

## Secular Humanism vs. Religion? The Liberal Democratic Education Tradition and the Battle over Vouchers in the USA

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### Abstract

Since *Mueller vs. Allen* (1983), several legal decisions have attempted to clarify what is the appropriate relationship between religion and public education in a democratic society. During this time, the United States legal system has shifted, moving the historic “establishment clause” away from a strict “separationist” view and toward an “accommodationist” interpretation.<sup>1</sup>

This major philosophical shift correlates with other landmark legal decisions; one finds publicly sponsored vouchers for private and religious schools are constitutional,<sup>2</sup> another argues publicly sponsored for-profit charter schools are permissible.<sup>3</sup> With faith-based initiatives signaling that the trend toward public financing of religious education is emerging as a full-blown wave, under TITLE V-PROMOTING INFORMED PARENTAL CHOICE AND INNOVATIVE PROGRAMS of the No Child Left Behind Act (NCLBA), the federal department of education asserts that publicly sponsored, for-profit supplemental educational services are not only allowable, but need to be encouraged.

Two major legal cases in particular have fueled this legitimization of the notion of ‘school choice,’ the first concerning vouchers and the second concerning charter schools as public schools:

- *Zelman, Superintendent of Public Instruction of Ohio, et al. v. Simmons-Harris et al.* 2002. No. 00-1751.
- *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, (2005) 111 Ohio St.3d 568, 2006-Ohio-5512.

Compiling over a seventeen year period a running chronicle of the contested birth of school choice in the United States of America, the author conducted ongoing simultaneous academic and journalistic research into the debate over the legality of, and dawning recognition of, the philosophical shift that has paved the way for acceptance of, education privatization, or more accurately termed, the corporatization of American education.

Prior scholarly work has provided a rich tapestry of the conflict over values in education, values considered secular and values seen as religious. These values debates come to a head with the emergence of the vouchers phenomenon and the campaign to validate the superiority of privatized “choice” schooling on religious grounds.

So how does the history of these debates over values in education relate to current voucher battles?

Throughout this essay, the author will consider: is the historic conflict of secular humanism vs. religion really the engine that is driving the battle over vouchers and school choice today? What will be argued, in fact, is the obverse, that America’s venerable secular educational philosophy is being undermined, not so much by the new religious evangelicalism as by free market economics, as the author proposes to show in the form of a personal narrative relating his own (eighteen year) journey as a ubiquitous eyewitness to and video documentarist of the battle over vouchers, the emergence of charter schools as public schools, and the expansion of ‘school choice’ under NCLBA.

### Introduction

The purpose of this study is to explore what have been the historic tensions between public education and religion, not exhaustively, but strategically, as these tensions become polarizing debates which in turn relate to the politics of ‘school choice’ or what has literally been

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<sup>1</sup> See Viteritti, Joseph P. 1999 *Choosing Equality: School Choice, the Constitution, and Civil Society*. Brookings Institution Press, Washington D.C.; p. 117-179. This argument is claimed by Viteritti to be the essential one between Jefferson and Madison over the proper role of religion in a democratic republic.

<sup>2</sup> See *Zelman, Superintendent of Public Instruction of Ohio, et al. v. Simmons-Harris et al.* 2002. No. 00-1751.

<sup>3</sup> See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, (2005) 111 Ohio St.3d 568, 2006-Ohio-5512.

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a publicized battle over ‘vouchers’. I will argue that what is critical for educational policy decision makers around ‘school choice’ is to understand not only how the legal cases are understood, but how the story is told, and how the battle over ‘vouchers’ has been framed, mistakenly I believe, as one of secular humanism vs. religion. The historiography, or how the battle over vouchers has been written, is revealing for what it doesn't say, namely, that school choice has little to do with religion, wisdom, knowledge, or truth. But it does have something to do with faith in the free market and declining faith in public education. Current debates around educational reform focus on ownership, management, funding, participation and benefit. Pressured initially from an outside movement of private corporatism under the guise of religious reformation, public education faces new challenges in an age of competition, standards and accountability.

My personal testimonial to this pursuit of economic benefit as the iron fist inside the velvet glove of religious choice education that will be presented here was compiled first-hand in my service as a videographer based in Wisconsin. The transcripts are derived from those videotape archives, and include several interviews.

Wisconsin, as voucher advocates and opponents know, was the state that was the birthplace of vouchers in American Education with the first experiment with use of public funds for private school tuitions in the city of Milwaukee in 1990. Working either on a free-lance or commissioned basis on newsgathering, my video work put me on location at well nigh all of the landmark events that have been the stepping stones toward today's reconstitution of the historic secular essence of the American public school.

### **A Secular Debate**

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My initial education research in higher education involved studying educational policy and the implications on curriculum and instruction. I used the video camera to document that research, to create in essence, analog field notes. My encounters took me outside of the narrow walls of academia.

In the fall of 1992, I was commissioned by a labor group to videotape a panel convened in Milwaukee to debate the efficacy of the Milwaukee Parental Choice Program (MPCP). The debate was moderated for public television. Invited to speak and in attendance were three professors, a union official representing public school teachers, a charismatic state legislator, Annette “Polly” Williams, who started the school choice program,<sup>4</sup> and a representative of Partners Advancing Values in Education (PAVE).<sup>5</sup>

This panel represented the figures who held starkly different views on school choice. Polly Williams was an enigma. She rose out of poverty as a welfare mother, and for five years fought to get school choice legislation passed in the state legislature. Embraced by the conservative, religious right, Williams was in the Wisconsin Democratic Party, a party that traditionally supported the teacher’s unions, who in turn opposed vouchers vigorously.

The discourse at this panel became heated over the supposition by the representative from PAVE that private schools were doing a better job than the public schools. He further

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<sup>4</sup> See Kirkpatrick, David W. 1995. “School Choice: The View from Milwaukee.” *Choice Comments* Vol. 4, No. 11, May 30, 1995, School Choice Newsletters. “Most readers of this newsletter know that in 1990-91 Wisconsin approved a proposal by Rep. Annette “Polly” Williams for the Milwaukee Public School District’s 97,000 students, and to the number of eligible nonpublic schools that could participate, the program has been growing slowly each year. About 750 students received government-funded tuition vouchers in 1993-94 to attend any one of a dozen non-religious private schools in that city.”

<sup>5</sup> See Meyerson, Adam. 1999. “The Achievements of Privately Funded Vouchers.” *Hoover Institution Policy Review*. Questions on School Choice. Features: A Model of Cultural Leadership. January and February 1999. “PAVE (Partners Advancing Values in Education) financed a scholarship program that paved the way for Wisconsin’s publicly-funded voucher program now available to 15,000 low-income children in Milwaukee.”

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commented that while the panel, which included a long time urban educator and opponent of the school choice program, was talking about saving systems, PAVE was talking about what really mattered, families and children:

PAVE: We're talking about schools that serve families and we trust parents to make good decisions. Now I think one of the basic distinctions that we need to make here is that public schools are not a good in and of themselves, they're a means to a greater good which is educating kids...If our [private] schools, the 95 other schools in this town are educating kids what's wrong with that and why hasn't anybody come out and said that these 95 schools are destroying public education by their very existence? They've been there for a hundred years doing this job quietly they're just a means to an end...we hear talking about helping families... if families want these [school choice] options, what's wrong with that?

MODERATOR: You don't take money away from public schools?...instead you let private companies...you let the Bradley corporation underwrite those students who wish to leave the public schools to attend private schools, do I have that right?

PAVE: Yes, the fact is that we're basically a voluntary organization funded by about 40 or 50 corporations and foundations who want to give more people the options that Polly (referring to State Legislator Annette Polly Williams, who first introduced the Milwaukee Parental Choice Program) has begun to give them through the state law.

