Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory

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INTRODUCTION

We believe that the program challenged here is a program of true private choice.1

With that statement, the United States Supreme Court upheld a voucher program in the city of Cleveland that provided public funds to religious schools.2 Like many urban school systems, Cleveland was facing an educational crisis3 that required creative thinking, at least in the mind of the state General Assembly.4 As a result, the state enacted the Pilot Project Scholarship Program in 1995 to improve educational offerings for the primarily low-income students of color residing in the school district.5 From the start, the program’s use of public dollars to fund religious schools was controversial;6 by the time the case reached the Supreme Court, well

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2. Id. at 653, 662-63.
3. In the context of a twenty-five-year class action lawsuit challenging racial segregation in Cleveland schools, a district court declared a “crisis of magnitude” and ordered the system to be placed under state control in order to enable it to comply with the court’s Remedial Desegregation Orders and Consent Order. Reed v. Rhodes, No. 1:73 CV 1300, 1995 U.S. Dist. LEXIS 3814, at *1, *6 (N.D. Ohio Mar. 3, 1995). The Court in Zelman does not otherwise mention this important aspect of the case, which provides some context for the state’s decision to implement a voucher program. This litigation is discussed more fully herein. See infra Part III.C.
4. See, e.g., Zelman, 536 U.S. at 644-45.
5. Id. at 644.
6. Almost from the beginning, the debate centered on the need to provide market incentives to improve the failed schools and the question of whether doing so at the expense of public schools was worth the cost. See, e.g., Richard A. DeColibus, School Vouchers Bad Paper, PLAIN DEALER, Apr. 7, 1995, at 11B; Scott Stephens, School Voucher Proposal Debated, PLAIN DEALER, May 12, 1995, at 4B. Indeed, when questioned about the difficult choice the voucher program presented for lawmakers — providing
over 100 organizations had submitted amicus briefs weighing in on the issue of whether this program violated the Constitution.\textsuperscript{7}
Primary among the issues the amici curiae addressed was the notion of choice and its importance for low-income families of color. As explained in greater detail below, the issue of private choice was essential to determining whether the program ran afoul of the Establishment Clause of the First Amendment.\(^8\) The amici, the parties, and even the Court itself, however, examined choice in a manner suggesting that far more was at stake: namely, the availability of educational opportunities for low-income students of color. For example, a common refrain among the briefs was that choice generally is available with regard to schools — unless one is poor.\(^9\) More specifically, parents of means can live in districts that have high quality schools; even if they decide not to move out of a troubled school district, they can afford to send their children to private schools to get a good education.\(^10\) For poor parents, however, such choices do not exist.\(^11\) In this sense, supporters of the program argued, vouchers help to level the playing field by providing low-income families with choices they might not otherwise have and, correspondingly, an avenue out of the failing school districts to which so many children are consigned.\(^12\) The rhetoric thus framed the voucher program as something other than a First Amendment concern; it suggested that the program was a much needed strategy to fulfill the promise of *Brown v. Board of Education*,\(^13\) a means of equalizing educational opportunity.\(^14\)


\(^1\) See, e.g., Brief of Black Alliance for Educational Options as Amicus Curiae in Support of Petitioners, supra note 7, at 2-3, 5, 22-23.

\(^2\) See, e.g., id. at 22-23.

\(^3\) See, e.g., id.

\(^4\) See, e.g., Brief of Amicus Curiae American Civil Rights Union Supporting Petitioners, supra note 7, at 11 (arguing that school choice programs, such as the one at issue, allow "low income and minority students . . . to choose schools that offer[] a sound education, enabling them to escape a life of poverty").


\(^6\) Indeed, the petitioners framed their argument as follows:

Forty-seven years ago, in *Brown* . . . this Court set forth a sacred promise
However, what is the meaning of choice in this context? What options truly are available to parents seeking quality education in a school district that state assessments declare an "academic emergency"? Are the choices real when the abysmal conditions mirror disparities that plagued the system under de jure segregation? Under these circumstances, private choice may only cement a social order that relegates low-income students of color to the bottom rungs of society. How can we assure that private choice actually transforms public education? I submit that critical feminist theory provides some answers.

of equal educational opportunities for all American school-children. Since that ruling, we have traveled a long and often-painful [sic] distance. Along the way, the promise has become reality for many. But for others, especially minority schoolchildren mired in many of our nation's worst urban school systems, that promise has been an illusion.


15. Scott Stephens, Grades Are in; Results Unclear, PLAIN DEALER, Aug. 16, 2005, at A1 (reporting that Cleveland schools had received a grade of "academic emergency," the state's lowest rating for a district's progress toward meeting federal performance standards).

This article examines the nature of private choice in *Zelman*, using the lens provided by feminist legal theory and praxis. It argues that the rhetoric of private choice masks the fact that far too many low-income families lack meaningful decisional autonomy to ensure that their children get quality education. In school districts such as Cleveland, where segregation long was the norm even after legal battles to eliminate the vestiges of discrimination, long-standing race-based disparities persist, largely as a result of systemic subordination. Consequently, the real choices available to inner-city parents often are among many unsatisfactory alternatives, none of which is calculated to provide the educational opportunities available to parents with economic means, irrespective of rhetoric to the contrary. Indeed, rather than leveling the playing field, the emphasis on choice only exacerbates the disparities that promise to consign students of color to subordinate status. In this connection, the discourse of private choice detracts from efforts to improve educational opportunities substantively and create meaningful options for low-income children of color, the true promise of *Brown*.

To make this case, the article is divided into three parts. Part I discusses *Zelman* in greater detail, first examining the issue of public education reform as a matter for feminist concern and then exploring the troubling implications of the privatization of education embodied in the choice the Court upheld. This Part notes private choice must be interrogated carefully to ensure it does not reinforce the subordinating social order. Part II discusses feminist legal theory concerning decisional autonomy to identify principles that may be useful to effect social change in public education, and thus urges the recognition of a positive right to parental autonomy grounded in the Fourteenth Amendment and its roots in post-Reconstruction efforts to provide Blacks agency with respect to their families. Part III then applies those principles to the context of *Zelman* to argue that, in light of the district's long history of discrimination—which it refused to remedy—the state had an affirmative obligation to provide parents with meaningful choices that dismantled the

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18. This article uses the terms "Black" and "African American" to express that "Blacks like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).
racially subordinating system of education. In failing to do so, the state unreasonably interfered with the Cleveland parents’ positive right to make meaningful decisions concerning the education of their children.

I. ZELMAN: OPPORTUNITY FOR A FEMINIST INTERVENTION

On the face of the opinion, Zelman appears to present a neutral issue; beneath the surface, however, the decision is very much about the existing social order and the extent to which it should change. This both helps explain the Court’s limited holding and suggests the need for an alternative analysis that yields social change, a primary objective of feminist legal theory. The following subsections discuss what Zelman holds for women, briefly examine Zelman, and ultimately “unpack” the significance of private choice in the context of public education reform.

A. What’s Gender Got to Do with School Choice?

While ostensibly articulating the parameters of the Establishment Clause, Zelman is ripe for feminist analysis. Public education reforms such as vouchers reflect existing social hierarchies, which are the subject of feminist legal theory. Specifically, women raising their children in the inner cities tend to be poor and disempowered in some way, while women living in more affluent communities tend to be capable of exercising more agency.

