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SCHOOL VOUCHERS: INVITING THE PUBLIC INTO THE RELIGIOUS SQUARE

JAMES G. DWYER*

The most prominent question today relating to church-state relations is how far "charitable choice"—the inclusion of religious social service providers in programs of state aid to private organizations—can go. What kinds and amounts of aid may the state supply to religious groups to support their provision of services that are similar to those provided by state agencies and by nonreligious private service providers? And how much discretion may or must the state give religious aid recipients with respect to how they use the aid?

The types of services for which religious organizations might receive state aid are quite varied. Many important programs serve primarily or solely adults and adolescents—for example, programs of drug rehabilitation and programs of reproductive counseling. But the most discussed, and potentially most revolutionary, kind of service for which religious and other private organizations are seeking aid today is a service for children—namely, elementary and secondary education.¹ There is increasing momentum today in favor of substantial state aid to religious and other private schools. For

* Assistant Professor, William & Mary Law School. The conference for which this Essay was originally prepared was very stimulating and I benefited greatly from listening to the other participants as well as from their questions and comments on my presentation. I am especially grateful to Peter Alces, Neal Devins, Dave Douglas, and Alan Meese for their helpful comments.

1. Secondary education is also provided to adolescents, of course, who in fact and in law are in a situation intermediate between childhood and adulthood. For the sake of simplicity, this Essay addresses only the situation of persons who, because they are in early stages of human development, are insufficiently autonomous or competent to decide for themselves what kind of education they should receive. It brackets questions about whether and to what extent the points made would apply to minors who are more capable of making free and informed decisions about their own education. In other words, I assume that the persons to whom I refer as "children" are not to be ascribed a right to choose for themselves where they will attend school and what sort of instruction they should receive, but rather that an adult must make these choices for them.

decades states have provided private schools with modest forms of in-kind (i.e., nonmonetary) aid, but today there is mounting pressure to provide substantial monetary aid. There are already school voucher programs that include religious schools in three jurisdictions—Milwaukee, Cleveland, and Florida²—and nearly every state has had a proposal for a voucher program on its legislative agenda in recent years.³

This Essay focuses on school vouchers, which I will treat as representative of a variety of schemes for directing public money to private schools on a per-pupil basis.⁴ It presents a few of the ideas

2. The Cleveland and Florida programs are currently under court review. A federal district court has ruled the Cleveland program unconstitutional, *see Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999), and that decision was affirmed by the Sixth Circuit. *See* Nos. 00-3055/00-3060/00-3063, 2000 U.S. App. LEXIS 31367, at *1 (6th Cir. Dec. 11, 2000). A Florida state trial court ruled that the Florida program violates Florida's state constitution. *See Holmes v. Bush*, No. CV 99-3370, 2000 WL 526364, at *1 (Fla. Cir. Ct. Mar. 14, 2000). An intermediate state appellate court reversed that decision, *see* 767 So.2d 668 (Fla. Dist. Ct. App. 2000), and the case awaits resolution by the state's supreme court.

3. Last year at least 25 state legislatures considered voucher proposals. *See* Michael Janofsky, *School Voucher Measures Face Uphill Battles; Disgruntled Parents Lead Push for Education Choice*, SAN DIEGO UNION-TRIB., Jan. 31, 2000, at A1, available in 2000 WL 13947950. As of the November election, 21 states had such proposals pending. *See* Anjetta McQueen, *Voucher Backers Refuse To Quit; Strategy I to Shift to Legislatures*, WIS. STATE J., Nov. 10, 2000, at A4, available in 2000 WL 24294951. During the 1999 legislative session, a similar number of states considered but did not pass voucher or tuition tax credit legislation. *See, e.g.*, H.B. 5, 21st Leg., 1st Sess. (Alaska 1999); H.B. 2279, 44th Leg., 1st Reg. Sess. (Ariz. 1999); H.B. 2275, 82d G.A., Reg. Sess. (Ark. 1999); S.B. 882, Reg. Sess. (Cal. 1999); S.B. 1132, Jan. Sess. (Conn. 1999); S.B. 59, 140th G.A. (Del. 1999); H.B. 195 (Ga. 1999); S.B. 12, 20th Leg. (Haw. 1999); S.B. 0329, 91st G.A. (Ill. 1999); S.B. 633, 111th G.A., 1st Reg. Sess. (Ind. 1999); H.B. 2462 (Kan. 1999); S.B. 1115, Reg. Sess. (La. 1999); H.B. 668, Reg. Sess. (Md. 1999); S.B. 216, 90th Leg., Reg. Sess. (Mich. 1999); H.B. 31, 81st Leg. (Minn. 1999); H.B. 437, Reg. Sess. (Miss. 1999); S.B. 74, 90th G.A., 1st Reg. Sess. (Mo. 1999); L.B. 385, 96th Leg., 1st Reg. Sess. (Neb. 1999); A.S. 507, 70th Reg. Sess. (Nev. 1999); H.B. 633, 156th Sess. (N.H. 1999); S.B. 7, 44th Leg., 1st Spec. Sess. (N.M. 1999); H.B. 2366, 76th Leg. (Tex. 1999); H.B. 1670, 56th Leg., Reg. Sess. (Wash. 1999). In addition, the United States Congress considered during the last session the "Education Savings Account and School Excellence Act of 1999," which would have allowed a federal income tax deduction for the expenses of sending a child to a private school. *See* S. 14, 106th Cong. (1999).

4. The most commonly discussed alternative strategies are tax credits and tax deductions for tuition costs incurred by parents. Tuition reimbursement has also been tried. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 764 (1973). Because these strategies simply change the timing and mechanics of the state payments, they are for practical purposes indistinguishable from vouchers. Under a voucher approach, a tax benefit approach, or a tuition reimbursement approach, or even an approach of making direct payments to schools on a per-pupil basis, the state pays out money for only one specific purpose—enrollment of children in private schools. Under all of these approaches the private

I develop, more fully, in the forthcoming book *Vouchers Within Reason*.⁵ The Essay addresses whether states should provide vouchers for use at religious and other private schools and whether significant regulation should be attached to vouchers. Analysis of these questions suggests that vouchers create the likelihood of unprecedented state control over activities of religious organizations, precisely because the recipients of the service that the state is supporting are children rather than adults. It also suggests that, in the case of children's schooling, the state's entrance into the religious arena is, on the whole, a good thing. In fact, it is long overdue.

When addressing questions of constitutional interpretation or political theory presented by conflicts over *any* aspect of child rearing, one must first recognize that a proper analysis will necessarily differ in important respects from an analysis of situations involving only adults. Because standard modes of constitutional analysis and political theorizing envision that only competent adults are involved in disputed matters, and rely substantially on premises that are true of competent adults but not of children, the standard modes of analysis cannot simply be extended without modification to child-rearing contexts.⁶ Whenever constitutional scholars or political theorists turn their attention to schooling or any other child welfare issue (e.g., parents' religious objection to medical care or core family law issues like child abuse), they must restructure their analytical apparatus. This is so because of two facts about child-rearing situations that are obvious but often ignored.

First, it is generally true that in controversies over child rearing, the persons who have the most important interests at stake are the children whose upbringing is in dispute. No adults have interests at stake that are as important as those of the children—not parents, not other individual citizens who take a special interest in

choices of parents serve as a but-for cause of state money reaching any particular school. At most, the approaches might differ in their symbolic impact and in their distributional effects.

5. JAMES G. DWYER, *VOUCHERS WITHIN REASON* (forthcoming 2001).

6. The United States Supreme Court's decisions regarding parental rights of control over children's upbringing nevertheless do just that, and thus are defective at their core. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1379-88 (1994).

the controversy (e.g., the secularist citizen/taxpayers who often bring Establishment Clause suits in aid-to-school cases), and not individual members of the rest of society whose interests are represented collectively by the state. Analysis of these controversies, then, if it is accurately to reflect the relative importance of the human interests at stake, as ethical and legal thinking is generally expected to do, should focus first and foremost on the interests and rights of the children. Yet most arguments about child-rearing issues give little attention to, and often simply ignore, the developmental interests of the children involved. Instead they focus on the interests and rights of parents, of the rest of society (e.g., societal interests in pluralism, in creating good citizens, or in avoiding public expense), and of other individual adults who claim to be affected by state policies. For that reason they are deficient.

The second important fact is that children do not have the same capacities and experience of the world that adults are presumed to have. Most importantly, they are not autonomous and are not capable of directing their own lives, but rather must have their lives directed by others. In addition, while they are more impressionable, they are also generally oblivious to what actors (such as the state) outside their immediate community are doing, or are at least less likely to distinguish the various sources of influence and authority in their world.

The differences in children's capacities and experience require that, in analyzing church-state issues in child-rearing contexts, we abandon some of the assumptions we ordinarily make about rights and about personal responsibility. For example, in other contexts, it is typically the case that certain individuals have at stake rights to effectuate their wishes. Thus, to give content to the rights that people have, courts need simply look to the people's preferences. Plaintiffs in free exercise cases assert a right to effectuate preferences grounded in religious belief, and it is a relatively straightforward matter to figure out what it would mean to recognize and respect the person's asserted right: it would mean satisfying the person's expressed preferences. In Establishment Clause cases, plaintiffs may or may not be regarded as having a right at stake (as opposed to simply having standing), but we are

more inclined to say they have a right at stake the more the challenged state action works a coercion of their religious beliefs, which they presumably do not want, or forces them to support others' exercise of religion against their will.

If children are to be the primary focus of legal and moral concern, their lack of autonomy means that the individual rights principally at issue will be of a different sort—that is, protections of interests identified by persons other than the right holders, rather than protections of the right-holders' choices. It also means that responsibilities generally attributed to right holders in connection with their exercise of rights—principally, the responsibility to bear the costs of one's choices—are inapposite. In addition, children's different experience of the world means that state interaction with religious organizations in child-rearing contexts might not raise, or might not raise to the same degree, some of the Establishment Clause concerns that arise in adult contexts—for example, concerns about symbolic unions or perceived endorsement. On the other hand, such interaction might create some new concerns, such as inordinate influence on formation of beliefs.

The analysis of school vouchers in the remainder of this Essay turns to a substantial degree on, and gives more concrete form to, these general observations on constitutional and moral reasoning about child rearing. It offers what I call a “child-centered analysis” of the two important questions that voucher proposals raise. The first question is whether states should enact voucher programs. The second question is what regulations states should attach to vouchers if they do create such programs. A child centered analysis—one that gives primacy to children's interests and rights and that takes into account children's differences—generates conclusions unlike any arrived at by the “adult-centered” approaches that dominate discussion of this and other child-rearing issues.

I. RIGHTS AND RESPONSIBILITIES IN THE VOUCHER CONTEXT

The first implication of a child-centered analysis is that none of the parties immediately involved in state funding or regulation of private schooling should be deemed to have at stake “freedom rights,” by which I mean rights to do what one wants to do, or to be

free of constraints on one's freedom.⁷ None of the interests of the adults involved—parents, school operators, religious leaders, and citizens represented by the state—are adequate to generate such a right.⁸ Whatever interests those adults have at stake are insufficiently important and/or are of a *kind* that, as a matter of general principles, we simply do not protect with rights in our legal and moral culture. Thus, those interests would be “trumped” by any rights that children possess in connection with their schooling.