MODERATOR: Does your program help students escape from public schools or does it invite competition so that the public schools are forced to improve themselves?

PAVE: There's always been competition is what I'm trying to say. People here are talking about public schools; we're talking about the public good they're 95 other schools in Milwaukee serving the public good. That's competition it helps. But basically I don't want to talk about systems I want to talk about families...families want to take back the agenda. We have 7500 applications snapped up within a week, we have 3100 families who've filed applications, low income families the same requirements as Polly's program, that are willing to pay up to half the tuition...and we funded 1953 grants to kids...1300 are new. Therefore I assume they're coming from somewhere probably public schools or perhaps they are just entering the schooling tradition. You have to focus on who you're serving and I'd like to hear a lot more conversation about how your schools are going to serve families better

PROFESSOR MOLNAR: Excuse me just for clarification did you understand anyone on this panel to not be talking about families and children?! The reason I ask the question because what I heard you just say...if I understood you properly, so I want to give you an opportunity to respond... is that you're seated with a panel of people who might disagree with you and that essentially what we're doing is defending a tired, old, bureaucratic system that is trying to protect itself without regard for children or families...now I don't want to be reading into your remarks, so could you clarify for me if that's what you're implying?<sup>6</sup>

The exchange was notable both for its intensity and for highlighting the key issues regarding vouchers and school choice. Private schools of Milwaukee (at the time only non-

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<sup>6</sup> Garvey, Ed, Chuck Mitchell, Todd Schmitz, and Gale Ketteler. 2000s. *A matter of fact*. On the Earth Productions, educational series. [Oconomowoc, WI]: On the Earth Productions, LLC.

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religious ones could participate) had been portrayed as sharing family values, and the public school system was portrayed, or certainly perceived to have been portrayed, as being bureaucratic and unconcerned about families, let alone students.

Polly Williams garnered much press during the school choice debate, played out in public through newspapers, radio and television, by lambasting the public schools for failing Black children:

And when they come out of schools and can't read and write, we better find out why not. And we better find out where is that money going that was supposed to [educate] our kids and it didn't.<sup>7</sup>

At one event, sponsored by Citizens Advocating Respect for Education (CARE) where she was the invited speaker, the general theme was the same; public schools were a failed experiment:

We're under court order to desegregate MPS [the Milwaukee Public School System]. Now somehow or other they sold this lie to our parents. That desegregation has something to do with education. Now the court order said desegregation. There was nothing in that order that said anything that you had to educate them...It just said that you had to desegregate because some schools in Milwaukee were predominantly black. And somehow the feeling was if it was predominantly black than that's why those kids are not doing well. It's because they all black. So if we can kind of do something about all this blackness and get them desegregated and mixed with white kids, then by osmosis they're all going to be intelligent!<sup>8</sup>

This was a surprising argument to make in Milwaukee, one of the more racially segregated cities in the country. Equally surprising was William's vote against a public school funding referendum which would provide more funds to inner city schools.

But beyond the enigma of Representative Williams, was the emerging role of PAVE. Of note was the fact that the PAVE board was the creation of the Bradley Foundation; a number of corporations partnered with religiously affiliated members. They started their own program in

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

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1992, providing a grant to a number of low income students, grants which were not limited, like the MPCP, to secular schools:

In 1990 the Wisconsin legislature enacted a modest parental choice program for low-income students in Milwaukee, but it was available only for the tiny number of private nonsectarian schools in the area, and only for students transferring out of public schools. In sharp contrast, the PAVE voucher program started in 1992 did not exclude the much larger number of private religious schools, and it did not discriminate against low-income families that were already sacrificing to send children to private schools <sup>9</sup>

Indeed several students enrolled and several religious schools took the students with grant in tow. While advocating for family values which is the same argument religious schools and their spokespersons had made, PAVE also advocated for competition and the free market. With the financial aid and political muscle of the most powerful and strategic lever in Milwaukee, the Bradley Foundation,<sup>10</sup> PAVE amplified school choice over and beyond the historic secular humanism vs. religion debate. The school choice program would get over several hurdles because of PAVE: or more specifically, because of the skillful work of a powerful former member of President Ronald Reagan's administrative team, Bradley Foundation Chairman Michael S. Joyce.

But what of the secular humanism vs. religion debate? We need to step back from the current rhetorical debates to examine the substance of the complex relationship between religious education and secular education, or what is termed public education. This relationship, indeed turbulent at times, has nonetheless endured over several hundred years. In other words, in the United States of America, religious schools and public schools have clashed, but they have also flourished, and often in harmony. Perhaps they are cut from the same cloth?

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<sup>9</sup> Ibid.

<sup>10</sup> Op. cite. Anderson.. "Of the \$20 million PAVE spent on vouchers from 1992 to 1998, over \$8 million was provided by the Bradley Foundation."

**In the beginning...**

Often the history of American public education is recounted with the emergence of the Common School of the middle 19th century. This quaint story usually begins with Horace Mann, riding a horse through little towns, writing his twelve annual reports<sup>11</sup> on improving education and is followed by a regal Catharine Beecher exhorting her young female teachers-in-training to relocate to fill positions in schools emerging on the Western frontier.<sup>12</sup> As described in the video documentary,

Our public school system is rooted in the common school reform movement of the mid 1800's. Common schools gradually replaced the patchwork of pay schools for the rich and charity schools for the poor...<sup>13</sup>

Yet this secular Common School story is preceded by a religious one. One interesting point of departure would be to note, as some scholars do, the close relationship between religious faith and the development of faith in an otherwise secular Common School system. Where does faith in the public schools come from? Perhaps religion?

Several scholars place the 'Genesis' of American public education back further than the Common School, to the middle of the 17th century. One particular story from this period tells of Pilgrims landing on Plymouth Rock, of the fabled "City upon a Hill,"<sup>14</sup> of growing villages,

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<sup>11</sup> Cremin, Lawrence. 1957. *The Republic and the School: Horace Mann on The Education of Free Men*. Classics in Education. No. 1. Teachers College, Columbia University, New York.

<sup>12</sup> Stone Lantern Films. 2001 *School: The Story of American Public Education* foreword by Meryl Streep; introduction by David Tyack, with James D. Anderson ... [et al.]; narrative by Sheila Curran Bernard and Sarah Mondale; edited by Sarah Mondale and Sarah B. Patton. Boston: Beacon Press. In this series produced by the Public Broadcasting System, four parts are presented to the American public education story. Several educational historians are prominently featured to provide the narrative underneath the pictures and the story of the development of the public school.

<sup>13</sup> See Garvey, Ed, Chuck Mitchell, Todd Schmitz, and Gale Ketteler. 2000s. *A matter of fact*. On the Earth Productions, educational series. [Oconomowoc, WI]: On the Earth Productions, LLC. Charity schools for the rich, Lancaster schools with huge halls of poor ne'er do well students, these images are etched into the fabric of our pre-common school experience, as well as the vignette of Laura Ingram Wilder's Little House on the Prairie, and the one-room school house.

<sup>14</sup> Winthrop, John. 1630. "For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us. So that if we shall deal falsely with our God in this work we have undertaken ... we shall be made a story

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peopled with hard working families, where children were to be seen and not heard. In these little communities adults worshipped and children were proctored to by a stern religious master, a theologian. With passage of the law, the Old Deluder Act of 1647,<sup>15</sup> religious morality and corporeal punishment would be combined to, for the first time, mandate compulsory education. Master teacher would teach students to read the King James Bible and, subsequently, would instill the proper amount of fear and respect in order to spread the Word.

