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Our History of Educational Freedom
What It Should Mean for Families Today

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Executive Summary

America has two strong, yet conflicting, educational traditions. One is our tradition of educational freedom, and the other is a strong, though shorter, tradition of state-controlled schooling.

In the wake of the Supreme Court's historic decision in *Zelman v. Simmons-Harris* upholding school choice programs, more and more families are questioning whether state control over educational decisions is really best. Decades of public school failure in our inner cities have contributed to the recent increase in sentiment against standard state solutions to social problems, and the success of school choice programs in Milwaukee and elsewhere has challenged the conventional wisdom that families with low incomes cannot or will not make good choices for their own children.

In this paper we examine the American tradition of educational freedom, following its ebb and flow at various points in our history. America's ethos of educational freedom has always been strong, tied to our values of pluralism, tolerance, and free inquiry. But our legacy of freedom has suffered repeated assaults by individuals and groups who wish to use state control over schooling to homogenize American culture.

We then examine recent victories for educational freedom, such as the historic Supreme Court decision upholding school choice and the introduction of new school choice programs around the country. Finally, we outline the most critical additional freedoms that parents and families need in the areas of school choice, private school freedom, homeschooling, and religious neutrality.

Recent victories for educational freedom are encouraging but only a beginning. School choice is legal, but it is not widespread, and opponents of educational freedom are threatening to smother existing private schools in a morass of new regulations, which would dictate everything from curriculum to staffing.

Supporters of educational freedom must not win legal battles while losing the public policy war. An educational freedom agenda including choice for all families, religious neutrality, freedom for private schools, and protection for homeschooling families will ensure that educational freedom provides real benefits to families who are harmed by current policies.

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Introduction

America's educational history is the story of a conflict between two strong traditions.[1] On one hand rests our tradition of educational freedom. For much of our nation's history, control over education was entirely decentralized, and educational institutions were voluntary, cooperative efforts involving parents, teachers, students, and charitable organizations or local governments. Parents sought educational options for their children that harmonized with their religious and cultural traditions, and constitutional protections including freedom of expression, religion, and association helped to protect diverse educational institutions from state repression.

On the other hand, we also have a very strong tradition of state-controlled schooling. The rise of the American public school accompanied large waves of immigration in the 19th century. Government control of schooling was thought necessary to assimilate the children of immigrants and to avoid conflicts over state subsidization of minority religious schools. In one respect the latter tradition has largely carried the day; well over 80 percent of American schoolchildren now attend public schools.[2]

But an ethos of educational freedom still exists in the United States. Although most children attend public schools, the U.S. Constitution protects the right of alternative private schools to exist, and the right of parents to choose them. Professor Stephen Gilles of Quinnipiac University School of Law links America's tradition of educational freedom to an embrace of a broader intellectual tradition he calls "liberal parentalism."[3]

Liberal parentalists believe that parents should be afforded maximum freedom to make child-rearing decisions, unless those decisions are plainly seriously harmful to the child. Contrary to the assertions of some critics,[4] liberal parentalism does not stand in opposition to the notion that children have individual human rights. Rather, liberal parentalists and their critics both attempt to address the following question: Who should make decisions for children that all parties agree cannot yet be made by children themselves? Either parents can make such decisions, or a government entity must.

Liberal parentalists believe that parents are better able to make child-rearing decisions—including educational decisions—than the state. For example, no government actor, no matter how conscientious or exceptional, will have the time and motivation to choose a school for a single child as well as a parent will.

By allowing parents to make child-rearing decisions, liberal parentalism and educational freedom help in the long run to preserve our free and pluralistic society. As the Supreme Court has warned, government control of education threatens to "standardize children."[5] Educational freedom is thus closely tied to the American tradition of the right to dissent from majority views and state orthodoxies. Our freedom to determine what and how our children learn is important to preserving our political freedom in a constitutional democracy.

In the wake of the Supreme Court's historic decision in *Zelman v. Simmons-Harris* upholding school choice programs, more and more families are questioning whether state control over educational decisions is really best. Decades of public school failure in our inner cities have contributed to the recent increase in sentiment against standard state solutions to social problems, and the success of school choice programs in Milwaukee and elsewhere has challenged the conventional wisdom that families with low incomes cannot or will not make good choices for their own children.

In this paper we examine the American tradition of educational freedom, following its ebb and flow at various points in our history. We then discuss recent victories for educational freedom. Finally, we turn to the importance of securing additional freedom for parents and families in the areas of school choice, private school freedom, homeschooling, and religious neutrality—a critical "to do" list for advocates of educational freedom if all American families are to secure its rewards.

Educational Freedom in Early America

Before the mid-19th century, schooling in the United States was an entirely local undertaking. Schools funded by tuition, charity, public funds, or some combination of the three coexisted, at least in densely populated areas. That mixture of schools did a surprisingly good job of spreading literacy and meeting the population's other educational needs. Tuition-charging schools in particular produced curricular and other innovations that spurred the young nation's economic growth. The establishment of state schooling systems curtailed this varied marketplace, however, and by 1900 had replaced it with an increasingly expensive and inefficient monopoly.

A Variety of Local Schools

In the colonial and early national periods, a range of schooling options met most citizens' needs.[6] Residents of small towns and rural areas in the North attended semipublic district schools, which generally allowed poor students to attend for free while charging tuition to those who could afford it. In the South, teachers selected temporary locations or were engaged by a group of parents to teach for a term.[7] Most children in rural areas of the North and a substantial number of white children in the South attended school for at least two or three months a year.[8] Parents had considerable influence in these rural schools, particularly because of the custom of housing teachers in student homes. Parents also played a significant role in the selection of teachers and textbooks.[9]

In populous areas, independent schools existed in various forms; often, teachers simply taught in their houses, advertising for pupils with signs or newspaper notices.[10] The quarterly fees at most of those schools were within the means of roughly three-quarters of the population.[11] Because teachers had the freedom to adapt courses and hours of instruction to student interest and convenience, those schools generated many improvements in curricula and methods. Over time, classical curricula were replaced in part by the more useful subjects taught in town "writing schools" and private vocational schools; the nature of economic life in the colonies generated demand for vocational learning over more traditional subjects. In contrast to the independent schools' evolution, the semipublic town schools continued to adhere to traditional methods and subjects during this period.[12]

Charity schools established by philanthropists and religious societies existed in many parts of the country. Unlike the situation in England, opposition to educating the poor did not arise.[13] The Lancasterian, or monitorial, system of instruction[14] also furthered the spread of charity schooling. It proved to be an efficient and inexpensive way to educate large numbers of children.[15] The system allowed pupils to advance according to their abilities in each subject, in contrast to the rigid grading system of later common schools.[16]

As urban populations grew, local voluntary associations seeking to assist needy women and children often took over the management of the "free schools." Mutual-aid societies formed around trades and religious denominations for similar purposes.[17] Although the charity system contributed much to the education of the poor, it was far from perfect. Some reformers used charity schools to indoctrinate the children as they saw fit, often with the idea that their families were a harmful influence.[18]

Beginning in the 1790s, scattered Sunday schools helped provide basic instruction to individuals and groups that lacked access to weekday schools. Though they played a relatively small role in spreading literacy, Sunday schools did help fill the gaps in schooling opportunities for girls, adults, blacks, factory children, and frontier residents.[19] With the spread of tax-supported public schools in the 1820s and 1830s, however, Sunday schools abandoned basic education in favor of religious teaching.[20] While Protestant factions battled over the religious content of common school curricula, Sunday schools sought to make up for deficiencies in students' religious education.[21]

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Local Schools for African Americans

African Americans, because they were excluded from most free schooling,[22] eagerly sought out Sunday schools, which generally held separate classes for black adults and children. In New York, blacks were 25 percent of Sunday school pupils by 1817.[23] Sunday schools in cities throughout the South held classes for free blacks; during the 1820s, some even included slaves. Many of the students were adults, women as well as men.[24] After Nat Turner's 1831 rebellion magnified racial prejudices, however, many southern states prohibited teaching slaves to read and restricted the liberty of free blacks, ending black participation in white Sunday schools.[25]

Quakers also made notable efforts to help educate African Americans, founding numerous schools for the children of black freedmen between 1770 and the first decades of the 19th century. They even ran "mixed schools" for a short period after the Revolution.[26] In northern cities during the antebellum years, abolitionist groups helped provide schools for black refugees from the South.[27]

Although white charity efforts were important, black communities in the urban North established successful schools as well. Many black-run Sunday schools were organized after the Turner revolt, which caused white Sunday schools in Washington, D.C., and other places to dismiss black children.[28] White-run Sunday schools had in any case ceased to be of much use after the spread of common schools diminished their emphasis on reading and writing.[29]

