VOUCHERS AND THE PRIVATIZATION OF AMERICAN EDUCATION: JUSTIFYING RACIAL RESEGREGATION FROM *BROWN* TO *ZELMAN*

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In Brown v. Board of Education *the Supreme Court held that separate educational facilities for blacks and whites were inherently unequal. Since* Brown*, those seeking to avoid desegregation have found a powerful weapon in school vouchers, which enable parents to practice private discrimination with public dollars. The prevailing Supreme Court interpretation of the First Amendment's Establishment Clause permits the government to support parochial schools so long as it does not effectively establish a state religion or express a preference for one religion over another. Earlier, the Supreme Court in* Griffin v. County School Board of Prince Edward County *and* Green v. County School Board of New Kent County *required that states abandon devices like vouchers and tuition assistance when they are used to promote segregation. More recently, though, a line of cases from* Board of Education of Central School District No. 1 v. Allen *to* Zelman v. Simmons-Harris *has paved the way for the establishment of voucher programs by allowing government support for religious educational institutions where such support does not have the effect of advancing or inhibiting religion and the assistance is given to a broad class of private individuals whose allocation of the funds is determined by personal choice. The Supreme Court's approval of such tuition assistance programs portends a new regime of aid to private and religious schools, contributing to the resegregation of American education.*

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I. INTRODUCTION

Resistance to *Brown v. Board of Education*[1] and its progeny has taken many shapes since 1954. Initially, the response was blatantly confrontational, as massive opposition gave birth to a decade of social conflict. Later, the resistance became more subtle. Housing patterns changed as whites moved to the suburbs, then to exurbia. Private religious academies were built throughout the South, and new enrollments revitalized parochial schools in the North. Middle-class parents took a new and intensified interest in their children's education and sought out schools a safe distance from busing and integrated schools. Various rationales emerged over the years as proponents of private schools sought moral justifications for their abandonment of America's public schools. As the theologian Reinhold Niebuhr observed in *Moral Man and Immoral Society*, privileged groups who benefit from inequality invent "specious proofs" to support the moral justifications for their discrimination.[2] These justifications seek to "negate and transcend" the actual purpose for which the inequalities were created.[3]

The specious proofs used to justify racial discrimination in the post-*Brown* era espouse appealing concepts of liberty, parental choice, competition, and neutrality, which implicitly call for the privatization of education with public resources. The tuition voucher has become the preferred method, funneling public tax funds to private and parochial schools.

The subject of vouchers has consequently become a lightening rod issue in American politics. A voucher is a coupon worth a predetermined amount of money that is presented at a private or parochial school by the parent. The school and parent endorse the voucher, and the school redeems the money from the state or local school district. Vouchers, and other similar devices, are not new; they have often been used as a conduit to move public funds to the private sector, not only for education, but for various health and welfare functions of government as well.[4] Yet, the public most readily understands vouchers as a way to channel money from the general public coffers to church schools. Opponents of vouchers argue that such devices reinforce the reactionary preferences and biases of parents who choose to spend the public's money at like-minded schools.[5] Michael Walzer, in his seminal book *Spheres of Justice*,

1. 347 U.S. 483 (1954). Chief Justice Earl Warren wrote, "[I]n the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal." *Id.* at 495.

2. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 116–17 (1932).

3. *Id.*

4. JOSEPH E. STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 55–63, 104–14, 304–22, 391–98, 420–41 (4th ed. 2000).

5. JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 193 (1994); JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM 190–209 (2000).

captures the essence of the problem of vouchers and parental choice in the marketplace of education: "For most children, parental choice almost certainly means less diversity, less tension, less opportunity for personal change than they would find in schools to which they were politically assigned."[6]

The purpose of this article is to explore the relationship between school vouchers and desegregation in the aftermath of *Brown v. Board of Education*. Part II will briefly examine the historical roots of tuition vouchers and various theories underlying the Supreme Court's interpretation of the First Amendment's religion clauses. Part III will explore early efforts to circumvent desegregation and the key Supreme Court decisions from *Griffin*[7] to *Zelman*[8] that paved the way for the establishment of tuition vouchers in American education. Part IV will discuss the implications of various voucher initiatives across the country as well as the federal government's recent role in furthering the cause of private and parochial education at the expense of public schools. This article will conclude by arguing that the use of tuition vouchers did not arise in any significant degree in the United States until the public schools were desegregated following the *Brown* decision. In response to desegregation, a veiled crusade was launched under the pretext of private choice to resegregate the nation's schools through the use of tuition vouchers and other forms of public aid to private and parochial schools. The Supreme Court's decision in *Zelman* was a critical turning point which gave privatization a new impetus, opening the constitutional door to an expansion of tuition voucher initiatives and the erosion of *Brown*'s significance in American society.

II. THE BACKGROUND TO VOUCHERS AND THE RELIGION CLAUSES OF THE FIRST AMENDMENT

A. The Historical Roots of Vouchers

The idea of tuition vouchers can be traced back to the French Revolution in 1793.[9] At that time, the Catholic Church thwarted the French government's efforts to create a system of public schools, and in its place, initiated a system whereby parents were given vouchers to send their children to religious schools.[10] The voucher committed the state to pay the tuition (*rébribution scolaire*) of each student at a standard rate. Al-

6. MICHAEL WALZER, SPHERES OF JUSTICE 218 (1983).
7. Griffin v. County Sch. Bd., 377 U.S. 218 (1964).
8. Zelman v. Simmons-Harris, 536 U.S. 369 (2002).
9. ISSER WALOCH, THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIC ORDER, 1789–1820s, at 180 (1994).
10. DANIEL ROCHE, FRANCE IN THE ENLIGHTENMENT 360 (1998).

though this early system of vouchers soon collapsed, it was not dissimilar to those now in use in a few states and cities in the United States.[11]

In the New World, the idea of tuition vouchers did not take hold until much later. This was, in part, because colonial governments, operating under English rule together with the established Anglican Church, provided tax funds directly to church schools and colleges long before the American Revolution.[12] With no separation of church and state, and no written English constitution to restrain them, the colonial governments offered direct aid to certain majority-supported church schools while systematically refusing aid to minority denominations and sects. Without constitutional separation of church and state, colonial governments did not need to adopt circuitous means, such as tuition vouchers, to fund church schools. But with independence came a new nation that valued religious freedom and free public education for all denominations, greatly diminishing the direct funding of church schools and colleges by state and local sources.[13]

