

2013

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Repository Citation

Dwyer, James G., "No Accounting for School Vouchers" (2013). *Faculty Publications*. 1577.
<https://scholarship.law.wm.edu/facpubs/1577>

NO ACCOUNTING FOR SCHOOL VOUCHERS

*James G. Dwyer**

The standard conservative view of privatization in education favors state funding of private schools, religious and nonreligious, without state oversight to ensure accountability for how the money is used.¹ The standard liberal view opposes state funding of private schools regardless of whether there is state oversight to ensure that the funding improves children's secular education.² I take the intermediate position that states may provide funding for private schooling but only if they also regulate and oversee the private schools sufficiently to ensure that the state money has the effect of improving the secular education that the schools provide. In fact, I maintain that states *should* have school voucher programs with robust accountability mechanisms, both to respect the equality right of children whose parents place them in private schools and to incentivize private schools, some of which are educationally inadequate, to accept state oversight. In this Article, I highlight the main points against the standard views, critique the prevailing assumptions about what accountability entails, and assess to what extent there is real educational accountability in voucher programs today.

Two preliminary definitional matters: First, I use the term "school voucher program" to encompass any scheme by which the

* Arthur B. Hanson Professor of Law, William & Mary School of Law. I am grateful to Professor Omari Scott Simmons for hosting and inviting me to an excellent symposium and for sharing with me his insights on the topic of this Article. Thanks also to the *Wake Forest Law Review* editors who assisted with and participated in the symposium events and who displayed extraordinary ability and professionalism.

1. See JAMES G. DWYER, VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM 41–43 (2002). There is, of course, no single uniform view among conservatives or liberals. I refer here to views that prevail in the political debate. There has been substantial support for vouchers among parents in poor communities simply because they are parents seeking some better alternative for their children, not because of their political views.

2. See *id.* at 43–46; Terry M. Moe & Paul T. Hill, *Moving to a Mixed Model*, in THE FUTURES OF SCHOOL REFORM 65, 91–92 (Jal Mehta et al. eds., 2012); Gary Scharrer & Peggy Fikac, *Houston Lawmaker Expected to Revive Fight over School Vouchers*, HOUS. CHRON. (Oct. 4, 2012), <http://www.chron.com/news/houston-texas/article/School-voucher-fight-expected-for-next-session-3920840.php> (describing the polarized debate in the Texas legislature over vouchers).

state chooses to have money that it would otherwise collect and use for public purposes instead go to private schools at the election of some private party. It therefore includes the stereotypical voucher program by which the state gives money directly to private schools to pay for the tuition of specific children whose parents have successfully applied for such public funding of their children's education.³ But it also includes transfers of public money to private schools through the income tax system. One way some states use the tax system is to reimburse parents for their private school tuition payments, in whole or in part, by means of tax credits or deductions.⁴ More commonly, states reimburse any taxpayer who makes donations to a private school or to a private school scholarship fund by means of tax credits or deductions.⁵ All of these programs entail a state decision to divert to private schools funds that are in the state's possession or that are owed to the state. On this broader view of "vouchers," currently there are voucher programs for regular education in fourteen states and the District of Columbia,⁶ and the number will undoubtedly keep growing.⁷

Second, I refer in this Article to "secular education" as the aim of state decision making about funding and regulation of any school. Rather than defining that concept with precision here, I will simply stipulate for purposes of this Article that what I mean is basically what public schools provide—that is, mainstream views and

3. It is a common misperception or mischaracterization that voucher programs entail transfer of state money to parents. See, e.g., Paul E. Peterson & David E. Campbell, *Introduction: A New Direction in Public Education?*, in CHARTERS, VOUCHERS & PUBLIC EDUCATION 1, 10, 13 (Paul E. Peterson & David E. Campbell eds., 2001) (saying "government assistance is given to parents, not directly to schools" and mentioning "the money given to families"). In reality, parents who qualify for vouchers receive vouchers, not money. A voucher is a piece of paper that effectively says to whichever school parents select for their child: "We, the state, will pay for all or part of this child's tuition. You, the school, enroll this child and then send us this piece of paper, and then we, the state, will send you, the private school, money from the public treasury." See, e.g., LA. REV. STAT. ANN. § 17:4015(5) (Supp. 2012); *id.* § 17:4017(A); OHIO ADMIN. CODE 3301-11-10(A) (2009).

4. E.g., IOWA CODE ANN. § 422.12(2)(b) (West 2011).

5. E.g., *id.* § 422.11S.

6. These states are Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Louisiana, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, Virginia, and Wisconsin. See *infra* notes 54–56, 77–84, 99, 101, 108, and accompanying text. There is an additional group of states with programs for state funding of just special education in private schools. See, e.g., THE AM. FED'N. FOR CHILDREN, SCHOOL CHOICE YEARBOOK 2011–12, at 56 (2012), available at http://www.federationforchildren.org/system/uploads/181/original/North_Carolina.pdf?1328559425.

7. See Ariz. Sch. Tuition Org. Ass'n, *The Year of School Choice: 42 States Consider School Vouchers, Scholarship Tax Credits in 2011* (June 16, 2011), <http://astoa.com/2011/the-year-of-school-choice-42-states-consider-school-vouchers-scholarship-tax-credits-in-2011/>.

methodologies in math, reading and writing, and the physical and social sciences. I take for granted that the state cannot constitutionally aim to support religious instruction per se. Available evidence suggests, though, that most religious schools aim to provide a good secular education for students, as well as to impart religious beliefs and values.⁸ The division between the two might not always be neat in practice; the same lesson might do both. Nevertheless, a religious school could accomplish all that the state expects of its public schools and simply supplement that with instruction in the beliefs of a particular religious faith.⁹

Part I of the Article provides basic details about elementary and secondary schooling in America and about state regulation of the public and private sectors apart from voucher programs. Part II identifies a number of bad arguments commonly made for or against school vouchers. Part III explains how a child-centered view leads to a “vouchers with strings” position. Part IV then describes the many and varied current voucher programs around the United States. Finally, Part V assesses whether any of these programs include measures to ensure that participating schools are providing a good secular education. Throughout the Article, I highlight various fallacies that confound rational deliberation about the morality, legality, and policy wisdom of voucher programs.

I. BASIC FACTS ABOUT AMERICAN SCHOOLS

Eighty-six percent of children in the United States attend public schools.¹⁰ Eleven percent attend private schools, and three percent are homeschooled.¹¹ Among private schools, seventy-seven percent are religious, and twenty-three percent are nonsectarian.¹² Popular perception of the public and private school sectors betrays certain fallacies.

Fallacy 1: Private schools are legally required to demonstrate academic adequacy. Reality: In contrast to the extensive state regulation of public schools, there is no meaningful mandatory

8. See, e.g., Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. LAB. ECON. 98, 98–100 (1997).

9. But see MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 158 (1999) (suggesting that any religious instruction is inherently contrary to students’ interest in developing autonomy).

10. Table 41. *Percentage Distribution of Students Ages 5 Through 17 Attending Kindergarten Through 12th Grade, by School Type or Participation in Homeschooling and Selected Child, Parent, and Household Characteristics: 1999, 2003, and 2007*, NAT’L CENTER FOR EDUC. STAT., http://nces.ed.gov/programs/digest/d11/tables/dt11_041.asp (last visited Mar. 23, 2013).

11. *Id.*

12. Table A-5-3. *Percentage Distribution of Students Enrolled in Private Elementary and Secondary Schools, by School Type and Selected Characteristics: 2009–10*, NAT’L CENTER FOR EDUC. STAT., <http://nces.ed.gov/programs/coe/tables/table-pri-3.asp> (last visited Mar. 23, 2013).

regulation or state oversight of private schools in America.¹³ Typical state code provisions pertaining to private schools require merely that the schools report attendance to the state and profess to teach certain core subjects.¹⁴ The state does not know whether and how private schools actually teach anything, and it might explicitly disavow any intent to constrain the content of curriculum or to conflict in any way with religious beliefs.¹⁵ Private schools do not have to administer standardized tests or use any other academic assessment tools. If they choose to administer tests, they do not have to report the results to anyone. Moreover, the state places no restrictions on how private schools treat students beyond the prohibitions on physically harmful conduct that apply to all custodians of children. Thus, for example, private schools may freely treat female students in a subordinating manner, refusing to allow them to occupy leadership roles and discouraging them from studying certain subjects or aspiring to college attendance.¹⁶

Fallacy 2: Private schools are better than public schools. Reality: This is a common, but hopelessly nonsensical, assertion.¹⁷ It implicitly supposes that (a) all private schools are the same and all public schools are the same and (b) someone has reliably assessed the quality of “the private school” and “the public school” and determined the former to be superior. Neither supposition is true.

Preoccupation with average school sector test scores is one of the most prominent and puzzling aspects of public and scholarly debates over voucher programs.¹⁸ What policy decision could

13. See James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1338 (1996). Some states offer state approval for schools that wish to receive it.

14. See, e.g., KY. REV. STAT. ANN. § 158.080 (LexisNexis 2009).

15. See, e.g., WIS. STAT. ANN. § 118.165(1)(d) (West Supp. 2012) (“The program provides a sequentially progressive curriculum of fundamental instruction in reading, language arts, mathematics, social studies, science and health. This subsection does not require the program to include in its curriculum any concept, topic or practice in conflict with the program’s religious doctrines or to exclude from its curriculum any concept, topic or practice consistent with the program’s religious doctrines.”).

16. For evidence that this occurs, see JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS* 26–27 (1998). See also Barbara Miner, *School Vouchers: A Threat to the Rights of Women and Gays*, RETHINKING SCHOOLS (Feb. 2002), http://www.rethinkingschools.org/special_reports/voucher_report/v_gay.shtml.

17. See, e.g., Peterson & Campbell, *supra* note 3, at 7–8 (stating that the impetus for voucher programs came in the 1980s and 1990s in large part from reaction to studies purporting to show “performance” in Catholic schools—or in private schools, more generally—relative to public schools); *Facts and Studies*, COUNCIL FOR AM. PRIVATE EDUC. (CAPE), <http://www.capenet.org/facts.html> (last visited Mar. 23, 2013).

