The contributors to this section try to move the discussion one step beyond past decisions, to talk about how the law might well look in the future. There are many questions to ask: Are vouchers a "neutral" activity? Does the likely positive impact on parochial schools create the danger of "excessive entanglement?" How much does the intent of the government authority creating a voucher system matter? In particular, we will consider whether a school voucher program could be structured without violating traditional principles of church-state separation, or whether we should consider changing traditional doctrine if it is not consonant with voucher schemes.

In short, we try to talk about both theory and practice, and to work out what the limits of government assistance in this area might be.

The History of the "Wall of Separation": Church and State in Constitutional Tradition

Robert Destro

In the United States, the law permits universal access to society's opportunities, benefits, and social obligations without regard to religious faith. In practice, however, it was (and remains) inevitable that social and political structures reflecting the perspective of the dominant religious faiths would (and will) cause problems for religious minorities.

The experience of religious minorities in the public (or "common") schools is well-documented in the state and federal case law. From its inception in the 1830s through 1860, the Common School Movement had several basic goals: 1) to provide schooling for all white children, either partially or wholly at public expense; 2) to encourage or require school attendance; 3) to foster the moral, political, and economic improvement of the citizenry (especially those of the "lower classes") through a program of civics and "non-sectarian" religious instruction; 4) to create training programs for teachers; and 5) to establish some measure of state control over all of these processes.

The educational and political strategies collectively known as "school choice" are controversial because the advocates for common schooling have been so successful, both in achieving the broad outlines of their political and social agendas, and in assimilating religious and many minorities into the mainstream of American life and culture. As early as 1880, a writer in *Scribner's Monthly* observed that: "We have made a sort of God of our common school system. It is treason to speak a word against it."

Today's debates over school choice are often couched in incendiary language. Though we have expanded our concern to include all children, regardless of race, the issues and goals facing the community are very much the same in the 1990s as they were in the 1830s.

What is "Choice" in Education?

I begin with a simple, yet often unstated, fact: from the perspective of the consumers of educational services—that is, parents, children, and taxpayers, primary and secondary education in the United States is not a matter of "choice." It is compulsory. Every state requires children to attend school, and will prosecute parents who refuse or neglect to educate them. Most states prescribe minimum standards for educational content, facilities, and teachers, and will enforce them vigorously. There is growing political and professional support for early childhood education, and calls for minimum educational and facility standards for day care centers are heard with increasing frequency. The inevitable next step will be to debate whether to make both mandatory. Education programs concerning human sexuality, drug and alcohol abuse, AIDS prevention, the use and distribution of contraceptives, and a whole host of programs on other sensitive topics (most recently, "multi-culturalism") inexorably metamorphose from "experimental, pilot programs" to required courses.

On a more tangible level, intense political and judicial battles are fought regularly over mandatory student assignment plans, school funding levels, and the administration of "magnet" school programs. It matters little whether the issue is busing for school desegregation, a redrawing of district lines to reflect demographic change and diversity, or the availability (or lack thereof) of education for children with special needs: choice in education, or, more appropriately, lack of choice, is a perennial and sensitive issue. It has been for a long time.

Last, but certainly not least, is the question of money. The cost of public education is borne by all the taxpayers, who have no more "choice" in the matter of making timely tax payments than the "choice" they will have in the face of death. Public education is big business, but with one important difference: it has no publicly-funded competition. Neither taxpayers nor consumers can vote with their wallets; they pay for the service whether it meets their needs or not. Choice is "extra." According to the 1990 *Statistical Abstract of the United States,* federal, state and local government support for public education totaled $148.6 billion in 1986, an average of $3733.67 for each child enrolled in the public schools. Private sector spending on non-public education during the same period amounted to $13.2 billion, an average of $2421.13 per child.