In the modern era, the inexorable drive toward the privatization of government functions is a major force behind tuition voucher initiatives in the United States and around the world. Since the 1980s, the free market ideology of the so-called Washington Consensus and the Chicago school have led the U.S. government down a slippery slope with respect to social policy, seeking to privatize and deregulate health care, social security, transportation, education, and other government functions.[14] Joseph Stiglitz, winner of the 2001 Nobel Prize in Economic Science, questions the effects of privatization on developing countries in his best-selling book, *Globalization and Its Discontents*,[15] arguing that the World Bank and the International Monetary Fund (IMF), under the influence of the Washington Consensus in the United States, have misapplied the free market ideology in a zealous pursuit to privatize everything in sight regardless of the consequences.[16] Stiglitz cautions that the selling of gov-

11. The voucher system in France of the Bouquier Law of 1793 committed the state to paying tuition, *retribution scolaire*, for each student at a standard rate. Tuition vouchers were provided to parents who, in turn, could hire teachers that suited them. The teachers needed only to secure a *certificate de civisme* and announce that they were opening a school. This law lasted for only one year and was succeeded by an entirely new law known as the Lakanal Law in 1794 that abandoned the voucher system. WALOCH, *supra* note 9, at 180–81; *see also* KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 195–207 (6th ed. 2005).

12. JOHN LAWSON & HAROLD SILVER, A SOCIAL HISTORY OF EDUCATION IN ENGLAND 181–209 (1973).

13. ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 86–91, 94–97 (1934).

14. MICHAEL B. KATZ, THE PRIDE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE 1–8, 66–76 (2001); *see also* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); ROBERT B. KUTTNER, THE ECONOMIC ILLUSION: FALSE CHOICES BETWEEN PROSPERITY AND SOCIAL JUSTICE 50–59 (1991). Note also that Joseph Stiglitz explains in considerable detail the so-called Washington Consensus in *Globalization and Its Discontents*. JOSEPH R. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 67, 81, 92, 155 (2002).

15. STIGLITZ, *supra* note 14.

16. *Id.* at xiii, xv, 18–21.

ernment functions to private companies in developing countries has not resulted in greater efficiency and increased competition as expected, but rather has produced widening disparities between the haves and have-nots and, in some countries, social and political chaos.[17]

The World Bank and the IMF, in advancing the aims of the Washington Consensus, have required developing countries to restructure their approach to funding education in order to receive loans.[18] Developing countries are encouraged to undertake structural adjustments, such as reductions in state funding of public education, replaced by tuition from families and tuition voucher systems.[19] Moreover, governments are asked to reduce or terminate funding of higher education and rely on increased tuition and fees to cover costs. These measures have resulted in an increasing number of private schools, some secular, but mostly fundamentalist religious schools, with destructive consequences.[20] Stiglitz points out that the privatization approach of the Washington Consensus to education funding in Uganda, for example, resulted in discrimination, cultural conflict, and denial of educational opportunity for many children, especially girls.[21]

In the United States, the movement toward privatization of education and the initiation of a tuition voucher system has taken a different road. In the wake of the *Brown* decision intended to desegregate the public schools, the present Supreme Court, influenced by the Washington Consensus and the religious right, has condemned the First Amendment's Establishment Clause, the metaphorical wall of separation between church and state, as the main hurdle in obtaining public funding via tuition vouchers for private religious schools. Along the way, America's system of public schools has suffered reduced political support and increased isolation due to mainstream middle-class religious preferences for private and parochial schools.[22] The result of this privatization has been the erosion of the public school ideal, the proliferation of private segregated academies, and the balkanization and racial resegregation of American education with the government's help.

17. *Id.* at 18. According to Stiglitz, the "net effect of the policies set by the Washington Consensus has all too often been to benefit the few at the expense of the many, and the well-off at the expense of the poor." *Id.* at 20.

18. *Id.* at 74–80.

19. *Id.*

20. *Id.*

21. Uganda had a free system of public schools requiring no fees or tuition. *See* STIGLITZ, *supra* note 14, at 76. However, experts at the IMF required the Ugandan government to charge tuition as loan conditions. *Id.* Later, it was discovered that very poor families, seeing greater short-term economic benefits in keeping their daughters at home to do menial family chores, refused to pay fees to send their daughters to school. *See id.* Eventually, Uganda's President Museveni rejected the IMF's advice, abolished all school fees, and enrollment of girls in school dramatically increased. *See id*.

22. JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 108–09, 123–27, 130–31 (2003).

B. Education and the First Amendment: Three Theories of Separation

To better understand the rationale of the Supreme Court in approving public funds for private religious schools, it is instructive to examine the competing theories and philosophies associated with the religion clauses of the First Amendment. Over the past few years, three interpretations of the Establishment Clause and Free Exercise Clause have been used to explain the permissible relationship between church and state in the field of education. The first is the traditional American separation philosophy of John Adams, Thomas Jefferson, and James Madison. The second is the neutrality theory, supported by those who advance the cause of private schools and who interpret the religion clauses of the First Amendment to simply mean that government must be impartial toward religion—it cannot favor one religion over another religion. The third is the accommodation theory under which the government can finance religious private schools, without violating the Establishment Clause, unless it actually establishes a state religion or a state school system of one religion.

The separation theory, first, is based on the idea that government and religion should operate in two entirely separate spheres, the temporal and the spiritual. This view lies at the heart of Madison's philosophy as expressed in his *Memorial and Remonstrance*,[23] and in Justice Black's interpretation of the First Amendment in *Everson v. Board of Education*.[24] In *Everson*, Justice Black captured the essence of the theory of separation: "Neither a state nor the Federal Government . . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another," and "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[25] The prohibition of any tax "large or small" to support private religious schools in this 1947 decision became anathema to those who sought public funding for private religious schools and escape from the post-*Brown* desegregated public schools by retreating to private religious, tax-supported schools.

The second theory, lately advocated by Chief Justice Rehnquist, and Justices O'Connor and Kennedy, asserts that the dictates of the Establishment and Free Exercise Clauses are fulfilled if the government is simply neutral toward religion, neither preferring nor favoring one religion over another. In *Mueller v. Allen*, with Chief Justice Rehnquist writing for the majority, the Supreme Court upheld tax deductions for expenses incurred by parents whose children attended private and

23. *See* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 55–60 (1964).

24. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

25. *Id.*

parochial schools.[26] The Court reasoned that because the tax deductions were available to all parents, regardless of the type of private or religious school attended, the benefits were neutral.[27] This second theory has been used as the principal rationale by the Court over the past two decades to justify the use of governmental financial incentives to establish and expand private and parochial schools.[28]

Finally, the accommodation theory also supports public funding of private religious schools. Under this theory, the state effectively "embraces, obliges and accommodates religion's presence in government."[29] This approach interprets the Establishment Clause to mean that the government can generally finance private religious schools and only prohibits state laws that do not treat all religious schools equally. The underlying theory of accommodation has long been advocated by parochial school proponents, but has only recently gained judicial support.[30] Justice Kennedy, in advancing this theory, has said that government can aid private religious schools, and the only Establishment Clause restraint is that government "may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion,' or tends to do so."[31] Both the neutrality and accommodation theories support public financing of religious schools, and thereby provide incentives for parents to move their children from desegregated public schools to private, segregated ones.

III. THE ROAD TO TUITION VOUCHERS

A. Griffin *and the Advent of School Vouchers in the United States*

Tuition vouchers for private schools were not used to any significant degree until white parents and legislators responded to *Brown* and its progeny.[32] During the years immediately following *Brown*, school districts experimented with a number of devices to circumvent the Equal Protection Clause of the Fourteenth Amendment. Most notably, the Virginia legislature enacted a tuition voucher law in 1956, and an amended law in 1959, that permitted the closing of public schools and the opening of private, segregated academies.[33] Pursuant to the Virginia legislation, a group of white parents formed a charter school for white chil-

26. Mueller v. Allen, 463 U.S. 388, 403 (1983).

27. *Id.* at 397. The neutrality theory is also called the "no preference" theory. *See* Richard S. Myers, *The Supreme Court and the Privatization of Religion,* 41 CATH. U. L. REV. 19, 44 (1991). Justice Rehnquist, in his dissent in *Wallace v. Jaffree*, interpreted the Establishment Clause to forbid "preference among religious sects or denominations." 472 U.S. 38, 106 (1985).

28. *See, e.g.,* Edwards v. Aguillard, 482 U.S. 578, 593 (1987).

29. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1149–55 (2002).

30. *See* Mitchell v. Helms, 530 U.S. 793, 835–36 (2000) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (holding that a state voucher program does not run afoul of the First Amendment).

31. Lee v. Weisman, 505 U.S. 577, 587 (1992).

32. *See* Griffin v. County Sch. Bd. of Prince Edward County, 337 U.S. 218, 220–22 (1964).

33. *Id.*

dren only and were awarded tuition vouchers and tax credits by the Board of Supervisors of Prince Edward County. In *County School Board of Prince Edward County v. Griffin*, the Supreme Court of Virginia upheld the program.[34]

On appeal, the U.S. Supreme Court held that the public school closings and the tuition voucher and tax credit scheme violated the Equal Protection Clause of the Fourteenth Amendment.[35] According to the Court:

> [T]he record in the present case could not be clearer that Prince Edward's public school were closed and private schools operated in their place . . . for one reason, and one reason only: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.[36]

Justice Black, who wrote the majority opinion, reasoned that closing the public schools in Prince Edward County only, and in no other Virginia county, denied black students the equal protection of the laws guaranteed by the Fourteenth Amendment.[37] "Closing Prince Edward's schools," he argued, "bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools."[38] The effect of Prince Edward County's voucher policy was a racially segregated school system in which whites attended publicly financed private schools within the county and blacks attended either public schools outside the county or no school at all.

The *Griffin* case, which has been overshadowed by *Brown*, was an important development in American education. It marked the beginning of a new era of indirect discriminatory financial measures designed to keep black and white children separate in the school system. The use of tuition vouchers to circumvent the Equal Protection Clause was unprecedented in American education, but was viewed favorably by segregationists as a necessary device to reestablish the pre-*Brown* status quo consistent with the so-called southern strategy.[39]

In *Brown,* the Supreme Court only dealt with the issue of de jure segregation—segregation arising by law or deliberately discriminatory acts of government.[40] Similarly, the *Griffin* Court concluded that pur-

34. Griffin v. County Sch. Bd. of Prince Edward County, 1335 E.2d 565, 568–69, 580 (Va. 1963) (upholding the closing of the Prince Edward County public school, the state and county tuition grants for children who attend private schools, and the county tax concessions of those who make contributions to private schools).

35. *Griffin*, 377 U.S. at 230–33.

36. *Id.* at 231.

37. *Id.* at 225.

38. *Id.* at 230.

39. R. KENNETH GOODWIN & FRANK KEMERER, SCHOOL CHOICE TRADEOFFS: LIBERTY, EQUALITY, AND DIVERSITY 107 (2002).

40. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

poseful segregation was the underlying motivation behind the Virginia voucher law, by the emphasis on the effect of the law which emanated from the private choices of individuals. Parental choice was motivated by public funds that flowed from the state to parents to the private academies. According to Justice Black, "the result is that Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support."[41] In *Griffin*, discrimination by parental choice, though apparently de facto, was rendered de jure by virtue of state-funding—private individuals were making blatantly race-conscious private choices with public funds.[42] The Supreme Court thus determined that this was a violation of *Brown*'s desegregation mandate. Four years after *Griffin*, the idea of private choice was examined more fully by the Supreme Court in another Virginia case.

In *Green v. County School Board of New Kent County, Virginia*,[43] the Supreme Court reviewed a "freedom of choice" plan instituted by the New Kent County School Board to remedy segregation in the public schools.[44] Under the New Kent County plan, an evenly divided population of whites and blacks in the county were allowed to choose between two public schools, one white (New Kent), the other black (George W. Watkins).[45] In three years of operation, not a single white child chose to attend the all-black Watkins school, and eighty-five percent of the black children were still enrolled in Watkins.[46] The Board contended that it had fully discharged its obligation under *Brown II* by adopting a plan by which every student, regardless of race, could "freely" choose the school he or she would attend. The Supreme Court disagreed.

The Court held that the plan did not adequately satisfy the Board's duty to achieve a unitary, nonracial system of public education.[47] The Court's reasoning focused on the aspect of private choice in schooling. According to the Court: "'Freedom of choice' . . . is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove ineffective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end."[48]

41. *Griffin*, 377 U.S. at 230–31.

42. *See id.* at 230–31.

43. 391 U.S. 430 (1968).

44. At the time, the school system served approximately 1300 pupils, of which 740 were black and 550 were white. Each of the two schools served the entire county. *Id.* at 432.