This story, and other such stories are vividly recounted in *American Education; the Colonial Experience, 1607-1783* by Lawrence Cremin. While the ‘old’ world was rapidly changing with advances in liberal political thought, a questioning of religious orthodoxy and an emerging appreciation of Enlightenment philosophy, in the ‘new’ world of the Americas, early Colonists still carried over the predispositions of their ‘old’ world religious orders, accounting for the architecture, personal dwellings, social relations, and the school. They also, apparently, brought over reams of books. Furthermore, in the earliest days home schooling was commonly practiced, before the demand of tilling the fields pulled young ones out to work.

During this pre-Revolutionary, Colonial period, (1620's to 1776) both the Anglican Church was sustained, while new churches were formed, members flocked, a new revival was heard, and contentious denominational lines were drawn. On the one hand, where the Episcopalians flourished there was resistance to the idea of paying for the education of other people’s children. Schooling in such a case lay largely in the hands of private, church agencies and was supported by philanthropic funds or church tithes. The private management of the

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*and a by-word throughout the world. We shall open the mouths of enemies to speak evil of the ways of God ... We shall shame the faces of many of God's worthy servants, and cause their prayers to be turned into curses upon us till we be consumed out of the good land whither we are going.”*

<sup>15</sup> Cremin, Lawrence. 1970. *American education; the colonial experience, 1607-1783* [1st ed.] New York, Harper & Row.

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schools seemed to be located in the middle and southern Colonies where the Episcopalian and other similarly motivated denominations would predominate.

Public management of the schools, on the other hand, was brought to life first by the New England communities and in the Puritanical settlements. The state of Massachusetts required that settlements with more than fifty residents provide an elementary school:

a precedent was thus set; with in almost every case, schools [being] paid for out of taxes...the early schools of Massachusetts were both publicly supported and publicly controlled.<sup>16</sup>

Although religion advanced the idea of compulsory education in the early Colonial period, the idea of publicly supported education corresponded to a growing secularism, reflected in Enlightenment philosophy from Comenius, Locke and Rousseau, and up through Wollstonecraft and Pestalozzi. What transpired, despite the overarching European influence, was Americanization. While it was European liberal philosophy that influenced the ideas of curriculum and pedagogy, an American, Noah Webster, pushed the idea of building a uniquely American language and culture, casting out the old European texts, and ushering in the new American republic with books like *The Original Blue Back Speller* and *The Compendious Dictionary of the English Language...Webster's Dictionary*.

Religiosity would morph with secularism over time, evolving into a uniquely configured American citizenship education. The diverse denominational styles of education would be systematically replaced with a growing secularism and humanism merged with evangelical Protestantism. Liberal humanists, many religiously educated, would advance the notion that education, though started by God-fearing peoples, should be directed toward meeting the needs

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<sup>16</sup> Cremin, Lawrence. 1970. *American education; the colonial experience, 1607-1783* [1st ed.] New York, Harper & Row.

of all, not just the faithful, and that given sufficient support, to restate, the ideals of citizenship and an American pragmatism would follow.

Philosophically speaking, the aims of both styles, public and private, of ownership, funding and management were thus enshrined during the early Colonial pilgrimage. Public education grew out of the tension that separated publicly managed and privately managed schools. The tensions between the different philosophies are emphatically documented here:

These differences were of the greatest importance. When the American people decided to establish public schools throughout the United States, they found that the job was easier where habits of public support and control were deep in the life of the people, as they were in Massachusetts, than it was where the private school had been the dominant educational institution, as in the middle and the southern states.<sup>17</sup>

In a recurring, popular educational textbook, historian Joel Spring makes a powerful point regarding the history of public education. To some, school is experienced as a vehicle of social mobility...where status is "conferred" yet to others it is more narrowly understood as a site of ideological control, where status is... "confirmed."<sup>18</sup>

Although history textbooks frequently speak of a collective, shared, American experience, different groups of people share different experiences in the pursuit of the American dream, and likewise have different experiences of 'school:' it all depends on one's personal experience as part of the collective experience.

In sum, by telling a story about secularism vs. religion, of the debate and merrgence of different forms of ownership, management, funding, participation and benefit in the public school, the student, parent and/or teacher should recognize that there are often many contradictory ways in which a story about school can be received, interpreted and understood.

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<sup>17</sup> Ibid.

<sup>18</sup> Spring, Joel. H. 2005. *The American School, 1642-2004*. 6th ed. Boston: McGraw-Hill.

Stated another way, history has its share of ‘winners’ and ‘losers’ but over time, there are different versions of who won and lost and what winning and losing means. There is, for example, ‘his’ story and ‘her’ story, and there are stories of school that speak eloquently to the following: Colonization, accommodation, assimilation, marginalization, socialization, indoctrination, all of which speak of the phenomena of Americanization.

### **Secular Humanism vs. Religion: A True Distinction or a False Dichotomy?**

Moving from Europe and Comenius to Thomas Jefferson and the Americas, the liberal democratic education tradition called for an educated citizenry whom could preserve “the Republic for which it stands, one nation,<sup>19</sup> indivisible, with liberty and justice for all...”<sup>20</sup>

Democracy in the United States of America is a little over two hundred years old. Essentially at the heart of the dream of what it means to be an American, is freedom. Freedom to speak, freedom to worship and freedom to choose. Along the lines of what is at stake is that the rights of the individual are dependent (often misunderstood) not on the assurances of the checks and balances (as critical as these are) of a three branched government which includes the executive, the legislative, and the judicial, but upon what is sometimes referred to as the ‘fourth branch’, namely the citizenry themselves. The citizenry, educated, informed, enfranchised to prevail upon their government the interests of her constituents, are the last defense in between the promise of liberty and the cloud of tyranny. It is in the greatest and most grave interest of preserving the republic from being overthrown by tyranny, that the forefathers (at least the more

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<sup>19</sup> In a conservative moment during the 1950's the words ‘under God’ would be included.

<sup>20</sup> “The Pledge of Allegiance was written for the popular children's magazine *Youth's Companion* by [socialist](#) author and [Baptist](#) minister [Francis Bellamy](#) on [September 7, 1892](#). The owners of *Youth's Companion* were selling flags to schools, and approached Bellamy to write the Pledge for their advertising campaign. It was marketed as a way to celebrate the 400th anniversary of [Columbus arriving in the Americas](#) and was first published on the following day.”

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enlightened ones) of the early American independence, found it so necessary to *inform*<sup>21</sup> their discretion with education:

Every government degenerates when trusted to the rulers of the people alone. The people themselves are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree...An amendment of our constitution must here come in aid of the public education.<sup>22</sup>

Thus the past foretells the great debate today: how to both preserve that liberty and ensure that American education preserves the interest of a republic of *informed* democratic citizens?

Should government dictate what schools teach? Such was not in the spirit of Jefferson's idea, save American citizenship, which was indeed part of the expected curriculum.

Who then has the right to *inform* their own education, and what interest for the nation at large is there in the citizenry choosing their own means? What role does school choice exercised today play in the selection of schools, and in the maintaining of a nation into the 21<sup>st</sup> century?

### **Religious History**

Joseph Viteritti makes an interesting and perhaps most articulate argument for the relationship between religion and education in the USA. He seems to believe that the nation is preserved largely by liberty to exercise religious freedom, because America is founded upon religious freedom principles. While side stepping the issue of how choosing religious schools ensures toleration and support for liberal democratic values, his reading of history is worth noting.

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<sup>21</sup> Author's italics throughout.