18. See, e.g., Jay P. Greene, *The Hidden Research Consensus for School Choice*, in *CHARTERS, VOUCHERS & PUBLIC EDUCATION*, *supra* note 3, at 85–90;

possibly depend on whether the average test scores for the private school sector are a certain number of points above or below the average test scores for the public school sector? Within each sector, there is enormous variation in quality, and sector averages tell us nothing about the degree or distribution of variance from the mean. Extraordinarily good results among, for example, elite private academies would mask performance far below the mean among other private schools. State education policy would be entirely irrational if it reacted to sector averages rather than to the actual quality of individual schools. If a state reacted only to average scores for an entire sector, then it should conclude that all is well with public schools because the average score for the public school sector is never much different from that for the private schools included in these studies.¹⁹ Yet that would be absurd because we know that some public schools are not functioning adequately. The results for the worst public schools would be masked by those for the best public schools.

Thus, it makes no more sense to say that the state should fund all private schools because the average test scores for private schools are similar to, or somewhat better than, the average for public schools than it would be to say that the state should not fund any private schools because the average test scores for public schools are similar to the average for private schools. There is every reason to suppose, and published evidence to confirm, that some private schools, like some public schools, are grossly deficient academically.²⁰ The hard question voucher proponents have never been willing to face is whether it is appropriate for the state to divert funds to those bad private schools, to facilitate children's continued enrollment in or transfer to such schools, and to do so without any state oversight to ensure that such schools use the state funding to improve the secular education they provide.

Jim McLaughlin, *Audit Questions Impact of Voucher Schools on Test Scores*, MILWAUKEE J. SENTINEL (Aug. 30, 2012), <http://www.jsonline.com/news/education/audit-questions-impact-of-voucher-schools-on-test-scores-116mcbs-168088946.html>.

19. See NAT'L CTR. FOR EDUC. STATISTICS, COMPARING PRIVATE SCHOOLS AND PUBLIC SCHOOLS USING HIERARCHICAL LINEAR MODELING, at iv–v (2006), available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2006461.pdf>; Harold Wenglinsky, *Are Private High Schools Better Academically than Public High Schools?*, CENTER ON EDUC. POL'Y (Oct. 10, 2007), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=121>.

20. See DWYER, *supra* note 1, at 171–75; *School Vouchers: The Emerging Track Record*, NAT'L EDUC. ASS'N, <http://www.nea.org/bare/print.html?content=/bare/16970.htm> (last visited Mar. 23, 2013) (relating an article published by an Ohio paper that reported a fundamentalist Christian school in Cleveland did not employ teachers but rather used state voucher money to buy religious videos that pupils spent most of the school day watching).

In fact, it is unlikely that voucher advocates would change their position if faced with undeniable evidence that average test scores for private schools are worse than average test scores for public schools. And they should not. That evidence would in no way undermine the claim that some children would be much better off transferring from their local public school to a particular private school in their locale. Likewise, evidence that students in private schools on average score higher on certain tests than students in public schools would in no way support a claim that children in bad public schools would benefit from transferring to whatever private school their parents might choose. If some private schools are also academically inadequate, it would be irrational and contrary to the aim of improving education for the state to facilitate transfer of any child from any public school to such a private school.

There are, in fact, studies finding better performance on average in public schools. One study comparing public school eighth grade National Assessment of Educational Progress ("NAEP") scores with scores for charter schools and for various denominations that operate private schools found that only Lutheran schools and charter schools performed better than their public-school counterparts, and only slightly.²¹ It found that Conservative Christian schools performed the worst, followed by Catholic schools.²² But even at this greater level of detail—breaking private schools out into ideological subgroups—policy makers should not rely on average results across a large number of schools, because that says nothing about the nature of any particular school. There is no question that *some* Catholic schools, for example, are far better than *some* public schools, and it would be sensible for the state to facilitate transfer of some students from public to Catholic school where that would mean movement to an academically superior school.

Moreover, test score averages are also quite misleading, even as to average sector performance, for at least two reasons. First, as noted above, states do not require private schools to administer achievement tests, so private schools that do administer tests have done so because they want to, which obviously creates a selection bias in the comparative analysis. Second, some existing tests, perhaps most, simply do not measure for good education and might in fact reward bad education—in particular, a monotonous diet of

21. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 19.

22. *Id.* A separate study by the National Center for Educational Statistics indicated that Conservative Christian schools employ a comparably low percentage of certified teachers. See *Private Schools in the United States: A Statistical Profile, 1993-94/Other Religious Conservative Christian Schools*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/pubs/ps/97459ch3.asp> (last visited Mar. 23, 2013) (explaining that "44 percent of conservative Christian school teachers did not hold a state teaching certificate").

rote memorization.²³ With respect to some existing tests, the fact that a particular school, public or private, does very well on them actually supports a conclusion that the school is academically inferior. A curriculum oriented around bad tests is likely to be a bad curriculum.

II. BAD ARGUMENTS ON BOTH SIDES

Debate about school vouchers is largely polarized, with political conservatives promoting them and political liberals opposing them. On both sides, thinking is predominantly adult centered, despite the fact that the schooling at issue is for children.²⁴ The conservative position, favoring vouchers without regulatory strings, originated in a pro-religion, parents'-rights, and antistate outlook.²⁵ The liberal position might be motivated in part by a child-centered concern that voucher programs will result in the destruction of public school systems, without really enabling poor parents to send their children to decent private schools, or will result in resegregation. But there is reason to suspect that much of the liberal opposition reflects sympathy for teachers and administrators in the public school system and an antireligion sentiment. Indeed, most political opposition comes from powerful teachers' unions, and most court challenges are predicated on a supposed right of taxpayers not to have their money go to religious institutions, regardless of whether those religious institutions are providing a better secular education for children.²⁶ The reasoning on both sides is plagued by explicit or implicit normative positions that are untenable.

23. See Jonathan Kozol, *Confections of Apartheid Continue in Our Schools*, 71 EDUC. DIG. 4, 17–19 (2006); Harvey Siegel, *High Stakes Testing, Educational Aims and Ideals, and Responsible Assessment*, 3 THEORY & RES. EDUC. 219, 224–29 (2004); Howard Blume, *Focus on Standardized Tests May Be Pushing Some Teachers to Cheat*, L.A. TIMES (Nov. 7, 2011), <http://articles.latimes.com/2011/nov/07/local/la-me-teacher-cheating-20111107>; *How Standardized Testing Damages Education*, FAIRTEST (Aug. 20, 2007), <http://fairtest.org/facts/howharm.htm>; Michael Winerip, *Teaching Beyond the Test, to Make Room Again for Current Events*, N.Y. TIMES (May 22, 2011), http://www.nytimes.com/2011/05/23/nyregion/teaching-beyond-test-with-eye-on-current-events.html?_r=0.

24. See DWYER, *supra* note 1, at 1–2, 41–46, 48–55.

25. See James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 563–66 (2007). Forman explains how conservative voucher proponents ultimately realized that they would have greater political success if they deployed racial justice rhetoric and enlisted minority community leaders to join the voucher movement. *Id.* at 568–73.

26. See *id.* at 573–77; *The Case Against Vouchers*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/19133.htm> (last visited Mar. 23, 2013). The explicit basis for taxpayer suits is the Establishment Clause requirement that the state remain separate from religion, but taxpayer standing to bring such suits rests

Fallacy 3: Parents who choose private schools for their children have an equality right to state funding of their children's schooling. Reality: Although voucher proponents frequently voice this normative claim, it is telling that none have ever brought equal protection suits against states that do not have voucher programs.²⁷ Such a suit would be dead on arrival. The obvious state response is that it provides to all citizens, without discrimination, certain educational resources, including museums, libraries, and public schools, and that if some citizens decline for whatever reason to use those resources, the state has no obligation to give them money instead. I might refuse to use the local public library because it contains books I think are evil, provides educational programs that promote values I reject, and allows equal access to people I view as infidels. Does that mean I have an equality right to a public voucher to use at a private library? Do biblical literalists who refuse to enter the Smithsonian's National Museum of Natural History have an equal protection right to state funding of a creationism museum? No court would say so.

Some voucher advocates might respond that the state should not be using taxpayer money to create and operate ideologically nonneutral educational institutions of any sort. If the state insists on doing so, they might maintain that it does in fact have an obligation to fund ideologically alternative educational institutions. An argument along these lines for abolishing the public school system and moving to complete privatization would have some purchase if public schools, public museums, and public libraries could plausibly be characterized as authoritarian indoctrinatory institutions, aiming to impose a particular orthodoxy on children and other members of society and to prevent them from questioning that orthodoxy. Then these so-called educational institutions would begin to look like instruments of an established church and contrary to a core constitutional prohibition. But that characterization is simply not plausible. Although public schools inevitably have curricular elements that implicitly favor, or could be viewed as favoring, a particular moral view, they also have intrinsic aspects today that prevent them from becoming oppressive indoctrinatory institutions—for example, openness to attendance by all resident children, transparency requirements for school administrators and school boards, fora for parent complaints, susceptibility to oversight by and challenge at several levels of elected government and in courts, and employment laws that constrain a school district's choice

on a supposition that lack of separation is an offense to any taxpayer. *See, e.g.,* *Ariz. Christian Sch. Tuition Org. v. Winn*, 113 S. Ct. 1436, 1445–47 (2011).

27. Parents did bring unsuccessful equal protection claims against a voucher program in Maine that was limited to secular private schools, claiming discrimination based on religion. *See Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147–48 (Me. 1999).

of teachers and administrators. Moreover, there are sound public-goods arguments for maintaining state-operated, taxpayer-funded schools, just as there are for maintaining public highways and a government-operated military—other government programs that inevitably do things that some citizens find morally offensive or contrary to their religious beliefs.²⁸ Equality norms simply do not support mandatory state financing of private analogues to every government operation.

Fallacy 4: Consumer (i.e., parent) choice leads to better education for children. Reality: Few parents are competent to judge the academic worth of a school, and a significant percentage of parents who choose religious schools for their children simply place little or no value on secular education.²⁹

What I call the “myth of parental omniscience” surfaces often in advocacy for vouchers and for parental power to direct children’s upbringing without state interference.³⁰ In reality, there is no more reason to expect parents in general to be capable of assessing the quality of teaching in a school than to expect them to be capable of assessing the quality of medical practices in hospitals. The poor parents who are typically the first participants in a voucher program are likely to have little education themselves and to operate at a lower cognitive level on average.³¹ Why would anyone think them capable of investigating and analyzing the relative educational merits of different schools?

