

DEBATE 3

DO SCHOOL VOUCHERS VIOLATE THE ESTABLISHMENT CLAUSE? ARE THEY GOOD PUBLIC POLICY?

MODERATOR

*The Honorable Arlin M. Adams**

PANELISTS

*Elizabeth J. Coleman***

*Stephen D. Sugarman****

Elliot Minberg⁺

Ruti G. Teitel⁺⁺

Kevin J. Hasson⁺⁺⁺

Summary:♦

Private school vouchers violate the First Amendment's Establishment Clause, harm public schools, and effect state regulation of religious institutions, according to Anti-Defamation League ["ADL"] Civil Rights Director, Elizabeth J. Coleman. Further, New

* Judge Adams currently serves of counsel to the law firm of Schnader Harrison Segal & Lewis LLP in the areas of appellate practice, arbitration and mediation, complex litigation, and First Amendment litigation. Judge Adams graduated with honors from the University of Pennsylvania School of Law in 1947. He served on the United States Court of Appeals for the Third Circuit from 1969 to 1986. He has also served in numerous appointed positions, and has received numerous honors, awards, and degrees. See Martindale-Hubbell Law Directory, Practice Profiles Section.

** Elizabeth J. Coleman is the Director of the Anti-Defamation League ["ADL"] Civil Rights Division.

*** Stephen D. Sugarman is the Agnes Roddy Robb Professor of Law at Boalt Hall, University of California, Berkeley. Professor Sugarman joined Boalt Hall in 1972 and is currently the director of the Family Law Program of the Earl Warren Legal Institute. For more information on Professor Sugarman, visit Regents of the University of California, *Boalt Hall Faculty Profiles* (last modified Feb. 29, 2000) <<http://www.law.berkeley.edu/faculty/profiles/sds>>.

+ Elliot Minberg is the Vice-President, General Counsel, and Legal Director of People for the American Way Foundation ["PFAW"].

++ Ruti G. Teitel is a professor of law at the New York Law School. Professor Teitel graduated from Cornell University School of Law in 1980. For more information about Professor Teitel, visit New York Law School, *Prof. Ruti G. Teitel* (visited Mar. 25, 2000) <<http://www.nyls.edu/bios/teitel.html>>.

+++ Kevin J. Hasson is President of The Becket Fund for Religious Liberty. Mr. Hasson has specialized in religious freedom cases for almost 10 years. He left a large Washington, D.C. law firm to found The Becket Fund. He is a former Attorney-Advisor for the U.S. Department of Justice's Office of Legal Counsel, where his responsibilities included advising the Reagan Administration on church and state issues. See The Becket Fund, *About the Becket Fund* (visited Mar. 25, 2000) <<http://www.becketfund.org/>>.

♦ Articles Editor Jeffrey Salladin wrote this summary.

York Law School Professor Ruti Teitel claims that public schools historically fulfill very public roles, namely the construction of an American, democratic identity, that private schools simply cannot.

On the other hand, Kevin Hasson of The Becket Fund for Religious Liberty and Boalt Hall Law Professor Steven Sugarman say, “Not so.” In American history, public institutions have always tried to push sectarian institutions from this arena. Accordingly, the fight against private school vouchers continues the trend of relegating religious, sectarian schools to the periphery. Choice is key. Private school vouchers allow poor Americans to choose a private education for their children, and this choice violates the Constitution no more than government-provided food stamps do when individuals spend them on religiously affiliated matzo bread.

Yet, if matzo bread is the only bread available, then food stamps would also violate the Establishment Clause, responds Elliot Minberg of People for the American Way. As religious schools dominate the private-school landscape, government-funded vouchers also violate church-state separation. Finally, it is unwise to shift funds from manageable public schools to private institutions whose management is questionable.

JUDGE ADAMS:

Because our time is so limited, I think we ought to try to get underway.

Good afternoon. The subject for this afternoon’s discussion is whether school vouchers violate the Establishment Clause¹ of the First Amendment² of the United States Constitution, and are they good public policy. I think we generally concede that one of the major contributions of the United States has been the concept of separation of church and state.³ After I say that, I cannot find much agreement on any other proposition. Moreover, I am sure that today’s discussion will be edifying and will probably defy any concept of complete agreement.

Our plan for this session is to have each of the five panelists speak for seven or eight minutes. We are not very rigid about that. After all the panelists have made their presentations, we will permit one or two minutes for the panelists to question each other or to make comments. Then we want to leave a pretty fair portion of today’s session for the audience to ask questions and to make comments.

Having said that, we will proceed with our first panelist, Elizabeth J. Coleman, who is affiliated with the ADL.⁴ Elizabeth, you can speak from there or from here, whichever is most comfortable for you.

¹ The Establishment Clause provides, “Congress shall make no law respecting an establishment of religion[.]” U.S. CONST. amend. I.

² The First Amendment states in full, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” *Id.*

³ *See* *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947) (stating “[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State’”) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

⁴ The ADL fights anti-Semitism across the U.S. and abroad. It “probes the roots of hatred against Jews and serves as a public resource for government, media, law enforcement agencies and the public at large.”

MS. COLEMAN:

Thank you very much. A special thanks to Howard Berkowitz,⁵ our National Chair, who conceived this idea, and to Colin Diver,⁶ Charles Heimbold Chair, who has really shepherded through this event with us.

As one of the nine people affiliated with Penn and one of those who went to the Penn Law School, I can tell you that the chairs are no more comfortable now than they were twenty-five ago. Also, if Howard Lesnick⁷ is in the room, he was my law professor at Penn. Howard, I plan to call on you today whether or not you raise your hand.

It is really a distinguished panel here. And even though Judge Pollak⁸ was unable to get us to settle our dispute and we do not agree on the solutions, we do agree that we all care deeply about the issues.

I am afraid that the ADL's position has already been given away, so there are no surprises here. We are opposed to vouchers both on constitutional and policy grounds.

We are extremely grateful also to Congressman Dick Arney for making the day so relevant by introducing the voucher legislation yesterday in the House, but we are even more grateful to Congress in having the wisdom to strike it down.⁹

Vouchers are a very emotional issue. David Saperstein spoke earlier about the most vulnerable of God's children,¹⁰ and that is with whom we are dealing when we talk about the issues of social services, Charitable Choice, and vouchers. Of course, the most vulnerable of God's children are our children themselves.

Anti-Defamation League, *About ADL* (visited Mar. 20, 2000)
<http://www.adl.org/frames/front_about.html>.

⁵ Howard P. Berkowitz is the ADL National Chairman.

⁶ Colin S. Diver is the Charles A. Heimbold, Jr. Professor of Law at the University of Pennsylvania School of Law.

⁷ Howard Lesnick is the Jefferson B. Fordham Professor of Law at the University of Pennsylvania Law School.

⁸ Louis H. Pollak is the Senior Judge, United States District Court for the Eastern District of Pennsylvania.

⁹ Congressman Arney offered the Safe and Sound Schools Amendment, H.R. 2, to the Elementary and Secondary Education Act of 1965. This amendment sought to establish a five-year pilot program to provide a \$3500 scholarship to children who are victims of violent crimes at school or who otherwise attend unsafe schools in order to attend another school chosen by their parents. *See Safe and Sound Schools Amendment Introduction* (visited Mar. 25, 2000)
<<http://www.freedom.gov/aea/releases/amendintro.asp>>; *Bill Summary & Status* (visited Apr. 21, 2000)
<<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR00002:@@L&summ2=m&>>.

On October 21, 1999 Congress voted 257 to 166 not to approve Congressman Arney's proposed amendments. *See Final Votes for Roll Call 521* (visited May 17, 2000)
<<http://clerkweb.house.gov/cgi-bin/vote.exe?year=1999&rollnumber=521>>; *We May Have Lost the Vote, But We Have Won the Debate* (visited Apr. 22, 2000)
<<http://www.freedom.gov/aea/releases/amendvote.asp>>.

¹⁰ *See supra Debate 1: The Role of Religious Institutions in Providing Social Services and Education in Neglected Communities; Reports From the Field.*

So, we look at vouchers through three lenses: through the lens of the Constitution, through the lens of public policy, and inevitably, through a very personal lens.

When one looks at something so emotionally, I think it is easy to look for simple solutions to extraordinarily complex constitutional and policy questions. One of the things we wanted to try to do today was to add some depth to a very important societal discussion.

As has been so eloquently stated by people who have come before me on this panel, our founding fathers had the wisdom to know that the union of government and religion tends to degrade religion and to destroy government. A person should absolutely not be taxed to pay for the religious indoctrination of others.¹¹ Over 80% of vouchers for private schools would be used in schools whose central mission is religious training.

Furthermore, in most such schools religion permeates the classroom, the lunchroom, and even the football field. Providing money, public money, to these institutions flies in the face of the separation of church and state. More than fifty years ago, the Supreme Court ruled that the Establishment Clause requires that no tax in any amount, large or small, be levied to support any religious activities or institutions.¹² Even though the Supreme Court has yet to rule on the constitutionality of vouchers specifically, as recently as 1997 it reaffirmed that government may not fund the inculcation of religious beliefs.¹³

Vouchers would do what the Supreme Court has so clearly said is unconstitutional: they would force citizens, Christians, Jews, Muslims, and Atheists to pay for religious indoctrination of students at schools with specific parochial agenda. Just as a Muslim student must not be forced to listen to the Lord's prayer¹⁴ when he goes to school to learn reading, writing, arithmetic, and our common American values, an Atheist must not be forced to sit through a sermon to receive social services. A Hindu defendant must not be forced to look at a cross and feel that in a courtroom he is getting a less equal form of justice. A Mormon mother must not be taxed to pay for a voucher for someone to pay for a pervasively sectarian education.

There is, however, something particularly important and troubling about vouchers in relation to other assaults on the wall. They are a bad idea not just because they hammer

¹¹ See, e.g., *Everson*, 330 U.S. at 16 (stating, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion"). See also *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (holding that public schools may not allow religious teachers to teach religion courses in public schools).

¹² *Everson*, 330 U.S. at 16.

¹³ See *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (stating, "As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.").

¹⁴ See *Matthew* 6:9-13 ("Pray then in this way: Our Father in heaven, hallowed be your name. Your kingdom come. Your will be done, on earth as it is in heaven. Give us this day our daily bread. And forgive us our debts, as we also have forgiven our debtors. And do not bring us to the time of trial, but rescue us from the evil one."); *Luke* 11:1-4 ("He was praying in a certain place, and after he had finished, one of his disciples said to him, 'Lord, teach us to pray, as John taught his disciples.' He said to them, 'When you pray, say: Father, hallowed be your name. Your kingdom come. Give us each day our daily bread. And forgive us our sins, for we ourselves forgive everyone indebted to us. And do not bring us to the time of trial.'").

at the wall separating church and state; they are a bad idea because they harm another pillar of American democracy, the public school. The glory of American public education is that it is for all children, regardless of religion, academic talents, or ability to pay a fee.

As Jews, we know the crucial role public schools have played over the years in helping immigrants become part of America by teaching the common political process and the common values of freedom and tolerance. Vouchers take money from public schools at a time when public schools desperately need money to be fixed.

It is really very simple. Government must not fund religion, and public schools must be enhanced, improved, and treasured, not short-changed in any way at this crucial time.

