Social Meaning and School Vouchers

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SOCIAL MEANING AND SCHOOL VOUCHERS

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The more things change, the more they seem to stay the same: In 1981, I wrote a paper on the constitutionality of school vouchers for a law school course. At the time, it appeared that a sharply divided Supreme Court would reject vouchers, five to four. Two decades later, it appears that a sharply divided Supreme Court might well uphold vouchers, five to four. For this very reason, academics and others continue to fill the pages of law reviews with competing analyses of whether school vouchers violate the Establishment Clause.\(^1\) Far more tellingly, during the 2000 elections, Court watchers claimed that the winner of the presidential race would control the constitutional fate of school vouchers (by, presumably, appointing the Justice who will cast the deciding vote in a constitutional challenge to school vouchers).\(^2\)

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1. Compare, e.g., Michael W. McConnell, Governments, Families, and Power: A Defense of Educational Choice, 31 CONN. L. REV. 847 (1999) (defending constitutionality of school choice), and Ira C. Lupu, The Increasingly Anachronistic Case Against School Vouchers, 13 NOTRE DAME J.L. ETHICS & PUB. POL'y 375 (1999) (same), with Marci A. Hamilton, Power, the Establishment Clause, and Vouchers, 31 CONN. L. REV. 807 (1999) (arguing that vouchers are a demand from powerful religious interests and, as such, may violate the Establishment Clause), and Laura S. Underkuffler, Vouchers and Beyond: The Individual As Causative Agent in Establishment Clause Jurisprudence, 75 IND. L.J. 167 (2000) (depicting voucher plans as an effort to circumvent the prohibition against direct aid to sectarian schools). See also Jesse H. Choper, Federal Constitutional Issues, in SCHOOL CHOICE AND SOCIAL CONTROVERSY 235, 259 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) ("Whether the present Supreme Court would find that the Establishment Clause forbids the participation of parochial schools [in choice programs] appears to depend on Justice O'Connor, who may well be influenced by the specific details of the challenged system.").


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That much of the ongoing fight over the constitutionality of vouchers appears little more than rote repetition of decades-old constitutional arguments cannot be denied. Yet this superficial similarity belies a critical difference between today's voucher wars and those of the early 1980s. Over the past two decades, the social meaning of school vouchers has undergone a radical transformation. In part, this change is about context: increasing emphasis on market-based solutions to social problems, the demise of court-ordered school desegregation, the "secularization" of Catholic schools, and changing attitudes of parents, especially minority parents, towards vouchers. But this change is also about the text of voucher plans, that is, targeted plans that benefit a limited number of parents whose children attend failing schools instead of across-the-board plans that benefit any parent sending her child to a private school.

In the pages that follow, I will detail the changing social meaning of school vouchers and, in so doing, explain why the classic arguments against vouchers seem less salient today than ever before. For example, the claim that vouchers would circumvent school desegregation no longer makes sense. With courts increasingly giving up on mandatory busing, racial isolation in public schools is a far more severe problem today than it was twenty years ago. For this reason, vouchers are often seen (by African Americans and others) as a way to improve the lives of minority students in a world without court-ordered desegregation.

Likewise, the claim that vouchers do little more than subsidize religious parents who opt out of public schools has, in significant respects, been overtaken by a broader debate over school reform. Voucher proponents rarely talk about the inequities of compelling religious parents both to subsidize public education and to pay the cost of private religious education. The focus, instead, is on the propriety of market-driven solutions to a failed public school system. For their part, most voucher opponents talk not about the


wrongness of the state's facilitating private religious instruction, but instead about the need to invest in public schools.5

Before turning to this proof of changing social meaning, I will explain why social meaning does and should matter to the Supreme Court. In particular, I will argue that social meaning affects the Justices' understanding of the facts and, as such, appropriately influences the application of preexisting standards of review as well as the decision to recalibrate those standards in favor of alternative ones.

I. SOCIAL INFLUENCES ON CONSTITUTIONAL LAW6

Just as the Supreme Court leaves its mark on American society, so are social forces part of the mix of constitutional law. True, the Justices work in a somewhat insulated atmosphere. But, as Chief Justice William Rehnquist reminded us, the "currents and tides of public opinion . . . lap at the courthouse door,"7 for "judges go home at night and read the newspaper or watch the evening news on television; they talk to their family and friends about current events."8 As such, "[j]udges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs."9

Constitutional decision making, moreover, is a dynamic process that involves all parts of government and the people as well. Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance. Its power, as the Justices themselves admit, lies in its

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5. For a discussion of opposing arguments, see Matthew Miller, A Bold Experiment to Fix City Schools, ATLANTIC MONTHLY, July 1999, at 15; Gary Rosen & Critics, Are School Vouchers the Answer?, COMMENTARY, June 2000, at 16. Indeed, even law review critiques of voucher plans place increasing emphasis on policy, not legalistic, arguments. See, e.g., Martha Minow, Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It, 49 DUKE L.J. 493 (1999).


8. Id.

9. Id.; see also Max Lerner, Constitution and Court as Symbols, 46 YALE L.J. 1290, 1314 (1937) ("[J]udicial decisions are not babies brought by constitutional storks, but are born out of the travail of economic circumstance.").
"legitimacy," that is, "the people's acceptance of the Judiciary as [being] fit to determine what the Nation's law means and to declare what it demands."¹⁰ This emphasis on public acceptance of the judiciary seems to be conclusive proof that Court decision making cannot be divorced from a case's (sometimes explosive) social and political setting.¹¹

A more telling manifestation of how public opinion affects Court decision making is evident when the Court reverses itself to conform its decision making to the social and political forces beating against it. Witness, for example, the collapse of the Lochner Era under the weight of changing social conditions.¹² Following Franklin Delano Roosevelt's 1936 election victory in all but two states, the Court, embarrassed by populist attacks against the Justices, announced several decisions upholding New Deal programs. In explaining this transformation, Justice Owen Roberts recognized the extraordinary importance of public opinion in undoing the Lochner Era: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."¹³

Social and political forces also played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement, state-mandated flag salutes, the Roe v. Wade trimester standard, the death penalty, states' rights, and much more.¹⁴ Absent popular support, these decisions proved ineffective. In the end, as Justice Robert Jackson wrote, "[t]he practical play of the forces of politics is such that judicial power has often delayed

¹⁰. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992); see also Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 DUKE L.J. 703, 715 (1994) ("[P]ublic acceptance of the Court's role as interpreter of the Constitution . . . enhances public acceptance of controversial Court decisions.").
¹². Much of the same can be said of the demise of strict separation in church-state matters. See infra notes 116-22 (detailing demise of strict separation). As detailed in Part II of this Essay, many of the concerns which animated strict separation review have given way to an era of accommodation and pluralism.
¹⁴. For support of these claims, see Devins & Fisher, supra note 6, at 95 nn.79-84.
but never permanently defeated the persistent will of a substantial majority."\(^{15}\) Consequently, for a court that wants to maximize its power and legitimacy, taking social and political forces into account is an act of necessity, not cowardice.

Beyond politics, courts have good reason to take into account the changing social meaning of the issues before it. When the "facts [underlying an earlier decision] have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification,"\(^ {16}\) a workable system of jurisprudence demands the repudiation of the old rule. In explaining its overturning of *Lochner*-Era decision making, for example, the Court pointed to the Depression and, with it, "the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in [*Lochner*-Era decisions] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."\(^ {17}\)

Short of overturning earlier precedent, courts can look to changed social meanings when applying the same legal rule. Needless to say, the more flawed the underlying facts of the earlier decision, the more likely it is that courts will reach dramatically different conclusions. For example, after the American Psychiatric Association reversed itself in 1973 by concluding that homosexuality is not a psychopathic condition, the courts also reversed course.\(^ {18}\) In rejecting Immigration and Naturalization Service claims that homosexuals were "ineligible aliens" by virtue of their "mental defect," the courts looked to science's changed understanding of homosexuality in sorting out the meaning of "mental defect."\(^ {19}\)

19. *See* Lesbian/Gay Freedom Day Comm. Inc. v. INS, 541 F. Supp. 569, 572 (N.D. Cal. 1982), aff'd., 714 F.2d 1470 (9th Cir. 1983); *see also* Bob Jones Univ. v. United States, 461
Education policymaking exemplifies the Court's willingness to take social and political forces into account in its decision making. Take the case of school desegregation. Beginning with *Brown v. Board of Education*, the Supreme Court allowed its perceptions of elected government preferences to shape its decision making in this area. In an effort to temper southern hostility to its decision, the Court did not issue a remedy in the first *Brown* decision. One year later, the Court issued a weak-kneed remedy, recognizing that "varied local school problems" were best solved by "[s]chool authorities" and that delays associated with "problems related to administration" were to be expected. By again taking into account potential resistance to its decision, the Court engaged in the type of interest-balancing that has set political parameters on judicial participation in equal educational opportunity.

Social and political forces, especially federal government efforts to enforce *Brown* during the 1960s, also figured prominently in the Supreme Court's approval of mandatory busing remedies in *Swann v. Charlotte-Mecklenburg Board of Education*. *Swann*, however, went well beyond elected government preferences. During the Nixon and Reagan administrations, the Court and the elected branches of government fought a pitched battle over busing, a battle that has now abated. In 1991, and again in 1992, the Supreme Court recognized greater state and local control over public schools and, in so doing, narrowed its controversial hard-line position on busing.

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24. See Freeman v. Pitts, 503 U.S. 467, 485-92 (1992) (identifying several factors that supervising district courts should consider when relinquishing control over the implementation of a desegregation plan); Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (recognizing that once a school district complies with a desegregation decree, federal courts no longer retain control over regulatory policy and rules).
In signaling an end to the era of mandatory busing, the Rehnquist Court did more than honor elected-branch preferences. The social meaning of school desegregation had undergone a radical transformation in the 1970s and 1980s. White flight from the cities to the suburbs and, with it, a diminution in the property tax base of inner-city schools cast doubt on the soundness of busing. Furthermore, opinion polls suggested that the minority community disfavored busing. Rather than expansive judicial intervention, minority interests typically favor magnet school programs, vouchers, and other education-related expenditures. Given the absence of support for mandatory assignments and other intrusive remedies, it is little wonder that the courts themselves would tire of continuing judicial supervision of school systems.

