

**DISTANT MIRROR OR PREVIEW OF OUR FUTURE: DOES
LOCKE v. DAVEY PREVENT AMERICAN USE OF
CREATIVE ENGLISH FINANCING FOR RELIGIOUS
SCHOOLS?**

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The typical poor or immigrant family today cannot realistically expect superior academic training from the average public school, although they continue to dream. In the inner city and other poor areas, older assumptions about the ability of the public school to deliver a quality education no longer obtain across the board today in part because the resources that elite public schools enjoy are not available in schools located in poor areas. Various proposals, including charter schools and “Adopt a School” programs, have rightly attempted to shore up the declining public schools. However, poor parents living in substandard school districts with children already in school cannot wait for future improvements which might occur after graduation. This article examines the question of school vouchers and makes the case for implementing them more widely to provide poor and other disadvantaged parents with a choice of schools. This reconceptualization of the problem of funding religious and other non-public schools considers the English system (which funds religious schools of all denominations and religions), the early history of the Establishment Clause of the First Amendment to the United States Constitution, and, in the context of Free Exercise, the urgent claims of parents as well as the mission of the schools.

Poor parents find it hard to place their children in other schools since they lack the funds to achieve this aim. Particularly in inner cities, children have on occasion had the opportunity through the availability of vouchers to choose a Roman Catholic or other school that they could not otherwise afford. Vouchers, which provide a receipt for an expenditure, typically allocate a small sum of money to parents who choose to send their child to a school other than the local public school in their neighborhood, thereby providing some alternative to parents who would otherwise have none. The parents use the money from the voucher to pay their child’s school tuition. Vouchers, therefore, appeal to parents in the inner city, new arrivals, and long-time residents alike. Why else would a good Democrat like the mayor of Washington, D.C. support vouchers?¹ It is well known that public

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1. The mayor of Washington, D.C., Anthony Williams, came out for vouchers. Craig Timberg & Justin Blum, *Mayor Endorses Vouchers in D.C.*, WASH. POST, May 2, 2003, at A1. He is by

school teachers and union members, usually Democrats themselves, object to vouchers. Teachers fear they will lose union members if vouchers prove extremely popular because of the lack of any realistic opportunity to organize the non-public school teachers into teachers' unions.²

In order for vouchers to become a political reality and operate successfully, proponents for vouchers must be willing to cooperate with the suburban public school districts to facilitate their acceptance of urban children who will thereby enjoy a choice of good public *and* private schools. Advocates of vouchers must also recognize the values and issues of those who promote public education, including union-level salaries for teachers and lay, or community, input into curriculum. Additionally, thoughtful objections to the widespread use of vouchers include the possible draining of funds from public schools, the failure to rescue all children from bad schools, and the small dollar amount given as vouchers, which both precludes poor children from choosing to attend expensive private schools and propels them toward schools which charge little more than the voucher amount, schools which in fact may often be aligned with one religious denomination or another. Another obstacle to crafting voucher programs comes from the nineteenth-century establishment clauses of state constitutions; their wording is often stricter than the Establishment Clause of the First Amendment to the United States Constitution.

no means the first Democratic politician to embrace vouchers. In 1991, Wisconsin State Representative Polly Williams started the Milwaukee experiment in vouchers for nonsectarian independent schools. James W. Skillen, *Educational Freedom with Justice*, in *THE SCHOOL CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL?* 67, 93–94, 107 (James W. Skillen ed., 1993); *see also* MIKEL HOLT, NOT YET “FREE AT LAST”: THE UNFINISHED BUSINESS OF THE CIVIL RIGHTS MOVEMENT 254 (2000) (covering the beginning of the Milwaukee voucher program). A Democratic governor in Maryland proposed tuition vouchers in the Maryland legislature in 1993. *Id.* at 93, 107; *see also* Rita-Ann O’Neill, Note, *The School Voucher Debate After Zelman: Can States be Compelled to Fund Sectarian Schools Under the Federal Constitution?*, 44 B.C. L. REV. 1397, 1417–18, 1429 (2003) (concluding that a Maine tuitioning program that allows parents in rural areas without schools to send their children to public or non-sectarian schools, but excludes sectarian schools outside the area, would be constitutional).

2. Realistically only about 20% at a maximum apply for vouchers to attend other schools. It is important to teachers' unions how many eligible poor children might take advantage of vouchers because the unions fear loss of membership if fewer teachers are needed in the public schools. William G. Buss, *Teachers, Teachers' Unions, and School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 300, 312 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

If a sufficient number of students exchange their school vouchers for a private education, the need for public school teachers will be reduced and the need for private school teachers will be increased. An exodus of teachers from public schools would also mean their exodus from the jurisdiction of public employment bargaining laws.

Id.

At their beginnings public schools had the option to include prayer and Bible reading in their daily classroom ceremonies and curricula, until the Supreme Court's decisions outlawing prayer in 1962 and Bible reading in 1963 in the public schools.³ Public schools were founded when the predominant religion in the United States was Protestant and the public schools used a Protestant version of the Bible. This requirement to read the King James version of the Bible led to suits by individual Roman Catholics (and Jews, though in lesser numbers) and gave greater impetus to the founding of a separate Roman Catholic school system.⁴ By serving the

3. *Engle v. Vitale*, 370 U.S. 421, 433 (1962) (school prayer); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963) (Bible reading), *decided together with Murray v. Curlett* (students reciting the Lord's Prayer together).

4. *Donahoe v. Richards*, 38 Me. 379, 398, 407 (1854) (noting that the Bible is nonsectarian). The lawyer "Horace Mann [1796–1859], the apostle of free public education, was an advocate of the use of the Bible in the public schools of Massachusetts." JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 769 (2001); *see also* DONALD E. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 220 (3d ed. 1965) (stating that Catholics found Bible reading in schools to be "a direct reflection of Protestantism"). Despite Horace Mann's allegations that the Bible was being allowed to speak for itself, Catholics continued to argue that required reading of the King James (Authorized) version of the Bible was unconstitutional. MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 152 (2d ed. 2002). *See generally* Timothy L. Smith, *Protestant Schooling and American Nationality, 1800–1850*, 53 J. AM. HIST. 679 (1967) (describing how religion influenced the system of education during the Jeffersonian settlement). Few Roman Catholics lived in the United States when the public schools came into being. For example, out of a population of some 300,000 in New York in 1790, approximately 1,000 were Roman Catholic, although the Catholic population grew steadily during the next century. JOHN WEBB PRATT, *RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY* 107 (1967). Less than a quarter of a century later, New York State agreed to support education in 1813. *Id.* at 163. The issue of education came to the fore in the elections of 1841 and 1842 when the Catholics wanted to obtain state funding for Catholic schools. *Id.* at 177–89. The Catholics' request for funds for their handful of schools was denied on the grounds of "legal establishment of one denomination over another" in violation of the State Constitution. *Id.* at 177. Nevertheless, the free schools required the reading of the King James version of the Bible, which the Catholics deemed sectarian. The newly created majority-Protestant New York City school board did not agree. From then on, "Catholics in New York concentrated on building their own educational system." ARIENS & DESTRO, *supra*, at 152. "Not until the 1950s and 1960s would a growing number of Protestants begin to experience the exclusion felt by Catholics in the 1840s." Skillen, *supra* note 1, at 70. As the cities grew rapidly during the 1840s, government and society changed from an emphasis on common law and the old traditions of family and church education to Jeffersonian ideas and the common schools of Horace Mann. "[T]he governance of education, from the 1840s on, manifested a highly restrictive vision of justice rooted in the idea that government should act uniformly in accord with majority will to advance a culturally homogenous public program for society." *Id.* at 71 (emphasis omitted).

For Jewish perspectives, *see generally* *VOUCHERS FOR SCHOOL CHOICE: CHALLENGE OR OPPORTUNITY? AN AMERICAN JEWISH REAPPRAISAL* (Marshall J. Breger & David M. Gordis eds., 1998) (providing a collection of essays discussing the implications of voucher programs on public schools, on traditional notions of church and state, and on the unique perspective of the Jewish community); GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* (1995) (providing a history of how Jewish Organizations and people were involved with church-state litigation).

average person unable to attend an expensive private school, the Catholic parochial schools functioned in much the same way as public schools but provided instruction in Catholic rather than Protestant Christianity.

Today Catholic schools have a different mission and serve both Catholic and non-Catholic populations. While Roman Catholic parochial schools may provide the largest number of non-public schools open to all and willing to accept vouchers, many other denominational and neighborhood schools would also happily accept vouchers. Should vouchers be available to poor parents of any (or no) religion to give their children a better education regardless of the religious affiliation of the school their children will attend? Do the public schools, despite their failure to provide a way into jobs and mainstream society for so many poor and immigrant children today, still merit total allegiance?⁵ In other words,

5. What has the American public school meant to us? “[P]ublic education is one of our most cherished democratic institutions” *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940) (Frankfurter, J.); see Richard J. Danzig, *Justice Frankfurter’s Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 677–78 (1984) (arguing that Justice Frankfurter’s opinions in the school flag-salute cases rightfully integrated personal propositions with constitutional legal propositions). Furthermore, various Supreme Court opinions have paid tribute to the central role public schools play “in the preparation of individuals for participation as citizens.” *Ambach v. Norwick*, 441 U.S. 1589, 1594 (1979). Historically, public schools have embodied our highest ideals of democracy, equality, and one society for all. Psychologically, our loyalty is still to the public school, but does it continue to merit our unalloyed allegiance today? Our answer must be a resounding yes for public schools in the suburbs and for elite city public schools (for example, Public School Six in Manhattan and the Bronx High School of Science) but for a large number of children in the inner cities, as well as in poor rural areas, that vision of a good education in the public schools too often remains unrealized. We know the public school stories only of those who later became prominent as adults. One story from the 19th and 20th centuries will suffice to illustrate the great opportunities available to children who attended the American public schools then. Born in Vienna, Felix Frankfurter came to New York at the age of twelve with his parents. MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* 9, 10 (1982). Justice Frankfurter proudly told the story of how his first teacher in America in 1894 forbade the other boys in the class to speak German with him on pain of corporal punishment. HARLAN B. PHILLIPS, *FELIX FRANKFURTER REMINISCES* 4–5 (1960). He recorded his gratitude to this teacher, crediting her with his having to learn English rapidly, and expressing his belief “in the ‘democratic faith’ inculcated in students at [the public] schools. ARIENS & DESTRO, *supra* note 4, at 37; PHILLIPS, *supra*, at 5. He further wrote that “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., separate opinion). Felix Frankfurter surely received an excellent academic education in the public schools. However, as his remark about divisive forces demonstrates, Frankfurter willingly and proudly accepted the then-prevailing ideology that all children de-emphasize their own heritage and ethnicity in order to come together with each other as Americans and express national unity together with their deep American patriotism. In de-emphasizing personal background, Justice Frankfurter might be said to have adopted the religious faith of democracy, a paramount secular consideration. See generally Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 110–13 (discussing Justice Frankfurter’s views on religion and its place in the law). Frankfurter’s view was shared by several intellectuals. See, e.g., John T. McGreevy, *Thinking on One’s Own: Catholicism in the*

because of their prior success in binding the nation together, are the public schools of such national value that the few individual children who could likely benefit from vouchers should instead remain in the public schools? How fair are vouchers in the context of the public school system today? Should every poor child go down with the ship because there are only a few lifeboats even though most students from poor families would probably not leave the public schools anyway?

Two recent Supreme Court opinions provide guidance in this dramatically changed school environment.⁶ Furthermore, English church-state relations during our colonial period and England's later divergence from its earlier pathway are relevant to our experience. In the First Amendment, the Framers tried in some ways to protect against the recurrence of the establishment troubles of the sixteenth and seventeenth centuries in our church-state relations. Establishment in England formerly recognized only the Anglican Church. However, after many societal changes, England recognized other churches and widespread education became a goal. During the nineteenth century, the English government came to realize that the schools of other denominations could also receive government money directly, unlike the position in the United States, which is to provide no government money to religious schools. Other concerns considered in this article include the ability of the parochial schools to make vouchers work by addressing public misgivings held by groups such as the teachers' associations, the arguments of fairness to the individual parents

American Intellectual Imagination, 1928–1960, 84 J. AM. HIST. 97, 126 (1997) (“Democracy . . . must be approached ‘in a truly religious spirit.’”) (quoting HORACE M. KALLEN, *THE EDUCATION OF FREE MEN: AN ESSAY TOWARD A PHILOSOPHY OF EDUCATION FOR AMERICANS* 229 (1949)).

6. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002), upheld voucher programs as a private parental choice. There, the Cleveland Pilot Project Scholarship Program provided financial assistance for students in Cleveland City Schools to enroll in either public schools in adjacent districts or in a private school. *Id.* at 644–45. The financial assistance for the neediest children was up to \$2,250 a year (up to 90% of the tuition) for a child with a parental co-payment of not more than \$250. *Id.* at 646. For less needy families, the Program provided up to \$1,875 a year (up to 75% of the tuition) without a cap on the parental co-payment. *Id.* Suburban school districts did not receive students participating in the Cleveland voucher system. Goodwin Liu, *Real Options for School Choice*, N.Y. TIMES, Dec. 4, 2002, at A31. In the second case, *Locke v. Davey*, a college student wished to use a state scholarship to study for the ministry, but the state denied his choice, forcing him to forego the scholarship. *Locke v. Davey*, 124 S. Ct. 1307, 1310–11 (2004). He sued on Free Exercise and Equal Protection grounds. *Id.* at 1311. In effect, the Supreme Court recognized the right of the state to maintain its harsher establishment clause under its own constitution than the First Amendment demands, thereby giving rise to a perhaps long political struggle for greater expression of conscience and recognition of the principles embodied in the concept of free exercise. *See id.* at 1315 (upholding the state scholarship program because the Court found no “animus towards religion” in either the Washington Constitution or the scholarship program); *see also infra* notes 189–207.

and schools accepting children with vouchers, and the mission of the schools themselves.

