voucher movement was perceived.²⁰⁸ In this Part, however, I outline why it may prove more difficult than commonly assumed to bring evangelical Christians back into the voucher fold. The reason is the accountability movement in education.

As I explain first, *Zelman* opened the door to vouchers just as increasing numbers of states and the federal government became committed to top-down accountability for all schools. Accountability means that schools are required to submit to a variety of state and federal mandates, including testing, teacher

205. Faith & Reason Inst., *Are Vouchers Good For Catholic Education?*, RIGHT REASONS, May 19, 2000, <http://www.frinstitute.org/rrvoucher.html> (quoting Douglas Dewey).

206. CARTER, *supra* note 86, at 152.

207. BOLICK, *supra* note 4, at 212. An early proponent of this approach was Tyll Van Geel, who argued that

those interested in enhancing the weight of parental preferences might think about what might be called the devious strategy of labeling one's reform one thing while really attempting to achieve something else. For example, one might call the reform one is seeking a reform to improve the education of the disadvantaged, when the larger purpose is to establish the principle that parents should have a voice in controlling the education to which their children are exposed. . . . [T]his kind of feint or indirection may be necessary to obtain what one wants from the courts.

Tyll Van Geel, *Parental Preferences and the Politics of Spending Public Education Funds*, 79 TCHRS. C. REC. 339, 363 (1978).

208. See *supra* notes 103–104 and accompanying text.

certification, and curriculum requirements. As a result, voucher plans today face a rather different accountability landscape than they did previously. Today's voucher plans force participating schools to accept greater government regulation, and as I explain next, government intrusion is distinctly unappealing to a broad swath of the religious schools favored by evangelical Christians. Accordingly, even if the voucher movement were able to return to its previous incarnation as a defender of religious freedom and values, it would find a less receptive audience in the Christian education community. I conclude this Part by examining the legitimacy and strength of the religious conservative arguments against regulation. While I find that religious educators are correct to believe that government oversight may reduce their independence, I argue that it is appropriate for participating schools to bear this cost.

A. The Accountability Movement

The currently prevailing theme in education policy is that schools must be held accountable for results. In practice, this translates into a requirement that states establish: (1) standards to define what students need to learn; (2) tests to measure whether the standards have been met; and (3) rewards and sanctions depending on whether the standards are met.²⁰⁹ The current emphasis on accountability can be traced to the standards movement that began in a number of states in the 1980s.²¹⁰ Prompted in part by the highly publicized Reagan Administration report, *A Nation at Risk*,²¹¹ a number of states adopted standards defining what they expected students to learn during different stages of schooling. A few states also developed tests that measured whether students were in fact learning what the state standards said they should. The business community was typically involved in pushing these efforts, because business leaders had grown increasingly concerned that American students would not be able to compete effectively in a global economy that required an increasingly capable

209. According to President Bush's education advisor Alexander "Sandy" Kress, real accountability consists of "high standards, annual testing, and . . . real consequences that flow from the measurement." Siobhan Gorman, *Step One: Grab the Center*, NAT'L J., Jan. 27, 2001, at 286, 287 (quoting Alexander Kress).

210. See Martin R. West & Paul E. Peterson, *The Politics and Practice of Accountability*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 1, 5-8 (Paul E. Peterson & Martin R. West eds., 2003).

211. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM* (1983). *A Nation at Risk* warned of a "rising tide of mediocrity" that weakened national security in the face of the Soviet threat. *Id.* at 5. The report argued that students needed to face more challenging assignments and a longer school year, that teacher quality needed to increase through increased pay and higher certification standards, and that parents needed to be more involved in their children's education and hold them to higher standards. *Id.* at 29-31, 33.

workforce.²¹² In Texas, a state at the forefront of this trend, businessman Ross Perot, Democratic governor Ann Richards, and her Republican successor George W. Bush all contributed to the development of a statewide testing regime that measured individual students' growth annually. When a RAND study found that test scores in Texas rose faster than in other states, the stage was set to use the Texas experience as a model for federal education legislation.²¹³

The Texas experience contributed to the 2002 passage of the federal No Child Left Behind (NCLB) law, "what may well be the most important piece of federal education legislation in thirty-five years."²¹⁴ Accountability is its central feature: NCLB requires that individual schools and districts test students yearly to measure academic achievement and report results broken down by race, gender, income, and other categories.²¹⁵ Schools in which too few students succeed are subject to a series of corrective measures, and schools are required to have all students academically proficient by 2014.²¹⁶ "[A]ccountability is the cornerstone for reform," said President Bush as he sent NCLB to Congress.²¹⁷ According to the House Education and Workforce Committee, "States have accepted billions in federal education aid but have never been held accountable for improving student achievement. Until now."²¹⁸

The accountability measures built into NCLB and a number of state regimes depend in large part on testing. According to Secretary of Education Margaret Spellings, "Annual assessments are nonnegotiable, because what gets

212. On the role of business leaders in the accountability movement, see Frederick M. Hess, *Reform, Resistance, . . . Retreat? The Predictable Politics of Accountability in Virginia*, 2002 BROOKINGS PAPERS ON EDUC. POL'Y, 69, 117 n.55; Paul T. Hill & Robin J. Lake, *Standards and Accountability in Washington State*, 2002 BROOKINGS PAPERS ON EDUC. POL'Y 199, 199.

213. DAVID W. GRISSMER ET AL., RAND CORP., *IMPROVING STUDENT ACHIEVEMENT: WHAT NAEP STATE TEST SCORES TELL US* 55, 99–100 (2000). For other evidence that state accountability systems improve student achievement, see Eric A. Hanushek & Margaret E. Raymond, *Lessons About the Design of State Accountability Systems*, in *NO CHILD LEFT BEHIND?*, *supra* note 210, at 127, 127. Subsequent to the passage of No Child Left Behind (NCLB), evidence came to light casting doubt on the validity of Texas's educational success. See Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities*, in *MANY CHILDREN LEFT BEHIND* 3, 21–22 (Deborah Meier & George Wood eds., 2004).

214. David S. Broder, *Long Road to Reform; Negotiators Forge Education Legislation*, WASH. POST, Dec. 17, 2001, at A1.

215. 20 U.S.C. § 6311 (Supp. 2002).