In this context, the interlocking oppressions of white supremacy, patriarchy, and class bias conspire to limit the educational opportunities available for low-income mothers. Reform efforts

19. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1 (2d ed. 2003) (observing that feminist theorists start from the premise that change is necessary).
20. Id. at 12. Feminist scholars use this terminology, which refers to closely examining choice to determine whether, in fact, meaningful alternatives exist for women. See id.
21. “Feminist legal scholarship is more oppositional; it assumes there is a problem and is suspicious of current arrangements, whether they take the form of different standards for men and women or purportedly neutral, uniform standards that nevertheless work to women’s disadvantage.” Id. at 1.
23. According to the 2000 U.S. Census, approximately thirty-seven percent of all Cleveland households with children are headed by single Black women. See U.S. Census Bureau, American Factfinder, http://factfinder.census.gov (last visited Mar. 8, 2006) (follow “data sets” hyperlink; follow “custom table”; select “place” for Geographic type;
currently focus on schools in low-income urban areas, where "a disproportionate number of inadequate schools are located." 24 A privileged class status enables families who can afford better schools to move to more affluent school districts or send their children to private schools. As a result of white flight from the inner cities and their schools, "35% of the poor and 43% of racial minorities attend urban public schools" 25 that typically do not provide them with the skills necessary to succeed on any meaningful level in society. 26 Thus, the inequalities in funding, which in turn lead to inequities in resources and curricula, among other things, fall more heavily on the poor and students of color. 27 Finally, patriarchy frequently is evident in the guise of reform itself and the attendant discourse. For example, single-sex schools — another popular choice reform — have emerged as a means of teaching Black boys how to become men and discouraging Black girls from engaging in sexual behavior, drawing upon longstanding negative constructions of Black masculinity and Black femininity. 28 In a related vein, by focusing on the need to discipline unruly Black children or inculcate them with appropriate gender roles, education reform policies appear to be ways of condemning poor parents, often single women 29 of color, for lacking the capacity to raise their children appropriately. 30 Women

25. Id.
26. See, e.g., id. at 62-63 (citing recent research showing that "only 40% of fourth and eighth grade students attending city schools met minimum basic standards on national exams in reading, math, and science," compared to "two-thirds of students in suburban and rural districts . . . .").
28. See Williams, supra note 16, at 21-26 (examining the racial and gender stereotypes endemic in rhetoric supporting single-sex schooling).
29. See Martha L. Fineman, Images of Mothers in Poverty Discourses, 40 DUKE L.J. 274, 275 (1991) (observing that single motherhood represents a threat to the patriarchal social order).
raising their children in such circumstances lack the agency to provide their young with meaningful access to quality educational opportunities, which is filled with social meaning of great concern to the critical feminist project.  

B. Zelman: Private Choice to Save Public Schools?  

Private choice was at the heart of the Court's analysis of whether the voucher program violated the Establishment Clause. Underlying the Court's opinion, however, is the notion that the program and private choice were necessary for the educational benefit of poor minority children. More specifically, accepting the hyperbolic question presented by petitioners at face value, it appears that on a certain level the Court approved the voucher program because it was "designed to rescue economically disadvantaged children from a failing public school system." The Ohio General Assembly first enacted the voucher program in the face of a court-ordered state takeover of the Cleveland school


32. The impetus for this article is my belief that feminist legal theory and praxis should focus more on public education reform because of its importance to the low-income women, primarily of color, who have not seen the gains of the women's movement. My experience in practice and my recent work with the Ford Foundation informs this conclusion. Ford is supporting a major reexamination of the reach and efficacy of the women's movement, stemming in part from a survey commissioned by the Center for Advancement of Women that showed a majority of women of color felt strongly that there was a continued need for a strengthened women's movement. See PRINCETON SURVEY RESEARCH ASSOCIATES, INC., CENTER FOR GENDER EQUALITY, PROGRESS AND PERILS: HOW GENDER ISSUES UNITE AND DIVIDE WOMEN, PART ONE 7-8, available at http://www.advancewomen.org/files/File/PDFs/PartOne.pdf. As part of this effort, the University of Cincinnati College of Law hosted a conference, "Women Coming Together: Claiming the Law for Social Change," which addressed health care issues of particular salience to under-served women by convening women of color from the academy, grass roots organizations, and national public interest organizations, among other walks of life, which provided a unique opportunity to begin national discussions about reconceptualizing feminist legal theory and practice to be more inclusive. See Univ. of Cincinnati College of Law & Joint Degree Program in Law & Women's Studies, Women Coming Together: Claiming the Law for Social Change Agenda, http://www.law.uc.edu/current/ws050225/index.html (last visited Mar. 8, 2006). This enterprise has contributed directly to my scholarship and specifically to this article.  

33. See, e.g., Zelman v. Simmons-Harris, 526 U.S. 639, 649-53, 662-63 (2002) ("We believe the program challenged here is a program of true private choice, consistent with Mueller, Witters, and Zobrest, and thus constitutional.").  

34. See, e.g., id. at 644-47.  

35. Taylor Petitioners' Brief on the Merits, supra note 14, at I.
district in 1995.36 At that point, the city already had been ordered to remedy longstanding intentional discrimination against Black students in a class action styled Reed v. Rhodes.37 The district court had issued a remedial order in 1978,38 but as of 1995, neither the city nor the state defendants had made any progress.39 By 1995, the city was in a financial crisis, in serious debt, lacking any credit or financial credibility, and utterly incapable of taking the necessary steps to address the myriad issues identified in the court order.40 The district court, essentially declaring the city school system a disaster, ordered the state to take over the finances and management of the school district.41 Significantly, it is in this context of bitter litigation charging the state and city board to remedy systemic racial discrimination and its effects that the state enacted the voucher program — a context the Court never mentioned in Zelman.42

The program, entitled the Pilot Project Scholarship Program,43 targeted Cleveland’s public schools and allowed parents to obtain state funded vouchers to send their children to public institutions or private schools or to get tutorial assistance for children in public schools.44 Adjacent suburban public school systems also were eligible to participate in the program, but none did.45 Though the program made no overt distinction or preference for religious or secular schools, the vast majority of private schools participating in the program (eighty-two percent) were religious in nature.46 As a result, most of the students receiving and using vouchers (ninety-six percent) were enrolled in religiously affiliated schools.47

The Court examined the program to determine whether it had the purpose or effect of advancing or inhibiting religion.48 In this instance, the state’s purported purpose was “to enhance the educational options of Cleveland’s schoolchildren in response to the

37. 662 F.2d 1219 (6th Cir. 1981). See also infra Part III.C.
38. Reed v. Rhodes, 455 F. Supp. 546 (N.D. Ohio 1978), aff’d in part, 607 F.2d 714 (6th Cir. 1979), aff’d, 662 F.2d 1219 (6th Cir. 1981). See also infra notes 216-17 and accompanying text.
40. See also infra notes 256-57 and accompanying text. See generally Reed, 1995 U.S. Dist. LEXIS 3814.
43. Id. at 644.
44. Id. at 645.
45. Id. at 646.
46. Id. at 647.
47. Id.
48. Id. at 649.
1995 takeover.”  

Because the purpose was valid and secular, the Court’s inquiry focused on the effects of the program.  

In this connection, the Court noted that its prior “decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”  

Accordingly, much of the Court’s inquiry revolved around the question of choice — that is, whether government monies went to religious schools as a result of the parents’ election or directly from the state. In this regard, the Court held the program to be one of true private choice and, therefore, constitutional.  

Among the factors influencing the Court’s decision were the following:

1. The program directly provided assistance “to a broad class of individuals defined without reference to religion”.
2. The program allowed all schools within the district to participate, whether religious or secular;
3. The program provided a financial incentive for adjacent public schools to participate; and
4. There were “no financial incentives that ‘skew[ed]’ the program toward religious schools.”

The Court also noted that when it considered other publicly funded options, such as magnet or community schools, the percentage of students enrolled in parochial schools plummeted to twenty percent, which further demonstrated that the government was not promoting religious schools.

While ostensibly focused on whether the voucher program advanced religion, the aims of the program were key to the Court’s conclusion that the program was constitutional. For example, the Court was particularly mindful of the fact that the state’s purpose was “provid[ing] educational opportunities to the children of a failed

49. Id. at 647.
50. Id. at 649 (“There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden ‘effect’ of advancing or inhibiting religion.”).  
51. Id.
52. Id. at 652-53.
53. Id. at 653.
54. Id.
55. Id.
56. Id. at 650.
57. Id. at 659.
school district." Additionally, in rebutting the respondents' charge that the state effectively was endorsing religion, the Court observed that "[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools." The Court described the programs as "most sorely needed" in Cleveland and even suggested that it empathized with the city parents who were "looking to choose the best educational option for their school-age children."

If there were any doubts about the Court's view of the context supporting the vouchers, Justice Thomas was even more overt in his concurrence. He argued that states should be afforded sufficient latitude to take the necessary steps to abate the educational emergency confronting urban schools:

Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children.

Moreover, Justice Thomas noted, the state action was calculated to help students of color, who predominate in urban settings and historically have lacked educational opportunities. Justice Thomas explained that "failing urban public schools disproportionately affect minority children most in need of educational opportunity . . . Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs

58. Id. at 653.
59. Id. at 654.
60. Id. at 655. That the "history and context" included findings of intentional discrimination on the part of the city and state were not part of the Court's analysis is puzzling. Those findings are relevant to why the district schools had "failed" and, as a result, whether any meaningful choice was available to parents. See infra Part III.C.1. See also Brief of the NAACP Legal Defense & Education Fund, Inc. & the Nat'l Ass'n for the Advancement of Colored People as Amici Curiae in Support of Respondents, supra note 7, at 8-12 (discussing the discrimination against Black students in the Cleveland schools and urging the Court to evaluate the voucher program in light of that context).
62. Id. at 660 n.6.
63. Id. at 680 (Thomas, J., concurring).
64. Id. at 681-82.
because they provide the greatest educational opportunities for their children in struggling communities.”

