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Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?

Michael W. McConnell†

What kind of education is needed to form citizens in this kind of republic? By “this kind of republic,” I mean a nation with liberal democratic principles and a broad diversity of cultures, religions and moralities, racial and ethnic groups, beliefs, tastes, and needs. One answer to the question goes under the banner of “multicultural education”—an education that recognizes the cultures of the diverse peoples of America rather than focusing solely on the core culture of the mainstream. Another answer, based on the ideal of a “common education,” seeks to bridge our differences and promote a common core of values important to American citizenship. In this paper, I intend to show that under the rubric of “multiculturalism” there exist two diametrically opposed philosophies of education; that one of them does not deserve the name “multiculturalism” because it is essentially the substitution of a new moral-cultural norm in place of the traditional one; that the other has considerable merit and at the same time poses great risks; and that the debate over multicultural education bears strong resemblance to, and would profit by comparison with, the debate over disestablishment of religion in the American states in the early days of the Republic. The education best suited to the American republic, like the religion best suited to the American republic, is based on the principle of diversity and choice.

I. THE TWO VERSIONS OF MULTICULTURALISM

To know what kind of education we should have we need to know what kind of citizens we are educating. Are we educating citizens with a common understanding of the public good, based on a common curriculum and a common education? Or are we educating citizens with primary commitments to their particular cultural, political, ethnic, and religious understandings of the good?

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One version of “multiculturalism” is essentially a call for reform of the common curriculum. Proponents urge introduction into the curriculum of materials from the perspectives of groups outside the mainstream of traditional Western culture, particularly Third World writers, feminists, gays and lesbians, persons of color, the poor and dispossessed, and the radical left. The other version of “multiculturalism” is a call for abandonment of a common curriculum. Students from different cultures and backgrounds should be given different educations, allowing the diverse groups of America to pass on their cultures and traditions to succeeding generations and to avoid assimilation into the common culture of mainstream America.

Both versions of multiculturalism are critical of the common curriculum of the past, which they see as narrow and parochial at best, if not Eurocentric, male-dominated, and repressive. But the first wishes to substitute its own common curriculum, while the second wishes to institute different curricula for different students. The first wishes to form citizens in a particular way, according to a particular ideal of what a citizen should be like. The second wishes to form citizens in different ways, according to the different ideals that are found in the different cultures of America.

The first version is not truly multiculturalism at all. It is an attempt to substitute an alternative culture—an adversary culture—in place of the mainstream traditional culture. The reason this version is so influential among educators is that the children of the adversary culture of the 1960s are now in power in educational institutions and they, like power elites before them, intend to use the instrument of education to promote their understanding of the public good. There is nothing inherently wrong with using education in this manner, but they should not be allowed to prevail on the false claim that the culture they present is more diverse, open, pluralistic, or multicultural. It is just as prone to narrowness and intolerance as anything that has come before.¹ A simple test of this proposition is to ask: how often do the advocates of this form of “multiculturalism” speak up for inclusion of perspectives at odds with their own?

The educational program of the adversary culture should be evaluated according to two criteria. First, are the aspects of culture they seek to introduce superior to those they would displace? It is

¹ I do not speak here of the professedly non-controversial version of multiculturalism advocated by Robert Fullinwider elsewhere in this volume. See Robert K. Fullinwider, Multicultural Education, 1991 U Chi Legal F 75.
possible, indeed likely, that some items in the accepted “canon” are less worthy than works from less familiar sources. It may well be that parochialism and prejudice played a part in past selections, and that the curriculum could be improved by a more self-consciously inclusive commitment to excellence. Even so, important works by white male writers should not be replaced by works of non-whites and women simply because of those characteristics.

Second, are the aspects of culture they seek to introduce more broadening than those they would replace? Excellence is not the only standard for education; it is important, as well, to broaden the minds of the students by introducing ideas and perspectives that challenge the students’ own predilections. The program of those who call themselves multiculturalists may on occasion serve this end; but in many instances it seems more likely that they will reinforce the political orthodoxies that are already dominant among college students, at the expense of other perspectives (for example, the perspectives of classical or biblical antiquity) that are genuinely challenging and unfamiliar. Does anyone really think that Toni Morrison’s *Beloved* presents a greater challenge to the zeitgeist than, say, Augustine’s *City of God*?

It may also be asked, especially at the elementary and secondary level, by what right the new educational elite seeks to impose its cultural and ideological preferences on the children of society as a whole. If there is to be a common curriculum, isn’t it more fair and more democratic for that curriculum to reflect the preferences of the mainstream rather than the adversary preferences of a well-positioned fringe?

In any event, disputes of this sort proceed within the tradition of a common curriculum. Whichever side is correct (and perhaps the truth lies somewhere in between) the outcome will not be multicultural in any serious sense. Teachers have neither the time nor the expertise to impart serious knowledge about the multitudes of cultures extant in America. Choices must be made, and the result, by definition, cannot be neutral toward all.

The more radical challenge to the status quo—the true multicultural challenge—comes from those who deny the very desirability of a common curriculum and advocate a pluralistic system of schools dedicated to particular, and particularistic, traditions, some of which will foster cultures and moral norms at variance from those in the wider society (whether mainstream or adversary). The most dramatic example is the demand in some quarters for an “Afrocentric” education that would emphasize the culture
and values of African-Americans, such as has been initiated in Milwaukee, New York, Seattle, and other cities.\(^2\)

This version of multiculturalism could be accomplished fairly and pragmatically by a comprehensive system of educational choice—a system commonly known as "vouchers," in which parents would be free to choose among available accredited schools, instead of being limited to the schools provided by the elected school board. Each student would be entitled to his or her per-pupil share of educational funds (adjusted for educational need and other factors). Instead of making educational decisions collectively by an elected school board, we would allow diversity and choice, within appropriate limits set by accreditation standards.\(^3\)

Under such a system, the distinction between "public" and "private" schools would collapse.\(^4\) Schools would become like grocery stores under a comprehensive system of Food Stamps: privately operated, privately chosen, and (in large part) publicly funded.

The two essential features of educational choice plans are (1) schools must have the autonomy necessary to create distinctive curricula; and (2) parents and their children must be free to choose among the schools, carrying their per-pupil allotment of tax-gener-

\(^1\) See, for example, Dirk Johnson, *Milwaukee Creating 2 Schools for Black Boys*, NY Times 1 (Sept 30, 1990); Terry Tang, *The African American Academy—Separatism For Success—An Afrocentric Focus in a New Seattle Pilot Program*, Seattle Times A21 (Mar 17, 1991). Schools with other varieties of ethnic focus have also been started. Seattle, for example, has Native American, Gypsy, and Hispanic schools as well as Afrocentric schools. Id.

\(^2\) In such a system, accreditation standards are needed to ensure that the schools are bona fide educational institutions, but they must not be so prescriptive as to frustrate educational choice. In my opinion, the best plan would be to use standardized testing to ensure that schools are producing positive results, rather than to institute particular requirements regarding curricular materials, staff, or educational plant, other than those pertaining to health and safety.