The story of school desegregation is relevant for another reason. It calls attention to the fact that private-school controversies, for the most part, are public-school controversies. We care about the racial composition of private schools because it tells us something about the racial makeup of the public schools. Similarly, student performance in private schools serves as a gauge for the quality of instruction in public schools. Finally, the Supreme Court's recognition, in Pierce v. Society of Sisters, that parents have a right to send their children to private schools hinges on the public schools' function as an inculcator of values and, with it, the state's power to teach those moral lessons it deems important.

The 1983 Bob Jones University v. United States decision exemplifies this situation. In affirming an Internal Revenue Service (IRS) ruling that denied tax exemptions to racially discriminatory private schools, the Court emphasized that these schools cannot serve a public function: "[T]he legitimate educational function [of such schools] cannot be isolated from discriminatory practices... Discriminatory treatment exerts a pervasive influence on the entire educational process." This language extends to private schools the universal nondiscrimination principle of Brown. At the same time,

28. Id. at 593-94 (emphasis omitted) (quoting Norwood v. Harrison, 413 U.S. 455, 468-69 (1973)). For further discussion, see infra notes 44-67 and accompanying text.
by refusing to allow civil rights interests to challenge IRS enforcement of this nondiscrimination requirement in *Allen v. Wright*, the Court refused to become the engine for the pursuit of numerical justice. Like *Bob Jones, Allen v. Wright* was a product of its times, specifically, the nation's growing skepticism of mandatory busing and, with it, the use of majority-minority population ratios.

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That the Court takes social and political forces into account cannot be denied. What is often overlooked, however, is that the tugs and pulls of politics make the Constitution more durable. In other words, absent the constraints imposed by social and political forces, the Court's constitutional judgments will be less relevant and hence less stable. Indeed, were the Court to see its constitutional decision making as definitive, the Constitution (and the Court) would suffer. As Alexander Bickel observed: "No good society can be unprincipled; and no viable society can be principle-ridden."

Judicial supremacy yields unworkable solutions, not a more equitable world. "[G]overnment by lawsuit," Justice Jackson wrote, "leads to a final decision guided by the learning and limited by the understanding of a single profession—the law." Consider, for example, the willingness of democratic institutions to resist Court rulings on abortion, affirmative action, busing, child labor, the death penalty, flag burning, the legislative veto, school prayer, voting rights, and religious liberty. Were judicial supremacy to rule the day, there is good reason to think that such challenges

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30. See Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U.PA. L.REV. 635 (1985) (suggesting that the Court's denial of standing to civil rights plaintiffs was a by-product of its views of the case's merits). It is also noteworthy that the Court, in *Milliken v. Bradley*, 418 U.S. 717 (1974), refused to hold nondiscriminating schools in surrounding suburban communities responsible for purposeful segregation in a city's school system. As such, a decision sanctioning nondiscriminating private schools for failing to enroll a sufficient number of minority students would hold private schools to a higher standard than public schools.
32. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLICS 291 (1941).
33. See Devins & Fisher, *supra* note 6 (discussing several of these episodes).
would still take place. The only difference is that the political branches and the people would act in defiance of the Court, declaring something to be the policy of the nation irrespective of the Court's constitutional judgment. It is therefore difficult to see how judicial supremacy would promote stability or nullify majoritarian control of transcendent questions.  

Complex social policy issues, especially those that implicate constitutional values, are best resolved through "the sweaty intimacy of creatures locked in combat." Judges and politicians sometimes react differently to social and political forces. Congress, for example, focuses its "energy mostly on the claims of large populous interests, or on the claims of the wealthy and the powerful, since that tends to be the best route to reelection." Courts, in contrast, are less affected by these pressures, for judges possess life tenure. Accordingly, because special interest group pressures affect courts and elected officials in different ways, a full-ranging consideration of the costs and benefits of different policy outcomes is best accomplished by a government-wide decision-making process. For this reason, courts and elected officials both should be activist in shaping constitutional values.

Consider, for example, the school voucher debate. If the social meaning of school vouchers has undergone a radical transformation, say, between 1980 and 2000, a court considering the constitutionality of vouchers today might reach a different conclusion than one that considered the same question in 1980. For this very reason, had the Supreme Court outlawed an across-the-board voucher scheme in 1980, elected officials today would not treat this decision as having decided, now and forever, the constitutional fate of school vouchers. Otherwise, constitutional

34. For a competing perspective, see Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359 (1997).
37. Witness, for example, the Supreme Court's 1973 decision in Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). The high-water mark of separationist decision making, Nyquist turned down a New York plan allowing a tax credit to low- and middle-income parents who send their children to private schools. Rather than treat this decision as definitive, 2000-era voucher proponents have called upon the courts to rethink the wisdom of Nyquist.
decision making would become stagnant, reflecting the social facts of a different era. Furthermore, by treating an earlier decision as nonbinding and continuing to experiment with alternative voucher schemes, a middle-ground solution might be reached. The Court, for example, could sign off on a targeted voucher scheme, something that is both politically popular and not fraught with the same constitutional infirmities as an across-the-board voucher scheme. In this way, the Court and elected officials would work together in shaping a constitutionally permissible voucher scheme that is right for the times.

Courts, like elected officials, cannot escape “[t]he great tides and currents which engulf” the rest of us.38 Rather than definitively settling transcendent questions, courts must take account of social movements and public opinion. By steering a course that fits within the permissible limits of public opinion, the Court maintains its strength. Under this view, as Ruth Bader Ginsburg put it, judges “participate in a dialogue with other organs of government, and with the people as well.”39

II. THE CHANGING SOCIAL MEANING OF SCHOOL VOUCHERS

What then of school vouchers? Are they little more than an attempt to circumvent Brown’s universalistic demand that there be neither white nor black schools, “but just schools,”40 or are they a market-based solution to the problem of single-race inner-city schools? Correspondingly, who are the principal beneficiaries of vouchers? Are they religious parents who would otherwise send their children to sectarian schools, or poor parents whose children are trapped in failing public school systems? And, for that matter, what is the mission of sectarian schools, especially Catholic schools? Is it the inculcation of religious teachings, or are these schools religious in name only? Finally, what of educational quality? Do private schools do a better job of educating children, or is the question, ultimately, one of choice, that is, the desire to eliminate

financial roadblocks standing in the way of parents who prefer to send their children to private schools?

The answers to these questions are relevant, as the above analysis suggests, because they define the social meaning of school vouchers. The more voucher schemes appear to be about the education of children, especially African Americans, the less reason there is to think that either the Establishment or Equal Protection Clauses should stand in the way of voucher experiments. Put another way: Is the fault line in today's voucher wars defined principally by religion and race, or, alternatively, does the battle over vouchers pit defenders of privatization and markets against teacher unions and others who believe in government-delivered public goods? If the battle, ultimately, is about "markets and schools," it is a policy battle. As such, courts should be reluctant about interceding in this fight—at least until there is reason to think that issues of race and religion are defining the social meaning of school vouchers. 42

My thesis, suggested in the introduction to this Essay, is that the social meaning of school vouchers has undergone a radical transformation over the past two decades. 43 In this section, I will sketch out this transformation. By calling attention to the ways that the 1980 conversation about vouchers now seems entirely beside the point, I will show that courts should be open to 2000-era voucher experiments.

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41. Social meaning and social facts are critically important in the religion area. Consider the so-called "endorsement" test championed by Justice O'Connor. Writing in Lynch v. Donnelly, for example, Justice O'Connor proclaimed that whether a particular religious display constitutes an endorsement of religion is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." 465 U.S. 668, 693-94 (1984).

42. My point here is that courts should allow government to experiment with vouchers. That way the social meaning of school vouchers can be defined by real-world experience, not speculation. See Lessig, supra note 3 (suggesting that courts have reason to defer to government when the social meaning of government decision making is contested).

43. Voucher proposals vary dramatically and, as such, their social meaning will also vary. With that said, reflective of dramatic shifts in education policy, church-state relations, and much more, voucher proposals enacted in the past few years all seem cut from the same cloth. See infra notes 178-92.
The World in 1980

Nineteen eighty was a watershed of sorts for school vouchers. With the Moral Majority, Christian Coalition, and other members of the so-called Religious Right coming “out of the pews into the polls,” Ronald Reagan, in his 1980 presidential campaign, embraced school prayer, creationism, and tax breaks for religious schools. Once elected, Reagan wasted no time repaying his debt to the Religious Right. Through his appointments power, he sought to transform Supreme Court decision making. Perceiving that “the fate of our democracy is intimately intertwined . . . with the vitality of the Judeo-Christian tradition,” Attorney General Edwin Meese, Education Secretary William Bennett, and Supreme Court nominee Robert Bork called for a “relaxation of currently rigid,” “somewhat bizarre,” “secularist doctrine.” In particular, Reagan nominees (unsuccessfully) sought to undo both Engle v. Vitale, the 1962 school-prayer decision, and a 1971 ruling, Lemon v. Kurtzman, that severely limited state efforts to assist parochial schools.

In the midst of his administration’s campaign to recalibrate judicial decision making, Reagan made several bully pulpit speeches to religious conservatives. In 1982, remarking that “God should [never] have been expelled from the classroom,” he demanded that the Constitution be amended to permit individual or group “prayer in our public schools and institutions.” Also in 1982, the Reagan administration sought to restore the tax-exempt status of Bob Jones University, a school that tied its segregationist

49. 403 U.S. 602 (1971).
50. President’s Message to the Congress Transmitting a Proposed Constitutional Amendment on Prayer in School, I PUB. PAPERS 647-48 (May 17, 1982).
practices to religious conviction. In so doing, the administration honored its campaign pledge to "halt the unconstitutional regulatory vendetta launched by Mr. Carter's IRS Commissioner against independent schools." Specifically, under Carter, the IRS had sought to tie federal tax-exempt status to the proportionate representation of minority students in private schools—a decision that prompted 150,000 angry letters from the burgeoning Christian school movement.