Justice Thomas opined that even “[i]f society cannot end racial discrimination, at least it can arm minorities with the education to defend itself from some of discrimination’s effects.” Moreover, Justice Thomas noted that the state’s chosen vehicle was preferable to the “other solution to these educational failures [which is] . . . racial preferences in higher education.” He went on to note that “[c]onverting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and deserves those in greatest need.”

Justice Thomas went so far as to suggest that opposition to vouchers was grounded in elitism: “While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society.”

Finally, Justice Thomas opined that

65. Id. at 682.
66. Id. at 683.
67. Id.
68. Id. at 684. At least one commentator has observed that the concern about transmogrifying the Fourteenth Amendment is ironic in light of the Court’s other decisions striking down efforts to equalize public education and assure its availability to the neediest students. See Gary D. Allison, School Vouchers: The Educational Silver Bullet, or an Ideological Blank Round?, 38 TULSA L. REV. 329, 357 (2002). According to Allison, [w]hat is so galling about the conservatives’ crocodile tears for the plight of poor minority students, and their insistence that vouchers are the tools of liberation, is their complete lack of acknowledgement that conservative United States Supreme Court majorities took away almost all other tools that could have helped inner-city schools avoid the crises endured by the Cleveland School District.
69. Zelman, 536 U.S. at 682 (Thomas, J., concurring). Of course, in other cases the Court has enumerated the significance of public education to our democracy. For example, in Brown the Court characterized public education as follows:

[It is] perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, preparing him for later professional training, and in helping him to adjust normally to his environment.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). It also should be noted that while the
the "failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives."\textsuperscript{70} This truism begs an important question that remains unanswered: Why, then, does the state not invest its money in developing substantive reforms to improve all public schools, rather than funding private ones, particularly religiously affiliated private schools?\textsuperscript{71}

Two dissenting Justices commented on the policy issues that apparently drove the Court's conclusion that the program complied with the Establishment Clause. Justice Stevens stated outright that "the severe educational crisis that confronted" the school district simply was not germane to the analysis.\textsuperscript{72} Noting that the state was embroiled in another education lawsuit, this time challenging its system of financing public schools,\textsuperscript{73} Justice Stevens argued that the Court should have given the state a chance to address Cleveland's ills through the reform likely to result from that effort.\textsuperscript{74}

Justice Souter dissented, arguing that the majority had subverted decades-long precedent concerning the meaning of "choice" in this context.\textsuperscript{75} According to Justice Souter, the majority misconstrued the appropriate analysis by examining the "entire menu of possible educational placements."\textsuperscript{76} He asserted that the Court

\textsuperscript{70} Zelman, 536 U.S. at 683 (Thomas, J., concurring).

\textsuperscript{71} Id. at 684 (Stevens, J., dissenting).

\textsuperscript{72} Id. at 685 n.1 (citing DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) (affirming a lower court determination that Ohio's system of funding public education violated the state constitution)).

\textsuperscript{74} Id.

\textsuperscript{75} Id. at 698-99 (Souter, J., dissenting).

\textsuperscript{76} Id.
should have inquired into “whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one.”  

Because the majority expanded the choice question to include every single school available — even those to which the voucher program did not apply — Souter suggested that “there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school.”

Moreover, Justice Souter raised important questions about the meaning of “genuine choice” in this context:

Until now, our cases have never talked about the quality of educational options by whatever standard, but now that every educational option is a relevant “choice,” this is what the “genuine and independent private choice” enquiry . . . would seem to require if it is to have any meaning at all. But if that is what genuine choice means, what does this enquiry have to do with the Establishment Clause?

Justice Souter doubted the relevance of the educational crisis upon which the majority’s opinion appears to rest, just as Justice Stevens did. Additionally, however, assuming the crisis was relevant, Justice Souter suggested “true choice” should require examining whether the options really provided a meaningful alternative to the failed schools the program purports to remedy. What is the meaning of public choice in public education? The following subsection examines that issue.

C. “Unpacking” Private Choice in Public Education

The subtext of Zelman typifies much of the debate concerning choice reforms; positing a market approach best promotes competition and quality in public education, particularly in the context of failing urban schools. In this regard, programs such as vouchers or charter schools focus on providing quality options to “promote
competition, and concentrate the mechanisms for evaluation and accountability in the hands of individual parents." Thus, proponents of choice programs argue this type of reform is about increasing parental autonomy — particularly for low-income minority parents — and promoting innovation and competition among schools. As such, choice programs are "anchored in faith in consumer sovereignty, skepticism about experts, and the turn to plural solutions to any dispute about substantive good." Critical theorists have questioned these premises, however, arguing that private choice is overly atomistic and holds the promise of retrenching the racial subordination, quite in opposition to the principles of Brown.

Martha Minow has examined this wave of education reform and suggests that at the heart of the debates about vouchers is the notion that equality is antithetical to quality, which, of course, is not the case. She cautions the rush to move away from the equality-focused initiatives of early education reform movements threatens the democratic and community aspects of public education. Instead, Minow argues these goals, though potentially contradictory, can and should be pursued in a complementary manner.

Minow characterizes the post-Brown period as one in which "reformers identified schools as a proper setting to attack the patterns of inequality, discrimination, and segregation that dominated the country." Reformers in this equality-based reform stage relied primarily upon the law to exert change, recognizing the power of education to support systemic subordination. The advances won in the area of race lead to laws protecting the rights of students based on gender, national origin, language, and ability status, which, in turn, led to significant change in public education, albeit not to the extent advocates hoped. Minow argues the current resistance to equality-based reforms, particularly with respect to improving the quality of education offered to under-served


83. Id. at 264.
84. See generally Charles R. Lawrence III, Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy), 114 YALE L.J. 1353 (2005); Minow, supra note 82, at 264.
85. Minow, supra note 82, at 257.
86. Id. at 282.
87. Id. at 285-88.
88. Id. at 272.
89. Id. at 273.
90. Id. at 276-79.
91. Id. at 279-80.
students, is the result of backlash, persistence of biases, and the legal successes of the movement: specifically, the attendant "[b]ureaucratic regulations, reporting requirements, and administrative complexity [that] accompany . . . recent equality initiatives. They often seem to distract attention from or fail to advance quality instruction." 92

The frustration with continued inequities in urban schools, coupled with the legal requirements that some argue impede needed changes, helped spur quality-based reform efforts. 93 As mentioned previously, this reform movement assumes that school systems are akin to a marketplace. Minow finds that the market-based assumptions underlying choice reforms have their limitations. 94 Among them is the risk of increasing segregation based on race, class, or ability level. 95 Additionally, Minow argues the success of choice reforms depends largely upon the ability of parents to become informed about their choices and to be motivated to participate, characteristics that vary widely among families and thus lessen the potential for systemic reform. 96 As a result, "the choice reforms may instead remove from existing public schools the motivated parents who make those schools as adequate or good as they currently are. The remaining students then will face risks even worse than they do now." 97 Accordingly, quality-based reforms ultimately may result in the diminution of quality choices for the neediest students.

Minow urges advocates to focus on the mission of public education and commit to "reforming school reform." 98 In this regard, she points to public education's emphasis on "forging commonality, promoting civic engagement in a diverse and democratic nation, and offering quality opportunities on an equal basis." 99 The choice movement undermines those goals:

[It] tells us to treat schooling as a matter of private consumption rather than shared time that is formative of community and nation. Vouchers and charters risk abandoning our longstanding commitment to a common future. They therefore may pose the

92. Id. at 280.
93. Id. at 258.
94. Id. at 265-67.
95. Id. at 269.
96. Id. at 268.
97. Id.
98. Id. at 286.
99. Id. at 282.
greatest jeopardy to equality and democracy that schools have seen in decades.  

Charles Lawrence expands upon these themes, arguing that treating public education as a matter of private choice means abandoning public schools and, in doing so, abandoning community, which is inimical to the principles the Court set forth in *Brown*:

The moral mandate of *Brown* is that all children in this country have a right to full membership in the community and to the community resources that membership brings. It cannot be that this moral mandate no longer holds simply because the walls that deny them access are built between poor black children in urban public schools and privileged white children in private schools and exclusive suburbs.