Because education funding is the largest single item in the budget of most local governments, and the school system may often be one of the largest employers in a community, issues which affect either education funding or policy become political issues of the first order as their effect ripples through

the affected sectors of the electorate. As political issues, issues of education policy are subject to all of the factional cross-pressures, log-rolling and legal disputes which affect other aspects of the political process. From the perspective of those who provide and control public education, the range of permissible choice among legitimate alternatives is usually limited only by the amount of money available, and what the political traffic will bear.

Toss the possibility of parental choice into this roiling cauldron of hot political and social issues, and the mixture becomes volatile indeed. Fund the choice, as Wisconsin, Cleveland, and other jurisdictions have done for poor children in inner-city neighborhoods, and it explodes. Litigation is inevitable.

Debates over educational choice can be confusing. Arguments pro and con have a tendency to leave the discerning reader or listener with the impression that there is as much "choice" in selecting the appropriate meaning of the term "choice" as there is promise in the concept itself. It is only when an appropriate descriptive adjective defines the nature of the "choice" to be permitted that the contours of the debate—and its critical importance—become clear.

Viewed in historical, political, and sociological context, the debate over school choice is not really about "choice" at all. It is about *control*: of money, of curriculum content and viewpoint, and of teachers and how they teach.

The Function of Education

No one questions the assertion that education is, by its very nature, a value-laden process. Neither is there any argument with the proposition that education policy always raises questions important to both law and religion. When education is publicly-funded, it is only natural that disagreements over the place of religion in education tend to focus on questions of control. *Whose* values, *whose* perspectives concerning religion and its place in education, and *whose* religious practices shall be accommodated or preferred?

Controversies over whose religion should be accommodated in publicly-funded education have been with us since Colonial days. The earliest debates over parental choice in education date back to the period between 1810 and 1820. School choice issues are an archetypal illustration of the truth of the classic observation "*Plus ça change, plus c'ést la même chose.*"

For both the Jewish and Catholic communities, the generic Protestantism of the public schools was troubling. Both communities sought to be supportive of the goals of the common schools. Both desired a safe space where their children could grow and learn without fear of imposition, ridicule, or proselytization by adherents of other faiths. The common schools were not receptive to these concerns. They were hostile.

Frustrated by the discrimination and animosity toward Catholics, the Church started its own school system in the mid-nineteenth century, and

fought back attempts by Nativists and the Ku Klux Klan to shut it down in the 1920s. The Amish and other religious minorities responded in much the same manner, often (but not always) with much the same results.

Similar concerns have animated the educational strategies adopted by other minority communities. Wisconsin school choice pioneer Annette "Polly" Williams has argued for years that the Milwaukee public schools, its teacher unions, and other institutions of the state and local economic and political establishment ignore the interests of minority children as they pursue their self-interest.

The ongoing struggle of the Black community to achieve equality in education is, at bottom, a "school choice" problem. The issue in *Brown v. Board of Education* (1954) was segregation on the basis of race, a policy that limited equality and fostered racial animus by controlling the racial characteristics of the educational environment. Black students had no choice. Today there is a choice for students from upper and middle-class Black families, but poor children of all races are often trapped in public schools that do not meet their needs. And so the debate continues within the Black community concerning the wisdom and utility of "school choice" strategies as a means of furthering the economic and social welfare of children trapped in substandard inner-city and rural schools.

How will the law respond? There are three possible solutions. The first is to forbid any kind of voucher program, and to permit school choice only within the public school system. The second is to permit state aid to follow the child, and to impose no limit on the choice of an alternative school that otherwise meets the requirements of the compulsory education laws. The third option, viewed as a middle-ground by some, is to limit the choices of parents and children.

Each of these options is problematic.

Much has been said and written about the "public school only" option. It is the *status quo*. It is problematic for several reasons, not least of which is that it leaves the fate of children in the hands of school administrators, rather than parents. The ability of a poor child to choose a private school depends on private charity. To the extent that they exist at all, options among public schools are limited. In rural areas, there are often no alternative public schools to attend.