28. See TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 17–19 (2001) (citing the work of Milton Friedman).

29. See Mark Schneider & Jack Buckley, *What Do Parents Want from Schools? Evidence from the Internet*, 24 EDUC. EVALUATION & POL’Y ANALYSIS 133, 133–34 (2002) (“The Carnegie Foundation concluded that ‘many parents base their school choice decision on factors that have nothing to do with the quality of education’ A Twentieth Century Fund report argued that parents are not ‘natural consumers of education’ and that ‘few parents of any social class appear willing to acquire the information necessary to make active and informed educational choices.’”).

30. See, e.g., *Frequently Asked Questions on School Choice: Are Participating Private Schools Held Accountable?*, FRIEDMAN FOUND., <http://www.edchoice.org/School-Choice/School-Choice-FAQs/School-Choice-FAQs-Are-participating-private-schools-held-accountable.pdf> (last visited Mar. 23, 2013). Indeed, even the Louisiana Superintendent of Education has recited this mantra. See Stephanie Simon, *Louisiana’s Bold Bid to Privatize Schools*, REUTERS (June 1, 2012), <http://www.reuters.com/article/2012/06/01/us-education-vouchers-idUSL1E8H10AG20120601>; see also Moe & Hill, *supra* note 2, at 69, 71, 80–81, 91 (studiously avoiding reference to “parental choice” in a recent paper arguing for expansion and multiplication of voucher programs and instead referring to the problematic concept of family choice and the truly peculiar idea of child choice).

31. See JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE? 116 (2007) (“[M]any researchers have argued that the tendency to make ill-informed choices is stronger among low-income parents.”).

One might think that any parent can simply compare test scores at different schools, but (a) that cannot be done with schools that do not administer tests, (b) as noted above, some tests are bad tests, and (c) we certainly cannot expect the average parent, let alone disadvantaged parents, to distinguish good tests from bad tests. Reliance on word of mouth among parents in the community only replicates the problems of parental incompetence: why rely on what any other particular parent says about the academic quality of a school? Parents might be able to identify schools that are safer or friendlier for their children, and those things are important, but there is no reason to think parents in general are able to identify good curriculum or teaching. Evidence of the potential for parents to be hoodwinked comes from exposure of widespread fraud and abuse in some existing charter and voucher programs.³²

In addition to attributing pedagogical expertise to all parents, voucher proponents more plausibly attribute to parents a strong motivation to do what is best for their children—a motivation that might well be lacking in state actors, including some public school administrators and teachers. There are several problems, however, with relying on parental motivation. First, parents' love for their children can make them more vulnerable to scams; fearing for their children's future, they might grasp at false promises from unregulated private school operators.

Second, religion, which is central to the thinking of many voucher proponents, confounds the "parental choice produces better education" argument on which their position rests. It does so in part because religion is likely to generate a motivation—namely, obligation to religious authority *per se*—that can compete with the motivation to do what is best for one's child. The Old Testament story of Abraham preparing to kill his son Isaac illustrates this well, as do the many instances of parents refusing medical care for their children because their religion forbids them from doing so—for example, Jehovah's Witnesses who adhere to what they regard as a biblical command not to allow blood transfusions.³³

The clearer problem, though, is that even if solely focused on what is best for their children, some parents make choices for their children as a matter of principle that the state must view as harmful. This is so because some parents' religion tells them that mainstream education is of less value than certain incompatible spiritual needs or is even inherently immoral. More concretely, some parents simply reject, as contrary to their religious outlook,

32. See, e.g., Gus Garcia-Roberts, *McKay Scholarship Program Sparks a Cottage Industry of Fraud and Chaos*, MIAMI NEW TIMES (June 23, 2011), <http://www.miaminewtimes.com/2011-06-23/news/mckay-scholarship-program-sparks-a-cottage-industry-of-fraud-and-chaos/>.

33. See, e.g., *Jehovah's Witnesses v. King Cnty. Hosp. Unit No. 1*, 278 F. Supp. 488, 502–03 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968).

liberal educational aims such as fostering autonomy, creative and critical thinking, and preparing children for an "open future."³⁴ Their top priority for their children is unquestioning acceptance of the parents' religious precepts, and the content of those precepts can include illiberal values such as female subservience or slaughter of infidels. They simply do not want their children to receive schooling that fosters critical thinking, intellectual curiosity and creativity, and individual expression as well as robust knowledge in secular subjects. With respect to those parents, whose numbers are simply unknown, it makes no sense to invoke parental motivation as a basis for supposing choice programs will improve education. From the state's perspective, sometimes parents' special concern for their children harms the children, and parental choice sometimes results in children being largely deprived of what the state views as an education.³⁵ Voucher proponents have yet to address this undeniable reality.

It makes no sense, therefore, to assert in a debate about state policy that, by supporting parental choices, the state will secure better education for children. "Parents know best and care most" is a nice slogan, but it is belied by the lack of any evidence that the average parent, let alone a parent in an impoverished community, is a savvy consumer of schools and by the fact that knowledge and caring are simply irrelevant in the case of the religious dissenter who rejects the state's aims for children's education.

Fallacy 5: Taxpayers have important interests at stake when public money goes to religious schools. Reality: Federal constitutional challenges to voucher programs have likely rested on the Establishment Clause primarily because, at least from an adult-centered perspective, it is difficult to conceive of any other federal constitutional basis for challenging the programs.³⁶ Taxpayers sometimes won before the U.S. Supreme Court's decisions in *Zelman v. Simmons-Harris*³⁷ and *Arizona Christian School Tuition*

34. See DWYER, *supra* note 16, at 17. The same is true of homeschooling. See J.C. Blokhuis, Book Review, 8 THEORY & RES. EDUC. 322, 322–26 (2010) (reviewing ROBERT KUNZMAN, *WRITE THESE LAWS ON YOUR CHILDREN: INSIDE THE WORLD OF CONSERVATIVE CHRISTIAN HOMESCHOOLING* (2009)).

35. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972) ("[T]he State . . . argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education . . .").

36. Some state constitutions contain prohibitions on funding of private schooling that operate similarly to some Federal Establishment Clause cases. See generally Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 573–86 (2003). I present a child-centered basis for challenging existing programs in DWYER, *supra* note 1, at 198–210.

37. 536 U.S. 639, 643–44 (2002) (rejecting an Establishment Clause challenge to the Cleveland voucher program).

Organization v. Winn,³⁸ but generally not because judges felt great concern about taxpayers' well-being or attributed to them a fundamental right.³⁹ In reality, no individual adult has especially important interests at stake in the voucher debate, and arguably least of all secularist taxpayer bystanders who object to "their money" going to religious institutions.⁴⁰ I am a secularist taxpayer, and if my state began paying the salaries of Catholic priests, I would be quite annoyed, I would believe that to be highly improper, and it might even make me feel that current government officials view me, because I am not Catholic, as a second-class citizen. But my negative feelings and beliefs about that would hardly threaten my basic well-being. In fact, the state is already subsidizing religion by granting income and property tax exemptions to churches, but no one is going mad because of that, and no taxpayers' lives have unraveled as a result. Separation of church and state is an important structural value, but it is implausible to say that any individual, as a taxpayer or simply as a citizen, has an important interest at stake in a state decision about one particular government program that helps religious institutions operate, when that program entails no real direct threat to bystander citizens' own freedom of conscience or conduct.

Conversely, children have a great interest at stake in education policy decision making, and the real problem with states subsidizing religious indoctrination is that it causes more children to be subjected to such indoctrination. For some children, whether there is a voucher program is of little consequence. This includes those who are currently attending an adequate public school and whose parents would use a voucher to send them to a private school that is not significantly better. It also includes those who are already attending a private school and whose secular education would not be much improved by the availability of state funding because the school and its customer parents already have ample resources for what they are trying to accomplish. But other children might have a great deal at stake. One such group contains those stuck in very bad public schools whose parents would transfer them to a good private school if a voucher were available. Another such group contains children whose parents have placed them in a private school that strives to provide a good secular education but that has too few resources to fulfill that aim. These latter groups of children have more important interests at stake in the voucher debate than

38. 113 S. Ct. 1436, 1440 (2011) (rejecting taxpayer standing to challenge an Arizona tuition tax credit); see DWYER, *supra* note 1, at 115–24.

39. *But cf. Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (quoting *Mitchell v. Helms*, 530 U.S. 793, 871 (2000)) (characterizing forced contribution to religious instruction as a unique affront to individuals' conscience).

40. See James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 968–71 (2001).

any adult who could possibly be affected by a voucher program, and so they presumptively should be the main focus of everyone involved in the debate. Both sides of the debate express concern for children in bad public schools, but that appears disingenuous when (a) both sides take categorical positions, with one side insisting that the state pay for parents to transfer their children to any unregulated school they want and the other side refusing to consider any reform proposal that includes devoting some public money to private schooling, and (b) neither side manifests any concern for children who are receiving a poor education in private school solely because of a lack of resources.

Fallacy 6: Any voucher program that includes religious schools necessarily entails illicit state payment for religious instruction and worship. Reality: This view betrays a lack of economic sophistication and an unwarranted Establishment Clause absolutism. Imagine a private school that is owned by a religious organization, has a religious name, and employs some clergy, but whose facility and operations are indistinguishable from a nonsectarian private or public school. There are no religious symbols, religious lessons, or religious activities. A state subsidy for that school cannot plausibly be characterized as payment for religious instruction or worship. Now suppose that that school hires one teacher just to provide religious instruction and offers a catechism elective to students. All costs associated with that instruction add up to one percent of the school's expenses. If the amount of state subsidy to the school equals ninety-nine percent or less of the school's expenses, then as a conceptual matter we can view the state as paying only for secular education. Private money is paying for the religious instruction. To this some might respond that the state subsidy "frees up" private money to pay for religious instruction, so the state is financially aiding religious teaching. But whether a state payment for secular activities enables private individuals to spend their private money on religious activities is normatively irrelevant. Otherwise, every government program of assistance to any private entity for any secular purpose would have to be viewed as breaching the supposed wall of separation because an incidental result would always be that private parties could devote more of their own money to religious activities. For example, by this line of reasoning the government could no longer distribute food stamps because food stamps enable poor people to use more of their money for their church instead of using it to buy food.