In this connection, Lawrence argues that the current prescriptions for school reform — including vouchers and charter schools — only support existing disparities in education and, in turn, a social order in which low-income children of color are prepared to take their places at the lowest rungs. Therefore, in significant ways, Lawrence submits that the privatization of education maintains the de jure segregation outlawed in *Brown*, reinforcing the attendant disparities in resources that spurred the landmark litigation in the first place. In so doing, these “choices” ultimately deny children of color the social capital necessary to succeed and, even more perilously, make segregation appear inevitable and legitimate.

As Lawrence notes, “[t]he genius of segregation as a tool of oppression is in the signal it sends to the oppressors — that their monopoly on resources is legitimate, that there is no need for sharing, no moral requirement of empathy and care.”

These commentators suggest that private choice in the educational context has become a means of perpetuating subordination of already oppressed groups. Specifically, the emphasis on promoting private choice *qua* private choice, though deeply rooted in our tradition of recognizing and respecting individual autonomy, ignores the fact that private choices tend to reflect and reinforce the existing

100. *Id.*
101. See generally Lawrence, supra note 84.
102. *Id.* at 1377.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
oppressive social order. It is from this vantage point that Dorothy Roberts critiques the meaning of private choice in a manner that is particularly helpful in assessing choice educational reforms.

Roberts posits the efficacy of contemporary anti-discrimination law has been weakened by what she calls the "priority paradigm."\(^\text{107}\) The priority paradigm is premised on the notion that "privileging individual autonomy over social justice is essential to human freedom."\(^\text{108}\) As a result, the fact that individual choices may result in inequalities is deemed an unavoidable outcome, "the price we may have to pay for freedom."\(^\text{109}\) Roberts cites the Supreme Court’s decision in \textit{Wygant v. Jackson Board of Education},\(^\text{110}\) which struck down a school district’s plan that ignored seniority in laying off teachers in the interest of promoting racial diversity among the faculty, as an example.\(^\text{111}\) In so doing, Roberts argues, the Court protected white teachers’ vested interests in their jobs at the expense of remedying the school board’s entrenched racism, which enabled white teachers to have seniority in the first place.\(^\text{112}\) Roberts posits that by privileging white choices over the eradication of subordination against Blacks, equality becomes an ephemeral goal, something so unattainable that Blacks should content themselves with a little less inequality, rather than seeking full equality.\(^\text{113}\)

Roberts argues for a jurisprudence that recognizes that the social order shapes and informs private choice.\(^\text{114}\) In this connection:

Our task should not be to calibrate the degree of private or state participation in acts of power, but to examine how acts of power promote or impede citizens’ freedom . . . Is the state perpetuating existing hierarchies of power? Does the government’s policy further alienate historically dispossessed groups from society’s privileges? Asking such questions severely weakens the primacy of private choices and the priority paradigm begins to crumble.\(^\text{115}\)

Thus, private choices must be understood as being inextricably intertwined with “unjust social structures.”\(^\text{116}\) As such, private choices


\(^{108}\) Id. at 370.

\(^{109}\) Id. at 371.

\(^{110}\) 476 U.S. 267 (1986).

\(^{111}\) Roberts, supra note 107, at 377.

\(^{112}\) Id.

\(^{113}\) Id. at 372.

\(^{114}\) Id. at 389.

\(^{115}\) Id. at 395.

\(^{116}\) Id. at 395-96.
are not merely indicators of personal preference; rather, they are reflections of an individual's place in the social order, which necessarily disadvantages subordinated groups. Roberts argues the primacy of private choice translates into the rhetoric of personal responsibility and an abandonment of laws and policies crafted to eradicate long-standing inequality, as manifest in the continuing disparities in well-being between whites and Blacks and a failure to see how these social issues affect us all.117

Roberts urges adoption of a reformed paradigm that does not treat liberty and equality as opposing principles.118 She advocates pursuing a "vision of justice that includes the protection of all citizens' interest in both liberty and equality."119 This vision recognizes that liberty encompasses eliminating structural race-based subordination. In this sense, personal autonomy embraces the needs of the individual and the needs of the community.120 As Roberts explains, this "affirmative view of privacy recognizes the connection between the dehumanization of the individual and the subordination of the group."121 Autonomy thus conceptualized is entwined with the larger goal of racial equality.122

Taken together, this literature suggests that, at a minimum, private choice in public education runs the serious risk of undermining the democratic principles we hold dear and further entrenching systemic subordination. Recognizing these dangers inherent in private choice as currently envisioned does not mean, however, that there is no room for privacy and autonomy in connection with public education reform. Feminist theory and praxis, which extensively have examined these concepts, provide a framework for seeking reform that supports the agency of families and promotes a regime for substantive change in which quality, liberty, and equality in public education can coincide.

II. FEMINIST LEGAL THEORY ON PRIVACY AND AUTONOMY

Feminists, like the commentators discussed in the previous section, first approached privacy with great skepticism, arguing that the concept has been used to constrain women's choices and reinforce their subordinate position in society. As the commentary

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117. Id. at 397-98.
118. Id. at 402-03.
119. Id. at 403.
120. Id.
122. Id.
has developed, some scholars have argued for a more affirmative understanding of privacy and autonomy, one that asserts positive rights that promote women's agency. This section briefly discusses privacy in this regard, being mindful that the uses of privacy may have different implications, depending on the race, ethnicity, class, and sexual orientation of the woman.

A. Privacy as a Shield for Subordination

Feminist legal discourse on the meaning of privacy first emerged in connection with confronting the enforcement of separate spheres ideology, that is, the notion that a woman's place is in the home. In this context, feminist scholarship and advocacy challenged the notion that women should be protected from the public world by relegating them to the home. In focusing on "opening the public sector" to women, however, feminists failed to acknowledge the racial aspects of separate spheres ideology — specifically, the laws that limited women's ability to work in the public sector in order to protect their procreative capacity exempted the jobs held primarily by women of color.

Interrogating the social meaning of the public/private dichotomy would have required examining the construction of womanhood embodied by the labor restrictions, which, in turn, could have provided a broader framework for challenging constraining gendered roles.
and raced roles. Feminists further explored the implications of the public/private divide in the context of domestic violence. In this connection, scholars argued that the privacy presumed in the home justified state refusal to intervene when men batter women. Accordingly, feminist scholars submit that privacy has played a major role in women’s subordination as privacy “devalues women and their functions and says that women are not important enough to merit legal regulation.”

Similarly, Catharine MacKinnon has argued that the concept of privacy ignores the coercion that occurs between men and women. Thus, in the context of heterosexual relationships, where the Court first recognized the fundamental right to privacy, “consent tends to be presumed. It is true that a showing of coercion voids the presumption. But the problem is getting anything private to be perceived as coercive.” MacKinnon argues that in order for the right to privacy to be meaningful for women, it should include the right to make decisions about sexual behavior. This right should start with the decision whether to have sex in the first place, which MacKinnon posits is not available to women and is one source of their inequality. This right requires state intervention. MacKinnon concludes that the state’s failure to intervene on the basis of privacy precludes the transformative change necessary to eradicate the subjugation of women. As a result, “the legal concept of privacy can and has . . . preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition.” According to MacKinnon, privacy doctrine is therefore responsible for women’s lack of agency.

As feminists critically examined the racial aspects of privacy doctrine, however, they concluded that government intervention
does not always advance women's privacy interests, particularly when the women at issue are low-income and of color. For example, when these women become pregnant, they also become subject to a legal regime that regards the activity of child bearing, and later child rearing, as a public matter that justifies government intervention, and not always for the better. Dorothy Roberts writes extensively about state laws that prosecute women for using drugs during pregnancy.\(^{138}\) Similarly, Elizabeth Schneider highlights instances in which women seeking assistance from their batterers end up being prosecuted for using alcohol, while their abusers face no prosecution whatsoever.\(^{139}\)

Feminist legal theory thus successfully has uncovered the harms of privacy, demonstrating how it has been used to keep women on the margins of society, construct limiting social roles for them, and justify norms of keeping women subordinated in all realms of life.