First, none of the interests that adults possess in connection with funding for private schools are “fundamental”; properly speaking, they are not interests in self-determination or basic welfare. As nonfundamental interests, they do not have the same claim to the protection of rights that fundamental interests have. What is truly at stake for those adults *directly* involved is how the lives of people other than themselves—namely, the children involved—will go.⁹ As

7. Such rights typically are couched in terms of substantive due process or free exercise of religion. I discuss a different type of right—a right to equal treatment by the state—below. See *infra* notes 81-93 and accompanying text.

8. This inadequacy suggests that the Supreme Court's fabrication of parental constitutional rights in the 1920s was a mistake. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that a state law requiring all children to attend a public school violated parents' Fourteenth Amendment substantive due process right to direct the upbringing of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a state law prohibiting school instruction in a foreign language violated this same right).

9. There is also money at stake, of course. For parents, however, the money is really a proxy for control over their children's education; vouchers would increase their ability to exercise such control by increasing their feasible options. In any event, the money parents spend on private schooling is presumably money they do not need for their basic subsistence, so their retaining that money is not a fundamental interest. The interest that individual taxpayers have in how tax revenue is used, or in retaining their per capita share of money being spent on private education, is even more clearly not a fundamental one.

Some commentators speak of schooling as a vehicle for adult speech—either parental speech or government speech. See, e.g., Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1012-33 (1996) (arguing for parental educative speech rights). But surely parents and state officials who seek control over schooling do not typically do so to communicate something to the outside world. They do so to secure for children the kind of education they think the children should have. Nor does anyone *need* to exercise control over schooling in order to express their beliefs to the world, or to their children. Parents have ample opportunity to communicate their views to their children outside of school hours. In addition, even if schooling did present a unique opportunity for adults to express particular views, it would be morally inappropriate to treat this important part of children's lives in such instrumental fashion, as a mechanism for gratifying an adult's desire to speak. No one has a fundamental interest in using the lives of others to communicate beliefs, and regarding anyone as entitled to use others this way violates the

a general matter, an interest in how someone else's life will go is not a fundamental interest, by any sensible definition of that term. It is not one of "the 'basic requisites of a man's well-being,'" or a "generalized means to a great variety of possible goals . . . whose joint realization, in the absence of very special circumstances, is necessary for the achievement of more ultimate aims."¹⁰

This does not change when the "someone else" is one's offspring. One's child is a distinct person, so control over the child's life is not a matter of self-determination. Nor is it a matter of securing the basic aspects of one's own well-being, the things one needs to function and pursue higher aims. In fact, it is one of the higher aims we pursue. My children's education is a fundamental aspect of *their* well-being. It will determine how *their* lives will go, how able *they* are to pursue self-chosen higher aims later in life. It is a shaping of *their* minds, a preparation for lives that *they* will lead. One of my higher aims in life is to ensure that this all goes well for them, and that my children receive the best education possible. As is true with many other higher aims people pursue—for example, success in a career or gaining political office—I attach great subjective importance to this aim. But that subjective importance does not transform my interests in the matter into fundamental ones, does not make my children's education a basic aspect of *my* well-being, and certainly does not elevate my interests to a position of greater importance than the interests of my children. Indeed, it would be paradoxical to say that satisfaction of my desire for their well-being is more important than their well-being.

In addition, an interest in how someone else's life will go is, as a general matter, not the *kind* of interest that generates an entitlement in our political and legal tradition. In fact, the opposite

basic moral requirement that we treat persons as ends rather than means. See also discussion *infra* notes 94-97 and accompanying text.

10. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 37 (1984). Feinberg gives the following as examples of a fundamental or "welfare interest": physical health, the integrity and normal functioning of one's body, basic intellectual abilities, emotional stability, "the capacity to engage normally in social intercourse," some minimum of financial resources, and "a certain amount of freedom from interference and coercion." *Id.* An interest in shaping the lives of other persons does not fit well with this definition or catalog of essential goods. In fact, Feinberg includes successfully raising a family among people's ulterior aims. See *id.*

is true. As a general matter, we reject the proposition that anyone should be deemed to have a *right* to determine how another person's life will go.¹¹ This is evident in every area of life other than the rearing of minor offspring where people desire to control someone else's life, including other kinds of relationships involving care-taking of an incompetent person. Guardians for incompetent adults generally do not possess rights in connection with decision making for their wards, but rather are deemed to enjoy a privilege of exercising a limited authority over the lives of their wards.¹² I have argued elsewhere that parents should be treated similarly,¹³ and this certainly would be true also of other adults who exercise some authority over children's lives—for example, citizens who participate in democratic decision making concerning education policy. They should be viewed as fiduciaries rather than right holders.

There is also a discrete group of individuals whose members get involved in litigation over state aid to religious schools, even though they are not directly involved in the interactions between state agencies and the religious entities. This is the group of citizen bystanders who object to the nature of the church-state interactions because they are troubled by breaches in the wall of separation between church and state, and/or because they experience some coercion of their beliefs by the state's perceived endorsement of, or union with, religion.

The interests these people (and I count myself among them) have in connection with children's schooling are significant but hardly commanding. They have an interest in avoiding any threat to the structural integrity of the government (i.e., its remaining purely secular).¹⁴ They also have an interest in the state not acting in any way that might imply that they are outsiders in this society or that the state generally and consciously disfavors their world view,¹⁵

11. See Dwyer, *supra* note 6, at 1405-23.

12. See *id.* at 1416-20, 1431-32.

13. See *id.* at 1423-47.

14. The issue of whether vouchers in fact pose a threat to the structural integrity of the government and whether existing Establishment Clause doctrine, which is intended in part to prevent such threats, precludes or constrains a voucher program is considered below. See *infra* Part II.

15. By "generally," I mean to distinguish merely having one's views on a particular issue

since this might harm them psychologically and/or pressure them to change their beliefs. These interests are substantial enough that such persons are often in the best position to challenge inappropriate state action relative to education, and they should be allowed to do so in a court of law. The Supreme Court has in fact carved out from the general ban on taxpayer standing—which is based on a premise that an interest in the government's complying with the law is not in itself a substantial interest—an exception for Establishment Clause cases.¹⁶

Courts, however, do not speak of these persons as having *a right* at stake. That seems proper, because the state's adherence to the structural constraint embodied in the Establishment Clause is better viewed as a duty owed to citizens collectively. Taxpayer plaintiffs are best seen as private attorneys general, acting as agents for society as a whole. In addition, an interest in avoiding offense or a message of exclusion, while more personal, is not of great moment in most aid-to-school situations. There are situations in which the personal impact of state action that violates the Establishment Clause is great, but payments designed to enable children in all private schools to receive a better secular education do not create such a situation.

Thus, the interest secularist taxpayers have at stake in the voucher controversy is diffuse and relatively small. It does not make a compelling case for saying they have a right at stake. In any event, even if one insisted that they have a right to protection of that diffuse and insubstantial interest, one would have to concede that the right is less weighty and important than a child's right to a good education.¹⁷ If the two rights were to conflict, then, the

disfavored, which occurs to the losers in every contest in the political process. By "consciously," I mean to distinguish finding that the government's policies are on the whole, but not by design, less consistent with one's world view than with others' world views, which also must inevitably happen to some group or groups.

16. See *Flast v. Cohen*, 392 U.S. 83 (1968) (holding that taxpayers had standing to challenge federal subsidies for parochial schools). The Supreme Court established the general bar to taxpayer and citizen standing in *Ex parte Levitt*, 302 U.S. 633 (1937), and *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

17. This right of children can be understood as a moral right (i.e., what they *should* have as a matter of law), or as a right they possess by virtue of positive law in some states, because of provisions regarding education in state constitutions or statutes. See Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right*

children's rights should trump. Whether thought of in terms of interests or rights, providing a good education for children is simply more important than avoiding unintentional and modest effects on secularist bystanders. It is thus peculiar that courts treat Establishment Clause values as a trump over all other considerations in the aid-to-school cases, and invalidate any state support for education in religious schools that runs contrary to Establishment Clause doctrine, without considering whether other values at stake—for example, children's educational needs—outweigh Establishment Clause values in particular situations.¹⁸ This seems difficult to justify on the basis of an objective assessment of the interests or moral rights at stake. It is also contrary to judicial treatment of constitutional provisions that more clearly confer rights on individuals; when state action infringes upon the Free Speech Clause or the Free Exercise Clause, for example, courts ask whether some state interest justifies the infringement.¹⁹

At best, then, some adults might have lesser rights at stake in connection with state support for private schooling, but no adults have rights that can compete with the rights of children for primacy in this context. The primacy of children's rights in the schooling context complicates matters, however, because it means that we cannot determine the content of the relevant rights—that is, what it would mean to recognize and respect the controlling rights—by simply looking to the expressed preferences of the right holders. Nor should we simply assume that the expressed views of any of the

to an Adequate Education, 78 N.C. L. REV. 399 (2000) (discussing the right to education under various state laws). The Supreme Court has long hedged on the question of whether children have a federal constitutional right to a good or minimally adequate education. See James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1414-20 (1996).

18. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (invalidating a New York statute that provided financial assistance to private schools and provided tuition reimbursement or tax deductions to parents who sent their children to private school).

19. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that law burdening religious practices could only be upheld upon showing of a compelling government interest); *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214 (1989) (holding that ban on primary endorsements burdened individuals' free speech rights and could only be upheld upon showing of a compelling state interest).

adults involved are an adequate proxy for those of the children. As is the case with incompetent adults, determining the content of children's rights requires some analysis. This task is more difficult in connection with the regulation question, which Part II below addresses. With respect to funding, I think everyone assumes that children in private schools would be better off with (and therefore would wish to have, if they were able to develop informed preferences) state support for their secular education.²⁰ The pertinent question, then, is whether children in private schools have a *right* to this benefit—state funding of their secular education—which we assume they would want to have.

To answer this question, we should first recognize certain implications that the focus on children has for the relevance of personal responsibility. Personal responsibility occasionally surfaces as an issue in the charitable choice context because individuals or groups sometimes argue that the state has an obligation, as a matter of fairness or equal treatment, to subsidize private analogues to public services for citizens who prefer to receive the service from a private provider. Most commonly, they contend that persons who exercise their constitutional right to religious freedom by choosing to receive a service from their religious community rather than from the state should not be penalized for doing so.²¹ The standard response to this contention is that fairness and rights to equal treatment do not require such subsidy, because fairness and equal treatment are served by the state making the public service available to all.²² Persons who decline the service through state agencies and instead seek it through a religious or other private organization have made a voluntary choice, and properly bear responsibility for that choice.

20. It does appear to be the case that most religious schools do strive to provide a good secular education—that is, training in general cognitive skills and methods of inquiry in various disciplines, as well as instruction in the content of state-mandated subjects. That religious schools have a religious affiliation, display religious symbols, and occasionally communicate religious views in the course of teaching secular subjects does not mean that they do not provide secular education. On the other hand, there is ample evidence that some religious schools do not strive to provide a good secular education, because such an education is contrary to their religious orientation. Such schools should not receive state support. See *infra* notes 66-67 and accompanying text.