But just as the Carter administration miscalculated the potency of the Religious Right (and, more generally, America's growing discomfort with numerical justice), the Reagan administration lost sight of both the power of civil rights interests and the nation's commitment to simple nondiscrimination. With more than 500,000 students circumventing school desegregation remedies by attending segregated private schools in the South, the Reagan policy shift touched a raw nerve. Subject to a barrage of criticism from newspapers, Congress, and civil rights groups, the administration backtracked, submitting legislation to Congress prohibiting the granting of tax exemptions to racially discriminatory organizations. The damage, however, was done. For example, when testifying on a proposed 1982 amendment to the Voting Rights Act, Reagan's Attorney General, William French Smith, prompted a "hearing room full of civil-rights activists [to] erupt[] into laughter" by contending that "the President doesn't have a discriminatory bone in his body."

Further damaging his relationship with the civil rights community, President Reagan appointed nominees who "[did not] worship at the altar of forced busing and mandatory quotas" to his

51. 1980 Republican Party Platform, supra note 45, at 63-B.
52. This episode is discussed in Jeremy A. Rabkin, Taxing Discrimination: Federal Regulation of Private Education by the Internal Revenue Service, in PUBLIC VALUES, PRIVATE SCHOOLS 133, 143-45 (Neal E. Devins ed., 1989).
54. See President's Message to Congress Transmitting Proposed Legislation, I PUB. PAPERS 34 (Jan. 18, 1982).
top civil rights posts. For the administration, busing "ha[d] failed to advance the overriding goal of equal educational opportunity" and, consequently, should have been replaced with "voluntary student assignment program[s], magnet schools," and the like. Moreover, as part of its New Federalism in Education, the administration called for the end of targeted federal relief to school systems subject to busing orders. In its place, the administration proposed a new education block grant, allowing states—who would receive lump sum federal support—to establish their own priorities.

By emphasizing state and local control, the administration once again signaled its desire for education policy to be defined outside the Washington D.C. beltway. For much the same reason, Reagan provoked the ire of teachers unions and others by calling for the elimination of the federal Department of Education. More generally, by making a commitment to an antiregulatory agenda, rather than substantive expertise in the relevant program, the critical prerequisite to a presidential nomination, the administration sought to launch a revolution that would transform government. By seeing themselves in the midst of a holy war, however, administration appointees were often their own worst enemies. As caricatured by Reagan's first Education Secretary, T. H. Bell, these "extremists" would say: "Let the chaos come.... This is part of the revolution! Pragmatism is cowardice and weakness!"

58. Id. at 631.
60. See id. at 1244.
63. On civil rights matters, for example, administration efforts to dismantle affirmative action were an abject failure. See Neal Devins, The Civil Rights Hydra, 89 Mich. L. REV. 1723, 1749-63 (1991).
When it came to school vouchers, for example, Reagan administration efforts fell short. In 1983 and 1985, Congress refused to act on administration proposals enabling poor children to receive vouchers worth roughly $600. While the administration argued "that private enterprise should be encouraged to help provide services now delivered by Government agencies," Democrats and Republicans in Congress both denounced the proposal.

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What would have happened, however, if the administration had convinced lawmakers to enact voucher legislation? More to the point, would courts have understood such legislation as being consistent with, or anathema to, the Supreme Court's Establishment Clause and school desegregation decision making? The answer, I think, is obvious: In the early 1980s, the social meaning of school vouchers could not be reconciled with the values of equal educational opportunity or church-state separation.

First and foremost, Reagan's call for school vouchers appeared part and parcel of his embrace of religious interests. Like his campaign to return God to the public schools, and his efforts to neuter the public school bureaucracy through the abolishment of the Department of Education as well as New Federalism in Education programs, Reagan's private school initiatives were aimed at religious parents disaffected by the "secularization of society and the supposed breakdown of morality that was thought to be its

65. I do not mean to suggest that Reagan saw school vouchers as a way to pay off the Religious Right. For the Religious Right, what mattered most was getting the government out of "God's classrooms." See Neal Devins, Fundamentalist Schools v. The Regulators, WALL ST. J., Apr. 14, 1983. School vouchers, instead, were part and parcel of Reagan administration efforts to emphasize market-based solutions, as well as to gain approval among religious parents. See Radio Address to the Nation on Taxes, the Tuition Tax Credit, and Interest Rates, I PUB. PAPERS 512, 512 (Apr. 24, 1982).

66. See U.S. to Push Plan to Pay for Private Schooling, N.Y. TIMES, Nov. 10, 1985, at 27; see also Robert C. Bulman & David L. Kirp, The Shifting Politics of School Choice, in SCHOOL CHOICE AND SOCIAL CONTROVERSY, supra note 1, at 36, 44. In 1983, Congress also turned down an administration-supported measure to provide a $300 income tax credit for tuition payments to private elementary and secondary schools. See U.S. to Push Plan to Pay for Private Schooling, supra, at 27.

For example, Reagan's effort to restore Bob Jones University's tax-exempt status was designed to placate those Christian evangelicals who had opposed the "unconstitutional regulatory vendetta" of the Carter IRS. More tellingly, in justifying school vouchers, Reagan spoke of the inequity of religious parents "supporting two school systems and only using one." Beyond the unmistakable religious overtones of Reagan's campaign for vouchers, an early 1980s voucher would have had a destabilizing effect on race relations. By opposing mandatory busing, defending the grants of tax breaks to racist schools, and opposing affirmative action, the Reagan administration had antagonized the civil rights community. For example, Benjamin Hooks, then head of the NAACP, saw the President's policies as bringing new "hardship, havoc, despair, pain, and suffering on blacks and other minorities."

More significantly, with two 1979 Supreme Court decisions reaffirming the Court's commitment to systemwide busing predicated on black-white student population ratios, the Court would have greeted with skepticism a voucher plan that may well have

69. See supra notes 51-52 and accompanying text.
70. Radio Address to the Nation on Taxes, supra note 65, at 512. Reagan said: "In some of our large cities, 40 percent of the parochial school students are from minority neighborhoods. Their families pay their full share of taxes to fund the public schools. . . . I think they're entitled to some relief since they're supporting two school systems and only using one." Id.
71. I refer here to an across-the-board voucher. But even a targeted voucher—that is, one in which only poor parents can participate—might raise the suspicions of the civil rights community. For example, by allowing African American students to opt out of school desegregation in favor of attending a predominantly black private school, Reagan's proposed voucher scheme might have further isolated minority and white students.
72. For a partisan accounting of the numerous ways that the Reagan administration provoked the ire of civil rights interests, see NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988).
73. DALLEK, supra note 61, at 70; see also Leadership Conference on Civil Rights, Without Justice: A Report on the Conduct of the Justice Department in Civil Rights in 1981-82 (1982); Washington Council of Lawyers, Reagan Civil Rights: The First Twenty Months (1982); Finn, supra note 55, at 17 (listing the condemnations of various civil rights interests).
74. See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537-40 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 466-67 (1979); see also Edmund W. Kitch, The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus, 1979 SUP. CT. REV. 1, 6 (noting that these decisions assume "that a neighborhood school policy, when combined with any significant residential segregation, is unconstitutional").
complicated judicial efforts to eradicate race discrimination in the schools. Indeed, in the early 1980s, there was reason to think that Catholic schools, which compose the majority of private schools in the United States, contributed to racial segregation. A study of black-white segregation in major cities found that "Catholic schools [were] highly segregated" and that "there [was] no compelling reason to think that a subsidy [or voucher] would reverse the present pattern" of private school transfers increasing racial segregation. In light of this evidence, it is hard to imagine the Justices looking the other way in an effort to uphold school vouchers. This conclusion seems inescapable when the Reagan voucher proposal is considered against the backdrop of other Reagan administration initiatives, including its calling for an end to court-ordered busing and restoring the tax-exempt status of avowedly segregationist schools.

There is another reason that the early 1980s Court would have been reluctant to approve a voucher scheme. By calling for an end to forced busing, a return to school prayer, and greater recognition of the legitimate ways that the government can aid sectarian schools, Ronald Reagan sought to transform the Court. But by making the Court the issue, the Reagan administration effectively asked the Court to do something that it is loathe to do, that is, reverse itself under political fire. For the Justices, "a surrender to political pressure" results in "profound and unnecessary damage" to the Court. Indeed, the Court's habit is to adhere to precedent and declare itself the final word on the Constitution's meaning whenever it feels especially challenged by the other branches. Consequently, while taking stock of the social and political forces

75. Robert L. Crain & Christine H. Rossell, Catholic Schools and Racial Segregation, in PUBLIC VALUES, PRIVATE SCHOOLS, supra note 52, at 184, 185. For a competing perspective, see JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982) (concluding that although minorities are underrepresented in private schools, such schools are nevertheless racially balanced).

76. See supra notes 44-67 and accompanying text.

77. Reagan, of course, sought to transform the Court in other ways—by, among other things, calling for an end to abortion rights and a renewal of states' rights. See FISHER & DEVINS, supra note 11, at 210-19 (abortion), 94-100 (federalism).


79. Id. at 869.

80. For examples, see Devins & Fisher, supra note 6, at 64-65.
surrounding it, the Court cannot lose sight of its institutional legitimacy, that is, the "public acceptance of the Court's role as interpreter of the Constitution." 81

* * *

There is, I admit, a curious feature to the above analysis. Ronald Reagan, not Jimmy Carter, won the 1980 elections. And if the spoils go to the victor, why shouldn't the 1980 election have changed the social meaning of school vouchers? To put it more bluntly: Civil rights interests and teachers unions supported the losing side in the 1980 election; social conservatives supported the winning side. Accordingly, rather than see the fight over vouchers as being about, say, church-state separation, why not see it as being about the repudiation of teachers unions which, after all, are special interests "adamantly opposed to competition in their labor markets, and to any policy that would shrink the market for teacher services"? 82

The answer, I think, is that critical elections—like Reagan's 1980 victory—play an instrumental role in changing social meaning. But no election in and of itself defines social meaning. The 1980 election did not mark the end of either teachers unions or civil rights groups; instead, these special interests remained a potent force in shaping public policy. Likewise, while the Religious Right came of age in the 1980 election, the American voters did not consider 1980 to be a coronation of the Religious Right.

