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Robert K. Vischer

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# THE SANCTITY OF CONSCIENCE IN AN AGE OF SCHOOL CHOICE: GROUNDS FOR SKEPTICISM

ROBERT K. VISCHER\*

## I. INTRODUCTION

The sanctity of individual conscience looms large in our society's understanding of religious liberty. While the state long ago forsook its authority to regulate the contours of the individual's religious devotion directly, there are a myriad of efforts to utilize law to shape the relationship between an individual's religious devotion and her participation in the marketplace of essential public goods and services. Individual providers regularly look to law to defend their integration of the dictates of conscience with their professional identities, even when the integration impacts the provision of goods deemed foundational to a meaningful human existence, like health care. In recent months, for example, a state-by-state legislative battle has raged over the extent to which pharmacists may allow their religiously shaped moral judgments to narrow the range of prescriptions they fill.<sup>1</sup> But the lure of conscience is not limited to providers; conscience also is invoked to mandate access to essential goods on terms that maximize consumer autonomy, even at the cost of negating the efficacy of providers' diametrically opposed consciences. Such was the impetus behind California's recent enactment of legislation requiring employers, including a vehemently resistant Catholic Charities, to include contraceptives within their coverage of prescription drugs.<sup>2</sup>

This trend is unmistakable, if more subtly apparent, in other fields, including education. On the provider side, teachers have long

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\* Associate Professor, University of St. Thomas School of Law (Minnesota). B.A., University of New Orleans; J.D., Harvard Law School. Thanks to Tom Berg, Lisa Schiltz, Rick Garnett and Rosemary Salomone for their helpful comments, and to the editors of the *University of Maryland Law Journal of Race, Religion, Gender and Class*, for organizing the symposium at which this article was originally presented. That symposium was entitled *God's Law in the People's Law: A Discussion of Contemporary Issues Arising from Religion and the Law*.

1. See Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83 (2006).

2. See Susan Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J. L. & PUB. POL'Y 741 (2005).

claimed academic freedom on a variety of grounds, but the religious dimension of such claims recently received a high-profile media jolt in Cupertino, California, where an elementary school teacher sued the school district for religious discrimination after his curricular choices were subjected to screening for inappropriate religious content by the principal.<sup>3</sup> His case, while ultimately unsuccessful legally, garnered widespread sympathy as a welcome effort to infuse a secularized educational orthodoxy with a teacher's own religious sensibility.

On the consumer side, the conscience of a student dissenting from prevailing social norms has been a pressing jurisprudential concern since the Supreme Court recognized a student's right not to pledge allegiance to the majority's sacred ideals.<sup>4</sup> The latest evidence of the dissenting conscience's prominence comes from Dover, Pennsylvania, where a federal court invalidated the local school board's clumsy effort to introduce Intelligent Design to the high school science curriculum. The implicit religious underpinnings of the board policy, coupled with compulsory attendance laws, sensitized the court to the plight of the captive student conscience.<sup>5</sup>

Deference to the individual consciences of both educational provider and consumer makes sense under our traditional "common school" framework. Where students and their families are presented with a single option of publicly financed schooling, and where public school teachers' employment opportunities are fungible in terms of the moral content of the curriculum and pedagogical mission, the school is functionally equivalent to the state. As such, invoking the sanctity of conscience can bolster the individual's authority in what otherwise would be a pronounced power disparity in the state's favor. If teachers and students are understood to operate within a monolithic, unitary educational system, their claims to be empowered legally to act (or not act) on conscience in the face of conflicting normative claims by the system are not to be dismissed lightly.<sup>6</sup>

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3. *Williams v. Vidmar*, 367 F. Supp. 2d 1265 (N.D. Cal. 2005).

4. *See W.Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

5. *See Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 712-16 (6th Cir. 2005) (applying endorsement test).

6. This is not to suggest that courts have embraced a robust vision of teachers' or students' rights, only that there is a logical foundation for invoking a right of conscience under a "common school" approach to public education. *Compare Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."), *with Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school.") (citation omitted).

But the common school framework may be unraveling. School choice is on the rise in many districts, giving students and teachers an important tool that can change the power dynamic in their relationship with any particular school: an exit option. While only a few school districts have embraced private school vouchers, hundreds of districts utilize an array of charter, magnet, and other schooling options, creating paths by which like-minded teachers and students can affirmatively choose to invest themselves in one school instead of another based on distinct normative claims embodied in the schools' respective missions. As school choice bolsters the ability of a school to create its own identity, the ability to maintain and defend that identity presupposes a reduced authority for the individual consciences of the school's prospective constituents.

Under these circumstances, it becomes more difficult to portray schools as fungible components of an educational monopoly backed by coercive state power. Schools instead begin to serve a mediating function, linking students and teachers together in common support of a mission that is not shared by every school. The viability of this mediating function has two implications for individual conscience: first, to the extent that a teacher's conduct is inconsistent with the school's deliberately chosen mission, the school has a stronger claim to control the conduct; and second, to the extent that the implementation of a school's mission creates tension with a dissenting student's conscience, the student's exit option gives the school a stronger claim to maintain its mission. Conscience is not erased from the religious liberty analysis by the rise of school choice, but its relevance and authority must be viewed from a different perspective. This article aims to begin tracing the contours of that perspective.

## II. MAKING A CASE FOR CONSCIENCE

Near the end of 2004, Stephen Williams emerged from relative anonymity as a fifth-grade elementary school teacher to provide a rallying cry for culture war veterans who finally found conclusive evidence of the public school system's hostility toward Christians. The media widely reported that Williams had "been forced to stop distributing copies of the Declaration of Independence to his students because the document on which our freedom was founded happens to

mention God.”<sup>7</sup> In reality, the principal required Williams to submit his lesson plans and readings for approval only after parents complained that the pervasive incorporation of pro-Christian viewpoints into Williams’s teaching amounted to religious indoctrination. The court cut through the hyperbole surrounding the case and observed that there “is a difference between teaching about religion, which is acceptable, and teaching religion, which is not.”<sup>8</sup> The eventual settlement reflected the weakness of the case.<sup>9</sup>