The "universal choice" option is criticized for leaving too much power in the hands of the parents, and for practical reasons. Not only are there not enough affordable private schools in operation, but the supply of currently available seats favors religiously-affiliated schools. Although Milwaukee's experimental program has been approved by the Wisconsin courts, it remains

controversial. Children living outside of Milwaukee cannot participate, and only a limited number of children in the city are currently eligible. The inclusion of religious schools in the program also makes it inevitable that the judgement of the Wisconsin Supreme Court will be appealed to the United States Supreme Court.

The third option, viewed as a more "moderate" approach by some, would permit state funds to follow children to schools that do not teach from a religious perspective or include religion in their curriculum or activities. This option is discriminatory on its face. Exclusion of religious schools will inevitably result in litigation over the definition of "religion" and the degree to which it permeates a school's specific programs and activities.

In the end, however, these issues will not be resolved in the rough and tumble of the political process alone. Litigation is an inevitable part of the strategic equation, and the outcome will depend on how the United States Supreme Court reads the Religion Clause of the First Amendment.

The State of the Federal Case Law, Circa 1997

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

It is a truism among scholars of the First Amendment that the jurisprudence of the Religion Clause is a conceptual disaster area. Professors Mary Ann Glendon and Raul Yanes, among others, have urged both courts and scholars to undertake "a long overdue reconsideration of Religion Clause jurisprudence from the foundations." ("Structural Free Exercise," 90 Mich. L. Rev. 477, 547 (1991)). Recent case law indicates that the Court may be willing to reconsider its approach to questions arising under the Religion Clause. Should the Court be willing to undertake the task, school choice issues will provide the vehicle for that reconsideration.

Families and communities use both formal and informal education methods to transmit knowledge, culture, tradition, philosophy, and religion to their children. Education is accomplished by example, by use of the written and spoken word, and through socialization. It contains a variety of messages. Content and viewpoint are critical. Education cases thus stand at the intersection of all of the First Amendment's guarantees of non-establishment, free exercise, freedom of speech and of the press, peaceable assembly, and petition for redress of grievances.

Proverbs 22:6 admonishes us to "train up a child in the way he should go, and when he is old he will not depart from it." Education has been a key battleground of religious and academic freedom because every religious community in the United States takes those words to heart. All agree that protection of religious and academic freedom is (or should be) a key component of publicly-funded education programs. The disagreements center on matters of design and control.

Education cases having religious elements are usually described as "church-state cases." For analytical purposes, however, such cases can, and often do, raise a variety of related, but legally distinct, issues. Table One is a summary of the many ways that education cases having religious elements can be classified ("characterized") for purposes of legal analysis.

Table 1. Characterizing and Education Case Having Religious Elements

First Amendment Issues	Family Law Issues	Liberty or Equality Issues
non-establishment	custody	parental rights
free exercise	control	children's rights
speech and press	neglect	de jure and de facto discriminiation
assembly, association and non-association		academic freedom
petition for redress of grievances		

Each of these possible characterizations raises a distinct set of questions and constitutional issues. Family law, for example, requires that parents see to the education of their children. Parents who want significant control over the education of their children learn quickly, however, that professional educators control curriculum, environment, and child placement. A parent who objects, on grounds of religious liberty, to any aspect of the public education program thus faces a dilemma. Keeping the child from school until remedial action is taken can result in neglect charges, criminal prosecution under the compulsory education law, or loss of custody. Placing a child in private school requires a significant expenditure of money. Litigation designed to force recognition of parental concerns, including those centered on religious freedom, is often the only alternative.

A large body of state case law on what historians call the "School Question" has developed since the mid-nineteenth century. Federal case law concerning religion in education is of more recent vintage. Much of the public's understanding of the law of church-state relations is based on the holdings of the United States Supreme Court since 1947.

Table Two is a summary of the federal case law on support for students at religiously-affiliated school since 1947. This table should be viewed in light of several caveats. All but one are summarized below the table.