The Establishment Clause of the First Amendment may seem at first glance clear enough in its wording.⁷ Indeed, it is uncontroversial that the Establishment Clause means that there shall be no state church in the United States, unlike in England.⁸ But scholars today do not agree about either the original intention of the drafters or the meaning of its words. One thing is clear about the American application of establishment in 1791 when the Bill of Rights was passed: the American public school system with compulsory school-leaving ages, the Roman Catholic parochial school system, and other denominational school systems were not yet in place.⁹ Establishment, regardless of its meaning in 1791, did not refer to government aid to religious schools.¹⁰ Ministers' salaries were more likely to have been the subject of debate about establishment in 1791.

7. The Establishment and Free-Exercise Clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

8. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* xx (2d ed., rev. 1994). Using the ambiguity and non-determinacy of the history of the Establishment Clause, various groups derive different conclusions about what the nature of nonestablishment should be. See Edward J. Larson, *The "Blaine Amendment" in State Constitutions, in THE SCHOOL-CHOICE CONTROVERSY* 35, 38–39 (discussing the competing views of religion in public schools, as held by Blaine Amendment supporters, the common school movement, and Roman Catholics in the late-nineteenth-century United States).

The federal government simply was not involved in public education during the early years of our Republic. Therefore, it is problematic to gauge the founders' intentions about government aid to parochial schools under the federal Constitution's establishment clause. It is quite likely that the founders did not consider the issue, especially since the establishment clause then applied only to federal government action.

Id. at 36. All groups may claim "that they are merely proposing a better policy to inform the non-establishment principle . . ." Paul E. Salamanca, *Choice Programs and Market-Based Separationism*, 50 *BUFF. L. REV.* 931, 937 (2002) (stating that programs that allow parents to use vouchers for religious schools do not violate the Establishment Clause).

9. DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–1973, A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE* 32 (1974) (stating that of some 12,000 Catholic children only a few hundred attended public schools in the late 1830s).

10. For a different view of establishment, see THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 209 (1986) (stating that even in 1791, establishment did not extend to public support of several or all churches but continued to mean a preference for one church to the exclusion of other churches); see also Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 *VAND. L. REV.* 1539, 1546 (1995) (concluding that the Fourteenth Amendment did not make First Amendment applicable to the states). For the opposite position, see Professor Lash's work on the effect on our understanding of the Establishment Clause by Reconstruction in 1868. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment*, 88 *NW. U. L. REV.* 1106, 1156 (1994); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *ARIZ. ST. L.J.* 1085, 1088 (1995).

The word “establishment,” which gives us so much trouble today, is a dubious legacy from the very troubled relationship between the English church and state during the sixteenth and seventeenth centuries. The English were later freed from their own troubled history when society’s attitudes changed. Although establishment had once loomed over English legal history, England was not constrained by a written constitution and could make these changes. While the English retain an established church today, the horrible religious conflicts of their past do not haunt their present financing of religious schools in the way that our Establishment Clause bedevils American constitutional jurisprudence more than two centuries later.¹¹ This article will briefly summarize that difficult English history before exploring the later English financing of religious schools. Because our First Amendment was partially a reaction to the colonial experience and to the turbulent English church-state relations during the sixteenth and seventeenth centuries, this article will set out the history in some detail. The sixteenth-century legal establishment of one church that demanded the attendance of everyone in England gave the new nation much to react against.

In England, the first clause of the Magna Carta provided for the liberty of the church, drawing on the treaty made by King Henry II in 1172 after the murder of the Archbishop of Canterbury at the high altar of Canterbury Cathedral in December, 1170.¹² The saying was that the two swords, church and state, were free but cooperated with each other. During the sixteenth century, under Henry VIII, people were not allowed to believe as

11. LEVY, *supra* note 8, at xvii (referring to William H. Rehnquist’s opinion in *Wallace v. Jaffree*, 472 U.S. 38, 99, 113 (1985), and stating that Rehnquist “flunked history when . . . he sought to prove that the establishment clause merely ‘forbade the establishment of a national religion and forbade preference among religious sects or denominations’”). Levy admits, however, that

no scholar or judge of intellectual rectitude should answer establishment-clause questions as if the historical evidence permits complete certainty. It does not. Anyone employing evidence responsibly should refrain from asserting with conviction that he or she knows for certain the original meaning and purpose of the establishment clause. The framers and the people of the United States, whose state legislatures ratified the clause, probably did not share a single understanding.

Id. at xix. Despite, or perhaps because of, its establishment, the Anglican Church is not centrally important in the lives of most English people today. MELANIE PHILLIPS, *ALL MUST HAVE PRIZES* 226 (1996). Although more fundamentalist denominations have relatively good church attendance, many calamities which have befallen the twentieth century have also affected the Anglican Church: “since the end of the Second World War, the Church of England has lost its authority and its congregations.” *Id.*

12. JOHN GUY, *TUDOR ENGLAND* 28 (1988). The Compromise of Avranches between King Henry II and the Pope in 1172 “secured the Church’s right to self-regulation.” *Id.* In the *concessimus Deo* clause of Magna Carta, the kings confirmed again and again “for us and our heirs in perpetuity, that the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” *Id.* On May 15, 1532, the convocation of the clergy under some duress submitted their legislative and judicial authority to King Henry VIII. *Id.* at 131.

they wished because they were required to swear oaths on pain of execution.¹³ Later, during the sixteenth century, people were compelled to attend only state-established churches. When Charles II's brother James II ascended the throne in 1685, more trouble followed. James' Roman Catholic sentiments had become known. England had by now become resolutely Protestant. The King was forced to leave and a statute was passed requiring that the monarch be a member of the established church.¹⁴

The Toleration Act of 1689 eventually fostered acceptance for different dissenting sects, although not for Protestant education of children.¹⁵ Roman Catholics (among others) were excluded from legal toleration in 1689, however, since they posed a perceived threat in the years leading up to the passage of the Toleration Act.¹⁶ In addition, the "Act for the further preventing the growth of Popery" made it an imprisonable offense for a

13. *Id.* at 135, 140. By the end of the sixteenth century, the Puritan sects grew stronger and challenged the recently established Anglican Church. During the English Civil War (1642–1649), the Puritans overcame the royal government, executing King Charles I on January 30, 1649. Soon thereafter, the godly government of the Lord Protector Oliver Cromwell (1599–1658) was installed. When the Cromwell family could no longer balance army and parliament, Puritan rule collapsed. The monarchy was restored and with it the Anglican Church in 1660 with the recall of Charles II from Europe. But the English Parliament continued to make laws against new dissenting sects, such as Baptists and Quakers, whose members faced imprisonment during the 1660s when they refused to conform to the re-established Anglican Church.

14. James's nephew, William of Orange, married since 1677 to James's daughter Mary, was proclaimed joint sovereign with Mary on February 13, 1689. Succession to the throne is affected by the requirement that the sovereign not be a Roman Catholic or married to a Roman Catholic, Bill of Rights, 1689, 1 W. & M., sess. ii, c. 2 (Eng.), and by the later requirement that the sovereign "shall join in communion with the [C]hurch of England, as by law established." The Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), available at <http://www.guardian.co.uk/print/0,3858,4100998-1003573,00.html> (Dec. 6, 2000).

15. Toleration Act, 1 W. & M., sess. i, c. 18 (Eng.). Note that the Bill of Rights of 1688 provided that punishment should not be cruel or unusual. 1 W. & M., sess. ii, c. 2 (Eng.). Various Protestant dissenters were regulated by a series of acts. Anthony Fletcher, *The Enforcement of the Conventicle Acts 1664–1679*, in PERSECUTION AND TOLERATION 235 (W.J. Sheils ed., 1984). In 1689, those regulations were put aside. "Presbyterians, Independents, Baptists, and Quakers all gained the right, by law, to worship freely." Nicholas Tyacke, *The 'Rise of Puritanism' and the Legalizing of Dissent, 1571–1719*, in FROM PERSECUTION TO TOLERATION: THE GLORIOUS REVOLUTION AND RELIGION IN ENGLAND 17, 41 (Ole Peter Grell et al. eds., 1991). Removal of such civil penalties as permitting the licensing of dissenting schoolmasters did not pass, but later case law interpreted the statute broadly to permit dissenting educational institutions. *Id.* at 42–43. Unitarians and other non-Trinitarians (such as Jews) were not included in the protection of the Act. *Id.* at 41–43. By 1714, in the Schism Act (repealed in 1719) the Tories restricted the Toleration Act as it related to protestant education. W.A. SPECK, TORY AND WHIG: THE STRUGGLE IN THE CONSTITUENCIES, 1701–1715 (1970).

16. See JOHN BOSSY, THE ENGLISH CATHOLIC COMMUNITY, 1570–1850 71 (1975) (discussing the threat of "a dangerous increase clerical power" posed by "any sort of revival of a Catholic establishment"). Prosecution was by informers who were to be rewarded with £100. An Act for the Further Preventing the Growth of Popery, 1700, 11–12 Will. 3, c.4 (Eng.). This law remained in effect for eighty years until it was repealed in 1778, and apparently few prosecutions took place. John Bossy, *English Catholics after 1688*, in FROM PERSECUTION TO TOLERATION, *supra* note 15, at 369, 373 n.7.

Roman Catholic schoolmaster to keep a school.¹⁷ The characteristics of an established religion have been summarized as “a legal union of government and religion.”¹⁸

By 1829 the Roman Catholics had managed to reach a political compromise and were “emancipated.”¹⁹ After this time, Roman Catholics worked to get religious schools funded.²⁰ Compromise and cooperation

17. 11-12 Will. 3, c.4, § 3; Bossy, *English Catholics after 1688*, *supra* note 16, at 313.

18. LEVY, *supra* note 8, at 5. Levy spelled out the details of establishment, common in Europe from the sixteenth through the eighteenth centuries, as follows:

Attendance at a state church was compulsory, unless the state indulged the existence of open religious services by dissenters. An establishment of religion had an official creed or articles of faith, and its creed alone could be publicly taught in the schools or elsewhere. Its clergy alone had civil sanction to perform sacraments or allow them to be performed. Subscribers to the established faith enjoyed their civil rights but . . . [d]issenters were excluded from universities and disqualified for office, whether civil, religious, or military. Their religious institutions (churches, schools, orphanages) had no legal capacity to bring suits, hold or transmit property, receive or bequeath trust funds.

Id. While other states besides England had established churches and while other peoples besides the English settled in the United States of America during the colonial period, the English model was most familiar to the majority of the Founding Fathers who wrote the Bill of Rights. *See id.* at 102 (discussing the various drafts of the Establishment Clause rejected by the Senate). But Levy does not see the English model of establishment as all that the amendment’s framers had in mind when they referred to establishment. *Id.* at 104. For a detailed study of the drafting of the religion clauses, see Marc M. Arkin, *Regionalism and the Religion Clauses: The Contribution of Fisher Ames*, 47 BUFF. L. REV. 763, 770 (1999) (“[T]he story of Ames and the religion clauses confounds many of the historical assumptions that power current interpretive discourse about the Constitution.”).

19. *See* The Emancipation Act, 1829, 10 Geo. 4, c. 7 (Eng.) (repealing various civil and religious disabilities). Dissenters were prohibited from holding political or municipal office, taking degrees at the universities (though they could attend), and serving in the armed forces. J.C.H. AVELING, *THE HANDLE AND THE AXE: THE CATHOLIC RECUSANTS IN ENGLAND FROM REFORMATION TO EMANCIPATION* 226, 268, 282 (1976). Emancipation has been traced to the consequences of the English government’s decision to unite Ireland in parliament with England. ADRIAN HASTINGS, *CHURCH AND STATE: THE ENGLISH EXPERIENCE* 27 (1991). Daniel O’Connell showed

that unless Irish Catholics could be elected to parliament, Ireland would be ungovernable. . . . While everything was done to play down the religious implications of this for England, in fact in 1829 imperial *raison d’etat* ended the establishment in any coherent form. Everything subsequent was but a mopping up operation, as bit by bit surviving privileges of the Church of England were cut away, grievances of non-Anglicans remedied.

Id.

20. At the same time in the United States, developments were trending in the opposite direction as Catholic immigration to the United States increased dramatically for half a century beginning in 1830. *See* RICHARD J. GABEL, *PUBLIC FUNDS FOR CHURCH AND PUBLIC SCHOOLS* 348–70 (1937) (describing the formation of the public school system in eastern states between 1820 and 1865 and the general tendency towards inclusion of all religions); *see also* PETER R. HOBSON & JOHN S. EDWARDS, *RELIGIOUS EDUCATION IN A PLURALIST SOCIETY: THE KEY PHILOSOPHICAL ISSUES* 117 (1999) (stating that “a number of western countries” have funded Catholic schools). Anti-Catholic sentiment was constitutionally expressed in amendments to state constitutions. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV.

proved as important to achieving financial support as the legal victory emancipating Roman Catholics. The English continued to retain the established church, but uniformity ceased to matter so much, and emphasis on the unity of the nation-state allowed the English simply to provide partial funding for religious schools run by denominations (and religions) other than the established church. These schools were traditionally called “voluntary aided” (denominational) schools.²¹

In 1993, 2,000 Anglican, 2,100 Roman, 21 Jewish, and 4 Methodist schools were categorized as voluntary-aided schools.²² A Muslim school was funded in 1998.²³

J.L. & PUB. POL’Y 551 (2003). Statistics from the Department of Education revealed that during the 1930s, although forty-three denominations ran elementary schools, only Lutherans and Catholics enrolled substantial numbers of children. Note, *Catholic Schools and Public Money*, 50 YALE L.J. 917, 919 n.10 (1941) [hereinafter *Catholic Schools and Public Money*]. More recently, Roman Catholic schools in the United States became financially less secure during the latter part of the twentieth century, at the same time that fundamentalist Protestant schools grew enormously with well over one million children. James Davison Hunter, *Evangelical Schools in Growth, Catholic Schools in Decline*, WALL ST. J., Mar. 8, 1988. See generally James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 54 (James Davison Hunter & Os Guinness eds., 1990). Between 1965 and 1989, the enrollment in Catholic schools declined “by 54 per cent, from 5.574 million to 2.551 million pupils in twenty-four years. Meanwhile, schools sponsored by other groups (e.g., Lutheran, Jewish, Quaker, Seventh-day Adventists, Greek Orthodox, and ‘independent’) have increased during this same period, from 0.795 million to over 2.55 million: a rise of 221 per cent.” Bruce S. Cooper, *National Crisis, Catholic Schools and the Common Good*, in THE CONTEMPORARY CATHOLIC SCHOOL: CONTEXT, IDENTITY AND DIVERSITY 42, 47 (Terence H. McLaughlin et al. eds., 1996).