<sup>22</sup> Padover, Saul. K. 1939. *Thomas Jefferson on Democracy*. Selected and arranged by Saul Padover. D. Appleton Company Inc. p. 87.

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If the issue of vouchers and religious freedom are at the heart of the school choice debate, then one would do well to consider this position. Viteritti posits:

middle-class parents make values-driven choices as a matter of course. Families with strong religious convictions select sectarian schools when they want their children educated in an instructional environment that reinforces values taught in the home.<sup>23</sup>

If this is so, he asks, then

why shouldn't poor parents enjoy the same prerogative?<sup>24</sup>

Limitations imposed on vouchers for religious schools are unconstitutional, he believes. Viteritti reckons Jefferson's "wall of separation" interpretation of church and state is fairly narrow, "separationist", and Madison's interpretation of church and state, is much broader, more in the spirit of the country's architects; what he terms "accommodationist".<sup>25</sup> Viteritti's theory is that liberty is secured through religious freedom, and subsequently vouchers. He seems unconcerned that a religious school could place its own values, knowledge and education beyond that of the critical needs of a democracy of informed citizens.

### **School Choice History**

Beyond religion are other compelling issues which speak to school choice and vouchers. For example, in *The Intellectual History of Choice in Education* Christopher Jencks argues that the first case made for distributing resources to the family for purchasing the right to an education was in Thomas Paine's, *The Rights of Man*.<sup>26</sup> The economist Adam Smith believed

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<sup>23</sup> Viteritti, Joseph. 1999 *Choosing Equality: School Choice, the Constitution, and Civil Society*. Brookings Institution Press. Washington D.C. p. 117

<sup>24</sup> *Ibid*, 117.

<sup>25</sup> *Ibid*.

<sup>26</sup> Coons, John E. and Sugarman, Stephen D. 1978. *Education by choice: the case for family control*. Berkeley : University of California Press.

that the market would spur innovation and creativity.<sup>27</sup> Paine would translate this to the idea that the poor should be provided the benefit of a negative income tax, so that their kin could go to a school of their choice; he was advocating for parental choice.<sup>28</sup> It was John Stuart Mill, who, many years later would advocate for the rights of children, to be educated at home and then to be subsidized by the government where the parents failed to be able to provide the difference for the cost of tuition.<sup>29</sup> Thus at the heart of the early debates (late 20th century) over the utility and necessity of vouchers-as-educational reform in the United States of America, are not only centuries old hurdles regarding religion and secularism, but also economics.<sup>30</sup>

The public school system in the America that Alexis De Tocqueville eulogized, took off as the rural school moved to the urban with its flourishing industry. In this period 1875-90's schools were growing rapidly. Jencks, a democratic socialist, is critical of the failure of the state to provide for all. Not unlike other conservative school choice advocates, he argues that the period of the Common school reform was replete with a particular strain of Nativism, and he notes that it went so far as to marginalize groups. The public school system, fashioned after a factory model of industry served labor well, as young children were taken out of the factories so as not to compete with newly arriving adult immigrant labor. Later this would be enforced with the child labor laws.

Yet would all be forced to attend the public schools? This question was settled with *Pierce v. Society of Sisters*, 1925, where the court found in favor of the private schools and

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<sup>27</sup> Ibid, p. 18.

<sup>28</sup> Ibid, p. 18.

<sup>29</sup> For a broader discussion, see of course Mill, John Stuart. 1987 "On Liberty" in *Utilitarianism and other Essays*. Edited by Alan Ryan Harmondsworth, Middlesex, England; New York: Penguin Books.

<sup>30</sup> Ibid.

parents.<sup>31</sup> The state could not demand that all students attend public schools; private schools had their place, and the court further recognized parents as the child's first teacher.

From all of this history, Jencks, perhaps uniquely so, notes that there is a history to school choice. He posits three. The three theories all hold strong ideological positions, but weak prescriptive and practical positions to avail choice to become a reality: the free market economists, the parent's rights advocates, and the radical child centered theorists.<sup>32</sup>

These are, I believe, the real or substantive theoretical issues. Yet since the 1950's and with vigor in the 1980's, neo-conservative transformed the debate. In the 1950's "back to the basics" critics from Professor Arthur Bestor and Admiral Hyman Rickover started to level sustained attacks directly at Progressive Education, the philosophy that was supposedly infecting the schools. With the launching of Sputnik this became a rallying cry, as American education was to blame for losing the Cold War.

The federal government became involved in public education curriculum matters for the first time, positing

### **The Culture Wars**

Not surprisingly to anyone living in the United States of America over the last quarter of a century, politics and culture have clashed over the issue of family values. "Family values" was a powerful slogan which divided groups of people along politically divisive lines of discourse.

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<sup>31</sup> Ibid, p. 19.

<sup>32</sup> Ibid, p. 21, 22, 23.

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The criticisms of public education became shrill during the latter part of the 1980's. Televangelists from Jerry Falwell of the Moral Majority to Pat Robertson of the Christian Coalition broadcast serious charges on television and radio, against liberal, secular humanism. This discourse left deep fissures in the body politic, and spilled over into the cultural wars of the 1990's. These are the general suppositions:

- Public Schools impart if not entirely negative, at least neutral values; public education is relativistic
- Religious Schools impart positive values; religious education is superior in that it taught students 'good from evil,' 'right from wrong,' morality or even 'Christian' family values

With James Dobson from the Family Research Council, and the National Endowment for the Humanities Chair Lynne Cheney,<sup>33</sup> the "new right" won the propaganda wars, cutting the debate<sup>34</sup> by defining it as one of "Secular Humanism vs. Religion." In Cheney's case it was more a criticism of anti-Americanism from higher education infecting the public schools, and back-to-the-basics meant back to an American centered curriculum.<sup>35</sup>

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<sup>33</sup> See Neal, Pat. 2000. *Lynne Cheney part of Bush-Cheney ticket* CNN. 7.25.2000. "For years she has advocated a back to basics curriculum for schools. And she supports Gov. George W Bush's education platform supporting vouchers." and "The schools will have some choice for parents so that the schools will have a reason to get better," Cheney maintains. [www.cnn.com/.../07/25/lynne.cheney/index.html](http://www.cnn.com/.../07/25/lynne.cheney/index.html)

<sup>34</sup> For but one minor example, the following comments in relation to culture gives a snapshot of Cheney's tenure at the powerful Endowment for the Humanities, which set the tone for cultural debates across the country during the most heated challenges levied against the public schools and their supposedly secular, and (characterized thusly) anti-American values: "The booklet included several brief references to the National Standards for History, which were developed at the University of California, Los Angeles in the mid-1990s with federal support. Created by scholars and educators to help school officials design better history courses, they are voluntary benchmarks, not requirements. At the time, Lynne Cheney, the wife of Vice President Cheney, led a vocal campaign complaining that the standards were not positive enough about America's achievements and paid too little attention to figures such as Gen. Robert E. Lee, Paul Revere and Thomas Edison. In response to the criticism, the UCLA standards were heavily revised, most critics were mollified and the controversy faded -- but not for Cheney and her staff. ... [W]hen her office spotted the references to the National Standards for History in the new edition of the history booklet, her staff communicated her office's displeasure to the Education Department. Subsequently, the department decided it was necessary to kill the new edition and reprint it with references to the standards removed." Cline, Austin 2007. "Lynne Cheney Gets History Guide Destroyed." *Agnosticism/Atheism*. <http://atheism.about.com/b/a/118143.htm>.

<sup>35</sup> Ibid, Neal. "Cheney felt liberals had taken political correctness too far. With her keen interest in history, Cheney argued for changes in standards. She supported teaching a more Western centrist view, believing it allowed Americans to have a more common culture. While at the NEH, Cheney supported grants for Ken Burn's epic on the Civil War, but vetoed money for a Christopher Columbus film that examined attacks on Native Americans."