216. *Id.* § 6316.

217. President George W. Bush, Remarks Prior to a Meeting With Congressional Education Leaders and an Exchange With Reporters (Jan. 23, 2001), available at 37 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 216, 217 (2001).

218. John Boehner, Chairman, H. Comm. on Educ. & the Workforce, Fact Sheet: H.R. 1 Conference Report Highlights: Accountability for Student Achievement (Dec. 10, 2001), available at <http://www.mnteachered.org/resources/ShorttReportFACTSHEET.doc>.

measured gets done. This is the heart of accountability.”²¹⁹ Or, as the president put it, “See, we believe every child can learn and, therefore, we’re saying to states, you must measure to show us whether a child has learned to read and write and add and subtract.”²²⁰ Testing is not new in schools, but standardized test results were historically shared only with the individual student and her parents.²²¹ What is different about the new accountability regime is that schools are required to disclose schoolwide scores to the public, and there are consequences for schools with persistently low scores.

The voucher movement has been profoundly affected by the logic of accountability, as there is growing political pressure for government oversight of private schools receiving vouchers. There is a great irony here: When first proposed, NCLB provided that students in continually failing schools would be entitled to a voucher for use in the public or private school of their choice.²²² This led critics to charge that NCLB was part of a conservative plan to privatize public education.²²³ Though the voucher provision in NCLB was abandoned fairly quickly, the argument that NCLB is part of a privatization agenda persists.²²⁴ There is no doubt that some supported NCLB because it would increase the pressure to privatize schools. But the irony is that NCLB has hurt the voucher agenda in one important respect—private schools now face demands that they accept at least some portion of the accountability burdens that NCLB places on public schools.

For example, the few jurisdictions with private school choice are increasing their regulation of private schools. In Florida, where many evangelical schools were already avoiding government funding because of their fear of regulation, lawmakers recently increased government oversight.²²⁵ The state imposed

219. Margaret Spellings, *Our High Schools Need Help . . .*, WASH. POST, Apr. 2, 2005, at A21. Former Education Secretary Rod Paige made the same point using a sports analogy saying, “[I]f you want to win the football game, you have to first keep score.” Rod Paige, U.S. Sec’y of Educ., Remarks Before the American Council on Education (Feb. 20, 2001), available at <http://www.ed.gov/news/speeches/2001/02/010220.html>.

220. President George W. Bush, Remarks to the National Catholic Educational Association (Jan. 9, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040109-10.html>.

221. See Terry M. Moe, *Politics, Control, and the Future of School Accountability*, in NO CHILD LEFT BEHIND?, *supra* note 210, at 80, 95.

222. See FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT BEHIND 17 (2006).

223. See Barbara Miner, *Seed Money for Conservatives*, RETHINKING SCHOOLS, Summer 2004, at 9, available at http://www.rethinkingschools.org/special_reports/voucher_report/v_seed184.shtml.

224. See *id.*

225. Bolick notes in *Voucher Wars* that “[i]n Florida, for instance, many evangelical Christian schools have chosen not to participate in the opportunity scholarship program, while many Catholic schools have chosen to do so.” BOLICK, *supra* note 4, at 210; see also Jeff Brumley, *Religious Schools See Little Impact Now*, FLA. TIMES-UNION, Jan. 6, 2006, at A7 (“Hardly anybody

background checks for teachers, fiscal-accountability requirements for schools, and mandatory testing for the 14,000 students in the corporate tax-credit program.²²⁶ Senator James King, a sponsor of the legislation, argued that “year after year, we spend taxpayers’ dollars on these voucher programs. Schools that benefit from this funding should be accountable—both fiscally and academically—for how they use these funds.”²²⁷ Similar legislation passed in Milwaukee subjects voucher schools to increased regulation and requires them to administer a national standardized test.²²⁸ In both of those jurisdictions, the increased accountability requirements were a compromise—there were forces pushing for even greater regulation of the private schools.²²⁹ In light of the national trend toward increased accountability in education, there is every reason to believe that these new oversight measures will not be the last. For example, states may become more specific about which standardized tests the publicly funded private schools must administer—requiring, for instance, that private school students take the same state assessment that public school students do.

Public opinion strongly supports increased accountability for private schools accepting vouchers. The sophisticated polling of voucher supporter Terry Moe²³⁰ is informative here, and it has received insufficient attention.²³¹ Regarding testing, 86 percent of those Moe polled agreed that private schools in a voucher plan should be required to administer standardized tests and publish the schoolwide results; 88 percent agreed that participating private schools should be required to hire state-certified teachers; 80 percent agreed that the state should impose curriculum requirements regarding the nature and content of the courses offered; and 83 percent said that participating private schools should have to submit annual financial statements to the state and agree to public audits of their

uses [vouchers] in the Christian school world because of the strings attached.” (quoting Dennis Robinson, president of the Florida League of Christian Schools)).

226. See Erik W. Robelen, *Florida Lawmakers Float New Voucher Plans*, EDUC. WK., Apr. 5, 2006, at 25; *Bush Signs Voucher Oversight Bill*, PALM BEACH POST, June 7, 2006, at 12A.

227. Erik W. Robelen, *Fla., Wisconsin Tying More Strings to Vouchers*, EDUC. WK., May 17, 2006, at 18.

228. See Alan Richard, *Deal May Pave Way for Milwaukee Voucher Expansion*, EDUC. WK., Mar. 1, 2006, at 18; Robelen, *supra* note 227.