The first caveat relates to its content. Table Two contains only federal cases involving public support of religiously affiliated schools and their students decided since 1947. Federal cases dealing with religion in the public schools raise exactly the same issues, but are not included. State cases are excluded as well.

Everson v. Board of Education is the first case on the list. It marks the first time the United States Supreme Court applied the Establishment Clause to the States. It is also the first of its many subsequent attempts to convert Thomas Jefferson's metaphorical "Wall of Separation of Church and State" (derived from his famous Letter to the Danbury Baptists) into a rule of law.

However, as Jonathan Sarna points out elsewhere in this volume, the history of church-state disputes over education does not begin in 1947. It dates to the early nineteenth century. *Everson v. Board of Education* was not the first case on the subject of religion and education at the federal level, but it does lay down a basic federal "rule." State cases involving religious freedom in schools were in litigation nearly a century prior to Everson.

As the years have passed, the Court's attempts to construct a "wall of separation" between religion and publicly funded education have failed. What stands in its place is, by the Court's own admission, a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." (*Lynch v. Donnelly* (1984), quoting *Lemon v. Kurtzman* (1971)). The reason is straightforward: cases involving religion and education involve a wide range of constitutional issues and interests that cannot easily be reconciled.

Table Three is designed to illustrate kinds of federal constitutional questions that arise when taxpayers are asked to fund or support any type of educational program, public or private. The first column contains the constitutional provisions or doctrines most commonly raised in education cases. The second contains some of the questions a court considering a constitutional case arising under that particular clause will have to answer.

The questions presented in Table Three demonstrate why the Court is thus caught on the horns of a dilemma of its own making. A "no aid" rule is easy to administer, and would be consistent with the "strict separation" view of the Establishment Clause. The values protected by the Free Exercise, Speech and Press, Petition, and Equal Protection Clauses would simply be subordinated to the "no-aid" principle. A set of rulings that accommodates religious belief, speech, and practice in the context of publicly funded education, would necessarily result in a scaling back of the Court's commitment to a regime of "strict separation."

Table 2. The Supreme Court on support for Students Enrolled at Religiously Affiliated Schools (1947–1997)

Case	Permits	Forbids	Reason
Everson *v.* Bd. of Ed. 330 U.S. 1 (1947)	Reimbursement to parents of transportation costs		Generally available, neutral public welfare program for children
Bd. of Ed. *v.* Allen 392 U.S. 236 (1968)	Loan of Secular Textbooks		Aid to children
Walz *v.* Tax Comm'n 397 U.S. 664 (1970)	Tax Exemptions		No First Amendment violation
Lemon *v.* Kurtzman 403 U.S. 602 (1971)	Loan of Secular Textbooks	Teacher Salary Supplements	Excessive administrative entanglement
Tilton *v.* Richardson 403 U.S. 672 (1971)	Grants to religiously-affiliated college under federal program supporting construction of college facilities used for secular purposes		Schools were not "pervasively sectarian," college students are less susceptible to religious indoctrination than younger children, and nature of aid did not lead to excessive entanglement
Hunt *v.* McNair	use of state bonding authority to finance secular program facilities at religiously affiliated colleges		School was not so sectarian as to make it impossible to separate religious and secular secular components of its program
Comm. for Public Ed. *v.* Nyquist		Tuition tax credit to parents	Aids religion, Catholic schools primary beneficiary
Sloan *v.* Lemon 413 U.S. 756 (9173)		Tuition reimbursement to parents	Aids religion, Catholic schools primary beneficiary

Table 2. The Supreme Court on support for Students Enrolled at Religiously Affiliated Schools (1947–1997) cont.