'Liberal secular humanism' became the awkward yet effective buzz words, which when picked up by the mainstream media, became synonymous with what was taught in public schools. The convoluted supposition that followed was that public school curriculum was a "social stew,"<sup>36</sup> that teachers were unqualified, and that schools were administered by a bureaucratic, monopolistic state, a state which, to neo-conservative critics, was moving further away from its Christian theological roots.<sup>37</sup> And of course it was anti-American.<sup>38</sup>

Along with this powerful ideological construction of reality, for example, public education was linked with the equally powerful message of public schools teaching inferior values. The American state was spiritually adrift, coupled with liberal teachers teaching inferior values...this was strategically correlated with America as a declining economic superpower.

To conclude, in times of economic, or political crises, both real and perceived (difficult always to distinguish)...public schools are an easy target to blame. The National Defense Education Act (NDEA) of 1958 was prefaced on losing out to atheistic Communism. Years later, the Nation at Risk Report of 1983, written largely by the Heritage Foundation, was forwarded

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<sup>36</sup> This term was articulated several years earlier, but generally reflects the sentiment of those to whom public school subject matter is a mish mash of add-ons and electives. See Bestor, Arthur. 1985. *Educational wastelands: the retreat from learning in our public schools*. Urbana: University of Illinois Press.

<sup>37</sup> See the Religious Movements Robertson strongly supports bringing religion back into the public schools. He believes that "in removing religion from public schools, America has been stripped of religious and moral values, has been a vast social science laboratory, and is overrun by crime, violence, drugs, alcohol, and sexual permissiveness" (*The Turning Tide*, 243). <http://religiousmovements.lib.virginia.edu/welcome/welcome.htm>

<sup>38</sup> See Combs, Roberta. 2007. *Washington Weekly Review*. Christian Coalition of America. The theme of anti-Americanism is used frequently to this day as an attack on higher education. A recent discussion by the Christian Coalition serves as an example: "*The political correctness of the higher education establishment in America knows no bounds as evidenced by the infamous decision of Gene Nichol -- the new president of the second oldest college in the country, the 274-year old William & Mary College in Williamsburg, Virginia -- to remove the 100-year old Wren Cross from the school's chapel in order to make the college "more welcoming."* Vince Haley writing on "Save the Wren Chapel" last Friday in the "National Review," said, "If this decision, at what has been one of the world's leading liberal arts universities, ultimately stands, it will signal a dramatic weakening in the intellectual standing of a once proud college and will have corrosive effects for the wider culture.... Can a growing but deadening secularism ultimately defend the experiment in American democracy? Washington, Adams, Hamilton all would have thought no. However, it seems that Gene Nichol and William & Mary are ready to give it a try."

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because America was supposedly losing out to the economic prowess of the Germans and the Japanese; this again was effectively linked with the idea that public education was becoming relativistic and atheistic and made calls to American patriotism.

Currently, the NCLBA is predicated almost exclusively on the notion of America's schools failing to prepare students to compete in a world economy. Not insignificantly, there is placed an emphasis on faith-based institutions being touted as useful in this challenge to educate, and there is a not so subtle indication by at least the first administration of the department of education that, once again, that public schools have inferior values to private and religious schools.

The 'new right' and the 'neo-liberal' movements seem constantly to try to reinvent ways to vilify anything that is effectively 'public'. Lost on critics too, were the beginnings of religious, private education in the United States of America, which emerged not because religious educators and schools wanted to be private, but because Catholics were denied by the public the 'right' to a Common school fund, circa 1840's.

It is false to suggest that public schools are relativistic; values are inculcated in any school, given the heavy emphases on socialization that is encouraged. Public school teachers are positioned often to be surrogate parent, counselor, advocate for their students. Note, in but one example, the contracting out of school districts to Character Counts, a curriculum created by a private for-profit organization whose mission is to inculcate good values into children.

On the other hand, are private religious schools devoid of secular influence? Evermore so do they endorse and solicit state mandated testing tools in order to certify that their students are

college ready. Clearly in all these instances noted, the distinction between secular humanism and religion, what has been characterized as the public school versus the private/religious school is blurred indeed. However, one area, one line that has been clearly demarcated is the separation of church and state.<sup>39</sup>

James Blaine, former speaker of the House of Representatives advocated that

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.<sup>40</sup>

This is the dividing line, wherein no state/governmental authority can either advocate or discriminate for or against a particular religion. This has played out significantly in the public school system in:

- The exclusion of prayers from the public school itself
- The debates over the use of the term 'God' in the pledge of allegiance
- The debate over the place of faith and values in public education

Hamilton and Mort more specifically point to seven cases in which the “wall of separation” issue of public education and the role of religion has come to a head; these are as follows:

- Free textbooks to parochial schools
- Transportation of children to parochial schools at public expense
- Released time for religious instruction
- Bible reading in the public schools

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<sup>39</sup> The development of the (infamous?) so-called Establishment Clause is/has been at the heart of the school vouchers battle in the USA. In effect, when matters of the proper role of Church and State are brought before a court of law, the essential, contentious and litigious issue is whether a precedent has been set which violates the establishment clause. Such cases the court will throw out and find no precedent, thus deeming the case unwarranted, unconstitutional and a violation of the separation of church and state, the establishment clause. The establishment clause prohibits the government of the United States of America from advocating for or discriminating against a particular religion; in effect from establishing a national religion (regardless of the form that denomination would take).

<sup>40</sup> Duncan, Kyle. 2003 *Secularism's Laws: State Blaine Amendments and Religious Persecution*. The Berkeley Press.

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- What is a parochial school
- The wearing of religious garb by public school teachers
- The dissemination of religious literature through the schools <sup>41</sup>

### **Video Journalism as Educational Research**

If you've been in the voucher debate long enough, you likely have a story that explains your position. Mine is as follows:

I was a graduate student in Curriculum and Instruction in 1991, at the University of Wisconsin-Madison. I fancied myself as well as a budding video journalist, producing community access television productions about education and politics. I was learning analog video production when an opportunity was availed to me to work for a labor lawyer, Ed Garvey. Garvey was a well known activist in Wisconsin, a perennial union supporter and frequent candidate for higher office. But more to the point, he was a pugnacious and savvy scrapper, and as staunch an advocate for working peoples as was around. He was gravely concerned about the impact that looming privatization would have on public services and public workers. In sum, a privatized workplace, meant the end of the union, and family supporting, union protected jobs. He noted with great consternation preliminary talks of labor at the Milwaukee museum being outsourced, and predicted (accurately) that this was a harbinger of other outsourcing to come. Garvey had been ahead of many in recognizing corporate intrusion on the public interest, and was always first in the fight to prevent free market forces, whether the mining companies, the business lobbies, or the business foundations, from privatizing everything they could lay hands upon. He was a frequent guest on a Wisconsin public television program which had a panel of political observers, and he would at times argue with the other media spokespersons who seemed to think big business could do no wrong.

In particular, one powerful radio station in Milwaukee, WTMJ, bemoaned the state of public education and continually harangued teachers under the guise of attacking the teacher's union. The radio host of the morning talk show, Charlie Sykes, was a paid fellow for the Institute for Policy Studies (IPS). This group, IPS, put out conservative policy papers, basically talking points to form the opinions of preferred conservative voters using the public airwaves. IPS was funded by the Michael and Lynne Bradley Foundation, a powerful think tank. The host was at times a guest on the Wisconsin Public Television program, and he and Garvey clashed.