229. See, e.g., Steve Schultze, *Doyle Ready to Deal on School Choice*, MILWAUKEE J. SENTINEL, July 21, 2004, at B1.

230. Terry Moe indicates his support for vouchers in MOE, *supra* note 98, at 10.

231. The treatment of Moe’s findings by the pro-voucher movement is instructive of the challenges the movement faces regarding the question of government regulation. Moe’s finding that Americans are most likely to support vouchers targeted at the disadvantaged has been endorsed by leaders such as Bolick. BOLICK, *supra* note 4, at 212. But the voucher movement has not given similar prominence to Moe’s findings that Americans support regulation of private schools in a voucher program.

books.²³² For each of these findings, Moe points out that the support for regulation is strong,²³³ cuts across race and class, and is corroborated by other poll results.²³⁴

In addition to the overwhelming levels of support for these various regulations, most people surveyed also endorsed limiting the ability of private schools to select students. Moe's survey asked respondents to choose between two ways to regulate student selection in a voucher system: "(a) Private and parochial schools should be allowed to make their own decisions about which students to admit, based on their own standards, or (b) Private and parochial schools should be required to admit all students who apply, as long as there is room."²³⁵ Sixty-one percent said schools should have to admit all who apply, while 29 percent supported allowing private schools to use their own admissions standards.²³⁶ Perhaps not surprisingly, inner-city parents were the group that most opposed selective admissions policies, with 72 percent of these parents supporting a rule that schools admit all applicants and 20 percent saying schools should be allowed to use their own admissions standards.²³⁷

In light of these challenges, voucher supporters have had to alter their position on how much government regulation is acceptable. For example, in 1992 voucher pioneers Coons and Sugarman offered a model voucher plan with minimal regulation for participating private schools.²³⁸ Their central message was that regulation should be avoided, and they argued that when the state funds a voucher program, it should not be permitted to impose any greater control on the voucher schools than states traditionally impose on private schools that do not receive government funds.²³⁹ By 1999, however, they had a new model proposal, with increased attention to regulation.²⁴⁰ Importantly, while the initial proposal did not mandate student testing, the newer one suggested that voucher schools be required to test students on the same statewide assessment that public schools are using, and that a school's composite results be released to the public.²⁴¹

232. MOE, *supra* note 98, at 298–301.

233. The great majority of respondents say that they "strongly agree" with each of these statements. *Id.* at 299.

234. *Id.* Moe's findings are corroborated by a Phi Delta Kappa survey in which 77 percent of people said yes to the following question: "Do you think private or church-related schools that accept government tuition payments should be accountable to the state in the way public schools are accountable?" Lowell C. Rose & Alec M. Gallup, 32nd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, 82 PHI DELTA KAPPAN 41 (2000).

235. MOE, *supra* note 98, at 302.

236. *Id.* at 302, 304.

237. *Id.*

238. JOHN E. COONS & STEPHEN D. SUGARMAN, SCHOLARSHIPS FOR CHILDREN 9–12 (1992).

239. *Id.* at 32.

240. COONS & SUGARMAN, *supra* note 103, at 54–56.

241. *Id.* at 58–60.

This proposal regarding student testing was echoed by a recent National Governors Association (NGA) report on school choice.²⁴² Arguing that “there must be accountability for academic results,”²⁴³ the NGA report suggested that states “may want to require *all* education providers receiving public funding to use the same test to measure academic achievement.”²⁴⁴

To this point I have argued that the emergence of top-down accountability has placed pressure on the voucher movement to accept government regulation as the price of government money. But why does this matter to the future of the voucher movement? As we will see, a nonnegotiable for evangelical Christian educators is the independence of their schools. If government money brings even the *risk* of government control, as it increasingly appears to for many, then the voucher movement will lose the support of religious conservatives.

B. Government Regulation and Christian Schools

Even as *Zelman* was decided, there were reasons to suggest it might not have the revolutionary impact so many predicted. Immediately after the decision, some Christian educators gave notice that they would be reluctant to accept government funding because of the regulation and other oversight that might accompany it. A Seventh Day Adventist official said that the church would “wait and see what the ultimate results of this plan will be in practice.”²⁴⁵ According to the working policy of the church, state aid for schools should be rejected if it would lead to “excessive control by or entanglement with the government,” if it would foster “dependence on the government,” or if in any other way it would “compromise the integrity of the church or reduce its ability to design programs and curricula to fulfill its gospel commission.”²⁴⁶ Similarly, a writer for the Home School Legal Defense Association argued that even though *Zelman* was correct in principle, Christian educators should not seek government funding.²⁴⁷ After all, suppose that a school accepts government money and goes into debt to buy a bigger building. What if the state then decides that schools receiving voucher money may not

242. DEBRA HARE FITZPATRICK & IRENE M. BERMAN, PROVIDING QUALITY CHOICE OPTIONS IN EDUCATION (2005).

243. *Id.* at 21.

244. *Id.* at 22.

245. Bettina Krause, *Church Leaders Urge Caution on School Vouchers*, ADVENTIST NEWS NETWORK, July 2, 2002, <http://news.adventist.org/data/2002/06/1025625143/index.html.en>.

246. *Id.*

247. Thomas Washburne, *Vouchers: Constitutional But Dangerous*, HOME SCH. LEGAL DEF. ASS'N, July 2, 2002, <http://www.hslda.org/docs/news/hslda/200207020.asp>.

teach creationism? Won't the school feel compelled to go against its core beliefs in order to avoid bankruptcy and the loss of its building?²⁴⁸

While Christian conservatives still support the principle that state funding of private schools should be constitutional, they no longer highlight school vouchers as a priority. Polls show that evangelicals are ambivalent about vouchers and are much less united on this issue than they are on some other church-state questions. For example, in a 2004 survey, 44 percent of evangelical Protestants supported school vouchers and 41 percent opposed them.²⁴⁹ By contrast, evangelicals were overwhelmingly supportive (83 percent in favor) of the posting of the Ten Commandments in public buildings.²⁵⁰ Another poll found that while 54 percent of traditionalist evangelicals supported vouchers, 89 percent of the same group endorsed prayer in school.²⁵¹ In light of such figures, it is not surprising that political leaders within the evangelical community have chosen to mobilize around issues other than school vouchers—after all, on these other issues their constituents are more united.

There remains a vocal contingency among the Christian faithful arguing that Christians should leave the public schools. These groups include Bob Simonds's Rescue 2010,²⁵² the Alliance for the Separation of School and State,²⁵³ the Exodus Mandate,²⁵⁴ the Kingdom Education movement,²⁵⁵ the Southern Baptist Church and Home Education Association,²⁵⁶ the Southern Baptist

248. *Id.* ("By their very nature, vouchers are susceptible to government control and strings.").