Case	Permits	Forbids	Reason
Levitt *v.* Comm. for Pub. Ed. 413 U.S. 472 (1973)		Per capita reimbursement to school of state-mandated service costs	Aids religion, no guarantee that aid would be used to defray only secular costs
Meek *v.* Pittenger 421 U.S. 349 (1975)	Loan of Secular Textbooks		Approved in *Allen*
		On-premises educational services by public school personnel	Possibility that public school teachers might advance religious mission
		Loan of instructional materials, such as maps, globes, A.V. equipment	Aids religious mission by making schools more viable
Roemer *v.* Bd of Public Works 426 U.S. 736 (1976)	Annual per-student subsidy to private universities amounting to 15% of the aid given to students in state institutions		Institutions were not so "evasively sectarian" as to make it impossible to separate religious and secular components of the education program
Wolman *v.* Walter 433 U.S. 229 (1977)		Cost of bus transportation to field trips	Might advance religious mission
	Off premises diagnostic/remedial services		No possible religious effect
	Loan of secular textbooks		Approved in *Allen*
	Funds to distribute and score standardized tests used in public schools		Important secular purpose, no religious involvement in preparation of tests
		Loan of instruction materials	Might advance religious mission
New York *v.* Cathedral Academy 434 U.S. 125 (1977)		Reimbursement to schools under program held invalid in Levitt	Advances religion, fostered excessive entanglement. Reliance on program by schools prior to challenge irrelevant.

Table 2. The Supreme Court on support for Students Enrolled at Religiously Affiliated Schools (1947–1997) cont.

Case	Permits	Forbids	Reason
Comm. for Public Ed *v.* Regan 444 U.S. 646 (1980)	Reimbursement to school for standardized testing and reporting services		No religious effect. Repaid only administrative costs
Mueller *v.* Allen 421 U.S. 349 (1983)	Tax deduction for parents educational expenses at any school		
Witters *v.* Wash. Dept. Serv. for the Blind 474 U.S. 481 (1986)	Tuition at school of handicapped college student's choice		College student had right to choose and program was neutral.
Aguilar v. Felton 473 U.S. 402 (1985)		On-premises remedial education for poor children	No guarantee that public officials would not advance religious mission of the school. *Aguilar* was overruled in 1997 in *Agostini v. Felton.*
Ball *v.* School. Dist. of Grand Rapids 473 U.S. 373 (1985)		"Shared time" public school teachers teaching secular subjects on private school premises	Frees up resources for religious function; creates "symbolic" link between church and state.
Bowen *v.* Kendrick 484 U.S. 942 (1987)	Grants to churches and religious institutions to develop secular sex education programs approved by federal government		Religious institutions may participate in general social welfare programs, but may not utilize funds to advance religion.
Zobrest *v.* Catalina School District 509 U.S. 1 (1993)	On-premises sign-language interpreter for deaf child in religious secondary school		Benefits available in otherwise neutral program
Agostini *v.* Felton 117 S.Ct. 1997 (1997)	On-premises remedial education for poor children		Benefits available in otherwise neutral program

Table 3: A Typology of School Choice Cases and Constitutional Questions Presented

Case Type, by Clause	Questions Raised
Establishment Clause	Does the Establishment Clause permit, or require, federal control of the religious content or viewpoint of education purchased with public funds?
Free Exercise Clause	To what extent will religion, religious exercise, and religious speech (including proselytization) be accommodated in public settings, including the public schools?
Speech and Press Clause	To what extent do the guarantees of freedom of speech and of the press limit the government's ability to control the content or perspective of the speech, or of the written work of teachers and students, in publicly funded educational programs?
Peaceable Assembly	To what extent may the government limit the ability of groups to assemble peaceably on public property, including public school buildings?
Petition for Redress of Grievances	To what extent does the First Amendment limit the range of possible legislative outcomes available to political factions aggrieved by the government's claim that it may control the content, viewpoint, and environment of educational programs purchased with public funds?
Parental Control	To what extent does the Constitution protect and preserve the primary right of parents to control over the education and socialization of their children?
Liberty (Substantive Due Process)	To what extent does the Constitution's guarantee that "liberty" will not be taken without "due process of law" limit the government's ability to restrict individual and parental choices among educational alternatives?
Equality	Do the Constitution's guarantees of equal protection of the law, including the No Religious Test Clause of Article VI, permit public funding of "common schools" only, or can they also be construed to permit the funding of private and religious schools as well?