But for our purposes, the case’s significance lies in the considerable traction that Williams’s conscience-driven cause had with members of the public concerned with the efficacy of religious convictions in the educational sphere. Much of the case’s notoriety undoubtedly stemmed from majoritarian concerns over the godless public school, but the proffered vehicle for remedying that void was the religious sensibilities of an individual teacher. According to Williams’s own understanding of the dispute, “he merely wanted to give his 5th graders an accurate picture of the nation’s heritage by enriching his lessons with documents containing references to God, the Bible, and Jesus Christ.”<sup>10</sup> By violating his constitutional rights, one columnist insisted, the school district was “engaging in educational malpractice.”<sup>11</sup> After all, another observed, “we hire teachers who bring their own backgrounds and passions and beliefs to their teaching” because “[w]e don’t want robots.”<sup>12</sup>

Numerous organizations devoted to the cause of religious liberty embraced his case, including the Alliance Defense Fund, which ultimately brought suit against the school district. The claims, of course, presumed that Williams should have the authority to act on the dictates of conscience: a right to “academic freedom—his ability to speak and teach freely in accordance with the state educational

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7. *Scarborough Country* (MSNBC television broadcast Nov. 29, 2004), available at 2004 WLNR 14281560 (transcript).

8. *Williams v. Vidmar*, 367 F. Supp. 2d 1265, 1273 (N.D. Cal. 2005).

9. Wyatt Buchanan, *Cupertino; Teacher, District Agree on Religious Materials*, S.F. CHRON., Aug. 12, 2005, at B4; Editorial, *SAN JOSE MERCURY NEWS*, Aug. 17, 2005, at A1 (“Let’s call the agreement what it was: a total victory by the district over conservative lawyers who drummed up a bogus claim of religious persecution.”).

10. Caroline Hendrie, *References to Religion in Teacher’s Handouts Spur Calif. Legal Fight*, EDUC. WEEK, Jan. 5, 2005, at 17.

11. Nat Hentoff, *Sweet Land of Liberty*, WASH. TIMES, Dec. 20, 2004, at A21.

12. Scott Herhold, *Give Teacher Benefit of Doubt Amid Uproar*, *SAN JOSE MERCURY NEWS*, Dec. 9, 2004, at 1B.

standards,”<sup>13</sup> protection from government discrimination based on his viewpoint that “[this] nation was founded on the Judeo-Christian heritage,”<sup>14</sup> and termination of the school’s practice excluding “Mr. Williams’ [sic] religious expression.”<sup>15</sup> Such language comports with longstanding calls to give teachers academic freedom to ensure that students can “explore and develop new ideas,” and to provide a bulwark against education becoming “indoctrination.”<sup>16</sup>

Supporters of Williams’s cause lost sight of the fact that, if successful, his case would have been a significant setback for those who want to close the gap between the values and worldviews of families and the values and worldviews reflected in their children’s educational environments. One key dimension of religious liberty claims, especially among their more conservative proponents, is to increase the efficacy of parents’ child-forming decisions, especially as those decisions relate to the maintenance of a family’s faith tradition. Empowering teachers to speak their minds in defiance of school authorities threatens to do the opposite; that the substance of Williams’s underlying faith commitments aligned with those of conservative Christians cannot obfuscate this fact.

The reaction of community parents to the Williams controversy reflects the tension between teachers’ rights and parental authority.<sup>17</sup> If one facet of religious liberty is the freedom to transmit values across generations, and if parents’ only power over a child’s education lies in their choice of school, then equipping schools to create a more deliberate institutional identity is essential. Teacher autonomy precludes that identity, negating a more meaningful mediating role for schools in the process. For folks concerned with the hybrid right of

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13. Verified Complaint for Declaratory and Injunctive Relief ¶ 136, *Williams v. Vidmar*, 367 F. Supp. 2d. 1265, (N.D. Cal. 2005) (No. 5:04-CV-4946 JW PVT), available at <http://www.alliancedefensefund.org/userdocs/WilliamsvCupertinoComplaint.pdf>.

14. *Id.* at ¶ 101.

15. *Id.* at ¶ 147.

16. David K. DeWolf, Stephen C. Meyer, Mark E. Deforrest, *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 105 (2000); see also Francis J. Beckwith, *A Liberty Not Fully Evolved?: The Case of Rodney LeVake and the Right of Public School Teachers to Criticize Darwinism*, 39 SAN DIEGO L. REV. 1311, 1325 (2002) (“Bringing into the classroom relevant material that supplements the curriculum (and does not violate any other legal duties), when public school teachers have adequately fulfilled all of their curricular obligations, is protected speech under the rubric of academic freedom.”).

17. Indeed, some parents formed an advocacy group, fearful that Williams’s allegations and the ensuing media coverage would give the country the wrong impression of their community. Luis Zaragoza, *No Apology in Cupertino School Flap*, SAN JOSE MERCURY NEWS, Jan. 30, 2005, at 1B; see also *We the Parents*, <http://www.stevenscreekparents.org> (website of parents group opposing lawsuit) (last visited Aug. 16, 2006).

parental autonomy and religious liberty,<sup>18</sup> then, the case for a robust vision of teachers' rights within the classroom should be a non-starter.

The problem posed by individual conscience on the consumer (i.e. student) side of the ledger is not nearly so stark. Indeed, few take issue with the Supreme Court's decision more than sixty years ago striking down, on free exercise grounds, a West Virginia law compelling students to salute the flag.<sup>19</sup> And few passages garner as much admiration across the political spectrum as Justice Jackson's eloquent admonition in support of the ruling that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>20</sup>

The question now is not whether a student's conscience merits such deference, but whether such deference can be at least partially facilitated by affording the student her choice of schools. If a student chooses to attend a school that has staked out an identity grounded in non-universal norms and ideals, should the student lose any portion of her constitutional right to resist the imposition of those norms and ideals?

The question also bears on our understanding of the Establishment Clause, not just free exercise. Under the Supreme Court's endorsement test, as well as under the effects prong of the *Lemon* test,<sup>21</sup> school policy is viewed through the eyes of the reasonable student to determine whether the policy amounts to an endorsement of, or effectively advances, religion. Both approaches were utilized by the district court judge who recently invalidated the Intelligent Design "disclaimer" adopted by the Dover, Pennsylvania school board for inclusion in the evolution curriculum. The disclaimer read, in part, as follows:

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations. Intelligent Design is an explanation of the origin of life

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18. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

19. See *West Virginia v. Barnette*, 319 U.S. 624 (1943).

20. *Id.* at 642.

21. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families.<sup>22</sup>

Defenders of the school board saw this simply as a safeguard against putting undue pressure on students' religious beliefs through the teaching of evolution. In this regard, the court's ruling confirmed for some that "we cannot trust government schools to teach our children without undermining our values and our worldview," and that the only viable way of ensuring "that our children are taught properly" is to "consider the form of education our Founding Fathers believed in and practiced—private and home schools."<sup>23</sup> For many others, though, the ruling was a sensible acknowledgment of the fact that inserting contested views on life's transcendent origins into the science curriculum creates problems for families whose worldviews do not acknowledge such transcendence. As the district court recognized:

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>24</sup>

But, in the school choice era, that straightforward summation does not pack the same punch. It is by no means obvious that the message received by students and their families will remain the same when a system of fungible schools with monopoly power is replaced by a marketplace of schools offering distinct normative identities, especially if those identities are articulated and cultivated from below, by the association of like-minded families, teachers, and

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22. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708-09 (6th Cir. 2005).

23. John Eidsmore, *An Intelligently Designed Ruling?*, NEW AMERICAN, Jan. 23, 2006, at 35.

24. *Kitzmiller*, 400 F. Supp. 2d at 713 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).



administrators, rather than imposed from above by a centralized government body. Certainly for explicitly religious activities or unmistakably sectarian environments, the Establishment Clause is an insurmountable obstacle to the direct government funding that drives public school choice programs. But in contexts where the religious nature of the school's curriculum is less clear—such as Intelligent Design or abstinence-only sex education—the obstacle does not appear so absolute. At a minimum, the constitutional analysis may need to account for a diminished ability to rely on individual conscience as the rationale for constraining the mediating function of individual schools.

### III. CONSCIENCE AND THE COMMON SCHOOL PARADIGM(S)

The elevation of individual conscience has been a sensible reaction to the paradigms of public schooling that have traditionally prevailed in the United States. The two most influential paradigms—the assimilationist model popularized by John Dewey in the early twentieth century and the marketplace of ideas model emerging from the anti-authoritarian movement of the 1960s—adopt a critical stance toward the moral presumptions with which a student emerges from her family of origin. As Rick Garnett explains, this stance emanates from the stakes of the project:

Education is the process of and vocation of shaping souls. Now more than ever, though, the shape our souls ought to take, and the ends toward which they ought to be directed, are contested matters. Education is, therefore, in many ways a contest that the liberal state, no less than any other, wants to win and is invariably tempted to “fix.”<sup>25</sup>

Especially in matters of morality that are highly contested or closely linked to religious convictions, private schools are available to protect some students and their families from the state's pedagogical overreaching, but for the vast number of students for whom private schools are not a financially viable option, a limited right of conscience serves a much cruder, but equally crucial, bulwark function. And a teacher's right of conscience—usually articulated in

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25. Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expressive Association*, 85 MINN. L. REV. 1841, 1882 (2001).

the language of academic freedom—facilitates students' critical reflection on the state's homogenizing impetus (under the assimilationist model) or makes possible the day-to-day realization of the marketplace of ideas.

When common schools were avowedly religious, the push to assimilate students into a shared moral identity was unmistakable.<sup>26</sup> The assimilationist project was secularized, but did not noticeably dissipate, under the influential work of John Dewey. The ambition of his vision was made evident by his famous aspiration that “[w]hat the best and wisest parent wants for his own child, that must the community want for all of its children.”<sup>27</sup> It is not difficult to perceive a collectivist angle to this ambition, especially when read against Dewey's profound distrust of subcommunities that cling to tradition instead of embracing the promise of liberalism:

The isolation and exclusiveness of a gang or clique brings its antisocial spirit into relief. But this same spirit is found wherever one group has interests ‘of its own’ which shut it out from full interaction with other groups, so that its prevailing purpose is the protection of what it has got, instead of reorganization and progress through wider relationships. . . . That savage tribes regard aliens and enemies as synonymous is not accidental. It springs from the fact that they have identified their experience with rigid adherence to their past customs.<sup>28</sup>

Dewey invoked such groups as support for his skepticism that moral education could ever be accomplished by targeting students' character directly. After all, “direct instruction in morals has been effective only in social groups where it was a part of the authoritative control of the many by the few.”<sup>29</sup> To attempt a similar feat in an enlightened democracy “is to rely upon sentimental magic.”<sup>30</sup>

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26. NOAH FELDMAN, *DIVIDED BY GOD* 69 (2005) (“The Catholic bid for a constitutional right to liberty to conscience foundered on the Protestant perception that an exemption from Bible reading would undermine the schools' project of teaching a shared republican, Christian morality.”).

27. AMY GUTMANN, *DEMOCRATIC EDUCATION* 13 (1987) (quoting JOHN DEWEY, *THE SCHOOL IN SOCIETY* 7 (1900)).

28. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 99 (1916).

29. *Id.* at 411.

30. *Id.*

This is not to suggest that Dewey shunned the possibility of moral education, for he believed that “[a]ll education which develops power to share effectively in social life is moral” because “[i]t forms a character which not only does the particular deed socially necessary but one which is interested in that continuous readjustment which is essential to growth.”<sup>31</sup> The “essential moral interest,” then, is “[i]nterest in learning from all the contacts of life.”<sup>32</sup> In other words, the moralizing force of education consists of its ability to foster a willingness to adapt among students as they encounter the worldviews and lived realities of others. The homogenizing implications are clear. As Diane Ravitch puts it, in Dewey’s “conception of democracy . . . the particularities of neighborhood, region, religion, ethnicity, race, and other distinctive features of communal life are isolating factors, all of which may be expected to dissolve as individuals interact and share their concerns.”<sup>33</sup>

In a significant sense, Dewey succeeded in replacing the homogenizing Protestant common school with the homogenizing secular common school. Joseph Viteritti observes that this “aggressive secularism would become a creed in itself.”<sup>34</sup> Indeed, Dewey seemed to revel in that fact, insisting that by “bringing together those of different nationalities, languages, traditions and creeds, in assimilating them together upon a basis of what is common and public in endeavor and achievement,” the schools “are performing an infinitely significant religious work.”<sup>35</sup> He was, according to Viteritti, “incapable of comprehending the oppressive nature of his own self-righteous approach to education.”<sup>36</sup>

Dewey helped shape our nation’s understanding of public education, but he was not alone in espousing the assimilationist message. To take one prominent example, when Oregon passed a law

31. *Id.* at 418.