Blacks also established weekday schools in many northern cities and towns. Most charged tuition, though some charity schools were also established.[30] A surprising number of those schools appeared in Washington, D.C., and Baltimore, where charitable organizations had been much less active than in New York and Philadelphia.[31] Freemen in the South also made significant efforts to educate themselves, though in general black education was confined to private teaching and religious instruction in population centers.[32]

In a few places black-run schools were drawn into emerging public systems, generally to their detriment.[33] In early 19th century Boston, black parents and white philanthropists established a free private school in the home of local black activist Primus Hall.[34] Meant to serve as an escape from Boston's public schools, the school quickly fell under the public school committee's control. The loss of control over this and other segregated schools led African-American parents to petition the committee to end school segregation, a request that was continually denied.[35]

Literacy and Parent Power

The seemingly haphazard mix of schools that existed in the years before 1840 produced a surprisingly well-educated populace.[36] By 1787 free male literacy was about 65 percent and probably greater than 80 percent in New England. By 1850 only 1 in 10 people identified themselves as illiterate on the U.S. census.[37] Enrollment rose steadily during those years, particularly among girls.[38] Findings from an 1821 annual report of New York State superintendents indicate that schooling was almost universal there, without being compulsory or free except to the very poor.[39]

That surprising success came at a time when parents were almost entirely responsible for their children's education. Independent and, to a lesser extent, semipublic schools succeeded precisely because parents controlled teacher pay and made other important decisions. In the proposal for improving education outlined in his *Wealth of Nations*, Adam Smith acknowledged this fact: every parish or district should have a school charging a small tuition, "the master being partly, but not wholly paid by the public; because, if he was wholly, or even principally paid by it, he would soon learn to neglect his business."[40] Since parents were in the best position to assess teachers' efforts, they were the best group to control teachers' salaries.

Peaceful Prelude

Before the appearance of state-sponsored systems, schools were not a source of conflict. Since most parents had at least some degree of control over their children's education, they

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found arrangements to suit their needs:

> There were nondenominational schools, Quaker schools and Lutheran schools, fundamentalist schools and more liberal Protestant schools, classical schools and technical schools, in accordance with the preferences of local communities. Some had homogenous enrollments; others drew students from across ethnic and religious lines. In areas where schools of different sects coexisted, they and their patrons seldom came into conflict, since they did not try to foist their views on one another. They lived and let live in what were comparatively stable, though increasingly diverse, communities.[41]

The Puritans' educational experience illustrates this point. Their community-run and community-funded town schools had impressive success despite using local public funds. However, their curricula adhered strictly to Calvinist teachings, and such an arrangement would not have survived in the absence of a homogenous community. The Puritans' presence in the New World was in fact due in large part to their exclusion from English schools and universities.

Similarly, the Founders' plans for public education aimed to create and maintain a homogenous society. While Jefferson and Franklin advocated the establishment of publicly funded schools, they did so on the basis of the assumption that English Protestant values would inform their curricula. At that time the Catholic Church (and Catholic education) was widely viewed as a threat to liberal society,[42] which some of the Founders may have hoped public schools could counteract by enforcing Protestant views.

Declining Freedom: The Rise of Government Schooling

Beginning in the antebellum period, a system of "free" public schools replaced the network of semipublic, independent, and charity schools. Where they had once been informal arrangements, schools became institutions designed to achieve social goals.[43] By the end of the 19th century, a clear line dividing public schools and the remaining private institutions had emerged.

Protestant Reformers

The common school movement accompanied an era of dramatic social change, particularly the influx of immigrants during the 1830s and 1840s. From the dominant (Anglo-Saxon Protestant) viewpoint, that influx threatened democratic institutions. Protestantism, along with faith in capitalism and republicanism, justified school reformers' wish to regulate morals and create a more homogenous population through public schooling.[44] In other words, religious prejudice inspired the establishment of public schools.[45]

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State aid to Protestant schools (and not Catholic schools) became politically difficult during the 1840s when 700,000 Catholic immigrants entered the country. Instead of providing aid, states established public schools with a pronounced Protestant bias.[46] Catholics, of course, rejected those public schools and campaigned for public funding of Catholic schools. Compromise was impossible because reading the Bible without comment, a central feature of Protestant public schools, was simply unacceptable to Catholics.[47]

Angry protests ensued in 1840 when some Catholics petitioned to allocate a portion of New York City's school funds (controlled by the philanthropic Public School Society) to parochial schools.[48] The petition was defeated, and Catholic lobbying resulted instead in the establishment of supposedly nonprotestant public schools, administered by the city government beginning in 1841. In 1844 a Philadelphia school board ruling that Catholic children could choose to read from the Catholic Douay[49] Bible resulted in a riot that killed 20. Blocks of Irish immigrant homes, as well as three Catholic churches, were burned.[50]

The public schools generally enforced their Protestant bias. In 1854 the Maine Supreme

Court held that public schools could require reading from the King James Bible.[51] In 1858 and 1859 students in New York City and Boston were expelled from public school for refusing to read from the King James Bible.

By 1870 Protestant reformers, with few exceptions, were united in support of public elementary schools. They had decided that public funds could not be allocated to sectarian schools and that reading from the Protestant Bible was to be encouraged in the public schools.[52] At first, some denominations opposed state involvement in secondary and higher education (because they sponsored schools at those levels), but church leaders abandoned their opposition by the end of the 19th century.[53]

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Development of an Education Bureaucracy

As public schooling spread, bureaucracies developed to regulate the new school systems. States began to prescribe methods of teacher training and certification and to hire school administrators. Compulsory attendance laws further consolidated state control.[54] Advocates of public schools hoped that state involvement would attract more qualified and less transient teachers by establishing teaching as a profession.[55] They also sought to use public schooling to achieve other important social goals.[56]

In his advocacy of reform, Horace Mann, perhaps the most prominent common school reformer, drew much of his inspiration from a distant source: Prussian Pietism. Following the advice of Pietist reformers, early German king and Roman emperor Frederick II made schooling compulsory for children aged 5 to 13 and declared all schools and universities state institutions.[57] Prussian teachers were trained and certified by the state during the following centuries.[58] After touring German schools in 1843, Mann worked to spread their pedagogy in America.[59] One scholar has argued that all traditional elements of primary education—compulsory attendance, pupils raising their hands, collective instruction from state-approved textbooks, children grouped by age—are in fact a direct legacy from Prussia, a kingdom with little appreciation for the virtues of limited government and intellectual freedom.[60]

The popular notion that Thomas Jefferson was public schooling's original advocate is incorrect. The Founders certainly thought that education was crucial for the stability of a republic, but that fact does not imply that they wanted most education to take place in school *systems*.[61] Public education as envisioned by Jefferson was limited to basic elementary education for all in district schools. Further schooling at public expense was reserved for a talented few.[62] Even though Jefferson failed to get a free-school bill through the Virginia legislature, he opposed Charles Mercer's later bill because he felt it was too centralist.[63]

Winners and Losers

Teachers and administrators vigorously supported the campaign for public schools. In fact, at least in New York State, the campaign for free schools apparently began in the teachers' institutes.[64] The teachers' objective was to abolish rate bills (partial fees paid by parents) so district taxation would pay their salaries instead. Later, they lobbied for compulsory education. After both objectives were accomplished, teachers were able to earn higher salaries with less accountability to parents.

The lower classes and ethnic and religious minorities, however, were losers. As state funding increased, charity decreased.[65] Immigrants found that public schools sought to "Americanize" their children at the expense of their traditional customs and beliefs. And African Americans were condemned to the segregated system produced by post–Civil War conditions.[66] Whether they pressed for integration or tried to make the best of separate schools, their charity schools were gradually absorbed by public systems.[67]

In the end, state-sponsored education was detrimental to white Protestant children as well. By ceding control to the state, parents had reduced private options, ensuring declining educational quality. As John Stuart Mill

warned, states satisfy their own interests before those of the individual:

> A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation; in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body. An education established and controlled by the State should only exist, if it exists at all, as one among many competing experiments.[68]

In practice, public education in the United States increasingly satisfied the interests of the people the state had put in charge, teachers and administrators.[69]

The Early 20th Century: The Struggle Continues

The dawn of the 20th century saw an escalation in the battle between proponents of educational freedom and activists bent on using the law to restrict schooling. Fortunately, the U.S. Supreme Court effectively defended educational freedom from some of the era's worst assaults, striking down restrictions on teaching foreign languages and even compelled full-time attendance at public schools, which operated as an effective prohibition on private schooling.[70]

Efforts to restrict educational options during this period sprang primarily from a continuing cultural backlash against large waves of immigrants from southern Europe, Asia, and elsewhere.[71] By the turn of the century, America was accepting more than 1 million immigrants each year.[72] Like Reconstruction Era immigrants, but unlike earlier arrivals, those immigrants were often not Protestant. Jewish and Italian immigrants, among others, were subject to widespread prejudice.[73]

World War I significantly exacerbated distrust of immigrants, particularly those from Germany.[74] That anti-immigrant backlash was variously called nativism, or "one hundred percent Americanism."[75] Immigrants were seen as ideologically suspect and thus unreliable supporters of the war effort.[76] National and local organizations sprang up to foster support for the war and to investigate individuals and groups deemed hostile to the American action in Europe.[77]

It was against this backdrop of intense patriotic fervor, distrust of immigrants, and a specific anti-German bias that laws banning foreign language instruction and private schooling arose.[78]

The English Only Movement

World War I era nativist sentiment quickly focused on the domestic use of foreign languages. Stories circulated about U.S. Army conscripts who could not understand orders, because they had been educated primarily in a language other than English.[79] Language was suddenly a national security concern, both because of the need for an effective fighting force overseas and because of fears that immigrant groups were subverting the war effort in foreign-language meetings and publications at home. Beyond that, language was seen as a barrier to intellectual assimilation during a period of intensely conformist patriotism.