A good example of the inverse relationship between "strict separation" and other constitutional values is illustrated by the Court's decision in *Aguilar v. Felton.* In *Aguilar*, the purpose of the litigation was to eliminate on-site remedial education services for poor children who attend religious schools. Although no public assistance actually flowed to the religious schools, a

majority of the Court thought that the program itself created a "symbolic link" between church and state that should be eliminated. The intended effect of the decision was to compel poor children entitled to services to go to the public schools in order to get them.

Agostini v. Felton, which reverses *Aguilar,* adopts an approach described by Dr. Sarna as "equal footing." After *Agostini,* children are entitled to on-site remedial education services provided by public school teachers, regardless of the religious or non-religious character of the school they attend. The dissenting Justices in Agostini objected. In their view, the Court's approach is a breach in the "wall of separation."

The final caveat concerning Table Two is contextual. The table is a summary of the holdings of a shifting majority of the United States Supreme Court concerning the types of aid permitted or forbidden at any point in time. It cannot possibly capure the political dynamics that led to litigation over the specific types of aid in issue, and is affected by changes in the membership of the United States Supreme Court.

Taken as a whole, Table Two is a reflection of the political battles that led to the adoption of the challenged aid programs. The case law addressing the "School Question" is not a set of rules derived from a dispassionate reading of the constitutional text. The United States Constitution says nothing about education, either public or private. The outcomes are compromises, and the rules are designed to permit the Court to strike what Justice Sandra Day O'Connor has called "sensible balances" between and among the interests of the competing political factions. (See *Employment Div. v. Smith* (1990), O'Connor concurring.) These "balances" shape our understanding of the meaning of the First Amendment, but they are incomprehensible unless there is some understanding of the political, religious, and philosophical differences among the contending factions.

Controversies over aid to private schools and battles over the content or perspective of public school programs revolve around a set of common questions: "How, and in what setting, shall the community's children be educated?" Political disagreements over immigration policy, cultural and linguistic assimilation, the role of religion in education, the rights and obligations of religious and political minorities, and political control of culture-forming institutions are as important today as they were in the period before the Civil War.

In Table Four (p. 77) the focus is the factional interests that complicate controversies over taxpayer-funded school choice programs. It builds on the questions raised in Table Three by contrasting the factional interests involved when the federal courts consider school finance questions.

The first column heading is *Parent & Student "First Amendment" Interests.* Each of these interests described under that heading is recognized as a "first amendment interest" by the United States Supreme Court, and would merit significant protection were the funds supporting an educational program to be derived purely from private sources. Parents and students who want an equal share of public assistance devoted to education of the community's children assert these interests. So do their opponents.

The second column heading is *Taxpayer "First Amendment" Interests.* In that column are summarized the interests of two distinct sets of taxpayers. The first group includes those who object to the use of their tax money to support educational programs that offer educational content with which they disagree. For purposes of this discussion, it also includes taxpayers that support the ideal of a common school system, and who believe that private schooling fosters the social, religious, and economic fragmentation of the community. The case law often refers to these individuals as "*dissenting* taxpayers." So too does Table Four.

Table Four uses the term "*supportive* taxpayers" to describe taxpayers who agree with the use of their tax dollars to support a wide range of religious, philosophical and political perspectives in educational programs. Taxpayers that do not object to the use of public funds to pay for education in private schools are included in this category by default.

The political debate over public financing of education at private schools pits at least these three—and usually many more—political factions against each other. If a legislature decides to provide funds to defray all or part of the cost of private education, it can safely be assumed that the supportive taxpayer faction prevailed in the legislature. When a "supportive" bill reaches the executive (Governor or President) for signature or veto, the lobbying for a result deemed favorable inevitably involves the same political factions.