Over time, as the next section will show, the social meaning of school vouchers did change. Ronald Reagan played a big part in this change—by, among other things, questioning the wisdom of big government and, with it, courts who would invoke the Constitution to manage school systems or limit government efforts to assist religiously based social services. In so doing, the "Reagan Revolution" began a shifting of power to communities, families, and markets to assume the responsibilities of big government. Also contributing to the changing social meaning of school vouchers has

81. Tyler & Mitchell, supra note 10, at 715.
82. MYRON LIEBERMAN, THE TEACHER UNIONS 5 (1997); see also Myron Lieberman, The Ruminations of a Right-Wing Extremist, 80 PHI DELTA KAPPAN 229, 230 (1998) (noting that the NEA and the AFT, the two largest teachers unions, do not oppose privatization when it comes to settling grievances and disputes: "they [only] oppose privatization when the services of union members or NEA and AFT allies are involved").
been the "secularization" of religious schools, a growing recognition that students in general, and minority students in particular, may benefit from school choice (especially 2000-era proposals that target students who attend failing schools), and a realignment of power and attitude among Catholics and southern Protestants (the very core of the Religious Right). Finally, unlike 1980, the federal judiciary is today more receptive to this changing social meaning. By appointing Justices more accepting of church-state partnerships and more skeptical of court-managed social reform, Reagan (and to a lesser extent George H.W. Bush) helped reshape judicial attitudes towards school vouchers. 83

The World in 2000

Like 1980, the 2000 election proved to be a watershed for school vouchers. Ballot initiatives in Michigan and California made clear that the school choice movement is (at least for now) a potent political force. 84 Furthermore, the presidential campaign revealed vouchers to be a wedge issue: Al Gore, strongly backed by teachers unions, adamantly opposed vouchers; George W. Bush, looking to opinion polls showing support for vouchers among parents of public school children, embraced vouchers for students attending failing schools. 85 Unlike 1980, however, today's voucher wars barely consider the ways in which voucher schemes either advance powerful religious interests or, undermine court-ordered desegregation. Those arguments appear—to politicians, journalists, and most Americans at least—a relic of times past.

With forty-nine states having launched significant initiatives to improve academic standards in public schools, 86 vouchers have been

83. Consider, for example, Board of Education v. Dowell, 498 U.S. 237 (1991), and Agostini v. Felton, 521 U.S. 203, 236 (1997). In Dowell, four of the five Justices who voted to limit court-ordered busing were either appointed or (in the case of Chief Justice Rehnquist) elevated by Presidents Reagan and Bush. In Agostini, Reagan and Bush appointed or elevated all five of the Justices who voted to overturn a 1985 decision, Aguilar v. Felton, 473 U.S. 402 (1985), which had severely limited federal aid to sectarian schools.
85. See id.; see also Kenneth J. Cooper, Teachers Unions Are Poised to Boost Turnout for Gore, WASH. POST, July 6, 2000, at A9, available in 2000 WL 19617968. On the role of teachers unions in opposing school choice, see Bulman & Kirp, supra note 66, at 46-47.
subsumed into the larger national debate about how best to run our schools. Indeed, when researching this Essay, I looked extensively for popular-press stories commenting on the ways in which politicians discussed the constitutionality of vouchers. For the most part, I searched in vain. This is not to say that law professors, interest group lawyers, and spokespersons for teachers unions do not have an opinion (one they no doubt would gladly share) about the constitutionality of vouchers; rather, it is to say that reporters do not bother asking these folks what they think about the constitutional fate of voucher proposals. Consider, for example, a New York Times story about election-year politics. After noting that "[n]o self-respecting candidate" can give a stump speech without appearing as if they are "running for school board," the story listed vouchers as simply one of several types of reform proposals being bandied about. School desegregation, church-state relations, or the near-certainty of a constitutional challenge to vouchers did not even merit a mention in the story.

Why is it that the social meaning of school vouchers has undergone such a radical transformation? What follows is an elaboration of the various explanations that I suggested in the prior section.

The End of School Desegregation

American schools are more racially segregated today than thirty years ago. In particular, by signaling its disapproval of mandatory busing, the Rehnquist Court paved the way for the dismantling of


87. Some legal analysts made mention of the uncertain constitutional fate of voucher proposals, and one op-ed writer suggested that a Gore victory would result in the appointment of antivoucher Justices. See supra notes 1-2 and accompanying text. But in light of the thousands of stories written about education policymaking, these stories are barely a drop in the bucket—especially considering the success that voucher opponents have had in judicially challenging school choice proposals.


court-ordered school desegregation. Following these decisions, several major school districts began phasing out their desegregation plans, including Boston, Buffalo, Charlotte, Cleveland, Denver, Kansas City, Las Vegas, Nashville, and Oklahoma City. By 1997, nearly 70% of African American students and 75% of Latinos attended schools that were predominantly African American or Latino, with one-third of minority students attending schools in which 90% or more of their classmates were African American or Latino. Furthermore, a 1999 Gallup Poll found that 60% of both African Americans and whites opposed “stepping up efforts to integrate white students with minority students,” preferring, instead, to increase “funding and other resources for minority schools.”

African Americans, especially in recent years, see vouchers as a way out of underfunded, failing public schools. A poll by the Joint Center for Political and Economic Studies found that vouchers were supported by 60% of African Americans overall and 70% of African Americans under 35. In Wisconsin, where a significant voucher experiment is underway in Milwaukee, 73% of low-income African Americans support the program.

90. See supra note 24 and accompanying text.
91. Wendy Parker, The Future of School Desegregation, 94 NW. U. L. REV. 1157, 1157-58 (2000); Tamara Henry, Is School Desegregation Fading?, USA TODAY, July 22, 1999, at A1. With that said, reports of the death of school desegregation may be premature. In a recent study of Fifth and Eleventh Circuit school desegregation cases, for example, Wendy Parker convincingly demonstrates that most “school desegregation litigation continues, with no hint of impending termination.” Parker, supra, at 1159. At the same time, as Parker concedes, this state of affairs is largely a by-product of inertia, that is, the unwillingness of the school board to pursue the termination of school desegregation orders. Parker, supra, at 1159-60.
94. See V-Day for Vouchers, supra note 84, at 27 (citing poll results); see also Sari Horwitz, Poll Finds Backing for D.C. School Vouchers; Blacks Support Idea More Than Whites, WASH. POST, May 23, 1998, at F1, available in 1998 WL 11581968 (noting that 60% of African Americans expressed support for vouchers, while only 43% of whites did).
For African Americans and other minorities, school vouchers are seen as part of the solution, not the problem. That voucher programs now target poor, overwhelmingly minority communities plays a large part in explaining this changed attitude. That court-ordered reforms, if ever successful, have run their course sheds additional light on this shift in opinion. Whatever the explanation, when it comes to equal educational opportunity, the social meaning of today's school voucher experiments is resoundingly positive.

The Changing Face of Sectarian Education

Over the past three decades, the demographics of private education have been turned upside down. In part, there is far less reason to fear vouchers benefitting segregationist academies that justify their exclusionary policies in the name of religious conviction. Following the Reagan administration's debacle in *Bob Jones University*, it is unimaginable that these schools would be allowed to participate in any voucher scheme. Moreover, the raison-d'etre of segregationist academies was court-ordered busing, a practice that has given way to Rehnquist Court decisions favoring local control in education and, with it, neighborhood schools.

Of far greater significance, school choice proposals can no longer be cast as a spoils system benefitting politically powerful Catholic parents. Catholic schools no longer dominate the world of private schooling. In the early 1970s, two-thirds of all private schools were Catholic schools. In some states, more than 90% of students

96. See infra notes 178-92 and accompanying text (describing some voucher programs). At the same time, there is a danger in an open-ended voucher plan. For example, noting that "African-American and Latino students in impoverished areas . . . will [disproportionately] lose out in any real competition" for slots to high-quality private schools, Martha Minow and other voucher critics are correct in arguing that choice reforms "could undermine equality goals unless there are direct efforts to maintain and enforce them." Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 280-81 (1999). Perhaps for this reason, Kweisi Mfume, president of the NAACP, has broken rank with most African Americans, dubbing vouchers a "terrible threat." See Miller, supra note 5, at 15.

97. See supra notes 51-55 and accompanying text.

98. See supra note 24 and accompanying text.

99. For the most comprehensive treatment of this subject, see ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* (1993). For a law review article that makes good use of Bryk's findings, see Lupu, supra note 1.

100. See Diane Gertler & Linda A. Barker, U.S. Dep't of Health, Educ. & Welfare,
attending private schools went to Catholic schools, a fact that greatly influenced the Supreme Court in a string of 1970s decisions limiting state aid to private schools. Specifically, perceiving that powerful Catholic interests pushed for government aid to help finance a Catholic-only school system, the Court struck back, severely limiting such aid by speaking (without meaningful empirical support) "about the pervasive religious indoctrination thought to accompany the system of Catholic education." By the late 1990s, roughly 30% of private schools were Catholic, with one-half of all private school students attending them. More strikingly, between 1970 and 2000, the number of non-Catholics attending Catholic schools had grown from 2.7% to 13.4%. In fact, at some Catholic schools (including Catholic schools participating in Milwaukee's voucher experiment) non-Catholics outnumber Catholic students. All in all, it is nearly certain that the majority of today's sectarian school students are non-Catholic.