Of course, most actual religious schools do not compartmentalize so cleanly. Catholic schools, which are still the largest sector of the private school universe,⁴¹ do generally have

41. See *Facts and Studies*, *supra* note 17 (showing that forty-three percent of children attending private school are in Catholic schools).

separate classes for catechism, but they are typically mandatory. Other classes are secular in nature, but teachers might begin a class with a prayer or occasionally make a faith-informed statement to students—for example, in imposing discipline or in giving an explanation for some historical event or natural phenomenon. A few topics that are not essential to preparation for higher education, such as birth control, might be out of bounds for any class material or discussion or might be addressed in a religiously tendentious way. Yet the core of instruction in Catholic schools is secular, and those schools aim to fully prepare students to attend any university in the country. It should be possible to arrive at a reasonable estimate of what portion of the school's budget goes toward secular instruction and what portion toward religious instruction and to peg state aid at a level below the estimate for the secular portion. Modest coloring of the secular portion with religious messages simply should not concern the state or secularist taxpayers; from an objective perspective, it is not sufficiently significant to worry about.

The real problem cases are religious schools that are pervasively religious in the sense that religious tenets substantially limit or distort the content of instruction and the aim of religious conformity leads to teaching methods antithetical to cognitive development and autonomy.⁴² In such schools, religious tenets are also likely to motivate treatment of pupils in ways the state deems harmful—for example, extreme forms of denigrating and restricting students and denying girls equal opportunities for learning.⁴³ The state should not support such schools primarily because the schools are not furthering the state's aims for education and in fact are doing what the state regards as harm to the children, not that the state aid might give offense to secularist taxpayers.

All existing voucher programs, as discussed further below, suffer from this latter problem—that they implicitly authorize payments to pervasively religious schools with aims and practices contrary to the state's educational goals. The Indiana school voucher program that the Indiana Supreme Court approved in *Meredith v. Pence*,⁴⁴ for example, explicitly disavows any intention to constrain the curriculum or pedagogy of participating private schools, beyond requiring them to profess that they will teach

42. See DWYER, *supra* note 16, at 16–20, 27–37; Frances Patterson, *With God on Their Side*, RETHINKING SCHOOLS (Winter 2001/2002), http://www.rethinkingschools.org/special_reports/voucher_report/_god162.shtml (describing extreme bias in religious schools' social studies text books). For the view that "faith schools" are inherently indoctrinatory, see generally Michael Hand, *A Philosophical Objection to Faith Schools*, 1 THEORY & RES. EDUC. 89 (2003).

43. See DWYER, *supra* note 16, at 21–27, 37–44.

44. 984 N.E.2d 1213 (2013).

certain subjects, which they are free to do however they wish.⁴⁵ The Indiana program also has the defect of potentially paying for purely religious components of schools' operations, insofar as it authorizes state payment to religious schools of a child's entire tuition and not just a percentage of tuition reflecting the secular education component of a school's operations.⁴⁶

Fallacy 7: Voucher programs undermine public school systems. Reality: Many voucher opponents, especially teachers' unions, maintain that voucher programs harm public school systems by taking money away from them and by skimming off the better students. The funding aspect should be irrelevant to self-interested teachers themselves, at least those who are competent; shifting children from public to private schools means fewer jobs in public schools but more jobs in private schools, especially in private schools with new resources from the voucher program. But the unions only represent public school teachers and presumably do not want to lose dues-paying members.

In any event, the funding argument is nonsensical. As a conceptual matter, it makes no more sense to say voucher money reduces funding for public schools than to say that state spending on highways reduces funding for public schools. The state collects taxes and allocates the total among a great variety of programs, and every expenditure on one program means there is less for others. In each budget cycle, legislators look at their overall resources and explicitly or implicitly divide the entire pool among all the programs they wish to fund. Funding legislation might specify that allocations for one program will be reduced dollar for dollar by whatever amount is spent on another program. But that would be a political choice with vouchers, not a necessary feature of state funding of private schools, and implicit in that choice would be a legislative decision not to increase aggregate spending on education by taking money away from noneducation programs, such as highway construction. If past funding of public schools has been inadequate, and funding of public schools following implementation of a voucher program remains inadequate, despite the lower student population in the public schools, then those who want to improve public schools could just as sensibly argue both before and after the implementation of a voucher program that the state should increase taxes or take money away from noneducation programs in order to bolster the public schools. Indeed, they might be on stronger ground arguing that the state should take money away from some budgetary item that is less important than education, rather than arguing that the state should withhold money from children whose

45. *Id.* at 1220–21.

46. *Id.* at 1220 n.7; *see also* IND. CODE ANN. § 20-51-4-4(1) (LexisNexis Supp. 2012).

parents put them in private schools in order to shore up funding for the education of children whose parents put them in public schools. The former action might be optimal for the public system—the same amount of money with fewer students to serve, even if those fewer students are, on average, more challenging. In short, there is no inherent connection between spending on private schooling and reduction in spending on public schooling.

The skimming complaint appears plausible. Studies show that one of the main determinants of educational outcomes for a given child is the quality of the other learners in the school environment.⁴⁷ An at-risk child is more likely to stay in school and progress from grade to grade if the student population as a whole creates an ethos of disciplined focus on lessons and academic success. And because existing voucher programs require some parent initiative, and possibly up-front tuition money as well (for tax credit programs), children who exit public schools because of vouchers are likely to be, on average, better learners because of the role that parental involvement plays in children's readiness and desire to learn.⁴⁸ Yet studies have generally found that voucher programs have either a positive effect or no effect at all on public schools, so the empirical supposition just does not materialize.⁴⁹ And there is a normative problem with this objection as well; it supposes that it is appropriate, even required, to hold some children in an inferior education environment in order to improve that environment for other children. It treats the better learners instrumentally, as a means to serve the welfare of poorer learners.

The skimming argument might also be nonsensical in the same way the lost-funding argument is. If there were any other way to improve the learning environment for children in public schools whose parents would not participate in the voucher program—for example, by transferring huge amounts of money from other government programs to the public school systems in order to attract the very best teachers in the nation and to provide Cadillac facilities and services⁵⁰—then it would make no more sense to blame

47. See RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 24–34 (2001); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 *TEACHERS C. REC.* 1999, 2001 (2005).

48. See, e.g., Nancy E. Hill & Lorraine C. Taylor, *Parental School Involvement and Children's Academic Achievement: Pragmatics and Issues*, 13 *CURRENT DIRECTIONS PSYCHOL. SCI.* 161, 161–62 (2004); Chia-Lin Hsieh & Jianping Shen, *Is School Choice a Mechanism for Sustaining Change? Implications from a National Survey*, 75 *CLEARING HOUSE* 88, 90 (2001).

49. See GREG FORSTER, *A WIN-WIN SOLUTION: THE EMPIRICAL EVIDENCE ON SCHOOL VOUCHERS* 15 (2011) (summarizing results of nineteen studies).

50. Studies showing the importance of peers compare standard classrooms with different demographic composition. They do not compare a standard

vouchers for the worsened environment in public schools than to blame the state's failure to shift huge amounts of money from noneducation programs.

What is truly troubling, from a child-centered perspective, about the fact that it is generally the parents who are wealthier (possibly subject to a program's income cap) and more involved in their children's lives who apply for vouchers is that the programs tend not to benefit the children who need it the most. If the state chooses to reduce funding for public schools when enrollment drops as a result of vouchers, then the state does nothing to benefit these worst-off children. My suggestion for addressing this phenomenon is to eliminate parental initiative from voucher programs. School districts could identify the worst-off children, or those in greatest need of transfer to a better school, by means of performance results and recommendations from teachers and counselors. They could then notify those children's parents that the children will be transferring, at state expense, to a private school that the state has scrutinized and found to be academically superior. A legislative proposal to implement such an approach would, I believe, reveal clearly the lack of genuine concern for children among most who promote vouchers. Conservatives would oppose the proposal because it both makes the voucher program no longer about parental choice and entails state approval of private schools, to which they are viscerally opposed. Defenders of the public school system, on the other hand, should like the idea of removing the most difficult pupils from that system, but teachers' unions might nevertheless oppose it because it could mean fewer union members as public school enrollment declines.

III. A CHILD-CENTERED VIEW OF VOUCHERS

I reject adult-centered reasoning about education policy and the constitutionality of vouchers. Children's educational interests are objectively more important than any interests any adults have at stake in the voucher debate; they are the only interests accurately characterized as fundamental. "Parental rights" are a misnomer for the fiduciary obligation imposed on them by the state as a condition for enjoying the state-conferred benefit of parental status and custody.⁵¹ Statist thinking that makes collective societal benefits the determinant of education policy is likewise morally flawed, entailing an instrumental view of children. My position emerges

classroom with a large percentage of disadvantaged children to alternative and much more expensive forms of instruction resembling those given to children with serious special needs—for example, with extraordinarily low child-to-teacher ratios, high-tech learning aids, etc.

51. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1372 (1994).

from a child-centered perspective—one focused on whether voucher programs actually help any children get a better secular education and whether such programs themselves harm any children—and it rests on a more nuanced understanding of what private schools are like and of the regulatory environment in which they operate. I do not suppose that the state must fund children's schooling, but I maintain that if the state chooses to do so it must extend the benefit equally to all children who would benefit from it and must ensure that by funding private schools it does not actually make some children worse off.

The operating premise of voucher programs is that children will leave, or avoid in the first place, bad public schools and instead attend academically good private schools. The bad public schools clearly exist, the state has many reasons to prefer that children attend good schools, and for reasons given above there can be no legitimate objection to the basic idea of the state's financial support of underprivileged children's attendance at academically good private schools, religious or nonreligious. In fact, *children* whose parents place them in private schools are constitutionally entitled to state funding of their secular education if that would substantially improve their secular education. Otherwise the state violates *their* right to equal treatment.⁵² Though parents, as explained above, have no right to state subsidizing of their choice of private school, children do have an equality-based right to state subsidizing of their schooling if the subsidy would improve their secular education, because it is generally not their choice to be in a private school rather than a public school, so they cannot be treated as having waived a state-proffered benefit. Rather, it is a choice parents have made using legally effective power the state has conferred on them.