The Bradley Foundation, we were to learn, played the critical role in advocating for choice; first off, they worked the media effectively getting their message out. Secondly, they provided cover for the controversial program and unwitting participants, funding families in order to support some of the cost of implementing the voucher plans, and providing selective grants before the state monies rolled in. They funded scholars from Chicago, and later from Harvard, to conduct work on a few very significant and well publicized studies which, by no

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<sup>41</sup> Hamilton, Robert R. and Mort, Paul R. 1959 *The Law and Public Education with Cases*. Brooklyn. The Foundation Press, Inc.

coincidence, advocated for social engineering and vouchers/school choice as part of a needed and necessary plan.

These studies included an exceedingly controversial one called *The Bell Curve*, authored by Richard J. Herrnstein and Charles Murray in 1994. A storm of protest emerged, because several considered *The Bell Curve* to be an avowedly racist book which claimed correlations between race and IQ. Murray's participation on a panel at University of Wisconsin-Milwaukee precipitated a vociferous rally in protest.

Less well known, but no less controversial, and in fact far more influential in advancing the idea of vouchers/school choice as a necessary reform, was another Bradley funded study called *Politics, Markets and America's Schools*. This book made the sweeping generalization that free markets should replace democratic governance in the schools. The argument, first made here, is that the management of the public school system of education itself was at fault and reforms were doomed to fail unless the entire system was overhauled. This was a radical position in its day, but was picking up more legitimacy in the waning years of the 20th century, the idea of putting corporations and business in charge. Coupled with powerful organizations such as the National Governor's Association and the Business Roundtable, the drive for more competition, high stakes tests, and so-called world class standards seemed inevitable married to corporatization and its more benign yet pernicious face, privatization.

Michael Joyce described himself as a one time liberal Democrat, in the image of the Kennedy Administration. He argued that the public schools should not have a monopoly on public education and made the interesting, and at the time, controversial statement as follows:

We are talking about public education here, irrespective of the form that it takes. It doesn't follow that because the state has an interest in the education of the citizens it must control and routinize the kind of education which is offered. Clearly there are many things government recognizes it cannot do very well and it goes therefore into the private marketplace.<sup>42</sup>

### **A New Day for School Choice? The Conservatives Win**

Michael Joyce had his counterpart in one David Brennan. Brennan, a philanthropist, lawyer, attorney and owner of several companies described his elation when he attended the Supreme Court hearing in 2002, the culmination of several battles over vouchers and the constitutional issues:

The day before the hearing, the New York Times called the Supreme Court case “one of the most important church-state cases in the last decade.” The Hartford Courant called it the “most closely watched case of the current session.” And the Financial Times of London called it “the most important social policy issue of (the) current term.” I was humbled by seeing the program I helped design become the constitutional test of school vouchers open to private, sectarian, and public schools.<sup>43</sup>

Polly Williams, the democratic state legislator from Wisconsin, had her counterpart as well; this time in a Republican legislator from Ohio named Mike Fox. I learned of the Mike Fox and the Ohio voucher story through a political analyst and editorial writer, Geoff Berne. Berne pointed out that Michael Fox was the chairman of the House Education Committee that in 1996 brought vouchers to Ohio, with an experimental program in Cleveland, Ohio.

Fox made a name for himself in advocating for educational reforms ranging from school choice to educational technology integration. He was a caustic character in the press; he argued that the public schools were committing “educational genocide” and he rallied forces around the idea of a free market of schools. Berne provided details as to his political ascendancy and

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<sup>42</sup> Op. cite. Garvey.

<sup>43</sup> Brennan, David. (2002) *Victory for Kids: The Cleveland School Voucher Case*. New Millennium Press, Beverly Hills. P. 2

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suggested a video documentary on school choice. In an exclusive interview, we were able to interview Fox, his role in school choice; he explained his involvement this way:

“There was a small group of change agents around the country. [Superintendent] Howard Fuller out of Milwaukee, I worked closely with him, Jeanne Allen that ran the group [Center for Education Reform] in Washington that was kind of the information clearing house, on community and charter schools. Polly Williams was really a major breakthrough...because here was a woman who had run Jesse Jackson’s campaign for president, a long time dedicated democrat...who said it’s time to give low income parents the same choices that high income parent have. [Governor] Tommy Thompson on the national scene, the work I was doing in Ohio; and all this created a critical mass...but there were a lot of leaders across the country.”<sup>44</sup>

Fox argued that the public school system should be shifted to a market mentality:

“The paradigm and the model should be based on outputs...”<sup>45</sup>

He dismissed the school’s concerns over charters:

“I hear public schools saying all the time, well if it were a level playing field... and I say ok let’s give them the same bag of rocks and non-value added that you have...”<sup>46</sup>

Finally, Fox offered a simple solution to the public schools that were protesting their lack of funding (which was a reasonable argument, given the Ohio Supreme Courts own findings that the school funding formula was utterly unconstitutional with poor schools inadequately funded)

“Why not make your school a charter school!”<sup>47</sup>

With *Zelman vs. Harris-Simmons*, the Supreme Court found fit to reverse a decision made by lower courts. Generally speaking the court case has been summarized thusly: as long as the money from the voucher goes to the parent in order that they have a true choice among religious and secular schools, and as long as the religious schools so selected were neutral with regards to the teaching of religion, and finally, as long as the religious schools are open to any student and parent who wishes to attend (although they have to win the applicant lottery first),

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<sup>44</sup> See Price, Todd Alan, Geoff Berne, and Karen Rybold Chin. 2005. *No Child Left Behind report*. On the Earth Productions, educational series. [Oconomowoc, WI]: Northwest Ordinance Productions, Inc.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

then, in effect, the state considers the use of vouchers to be neutral with respect to the separation of church and state.

A dissenting view was held, uttered by Justice Souter, that this would be a regrettable and disastrous decision, opening up the flood gates to a number of potentially theocratic and evangelical schools, schools which would receive tax payer funds to proselytize against the values of a nation of laws, a nation otherwise based in secular and liberal democracy, values, and reason.

Interestingly enough, although the school voucher advocates did indeed see the decision as a victory, the expected outgrowth of school choice programs did not mushroom for several reasons. The first was that although the decision could be rightly considered a victory for the school choice movement, it was not a total victory. It did not settle the question of the constitutionality of vouchers for all time. Another reason is that school choice is just not practical among the people to whom it is supposedly aimed to help, mainly, the poor and largely disenfranchised in inner city America. While some surveys exist to the contrary<sup>48</sup> arguing that school choice even to religious sectarian schools is coveted, the beneficiaries of school choice do not seem to be willing to move in large scale if it means leaving a neighborhood school. In fact the trend has been the reverse; parents seem to try to avail their own students in inner cities access to a neighborhood school.

### **No Child Left Behind and Public School Choice: The Liberals Win?**

In the years ahead, after the political wrangling over school choice and the historic *Zelman vs. Simmons-Harris*, school choice was still afloat. One article regarding school choice

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<sup>48</sup> See Peterson, Paul E. 2003. *The Future of School Choice*. Hoover Institution Press. Stanford University, Stanford California. p. 13.

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makes the following, unusual argument: stakeholders from the left to the right have outlined different but supportive positions regarding school choice. The party on the right wants private school choice; they see the public schools as failed or failing, and they want to open up a marketplace of schools for a smart consumer/parent to choose from. The left, surprisingly, also wants school choice; they want public schools with everyone footing the bill to ensure that all schools are excellent. If all schools are excellent, then public school choice could be and would be supported. This is an interesting argument: that in effect liberalism won! The author, Brownstein cites

The federal No Child Left Behind Act, which president George W. Bush signed into law in January 2002, represented a victory for the advocates of public school choice: the law rejected funding for private school vouchers, but did mandate that districts allow children in persistently failing schools to transfer to public schools that perform better.<sup>49</sup>

In staking out such a position, Brownstein seems to assert that liberals wish to use No Child Left Behind (NCLB) as a lever to force the government to fully fund all the schools and to force successful public schools to open their doors so that struggling public schools may exercise a public choice option.