45. Under the plan, each pupil, except those entering the first and eighth grades, had the option to attend either New Kent or Watkins school. Pupils not making a choice were assigned to the school previously attended, but first and eighth grade pupils were required to choose a school. *Id.* at 433–34.

46. Between 1965 and 1967, a total of 115 black children enrolled in the all-white New Kent school, but this was less than ten percent of the entire student population *Id.* at 441.

47. *Id.* at 440.

48. *Id.* at 430.

In effect, the burden was on the Board to produce a plan that promised immediate progress toward disestablishing state-imposed segregation. Whether the plan was based on freedom of choice, vouchers, or any other device, the duty to eliminate racial segregation was still the goal, and that goal had to be achieved for the plan to survive judicial scrutiny.[49]

The *Griffin* and *Green* decisions established important parameters for state and local governments seeking to comply with *Brown*'s desegregation mandate. Essentially, the use of tuition vouchers and private choice plans were deemed compatible with the law as long as they furthered the goal of desegregating the public schools.[50] As the Supreme Court explained in *Green*, "[w]here [freedom of choice] offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation."[51] However, in the event that these devices failed to achieve the desired objective of desegregation, the Court declared that other means must be used to achieve this end.[52] Today, this standard has been largely forgotten as the ideals and objectives of communalism and public unity have been swept aside in pursuit of parental choice and racial separation.

B. The Establishment Clause and the Road to Vouchers

The debate over state aid to private schools intensified in the wake of the passage of the Civil Rights Act of 1964. Supporters and opponents of desegregation clashed over the meaning of *Brown*, *Griffin*, and *Green* and their impact on public education, especially in the South.[53] After *Brown*, the Fourteenth Amendment became a great hindrance to state governments that sought public funds for private schools. Prior to that time, only *Everson* was an obstacle to choice-driven segregation, interposing the theory of strict separation as a barrier to state aid for private religious schools. What emerged was a protracted campaign by those opposed to desegregation to discredit public schools in order to gain tax resources for *Green*-type freedom of choice in education.[54]

49. The Supreme Court quoted Judge Sobeloff, who gave a concurring opinion in *Bowman v. County School Board*, 382 F.2d 326, 333 (4th Cir. 1967), stating that:

> "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, nonracial system."

50. *See* Green Bay v. City Sch. Bd., 391 U.S. 430, 439–41 (1968).

51. *Id.* at 440–41.

52. *Id.* at 441–42.

53. GOODWIN & KEMERER, *supra* note 39, at 105–12.

54. *Id.* at 119–24. *See generally* JOHN E. CHUBB & TERRY M. MOE, POLITIC, MARKETS AND AMERICA'S SCHOOLS (1998); JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS (1987).

In 1968, the Supreme Court, in *Board of Education v. Allen*, reviewed a New York program authorizing local school boards to lend textbooks in secular subjects to children attending private, sectarian schools.[55] The Supreme Court upheld the law on the basis that this form of aid was to be used for secular educational purposes only and therefore did not violate the Establishment Clause of the First Amendment.[56] The Court found it important that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools."[57] Acknowledging the reality that religious instruction and secular education can easily become entangled in sectarian schools, the Court reasoned that indirect public aid would be permissible under the Establishment Clause if it could be tailored to serve only secular purposes.[58] Moreover, Justice White revived the child benefit theory that fit perfectly into the parental choice philosophy and the funding of parochial schools.[59]

In 1971, the Supreme Court considered the question of direct aid to private sectarian institutions of higher learning in the landmark case of *Tilton v. Richardson*.[60] In *Tilton*, the Court held that direct federal aid to church-related institutions under Title I of the Higher Education Facilities Act of 1963, providing construction grants for buildings and facilities used exclusively for secular educational purposes, did not violate the Establishment Clause.[61] In reaching its conclusion, the Supreme Court distinguished higher education from elementary and secondary education, reasoning that older students were less susceptible to proselytizing: "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities."[62] The Court did point out, however, that direct financial aid to such church-related educational institutions for general operation could run afoul of the Establishment Clause if, for example, funds were provided for teachers' salaries.[63] The Court observed that because teachers are not necessarily "religiously neutral," greater surveillance would be required to "guarantee that state salary aid would not in fact subsidize religious instruction."[64]

Allen and *Tilton* encouraged private school proponents, who lobbied Congress and state legislatures to create new funding mechanisms to

55. 392 U.S. 236, 238–42 (1968).
56. *Id.* at 245–48.
57. *Id.* at 243–44.
58. *See, e.g., id.* at 243–45.
59. *See id.* at 247–48.
60. 403 U.S. 672, 674–75 (1971).
61. *Id.*
62. *Id.* at 687.
63. *Id.* at 687.
64. *Id.* at 687–88.

benefit private education. Mindful of the *Tilton* decision, Congress enacted a form of tuition voucher (called Pell Grants) in 1972 to provide major federal subventions for poor students to attend private and public institutions of higher education.[65] Because direct institutional aid for operational expenses to the church-related institutions was apparently foreclosed by *Tilton*, Congress followed the safer route of indirect aid through the Pell Grant vouchers. Part of the rationale for the adoption of Pell Grants was the political necessity of combating rising higher education costs and providing assistance to the large numbers of poor students attending public and private institutions. Today, these tuition vouchers provide more funding per student for private institutions of higher learning than for public ones.[66]

Allowing tuition vouchers in the form of Pell Grants to skirt the strictures of the Establishment Clause in higher education provided an incentive for sectarian elementary and secondary schools to pursue the same type of financial assistance. Following the same rationale, the legislature of New York enacted a law authorizing tuition grants for poor parents, and tax deductions for affluent ones, who sent their children to private and parochial schools.[67] However, New York's tuition grant plan was struck down by the Supreme Court in *Committee for Public Education & Religious Liberty v. Nyquist* as violative of the Establishment Clause.[68] Although the program was ostensibly enacted for "secular purposes," the Court found that its effect was "unmistakably to provide desired financial support for nonpublic, sectarian institutions."[69] The Court focused on what the aid was used for after disbursement and reasoned that aid to parents in the form of tuition grants or tax deductions was no different than the forbidden direct aid to religious schools for religious uses.[70] Aid in either form was deemed to violate the no aid to religion principle enshrined in the Establishment Clause.[71] The significance of *Nyquist* was that it created a strong wall of separation between church and state with respect to the allocation of indirect aid, like tuition vouchers, to sectarian primary and secondary schools, though that wall had been eroded somewhat in the field of higher education.