Today it is Protestant fundamentalists and evangelicals who are often marginalized, because the knowledge class sees them as a narrow and prejudiced interest group. Agnostic intellectuals are easily persuaded that people who opt for Christian schools must be fleeing from racial integration, or are not really exercising free choice because they are dominated by an authoritarian preacher. Freedom of choice will become irresistible only when it becomes impossible to deny that a great many people of diverse ethnic and religious backgrounds want to have an alternative to the public schools.

Phillip E. Johnson, *School Vouchers and the United States Constitution*, in THE SCHOOL-CHOICE CONTROVERSY, *supra* note 1, at 51, 64–65.

21. VERA G. MCEWAN, *EDUCATION LAW* 19 (2d ed. 1999). Historically, the schools were voluntary because they were not set up as compulsory schools under the Education Act of 1870 which was enacted under the new philosophy that the government was responsible for education. *Id.* at 1; JAMES ARTHUR, *THE EBBING TIDE: POLICY AND PRINCIPLES OF CATHOLIC EDUCATION* 18 (1995). Section 15 of the Education Act of 1944 created three categories of voluntary schools: controlled schools, aided schools (religious) and special agreement schools (the product of an agreement between an LEA and school promoters for a grant to establish or rebuild a secondary school structure). MCEWAN, *supra*, at 19. There are also independent schools (so-called because they are not under the jurisdiction of a local education authority) funded by charitable trusts.

22. MCEWAN, *supra* note 21, at 19.

23. Rebecca Smithers, *Analysis: Church Schools: God’s Value Added Academies*, GUARDIAN (London), Dec. 3, 1998, at 23; Marie Parker-Jenkins, *Equality Before the Law: An Exploration of the Pursuit of Government Funding by Muslim Schools in Britain*, 1999 BYU EDUC. & L.J. 119. See

In contrast to the United States, in England and Wales religious schools (mainly Roman Catholic and Church of England schools) are not only to be found in the 'independent' or 'private' sector of schooling but are also a prominent part of the publicly funded education system. They are therefore seen as part of the national educational effort, and as having an acknowledged role to play in relation to the common good.²⁴

The English decision to fund all types of religious schools should prove a fruitful example for the United States. By following England, now the United States would overcome the earlier negative legacy of the English establishment of one denomination above all others, a decision with tragic consequences, including the loss of many lives.

I. ENGLISH EDUCATION AND ITS FINANCING ARE LARGELY CREATURES OF STATUTE

In recent years, English education has been subject to an ever-increasing amount of parliamentary legislation. But the English method of financing secular and religious schools has not recently changed. Through a complicated process, English religious schools of any denomination and religion may qualify to receive government funds derived from taxes. This is particularly enlightening since the Supreme Court recently upheld American voucher programs.²⁵ Further, the No Child Left Behind Act at least suggests that the urban poor might have school choice.²⁶ Vouchers are

generally Syed Ali Ashraf, *The Islamic Response: Faith-Based Education in a Multifaith Multicultural Country*, in AGENDA FOR EDUCATIONAL CHANGE 269 (John Shortt & Trevor Cooling eds., 1997) (arguing that Muslim schools should be given voluntary-aided status); J.M. HALSTEAD, THE CASE FOR MUSLIM VOLUNTARY-AIDED SCHOOLS: SOME PHILOSOPHICAL REFLECTIONS, The Islamic Agency (1986). According to Susan Gilles, "England's experience suggests that once the state is allowed to fund religious education, discrimination against minority religions, even if avowedly benign, follows both in terms of opportunities to establish religious schools and in terms of the religious worship and education required at even public schools." Susan M. Gilles, "Worldly Corruptions and Ecclesiastical Depredations: How Bad is an Established Church?", 42 DEPAUL L. REV. 349, 360 (1992).

24. Cooper, *supra* note 20, at 43. England and the principality of Wales share the same law. There are separate laws for other parts of the United Kingdom.

25. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002).

26. Similarly, in England there has been political pressure to provide excellent education "for the many and not for the few." Sarah Billington, *Education Action Zones: A Progress Report*, 1 EDUC. L. J. 9, 9 (2000). The United Kingdom Department for Education and Employment provided guidance to administrative bodies including local education authorities that have the power to intervene in under-performing schools. U.K. DEP'T FOR EDUC. & EMPLOYMENT, SCHOOLS CAUSING CONCERN, CIRCULAR NO. 06/99 (June 1999), available at http://www.dfes.gov.uk/publications/guidanceonthelaw/6_99/6_99.doc.

now the most debated vehicles for aiding American religious schools. The American government provides indirect financial assistance to religious educational institutions through not-for-profit status and tax exemptions. English religious schools receive direct financial aid from public taxes.²⁷ Since vouchers are relatively new in American education, the English experience in financing schools can instruct the United States on how tax money is allocated to religious as well as secular schools. This portion of the article will focus on how English primary education is financed, showing how government financing for all types of religious schools works.

Historically, England and the United States have had very different views of the establishment of religion. Today, the English government gives financial aid to non-Anglican religious schools. This aid is not considered to have “established” the religions or denominations of the aided schools. In the United States, direct financial aid to religious schools is forbidden because “establishment” has a much broader connotation. Therefore, devotional activities and religious indoctrination in American public schools after *Everson v. Board of Education of Ewing* and its progeny have normally been considered by the Supreme Court to establish a religion.²⁸ In a neutral setting, the word “establishment” may imply that

27. Morken describes the vision of the evangelical scholar James Skillen for the American public school as a rejection of “a state monopoly of education, even while funding schools by tax revenues.” Hubert Morken, *The New Common School: The Evangelical Response to Everson*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 72 (Jo Renée Formicola & Hubert Morken eds., 1997). Skillen “[l]ooks for inspiration to a European model of confessional pluralism in schools, long practiced in Holland and France. These systems allow for tax subsidies for schools maintained by church denominations.” *Id.* Morken, however, points out that French Catholic schools have drawn hostility “either because they are too much like government-run schools . . . or because they are so different that they threaten national unity.” *Id.*; see also James W. Skillen & Stanley W. Carlson-Thies, *Religion and Political Development in Nineteenth-Century Holland*, *PUBLIUS*, Summer 1982, at 57–58 (explaining that the government of Holland provides a supervisory and financial role in education, but also allows private institutions to provide this service). See generally William Lowe Boyd, *Balancing Public and Private Schools: The Australian Experience and American Implications*, in *PRIVATE SCHOOLS AND PUBLIC POLICY: INTERNATIONAL PERSPECTIVES* 149–70 (William Lowe Boyd & James G. Cibulka eds., 1989) (examining how Australia has addressed the policy problems of achieving a fair balance between public and private schools); MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 272–281, 342–363 (1997) (describing parental choice in education as mandated by Article II of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief); PRIVATE SCHOOLS IN TEN COUNTRIES: POLICY AND PRACTICE 3 (Geoffrey Walford ed., 1989) (providing a comparative study of the educational systems of ten countries); Joel D. Sherman, *Public Finance of Private Schools: Observations from Abroad*, in *PUBLIC DOLLARS FOR PRIVATE SCHOOLS: THE CASE OF TUITION TAX CREDITS* 71, 71–72 (Thomas James & Henry M. Levin eds., 1983) (discussing how countries outside the United States have dealt with public aid for private education).

28. See *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947) (holding that the State must be neutral toward religion). “[W]hat the ‘establishment of religion’ clause of the First Amendment does, and all that it does, is to forbid Congress to give any religious faith, sect, or denomination preferred

religion makes a positive and significant contribution to society as do atheism and agnosticism. Establishment in the United States during colonial times and the early republic meant that the state legislature had passed a law requiring everyone residing within its jurisdictional to join a particular religion or denomination.²⁹

The United States and England share a common history from 1607 to 1776, but each has reacted differently to the problems in their common history. By the time the first English settlers came to Jamestown in 1607, England had already suffered great religious turmoil. The Crown had decided that the church should no longer be separate from the state, and that all subjects were obligated to belong to an established national church. The Crown used religious uniformity as the major tool to maintain social order and unity.³⁰ Indeed, some of the early colonists sailed to America to avoid belonging to the legally established church. Other colonists who came to America followed the pattern in England and established one church that received government tax money. In Virginia the Anglican Church was established, leaving Baptist and Presbyterian Sunday schools without government funding.³¹

This discrimination led the Founding Fathers to eschew an established church in the Bill of Rights. Indeed, Thomas Jefferson assured the Baptists that there was a wall of separation between the state and the church.³² The First Amendment to the Constitution prevents the federal government: from

status . . .” Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW AND CONTEMPORARY PROBLEMS 3, 10 (1949). See generally MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 9–53 (1992) (providing historical studies of the early development of Christianity in Europe and the United States).

29. See, e.g., LEVY, *supra* note 8, at 11 (explaining how New York passed the “Duke’s Law” that required each township to endorse a church).

30. See Act of Supremacy, 1558, 1 Eliz., c. 1 (Eng.) (declaring “that the Queen . . . is the highest power under God in the Kingdom and has supreme authority over all persons”); Act of Uniformity Act, 1559, 1 Eliz., c. 2 (Eng.) (stating that if anyone refuses to say the common prayer, they shall be punished). The Act for the Uniformity of Common Prayer and Divine Service (1559), was perhaps the best known Tudor, if not English, statute, being printed at the beginning of the Book of Common Prayer and requiring strict church attendance. *Id.*

31. See THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, 8 (1977) (stating that the “Church of England had enjoyed a legal supremacy in Virginia since the beginning of the colonial period”); see also GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 32 (1987) (stating that the Anglican vestry dominated legally throughout the South, especially in Maryland, South Carolina, and Virginia); ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 163 (1950) (mentioning that the original order given by England to the London company that established the first permanent settlement in Virginia contained “an Anglican statement based on Protestant foundations”).

32. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 n.1 (2002). Thomas Jefferson wrote to the Baptists on January 1, 1802 in reply to a letter from the Danbury, Connecticut Baptist Association of October 7, 1801. *Id.*

establishing one particular church; from giving government funding at the expense of other denominations; or compelling church attendance. Nevertheless, the wall of separation did not always prevent interaction between church and state or even funding for religious activities.³³

In the United States, every state provides state schools that all children can attend. Generally speaking, students are required to attend school until they reach the age of sixteen. However, state schooling is available for twelve years, increasing the average age of most graduating students to eighteen. Many parents make great sacrifices to move to an area, often in the suburbs, with a good public school district. For the most part, local property taxes finance the state schools. Children whose parents cannot afford to live in a district with a good school system may be left behind.³⁴ This inequality in schooling has given rise to the idea that parents should have some choice about the school in which to enroll their children.³⁵ As a result, vouchers have allowed children of parents who cannot afford to move to an area with good schools to escape from an inadequate school district.³⁶ Some decades previous to the voucher movement, a few states tried to provide better education for these children. However, because these early provisions aided religious schools directly, they fell afoul of the *anti-establishment* clause of the First Amendment.³⁷ Vouchers avoid this problem by aiding students rather than schools.³⁸ However, the English

33. LEVY, *supra* note 8, at 249. Jefferson did not see the wall of separation as a barrier to providing money in a treaty with American Indian tribes to pay a Roman Catholic priest to minister to them or to construct a church for them. *Id.* at 248. Levy suggests that either Jefferson “was not wholly consistent when it came to an establishment of religion” or that “Jefferson meant the wall [of separation] only against aids to religion by the national government, not by the states.” *Id.* at 248–49. Levy points out that the Fourteenth Amendment means states could no longer establish a particular denomination, even if they desired to do so. *Id.* at 249. For an extensive, thoughtful treatment of Jefferson’s letter to the Baptists, see HAMBURGER, *supra* note 32, at 1–12, 109–10, 155–70, 259–60. Jefferson’s letter was not widely known until it was printed in an edition of Jefferson’s works in 1853. Daniel L. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation,”* 39 J. OF CHURCH & ST. 455, 491 (1997).

34. See Spencer S. Hsu, *D.C. Vouchers Debate Resumes in Senate*, WASH. POST, Sept. 26, 2003, at B4 (stating that only ten percent of fourth graders in Washington, D.C. public schools read proficiently).

35. See *id.* (explaining the Congressional voucher bill aimed to provide “opportunity scholarships” to the parents of low-income D.C. students to attend private or religious schools).

36. *Id.*

37. See ARIENS & DESTRO, *supra* note 4, at 503–05 (showing that transportation tuition tax credits to parents, the loan of instructional materials such as maps, globes, and audio-visual equipment, and on-premises remedial instruction for poor children have all been held unconstitutional at one time or another).