249. See JOHN C. GREEN, *THE AMERICAN RELIGIOUS LANDSCAPE AND POLITICAL ATTITUDES: A BASELINE FOR 2004*, at 48 (2004).

250. See *id.*

251. See John C. Green, *Religion and Politics in the 1990s: Confrontations and Coalitions*, in *RELIGION AND AMERICAN POLITICS: THE 2000 ELECTION IN CONTEXT* 19, 25 (Mark Silk ed., 2000). For purposes of this study, traditionalists were defined as those evangelicals who were highly observant and evidenced strong acceptance of the Bible's authority. See *id.* at 21.

252. Bob Simonds, *Rescue 2010 Strategy*, <http://www.nace-cee.org/ceestrategy.htm> (last visited Jan. 5, 2007) ("Christians must exit the public schools as soon as it is feasible and possible. . . . America must not just get vouchers and tax breaks for parents in private schools . . .") (emphasis removed); see also Robert Stacy McCain, *Christians Urged to Abandon Public Schools as Irreparable*, WASH. TIMES, Aug. 26, 1999, at A2.

253. Alliance for the Separation of School and State, <http://www.schoolandstate.org/home.htm> (last visited Jan. 5, 2007); see also Brandon Dutcher, *Emerging "Voucher Left" Could Alter School-Choice Debate*, OKLA. COUNCIL FOR PUB. AFF. PERSPECTIVE, Nov. 1999, <http://www.ocpathink.org/ViewPerspectiveEdition.asp?ID=74> ("[V]ouchers will come with strings attached which will emasculate private schools."); Marshall Fritz, *Can You Say "en-a'-tle-ment?"*, EDUC. LIBERATOR, July 1996, available at <http://www.sepschool.org/edlib/v2n6/entitle.php> ("[T]ax-funded vouchers are a bad idea."); Sharlene Holt, *Tuition Voucher Plan Is Wrong Path*, PATRIOT-NEWS (Harrisburg, Pa.), Oct. 2, 1995, at A7.

254. Exodus Mandate, <http://www.exodusmandate.org> (last visited Jan. 5, 2007); see also Richard Vara, *Encouraging An Exodus*, HOUSTON CHRON., June 18, 2005, Religion, at 1.

255. Kingdom Education, <http://www.kingdomeducation.com> (last visited Jan. 5, 2007).

256. Southern Baptist Church and Home Education Association, <http://www.sbchea.com> (last visited Jan. 5, 2007).

Association of Christian Schools,²⁵⁷ GetTheKidsOut.org,²⁵⁸ and a number of activists within the powerful Southern Baptist Convention.²⁵⁹ Importantly, however, these groups have not made school vouchers a priority, and some explicitly oppose vouchers. While encouraging parents to send their children to religious schools or teach them at home with a religious-based curriculum, the activists accept that parents will have to pay for these alternatives themselves.

The ambivalence of Christian educators regarding vouchers is rooted in their opposition to virtually every aspect of the government oversight (especially federal government oversight) that has become de rigueur in today's accountability movement. Whether the topic is student admissions, national standards, or testing, Christian opposition is mounting. Consider first the question of student admissions. Many religious schools are adamant that they must have the right to selectively admit students. Some Christian schools attempt to create a community of parents with shared values by requiring proof that at least one of the parents is born again.²⁶⁰ Others do not promote themselves and serve only the children of their congregation.²⁶¹ The Association of Christian Schools International, the largest Protestant school association, cites control over student admissions as a condition of its support for a school-choice program.²⁶² Similarly, a Department of Education survey of private schools reveals that if private schools had to accept students by lottery, the number of schools that would be interested in participating in a voucher program would plummet.²⁶³

The question of federal oversight raises similar challenges for a voucher movement long committed to independence from regulation. NCLB is the most significant extension of federal authority into state and local education prerogatives since the 1965 Elementary and Secondary Education Act, which ushered in the era of federal involvement. The Bush Administration, in keeping

257. Southern Baptist Association of Christian Schools, <http://www.sbacs.org> (last visited Jan. 5, 2007); see also Donna Callea, *Resolution Urges Southern Baptists to Abandon Public Education*, DAYTONA BEACH NEWS-J., May 27, 2004, at A1.

258. GetTheKidsOut.org, <http://getthekidsout.org/Introduction.php> (last visited Jan. 5, 2007).

259. See Tom Strode, *SBC Lifts Disney Boycott, Urges Parental Diligence in Education*, BAPTIST PRESS NEWS, June 22, 2005, <http://bpnews.net/printerfriendly.asp?ID=21053>; Greg Warner, *Conventions Vocal About Gay Marriage, Cautious About Public Education*, ASSOCIATED BAPTIST PRESS NEWS, Nov. 24, 2004, <http://www.abpnews.com/134.article>.

260. See William J. Reese, *Soldiers for Christ in the Army of God: The Christian School Movement in America*, 35 EDUC. THEORY 175, 181 (1985).

261. See PAUL F. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS*, at xv (1987).

262. ACSI Position Statement Concerning Government Funding of Christian Schools (July 2005), http://www.acsi.org/webfiles/webitems/attachments/003857_2_%20ACSI%27s%20Position%20on%20Tax%20Credits%20and%20Vouchers.doc.

263. LANA MURASKIN & STEPHANIE STULLICH, U.S. DEP'T OF EDUC., *BARRIERS, BENEFITS, AND COSTS OF USING PRIVATE SCHOOLS TO ALLEVIATE OVERCROWDING IN PUBLIC SCHOOLS* 69 (1998).

with the rhetorical use of *Brown v. Board of Education* that it deployed in the voucher debate, has defended federal oversight of schools as being in the spirit of *Brown*. For example, Secretary Spellings defended NCLB against Republican critics who believe that education should be left to the states by saying, "There is indeed a compelling national interest in education Just as the *Brown v. Board of Education* decision moved to end unequal education because of race, the federal government can now help ensure that states provide a quality education to every student."²⁶⁴ The problem for voucher defenders is that, despite Spellings's argument, NCLB's premise is rejected by many conservative Christians, who have been arguing for some time that the federal government should be less, not more, involved in schools.