To state another way, Brownstein argues that the public school choice, a sanction under NCLB, is really a test to see how well public school choice works to provide opportunities for individual kids. The law, consistent to the language used by one of the key educational advisors of the Bush administration, the former Assistant Secretary of Education, is a powerful lever (my main argument, school choice has always been intended to be a tool, and has served as a lever) to force failing schools to do better. Otherwise, failing schools risk losing both their students and

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<sup>49</sup> Ibid. Peterson 2003.

their per pupil funds; this is the old competition argument, that raising the bar will automatically raise the level of performance.

Is this argument believable? Is NCLB truly bi-partisan, with the right and the left both in favor of greater federal oversight, and both trying to use school choice to leverage their own political agenda? Perhaps. The author then goes on to show how the public school choice option is just not taking off...he speculates that parents are not taking to this option because they are either ill-informed about the program to begin with, and/or are discouraged by the school districts that put up a wall to exercising the school choice option. Indeed this is a theme of the neo-conservatives, being exemplified in the case of California, where school choice advocate and a leading litigator is attempting to force the federal government to use NCLB provisions as a means to threaten to withhold federal funds from the Los Angeles school district for not making parents aware of their school choice options.

Brownstein concedes that parents may simply not want to disrupt relationships that are in their neighborhood school, and furthermore, they may not see a big gain for students in moving to another school.

So the author suggests, that, since there are only a few private choice programs, and since public school choice is being failed...the solution is to create more private schools. Brownstein concludes by making the argument that the debate will be over whether the solution is to create a more sweeping form of public school choice or to revive private school vouchers to create the alternative the public system has so far squelched.<sup>50</sup> One need only consider the words of one of

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<sup>50</sup> Ibid. Peterson 2003.

the leading neo-conservative pundits, Chester “Checkers” Finn, on advancing the free market as educational reform to understand privatization and the alternative ‘public’ school system:

All charter schools by definition are public schools some of them are operated by for-profit firms.<sup>51</sup>

### **Old Wine in a New Bottle: Who Wins?**

A recent court case would seem to be quite fortunate for the advocates of the free market. While school choice fails to grow, public or private, one decision would fulfill the desire so long held by the free marketers, that is, to create an alternative ‘public’ school system.

David Brennan, the same advocate for School Choice in the *Zelman vs. Harris-Simmons* case was the defendant in this next one which dealt with charter schools. A long time entrepreneur, he describes his own journey into the world of educational reform:

I’ve been around the country enough... been in enough different states, put educational facilities in we’re in seven states now and I’ve talked to so many people in education. It’s extraordinary to me how each community says ‘oh but we’re different, we’re unique we have our own unique problems.’

Now to a great extent, that certainly has to be true each community has it’s own culture they develop the problems but in the education world that is not true the problems are almost the same everywhere you go. They look the same they act the same and the kids react the same.<sup>52</sup>

The State of Ohio, *Ohio Congress of Parents and Teachers vs. the State of Ohio Board of Education and White Hat Management LLC* (2005)...under this decision, the most fundamental issue was over the definition of what is meant by “public.”

In the case of *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, the critical definition of “community school” was noted to

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<sup>51</sup> Hirsch, E. D., Diane Ravitch, Kate Burke Walsh, Chester E. Finn, Gerald W. Bracey, Denis P. Doyle, Toni Cortese, Karen Rybold Chin, and Todd Alan Price. 2006. *Checkers and Me*. On the Earth Productions, educational series. [Oconomowoc, WI]: On the Earth Productions, LLC.

<sup>52</sup> See the Heartland Institute. 2006. *School Choice Speaker Series: David Brennan*. On the Earth Productions, educational series. [Oconomowoc, WI]: On the Earth Productions, LLC.

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have been created from the Ohio General Assembly enacted R.C. Chapter 3314 in 1997, or the Community-Schools Act. This act established Charter schools in the state of Ohio. As follows “community schools are independently governed public schools that are funded from state revenues pursuant to R.C. Chapter 3314.”<sup>53</sup>

The court recognized that the public school system itself had already been found to be unconstitutional, four times brought to the court was the problem of the unequal distribution of school funding, and four times the court had agreed that the school funding formula was unconstitutional.<sup>54</sup>

Explaining they’re jurisprudence, stated was that “a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power.”<sup>55</sup>

Key was to understand how the public trust, public funds, are being used. Irrespective of the issue of religion, in this case what was at stake is this: what is meant when we use the term ‘public’ to refer to a school? This was the question posed to the Attorney representing the public interest in preserving the integrity of the public schools:

JUDGE: Counsel, could you take us to the uh what you see as the minimum constitutional threshold of the thorough and efficient I’m not clear whether you are arguing that an intermixed system... if the same standards were to apply, let me put it this way, and then you sort out what is that what you see is the constitutional threshold. If the community schools or Charter Schools were subject to the same degree of oversight, minimum standards of achievement, same sanctions or intervention, if that’s not achieved at the public schools... and if there were no diversion or no penalty to the property tax for the removal of students from the public schools and placed in the community schools... would that violate the constitutional threshold, and what do you see as the constitutional threshold?

ATTORNEY MOONEY: I think the constitutional threshold is it has to be a single system it has to be common. Common is the same as public. I think that if you look at that 1933 attorney general opinion that’s attached to the states second brief you can go through that and see that in the attorney general’s view at that time and I think it was consistent with the history, common schools or public schools were administered by public agencies created by law or by public officials. So I think the key is public

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<sup>53</sup> *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, (2005) 111 Ohio St.3d 568, 2006-Ohio-5512 p. 2.

<sup>54</sup> See *DeRolph v. State* 2002. 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529.

<sup>55</sup> See *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. Of Edn.* (1942), 139 /Ohio St. 427, 438, 22 O.O, 494, 40 N.E.2d 913.

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accountability. I don't think that the state of Ohio can delegate to a private corporation the ability to operate what then is described in the legislation as a public school. It's not a public school if it's administered by private entities, if it's managed by a for-profit corporation, and I think that is the key.

JUDGE: So you're attacking the structure and not just the... because you present a lot of facts about the damage to the public school system that the diversion of dollars is...and so my question goes to if there were no damage in terms of drainage of funds from the public schools and the legislature just chose to also provide some financing whether we have the vouchers for the non-publics or whether it's some system like this where private for-profit or private for non-profit get some money additionally... would that violate the constitutional threshold?

ATTORNEY MOONEY: I think if you don't have some direct, public, official involvement in the administration of the school it's not a public school. I mean I think that in the attorney general's opinion, as an example, he talks about public schools as being administered by public officials. What does administer mean? If you look at Black's law dictionary it means to operate, to manage...it doesn't mean to regulate. You know, I think what we have now is a system where you have these privately owned schools that get public money ...they are regulated by sponsors, who are now private entities that can be charitable foundations they get a 3% payback for their role as sponsors. The Ohio Department of Education now plays a very remote role in actually regulating these schools. In theory the ODE regulates the sponsors who regulate these privately owned and managed schools and I think until you have some public accountability some public official responsible for managing those schools they are not common or public schools. Now some of my other counts we can resolve by changing the funding, but I think the fundamental issue is here...422 million dollars spent on privately owned and managed schools are not part of a common system of public education.<sup>56</sup>

What then is public? Does it mean funding? Ownership? Management? Does it mean who participates? Or who benefits?