**B. Finding Possibilities in Privacy Doctrine**

Some feminists have urged a reexamination of privacy as a means of promoting women's personhood. Anita Allen, for example, identifies ways in which privacy, as newly conceptualized, furthers the feminist agenda, notwithstanding the well-established risks of traditional conceptions of privacy (as discussed above).\(^{140}\) For example, middle-class and educated women have options today that require them to exercise private choices, such as whether or not to have children or delay marriage to pursue a career.\(^{141}\) Allen submits that "[e]ncouraging women to recognize their options, and to exercise their options in ways that acknowledge that women's privacy and private choice are worth something, would be an appropriate feminist emphasis."\(^{142}\) Similarly, in the context of domestic violence, Allen argues that women need privacy to devise solutions to their particular circumstances.\(^{143}\) Shelters for women "protect [them] by providing health services, safe companionship, and privacy."\(^{144}\) In this sense, Allen suggests that privacy is not

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139. Schneider, supra note 128, at 977.
141. Id. at 744.
142. Id.
143. Id. at 746.
144. Id.
always about freedom from government intervention, but rather may entail "a claim to" something from the government.\textsuperscript{145} Accordingly, rather than abandon the concept of privacy as reinforcing women's subordination, Allen suggests that feminist theorists recognize the elasticity of the public/private divide and "stress that the lines between public and private should be renegotiated and redrawn as necessary to further dignity, safety, and equality."\textsuperscript{146} 

Dorothy Roberts urges the recognition of autonomy as essential to the collective functioning of democracy.\textsuperscript{147} In this regard, she posits the existence of a positive right of persons dependent on the government for obtaining information essential to their participation in society, focusing primarily on the context of reproductive rights for poor Black women.\textsuperscript{148} Roberts critiques the Supreme Court's decision in \textit{Rust v. Sullivan},\textsuperscript{149} which upheld government regulations prohibiting health care providers in Title X-funded reproductive health clinics from dispensing information about abortions to their patients.\textsuperscript{150} Rejecting a First Amendment challenge to the regulations, the Court held that the prohibition did not interfere with the substantive privacy right to choose to terminate a pregnancy; rather, the regulations merely constituted a "refusal to subsidize a protected activity."\textsuperscript{151} Roberts argues the Court's characterization embraces a Constitutional jurisprudence that "protects only an individual's 'negative' right to be free from unjustified intrusion, rather than the 'positive' right to actually lead a free life."\textsuperscript{152} 

Roberts urges a jurisprudence that examines the state's inaction and its "impact . . . on the status of subordinated groups. . . . The critical questions become: Is the state perpetuating existing hierarchies of power? Does the government's policy further alienate an already-outcast community from society's privileges?"\textsuperscript{153} With this foundation, Roberts argues that rather than analyzing the regulations from the traditional First Amendment perspective of

\textsuperscript{145} Id. at 748. 
\textsuperscript{146} Id. at 750. 
\textsuperscript{148} Id. at 590 (stating that her intention is to "articulate an affirmative government obligation to provide abortion counseling to Title X patients" as "information necessary for self-determination"). 
\textsuperscript{149} 500 U.S. 173 (1991). 
\textsuperscript{150} Id. at 203. 
\textsuperscript{151} Roberts, supra note 147, at 601. 
\textsuperscript{152} Id. at 602. 
\textsuperscript{153} Id. at 605.
whether they interfered with the marketplace of ideas\textsuperscript{154} or whether they required patients to give up their privacy rights,\textsuperscript{155} the Court should have examined the extent to which the government impermissibly restricted the flow of important information and thus perpetuated oppression against an already subordinated group.\textsuperscript{156}

Applying that framework, Roberts argues that the regulations at issue in \textit{Rust} constituted an instance in which the "control of knowledge . . . helps to maintain the existing structure of racial domination."\textsuperscript{157} The regulations, Roberts contends, helped perpetuate the subordinating "dominant social structure, ideology and culture,"\textsuperscript{158} just as public schooling does.\textsuperscript{159} Roberts then argues for a "liberating constitutional vision"\textsuperscript{160} that would recognize and emphasize "ending the oppressive control of knowledge available to the Black community and ensur[e] the [availability of] information necessary for Black emancipation."\textsuperscript{161} Recognizing "the importance of information for self-determination, and . . . plac[ing] an affirmative obligation on the government to provide this information to people who are dependent on government funds" is key to this theory.\textsuperscript{162}

As the foregoing suggests, critical feminist legal theories have illumined the subordinating reality of true private choice and the negative public consequences it can provoke. Significantly, however, they also provide an avenue for recognizing and supporting the agency of low-income women of color raising children by linking privacy to autonomy and the right to have information critical for self-determination. The next question is what implications do those principles have for \textit{Zelman}?

III. TRUE PRIVATE CHOICE UNMASKED: IMPLICATIONS FOR ZELMAN

As suggested above, the Court confronted and addressed the fact pattern in \textit{Zelman} as raising an Establishment Clause issue; however, much more was at stake. The Court was influenced at least in part by the state's effort to reform the abysmal condition of the Cleveland public schools in concluding that the voucher program

\textsuperscript{154} Id. at 606-12.
\textsuperscript{155} Id. at 612-16.
\textsuperscript{156} Id. at 616.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 620.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 640.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
did not unconstitutionally promote religion.\textsuperscript{163} If, however, we place the substandard condition of the Cleveland schools in the forefront and examine the voucher program in the context of a school system that, as a matter of fact and law, had discriminated against Blacks decade after decade,\textsuperscript{164} the notion of private choice takes on new significance. It becomes clear that the options the state provided were limited, at best, which in turn raises issues of subordination.

Viewing privacy rights through a feminist lens requires assuring agency to subordinated groups so that choice does not reify the social order. Examined in this light, private choice in public education reform should be about enabling low-income families of color to direct their children toward schooling that will improve their lives and integrate them into society instead of perpetuate their subjugated status. In other words, private choice must protect the autonomy of low-income parents by providing them with meaningful, nondiscriminatory choices concerning the education of their children. In this connection, the relevant privacy right is grounded in the well-established right to parental autonomy, which is found in the Fourteenth Amendment.\textsuperscript{165} The following subsections discuss the existing contours of this right, particularly its roots in the abolition of slavery, which point toward a broader understanding of it as encompassing a positive right to decisional autonomy to counter systemic subordination. Finally, this part argues that pursuant to this conception of privacy, the state and city school board unreasonably interfered with the autonomy of Cleveland parents by failing to provide meaningful educational offerings.

\textbf{A. Existing Doctrine Concerning the Right to Parental Autonomy}

The fundamental right to make decisions concerning the upbringing of one’s children is well-established and long-standing. The Court first recognized this right in the context of education, noting, for example, in \textit{Meyer v. Nebraska},\textsuperscript{166} that autonomy to raise one’s children also encompasses a duty to educate them and prepare them to be successful citizens in the future.\textsuperscript{167} Two years later in

\begin{itemize}
\item \textsuperscript{163} See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 643-44, 653 (2002).
\item \textsuperscript{164} See \textit{generally} Reed v. Rhodes, 869 F. Supp. 1274 (N.D. Ohio 1994).
\item \textsuperscript{165} U.S. CONST. amend. XIV.
\item \textsuperscript{166} 262 U.S. 390 (1923).
\item \textsuperscript{167} See, e.g., \textit{id.} at 400 (observing that this nation has “always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted” and stating that “it is the natural duty of the parent to give his children education”).
\end{itemize}
Pierce v. Society of Sisters, the Court struck down a state statute requiring students to attend public schools. In so doing, the Court reaffirmed the principle that parents have a liberty interest in "direct[ing] the upbringing and education of children under their control" and again emphasized the key role parents have in readying their children for adulthood, characterizing this job as the "high duty[] to recognize and prepare [children] for additional obligations." Though parental rights are not without constraints, the Court has noted in this context that states may not interfere with this liberty "under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the[ir] . . . competency to effect."