Thus, I favor voucher programs that enable children to exit or avoid bad public schools and to attend academically sound (as the state sees it) private schools, as well as voucher programs that enable resource-poor private schools to provide a substantially better secular education. But it is the assumption about children getting a better education as a result of vouchers that is problematic. It has been, under most voucher programs, a step in the dark that could be off a cliff. Undoubtedly, as to any very bad public school, there are private schools that are not prohibitively distant and that would provide children a much better secular education. But there are likely also to be some very bad private schools nearby, some of which parents choose out of ignorance or for ideological reasons rather than based on knowledgeable comparison of secular educational quality. The inattention most supporters of voucher programs have paid to that demonstrably substantial possibility is further reason for suspicion that they do not really

52. See DWYER, *supra* note 1, at 148–68.

much care about the fate of kids from the ghetto and that their support arises from other motivations. They hope for studies that show better average test scores for voucher students than for public school students, but such results are not crucial to their position, and when such a study appears, they manifest no interest in its reliability or details—in particular, whether very strong performance at some private schools is masking very poor performance at others.

I am not interested in psychoanalyzing anyone; my aim is just to get state actors to look hard at what the state is buying in the private school sector, just as state agencies do when the state buys real estate, employees, equipment, and medicines in the private sector in order to operate a public health facility. Over the course of the history of voucher programs, there has been some movement in that direction. As explained below, a few of the current programs have some accountability measures that might function to exclude at least some bad private schools. However, all current voucher programs entail, to varying degrees, a step into the dark and, for some children, over a cliff.

In concrete terms, the problem with most programs is a lack of regulatory strings to create academic accountability in private schools receiving voucher students. This is in turn, more generally, a reflection of the larger problem of lack of accountability in private schools; states demand little or nothing from private schools as a general matter, and those that have had voucher programs have not added much or any substantive demands as a condition for participation. With or without vouchers, states have relied on supposed competition in the private market to determine quality, and that is a mistake for the reasons given above—namely, unsophisticated consumers and consumers whose illiberal ideology generates criteria of selection that differ completely from those of the state. The result is that most existing voucher programs are, to an undetermined extent, harming some children instead of helping them, which is morally and constitutionally unacceptable.⁵³

IV. WHAT PROGRAMS NOW EXIST?

I limit discussion here to programs under which the state pays, directly or indirectly, for children in regular education programs to attend a private school. This leaves out charter schools and voucher programs for special needs students. Those other types of “school choice” programs raise different issues and require different normative analysis.

The oldest traditional voucher programs are in Wisconsin and Ohio, and they were originally limited to specific cities—Milwaukee

53. See *id.* at 183–210; *infra* notes 75–76, 121–31, and accompanying text.

and Cleveland.⁵⁴ As originally structured, those programs contained no meaningful accountability measures.⁵⁵ Wisconsin recently added Racine, and Ohio has added a statewide program, EdChoice, to subsidize transfer out of the state's worst schools.⁵⁶ The D.C. program is inherently limited to one city. Douglas County, Colorado tried to launch its own voucher program in 2011, but it remains on hold as of this Article's writing as a legal challenge works its way through the state court system.⁵⁷ Programs in Indiana and Louisiana were statewide from inception.⁵⁸ In these straightforward voucher programs, parents apply for a chit that they can use to enroll their children in a participating private school. The schools collect the chits and send them to the state department of education, which in turn pays the private schools an amount of money based on the number of chits. A larger number of states—Arizona, Florida, Georgia, Indiana, Iowa, Louisiana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, and Virginia—subsidize private schooling by partially or fully reimbursing parents for tuition payments or any taxpayer for donations to a private school scholarship fund via tax credit or deduction.⁵⁹

Fallacy 8: Voucher programs do not entail state choice of which private schools to fund. Reality: This proposition has been a key aspect of courts' reasoning when they uphold voucher programs against anti-religious-establishment-type challenges.⁶⁰ But it is patently false. Every voucher program necessarily entails a state decision as to which private schools are eligible to participate. As explained below, existing programs do include some minimal participation requirements, and those requirements amount to the

54. DWYER, *supra* note 1, at 19–20.

55. *Id.* at 176–80.

56. See ALEXANDRA USHER & NANCY KOBER, CTR. ON EDUC. POLICY, KEEPING INFORMED ABOUT SCHOOL VOUCHERS: A REVIEW OF MAJOR DEVELOPMENTS AND RESEARCH 16 (2011).

57. See Karen Augé, *Colorado Appeals Court: Douglas County School Voucher System Legal*, DENV. POST (Feb. 28, 2013), http://www.denverpost.com/breakingnews/ci_22691754/colo-appeals-court-dougco-school-voucher-system-is;Choice_Scholarship_Pilot_Program, DOUGLAS COUNTY SCH. DISTRICT, <https://www.dcsdk12.org/strategicplan/choice/choicescholarships/index.htm> (last visited Mar. 23, 2013).

58. *School Voucher Laws: State-by-State Comparison*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/educ/voucher-law-comparison.aspx> (last visited Mar. 23, 2013).

59. See, e.g., ARIZ. REV. STAT. ANN. § 43-1184 (2012) (providing for one-hundred percent reimbursement of contributions to a "school tuition organization"); GA. CODE ANN. § 48-7-29.16 (2009) (providing a tax credit of up to \$1000 for individuals and \$2500 for married couples and a cap of seventy-five percent of total tax liability for corporations); IOWA CODE ANN. § 422.11S(1) (West 2012) (allowing a credit equal to sixty-five percent of contribution to scholarship fund); *id.* § 422.12(5)(b) (permitting a tax credit for parents' tuition payments up to \$250).

60. See, e.g., *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013).

basis upon which the state chooses which schools to fund. Even if a program contained no requirements for participating schools, that would simply mean the state had decided that every single private school in the covered geographical area is eligible. Moreover, with both chit and parent reimbursement programs, state education officials are directly aware of which particular private schools the state is effectively paying to educate children, because it receives chits from particular schools or is given the names of the schools through tax returns.⁶¹

Scholarship-fund tax credits or deductions create the appearance of further distancing the state from the private schools in which parents enroll children, but that is illusory. The scholarships consist at least partly of state money; the scheme essentially allows taxpayers to designate use of some of the taxes they owe for payment of tuition at private schools the state has selected rather than for some other government program.⁶² If taxpayers are reimbursed, through a tax credit, for every dollar they contribute to a private school scholarship fund, then the full amount of the scholarship value is really state money. If there is only partial reimbursement, by allowing a deduction for the amount of the contribution or capping a credit, then the state share of the scholarship value is equal to whatever reduction in taxes the contributor experiences as a result of the deduction. With partial reimbursement, the state essentially operates a partial matching fund. And, so long as any portion of a voucher or tax program entails state spending on private schooling, the state is responsible for the consequences.

Donor tax credit programs appear to make decision making entirely private because, unlike with vouchers and tax benefits for parents, the state might never learn to which particular schools the money is going. But the state does know that the money, which as just explained is at least partly state money, is going to some private school and thereby facilitating attendance of a child at a private school. The state must either choose individual private schools at which scholarships qualifying for the tax benefits must be used or else implicitly choose every private school for inclusion in the program by choosing to exclude none. That the state does not know which particular private schools it is effectively subsidizing for any

61. See, e.g., LA. REV. STAT. ANN. § 17:4015(3)(a) (2012) (requiring applicants for vouchers to identify the school a child will attend).

62. See Stephanie Saul, *Public Money Finds Back Door to Private Schools*, N.Y. TIMES, May 21, 2012, at A1 (describing a congratulatory ceremony for a corporation that donated \$650,000 to Pennsylvania's private school scholarship program where the company got ninety percent of that donation back by way of a tax credit, and noting that some taxpayers actually make money by donating because they get back all or most of their donation via state tax credits and also claim a charitable deduction on their federal tax returns).

particular child does not relieve it of responsibility; in fact, it arguably means the state is being even more irresponsible with its spending than it is under other types of programs.⁶³

The essential causal role that state choice plays in all these legislative schemes I include within the term “voucher programs” would be evident to my teenage daughters, even if it escapes the understanding of Supreme Court Justices.⁶⁴ If I give my daughters money for the movies but limit them to one of three currently playing movies, they know that I am paying for the movie, not them, and that I have made a choice to subsidize those three particular movies and no others. If I do not limit their choice of movie, then I have implicitly approved use of my money to pay for any available movie. If my daughters call me from school and say they need to pay fifty dollars right away in order to get a yearbook (teenagers not being known for excellence at advance planning . . .), and I tell them to use their own money for now and get reimbursed by me when they get home, they understand that I am the one who bought the yearbook, having decided that it was a worthy use of my money. Likewise, if my daughter is at basketball practice and calls to tell me she needs fifty dollars right away for the team sneakers, but my ex-wife is picking her up from practice rather than me, I would ask whether her mother could give her the money now and get reimbursed by me later. My daughter would understand that it was I who paid for the sneakers, not her and not her mother, again based on my decision that it is a worthy use of my money. If I agreed to reimburse her mother for only half of the cost, my daughter would understand that half of the money that paid for her sneakers was my money. Finally, if they needed fifty dollars for a yearbook or sneakers and they owed me fifty dollars from some previous transaction, and I told them that instead of repaying that debt they should just pay for the yearbook or sneakers themselves and call it even, they would recognize that I had effectively paid for the

63. *Id.* (“Some states collect little information on the scholarship organizations. When asked how many students switched from public to private schools, Linda Dunn, policy analyst for the Georgia Department of Education, said: ‘We don’t collect that data. We don’t regulate them in any fashion.’”).

64. The Court’s decision in *Winn* rested crucially on a supposition that no state money goes to private schools as a result of a tax program in which Arizona effectively reimburses taxpayers for all or part of their donations to a private school scholarship program by giving them a tax credit for those donations. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011). The Indiana Supreme Court’s decision in *Meredith v. Pence* rested crucially on the equally implausible premise that the state does not benefit a business when it gives citizens money to purchase the business’ services, *Meredith*, 984 N.E.2d at 1227–28, a premise upon which churches could build an argument for state-provided “worship vouchers” or, in more religiously neutral terms, “private-organization ceremony vouchers.”

yearbook or sneakers. Such understanding does not require great economic sophistication.

Thus, with every type of program I include within the description of “voucher programs,” the state knowingly directs some public money to private schools explicitly or implicitly approved by the state for the purpose of enabling parents to enroll their children in those private schools rather than in public schools. As to all programs, then, we should ask what, if anything, the state does to ensure that this public money it is choosing to use to pay for private schooling is actually used to give children a better secular education than they would otherwise receive. Otherwise, it is difficult to conceive of any legitimate justification for the program, and, beyond that, the concern arises that the state is actually making some children worse off educationally.