\(^3\) Some jurisdictions, like Minnesota, have instituted educational choice plans solely within the public school system. Limiting choice to the public schools, however, undermines the multicultural effect by excluding truly distinctive schools, especially religious schools, and institutes in effect a political veto on educational diversity. It is difficult to understand either the justice of or the pedagogical justification for this discrimination.

Some have suggested that private schools should not participate because they do not have the obligation to serve all students, and might discriminate on invidious grounds. But these concerns are not a sufficient basis for a categorical exclusion. First, rather than exclude all private schools, it would be better to exclude only those that do not comply with an appropriate nondiscrimination requirement. Second, a sensible system would not require all schools to serve all types of student; one of the practical advantages of the program is to allow specialization. The problem of hard-to-educate children is better solved by the market solution of differential per-pupil allotments than by command-and-control regulation. Finally, to the extent that the argument against inclusion of private schools rests on the fear that aid to religious schools would be unconstitutional, these fears are probably groundless under current and emerging precedent. See pages 139-49, below.
ated financial support with them. (Of course, laws prohibiting racial discrimination in private education would continue to apply.8) An ideal system would adjust the per-pupil allotment upward for hard-to-educate children (those with handicaps or other special needs, those from disadvantaged backgrounds, and so forth), to create an incentive for schools to develop programs to meet their needs. These adjustments could facilitate social and racial integration,6 while the system as a whole would foster efficient specialization.

Under such a system, the large majority would probably choose some version of education within the majoritarian culture. The primary effect (other than a salutary spur of competition, which automatically comes from consumer sovereignty) would be the emergence of schools specializing in particular areas: math and science academies, language academies, traditional “three Rs” schools, schools with strong programs in art and drama, schools with special pedagogical philosophies (like Montessori schools), and the like. But if current trends are any indication, a significant minority will choose to educate their children within a different culture. There will be more religious schools, and among these, the cost salient will be from religious traditions at odds with mainstream American culture (fundamentalist and evangelical schools, Catholic schools, Islamic schools, Orthodox and Conservative Jewish schools, Mormon schools, Hindu schools). There will be more schools from an identifiable ideological perspective (feminist schools, progressive schools). And there will be more ethnic or racial schools, including Hispanic schools, some Asian schools, and (as the experience in Milwaukee shows), Afrocentric schools.

Adoption of a genuine multiculturalism, however, would pose great risks. There is a danger that, when freed from the cultural and moral norms of the wider society, subgroups might develop curricula that are morally repugnant or substantively inferior. Television advertisements opposing the educational choice recently re-

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6 It might be argued that, to prevent socio-economic stratification, parents should be forbidden to supplement the governmental subvention with private tuition. Such restrictions should be resisted, however, both because, in my opinion, it is the parents’ right (and moral obligation) to do what they can to improve their children’s education, however they can, and also because it is socially useful for private individuals to devote more resources to education, which produces substantial benefits to society as a whole. If socio-economic stratification turns out to be a problem, a better solution would be to require each school to accept a certain percentage of its student body (50 percent?) without supplemental tuition.
jected by voters in Oregon\textsuperscript{7} for example, effectively (although misleadingly) featured classrooms in which students and teachers huddled in Ku Klux Klan robes. The message was that with educational choice, some would make evil choices.

Commentators have called Milwaukee's special schools for black males "nothing less than an experiment in racism and sexism."\textsuperscript{8} A group of eminent historians charged that the attempt in New York to make the history curriculum more "inclusive" would undermine and politicize the teaching of history.\textsuperscript{9} In a thoughtful essay elsewhere in this volume, Robert Fullinwider warns that Afrocentric studies "are as much about creating as reclaiming a culture,"\textsuperscript{10} that they "may purvey dubious or spurious lessons and grind special ideological axes,"\textsuperscript{11} that they sometimes "argue for witchcraft and magic (African) as legitimate alternatives to science and reason,"\textsuperscript{12} and that they may provide excuses for demanding less of black students with respect to both learning and discipline.\textsuperscript{13}

More fundamentally, critics of multiculturalism warn that it will undermine the civic purpose of common education. In Fullinwider's words, multicultural education "fosters a sense of difference where there is already too much; it obscures or denies what unites us; it undermines rather than aids induction into a common 'civic culture.'"\textsuperscript{14} In a nation riven by racial, ethnic, and religious divisions, it is said, we need most of all an education that will soften our differences and establish a common core. This serious claim marks the ground on which the debate over multiculturalism must proceed.

A review of the historical arguments and approaches is instructive in the context of today's debates over multiculturalism.


\textsuperscript{10} Fullinwider, 1990 U Chi Legal F at 85 (cited in note 1).

\textsuperscript{11} Id at 86.

\textsuperscript{12} Id.

\textsuperscript{13} Id at 86-87.

\textsuperscript{14} Fullinwider, 1990 U Chi Legal F at 88.
II. MULTICULTURALISM AT THE FOUNDING

The Founders of the American republic were ambivalent about multiculturalism, just as we are today, although they did not use the same vocabulary to talk about it. Culture is not simply a matter of style and aesthetics; it is more fundamentally about what kind of people, with what kind of character, we are to be. Culture is bound up in morality, and no state can be indifferent to the question of morality. Our Founders addressed these matters in terms of the civic republican tradition, the central theme of which was the need for what they called public "virtue"—a commitment to the common good without bias in favor of one's own interests. In a monarchy, public order could be maintained by coercion and hierarchy. In a republic, the people themselves must desire to live together in harmony, for the people rule themselves. As Gordon Wood has explained, summarizing the dominant opinion of the founding period:

In a monarchy each man's desire to do what was right in his own eyes could be restrained by fear or force. In a republic, however, each man must somehow be persuaded to submerge his personal wants into the greater good of the whole . . . . A republic was such a delicate polity precisely because it demanded an extraordinary moral character in the people. Every state in which the people participated needed a degree of virtue; but a republic which rested solely on the people absolutely required it.\(^\text{15}\)

Division of moral opinion or, worse yet, unbridled individualistic self-interestedness, would lead quickly to disintegration and anarchy in a republic. In the civic republicanism of the founding period we hear the same persuasive theme that is sounded today in support of a common education: in a nation as diverse and potentially disorderly as America, we need a civic culture and hence an education that brings us together and reinforces the public good.\(^\text{16}\)


\(^{16}\) The connection between republicanism and education was drawn most clearly by Montesquieu:

It is in a republican government that the whole power of education is required. The fear of despotic governments naturally arises of itself amidst threats and punishments; . . . but virtue is a self-renunciation, which is ever arduous and painful. This virtue may be defined as the love of the laws and of our country. As such love requires a constant preference of public to private interest, it is the source of all private virtue; for they are nothing more than this very preference itself. This love
Yet the best minds of the founding generation were aware that there could be no "virtuous republic"—no nation with a common commitment to a common ideal—in a continent as vast as America. The political science of their day demonstrated that the preconditions for this kind of republic could exist only in a small jurisdiction with a homogeneous population. "In a republic," according to "Brutus," a leading Antifederalist pamphleteer, "the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other." A more expansive territory would deny the citizens the opportunity of knowing one another and of participating in the formation of the laws; it would thus undermine their public spiritedness, personal attachment to the laws, and common feeling. An extended union would also contain more heterogeneous opinions and interests, which would tend toward division. There could be no common understanding of the public good in a large and diverse nation, and hence no true republican virtue.