32. *Id.*

33. Diane Ravitch, *Education and Democracy*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 15, 21 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

34. JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 158 (1999).

35. *Id.* at 159 (quoting John Dewey, *Religion in Our Schools*, 6 HIBBERT J. 800, 806-07 (July 1908)).

36. *Id.* This self-righteousness and marginalization of tradition are equally evident in Dewey’s emphasis on science as a unifying force, calling it “the office of intelligence, in projection and control of new experiences, pursued systematically, intentionally, and on a scale due to freedom from limitations of habit,” going so far as to label it “the sole instrumentality of conscious, as distinct from accidental, progress.” DEWEY, *supra* note 28, at 266.

in 1922 that required all children to attend public schools,<sup>37</sup> much of the credit went to a campaign in which supporters argued that public schools should “[m]ix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.”<sup>38</sup>

The presumption that schools should function primarily as socializing institutions held sway, to varying degrees, until the 1960s, when anti-authoritarianism triggered educational innovations grounded in critical thinking skills.<sup>39</sup> Schools began to be reimagined as marketplaces of ideas in which students would not be indoctrinated into collectively shared moral norms, but would be exposed to a “values clarification” curriculum. The autonomy-stifling nature of Dewey’s assimilationist program was recognized, but it was replaced with an individualist understanding of student well-being that not only marginalized parents, but affirmatively strived to achieve critical distance between them and their child.

The very rationale of common schools, under the individualist approach, stems from “the basic fact that children are independent persons-in-the-making with their own basic interests and their own lives to lead.”<sup>40</sup> And the person-to-be-made should, at a minimum, honor the basic premises of liberalism, meaning that they “should be alert to the possibility that religious imperatives, or even inherited notions of what it means to be a good parent, spouse, or lover, might in fact run afoul of guarantees of equal freedom.”<sup>41</sup> Those who resist should not stand in the way; Stephen Macedo, for example, perceives no reason “why public educational policy should be guided by the peculiarities of a small number of people whose needs for psychological closure place them in opposition to liberal democratic civic practices and virtues, including mutual respect amidst diversity and cooperation among group lines.”<sup>42</sup>

37. The law was subsequently invalidated as an unconstitutional intrusion on parental autonomy by the Supreme Court. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

38. Edward M. Gaffney, Jr., *Piece and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491, 492 (2001) (quoting statement of the Imperial Council, A.A.O. Nobles Mystic Shrine, reprinted in WALTER MARCUS PIERCE, OREGON SCHOOL CASES: COMPLETE RECORD 269, 732 (1925)).

39. Bruce Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 667 (1987).

40. STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 233 (2000).

41. *Id.* at 239.

42. *Id.* at 252.

The autonomy-driven approach comported nicely with rulings by the Supreme Court from the same era, most notably *Tinker*, in which the majority reasoned:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over our students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>43</sup>

Note that the central place for individual autonomy—secured by collectively observed liberal norms—is a departure from Dewey’s emphasis on the creation of socially amenable and infinitely adaptable American citizens. But the student’s attainment of individual autonomy through schooling still places tremendous pressure on the student’s continued identification with her family’s worldview. John Goodland, for example, asserts that “[s]chools should liberate students from the ways of thinking imposed by religions and other traditions of thought.”<sup>44</sup> And in turning the marketplace norm into a reality, Macedo observes that today’s urban high schools “embody the variety and choice of the liberal community as a whole: they aim not to reinforce particularistic communal norms but to provide access to a world beyond the family and its closest affiliations.”<sup>45</sup>

For some, the marketplace model does not go nearly far enough. Martin Redish and Kevin Finnerty caution that, through public schooling, “the state is able to engage in a dangerous form of political, social, or moral thought control that potentially interferes

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43. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

44. VITERITTI, *supra* note 34, at 167 (quoting Goodland).

45. MACEDO, *supra* note 40, at 257.

with a citizen's subsequent exercise of individual autonomy."<sup>46</sup> They propose an "anti-indoctrination" model of the First Amendment, urging "the judiciary to reasonably police the educational process in order to restrict values inculcation to that essential minimum degree required for the educational process to function."<sup>47</sup> School programs or messages regarding racial or gender equality, patriotism, or ethnic tolerance would be "presumptively unconstitutional because they are improper government attempts to inculcate socio-political values in a uniquely impressionable audience."<sup>48</sup> Under this approach, the autonomy of individual students is of such paramount importance that the school must abdicate completely any value-inculcative role.

One problem in facilitating critical moral reasoning by liberating students from direct value inculcation is that it disregards the inherently social nature of moral judgment:

[O]f course that [values clarification] approach was hopelessly superficial because it left students essentially on their own . . . . We are not, after all, social atoms, free or even able to create a moral universe out of our own resources; we are born into communities and traditions, into a world rich with theories and practices on which we can and must draw in order to think in an informed and truly critical way. Morality is not intellectually free-floating, a matter of arbitrary choices or merely personal values. Moral judgments and conceptions of morality are rooted in historical, cultural, and intellectual contexts that make sense of them.<sup>49</sup>

Because values are embedded in relationships, the notion that lessons can be imparted through the teacher-student relationship without accompanying moral messages is dubious.<sup>50</sup> More broadly, seeking to foster critical reflection by drawing out a child from her

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46. Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002).

47. *Id.* at 69.

48. *Id.* at 70.

49. Warren A. Nord, *Moral Disagreement, Moral Education, Common Ground*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY, *supra* note 33, at 142, 147.