21. See *infra* note 23 and accompanying text.

22. See *infra* note 24 and accompanying text.

As a general matter, the standard response must be correct, if for no other reason than accepting the fairness claim across the board would result in chaos. Every activity engaged in by government is one as to which some persons might prefer that a private organization were performing it instead, at least for them. One group of persons might object on religious grounds to the state's handling of their personal correspondence, and demand state funding for a private postal service. Another group might object to receiving personal protection from the state, and demand a state subsidy for its private police force. Still another might want its own tax collection agency. Some might even object to secular government itself, and demand that tax money be allotted for private systems of governance. No one seriously maintains that the state must fund every private analogue to government services that some individual or group might prefer. Persons who demand funding for one particular activity tend simply to ignore the implications of adopting their position as a general rule of state obligation.

The only acceptable *general* rule, then, is that government may elect to fund only its own operations, and need only make the benefits it offers through its own operations available to all similarly situated persons to accept or refuse as they choose.²³ Most supporters of evenhanded aid to religious and other social service providers recognize this and do not contend that such aid is mandatory. They argue simply that it should be permitted—that

23. This is true even of government services that communicate contestable messages or ideas. For example, if the Smithsonian were the only museum that received funding from the federal government, no religious organization could claim a right to government funding of its own museum on the ground that it objects to messages conveyed by exhibits in the Smithsonian and therefore does not wish to patronize the Smithsonian. Of course, the religion clauses impose certain restrictions on what messages the government may convey, prohibiting endorsement of religious or antireligious views. But religious groups frequently also take offense at views that are ostensibly nonreligious, because those views conflict with their beliefs, and they might avoid public facilities that they perceive as endorsing those views. For example, Fundamentalist Christians might refuse on religious grounds to visit the Museum of Natural History in Washington. Their objection to displays that reflect an evolutionary understanding of life on earth does not entitle them to state funding for their own creationism museum. They would have a valid objection to an exhibit in the Smithsonian ridiculing Fundamentalist interpretation of the Bible, or proclaiming the infallibility of the Pope, but their objection would entitle them to removal of the exhibit rather than the funding of their own museum.

the Establishment Clause should not act as a barrier to states voluntarily extending state funding beyond state agencies to private agencies, including religiously affiliated agencies. In the voucher context, though, occasionally there have been claims made on behalf of parents who send their children to private school, or who would like to, that fairness requires the state to channel public money to support their preference for private schooling.²⁴ Courts that have addressed such a claim, which is typically couched in terms of a right to equal protection, have uniformly rejected it. They have invoked the standard response, pointing out that a state-funded education is available to all, and that these parents are responsible for, and must accept the financial costs of, the choice they make to forego this public benefit in favor of a private school education.²⁵

24. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 782 n.38 (1973) (cautioning against providing "a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools"); *Miller v. Benson*, 878 F. Supp. 1209, 1212 (E.D. Wis. 1995), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995) (upholding exclusion of religious schools from voucher program against challenge based in part on parents' right to equal protection); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 267 n.51 (1999) (discussing the equal protection analysis in the context of charitable choice); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1017-19 (1991) (arguing that withholding funding to religious schools penalizes the exercise of a constitutional right).

25. Where such a claim has been advanced in litigation, it typically has been in situations where a state was providing funding for private schooling but only for use at nonreligious private schools—that is, in cases where a state had elected to go beyond funding of just its own agencies and was discriminating on the basis of religious orientation among private recipients of state funding. Parents who sent their children to religious schools sued to have the program extended to include religious schools. See, e.g., *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999); *Miller*, 878 F. Supp. at 1213; *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 136 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999). This type of situation is clearly different from one in which the state confines its funding to state agencies. In the former case, the parents' fairness claim has more purchase. The personal responsibility response is less plausible, for although the element of voluntary choice is still present, the justification for confining state funding to state agencies—that funding of private alternatives to all government services is not feasible—does not apply. Courts addressing equal protection objections to funding of only nonreligious private schools have nevertheless invoked this response, pointing out that parents in that context freely forego the opportunity to choose either a public school or a nonsectarian private school. See, e.g., *Strout v. Commissioner of Educ.*, 13 F. Supp. 2d 112, 114 (D. Me. 1998). While there is a good case to be made that this assertion is mistaken, it is not necessary to present it here, because in any event there is a stronger case for the proposition that the children in religious schools

As long as the voucher issue is approached in an adult-centered way, in which adult interests and rights are given primacy, the conclusion that state aid to religious and other private schools is at best permissible, and by no means mandatory, is inescapable. But a child-centered approach leads to a very different conclusion. Approaching child-rearing activities from a child-centered perspective renders talk of personal responsibility for voluntary choices largely impertinent. For while it is true that the adults involved have made a voluntary choice to forego the state-funded service, and so have no claim on their own behalf to a fair share of state spending, the children involved have *not* made a choice to forego the state-funded service.²⁶ The children therefore are not responsible for their situation, and any discrimination they suffer—in terms of state funding for services provided to them—cannot be justified by reference to personal responsibility. If children lose out on an important benefit because of the lack of state funding for the organization from which they are receiving the service,²⁷ they have

have an equal protection claim in this circumstance that is sufficient to require their inclusion in the voucher scheme. In other words, focusing on children's rights renders an equal protection claim on behalf of parents moot.

26. As noted at the outset, the analysis here is limited to younger children, who presumably are not making the decisions regarding their education. One can imagine situations in which parents, too, cannot really be said to have made a voluntary choice. For example, if the public schools available for a given child were so exceptionally horrible in terms of educational quality and/or safety that parents could not satisfy their legal responsibilities as parents—responsibilities including both the duty to enroll their child in a school and the duty not to place their child in a dangerous or unhealthy situation—then the parents effectively would be compelled by the law to enroll their child in a private school. In such extreme circumstances, parents might have a sound equal protection claim. There might be disagreement about when circumstances are sufficiently dire, but as noted above, resolving such disagreement, and thus determining exactly when parents can be said to have a sound equal protection claim, is rendered moot by the argument for children's equal protection rights.

27. The "if" here is important. Children whose parents are so wealthy that receiving a share of state spending on education would have no effect on their lives would not have a claim to state funding of their schooling. In other words, a family wealth cap is entirely appropriate for voucher programs, just as it is for other programs of state assistance. The cap should be sufficiently high, however, so that it does not exclude any children whose parents make a significant financial sacrifice to pay for tuition, even if their school has all the resources it needs to provide an excellent secular education. Such children would presumably lose out on extracurricular learning activities, such as lessons, camps, and trips, because of the financial sacrifice by their parents, and thus would be harmed by the denial of state funding. The harm is even clearer for children whose private schools lack adequate resources.

a legitimate claim against the state. They are being improperly denied their fair share through no choice of their own. Unlike their parents, they have a legitimate equal protection objection.²⁸

In the voucher context, this leads to the novel conclusion that state financial support for religious and other private schools is not only permissible, but is in fact *mandatory*. Children attending private schools, many of which struggle to provide even a minimally adequate education because they lack resources,²⁹ are entitled to a fair share of state spending on education. They should not suffer for choices their parents have made. They are not their parents and do not control their parents. As a general moral proposition, people should not be penalized for choices others make. Moreover, as a general constitutional principle, the state cannot justify discrimination in the conferral of public benefits by referring to choices made or actions taken by third parties.³⁰ As long as the state empowers parents to enroll their children in private schools, the state owes the children a duty to ensure that they do not suffer deprivation as a result. While it would be awkward for parents to assert this right of children in litigation to compel funding for

28. One might think that the children's complaint really lies with their parents, and that the children have a right as against their parents to be enrolled in public school, where they can receive their share of state education spending. However, the state confers on parents the legal power to choose a private school, so as a matter of law parents violate no right by choosing a private school. Thus, even if one thought the correct solution is for all children to attend public school, the children's complaint would still lie with the state for failing to require that they attend public school. In any event, it is necessary to treat parents' state-conferred power to choose a private school as a "fixed point" in any analysis of education; parents' entitlement to make that choice is so entrenched in our culture that an analysis of a particular policy issue like vouchers that rested on the premise that this entitlement should be eliminated would be of little practical worth.

29. See, e.g., Joseph Claude Harris, *The Funding Dilemma Facing Catholic Elementary and Secondary Schools*, in *CATHOLIC SCHOOLS AT THE CROSSROADS* 55 (James Youniss & John J. Convey eds., 2000) (discussing the financial difficulties facing Catholic schools).

30. For example, this principle is reflected in court decisions invalidating welfare programs that discriminated against illegitimate children. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461-65 (1988) (invalidating on equal protection grounds a state statute that imposed a limitation period on the ability of children born out of wedlock to establish paternity); *Trimble v. Gordon*, 430 U.S. 762, 766-76 (1977) (holding that a state statute entitling legitimate children, but not illegitimate children, to a distribution of intestate property from their fathers violated the Equal Protection Clause); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 167-76 (1972) (holding unconstitutional a state statute precluding illegitimate children from bringing worker's compensation claims on behalf of a deceased father).

private schools,³¹ legislators and scholars should recognize this right of children when they deliberate about voucher initiatives.³²

Thus, as a matter of fairness and as a matter of constitutional principle, every state in this country *must* create a voucher program. Shifting moral positions from the rights of adults to the rights of children makes an equality-based claim plausible. And this would actually appear to be the strongest argument for vouchers. It might seem counterintuitive that the strongest argument is one predicated on the rights of children already in religious schools. To the extent that supporters of vouchers focus on the interests of children at all, it is typically the interests of children currently attending bad public schools.³³ But those children do not have a right to vouchers *per se*. They might have a right to a good education, on the basis of which they should be able legally to compel the state to improve their situation, but vouchers are not a necessary means to that end.³⁴ Vouchers might be one way to accomplish that aim, and might even be the most cost-effective way for the state to do so; however, the state can, consistently with this right, choose other means—such as various sorts of public school

31. It would be uncomfortable, to say the least, for a parent to stand and proclaim, "Your Honor, my children should not have to suffer for my choices." A judge might respond that the parent is free to make a different choice. The parent could then retort that he should not have to, but then he would have shifted to a claim based on his own rights.

32. One can also imagine a child advocacy group suing on behalf of the children. For discussion of the procedural mechanisms for doing so, see Dwyer, *supra* note 17, at 1465-76.

33. In fact, the Milwaukee program originally was designed so that only students previously attending public schools could receive vouchers. See *Davis v. Grover*, 464 N.W.2d 220, 229 (Wis. Ct. App. 1990) (setting forth Wisconsin statute creating Milwaukee voucher program).

34. Vouchers are also not necessarily a threat to the welfare of children who remain in public schools, as opponents of vouchers sometimes imply. The impact of voucher programs on public schools is outside the scope of this Essay, but it is important to point out that the assumption implicit in the charge that vouchers will lead to the ruin of public schools—namely, that education funding as between public and private schools is a zero sum game—is certainly not true as a conceptual matter. States could start paying for private schooling and at the same time hold steady or even increase total spending on public schools. In recent years, there have been several legislative proposals to do just that. See, e.g., S.B. 882, Reg. Sess. (Cal. 1999); A.B.X.1 24, 1st Extraordinary Sess. (Cal. 1999); A.B.X.1 5, 1st Extraordinary Sess. (Cal. 1999); H.B. 2597, 70th Leg., Reg. Sess. (Or. 1999); H.B. 2681, 1999 Sess. (Va. 1999). In addition, even if it were necessarily true as a political matter that spending on private schooling would result in a decrease in public school funding, it is not clear that this would nullify the right of children in resource-poor private schools to a share of state funding.

choice or a major reform of public schools—if those approaches would be effective.³⁵ Such a possibility weakens or defeats arguments that the state has an obligation to facilitate the transfer of children from public schools to private schools.