The major impetus for change in Catholic schools was 1965's Vatican II, an ecumenical council that "has been aptly described as a paradigm shift from medievalism to postmodernity in the images of the Church and its relationship with the world." Through its pastoral constitution, The Church in the Modern World, Vatican II placed increasing emphasis on the social mission of the Church and, with it, the need to dialogue with all people, including adherents to other faiths. Accordingly, the Catholic Church has become more

102. Lupu, supra note 1, at 385. Ironically, Catholic schools, in significant measure, came of age at the turn of the twentieth century, a time when anti-Catholic prejudice essentially compelled the creation of a separate school system. See David B. Tyack, The Perils of Pluralism: The Background of the Fierce Case, 74 AM. HIST. REV. 74 (1968).
105. See id. (discussing one such school where 80% of the students were non-Catholic). Many of these non-Catholics are Protestant African Americans. See William Sander, Studies Vouch for Private Schools, CHI. SUN-TIMES, Jan. 5, 1999, at 21, available in 1999 WL 651761.
106. BRYK ET AL., supra note 99, at 46.
107. See id. at 48.
public in its functions, creating, if you will, "a massive impetus towards the deprivatization of religion," that is, a chiseling-away of the "reigning structures that have long organized understandings of religious and secular life." From 1970 to 2000, Vatican II's influence has been extraordinary. Starting in the 1970s, many parents rejected Catholic schools that pursued then-popular innovations like an expanded personal development curriculum. Because of increasing openings in their schools, Catholic educators pursued their "broadly shared institutional purpose of advancing social equity" by reaching out to (often non-Catholic) inner-city students. Over the past thirty years, moreover, there has been a precipitous decline in the number of priests and nuns, resulting in an overwhelming number of lay teachers in Catholic schools. Specifically, between 1960 and 1995, the number of religious and ordained staff per thousand Catholics dropped 54%. By 1998, over 90% percent of Catholic school teachers were lay persons. Furthermore, most of these teachers were under the age of forty-five and thus had been educated in the

109. Id. Teitel's concern is far broader than changes in the Catholic Church spurred on by Vatican II. See generally JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD (1994) (discussing the deprivation of religion, including analysis and comparison of five case studies from four different countries).
110. See BRYK ET AL., supra note 99, at 300.
111. Id. It may also be the case that Catholic educators have watered down their religious message, in part to reach out to non-Catholics. For this very reason, some fear that vouchers "could become a Trojan horse for government meddling in private education," Joe Loconte, Paying the Piper, POL'Y REV., Jan. 1, 1999, at 30, available in 1999 WL 8573517, and, as such, could undermine the mission of religious schools. See id.; see also James G. Dwyer, School Vouchers: Inviting the Public Into the Religious Square, 42 WM. & MARY L. REV. 963 (2001) (arguing that children's interests are served by voucher plans that see to it that all private schools satisfy state-prescribed standards); Stephen Macedo, Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values, 75 CHI.-KENT L. REV. 417, 436 (2000) (noting and ultimately endorsing the need for sectarian schools that receive vouchers "to redefine themselves as institutions and communities more attuned to public values").
post-Vatican II era. Furthermore, an exponential rate of interfaith marriages is contributing to the changing face of the Catholic Church and, with it, Catholic schools. None of this is to say that Catholic schools have somehow become sanitized of religion. Rather, it is to say that the social meaning of attending a Catholic school has changed. Today, these schools—reflecting Vatican II, market forces, and a diminishing clergy—are less overtly religious and, consequently, more a melting pot of different faiths and beliefs.

**Religion and the Public Schools**

Over the past two decades, religion has played an increasingly visible role in the nation's public schools. The "political, religious and legal forces that had briefly converged to produce the wall of separation [between church and state] began to collapse," so that separationism had been replaced by a "new vision of equal treatment . . . which[, while embracing religious expression,] insists that [the] religious activity should be initiated and controlled by individuals rather than by the state." Witness, for example, the 1984 Equal Access Act (Act), legislation that prohibits any public secondary school receiving federal funds from denying equal access to students who wish to conduct a meeting devoted to religious objectives. Frequently referred to as the "godson of school prayer," the Act responded to perceived "State hostility toward religion." As Jerry Falwell said: "We knew we couldn't win on school prayer but equal access gets us what we wanted all along." In particular, as Act sponsor Jeremiah Denton observed, because of

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114. See BRYK ET AL., supra note 99, at 143-44.
118. See id. § 4071. In 1990, the Supreme Court upheld this legislation, holding that Congress had every right to conclude that "religious speech in particular was valuable and worthy of protection." Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990).
court rulings “there was a sealed door to keep any practice of
religion out of the schools. Now that seal has been broken.”

The Act is revealing for another reason. In 1984, the Equal
Access bill appeared to be little more than special interest
legislation designed to placate the Religious Right. Indeed, after
church-state separationists helped stall the bill in Congress, Ronald
Reagan—at the behest of the Religious Right—worked overtime for
its passage. Specifically, by threatening to veto a massive school aid
bill, Reagan helped push The Act through Congress. By 1995,
however, The Act had won wide support throughout the nation.
Noting that he “never believed that the Constitution required our
schools to be religion-free zones, or that our children must check
their faith at the schoolhouse door,” Bill Clinton directed
Education Secretary Richard Riley to issue guidelines regarding
religious expression to every school superintendent in the
country.

Participation in religious activities also appears to be on the rise.
Challenge 2000, an umbrella group of about fifty Christian youth
organizations, estimates that more than 10,000 student-run
Christian clubs exist in the nation’s secondary schools. For
example, more than 3 million students now gather around their
school flagpoles to pray. These on-campus activities, according to
a 1998 Washington Post report, “reflect how, after years of national
confusion, anger and litigation sparked by the Supreme Court’s
1962 [school prayer] ruling, a broad new consensus has emerged on

122. James E. Wood, Jr., Equal Access: A New Direction in American Public Education,

123. Cf. Statement on Signing the Education for Economic Security Act, 2 PUB. PAPERS
1129, 1130 (Aug. 11, 1984) (“It has been the consistent policy of this administration to
support the right of students... to meet voluntarily for religious purposes in school facilities
...”).


125. See Memorandum on Religious Expression in Public Schools, 2 PUB. PAPERS 1083,
1085 (July 12, 1995).

126. See Stephen Braun, Divide in Schools is More than Spiritual, L.A. TIMES, May 9,
1998, at A1, available in 1998 WL 2425859; Caryle Murphy, At Public Schools, Religion
Thrives: Students of All Faiths Increasingly Active, WASH. POST, May 7, 1998, at A1,
available in 1998 WL 11575080.

127. See Alana Baranick, Teens Tuned to a Higher Power, CLEV. PLAIN DEALER, Sept. 17,
what is permissible and forbidden when it comes to religion in public schools."\textsuperscript{128}

Further reflecting the changed social meaning of religion in the public schools, many school districts across the nation are beginning to offer classes on the Bible as literature as well as discussing the impact of religion on Western civilization.\textsuperscript{129} Though these classes remain rare, there are more of them than ever before, especially because a growing number of educators and interest groups view teaching about the Bible as "vital to a well-rounded education."\textsuperscript{130} Consequently, while the Supreme Court remains steadfast in refusing to allow state-sanctioned prayer in the public schools,\textsuperscript{131} there is a far greater recognition today (as compared to 1980) that religion plays a vital, beneficial role in the lives of public school students. In this way, the public school norm of separatism has given way to one of religious pluralism, that is, the idea that, while it may not embrace a particular religious practice, government ought to facilitate private expressions of religious faith.\textsuperscript{132} Accordingly, as compared to 1980, there is far less reason to see vouchers as a wedge separating overtly religious private schools from completely secularized public schools.

\textsuperscript{128} Murphy, supra note 126, at A18.

\textsuperscript{129} See Mireya Navarro, Florida Case Highlights Conflicts on Use of the Bible as a Textbook, N.Y. TIMES, Feb. 17, 1998, at A1, available in LEXIS, News Library, Nyt File. Notwithstanding this renewed interest in the religion-based instruction, the vast majority of public school systems treat religion-based topics as anathema to public schooling. For a survey and analysis, see Jay D. Wexler, Beyond the "New Consensus": Teaching About Religion and the Challenges of Civic Education (unpublished manuscript, on file with author).

\textsuperscript{130} Craig Timberg, Bible's Second Coming: Scriptures Returning to Public Schools as Text for History and Literature, WASH. POST, June 4, 2000, at A1, available in 2000 WL 19612663. By way of contrast, studies released in the mid-to-late 1980s found that religion had been systematically excluded from the public school curriculum. See, e.g., O.L. Davis, Jr., Looking at History: A Review of Major U.S. History Textbooks 3-4, 11 (1988); Paul C. Vitz, Religion and Traditional Values in Public School Textbooks: An Empirical Study 3-7 (1985).


\textsuperscript{132} For a critical assessment of this evolution, see Martha McCarthy, Religion and Education: Whither the Establishment Clause?, 75 IND. L.J. 123 (2000). See also John O. McGinnis, Creating Order from Below: The Supreme Court's New Jurisprudence of Social Discovery (describing Santa Fe and other 1999-2000 decisions as part of a pervasive movement towards decentralization and private ordering) (unpublished manuscript, on file with William and Mary Law Review).
Religion & Politics in the New Millennium

Two thousand-era church-state relations are different for another reason. Unlike two decades ago, when Ronald Reagan's private school initiatives seemed inextricably linked to his campaign debt to the New Right, there is far less reason to look at vouchers as being a handout to powerful religious interests. In part, as I have already suggested, this is a by-product of the increasing emphasis on nondenominational outreach programs by the Catholic Church and other religions, as well as changes in the practices of both Catholic and public schools. Correspondingly, public expressions of religious faith no longer seem out of place in the public square. Indeed, Democratic vice presidential candidate Joseph Lieberman was celebrated for his public religiosity.

There is, however, another explanation for this phenomenon, namely, the changing realignment of religious interests in American politics. Today, there is no longer a group—the Religious Right—that dominates public discourse about church-state relations. And while the Religious Right remains a factor in politics, it appears a shadow of its former self. Christian activists who once sought to "remake the secular world in God's image now seek only to escape that world." Furthermore, recent years have witnessed a reversal of southern Protestants on the question of state aid to religion. Rather than opposing such aid, southern

133. I do not mean to suggest that Reagan's embrace of school choice initiatives was championed by the Religious Right, but rather that the social meaning of Reagan's private school initiatives, including vouchers, was linked to Reagan's alliance with religious interests.