This conundrum was the heart of the ratification debate in 1787. If it were true that republican government requires an extraordinary degree of public virtue and that public virtue can exist is peculiar to democracies. In these alone the government is intrusted to private citizens. Now, a government is like every thing else: to preserve it we must love it... Every thing, therefore, depends on establishing this love in a republic; and to inspire it ought to be the principal business of education.

Baron de Montesquieu, 1 The Spirit of the Laws bk 4, ch 5 at 34 (1748, reprinted by Hafner Press, 1949) (paragraph divisions omitted).

17 See, generally, Herbert J. Storing, What the Anti-Federalists Were For 15-23 (U of Chicago Press, 1981). Montesquieu was the most frequently cited authority:

It is natural for a republic to have only a small territory; otherwise it cannot long subsist... In an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and, of course, are less protected.

Montesquieu, 1 The Spirit of the Laws bk 8, ch 16 at 120.


19 The seeds of American nativism can thus be detected in the civic republican ideology. See, for example, Agrippa, Letters of Agrippa, Massachusetts Gazette (Dec 28, 1787), reprinted in Storing, ed, 4 Complete Anti-Federalist at 85-86 (arguing against federal power of naturalization, citing the example of Pennsylvania, whose pro-immigration policy had led to a decline in "morals, education, [and] energy," in contrast to the New England states, which had "by keeping separate from the foreign mixtures, acquired, their present greatness"). The opposition to the moral culture of immigrant groups would later strongly influence the common school movement. See text accompanying notes 42-44.
in this sense only in a small territory, then according to the Anti-
federalists, the new federal government could not be a republic,
but would inevitably tend toward some form of aristocracy or op-
pression. Significantly, the defenders of the Constitution did not
take issue with this syllogism on its own terms. Rather, they ar-
gued—most prominently in Madison’s essays in The Federalist,
Numbers 10 and 51—that institutional balance would pit differ-
ences of opinion and interests against each other in such a way
that it would substitute for public virtue as a means of protecting
liberty. It would not be a homogeneous moral culture, but a mul-
tiplicity of factions, that would protect against oppression. When
the people agreed with Federalist 10 and 51 and voted to establish
the federal government, they were by sheer force of geography
committing themselves to a multicultural polity. They knew this
course was risky. That is why the Antifederalists almost won.

The debate over multiculturalism reached its culmination in
the Religion Clauses of the First Amendment. The logic of the
civic republican position suggested that some support for religion
was necessary in order to foster public virtue. Washington’s Fare-
well Address was perhaps the most eloquent statement of this po-

tion: “Of all the dispositions and habits which lead to political
prosperity, religion and morality are indispensable supports . . . .
And let us with caution indulge the supposition that morality can
be maintained without religion.” This position was widely shared,
for it seemed inconceivable that morality could flourish without
the support of religion. Thus, in the crisis of national self-exami-
nation that occurred in the mid-1780s, when public virtue seemed
at a dangerously low ebb, efforts were undertaken in many states
to provide public subvention for religion. The argument for these
measures was political (civic republican) rather than religious. The
Massachusetts Constitution of 1780, for example, justified its min-

* Federalist 10 and 51 (Madison) in Clinton Rossiter, ed, The Federalist Papers 77,
320 (Mentor, 1961).
1 Henry Steele Commager, ed, Documents of American History 169, 173 (Meredith,
* See Storing, What the Anti-Federalists Were For at 22-23; Wood, The Creation of
the American Republic at 427-28 (cited in note 15).
* Connecticut, Massachusetts, New Hampshire, and Vermont already had ministerial
taxes; in Georgia, a law providing for ministerial taxes was passed in the legislature, al-
though apparently never went into effect; in Maryland, ministerial taxes were authorized by
the state constitution but never enacted by the legislature; in Virginia, a proposal for minis-
terial taxes was widely debated and defeated in the General Assembly. See Thomas J.
Curry, The First Freedoms: Church and State in America to the Passage of the First
isterial taxes on the ground that "the happiness of a people and the good order and preservation of civil government essentially depend on piety, religion, and morality," and the Northwest Ordinance provided that "[r]eligion, morality, and knowledge [are] necessary to good government."

But the perceived need for support for religion came into conflict with what was coming to be a more central feature of American constitutionalism: the liberty of conscience. The right of each individual to worship God in accordance with his own faith and convictions precluded any attempt to enforce religious duties by the instrument of law. The diversity of religious opinion was too great for the Founders to reach any agreement on the religious principles to be supported by the State. Accordingly, from the beginning the new federal government was forbidden to establish any religion or to interfere with the right of free exercise, and the remaining state establishments were gradually dismantled (Massachusetts's being the last to go, in 1833).

Thus, as Charles Kesler observes in his essay elsewhere in this volume, the nation founded in 1787 was not a polis—not a nation organized around a common understanding of the good. The Founders "knew they could not have built such a narrow, soaring structure because they lacked the keystone, the absolutely essential and binding part: the gods." Under the First Amendment, we are committed to the proposition that the citizens will believe in different gods, or at least different understandings of the same God. The First Amendment singles out religion for special attention not because it is unimportant—although it is easy to be tolerant and broad-minded about unimportant things—but because religion is so very important to individual character, and thus to public culture and morality. Our Constitution is therefore a multicultural constitution.

From a comfortable distance in time, it may be difficult to appreciate how radical an experiment this was. No nation had ever

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been founded without a unifying religion. The Religion Clauses of the First Amendment meant that we would not have a common civic culture at the most fundamental level. We would not have a common morality. We would not have a common understanding of our relations to one another. We would not be joined in the feeling of fellowship that comes with membership in a common community of faith.

The Constitution thus left a dangerous void. Left to their own devices, the various religious sects might propagate all manner of pernicious doctrines. At the very least, the clergy might stir up the followers in antagonism to one another, making civic harmony virtually unattainable. Jefferson commented of the Presbyterian clergy: "they are violent, ambitious of power, and intolerant in politics as in religion and want nothing but license from the laws to kindle again the fires of their leader John Knox, and to give us a 2d blast from his trumpet." According to their detractors, Baptists were worse: fanatical, ignorant, disruptive, and divisive. If a civic moral culture is necessary for a pluralistic republic, and if churches are the primary instruments for the spread of morality, then our Founders might have been forgiven for concluding that an established church—or at the least, substantial government control over private churches—was the more prudent course.

Yet they took the risk. And it turned out that giving free rein to private institutions for the propagation of moral culture was not so dangerous after all. Secure in their own rights, and stripped of the potentiality of imposing their dogmas onto the wider society through public institutions, the religious groups of America settled into a harmonious competition, with the result that religion is stronger and more influential in this country than in virtually any nation of Western Europe—presumably performing its civic function of promoting public virtue more effectively than if it had been established by the state.