Professor William G. Ross of the Cumberland School of Law at Samford University writes that German Americans were, on the eve of World War I, "the largest, most cohesive, distinctive and self-confident of the nation's non-British ethnic enclaves, cleaving to their language and traditions even as they adopted American ways."[80] German Americans thus often used the German language in social clubs, newspapers, and churches as well as in their parochial schools.[81]

Legislatures around the country began to crack down on the use of foreign languages. A law in Oregon effectively shut down foreign-language newspapers by requiring a lit-

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eral English translation of every article to be printed beside the original. Nebraska banned the conduct of public meetings in languages other than English. [82]

Many lawmakers focused on the use of foreign languages in private schools, believing that children "could not properly absorb American values and become good citizens unless they received instruction in the English language."[83] Eventually, 23 states enacted statutes regulating or prohibiting instruction in foreign languages. Several states specifically prohibited the teaching of German.[84]

Among those was Nebraska, which in 1919 adopted a law prohibiting any foreign-language instruction in public or private schools before high school.[85] A teacher named Robert T. Meyer was convicted of teaching German to elementary schoolchildren during the time allotted to recess.[86] Meyer appealed his conviction to the Supreme Court, arguing in line with economic liberty precedents embraced by the Court at that time that a prohibition on foreign-language instruction violated his right to engage in his profession.

More important, Meyer argued that students and teachers had a personal liberty interest in the acts of teaching and learning without government interference, and that parents enjoy a constitutional right to control the upbringing of their children. Those last arguments—relating to educational freedom and family autonomy—formed the basis of the Court's decision to strike down foreign-language laws. In doing so, it delimited a sphere of professional, personal, and family life that was protected from undue interference by the state:

> Without a doubt [the Fourteenth Amendment] denotes not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[87]

Noting that "the American people have always regarded education and the acquisition of knowledge as matters of supreme importance," the Court wrote, "[Meyer's] right to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment."[88] Because mere knowledge of the German language cannot be said to be inherently harmful, the foreign-language prohibitions were illegitimate. The states had no proper interest in restricting the liberty of teachers and students of German.

Thus, the demise of the foreign-language laws marked the beginning of an era in which a safe haven existed in American law for parenting and family life. Not just foreign languages but any other areas of learning that parents and students wished to pursue were now protected from arbitrary state interference. That newly recognized personal freedom proved critically important in years to come, as the state schooling movement gained economic and political clout.

Forced Public Schooling

Throughout the controversy surrounding the teaching of foreign languages, a bigger question loomed: can states force every student to attend the common public schools? The ultimate goal of many groups supporting regulation of private schooling was the abolition of alternative schools. Members of such groups hoped that eliminating all private schools and forcing all children to attend public schools would "Americanize" the children of the nation's many immigrant subcultures.[89]

Oregon pioneered forced attendance at public schools in 1922, when its voters approved an initiative requiring all children between the ages of 8 and 16 to attend government-run schools full-time.[90] While private schools were not banned by the letter of this law, they were effectively eliminated as options because children have only so many

hours each day to pursue studies. Supporters of compelled public schooling elsewhere looked eagerly to Oregon to set an example for the nation.

Advocates of compelled public school attendance included a motley assortment of groups with both benign and suspect intentions. Professor Richard Seid of the University of Detroit Mercy School of Law writes:

> The [compelled public schooling controversy] grew out of an attempt by two major interest groups in Oregon to prevent the creation of private schools as alternatives to public schools. One interest group, rooted in bigotry, was simply hostile to the prospect of religious schools, particularly Catholic schools. The other group was concerned that private schools in general would undermine the idea of an egalitarian public minded society.[91]

Although Progressives and Socialists supported such measures as a way to unify America's working classes, darker forces played a more powerful role in support of the Oregon school law. Ross notes that only three groups actively worked to pass the Oregon initiative: the Federation of Patriotic Societies, the Scottish Rite Masons, and the Ku Klux Klan.[92]

The local Scottish Free Masons adopted a resolution calling for compulsory public education and circulated petitions to put the measure on the Oregon ballot.[93] The Masons explained their support for the measure by stating that it would ensure "united interest in the growth and higher efficiency of our public schools."[94] But they, too, played on the anti-Catholicism common at the time, alleging in their journal *New Age* that the Roman Catholic hierarchy favored the abolition of public schools.[95]

Scholars have also established that the Ku Klux Klan played a prominent role in promoting the Oregon initiative campaign.[96] Some have noted that, as Oregon had only a very tiny population of African Americans at the time, the state's Klan organization focused most of its hostility on other ethnic and religious minorities, particularly Catholics.[97]

Oregon voters approved the so-called compulsory public education initiative by a vote of 115,506 to 103,685.[98] The American Civil Liberties Union assisted the local Catholic Church as it, along with others, immediately challenged the new law in court.[99] The Supreme Court decided that this law, too, interfered with the liberty of parents to direct the upbringing and education of their children.[100]

Many critics of forced public school attendance during this period recognized the threat that such laws posed to intellectual freedom in America. Much of the nationwide debate about compelled attendance touched on that issue. The Scottish Rite Masons argued, for example, that educating children "along standardized lines . . . will enable them to acquire a uniform outlook on all national and patriotic questions."[101] Yale University president Arthur Hadley agreed but disapproved. He saw compelled public schooling as "an attempt to give the majority of the people a dangerous power to restrict the diffusion of truth which it wishes to suppress."[102]

Attorney Lois Marshall, arguing on behalf of private schools challenging the law, similarly warned that coerced state schooling "will lead inevitably to a stifling of thought."[103] Indeed, freedom from state orthodoxy in education formed an important basis for the Supreme Court's decision to strike down compulsory public schooling laws:

> The fundamental theory of liberty on 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 child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[104]

Thus, the controversy over compelled public schooling tied parents' liberty interest

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in raising children explicitly to freedom of intellectual inquiry and freedom from official orthodoxy. Americans reaffirmed their right to think differently and recognized that educational freedom was critical to an intellectually diverse and tolerant society.[105]

The Conflict over Racial Segregation

The civil rights movement scored a critical victory for educational freedom in 1954 in *Brown v. Board of Education*. In that case, the Supreme Court held unanimously that states could not force children into separate schools based on their race.[106]

Unfortunately, the southern states responded with widespread passive resistance to the Supreme Court's mandate to integrate their schools. For example, some states created sham "choice programs," which in fact forced students into racially segregated schools under thinly veiled threats of violence against African-American families.[107] Too often, corrupt local police departments failed to provide those families with adequate protection, preventing them from obtaining superior educational opportunities for their children.[108]

Frustrated with southern recalcitrance, the Supreme Court empowered federal judges to order local officials to affirmatively integrate their public schools "with all deliberate speed."[109] Over the ensuing decade, school districts finally did integrate their schools, in many cases under the direct supervision of federal trial court judges committed to stamping out the vestiges of racially segregated education.

At the time, federally supervised integration strategies were necessary to overcome the racist refusal of state government officials to offer all students the equal protection of the law. Unfortunately, a side effect of federal supervision was the proliferation of race-conscious public school assignment programs that forced millions of children to ride buses to schools far from their own neighborhoods.[110]

Forced busing ultimately became detrimental to the cause of educational freedom in at least two ways. First, it increased the burden government education placed on family life by separating children from their parents for a greater number of hours each day—hours that had no educational value to the children.[111] Second, busing programs made school choice appear infeasible to school district administrators, who feared that choice programs would allow too many students to opt out of the long commutes.

Ironically, busing eventually reduced integration, both in urban neighborhoods and in schools, because middle-class white parents left the cities for suburban school systems where their children could attend local schools.[112]

Educational Freedom, Religion, and Family Privacy

Though educational freedom has never since been as dramatically threatened as it was during and after World War I, the remainder of the 20th century brought continuing challenges to parental autonomy.