134. See supra notes 99-115 and accompanying text.


137. Kelly, supra note 136, at A17. Correspondingly, over the course of the past two decades, the Religious Right—notwithstanding its rhetoric to the contrary—has had relatively little influence on American politics and society. See Andrew M. Greeley & Michael Hout, Measuring the Strength of the Religious Right, 116 CHRISTIAN CENTURY 810 (Aug. 25, 1999).
Protestants now support it. The explanation lies in "a broader religious realignment involving the rise and fall of anti-Catholicism."\footnote{138}

All of this suggests a greater willingness on the part of religious interests to both tolerate and work with each other. For example, in pushing through the enactment of legislation designed to provide broad statutory protections for religious liberty, the Religious Freedom Restoration Act, the Coalition for the Free Exercise of Religion spanned "ideological and religious lines,"\footnote{139} making it "one of the broadest coalitions ever assembled to support a bill before Congress."\footnote{140} By working together this way, fears of a single religious group's (whether it be the Religious Right or the Catholic Church) capturing the White House or Congress have given way to religious pluralism and toleration. As such, there is less reason for the Court to view the Establishment Clause as a mechanism to protect relatively weak religious interests from powerful ones. Instead, the changing face of church-state relations suggests that the Court should take a more accommodationist stance to state aid to religious organizations.\footnote{141}

Privatization

Over the past two decades, the idea that government will provide for education and other basic needs has collapsed "as liberals and conservatives lost confidence in the ability of government to provide

\footnote{138. Rosen, \textit{supra} note 116, at 42. It is also noteworthy that Ralph Reed and other leaders of 2000-era evangelical politics have worked hard at purging racism from their ranks. \textit{See generally} NINA J. EASTON, \textit{GANG OF FIVE: LEADERS AT THE CENTER OF THE CONSERVATIVE CRUSADE} (2000). In particular, by preaching religious tolerance and racial diversity, the Religious Right has muted much of the divisiveness that characterized church-state relations.}


\footnote{141. For arguments that the era of strict separation is over, see McConnell, \textit{supra} note 1, at 852-59; Rosen, \textit{supra} note 116, at 40.}
welfare and education services in the inner cities."¹⁴² In its place, increasing reliance on privatization of the public sector has taken hold. This privatization movement is profound. Grounded in increasing skepticism of centralized government's ability to produce anything but special interest legislation, the private sector is now looking to "decentralize the setting of social norms and subject them to more rigorous forms of competition."¹⁴³ School choice, whether it be vouchers, charter schools, or the turning-over of public schools to private businesses, is part and parcel of this movement towards privatization. In this way, the social meaning of school choice has been transformed by "a tidal change in the role of governments in providing for basic human needs."¹⁴⁴

This ongoing shift away from the social reforms of the New Deal and Great Society dates back to the deregulatory initiatives of the Carter Administration, although it was not until the Reagan Administration that the deregulation movement began in earnest. For Reagan, the war against Big Government took the shape of, among other things, a Task Force on Regulatory Relief and a determination to appoint agency heads on the basis of the fervency of their belief in downsizing government.¹⁴⁵ By 1992, the privatization movement had taken hold.¹⁴⁶ Bill Clinton, running as a "New Democrat," embraced this ideology.¹⁴⁷ By 1995, The

¹⁴². Rosen, supra note 116, at 42; see also Christopher H. Schroeder, Causes of the Recent Turn in Constitutional Interpretation, DUKE L.J. (forthcoming) (copy on file with author).

¹⁴³. McGinnis, supra note 132, at 2ms. The Supreme Court, sensitive to this shift, has embraced decentralization and private ordering by, among other things, reviving federalism and protecting and facilitating civil and religious associations. See id.

¹⁴⁴. Minow, supra note 5, at 499; see also id. at 500 ("Taking the place of social welfare guarantees are policies intended to harness the competitive efficiencies of the free market and to promote individual consumer choice.")


¹⁴⁶. At the very least, the rhetoric of government had changed. George H.W. Bush, for example, spoke at length about deregulation while launching a significant expansion of government's regulatory power. See Jonathan Rauch, The Regulatory President, 23 NAT'L J. 2902 (Nov. 30, 1991). For my purposes, it does not matter whether government in fact privatized. My argument concerns the changing social meaning of school vouchers, not whether people's beliefs about privatization are mistaken.

¹⁴⁷. See Democrats' Document has Echoes of Perot, ORLANDO SENTINEL, June 13, 1992, at A10, available in 1992 WL 10607842 (stating that the draft Democratic platform included the phrase "[w]e reject the big government theory that says we can hamstring business, create a program for every problem and tax and spend our way to prosperity.") (emphasis
Economist reported that “[e]very year privatisation gains in popularity in America . . . . Once seemingly unassailable redoubts of the public domain have been conquered.”148 In 1996, public administration scholars bemoaned “the recent glorification of the private market and the demonization of public bureaucracy,” noting that such a shift in attitude has “created a considerable challenge to the intellectual credibility, norms, and integrity of public administration as a field of study.”149

When it comes to education, this distrust of bureaucracy has manifested itself in one of two entirely predictable ways. For public schools, there is an increasing emphasis on standards—whether it be comprehensive examinations or meatier curriculum requirements.150 Furthermore, there is an increasing emphasis on private-sector solutions, including charter schools, vouchers, and the turning-over of public schools to the Edison Project and other nationwide contractors.151 In particular, by leaving it to parents—not bureaucrats—to play a leadership role in defining their children’s education, modern-day reforms perceive schools as markets and parents as consumers who will do right by their children.152

added); Democrats’ Platform Draft Criticizes ‘Big Government,’ CHI. TRIB., June 26, 1992, at 5, available in 1992 WL 4494969 (noting that “[t]he 1992 platform reflects an effort by some Democrats to move away from old-style liberalism, rooted in the political orthodoxy of the New Deal and labor unions, and toward a more centrist position”).


152. For a defense of parental prerogatives in this regard, see Steven Gilles, A Parentalist Manifesto, 63 U. CHI. L. REV. 937 (1996). For a critique of this practice, see JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS (1998) (suggesting that some parents have aims in choosing schools different from giving their children a good secular education).
Charter schools, for example, are public schools that operate outside many of the rules and regulations of school-board run public schools.¹⁵³ The idea is that bureaucracy stifles innovation and, consequently, charter schools serve as “incubators for new ideas that can be adapted by the public schools.”¹⁵⁴ By competing with state-managed public schools, however, charters are inextricably linked to vouchers and, not surprisingly, generally opposed by teachers unions, who see them as a wedge in the war over the future of public education.¹⁵⁵

Much more than vouchers, where longstanding support of public education stands as an extraordinary roadblock to an across-the-board voucher experiment, charters portend a dramatic restructuring of public schooling. Over the past decade, the charter school movement has caught fire: thirty-six states and the District of Columbia have authorized charter schools, and in 1998 Congress enacted The Charter School Expansion Act of 1998,¹⁵⁶ fostering the development of high-quality charters.¹⁵⁷ At the same time, the voucher wars paved the way for charters, a mechanism to allow for school choice without abandoning public schooling. In this way, today’s fight over vouchers seems linked to a broader debate about markets and schooling and, more generally, to an increasing shift towards privatization.

Measuring Educational Quality

More than anything, the changing social meaning of school vouchers is a by-product of a growing skepticism of the quality of

¹⁵³. For overviews of charter schools and the charter school movement, see Bulman & Kirp, supra note 66, at 36, 52-60; David Osborne, Healthy Competition, NEW REPUBLIC, Oct. 4, 1999, at 31.
¹⁵⁴. Bulman & Kirp, supra note 66, at 54. Typically created by parents, these schools receive their funding from public school systems on a per-student basis. As such, the lifeblood of charter schools is parental choice: to succeed, these schools must attract and keep students.
¹⁵⁵. See Osborne, supra note 153.
instruction in our public schools. In 1983, the National Commission on Excellence in Education published *A Nation at Risk*, a scathing report about the nation's educational system. In language that became a battle cry to the modern school reform movement, the Report began by declaring

> Our nation is at risk.... [T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity....

> ... If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war.

*A Nation at Risk* had a galvanizing effect. Ronald Reagan abandoned his campaign to dismantle the Department of Education; state lawmakers began exploring merit pay for teachers, raising high school graduation requirements, and initiating student competency exams; and education moved to the front burner of newspapers and network news. And while the report did not call for vouchers or other private-school-focused reform, its emphasis on teaching basics, higher achievement standards, and parental involvement called attention to the differences between public and private schools.

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158. My point here is that public attitudes towards the comparative advantages of public versus private schools have changed. And while I think there is sound empirical support justifying this changed attitude, the point I am making is about the changing social meaning of vouchers, not the soundness of vouchers as a matter of education policy.


160. *Id.*

161. See Terrel H. Bell, *The Thirteenth Man* 114-59 (1988). Notwithstanding this widespread support for *A Nation at Risk*, some defenders of public schooling argue that America's public schools in fact have done a remarkable job educating a diverse citizenry. For recent articulations of this argument, see Peter Schrag, *The Near-Myth of Our Failing Schools*, Atlantic Monthly, Oct. 1997, at 72. Furthermore, since the release of *A Nation at Risk*, public schools have become more demanding and, consequently, there has been a modest rise in achievement tests and other measures of student quality. See Thomas M. Smith, *Findings from the Condition of Education 1994 No. 1: High School Students Ten Years After "A Nation at Risk"* (U.S. Department of Education, Office of Educational Research and Improvement 1995).
In the years following *A Nation at Risk*, social scientists and others have released numerous reports calling attention both to the strengths of private schools and the weaknesses of public ones.\textsuperscript{162} And while the findings of some of these studies have been challenged,\textsuperscript{163} these studies nevertheless have played an instrumental role in shaping public discourse concerning school-choice proposals. Of particular significance, a 1990 study by John Chubb and Terry Moe concluded that the problem with public schools was that they were the product of an institutional setting that was highly bureaucratized and subject to centralized control, which negatively affects everything from teacher morale and professionalism to union influence to choice of curriculum.\textsuperscript{164} Private schools, in contrast, were subject to market control, which leads to a decentralized system that is competitive and, consequently, more effectively organized.\textsuperscript{165}

Consider, for example, the following studies comparing student performance in private and public schools. A 1990 Rand Corporation study of minority students and those from low-income families found that students in Catholic high schools averaged 803 on the SAT, compared with 642 by those in regional public schools and 715 by those in magnet schools.\textsuperscript{166} In addition, Catholic high school students score higher on government-sponsored tests: 3.6%...