The Court reaffirmed parental autonomy recently in Troxel v. Granville, which concerned the scope of Washington's visitation statute. The plurality opinion written by Justice O'Connor celebrated this liberty interest, detailing the long line of cases since Meyer that have upheld the parental right of autonomy. The plurality specifically noted that the "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

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168. 268 U.S. 510 (1925).
169. Id. at 534-35.
170. Id. at 535.
171. Id.
174. Indeed, none of the Justices disputed the continued vitality of this fundamental liberty interest. See id. at 65-66, 78 (Souter, J., concurring); id. at 80 (Thomas, J., concurring); id. at 86-87 (Stevens, J., dissenting); id. at 95 (Kennedy, J., dissenting). But see id. at 91-92 (Scalia, J., dissenting) (declining to find a substantive due process right but noting that the "right of parents to direct the upbringing of their children . . . is also among the 'other [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage".
175. Id. at 65-66 (majority opinion).
176. Id. at 66. Of course, the liberty interest is not without limits. In Troxel, the Court held that, as applied, the statute unconstitutionally interfered with the parental right to make decisions about one's children; the Court, however, did not address the lower court's determination that the state may not interfere with the parental right to decisional autonomy unless there is a showing of harm. Id. at 63, 70, 75. In this connection, the Court chose not to articulate the "scope of the parental due process right in the visitation context." Id. at 73. As discussed above, however, in other contexts, the Court has suggested that states may not interfere with parental authority absent a reasonable justification having to do with matters within the state's competency. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
As the foregoing suggests, the Court has interpreted parental autonomy as a negative right, that is, the right to be free from unreasonable governmental interference. Feminist legal theory, as discussed above, urges a closer examination of the source of this right, the Fourteenth Amendment, and points toward a fuller reading that encompasses a positive right to make decisions concerning one's children, free from the constraints of state-sponsored subordination. Such a right posits a state obligation to provide meaningful choices that promote decisional autonomy. This positive vision of parental autonomy is perfectly consistent with and reflects the underpinnings of the Fourteenth Amendment, a post-Reconstruction enactment designed to remove state-imposed constraints on former slaves. The next subsection explores this aspect of decisional autonomy in greater detail.

B. The Path Toward a Positive Right to Parental Autonomy

As Peggy Cooper Davis has observed, the family privacy doctrine has roots in the post-Reconstruction amendments, which strengthens the case for evaluating state school reform efforts with a critical eye toward their potential for perpetuating racial subordination. Specifically, the framers of the Fourteenth Amendment were cognizant of and sought to eradicate state constraints on former slaves' ability to exercise fully their human rights, which encompassed the right to have and manage one's family.

During slavery, Blacks had no rights with respect to their children, because under that system offspring belonged to the master — pure and simple. Children could be sold or sent to work at other plantations in order to advance the master's economic interest without providing notice to their parents or seeking their consent. Because the parents' first obligation was to fulfill their duties on the plantation, they frequently were unable to provide their children the basics in terms of attention, affection, and even nutrition. Slave parents could not educate their children. When it came to disciplining children, slaves could find themselves at the

178. Id. at 9-10.
179. E.g., id. at 91-92.
180. See, e.g., id. at 92-94. It should be noted that other adults tried to fill in for parents, such that the community of slaves attempted to provide guidance and support when parents were unable to do so.
181. E.g., id. at 94.
end of the whip for taking action against their master's property. As a result of these norms, slave children learned early on that parents had no meaningful authority over them, which meant in turn that parents had no power to protect them from harm or from being sold or bound out. In this regard, the children were charges of the slavery system itself, rather than of their own parents. Abolitionists were aware of and particularly abhorred this aspect of slavery; consequently they highlighted such abuses, hoping to help whites identify with the plight of these parents who, like them, loved and wanted to keep their families together.

After the Civil War and the end of slavery, states passed laws that continued to undermine Black parental authority. For example, under the Black Codes, employers could take Black children and apprentice them without getting the parent's consent. Additionally, the laws that proscribed vagrancy provided a cover for removing Black children from their families and requiring them to work for someone against their will, again without the parents' consent. Other laws proscribed educating Black children or limited education so much as to make it unavailable. Thus, even though slavery had ended officially, states still constrained Black parents' rights to control their children's upbringing as part of an overall scheme to maintain Blacks' subordinate status.

Members of Congress were aware of and sought to correct these abuses by enacting the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866. Davis reports that lawmakers intended to assure that former slaves were "secure in the parental relation." Specifically, she explains that the debates in both chambers demonstrated:

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\text{[A]s these bodies shaped the Thirteenth and Fourteenth amendments, they were deeply affected by the widely publicized}\]

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182. See, e.g., id. at 98.
183. See, e.g., id. at 95.
184. See, e.g., id. at 105-08.
185. Black Codes were laws that the former Confederate states passed to vitiate the effects of the Thirteenth Amendment. Id. at 114.
186. Id. at 147-48.
187. Id. at 114-15.
189. See, e.g., DAvis, supra note 177, at 112-17.
190. Id. at 112.
accounts of parental separations and fully responsive to the argument that rights of family are inalienable.¹⁹¹

Thus, the legislative history of these Amendments is replete with statements concerning the significance of affording Blacks the right of family autonomy. For example, Senator Wilson opined that ratification of the Thirteenth Amendment would “protect the ‘hallowed’ relations of parent and child.”¹⁹² Senator Charles Sumner made the rhetorically powerful point that even an alien from outer space would be stunned that a democratic nation permitted a system that denied parents’ basic rights respecting their children:

[²⁴]stonishment . . . would swell to marvel as he learned that in this republic . . . there were four million human beings in abject bondage, degraded to be chattels, despoiled of all rights, even the . . . sacred right of family; so that the relation of husband and wife was impossible and no parent could claim his own child.¹⁹³

Once it became clear, however, that the abolition of slavery did not protect families, lawmakers continued their work, spurred by the inequities of the Black Codes, again in large part because of their infringement upon family rights.¹⁹⁴ Thus, in debating the Civil Rights Act of 1866, members provided protection for making and enforcing contracts, which was, according to Davis, “understood to encompass familial rights.”¹⁹⁵ Senator Sumner stated the legislation must assure that newly freed slaves had the “rights ‘to contract marriage, and to make any arrangement whatever concerning their family affairs.’”¹⁹⁶ Finally, after enactment of the Civil Rights Act, lawmakers proposed the Fourteenth Amendment to ensure the rights would be enshrined in the nation’s Constitution.¹⁹⁷ The Amendment was intended to provide former slaves with citizenship and the protections attendant to it, including rights of family, which lawmakers described as a key element of true freedom.¹⁹⁸ For example, consider the words of Senator Howard:

¹⁹¹. Id.
¹⁹². Id. at 114 (quoting Cong. Globe, 38th Cong., 1st Sess., 1324 (1864)).
¹⁹³. Id. at 113 (quoting Cong. Globe, 38th Cong., 1st Sess., 1479 (1864)) (alterations in original).
¹⁹⁴. See id. at 114-16.
¹⁹⁵. Id. at 115.
¹⁹⁶. Id. (quoting Cong. Globe, 39th Cong., 1st Sess., 91 (1865)).
¹⁹⁷. Id. at 116. Members were concerned that the Act might be struck down as exceeding Congress’s authority. Id.
¹⁹⁸. Id. at 116-17.
[The slave] . . . had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend. . . . Is a free man to be deprived of the right of . . . having a family, a wife, children, home? What definition will you attach to the word “freeman” that does not include these ideas? The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free? 199

As Cooper’s work makes clear, the Fourteenth Amendment substantive due process right to family autonomy has its roots in protecting the integrity and agency of Black families. Understood in this light, the right to parental autonomy should be construed to encompass a right to make decisions about one’s children, free from state-imposed constraints of systemic subjugation. Pursuant to such a right, the state would be required to provide meaningful educational options that dismantle racial disparities, rather than choices that merely reify them.

C. Cleveland Public Schools: Lack of Meaningful Choice as an Unreasonable Interference with Parental Autonomy

The foregoing suggests that in assessing the validity of Cleveland’s educational reform — quite apart from the Establishment Clause issue — the key inquiry is whether the state infringed upon the autonomy of parents by providing limited educational offerings resulting from a legacy of racial discrimination. 200 As explained below, the fact that the voucher program perpetuated an inadequate system born of racial discrimination means that the reform and the underlying system furthered the subordination of an already oppressed group and, therefore, unreasonably interfered with the parents’ decisional autonomy.