Public schools became more secularized, with mixed results. The trend was beneficial in some ways to religious minorities, including Jewish and Catholic students, because at least Protestant dogma was no longer taught. On the other hand, barred from teaching traditional religious values, public schools increasingly embraced nonreligious worldviews and causes.[113]

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Many parents complain that public schools now affirmatively promote moral relativism and extreme forms of environmentalism that are as offensive to their values as any alternative religious instruction. Thus, special protection for the educational freedoms of religious minorities is still very important.

Also, rising divorce rates over the last half century have forced the judiciary to make intimate determinations about which adults are responsible for children under the law. While some discretion when awarding child custody is necessary, too much discretion empowers judges to make decisions based on a parent's personal religious, lifestyle, and educational preferences. Too much discretion with respect to parental rights empow-

ers judges to intrusively inspect and evaluate parents' beliefs and to threaten parents who deviate substantially from consensus views.

The public controversies of the latter 20th century illustrate that educational freedom is an inseparable part of a multifaceted conception of personal liberty—a conception that includes privacy, freedom of speech, religious freedom, and parental autonomy as well as educational choice.

Education and Religious Freedom

A conflict between Amish parents and state authorities concerning compulsory schooling laws in the 1960s was illustrative of the tension between the state interest in education and our highly valued freedom of conscience.

Throughout their lengthy history in the United States, Amish communities have deliberately insulated themselves from the outside world, believing that modern society is built on values that directly conflict with the Amish conception of a virtuous life. The Amish embrace virtue over intellectual accomplishment, wisdom over technical knowledge, and community spirit over competition.[114] They believe that the competition and complexity of the modern world endanger their salvation.

Although the Amish acknowledge the importance of basic reading, writing, and computational skills, they believe that high school level course work nurtures habits and values inimical to the simple nature of Amish life.[115] The Amish therefore disapprove of formal education beyond the eighth grade. Following the eighth grade, Amish children usually enter vocational training within their own communities to prepare for lives as farmers, craftsmen, or homemakers.

Parents Jonas Yoder, Wallace Miller, and Adin Yutzy were all members of traditional Amish religious communities in Green County, Wisconsin, in the late 1960s.[116] In accordance with Amish beliefs, they each removed an adolescent child from school after the child's successful completion of the eighth grade.[117] The state of Wisconsin charged all three parents with violating a state law requiring all children to attend school until the age of 16, and an important educational freedom case was born.

Attorneys for Yoder and the other parents argued that the state statute was unconstitutional as applied to the Amish, both because it violated their *Pierce* rights to make decisions about their children's education and because it violated their First Amendment right to free exercise of their religion. The U.S. Supreme Court agreed that Wisconsin's compulsory education law was unconstitutional as applied to the Amish, basing its decision on a combination of both the religious rights and the parental rights burdened by the law.[118]

Compulsory education laws such as Wisconsin's are usually constitutional as long as they allow parents to select nonpublic alternative schools. States may require parents to provide some sort of formal education through high school, and thus parental rights alone will not justify striking down those laws.[119]

However, Amish parents also have an important religious interest at stake: the right to raise a child in accordance with the dictates of an established faith community. Although neither the religious interest nor the parental interest alone might be enough to outweigh a state's interest in requiring universal high school education, those two important liberty interests worked in combination to render compulsory schooling laws unconstitutional as applied to the Amish.[120]

The *Yoder* case was important to the cause of educational freedom primarily because it provided the Supreme Court an opportunity to reaffirm the educational freedom rights set out in *Pierce* and *Meyer* decades earlier—rights thrown into significant doubt by the Court's retreat from economic liberty rights dating from the same era.

It is true that the *Yoder* Court failed to adequately describe the exact standard for success applied to an educational freedom claim standing alone, but *Pierce* and *Meyer* were also unclear on that point.[121] *Yoder* moved the law in the direction of freedom because it

Compulsory education laws such as Wisconsin's are usually constitutional as long as they allow parents to select nonpublic alternative schools.

did not retreat from *Pierce* but did establish that, where a religious interest is at stake, parental rights to educational freedom will extend further than they will in the absence of related religious considerations.[122]

Parental Privacy

As nontraditional families have become increasingly common in the United States, important new questions have been raised concerning parental rights. Liberal parentalists believe that parents, rather than the state, should make child-rearing and educational decisions. But who are the child's parents exactly, and under what circumstances must our legal system apportion parental rights among various individuals?

Government control of schooling was ascendant for most of the 20th century, but the pendulum has recently begun to swing the other way.

Troxel v. Granville, concerning a visitation dispute between a mother and her former boyfriend's parents, demonstrates the possibility for state interference in family life as a result of unclear parenting roles.[123]

The Troxel grandparents demanded visitation of their two granddaughters under Washington State's visitation statute after their deceased son's former companion married and chose to limit the girls' time with the Troxels to facilitate bonding with her new family.[124] The trial court granted visitation rights to the grandparents, but the Supreme Court decided that the grant of visitation had violated Ms. Granville's fundamental right to direct the upbringing of her children.[125] Any judicial decision about visitation must take into account the judgment of a custodial parent, rather than simply substitute a judge's opinion for a parent's opinion.[126]

Troxel is not a case about education. Yet it was an important educational freedom case for two reasons. First, *Troxel* clarified beyond any doubt that the parental rights recognized in *Meyer* and *Pierce*—including the right to direct the education of children—are "fundamental rights" under federal constitutional law.[127] That means that they are entitled to a particularly high degree of judicial protection.

Troxel is also important to educational freedom because it embraces the tradition of liberal parentalism as a basic judicial philosophy regarding family life. That is, it empowers custodial guardians to make child-rearing decisions by restricting judges' discretion to make lifestyle decisions for children in the course of domestic disputes. For example, if a parent decides to send a child to a Montessori or parochial school, courts must defer to that parental decision under *Troxel*.

Recent Victories for Educational Freedom

Government control of schooling was ascendant for most of the 20th century, but the pendulum has recently begun to swing the other way, away from state control and back toward parental control of education.[128] Educational freedom has become more popular with both courts and policymakers.

The Supreme Court Upholds School Choice

Supporters of educational freedom often wish to empower parents through school choice programs. The constitutionality of school choice programs, however, was only recently established in a Supreme Court case, *Zelman v. Simmons-Harris*.

Opponents of school choice including the National Education Association, the American Federation of Teachers, and Americans United for Separation of Church and State filed the *Zelman* case to challenge an Ohio law authorizing a school choice program in Cleveland. They claimed among other things that the Cleveland school choice program violated the Establishment Clause of the First Amendment to the U.S. Constitution. The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof."

The Supreme Court upheld the Cleveland program in a five-to-four vote.[129] Looking back through decades of rulings, the Court separated its Establishment Clause cases into two categories. In the first category were programs that directly aided religious organizations or subsidized religious activities,

whether on a neutral or on a discriminatory basis. In the second category fell programs that offered aid directly to individuals, who then made private choices about where to use the aid. The Court held that, while the former category of programs should be carefully scrutinized for evidence of church-state entanglement, the latter category of programs was constitutional so long as they met a few clear guidelines demonstrating that they are indeed programs of "true private choice."

The Supreme Court evaluated the Cleveland program using its traditional "*Lemon* test" for deciding church-state separation questions. First developed in *Lemon v. Kurtzman*[130] and later modified in *Agostini v. Felton*,[131] the *Lemon* test asks two things: (1) does the challenged program lack a secular government *purpose*, and (2) is its *primary effect* to advance or inhibit religion?[132] If the answer to either of those questions is yes, then the challenged program is considered unconstitutional.

The Supreme Court reiterated that, to demonstrate a secular public purpose, any "true private choice" program must be motivated by some legitimate goal, such as improving education, that has nothing to do with religion. In order to demonstrate that promoting religion is not nonetheless a program's "primary effect," the Supreme Court explained that a school choice program must offer only indirect aid to religious schools, that the benefits of the program must be made available to a broad class of beneficiaries, that the program must not be set up in a way that favors religious options over secular options, and that states must ensure that parents have adequate nonreligious educational options.[133]

The Court upheld the Cleveland school choice program in *Zelman*.[134] But more important, the Court established a clear set of rules for school choice, encouraging state lawmakers to establish new programs around the country.