50. See Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 778 (1995).

embeddedness within a particular culture, family, and faith tradition may compromise the realization of a more fulsome autonomy by imposing on her a critical stance toward life choices that she may authentically be inclined to make.<sup>51</sup> And to the extent that the message purports to offer a smorgasbord of values to pick from, schools may be encouraging “in children a false subjectivism or relativism, giving rise to the logical inference that no one set of values can be right.”<sup>52</sup>

These grounds for skepticism toward values clarification have led some to question the relentless focus on the autonomy of individual students. Amy Gutmann, for example, asks “[w]hy must freedom be the sole end of education, given that most of us value things that conflict with freedom?” and so why should we “prevent teachers from cultivating moral character by biasing the choices of children toward good lives and, if necessary, by constraining the range of lives that children are capable of choosing when they mature?”<sup>53</sup> Gutmann’s vision of moral teaching should not necessarily reassure families whose worldviews do not align with secularist norms, though, for she also sees education as functioning to “convert children away from the intensely held [religious] beliefs of their parents.”<sup>54</sup>

But practical obstacles present themselves even as the theoretical justification for value inculcation becomes clear. Putting aside momentarily the question of religion, space for the inculcation of countercultural values of any stripe appears to be negligible as long as each school functions as a fungible component of the state’s monopoly power.<sup>55</sup> Even relatively uncontroversial norms grow elusive in

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51. Rosemary Salomone explains that the educational process touches children deeply through specific visions of the good life. These visions typically reaffirm those valued by the larger secular culture, but they may also negate the vision fostered by the family. Education exerts a powerful indoctrinative force. The scope and direction of that force are largely a function of district policy, school practice, and teacher discretion. In effect, this process potentially can undermine children’s autonomy by forcing them to choose a life contrary to that of their parents and community.

Rosemary Salomone, *Common Education and the Democratic Ideal*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY, *supra* note 33, at 223.

52. Bitensky, *supra* note 50, at 778.

53. GUTMANN, *supra* note 27, at 37.

54. *Id.* at 121.

55. Mark Holmes, *Education and Pluralism in an Age of Pluralism*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY, *supra* note 33, at 196 (“Can a state monopoly of schooling successfully inculcate values that are foreign to the larger society?”).

modern public schools as the varied constituents and panoply of values on display erode any sense of common identity.<sup>56</sup>

Viewed against these traditional conceptions of public education, the case for conscience is formidable. By presuming to shape students from wildly divergent backgrounds into a common model of the right-thinking American citizen, the assimilationist approach invites the creation of a limited constitutional buffer around individual students who resist the more aggressive efforts to shape them. To a lesser degree, the assimilationist approach also justifies protecting teachers who are called to conform in their conduct and pedagogy to the prescribed model, both for their own liberty interests and for the instrumental value of that liberty to the extent that it provides students with critical perspectives on the state indoctrination.

The marketplace approach's focus on achieving critical distance between the student and the traditions from which she emerges provides a rationale for conscience claims not so much for any unified message it imparts, but for the alienating implications of the fact that so many messages are imparted without concern for the tension they create—both by their substance and by their sheer number—with the student's previously governing worldview or values. And the teacher's claim of conscience is instrumentally valuable, for without an empowered and independent voice for teachers, the collectivizing reach of school authorities could easily compromise the very premise of the marketplace approach.<sup>57</sup>

Both the teachers' and students' claims to conscience under the assimilationist and marketplace approaches to public education gain traction because of the lack of an exit option and because of the collective manner in which a school's moral identity is imposed within a monopolistic, centralized system of fungible schools. The concerns

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56. *Id.* at 205 (“A genuine citizenship is more likely to be found in a fundamentalist school, despite its intolerance, than in a comprehensive high school, with its tolerance of almost everything and parallel belief in almost nothing.”).

57. In a Supreme Court ruling invalidating New York's loyalty oath requirement for teachers, Justice Brennan wrote:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the ‘marketplace of ideas.’ The Nation's future depends upon leaders trained through wide exposures to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’

*Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted).



driving the case for conscience change markedly with the advent of school choice.

#### IV. SCHOOL CHOICE AND CONSCIENCE

The school choice movement has been exhaustively documented and debated in countless fora, and those efforts will not be rehashed here. Much of the focus has been on the inclusion of private schools in voucher programs, particularly in the wake of the Supreme Court's ruling that voucher funds directed by parents to religious schools do not violate the Establishment Clause.<sup>58</sup> Clearly, if students are financially empowered to choose among a variety of secular and religious schools, the compulsion to protect their individual consciences from the moral or religious content embodied in the curriculum or environment at any particular school dissipates significantly. A student whose faith tradition rejects Darwinian evolution, for example, has a much less compelling conscience claim when she can choose to attend a religious school that introduces Intelligent Design theory in science class than if her only option is a public school where evolution is the only theory presented.

However, a narrower focus on the rise of choice within the public school system makes sense for two reasons. First, public school choice is much more widespread than voucher programs encompassing private schools, which have thus far been limited largely to districts in Florida, Cleveland, and Milwaukee. Second, it presents more challenging and nuanced conscience implications than voucher programs do because the latter entail spending decisions by parents who have been given government funds, while the former entail direct spending decisions by the government. An expansive understanding of school autonomy on religious issues will at some point bump into the Establishment Clause; the question is whether school choice alters the relevant boundaries, even in the public school sphere.

Charter schools are at the center of these developments because they so fundamentally change the prevailing conceptions of public schools while remaining unmistakably public institutions. Approved by a school board for a fixed period of time and funded by a combination of public and private sources, charter schools fall "between the ultimate independence of private schools and the

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58. See *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

bureaucratic constraints of traditional public schools.”<sup>59</sup> Nearly 3000 new schools have been launched since states began enacting charter legislation in the early 1990s.<sup>60</sup> In states with strong charter laws, “school-level personnel [have] wide discretion over their budgetary and personnel decisions and [are released] from all regulations except those that deal with civil rights, health, and safety.”<sup>61</sup> As a result, individual schools are empowered to determine “dress codes, teaching materials, and the overall theme of the curriculum.”<sup>62</sup> Across the nation, charter schools are proposed by community members along myriad lines of distinctiveness in their pedagogy, environments, and service objectives, including emphases of themes like leadership, particular fields like technology, music, or dance, or specific cultural traditions or underserved minority populations.<sup>63</sup>

Those willing to put forth the considerable effort necessary to create and maintain a charter school are generally motivated to do so by the insufficiency of current public school offerings within their district. They indicate a desire “to achieve more managerial autonomy” in order to “realize an alternative educational vision or to serve a special target population of students whose needs were not adequately being met in existing schools.”<sup>64</sup> While nothing precludes a given charter school from organizing itself around the assimilation or marketplace approaches,<sup>65</sup> they do not all limit themselves to those two models. The result is an array of educational offerings that replaces “the rigid, and frankly anachronistic, concept of the common school” with “the more flexible and accommodating notion of common education.”<sup>66</sup> Rosemary Salomone offers a helpful comparison:

The one seeks to homogenize students by imparting a  
fixed set of values through a system of neighborhood

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59. JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION* 17 (2000).