Voucher opponents also might contend that vouchers are not necessary to ensure a good education for children in any private school, because their parents can send them to a public school and the states can ensure that all children receive a good education in a public school. Some parents do enroll their children in private schools primarily because the available public schools are academically inferior or unsafe. Those parents might elect to shift their children to a public school if the local public schools were dramatically improved. However, many parents enroll their children in private schools—particularly religious schools—primarily for ideological reasons, and thus many would not transfer their children to a public school no matter how much the public schools improved.³⁶ The children of those parents will remain in religious schools, and in order for them to benefit from state spending on education the state will have to direct funds to the religious schools.

To argue against this result, therefore, voucher opponents will have to contend that attendance at a religious school is a matter of private choice for which private parties, not the state, are responsible. For reasons presented above, this contention is untenable.³⁷ The children who suffer educational deprivation are not responsible for their parents' choices. The state, however, *does*

35. Joseph Viteritti argues that charter schooling, which is one sort of public school choice, has been quite successful in improving the quality of education for some children. See JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 72-76 (1999). While it is a common refrain among voucher proponents that states have poured money into public schools for decades without improving them, see *id.* at 3-4, a charge so vague that it is difficult to prove or deny, there certainly have been instances where states have dramatically improved some public schools. See, e.g., LINDA DARLING-HAMMOND, THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK 2-4, 99-105 (1997); DEBORAH MEIER, THE POWER OF THEIR IDEAS: LESSONS FOR AMERICA FROM A SMALL SCHOOL IN HARLEM 15-38 (1995); VITERITTI, *supra*, at 60-61, 63; Richard Rothstein, *The Myth of Public School Failure*, AM. PROSPECT, Spring 1993, at 20; Jodi Wilgoren, *Seeking to Clone Schools of Success for Poor*, N.Y. TIMES, Aug. 16, 2000, at A1.

36. As noted above, I treat the power of parents to do this as a fixed point for the sake of analysis. See *supra* note 28.

37. See *supra* notes 26-30 and accompanying text.

bear some responsibility for their situation, because *it* empowers parents to make that choice, and then discriminates among children based on their parents' exercise of that state-conferred power.³⁸ Analogously, if a state made education mandatory for boys but not for girls (i.e., conferred the benefit of a statutory right to an education only on boys), the discrimination could not be dismissed by contending that the proper redress for girls who receive no schooling is for their parents voluntarily to send them to school.

II. CONSTITUTIONAL CONSTRAINTS ON STATE SPENDING

The foregoing analysis, leading to the conclusion that children in private schools have an equal protection right to vouchers, did not directly consider whether, under existing legal doctrine, there are any constitutional constraints on state spending that conflict with, and potentially override, that right. This section of this Essay addresses two constitutional prohibitions that bear on the voucher debate: the Establishment Clause and the Equal Protection Clause. It shows that those prohibitions simply require that certain regulations or conditions be attached to vouchers. However, those regulations would profoundly affect private schooling in this country.

A. *Establishment Clause Strictures*

I argued above that the interests of secularist bystanders—those who typically challenge aid to religious schools under the Establishment Clause—are not sufficient to override the rights of children.³⁹ The Establishment Clause, however, protects values other than simply the interests of these individuals. It also preserves a division of power between two very powerful social institutions—government and religion—so that neither can become

38. Because the Supreme Court has held that states are constitutionally required to give parents the power to choose a private school for their children, and therefore the power to waive children's statutory rights to a public school education, *see Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), "the state" here refers collectively to state governments and the federal judiciary.

39. *See supra* note 17 and accompanying text.

tyrannical. It might protect other societal values as well. While Establishment Clause doctrine does not typically balance the values that the Clause protects against the values that the state is trying to promote through the action or program that is being challenged, it does call for a rough assessment of the degree to which the values that the Clause protects are threatened by the state action. Thus, even for a child-centered analysis of state funding of private child-rearing services, the doctrine provides useful guidance. If vouchers are incompatible with existing doctrine, this suggests that they threaten Establishment Clause values to a significant degree. This in turn would suggest the need for a careful balancing of children's welfare against those values. Such a balancing might show that efforts to help children must follow certain guidelines, and perhaps even that children's welfare must be sacrificed to some degree in some cases. I therefore consider in this section what existing doctrine has to say about vouchers. This discussion is necessarily cursory, and therefore somewhat conclusory; it is meant to suggest a line of reasoning rather than to provide a definitive argument.⁴⁰

On the general question of state aid to private social service providers, the neutrality position has come to dominate judicial application of the Establishment Clause.⁴¹ The neutrality position asserts that states are free to include private entities affiliated with a religious organization in programs of state aid to support the secular functions of public and private-service providers. They may deal "evenhandedly" with religious and nonreligious institutions. Based on this view, the Supreme Court has approved several forms

40. I offer a more thorough and better supported analysis of the constitutional issues in a forthcoming book on vouchers. See DYWER, *supra* note 5.

41. See *Mitchell v. Helms*, 120 S. Ct. 2530, 2556-57 (2000) (O'Connor, J., concurring) (agreeing with the four-justice "plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," and objecting only that "the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs"); *id.* at 2573 (Souter, J., dissenting) ("There may be no aid supporting a sectarian school's religious exercise or the discharge of its religious mission, while aid of a secular character with no discernible benefit to such a sectarian objective is allowable."); *id.* at 2576 (discussing the Court's provision of "definitive examples of public benefits provided pervasively throughout society that would be of some value to organized religion but not in a way or to a degree that could sensibly be described as giving it aid or violating the neutrality requirement" in the case of *Everson v. Board of Education*, 330 U.S. 1, 16-18 (1947)).

of aid to religious groups or to individuals patronizing religious institutions—for example, printing services for a religious student newspaper at a public university,⁴² a tuition grant for a blind adult to use at a theological college,⁴³ and monetary aid to religious groups providing reproductive counseling.⁴⁴

Traditionally, however, the Court has treated religious elementary and secondary schools differently from other religious institutions. It has held that aiding religious schools presents special problems because, in the Court's view, they tend to be, more so than other kinds of service providers, "pervasively sectarian."⁴⁵ This term generally connotes that an institution's secular and religious activities are so integrated that aid to any part of the institution would necessarily amount to aid for religious instruction. For this reason, the Court struck down an aid program that closely resembled a voucher program in *Committee for Public Education v. Nyquist*.⁴⁶ In *Nyquist*, the Court held violative of the Establishment Clause a scheme whereby the State of New York reimbursed parents for tuition payments they made to private schools, including religious schools.⁴⁷ If the Court followed this decision today, it would have to strike down voucher programs that included religious schools. In recent years, however, the Court has become more accepting of aid to religious schools, and has approved several nonmonetary forms of aid to religious and other private schools, such as state-paid remedial instructors⁴⁸ and computers⁴⁹ that would not have survived an Establishment Clause challenge

42. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995).

43. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

44. See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

45. See *Lemon v. Kurtzman*, 403 U.S. 602, 617-18 (1971). The "pervasively sectarian" standard has been the subject of much commentary. See Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 298-300 (1999); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 55 (1997).

46. 413 U.S. 756 (1973).

47. See *id.* at 780-89.

48. See *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding program of federal and state aid to pay for remedial reading instruction in religious and other private schools as well as in public schools).

49. See *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (upholding program of federal and state aid to local school districts to be used for purchasing instructional materials and equipment, including computers, for religious and other private schools as well as public schools).

twenty years ago. At this point, there appears to be sharp division in the Court regarding whether the line can be crossed from in-kind aid to monetary aid, and from small-scale aid to large-scale aid.⁵⁰ There is much debate as to how the swing vote in this area—specifically, Justice O'Connor's—would come down on vouchers, and there is material in her recent opinions to give both sides hope and concern.⁵¹

Putting aside predictions about what the Court will do when it inevitably entertains a challenge to school vouchers, there is a good case to be made that voucher programs should not be deemed to violate the Establishment Clause, or in other words, do not conflict with the best interpretation of the Clause *if* they are properly structured. This is the rub; Establishment Clause values and clearly established Establishment Clause doctrine unquestionably require that if state financial support for the education of children in religious schools *is* permissible, it must be carefully constrained.

50. Compare *id.* at 2546 n.8 (plurality opinion) (suggesting that “principles of neutrality and private choice would be adequate to address those special risks” of advancing religion posed by monetary relief), and *id.* at 2542 n.6 (arguing that the percentage or absolute amount of aid that reaches religious schools under a program of state aid is irrelevant for Establishment Clause purposes), with *id.* at 2585-86 (Souter, J., dissenting) (contending that the Establishment Clause absolutely prohibits cash grants to religious schools), and *id.* at 2589 (“[W]e have recognized what is obvious (however imprecise), in holding ‘substantial’ amounts of aid to be unconstitutional . . .”).

51. Compare *id.* at 2558-59 (O'Connor, J., concurring) (suggesting that it is constitutionally permissible for state monetary aid to reach religious schools and to be used to advance religion in those schools so long as the aid goes directly in the first instance to private individuals who can choose to use the aid at a religious school or a nonreligious school), and *id.* at 2566 (repeatedly attaching the modifier “direct” to “money grants” or “monetary aid” or “cash aid” when discussing kinds of aid that are constitutionally problematic), with *id.* at 2562 (emphasizing that the aid in question was supplemental, rather than supplanting religious schools’ private funding, that no state money ever reached the coffers of religious schools, and that the state retained title to the instructional material and equipment, thus ensuring “that religious schools reap no financial benefit”), and *id.* at 2566 (emphasizing the special concerns raised by monetary aid, because preventing state financial support for religious activity was “the original object of the Establishment Clause’s prohibition”), and *id.* at 2567 (emphasizing that the statutory program under review contained a prohibition on use of aid for religious worship or instruction), and *id.* at 2568 (reaffirming her position in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), which found unconstitutional state payment for religious school teachers to teach secular subjects after regular school hours on the grounds that “[b]ecause the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government”).

This is necessary to avoid the appearance or reality that aid is simply subsidizing religious practices.

When the Court has approved of monetary aid to religious social service providers other than schools, it has insisted that the state implement measures to ensure that the aid is used for the secular purpose that is the reason for the state aid. For example, in *Bowen v. Kendrick*,⁵² the Court upheld the Adolescent Family Life Act, which authorized grants to support public and private organizations in counseling teens on premarital sexual relations and pregnancy. In doing so, the Court stated: "There is no doubt that the monitoring of AFLA grants is necessary if the Secretary is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause."⁵³ The Court indicated that state monitors would need to review for religious content the educational materials that aid recipients used and to perform on-site visits to ensure that the aid was not being used for "specifically religious activit[ies]."⁵⁴

Similarly, when the Court has approved in-kind aid to private elementary and secondary schools, it has emphasized that there were sufficient safeguards in place to ensure that the aid would promote secular education and not religious instruction.⁵⁵ In the recent *Mitchell v. Helms*⁵⁶ decision, in which the Court upheld state provision of instructional and educational materials and equipment to religious schools, the plurality opinion stated as a general rule that

if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.⁵⁷

52. 487 U.S. 589 (1988).