New Choice Programs across the Nation

Several states and cities around the country have enacted either voucher or tax credit programs in recent years. Milwaukee's Parental Choice Program, established in 1990 and expanded in 1995, distributes vouchers to more than 10,000 students with family incomes at or below 175 percent of the poverty line.[135] Similarly, the Cleveland Scholarship and Tutoring Program gave more than 4,500 low-income students vouchers of up to $2,250 for the 2002–03 school year.[136] Two random assignment studies of the Milwaukee voucher program found score improvements among voucher recipients.[137] Also, economist Caroline Minter-Hoxby found that Milwaukee's *public* schools experienced dramatic increases in productivity, especially the schools that faced the most competition.[138]

Florida, the state most notable for choice initiatives, has two voucher programs: McKay scholarships for students with disabilities and Opportunity Scholarships for students attending failing schools (those that received an F on the state report card twice within four years). Nearly 10 thousand special education students in Florida now receive McKay program vouchers, the dollar amount of which depends on the funds spent on the student in his or her assigned public school.[139] The amount of an Opportunity Program scholarship also depends on public school spending for a given student. Of the approximately 9,000 students eligible for Opportunity Program scholarships during the 2002–03 school year, 702 chose to attend private schools. (Another 909 students chose to attend other public schools.)[140] Researcher Jay Greene found that schools in danger of losing students as a result of this program achieved standardized test score gains more than twice as large as those made by other public schools.[141]

Florida and Pennsylvania have enacted corporate tax credit laws to increase educational options. A corporate tax credit allows corporations to take credits against their tax liability for amounts they donate to scholarship organizations. The organizations then distribute the funds to children in the form of scholarships to private schools their par-

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ents choose for them. In Florida this year, about 15,000 low-income students received scholarships worth $3,500; about 40,000 more applicants were turned away.[142] Pennsylvania's less generous program allows corporations to credit 75 percent of their donation, up to $100,000.[143] In Arizona, taxpayers may receive a dollar-for-dollar tax credit of up to $500 ($625 for married couples) for donations to state-approved scholarship organizations. The program has grown rapidly; in 2002, 31 nonprofit scholarship organizations distributed more than 15,000 scholarships (80 percent of which were given on the basis of financial need).[144]

Last summer's historic *Zelman* decision has inspired lawmakers in several states to propose new voucher and tax credit programs. By December 2002, more than 40 voucher, tax credit, or charter school proposals had been introduced in state legislatures.[145] This year school choice bills have been introduced in several states and in Washington, D.C., for which Congress will likely enact some sort of voucher program. Colorado is the only state to have enacted new choice legislation so far, however. There, low-income students who have failed the statewide exam and live in 11 "failing" districts may receive vouchers worth 75 percent of their local schools' operating costs (85 percent in high school). Initially the program will be limited to 1 percent of a participating district's enrollment; 6 percent will be eligible in 2007.[146]

Less Discrimination against Religious Schools

America's early history of using the public school monopoly to discourage non-Protestant education and the subsequent struggles of religious minorities such as the Amish illustrate that educational freedom is often closely tied to freedom of conscience. On the heels of the Supreme Court's decision in *Zelman*, the Ninth Circuit decided in *Davey v. Locke* that states may not discriminate against religion when they administer programs designed to foster educational opportunities.[147]

Joshua Davey was a high school graduate in the state of Washington in 1999. He was awarded a Promise Scholarship by the state on the basis of his outstanding academic performance and his family's moderate income.[148] Davey matriculated at Northwest College that fall, where he declared a double major in business administration and pastoral ministries.[149]

However, the state of Washington rescinded his scholarship when it was discovered that he was majoring in pastoral studies. Washington's policy of excluding theology majors from the scholarship program was based on the state's constitution, which provides, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[150]

The Ninth Circuit, citing *Zelman*, held that Washington had violated the rule of neutrality toward religion when it excluded theology students from its scholarship program.[151] The Court also found that Washington's interest in administering a program consistent with its own, different state constitutional rule was not sufficiently compelling to justify state discrimination on the basis of religion and struck down the state's exclusionary policy.[152]

Davey stands for the proposition that a state that offers a choice-based aid program, such as a scholarship or voucher, can't restrict the recipient's choices on the basis of religion. The Supreme Court has decided to review the *Davey* decision during its 2003–04 term.[153] If *Davey* is upheld, it will help to ensure that families participating in choice programs will have a wide array of religious and nonreligious choices available to them.

Educational Freedom for Families Today

While recent victories for educational freedom are encouraging, they are only a beginning. Although school choice is legal, it is not widespread, and opponents of educational freedom are threatening to smother existing

private schools in a morass of new regulations designed to dictate everything from curriculum to staffing.

Advocates of educational freedom must not lose the public policy war while focusing on legal battles. After all, the courts can only establish a minimum level of educational freedom. They do not require maximum freedom. Nor should supporters of educational freedom be satisfied with incremental gains that benefit only a few families and may be easily lost. The suggestions that follow would ensure that a public policy based on educational freedom provides real benefits to families who are harmed by current policies.

Elimination of Blaine Amendments

The rules for school choice under the federal Constitution are now fairly clear, even permissive, but many state lawmakers still face uncertainty about whether choice programs will be upheld under their state constitutions. The most common constitutional barrier to choice is the Blaine Amendment. Adopted during the rising tide of anti-immigrant sentiment in the 19th and early 20th centuries, Blaine Amendments are provisions that explicitly prohibit states from funding sectarian education, directly or indirectly.[154]

It is critical to educational freedom that those amendments be eliminated, because, for lawmakers, they create a dual roadblock to education reform. Because they prohibit states from adopting school choice programs that include religious schools,[155] would-be school reformers in states with restrictive Blaine Amendments are unable to enact any form of school choice at all.[156] Excluding religious schools from a generally applicable school choice program in order to comply with a state constitutional provision would violate the federal Constitution.[157]

To break down these remaining constitutional barriers, organizations that favor school choice are launching legal attacks against the Blaine Amendments themselves. The Institute for Justice has intervened on behalf of parents in a dispute over the legality of Florida's Opportunity Scholarship Program, contending that Florida's Blaine Amendment itself violates the federal Constitution.[158] The Becket Fund for Religious Liberty has also recently filed a challenge to South Dakota's Blaine Amendment.[159]

Choices for All Families

Supporters of school choice reforms often point out that most families already choose their schools. They do so either by choosing to move to a neighborhood with a public school they like or by "paying twice" to send their child to an alternative private school using after-tax dollars.

For those parents, a majority, the public school monopoly is more of a financial burden than a direct impingement on their civil liberties. School choice programs would benefit this group by making educational alternatives truly cost competitive, thereby increasing competition and improving overall school quality. Moreover, it is unjust to financially penalize parents who choose alternative educational settings for their children, and choice programs will eliminate that injustice.

Far more important, however, is the introduction of school choice for families who, because they have low incomes, currently have no real choice at all. For those families, school choice is a pressing issue of personal liberty.

Compulsory schooling laws, present in every American state, bind low-income families just as they bind all others. But unlike other parents, low-income parents lack funds to move to a more expensive neighborhood or send a child to an alternative private school. They also often lack sufficient time, educational attainment, and financial resources to homeschool their children, even in states where homeschooling laws are relatively liberal.

As a result, low-income parents may be presented by the state with a terrible Hobson's choice. They must either send their children daily to a single local government school, no matter how violent, ineffective, or religiously offensive, or be arrested for a violation of state law. Critics of school choice pro-

Many state lawmakers still face uncertainty about whether choice programs will be upheld under their state constitutions.

grams who label them mere "financial subsidies" or welfare programs fail to appreciate the lack of legal alternatives to local public schools for many low-income families.[160]

The result—forced attendance at a government school under threat of arrest—is the antipode to America's tradition of educational freedom.[161] Advocates of educational freedom should view remediation of this injustice as their most critical mission. Choice programs should be universal, but they are most important for needy families.

Freedom for Private Schools

Zelman has encouraged state lawmakers to expand educational freedom for families through school choice programs, but another recent trend is endangering that freedom. Lawmakers appear increasingly interested in regulating private schools. But regulation of private school curricula, academic standards, or specialization threatens educational freedom by eliminating options desired by many parents. In the absence of a compelling state justification, supporters of educational freedom should oppose regulations that limit parents' choices.

Sometimes the new regulations are tied to school choice proposals and seek to make private schools "accountable," that is, force them to generate and disclose the same statistics public schools do. In Colorado the first voucher program enacted since *Zelman* requires participating schools to administer state tests to voucher students.[162] Gov. Mike Foster of Louisiana, a vocal supporter of vouchers, has insisted that any program must require schools accepting voucher students to administer to all of their students the state's own standardized test and the national standardized exam used by the state. He advocated combining the resulting scores with attendance and dropout rates to give the private schools "performance scores" similar to those used to grade public schools.[163]

Lawmakers appear increasingly interested in regulating private schools.

Private schools have always had to satisfy individual parents that they are effective. But the new trend of state regulation and evaluation will have the effect of dictating what high quality is to both parents and schools. By specifying what is and is not important for children to learn, state regulations threaten to homogenize private schools, eliminating the very variety that allows them to cater to the preferences of the families they serve.

Many private schools already administer widely recognized standardized tests, such as the Stanford 9 or the Iowa Test of Basic Skills, as one means of demonstrating their quality to parents. Because the individual private school chooses the test it will administer, the test reflects that school's curriculum and learning philosophy. In Florida, where some legislators thought that schools participating in choice programs should be forced to administer Florida's state standardized test, others pointed out that 95 percent of private schools surveyed already administered some commercially designed standardized test.[164] Florida lawmakers wisely decided not to require participating schools to give the state's public school exam.