V. IS THERE ANY ACCOUNTABILITY?

Judicial analysis and scholarly and popular debate have paid some attention to what conditions are imposed on private schools in order for them to receive direct or indirect state subsidies—that is, to be eligible for vouchers or in order for parents who enroll their children in them to qualify for tax-system reimbursement or for state-subsidized scholarships.⁶⁵ But the attention is superficial and manifests little understanding of what it would take to ensure that a school serves the ostensible purpose of the programs. One way of determining whether any regulatory aspect of a voucher program creates real accountability is to ask these two questions: First, are there requirements for participation that do not also apply to licensing of grocery stores? Second, are there requirements for participation that would exclude a jihadist indoctrinatory academy in which students do nothing but watch religious videos?

A. *Most Regulations Attached to Vouchers Apply Also to Grocery Stores*

Nearly all common conditions for participation in voucher programs apply also to grocery stores, which illustrates how irrelevant they are to academic quality. Schools must pass fire and health codes.⁶⁶ That is important, but it is not related to instruction. Some programs require schools to demonstrate

65. Restrictions on eligibility for vouchers, such as a parental income cap or a requirement that students have previously attended a failing school, are normatively significant but not my focus in this Article. Courts and scholars have paid greater attention to those restrictions than to accountability measures.

66. See, e.g., WIS. STAT. ANN. § 118.60(2)(a)(5) (West 2012); see also D.C. CODE § 38-1853.07(a)(4)(A) (LexisNexis 2012) (requiring a certificate of occupancy).

financial viability,⁶⁷ just as a grocery store might be required to carry liability insurance. Participating schools might be required to perform criminal background checks on potential employees and exclude those convicted of certain crimes.⁶⁸ This, too, is necessary; as with similar checks for butchers in a grocery store, such a requirement helps to make customers safer. But it does nothing to ensure that the employees who are hired do their jobs well.

Fallacy 9: Antidiscrimination rules for admissions are important. Reality: What many involved in the voucher debate emphasize are antidiscrimination requirements.⁶⁹ Voucher programs in fact uniformly require that participating schools refrain from racial discrimination in accepting students.⁷⁰ But this requirement likely has little significance in practice. Few, if any, private schools in the United States have explicit race-discriminatory admissions policies, parents in any group who feel unwelcome at a school are not likely to want to send their children to that school anyway, and children would be unlikely to have a positive experience in a school where they are not wanted. Thus, although the possibility that vouchers would facilitate racial segregation has been a legitimate concern of voucher opponents,⁷¹ formally requiring equal opportunity for admissions is not going to prevent that. The state would have to delve more deeply into the atmosphere in a school seeking to participate, and would have to enact a statutory rule requiring education agency officials to exclude schools with a racially hostile environment. A prohibition on racially discriminatory admissions practices has been an easy concession for voucher proponents to make, precisely because schools run by racists are unlikely to have an explicit policy

67. See, e.g., D.C. CODE § 38-1853.07(a)(4)(C); FLA. STAT. ANN. § 1002.421(2)(f) (West 2012).

68. See, e.g., FLA. STAT. ANN. § 1002.421(2)(i); LA. ADMIN. CODE tit. 28, § 501 (2012).

69. See, e.g., Press Release, Mandy Simon, Am. Civil Liberties Union, House Passes Troubling Bill Authorizing Fed. Funds for D.C. Sch. Vouchers (Mar. 30, 2011), available at <http://www.aclu.org/religion-belief/house-passes-troubling-bill-authorizing-federal-funds-dc-school-vouchers>.

70. See, e.g., ARIZ. REV. STAT. ANN. § 15-2402(B)(1) (Supp. 2012) (requiring parents to swear that they will use state money to secure for their child education in certain subjects); D.C. CODE § 38-1853.08(a) (LexisNexis Supp. 2012); IND. CODE ANN. § 20-51-4-3(a) (LexisNexis Supp. 2012); LA. REV. STAT. ANN. § 17:4021(2) (Supp. 2012); WIS. STAT. ANN. § 118.60(2)(a)(4) (West Supp. 2012); IOWA ADMIN. CODE r. 281-12.1(1) (repealed 1991).

71. See, e.g., The Century Found. Task Force on the Common Sch., *Vouchers and Segregation*, in PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS 63, 63-64 (Richard D. Kahlenberg ed., 2003); Simon, *supra* note 69; see also Schneider & Buckley, *supra* note 29, at 135 (discussing studies showing that segregation results from a preference of minority-race parents to have their children in school with others of the same race, as well as from such a preference among some white parents).

excluding children based on race. In any event, nondiscrimination in serving customers is a restriction imposed also on grocery stores, so it does not pertain to the content or methods of instruction in the schools. The same is true of a rule prohibiting discrimination in admissions based on religion.⁷²

These "grocery store regulation" aspects of voucher legislation might incidentally exclude some schools that are educationally inadequate. Organizations operating schools in buildings that cannot pass fire and health codes are likely to be shoestring operations, scammers, or organizations with insufficient resources to hire qualified teachers. If there are any schools that manifestly discriminate in admissions based on race, they are likely to be run by illiberal ideological extremists, and such persons are unlikely to provide a type of education the state values. Nevertheless, the foregoing regulations do not directly encourage, let alone ensure, a good secular education for children. Commentators and courts have manifested little appreciation for the fact that schools can comply with general business regulations yet completely fail to provide an adequate education, and in fact could affirmatively harm children.⁷³

B. School-Specific Regulations

Fear of inadequate education in private schools is hardly an idle concern; ethnographic work and news reports on private schools have exposed both private schools run by scammers and private schools that are indoctrinating institutions providing little secular education.⁷⁴ No one would deny that schools participating in existing voucher programs are extremely varied in size, experience, funding, and institutional aims.⁷⁵ In addition, schools can affirmatively harm children by, for example, psychologically abusing them, stifling their cognitive development with aggressive indoctrination, or simply wasting their time.⁷⁶ It is ironic that so much attention is paid to discriminatory admissions policies and none to racist or sexist teachings imposed on children who are admitted. Such teachings pose a much greater threat to children's well-being than do discriminatory admissions policies, yet no voucher program prohibits participating schools from teaching that enslavement of Africans was appropriate and divinely ordained or that females are inherently inferior to males and should aspire only

72. See, e.g., D.C. CODE § 38-1853.08(a) (LexisNexis 2001).

73. See generally KAHLENBERG, *supra* note 47 (collecting a volume of essays that are predominantly antivoucher yet make no mention of the possibility of educational deprivation in private schools).

74. See DWYER, *supra* note 16, at 13–37.

75. See, e.g., Saul, *supra* note 62 ("Schools participating in the programs range from elite private academies to small, inexpensive programs operating in church education wings.").

76. See DWYER, *supra* note 16, at 37–44; DWYER, *supra* note 1, at 183–86.

to serve men and to take care of a home. What, if anything, do states require of the private schools they subsidize by way of education?

With several existing voucher programs, the answer is straightforward: "nothing." Arizona forthrightly rejects accountability for its Arizona Empowerment Scholarship Accounts.⁷⁷ Its governing statute declares that the program "does not permit any government agency to exercise control or supervision over any nonpublic school" and that "[a] qualified school shall not be required to alter its creed, practices, admissions policy or curriculum" as a condition of participation.⁷⁸ The singular requirement for schools' eligibility to receive Arizona's state-provided scholarships is that they not discriminate among potential customers based on race,⁷⁹ one of the grocery store regulations discussed above. New Hampshire similarly disavows any intent to condition participation in its Education Tax Credit program on compliance with any curricular requirements or submission to any state evaluation of its instructional program.⁸⁰ Pennsylvania and Rhode Island simply require nothing of private schools receiving state money via their tax credit programs, without announcing that fact.⁸¹

Florida's Tax Credit Scholarship program eschews accountability to the state and instead aims to encourage accountability to parents by requiring that participating schools merely give annual student progress reports to parents, administer at least one standardized test per year to students, and report each student's test result to the student's parents.⁸² Oklahoma similarly expects accountability only to parents, regardless of what any particular parents' desires and expectations might be, by requiring

77. ARIZ. REV. STAT. § 15-2404 (LexisNexis Supp. 2012).

78. *Id.* Indiana's voucher statutes similarly declare that:

[T]he department or any other state agency may not in any way regulate the educational program of a nonpublic eligible school that accepts a choice scholarship under this chapter, including the regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school[.]

IND. CODE ANN. § 20-51-4-1(a)(1) (LexisNexis Supp. 2012). However, as discussed below, Indiana does, in fact, indirectly regulate participating schools' educational program by demanding certain outcomes, measured by mandatory standardized tests. Indiana's voucher law also specifies a number of topics and moral principles that participating schools must teach. *Id.* § 20-51-4-1(f); *id.* § 20-51-4-3(a).

79. ARIZ. REV. STAT. ANN. § 15-2401(5). In addition, parents must agree to secure "an education for the qualified student in at least the subjects of reading, grammar, mathematics, social studies and science." *Id.* § 15-2402(B)(1).

80. See N.H. REV. STAT. ANN. § 77-G:9 (LexisNexis Supp. 2012).

81. See 72 PA. CONS. STAT. ANN. § 8703-F (West Supp. 2012); R.I. GEN. LAWS, § 44-62-2(5) (2010).

82. FLA. STAT. ANN. § 1002.395(8) (West 2012).

of schools participating in the Oklahoma Equal Opportunity Scholarship Tax Credit program “academic accountability to parents . . . through regular progress reports.”⁸³ Other states attempt to create at least an appearance of expecting private schools to demonstrate something to the state in exchange for their receiving public money, but for the most part it is only an appearance.

1. Private Accreditation

Several programs require that participating schools be “accredited” or “chartered.”⁸⁴ However, what they all mean by this is approval by a private school accrediting organization, of which there are dozens, mostly religious, and voucher laws do not specify the standards that such organizations must apply.

2. Teach Certain Subjects

Many states prescribe a list of subjects for all private schools, independently of the voucher program,⁸⁵ and some voucher program regulations themselves set out a list of required subjects.⁸⁶ With one exception, however, general private school regulations and voucher program regulations leave schools entirely free to teach the prescribed subjects however they wish, including from an ideologically distorted perspective and in an oppressively authoritarian manner; they do not specify curricular materials or pedagogical approaches that schools must use.