53. *Id.* at 615.

54. *Id.* at 621 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

55. *See, e.g., Mitchell*, 120 S. Ct. at 2555; *Agostini v. Felton*, 521 U.S. 203, 221-24, 226-27, 234-35 (1997).

56. 120 S. Ct. 2530 (2000).

57. *Id.* at 2541 (emphasis added); *see also id.* at 2551 ("[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose.").

The other five Justices, including Justice O'Connor, expressed even more strongly that the state must ensure that its aid is used for the secular purpose motivating the program of aid.⁵⁸

There is also near unanimous agreement among legal scholars that state funding for private-service providers must, at a minimum, satisfy the two requirements suggested by the Court in *Mitchell*. First, when an organization engages in both predominantly secular and inherently religious activities, the state may fund only the former.⁵⁹ Second, the state must condition

58. See *id.* at 2558 (O'Connor, J., concurring) ("Although 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'" (quoting *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring))); *id.* at 2589 (Souter, J., dissenting) ("[W]e have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools."); *id.* at 2590 ("The object of all enquiries into such matters is . . . is the benefit intended to aid in providing the religious element of the education and is it likely to do so?"). The four Justices signing onto the plurality opinion were not concerned to ensure that in-kind aid was not "diverted" to religious purposes. See *id.* at 2547-49 (plurality opinion). Implicit in this position, however, seems to be the view that so long as an institution is devoting a large portion of its budget to serving the state's secular purpose, aid to the institution that is clearly less than the portion of its budget devoted to secular education is permissible, regardless of how it ultimately gets mixed into the institution's resources as a whole. See *infra* note 61 and accompanying text. In other words, all forms of aid are considered fungible with privately raised resources, and thus it does not make sense to track the state-provided aid and to make judgments about how it is used relative to the institution's other resources. The other five Justices did not share this view, and expressed substantial concern about the divertibility of aid. See *id.* at 2558 (O'Connor, J., concurring) ("I . . . disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. . . . [W]e have long been concerned that secular government aid not be diverted to the advancement of religion [A]ctual diversion is constitutionally impermissible."); *id.* at 2585 (Souter, J., dissenting) ("[W]e have long held government aid invalid when circumstances would allow its diversion to religious education."); *id.* at 2591-96 (finding the state aid in question unconstitutional because of its divertibility and actual diversion to religious instruction).

59. See, e.g., Esbeck, *supra* note 45, at 288-89 ("[I]n neutrality theory . . . monies are to be spent only for the purposes set out in the service contract or grant. These purposes—having already satisfied *Lemon's* secular-purpose prong—necessarily exclude use of the monies for inherently religious programming."); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 362 (1996) (stating that neutrality requires "the state refrain from subsidizing religion qua religion"); McConnell, *supra* note 24, at 1018 ("[N]o one disputes that it is just and proper for the government to refuse to pay the incremental cost of religious components of the education, in light of the conscientious objection many taxpayers have toward mandatory support for religious instruction."); Michael J. Perry, *Religion, Politics, and the Constitution*,

participation in any program of state aid on compliance with such regulations as are necessary to ensure that recipients in fact further the secular aim that is the purpose for the aid program.⁶⁰ The correctness of this position appears unassailable. There can be no public purpose to the state's funding religious activity per se. Equally, there can be no public purpose to funding an activity that *purports* to provide the secular good that the state is seeking to promote, but in fact does not. For example, if the state funds private providers of mental health services for female rape victims, then an organization whose counseling of rape victims consists entirely of berating them for not submitting more readily to men, based on a religious belief that a woman's function and salvation lie in serving the sexual needs of men, should not qualify for aid. It is not serving the secular purpose the aid was intended to achieve. What the religious organization regards as promoting the well-being of women the state does not so regard. Indeed, what the organization does is the antithesis of what the state is striving to promote. There must be regulations in place to prevent such an organization from receiving aid.

There is a clear consensus, therefore, that at a minimum, any program of aid to private service providers that includes religious organizations must attach adequate regulations to the aid to ensure that 1) the aid is not provided for inherently religious activities, and that 2) the aid is used to further the secular purpose for the aid. In theory, it should be possible to take the same approach to vouchers—to allow state funding of religious schools, but require

7 J. CONTEMP. LEGAL ISSUES 407, 427 (1996) (stating that aid to religious schools is acceptable "if the criteria for such aid are religiously neutral").

60. See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 36 (1997) ("[T]he public purpose is for government and the independent sector to engage in a cooperative program that addresses the *temporal needs* of the ultimate beneficiaries, and to do so in a manner that enhances the quality or quantity of the services to those beneficiaries.") (emphasis added) (footnote omitted). Esbeck takes the position that mere facial neutrality among secular and religious entities is not sufficient to ensure that aid serves the public purpose. See *id.*; cf. *Bowen v. Kendrick*, 487 U.S. 589, 623-24 (1988) (O'Connor, J., concurring) (emphasizing, in joining decision to uphold state support for secular teen counseling provided by religious organizations, that aid to religious organizations is permissible only insofar as it will clearly be directed toward satisfaction of temporal needs); *id.* at 624-25 (Kennedy, J., concurring) (indicating that aid to religious organizations is permissible so long as it is actually used by them for the designated public purpose).

that the funding be limited to payment for secular activities and that the secular activities advance the purpose—secular education—intended by the state. In the view of some people, the first requirement would *in practice* preclude monetary aid to religious schools. They believe that money is readily divertible from secular to sectarian use and/or that secular and religious activities/instruction are so inextricably intertwined, that there is no feasible way of ensuring that the aid is used only for secular activities and instruction.⁶¹

From a certain economic perspective, however, the first requirement demands only that the value of aid to religious organizations not exceed the portion of an entity's budget devoted to activities that are predominantly secular.⁶² For example, on this economic view, if a religious organization operates a homeless shelter, and in addition to providing meals and sleeping quarters conducts worship services for guests, the value of state aid should not exceed the percentage of the shelter's budget that reflects costs for things like food and bedding that, unlike worship service, are not inherently religious in the same manner as a worship service.⁶³ The state should not pay for religious worship, and from this economic perspective it does not do so as long as it limits the amount of aid to what might be called the secular component of an organization's budget. That it "frees up" private money for use in religious activities is irrelevant, because it is no concern of the state what people do with private money. Moreover, that it pays for activities to which a religious service provider might add a religious flavor (e.g., by having religious symbols in the homeless shelter or by homeless shelter workers conveying words of faith while handing

61. See Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 49-54 (1993).

62. I adopted this view after being persuaded by an article by Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989). The simplified treatment this Essay affords to McConnell and Posner's theory leaves many questions unanswered, which I address in *Vouchers Within Reason* (forthcoming 2001).

63. Cf. *Mitchell*, 120 S. Ct. at 2541 (plurality opinion) ("The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.").

out food) is also irrelevant, because that does not increase the cost of the activity nor detract from the secular value it provides.

Analogously, a voucher program would satisfy the first requirement so long as the face value of the voucher used at any particular religious school did not exceed the portion of the school's budget devoted to activities that are not inherently religious (e.g., not catechism class or worship services).⁶⁴ That vouchers might free up private money previously devoted to secular education, so that a school can also devote more resources to religious instruction and religious activities, would be irrelevant. That the classrooms in which secular instruction takes place have religious symbols, and that some instructional materials used might have a religious slant or significance, would also be irrelevant.⁶⁵ As long as a school is primarily engaged in providing a secular education to students, as is true of most (but not all) religious schools, state funding of a large portion of the school's budget should not be objectionable.

While it does not appear that a majority of Supreme Court Justices currently embrace this economic view, and while it would not obviate all anti-establishment worries if the view were correct (because public perception also matters), this view makes a lot of sense. It also has the virtue of allowing states to go forward with their extremely important purpose of improving the education of children in private schools. It shows that the first condition on state aid to religious institutions identified above is not an insurmountable obstacle to vouchers. The first condition would

64. The Cleveland program appears designed to accomplish this end. Under the Cleveland program, the face value of vouchers may not exceed 90% of a school's tuition or \$2,500, whichever is less. See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999), *aff'd*, Nos. 00-3055/3060/3063, 2000 U.S. App. LEXIS 31367, at *1 (6th Cir. Dec. 11, 2000). Any given voucher school in Cleveland could, however, be devoting much less than 90% of its tuition to secular education, and so effectively be receiving money for religious activities and instruction. The Milwaukee program does not appear even designed to accomplish this end. Under that program, the face value of vouchers is the lesser of the state's per pupil expenditures on public schools and the private school's "operating and debt service cost per pupil that is related to educational programming." *Jackson v. Benson*, 578 N.W.2d 602, 607-09 (Wis. 1998) (quoting Wis. STAT. § 121.08 (1995)). The governing statute does not exclude religious instruction from the definition of educational programming, so recipient schools apparently may use state money to pay salaries of catechism teachers, to buy religious books, and even to maintain a chapel if that is somehow "related to" educational programming. See *Jackson v. Benson*, 570 N.W.2d 407, 414 (Wis. Ct. App. 1997).

65. McConnell offers the example of a Christian school using *The Pilgrim's Progress* in a literature course. See McConnell, *supra* note 24, at 1020.

simply require that the state engage in sufficient oversight to determine roughly how much of a recipient school's budget is devoted to state-mandated courses.

The second condition, however—that aid actually be used to further the state's secular purposes—generates substantial regulatory requirements, including imposition of comprehensive and robust educational standards on all recipient schools. This is necessary to ensure that the aid is being used to provide secular instruction rather than religious instruction under the guise of state-mandated courses. The available empirical evidence suggests that there are many schools in this country today—particularly Fundamentalist Christian schools—that ostensibly teach state-mandated courses but so infuse them with religious content and so distort the secular content to conform to religious beliefs that the courses in effect become religious activities.⁶⁶ The state cannot constitutionally pay for that sort of practice, even if the schools themselves characterize it as secular instruction. The Establishment Clause dictates against it, and the rights of children in the schools do not support it. In fact, children's equal protection right to state support for their secular education supports the conclusion that the state may not fund such a school at all, because the funding encourages and facilitates the denial of a secular education.⁶⁷

How the necessary standards would be enforced is a very complex matter outside the scope of this Essay.⁶⁸ I will simply note that if

66. See JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 13-37 (1998) (summarizing and citing empirical studies).

67. I have previously argued that such a school should not even be allowed to exist. See *generally id.* Nevertheless, there is virtually no political will today to close such schools. The most that can realistically be done for the children in such schools is to refuse to support their educational deprivation, and to communicate publicly, if only implicitly by refusing to support it, the state's disapproval of these schools.