Supporters of increased regulation of private schools argue that private schools, like public schools, should submit to evaluations by school boards or other government officials. For example, the Colorado school choice law requires state evaluation of participating schools. School districts participating in the Colorado program must provide the state with regular reports conforming to state-sanctioned measures of student achievement.[165] Supporters justify those and other regulations as "accountability measures" that level the playing field by making private schools "comply with the same standards" that public schools must.

That "accountability" rhetoric, when applied to private schools, represents an anti-choice political response to the No Child Left Behind Act,[166] which demands that public schools collect and report student achievement data to federal officials in return for federal funds.[167] The teachers' unions have seized upon this argument as part of their tactical response to *Zelman*; they plan to use the rhetoric of accountability as a weapon against choice programs by demanding bur-

densome regulations designed to stifle private school participation.[168]

For example, AFT president Sandra Feldman has promised to "work with local, state, and national policymakers to ensure that private schools that receive public funds are held accountable, just like public schools are."[169] Of course, few of those activists would support the converse proposition that public schools should be subject to the same accountability standard private schools are: satisfy parents or lose students and their education dollars.

In addition to mandating testing, Colorado's pilot voucher program directs the admissions policy of participating nonpublic schools.[170] For example, schools may not consider disability of an applicant even if the school is ill equipped to serve the disabled child.[171] Religious institutions may not consider the applicant's religion, although part of their appeal may be a committed religious community.[172] Participating Colorado schools must also accept applicants "on the basis of the order in which their applications are received."[173] Similarly, the Education Freedom Program measure now under consideration by Texas lawmakers requires schools to fill their available positions by a "random selection process."[174] Such rules will discourage private schools that wish to educate specific groups of students (disabled ones, for example) from accepting voucher students, lest they be forced to admit applicants they cannot serve.

Provisions that prevent sectarian schools from considering religion in admissions may be found unconstitutional if challenged, because a voucher program may neither advance nor inhibit religion.[175] Regulations that interfere with a school's religious mission do just that. For example, parochial schools in Milwaukee must select voucher students by lottery and may not require a student to participate in religious activities.[176] One scholar argues that enforcement of this "opt-out" provision would "generate precisely the sort of entanglement that offends the court's Establishment Clause holdings."[177] In other words, regulating sectarian schools inhibits religion, thus creating an excessive entanglement in violation of the Establishment Clause.

In any event, many if not most religious schools will refuse to participate in voucher programs that compromise their religious missions. According to a 1998 Department of Education survey, 86 percent of religious schools said they would not participate in a transfer program if students could obtain exemptions from religious instruction or activities.[178] The same survey found that only one-third to one-half of private schools would accept transfer students if they were randomly assigned or required to participate in state assessments. Even fewer (15 to 31 percent) said they would participate if they were required to accommodate all students with special needs. Regulations thus threaten to significantly limit the options that choice programs can offer parents.

Artificial tuition caps may also narrow the pool of private schools willing to participate in choice programs. The Texas proposal, for example, prevents parents from paying tuition in addition to the child's scholarship.[179] That provision immediately puts schools that charge higher tuition out of reach (unless more scholarship money is available). But it will also make all private schools wary of accepting voucher students, because they will have to rely on the legislature to raise the voucher amount in case of inflation or other changes. If lawmakers fail to do so, schools may be unable to continue their participation in the program. Moreover, small tuition payments by low-income families have been shown to increase parental involvement in a student's schooling and improve academic outcomes.[180]

Advocates of educational freedom should vigilantly oppose standardization of alternative schools through rules governing curricula, standards, and specialization. If they do not, educational freedom may fall victim to a state-run educational system far less obvious than the present public school monopoly.

Freedom for Homeschooling Families

Homeschooling, legal in all 50 states only

Many if not most religious schools will refuse to participate in voucher programs that compromise their religious missions.

during the last decade, has grown rapidly in recent years. [181] Despite a range of burdensome state regulations, conflicts between homeschooling parents and administrators have been infrequent; in many cases states have simply not enforced their own laws. But conflict will likely increase as homeschooling spreads, since districts often receive federal and state funds based on attendance numbers.

California is one notable example. Its laws make it among the most difficult states in which to homeschool children—students must learn from a credentialed tutor, a state-approved charter school, or a home study program supervised by a public school district.[182] To circumvent the credential requirement, parents declare their homes private schools.[183] Last summer the state's Department of Education took steps to block that practice, warning homeschooling parents that they needed teaching credentials or a public school affiliation. In a memo to administrators outlining the new filing process for private schools, Deputy Superintendent Joanne Mendoza wrote that home schooling "is not an authorized exemption from mandatory public-school attendance."[184] The department recently retreated, however, when the new superintendent of public instruction announced that the state would no longer consider every homeschooled child a truant.[185]

Advocates of educational freedom for families must guard against regulations that seek to homogenize or eliminate parents' new choices one by one.

Homeschooling regulations vary greatly from state to state but commonly include curriculum content or testing requirements. In some places parents are required to register with their local school district. A few states require parents to qualify as teachers.[186] Compulsory attendance laws help officials to enforce those restrictions, allowing authorities to threaten homeschool parents with truancy prosecution. In one recent instance in Illinois, a regional superintendent sent police to the homes of homeschool families to demand that parents appear in court to demonstrate their compliance with the law.[187] Because the laws governing homeschooling are so often ignored, such incidents occur unpredictably.

It's important to the future of educational freedom in the United States that its advocates resist efforts to eliminate homeschooling through teacher certification requirements or other impossibly burdensome regulations. If assaults on homeschooling such as that mounted by California spread to other states, parents may lose what in some cases will be their only viable alternative to the monopoly public system.

Conclusion

Opponents of educational freedom often cite America's tradition of state-controlled schooling in an effort to show that parental control over education is a new, perhaps un-American concept. But those critics are wrong. America boasts a long, robust history of valuing and protecting educational freedom. That tradition is grounded in liberal parentalism, a philosophy that limits state involvement in intimate details of family life to benefit children and also to preserve social tolerance and limited government.

Although in many respects the statist experiment in education appears to be on the decline, advocates of educational freedom for families must guard against regulations that seek to homogenize or eliminate parents' new choices one by one. Instead, by working to empower parents with more choices and to afford schools more autonomy, those advocates may hope for a day when all families can fully enjoy the benefits of educational freedom.

Notes

1. See Charles Leslie Glenn Jr., *The Myth of the Common School* (Amherst: University of Massachusetts Press, 1988), pp. 10–12.

2. See National Center for Education Statistics, *Digest of Education Statistics 2001* (Washington: U.S. Department of Education, 2002), Table 2.

3. See generally Stephen Gilles, "Liberal Parentalism and Children's Educational Rights," *Capital University Law Review* 26 (1997).

4. See, for example, Barbara Bennett Woodhouse, "'Who Owns the Child?': *Meyer* and *Pierce* and the Child as Property," *William and Mary Law Review* 33 (1992).

5. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

6. For a description of education options available during these periods, see Andrew J. Coulson, *Market Education* (New Brunswick, NJ: Transaction, 1999), pp. 73–75.

7. Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780–1860* (New York: Hill and Wang, 1983), p. 13.

8. Ibid., p. 15.

9. "Since the teachers were often billeted in rotation in students' homes, they were a captive audience for parents' questions, criticisms, and praises." Coulson, *Market Education*, p. 74. See also Kaestle, p. 22.

10. Coulson, *Market Education*, p. 74

11. Kaestle, p. 30.

12. R. F. Seybolt, *Source Studies in American Colonial Education* (Urbana, IL: Arno, 1925), in *Readings in Public Education in the United States*, ed. Ellwood P. Cubberley (Westport, CT: Greenwood, 1970), pp. 89–90.

13. "Yet in England there was an extended, passionate debate over the wisdom of educating the poor, and in the United States there was virtually no debate. The advocacy of mass schooling for social stability . . . was the mainstream reform view in America during these years and was virtually unopposed." Kaestle, p. 33.

14. The Lancasterian system used student monitors to instruct small groups of younger children, allowing a single schoolmaster to run a school with hundreds of children.

15. Kaestle, p. 41.

16. Ibid, p. 43.

17. Coulson, *Market Education*, p. 75.

18. Charity organizations "favored literacy and moral instruction as tools for combating the problems of crime and vice. Parents were often seen as adversaries in this context, for the reformers tended to equate poverty with apathy and immorality, and wished to isolate children from the presumed harmful influences of their families." Ibid.

19. Anne M. Boylan, *Sunday School: The Formation of an American Institution, 1790–1880* (New Haven, CT: Yale University Press, 1988), pp. 24, 33.