Iowa is unusual in going beyond a list of subject areas to specify a great many specific topics that should be taught and in attempting to dictate, to some degree, an approach or normative orientation—specifically, one that is cosmopolitan, egalitarian, and autonomy promoting.⁸⁷ Its tax credit program requires that participating

83. OKLA. STAT. ANN. tit. 68, § 2357.206(F)(5)(d) (West 2008 & Supp. 2013).

84. See, e.g., GA. CODE ANN. § 20-2A-1(2)(A) (2012); OKLA. STAT. ANN. tit. 68, § 2357.206(F)(5)(a); *id.* tit. 70, § 3-104.7 (West 2005); VA. CODE ANN. § 58.1-439.28(D) (Supp. 2012); WIS. STAT. ANN. § 118.60(2)(a)(7) (West 2004 & Supp. 2012); IND. DEPT OF EDUC., INDIANA CHOICE SCHOLARSHIP PROGRAM: FREQUENTLY ASKED QUESTIONS—ELIGIBLE SCHOOLS 6 (2012), available at <http://www.doe.in.gov/sites/default/files/school-choice/2013-03-18-faqforschools.pdf>; *Member Associations*, VA. COUNCIL PRIVATE EDUC., <http://www.vcpe.org/pages.asp?pageid=109451> (last visited Mar. 26, 2013). To participate in Ohio's statewide EdChoice program, a private school must be “chartered.” OHIO REV. CODE ANN. §§ 3310.02(A), .10 (LexisNexis 2009). One way of becoming chartered is by complying with various provisions in the state's administrative code, but another independent basis is being accredited by a private school association. See *id.* § 3310.10.

85. See DWYER, *supra* note 16, at 10–11.

86. See, e.g., IND. CODE ANN. § 20-51-4-1(f) (LexisNexis Supp. 2012); IOWA CODE ANN. § 256.11(2)–(5) (West 2012); *id.* § 422.11S(5)(b) (West 2011).

87. See, e.g., IOWA ADMIN. CODE r. 281-12.5(5), (8) (2012).

schools be accredited, and its school regulations require accredited private schools to use "a multicultural, gender fair approach"⁸⁸ to instruction, incorporate "[g]lobal perspectives,"⁸⁹ teach subjects such as social studies in a way that reflects the perspectives of women and men and of people of different races,⁹⁰ design their curriculum "to eliminate career and employment stereotypes,"⁹¹ and "apply to all curricular areas the universal constructs of critical thinking, complex communication, creativity, collaboration, flexibility and adaptability, and productivity and accountability."⁹² Whether and how Iowa's education department enforces these "approach" requirements is unclear, however. It seems to be left to subjective opinion on the part of department employees who review schools' curricular plans or do site visits.⁹³ It is significant, though, that Iowa is the only state whose voucher laws mention promotion of cognitive abilities.

3. *Teach Certain Amount of Hours*

Many states specify the minimum number of hours of instruction that students must receive each year in any private school or in a private school participating in a voucher program.⁹⁴ But, of course, no amount of bad instruction or noninstruction adds up to a good education.

4. *Teacher Qualifications*

A few programs require that participating schools employ only teachers with a certain level of education, typically a bachelor's degree and never more than that.⁹⁵ However, a school might employ only one teacher, the bachelor's degree could be from any college anywhere, and the degree could be in a field unrelated to education or to the subject a teacher purports to teach. Ohio statutes mandate that the state education department accept as a sufficient basis for teacher certification a "diploma" from a "bible college" or "bible institute."⁹⁶ Florida has an even weaker teacher-quality condition for participation in its scholarship program; participating schools must "[e]mploy or contract with teachers who hold baccalaureate or higher degrees, have at least 3 years of teaching experience in public or private schools, or have special skills, knowledge, or expertise

88. IOWA CODE ANN. § 256.11; IOWA ADMIN. CODE r. 281-12.5(8).

89. IOWA CODE ANN. § 256.11.

90. IOWA ADMIN. CODE r. 281-12.5(256).

91. *Id.* r. 281-12.5(4).

92. *Id.* r. 281-12.5(17).

93. *Id.* r. 281-12.8(256).

94. *See, e.g.*, WIS. STAT. ANN. § 118.60(2)(a)(8) (West Supp. 2012).

95. *See* D.C. CODE § 38-1853.07(a)(4)(F) (LexisNexis Supp. 2012); OHIO REV. CODE ANN. § 3301.071 (LexisNexis 2009); WIS. STAT. ANN. § 118.60(2)(a)(6).

96. OHIO REV. CODE ANN. § 3301.071(A)(2).

that qualifies them to provide instruction in subjects taught.”⁹⁷ Thus, a school need only employ as teachers people who have “teaching experience” in any school anywhere, or else simply claim that all their teachers have special skills or knowledge.

5. Administer Tests

A significant number of states require that students participating in a voucher program take some of the same standardized tests that public school students take and report the results to the state education agency or to parents.⁹⁸ The great majority of these states, however, never attach any consequence to poor student performance.⁹⁹ Students need not achieve any particular score on the assessment or improve on the assessment from one year to the next in order for them or the school to continue participating in the program.¹⁰⁰ The D.C. program rules appear to leave to the discretion of agency officials which, if any, participating schools will have to administer tests,¹⁰¹ and otherwise require only that organizations that operate schools periodically submit a report to education officials on “the academic growth and achievement of students participating in the program” (as the school operators see it) and the high school graduation rates of students in the program (which depends entirely on what the schools choose to require for graduation).¹⁰²

Indiana attaches some consequence to poor test results, but it is limited to denying a school the opportunity to accept new students; the students who tested poorly can continue receiving state money

97. FLA. STAT. ANN. § 1002.421(2)(h) (West 2012) (emphasis added).

98. See, e.g., LA. REV. STAT. ANN. § 17:391.7 (2001); *id.* § 17-4015(7) (2012); OHIO REV. CODE ANN. § 3301.0710 (LexisNexis Supp. 2012); *id.* §§ 3310.03(D)(2), 3310.14, 3310.15(A)(3), (C), (D); VA. CODE ANN. § 58.1-439.28(D) (Supp. 2012); WIS. STAT. ANN. § 118.60(7)(e); OHIO ADMIN. CODE 3301-11-11 (2012). Iowa requires private schools benefiting from its tax credit programs to administer “valid and reliable student assessments,” and appears to require that this include at least one assessment in reading, math, and science that would make possible a “comparison of the school . . . students with students from across the state and in the nation.” IOWA ADMIN. CODE r. 281-12.8(1)(f) (2012). They might require reporting of retention and graduation rates as well. See, e.g., VA. CODE ANN. § 58.1-439.28(D); WIS. STAT. ANN. § 118.60(6m)(b).

99. Iowa allows schools to set their own criteria for successful outcomes. IOWA ADMIN. CODE r. 281-12.8(1)(f).

100. See, e.g., *Educational Choice Scholarship (EdChoice) Program: Frequently Asked Questions for Nonpublic Schools*, OHIO DEPT EDUC., <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=667&ContentID=46196&Content=137093> (last visited Mar. 26, 2013) (assuring schools inquiring about participation that the law “does not require that students achieve a specific level of proficiency”).

101. See D.C. CODE § 38-1853.08(h) (LexisNexis Supp. 2012).

102. See *id.* § 38-1853.10(b)(1)(A), (B).

to subsidize their attendance at a failing school.¹⁰³ Its voucher law provides that if a participating school has a grade of D or F “for two (2) consecutive years, the department shall suspend choice scholarship payments for one (1) year for new students,”¹⁰⁴ if a school has a grade of D or F “for three (3) consecutive years, the department shall suspend choice scholarship payments for new students . . . until the school” receives a C or higher “for two (2) consecutive years,”¹⁰⁵ and if a school receives an F “for three (3) consecutive years, the department shall suspend choice scholarship payments for new students . . . until the school” receives a C or higher “for three (3) consecutive years.”¹⁰⁶ Given that a rating can be made only after the school has been in operation and has received vouchers for at least a year, there are no consequences in Indiana for operating at an F level until after two years, and then the only consequence is not being able to take on more scholarship students than one already has. Once students have enrolled in a school using a state-provided scholarship, the state will pay for them to remain there indefinitely even if the school receives an F grade year after year.¹⁰⁷

Louisiana similarly makes a show of performance-based accountability, but its protection against state payment for educational deprivation in private schools is even weaker. First, schools are subject to consequences only if they enroll ten or more voucher students per grade.¹⁰⁸ This currently means less than a third of participating schools.¹⁰⁹ Left entirely free of evaluation, therefore, are the many church-basement fundamentalist schools that have fewer than fifty children in the entire school, or really any school that simply chooses to allow only up to nine voucher students per grade. Second, as to those schools that do enroll more than ten voucher children per grade, there is no assessment of their performance until the second year in which a school has collected almost \$9000 of state money per pupil, and at that point, if they are

103. IND. CODE ANN. § 20-51-4-9(a) (LexisNexis Supp. 2012).

104. *Id.* § 20-51-4-9(a)(1).

105. *Id.* § 20-51-4-9(a)(2).

106. *Id.* § 20-51-4-9(a)(3).

107. *Id.* § 20-51-4-9(a)(4).

108. See LA. REV. STAT. ANN. § 17:11 (2001 & Supp. 2012) (leaving it to the state education board to determine whether state-financed private schools have “a sustained curriculum” of sufficient quality); *id.* § 17:4025 (Supp. 2012) (same); John White, *Accountability Is Key to Louisiana School Vouchers’ Success*, TIMES PICAYUNE (July 24, 2012), http://www.nola.com/opinions/index.ssf/2012/07/accountability_is_key_to_louis.html (presenting the State Superintendent of Education’s vision for voucher school accountability).