38. See *id.* at 505 (stating that voucher programs offer “the ‘true private choice’”) (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002)). In 1908 the Court foreshadowed the argument used to craft vouchers because the opinion concentrates not on the religious nature of the education the Indian trust fund supported but on the source of the federal funds from the sale of Indian lands. Reuben

experience shows that vouchers do not solve all problems. Particularly, parents and their children would not have a real choice of schools. Additionally, dangers still exist for the religious schools themselves from the possibly onerous conditions attached to the government money schools receive from parents who select their school.³⁹

Several issues are common to both the United States and England. Too much control by the state or political parties is the most prevalent danger especially after the school has accepted state money. Other issues are unique to the United States, such as subsidizing “secular” as opposed to “religious” aspects of education.⁴⁰ Since England has been historically Christian, even county-run schools (equivalent to American public schools) require religious education and programs of worship.⁴¹

In financing religious schools, England surpasses the United States.⁴² England shares public money with Hindu, Moslem, Jewish, and differing Christian denominational schools.⁴³ Thus, ninety-two percent of the Roman Catholic schools were state-funded for all of their operating costs and eighty-five percent of their capital costs.⁴⁴ The Roman Catholic, Anglican, and other denominational schools together serve about one-third of the students in England.⁴⁵ Parents do not pay tuition to send their children to these schools.⁴⁶ England does not treat any of these religions or denominations as state-sponsored, but the Anglican religion remains established.⁴⁷ Currently, teachers’ salaries are comparable in voluntary-aided schools and county schools because voluntary-aided schools receive tax money.

In the United States, teachers’ salaries in many Christian schools are below the salaries of teachers in public schools that are supported directly by money received from local taxes. The Court has struck down state

Quick Bear v. Leupp, 210 U.S. 50, 82 (1908).

39. ARIENS & DESTRO, *supra* note 4, at 523 n.1.

40. *Id.* at 503–05.

41. Education Act, 1944, 8 Geo. 6, §§ 25–26; William K. Kay, *Religious Education and Assemblies: Pupils’ Changing Views*, in RESEARCH IN RELIGIOUS EDUCATION 267, 267 (Leslie J. Francis et al. eds., 1996).

42. Smithers, *supra* note 23.

43. *Id.*

44. Terence H. McLaughlin et al., *Setting the Scene: Current Realities and Historical Perspectives*, in THE CONTEMPORARY CATHOLIC SCHOOL, *supra* note 20, at 1, 12. The Roman Catholic Church itself spends nearly £20 million on education at all levels, including 2,000 primary schools. Smithers, *supra* note 23.

45. Smithers, *supra* note 23.

46. *Id.*

47. The British Humanist Association strongly opposes “the expansion of religious schools because it’s discriminatory and an example of religious privilege,” according to the Association’s spokesperson, Marilyn Mason. Smithers, *supra* note 23.

statutes that attempt to equalize salaries using state-tax money.⁴⁸ In addition, the United States rarely sets school standards using nation-wide legislation whereas, in England, Parliamentary legislation governs school standards.

Currently, Parliament passes an abundance of legislation concerning English education. Although the 1944 Education Act had *settled* English education by putting to rest decades of controversy, political unrest in the 1970s gave rise to some twenty statutes beginning in 1980.⁴⁹ Among the more important statutes is the Education Reform Act of 1988.⁵⁰ This Act states that the political aim is to focus on parental choice of schools, parental involvement in matters of school standards, and school finance.⁵¹ Equally important, the Education Act of 1993 consolidated previous law scattered in different statutes and continued the theme of parental choice. It allowed schools to change their status to avoid the local education authorities (LEAs) (parallel to local American boards of education) by creating the Funding Agency for Schools.⁵²

Further change occurred when the Labour party came into power in 1997.⁵³ The School Standards and Framework Act of 1998 set out a new structure for schools and looked to LEAs to assume administrative functions.⁵⁴ The Act centralizes the provision of education, perhaps at the cost of flexibility.⁵⁵ Independent contractors have taken over the planning role of some failing LEAs.⁵⁶ LEAs, along with school organization committees, plan to provide sufficient places for students in schools.⁵⁷ The planning committees are composed of elected members of LEAs, school governors (administrators), representatives from Anglican and Roman dioceses, and further education council members that only vote on provisions affecting students over age sixteen.⁵⁸

The United States, conversely, does not have a national statute resembling the English Schools Standards and Framework Act because

48. *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971).

49. MCEWAN, *supra* note 21, at 4-7 (listing the major legislation passed through 1998).

50. *Id.*

51. *Id.* at 5.

52. *Id.* at 5-6.

53. *Id.* at 7.

54. *Id.* This statute also provides that schools with a religious character set out the ethos of the school; representatives of dioceses will be appointed to school organization committees. *Id.* at 15, 19. LEAs are the councils of local administrative districts such as counties or boroughs (parts of urban areas), as set up in the Education Act of 1902. *Id.* at 3.

55. *Id.* at 14.

56. *Id.*

57. *Id.* at 14-15.

58. *Id.* at 15.

most American school legislation and funding comes from state and local government.⁵⁹ Ultimately, school funding for American religious schools will be worked out by state and local governments, as *Locke v. Davey* recognizes.⁶⁰ That may prove to be the greatest challenge under the free exercise clause of state constitutions during the first half of this century.

The status of voluntary-aided schools was treated in *Challoner* when Lord Browne-Wilkinson construed section 6(2) of the Education Act of 1980, which imposes duties on LEAs with regard to school admissions policies and parental preference.⁶¹ Because too many children applied to the school, the duty to comply with parental preferences did not pertain.⁶² Lord Browne-Wilkinson held that as important as parents are, the school's policy of preserving the character of the school itself took precedence under section 6(3), which allowed the school a way not to comply with parental preference if efficient use of resources would be prejudiced.⁶³ However, the Education (No. 2) Act of 1986 expanded parental rights by granting parents equal representation on school governing bodies with the LEA.⁶⁴ Section 8 allowed the trustees who appointed the school governors to

59. See, e.g., John Dayton, Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation, 157 EDUC. L. REP. 447, 447 (2001) (finding that the Supreme Court "foreclosed the option of federal funding equity challenges in *San Antonio v. Rodriguez*, causing plaintiffs to turn to state courts for relief") (footnote omitted).

60. The decision in *Locke* relies on the establishment clause of the Washington Constitution, rather than the United States Constitution, to prohibit using the state scholarship for studying for the ministry. *Locke v. Davey*, 124 S. Ct. 1307, 1315 (2004). Therefore, the Supreme Court did not require application of the Free Exercise and Equal Protection clauses in *Locke*. Many plaintiffs may accordingly be expected to challenge the separationist ethos of various states by seeking recognition of their free exercise rights in the state courts. See *infra* notes 189–95 and accompanying text.

61. *R. v. Governors of the Bishop Challoner Roman Catholic Comprehensive Girls' Sch.*, 3 W.L.R. 99, 101 (H.L. 1992). The school was named after Richard Challoner (1691–1781), an eighteenth-century Roman Catholic bishop of London (titled Vicar Apostolic in those days before the restoration of the hierarchy of bishops in 1850) who founded schools. One Muslim and one Hindu girl in Tower Hamlets sued when they were refused admission. *Id.* The Court of Appeals had followed statutory guidelines under section 6(6) of the Education Act of 1980 that required the LEA's agreement to deviate from parental preference. *Id.* The trial court and Lord Browne-Wilkinson necessarily construed the statute and weighed the policies. Roman Catholic educators assessed the policy of denominationalist perspective as part of the ethos of a religious school. PRISCILLA CHADWICK, SCHOOLS OF RECONCILIATION: ISSUES IN JOINT ROMAN CATHOLIC-ANGLICAN EDUCATION 50 (1994). The historic Catholic view was that their schools are primarily for Roman Catholics. *Id.* at 24. More recently, admissions policies have included different assumptions looking to the needs of the greater community. *Id.* at 25–26. The Catholic staff at one school now, with only a thirty percent Catholic enrollment, took the position that Catholicity "cannot simply be confined to measures of religious practice, but must take into account the spiritual life of the school as a whole, witnessed to by the majority of those who come to it." *Id.* at 26.

62. *Governors of the Bishop Challoner Roman Catholic Comprehensive Girls' Sch.*, 3 W.L.R. at 106.

63. *Id.* at 108.

64. MCEWAN, *supra* note 21, at 5.

remove them.⁶⁵ Accordingly, *R. v. Trustee of the R.C. Diocese of Westminster* held that the trustees of a voluntary-aided school could dismiss governors who opposed changes that the trustees proposed to the character of the school.⁶⁶ Soon thereafter, the English Court of Appeal and later the House of Lords held that an LEA could not exercise their removal power simply because the governor disagreed with LEA policies.⁶⁷ Consequently, *Challoner* was reversed.⁶⁸

While parental rights are not absolute, as *Challoner* demonstrates, parents are very important in the statutory framework, with parental choice in education recognized as far back as the Education Act of 1944.⁶⁹ The 1996 Education Act⁷⁰ preserved the 1944 Act, so far as practicable, in the principle that “pupils are to be educated in accordance with the wishes of their parents.”⁷¹ Thus, parents may withdraw children from religious worship and instruction.⁷² The legislative history of the Education Act of 1944 shows that parental choice started out as a “religious settlement” to give Roman Catholic and Anglican parents a “choice” of schools.⁷³ By 1980, parental choice became a right to express a preference for a school, unless the choice proved inefficient, contradicted criteria for admission to a voluntary-aided school, or failed because the child did not have the requisite aptitude or ability.⁷⁴ Parents required information about the school

65. Education (No. 2) Act 1986, c.1, § 8, sched. 5 (Eng.).

66. *R. v. Trustees of the Roman Catholic Diocese of Westminster, ex p. Andrews*, [1988] 86 LGR 507 (Divisional Ct.), *rev'd as R. v. Westminster Roman Catholic Diocese Trustee, ex p. Andrews*, [1990] COD 25.

67. *R. v. Governors of the Haberdashers' Aske's Hatcham Schs.*, (C.A. 1989), *aff'd Brunyate v. Inner London Educ. Auth.*, 2 All E. R. 417, 420 (H.L. 1989).

68. *Governors of the Bishop Challoner Roman Catholic Comprehensive Girls' Sch.*, 3 W.L.R. at 101.

69. Education Act, 1944, § 76 (Eng.).

70. Education Act, 1996, § 411 (Eng.)

71. Education Act, 1944, § 76 (Eng.); MCEWAN, *supra* note 21, at 80.

72. School Standards and Framework Act, 1998, (SSFA) §§ 69–71 (Eng.). The provision of and withdrawal from religious education and services had been allowed previously. Education Reform Act of 1988, §§ 9(3)–(4) (Eng.).

73. MCEWAN, *supra* note 21, at 75 (quoting Lord Richard Austen Butler in *Hansard*, 353 Parl. Deb. H.L. (5th Sess.) (1974) 580). Section 76 was not meant to provide universal parental choice: “the objective of that settlement and of section 76 was to give Roman Catholic and Anglican parents a choice of school[.]” *Id.* Some thirty years after the passage of the 1944 Act, Lord Butler, the official responsible for passing the Act, stated that he had drafted section 76 in the context of a “religious settlement.” *Id.* The 1944 Act required Christian religious education in all state-funded schools and gave parents the right to withdraw their children from religious education classes. *Id.* at 130. Since that time, England has become multicultural and many more faiths are now present. The Education Reform Act of 1988 recognized multiculturalism. See Education Reform Act of 1988, §§ 9(3)–(4) (Eng.) (allowing parents to excuse their children from attending religious worship and receiving religious education).

74. Education Act of 1980, § 6 (Eng.).

curriculum, organization, discipline, examination results, recruitment criteria, and number of available places at the school.⁷⁵

In Lancashire, long a heavily Catholic area of England, Roman Catholic children who attended Roman Catholic primary schools were considered at county secondary schools for enrollment only after other applicants had been placed.⁷⁶ In one instance, a parent wanted her son placed in a school opposite his home but he was only offered a place in a school several miles away.⁷⁷ Since the child was not Catholic, the LEA overrode parental preference because of the particular arrangements in the diocese.⁷⁸ There were few places for non-Roman Catholic children to attend Roman Catholic schools.⁷⁹ Thus, the school's accommodation of a student of a non-established denomination led, in this case, to a lack of parental choice.⁸⁰

As for curriculum, the Education Act of 1944 mandated schools (county schools) fully funded by the government to begin the school day with collective worship, unless the parent requested that a student be excused.⁸¹ By 1985 the act of collective worship was in disuse, and the Education Reform Act of 1988 did not provide for it but did allow worship in separate groups.⁸² Seventy percent of schools do not comply with the requirement to provide a daily act of collective worship, but few parents have complained and provisions are made to excuse students from attendance.⁸³ In 1944, "the only compulsory subject was religious instruction, which became in effect religious education."⁸⁴ The Education Reform Act of 1988 continued religious education and collective worship in county schools.⁸⁵ It also extended religious education and worship to all age groups up to the equivalent of senior year in an American high school

75. MCEWAN, *supra* note 21, at 76. Since 1992, information about the comparative performance of schools has been made available to parents and they have appealed in much greater numbers. *Id.* To even the playing field between parents, the system has been refined under the School Standards and Framework Act of 1998. *Id.*

76. *Id.* at 79 (discussing *R. v. Lancashire County Council*, ex p. Foster, [1995] COD 45).

77. *Id.* at 80. One mother "said she was going to change her child's religion so that she could get a free bus pass to attend a Roman Catholic school some miles from her home where her parents thought she would receive a better education." *Id.*

78. *Id.* at 79. In *R. v. Lancashire County Council*, the court found the LEA's actions lawful, despite the government policy that if non-denominational schools were over-subscribed, faith was an unacceptable criterion for selection. *Id.*

79. *Id.* at 80.

80. *Id.*

81. *Id.* at 130; Education Act, 1944, § 25 (Eng.).

82. MCEWAN, *supra* note 21, at 130-31.

83. *Id.*

84. *Id.* at 131.