Unfortunately, forces coming from three groups of people have converged at this time to create societal pressure for vouchers. First, there are those who want to have their religious views permeate every aspect of public life. Second are those who want to privatize the public business of our country, regardless of whether they have a historic interest in inner city and minority children. Third are those who care deeply and rightly about a good education for their children, but fear that that education is not available to them through the public schools now and believe vouchers will help.

To the first group I say, as a religious-based organization, we also value deeply the role religion can play in people's lives and in society, and we believe that religious schools, from Catholic schools to Jewish day schools, are an important option for families. They are a necessary part of our educational mosaic. The government, however, must not pay for this education.

Let us stick with the American tradition of separation. It has served us, the religious and nonreligious, magnificently for 200 years, and serves us even better as we become more religiously diverse. Besides, as was discussed earlier, state regulation of religious schools may well follow state funding, something deeply religious people should find particularly odious, thus compromising another great constitutional principle, religious freedom. The flip side of that, of course, is inadequate accountability. Neither situation is palatable, the regulation of federally funded parochial schools or the lack thereof. Finally, once down that road, there is divisiveness, as was said earlier, for scarce federal funds. Religious minorities will never win a political battle over scarce federal funds.

To the second group, I say we are better off leaving the public schools in the hands of government. The government has been doing this for 200 years. Furthermore, any perception that the general American public does not share this view would be misplaced. Public schools are part of our American tradition. Like separation of church and state, they are cornerstones of our democracy. When we take money and talented students from them, we leave people behind, because many private schools do not accept people with learning disabilities, special language needs, low academic achievement, those who might not meet a religious criterion, et cetera. People would be at risk of being left out of the American dream altogether. This can harm those left behind, their communities, and ultimately, our greater American community. Also, they risk separating communities, vulcanizing them, taking away historically the most important thing that brings us together, at a time when increasing diversity makes this even more important. Ultimately, this is bad for all of us.

There are, of course, enormous issues about whether competition works in this setting. I am still puzzled by how taking money away from the schools improves the

schools. Finally, it is unpalatable to try to save just a few children, as not every child can go to private schools.

To the third group, I say - and this is the hardest, the very hardest to say - apart from the fact that it is unclear vouchers improve academic achievement, you are right, everyone deserves a great education. It is part of our birthright as Americans, and everyone has to look after his or her children and do the best for them. How can parents not seek vouchers for their children, if they can do so and believe that it is the children's best hope? But the jury is far from out on whether vouchers work. Besides, from a societal standpoint, it is an unacceptable choice, because so many children will not have the choice. They will not be able to afford the schools even with vouchers; will not be chosen by private schools for a specific reason, or for no reason at all, or perhaps for a socially unacceptable reason like race or religion; or maybe their parents will not be able to afford the transportation, the uniform, or the school trips.

It is unpalatable for a parent to have to choose between giving up his child's religious upbringing and getting the child the education he or she needs. To call vouchers school choice is a misnomer, for they merely leave many with a worse choice or no choice. The poorest are left behind in schools that are even more bound to fail.

So, to the third group I say - and I think others will talk about it more, and Judge Adams is giving me that eye - let us work together to fix the public schools. I think Elliot Minberg has been very involved with People for the American Way¹⁵ in some extraordinary ideas. There is an enormous amount of creativity out there on what to do with the public schools within the public system. I think we need to grab onto that and go with those types of efforts and really treat that issue like the emergency it is.

I had a top ten list that I did in homage to Barry Lynn. But as I do not have time, I am going to skip it and just say that we need to fix what is broken and not fix what is not. Let us fix our public schools and leave our Constitution alone. Thank you.

JUDGE ADAMS:

Our next speaker is Professor Steve Sugarman, Boalt Hall, University of California.

PROFESSOR SUGARMAN:

Thank you.

The President of the United States sent his daughter to a private school. I read recently that a majority of the members of the Senate and the Congress have sent their children to private schools. A startling proportion of public schoolteachers sends their children to private school.

What is the message here? The message is that the poor cannot be trusted to make choices for their children. And it is really bad when you hear the message from the people who view themselves as self-styled defenders of the civil rights and civil liberties of the poor.

¹⁵ People for the American Way Foundation organizes and mobilizes Americans to fight for fairness, justice, civil rights, and the freedoms guaranteed by the U.S. Constitution. PFAW lobbies for progressive legislation and helps to build communities of activists. For more information about PFAW, visit People for the American Way, *Homepage* (visited Mar 25, 2000) <<http://www.pfaw.org>>.

Another source of dismay of mine is that liberal opponents of school vouchers attack Milton Friedman's plan,¹⁶ an unregulated voucher scheme, in which half the money that we now spend on public school kids would go to every kid in the country. That is not what the public wants. That is not what school choice is becoming. It is not what the publicly funded private school choice programs in states like Florida and cities like Milwaukee and Cleveland are about. It is not what privately funded school voucher programs in Indianapolis, San Antonio, and seventy-five other cities around the country are about. Those plans are all about giving choice to working class and poor families. It is choice for those families that we liberals ought to be concerned about, and it is choice that the children in those families desperately need.

People who have means can already move to the fancy suburbs and send their kids to what are purported to be public schools, or they can send their kids to private schools. Of course, those schools do not generally admit poor kids from the cities. Poor families do not usually have a choice.

What happens when you do give poor families a choice for their kids? They jump at the opportunity. John Walton and Ted Forstman recently offered 40,000 school vouchers to poor families, and one million families around the country signed up in a very short time.¹⁷

How do the poor feel about the choices they make once they are given the opportunity to choose? They think their choices are great. They think the schools they have selected for their kids are better. Their kids like it better. The kids go more often. The teachers are more demanding. The curriculum is more central to the kids' lives. Plus, if the kids stick with it, the kids do much better. The literature also demonstrates that poor children who attend private schools graduate from high school and go on to college at a far higher rate than their counterparts who stay in the public schools.

Elizabeth Coleman charged that voucher plans skim off the cream. It is a charge often made by liberals. These programs I am talking about do not skim off the cream. First of all, to start with, we are talking about poor people. Second, among poor families whose kids are doing very well in public schools, do they leave when they are given these choices? No, they stay where their kids are succeeding. Who leaves in these typical programs that are now in place around the country? It is the single mother whose kid is being treated very badly and failing miserably in the school. She is the one who moves her child to a place where the child has a chance to do better.

Now, will some private schools go bankrupt or rip off their families through fraud under a school voucher plan? Yes, a few will. That is also true for some car dealers and some department stores, but no one is suggesting that we have Soviet-style government ownership of the distribution of clothes and automobiles in this country.

In any event, the real bankruptcy and fraud are in many of our urban public schools, where the push-out/drop-out rate, in public schools like those in New York City for example, is more than 50%,¹⁸ and many of those who so-called graduate end up functionally illiterate. That is where the real bankruptcy and fraud are.

¹⁶ Nobel laureate economist Milton Friedman advocates educational choice. See *The Friedman Foundation* (visited Mar. 26, 2000) <<http://www.friedmanfoundation.org/>>.

¹⁷ See Jacques Steinberg, *Voucher Program for Inner-City Children*, N.Y. TIMES, June 10, 1998, at B11.

Will some parents make poor choices for their children? Yes, some will. But, of course, under a choice plan, if your first choice does not work out very well, you can change your choice and go somewhere else. That is not what our public schools are about. They are very, very reluctant to let you transfer out of the local school if your child is not doing well. Often your only real choice is to try to move. But if you are poor and living even in quasi-decent, low-income housing, the last thing you want to do is to move. And if you are living in government-subsidized housing, you probably cannot move at all.

Will we get more racial isolation by having school choice? Well, the reality is that we have a tremendous and growing amount of racial isolation in our public schools today. Although private schools and charter schools have considerable racial isolation, it is less than the public schools have. We will get some more appealing sorts of racial isolation, I suspect, with choice. Some African-American families will choose Afro-centric schools. Some Hispanic families will choose bilingual schools. I think that is great. They should be able to get what they want for their kids. In fact, they will probably be moving their kids from one racially isolated school to another racially isolated school.

Will the public schools get better? Elizabeth Coleman makes the usual complaint that we are siphoning money from the public schools with these plans, neglecting to note, of course, that children are leaving, so there are fewer children over whom to spread the money. In fact, in the last two decades we have more than doubled spending in public schools – that is, real, inflation-adjusted spending. Alas, our public schools are not doing significantly better. Most people think they are doing worse.

If we have widespread school choice, public schools will get better. They will get better because they will want to hold on to their enrollment. In order to hold on to their pupils, they will be more responsive to the needs of kids - needs that are neglected now. We see this already with charter schools. When charter schools begin to spring up in substantial numbers in the community, the public schools respond and the public schools do more.

Now, let me just say a few words about the constitutionality of school choice. The purpose of these plans is to give some measure of choice to the poor that other families, like those of most of us in this room, have long had for our children. Is this worthy and legal purpose somehow made illegal because some of those children will be sent to religious schools? I do not think so.

Is the Food Stamp program¹⁹ illegal because some poor people use their food stamps to buy matzo for use in their Passover Seder?²⁰ I do not think so. No one would say that.

¹⁸ See National Center for Education Statistics, *National Center for Educational Statistics (NCES) Home Page*, a part of the U.S. Department of Education (visited Mar. 27, 2000) <<http://nces.ed.gov>>.

¹⁹ Food stamps were instituted “[t]o end hunger and improve nutrition and health. It helps low-income households buy the food they need . . .” U.S. Department of Agriculture, *About FSP* (last modified Nov. 8, 1999) <<http://www.fns.usda.gov/fsp/menu/about/about.htm>>.

²⁰ Passover “commemorat[es] the freedom and exodus of the Israelites (Jewish slaves) from Egypt during the reign of the Pharaoh Ramses II. A time of family gatherings and lavish meals called Seders, the story of Passover is retold through the reading of the Haggadah, the Book of Exodus.” Holidays on the Net, *Passover on the Net* (visited Mar. 27, 2000) <<http://www.holidays.net/passover/>>.

Some people say, “Well, that is different, because only a little bit of the food stamp program’s money is used for religious ritual purposes.” And they say, “Look at all the school choice that will be used for religious schools.” Elizabeth Coleman said 80%. But that is the wrong way to understand school choice plans.

Most people who are given choice in a sensible school choice plan will choose to stay in their local public schools. That is where most of the choice will be made. Some will choose charter schools. Some will choose magnet schools. Some will choose an inter-district transfer, in the states that allow it, to out-of-district schools in the suburbs. Some will choose private, nonreligious schools. And, yes, some will choose private religious schools. In the bigger picture, relatively few of the people who have the choice will make that choice.

Let me emphasize that the people who choose to keep their kids in public schools will also be making a choice, and their choice will change the milieu of the public schools. This is because their children will now be there by choice, and not by force. In turn, those public schools will get a benefit that private schools now have. They will get the loyalty of their families, because the families will be there because they want to be there. And if you choose to be there, the schools can make more demands on you as a family and more demands on your child. That, I think, is part of the secret as to why private schools do so well.

Now, you could say, “Well, we could create vouchers that could only be used in nonreligious private schools. What would be wrong with that?” I would certainly be in favor of such a plan, as compared to what we have now. But why, I say, should we limit it to that? If there are some families who want religious schools for their children, why should they be singled out and treated worse because that is the kind of choice they want to make? That is what the free exercise of religion²¹ is about. That is the sort of position that I would have thought that the Anti-Defamation League, our cosponsor today, would have been supporting – that is, endorsing the free exercise rights of all of American families. Thank you.