60. See Amy Stuart Wells, *Charter Schools: Lessons in Limits*, WASH. POST, Dec. 29, 2004, at A19.

61. VITERITTI, *supra* note 34, at 65.

62. *Id.*

63. *Id.*

64. *Id.* at 72-73.

65. “A court faced with twin teacher-speech cases arising out of two such dissimilar hypothetical schools should employ a legal rubric allowing consideration of the unique school goals and school designs.” Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts’ Imprudent Treatment of Controversial Teaching in America’s Public Schools*, 50 UCLA L. REV. 959, 1019 (2003).

66. Salomone, *supra* note 51, at 226-27.

schools funded partially by the state and controlled by local government. This 'one size fits all' approach historically has shown little if any regard for differences in family values or divergent perspectives on educational practice. The other aims to impart a common core of political principles, virtues, and understandings while recognizing differences at the broad margins. The focus on common education supports contemporary initiatives that allow families greater choice, and therefore voice, in the education of their children.<sup>67</sup>

In this regard, schools have the potential to be important relationally, as their connection to both the individual and the state equips them to fulfill a mediating role, serving as bridges between families and the surrounding, impersonal society.<sup>68</sup> Public schools already serve a limited mediating function whenever the state or federal governments defer to the judgment of local communities in the schools' operation,<sup>69</sup> especially as that judgment pertains to the values properly embodied in the educational environment.<sup>70</sup> But the efforts to cultivate either a marketplace of ideas within each school or to impose certain universalized normative ideals through the curriculum of every school have drastically reduced the efficacy of particular parents' values in the educational experience.

When there are a variety of schools to choose from representing different normative ideals, schools can bring a greater sense of identity, meaning, and shared purpose to students and their

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67. *Id.*

68. *See, e.g.,* Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1715 (1988).

Intermediate organizations fill the gap between individuals and the state. On the one hand, they are vehicles that reflect and amplify individual members' interests. On the other, they are subnational bases for social integration and the formation of ideals and beliefs. They are both instrumental and formative, both mechanical and organic, both conveyor belts for interests and nurturing grounds for values.

*Id.*

69. *See* Bruce Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 *OHIO ST. L.J.* 663 (1987).

70. *See, e.g.,* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

families.<sup>71</sup> The mediating function expands considerably as a given school is empowered to reflect more closely the values and priorities of its constituents,<sup>72</sup> solidifying their trust in the institution.<sup>73</sup>

It is not difficult to appreciate that an empowered school does not invariably bring about a heightened mediating function. In those cases where school autonomy is unhinged from parental choice, the outcome can be jolting. This was evident recently when parents brought suit against a California school district after their children in first, third, and fifth grade were given a research survey in class that, unbeknownst to the parents, inquired about sexual topics such as the frequency of “thinking about sex” and “thinking about other people’s private parts.”<sup>74</sup> The Ninth Circuit ruled that the district’s failure to disclose the survey’s contents to the parents before obtaining their consent was not actionable under the Constitution because the parental right to control the upbringing of children, as recognized in the landmark cases of *Pierce v. Society of Sisters*<sup>75</sup> and *Meyer v. Nebraska*,<sup>76</sup> “does not extend beyond the threshold of the school door.”<sup>77</sup> In other words, “once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at least, substantially diminished.”<sup>78</sup> The problem is that for parents without the financial means to choose a non-public school, the right to control their children’s education is illusory, and the school’s potential mediating power appears, to dissenting families, more akin to heavy-handed indoctrination.

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71. See Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004).

72. “A strong degree of institutional autonomy is a crucial ingredient in empowering the school’s mediating role.” Hafen, *supra* note 69, at 730.

73. “[M]y trust in a particular social organization underwrites my truth claims. Trust is therefore epistemologically prior to truth.” Posting of Hanno Kaiser to Law & Society Blog, <http://www.lawsocietyblog.com/archives/116#> (Sept. 6, 2005).

74. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1202 (9th Cir. 2005).

75. In *Pierce*, the Court held that the state could not require parents to send their children to public schools, for “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.” 268 U.S. 510, 535 (1925).

76. In *Meyer*, the Court struck down a state law banning the teaching of foreign languages to students before they graduated from eighth grade, reasoning that there was insufficient justification for state interference “with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.” 262 U.S. 390, 401 (1923).

77. *Fields*, 427 F.3d at 1207.

78. *Id.* at 1206.

But when students and their families are given a meaningful opportunity to embrace a school's unique identity, the robust understanding of school autonomy expressed in *Fields* creates a powerful mediating relationship between families and the broader community. Witness the dramatic impact of the Harvey Milk School in New York City, a high school devoted to providing a safe haven for gay and lesbian youth. The school, which requires the consent of parents before students can enroll, is permeated by normative messages that are far from universally accepted—e.g., many conservatives object to its legitimization of homosexuality while many progressives object to its “self-exile” of gay students from the straight community.<sup>79</sup> The mediating power, though, is unmistakable: the high school serves as a thick community centered on a common ideal that is hotly disputed by the surrounding society, providing students with a shared sense of identity, purpose, and meaning.<sup>80</sup> If a student enrolled or a teacher sought employment at Harvey Milk with knowledge of its unique mission, they would be hard-pressed to earn a sympathetic audience for a claim that the school's environment and curriculum unfairly impinged on their deeply held convictions that homosexuality is immoral. The claim to conscience, from a common-sense perspective, would be a non-starter.

Even those who defend a fairly aggressive state role in transmitting liberal values through the schools have begun to appreciate the appeal of decentralized authority in that process. Amy Gutmann rejects the value-free presumptions of the marketplace approach,<sup>81</sup> but she also rejects the collectivizing premise of Dewey's value-laden approach, conceding that “[a] democratic society must not be constrained to legislate what the wisest parents want for their child,” as long as the society does not “legislate policies that render democracy repressive or discriminatory.”<sup>82</sup> Stephen Macedo embraces

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79. See John Colapinto, *The Harvey Milk School Has No Right to Exist: Discuss*, NEW YORK MAG., Feb. 7, 2005, available at <http://newyorkmetro.com/nymetro/news/features/10970>.