\textsuperscript{162} Before *A Nation at Risk*, in 1981, James Coleman and others released a significant, controversial study concluding that private high schools provide a better education than public ones. \textit{See Coleman et al., supra} note 75; \textit{see also} Richard J. Murnane, \textit{A Review Essay-Comparisons of Public and Private Schools: Lessons from the Uproar, 19 J. Hum. Resources} 263 (1984) (discussing Coleman and his critics).


\textsuperscript{164} \textit{See John E. Chubb & Terry M. Moe, Politics, Markets, and America’s Schools} (Brookings Institution 1990).

\textsuperscript{165} For Chubb and Moe, increasing the funding of public schools would not cure this fundamental flaw in public education. Private schools spend less per pupil than public ones, including less on teacher salaries. \textit{See id.} at 103, 144. Ultimately, even if family background, socioeconomic status, and other factors were held constant, private schools would inevitably outperform public ones, for students gain from attending an effectively organized school. \textit{See id.} at 129.

\textsuperscript{166} \textit{See U.S. Catholic Secondary Schools, Fact Sheet, at http://www.ncea.org/NewsInfo/FactSheets}. It is also noteworthy that African American and Latino students who graduate from Catholic high schools are three times more likely to earn a college degree (25% compared to 8.5%). \textit{See id.}
in math, 7.9% in reading, and 3.76% in science. More tellingly, a 1998 study of four urban school districts where some type of school choice program is in place found that "reading and math scores are higher, per pupil costs are lower, segregation by race, income, and ethnicity is unaffected, parents are more involved in the schools, the curriculum is more challenging, and the environment is more disciplined." Finally, a controversial August 2000 study comparing public and private school students with similar motivations and family backgrounds found that some students participating in voucher programs have moved ahead of their public school classmates.

Over time, of course, one or more of these studies may be called into question. The fact remains that religion has taken a back seat in today's debate over school vouchers. The focus, instead, is education quality, something that recent polling data reinforces. For example, educational quality is cited as the most important factor of parents' decisions to participate in Cleveland's and Milwaukee's targeted voucher plans. Teaching approach and

167. See id.
168. McConnell, supra note 1, at 850.
169. See William G. Howell et al., Test-Score Effects of School Vouchers in Dayton, Ohio, New York City, and Washington D.C.: Evidence from Randomized Field Tests (Sept. 2000), at http://data.fas.harvard.edu/pepg.htm. Voucher proponents also contend that school choice will facilitate good citizenship. For example, arguing that public schools are obligated to balance the dramatically different values of a multicultural society, Michael McConnell claims that the problem with public schools is that they cannot teach from a morally coherent perspective. See Michael W. McConnell, Education Disestablishment: Why Democratic Values are Ill-Served by Democratic Control of Schooling, NOMOS (forthcoming, copy on file with author). In contrast, because dissenters can go elsewhere, private schools "are in a better position to teach from a coherent perspective. . . . [They] are less tempted to water down the moral curriculum for the purpose of avoiding controversy. Moreover, as institutions of choice, they are likely to experience a greater degree of cooperation between families and schools." Id. at 51. For a competing view, see Macedo, supra note 111 (arguing that government regulation, not decentralization, is the only way to ensure that schools participating in voucher programs advance liberal democratic values).
style, disciplinary environment, safety, and the general atmosphere of the school were also cited by an overwhelming number of parents (75%); religion, in contrast, was mentioned by just 37% of parents. National polling data also suggests that public support for vouchers has steadily grown in recent years. Between 1993 and 1998, opposition to "allowing parents to choose a private school to attend at public expense" has declined from 74% to 50%, with support almost doubling (from 24% to 44%). Among parents of public school students, moreover, 60% now support vouchers (as compared to 51% in 1994). This change in public attitudes, no doubt, is traceable to the growing recognition that today's fight over school choice is about educational quality. One consequence of all this is that religion plays, at best, a minimal role in today's voucher wars; the focus, instead, is how best to educate our children.

* * *

How should courts take into account the changing social meaning of school choice? Remember, it is both inevitable and desirable that courts consider changing social conditions. At the same time, courts are not obligated to approve any and all voucher schemes simply because the social meaning of school choice has changed over the past two decades. One can hypothesize, for example, a voucher scheme that only benefits parents who presently send their children to church-affiliated schools or, alternatively, a voucher scheme designed to transform a racially integrated school system into a segregated one. These proposals are patently unconstitutional; in these cases, the changing social meaning of school choice is simply beside the point.

What the changing social meaning of vouchers should do is affect the ways that judges understand the facts before them. A voucher scheme that, in 1980, undermined both equal educational opportunity and the Establishment Clause might, in 2000, seem perfectly acceptable. In part, this means that Establishment Clause

172. See id.
173. See The 30th Annual Phi Delta Kappa / Gallup Polls of the Public's Attitudes Towards the Public Schools, at http://www.pdkintl.org/kappan/kp9809-1a.htm (last modified Aug. 12, 1998). African American parents are far more supportive of vouchers than are whites. See supra notes 94-96 and accompanying text.
174. See supra note 96 and accompanying text.
175. See supra Part I.
or equal protection doctrine might be recalibrated to reflect changing conditions. But even if doctrine is left alone, judges—when applying facts to law—should consider the social meaning of the facts before them.

There is a chicken-and-egg aspect to the above analysis. After all, the proposed voucher plan itself contributes to the social meaning of school choice. Consequently, if nearly all beneficiaries of a voucher scheme are religious parents who send their children to church-affiliated schools, it is quite likely that vouchers will be seen as a spoils system designed to reward powerful religious interests. For this reason, a court sensitive to this social meaning will be inclined to strike down the plan under a rigid separationist analysis. But if the beneficiaries of a voucher scheme are poor inner-city students attending failing schools, the social meaning suggests a quite different outcome.

What then of today's voucher schemes? Let me start with the three most visible plans—those in Florida, Cleveland, and

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176. For example, the Rehnquist Court helped bring an end to court-ordered busing by embracing local control of schools. See supra note 24 and accompanying text. Establishment Clause doctrine has also changed in ways that are consistent with the changing social meaning of church-state relations. See supra notes 68-81. In particular, the wall of separation has given way to a greater receptivity to a nondiscrimination principle, that is, a principle more accepting of aid programs that benefit both secular and sectarian organizations. Along the same lines, the Court is increasingly receptive to direct governmental aid that benefits the secular education functions of parochial schools. See, e.g., Agostini v. Felton, 521 U.S. 203 (1997) (overturning Aguilar v. Felton, 473 U.S. 402 (1985); Mitchell v. Helms 120 S. Ct. 2530 (2000).

177. In other words, even if judges adhere to separationist Establishment Clause doctrine, the changing social meaning of school vouchers should affect their understanding of, for example, whether the effect of a voucher scheme is to advance religion. Needless to say, some adherents to separationist decision making think that church-affiliated schools cannot help but proselytize. For example, through the display of religious symbols and other denominational trappings, some separationists are of the view that the participation of church-affiliated schools in a voucher plan necessarily establishes religion. I do not doubt the sincerity of these strict separationists (nor the legitimacy of strict separationism in, say, the 1970s). For my purposes, however, it does not matter whether some separationists legitimately fear vouchers. Rather, in calling attention to why courts should pay attention to social meaning and how the social meaning of vouchers has changed over the past two decades, my claim is that courts should not employ outdated thinking in their application of Establishment Clause doctrine. Of course, once a voucher scheme is put into effect, the experiences of nonadherents attending church-affiliated schools may affect the social meaning of school vouchers. In other words, it is possible—albeit unlikely—that the pendulum may shift back towards separationist decision making.
In all three cases, vouchers were seen as a way out for poor students attending failing schools. Florida limited eligibility to students from public schools that failed to meet minimum state performance standards for two consecutive years. In Cleveland, the plan was enacted in response to a 1995 federal court order finding that the city was incapable of managing its public schools and demanding that the state take over direct supervision and management of these schools. Among other problems, Cleveland's public schools were beset by chronic financial problems, proficiency test scores that ranked in the bottom 10% of the country, and a failure to eliminate segregated schools within the District. Finally, Milwaukee's plan was also prompted by poor academic achievement, especially among minority students.

In responding to the problem of failing schools, Florida, Cleveland, and Milwaukee limited participation to a small number of students. In Milwaukee, 6,000 out of 107,000 students get vouchers; in Cleveland, 4,000 out of 77,000 received vouchers; and in Florida, it is estimated that roughly 12,000 of the state's 2.3 million students would get vouchers. Of those students who received vouchers, the overwhelming majority were poor, minority students attending racially isolated schools. In Milwaukee, program eligibility is limited to families with an income at or below 175% of the federal poverty level ($24,900 for a family of three). Furthermore, with a failed court-ordered busing plan (in 1990, at least twenty-two of Milwaukee's schools were all African American)
and significant test score disparities between African American and white students, the voucher plan was a salve of sorts for the city's African American community. In Cleveland, vouchers were given to all parents whose income was below 200% of the poverty line, with the balance distributed by lottery (with the lottery weighted to prefer poor parents). Moreover, because 70% of its families are minorities, Cleveland's voucher scheme principally benefitted African Americans burdened both by a failing public school system and a failed desegregation plan. In Florida, according to Republican Governor Jeb Bush, the voucher plan was part of a comprehensive reform designed to help poor families achieve high standards of learning. In other words, although eligibility was defined by a school's poor academic performance, it was anticipated that most failing schools would be located in school systems where a disproportionate number of parents were poor.

When it comes to church-affiliated schools, Florida, Cleveland, and Milwaukee allowed these schools, along with nonsectarian schools, to participate in their voucher programs. To protect against proselytizing, all three programs placed some restrictions on religious schools. In Milwaukee, participating religious schools must abide by an opt-out provision allowing parents to have their children exempted from religious activities. In Cleveland, participating schools may not discriminate or teach hatred on the basis of religion. Finally, in Florida, participating schools "would need to accept students without consideration of their past academic performance and on a religion-neutral basis. They would

185. See Fixing MPS, MILWAUKEE J. SENTINEL, Nov. 26, 1995, at 18, available in 1995 WL 12839316; Milwaukee's Schools; Polly's Plan, ECONOMIST, Aug. 4, 1990, at 21. The plan was sponsored by Democratic state representative Annette "Polly" Williams, an African American who maintained that "a decent education is more important than artificial racial integration." Id. at 22. Among the city's African American community, moreover, the plan enjoys overwhelming support. See supra notes 94-95 and accompanying text.