JUDGE ADAMS:

Our third speaker this afternoon is Professor Ruti Teitel, New York Law School. We welcome you.

PROFESSOR TEITEL:

My remarks are going to try to reconceptualize the voucher policy today and to set it within certain political and social trends: one which is the surge in privatization of traditional government functions, and the second is the trend toward a new politicization in the churches for whom the delegations of government power constitute, in part, religious missions.

The voucher debate raises an issue that is at the juncture of these two trends, which merge the domains of state and civil society. What we have here is privatization of government and a de-privatization on the part of the churches, and a paradigm shift

²¹ The Free Exercise Clause provides, “Congress shall make no law . . . prohibiting the free exercise [of religion.]” U.S. CONST. amend. I.

occurring all across the board, both in academic policy and political circles. And that is really what is at issue.

Now, what we have heard so far in just the previous speaker and in the ordinary deliberations of a voucher policy is an attempt to duck this context, and it is debated as a matter of efficiency. Milton Friedman was quoted, “As a matter of efficiency in the provision of a public good, the dominant terms of the debate are framed as a matter of market economics.”²² The claim is that somehow education is beleaguered in this country and that religious institutions are the most highly efficient in the provision of this good. This is - and then it goes on, and it is even a more perverse account - which is that somehow the most efficient providers are perversely excluded from the provision of education and related services.

Now, I want to suggest that this is a highly reductive and distorted picture of the voucher policy debate and that this account trivializes the voucher policy question because it suggests that what is truly at stake here is merely the allocation of public monies and an issue of equality of distribution in an array of education providers. So that as a matter of economic perspective, voucher policies are often represented to be a matter of equality in the distribution, and the focus is on the allocation of government benefits and the aggregation of individual choices.

And that is what we hear, “school choice,” “pro-choice.” How can one be against “choice”? The claims are that this is all a matter of private choice and of consumption. Moreover, education itself is reduced to a matter of technocratic skills. What is lost in all of this are the public purposes of the public schools in our constitutional scheme. For a long time, the history and tradition of schooling in this country has not been a private matter. On the contrary, quite aside from technocratic skills public institutions, in particular, educational institutions, have advanced important public purposes.

Now, where the issue of the role of private institutions in the advancement of public purposes is complicated; the experiments are expanding. Privatizing prisons, libraries - there is almost a fever of destruction of the public sphere. But the question raised here is, how, if at all, can private institutions, which are religious actors, advance public purposes? To what extent can they do that, and what sorts of principles need to be developed if these are to be the actors that will advance the public purposes with which we are concerned?

So that the question posed here concerns the constitutional implications of the dominance of private actors at a time of a wave of public disengagement protecting other public purposes beyond particular, technical skills. These are just some of the constitutional ramifications that have simply been excluded from the debate.

In part, the early Supreme Court case law, in order to resolve some of these questions, also entertained the fiction of the child benefit theory,²³ ignoring the macro-institutional questions here. Many of those categories, perhaps not surprisingly, have broken down; such as the direct, indirect dichotomy, and the question of child benefit versus

²² See generally *supra* note 16.

²³ Child benefit theory refers to the idea of balancing the needs of children with the First Amendment limitations placed on the government. See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

institutional benefit. This brings us to the present. The direction in doctrinal developments has come to a point where it is no longer possible to ignore the big picture and the question of the nature of institutional involvement.

I want to suggest that there is this broader question of the context of the change in providers of education in this country, and to add to this picture the other role played by public education. Education has served an arch-governmental function: there is a historical, structural role, of education in this country. The landmark case of *Brown v. Board of Education*²⁴ is perhaps the first place to look for elaboration by the Supreme Court on the role of education. This case certainly reminds us of the role contemporary public schools play, which goes beyond the provision of technical skills, as one of the few sites of development of a shared identity. This is what is truly at stake both in the voucher debate and more generally in the privatization of the public sector.

Thus, the contemporary move to radical privatization departs from our longstanding history. Indeed, the identity-politics question raises issues of religious affiliation and status that go back to the founding and to the earliest constitutional history. It was certainly something of which the framers were aware. Reconceptualized in light of both its historical and contemporary contexts, the Establishment Clause emerges as a pragmatic compromise for how to reconcile the greatest individual freedom consistent with protecting other goals, other public purposes.

Let me just wrap up these brief remarks and say that the questions that ought to be debated by the Anti-Defamation League and other actors in civil society ought to be concerned about – here what is going on in parts of the world is a warning - is that there are significant, potential ramifications of the delegation to private actors of public functions, of the move to privatization. Principles would have to be developed for this complex, indeed, new constitutional scheme, to be reconciled with our constitutional traditions and histories, and might very well end up strangling the freedoms of the religious actors and the robust development of civil society.

There is no account given by the religious educators on how to protect the American idea of something of a common identity. Indeed, we may have to recognize that there may well be two competing goals here: the goal of maximizing educational opportunities versus the goal of developing a better education in common. Under a private educational scheme, how would the commonality goals advanced by public education be advanced? Voucher advocates do not have an answer. Moreover, to the risk of the sectarian and divisive consequences in turning to a regime of religious education, borne out throughout history, voucher advocates again do not have a good answer. These are some of the concerns.

Even if there might be an affirmative good served by broadening the diversity in education choices, there are many questions about the nature of the normative goal contested here, of what sort of diversities advocated, and the likelihood of leading to development of religious- and ethnic-based identity politics. The question really is to what extent are these desirable and reconcilable with our American constitutional regime and traditions.

²⁴ *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (holding that racial segregation in public accommodations is unconstitutional).

JUDGE ADAMS:

Our fourth speaker is Kevin Hasson, Becket Fund for Religious Liberty.²⁵

MR. HASSON:

Thank you. I will begin with a quick commercial for The Becket Fund. We are a bipartisan and ecumenical public interest law firm. We stick up for everybody. We won a case in the Third Circuit this year for Muslim police officers in Newark to protect their right to grow beards.²⁶ We have just taken on a case for a Sikh gentleman who was arrested for carrying his Kirpan, that is, his ceremonial dagger.²⁷ We have represented a Buddhist, retreat houses, Native Americans,²⁸ - everybody you can imagine. I am not interested in any one religion dominating America. To the extent anybody tries, I will sue him.

Having said that, of course I believe in separation of church and state. The question is what one means by it. I think vouchers are a great idea. I also think they are constitutional.

Elizabeth Coleman said that one of the great values of the public education tradition in America was that it helped immigrants become Americans.

I am going to spend seven minutes giving 100 years of history on the dark side of exactly how it happened that public education helped immigrants become Americans.

In 1854, the Know-Nothings²⁹ had control of the Massachusetts government. Now, the Know-Nothings were not called Know-Nothings because they did not know anything, although, in retrospect, they clearly knew a lot less than they thought they did. They were called Know-Nothings because no one was supposed to know anything about their activities.³⁰ They were a secret political organization designed to oppose immigrants in general, and Catholic immigrants in particular, at every turn.³¹

²⁵ The Becket Fund “for Religious Liberty is a bipartisan and ecumenical, public-interest law firm that protects the free expression of all religious traditions.” The Becket Fund, *About the Becket Fund* (last modified Mar. 20, 2000) <<http://www.becketfund.org/>>.

²⁶ *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.) (holding that the police department’s denial of a religious exemption to its no-beard requirement violated the Free Exercise Clause), *cert. denied*, 120 S. Ct. 56 (1999).

²⁷ *See generally supra* note 25.

²⁸ *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999) (affirming district court’s finding that National Park Service’s compromise between Native Americans use of Devil’s Tower as sacred shrine and climbers did not violate Establishment Clause).

²⁹ For a short article on the history of the Know-Nothings, *see* Smithsonian Magazine, *The Know-Nothings knew how to win . . . for awhile* (visited Mar. 28, 2000) <<http://www.smithsonianmag.si.edu/smithsonian/issues96/nov96/knownothings.html>>.

³⁰ The Becket Fund, *Boyette v. Galvin Background Sheet (April 6, 2000)* (visited May 17, 2000) <<http://www.becketfund.org/press/040600b.html>> (stating “the name comes from the fact that its members were sworn to deny knowing anything about its existence”).

³¹ *Id.*

In 1855 Abraham Lincoln wrote: “As a nation we began by declaring that ‘all men are created equal.’ We now practically read it, ‘All men are created equal, except Negroes.’ When the Know-Nothings get control, it will read, ‘All men are created equal except Negroes, foreigners, and Catholics.’ When it comes to this, I shall prefer to emigrate to some country where they make no pretense of loving liberty.”³²

He apparently did not realize that the Know-Nothings had actually gotten control of Massachusetts the year before. They had all but three seats in the State House, all forty seats in the Senate, and the Governor’s Mansion.³³ And they were alarmed. Why were they alarmed? The Catholic population had tripled in the previous decade. They said in the legislative history of the measures I am about to describe that this was an alarming phenomenon that had to be headed off.

So they did three things. They created a commission for the investigation of nunneries to prove there really were dungeons underneath those convents. They passed a law saying the King James Bible, and only the King James Bible, had to be read in all the so-called “common schools.”³⁴ Of course, in those days, reading the King James Bible for Catholics was like eating meat on Fridays was in those days. And, third, they passed a constitutional amendment saying that no public funds could ever be used for “sectarian schools.”³⁵ Now, the common schools were not considered sectarian. They taught the “common” religion. The common religion was not sectarian; other people’s religions were.

Fast forward to 1917, when the grandkids of the Know-Nothings were in power. Their parents and grandparents had done a very good job of keeping Catholics out of society, but there were a lot of them now and that was worrisome. So they amended the Constitution a second time to say that the citizen ballot initiative process can never be used to amend the Anti-Aid Amendment.³⁶ Even the *New York Times* in 1917 editorialized against that as “a fine bit of bigotry.”³⁷

³² Letter from Abraham Lincoln to Joshua Speed (Aug, 24, 1855), reprinted in THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (1953) (Roy P. Basler, ed.). See also generally The Library of Congress, *Abraham Lincoln Papers at the Library of Congress* (visited May 17, 2000) <http://memory.loc.gov/ammem/alhtml/malhome.html>>.

³³ See The Becket Fund *supra* note 30 (stating that Massachusetts Know-Nothing candidates “won every constitutional state office including governor, the entire congressional delegation, all [40] state senator races, and took all but [three] of the 379 seats in the state house of representatives”).

³⁴ *Id.*

³⁵ See *id.* Specifically, the Massachusetts Constitution provides that “no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.” MASS. CONST. amend. art. VIII, § 2.

³⁶ See The Becket Fund, *supra* note 30 (advising that the 1917 Massachusetts Constitutional Convention added “a provision that explicitly insulated the Anti-Aid Amendment from alteration or repeal through the initiative process”). See also The Becket Fund, *Boyette v. Galvin motion for preliminary injunction* (visited May 17, 2000) <<http://www.becketfund.org/press/040600.html>>; The Becket Fund, *Boyette v Galvin denial of motion for preliminary injunction* (visited May 17, 2000) <<http://www.becketfund.org/press/050800.html>>.

In the interim, the Know-Nothing movement went national under the leadership of an opportunist bigot named James Blaine,³⁸ who tried in 1876 to pass a federal constitutional amendment on the same order, banning the states from using their own money for the support of sectarian schools.³⁹ Not religious schools, sectarian ones. The “common religion” was not sectarian; other people’s religions were.