80. *Id.* (describing school's “aging out” policy requiring students to leave the school by age 21 because they are so resistant to departure).

81. Gutmann supports the “nonneutral education of states and families” because the good of children includes not just freedom of choice, but also identification with and participation in the good of their family and the politics of their society. . . . To focus exclusively on the value of freedom, or even on the value of moral freedom, neglects the value that parents and citizens may legitimately place on partially prejudicing the choices of children by their familial and political heritages.

GUTMANN, *supra* note 27, at 43.

82. *Id.* at 15.

some differentiation, at least in process and form, advocating for schools as “moral communities”:

The public high school could be more like the Catholic school by being organized on a scale capable of sustaining a sense of community among students and teachers. The schools must also have enough autonomy so that they can be self-governing and develop a shared ethos. An element of parental choice is important so that children want to be there. Individual schools should have the ability to hire and fire teachers to ensure that a shared sense of mission and purpose can be sustained—that is, to ensure that the teachers want to be there as much as the students do.<sup>83</sup>

Though many will contest the substance<sup>84</sup> or the non-negotiable status<sup>85</sup> of the values prudently transmitted according to these theorists, it is significant that the broader trend appears to be toward reconceiving schools as “voluntary associations that participants have joined as a matter of their own free will.”<sup>86</sup>

So while Stephen Williams’s supporters sympathetically portray him as the noble individual standing alone against monolithic

83. MACEDO, *supra* note 40, at 264.

84. *See id.* at 10-11.

For a liberal democracy to thrive and not only survive, many of its citizens should develop a shared commitment to a range of political values and virtues: tolerance, mutual respect, and active cooperation among fellow citizens of various races, creeds, and styles of life; a willingness to think critically about public affairs and participate actively in the democratic process and in civil society; and a willingness to affirm the supreme political authority of principles that we can publicly justify along with all our reasonable fellow citizens.

*Id.* *See also* GUTMANN, *supra* note 27, at 838 (A democratic theory of education recognizes the importance of empowering citizens to make educational policy and also of constraining their choices among policies in accordance with those principles—of non-repression and nondiscrimination—that preserve the intellectual and social foundation of democratic deliberations.”); Bitensky, *supra* note 50, at 838 (listing values to be embraced as “good starting point for schools in preparing their students to maintain democracy and civilized order in the twenty-first century,” including “a commitment to peaceful coexistence, environmental conservation, the United Nations, the rule of law, and tolerance toward other people; and an abhorrence of genocide, invidious discrimination, torture and other inhuman punishments”).

85. “Reinvigorated communities may be an important part of educational reform, but only insofar as they contribute to the full range of our public purposes, which includes the well-being of children, the health of local communities, and the larger civic ideals of the nation.” MACEDO, *supra* note 40, at 260.

86. VITERITTI, *supra* note 34, at 217.

state power, the spread of school choice may require us to shift our perspective. If there is a range of distinct schools embodying a variety of deliberately crafted normative ideals, teachers' rights cases may be more accurately portrayed as pitting a voluntarily constructed subcommunity founded on a distinct identity against a designated agent of that subcommunity who threatens its continued viability. If the teacher's exercise of conscience threatens the identity staked out by the school, school autonomy must trump. There is no obvious legal impediment to such an approach once we leave behind the intraschool marketplace model,<sup>87</sup> especially where knowledge of the basis for a particular restraint on conscience can be imputed to the teacher before any dispute arises by virtue of the school's ongoing articulation of mission.<sup>88</sup>

It is fairly easy to see how school choice reduces the power of a dissenting student's claim to conscience generally, but it is less clear whether a reduced claim to conscience expands a school's discretion to implement policies or practices that would otherwise run afoul of the Establishment Clause. This article does not purport to reach conclusive answers on this question, but it offers preliminary reflections on why we may need to rethink the role of conscience in our understanding of the Establishment Clause as applied to public school districts where meaningful parental choice is available.

One reason is that the Supreme Court's decision in *Zelman v. Simmons-Harris*<sup>89</sup> makes more difficult any sharp demarcation between publicly and privately funded schools when it comes to religion. In *Zelman*, the Supreme Court held, in a 5-4 decision, that Cleveland's school voucher program did not violate the Establishment Clause. In so ruling, the Court reversed the Sixth Circuit, which had

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87. Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1356 (1976).

The freedom of expression justification for teacher control is premised on an analytical model of education which views schools as a market place of ideas. There is no historical or precedential basis, however, for concluding that the market place of ideas model is constitutionally compelled over the traditional value inculcation model. Thus, in the final analysis, teachers' constitutional rights, in and out of the classroom, do not extend beyond the first amendment rights of all citizens.

*Id.* See also Ralph D. Mawdsley, *School Board Control Over Education and a Teacher's Right to Privacy*, 23 ST. LOUIS U. PUB. L. REV. 609, 624-25 (2004) ("Efforts under a variety of legal theories to change or to personalize school curriculum have generally been rejected.").

88. See Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 GREEN BAG 2D 17, 24 (2005) (suggesting that "public school restrictions on teacher speech should emphasize substantial before-the-fact control, while curtailing the availability of after-the-fact sanction").

89. 122 S. Ct. 2460 (2002).

invalidated the program in light of the fact that eighty-six percent of the participating schools (46 of 56) were religious and ninety-six percent of students using vouchers enrolled in religious schools.<sup>90</sup> The Supreme Court concluded that the structure of the program did not favor the participation of religious over nonreligious schools.<sup>91</sup> Similarly unconvincing to the Court was the fact that ninety-six percent of participating students chose religious schools, as it is “irrelevant even to the constitutionality of a *direct* aid program that a vast majority of program benefits went to religious schools.”<sup>92</sup> The Court suggested that the availability of magnet schools and privately run community schools, in addition to the traditional public schools, made the religious schools’ inclusion less problematic.<sup>93</sup>

*Zelman*’s relevance is limited, however, by the fact that parents under the Cleveland plan were provided with government funds and they, in turn, directed the funds to the school of their choice.<sup>94</sup> The constitutional inquiry is different when a government agency approves a proposal for a new school and then funds its start-up directly. It bears further exploration, though, whether the *Zelman* Court’s approval of state funding of expressly religious educational programs pursuant to the decisions of private individuals may suggest that even charter schools could merit a different Establishment Clause analysis than the traditional public school system.