I pose that these issues: who funds, owns, manages, participates, and benefits are key indices distinguishing what is public or what is private, and I reference a business sociologist, gratefully, for this tool of management assessment. Apparently the Ohio Supreme court reveals in this instance of the White Hat Management case, that the school funding formula, although found to be unconstitutional in the state of Ohio no less than four times, is not easily reconciled with economics. Stated another way, although the school funding formula has been found unconstitutional, meaning that the schools in Ohio are neither thorough or efficient, nonetheless, the state refuses to fix them. The Ohio Supreme Court thus indicated, by a measure of 4-3, that the local per pupil spending formula, is easily discernable and unaffected because the charter

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<sup>56</sup> *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 2005. On the Earth Productions, educational series. [Oconomowoc, WI]: On the Earth Productions, LLC.

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school program is funded by state funds. This is not to say that one of the dissenting judges did not recognize the problem. He correctly noted that when a student leaves a public school, exercising their choice to attend another school, the state, represented by this state Supreme Court, assumed that the money ultimately comes from and goes to in direct proportion, to the next school. They had trouble understanding that the local taxable base is exponentially impacted; it rises dramatically for the local taxpayer with the leaving of one student's per pupil funds. Others didn't; or felt that the money should just follow the child.

They found, in effect, in ruling in favor of the White Hat Management defendant, that the manner in which funding of the 'Liberal Democratic Education Tradition' has historically proceeded, is not sacred. In this ruling, the court found that it was reasonable to assume that if students leave the public school to go to a newly defined 'public' school (defined in this instance broadly to mean even corporations) then the loss of revenue is reasonable. This negates the fact that the public schools don't recoup the costs of educating the student, if and when that student returns in the future to the public school.

Nor in this case, did the Supreme Court consider the obvious ramifications: the state could take public funds, ultimately, if not directly (it must pass through the hands of the parent first) and award a corporation through what would be little more than a voucher, going to private, corporate schools, or given the *Zelman vs. Simmons-Harris* decision, to a religious school.

How could this ever be considered constitutional?

**Conclusion?**

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While the decision was being deliberated on and rendered in Ohio October, 2006, the Katrina disaster revealed the federal, state and local government's utter incompetence and inability to respond to domestic crises. Beyond the death, destruction and displacement, the long struggling New Orleans public school district was in need of renewal. A wide open voucher system was instituted to provide educational opportunities. Some saw this as a cynical move by the Bush administration to score a political victory on the backs of a tragedy.

Yet again, the pendulum swings. In Florida in 2006, the state school choice program was dealt a crippling blow, and at issue was that the Florida voucher program violated the charge of the state to fund one and only one uniform public school system.<sup>57</sup> This would seem to run counter to the Ohio decision, that argued that the Charter schools had not reached the threshold (number) of schools, as did apparently the Florida school system, to constitute an alternative system. Florida in reaching and surpassing that threshold was deemed to have had funds flowing to an alternative school system in a manner that was envisioned by the Florida Supreme Court as being correlated with funds leaving the public school system, so the alternative system, vouchers and all, was told to shut down at the end of the year.

So what are the fates of school choice, vouchers, charters and private schools claiming to be public? One major finding is that although many religious organizations will always be on the side of voucher programs, some will not be, and although teachers unions and secular organizations will oppose privatization, they may endorse some form of choice and charters to

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<sup>57</sup> Dillon, Sam. 2006 Florida Supreme Court Blocks School Vouchers. *New York Times*.

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ensure other political gains (as happened in the case of California where the union endorsed charters as a compromise to avoid an open voucher system):<sup>58</sup>

The political history of charter schools in California is intertwined with the politics of vouchers. Democrats supported charter schools in hopes that this variant of choice would diminish support for Proposition 174, the voucher measure that was about to be put to the voters.<sup>59</sup>

But regardless of the side selected, school choice, vouchers, charters and other variants will in the final analysis, play a major role in educational reform efforts ahead and the debate over religion or secularism will have little or nothing to do with it.

In the two major cases, *Zelman vs. Simmons-Harris* where “the United States Supreme Court has ruled that the federal Constitution does not prohibit vouchers”<sup>60</sup> and in *The State of Ohio, Ohio Congress of Parents and Teachers vs. the State of Ohio Board of Education and White Hat Management LLC* (2005) case (yet to be challenged at the federal level) where, apparently, private for-profit schools can be considered to be ‘public’...the main party in dispute was/is itself a for profit-company, an educational maintenance organization (EMO).<sup>61</sup>

It seems highly ironic, on the surface, that the voucher advocates, many who support laissez-faire, free market, non-interventionism, become big government enthusiasts as they argue in favor of local taxpayer funding of choice and charter schools. The once despised big government has big shoulders for the education industry as well as faith based institutions. Simultaneously, voucher advocates insist, government shouldn’t have the right to force parents

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<sup>58</sup> See Bulman, Robert and Kirp, David L. 1999. The shifting politics of school choice. In *School Choice and Social Controversy: Politics, Policy, and Law*, p. 51-62. edited by Sugarman, Stephen D. and Kemerer, Frank R. Washington, D.C. Brookings, Institution Press.

<sup>59</sup> Ibid, p. 54.

<sup>60</sup> Op. Cite. *Zelman*.

<sup>61</sup> Ibid, *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512.

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to place their children in secular schools, yet...government should be brought in to fix those same secular schools, tightening further surveillance and regulation?!

Returning to the old argument, made by Bishop John Hughes in the middle 19<sup>th</sup> century,<sup>62</sup> that religious schools deserve a portion of the common school fund, the same advocates are now relying on the NCLBA to force public schools to fund private schools, and by circumstance, force public school students to attend what are essentially privately run charter schools. So, no longer is choice a true choice, rather, it is an 'intervention.'<sup>63</sup> Yet of late even that type of cynicism is waning.<sup>64</sup> Increasingly, conservatives want out of NCLBA, believing the federal government should stick to testing.

In the end, I find only mildly ironic that a company with the image of a White Hat, may turn out to be, the decisive influence on what has been perceived to be the public good. At least as far as public education goes, and with it the liberal democratic education tradition, the image of Horace Mann riding his horse from Massachusetts town to town, to shore up common schools is being replaced by one of a David Brennan with white hat, riding in to shut them down. This historical footnote seems less than beatific.

Finally, and I believe most importantly, school choice is being used as a sanction under No Child Left Behind, which makes it seem more a punishment and less a choice. But even then, there are still not enough schools of choice to pick from. Does this mean that school choice is

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<sup>62</sup> Op. Cite Stone Lantern Films. 2001. *School: The Story of American Public Education*. For a stellar documentation of Father Hughes historic debates.

<sup>63</sup> This is the language now being used; see Thompson, Secretary Tommy G. & Barnes, Governor Roy E. 2007. *The Commission on No Child Left Behind. Beyond NCLB: Fulfilling the Promise to Our Nation's Children* The Aspen Institute.

<sup>64</sup> Op. Cite Hirsch, E. D., Diane Ravitch, Kate Burke Walsh, Chester E. Finn, Gerald W. Bracey, Denis P. Doyle, Toni Cortese, et. al. at the Fordham Institutes Beyond the Basics conference held in Washington D.C. December 12, 2006.

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dead? Hardly, the terrain is changing and with No Child Left Behind reauthorization around the bend, it seems that school choice, vouchers, charters and educational reform strategies are changing into something else. Where is our Horace Mann today?

The public schools are in trouble, not for failing, but for being failed.

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