His amendment passed the House of Representatives overwhelmingly.⁴⁰ It garnered a majority in the Senate.⁴¹ But, it did not reach the super majority necessary and it failed by a narrow margin. It did spawn a national wave of Baby Blaine amendments.⁴² Depending on how one counts, there are between twenty-two and thirty-seven Blaine amendments existing in state Constitutions today.⁴³ Five of them are there because Congress, in its Blaine amendment enthusiasm, required them of Western states as a condition for their admission into the Union.⁴⁴ Arizona and South Dakota are two examples.⁴⁵

³⁷ The Becket Fund, *supra* note 30 (stating, “An editorial in the New York Times in 1917 called the Massachusetts measures ‘a fine bit of political bigotry.’”).

³⁸ James Gillespie Blaine was a member of the House of Representatives from 1863-76, and of the Senate from 1876-81. Board of Regents, University of Wisconsin System, *James G. Blaine* (last modified Nov. 18, 1998) <<http://us.history.wisc.edu/hist102/bios/html/blaine.html>>.

³⁹ See Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity under Constitutional Federalism*, 15 YALE L. & POL’Y REV. 113, 144-47 (1996). Blaine proposed to change the First Amendment to read:

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

Id. at 144 n.165 (citing LLOYD P. JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925*, at 138-39 (1987)).

⁴⁰ *Id.* at 145 n.166 (citing Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 942, 944 (1951)).

⁴¹ *Id.*

⁴² *Id.* at 146-47 (advising, “By 1876 [14] states had enacted legislation prohibiting the use of public school funds for religious schools; by 1890 [29] states had adopted constitutional requirements along the same lines.”).

⁴³ See Viteritti, *supra* note 39.

⁴⁴ *Id.* at 146, 146 n.177 (advising, “In 1899 Congress passed enabling legislation that would divide the Dakotas into two states and permit them, along with Montana and Washington, to draft constitutions but would require that each constitution adopt language similar to that of the Blaine Amendment.”) (citing to Act of Feb. 22, 1899, ch. 180, 25 Stat. 676 (1889)).

⁴⁵ *Id.*

In the course of all of this fervor, what got lost was the idea of America as a welcoming place. What was affirmed was that one needed, if one was an immigrant, to be Americanized. One needed to be taught the common religion.

Of course the common religion has now disappeared from public schools, and good riddance. It was never a good idea in the first place, and I would never say anybody should go back to it. The opposition, however, to school choice and the exclusion of religious, particularly Catholic, schools from the beginning has been about maintaining a government monopoly of education. The precise goal is to maintain a government monopoly on education and to maintain a monopoly on the values that children are taught. That is fundamentally wrong. It was wrong in the nineteenth century. It is wrong today. But the Know-Nothings are alive and well, and living in certain sectors of our community.

I will devote my last two minutes to the issue of distribution of benefits. Contrary to the view of others here, I would like to suggest that it does not matter if 80% vouchers wind up in religious schools. It does not matter. Now, there is good reason to think that maybe that is not true already. There is good reason to think that if vouchers become available, many more schools will spring up. The market will respond and there will be a great variety of schools available. But what if it does not? What if 80% really do wind up in religious schools? The answer is, so what? As long as the decision-maker is a private actor and not the government, then the government is not choosing to send the money there.

*Mueller v. Allen*⁴⁶ upheld a tax plan that gave tax advantages to students in Minnesota. Public school students could use this tax break for little more than buying pencils.⁴⁷ Parochial school students could use it for tuition.⁴⁸ The dissent in *Mueller* pointed out that over 90% of the money would end up benefiting parochial school students.⁴⁹ The majority dropped a footnote that said that was irrelevant.⁵⁰ As long as the decision-maker is private, that is the end of the discussion. As a purely constitutional issue, it should be the end of the discussion. In view of our history, it very much ought to be the end of the discussion. Thank you.

JUDGE ADAMS:

⁴⁶ *Mueller v. Allen*, 463 U.S. 388 (1983) (holding that a Minnesota law granting parents of parochial school children a tax deduction equivalent to their educational cost did not violate the Establishment Clause).

⁴⁷ *Id.* at 392.

⁴⁸ *Id.* at 395.

⁴⁹ *Mueller v. Allen*, 463 U.S. 388 (1983) (Marshall, J., dissenting). Specifically, Justice Marshall first cites *Sloan v. Lemon*, 413 U.S. 825, 830 (1973), in which the Court determined that more than 90% of the children attending private schools in Pennsylvania were enrolled in religiously affiliated schools. *Id.* at 410. He then states that in Minnesota, the state in which *Mueller* arose, over 90% “of the children attending tuition-charging schools in Minnesota are enrolled in sectarian schools.” *Id.* at 411.

⁵⁰ *Id.* at 401 n.9 (advising, “We fail to see the significance of the report; it is no more than a capsule description of the tax deduction provision.”).

Our fifth speaker, last member of the panel, Elliot Mincborg, People for the American Way.

MR. MINCBERG:

Thank you, Judge Adams. I want to thank both Judge Adams and David Rosenberg for arranging for me to be last so I would have more time to digest my food after lunch.

I want to talk briefly about both the legal and the policy issues with respect to vouchers, both of which lead to the inescapable conclusion that vouchers are bad law and bad policy.

Legally what we have heard from Kevin Hasson and Steve Sugarman is that it is all okay, because it is choice, because the program is neutral, and, therefore, everything is all right. After all, says Steve, people can choose to stay in their public schools.

But the Supreme Court in the *Nyquist*⁵¹ case in 1973, the closest they have come to vouchers, explicitly rejected that notion. Because, after all, the Court said, people already have the right to a free public education, so the government subsidization of private education through vouchers inevitably creates an incentive for sending kids to private schools, and those private schools are overwhelmingly religious.⁵²

Why does this matter? Now, Steve says, “What if somebody chooses to buy matzo with their food stamps?” Of course, they can. But imagine if 95% of all of the stores sold only matzo. What kind of choice would that give to those who, unlike me, do not want to eat only unleavened bread for Passover or other parts of the year? Of course, it really is not a choice.

Mueller does not apply, because in *Mueller* what the majority of the Court found was that there was a genuine choice.⁵³ But when you deal in a universe where, for example, in Cleveland, as we are finding in that case, 95% of the private schools are in fact religious,⁵⁴ the inevitable result legally of having that kind of so-called choice, even assuming choice could truly be exercised by parents, is to inevitably subsidize religion.

But there is a second reason legally why there is a serious problem. I am going to quote Justice O’Connor, who, as we all know, may well be the deciding vote in a future voucher case in the Supreme Court. What she said is that neutrality is only one touchstone on the Establishment Clause.⁵⁵ The other is that public funds may not be used to endorse the religious message.⁵⁶ “Our cases,” she said, “provide no precedent for the

⁵¹ *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding that a New York statutory scheme that allowed maintenance, repair, and tuition-reimbursement grants to private schools had the primary effect of advancing religion and violated the Establishment Clause).

⁵² *Id.* at 768.

⁵³ *Mueller*, 463 U.S. at 391.

⁵⁴ *Id.* at 410 n.4 (Marshall, J., dissenting) (advising that in *Wolman v. Walter*, 433 U.S. 229, 234 (1977), the Court relied on the stipulated fact that during the 1974-75 school year in Ohio, “[m]ore than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools”).

⁵⁵ *County of Allegheny v. ACLU*, 492 U.S. 573, 628 (1989) (O’Connor, J., concurring) (stating, “This Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.”).

use of public funds to finance religious activities.”⁵⁷ As Elizabeth Coleman has already demonstrated, this is exactly what happens in voucher schools.

Now let me move to the policy questions. We all know, frankly, the legal questions will be decided sooner or later by the Supreme Court. Justice O’Connor is probably going to be a key vote there.

But let us look at the policy issues relating to vouchers about which Steve Sugarman and Kevin Hasson have already spoken. From our perspective, the biggest problems with vouchers are that they inevitably harm the public schools. I am not just quoting People for the American Way, and I am not just quoting the NAACP,⁵⁸ both of whom have opposed vouchers. I am quoting here conservative Michigan Republican Governor John Engler, who recently opposed a voucher initiative in Michigan for that exact reason.⁵⁹ Let us look, for example, at Milwaukee. In the last year, over \$22 million was drained from the Milwaukee public schools treasury for vouchers. But - and this is an important but - only about one-quarter of the kids in the voucher program had actually been in the public schools the year before. That means that something like three-quarters of the voucher money was drained from the public schools for kids they were not even educating. You spread out the money and you dilute the resources available.

There is a similar situation in Cleveland, but I will not read the statistics. But more importantly than the numbers is the fact that vouchers divert the effort from reform. For example, in Wisconsin there is a terrific program that we have supported called the SAGE Program.⁶⁰ It is available throughout the state and substantially reduces class size for poor kids and undertakes other educational reforms. Even voucher supporters who have researched this program have concluded that, in fact, SAGE Program students substantially outperform kids in regular public schools and in voucher schools in Milwaukee. There is only one problem. In Wisconsin, due in part to the money being drained because of the voucher program, they set up the SAGE Program in this way: if you are a poor student outside of Milwaukee, your odds of getting into the SAGE Program are 1 in 2. If you are a poor student inside Milwaukee, your odds of getting into the SAGE Program are 1 in 6. That diverts effort and funding - that is one of the results of vouchers.

⁵⁶ *Bowen v. Kendrick*, 487 U.S. 589, 622 (1988) (O’Connor, J., concurring) (stating “public funds may not be used to endorse the religious message”) (citing dissenting opinion).

⁵⁷ *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O’Connor, J., concurring) (stating, “These decisions, however, provide no precedent for the use of public funds to finance religious activities.”).

⁵⁸ The National Association for the Advancement of Colored People. *See* National Association for the Advancement of Colored People, *Welcome to the NAACP Homepage* (visited Mar. 26, 2000) <<http://www.naacp.org/>>.

⁵⁹ *Engler Asks DeVos To Be an Adviser on Vouchers*, GRAND RAPIDS PRESS, Nov. 9, 1999, at D8; *Reader Debate: Is Engler Right to Oppose Vouchers?*, DETROIT NEWS, Oct. 2, 1999, at C7.

⁶⁰ For more information about this program, visit State of Wisconsin, Department of Public Instruction, *DPI’s Student Achievement Guarantee in Education Program (SAGE) program* (last modified Mar. 22, 2000) <<http://www.dpi.state.wi.us/dpi/oea/sage/>>.

Take Title I, which was thankfully just passed by the House yesterday.⁶¹ Governor Bush's proposal under Title I says, if you have a failing public school under Title I, and it does not perform, at the end of three years, we will just give kids \$1500 in vouchers.⁶² And this is supposedly going to solve the problem of poor-performing public schools. But what about the kids who cannot get in for \$1500? What about the vast number of kids who will stay behind in the public school? That proposal offers nothing to them.

On the other hand, the proposal just passed by the House yesterday says something different. If a school does not perform, and does not perform immediately, not only do the kids have the option to transfer to a better-performing public school, but also the state has to reconstitute the school.⁶³ That means maybe firing the principal or reassigning teachers, doing something to make the schools work in the way that David Hornbeck⁶⁴ is trying so hard to do right here in Philadelphia.