20. Ibid., p. 24.

21. Ibid., p. 58.

22. "The 'Sabbath-school' constituted an important factor in Negro education . . . the institution permitted its workers to teach them reading and writing when they were not allowed to study such in other institutions." Carter G. Woodson, *The Education of the Negro prior to 1861* (New York: Arno and New York Times, 1968), p. 124.

23. Boylan, p. 23. The percentage is based on membership in the New York Sunday-School Union Society.

24. Ibid., pp. 23, 28.

25. Ibid., p. 28.

26. Coulson, *Market Education*, p. 75.

27. Woodson, pp. 127, 150.

28. Boylan, pp. 25–28. Because these schools' work went unreported, their influence is unclear. According to Woodson, Sabbath-school "began as an establishment in the white churches, then moved to the colored chapels, where white persons assisted as teachers, and finally became an organization composed entirely of Negroes." Woodson, pp. 124–25.

29. Boylan, p. 26.

30. "The concentration of the colored population in cities and towns where they had better educational advantages tended to make colored city school self-supporting. There developed a class of self-educating Negroes who were able to provide for their own enlightenment." Woodson, pp. 128–41.

31. Woodson describes an American Union for the Relief and Improvement of Colored People representative's 1835 visit to Baltimore, when "he was informed that the education of the Negroes of that city was fairly well provided for." Woodson, p. 142.

32. Ibid., pp. 122, 128.

33. Ibid., p. 149.

34. James Oliver Horton and Lois E. Horton, *Black Bostonians* (New York: Holmes & Meier, 1979), p. 70. Primus Hall was the son of Prince Hall, legendary black Boston activist and founder of the African Masonic Lodge no. 459 in Boston in 1787. Ibid., pp. 29–30.

35. Coulson, *Market Education*, pp. 76–77.

36. "Though memorization and repetition made up a greater part of the pedagogical method than is generally thought best, the nation's schools were generally considered effective." Ibid., p. 84.

37. Ibid.

38. Kaestle, p. 25.

39. E. G. West, *Education and the State: A Study in Political Economy* (Indianapolis: Liberty Fund, 1994), p. 302.

40. Adam Smith, *The Wealth of Nations* (New York: Random House, Modern Library, 1994), p. 843.

41. Coulson, *Market Education*, p. 85.

42. Lorraine Smith Pangle and Thomas L. Pangle, *The Learning of Liberty: The Educational Ideas of the American Founders* (Lawrence: University Press of Kansas, 1993), p. 15.

43. Michael B. Katz, "The Origins of Public Education: A Reassessment," in *The Social History of American Education*, ed. B. Edward McClellan and William J. Reese (Champaign: University of Illinois Press, 1988), p. 93.

44. Ibid., pp. 76–77.

45. Myron Lieberman, *Public Education: An Autopsy* (Cambridge, MA: Harvard University Press, 1993), p. 15.

46. In the early 19th century, states provided assistance to denominational and other private schools. Ibid.

47. Lloyd P. Jorgenson. "The Birth of a Tradition," *Phi Delta Kappan*, June 1963, p. 411.

48. Ibid., p. 410.

49. The French town where in the early 1600s English priests produced the first English translation of the Old Testament.

50. Jorgenson deems it "American Protestantism's darkest hour." Jorgenson, p. 410.

51. Ibid., p. 414.

52. Ibid., p. 413.

53. Ibid., p. 412.

54. Thirty states and the District of Columbia had compulsory education statutes in 1900, but enforcement was limited. Myron Lieberman, *Privatization and Educational Choice* (New York: St. Martin's, 1989), p. 273.

55. Kaestle, p. 132.

56. Ibid., p. 105.

57. Michiel Visser. "Public Education versus Liberty: The Pedigree of an Idea," 2001, www.acton.org/programs/students/essay/2001winners/visser.html.

58. Kaestle, p. 73.

59. Visser, p. 2.

60. See generally Visser.

61. Kaestle, p. 199.

62. Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (New York: Norton, 1982), pp. 146–47. Jefferson proposed to divide each county into districts, called hundreds, each of which would support a tutor. Residents of the hundred would have been entitled to send their children to the tutor for free for three years, after which they would have had to pay fees. Then, of the boys whose parents were too poor to educate them further, the best student in each district school would have been eligible for further schooling at one of 20 grammar schools. Twenty boys would then have been selected to finish grammar school; 10 of those would have continued to William & Mary College.

63. Kaestle, p. 199. Mercer's bill provided a state board of education and matching state aid to localities.

64. West, p. 307.

65. Coulson, *Market Education*, p. 83.

66. Wayne J. Urban and Jennings L. Wagoner, *American Education: A History* (Boston: McGraw Hill, 2000), p. 150.

67. Kaestle, pp. 172–73.

68. J. S. Mill, *On Liberty* (1859), in *The English Philosophers from Bacon to Mill*, ed. Edwin A. Burtt (New York: Random House, 1939), pp. 1033–34.

69. Kaestle reports that the Wisconsin Teachers' Association declared in 1865, "Children are the property of the state." Kaestle, p. 158.

70. *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Pierce.*

71. Many disparate groups shared an interest in assimilating immigrants. For example, Jay Bybee notes, "Education was important to populist goals as a means of socializing and Americanizing the people. For 'new people' involved in governing themselves, education would level differences of

class race and alienage." Jay Bybee, "Substantive Due Process and Free Exercise of Religion: *Meyer, Pierce* and the Origins of *Wisconsin v. Yoder*," *Capital University Law Review* 25 (1996): 893.

72. Irene Scharf, "Tired of Your Masses: A History of and Judicial Response to Early 20th-Century Anti-Immigrant Legislation," *Hawaii Law Review* 21 (1999): 137.

73. Ibid.

74. See William G. Ross, "A Judicial Janus: *Meyer v. Nebraska* in Historical Perspective," *Cincinnati Law Review* 57 (1988): 126.

75. Bybee, p. 893.

76. Ross, "A Judicial Janus," pp. 131–33.

77. The federal government formed the Committee on Public Information, which over the course of the conflict generated tens of millions of pieces of propaganda, many of which were designed to foster hatred of Germany. A government-endorsed volunteer organization called the American Protective League formed to investigate allegations of domestic espionage. The APL and the National Security League have been accused of indiscriminately attacking German-American institutions during this period. Ibid., p. 132.

78. "The advent of World War I only exacerbated the demand for common schooling." Bybee, p. 893.

79. See, for example, *Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*, 175 N.W. 531, 533 (1919).

80. Ross, "A Judicial Janus," p. 130.

81. The German parochial schools were Lutheran. Ibid., p. 132.

82. Scharf, p. 140.

83. Ross, "A Judicial Janus," p. 132.

84. Ibid., p. 133.

85. Ibid., p. 140.

86. Ibid., p. 146.

87. *Meyer* at 399.

88. *Meyer* at 400.

89. Glenn, p. 260.

90. Richard Seid, "75 Years after *Pierce v. Society of Sisters*," *University of Detroit Mercy Law Review* 78 (2001): 374.

91. Ibid., pp. 373–74.

92. William G. Ross, *Forging New Freedoms: Nativism, Education and the Constitution* (Lincoln and London: University of Nebraska Press, 1994), p. 151.

93. Ibid., p. 150. Some Oregon Masons have denied that their organization favored the compelled public school attendance law, claiming that the Klan illicitly hijacked their organization in an effort to artificially broaden support for the initiative. See David Tyack, "The Perils of Pluralism: The Background of the *Pierce* Case," *American Historical Review* 74 (1968), p. 77.

94. Ross, *Forging New Freedoms*, p. 153.

95. Ibid.

96. See generally Tyack.

97. Ibid. Apparently, the Klan saw no contradiction between its belief in the superiority of white protestant America and its strong support of compulsory public education. Tyack observes, "The Klan believed in inherent WASP superiority and the inferiority of aliens, Negroes, Catholics and Jews, yet somehow it had persuaded itself that to force all children to attend public schools would avert the ruin of the republic." Tyack, p. 80. The group simply ducked the issue of whether the state should create separate schools for African-American children.

98. Ibid., p. 91.

99. Ibid., p. 92.

100. *Pierce* at 534–35.

101. Tyack, p. 77.

102. Ibid., p. 82.

103. Ibid., p. 97.

104. *Pierce* at 535.

105. The *New Republic* editorialized following the *Pierce* decision, "Thus comes to an end the effort to regiment the mental life of Americans through coerced public school instruction." "Can the Supreme Court Guarantee Toleration?" *New Republic* 43 (1925): 85–87.

106. *Brown v. Board of Ed.*, 347 U.S. 483 (1954). The Court sharply limited its shameful prior decision in *Plessy v. Ferguson* upholding the constitutionality of "separate but equal" public facilities. See *Brown* at 495.

107. David Nevin and Robert Ellis, *The Schools That Fear Built* (Washington: Acropolis Books, 1976), pp. 6, 14.

108. Vincent P. Franklin and James D. Anderson, *New Perspectives on Black Educational History* (Boston: G.K. Hall, 1978), p. 201.