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30 Richard John Neuhaus, ed, Unsecular America 115-127 (Wm B. Eerdmans, 1986) (appendix reproducing the results of various cross-national surveys of religious affiliation and conviction).
The history of religious pluralism is closely related to the issue of educational pluralism for two reasons. First, education has always been closely related to religion. Until well into the nineteenth century, most schools (primary through college) were connected with churches or religious orders, most teachers were clergy, and the curriculum was a mixture of classicism and Christianity. This century's abandonment of serious religious instruction in primary and secondary schools has been a significant contributing factor in the secularization of American life. Second, the moral-cultural role of primary and secondary schools today closely resembles that of churches at the time of the founding. Today, it is the schools to which society looks as the principal instruments for inculcation of public virtue—for solutions to problems such as drug use, racism, poor self-esteem, imprudent sexual conduct, and the like. It is not surprising, then, that disagreements over the content of public education are as prominent today as arguments over the content of public religion were two hundred years ago. The hard question is whether a similar solution—individual freedom—will be adopted.

III. THE COMMON SCHOOL MOVEMENT

Multiculturalism, especially in the form of religious diversity, posed a problem for public education from the beginning. As Diane Ravitch has pointed out, public support for education was instituted first in parts of the country, such as New England, that were relatively homogeneous in religion. Education was inseparable from religion, and where there was diversity in religion it was difficult to achieve consensus regarding education. As the need for governmental support for education came to be perceived as more pressing, jurisdictions with numerous contending religious sects were faced with two models of education. First, the government could provide financial support to a diverse range of privately administered schools, including schools of the various denominations. The states followed this pattern in the early nineteenth century. Alternatively, the government could provide financial support exclusively to common schools—schools that would, theoretically, educate all the children of the jurisdiction without divisions along religious, cultural, or economic lines. The latter—championed by

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82 Id at 7. See also Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780-1860 57, 166-67 (Hill & Wang, 1983) (specifically addressing New York City's schools).
such noted reformers as Horace Mann—became the universal pattern in the United States after the Civil War.\textsuperscript{83}

The arguments for the common school movement closely followed the traditional position of civic republicanism. The schools would serve to eliminate distinctions of wealth, ethnic origin, and religion, and thus promote the assimilative goals of "Americanism." "The children of this country, of whatever parentage, should . . . be educated together,—be educated, not as Baptists, or Methodists, or Episcopalians, or Presbyterians; not as Roman Catholics or Protestants, still less as foreigners in language or spirit, but as Americans, as made of one blood and citizens of the same free country,—educated to be one harmonious people."\textsuperscript{84}

The early nineteenth century, pluralistic system lost favor after the Civil War because it perpetuated differences in language and religion and retarded the inculcation of American values among the newly arrived immigrant classes.\textsuperscript{85} In addition to its altruistic motivations, the common school movement was also tinged with nativism and anti-Catholic prejudice.\textsuperscript{86} Some argued it was necessary to confine funding to public schools because a pluralistic funding system would "drive the children of foreigners, and especially of Roman Catholics, into clans by themselves, where ignorance and prejudice respecting the native population, and a spirit remote from the American, and hostile to the Protestant, will be

\textsuperscript{83} See Stokes & Pfeffer, \textit{Church and State in the United States} at 422-25 (cited in note 26).

\textsuperscript{84} W.S. Dutton, \textit{The Proposed Substitution of Sectarian for Public Schools}, Common School Journal 166-68 (June 1, 1848), quoted in Charles L. Glenn, Jr., \textit{The Myth of the Common School} 223 (U of Massachusetts Press, 1987).

\textsuperscript{85} See Glenn, \textit{The Myth of the Common School} at 230-34; Kaestle, \textit{Pillars of the Republic} at 163-64; Ravitch, \textit{The Great School Wars} at 67 (describing efforts of nativist groups to defeat funding of Catholic schools).

\textsuperscript{86} One prominent defender of the public school monopoly, a Congregationalist minister, described the common school as "a Protestant institution—associated with all our religious convictions, opinions, and the public sentiment of our Protestant Society." He warned that students in parochial schools are "instructed mainly into the foreign prejudices and superstitions of their fathers," commenting that "the state . . . will pay the bill!" \textit{Life and Letters of Horace Bushnell} 299-303 (Harper & Bros., 1880), quoted in Glenn, \textit{The Myth of the Common School} at 227, 229. A Congregationalist newspaper called "the present system" of common schools "an important check against Romanism." Id at 231-32. The Catholic attempt in Philadelphia to allow substitution of the Douay Bible and excusal from other religious exercises inspired anti-Catholic demonstrations and riots in which thirteen persons were killed and St. Augustine's Church was burned. Kaestle, \textit{Pillars of the Republic} at 170.

Fear or resentment of other minority religious groups also contributed to the defeat of pluralistic education finance. See, for example, Glenn, \textit{The Myth of the Common School} at 193 (quoting Horace Mann's warning that if the public system supports religious schools, "how long would it be, before we should have schools for the Come-outers, for the Millerites, and the Mormonites?").
fostered in them.”  Common school advocates, like Mann, made no secret of their hope that, deprived of any share of public funds, religious schools would be forced to shut down.

Thus, despite insistent demands by minority groups, principally Catholics, but including Jews, Presbyterians, Baptists, and Methodists, for equal funding for their free schools, the common school movement soon achieved a monopoly of public funding. Many states even adopted constitutional provisions barring state funding of religious schools, and a federal constitutional amendment to that effect was narrowly defeated in Congress. The opposition to particularistic private schools grew to the extent that, in the early twentieth century, some states passed laws forbidding the education of children in languages other than English and banning private schools altogether. These efforts were promptly overturned by the Supreme Court, on the ground that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” The cases brought into sharp relief the conflict between a multicultural constitution and the civic republican educational system, which was predicated on the assumption that there is a single “American” culture into which all citizens should be assimilated. To its core, the common school movement was dedicated to the very program the Court deemed unconstitutional: the “standardization” of the nation’s children through common education.

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88 See id at 219-22.
89 In 1813, these groups petitioned for and received a share of the New York school fund. See Jonathan D. Sarna, American Jews and Church State Relations: The Search for “Equal Footing” 6-7 (American Jewish Committee, 1989). The petition of Shearith Israel appealed to “the liberal spirit of our constitution” in support of pluralistic funding. Id at 7. In the great controversy over public funding in New York in 1840, Jewish and Presbyterian schools joined Catholics in requesting funding, and Jews were the only religious group not to join in the “general attack on the Catholics” that ensued. Ravitch, The Great School Wars at 40, 53 (cited in note 31). This effort proved unsuccessful and public funds were thereafter confined to “nonsectarian” public schools in New York. For a detailed account of the 1840 controversy, see id at 33-76; see also Kaestle, Pillars of the Republic at 167-69 (cited in note 32).
90 See Stokes & Pfeffer, Church and State in the United States at 422-25 (cited in note 26).
91 Id at 434.
The common school movement was explicitly anti-multiplu
cultural, with respect to both culture in general and religion in particular. One opponent of funding of parochial schools testified that “the task of absorbing and Americanizing these foreign masses . . . can only be successfully overcome by a uniform system of American schools, teaching the same political creed” and assured the Congress that this uniform system would “continue us” as “a united, homogeneous people.”