That is what reforms public schools - not this alleged notion of competition, which so far has had no record of success.

But what about the voucher schools themselves? What kind of deal are they offering? As Elizabeth Coleman has said, the voucher schools are really choice for schools, not for students.

But let us take a look just briefly again at Cleveland and Milwaukee. In Cleveland, there was a state audit of the program that found that over \$2 million of an approximately \$8 to \$10 million budget was being wasted, including \$1.4 million that was being used for taxicabs to transport kids to voucher schools.⁶⁵ A recent exposé in Cleveland's *The Plain Dealer* found one voucher school that, instead of having live teachers, had videotapes as their only way of providing instruction.⁶⁶ Another school had a convicted

⁶¹ The Academic Achievement for All Act (Straight A's Act), H.R. 2300, was passed by the House of Representatives by 208 to 9 votes on October 21, 1999. *Final Votes for Roll Call 523* (visited May 23, 2000) <<http://clerkweb.house.gov/cgi-bin/vote.exe?year=1999&rollnumber=532>>.

⁶² See Governor Jeb Bush, *The Bush/Brogan A+ Plan for Education* (visited May 21, 2000) <http://www.state.fl.us/eog/plusplan/A+_plan/A+_plan_revised.html>. Christopher Prawdzik, *Misperceptions Surround Florida's Education Program*, *The Tampa Tribune*, Apr. 22, 2000, as posted at The Alexis de Tocqueville Institution, *Misperceptions Surround Florida's Education Program* (visited May 21, 2000) <http://www.adti.net/html_files/education/tampatrib_cp04224000.html>.

⁶³ See Academic Achievement for All Act (Straight A's Act), H.R. 2300, as posted by the Library of Congress, *H.R. 2300* (visited May 23, 2000) <<http://thomas.loc.gov/cgi-bin/query/C?c106:/temp/~c106aecMt6>>.

⁶⁴ David Hornbeck is the Superintendent of the Philadelphia School System. For more information on the superintendent, visit *SUPERINTENDENT DAVID W. HORNBECK* (visited Mar. 24, 2000) <<http://www.phila.k12.pa.us/Admin/superintendent/>>.

⁶⁵ Benjamin Morrison & Mary Beth Lane, *Voucher Study Finds No Big Academic Gain*, *THE PLAIN DEALER*, March 28, 1998, at 1B.

⁶⁶ See Scott Stephens & Mark Vosburgh, *Voucher School Relies on Videos as Teachers; Operators to Appeal Being Cut from the Program*, *THE PLAIN DEALER*, Jul. 10, 1999, at 1A; Mark Vosburgh, *Retain Voucher School Examiner Says*, *THE PLAIN DEALER*, Aug. 31, 1999, at 4B; Mark Vosburgh, *Voucher Program Drops Third School*, *THE PLAIN DEALER*, Sept. 30, 1999, at 1B; Mark Vosburgh, *Vouchers Restored to Students at Academy*, *THE PLAIN DEALER*, Oct. 21, 1999, at 7B.

murderer on their teaching staff.⁶⁷ A third school literally could not pass the fire code - the kids were in a firetrap.⁶⁸ A fourth school's idea of discipline for third graders was putting paper bags over their heads.⁶⁹ When one parent found out about the conditions her child was in, she said to *The Plain Dealer*, I wish I had never heard of the voucher program.

Indeed, schools are not like used car lots. There is a very good reason why we should have accountability with respect to schools. Look at Milwaukee. In the Wisconsin voucher program, there are no provisions for civil rights protections in most respects for kids in voucher schools.⁷⁰ There is no provision with respect to educational accountability.⁷¹ Even though kids in public schools in Milwaukee are tested, they are not tested at all in voucher schools.⁷²

We recently joined with the NAACP to conduct a testing program with respect to voucher schools to determine if they are even complying with the minimal regulation that already exists. Here is what we found: a number of schools are charging admission fees to poor voucher students, clearly illegal under the state law.⁷³ One school is requiring an admission test before it will accept students.⁷⁴ Several schools, despite the fact that the law says that they must allow kids to opt out of religious services, are doing no such thing.⁷⁵ One parent was told when she called, "If you want your child to opt out of

⁶⁷ Scott Stephens & Mark Vosburgh, *Murderer on Staff of State-Funded Private School; Building's Windows Broken, Lead Paint Flakes off Wall*, THE PLAIN DEALER, Jul. 1, 1999, at 1A.

⁶⁸ Scott Stephens & Mark Vosburgh, *Private Schools Visited by State Inspectors in Health, Safety Inquiry*, THE PLAIN DEALER, Jul. 8, 1999, at 1A; Scott Stephens, *Fire Marshall Calls Building Unsafe; 110-Year Old School to Get Look Thursday*, THE PLAIN DEALER, Jul. 27, 1999, at 2B. Mark Vosburgh, *Schools Won't Fight State, They Face Expulsion From Voucher Program*, THE PLAIN DEALER, Aug. 11, 1999, at 1B.

⁶⁹ *Prepared Statement of Carole Shields President of People for the American Way Before the House Budget Committee*, FEDERAL NEWS SERVICE, Sept. 23, 1999.

⁷⁰ ERIK GUNN, *Vouchers and Public Accountability*, RETHINKING SCHOOLS, AN URBAN EDUCATIONAL JOURNAL, Fall 1999, reprinted in Erik Gunn, *Rethinking Schools -- Vouchers and Public Accountability -- Volume 14, No. 1 -- Fall 1999* (visited Mar. 28, 2000) <http://www.rethinkingschools.org/Archives/14_01/vouc141.htm>.

⁷¹ *Id.* Cf. PRISCILLA PARDINI, *Church/State Complexities*, RETHINKING SCHOOLS, AN URBAN EDUCATIONAL JOURNAL, Fall 1999, reprinted in Priscilla Pardini, *Rethinking Schools -- Vouchers: Church/State Complexities -- Volume 14, No. 2 -- Winter 1999* (visited Mar. 28, 2000) <http://www.rethinkingschools.org/Archives/14_02/chur142.htm>.

⁷² GUNN, *supra* note 71.

⁷³ Jon Williams, *School Choice Attacks Often Fail Accuracy Test*, MILWAUKEE J. SENTINEL, Sept. 6, 1999, at P1.

⁷⁴ *See id.*

⁷⁵ *See generally*, Alan J. Borsuk, *Dividing Church and State under Renovation*, MILWAUKEE J. SENTINEL, July 5, 1998, at P1.

religious services, we think you ought to opt out of this school.”⁷⁶ So much for school choice by the parents. Whose choice is it?

That is the fundamental problem with choice, so-called, voucher programs. They do not afford choice for students. What they do afford is a method to weaken our public school system, to provide choices for schools, not students, and, just as important, to violate the church-state separation of our Constitution that has made religion flourish in our country as in no other. Thank you very much.

JUDGE ADAMS:

Now we are going to permit each of the panelists to ask a question of one of their colleagues or to make a comment. We will start with you, Elizabeth.

MS. COLEMAN:

My question is for Steve. Steve, what do you say about the children who are left behind in this choice scheme; the ones who cannot get into the schools; the ones who cannot get into the private schools, who cannot get into the voucher schools, that have the language problems, et cetera?

PROFESSOR SUGARMAN:

Elizabeth, what do you say about the children who have been left behind now? Most of the middle-class families have fled the cities or stayed and have gone to private schools. The children that are left behind are the ones who are being failed by our public institutions, which are treating them badly.

Under a choice scheme I think the kids who will leave first will not be the kids who are succeeding; it will be the kids who are being worst served. That is who leaves in Milwaukee, in Cleveland, in San Antonio, and in Indianapolis. So I think that you have the wrong picture of who is going to be left behind.

Furthermore, I think that the public schools will get better. We are already seeing this in the charter school experience. And the ones that cannot get better, they should go under. Maybe “reconstitution” is the right answer. I do not think the legislature should decide that. School people should decide. If that is the right thing to do, fine, the schools should be reconstituted. But schools that are really failing should go under. The kids should be able to have a different staff to take responsibility for them.

Those of you who oppose these choice plans seem to have a romantic view, an idealistic view, of what inner-city public schools are today. They are not serving public purposes; they are undermining the solidarity that we once had in our country. That is what we need to change.

When the dust settles, most people will still be using public schools. Certainly most of the middle-class people in the suburbs will be using public schools. And our urban public schools, the ones that remain, will be better. That is what we are trying to achieve here.

JUDGE ADAMS:

Do you want to ask a question?

⁷⁶ See *id.*

PROFESSOR SUGARMAN:

Can I have my turn at the end? Give someone else a chance.

JUDGE ADAMS:

Professor, would you like to ask a question or make a comment?

PROFESSOR TEITEL:

I guess I had a question for Elizabeth, to draw out more of our side, I guess. This is a friendly question.

As you know, in his writings James Madison propounded the view that religion was about faction. And, in fact, in some of his early writing he equated religious faction with political faction.⁷⁷ What is interesting now is that in today's politics we frequently see coalitions emerging. Somehow the unity and union of various religious groups (including some Jewish groups) and many other religious groups that often were thought to be outside of the more dominant religious factions, have led to the idea that somehow commonality lies in these coalitions. I think the Religious-Freedom-Restoration-Act⁷⁸ coalition has this two-edged side to it precisely because of this view that, in fact, commonality lies in that political coalition. I am wondering if you might have any thoughts about that.

MS. COLEMAN:

Yes. I think that was indeed a friendly question, and I appreciate it. I think that it is a really interesting point.

I think, first of all, we are talking about keeping church and state separate, which is, I think, where the danger lies. I think that the commonality we see - and Kevin is referring to the vast number of religious groups that you represent - is a very sort of inspiring concept. When we look out for Jewish groups, we look out for all minority religions. We were involved in the same case with the Muslim policemen in New Jersey that Kevin's group was involved in, and there was a coalition. What is so exciting about these coalitions is that sometimes we are in the same coalition as Kevin, and sometimes we are not fighting. So there is fluidity in the coalitions and a lot of freedom in the coalitions, and there is not an obligation either way.

I think this is part of the flourishing of religion in an increasingly diverse religious society. We have over 1500 religions in this country. As Elliot and Ruti said, it is extraordinary that we have not had religious strife, that we have not had religious wars. And when we see what happened throughout the world, what we have here is remarkable.

⁷⁷ See James Madison, *Memorial And Remonstrance Against Religious Assessments*, II WRITINGS OF J. MADISON, 1836 (1975); James Madison, *Memorial and Remonstrance – 1785* (visited Mar. 28, 2000) <<http://odur.let.rug.nl/~usa/P/jm4/writings/memor.htm>>; James Madison, Federalist No. 10 (visited Mar. 28, 2000) <<http://odur.let.rug.nl/~usa/D/1776-1800/federalist/fed10.htm>>.

⁷⁸ Religious Freedom Restoration Act of 1993, 5 U.S.C. § 504 (1993); 42 U.S.C. §§ 1988, 2000bb – 2000bb-4 (1993). To read the full text of the Act online, visit *Religious Freedom Restoration Act of 1993* (visited Mar. 24, 2000) <<http://thomas.loc.gov/cgi-bin/query/z?c103:H.R.1308.ENR:>>.

I apologize for the idealism, but we do think this is a remarkable system that has served us very well over 200 years.