1. The Context: Systemic and Historic Discrimination

The voucher program at issue in Zelman was just the latest effort on the part of the state to remedy abysmal conditions in

199. Id. at 117 (quoting Cong. Globe, 39th Cong., 1st Sess., 504 (1866)) (alterations in original).

200. It should be noted that this analysis also would apply to other systemic discrimination in education, including biases based on gender or ethnicity, for example.
Cleveland schools. In 1973,201 Black parents sued the city and state school boards for relegating their children to segregated, inadequate schools.202 The plaintiffs were successful in demonstrating, as the district court found, that de jure segregation had been in place in Cleveland since at least the 1940s.203 The court found that the city intentionally established and maintained such a system, taking care to preserve the racially-identifiable character of the schools and, as a consequence, of the segregated neighborhoods in which they were located.204 For example, when a Black school was overcrowded, a common occurrence, the school district transferred students to a less overcrowded Black school, even though nearby white schools were under capacity.205 In some instances, the school board sought and received waivers from the state that permitted educating Black students in over-capacity schools for 3.5 hours a day, rather than the five hours required by law.206 This system of so-called relay classes,207 enabled two shifts of students to attend classes in an overcrowded building.208 In other cases, the board addressed overcrowding by transporting Black students to a nearby white school to attend certain classes, which had the promise of integrating schools.209 In reality, however, the Black students would arrive at the white school and remain an isolated group.210 Thus, the

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201. Like many states, Ohio has a long history of using education to support the oppression of African Americans. See Reed v. Rhodes, 500 F. Supp. 404, 407-10 (N.D. Ohio 1980), aff'd, 662 F.2d 1219 (6th Cir. 1981) (examining the historic roots of discrimination in the state). Starting in the first half of the nineteenth century, Ohio lawmakers outlawed educating Blacks in public schools. See Douglas, supra note 188, at 989, 993. Later, they passed laws requiring segregation in public schools. Id. at 993. Even after the state repealed these laws, however, segregation persisted throughout the state, as many localities resisted complying with the law or made integration voluntary. Id. at 1004-05. As southern Blacks migrated to Ohio in increasing numbers after the Civil War and well into the twentieth century, opposition to integration and racial tension increased. Id. at 1010-16. Black children confronted hostile environments when they attended predominantly white schools. For example, “white teachers punished white children by making them sit next to black children.” Id. at 1006. Violence erupted in other communities that attempted integration. Id. at 1009-10. By the 1970s, major litigation challenging segregation in cities such as Dayton, Columbus, and Cleveland was undertaken. Indeed, Douglas observes that “more school desegregation litigation was filed in Ohio during the post- Brown era than in any other northern state.” Id. at 1030.


204. See, e.g., Reed, 422 F. Supp. at 726.

205. Id. at 722.

206. Reed, 662 F.2d at 1226; Reed, 607 F.2d at 730-31; Reed, 422 F. Supp. at 783 n.14.

207. Reed, 607 F.2d at 730-31.

208. Reed, 662 F.2d at 1226.

209. Reed, 607 F.2d at 731.

210. Id. at 731-32.
bused-in Black students typically were assigned seats in the back of classrooms away from whites; they were not allowed to participate in activities with the white students, such as gym class or even eating lunch.\textsuperscript{211} Finally, the court found that the school board assigned teachers to schools on the basis of race as a means of preserving the racial identity of the schools.\textsuperscript{212}

The court also found that the state school board knew about and colluded in these practices. For example, state officials discouraged Black parents from complaining about the discrimination, invoked procedural hurdles designed to limit the impact of their statements, and erroneously claimed that they could merely advise parents, rather than meaningfully address their concerns.\textsuperscript{213} When the lone Black member of the state board introduced motions designed to address the discriminatory conditions in the schools, those motions failed.\textsuperscript{214} The state board later ignored the state Attorney General's legal advice that its members had a legal obligation to take measures to correct existing discrimination in the schools, including cutting off state funds where necessary.\textsuperscript{215} The federal government also put the state board on notice of the discrimination through reports issued by the Department of Health, Education, and Welfare, which had denied Cleveland's application for emergency funding because of racial segregation in its schools.\textsuperscript{216} The U.S. Commission on Civil Rights also issued a report on the racial discrimination in schools.\textsuperscript{217} Neither of these moved the state board to investigate or take any other action to address the situation. Accordingly, in 1978, the district court found both the city and state school boards liable for intentionally discriminating against Black students and ordered the parties to remedy the system-wide violations.\textsuperscript{218} Significantly, the court emphasized improving the quality of education as a key part of removing the vestiges of discrimination.\textsuperscript{219}

\begin{itemize}
  \item \textsuperscript{211} Id. at 732-33.
  \item \textsuperscript{212} Reed, 422 F. Supp. at 786-87.
  \item \textsuperscript{214} Id. at 410-11.
  \item \textsuperscript{215} Id. at 411-12.
  \item \textsuperscript{216} Id. at 420.
  \item \textsuperscript{217} Id. at 417.
  \item \textsuperscript{218} See Reed v. Rhodes, 455 F. Supp. 569, 571-73 (N.D. Ohio 1978), aff'd in part, 607 F.2d 714 (6th Cir. 1979), aff'd, 662 F.2d 1219 (6th Cir. 1981).
  \item \textsuperscript{219} Id. at 597-98 ("Remedial programs are sometimes required to overcome the inequalities inherent in dual school systems, and when the consequences of unlawful educational isolation linger, they must be dealt with by independent measures beyond pupil assignment.").
\end{itemize}
Finding liability was only the beginning, however, as the effort to desegregate schools evolved into a bitter struggle documented in the nation's leading newspapers and magazines. Significantly, financial woes figured prominently in the almost twenty-year lag between the issuance of the court order and actual implementation of elements of the remedial plan. Black voters initially supported tax measures to raise money for the schools; whites consistently voted them down. Two years after the court had ruled against the city, the court held the school board in contempt for failing to make progress toward desegregation. The court created a new position to oversee the desegregation effort, stripping the school board of significant authority, and appointed Dr. Donald Waldrip, a former superintendent of schools in Cincinnati. In assessing the school district at the time, the court stated that its "policies and actions have led to confusion and chaos in every important desegregation-related area," characterizing its performance as "abyssmal" and representing "at best reckless conduct, and at worst, a designed attempt to insure that desegregation fails."

Even with the appointment of an expert to oversee the desegregation process, the goals of the remedial plan remained elusive. Enrollment began to drop—from 90,000 when the litigation began to 80,000 in 1980 when busing started in earnest. Research demonstrated that forty-one percent of white students leaving the system did so because of busing. One year into Dr. Waldrip's tenure, budget difficulties resurfaced, prompting him to suggest that
the court place the school district in federal hands. Dr. Waldrip later recommended a plan that relied on magnet schools, essentially school choice, to desegregate the schools. The court rejected it, stating that "[i]t was never the court's intention that (magnet) schools or programs be the focus of the desegregation effort." The court continued to spar with city officials, at one point sending the school board president and treasurer to jail for refusing to pay for raises and promotions of Dr. Waldrip's staff. The most dramatic and troubling development occurred in 1985, when the first Black superintendent, Dr. Frederick Holliday, committed suicide, apparently out of frustration caused by what he termed "petty politics." In two years, Dr. Holliday successfully had cleared up the budget deficit and earned the support of the community, which voted to support a school levy for the first time in ten years. The desegregation process, however, continued to lag, with some school officials still failing "to read the full court order or make desegregation plans." The court again voiced its frustration, accusing the district of "maladministration, a form of resistance quite different from standing in the schoolhouse door, but equally effective." In 1987, the court "approved an Unfinished Compliance Agenda," which specified the actions the school board needed to take to realize the terms of the Remedial Order. Five years later, the school board still had made negligible progress, causing the court to remark bitterly about the defendants:

[F]or more than a decade they displayed a recalcitrance and hostility toward the laws of the land and the remedial orders of this Court that not only prevented progress in this case but also inflicted grievous wounds on the community as a whole. Of late, no one has been heard to assert that the schools are operated in

234. Id.
236. James Barron, Rescuing Cleveland Schools May Be Harder Than Ever, N.Y. TIMES, Feb. 3, 1985, § 4, at 2 (quoting a note written by Dr. Holliday shortly before his death).
237. Id.
238. Id.
239. Id. (quoting Federal Judge Frank Battisti).
240. See Reed v. Rhodes, 179 F.3d 453, 475 (6th Cir. 1999) (Cole, J., dissenting) (quoting the district court's observance that "the Unfinished Compliance Agenda is ample evidence of local defendant's failure to implement remedial orders over the past nine years").
a satisfactory manner; to put it another way, every voice laments the unsatisfactory condition of the school district.\textsuperscript{241}

Significantly, however, the court observed that “[m]uch of the senseless anger permeating [this litigation] has dissipated.”\textsuperscript{242} The parties apparently were ready to take steps to put the students first and move forward.

3. Incremental Progress, Finally

In 1992, the court ordered the parties to work together again to develop a plan that would address the underlying violations and be implemented in the 1994-95 school year.\textsuperscript{243} The touchstone to guide their discussions was designing a plan that would not only address the racial imbalances, but also provide students with a quality education,\textsuperscript{244} recognizing the link between segregation and the inadequacies in schooling for the plaintiff class.