68. I address enforcement issues in *Vouchers Within Reason*, (forthcoming 2001). The most difficult issues arise with respect to religious schools that strive to provide a good secular education but nevertheless fail to meet established standards. The basic principle that children should not suffer educational deprivation because of the choices or failings of adults would seem to preclude ever denying financial support to such a school. Public schools also face this conundrum. There is much interest now in "grading" public schools, but it is not clear what the state should do with schools that are failing; cutting funding is likely to make the schools even worse. An alternative solution for both public and private schools that are failing because of incompetence might be to increase state supervision or control of schools that fail to meet standards. In addition, standards ideally should be adjusted to

testing were used—as some advocates for religious schools suggest—the testing would have to be much more comprehensive and rigorous than that currently employed in most states, which typically measures only a narrow range of very basic skills.⁶⁹ There might be a limit to how much interference with content of instruction the courts would tolerate before saying that the interference violates parents' right to control their children's upbringing. But certainly states can and should require, for example, administration of testing for critical thinking skills, problem solving, mastery of methods of inquiry in a variety of disciplines, and knowledge of mainstream views in the hard and social sciences, in addition to testing for elemental reading, writing, and math skills. This effectively would discriminate against some religious organizations—those that, for example, do not value, and perhaps even discourage, critical thinking and mastery of scientific methods, or that do not want their students to learn mainstream views on certain topics. This discrimination among religious groups is necessary to comply with the strictures of the Establishment Clause.

In sum, the Establishment Clause demands that if states are permitted to provide monetary aid to religious schools, they must also impose regulations on aid recipients to ensure that all taxpayer money is furthering a secular purpose and not being used to fund religious activities. This would substantially transform the nature of private schooling in this country, which, from a child-centered perspective, would be a good thing. This conclusion is bolstered by an independent consideration of the special obligation the state owes to children in private schools to ensure that they receive a good secular education.

This special obligation arises for two reasons. First, the state is partly responsible for the fact that the children are in a private school rather than in a public school. The state, through decisions of the Supreme Court and through state statutes, has conferred on parents the power to place their children in private schools rather

reflect the great obstacles that many public and private schools have to overcome—in particular, a difficult social environment and a large number of at-risk or special needs children.

69. On the inadequacies of commonly used tests, see DARLING-HAMMOND, *supra* note 35, at 57-61, 88-89.

than public schools. State-conferred parental rights are thus a but-for cause of some children being in private rather than public schools. In addition, going beyond *permitting* private schooling to *subsidizing* private schooling further implicates the state in the situation of these children. It heightens the state's obligation to ensure that the children whose parents place them in private schools receive a good secular education and are not subjected to harmful practices. The Supreme Court has said on several occasions that the state is constitutionally permitted to do this.⁷⁰ I am arguing here that the state is morally compelled to do this.

Second, another equality issue arises that supports the conclusion that states must regulate private schools regardless of whether it provides aid to them. States impose substantial regulation on public schools to promote the quality of secular education, such as teacher qualifications, mandatory content, achievement standards, etc.⁷¹ Such regulation—at least when it works properly, and it does so much more than critics of public schools admit⁷²—is a state-conferred benefit to children in public

70. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that parents have a right to send their children to private schools, but clarified that “[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils.” *Id.* at 534. Moreover, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Justice White in a concurring opinion stated that the Court’s earlier decision in *Pierce* lent “no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society,” but rather “held simply that while a State may posit [educational] standards,” it may not require children to receive their education in public schools. *Id.* at 239 (White, J., concurring). At least some degree of interference with the freedom of parents and school operators, the Court has said, is justified by the state’s great interest in, and responsibility for, protecting the educational interests of children. *See, e.g., id.* at 213-14; *id.* at 238 (White, J., concurring); *see also* *Murphy v. Arkansas*, 852 F.2d 1039, 1042 (8th Cir. 1988) (“[I]t is ‘settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated.’” (quoting trial court)); *Palmer v. Board of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979) (“There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society.”).

71. For a summary of the regulatory environment in which public schools in this country operate, *see* Dwyer, *supra* note 17, at 1329-38.

72. *See* VITERITI, *supra* note 35, at 12 (“Public education is doing a lot better than the evacuation thesis [i.e., the thesis that vouchers will cause a great number of parents to shift their children from public to private schools] implies.”). If parents’ views are indicative of the quality of public schooling and of regulation of schooling, then it is worth noting that the great majority of parents in suburban areas rate the local public schools highly. *See id.* In addition, an overwhelming majority of parents in all areas favor imposing *stricter* standards

schools just as much as state funding is. As is true of funding, children in private schools are entitled to that benefit as a matter of equal protection doctrine.⁷³ They should not have to forfeit that important protection of their developmental interests because of their parents' choice of schools. To deny it to them, as states now do by leaving private schools virtually unregulated,⁷⁴ violates their right to equal protection. Therefore, the state has not only a *moral* obligation to ensure that children in all private schools receive a good secular education, but also a *constitutional* obligation to do so. This is so regardless of whether the state is also funding private schools. All states should already be imposing substantial regulations on private schools.

Thus, both because of Establishment Clause strictures and because of the government's legal and moral obligation to all children, states must attach to vouchers whatever regulatory strings are needed to ensure that children in all private schools receive a good secular education. Yet to date, none of the voucher programs that any state has enacted or seriously considered has contained the necessary regulatory strings.⁷⁵ Programs now in place leave voucher schools in more or less the same unregulated situation, with respect to curriculum, that they were in before vouchers came along, doing little more than imposing some additional paperwork requirements.⁷⁶ It is for *this* reason that those

on schools. *See id.* at 7. Where public schools fail, parents do not appear to blame state regulation, but rather lack of safety, crumbling buildings, behavior problems, inability to attract and retain good teachers, and other obstacles that arise from the social environment rather than from regulation. *See id.* at 6-7.

73. *See* Dwyer, *supra* note 17, at 1365-1465.

74. For a description of state statutes relating to private schools, *see id.* at 1338-43.

75. Among voucher bills considered, but not approved in 1999, most provided that participating schools would simply have to satisfy the extant requirements for private schools in the state. *See, e.g.,* S.B. 882, Reg. Sess. (Cal. 1999); H.B. 195 (Ga. 1999); S.B. 329, 91st G.A. (Ill. 1999); H.B. 2462 (Kan. 1999); H.B. 1953 (La. 1999); S.B. 31 (Mich. 1999); H.B. 437, Reg. Sess. (Miss. 1999); H.B. 147, 123d G.A., Reg. Sess. (Ohio 1999). Some bills stated explicitly that the bill would not authorize state education officials to exercise any increased control or supervision over private schools. *See, e.g.,* H.B. 2275, 82d G.A., Reg. Sess. § 12b (Ark. 1999); H.B. 195 (Ga. 1999); H.B. 2462 (Kan. 1999); S.B. 1115, Reg. Sess. (La. 1999); H.B. 937, 90th G.A., 1st Reg. Sess. (Mo. 1999).

76. *See* FLA. STAT. ANN. § 229.0537 (West Supp. 2000) (instituting statewide voucher program); OHIO REV. CODE ANN. § 3313.976 (West Supp. 2000) (instituting pilot voucher program); WIS. STAT. ANN. § 119.23 (West 1999) (instituting a voucher program in Milwaukee). To illustrate, the Wisconsin voucher law requires that participating schools

programs are unconstitutional. They are giving money to religious institutions with no assurance that the money is being used to provide secular education, rather than to support *denial* of a good secular education and perhaps even activities that affirmatively harm children—for example, explicit and aggressive sexist teaching. This is grossly irresponsible as well as unconstitutional.

For some schools, a major transformation would be necessary before they should be able to qualify for vouchers. There are schools in existence now that, because of the religious beliefs of their operators, are like the hypothetical rape counseling service previously mentioned,⁷⁷ in that they intentionally act in ways *contrary* to the state's secular purpose for providing aid. These schools intentionally deprive their pupils of what the state regards as a good education. State regulators have known for decades that some schools operate in a manner antithetical to the state's educational aims—stifling rather than fostering critical and independent thought, refusing to teach scientific methods, and grossly distorting the content of the core curriculum.⁷⁸ But state officials long ago gave up trying to impose and enforce regulations in the face of vehement opposition by parents and religious leaders.⁷⁹

operate in a building that complies with health and safety laws, annually submit an independent financial audit, admit students on a non-racially-discriminatory basis and without regard to past academic performance or membership in a religious organization, and allow parents to opt out of religious activities at the school for their children. *See id.* None of these requirements affect curriculum. A sixth condition for participation could, but need not, impact the quality of instruction in voucher schools. Voucher schools in Milwaukee are required to satisfy *one* of the four following requirements: 1) that 70% of voucher students advance one grade level each year; 2) that voucher students have an average attendance of at least 90%; 3) that at least 80% of voucher students "demonstrate significant academic progress," or 4) that at least 70% of voucher families "meet parent involvement criteria established by the private school." *Id.* § 119.23 (7)(A). Thus, a school can participate if its students have a 90% attendance rate, regardless of what the students are learning. In addition, the statute and implementing regulations leave it more or less entirely up to voucher schools themselves to define what it means to advance a grade level and what constitutes parent involvement. *See id.*; WIS. ADMIN. CODE § PI 35.03(5)(a).

77. *See supra* text accompanying note 60.

78. On the importance of critical thinking skills, see DARLING-HAMMOND, *supra* note 35, at 28-29, 108-09; Elliot W. Eisner, *The Uses and Limits of Performance Assessment*, 1999 PHI DELTA KAPPAN 658. On the importance of students acquiring a robust body of knowledge in core subject areas, see E.D. HIRSCH, *THE SCHOOLS WE NEED AND WHY WE DON'T HAVE THEM* 17-47 (1996).

79. *See* Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable*

The beauty of vouchers, for anyone concerned about the current lack of regulation of private schools, is that vouchers provide a mechanism for states to greatly influence the nature and quality of instruction in religious and other private schools. By offering this large benefit to all private schools willing to comply with state education standards, states can greatly influence the market for private education. In all likelihood, a substantial percentage of parents who send their children to religious schools would be willing to sacrifice some control over their children's education in order to be relieved of the burden of private school tuition. Many religious leaders are well aware of this prospect, and worry that voucher proposals are a Trojan horse, an insidious plan for bringing the state into their domain.⁸⁰ They see this only as a political possibility—a strategy some legislators might pursue—when in fact it is a moral and constitutional imperative.

B. Implications of the Equal Protection Clause for Restrictions on Specific Instructional Content

There is another constitutional restriction on state spending that is virtually ignored in the debate over vouchers among legal scholars, even though it is clearly pertinent. This is the prohibition on state support of private discrimination that the Supreme Court has extrapolated from the Equal Protection Clause of the Fourteenth Amendment. This prohibition has been the subject of important court cases—including Supreme Court decisions holding that states may not provide any aid, not even textbooks, to private schools with racially discriminatory admissions policies.⁸¹ It is thus

Compromise, 60 GEO. WASH. L. REV. 818, 825-34 (1992) (describing states' inability or unwillingness to overcome Fundamentalist Christians' defiance of court decisions upholding state regulation of their schools).

80. See, e.g., Joe Loconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, POL'Y REV., Jan. 1, 1999, at 30 (discussing religious educators' fears of government meddling in private education); A. James Rudin, *Florida's Voucher Plan Faces Challenges*, CLEV. PLAIN DEALER, July 12, 1999, at 7B (identifying Christian and Jewish religious leaders' opposition to vouchers).