109. *Brown v. Board of Ed. (Brown II)*, 349 U.S. 294, 301 (1955).

110. See, for example, *Haycraft v. Board of Education*, 585 F.2d 803 (Sixth Cir. 1978).

111. Ibid.

112. Interestingly, today's inner-city parents don't want to send their children out into the suburbs every day to attend good schools. They want just what the suburban parents want: good schools in their own neighborhoods. See Clint Bolick, *Voucher Wars: Waging the Legal Battle over School Choice* (Washington: Cato Institute, 2003), pp. 19–20. School choice programs thus better serve the needs of inner-city parents than interdistrict busing programs could, even if such programs were politically viable.

113. Glenn, pp. 278–83.

114. *Wisconsin v. Yoder*, 406 U.S. 205, 210–11 (1972).

115. Ibid.

116. Ibid. at 207.

117. The children were Frida Yoder, aged 15, Barbara Miller, aged 15, and Vernon Yutzy, aged 14. *Yoder* at n. 1.

118. Ibid. at 234–35.

119. Ibid. at 214.

120. Ibid. at 233–34.

121. Jay Bybee correctly notes, "Chief Justice Burger's opinion for the majority in *Yoder* is a model of imprecision." Bybee, p. 921.

122. Ralph Mawdsley writes, "Where parents' interests in directing their children's education was 'one of deep religious conviction, shared by an organized group, and intimately related to daily living, *Yoder* strengthened parents rights when balanced against state interests." Ralph D. Mawdsley, "The Changing Face of Parents' Rights," *Brigham Young University Education and Law Journal* 2003 (2003): 172.

123. See generally Susan Tomaine, "Comment: *Troxel v. Granville*: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family," *Catholic University Law Review* 50 (2001): 761.

124. Revised Code of Washington § 26.10.160(3). See also *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

125. Ibid. at 63.

126. Ibid. at 69–70.

127. Ibid. at 66.

128. Glenn, pp. 278–79.

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

130. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

131. *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

132. *Lemon* at 612.

133. For a more detailed discussion of *Zelman*, see Marie Gryphon, "True Private Choice: A Practical Guide to School Choice after *Zelman v. Simmons-Harris*," Cato Institute Policy Analysis no. 466, February 4, 2003.

134. *Zelman* at 662–63.

135. Marya DeGrow, "Educational Vouchers and Tax Credits: A State-by-State Summary of Current Programs," Independence Institute, December 18, 2002.

136. Ibid.

137. Cecilia Elena Rouse, "Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program," *Quarterly Journal of Economics*, 113, no. 2 (May 1998): 553–602; and Jay P. Greene, Paul E. Peterson, and Jiangtao Du, "School Choice in Milwaukee: A Randomized Experiment," in *Learning from School Choice*, ed. Paul E. Peterson and Bryan C. Hassel (Washington: Brookings Institution Press, 1998).

138. Caroline M. Hoxby, "School Choice and School Productivity (or Could School Choice Be a Tide That Lifts All Boats?)" National Bureau of Economic Research Working Paper no. W8873, April 2002.

139. David F. Salisbury, "Lessons from Florida: School Choice Gives Increased Opportunities to Children with Special Needs," Cato Institute Briefing Paper no. 81, March 20, 2003.

140. Manhattan Institute for Policy Research, Education Research Office, "A+ Accountability Pro-

gram Opportunity Scholarships," www.miedresearchoffice.org/opportunity.htm#_Schools_w/_two.

141. Jay P. Greene, "An Evaluation of the Florida A-Plus Accountability and School Choice Program," Manhattan Institute for Policy Research, February 2001.

142. Manhattan Institute for Policy Research, Education Research Office, "Corporate Tax Credit Scholarships," www.miedresearchoffice.org/corporatetaxscholarships.htm.

143. DeGrow, "Educational Vouchers and Tax Credits."

144. Arizona Department of Revenue, unpublished figures, September 2003.

145. Krista Kafer, "Progress on School Choice in the States," Heritage Foundation Backgrounder no. 1639, March 26, 2003.

146. Tom McAvoy, "Colorado Governor Signs School Voucher Bill," *Pueblo Chieftain*, April 17, 2003.

147. *Davey v. Locke*, 299 F.3d 748 (Ninth Cir. 2002).

148. Ibid. at 751.

149. Ibid.

150. Washington Constitution, Article I, §11.

151. *Davey* at 760.

152. Ibid. at 759–60.

153. Robert Marshall Wells and Janet I. Tu, "Supreme Court to Hear State Religious Rights Case," *Seattle Times*, May 20, 2003.

154. See Glenn, pp. 251–61.

155. See, for example, the Washington State case of *Witters v. State of Washington Comm'n for the Blind*, 112 Wn. 2d 363 (1989) *certiorari denied* 493 U.S. 850 (1989).

156. This problem is discussed in greater detail in Gryphon, "True Private Choice," pp. 8–11.

157. Joseph Viteritti writes, "It is unlikely that the Supreme Court, under the standard of neutrality it has adopted, would permit the States to exclude religious schools or their pupils from participating in programs that distribute public benefits on a general basis." Joseph P. Viteritti, "Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law," *Public Policy* 21 (1998): 715.

158. See Mary Leonard, "Proponents of Vouchers See Opening," *Boston Globe*, November 18, 2002.

159. "South Dakota Sued over Busing," Associated Press State & Local Wire, April 24, 2003.

160. See, for example, Greeley.

161. Some scholars have even suggested that compelling low-income families to send their children to a local public school is unconstitutional, if those families have no options. See Gary J. Simpson, "School Vouchers and the Constitution—Permissible, Impermissible, or Required?" *Cornell Journal of Law & Public Policy* 11 (2002): 556–57.

162. Colorado House Bill 1160, 2003, p. 10, www.leg.state.co.us/2003a/pubhome.nsf.

163. Laura Maggi, "Political Landscape Tipping toward School Vouchers," *(New Orleans) Times-Picayune*, March 23, 2003.

164. Jay P. Greene and Marcus A. Winters, "Forcing the FCAT on Voucher Schools Is a Bad Idea," *Tallahassee Democrat*, March 31, 2003.

165. Colorado House Bill 1160, p. 16.

166. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

167. Marie Gryphon, "Accountability to Parents Is Best," *Montgomery Journal*, March 30, 2003.

168. Daniel McGroarty, "The Red Tape War," *School Choice Advocate*, January 2003. McGroarty writes that "voucher opponents indicate that they will open a second front—this one a 'red tape war,' torturing the meaning of the word 'accountability' until the only acceptable *private* school is one that turns itself into a *public* school."

169. Quoted in Steven Menashi, "The Church-State Tangle," *Policy Review*, no. 114, August 2002, www.policyreview.org/AUG02/menashi.html.

170. Colorado House Bill 1160, pp. 9–10.

171. Ibid. While many private schools welcome disabled children, each and every school may not be prepared to effectively work with each and every disability, as disabled students have highly variable needs. See generally David S. Salisbury, "Lessons from Florida: School Choice Gives Increased Opportunities to Children with Special Needs," Cato Institute Briefing Paper no. 81, March 20, 2003.

172. Colorado House Bill 1160, pp. 9–10.

173. Ibid.

174. Texas House Bill 2465, www.capitol.state.tx.us/tlo/78r/billtext/HB02465H.HTM.

175. *Zelman* at 668–69 (O'Conner, J., concurring).

176. Independence Institute, Fact Sheet no. 1-02, December 12, 2002, http://i2i.org/Centers/Education/Fact%20Sheets/accountability_fs.htm.

177. Menashi.

178. Lana Muraskin, "Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools." U.S. Department of Education, Planning and Evaluation Services, 1998.

179. Texas House Bill 2465.

180. Andrew Coulson, *Markets versus Monopolies in Education*, forthcoming.

181. "Even conservative estimates of homeschooling pin the current number of students at 350,000 in 1990, 750,000 in 1996, and 1.3 million in 1998." Rob Reich, "Testing the Boundaries of Parental Authority over Education: The Case of Home Schooling." Paper presented at the 2001 annual meeting of the American Political Science Association, San Francisco, August 30–September 2, 2001, p. 7.

182. Ibid., p. 9.

183. A California law exempting homeschools from federal criminal background checks acknowledged this practice. 1998 Cal. Stat., Chap. 594.

184. Quoted in Chrisanne Beckner, "Truant or Home-Schooled?" *Sacramento News & Review*, October 21, 2002.

185. Jim Brown, "Home Schooling Not Illegal Anymore in California—Even though It Never Was," *Agape Press*, June 5, 2003.

186. North Dakota, Alabama, Washington, West Virginia, and Pennsylvania have such rules. See www. hslda.org/laws/default.asp.

187. Art Moore, "Homeschoolers Get Knock on Door from Police," *World Net Daily*, November 18, 2002.

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