In addition to opposing diverse private schooling, the common school movement sought to foster a common morality in the public schools. A statement by one noted reformer argued that “what above all things is wanted in every State in the Union” is “a moral power which shall address itself to the highest faculties of the people, and assist in forming and giving consistency and permanence to opinion, and which . . . may serve, through the influence of reason, to elevate, temper, and guide them all.” The Boston School Committee explained that in the common schools, immigrant children would “receive moral and religious teaching, powerful enough if possible to keep them in the right path amid the moral darkness which is their daily and domestic walk.”

The common school movement was a self-conscious effort to use education to foster the common culture, which of course had a religious (Protestant) dimension. Horace Mann expressed this intention as follows:

All those who are worthily laboring to promote the cause of education are laboring to elevate mankind into the upper and purer regions of civilization, Christianity, and the worship of the true God; all those who are obstructing the progress of this cause are impelling the race backwards into barbarism and idolatry.

This emphasis on moral education necessarily involved the schools with religion. Indeed, the leaders of the common school movement prided themselves on the extent of the religious education in their

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schools, which usually included Bible reading (typically the King James version), "nonsectarian catechism," and other religious exercises.  

But while the common school reformers imbued their systems with religious exercises, they were equally insistent that these exercises be "nonsectarian." In practice, this meant that the common schools would teach those tenets of Protestant Christianity that were most widely shared, and exclude those doctrines about which there was serious disagreement. The result was a watered-down piety closely resembling liberal Protestantism.

To its detractors—principally Catholics, Jews, and so-called "orthodox" Protestants—the system appeared both sectarian and offensive. They could not understand why the religion of the liberal elite should receive the support of public funds, while their own schools received none. To its defenders, the system appeared to steer a neutral course between the extremes of sectarianism and irreligion.

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47 Ravitch, The Great School Wars at 18-19. See also Glenn, The Myth of the Common School at 115 (one of Horace Mann’s "proudest accomplishments [was] that the Bible was more commonly read in school than before his efforts began"); and at 165 (quoting Mann’s statement that "the influences of the Board of Education have been the means of increasing, to a great extent, the amount of religious instruction given in our schools").

48 While opposing introduction of what he called "sectarian instruction or sectarian books" into the public schools, Horace Mann, Fourth Annual Report of the Secretary of the Board 59 (Dutton & Wentworth, 1841), quoted in Glenn, The Myth of the Common School at 164 (cited in note 34), Mann claimed that "[m]oral training, or the application of religious principles to the duties of life," should be the "inseparable accompaniment" to education. Horace Mann, Ninth Annual Report of the Secretary of the Board 157 (Dutton & Wentworth, 1846), quoted in Glenn, The Myth of the Common School at 168. See also Glenn, Myth at 125, 168.

49 See Glenn, The Myth of the Common School at 164 (cited in note 34) (quoting Mann’s statement that the schools should "draw the line between those views of religious truth and of christian faith which are common to all, and may, therefore, with propriety be inculcated in school, and those which, being peculiar to individual sects, are therefore by law excluded"); and at 149, 155, 173.

50 See id at 132 ("By retaining only those aspects of Christianity with which Unitarians agreed the proposed religious teaching was in fact identical with Unitarian teaching"); Ravitch, The Great School Wars at 9 (cited in note 31) (the "nonsectarianism of the New York Free School Society "was in reality nondenominational Protestantism"); Sarna, American Jews at 19 (cited in note 39) ("Whatever their claims to the contrary, the schools then were culturally Protestant.").

51 See Sarna, American Jews at 18-19; Glenn, The Myth of the Common School at 179-206; Ravitch, The Great School Wars at 35, 41-42, 45, 48-49, 53. Matthew Hale Smith, a Protestant critic of the Massachusetts system, addressed Horace Mann in these terms: "Certain views that you entertain, you call religion, or 'piety.' These you allow to be taught in schools. You enforce them in your lectures, reports, and Journal. Those which clash with your particular views, you reject as 'dogmatic theology,' or 'sectarianism.' " Glenn, The Myth of the Common School at 189.
Some voices were raised in favor of a pluralistic alternative. Governor Seward of New York, for example, recognized that "prejudice arising from differences of language or religion" was responsible for the exclusion of many immigrant children from the public schools. As a remedy, he proposed "the establishment of schools in which they may be instructed by teachers speaking the same language with themselves and professing the same faith." Raising still more fundamental questions, the Committee on Education of the Massachusetts legislature, critical of Mann, argued that nonsectarianism is "utterly impossible" because "religion and politics, in this free country, are so intimately connected with every other subject." Even a book "upon politics, morals, or religion, containing no party or sectarian views," is not genuinely neutral, for it will "be likely to leave the mind in a state of doubt and skepticism, much more to be deplored than any party or sectarian bias." The Committee argued that "[t]he right to mould the political, moral, and religious opinions of his children is a right exclusively and jealously reserved by our laws to every parent; and for the government to attempt, directly or indirectly, as to these matters, to stand in the parent's place, is an undertaking of very questionable policy." They therefore proposed that public funds should be used to support a variety of schools, leaving the choice among them to the families involved. Neither proposal was ultimately adopted, and further progress was halted by the rising tide of anti-immigrant feeling.

IV. THE RECENT HISTORY OF EDUCATIONAL PLURALISM

After World War II, some states, especially in the Northeast, began to explore ways to provide modest financial assistance to nonpublic schools. The impetus for these measures stemmed from three factors: (1) the decline in anti-Catholic prejudice, most dramatically symbolized by the election in 1960 of the nation's first Catholic President, (2) economic considerations—principally the strain on public school resources from the Baby Boom and cost

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83 Id.
85 Id at 125.
86 Id at 122.
87 This position was also adopted by John Stuart Mill. See John Stuart Mill, On Liberty 104-06 (Hackett, 1978).
increases threatening the closing of many nonpublic schools—that led to the realization that it is cheaper for the state to subsidize a small part of nonpublic school costs than to absorb the children into the public schools, and (3) the increasing political power of groups that favor nonpublic schools.

In early court challenges, the Supreme Court upheld assistance to nonpublic schools if, but only if, the aid took a secular form. Thus, in *Everson v Board of Educ.*, the Court permitted the state to pay for transportation to religious schools, and in *Board of Educ. v Allen*, it permitted the state to pay for secular textbooks (chosen from among those approved for use in the public schools). While perceived as a victory for parochial schools, and hence for pluralism in education, these decisions were in fact a serious setback for pluralism. Public subsidies on the Court's terms were a powerful inducement to homogeneity. Religious schools could receive public money, but only at the cost of adopting the secular curriculum of the public schools.