81. See *Norwood v. Harrison*, 413 U.S. 455, 467 (1973) ("A state's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."). In *Norwood*, the Court specifically held that a textbook aid program may be unconstitutional. See *id.* at 465-67; see also *Gilmore v. City of Montgomery*,

clear as a matter of law that states must attach at least one string to private school aid—namely, the requirement that recipients admit students without regard to race. Existing voucher programs do in fact all include a requirement that recipient schools have racially nondiscriminatory admissions.⁸²

The same principle underlying the prohibition on state funding of racially exclusionary schools—namely, that states should scrupulously avoid succoring private discrimination, lest they effectively do indirectly what they are not permitted to do directly—logically would also apply to discrimination based on gender. Thus, one might expect that courts would also find constitutionally problematic state aid to schools that exclude girls, at least if, in the particular circumstances, the discrimination is invidious—that is, if it fosters male privilege. Yet none of the existing voucher programs preclude funding of schools that discriminate on the basis of gender in admission.⁸³ As such, they are subject to constitutional challenge on this basis as well.

Moreover, invidious discrimination by private schools goes far beyond admissions policies, finding its way into the treatment of students who are admitted and even into the content of instruction. This discrimination that goes on inside some schools would appear to be (from the state's perspective) far more threatening to children's welfare. A child excluded from a school because of his race, if he is aware of the exclusion at all (one might expect his

417 U.S. 556, 568-69 (1974) ("[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.'" (quoting *Norwood*, 413 U.S. at 466)).

82. See FLA. STAT. ANN. §229.0537(4) (West Supp. 2000) (requiring compliance with 42 U.S.C. § 2000(d), which is the federal law on prohibiting racial discrimination in programs receiving federal financial assistance); OHIO REV. CODE ANN. § 3313.976(A)(4) (West Supp. 2000) (prohibiting discrimination "on the basis of race, religion, or ethnic background"); WIS. STAT. ANN. § 119.23(2)(a)(4) (West 1999) (requiring compliance with 42 U.S.C. § 2000(d)).

83. Under Title IX of the Civil Rights Act of 1964, as well as state analogues to Title IX, many private schools already are prohibited from discriminating on the basis of gender if they receive state aid. See 20 U.S.C. § 1681(a) (1994). Title IX and its state analogues, however, all contain a religious exemption, which allows state aid to flow to religious schools that engage in gender discrimination. See *id.* § 1681(a)(3). This discrimination by the state (i.e., in conferral of a legal protection) against girls harmed by religious schools' gender discrimination violates the equal protection rights of those girls. See generally Dwyer, *supra* note 17. I do not believe, however, that anyone has challenged the religious exemption on these grounds.

parents to shield him from that knowledge, if possible), suffers a one-time, rather impersonal slight. A child subjected to discriminatory attitudes on a daily basis is likely harmed much, much more. In fact, I would suppose that an African American child would be better off being excluded from certain private schools than being accepted and subjected to racist teaching.

It stands to reason that if the state may not support private discrimination in any way, then it must condition aid on a commitment by a recipient school to eradicate discriminatory messages from its instruction, to maintain nondiscriminatory admissions policies, and to allow some degree of state monitoring to ensure that steps are being taken to comply. Moreover, it is even clearer with instruction and treatment within schools than it is with admissions policies that the prohibition on state funding should extend to gender discrimination as well as to racial discrimination. The state absolutely should not financially support schools that routinely subject girls to explicit sexist teaching.

Thus, the Equal Protection Clause requires that states attach to voucher programs not only a requirement of nondiscrimination in admissions, but also a requirement that schools commit to eradicating racism and sexism from the content of their curriculum. Even more so than academic curricular requirements, this would go to the content of instruction, targeting specific forms of expression, and so would surely exclude or disadvantage some religious groups. The ethnographic literature on Fundamentalist Christian schools, for example, shows that many such schools explicitly, routinely, and unapologetically teach their students that females are inferior to males, that gender equality defies God's word, and that a girl's primary, if not sole, ambition in life, should be to serve a husband and be a homemaker.⁸⁴ I consider in the next section objections to restriction of content on free speech grounds. Regardless of what view one takes on the question of whether parents and school operators have a basic right to teach racism and sexism to children, however, one must concede that it would be constitutionally problematic for the state to subsidize such teaching.⁸⁵

84. See DWYER, *supra* note 66, at 26.

85. A common response to this point from apologists for religious minorities is a blanket denial that religious schools, or any significant number of religious schools, do anything to harm children, without addressing the empirical literature to the contrary. See Michael W.

The equal protection constraint on state spending might extend to other areas as well. That would depend on whether the state is proscribed from doing or teaching certain other things itself in public schools. For example, it might be that courts would interpret the Equal Protection Clause to preclude public schools from discriminating against gay students or teaching that homosexuals are morally inferior human beings. If so, the state might also be precluded from funding private schools that do so, based on the *Norwood* principle that the state may not do indirectly what the Constitution forbids it to do directly.

Beyond anti-establishment and equal protection strictures, additional constraints on state funding—constitutional or moral—might also exist. May states fund schools that teach religious bigotry? May states fund schools that impose severe limitations on students' personal liberty—for example, by confining them to cubicles all day or by prohibiting them from expressing views inconsistent with a religious group's beliefs? In general, if the state has concluded, with a reasonable degree of certainty, that a certain practice is harmful to children, and acts on this conclusion by prohibiting public schools from engaging in that practice, the question necessarily arises whether the state can justifiably not only tolerate such practices in private schools but actually subsidize schools that engage in such practices.⁸⁶ These seem important and

McConnell, *Education Disestablishment: Why Democratic Values are Ill-Served by Democratic Control of Schooling*, in NOMOS: MORAL AND POLITICAL EDUCATION (John Holzhworth & Stephen J. Macedo eds., forthcoming 2001) (manuscript at 53, on file with author); Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENTARY 149, 171-85 (1999) (reviewing JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998)). Questions about objectivity aside, a debate over the empirical evidence is in any event unnecessary, because if it were in fact the case that no school is intentionally or systematically engaging in sexist teaching and treatment of children, then no school should have an objection to a requirement that it commit to eradicating sexist teaching and treatment of children.

86. Different conclusions might emerge where the state merely has concerns that a practice *might* be harmful, and prohibits the practice in public schools just because it is highly risk averse. A different answer is particularly likely where the practice also might have certain effects that the state believes beneficial. Thus, publicly supported private schools might remain free to undertake some approaches to education that the state is unwilling to attempt because of its concern that the approach might be harmful. In addition, voucher schools would be free to experiment with approaches that the state does not take and as to which the state does not have reason to fear that children will be harmed.

pertinent questions that voucher proponents should be called upon to address.

C. Objections

Examination of Establishment Clause and equal protection strictures has led to the conclusion that vouchers must bring with them substantial state oversight and control of private education. These are necessary both to maintain the integrity of government and to respect the rights of children. There has not been a great deal of academic writing on the regulation aspect of vouchers, but it is not difficult to anticipate a number of objections to this conclusion.

Most proponents of evenhandedness in aid programs concede the need for regulation to accompany aid as a general matter.⁸⁷ For any of these people to object to attaching regulatory strings to school vouchers, they would have to argue that the child-rearing context is different in a way that cuts in a direction opposite to the one I have taken. They would have to argue that adults who choose to patronize a religious provider of health care or some other service *for themselves* must accept state regulation of that provider, while adults who choose a religious provider of a service *for their children* do not have to accept such regulation, but rather are entitled to receive the benefit of state aid *and* at the same time to be free of state regulation. In other words, they would have to contend that adults have greater rights when directing the lives of their children than they do when they are directing their own. This is clearly untenable. It finds no support in any widely accepted general principles of individual rights. In fact, the opposite is true; our rights to freedom are at their strongest when we are directing our own lives and not affecting the lives of others, and are at their weakest or are nonexistent when we seek to control the life of, or even incidentally have a substantial effect upon, another person. My children are other persons, and any "right" I have to control their lives certainly is weaker than the right I have to control my own. Religious belief does not change that.

87. See, e.g., Esbeck, *supra* note 60, at 21, 35-36; McConnell, *supra* note 24, at 1018.

Some proponents of including religious service providers in programs of state aid, however, believe that the state should exempt religious organizations from specific regulations that conflict with an organization's religious beliefs.⁸⁸ They would certainly object to the conclusion that states may—in fact, must—use vouchers as a wedge to open the doors of God's schools to state regulators, to restrict the freedom of parents and religious groups to educate children in accordance with their deeply held

88. See, e.g., Esbeck, *supra* note 60, at 37 ("For faith-based providers to retain their religious character, programs of aid must be written to specially exempt them from regulatory burdens that would frustrate or compromise their religious character."); Lupu, *supra* note 59, at 84 (arguing for exemptions in cases of extreme hardship to individuals arising from their religious beliefs or from aspects of "secular conscience that are highly analogous to protected religious claims"); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 24-28 (noting examples of legal exemptions provided by the Supreme Court); Perry, *supra* note 59, at 435-36 (arguing in favor of religious exemptions on matters of religious conscience). Lupu and Perry would both broaden exemptions to include nonreligious matters of conscience, in order to avoid privileging religion over nonreligion, and Lupu (unlike Perry) would insist that the exemptions be broadened in that way before any are allowed. See Lupu, *supra* note 59, at 384; Perry, *supra* note 59, at 415-16. But this position still privileges religion. It takes religion and religious belief as privileged phenomena to which other bases for wanting an exemption must be analogous ("highly so" in Lupu's words) in order to be worthy of consideration. From the perspective of the nonbeliever, this is somewhat analogous to the state telling members of racial minorities that they will be allowed to enjoy the privileges historically enjoyed by white people if and only to the extent that they act like white people. Lupu and Perry, like other supporters of exemptions, fail to explain why religious and quasi-religious objections should alone merit exemptions, to the exclusion of other reasons people have for wanting to be out from under certain government-imposed rules, such as love for other individuals (e.g., a spouse, one's children, a group of close-knit but unrelated persons), deep attachment to a piece of property (e.g., the family home, the lake where one vacationed as a child), a life's passion (e.g., protecting the natural environment from pollution and development, making explosives), or even the great pleasure one gets in a particular activity (e.g., ingesting a certain drug, frolicking in the nude, gambling). Pro-exemption arguments typically proceed from the assumption that religion is more deserving than such other human motivations, without justifying that assumption on the basis of the sort of secular grounds that the state ought to have in making exemption decisions. As Perry stated:

[G]overnment may not take any action based on the view that the preferred religion or religions are, as religion, better along one or another dimension of value than one or more other religions or than no religion at all. . . . [N]o matter how much some persons might prefer one or more religious practices, government may not take any action based on the view that the preferred practice or practices are, as religious practice . . . better—truer or more efficacious spiritually, for example, or more authentically American—than one or more other religious or nonreligious practices or than no religious practice at all.

Id. at 415.

beliefs. They will worry about the apparent threat to parents' rights, religious liberty, and religious pluralism from state control over the content of instruction in religious schools, and insist that religious schools should have a special exemption to any regulations attached to vouchers.

I explained at the outset why neither parents nor any other adults should be deemed to have any rights themselves in connection with children's education, because the interests they have at stake do not satisfy generally accepted criteria for attributing rights to people.⁸⁹ Children alone should have rights with respect to the nature and content of their education. The Supreme Court has held otherwise, of course, finding in *Pierce v. Society of Sisters*⁹⁰ that parents have a right to decide whether their children will go to a public or private school.⁹¹ As mentioned above, however, the Court has also stated in dictum on several occasions that parents do not have a right, even when motivated by religious belief, to prevent the state from regulating instruction in private schools, because the state has a compelling interest in protecting the educational interests of children as *it* sees them.⁹² There can be no question then that, even in the absence of funding, states may mandate that certain skills be fostered and certain content be taught, and may take steps necessary to ensure that schools comply with this mandate.