To answer Professor Sugarman, I think our concern, apart from the constitutional issues, is taking money from public schools at a time when there are problems to fix and when there are things that can be done. Instead of draining them, they should be fixed with that money.

JUDGE ADAMS:

Kevin, a question or comment, or both?

MR. HASSON:

A little bit of both.

You are right. We were on the same side of the Muslim beard case. It was a lot of fun to stand up and say, "Good morning, Your Honor, Kevin J. Hasson for The Becket Fund, the ADL, and the ACLU." Particularly since two weeks later, in the very same courtroom, it was switched around; the same players were on opposite sides of the aisle. That is an interesting form of commonality. But private commonality and government-enforced commonality are two entirely different things.

My question to Elizabeth - and it is not entirely a friendly question . . .

MS. COLEMAN:

I hope it is not about the Know-Nothings . . .

MR. HASSON:

. . . Well, a little bit.

MS. COLEMAN:

Because I do not know anything about the Know-Nothings.

MR. HASSON:

They succeeded in light of the dark history of enforcing commonality in public schools by requiring that public schools teach the common religion. Sectarian schools were bad not because they were religious but because they were sectarian.

In light of that, do you not find the need to temper your romanticism just a little bit, at least in terms of your vocabulary?

MS. COLEMAN:

Well, first of all, I am getting a little bit old to start tempering my romanticism. But I think that - although I appreciate the input, I think you are talking about several things, and I think that what we believe now is, of course, it is not a perfect world. There have been numerous abuses, in the public school system, in the public school system. There are abuses in every system, and I am not saying that there were not. I think there are two things: One is our common American values, as opposed to sectarian . . .

MR. HASSON:

Which are?

MS. COLEMAN:

Which are freedom, our Constitution, our political process and our tolerance, our history of tolerance.

MR. HASSON:

And who are the sectarians that you are trying to keep out?

MS. COLEMAN:

I think what I was trying to say earlier when I was speaking, was that we believe very much in the idea of religious schools. We support the opportunity of people to send their children to religious schools. We think that is a very important choice for parents, whether it is a Jewish school, whether it is a Catholic school, or whatever it is. We believe, however, it is both unconstitutional and bad public policy for the government to fund the choice.

JUDGE ADAMS:

Okay. I guess we have to give Elliot an opportunity to comment.

MR. MINCBERG:

Actually, what I would like to do, if I could, is to pose questions that either Steve or Kevin could answer. I confess my question is not entirely friendly, although I offer it in the spirit of friendship.

A survey of the Department of Education found that the vast majority of private schools, particularly religious schools, would not participate in a voucher program if the government had imposed on them some of the same requirements of public schools.⁷⁹ These requirements have included accepting special ed. kids, anti-discrimination, accountability, et cetera.⁸⁰ But at the same time, public opinion polls indicate that to whatever extent people support the idea of choice - and that is somewhat controversial - over 75% say, that if you are going to provide government money to private schools, the private schools ought to be accountable educationally in the same way as public schools are. The schools ought to have the same civil rights and other protections. Would you support a voucher program if it imposed all those requirements on private and religious schools?

JUDGE ADAMS:

Kevin, do you want to try it?

MR. HASSON:

⁷⁹ *There's Just No Competition*, NEA Today, May 1, 1999.

⁸⁰ Richard W. Riley, *What Really Matters in American Education* (last modified Sept. 24, 1997) <<http://www.ed.gov/Speeches/09-1997/970923.html>>.

I would not oppose it. We are not in the business of legislation. We file lawsuits. However, I would not sue over this. Although I do not know that it would be optimally efficient, for two reasons. First, I think a lot of schools would not participate. Second, I think a lot of what has necessarily bogged down public schools in their efficiency has been the growth of the Due Process Clause⁸¹ and the granting of those rights to kids in public schools. I am not saying that it is a mistake to extend kids such rights. I am saying it necessarily puts inefficiencies into the private school system. One thing that makes private schools much more efficient is that you can throw out kids and you can suspend them without much hearing. As a result, the bottom line is basically good, and that bottom line is what is driving a lot of people to want vouchers. I would not sue to stop the thing you propose. My private opinion is that it would be less than optimal, but it would probably be better than what we have now.

JUDGE ADAMS:

Thank you. Steve, you have the last question or comment.

PROFESSOR SUGARMAN:

In Sweden, some years ago, the conservatives, to their amazement, were elected into office.⁸² They did not expect to win, with so many years of social democrats being in charge. They had campaign promises that they idly made, without thinking too much about them, probably. Then, they suddenly got elected, and they felt they had better act on their principles.

Sure enough, they adopted and introduced what I would call a voucher plan in Sweden.⁸³ Now that the social democrats are back, they have changed the name, but they have kept the system in place. The plan basically says that anybody in Sweden can get a check for an average of 80 to 90% of what is spent on public school kids in Sweden, and they can take that and endorse it over to any private school that wants to participate in the plan.⁸⁴ The private schools have a tremendous amount of managerial freedom as to how they run the schools, but they are not allowed to charge any extra tuition, and they have to admit people on the basis of a lottery. I would certainly be in favor of that kind of system.

For our country, I would be much more in favor of focusing on the poor. That is where the problem really is. But in response to the question, the Swedish system, I think, would be a very fine system for us.

⁸¹ The federal Due Process Clause provides, “No person . . . shall . . . be deprived of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. V. The Fourteenth Amendment incorporates federal due process to the states: “No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. XIV, § 1.

⁸² For more information regarding the Swedish Parliament, visit The Swedish Parliament, *Welcome to the Riksdag* (visited Mar. 28, 2000) <http://www.riksdagen.se/index_en.asp>.

¹⁰³ See Gregg Vanourek, *Sweden’s Voucher Experiment* (visited Mar. 28, 2000) <<http://www.edexcellence.net/issuespl/subject/internat/swedvouc.html>>.

⁸⁴ See *id.*

One thing I find interesting, speaking of Sweden, is that when you go to Europe, people are very - and understandably - critical of our elementary and secondary schools, which they find generally to be inferior to theirs. In country after country they allow religious schools to carry on and thrive with public money. You understand that we are very much an exception there to the rest of the world. Yet, on the other hand, Europeans are extremely envious of our system of higher education, where, interestingly enough, most of the higher education institutions in Europe are all government. What we have in our society, by contrast, is a very healthy partnership between public higher education institutions, such as the one where I teach, and private higher education institutions, such as the one we are located in today. I think this system we have in higher education is just the sort of thing we need in our elementary and secondary schools.

What have we learned, by the way, on this issue? What do you think about the tolerance of Catholics who have gone to public schools versus the tolerance of those who have gone to Catholic schools? Well, on the whole, Catholics are pretty tolerant, it turns out, but they are more tolerant if they went to Catholic schools. Choice schools do not teach Catholics to be intolerant people. It has been argued that choice schools are going to turn children into intolerant people. If you think that is going to happen, what I say, again, is that you just do not trust poor people.

We used to give poor people government food handouts. We knew what was better for them. We sent them down to the government food pantry. If they were poor, we gave them whatever the government thought was best for them, which, by the way, was usually whatever was left over, whatever was stockpiled in the government warehouses. That is what the government gave them. Now we give them food stamps. That is a lot better.

JUDGE ADAMS:

Okay, Steve.

We want to devote the last part of our program to questions from the members of the audience, or comments, as the case may be. We will start here.

AUDIENCE MEMBER:

I think that public policy considerations may be more compelling, from the legal end of things, with regard to the topic you were just talking about. These are topics from acceptance of regulations, a requirement of private schools to accept vouchers, to having an admission policy that requires them to accept some of the children who are most difficult to educate, to allowing people to opt out of religious practices, and other things. Does the Constitution not, in fact, require that? I mean, if you do not require . . .

JUDGE ADAMS:

Do you want to address your question to one of the panelists?

AUDIENCE MEMBER:

Any of them is fine. But, I mean, if we do not require opt-out programs, if you do not, in fact, you create a government benefit access that is conditioned on submission to religious invocation and attendance at church.

JUDGE ADAMS:
Professor Sugarman.

PROFESSOR SUGARMAN:

There is a Supreme Court case where the school was almost all entirely publicly supported.⁸⁵ The Court felt that the school's behavior in denying its teachers what would be rights that public school teachers might have had under the First Amendment was not state action.⁸⁶ Therefore, I do not think it follows that it is required that voucher schools would have to allow for the opt-out you propose. I think it is a matter of whether or not we would want to insist on that option in the voucher legislation.

AUDIENCE MEMBER:

I think you may have misunderstood my question. If 80 to 90% of the private schools in the country claim a religious identity, then 85% of those would object to a rule that would allow an opt-out provision.

PROFESSOR SUGARMAN:

That is not at all true.

AUDIENCE MEMBER:

In the country, those schools are the only choice other than public schools. Assuming there are vouchers, do we not then say that only those who are willing to go to church when the school tells you it is time to go to church can opt out, do we not create a government condition . . .

MR. MINCBERG:

In fact, the Wisconsin Supreme Court, one of the few courts that has upheld a voucher program, said that some of those kinds of conditions, which in theory are in the Wisconsin statute, were crucial to its constitutionality.⁸⁷ These necessary conditions include allowing people to opt out of religious exercises, and requiring the schools not to admit based on religion.⁸⁸

⁸⁵ *Agostini v. Felton*, 521 U.S. 203 (1997).

⁸⁶ *Id.*

⁸⁷ *See Jackson v. Benson*, 578 N.W.2d 602, 603 (Wis. 1998) (holding that public school funds may be diverted to religiously affiliated schools).

⁸⁸ *Id.* (advising that as the amended program “neither compels students to attend sectarian private schools nor requires them to participate in religious activities, the program does not violate the [Compelled Support Clause] of art. I, § 18 [of the Wisconsin Constitution].” The Wisconsin Constitution specifically provides that:

[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or

Two points, though, that I think are very important. First, even those minimal requirements are not nearly enough, in our view, to provide the educational and civil rights accountability that ought to be provided. However, I would still love to hear Steve's response as to whether he would support that, and not the Swedish system.

Second, as we are finding in Milwaukee, there is often a large gap between what the statute says and what the schools actually do.⁸⁹ Our research has discovered that a number of schools, even though they have pledged that they will let kids opt out of religious services, are in fact discouraging them from doing so or preventing them from doing so. I think this underlines some of the inherent problems with the voucher program.

JUDGE ADAMS:

Question back there.

AUDIENCE MEMBER:

Yes. The concept of vouchers is a very popular concept in the African-American community. But when I think of it, I think of Wole Soyinka, the Nigerian Nobel Prize winner in literature.⁹⁰ He often writes about his experience growing up in Nigeria, where he and other Africans, if they wanted to get an education, were forced to abandon their traditional religions, their traditional names, their languages, and become Christians. Now, what is there in this whole concept of vouchers to prevent that type of religious apartheid from happening right here in America?

JUDGE ADAMS:

Elizabeth, you want to seem to answer that.

MS. COLEMAN:

I think that is a really good point, and it goes with the earlier question. I think it is sort of a double bond, and either alternative is unacceptable. If there is not the regulation preventing the discrimination, I think that is unacceptable. If there is a regulation, having the regulation is unacceptable from the religious freedom of the school. Then also, as you say, if people have to give up their religious freedom to get the education they need, that is an unpalatable exception as well.

support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WIS. CONST., of 1848, art. I, § 18 (amended 1982).