In later decisions, beginning in 1971, the Court effectively cut off even this avenue of assistance to nonpublic schools. Following the logic of *Everson* and *Allen*, several states had decided to assume part of the salary cost of teachers of secular subjects in nonpublic schools, on the condition (thought to be constitutionally required) that the teachers refrain from incorporating any religious elements in their teaching. The effect of such programs would have been to reduce still further the diversity of private education. If both textbooks and teaching are stripped of their religious character, little would be left of the religious alternative to the common schools. In *Lemon v Kurtzman*, however, the Court held these programs unconstitutional on the ground that the monitoring necessary to ensure that the subsidized teaching is nonreligious would entail an "excessive entanglement" between church and state. It became evident that only forms of assistance that effectively could not be imbued with a religious element (such as diagnostic tests, school lunches, or the grading of standardized tests) would be permitted. The effect of this decision was to reduce the opportunities for assistance to nonpublic schools dramatically, and at the same

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**330 US 1 (1947).**

**392 US 236 (1968).**

**403 US 602 (1971).**
time to remove the temptations created by *Everson* and *Allen* to secularize non-public schools.61

During the same period, in the public schools the Court was pursuing a radicalized version of Horace Mann’s program of common education. The Court warmly embraced the civic republican ideal of the common school movement, seemingly forgetting the multicultural constitutional ideals of *Pierce* and *Meyer*. The Court referred to the “importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,”62 described public schools as “an ‘assimilative force’ by which diverse and conflicting elements in our society are brought together,”63 and endorsed the “observations of social scientists” that “the public schools . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.”64

The Court also insisted on the rigorous exclusion of overtly religious elements from the curriculum, including school prayer,65 Bible reading,66 creationist biology,67 some moments of silence for prayer or meditation,68 and the posting of the Ten Commandments.69 The principal difference between this and the approach of the Nineteenth Century reformers is that the Court has recognized the sectarian character of even broadly interdenominational religious exercises like the Regent’s Prayer. This combination of commitments—to inculcation of values and to secularism—means that public schools are constitutionally committed to inculcating a secularistic morality. The Supreme Court seems to have assumed that a secularistic morality is neutral among religions and between reli-

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61 Allen, however, remains good law, with the unhappy consequence that most Catholic schools and many other private schools use the same textbooks used in the public schools.
63 Id at 77.
64 Id. See also Bethel School Dist. v Fraser, 478 US 675, 681-83 (1986) (“The role and purpose of the American public school system [is to] ‘prepare pupils for citizenship in the Republic . . . . [S]chools must teach by example the shared values of a civilized social order.’ ”); Board of Educ. v Pico, 457 US 853, 864 (1982) (plurality opinion per Brennan) (“local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values’ [and] ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.’ ”).
igion and non-religion. This assumption is subject to the same criticisms that were levelled against Mann's neutral "piety." 70

Moreover, educators and textbook publishers have taken the Court's decisions to extremes. Recent studies under the auspices of the Department of Education, People for the American Way, Americans United for Separation of Church and State, and the Association for Supervision and Curriculum Development have documented that the leading elementary and secondary school textbooks virtually neglect any mention of religious influences or ideas in history, ethics, or social studies. 71 Thus, the "public values" inculcated by the public schools are not, in fact, the values held by the large majority of the American public, but the values held by a secular minority. As one commentator has observed, "[w]herever we look—in history, social studies, reading texts, psychology, values education, the sciences both natural and social—the thrust in the public schools is to treat religion not at all, or as irrelevant, or as superstition." 72 Nothing in the Supreme Court's cases demands this extreme result. But the logic of the Court's position, in favor of inculcating a common morality but against any overt religious teaching, necessarily pushes in that direction. It is hard to see how any genuine pluralism could exist in public schools operating under those strictures.

It is not possible, practically or theoretically, for public schools to be "neutral" with respect to contentious questions of morality, politics, and religion. The more the school attempts to be even-handed, the more it will appear to endorse a position of relativism, or worse, cynicism. Now, as in the nineteenth century, the moral-religious position that seems most "neutral" to those in power will almost inevitably be the position in which they themselves believe. That is true of educational traditionalists, who view assaults on the


72 Marty, Schools in a Pluralist Society, in Weber, ed, Equal Separation at 99. This form of moral education has, not surprisingly, led to challenges from parents (particularly from strong religious persuasions) who perceive it as equivalent to moral relativism or ethical individualism, which are anything but "neutral" toward their own moral-religious beliefs. Dent, 61 S Cal L Rev at 866-73.
MULTICULTURALISM AND CHOICE

educational canon as "politicization" of education; it is true of the adversary culture, who view more traditional moral-cultural teachings as oppressive and confining; and it is true of the Supreme Court, which views secularism as the equivalent of neutrality.

The same problem exists with respect to ethnic sources of contention. A curriculum cannot please both those who wish to teach the importance and equality of a wide variety of cultures and those who wish to concentrate on what they consider best in Western culture. The multiculturalism desired by African-Americans is not the same as the multiculturalism desired by South Asians. Thoroughgoing multiculturalism, like thoroughgoing religious neutrality, is impossible. There are too many cultures, too many languages, too many religions. They cannot all receive "equal time." Even if they could, the message communicated to the students would be one of moral and cultural relativism—a position no less sectarian than the rest.

No shifts in constitutional doctrine governing the conduct of the public schools can solve this problem, because it inheres in the nature of things. The Supreme Court can alter the character of public education, making it more religious or more secular, but it cannot make public education genuinely more pluralistic. A common school is a common school. That is its blessing and its curse.

On the other hand, there has already been a shift in constitutional doctrine regarding aid to nonpublic schools that permits educational pluralism through parental choice. While there once was serious doubt that an educational choice plan would be upheld

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7 This is borne out by experience. For example, according to press reports, the California school system adopted history textbooks that sought "to accommodate every culture," but were immediately attacked by black, Asian, Hispanic, Islamic, Jewish, Indian, Chinese, women's, gay and lesbian organizations, all claiming they had been slighted. Charles Bremner, US Academics under Pressure to Rewrite Ethnic History, The Times (London) (Overseas News Section) (Oct 22, 1990). "Muslims said they should have written the chapters on Islam; Chinese said their cruel treatment by whites had been glossed over; Jews complained that nothing was said about persecution by Christians; homosexuals said famous gays had not been given their due. Black historians denounced the new course as biased towards the white, European version." Id. According to the report, "[t]he criticism in California was surprising since the state had tried to wipe the slate clean and produce a curriculum that drew on every culture and 'was no longer exclusively the property of white males,' as one of the authors of the new textbooks put it. Some educators are wondering if they should give up the whole idea of producing a single history for all Americans." Id.

4 The Supreme Court has agreed to review a case involving the constitutionality of a nonsectarian prayer at a junior high graduation ceremony. Lee v Weisman, 908 F2d 1090 (1st Cir 1990), cert granted, 111 S Ct 1305 (1991).
by the Supreme Court, recent decisions make it all but certain that a genuinely neutral and nondiscriminatory program of educational choice would be sustained.