85. *Id.*

(the sixth form).⁸⁶

Furthermore, religious education is supposed to be “broadly Christian” in accordance with the curriculum put together with the help of now mandatory advisory councils.⁸⁷ Thus, the committee drafted an agreed syllabus on religious education.⁸⁸ Teachers may also opt out of worship and religious education without discrimination, except in voluntary-aided and other (foundation) religious schools.⁸⁹ Parents in those schools may still withdraw their children from religious education and worship.⁹⁰ Many schools fail to provide religious education for children aged fourteen to sixteen years.⁹¹ Voluntary-aided schools put together their own religious education. In England, as in the United States, fundamentalists and pluralists compete for a place at the table of ideas.⁹² The Human Rights Act of 1998 incorporated the European Convention on Human Rights into English law.⁹³ The Human Rights Act, in effect, provides a version of the United States’ free exercise clause of the First Amendment by protecting the right to an education that comports with the parents’ religious convictions.⁹⁴ In the United States, public schools no longer begin the school day with exercises of religious worship.

Employment and teachers’ appointments to school teaching positions are also generally governed by statute and statutory schedules in England,⁹⁵ along with teachers’ salaries and pay scales.⁹⁶ While pay differs according to the qualifications and experience of the teacher or other performance indicators, there are no differences in pay between the voluntary-aided schools or ordinary county schools.⁹⁷

Recruitment of teachers may give rise to unusual problems in light of religious affiliations. In *Crizzle*, a Church of England school advertised for

86. *Id.*

87. *Id.*; Education Reform Act of 1988, § 7, sched. 1 (Eng.).

88. Education Reform Act of 1988, § 8, sched. 3 (Eng.).

89. MCEWAN, *supra* note 21, at 132.

90. *Id.*

91. *Id.*

92. See HOBSON & EDWARDS, *supra* note 20, at 134 (discussing the Education Reform Act of 1988 which requires the school syllabus to reflect the fact that the English religious tradition is mainly Christian and that this stance recognizes a historical truth but also “explicitly acknowledges the reality of a multi-faith society”).

93. MCEWAN, *supra* note 21, at 209.

94. *Id.*

95. *Id.* at 142. The governing bodies of schools must follow schedules 16 and 17 of the School Standards and Framework Act 1998 which are designed to avoid discrimination on the basis of sex or race. *Id.*

96. Education (School Teachers’ Pay and Conditions) (No. 2) Order 2004 (S.I. No. 1884).

97. MCEWAN, *supra* note 21, at 146–47.

a principal who was a “committed communicant Christian.”⁹⁸ A Roman Catholic, Asian non-communicant applied and later claimed that the advertisement indirectly discriminated against Asians.⁹⁹ The employment Appeal Tribunal held that the school’s needs justified the advertisement and that it was nondiscriminatory.¹⁰⁰

Finance is perhaps the most fascinating aspect of education law in both the United States and England because it is so deeply concerned with overall educational and social policy. In 1833, the English Treasury made its first grants to Anglican and non-conformist societies building schools.¹⁰¹ In 1847, the Treasury gave its first grant to the Catholic Poor School Committee, which had the purpose of founding Catholic schools. This grant was important because it allowed Roman Catholic schools into the system of tax-funded education. In under thirty years, the number of Catholic elementary schools rose from just under 100 schools serving fewer than 8000 students to almost 1500 schools serving over 100,000 students.¹⁰² Nevertheless, this was a time of struggle for Catholic schools seeking more funding.

The Anglicans, Non-Conformists, and Roman Catholics cooperated in voluntary organizations to develop government-sponsored elementary-school education. At the time of the Elementary Act of 1870, state funding for denominational schools was not popular, despite the availability of increased financial support for a national educational system. The Catholic Church was determined to have a separate school system in order to control the religious curriculum and moral teaching, so that the school system was in accordance with Catholic conscience. Its claim was for financial justice from the state because “the education of a child should not cost a Catholic parent relatively more than parents who sent their children to other schools.”¹⁰³

An interdenominational Voluntary Schools Association was founded in 1884 to obtain financial equality with the county schools from

98. *Bd. of Governors of St. Matthias Church of England Sch. v. Crizzle*, [1993] I.C.R. 401 (E.A.T.). In Ohio, on the other hand, “a condition of receiving government money under the program is that participating religious schools may not ‘discriminate on the basis of . . . religion,’ which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non believers.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 712 (2002) (citing OHIO REV. CODE ANN. §§ 3313.976 (A)(4), 3313.977(A)(1)(c)-(d) (West Supp. 2002)).

99. *Crizzle*, [1993] I.C.R. 401 (E.A.T.).

100. *Id.*

101. KENNETH P. POOLE ET AL., BUTTERWORTH’S EDUCATION LAW 1 (1997).

102. McLaughlin et al., *supra* note 44, at 4.

103. *Id.* at 5.

Parliament.¹⁰⁴ Local government taxes (rates) financed the county schools.¹⁰⁵ Parents of children in voluntary schools had to pay both the school board rates and had to contribute to their own schools that did not receive aid from the school board.¹⁰⁶ At the time, Roman Catholics received little aid from Parliament but took weekly house-to-house collections from the poor to build schools that were admittedly not so well equipped as county schools.¹⁰⁷ Despite the establishment in 1886 of a commission to inquire into the actual operation of the Elementary Education Act of 1870, the government did not take any action. Subsequently, Catholic schools received aid under the Education Act 1891 (seven pence per child), but soon after standards were raised and costs rose requiring Catholics to seek financial equality again.¹⁰⁸ Finally, in 1897 the new Education Act offered an additional five pence per child and exempted voluntary schools from the local tax rating.¹⁰⁹ However, Catholics still needed rate aid.

In 1902, voluntary schools received support from the rates in return for concessions. In effect voluntary schools were integrated into the publicly maintained educational system. County and borough (local) education authorities were established to control the secular instruction in Catholic schools and to manage one-third of the schools with responsibility for the teachers' qualifications.¹¹⁰ The Catholic schools remained responsible for finding land, putting up the buildings, and making repairs. Thus, the Education Act of 1902 did not equalize the treatment of voluntary schools with county schools, but provided for the maintenance of voluntary schools out of local rate income.¹¹¹ In 1906, the Liberal Party returned to power, leading the Catholics to redouble their efforts on behalf of voluntary schools in the face of liberal opposition to denominational schools. The House of Lords prevented legislation abolishing aid to voluntary schools, but the local authorities interpreted the existing laws and regulations unfavorably to the church schools.

There was much turmoil about the policy toward voluntary schools

104. ARTHUR, *supra* note 21, at 19.

105. *Id.* at 18.

106. *See id.* (explaining that in order to compete with educational development of financially secure county schools, Roman Catholics had to increase their voluntary financial support to their schools).

107. *Id.*

108. *Id.* at 21.

109. *Id.* at 22.

110. *Id.* at 23.

111. *Id.*

from 1906 until the passage of the Education Act of 1944.¹¹² At the time, Catholic newspapers such as *The Tablet* described battles with local authorities. These battles included the refusal of grants to pay teachers' salaries and the concerted effort to oust local authorities in elections when Catholics had sufficient numbers to effect a change.¹¹³ Although the main financial difficulty was providing funds for more primary schools, the Education Act of 1936 permitted LEAs to contribute between fifty and seventy-five percent of the cost of building voluntary secondary schools.¹¹⁴ Although the LEAs were to appoint the teachers, some positions were reserved for appointment by the Catholic governors.¹¹⁵ The LEAs, however, were not required to build schools and only a small number were actually built.¹¹⁶ In Liverpool, a large number of Catholics spearheaded special legislation permitting the LEA "to build schools and charge rent to the Catholic authorities."¹¹⁷ By 1920, the Catholic schools were educating about 400,000 children and receiving some measure of acceptance for public funding.¹¹⁸

Catholics wanted one hundred percent grants for voluntary schools.¹¹⁹ To achieve this goal, they were willing to allow the LEAs to appoint the teachers in exchange for guarantees.¹²⁰ The Education Act of 1944 gave the schools two choices. The first choice was complete control by the LEA with full financing.¹²¹ The alternative choice was having a majority of Catholic school governors with fifty percent of capital expenditure provided by the state.¹²² The Act, however, provided no money to build Catholic schools despite an increase in the population as a whole or new housing developments in urban areas.¹²³ Finally, "the organisation to defend the interests of Catholic schools needed to be strengthened, both at [the] local and national level, in order to deal with questions of law, building grants and the many technical negotiations with the Minister [of Education]."¹²⁴

The Education Act of 1944 was in many ways a watershed. The

112. *Id.* at 27.

113. *Id.* at 25 (noting that the local miners made up for the grants by collecting to pay the teachers' salaries for almost two years).

114. *Id.* at 27.

115. *Id.*

116. *Id.*

117. *Id.*

118. McLaughlin et al., *supra* note 44, at 5.

119. ARTHUR, *supra* note 21, at 28.

120. *Id.*

121. *Id.* at 29.

122. *Id.*

123. *Id.*

124. *Id.* at 29–30.

Catholics had finally won the battles of the last century for funding. The Act made possible not only a larger network of primary schools but also allowed expansion into secondary education. By 1974, more than 350,000 students were enrolled in Catholic secondary schools.¹²⁵

The 1944 Education Act did much to build a climate of common interest and a strong sense of partnership. It marked a new relationship between the Catholic Church and State by bringing both partners into a single publicly funded national education system. It was the end of passionate intensity after decades of strident opposition. . . . It put an end to a much declared principle expressed by opponents of Church schools that there should be no denominational teaching in schools provided for by public money.¹²⁶

At the same time the Catholics achieved equitable funding, the Catholic population itself changed and no longer lived principally in the inner cities. Descendants of Irish immigrants enjoyed greater social mobility. The parish church was inevitably less a center of “social, recreational and communal” activities.¹²⁷ The bishops still wished to obtain full financing for voluntary schools and had to engage in a public campaign leading up to the election in 1951.¹²⁸ In addition to the problem of getting money to build schools, the church had basic financial problems even running them. The growing urban Roman Catholic population led the Labour, Liberal, and Conservative parties to listen, at least in significant part, to the plight of the voluntary schools, thus removing the issue from the campaign.¹²⁹ The Education Act of 1953 helped with the building of schools in new towns.¹³⁰

Both Anglican and Roman Catholic voluntary schools suffered serious financial pressure during the 1950s. The government saw these financial strains. Roman Catholics during the mid-1950s accounted for some fifteen percent of the births in England and Wales.¹³¹ The Education Act of 1959 provided building grants for new voluntary-aided secondary schools that were necessary to continue the education of children who had come from

125. McLaughlin et al., *supra* note 44, at 5.

126. *Id.*

127. *Id.* at 6.

128. ARTHUR, *supra* note 21, at 31.

129. *See id.* at 31–32 (describing the responses of the political parties to the Catholic lobbying).

130. *Id.* at 32.

131. *Id.* at 92.

voluntary-aided primary schools during the post-war baby boom years.¹³² This program, however, was not expansionary.¹³³ Although voluntary schools desired to achieve both equal treatment with the county schools and financial justice, they were not in a position to bargain. The Roman Catholics felt that the trustees of the voluntary school had to work without a clear recognition of their roles and that there was no recognition of the relationships among LEAs, school governors, parents, and the government. Comprehensive secondary schools accommodating all levels of ability were introduced during the 1960s leading to further changes in school structure. The political parties recognized that schools needed protection from the costs of changing from voluntary to comprehensive, especially since it would take the Roman Catholics an estimated twenty to thirty years to pay off its existing school debt.¹³⁴

In response to these concerns, the Education Act of 1967 provided capital grants of eighty percent to voluntary-aided schools.¹³⁵ Furthermore, the Act raised the age of mandatory school attendance. Building costs doubled between 1964 and 1974, real estate costs of obtaining sites for new schools rose, and interest rates went from eight percent in 1966 to fifteen percent in 1974.¹³⁶ During this time, as the shape of education was changing, “[a] three-tier system of first, middle and comprehensive schools feeding into sixth-form colleges” (analogous to senior year of high school and junior college together) often proved popular with LEAs.¹³⁷ Capital grants had to again be increased (to eighty-five percent) in the Education Act of 1975, but lack of money led to creative experiments among voluntary-aided schools.¹³⁸ In 1968, only fifteen percent of the voluntary-aided Catholic schools were comprehensive. By 1980, eighty-five percent of these schools were comprehensives.

132. *Id.* at 33.

133. *See id.* (“[T]he 1953 and 1959 Education Acts allowed aided schools to maintain their existing numbers, but they did not allow for any expansion.”).

134. *Id.* at 96.

135. *Id.* at 100.

136. *Id.* at 103. The figures show that in the twenty years between 1953 and 1973 the Department of Education and Science granted £112,796,505 to diocesan authorities and made loans of £22,387,871; the dioceses had building liabilities of £70,000,000. Between 1949 and 1988, places in secondary schools had risen steadily from 2.9% of the total to 9.8%. By this time, non-Catholic students began to attend Catholic schools and the annual number of Catholic baptisms fell. *Id.*

137. CHADWICK, *supra* note 61, at 60–61.

138. *Id.* at 61. The increase in the school-leaving age, first from fifteen to sixteen and then beyond, gave schools large financial problems with providing space, teachers, and a curriculum to accommodate the older students. *Id.* Ms. Chadwick writes about the formation and administration of St. Bede’s joint Anglican/Roman Catholic School, Redhill, Surrey. *Id.* at 60–122. The author also notes the joint management of twenty-three first, primary, or middle schools by Methodists and Anglicans. *Id.* at 6.

II. DIFFERENCES BETWEEN ENGLISH AND AMERICAN FUNDING SYSTEMS

In the 1980s, the English Department of Education and Science became interested in curriculum, although voluntary-aided schools had been given legal control over the curriculum under the 1944 Act. The Department wanted to standardize curricula, but the denominational schools believed that the option they offered students was the very reason these students left county schools.¹³⁹ In 1988 and 1993, the government introduced “the market” as a vehicle for implementing parental choice.¹⁴⁰ The existence of the voluntary-aided schools was challenged. What was at best the indifference, or at worst the hostility, of the conservative government ended with the change in 1997 from Conservative to Labour-party control.