Unlike its porous approach to the Establishment Clause, the Supreme Court was less willing to interpret the Equal Protection Clause to accommodate schemes to aid private schools. In *Norwood v. D.L. Harrison*, the Court held unconstitutional a Mississippi program under which

65. F. King Alexander, *Private Institutions and Public Dollars: An Analysis of the Effects of Direct Student Aid on Public and Private Institutions of Higher Education*, 23 J. EDUC. FIN. 390 (1998).

66. F. King Alexander, *Vouchers in American Education: Hard Legal and Policy Lessons from Higher Education*, 24 J. EDUC. FIN. 153 (1998).

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

68. *Id.* at 798.

69. *Id.* at 783.

70. *Id.* at 783–89.

71. *Id.* at 685.

textbooks were purchased by the state and lent to students in both public and private schools, regardless of the racially discriminatory policies of participating private schools.[72] The evidence showed that 34,000 students attending 107 all-white, nonsectarian private schools that were formed in response to public school desegregation, were receiving state-purchased textbooks.[73] The Court reasoned:

> Free textbooks, like tuition grants directed to students in private schools, are a form of tangible financial assistance benefiting the schools themselves, and the State's constitutional obligation requires it to avoid not only operating the old dual system of racially segregated schools but also providing tangible aid to schools that practice racial or other invidious discrimination.[74]

The comparison the Court drew between tuition grants and the funding of textbooks was meant to link prior decisions involving state tuition grants with students attending racially discriminatory schools.[75] However, the Court in *Norwood* cited *Everson* and *Allen*[76] to make the point that public aid to private, sectarian schools is allowed more leeway than aid to racially segregated schools.[77] With respect to the Establishment Clause, the Court asserted that the clause "permits a greater degree of state assistance [to sectarian schools] than may be given to private schools which engage in discriminatory practices."[78] The Court noted that "where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests, states may assist church-related schools in performing their regular functions."[79] The key difference in *Norwood*, according to the Court, was that the legitimate educational function of private discriminatory schools could not be isolated from discriminatory practices.[80] Citing *Brown*, the Court argued that a more "stringent standard" under the Equal Protection Clause should be applied because "discriminatory treatment exerts a pervasive influence on the entire educational process."[81] Accordingly, it was the Court's view that the state had a constitutional obligation to steer clear of providing aid to institutions that practice invidious discrimination.[82]

Furthermore, the *Norwood* decision was important because it implied that the use of tuition vouchers would be unconstitutional if such

72. 413 U.S. 455, 459–63 (1973).
73. *Id.* at 459–60.
74. *Id.* at 455.
75. *See, e.g.*, Wallace v. United States, 389 U.S. 215 (1967). Mississippi's tuition grant programs were invalidated in *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969).
76. The Court noted that providing textbooks to private, sectarian schools had been approved in *Mueller v. Allen*, 463 U.S. 388 (1983). *Norwood*, 413 U.S. at 460.
77. *Norwood*, 413 U.S. at 470.
78. *Id.*
79. *Id.* at 468.
80. *Id.* at 469.
81. *Id*. at 455; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954).
82. *Norwood*, 413 U.S. at 467.

aid had a "tendency" to foster discrimination. The Court held that "[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce and support private discrimination."[83] The Mississippi textbook program was deemed unconstitutional because it supported a system of private schools which "may discriminate if they so desire."[84] Hence, the Court associated textbooks with tuition grants. Under this rationale, any type of government aid, including tuition vouchers, reaching the coffers of a private school that "may discriminate" would violate the Fourteenth Amendment. This outright prohibition on aid to schools that discriminate was a more rigid standard than that which was applied under the First Amendment analysis, and would later become important in assessing the constitutionality of present-day tuition voucher plans.[85]

The *Tilton* and *Norwood* decisions gave new guidance to segregationists who sought to capitalize on the Supreme Court's distinction between the secular and sectarian functions of religious schools. Another breakthrough came in 1976, when the Supreme Court heard a First Amendment challenge to a Maryland state financing scheme for higher education that authorized public aid in the form of noncategorical annual grants to eligible colleges and universities within the state.[86] In *Roemer v. Board of Public Works*, the Court held that Maryland's program did not violate the Establishment Clause because the aid did not have the "primary effect" of advancing religion.[87] In the Court's view, the eligible private institutions were not so "permeated by religion" that their secular functions could not be separated from their sectarian identity.[88] The Court concluded that states may not aid institutions that are so "pervasively sectarian" that their secular and sectarian activities cannot be bi-

83. *Id.* at 466. John Nowak and Ronald Rotunda asked the critical questions with regard to vouchers "[f]irst, does the granting of aid to a private party subject that person's activities to constitutional review? Second, even if the private activities are not subject to constitutional limitation, may the government continue to grant the private wrongdoer a subsidy?" JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 537 (2000). These questions with regard to tuition vouchers, and religious private school segregation, go unanswered, but the prognosis may not be a positive one. *See, e.g.,* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

84. *Norwood,* 413 U.S. at 467.

85. *See infra* text accompanying notes 131–39.

86. Roemer v. Bd. of Pub. Works, 426 U.S. 736, 739 (1976).

87. *Id.* at 755–59.

88. *Id*. at 759, *aff'g* 387 F. Supp. 1282, 1293 (Md. 1974). The Court, in defending the funding scheme, focused on three aspects of the institution. First, the Court stressed that although the Roman Catholic Church was represented on the governing boards of each college, there was "no instance of entry of Church considerations into college decisions." *Id.* at 755. Second, the Court pointed out that apart from the theology departments, faculty hiring decisions at these schools were not made on a religious basis. Hiring criteria, according to the Court, was primarily based on "academic quality." *Id.* The Court agreed with the lower court that any effort by an institution to "stack its faculty with members of a particular religious group" would have been noticed by other faculty members. *Id.*

furcated.[89] If, however, their secular activities can be separated out, those activities alone may be funded.[90]

Roemer was a victory for voucher supporters and choice advocates because it expanded the scope of permissible public aid to private sectarian colleges and universities. Direct grants were not only available for secular facilities, but for general expenditures and hiring costs as well. So long as a college or university was not "pervasively sectarian," it could receive federal and state funding.[91]

The same year that *Roemer* was decided, the Supreme Court handed down *Runyon v. McCrary*, a racial segregation case.[92] In *Runyon*, an action for deprivation of civil rights was brought under 28 U.S.C. § 1981 by parents of black children who were allegedly denied admission to two private schools solely on the basis of race.[93] Citing the *Norwood* decision, the petitioning schools argued that "private bias [in the admission of students to private schools] is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid."[94] The Court, quoting *Norwood*, disagreed, stating that the "Constitution . . . places no value on discrimination."[95] The Court held that the racial discrimination practiced by private schools violated § 1981.[96]

The Supreme Court in *Runyon* was careful, however, to qualify the interest being protected. Section 1981 prohibits private, commercial, nonsectarian schools from denying prospective students admission because they are black.[97] The Court also noted that the privacy interests of parents and private schools that are protected under the Constitution include the right to send one's children to private schools and the right of private schools to exclude students on religious grounds.[98] "[W]hile parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction," the Court wrote, "they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."[99]

89. *Roemer*, 426 U.S. at 758–59, 762.