More controversial would be the *prohibition* of specific content of instruction—the targeting of particular forms of expression such as racist or sexist views. The Supreme Court has not directly decided whether states are free to proscribe particular messages in private schools, so it is an open question whether there is a constitutional right to convey such messages. I suspect that nearly every current member of the Supreme Court would conclude that neither parents nor private school teachers and administrators have a constitutional right to teach racism or sexism to children, though different Justices would undoubtedly have different reasons for that conclusion. The Court as a body has stated, in cases involving discriminatory admissions policies at private schools, that the

89. See *supra* note 8 and accompanying text.

90. 268 U.S. 510 (1925).

91. See *id.* at 532.

92. See *supra* note 70 and accompanying text.

Constitution places no value on private discrimination, and that private discrimination "has never been accorded affirmative constitutional protection."⁹³ Thus, states may prohibit it. This suggests that there is no underlying constitutional right to teach racism or sexism to children.

Parents might also assert, in addition to a right of control over children's lives, a right of free speech. They might contend that the First Amendment precludes the state from preventing them or their proxies from expressing particular views to their children on any subject. Some legal scholars have in fact analyzed education as a form of adult speech.⁹⁴ This way of looking at schooling, however, is inappropriate. To view children's education as a vehicle for adult expression—rather than as a service to children designed to promote children's welfare—is to treat children's lives instrumentally, and that is morally and constitutionally improper. Adults should not be deemed to have a constitutional right to make children their sounding board, or to communicate something to the outside world by the way they treat their children. No court could give credence to such a claim while still treating children with the respect they are owed as persons. Schooling is about the welfare of children, not the gratification of adults. In addition, this claimed right to free speech finds no support in the value of *self-determination* that undergirds individual liberty in our political tradition, and it would be inconsistent with principles governing situations in which people seek to use adults as involuntary vehicles for expression.⁹⁵

93. *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

94. See, e.g., Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 710-14 (1996) ("A religious school's decision to maintain a distinctive religious creed and to teach any and all subjects from a perspective informed by that creed is at the absolute core of that religious institution's collective First Amendment freedom of expression."). Paulsen also posits that schooling is a matter of rights of "free association," see *id.* at 714, but does not explain how an association among people most of whom (i.e., the children) do not freely choose to associate can be protected by such rights.

95. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (upholding state court ruling that owners of shopping mall must allow group of students to solicit signatures for petitions in common area of mall, but emphasizing that "views expressed . . . in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner"); *id.* at 97-99 (Powell, J., concurring) (stating that, even though the property

Moreover, the notion that parents need control over their children's schooling in order to communicate their beliefs to the outside world or to the children is ridiculous. There are many ways to communicate one's views to the outside world, ways much more direct than inducing one's children to ape one's views or to act out one's conception of the good. Moreover, only about 15% of children's awake hours from birth to age eighteen are spent in school,⁹⁶ so parents have complete control over the vast majority of their offspring's childhood years regardless of what goes on in the schools they attend.⁹⁷ This suggests that what parents really seek in

owner "failed to establish a First Amendment claim" in the instant case, "[a] person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline 'to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a state may not require a newspaper to publish a political candidate's reply to a previously published criticism). Indeed, even in situations where adults claim the liberty to say certain things to children who are not "their own"—for example, teachers in public schools whose views differ with what the state wants them to teach, courts reject the notion that such adults have a right to do so as a matter of free speech or free exercise of religion. When teachers have claimed a constitutional right to say or not say certain things to students, contrary to the wishes of school district officials, courts have rejected their claim. See *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979). Courts have done so in large part because they do not view school as a forum for adult speech, but rather view it as a service for children. As the court stated in *Palmer*, "Plaintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy." *Id.* at 1274. This view of education should be no different when it is a parent who wants to control the content of a child's education. For children's sake, parents should have input into curricular decisions, but parents should not be said to have any rights themselves in connection with such decisions.

96. This percentage is based on an assumption that children are in school an average of seven hours per day, 180 days per year, for thirteen of the first eighteen years of their lives, and an assumption that children sleep an average of eight hours per day. Eliminating the first two years of life from the calculation and adding a significant amount of time in preschool raises the percentage to 18%.

97. I do not take the view that the state should radically curtail parents' freedom in that remaining 85% of children's awake hours. Intrusion into home life is much more disruptive of family life than is regulation of schooling, which occurs in a more public setting. The costs of that disruption for the child are likely to outweigh the benefits for the child, except where parental practices in the home approximate existing definitions of child abuse or neglect. Indeed, if one believes that what is best for children in general is, to use Professor Lupu's metaphor, a "separation of powers" over children's lives as between parents and the state, schooling is arguably the optimal sphere over which to give the state substantial authority. Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994). State control over schooling is the best, and possibly the only effective, safeguard

objecting to state regulation of curricular content is not freedom of expression, but rather state-conferred monopolistic control over their children's minds, and such a monopoly over any person's mind is antithetical to the values of the First Amendment.

If parents or teachers or religious organizations *did* have a constitutional right to complete control over the specific views communicated to their children in private schools, as a matter either of free speech or freedom of religion, then we would need to inquire whether the state may condition receipt of vouchers on foregoing that constitutional right. Supporters of the "unconstitutional conditions doctrine" would object to the state doing indirectly—using financial rewards to induce people not to do what they have a constitutional right to do—what it may not do directly—that is, by outright prohibition.⁹⁸ In some contexts, the Supreme Court has said that states may not condition important public benefits on a willingness to give up one's constitutional rights.⁹⁹

It is not necessary to enter here into the complex debate over the vitality and reach of the unconstitutional conditions doctrine, because there can be no dispute that the doctrine would not apply to situations where there is a specific constitutional prohibition on state spending. There are some things private persons may do that

against the harms that can arise from a complete parental monopoly over children's lives. This point invites questions about home schooling that must be put off until another day.

98. See, e.g., Paulsen, *supra* note 94, at 713 ("Whatever the legally permissible scope of government authority to regulate private religious schools, that scope is not enlarged by a religious group's acceptance of voucher funds that the government has provided to students on a religion-neutral basis.") (emphasis in original). Other academic supporters of evenhanded aid to religious social service providers, however, accept that parents' freedom to decline vouchers obviates the "strings attached" objection. See Michael W. McConnell, *Equal Treatment and Religious Discrimination*, in *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* 30, 48 (Stephen V. Monsma & J. Christopher Soper eds., 1998). McConnell also points out that a vouchers-with-regulations option actually diminishes the coercive effects of the overall scheme of government funding for schooling, because the prevailing scheme now requires parents to send their children to public school if they want to take advantage of state education money, while vouchers would create the possibility of receiving substantial state financial support without having to enroll one's children in public schools. See *id.* at 47-48.

99. See Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 *UCLA L. REV.* 371, 390-91, 418, 433, 442 (1995). But see also *id.* at 374-76 (explaining that the doctrine has received little support from the Court in recent decades).

the state simply may not support. As discussed above, this is true of religion and discrimination. While private individuals are free to exercise religion, the Establishment Clause does not allow the state to pay for religious exercise. And while individuals are free to engage in invidious discrimination in many areas of private life, the Equal Protection Clause prohibits the state from subsidizing such discrimination. So the state may—in fact, must—condition benefits it gives to private organizations on their compliance with antidiscrimination rules. As a general rule, this should be uncontroversial, and it would surely apply to school vouchers, which constitute a quite substantial subsidy. Therefore, if the courts were to conclude that the principle of nonsupport for discrimination reflected in *Norwood* extends beyond admissions policies to internal practices, including content of instruction, then the unconstitutional conditions doctrine would pose no obstacle to conditioning vouchers on schools' commitment to eradicating racism, and perhaps sexism as well, from their curriculum.

As for religious liberty and religious pluralism, the notion that unregulated religious schools promote those values is unsupportable. The objective of most such schools is to create ideological conformity, not to promote free thinking and diversity. Many aggressively repress their students' curiosity about different world views. Also unsupportable is the notion that requiring all schools to foster in their pupils critical and independent thinking and to teach mainstream views in the sciences would pose a threat to those values. More critical and independent thinking should lead to more diversity, not less. In my view, the conflict over regulation is really not about religious liberty and pluralism. It is really about the desire of some adults to claim, beyond simply freedom with respect to their own beliefs and religious exercise, the power to confine the minds of their children. This desire conflicts with the interest of their children in being able to make up their own minds about religion and other life decisions and to have a broad range of life options open to them. Ensuring that all children, in the 15% of their waking hours spent in school, receive training in critical, independent, and complex thinking and acquire the knowledge necessary for higher education and a broad range of careers, would pose no threat to religious liberty or religious pluralism. If anything, it would promote those values.

CONCLUSION

In the schooling context and in other child-rearing contexts, we should be adopting a child-centered perspective—one that makes the welfare and rights of children the center of attention. In the case of vouchers, such a perspective yields the conclusion that children in religious schools have a right to a share of state spending on education, but also have a right to state supervision of, and standard-setting, for their schools. And if this means that some parents cannot use their children's schooling to proclaim the "good news," because in the state's judgment the parents' news is not so good, then so be it.

This conclusion is likely to trouble both no-aid separationists and supporters of faith-based organizations. Both groups should see, however, that their general positions regarding charitable choice, whatever their merits, are weaker in child-rearing contexts, particularly in the context of education. The no-aid position is weaker because here we are talking about a matter of fundamental well-being for children—a good education, which some children might not receive in the absence of state funding of religious institutions, through no fault of their own. The argument for religious freedom is weaker because the freedom that is claimed is not a matter of self-determination, but rather a matter of controlling the lives of other persons.

Both sides must recognize that there can be no wall between children and the state, and therefore, that if parents place their children in a religious setting, there can be no wall separating that religious setting from the state. State authority must be present in every school, including every religious school, as a safeguard against educational deprivation. It should not need an invitation. But given the lack of political will to enter these schools without an invitation, vouchers may be the only way to create that state presence, which safeguard of children's educational interests. By accepting vouchers, with the regulatory strings that must, as a moral and constitutional matter, be attached to them, religious schools effectively would be extending that invitation.

The state's entrance into the religious arena of parochial schooling could, however, be largely metaphorical. In the realm of education, it should be possible to monitor quality from a distance

to a large degree. If states used more sophisticated tests than are currently used, ones that assessed whether schools are fostering higher-order thinking skills, helping students master advanced scientific methods, and teaching all the content needed for higher education, much or all of the monitoring of educational quality could be done through review of tests administered by a school's own officials and then submitted to a state agency. The best evidence for the potential of such tests to provide a meaningful measure of the quality of education in religious schools may be that Fundamentalist Christian groups have vehemently opposed proposals to require their administration. If, instead of trying to impose such a requirement on private schools involuntarily, states were to offer a very large financial incentive (i.e., vouchers) to administer the tests voluntarily, they could defuse that opposition and begin to institute genuine accountability in private schooling.