⁸⁹ Alan J. Borsuk, *School-choice complaints to advance DPI official favors probing charges of rule-breaking at private schools*, MILWAUKEE JOURNAL SENTINEL, Dec. 7, 1999, at 1; Alan J. Borsuk & Joe Williams, *Some choice schools broke rules, foes say But state says no students complained of problems with 'random selection'*, MILWAUKEE JOURNAL SENTINEL, Feb. 3, 1999, at 1.

⁹⁰ Winner of the Nobel Prize for literature in 1986. Paul Brians, *Wole Soyinka Study Guide* (last modified Feb. 4, 1999) <<http://www.wsu.edu:8080/~brians/anglophone/soyinka.html>>.

JUDGE ADAMS:

That is such a good question, we need two people to answer it.

MR. HASSON:

Well, the other response is, what keeps that from happening is that people get to choose. If people do not want to go to that kind of school, they can choose another one. If that kind of school is not available yet, presumably enough people can pull together and create that kind of a school. My organization exists to keep people from being forced into religions that they do not want to follow. I agree with you in principle, but I disagree with you in practice.

JUDGE ADAMS:

I think more than one can answer that question. We are going to let the audience try. You go ahead.

AUDIENCE MEMBER:

I just wanted to ask you a question. I am a historian, not a lawyer. My question that has been avoided in all of the sessions that I have attended, is whether there are people out there who are using vouchers for Charitable Choice⁹¹ as a kind of inroad, or tactic, to ultimately bring prayer in school, an inroad on the separation of church and state. My question is this: if vouchers and Charitable Choice would be validated by the Supreme Court, can they be a precedent for the next step, like bringing prayer back into schools?

JUDGE ADAMS:

I cut you off - why not try it.

MR. MINCBERG:

Okay. Well, the answer to that is, it depends on the Supreme Court's decision and how they approach it. I think the answer to that is probably yes. If the Court were to uphold the kinds of vouchers and Charitable Choice program we are talking about, I think we would be well on the way. That slope would be slippery, indeed. We would be there perhaps at the next court case.

But I do want to go back to Kevin's last statement, though, about providing a choice. I just cannot resist this. In Cleveland, the only choice is between inferior public schools, which the state itself now runs directly - the same state that is supporting vouchers now runs the Cleveland public school system - and opting into 95% religious private schools.⁹² That is no choice at all.

MR. HASSON:

Elliot, you are assuming that no other schools will ever come into existence.

⁹¹ Charitable choice programs are congressional proposals that would direct welfare funding from state or federal agencies to religious institutions. Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 802 (1999).

⁹² See *Mueller v. Allen*, 463 U.S. 388, 410 n.4 (1983) (Marshall, J., dissenting).

MR. MINCBERG:

As a matter of fact, what has happened in the Cleveland program is that the percentage of religious schools in the last three years has gone up, not down. The nonreligious schools are finding themselves less able to compete because they do not have the church subsidizing them.

JUDGE ADAMS:

Question from the audience. I apologize for not knowing your name, so I will have to just point.

AUDIENCE MEMBER:

I am also a historian. But I am here today in no small part because of one of the largest voucher programs this country ever had, the G.I. Bill.⁹³ I ask those who oppose vouchers, would they have opposed, or do they oppose, the G.I. Bill, or do they think this is qualitatively different?

JUDGE ADAMS:

Do you want to try to answer? Either one.

MR. MINCBERG:

Let me just say quickly, it is different not only for a qualitative reason. The Supreme Court actually dealt with this in the *Witters* case.⁹⁴ Justice Marshall, who certainly was no fan of things like vouchers, wrote the majority opinion in the *Witters* case that allowed a blind student to use a vocational rehabilitation grant at the college level to go to a religious school.⁹⁵ What Marshall said was that as there was only a tiny percentage of the schools in that program that were religious, that in no way skewed the program toward religion.⁹⁶ That is part of what we are talking about here. At the elementary and secondary level, where public school is free, a voucher program is inevitably skewed towards religion.

JUDGE ADAMS:

Do you want to add anything?

PROFESSOR TEITEL:

No.

⁹³ The G.I. Bill enables a veteran to use federal funds to attend a public college or university, as well as a religious school or seminary. 38 U.S.C. §104 (1994). See also *G.I. Bill Express.com – Veteran Scholarships, Schools, GI Bill* (visited Mar. 28, 2000) <<http://www.gibillexpress.com/>>.

⁹⁴ *Witters v. Washington Dept. of Servs. for the Blind*, 471 U.S. 481 (1986).

⁹⁵ *Id.*

⁹⁶ *Id.* at 488-89.

JUDGE ADAMS:

Okay.

MR. HASSON:

Can I say something?

JUDGE ADAMS:

Yes, sure.

MR. HASSON:

Elliot, we have debated this subject many times.

MR. MINCBERG:

Once or twice.

MR. HASSON:

You always say that, and you know what I say next. But I am going to say it again because these people have not heard us before.

MR. MINCBERG:

Some of them probably have, actually.

MR. HASSON:

It is true that Justice Marshall, in his majority opinion for the unanimous court in *Witters*, said that, thereby trying to resurrect the dissent that I referred to in *Mueller*.⁹⁷ But it is also true that five justices in concurrence caught him in his tracks and restated their position in *Mueller*.⁹⁸

JUDGE ADAMS:

I think somebody in that red jacket.

⁹⁷ *Id.* Justice Marshall's *Mueller* dissent argued that the Minnesota law granting parents of parochial school children a tax deduction equivalent to their educational costs violated the Establishment Clause, because, in part, a "tax deduction has a primary effect that advances religion[;] it is provided to offset expenditures which are not restricted to the secular activities of parochial schools." *Mueller*, 463 U.S. at 414 (Marshall, J., dissenting).

⁹⁸ In his *Witters* concurrence, Powell relied on the majority in *Mueller v. Allen*, which noted it "would be loath to adopt a rule grounding constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller v. Allen*, 463 U.S. 388, 401 (1983). "[I]n *Mueller*, we sustained a tax deduction for certain educational expenses, even though the great majority of beneficiaries were parents of children attending sectarian schools." (citing *Mueller*, 463 U.S. at 401). *Witters*, 474 U.S. at 491 (1986) (Powell, J., concurring, in which Burger, C.J. and Rehnquist, J., joined). Justices White and O'Connor agreed with Powell's opinion with respect to the relevance of *Mueller*. See *Witters*, 474 U.S. at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring).

AUDIENCE MEMBER:

Thank you. I would like to go back to the public policy aspect that we are talking about and Professor Sugarman's statement about some of us caring about the children. I would like to restate the debate and remind everybody that the children do not really get to choose. It is some adult that gets to choose. Many people, among whom I count myself, are concerned about those children who do not have the adult, the caretaker, who is alert and knowledgeable and has the energy and all those things that you need to go seeking these extra opportunities. We are concerned that we, the people of the United States, owe to those children the best education that we can fund for them and the fairness to them. So that is what I would like to readdress - the concern for children who cannot make a choice and who need our help as caring people of the United States.

JUDGE ADAMS:

This lady and this question, and then you.

AUDIENCE MEMBER:

I have a comment and a question that are entirely unrelated to each other. The comment: as Mr. Hasson referred to the 1854 event in Boston, I want to make people aware of a local Philadelphia event. In 1844 the native American Party,⁹⁹ which was the precursor to the Know-Nothings party,¹⁰⁰ protested against a School Board policy to exempt Catholic students from reading the King James Bible in public schools.¹⁰¹ There was a shooting war that went on from May to July of that year. Approximately thirty people were killed. They burned down what was then a northern suburb of Kensington and they burned down St. Michael's Church and St. Augustus's Church. It ended up with a fight in front of St. Philip Neri Church, where both sides had cannons. The cavalry tried to defend the church, and the natives were trying to shoot cannons into the church.¹⁰² So probably school prayer that will welcome this would not be a good idea.

The question, which has absolutely nothing to do with that, is would anyone on the panel want to comment on the proposals that have been made that if a voucher plan went through, should it also apply to those parents who home school?

JUDGE ADAMS:

Does anyone wish to comment?

⁹⁹ The native American Party was formed in "December 1843 . . . in Philadelphia, Pennsylvania. . . . The basic purpose of the party was to fight the increasing influence of immigrants (especially the Irish) at the ballot box. Members of this party were Protestants, while most of the Irish were Roman Catholics." Steve Baxley, *Nativists on the March* (visited Mar. 28, 2000) <<http://members.cts.com/crash/b/baxley/nativist.html>>.

¹⁰⁰ See generally IRA M. LEONARD & ROBERT D. PARMET, *AMERICAN NATIVISM 1830-1860* (1971); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1988).

¹⁰¹ *Id.*

¹⁰² *Id.*

PROFESSOR SUGARMAN:

I could say something about home schooling. There are estimates that vary about this. It is very difficult to get hard information about this because some people who home school technically form schools, and so on. But it is estimated that somewhere around a million children in America are being so-called home schooled today. These are children who, by and large, are being educated entirely with their parents' efforts and without any public assistance at all.

An interesting thing that is going on now in some states is that these children are being brought together into charter school programs. The charter school programs are reaching out to these children. What they provide to these families and to these children are often master teachers who come out and help the parents, usually the mother, learn something more about curriculum. They often provide computers to these families that help them with the children's education. They often provide other kinds of organized recreational activities for the kids. They provide supplements that these families have previously had to do without because they resorted to home schooling. These families resorted to home schooling because the public schools have been terrible for their children - or they perceive them as being terrible.

These are families that are very much committed and care very much about their children. And through the charter school movement, some of them have been able to get, finally, some sort of government support. There are questions about whether you want to pay the parents to be the teachers, and that is not generally what goes on in these charter school programs.

We can talk about whether that should be so. We could talk about whether home-schooled children should be able to receive vouchers in a school that has only one child, or whether they should have to be grouped together. But the point is that I think that these families should receive our support. They should be receiving better services than they have been receiving. On average, however, home-schooled children do remarkably well. They do better than the average public school children on tests.

PROFESSOR TEITEL:

I wanted to respond to that and to the prior comment about *Yoder*¹⁰³ and about the children's interests here.

I am very grateful for the hypothetical about home schooling, because home schooling is the total privatization of education. Right? So, if it could be shown that was the most efficient way to educate, would that be acceptable as generally applicable policy? That's really the question. It might be most efficient to have one-on-one sessions with a parent, generally if the mother has been in the home educating the child. Is that the vision of American democratic education? It is part of a traditional family vision, epitomizing promotion of some desirable values. This vision, however, deprives children of necessary interactions with others who are not part of the family, who might even be of different racial, ethnic, religious and economic backgrounds. Something is being lost there; we have to do a better job of articulating what exactly is being lost.

¹⁰³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the application of Wisconsin's compulsory high school attendance law to Amish children violated the Amish parents' rights under the Free Exercise Clause).

Where is it that people are supposed to meet? Where is pluralism supposed to happen? Where is respect and tolerance for others being learned? What are the other values being debated here, beyond efficiency in certain reading and math skills? I think that the answer from an educational perspective is that there are many other values at play here. The vouchers debate forces us to articulate what the nexus is between education and our democracy. Here, I also want to tie in *Yoder* with respect for children who might be dissenters or who might not want to continue in the education.

JUDGE ADAMS:

Please explain, for the benefit of those who might not know *Yoder*.