The parties came forward with a settlement agreement, with the defendants proposing a student assignment plan that they asserted would improve educational opportunities for the district’s children.\textsuperscript{245} This plan, called “Phase I,” was experimental in form; it allowed students from six elementary schools to choose the school they wished to attend. Since these schools were located in “some of the more racially integrated neighborhoods in Cleveland, the student bodies were naturally integrated.”\textsuperscript{246} Buoyed by this success, upon which all the parties agreed, the city school board developed a larger plan, dubbed Vision 21, which featured choice as its centerpiece.\textsuperscript{247} Notwithstanding the considerable progress made with Phase I, the state school board and the plaintiffs immediately blanched at the notion of choice for the entire system: Both filed objections with the court based on their fears that Vision 21 would

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\item \textsuperscript{241} Reed v. Rhodes, 1992 U.S. Dist. LEXIS 4723, *2-3 (N.D. Ohio Apr. 2, 1992). The court advised the parties that in developing a plan pursuant to the Remedial Order, they “should focus on the improvements in the educational program and changes in the practices of the school district that you believe will effectively eliminate the vestiges of past discrimination . . . .” Id. at *8.
\item \textsuperscript{242} Id. at *3-4.
\item \textsuperscript{243} Reed v. Rhodes, 179 F.3d 453, 475-76 (6th Cir. 1999) (Cole, J., dissenting).
\item \textsuperscript{244} See, e.g., Reed v. Rhodes, 869 F. Supp. 1274, 1276-77 (N.D. Ohio 1994) (“[T]he remedial orders . . . were not intended to produce equal access to mediocre schools.”) (quoting the Second Supplemental Report of the Office on School Monitoring and Community Relations).
\item \textsuperscript{245} See Reed, 179 F.3d at 476 (Cole, J., dissenting).
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\end{itemize}
result in "racially identifiable schools." The city school board reassured these parties and the court that such would not be the case; accordingly, they all entered into an "agreed order . . . to implement Vision 21, including its parental choice component." As the state defendants and plaintiffs feared, within one year of implementation Vision 21 resulted in nearly one-half of participating schools becoming racially imbalanced as defined by the terms of the consent decree.

Unfortunately, even while the parties were agreeing to the design and implementation of Vision 21, other intervening circumstances threatened the program's success. Specifically, when the district signed the agreement, it was in the throes of a severe financial crisis. The school district had incurred $140 million in debt, which meant it also was engaged in deficit spending "exceeding $70 million annually." The district had "destroyed its credit rating and fiscal credibility" with state and private financial institutions. At the same time, educational quality within the system was declining precipitously, with rates of truancy and student dropouts on the rise and student performance on state assessment tests on the decline. Twice the school district had sought a levy to raise the necessary funds to implement Vision 21; twice the public rebuffed the board in what the court termed a "lack of confidence" vote. At this point, over twenty years into the litigation, the district court gave the state board of education the authority to run the school system to help get it back on track to fulfill the terms of the Remedial Order. At this juncture, the state legislature enacted the voucher program.

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248. Id.
249. Id. The other components of Vision 21 included:
   Comprehensive Enhancements, which called for a strengthening of the educational foundation of Cleveland Public Schools. . . [and] Core Enhancements, which were designed to address the fundamental injustice of racial segregation through programs designed specifically to ensure African-American students a quality education as measured by improved student outcomes over a period of time. . .
250. Id. at 476 n.2.
252. Id.
253. Id. at 1460 n.1.
254. Id. at 1462.
256. The school voucher program was first implemented in 1995 but was struck down in 1999 because it violated the "Single-Subject Rule" of the Ohio Constitution. See Simmons-Harris v. Goff, 711 N.E.2d 203, 207 (Ohio 1999).
As the litigation wore on, financial problems for the school district worsened, lessening the likelihood that the defendants would be able to implement the ambitious goals of Vision 21. As a result, much of the plan focused on providing student choice, through magnet schools and the like, rather than on assuring that racially identifiable schools were a thing of the past. By 1998, the district was declared unitary as a matter of law,\textsuperscript{257} in large part because racial identifiability of schools was deemed to be a matter of private choice: that is, the parents' choice of schools and neighborhoods.\textsuperscript{258} The remaining disparities in achievement, which were the target of quality reforms required by the remedial order, were deemed attributable to socio-economic status and not the vestiges of past discrimination.\textsuperscript{259} In his dissent, Judge Cole attacked this notion of choice. Judge Cole observed that the district failed to provide any meaningful choices — in this context, integrated schools with desirable programming.\textsuperscript{260} He stated that "the Cleveland Board of Education made it possible for schools to become racially identifiable by directly offering parents a segregated choice."\textsuperscript{261}

4. Putting the Pieces Together: What the History Means for the Voucher Program

The Cleveland school desegregation narrative puts the voucher program in perspective. While this program emerged to address an educational crisis, that crisis was undoubtedly one of the state's own making, through hostility, resistance, and reckless maladministration,\textsuperscript{262} to paraphrase the district court, in the face of over two decades worth of orders to stop discriminating. Indeed, the program, designed to be a cure of sorts, appears to exacerbate the substandard conditions, perpetuating longstanding racial disparities in education and, as a result, rendering the choices available to parents less meaningful.

Because of the state's misdeeds, parents in Cleveland had the choice to remain in a substandard, segregated school system, or to avail themselves of the voucher program. The public schools clearly were an unattractive option, as evinced by its recent assessment as

\textsuperscript{257} Reed, 179 F.3d at 467.
\textsuperscript{258} Id. at 464.
\textsuperscript{259} Id. at 466-67.
\textsuperscript{260} Id. at 482-83 (Cole, J., dissenting).
\textsuperscript{261} Id. at 482.
\textsuperscript{262} See supra note 239 and accompanying text.
being in a state of "academic emergency,"\textsuperscript{263} which contributed, no doubt, to the declined enrollment of 60,000 students.\textsuperscript{264} Surrounding school districts that could participate in the voucher program declined to do so,\textsuperscript{265} which is hardly surprising since they are populated with parents who sought to avoid the city schools in the first place. Most ironic is that Black parents are not participating in the voucher program in numbers reflecting their substantial size in the school population. Fifty-three percent of the participants in the voucher program are Black; twenty-nine percent are white.\textsuperscript{266} Some reasons advanced for the lower Black participation rate include the fact that requiring all families to contribute some portion of tuition places private schools out of reach for the very poor and that the private schools tend to be located closer to white neighborhoods, making attendance a transportation issue.\textsuperscript{267} Finally, recent research suggests that the Cleveland voucher program has not produced the academic achievements its proponents advertised, resulting in lower outcomes on standardized tests for Black students in some instances.\textsuperscript{268} Thus, as an option designed to enhance opportunities for learning, the program falls short. The voucher program has failed to improve quality for the vast majority of low-income minority students in public schools; yet, the state plans to expand it, thus assuring that Ohio will continue to spend more public money on a per-pupil basis on private schools than any other state in the nation and to be among the least generous in spending for public schools.\textsuperscript{269}

The state policy appears to be one of abandoning public education, relegating families that cannot afford to move, take advantage of even the subsidized voucher program, or otherwise avail themselves of private schools to a grossly substandard system. The state has failed to address the inadequacies despite over twenty years of court supervision for its intentional racial discrimination.

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  \item 263. \textit{See supra} note 15 and accompanying text.
  \item 267. \textit{Id.}
\end{itemize}
Private choice cannot mask the fact that the abysmal condition of the schools is related to the official decision to subordinate Black students, a choice the state made at least as early as the 1940s. Through consistent mismanagement and resistance to federal enforcement, the state has perpetuated longstanding discrimination. In this connection, the state clearly has failed to comply with its obligation under these circumstances to provide meaningful options to parents and, in so doing, has violated their right to decisional autonomy.

CONCLUSION

Applying feminist legal theory to the choices available to low-income parents is essential to determining whether education reform truly holds promise for meaningful social change. The Cleveland experience demonstrates that choice has the great potential to retrench segregation and the attendant inequities in facilities and resources, rather than provide a lifeline toward educational and economic well-being. As feminist theory and praxis instruct, private choice and autonomy must and can be reconceptualized to advance social change, which means, in this instance, holding the state responsible for attempting to repackage ongoing subordination of low-income students of color as “school reform.” As this article has demonstrated, private choice understood as an affirmative right to parental autonomy furthers the guarantee of equal protection and requires much more than transparent efforts to maintain the status quo. Rather, this positive right demands a commitment to the principles of community and democracy embodied in Brown and substantive educational reform that provides both quality and equality to all the nation’s children.