The School Standards and Framework Act of 1998 made special provisions for schools with a religious character.¹⁴¹ Schedule 12 of the Act requires the “ethos” of the school to be set out in the Instrument of Government of the school.¹⁴² While section 59 protects teachers from discrimination, section 60 of the Act makes special provisions with regard to the religious opinions of teachers at religious voluntary-aided schools.¹⁴³ Section 71 continues to protect parents who may withdraw their children from both or either religious worship or education.¹⁴⁴ Section 91 of the School Standards and Framework Act of 1998 allows voluntary-aided schools to preserve their religious character by implementing admissions criteria that will select applicants of the appropriate religion; however, the LEA must agree with the criteria.¹⁴⁵ Parents whose children are rejected

139. CHADWICK, *supra* note 61, at 110.

140. ARTHUR, *supra* note 21, at 185, 251–52. According to Mrs. Thatcher, competition would force everyone to be better. “The Conservative Party began to promote actively the entrepreneurial ideal and a preference for selection within and between schools.” *Id.* at 109. Furthermore,

[i]n the 1980s the Conservative Party’s education policy has promoted competition between schools, the autonomy of individual schools, and the promotion of free-market ideas, in order to distribute scarce resources in the field of schooling. All of these policies have been applied in one form or another in Government action or legislation.

Id. at 251–52. See generally PHILIP A. WOODS ET AL., SCHOOL CHOICE AND COMPETITION: MARKETS IN THE PUBLIC INTEREST? (1998) (discussing in detail the market school approach and parental choice).

141. MCEWAN, *supra* note 21, at 19.

142. *Id.* at 19, 53. In general terms, “the life of a Church school [is] to be and to be seen to be Christian in its ethos and values. Science and technology have created a society ‘characterised by depersonalisation and a mass production mentality,’ and Christian schools need above all to retain the focus on the human being as an individual loved by God.” CHADWICK, *supra* note 61, at 57 (citation omitted). Ecumenical Christianity has not aimed at uniformity but “‘diversity in unity.’” *Id.* at 58.

143. MCEWAN, *supra* note 21, at 132.

144. *Id.*

145. *Id.* at 30.

have an appeal procedure.¹⁴⁶ Voluntary-aided schools continue to hold what they owned before the Act and for the most part own their own premises.¹⁴⁷ The Act also strengthens the local management of schools by giving them greater control over their budgets. Under section 45, the LEA which maintains the school must be allocated a “budget share” which the school’s governing body has the right to manage under section 49.¹⁴⁸ The 1998 Act spells out the current financial and administrative relationships between the LEAs and the individual schools.¹⁴⁹

In the United States, *Everson v. Board of Education* federalized the issue of public school finance.¹⁵⁰ Some states had tried to absorb certain educational costs for the parents who had “opted out” of public schools.¹⁵¹ *Everson* involved free bus transportation, which the United States Supreme Court upheld as a public service.¹⁵² *Everson* led to a string of American cases allowing states to subsidize the secular aspects of education in religious schools. Nevertheless, in the United States, it may be assumed that teachers in local public schools would receive a higher salary than teachers in a diocesan school. The progeny of *Everson* prevented states from subsidizing teachers’ salaries in religious schools.¹⁵³

Despite the public perception that voluntary-aided schools in Britain are struggling for money, they have received financial support from the government in a way that religious schools in the United States could not expect. Revenue sources for American Catholic schools include tuition, above all, and to a much lesser extent, “endowments, grants, charitable

146. *Id.*

147. *Id.* at 19.

148. *Id.* at 163–64.

149. *Id.* at 164–72.

150. *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 6, 15 (1947). Since 1947, the United States Supreme Court has rendered many decisions on aid to religious schools. See ARIENS & DESTRO, *supra* note 4, at 503–05 (charting the types of support for students enrolled in religious schools over the past half century the Court has permitted or forbidden); Angela C. Carmella, *Everson and Its Progeny: Separation and Nondiscrimination in Tension*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS*, *supra* note 27, at 103 (explaining some of the contradictions within the opinion in *Everson*, which has led to the complicated, and even contradictory jurisprudence reflected in Ariens and Destro’s chart).

151. *Everson*, 330 U.S. at 3 (explaining that a New Jersey statute allowed public money to be used to reimburse the transportation costs of students attending parochial schools).

152. *Id.* at 3, 6.

153. In *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971), and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985), the Supreme Court struck down state programs allowing public school employees to provide instruction in secular courses in religious schools. In these cases, strict separation was the Court’s tool for interpreting claims for aid to religious schools as impermissible entanglement. Carmella, *supra* note 150, at 110, 119 nn.34–35 (citing additional cases in which the Court applied strict separation).

donations, and public funds for certain services in some states.”¹⁵⁴ Instead of the unity found in English school funding because of the statutes, the nature of American religious school funding varies from state to state and town to town.¹⁵⁵ For example, in Chicago the number of Catholic inner-city elementary schools declined after 1965, and each surviving school “experienced a severe decrease in revenue and substantial reorganization, resulting from changes in local socioeconomic conditions.”¹⁵⁶

Another study, conducted at Great Falls Central High School in Montana, showed that expenditures totaled more than income in 1969, leading to a deficit.¹⁵⁷ The high school suffered a decline in enrollment during the 1960s because of rising costs due to replacing religious teachers with lay teachers, a de-emphasis on parochial education after the Second Vatican Council, and a decrease in the size of Catholic families.¹⁵⁸ Nevertheless, fourteen new Catholic high schools opened between 1985 and 1995; one in the Great Lakes, four each in the Plains and the West, and five in the Southeast.¹⁵⁹ This financial snapshot of American Catholic school funding would be incomplete, however, without mentioning the small proportion of Catholic school revenue that comes from the federal government. This revenue goes directly to public schools and indirectly to private schools for disadvantaged children.¹⁶⁰ Thus, three percent of all the students in the federal program were from religious schools in 1990 to 1991.¹⁶¹ These students received help from the local public school in the form of services in kind, such as computer instruction.¹⁶² The effect of the United States Supreme Court’s holding in *Zelman v. Simmons-Harris*, the voucher case, as Justice David Souter described it in his dissent is that:

154. Barbara M. De Luca, *Catholic School Finance: A Review of Research*, in HANDBOOK OF RESEARCH ON CATHOLIC EDUCATION 229, 230 (Thomas C. Hunt et al. eds., 2001).

155. See *id.* at 247 tbl.11.1 (providing a table that compares how much tuition assistance American Catholic Schools receive by region and by local area).

156. *Id.* at 231, 262.

157. De Luca, *supra* note 154, at 233–34.

158. *Id.* at 233.

159. *Id.* at 238 (noting that the major difficulties in opening these new schools were financial).

160. *Id.* at 234 (citing a study by M.B. HASLAM & D.C. HUMPHREY, U.S. DEP’T. OF EDUC., CHAPTER 1 SERVICES TO RELIGIOUS-SCHOOL STUDENTS (1993)). Chapter 1 is in Title I of the Elementary and Secondary Education Act of 1965. *Id.* The authors of the study found that in some school districts, public and religious schools possessed “a strong commitment . . . to work together to provide services” to children. *Id.* at 235. See generally Daniel Johnson, Comment, *Putting the Cart Before the Horse: Parent Involvement in the Improving America’s Schools Act*, 85 CAL. L. REV. 1757, 1757 (1997) (arguing that the law wrong-headedly involves low-income parents in advising on school policy rather than helping parents to be involved in improving their children’s learning).

161. De Luca, *supra* note 154, at 234–35.

162. *Id.* at 235.

Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.¹⁶³

The picture Justice Souter paints of all religious schools eligible to receive money certainly avoids the original harm in English establishment, the favoring of one religion to the exclusion of all other viewpoints in the attempt to provide social order through uniformity. In this small area of the Cleveland City School District with its 75,000 children,¹⁶⁴ the Pilot Project Scholarship Program makes Cleveland seem not too different from the English system after all. All children attending any religious schools are eligible to receive vouchers, although English religious schools themselves directly receive much greater financial aid than the parents receive in Cleveland.¹⁶⁵

Further, compared with English voluntary-aided schools, the children in American religious schools appear to be at a disadvantage financially in their education since they are not entitled to money from the local property taxes that generally finance American public schools. In *Lemon v. Kurtzman*, two states attempted to aid church-related elementary and secondary schools by reimbursing teachers' salaries, textbooks, and instruction materials in certain secular subjects (Pennsylvania) or by paying nonpublic elementary school teachers a supplement to their annual salary (Rhode Island).¹⁶⁶ These states were prevented from doing so by the United States Supreme Court in an opinion by Chief Justice Warren Burger in the wake of *Everson's* wall of separation.¹⁶⁷

This situation appears to have grown out of historical circumstances in which Americans wanted to avoid favoring one religious group over all others. The English had previously faced a similar situation with an established church from which all other religions and denominations were

163. *Zelman v. Simmons-Harris*, 536 U.S. 639, 687 (2002) (Souter, J., dissenting); see also MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 3–19 (2003) (discussing the constitutionality of government aid to religious schools under the Establishment Clause).

164. *Zelman*, 536 U.S. at 644.

165. See *id.* at 645–46 (noting that the Ohio program pays only 75% or 90% (depending on family income level) of the private school education, with maximum payments of \$1875 or \$2250, respectively).

166. *Lemon*, 403 U.S. at 606–07.

167. *Id.* at 607.

considered dissenters. Public opinion about religious uniformity, however, gradually changed in England between 1689 and 1829. Indeed, opinion was further transformed in the ecumenical age after the Second Vatican Council in the early 1960s and by an increase in the number of English Moslem and Hindu children.¹⁶⁸ Statutes in England later reflected the more tolerant public opinion and, without a written constitution, some of the issues faced today in the United States in religious school financing were already politically resolved. For example, in the Cleveland voucher program, neither Christian nor Moslem schools were aided.¹⁶⁹ Parental choice in Cleveland under the voucher program meant that parents who otherwise could not afford the tuition could enroll their children in a private school. While the United States will not find the same solutions as England, their political compromises to reach fairness in financing are surely instructive for Americans. This is especially true for the political compromises Catholics and other denominations will have to consider if they wish to take advantage of voucher programs and make them acceptable to society at large. Such compromises may possibly include lay input into religious curriculum and salaries equivalent to public school teacher salaries.

One danger that vouchers pose for American religious schools, however, is that with religious schools being in any way established, they will suffer the detriment of being under the thumb of the state.¹⁷⁰ The English experience shows that the government and considerations of efficiency are both firmly in control. Examples of parental dissatisfaction in the U.K. are easily found. One group of parents thought parental school choice was so fundamental an interest that the parents filed suit for a human rights violation when the LEA did not support their children financially at a Rudolf Steiner School.¹⁷¹ The parents argued that because they pay for education with their state and local taxes, they were entitled to education for their children in accordance with their religious and philosophical beliefs.¹⁷² The European Commission and Court of Human Rights acknowledged the

168. See, e.g., HOBSON & EDWARDS, *supra* note 20, at 134–35 (commenting how in 1994 two model religious syllabi were created for religious education based upon six major religions found in Great Britain at the time).

169. See *Zelman*, 536 U.S. at 687 (Souter, J., dissenting) (describing that aid disbursement in the program went to parents based on financial need and not to schools according to religious affiliation).

170. See *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (warning that the mixing of government and religion can be a threat to religion).

171. PAUL MEREDITH, *GOVERNMENT, SCHOOLS AND THE LAW* 28 (1992). For American debates over school choice, see TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* (2001); THOMAS L. GOOD & JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS* (2000); *SCHOOL CHOICE AND SOCIAL CONTROVERSY*, *supra* note 2.

172. MEREDITH, *supra* note 171, at 28.

huge burden states have to provide education. Indeed, the Steiner School had charitable status and was part of the government's assisted places plan.¹⁷³ Although these parents did not prevail, the Human Rights Court did acknowledge that the State demonstrates "respect for the religious and philosophical beliefs of parents."¹⁷⁴

This dispute about the scope of parental school choice yielded to the requirements of administrative efficiency, despite the invocation of human rights. Other cases show the interference of government policy in the running of religious schools even more clearly. At a time when Prime Minister Margaret Thatcher wanted to create "grant-maintained" schools out of voluntary schools, the Archbishop of Westminster, then Cardinal Basil Hume, wished to reorganize eight Roman Catholic secondary schools due to falling enrollment.¹⁷⁵ The governors of a voluntary-aided school, the Cardinal Vaughan Memorial School for boys, did not, however, wish to see the top grades cut out of the school. When Cardinal Hume could not change their minds, he terminated their appointments and replaced them.¹⁷⁶

The court ultimately held that the governors were not removable. The parents who supported the governors voted to opt out of voluntary-aided status in favor of the government's new grant-maintained status, which would effectively have removed the school from the Archbishop's jurisdiction. The education officials, however, could not consider the school's proposal until the diocese nominated twelve initial foundation governors for the school in its newly proposed status. At first, Cardinal Hume simply refused to nominate the governors in order to prevent the school from obtaining grant-maintained status. The chief education official then trumped the Cardinal by threatening to appoint the initial school governors on behalf of the diocese.¹⁷⁷ At that point, the Cardinal had to let the school become grant-maintained.

The parents and the dismissed governors were, of course, not hostile to the Roman Catholic religion and in fact simply did not wish to see a local Catholic school lose grades (sixth form, or in effect senior year of high school). At one level, they played into the government's hands. The fact that the Conservative government was promoting grant-maintained status at the precise time that the diocese was reorganizing its central London

173. *Id.*

174. *Id.*

175. *R. v. Trustee of Roman Catholic Diocese of Westminster*, ex p. Mars 86, L.G.R. 507 (Divisional Ct. 1987), *rev'd as Andrews v. Trustees of the Roman Catholic Diocese of Westminster* [1990] C.O.D. 25.