The Court has distinguished between two types of aid: "direct" (meaning that the funds are allocated by government officials directly to the recipient institutions) and "indirect" (meaning that the funds are allocated to private individuals, and that any benefit to institutions is a direct result of the private choices of individuals). If aid is direct, then the government has an obligation to ensure that it is not used for "specifically religious activity." It follows that direct aid cannot be given to institutions so "pervasively sectarian" that their religious and secular aspects are "inextricably intertwined." Educational choice programs, however, would be an instance of indirect assistance, because state agents would not allocate funds directly to the institutions; rather, the voucher would go to the parents, who would use it at the school of their choice, whether secular or religious.

The constitutionality of an educational choice plan, then, depends on the "indirect aid" precedents. The most pertinent case is Witters v Washington Dept. of Services for the Blind, a unanimous decision holding that public funds could be used to pay the tuition of a student at a Bible college for training for the ministry, pursuant to a program of vocational assistance for the blind. Justice Marshall's opinion for the Court identified several aspects of the program as "central to our inquiry." First, he noted that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices" of the individual students. Second, he noted that "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' and is in no way skewed toward religion." Both of these factors are equally true of educational choice plans.

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78 In Committee for Public Education v Nyquist, 413 US 756 (1973), the Court struck down a program of tax deductions for tuition costs at private schools. This suggested that other forms of indirect aid would likewise be held unconstitutional.


80 Lemm v Kurtzman, 403 US 602, 657 (1971); Roemer, 426 US at 759.

81 474 US 481 (1986).

82 Id at 487.

83 Id.

84 Id, quoting Nyquist, 413 US at 782-83 n 38 (1973).
Third, Justice Marshall stressed that the Washington program “creates no financial incentive for students to undertake sectarian education.” Their benefits are neither “greater nor broader” if they “apply their aid to religious education” than if to secular programs. “[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.”

This is the crux of the matter. The principal purpose of the Religion Clauses is to ensure that decisions about religious practice, including education, are reserved to the private realm of individual conscience. The decision to choose religious or secular education should be made by the individual, not by the State. The government has no legitimate interest in discouraging free religious choices, just as it has no legitimate interest in promoting a particular religion. Again, the educational choice idea closely resembles the Washington program upheld in Witters. The benefits are neither broader nor greater for parents who choose religious education than for those who choose secular. The proposal creates no incentive to undertake religious education; on the contrary, it is the current system that creates a significant incentive to forego religious education.

Finally, Justice Marshall noted that “nothing in the record indicates that . . . any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.” Similarly, there is no reason to expect that any more than a modest proportion of the aid dispensed under an educational choice plan will flow to religious schools. Furthermore, it must also be noted that on this final point, a majority of the Court rejected Justice Marshall’s analysis. Justice Powell, joined in substantial part by four other Justices, expressed the controlling principle as follows: “state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the Lemon v Kurtzman test.” Thus, even if a “significant portion” of the aid did flow to religious schools, it would not present a constitutional problem so

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82 Witters, 474 US at 488, quoting Nyquist, 413 US at 785-86.
83 Id.
84 Id.
85 Id.
86 Id.
87 Witters, 474 US at 490-91; id at 490 (White concurring); id at 493 (O’Connor concurring). The second part of the Lemon v Kurtzman test provides that the principle or primary effect of a statute must be one that neither advances nor inhibits religion. Lemon, 403 US at 612.
long as "any benefit to religion resulted from the 'numerous private choices of individual parents.'"

Witters is only the most recent of a long line of cases in which the Court has sustained indirect aid distributed neutrally to religious and nonreligious organizations, through the independent choices of private individuals. In Mueller v Allen, the Court upheld a Minnesota program of tax deductions for parents' expenses incurred in obtaining education for their children, despite evidence put forth by petitioners that a large part of these expenses were tuition payments to private schools, most of which were religious schools. As in Witters, the decisive consideration was that the allocation of financial assistance was determined through private, decentralized choice. "Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." The program therefore was consistent with the Establishment Clause, even assuming that tax deductions for parochial schools indirectly paid for religious instruction.

Unlike Witters, which was unanimous, the Court was closely divided in Mueller. But even the position of the dissenters in Mueller supports the constitutionality of the educational choice proposals. Justice Marshall's dissenting opinion stressed that the "vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools." In contrast, those eligible for assistance under an educational choice plan include parents whose children use secular as well as religious schools. Even the dissenters in Mueller, then, did not take the position that parents must be categorically barred from using their state-provided educational resources in religious settings. They merely insisted that government programs may not be devised in such a way that the preponderance of the benefit can be expected to go to religious recipients.

Similarly, the Court held in Widmar v Vincent, that it would not violate the Establishment Clause for a state university to make its facilities available, without payment, to a religious group on the

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88 463 US 388.
89 Id at 400-01.
90 Id at 397 (emphasis in original).
91 Id at 405.
same basis as other university student groups. Free facilities are, of course, a valuable benefit; and the group intended to use this benefit for specifically religious activities, including religious teaching, worship, and prayer. The Court reasoned, however, that when benefits of this sort are open to all on an evenhanded basis, "there is no effect of "advanc[ing] religion." The provision of benefits to so broad a spectrum of groups is an important index of secular effect."

Committee for Public Education and Religious Liberty v Nyquist is the case most often cited by opponents of educational choice. Yet, the Court in Nyquist, and in Sloan v Lemon, struck down programs of indirect aid to parochial education only because the allocation formula was heavily skewed toward religious schools. The Court in Nyquist sharply differentiated between programs in which aid flows to "all schoolchildren" and those in which aid is restricted to those who choose to attend private schools, which are overwhelmingly sectarian. The Court suggested, in dictum, that it would approve of a genuinely neutral aid program like the "G.I. Bill," even though government funds in such a program would go to religious institutions and would presumably support sectarian teaching. A few years later, the Court summarily affirmed two such programs. Education choice plans are, in effect, a "G.I. Bill" for kindergarten through high school, and would likely sustain a challenge under Nyquist or Sloan.

In Walz v Tax Commission, the Court held, with only one dissent, that state property tax exemptions for religious organizations are permissible, even when the property is used "solely for religious worship." Emphasizing the constitutional principle of

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93 Id at 270-75.
94 Id at 273.
95 Id at 274.
96 413 US 756 (1973).
98 Nyquist, 413 US at 782 n 38 (emphasis in original). The G.I. Bill provides educational assistance for eligible veterans attending any public or private school, college, or university. 38 USC §§ 1652 and 1681 (1988).
99 Americans United for Separation of Church and State v Blanton, 433 F Supp 97 (M D Tenn), aff'd, 434 US 803 (1977) (assistance program providing needy students with financial assistance to attend the accredited college of their choice); Smith v Board of Governors of Univ. of North Carolina, 429 F Supp 871 (W D NC), aff'd, 434 US 803 (1977) (tuition assistance for North Carolina residents attending independent colleges within the state, including church-related ones).
101 Id at 666.
“neutrality”,\textsuperscript{102} the Court noted that the tax benefit was provided to churches “within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.”\textsuperscript{103}

In sum, the key factor under the Supreme Court’s indirect aid cases is that “the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries.”\textsuperscript{104} When the allocation of aid is determined through individual choice and not government direction, and is not skewed in favor of religion, the program satisfies constitutional strictures. In such a program, there is no need to exclude religious schools, even those that are pervasively sectarian, and no need to forbid specifically religious activities. Indeed, in each of the indirect aid cases discussed—\textit{Witters, Mueller, Widmar, Walz}, and the Nyquist dictum—the recipients included pervasively sectarian organizations, that engaged in specifically religious activities. Such choices are not forbidden by the First Amendment, provided they are the product of independent decisionmaking.