PROFESSOR TEITEL:

Yes, I was about to say that there are a number of cases which have been wonderful articulations by the Supreme Court of religious freedom in this country. *Yoder* is one because it protected the right of Amish parents to exempt their children at the age of fourteen to have them, essentially, drop out of the requirement of education and to go back and work in the community. The children in *Yoder* did return to work.¹⁰⁴ Now the Amish often come to New York. They are at Union Square, now the Farmer's Market. (That is a New York reference.)

But, anyway, the point is, the exemptions provided both in *Pierce v. Society of Sisters*¹⁰⁵ for religious education, parochial education, and in *Yoder* the exemption from education altogether, whether public or private, after the age of fourteen, that was regarded as an exemption from something much bigger, what was thought to be a threshold or baseline of required education in common.

To invert that, and to say that now the presumption is private religious education, education provided by 90% religious actors, if not more in some states, but let us say 85% which is the statistic accepted nationwide, that is really to change the picture both in terms of the pluralism goals in the country, but also children's rights and interests. There are important values that are being sacrificed.

So, I think it is an interesting question where the baseline is really changing. Justice Douglas's dissent in *Yoder* is a rare articulation of the fact that there are other actors here: there are the parents, the state, and the *children*.¹⁰⁶

The children's interests may be quite different from those of the parents and may lead to the need to expose them to other values and other regimes than those of the home. Home schooling raises this problem as do some of the other questions.

JUDGE ADAMS:

¹⁰⁴ *Id.* at 211.

¹⁰⁵ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the Oregon Compulsory Education Act, which required nearly every child between the ages of 8 to 16 to attend public school, violated the Fourteenth Amendment's Due Process Clause).

¹⁰⁶ *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting) (arguing, first, that the Amish children should be given an opportunity to decide for themselves the extent to which they would adhere to Amish belief and second, that government ought to legislate into religious areas that subvert good order).

Two of our panelists want to comment on this. I remind everyone we only have about nine minutes left, and I want to give as much opportunity as possible for questions. So try to compress your answers.

MS. COLEMAN:

I just wanted to comment on a couple of questions.

One is the whole question of choosing a parochial school versus choosing a private school. It is also true, just in a reality-based sense, that parochial schools are much less expensive than most private schools, and that, therefore, a child or a parent would be forced in many situations to do what the woman back there was saying, which is possibly to give up a religious value to pay for the school.

The second thing is that the parents do not get a choice either in many situations. It is not just the child's choice. It is the parent's inability to choose a school because of the situation the parent and the child might be in.

Finally, if you include home schooling and vouchers, I think that also raises the question of vouchers in general and the way it takes money from the public school system.

JUDGE ADAMS:

Mr. Kevin Hasson, your turn, please.

MR. HASSON:

I do not know whether including home-schooled children is a good idea or not. But as we think about it, it is important to keep in focus what *Pierce v. Society of the Sisters*¹⁰⁷ was all about. *Pierce* was a successful challenge to a statute passed by the Ku Klux Klan as part of the Nativist movement that required everybody to go to public schools.¹⁰⁸

The Supreme Court said such a requirement was unconstitutional,¹⁰⁹ not because they were creating some kind of exception from an overall policy, but precisely because the overall policy could not be what the legislature wanted it to be in *Pierce*.¹¹⁰ That is to say, the norm cannot be the state owning children's education. What the Supreme Court said in *Pierce* is that there is a fundamental right of parents to control the education of their kids.¹¹¹

¹⁰⁷ 268 U.S. 510 (1925).

¹⁰⁸ Nativism maintained that all immigrants, except Protestant whites, were harmful to the American regime; the Ku Klux Klan is generally associated with this belief. See Baxley, *supra* note 101. See also Michael J. Nove, *Deliver Us From Evil: The Ku Klux Klan in Oregon's Legal History*, 57 OR. ST. B. BULL. 37 (1996); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 OHIO ST. L.J. 409, 418 (1986).

¹⁰⁹ *Pierce*, 268 U.S. at 532.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 534-35.

So to ask the question, “What values would we be giving up if we gave home-schooled children vouchers?” Then respond, “Horrors! We would be giving up the fundamental value of everybody being in common schools.” That is to turn the constitution on its head.

AUDIENCE MEMBER:

I receive a tax refund from the government every April. This year I intend to use it to pay my daughter’s tuition at Mount St. Joseph’s Academy. Is there anyone here who is going to stop me? Second, I enjoy the freedom I have to send my daughter to a private school. It happens to be a Catholic school. Why would I, who enjoy that freedom, want to deprive people who live just a mile from here, who may work as a security guard at minimum wage, of the freedom to make that same choice or some other choice? Why would I want to deprive a poor person, African-American, newly emigrated to this country, or whatever, of sending their boy or their girl to the school that they deem best? I have never heard such a liberal concern turned so completely on its head.

PROFESSOR SUGARMAN:

Do we get to respond?

JUDGE ADAMS:

Well, you will. But I have been holding this gentleman off, and I think I neglected him.

AUDIENCE MEMBER:

If everybody in Sweden or the United States would have a government subsidy of 90% of the cost of education, and then they had a choice, would that not be different from offering a \$1500 voucher, which is basically a subsidy to people already going to private school?

(Applause.)

PROFESSOR SUGARMAN:

I have written several books in which I said the voucher should be 85 to 90% of what is spent in public schools. That is what the proposal ought to be.

MR. MINCBERG:

But I think the second comment in part answered the first. There is no choice, not in any realistic way, for that poor family that you are talking about, if you only give them \$1500.

I do not object at all to you using your tax refund that you get back for that. But I do object, and my parents in Florida object, to their tax money being used to support other people’s religious school choices.

That is the principle of the Establishment Clause that Madison and Jefferson proposed,¹¹² and that Professor Chemerinsky talked about again this morning,¹¹³ that makes religion different from all the other kinds of usages of tax dollars.

AUDIENCE MEMBER:

I have a brief comment and a briefer question. I want to introduce a perspective that we have not talked about, which is I believe is fundamental to this issue. We allow a voucher program. It allows people to go to religious daycare centers, religious hospitals, and religious nursing homes. There is something intrinsically political about power politics, that when it comes to education, suddenly we find religion, or suddenly we find the Constitution. But my question is, on the issue of values, many of us would agree that the ideas of tolerance are good; that the ideas of exposing our children to people of different faiths, color, religion, and incomes are good values. Perhaps public schools do. Nonpublic schools expose children to those values as well.

However, what about parents who are looking for a quality education or safe environment? What about the parent who finds that the values or the absence of values in the public schools contradict their beliefs of marriage, sexuality, drugs, or other areas? Why is it that only wealthy people are entitled to prescribe to their religion or have their child in a proper religious environment if they can afford it? Why must poorer children be indoctrinated and placed in a value-based system that is contradictory to their parents' values?

MR. MINCBERG:

For the same reason that if they want to take taxi cabs every day, rather than the public transit system, they do not get to take the amount of money that they give to support public transit and pull it out and use it for taxi cabs.

AUDIENCE MEMBER:

But education is compulsory.

MR. MINCBERG:

Yes, it is. But it should not be compulsory in the way that, unfortunately, it was in the 1940s. In fact, church and state separation has ensured, if it is done correctly, that public education is structured in a way that is religion-neutral. That is the way it is supposed to be. That is the way we, and I think all of the other groups here, are committed to making sure public education will be.

If you want to choose an education that affirmatively supports a particular religious view, you have the right to do that, just in the same way that you have the right to take a taxicab. But you do not have the right to make my parents and me and everybody else

¹¹² The writings of James Madison and Thomas Jefferson express the position of strict separatism, strongly opposing government involvement with religion. 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Albert Ellery Bergh ed., 1905); *see also* Christopher A. Hoffman, *The Future of School Vouchers for Religious Academies after Jackson v. Benson*, 43 ST. LOUIS U. L.J. 1083 (1999).

¹¹³ *See supra* Debate 2: *Should the Government Provide Support for Religious Institutions That Offer Faith-Based Social Services?*

spend our compulsory tax money to support that. That is the fundamental principle of the Establishment Clause.

JUDGE ADAMS:

You have the last question.

AUDIENCE MEMBER:

I have two questions, one for each side: one dealing with the Constitution, and one dealing with public policy.

On the constitutional question, I gather that those of you who think vouchers are unconstitutional would not argue that there exists a constitutional compulsion to have the funding of public schools. In other words, if the government decided that it would never have created the public schools in the first place, that is acceptable. If that is acceptable, and then the government decides that it wants to relieve parents of some of their burden by providing a tax credit for parents who have children in school, would that also not be constitutional? And if that were constitutional, why is not the voucher program constitutional? That is the question for that side.

On the public policy side, I have a lot of trouble with the question, mostly for the reasons Mr. Minberg said, but I also have another problem. Let us take Philadelphia. Today we at least have a substantial political constituency that wants to do something about fixing the public schools. We do not disagree that they are broken. My concern is, that if we suddenly have a voucher program here in Philadelphia, it could negatively affect the constituency for public schools. If we had lots of money go to the parochial schools, there would be less money for improving public schools. For example, let us say a lot of people do move from the public schools to the parochial schools. What we would have left, then, I suspect, would be a constituency for public schools that would make it weaker, which would mean you have nobody politically active to try fix what was left. And I think that would be a disaster.

So, I am inclined to think that the down stroke in the competition would be a disaster. If I am wrong about that, I would also like to hear from Mr. Sugarman on why he has a concern about the political constituency problem.

PROFESSOR SUGARMAN:

One of the problems that we have today is that parents who already have their children in private schools resent what they view as paying twice. If we had a system in which the private schools were equally funded, there would be a much broader constituency for widespread support of extra funding for education. So I think that is one thing that should be considered in terms of constituency.

We have tried all sorts of public school reforms over past years in the existing structural setting. We are not making a go of it. Rather, we are making a mess of it. We need to try to get the public schools to respond to incentives. That is what we need to do: to get public schools to think about what it really takes to hold onto their pupils. Protecting them, which we have done for all those years, is not going to work.

JUDGE ADAMS:
Elliot, you have the last word.

MR. MINCBERG:

In terms of the legal point, the hypothetical you talk about is, frankly, a totally different country from ours. We have talked about the problems with public education, which were primarily confined to our urban areas. But, for the most part, the people in this country like public education. They like the idea of a system of public education where it is presumed that kindergarten through grade twelve is free education for everyone. Under those circumstances, as the U.S. Supreme Court explained in the *Nyquist* case, there is a very important legal difference between a voucher system and the sort of hypothetical situation you talk about, which would be more like the G.I. Bill kind of situation, in fact.

However, I think that it also illustrates the problem with some of what Professor Sugarman has just said. It would cost over \$15 billion, if we had universal vouchers today, just to pay for kids that are already in private school. Imagine having to increase our education budget, just to keep where we are now, by \$15 billion. It would never happen. The public policy implications of vouchers would be disastrous, and they would rob the public schools of the positive movement we are seeing in not only Philadelphia but also some other cities.

JUDGE ADAMS:

I highly compliment the members of the panel. I think they made a wonderful presentation.

One final comment. I compliment the University of Pennsylvania Law School, and distinguished retiring dean, for co-sponsoring this, as well as the Anti-Defamation League, which I think has rendered a very, very valuable service. It was a pleasure to be here. Your questions were wonderful. I am asked to remind you at 2:30 p.m., the last session will begin promptly. Thank you.