176. *Id.*

177. MEREDITH, *supra* note 171, at 179.

schools, combined with the fact that this government was not known to be friendly to religion, shows the difficulty that can arise when a religious school accepts state money. At another level, the dispute may simply be analyzed as lay (or parochial) versus diocesan control, but the interest of the state, not necessarily hostile but pursuing its own agenda, cannot be ignored. This case provides a caution for Americans interested in taking advantage of voucher programs for parochial schools.

An even more explicit caution is raised by commentators warning against entangling alliances for the American Catholic Church seeking aid for its schools:

An important recent development has been the alliance between the official leadership of Catholic schools at the United States Catholic Conference (the public policy wing of the National Catholic Conference of Bishops), the National Catholic Educational Association and the Republican Party on the question of public funding of Catholic schools. In addition, Catholic leadership has publicly espoused free-market models of parental choice in schools. These alliances create a serious conflict between Catholic teachings on solidarity with the poor and the radical individualism inherent in most school choice schemes.¹⁷⁸

This “market-based separationism” argues “that the government can subsidize some or all consumers in a market, without violating the Establishment Clause.”¹⁷⁹ The necessity of choice requires the subsidy to be “formally neutral with regard to religious and non-religious options” and to “be defined in strictly secular terms.”¹⁸⁰ Various fairness and moral arguments argue for assisting parents financially in educating their children at non-public schools,¹⁸¹ but, constitutional questions of establishment aside, fidelity to mission and other principles must not be sacrificed in the process or the moral ground on which these parents plead will be lost.

178. McLaughlin, *supra* note 44, at 11–12 (citations omitted).

179. Salamanca, *supra* note 8, at 934.

180. *Id.* The position has developed that “several of the animating purposes behind the Speech, Press, and Exercise Clauses of the First Amendment support the constitutionality of educational and charitable choice plans.” *Id.* at 932. Discussing *Zelman*, Salamanca assumes that these clauses “are designed to facilitate study, reflection, individual development, and the interchange of ideas.” *Id.* at 933.

181. For warnings about the dangers accompanying vouchers from a Madisonian perspective, see Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 CORNELL L. REV. 783 (2002).

State constitutional establishment clauses have posed some obstacles to funding religious school tuition from publicly financed vouchers.¹⁸² In the college setting, the Washington State Constitution has given rise to litigation in the United States Supreme Court. A quarter of a century ago, the blind Larry Witters applied for vocational rehabilitation funds to study for the ministry at a Bible college.¹⁸³ Unfortunately, the Washington State Commission for the Blind denied his application on state constitutional grounds.¹⁸⁴ The Washington Supreme Court used only federal grounds to affirm the Commission, thus giving rise to consideration in the United States Supreme Court.¹⁸⁵ Since the applicant was choosing how to use the funds, the Establishment Clause did not prevent the State from granting Witters's application.¹⁸⁶ Justice Powell went further by using a then-recent case to suggest that the Washington Supreme Court reached the wrong outcome.¹⁸⁷ On remand, the court held that Witters's use of the funds for religious purposes tainted his application because the use of public funds to pay for religious instruction is forbidden under the Washington State Constitution.¹⁸⁸

It is not surprising that another more recent Washington State scholarship program also excluded study for the ministry, even though the recipient chose to pursue that study, thereby interposing himself between the state and the religious institution.¹⁸⁹ Joshua Davey, the student whose

182. Linda Greenhouse, *Court Says States Need Not Finance Divinity Studies*, N.Y. TIMES, Feb. 26, 2004, at A1. Washington, New York, New Jersey, Michigan, and eight other states have scholarship programs which exclude religious training. The program in Michigan is currently the subject of a suit in federal court and school choice programs in Florida and Colorado were struck down in state courts. *Id.*

183. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 483 (1986).

184. *Id.* at 483–84.

185. *Id.* at 484.

186. *Id.* at 489.

187. *Id.* at 490 (Powell, J., concurring) (citing *Mueller v. Allen*, 463 U.S. 388, 401 (1983), which took essentially the same position as *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908), and *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 374–75 (1930), focusing either on the source of the funds or the use of the funds by the beneficiary rather than the religious setting in which the funds are expended). In the 1940's, John Dewey warned against a federal proposal similar to Louisiana's to aid parochial schools as encouraging "'a powerful reactionary world organization in the most vital realm of democratic life with the resulting promulgation of principles inimical to democracy.'" McGreevy, *supra* note 5, at 120 (quoting JOHN DEWEY, *THE LATER WORKS 1925–1953*, 284–85 (Jo Ann Boydston ed., 1953)). Dewey feared that aid to parochial schools would undo advances against "'centuries of systematic stultification of the human mind and human personality.'" *Id.*

188. *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121 (Wash. 1989).

189. *Locke v. Davey*, 124 S. Ct. 1307, 1309–11 (2004). In a ruling similar to *Locke v. Davey*, the Florida District Court of Appeal held that school tuition vouchers violate Article I, section 3 (1868) of the Florida Constitution. *Bush v. Holmes*, 886 So. 2d 340, 364–65 (Fla. Dist. Ct. App. 2004) (reh'g en banc). The court distinguished *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), because the Wisconsin Constitution did not have the provision prohibiting indirect aid. *Id.* at 361. Certification to the Florida Supreme Court and remand did not change the ultimate outcome.

application was denied, sued on free exercise grounds under the United States Constitution.¹⁹⁰ Davey argued that the Free Exercise Clause required the state, which finances secular education, also to finance religious education.¹⁹¹ Although vouchers are permissible under the First Amendment, the Court refused to say that the Free Exercise Clause controlled the issue in this case because the State was trying to avoid establishing religion under the more rigid Washington State Constitution.¹⁹² This case illustrates that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”¹⁹³ The Free Exercise Clause and the Equal Protection Clause of the Fourteenth Amendment were not strong enough to overcome considerations of establishment.¹⁹⁴ The Ninth Circuit’s recognition that the State had singled out religion for unfavorable treatment fell in the United States Supreme Court before the specter of establishment.¹⁹⁵ More than half a century ago it was recognized that public opinion about what is right in school-funding cases has a lot to do with constitutional status and judicial enforcement.¹⁹⁶ The fact that *Davey* was decided under the Washington State Constitution may narrow its influence. Nevertheless, the human rights claims of individual conscience and free exercise gave way in the balance to avoidance of establishment.

190. *Locke*, 124 S. Ct. at 1311. In their briefs, *amici curiae* brought up the bigotry of the state constitutional amendments (known as “baby Blaine amendments”) dealing with establishment of religion. *Id.* at 1314 n.7. The Blaine Amendment in the Washington State Constitution is reflected in Article I, section 11 and Article IX, section 4. WASH. REV. CODE CONST. art. I, § 11 (1889); WASH. REV. CODE CONST. art. IX, § 4 (1889). Davey did not, however, dispute Washington State’s characterization of the provision (Article I, section 11) involved here as not a Blaine Amendment. *Locke*, 124 S. Ct. at 1314 n.7. Despite the parties’ agreement, both Articles are historically part of the 1889 constitution incorporating the stance of the Blaine Amendment. *Id.* For a more complete treatment of these clauses in the Washington State Constitution and their relationship to earlier similar provisions against establishment, see Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988).

191. *See Locke*, 124 S. Ct. at 1311 (stating that Davey filed suit “to enjoin the State from refusing to award the scholarship solely because a student is pursuing a devotional theology degree”).

192. *Id.* at 1312.

193. *Id.* at 1311.

194. *See id.* at 1315 (holding the scholarship program constitutional under the Free Exercise and Equal Protection Clauses, due to the State’s interest in following the Establishment Clause).

195. *Davey v. Locke*, 299 F.3d 748, 760 (9th Cir. 2002).

196. *Catholic Schools and Private Money*, *supra* note 20, at 925.

Should present constitutional provisions barring public funds to Catholic schools be generally repealed, the courts would still be in a position to invalidate appropriations for them on this ground. A judicial disinclination to do so, however, is likely to be present when public opinion has been sufficiently strong to remove express restrictions.

Id.

Individual financial justice for the parents and regard for the mission of the schools argue in favor of making vouchers more accessible.¹⁹⁷ As these questions about vouchers are worked out in the states, old arguments may once again prove relevant. Roman Catholic bishops and priests, recognizing the pressure to widen public school availability just before and after the Second World War, “understood that the property tax increases necessary to fund building programs for the public schools would place even more financial pressure on Catholic parents asked to subsidize parochial schools. The direction of Catholic arguments shifted [to aid to the children rather than the schools themselves].”¹⁹⁸ At that time, assessments of arguments for and against financial support for religiously affiliated schools recognized the substantiality of the case for financial support: “Catholic expenditures for education save millions of dollars annually for the public purse. The Federal Constitution may guarantee freedom of religion from government control, but the Catholic must pay an enormous bounty to protect his children from the secular influence of the public school.”¹⁹⁹

197. Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 187, 216–17 (2003). It is no surprise to see the frustration exhibited due to lack of full recognition of free exercise:

Socialism—in the sense of state monopoly—is an unpopular doctrine in the United States, but our opinion-molders are devout state monopolists when it comes to education. We should not be surprised that American public education is a failing enterprise, for it is managed like Soviet agriculture in the period of stagnation. State monopoly is the rule and the ideal; private choice is the grudgingly tolerated exception.

The apparatchiks of education justify their monopoly power just as their Soviet counterparts used to do, by telling us that choice and competition will lead to inequality and exploitation. Some students will learn too much; others will lag behind.

Johnson, *supra* note 20, at 51–52.

198. McGreevy, *supra* note 5, at 121. The opposition to the Catholics’ position “suggested a desire to create a common culture in the midst of totalitarian foes, as well as a conviction that hierarchical religious institutions undermined the individual autonomy necessary for a healthy commonweal.” *Id.* at 130.

199. *Catholic Schools and Public Money*, *supra* note 20, at 926; see also GABEL, *supra* note 20, at 760–61 (discussing state tax laws and tax exemptions).

‘The Catholic argument is that, since the state passes laws compelling all children to go to school, it is the duty of the state to provide schools that accord with the dictates of the parents’ conscience. The public school maintains neutrality with regard to religion and creed. This in itself amounts to government taking a theological position, because it implies that religion and the creed one professes have no real or vital connection with everyday life, and that religion does not matter in the same degree as does arithmetic, geography, or natural science. The philosophy of secular education is not merely negatively but positively religious. Consequently, it stands in contradiction to Catholic principles of education.’

Catholic Schools and Public Money, *supra* note 20, at 923 n.37 (quoting George Johnson, *The Catholic*

Nevertheless, the Court decided *Everson* shortly after the war in 1947 and constitutionally diverted the country from facing these questions politically. *Everson* required the exclusion of religion from public schools as a constitutional prohibition.²⁰⁰ Establishment Clause jurisprudence focuses on separation of church and state and excludes religion from participation in the activity under discussion, such as to which majors a college student may allocate his scholarship money (*Davey*).²⁰¹ Neutrality, or non-discrimination, permits inclusion of religion.²⁰² After the separation of *Everson* proved too prohibitive, the Supreme Court turned to non-discrimination.²⁰³ The choices today are to exclude religion, which is permissive rather than mandatory under *Davey*, or to include religion, as *Zelman* permits. *Zelman* has returned these cases to a political solution. Judicial permission to include religion means that the Constitution no longer requires exclusion of religion under the Establishment Clause, as *Everson* mandated. We are no longer haunted by establishment in school funding cases before the United States Supreme Court and are no longer under the separation of *Everson*.

Further financing inequalities became apparent in the years following *Everson*. Today, the structure of public school financing through property taxes renders the amount allocated to each school district inequitable. Poor children live in school districts which get less money when they need more resources to put them on an equal footing.²⁰⁴ Vouchers may one day begin to redress that inequality in a small way. Indeed,

only today has the majority begun to notice the inequities involved in deriving school funds by means of property taxes—something that leads to unfair expenditure for rich and poor. . . . The injustice of channeling public funds only to government schools, however, has still not been redressed

Schools in America, 165 ATLANTIC MONTHLY 504 (1940)).

200. Carmella, *supra* note 150, at 103.

201. *Id.*

202. *See id.* (stating that the Court has used concepts of neutrality to place religious expression on equal grounds with secular expression).

203. From *Widmar v. Vincent*, 454 U.S. 263 (1981), to *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), the Supreme Court has used several devices to move away from separation, including free speech, equality of treatment, neutrality between religion and other activities, to ensure non-discrimination in access to, and distribution of, government funds. *Id.* at 103, 110–14.

204. Furthermore, the deductibility of local taxes gives “tuition tax credits” to those who live in “high income public school districts to the detriment of central city public and voluntary schools.” THOMAS VITULLO-MARTIN & BRUCE COOPER, SEPARATION OF CHURCH AND CHILD: THE CONSTITUTION AND FEDERAL AID TO RELIGIOUS SCHOOLS 125 (1987).

because majority opinion and Court rulings have thus far largely supported the nineteenth-century establishment.²⁰⁵

Meanwhile, school children, particularly in American inner-cities, have faced “drugs, violence, crime and low achievement.”²⁰⁶ It has been argued that “the willingness of the Roman Catholic community in the United States to support inner-city non-public schools for the poor (and non-Catholic) students establishes their commonweal function and justifies their receiving some public financing and support.”²⁰⁷ Nevertheless, due to lack of funding, Catholic schools in the inner cities faced a steady attrition of around two or three percent during the 1980s.²⁰⁸ One study, begun in 1983, found an attrition rate of ten percent by 1991.²⁰⁹

The central principle which makes a school Roman Catholic is summarized in its mission. “The specific mission of the school is a critical, systematic transmission of culture in the light of faith and the bringing forth of the power of Christian values by the integration of culture with faith and of faith with living.”²¹⁰ The mission of religious schools in inner cities, to contribute to the public good (the public interest in secular terms), under the concept of free exercise has been stated in the following terms:

The Catholic school’s emphasis on an academic curriculum for all . . . involves nurturing both mind and spirit, with equal concern for what students know and for whether they develop the disposition to use their intellectual capacities to effect a greater measure of social justice. This is the Catholic conception of an

205. Skillen, *supra* note 1, at 71.

206. Cooper, *supra* note 20, at 42.

207. *Id.* at 42–43. See generally ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD (1993) (describing ways in which Catholic schools have contributed to their communities and the public financing benefits that should be derived from these efforts); JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES (1987) (same).