90. *Id.* at 759–60.

91. *Id.* at 755–60.

92. Runyon v. McCrary, 427 U.S. 160 (1976).

93. *Id.* at 164. 42 U.S.C. § 1981 (2000) provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens."

94. *Runyon*, 427 U.S. at 171 n.9 (alteration in original) (emphasis omitted).

95. *Id.* at 176 (omission in original).

96. *Id.* at 178–79 (omission in original).

97. *Id.* at 168–75.

98. *See id.* at 176–77. In a footnote, the Court emphasized that nothing in the record suggests that either school excludes applicants on religious grounds. *Runyon,* 427 U.S. at 167–68 n.6.

99. *Id.* at 178.

C. A Prelude to Vouchers: Dismantling the Wall of Separation Between Church and State

During the mid-1980s, the ideological disposition of the country continued to shift dramatically. The election of Ronald Reagan to the White House in 1980 was an important turning point on the road to tuition vouchers as religious conservatives and school choice advocates found themselves in accord with a President who shared their vision of increased government support of private and parochial schools.[100] During his two terms in office, President Reagan made several appointments to the Supreme Court, all of whom were more ideologically conservative than their predecessors. In 1981, Justice Sandra Day O'Connor was the first woman appointed to the Court. At the time of her appointment, Justice O'Connor had a reputation for being a strong conservative on social issues.[101] In 1986, the first Italian American, Justice Antonin Scalia, was named to the Court. Acclaimed for his intellect and scholarship, Justice Scalia became noted for his adherence to the principle of judicial restraint, his conservative philosophy, and his strident opposition to the separation of church and state.[102] Also in 1986, President Reagan elevated Justice William H. Rehnquist to the position of Chief Justice despite criticism from the liberal establishment.[103] Another conservative, Justice Anthony Kennedy, was confirmed to the Supreme Court in 1988.[104]

As a result of the Court's ideological shift to the right during the 1980s, support for the wall of separation between and church and state in American education steadily waned. A decade after the *Roemer* and *Runyon* decisions, the Supreme Court in *Witters v. Washington Department of Services for the Blind* held that the First Amendment's Establishment Clause did not preclude the State of Washington from giving assistance under the state's vocational rehabilitation program to a blind person who chose to study at a Christian college.[105] According to the Court, state aid could flow indirectly to religious institutions only in the form of independent and private choices of aid recipients and as long as it was unlikely that any significant portion of aid expended under the program would end up supporting religious education.[106]

The *Witters* decision removed several stones from the wall of separation and established a new standard for assessing the validity of indi-

100. THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002).

101. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 604–05 (Kermit L. Hall ed., 1992).

102. *Id.* at 756–57.

103. *Id.* at 715–16.

104. *Id.* at 482–83.

105. 474 U.S. 481, 489 (1986). "As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487.

106. *Id.* at 487–88.

rect government aid to private and parochial institutions. It allowed for the indirect distribution of public money to private religious colleges and universities by way of private choice. The Court's accommodation of freedom of choice was premised on the plan's negligible effect on the actual separation of church and state. The Court held that the Establishment Clause did not preclude such aid because religious schools could derive no "large" benefit.[107] In *Green*, by contrast, the freedom of choice plan was invalidated because it failed to remedy segregation in the public schools. "[F]reedom of choice" in that case was deemed not to be "an end in itself" but "only a means to a constitutionally required end."[108] In *Witters*, "freedom of choice" was an end in itself.[109] The *Witters* Court's reverse logic lauded the foundation upon which the Supreme Court would eventually rest its general approval of private school tuition vouchers.

By the 1990s, the Supreme Court was led by conservatives. President Reagan's successor, George H. Bush, solidified the conservative majority by appointing Justice Clarence Thomas to the Court.[110] Emboldened by the appointment of Justice Thomas, the Moral Majority and the religious right increased pressure on lawmakers to fund private religious schools.[111]

In 1993, *Zobrest* took more stones from the wall of separation.[112] In *Zobrest*, a school district in Arizona refused to furnish a deaf boy attending a Roman Catholic high school[113] with a sign-language interpreter pursuant to the Individuals with Disabilities Education Act (IDEA)[114] and its Arizona counterpart.[115] The Supreme Court held that the Establishment Clause does not categorically bar placing a public employee in a sectarian school. Consequently, the school district was allowed to pay for an interpreter for deaf students who chose to attend a parochial school.[116] Chief Justice Rehnquist again addressed the choice issue, asserting that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of individual parents' private decisions."[117] Parental freedom of choice was the validating criterion for

107. *Id.* at 488.
108. Green v. County Sch. Bd., 391 U.S. 430, 440 (1968).
109. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).
110. http://www.oyez.org/oyez/resource/legal-entity/106/biography.
111. Herd Fisher, *City Hall Showdown Reveals Disturbing Pattern,* FRESNO BEE, July 13, 2002, at E12.
112. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).
113. *Id.* at 3.
114. 20 U.S.C. § 1400 (2000).
115. ARIZ REV. STAT. ANN. § 15-761 (West 2002).
116. *Zobrest,* 509 U.S. 1, 14–15 (1993).
117. *Id.* at 2. Chief Justice Rehnquist pointed out that an interpreter's presence cannot be attributed to state decision making because the IDEA creates no financial incentive for parents to choose a sectarian school. "Here, the child is the primary beneficiary, and the school receives only an incidental benefit," he wrote. *Id.* "[A]n interpreter, unlike a teacher or guidance counselor, neither adds to nor

public funding of religious schools. The *Zobrest* decision was significant because it eroded the Establishment Clause by expanding the scope of private choice to benefit parochial schools. The ruling was followed by a series of cases seeking to overturn previous Supreme Court decisions and validate new forms of government aid to private sectarian schools.[118] The stage had been set for the full recognition of tuition vouchers under the law.