109. See Mike Hasten, *Questions Surround Louisiana’s School Voucher Program*, TOWN TALK (July 29, 2012), <http://www.thetowntalk.com/article/20120729/NEWS01/207290346/Hasten-Questions-surround-Louisiana-school-voucher-program> (estimating that seventy-five percent of participating schools enroll fewer than forty voucher students).

found to be failing miserably, the consequence initially is merely to be precluded temporarily from accepting new voucher students.¹¹⁰ The next possible consequence—disqualification from the program—can come only after four years of failing—that is, after collecting state money for five years.¹¹¹ Therefore, Louisiana would pay for children to be in a horribly deficient private school for five years before it could decide no longer to pay for this denial of education to those children.¹¹² Moreover, even this weak enforcement mechanism could be eviscerated by an education agency decision to base evaluation of private schools on the most dumbed-down tests available, and Louisiana's Superintendent of Education is avowedly opposed to state supervision of voucher schools, having proclaimed: "[I]t's a moral outrage that the government would say, 'We know what's best for your child' 'Who are we to tell parents we know better?'"¹¹³

6. *Submit to Evaluation by Public Officials*

A few programs make participating schools susceptible to site visits by state education officials, though they do not mandate that such site visits occur for every participating school.¹¹⁴ An important question is whether a state's department of education actually has the power and statutory mandate to exclude academically deficient schools from the program. Voucher program regulations in Iowa and Ohio state that if a private school is not in compliance with statutory requirements or the education agency's standards, the agency *may* withdraw accreditation from the school, but the regulations do not require doing so.¹¹⁵

7. *Other Performance Measures*

Wisconsin requires that participating schools meet *one* of the following requirements: seventy percent of students advance one grade level each year, the average attendance rate is at least ninety percent, eighty percent of voucher students "demonstrate significant

110. White, *supra* note 108.

111. *Id.*

112. See Melissa S. Flournoy, *Voucher Accountability: From Bad to Worse*, LA. PROGRESS (July 24, 2012), <http://www.cloup.org/WordPress/voucher-accountability-from-bad-to-worse/#>.

113. See Simon, *supra* note 30.

114. See IND. CODE ANN. § 20-51-4-3(d) (LexisNexis Supp. 2012) (directing DOE officials to make random visits to five percent of participating schools each year); IOWA CODE ANN. § 256.11(10) (West 2012) (outlining rules for "accrediting" private schools providing that the state department of education will create compliance standards and review schools periodically to determine if they are satisfying the standards, and that participating schools must complete "accreditation compliance forms" and submit to site visits); OHIO ADMIN. CODE 3301-11-11(A)(6) (2007).

115. IOWA CODE ANN. § 256.11(11)(d); OHIO ADMIN. CODE 3301-11-11(B).

academic progress," or seventy percent of families meet whatever parent involvement standard the school might wish to establish.¹¹⁶ Given that only one of these goals must be met, that schools may establish their own bases for advancing students, that a high rate of attendance does nothing to ensure good education while students are present, and that parental involvement likewise has no inherent connection to content or methods of instruction, this requirement does nothing to promote accountability.

8. *Treatment of Students*

The vast majority of programs impose no restrictions on physical or psychological treatment of pupils. Iowa law prohibits schools participating in its subsidized scholarship program from using corporal punishment.¹¹⁷ And its condition for participation that a school must take a "gender fair"¹¹⁸ approach to instruction might rule out sexist treatment of girls. Otherwise, states have manifested no concern about sexist or oppressively authoritarian forms of instruction. The D.C. program rules, in fact, explicitly authorize participating religious schools to engage in sex discrimination.¹¹⁹

In sum, in any existing voucher program, illiberal indoctrinatory academies and fly-by-night voucher opportunists could participate, at least for some years. Undoubtedly, many such schools are deterred from applying for participation in programs that require administration of tests and publication of the results or that require participating schools to submit to site visits. Iowa's subject matter and approach requirements are so potentially intrusive that they probably also scare off many bad private school operators. Opportunists looking for easy money by luring in naïve parents are especially likely to try setting up shops instead in states where there is not even the pretense of regulation. But a bad school determined to get state money in its hands can succeed in any of the programs now in operation.

There is, in fact, evidence of some schools that are, from a secular perspective, bad schools being largely funded through state voucher programs. For example, many religious high schools in Georgia subsisting on state money use textbooks pervaded with religious messages and misstatement of facts driven by religious belief, such as an economics book teaching that "the Antichrist—a world ruler predicted in the New Testament—will one day control what is bought and sold."¹²⁰ In a great number of participating

116. WIS. STAT. ANN. § 118.60(7)(a) (West Supp. 2012).

117. IOWA CODE ANN. § 280.21 (West 2011).

118. *Id.* § 256.11 (West 2012).

119. See D.C. CODE § 38-1851.07(d)(1) (LexisNexis 2011).

120. Saul, *supra* note 62.

schools, creationism dominates the science curriculum.¹²¹ Many schools receiving funding from Georgia do not even provide instruction for the ostensibly mandatory minimum 4.5 hours per school day.¹²² The press in Louisiana has uncovered a large number of Christian schools that are prime beneficiaries of the state's voucher program but that have neither the facilities nor the inclination to provide a good secular education.¹²³ For example, the state's education department approved for program participation the New Living Word School, where children "spend most of the day watching TVs in bare-bones classrooms" and lessons are thoroughly infused with biblical messages,¹²⁴ having as its sole stated mission "to provide a foundation built on biblical principles."¹²⁵ The school almost tripled its enrollment by accepting voucher students, despite not having the required teachers or space to accommodate more students.¹²⁶ Louisiana's education department has also approved for receipt of state money the Upperroom Bible Church Academy in New Orleans, "a bunker-like building with no windows or playground";¹²⁷ the Eternity Christian Academy in Westlake where elementary and middle school students "sit in cubicles for much of the day and move at their own pace through Christian workbooks, such as a beginning science text that explains 'what God made' on each of the six days of creation," ignoring evolution because the pastor/principle believes it best "to stay away from all those things that might confuse our children";¹²⁸ and other schools that "use social studies texts warning that liberals threaten global prosperity; Bible-based math books that don't cover modern concepts such as set theory; and biology texts built around refuting evolution."¹²⁹

Some studies of school choice programs have found that voucher-using children in private schools actually did worse than children in the local public schools on standardized testing, in both math and reading, despite the self-selection that characterizes voucher users.¹³⁰ A recent summary of research found that "there is

121. *Id.*

122. S. EDUC. FOUND., A FAILED EXPERIMENT: GEORGIA'S TAX CREDIT SCHOLARSHIP FOR PRIVATE SCHOOLS 18-19 (2011), *available at* http://www.southerneducation.org/content/pdf/A_Failed_Experiment_Georgias_Tax_Credit.pdf.

123. Simon, *supra* note 30.

124. *Id.*

125. Valerie Strauss, *A Scary (and Telling) School Voucher Story*, WASH. POST (May 31, 2012), http://www.washingtonpost.com/blogs/answer-sheet/post/a-scary-and-telling-school-voucher-story/2012/05/31/gJQAxRgE4U_blog.html.

126. *Id.*

127. Simon, *supra* note 30.

128. *Id.*

129. *Id.*

130. See, e.g., Matthew DeFour, *DPI: Students in Milwaukee Voucher Program Didn't Perform Better in State Tests*, WIS. ST. J. (Mar. 29, 2011),

little evidence that vouchers increase achievement for students who utilize vouchers.”¹³¹ But preoccupation with these aggregate results makes no more sense than does concern with studies of public versus private average test results. A study showing voucher students in a given program on the whole score slightly worse than students in the local public schools should not lead to elimination of the voucher program. Some children might have been much better off educationally as a result of the program, and it would be desirable for the state to continue supporting the schools where that happened. Likewise, a study showing voucher students doing better than their public school counterparts provides no reason to accept the program as it is or to expand it. Regardless of the comparative average performance of students in voucher schools, as a whole, relative to students in public schools, the state should be identifying as early as possible the voucher schools where children appear to be doing worse. In fact, states with voucher programs should be rigorously examining applicant schools *before* including them in the programs to ensure as best they can that every child who receives a voucher will be using it to attend an academically sound school.

CONCLUSION

Voucher programs are proliferating. The lack of real accountability is not troubling enough to a sufficient number of people to prevent this from happening.¹³² Probably most taxpayers see the issue as a zero-sum game; the state will use their money either at public schools or at private schools, and, without knowing much about the private school universe, the taxpayer sees it as a matter of indifference. Liberals who truly wish to improve education and who are willing to part ways with the teachers' unions and their absolutist antivoucher position,¹³³ but who remain skeptical about the motives of voucher proponents, need to focus on uncovering the bad private schools that are receiving state money

http://host.madison.com/ws/news/local/education/local_schools/article_4f083f0e-59a7-11e0-8d74-001cc4c03286.html.

131. RESEARCH FOR ACTION, QUESTIONS AND ANSWERS ABOUT EDUCATIONAL VOUCHERS: FACTS, FIGURES AND A SUMMARY OF THE RESEARCH (2010), *available at* <http://www.researchforaction.org/wp-content/uploads/2011/01/Educational-vouchers-Facts-figures-and-a-summary-of-the-research.pdf>; *see also* JOHN F. WITTE ET AL., THE MILWAUKEE PARENTAL CHOICE PROGRAM LONGITUDINAL EDUCATIONAL GROWTH STUDY: THIRD YEAR REPORT 13 (2010), *available at* http://www.uark.edu/ua/der/SCDP/Milwaukee_Eval/Report_15.pdf (finding “no significant differences in achievement growth in either math or reading between students in MPCP or MPS”).

132. *But see* Forman, *supra* note 25, at 589–90 (noting a study showing that a large majority of the public supports attaching regulatory strings to vouchers to ensure recipients provide a good education).

133. Moe and Hill perceive such a movement growing among Democratic politicians. *See* Moe & Hill, *supra* note 2.

and on pressing state officials to justify the educational deprivation that children in those schools are suffering.

For their part, conservative voucher proponents should be forced to explain if and why they oppose simple but effective requirements for receiving public funding, such as (1) requiring any applicant school that has been in operation for some years to demonstrate either (a) *past* success, as evidenced by positive results on good tests or by state educational officials' observing their operations before approval, or (b) at least past adequacy and a high likelihood of future success with additional resources (for those schools that have the right aims and good administration but have lacked resources); (2) requiring all applicant schools to submit for preapproval an outline of curriculum and a list of texts to be used in mandated subjects; (3) requiring participating schools to employ only state-certified teachers and to have an appropriate faculty-student ratio (or at least as good as that in the local public schools); (4) requiring participating schools to administer good tests (to all their students or just to voucher students, at their election), report the results to the state, and be excluded from participation if they do not produce "passing" results fairly quickly; and (5) subjecting all participating schools to an unannounced site visit at least once in the first year of participation, to assess both adequacy of instruction and proper treatment of students, requiring expeditious correction of any problems, and doing follow-up visits and other forms of monitoring as appropriate. Voucher proponents could not plausibly argue that these requirements would be prohibitive for any established private school that is capable of fulfilling the promise vouchers are supposed to hold. And if they are hungry for some studies showing clear benefits for children from voucher programs, they might just get them if they would support programs that are much more discriminating in qualifying private schools to participate.