Opposition to federal government intervention in education is a leading principle for many conservative Christians. Since the family controls child-rearing, including education decisions, federal authority over education necessarily comes at the expense of familial control.²⁶⁵ Indeed, until recently, conservative Christian leaders routinely demanded the elimination of the Department of Education. At the 1995 Christian Coalition conference, for example, speakers won standing ovations when they called for the abolition of the department. "I want to live in a nation that abolished the federal Department of Education," said Ralph Reed.²⁶⁶ Presidential candidate Bob Dole said, "I voted against the creation of the Department of Education. As president, I would close it down."²⁶⁷

And although opposition to federal intervention is the most intense, opposition to oversight by state and local governments also has a long history.²⁶⁸ Over fifty years ago, leading Protestant churches warned of the dangers of government control of religious schools.²⁶⁹ Because these schools are often extensions of the church, government oversight of their operations is viewed as little better than

264. Spellings, *supra* note 219, at A21.

265. THE FUNDAMENTALIST PHENOMENON: THE RESURGENCE OF CONSERVATIVE CHRISTIANITY 206 (Jerry Falwell, Ed Dobson & Ed Hindson eds., 1981) ("The most important function performed by the family is the rearing and character formation of children, a function it was uniquely created to perform and for which no remotely adequate substitute has been found. The family is the best and most efficient 'department of health, education, and welfare.'").

266. Vail, *supra* note 15, at 30 (quoting Ralph Reed).

267. *Id.* at 31 (quoting Bob Dole). Similarly, Jennifer Marshall and Eric Unsworth complained that the Department of Education "has elbowed its way into places it does not belong, not the least of which are local schools and family life." Jennifer A. Marshall & Eric Unsworth, Family Research Council, *Freeing America's Schools: The Case Against the U.S. Department of Education*, FAM. POL'Y, Apr. 1995, at 1, 3. They concluded, "It is time to disestablish the U.S. Education Department and end the federal intrusion into America's schools." *Id.* at 7.

268. See PARSONS, *supra* note 261, at 140-54; see also ALAN PESHKIN, GOD'S CHOICE 5-6, 34 (1986).

269. See Brief of the General Conference of Seventh-Day Adventists et al. Amici Curiae at 18, *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947) (No. 52).

state interference in the church itself.²⁷⁰ As an Indiana school leader said, “We don’t think of our school as being anything separate from our church We have Sunday school, Monday school, Tuesday school, Wednesday school, and so on.”²⁷¹ The President of the Alabama Association of Christian Education made a similar point: “The state of Alabama is not interested in registering my Sunday school, and I don’t think they should register my Monday school.”²⁷²

Requirements that students take tests chosen by the state also raise concerns for many Christian educators, who believe that the tests will inevitably influence the curriculum and otherwise limit the independence of church schools. For Christian educators, these concerns are frequently connected to worries over the growing dominance of secularism in schools. One educator warns that standardized tests, “written from a secular bias, will become the tail that wags the curriculum.”²⁷³ A pastor explains that his school objects to state-mandated tests because they often reinforce values to which the school objects—and because students may underperform as a result. The pastor says, “[O]ne question on the test says Johnny is selling tickets to a rock concert, and sells so many tickets each day. It asks which day he did best. Our students would say his best day was the day he sold the fewest tickets, because he had no business selling tickets to a rock concert.”²⁷⁴ A related objection is raised by Bob Simonds, leader of the Rescue 2010 strategy that urges Christians to leave the public schools for Christian schools by the year 2010.²⁷⁵ Simonds believes that students who do not succeed on the state tests will be targeted for psychological services that “are designed and intended to destroy their faith in God and their Christian belief system.”²⁷⁶ The views of many Christian educators are summed up by a Texas voucher opponent, who argued, “If there’s only a test, that’s too much regulation. If the test is a precursor to further regulation, this is another government string.”²⁷⁷

270. See PESHKIN, *supra* note 268, at 33.

271. Reese, *supra* note 260, at 182.

272. *Id.*; see also MELINDA BOLLAR WAGNER, *GOD’S SCHOOLS* 36 (1990) (quoting Christian handbook stating, “Contrary to government rhetoric, accreditation does not mean quality, it means control.”).

273. Faith & Reason Inst., *supra* note 205; see also PARSONS, *supra* note 261, at 56 (quoting school handbook stating, “Living Word Christian Schools is not interested in using textbooks adopted or approved by the state. Many of those texts are developed by secular authors who reject fundamental Christian principles and therefore are saturated with humanistic values.”).

274. PARSONS, *supra* note 261, at 148.

275. Simonds, *supra* note 252.

276. *Id.*

277. Angela Valenzuela, *Accountability and the Privatization Agenda*, in *LEAVING CHILDREN BEHIND: HOW “TEXAS-STYLE” ACCOUNTABILITY FAILS LATINO YOUTH* 263, 282 (Angela Valenzuela ed., 2005).

These concerns are not trivial, and should not be dismissed as simply an abstract ideological claim unrelated to morality, virtue, or values. At first blush, it is easy to see why some might reject as unrealistic the fear that government testing mandates would limit the curricular independence of religious schools. After all, President Bush says NCLB requires nothing more than that schools “measure to show us whether a child has learned to read and write and add and subtract.”²⁷⁸ It is hard to see how this basic mandate would interfere with a school’s independence.

But the reality is much more complicated. There is substantial evidence that what is tested has a profound effect on what is taught. In the context of current school reform, for example, educators from across the political spectrum have argued that the federal government’s mandate for testing in reading and math is driving other subjects—from civics, to art, to gym—out of the school day.²⁷⁹ Some might respond that if public schools have to narrow their curriculum in response to the new accountability era, so too should private schools receiving public funds. If public schools have to give up art or field trips in order to spend more time on topics that are tested, then religious schools might have to give up religion, Bible ethics, and the like. I do not disagree. My claim is that when religious schools argue that submitting to a testing regime will limit their independence, they are correct, and their argument must be taken seriously.

A similar point should be made about teaching creationism. The religious-conservative claim that the government might prohibit the teaching of creationism as a condition for participation in a voucher program is more compelling than some secularists suggest. The prohibition on teaching creationism is not likely to be a direct ban, however. Instead, the prohibition would be indirect. If religious schools are forced to be accountable to state science standards, teachers in those schools would be under great pressure to prepare their students to correctly answer questions about evolution and related topics. Except in the unusual instance in which fundamentalists are able to take control of the state board of education, answers based on Genesis or intelligent design would not earn a student a passing score.