186. See Lessons Cleveland Can Teach, ECONOMIST, Nov. 29, 1997, at 27.


189. See WIS. STAT. ANN. § 119.23(7)(c) (West 1995). For an argument that the "opt-out" provision unfairly burdens religious schools, see Loconte, supra note 111, at 30, 34.

not be allowed to compel a student to profess to a specific ideology, to pray or to worship." 191

The stories of Florida, Cleveland, and Milwaukee reinforce the fundamental differences between today's voucher schemes and earlier proposals. Today, consistent with the changing social meaning of school choice, voucher plans are about education, especially the education of poor, minority students in failing school systems. And while religious schools can participate, this participation seems hinged to the increasingly visible role that churches play in providing social services in this era of privatization. In other words, irrespective of what a court may have said about school choice in 1980, today's voucher schemes appear a perfectly reasonable way to improve the lives of our neediest children. 192 Needless to say, the implementation of these voucher schemes might reveal that participating sectarian schools are in fact discriminating on the basis of religion or race. And what of more openended proposals—like California's 2000 ballot initiatives—that would provide a $4,000 across-the-board voucher for all parents who send their children to private schools? It is one thing to say that, in the abstract, the social meaning of a targeted voucher proposal is consistent with equal educational opportunity and Establishment Clause objectives. It is quite another to generalize from that conclusion to somehow immunize school choice proposals from constitutional attack. In the following (and concluding) section, I will sketch out an argument of how courts can take into account both the changing social meaning of choice proposals and the real possibility that, over time, the implementation of voucher schemes will once again change the social meaning of school choice.


192. This is not to say that vouchers are the best way of responding to the problems of poverty and failing schools. It is just to say that the above described school choice proposals may be a part of the solution, not the problem.
CONCLUSION: TAKING SOCIAL MEANING INTO ACCOUNT

This Essay has shown why it is that the social meaning of school choice has, over the past two decades, undergone a radical transformation. Many of the shifts leading up to this change—the advent of privatization, the ever-growing role of nondenominational social outreach efforts of the Catholic Church, and the demise of court-ordered school desegregation—seem enduring. At the same time, with civil rights leaders, church-state separationists, teachers unions, and others still opposing school choice, it is clear that the social meaning of vouchers remains contested. Consider, for example, California's just defeated across-the-board voucher proposal. \(^{193}\) For some, this scheme is about educational quality, or improving schools through competition; for others, it is a way to encourage racial and religious separatism. \(^{194}\) And while the targeted voucher plans of Florida, Cleveland, and Milwaukee avoid most of the problems presented by the California plan, it is nevertheless true that participating sectarian schools can subvert the antiproselytizing provisions of these choice programs. For example, the informational materials of one of the participating schools in Cleveland's choice program states that “total religious instruction is the major focus of the educational program.... Lessons learned in formal religious classes are purposefully carried over into all subject areas.” \(^{195}\)

What then is a court to do? On the one hand, it ought not foreclose voucher experiments. After all, the changing social meaning of school choice suggests that vouchers neither violate equal educational opportunity nor Establishment Clause prohibitions. Moreover, vouchers may prove to be the best way for poor inner-city students to escape failing school systems. \(^ {196}\) In other

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194. Compare Minow, supra note 96 (calling attention to the risks of voucher schemes), with Paul E. Peterson, Monopoly and Competition in American Education, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990) (noting that school choice is a necessary response to the unresponsive and inefficient public school monopoly).


196. This might be true, for example, if a fundamental retooling of public schools is either impossible (because of political forces favoring privatization) or unwise (because markets work). Furthermore, the market forces that make charter schools a very real possibility for
words, absolutist decision making blocking voucher experiments in
the name of the Constitution might well place an outdated obstacle
in the way of critically important education reform.\textsuperscript{197}

For this very reason, a federal district court and an appeals court
in Cleveland were wrong to strike down that city’s voucher scheme
on Establishment Clause grounds.\textsuperscript{198} True, the mission statements
of some of the participating schools in the Cleveland program
suggested that these schools were pervasively religious.\textsuperscript{199} True, the
failure of public schools in the surrounding suburbs to opt into the
program limited student choice to predominantly church-affiliated
private schools.\textsuperscript{200} Nevertheless, it is quite possible that program
guidelines forbidding religious-based discrimination in either
admissions or teaching would have been sufficient to prevent
possible abuses.\textsuperscript{201} Furthermore, the Ohio legislature, over time,
may have mandated the participation of suburban schools (whose
decision to opt out reinforced pervasive racial isolation). More to the
point, by rigidly applying the Establishment Clause precedents of
another era, the Cleveland district and appeals courts embraced a
standard of review that would foreclose the participation of
sectarian schools in voucher experiments. And in so doing, given

\textsuperscript{197} See Jeremy Rabkin, Racial Divisions and Judicial Obstructions, in REDEFINING
EQUALITY, supra note 22, at 90-94 (condemning court-created constitutional roadblocks that
stand in the way of innovative solutions for pressing social problems).

\textsuperscript{198} See Simmons-Harris, 72 F. Supp. at 834.

\textsuperscript{199} See id. at 837-38; see also Scott Stephens & Mark Vosburgh, Voucher School Relies
on Videos as Teachers, Operators to Appeal, Being Cut From Program, CLEV. PLAIN DEALER,
July 10, 1999, at 1A (explaining that newspaper reporters discovered that a Christian school
that had been receiving voucher money under the Cleveland program relied entirely on
Christian videos and workbooks for instruction, and that state officials told the school
operators they would have to “complement its video-based curriculum with other classroom
instruction” in order to remain a voucher school). For a description of ways in which some
religious schools might, because of their religious mission, fail to serve the state’s aim of
providing children with a good secular education, see DWYER, supra note 152.

\textsuperscript{200} See Jodi Wilgoren, A Ruling Voids Use of Vouchers in Ohio Schools, N.Y. TIMES, Dec.
12, 2000, at A 1 (noting that “96 percent of the 3,761 voucher students attended sectarian
schools”).

\textsuperscript{201} While some church-affiliated schools will refuse to participate in a voucher program
for precisely this reason, the Supreme Court has approved such across-the-board conditions
both the paucity of nonsectarian private schools in Cleveland and
the political obstacles of compelling suburban school participation,
the district court decision may have killed any and all voucher
experiments in Cleveland. Considering the well-documented
failings of Cleveland's public schools,\textsuperscript{202} the consequences of such
absolutist premature decision making are truly tragic.

At the same time, it would be equally problematic for the courts
to engage in absolutism in the opposite direction, that is, by
employing a standard of review that would uphold any and all
choice proposals. The concerns of the federal district and appeals
courts in Cleveland were not baseless. And that was with a targeted
voucher scheme; a free-market plan allowing participating schools
to discriminate on the basis of religion (let alone race) would raise
even more profound constitutional problems.\textsuperscript{203}

Lower-court judges should engage in a type of minimalist
decision making that allows states and municipalities to
experiment with targeted voucher plans.\textsuperscript{204} Once courts, politicians,
and the people see how these limited plans operate, the social
meaning of vouchers may again change. For example, if these plans
are successful, the scope and sweep of voucher programs may be
expanded to reflect a growing belief in market-based solutions.\textsuperscript{205}
But if these plans do little more than facilitate religious
proselytizing by church-affiliated schools, the social meaning of
vouchers will need to take into account the risks of church-state
entanglements.

Over time, the social meaning of choice may solidify, paving the
way for the Supreme Court to issue a more definitive decision on
the constitutionality of school choice. Until that time, however, the

\textsuperscript{202} See supra notes 180-81 and accompanying text.
\textsuperscript{203} See Minow, supra note 96.
\textsuperscript{204} For a defense of minimalist decision making by both the lower courts and the U.S.
Supreme Court, see Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the
Supreme Court (1999). Sunstein's embrace of minimalism, however, does not call upon
courts to uphold governmental programs when their social meaning is contested. For an
argument that courts should uphold governmental action when social meaning is contested,
see Lessig, supra note 3.
\textsuperscript{205} Today, however, it is hard to imagine an across-the-board voucher plan having
enough political currency to get through the electoral process. California voters
overwhelmingly rejected such a proposal with exit polls showing strong opposition cutting
across all demographic categories. See Graves & Helfund, supra note 193.
Court would be well advised to steer clear of the voucher issue. For this reason, the Justices are to be commended for resisting temptation and denying certiorari in *Jackson v. Benson*, a case challenging the Wisconsin Supreme Court’s approval of Milwaukee’s voucher plan.

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The future of school choice ought to be decided by parents, interest groups, and elected officials. Judges, at least for now, should steer clear of this fight by upholding targeted voucher proposals on narrow grounds. The stakes of the education reform debate are simply too high for courts to engage in absolutist decision making (either approving or invalidating all voucher schemes). Rather, by standing back and letting the school choice wars unfold, judges can help see to it that our constitutional law is informed by facts, not biases.

In proposing that courts look before they leap, I am, of course, urging judges to heed changing social conditions. Hardly radical, this proposal comports with the Supreme Court’s practice of measuring their decision making against prevailing social norms. More to the point, courts cannot absorb the costs of preempting legitimate (perhaps necessary) educational reform by embracing the social meaning and, with it, constitutional doctrine of another era. Rather, to preserve their place in government and facilitate constructive constitutional discourse, courts cannot impose their understanding of constitutionally relevant facts on either the people or their elected representatives.

206. In other words, unlike lower courts, the Supreme Court ought to issue maximalist decisions. Otherwise, the Supreme Court will be little more than a technocrat and, as such, will play no meaningful role either in directing lower courts or in engaging the elected branches in a constitutional dialogue with each other. See Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1986-87 (1999).
208. See supra Part I.