208. Cooper, *supra* note 20, at 47.

209. BRYK ET AL., *supra* note 207, at 337.

Because these numbers include the recent opening of new Catholic schools in suburban areas (to which middle-class Catholics migrated in large numbers in the 1960s and 1970s), the actual loss of institutions in urban neighborhoods is even more severe. Despite often heroic efforts by individual Catholic religious and laypeople, inner-city Catholic schools are closing at an alarming rate. This trend, first noticed in the late 1960s, shows no sign of abating.

Id. “[I]nner-city Catholic schools closed at a rate of two to five times higher than did other Catholic schools during the period from 1967 to 1973.” *Id.* at 380 n.1.

210. CHADWICK, *supra* note 61, at 50 (quoting SACRED CONGREGATION FOR CATHOLIC EDUC., THE CATHOLIC SCHOOL ¶ 49 (1977)).

education of value for human development and democratic citizenship.²¹¹

This role of the inner-city parochial schools has been described as demonstrating “strong values, clear mission, strong commitment, narrow but academically demanding curriculum, less tracking and separation, and high expectations for all.”²¹² The role of the parochial schools remains crucial “in the cities, where poor families suffered economic privation and had few educational options. The more Catholic schools accepted the challenge of educating the urban poor, and the more ‘public’ their function became, the more they needed government help to offset the costs.”²¹³

Several questions about vouchers raised at the outset of this article revolve around their political acceptability to the wider community. “Teachers are an important part of the choice movement. Whether school choices have a deep attraction to teachers will influence both the magnitude of the movement and the union’s response.”²¹⁴ For example, Catholic (and other denominational schools) have been perceived as “socially divisive” and “elitist.”²¹⁵ Although these fears were expressed earlier in the twentieth century as well, history has shown that the immigrants educated in parochial schools were integrated into American society as much as immigrants educated in public schools.²¹⁶ With the closings of Catholic schools in urban neighborhoods, the charge of elitism looks credible at first blush. Furthermore, the charge of elitism includes “seeking out students who are easier to educate and leaving the remainder to the public sector.”²¹⁷

211. BRYK ET AL., *supra* note 207, at 302.

212. Cooper, *supra* note 20, at 46.

213. *Id.* at 45. Cooper emphasizes “the moral dimension” of improving education in the inner city and “the remarkable contribution of religious schools (particularly schools run by Roman Catholic, Lutheran and Seventh-day Adventist communities) to the education of the poor.” *Id.* “Justice is a central mandate” of the Roman Catholic faith which “enables people to ‘see’ and respond to the poor and oppressed of society, and to imagine how to change unjust social structures and oppressive cultural mores. Justice is taught as the school *community* embodies ‘right relationship,’ and educates students in their responsibility to the ‘common good.’” Thomas H. Groome, *What Makes a School Catholic?*, in *THE CONTEMPORARY CATHOLIC SCHOOL*, *supra* note 20, at 107, 122–23.

214. Buss, *supra* note 2, at 325–26.

215. BRYK ET AL., *supra* note 207, at 339–40.

216. *Id.* at 339–40; *see also* LANGDON GILKEY, *CATHOLICISM CONFRONTS MODERNITY: A PROTESTANT VIEW 4–5* (1975) (explaining how Catholicism has been affected by changes in the secular institutions of modern society).

217. BRYK ET AL., *supra* note 207, at 339–40.

Ironically, Catholic schools that were attacked for most of their history as promoting social separatism, are now seen by many as the best hope for poor children to achieve the opportunity for economic and personal integration into the larger society. The contemporary school choice movement, increasingly supported by poor and minority parents, is an act of faith that non-public schools,

However, people have sought vouchers as one approach to prevent further school closings in poor neighborhoods as well as to permit greater accessibility to these schools for Roman Catholics and non-Catholics alike. “In schools with large proportions of low-income students, the social justice mission of Vatican II is tangibly manifested in the daily work of faculty and staff—caring for and educating some of the least advantaged in the society.”²¹⁸

We may turn briefly for comparison to the public schools in the period following the Supreme Court Establishment Clause decisions. These decisions banned the non-sectarian Protestant system of religious education paid for by taxes, that was founded in various states during the nineteenth century. In the forum of conscience, everyone has the freedom to believe or not to believe in God. The belief that God does not exist is as much a religion as theistic beliefs, although atheistic belief by its nature is not manifested in temples, churches, or meeting houses. The same misconception may be said of education in the public schools: beliefs, values, and sentiments are transmitted in the public schools. While these beliefs, values, and sentiments are secular and no longer Protestant, they nevertheless are transmitted although they do not constitute or reflect an organized religion. The absence of God in public education conveys that God’s role in education is only private. Yet reading, writing, mathematics, science, and languages may all be found in the public schools, albeit with greatly diverging standards of excellence in instruction. The failure to include non-secular schools within the system of publicly funded education (until the Supreme Court in *Zelman* held that vouchers do not violate the Establishment Clause) has impoverished this education by leaving out considerations of equity, “the preservation of disappearing educational options,”²¹⁹ and responsiveness to parental choice. Other doubts about current public schools, such as the quality of instruction or the charge that “large city school bureaucracies act like monopolies” unresponsive to children and parents’ concerns, only enhance the desire to include alternatives within the government-funded system of schools.²²⁰

including Catholic schools as a leading example, can be the vehicle by which these parents achieve justice for their children.

Richard Ognibene, *Social Justice, Catholic Schools, and Teacher Education*, in KNOWLEDGE AND WISDOM 50, 52 (Seton Hall University 1998).

218. BRYK ET AL., *supra* note 207, at 340. In the Catholic schools, the educational philosophy focuses on “person-in-community and [the] ethical stance of shaping the human conscience toward personal responsibility and social engagement. . . . This is not a narrow, divisive, or sectarian education but, rather, an education for democratic life in a postmodern society.” *Id.* at 341.

219. *Id.* at 342.

220. *Id.* at 342, 380 n.6. The characteristics identified as primarily responsible for the success of

CONCLUSION: VOUCHERS AT THE CROSSROADS OF CONSTITUTIONALLY PERMITTED PRIVATE SCHOOL FUNDING

The history of English education law and funding is relevant to the current crisis in American education. The American Establishment Clause was put into the Bill of Rights in order to protect against the types of establishment and lack of free exercise of religion that occurred during the course of English history.²²¹ The Establishment Clause must remain central in the jurisprudence of religious liberty in the twenty-first century. However, it need not prevent justice from being achieved by obscuring the contribution of the principle of free exercise of religion. To that end, the nineteenth and twentieth-century English experience shows us a different pathway to solving the funding problems of American religious schools. This experience resulted in all parents in England and Wales enjoying equal treatment in their choice of a school. Under our First Amendment, *Zelman* allowed American parents to choose a religious school through vouchers without violating the Establishment Clause.²²²

By statutorily permitting numbers of every type of religion or philosophy to seek funding for a religious school, England today has grown even further away from establishment problems than the United States has. On the other hand, the persistence of American Establishment Clause concerns is indicated by *Locke v. Davey*. Vouchers permit parents to take one step on the road to achieving the potential of the Free Exercise Clause by financing parental choice of a school for poor families without violating the Establishment Clause. The United States has yet to arrive at the road to actualizing full human rights in the area of religion. The Free Exercise Clause must still give way to a perceived danger of establishment, loosely redefined in the nineteenth century as funding an activity connected with religion.²²³ Furthermore, several state constitutions consistently remain

Catholic secondary schools include a narrow, focused curriculum, “communally organized schools operating within decentralized educational systems,” and a shared commitment to achieving social justice. Ognibene, *supra* note 217, at 50. See generally Franklin I. Gamwell, *Religion and Reason in American Politics*, in RELIGION AND AMERICAN PUBLIC LIFE 88 (Robin W. Lovin ed., 1986).

221. Everyone in England was required by statute to attend religious services in the denomination established by the government. Act of Uniformity, 1559, 1 Eliz., c. 2 (Eng.).

222. In order to pass constitutional muster, American vouchers have focused on the individual need of parents. These vouchers are much messier, costlier, and more complicated for parents and schools alike than direct funding of these schools would prove. Each parent must deal with funding by applying for and transmitting the voucher funds to the schools. The English system of financing schools exhibits a fuller realization of this freedom now, but this is probably not yet possible after *Locke v. Davey* and *Bush v. Holmes*.

223. Douglas Laycock stated:

Religious liberty is popular in the abstract, but unpopular in its concrete

overly concerned with avoiding establishment instead of protecting freedom of conscience, individuals, or the human right of parental choice in schooling. Moreover, since we are in an age of strapped state budgets, states are not encouraged to spend more money on education.

The conclusion in *Davey* that free exercise takes a back seat to establishment demonstrates that the United States has yet to value free exercise fully.²²⁴ The ancient, but uneasy, balance in favor of establishment (reflected in *Everson*) has not yet allowed the United States to recognize sufficiently the important components of free exercise such as individual conscience and the human right of parental choice.²²⁵ In effect, the importance of freedom of conscience and human rights must be enhanced in public opinion before the imbalance between fears of establishment and the secondary recognition of free exercise is redressed.²²⁶ That involves publicizing the importance and contributions to society of free exercise.²²⁷ Distributive justice will, therefore, eventually be found, if it is sought in the states in political (legislative) terms, the common law, or the state constitutions. The subordination of the principles of separation and non-discrimination to the primary goal of religious liberty will permit the United

applications. A secular society is far too quick to decide that its interests in uniform application of the law override the needs of religious minorities, or even of the religious mainstream. . . . One function of judicial review is to protect religious exercise against such hostile or indifferent consequences of the political process. The Court has abandoned that function, at least in substantial part, and perhaps entirely.

Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 68 (1990).

224. See Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 489 (1991) (stating that the free exercise clause is "narrowly construed to avoid conflict" with the establishment clause). See generally Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 534 (1994) (commenting on how free exercise jurisprudence before *Employment Division v. Smith* was "an effort to . . . practice the quality of tolerance"). Angela C. Carmella stated:

Because the Establishment Clause has been given such a rigid reading and the Free Exercise Clause such a limited one, these tendencies have precluded a fuller reading of the religious freedom guarantee built into the text of the First Amendment. Thus, the Court has no jurisprudential capacity to see that "a crucial aspect of religious freedom remains unavailable to those families that are not wealthy enough to afford private education after paying their local property taxes to support public schools."

Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191, 1201 (1998).

225. See Carmella, *supra* note 150, at 117 (noting that "[w]hen religion's uniqueness has been denied" under the Establishment Clause, free exercise protection has suffered).

226. See *id.* (noting that any effort to reform the Establishment Clause must begin with an acknowledgment of "the multifaceted nature of religion").

227. See *id.* at 115–16 (noting the academic commentary and hearings that resulted from the proposed Religious Equality Amendment, which aimed to secure rights under the Free Exercise Clause).

States to focus on the establishment and free exercise clauses themselves.²²⁸ We have already begun to see this in the states after *Zelman*.

Furthermore, the perils of the governmental strings attached to vouchers may threaten the independence of the schools that recipients choose.²²⁹ Teachers' unions will seek to make schools which receive vouchers more competitive in salaries and lay input. Public schools will also face changes, no matter how few students accept vouchers. State establishment concerns reflected in *Davey* express misgivings about the role of religion in American life. Greater articulation of these fears, and reassurances worked out by both sides, will lead to required social changes. These changes will allow society to get from *Zelman*'s enablement of vouchers to the realization of greater free exercise in parental choice and aid to parochial schools of all stripes. The English enacted the establishment of religion during the sixteenth century when all citizens were required to attend the religious services provided by the Church of England. That established Church remains the Church of the English Head of State. If, after the anguish of establishment, the English have provided statutorily for government funding for all types of religious schools, surely we can demonstrate the political will to achieve the same just result through vouchers and other means. Despite the many dangers and challenges, fundamental justice ultimately requires equality of financial treatment among all kinds of schools—evangelical, Catholic, Muslim, Jewish, and non-religious—serving all kinds of students.

228. *Id.* at 117.

[R]eligious liberty must be retrieved as the primary goal of both the establishment and free exercise clauses because religion is *always* unique, *always* a phenomenon sui generis. Separation and nondiscrimination, as well as other concepts, such as accommodation, are merely means to that greater end. It is therefore necessary to focus primarily on protecting the integrity and vitality of religious expression and exercise, for only religious liberty, not separation or parity, is the goal of the religion clauses.

Id.

229.

Separationists would argue that separation has advanced, not subverted, religious freedom. In fact, at the heart of Justice Brennan's opinion in *Aguilar* [*v. Felton*, 473 U.S. 402 (1985)] is a concern for the ability of the parochial schools to undertake their mission as they saw fit, unimpeded by the government monitoring that would necessarily accompany the government's aid.

Carmella, *supra* note 224, at 1202. Without the government's aid, however, it remains difficult to accomplish the school's mission at all. During the twelve years *Aguilar* was in effect (1985–1997), "New York City alone spent over \$100 million on vans (neutral sites for public school teachers and parochial school students to meet)," which were used so that public school teachers would not have to enter parochial schools. *Id.*