C. Government Oversight: Legitimate Fear or Paranoia?

Like the objections of civil rights organizations to the racial-justice claim, the objections of conservative Christians to government oversight of religious

278. Bush, *supra* note 220.

279. George Wood, *A View from the Field: NCLB's Effects on Classrooms and Schools*, in *MANY CHILDREN LEFT BEHIND*, *supra* note 213, at 33, 38–45.

schools deserve critical scrutiny. In each case, we must ask whether the critics' concerns are legitimate. Much of the history of Christian opposition to government regulation of schools is closely tied to a desire to discriminate against blacks. For many African Americans, "[t]he memory of the segregationist Christian academies of the 1960s still burns."²⁸⁰ In light of this history, we must consider whether the anti-regulation argument hides a more sinister agenda. Perhaps the schools really want to protect their right to practice racism in areas such as teacher hiring, student admissions, and curriculum. In this Subpart I argue that the fears of conservative Christians are legitimate: Increased accountability may indeed lead to less independence. But taking the racial-justice claim seriously suggests this is a cost that these schools should have to bear.

To understand why the history of Christian academies leads many to question the legitimacy of their desire for independence, consider the question of student admissions. As I discussed earlier, many Christian schools strongly oppose requirements that schools receiving vouchers use lottery admissions policies. While schools may have nonracial reasons for wanting to control admissions, the reality is that some religious and secular schools in the post-*Brown* era have also used this right in order to discriminate. In *Runyon v. McCrary*,²⁸¹ the Court held that 42 U.S.C. § 1981 prohibited secular private schools from excluding blacks. In so doing, the Court rejected the notion that its ruling unfairly limited a school's right to control its student body or a parent's right to direct her child's upbringing. Because *Runyon* did not involve a school whose religious beliefs mandated racial segregation, subsequent courts had to consider how to apply *Runyon*'s prohibition to such a case. Typical is *Brown v. Dade Christian Schools, Inc.*²⁸² where the school argued that its segregationist philosophy was grounded in religion. The *Dade* court held against the school, finding no religious basis for its racism. In order to rule in a case like *Dade*, a court must rummage through a school's written literature and otherwise closely examine records and materials that religious leaders generally seek to keep private. But when Christian educators object to a court's intrusion into their private affairs in such a context, it is easy to see why many are inclined to dismiss as illegitimate a church school's opposition to government intervention.

A similar lesson emerges from the legendary battle over IRS regulation of Christian schools in the 1970s and 1980s. This was such an important dispute that some conservative Christians have argued that it gave rise to the modern-day

280. STEPHEN L. CARTER, *GOD'S NAME IN VAIN* 36 (2000).

281. 427 U.S. 160 (1976).

282. 556 F.2d 310 (5th Cir. 1977) (en banc) (holding that racially discriminatory admissions policies of a religious school violate 42 U.S.C. § 1981 (2000)).

Christian conservative political movement.²⁸³ According to Paul Weyrich, one of the lead organizers of the movement, "[W]hat galvanized the Christian community was not abortion, school prayer, or the [Equal Rights Amendment]. I am living witness to that because I was trying to get those people interested in those issues and I utterly failed. What changed their mind was Jimmy Carter's intervention against the Christian schools"²⁸⁴ The issue grew out of the IRS's revocation of the tax-exempt status of Bob Jones University, which did not allow blacks to attend before 1971, and in 1975 still prohibited interracial dating or marriage.²⁸⁵ The controversy intensified when the IRS said that it would revoke the tax-exempt status of schools that practiced segregation.²⁸⁶ This outraged religious conservatives, who believed that the government was seeking to destroy Christian academies. The Supreme Court ultimately affirmed the government's authority to prohibit a university that practiced racial discrimination from obtaining tax-exempt status,²⁸⁷ and religious conservatives would not soon forget the perceived assault on the independence of their schools.

This historical backdrop naturally raises questions about the sincerity of anti-regulation arguments advanced by religious schools today. Despite this background, however, I think it would be a mistake to dismiss today's concerns about regulation as nothing more than a smokescreen hiding a true desire to discriminate. Like the religious schools' specific claims regarding the impact of testing on their independence,²⁸⁸ the more general argument that government oversight can threaten the religious distinctiveness of church schools has much to support it. For example, almost one-third of religious organizations being paid by the government to do child-service work report that they have either curtailed specific religious practices or felt pressure from the state to do so.²⁸⁹

While this finding alone might be enough to scare off some religious groups from considering school vouchers, there is even more direct evidence from Europe. A number of European countries have a well-established tradition of government support for private education, including religious education. But this support has come at a cost. Comparisons between U.S. private schools and European ones indicate that American schools are relatively lightly regulated in areas such as hiring and curriculum.²⁹⁰ The reduced autonomy of the European schools is often accompanied by diminished attention to the spirituality that

283. See, e.g., Ralph Reed, Jr., *Casting a Wider Net*, POL'Y REV., Summer 1993, at 31, 34.

284. MARTIN, *supra* note 44, at 173 (quoting Paul Weyrich).

285. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983).

286. See MARTIN, *supra* note 44, at 169.

287. *Bob Jones Univ.*, 461 U.S. 574.

288. See *supra* text accompanying notes 273–279.

289. See STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 90 (1996).

290. See GLENN, *supra* note 79, at 50.

previously distinguished them. As Robert Whelan's study of faith-based organizations in England reveals, "it is this sense of 'otherness' which seems to be missing, this spiritual perspective on material needs which should separate church-based from statutory programmes of assistance."²⁹¹ As a result of increased dependence on government funding, "the churches no longer provide an alternative . . . [but] seem to be content to provide services in much the same way as the state, taking taxpayers' money and reporting to local authorities and government departments."²⁹²

For some religious educators in this country, the European experience provides a compelling reason to reject government funding. For example, Douglas Dewey, an official at the Children's Scholarship Fund in New York City, seeks to increase the number of low-income students who attend religious schools. But he believes such efforts should be conducted privately. Government-funded Catholic schools in Europe, says Dewey, have seen "a dilution of mission and a homogenizing effect over time."²⁹³ Therefore, he says, "let me whisper the secret: private schools work better because they are private. Let's keep them that way."²⁹⁴ Perhaps Dewey's concern is overstated, and U.S. religious educators should be less fearful when looking to Europe. After all, in Europe there is more tolerance for state regulation of the private sphere in general. Moreover, churches in Europe have less political clout than American ones, so they are less able to resist government oversight. But while these differences might reduce the risk that government oversight presents to religious organizations in the United States, they do not eliminate it.