The Court, however, also has held that a statute is unconstitutional under the Establishment Clause if it “foster[s] an excessive government entanglement with religion.”\textsuperscript{105} Two possible forms of entanglement must be examined in connection with the educational choice proposal. First, the Court has frequently found the potential for “excessive entanglement” when, in order to avoid the “primary effect” of advancing religion, the government must monitor the conduct of a recipient institution to ensure that it does not engage in “specifically religious activities” within the funded program. The Court stated in \textit{Aguilar}: “though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state.”\textsuperscript{106} This form of entanglement is not present in cases of indirect aid, where there is no constitutional requirement that recipients refrain from religious activities. It is

\textsuperscript{102} Id at 669.
\textsuperscript{103} Id at 673.
\textsuperscript{104} Marsh v Chambers, 463 US 783, 809 (1983) (Brennan dissenting). See also Texas Monthly v Bullock, 109 S Ct 890, 897-99 (1989) (plurality opinion).
\textsuperscript{106} Aguilar, 473 US at 410. See also Lemon, 403 US at 619.
therefore not a problem with the educational choice proposal, just as it was not a problem with the tax credits in *Mueller v Allen*.

The second form of entanglement is the more general interaction between officials of religious organizations and agents of the state that can occur in the course of many regulatory programs. Entanglement of this form could result if a school’s eligibility for state aid is made conditional on meeting official educational standards. Unlike the first form of entanglement, however, this form is not necessarily connected to financial assistance; it is just as likely to arise from permissible assertions of the state’s regulatory or police power. The criteria are the same in the one context as in the other. An educational choice program in and of itself does not entail any additional regulation, beyond that already entailed by accreditation. Should future regulations lead to excessive entanglement, the proper remedy would be to enjoin their enforcement, not to invalidate the choice program.

Thus, while fears of church-state constitutional problems are often cited by opponents of educational choice, those fears are groundless. Whatever may be the flaws in the educational choice idea, it should be debated on its merits and not rejected on spurious constitutional grounds. In fact, far from offending the First Amendment, an educational choice plan is much more consistent with the pluralistic vision of the First Amendment than is granting secular schools a monopoly of public funds.

**V. WEIGHING THE RISKS OF PLURALISM**

The common school movement has run its course and no longer can establish a coherent position in the face of the conflicting demands of a diverse nation. All around us we witness its effects. It cannot teach any god because it would have to teach all

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109 The only involvement between agents of the state and agents of the school entailed by most educational choice proposals is that the latter must notify the state that the grant has been received. This is surely a minor and inconsequential involvement. See, for example, *Jimmy Swaggart v Board of Equalization*, 110 S Ct 688, 698 (1990) ("administrative and recordkeeping burdens do not rise to a constitutionally significant level" of entanglement).

gods; it cannot teach any culture because it would have to teach all cultures. When it departs from these principles it becomes narrow-minded and oppressive. The common school movement now teaches our children, unintentionally, to be value-less, culture-less, root-less, and religion-less. It can no longer achieve its crowning purpose of providing a unifying moral culture in the face of our many differences.

Freedom of choice offers the promise of a return to moral education, which is indispensable to the political health of the republic, without a sacrifice of minority opinion. With educational choice, each school could teach from a coherent moral-cultural perspective—one that is chosen by its student body. Of course, educational choice is risky. It runs the risk that some will choose a moral education that is pernicious, and that many will choose ethnically and religiously particularistic alternatives that might exacerbate already-dangerous divisions. I suspect these fears are overblown, however, just as the similar fears of religious pluralism were overblown in the eighteenth century. With parents making the decisions, how likely is it that many will choose alternatives that are demonstrably worse than the results of the present system?

It seems probable that parents will want what is good for their children—recognizing that they will evaluate the good in light of their own traditions and cultures. It also seems probable that what is good for people in one tradition will, as to most matters of serious importance, bear some resemblance to what is good, simply. Milwaukee’s experiment with black male schools could produce racist male supremacists. But consider this: If a person is brought up to be a good black male in an honorable minority tradition, isn’t it likely that he will also be brought up to be a good person and a good citizen? Why would we doubt that an education in the excellences of the black male would be so dissimilar to an education in the excellences common to all? The United States is

111 In this respect, parental choice is far less risky than schemes that devolve power upon community leaders or subgroups. Parents do not often subject their children to social or ideological experimentation, and are more likely to value education that will prepare their children for happy and productive lives within the wider culture than to use education for fissiparous social objectives. See Tang, The African American Academy at A21 (cited in note 2) (quoting Rickie Malone, planning coordinator for the Afrocentric academy in Seattle, as saying “African-American parents are quite traditional in what they want for their kids. Most stay away from alternative schools. They want structure.”); Debra Viadero, Baltimore Class Tests Theory of Providing “Positive Role Model” for Young Black Boys, 10 Educ Week 1, 17 (Feb 13, 1991) (quoting Richard Boynton, teacher of a black male class in Baltimore, as saying “All these kids are saying . . . is teach me, discipline me, and love me . . . . In here, . . . we’re always talking about respect, responsibility, and self-control.”).
not a *polis*. There is no such thing as the *one* model of a good citizen. The genius of America has been to teach people to be good citizens of the whole by first becoming good citizens of a part—good citizens of their family, of their community, of their church. Freedom of choice is risky. But isn’t the alternative risky as well?

The irony is that pluralistic education might well turn out to be more unifying than common education ever could be. Protestants, Catholics, Jews, and Muslims all *disagree* about important questions of religion and morality—so much so that no common curriculum that addresses such questions could be acceptable to all. But Protestants, Catholics, Jews, and Muslims all agree that there *is* a morality, that there are objective standards of right and wrong that transcend the mere preferences and choices of the individual. If Protestants, Catholics, Jews, and Muslims are educated together, the most likely compromise is a moral-religious relativism that is the antithesis of a common morality. If they are educated in their own traditions, it would not be surprising to find that the resulting moral education would have striking commonalities.

In conclusion, I believe that it is time to adopt a genuine multicultural approach to education, based on parental choice and control. When we formed a nation out of a continent of diverse cultures and peoples, when we guaranteed diversity and freedom of belief, we committed ourselves to a multicultural polity. The competing civic republican ideal is not practicable in a nation of this sort. It will either impose a single moral-cultural vision at the expense of the minorities, or no moral-cultural vision at all (if such a thing is possible), at the expense of coherence and value. The current system is not working. Why not try choice?