Factional involvement does not change after a case goes to court, but the dynamics change considerably. The legislative process is a "give-and-take," where compromise is the essence of good policy-making. In litigation over the "School Question," however, the allegation is that taxpayer support of education having religious elements is not simply unwise; it is *unconstitutional.* The goal is "winner-take-all," and the rhetoric is phrased in the language of high constitutional principle.

The United States Supreme Court has built much of its jurisprudence of the Religion Clause on the premise that it is the job of the federal courts to strike "sensible balances" between and among competing factional interests in education cases. In order to facilitate that role and encourage litigation, the Court has made it easy for dissenting taxpayers to challenge payments to, or on behalf of, children enrolled in religious schools.

And what makes a balance "sensible"? In the view of the Court and most legal and political commentators, a major concern is the way in which the outcome affects the interests of "minorities." Where the issue is school finance policy, the Court will seek to determine "who benefits?", and will scrutinize closely any program that seems discriminatory in either design or operation.

Table Five looks at the same factional interests summarized in Table Four, column one, but compares them with the interests of factions that are concerned that funding programs will either discriminate against their children, or leave them at a disadvantage.

The questions raised in Table Five (p. 78) are central to the resolution of many of the cases mentioned in Table One. They are also important variables in the cases omitted from that table: *i.e.* those involving religion in the public schools.

Concluding Observations

Writing in another context, Justice Sandra Day O'Connor has observed that the Supreme Court's case law was "on a collision course with itself." The Court's jurisprudence of the First Amendment suffers from the same problem.

It is possible—perhaps likely—that the current political debate over "school choice" will culminate in a series of cases that will give the Court the opportunity to clarify just how much parental and student choice in elementary and secondary education the First Amendment permits. Until those cases go to final judgment in the United States Supreme Court, however, advocates for and against school vouchers will be able to read the case law both ways.

A well-constructed school choice program that permits funded choice of a religious school might survive a constitutional challenge. It might not. The best that can be said at present is that the issue is a political one: in the states, in the Congress, and, unfortunately, in the courts. In the end, the issue will ultimately be decided the old-fashioned way: by counting the votes.

In closing, let me urge that all who reflect on this issue consider the admonition of Judge John T. Noonan, Jr. of the United States Court of Appeals for the Ninth Circuit. Only when we "immerse ourselves in history" will we be able to "appropriat[e] the experience that undergirds the constitutional principles of free exercise and no establishment."[1] In order to understand why school choice is such an important issue today, we need to understand the historical factors that prompted religious minorities to fight so hard to preserve educational choices for themselves and their children.

Endnotes

1. John T. Noonan, Jr. *The Beliver and the Powers That Are,* (Macmillan 1987), p. xiii.

Table 4. Interests Affected by Public Funding of Education Having Religious Elements

(Limited to consideration of Parent/Student and Taxpayer "First Amendment" interests)

Parent & Student "First Amendment" Interests	Taxpayer "First Amendment" Interests	
Free exercise of religion: Freedom to choose an educational program consistent with religious and moral beliefs, needs, and practices	Dissenting taxpayers	Non-association with ideas or beliefs
	Supportive taxpayers	Civic recognition of the value of different perspectives on educational matters
Free speech and press. Freedom to choose teachers, teaching materials, and textbooks that are consistent with religious, moral, and philosophical beliefs.	Dissenting taxpayers	Non-association with ideas or beliefs contrary to taxpayer's own. Lack of community control of the content or perspective of the prescribed curriculum.
	Supportive taxpayers	Civic recognition that eduction is not value-neutral, and that all teaching proceeds from a moral and political "perspective" on "the good."
Freedom to assemble peaceably, to associate freely, and to determine the terms of that association in a manner consistent with the law.	Dissenting taxpayers	Avoidance of religious factionalism, or political division along religious and other ideological lines concerning the content of education.
	Supportive taxpayers	Encouragement of diverse cultural, religious and intellectual educational resources.
The right to petition for redress of financial grievances caused by funding schemes that prefer one viewpoint on learning over others.	Dissenting taxpayers	Fear that political majorities will impose their religiously-motivated views of the common good on dissenters, including the possibility that there will be no secular alternative to religious education.
	Supportive taxpayers	Vindication of majoritarian democracy and representative government fostering parental choice.