Ultimately, while the concerns of religious educators are legitimate, they are outweighed by the powerful logic of accountability. To see why, consider the arguments that have been advanced by voucher opponents and supporters on the question of whether private schools receiving public money should be subjected to additional government oversight. Voucher opponents criticize voucher plans for allowing private schools to avoid regulation. For example, during a congressional debate over a federal voucher proposal, Representative Tim Roemer said: "This amendment has no accountability in it. We take the money with the voucher

291. ROBERT WHELAN, *THE CORROSION OF CHARITY* 98 (1996).

292. *Id.*

293. Faith & Reason Inst., *supra* note 205.

294. *Id.*; see also GLENN, *supra* note 79, at 9 ("Government support of choice among educational and social programs could come with so many strings attached that they would no longer offer real alternatives, function as mediating structures, or promote a coherent sense of moral obligation."); Peter L. Berger & Richard John Neuhaus, *Mediating Structures and the Dilemmas of the Welfare State*, in *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 157, 163 (Michael Novak ed., 2d ed. 1996) (Government-supported religious institutions "might be 'co-opted' by the government in a too eager embrace that would destroy the very distinctiveness of their function.").

from the public school to a private school, and then there is no accountability there. No test, no trail, no nothing.”²⁹⁵ Similarly, the editor of *Rethinking Schools*, a journal that is highly critical of vouchers, chastised private schools for not providing test-score data: “We live in an environment of ‘get tough’ school policies, with increasing requirements that public schools shape up and ‘be accountable.’ Why are the voucher schools exempted from comparable scrutiny?”²⁹⁶

In response, voucher advocates claim that private schools need only be accountable to parents. As Majority Leader Dick Armey argued in a debate over government regulation of voucher schools, “[W]e do not ask the Catholic schools to be accountable to the government, we ask them to be accountable to the parents.”²⁹⁷ Armey’s claim is that making schools accountable to parents will force the schools to deliver a quality product, because otherwise parents will leave and the school will close. “[P]arents freely choose to send their children to [Catholic] schools, and donors freely choose to invest in them,” argue two supporters of religious education.²⁹⁸ Therefore, “Catholic schools must operate in a more accountable fashion than public schools to keep enrollments high and donors satisfied.”²⁹⁹

Those pushing for greater accountability for private schools accepting vouchers have the better argument. Even if private schools are accountable to parents, voucher supporters have not offered a compelling explanation why *more* accountability is not better. In other words, why should we not ask Catholic schools to be accountable to the parents *and* the government? If NCLB-style accountability for public schools helps ensure that all public schools reach a certain quality standard, why should the government not increase its oversight of private schools in a voucher program? At a minimum, should not policymakers require a level of standards, testing, and public reporting that would give all parents the information they need to be intelligent consumers in the market for schools?³⁰⁰ After all, the point of parental choice is not to give parents a range of bad schooling options. While free-market purists might claim that the market alone is sufficient to guarantee school quality, the evidence suggests otherwise.

295. 147 CONG. REC. 2590 (2001) (statement of Rep. Roemer).

296. Barbara Miner, *Sooner or Later, Voucher Programs Will Face Scrutiny*, NAT’L CATH. REP., Mar. 24, 2000, at 32.

297. 147 CONG. REC. 2590, 2591 (statement of Rep. Armey).

298. THOMAS C. DAWSON & ERIC A. HELLAND, *HELPING HAND*, at vi; (2001); *see also* Davis v. Grover, 480 N.W.2d 460, 476 (Wis. 1992) (“[P]arental choice preserves accountability for the best interests of the children.”); Valenzuela, *supra* note 277, at 263 (quoting a Texas legislator making a similar argument on behalf of a proposed voucher plan, “Let consumer choice concepts rule. That’s a form of regulation. It’s called the market.”).

299. DAWSON & HELLAND, *supra* note 298.

300. *See* Chester E. Finn, Jr., *Sound and Unsound Options for Reform*, ACADEMIC QUESTIONS, Winter 2004–05, at 79, 85–86.

Results from Milwaukee, the urban district that has experimented with vouchers the longest, suggests that choice does not eliminate underperforming schools.³⁰¹ Allowing parents to choose schools in a largely unregulated private school market does not keep some bad schools from opening, and does not ensure that those that do open will quickly go out of business. Researchers are still exploring why—and the explanations vary depending on the parent and the school—but it is simply beyond dispute that some parents keep their children in schools that do not meet basic academic standards.

Any doubts about the case for increased accountability are resolved by considering that the racial-justice claim has replaced the values claim as the chief rationale for vouchers. While the values claim for vouchers did not turn on test results, recall that the racial-justice claim turns on the academic superiority of private schools.³⁰² Having justified vouchers as producing smarter students, it is hypocritical for the voucher movement to oppose testing requirements.

CONCLUSION

In this Article, I have explored the interplay between religion, race, and politics in the movement for school vouchers. In investigating why vouchers have not met with more political success following the Supreme Court's decision in *Zelman*, I have emphasized two factors—the choice to reframe school vouchers in racial-justice terms and the new politics of accountability—that have combined to limit the appeal of vouchers to religious conservatives, an important constituency. Further, I have argued that the demise of vouchers would be unfortunate, since the reform deserves a life long enough to see whether it can fulfill—even partially—the racial-justice promises of its advocates.

This is not to say that vouchers are dead. The accountability movement that has indirectly undermined support for voucher programs has an uncertain future. NCLB is under attack on a number of fronts.³⁰³ Many educators argue that it demoralizes teachers, encourages poor instruction, and demeans students and school professionals.³⁰⁴ Some conservatives claim that it is an unwarranted federal intrusion into education, a sphere best left to states and local

301. EMILY VAN DUNK & ANNELIESE M. DICKMAN, *SCHOOL CHOICE AND THE QUESTION OF ACCOUNTABILITY: THE MILWAUKEE EXPERIENCE* 142–46 (2003).