D. The Cleveland Voucher Decision: Resegregation's "Trojan Horse"

In 2002, the Supreme Court decided the issue of whether the use of tuition vouchers violated the Establishment Clause in *Zelman v. Simmons-Harris,* also known as the Cleveland voucher case.[119] A group of Ohio taxpayers challenged an Ohio program designed to provide financing and educational choice to families with school children in the Cleveland City School District.[120] Under the tuition aid portion of the program, any private school, religious or secular, could participate so as long as the school was located within the boundaries of the Cleveland school district and met statewide educational standards.[121] All participating schools, whether public or private, were required to accept students in accordance with the rules and procedures established by the state school superintendent.[122] Tuition vouchers were distributed to parents according to financial need.[123]

The Supreme Court, in a 5-4 decision, held that the Cleveland program did not have the forbidden effect of advancing or inhibiting religion

subtracts from the sectarian school's environment but merely interprets whatever material is presented to the class as a whole." *Id.*

118. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (holding that Chapter 2 aid distributed to religious schools in Jefferson Parish, Louisiana, was not a violation of the Establishment Clause); Agostini v. Felton, 521 U.S. 203 (1997) (overruling an earlier decision which invalidated a New York program sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (upholding an Establishment Clause challenge to a decision by the University of Virginia denying a student-run religious publication funding that was made available to numerous other student-run publications through the university's Student Activity Fund).

119. 536 U.S. 639, 652 (2002).

120. *See* Pilot Project Scholarship Program, OHIO REV. CODE ANN. §§ 3313.974–.979 (Anderson 2002). In 1995, the Federal District Court for the Northern District of Ohio placed the entire school district of Cleveland, Ohio, under state control, declaring a "crisis of magnitude" among some of the worst public schools in the nation. *Zelman*, 536 U.S. at 644.

121. OHIO REV. CODE ANN. § 3313.976(A)(3). Participating private schools may not discriminate on the basis of race, religion or ethnic background, or "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.* § 3313.976(A)(6).

122. *Id.* § 3313.977(A)(1)(a)–(c).

123. *Id.* § 3313.979.

and, therefore, should be permitted to stand.[124] Chief Justice Rehnquist, who wrote the majority opinion, observed that recent case law

> make[s] clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[125]

Zelman was the final word on vouchers. It opened the constitutional door to allow public money to flow to private and parochial schools based on the private choices of individuals. It also paved the way for the voluntary racial resegregation of America's school system under the pretext of private choice. Since the decision, tuition voucher legislation has been proposed in several states and President Bush's No Child Left Behind Act of 2001, which encourages students to opt out of failing public schools, has enjoyed the support of private school advocates and religious conservatives.[126]

IV. VOUCHER INITIATIVES AND THE EROSION OF *BROWN*

A. State and Local Voucher Programs and the Revival of a Segregated Education System

The impact of various voucher initiatives around the country is controversial and bears heavily on the continued desegregation of American schools. The Heritage Foundation, in a state-by-state analysis of privatized education, praises *Zelman* as authorizing voucher programs to aid private schools "even when participatory schools are overwhelmingly religious."[127] The Foundation also observes that "the Supreme Court's landmark legal opinion, and increased legislative activity on choice provide a foundation for new programs that will empower parents to choose the schools that best meet their children's needs."[128] The Foundation's analysis of state programs indicates that (1) six states now have voucher programs for private school choice,[129] (2) six states offer tax credits or

124. *Zelman*, 536 U.S. at 644, 649. The Supreme Court found in applying the first prong of the *Lemon* test that the program was enacted for a valid secular purpose, in this case "providing educational assistance to poor children in a demonstrably failing public school system." *Id.* at 649.

125. *Id.* at 652.

126. 20 U.S.C.A. § 6301 (West 2002); *see* RICHARD A. KING ET AL., SCHOOL FINANCE: ACHIEVING HIGH STANDARDS WITH EQUITY AND EFFICIENCY 234–38, 242–47, 263–64 (3d ed. 2003).

127. KRISTA KAFER, SCHOOL CHOICE 2003: HOW STATES ARE PROVIDING GREATER OPPORTUNITY IN EDUCATION ix (2003).

128. *Id.*

129. Maine has a century-old town tuition law that enables students in unorganized territories and towns without schools to attend available nonsectarian private schools with public funds. Vermont has a law enacted in 1869 that enables children in rural areas, without access to public schools, to obtain scholarships to attend either public or private schools of their choice. The Vermont Supreme Court

deductions for education expenses at private schools, and (3) forty states have enacted charter school laws to privatize education.[130]

Milwaukee, Cleveland, Colorado, and Florida have all instituted tuition voucher programs which provide low-income students in public schools with public funds to move to private and parochial schools.[131] The tuition voucher program in Milwaukee was established in 1990, expanded in 1995, and involves more than 10,000 students.[132] Under the program, low-income students receive approximately $5800 in tuition aid to attend private secular and sectarian schools.[133] On review, the Wisconsin Supreme Court held that the Milwaukee voucher plan offended neither the First Amendment, nor Article I, Section 18, of the Wisconsin Constitution, which prohibits money from being "drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."[134] The court concluded that if the state funds were washed through a third party, the primary effect of such funds was not to the benefit of the school. According to the court, "public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decision of third parties."[135] The legal contest over Milwaukee's voucher plan ended when the U.S. Supreme Court denied certiorari.

John Witte, in an exhaustive analysis of the Milwaukee voucher program, concluded that "[t]he pure market model [of parental choice] also has not-so-subtle racial implications . . . . It is difficult for me to see how a market model of choice would do anything but accelerate the growing balkanization of our schools and country."[136] The racial effects of the Milwaukee voucher program are distressing. From 1994 to 1995, the student bodies of four schools participating in the tuition voucher program were exclusively African American.[137] Four other schools were predominantly African American (above seventy percent).[138] One participating school "was [ninety-three] percent Hispanic and the remaining three schools were mostly white."[139] Based on the evidence, it is arguable that the Milwaukee program, at least in its early years, was certainly re-

ruled that use of state-funded scholarships to attend religious schools violated the Vermont Constitution. Crittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 541–42 (Vt. 1999).

130. KAFER, *supra* note 127, at ix.

131. *Id.* at ix n.2.