Table 5. Interests Affected by Public funding of Education Having Religious Elements

(Limited to consideration of Parent/Student interests from a Minority/Majority religious perspective)

Parent/Student Interests	"Practical" Concerns of Majority/Minority Faith Groups	
Free exercise of religion: Freedom to choose an educational program consistent with religious and moral beliefs, needs, and practices	Minority faiths	How will minority faiths, especially small ones, find adequate educational program alternatives? Will the alternative education programs available be equal in quality or diversity to meet their needs? Will funding, facilities, or other resources be allocated on an equal basis?
	Majority faiths	How will disputes be resolved concerning the allocation of resources between and among the education programs competing for public funds?
Free speech and press. Freedom to choose teachers, teaching materials, and textbooks that are consistent with religious, moral, and philosophical beliefs.	Minority faiths	Will competing programs be available? Can proselytism be avoided in programs controlled by others? How can adherents of minority faiths control the content or perspective of the curriculum to which their children are exposed?
	Majority faiths	Is it possible to avoid disputes among religious factions concerning the choice of materials, the tone and content of curricula, and the selection of teachers?
Freedom to assemble peaceably, to associate freely, and to determine the terms of that association in a manner consistent with the law.	Minority faiths	How can adherents of minority faiths avoid discrimination in, or exclusion from, educational programs funded by community resources. Is it possible, or wise, to resist public pressure to de-emphasize the unique religious identities of religious schools that accept public funds?
	Majority faiths	Why should the public fund educational programs that will not appeal to the general public, and that may discriminate on the basis of religion?
The right to petition for redress of financial grievances caused by funding schemes that prefer one viewpoint on learning over others.	Minority faiths	How can adherents of minority religions recapture their state-law entitlements to funding of educational programs for children? How can schools adhering to a minority religious viewpoint avoid public pressure to de-emphasize their religious identity after having accepted public funds?
	Majority faiths	Why should the public fund educational programs that will not appeal to the general public, and that may discriminate on the basis of religion? Is it possible to maintain the funding advantages built into the current system of school finance?

Remarks From a Roundtable

Marc Stern

There are a number of ways we could discuss the issue of vouchers here. The primary focus of this panel is going to be on church-state separation, which I frankly regard as something of a "red herring" in regard to the current debates. I do not believe that the contemporary political impetus for vouchers has very much to do with debates over the exact boundary between church and state.

In part the impetus is impatience in inner-city communities with public schools that have failed. As far as I know, there is no data indicating that choice is preferred in those communities over institutions that work, but until they do work, vouchers will be attractive. Nevertheless, I think that the bulk of the current political impetus for vouchers around the country is an effort to deconstruct (not in the academic sense of the word, but in the sense to "tear down") the role of government as a provider of social services, and particularly, educational services. The movement for vouchers stems from a libertarian economic and political outlook that has very little in common with the debate over church-state separation. So, while I would rather discuss policy, I'll stick to the assigned topic of Constitutional Law.

The strongest arguments against voucher proposals lie in state constitutional provisions which require states to operate public schools and to ensure that tax funds go only to public schools. Those are not exclusively motivated by church-state concerns, but also by a democratic commitment to schools operated by the government, subject to democratic control, with the purpose of serving as common schools. Common schools serve two functions. First, they provide a common curriculum across the state to everybody who wants it—and the framers of these provisions *thought* that most children would attend them. And along with useful knowledge and useful skills, common schools teach adherence to an agreed upon set of civic values.

Second, (and this is little noticed, although I notice it as a parent who sends his kids to yeshiva) these schools serve as a sort of mark against which every school must measure the education it provides. With the exception of schools operated by fairly small separatist groups, private and public schools compete