302. See *supra* text accompanying notes 115–131.

303. For a summary of various criticisms of NCLB, see HESS & PETRILLI, *supra* note 222, at 4–6, 23–25, 124–26; see also Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 885 (2006).

304. See, e.g., Nel Noddings, *Rethinking a Bad Law*, EDUC. WK., Feb. 23, 2005, at 38.

communities.³⁰⁵ If these critics prevail, the accountability era in education may end up being short-lived, and religious conservatives will be less fearful of regulation of voucher schools. Moreover, voucher advocates are resourceful and have recently adopted a strategy that conservatives have long chastised liberals for—trying to win in the courts what they cannot achieve in the legislature. In New Jersey, for example, voucher proponents have filed suit arguing that the state constitutional guarantee of a “thorough and efficient system of free public schools” means that the state should provide vouchers to parents in low-performing districts.³⁰⁶

But the challenges to the success of vouchers are serious. The public education establishment, its unions, and its allies among traditional civil rights organizations remain staunch voucher opponents. These groups have launched a variety of legal challenges to vouchers under state constitutions, some of which have been successful.³⁰⁷ Charter schools, which some feared would pave the way for vouchers,³⁰⁸ have in some states had the opposite effect—they have reduced enthusiasm for vouchers by giving dissatisfied parents other options.³⁰⁹

Further complicating the political future of the voucher movement is the inherent tension between the values and racial-justice claims, which I have discussed throughout the Article. For example, the racial-justice claim envisions restrictions on the ability of voucher schools to choose which students they want to admit. Most Americans—and especially minority and low-income voters—support such restrictions,³¹⁰ and some current voucher plans prohibit selective admission.³¹¹ Yet, as I have shown, religious conservatives are equally committed to protecting the admissions autonomy of their schools, and the values claim supports such a view. These differences threaten to destroy the fragile voucher coalition. In Milwaukee, for example, African American community activist and legislator Polly Williams, one of the founders of the

305. See, e.g., Lawrence A. Uzzell, *No Child Left Behind: The Dangers of Centralized Education Policy*, POL’Y ANALYSIS, May 31, 2005, at 1, available at <http://www.cato.org/pubs/pas/pa544.pdf>.

306. David J. Hoff, *Lawsuit Seeks Vouchers for N.J. Students*, EDUC. WK., July 26, 2006, at 22. This litigation strategy is modeled after the numerous lawsuits that school-funding advocates have filed arguing that state constitutions require additional funding for poor districts. For discussions of the current state of school-finance litigation, see John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351 (2004); James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL’Y REV. 463 (2004).

307. See, e.g., *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

308. See MACINNES, *supra* note 135, at 10.

309. See MORKEN & FORMICOLA, *supra* note 89, at 57–58, 183–84.

310. See *supra* text accompanying notes 232–237.

311. See, e.g., DC School Choice Incentive Act of 2003, Pub. L. No. 108-199, 118 Stat. 126; WIS. STAT. § 119.23(3)(a) (2005).

voucher movement, fought hard to limit the ability of schools to select students. But Catholic school administrators disagreed with her, and Williams has become alienated from the larger voucher coalition.³¹² Because minority voters and their leaders support regulations requiring lottery admission as strongly as religious conservatives are opposed to them, this dispute—and others like it—will continue to threaten the voucher movement.

In the face of this complicated political and legal environment, it is increasingly evident that vouchers will need support from additional constituencies for the reform to become widespread. But the voucher movement may have painted itself into a corner. In justifying vouchers as a means to an academically superior education, voucher advocates have tied their fortunes to research results proving that claim. The findings so far, viewed in the light most sympathetic to voucher defenders, show that religious schools have an impact on the academic performance of inner-city African Americans, but not on the performance of whites or Hispanics.³¹³ To date, voucher proponents have trumpeted these findings as a justification for voucher programs targeted toward inner-city blacks.³¹⁴

But those same findings can and will be used by voucher opponents to argue that there is no justification for broader voucher plans aimed at whites or Hispanics. The difficulty of “selling” vouchers to white suburban voters—a group whose support is essential to any educational reform³¹⁵—received inadvertent public acknowledgment from President Bush. “There are a lot of Republicans who don’t like vouchers,” Bush whispered before a White House event, without realizing that his podium microphone was broadcasting his comments to the press.³¹⁶ “They come from wealthy suburban districts who are scared to death of irritating the public school movement, and their schools are good.”³¹⁷ The argument for vouchers as a means to quality education will require convincing some of these voters that voucher schools achieve better academic results than their current schools. This may turn out to be an impossible standard for the voucher movement to reach; to date, even the research from voucher advocates like Howell and Peterson does not support this claim.

312. See MORKEN & FORMICOLA, *supra* note 89, at 205–07.

313. See *supra* text accompanying notes 125–128.

314. See *supra* text accompanying note 131.

315. See Ryan & Heise, *supra* note 200, at 2063.

316. Sarah Wildman, *Credit is Due*, NEW REPUBLIC, Feb. 26, 2001, at 15, 15 (quoting President George W. Bush).

317. *Id.*

So who will clamor for vouchers? If Christian conservatives are insufficiently moved by racial-justice claims and fearful of government regulation, and if suburban voters see no need to adopt a reform that has only succeeded with inner-city blacks, the voucher movement's appeal may be limited to the African American constituency it cultivated on the road to *Zelman*. That would be the ultimate irony, because thinkers as different as economist Milton Friedman on the right and law professor Derrick Bell on the left both agree on one thing: As long as a program is perceived as benefiting solely those with little power in society, it is unlikely to prosper for long.³¹⁸

318. See Bell, *supra* note 184, at 523 ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."); Robert Kuttner, *Agreeing to Disagree: Robert Kuttner Speaks with Milton Friedman*, AM. PROSPECT, Jan. 5, 2006, <http://www.prospect.org/web/kuttner> (according to Friedman, "A program for the poor would be a poor program.").