132. *Id.*

133. The Cleveland voucher initiative discussed in the previous part was modeled on the Milwaukee program. The tuition vouchers under the Milwaukee program are worth nearly twice as much as the tuition vouchers under the Cleveland program.

134. Jackson v. Benson, 578 N.W.2d 602, 620–23(Wis. 1998).

135. *Id.* at 621.

136. WITTE, *supra* note 5, at 203. Witte points out that this pattern was partly a result of "conscious specialization on the part of schools" and partly the result of location. *See, e.g., id.* at 199–209.

137. *Id.* at 87.

138. *Id.*

139. *Id.*

sponsible for more racial segregation than would have existed in its absence.

The State of Colorado established a voucher program in 2004, offering low-income students tuition vouchers to attend the school of their choice.[140] The Colorado pilot program provides a voucher that represents 37.5% of each school district's per pupil expenditure for kindergarten students, seventy-five percent for elementary and junior high students, and eighty-five percent for high school students.[141] Only low-income students who qualify for the federal free and reduced-price lunch program are eligible to participate.[142] The number of students permitted to participate is one percent of each school district's enrollment in 2004–2005, rising to six percent in 2007–2008.[143] At present, the Colorado voucher program has been put on hold as a legal battle over it continues.[144]

Florida is the principle breeding ground for state funding programs to support private schools. These programs have become a political priority for legislators and Governor Jeb Bush since the numbers of African Americans and Hispanic children have dramatically increased as a percentage of the total school-age population.[145] The Florida voucher program was the prototype concept for the federal No Child Left Behind Act proposed by President George W. Bush.[146] Under the Florida scheme, if a public school fails to improve its test scores for two years within a four-year period, then its students are given a voucher to attend a private school.[147] In 2002, ten Florida schools received a second consecutive failing grade, and 577 of their students used their private school vouchers.[148] Florida also established a *Zobrest*-type voucher program, called the McKay Scholarship, that, in 2002, provided $6000 per student to attend the private school of their parents' choice.[149] This voucher arrangement was used by well over 9000 students to attend private schools.[150]

B. Federal School Choice Initiatives

In January of 2004, the U.S. Senate approved a school voucher initiative for the nation's capitol, the first federal program to finance school

140. KAFER, *supra* note 127, at 28.
141. *Id.*
142. *Id.*
143. *Id.*
144. *See* Robert Sanchez, *Judge Deals Another Blow to Voucher Plan,* ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 7, 2004, at 6A.
145. KAFER, *supra* note 127, at 45–51.
146. *Id.*
147. *Id.* at 46.
148. *Id.* at 48.
149. *Id.*
150. *Id*.

vouchers in the country.[151] Under the five-year pilot program, "[c]hildren from low-income families in the District of Columbia will be eligible for tuition aid of up to $7,500 to attend religious or secular private schools in the city."[152] "Priority would be given to students in schools defined as underachieving under the No Child Left Behind Act."[153] "Once a year, participants would have to take the same standardized tests given to pupil's in the city's regular public schools."[154] Administration and coordination of the voucher program would be through the U.S. Department of Education and the Washington Mayor's office.[155] A similar voucher initiative was passed by Congress in 1998, but was vetoed by President Bill Clinton.[156]

The District of Columbia voucher program "[b]reak[s] new ground by using federal dollars to pay for private school tuition." School privatization advocates support the program as an important step toward promoting free market principles in American education. According to Secretary of Education Rod Paige, "[T]he D.C. experiment will be a model for the nation . . . [and] will force the public schools themselves to improve as they compete for students."[157] Opponents of the plan contend that it will undermine accountability and the important role that government plays in providing universal quality education to all children. Reg Weaver, President of the National Education Association, called the program "'evidence of misplaced priorities' that amounted to a 'gamble on private institutions not fully accountable to the public.'"[158]

V. CONCLUSION

Post-*Brown* equal protection cases and post-*Everson* Establishment Clause decisions have effectively circumvented public school desegregation by facilitating the privatization of education. By dismantling the First Amendment's "wall of separation," the Supreme Court has effectively obviated *Brown* and its progeny by opening the floodgates for states and the federal government to create funding schemes that encourage parents to send their children to segregated, private, religious schools. The Supreme Court has thereby condemned future generations

151. The fourteen-million-dollar program is part of an omnibus spending bill that the House of Representatives approved in December of 2003, expected to be signed by President Bush in the spring of 2004.

152. Caroline Hendrie, *Federal Plan for Vouchers Clears Senate*, EDUC. WEEK, Jan. 28, 2004, at 28.

153. *Id.*

154. *Id.*

155. *Id.* "Of the more than one hundred private and parochial schools in the city, Mr. Crane said he hoped that about a third could accept voucher students for the coming fall and half the next year." *Id.* These students will enjoy tuition vouchers worth more than twice as much as those provided under the Cleveland voucher program and nearly a third more than the Milwaukee program. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

to the stultifying beliefs and prejudices of their parents. The Court's decisions frustrate the pluralistic ideal of public schools, a place where racial and religious animosities are left at the schoolhouse gate and children of varying backgrounds come together to learn. Meira Levinson perhaps captures best the dilemma posed by *Zelman* and the public/private dispute in education: "It is out of the common commitment to the visible, even physical institutions of public life that citizens come to tolerate each others' private preferences. Children, as future citizens, develop these attachments best within the context of a public school that models in miniature this national public square."[159] In *Zelman*, the Supreme Court allowed parents to use public funds to greatly diminish the "public square."

Therefore, the ultimate constitutional incongruity is this: If parents believe so strongly in racial discrimination that it becomes a tenet of their religion, then they are eligible for state aid to support their beliefs. If, however, they believe only half-heartedly in racial discrimination and it does not rise to the level of a true religious tenet, then they cannot receive state aid for their private school choice.

All of this portends an exodus of students from integrated public schools to segregated private schools as tuition voucher programs and similar incentives are enacted at the state and federal levels. If such legislation is to be challenged and the stratification and segregation of society curtailed, new litigation strategies must be conceived and implemented. Such strategies will pit the philosophy of parental choice and liberty, now dominant in the Supreme Court's interpretations of the First Amendment's religion provisions, against the premise of equality under the Fourteenth Amendment and the mandates of the Civil Rights Act. The resolution will determine whether state-funded religion will claim refuge in vouchers and tuition assistance and exacerbate racial segregation in American society.

159. MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 114 (2002).