Three factors in combination could warrant broader discretion for the school: first, if the disputed element of the charter school is not sectarian or even expressly religious, but represents a moral claim that may be driven in significant part by a religious worldview (such as abstinence-only sex education<sup>95</sup>); second, if the element has been introduced by the self-selected constituents of the school, rather than imposed top-down on all schools in the district;<sup>96</sup> and third, if the state

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90. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

91. *Zelman*, 122 S. Ct. at 2469.

92. *Id.* at 2470 (emphasis added).

93. *Id.* at 2469.

94. *Id.* at 2468 (“[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.”).

95. See Frank Ravitch, *Some Thoughts on Religion, Abstinence Only, and Sex Education in the Public Schools*, CHILD. LEGAL RTS. J. (forthcoming, draft on file with author) (suggesting that religious motivation of abstinence-only sex education programs may render them unconstitutional).

96. Rich Schragger advocates “a jurisprudence that shows both some increased respect for local choices and some increased suspicion of centralized ones, whether those choices appear to favor or disfavor religion in any particular case.” Richard Schragger, *The Role of*



action involved—granting a charter to the school, which triggers the funding—was based on unquestionably legitimate educational objectives, not on the disputed element, which may be but one of many components of the school’s stated mission. The two pre-*Zelman* cases in which charter school practices were alleged to violate the Establishment Clause do not seem to have triggered different treatment by the courts than a traditional public school,<sup>97</sup> but the rationale of *Zelman*, along with the proper set of facts and understanding of conscience, may shift the analysis, if not the outcome.

Even apart from *Zelman*, the rationale of the endorsement test espoused by Justice O’Connor may not be as confining in a choice regime as when it is enforced against schools functioning as fungible components of the state’s monopoly power. The test holds that the Establishment Clause prohibits the government from either endorsing or disapproving religion, and endorsement is understood as sending “a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, members of the political community.”<sup>98</sup> Courts must evaluate the nature of the relationship between the government and any religious organizations involved, as well as the content of the message embodied in the policy or practice at issue. Determining whether the government acted neutrally toward religion will turn on “the judicial interpretation of social facts.”<sup>99</sup>

As a matter of logic, the exit option made available by school choice makes it less reasonable for a student to view herself as a political outsider simply because a particular school embraces a moral claim with which she disagrees. By way of obvious example, the existence of the Harvey Milk School hardly justifies a conclusion that gay and lesbian youth are “insiders,” while those who disagree with the school’s premise are “not full members of the political community.” What is not clear is whether the exit option changes the endorsement dynamic on religious matters. Certainly if a charter school was proposed with a mission of spreading the gospel of Jesus

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*the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004). The “fragmented authority” reflected in school choice “ensures that no one political authority has a monopoly on religion-regulating and -benefiting powers, thereby diffusing both the state’s power over religion and religion’s power over the state.” *Id.* at 1873-74.

97. See Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 97-99 (2004) (discussing *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 903 (W.D. Mich. 2000) and *Porta v. Klagholz*, 19 F. Supp. 2d 290, 293 (D.N.J. 1998)).

98. *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O’Connor, J., concurring).

99. *Id.* at 693-94.

Christ, the government's decision to grant the charter would send a strong message of endorsing religion, regardless of how many viable alternative schools students could choose. But suppose that the proposal stated only that the school would shape students holistically: physically, mentally, emotionally, and spiritually, and that each student was to be treated as "a significant creature entrusted with the weighty role of steward of Earth."<sup>100</sup> And while not communicating any overtly religious messages through the curriculum, assume that the school decides to set aside time each day for student reflection, meditation or prayer,<sup>101</sup> creates an externship program that includes opportunities to work with a variety of religious or secular organizations, institutes abstinence-only sex education based on the school's perception of adolescents' lack of emotional readiness for sexual activity, and offers a class in which the existential implications of Darwinian evolution are explored.

If such measures were introduced as a legislative package to be imposed on all schools within a jurisdiction, would that pose a more formidable Establishment Clause problem than when a single charter school adopts them? Two reasons suggest an answer in the affirmative: first, the state's role as overseer of the educational marketplace, rather than as arbiter of collectivized educational norms, makes the appearance of government endorsement more attenuated; and second, the student's exit option and perception of the broader marketplace makes the subjective impact of a potential government endorsement less problematic.<sup>102</sup> This is, of course, no guarantee that the Supreme Court's Establishment Clause jurisprudence will carve out a special place for charter schools; it simply reflects a rationale for the Court to do so.

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100. This particular phrase comes from the mission statement of Tarek Ibn Ziyad Academy, a charter school in Minnesota focusing on the Arabic language and the cultural traditions of the Middle East, East Africa, North Africa, and South Asia. Tarek Ibn Ziyad Academy, *Our School*, [http://www.tizacademy.com/Our\\_School.html](http://www.tizacademy.com/Our_School.html) (last visited Aug. 16, 2006).

101. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down Alabama law that added words "or voluntary prayer" to statute authorizing student moment of silence).

102. Cf. Schragger, *supra* note 96, at 1876.

The endorsement inquiry contains an implicit theory of scale. To determine whether a member of a community would feel like an outsider in that community, one must define what that community is and what membership in it means. . . . Religious exclusion is intimate and interpersonal; it is a message conveyed at close range, not across long distances or through institutional actors.

*Id.*

## V. CONCLUSION

This analysis is not meant to suggest that the diminished relevance of conscience should be interpreted as a license for schools to embrace any normative vision that is sustainable in the marketplace without regard for the foundational premises of liberal education. An educational provider should still be expected to fulfill the objectives for which public education exists in the first place. The fact that a school's mediating role demands freedom to pursue its own identity does not mean that the mediating role merits a degree of freedom that would effectively trump every other government interest. But there is considerable space within the broad constraints of liberalism for schools to pursue divergent moral values. These broad constraints should be defined and articulated primarily by the state through its oversight function, not through the constitutionally empowered resistance of individual teachers and students. Teacher autonomy, and to a lesser extent student autonomy, are inconsistent with the level of school autonomy that is necessary to cultivate a system of public education that is accountable to its constituents and does not shirk from the task of value inculcation.

Among schools that embody legitimate educational visions, the school's autonomy, even under the most robust framework of parental choice, is not unlimited. The sanctity of conscience cannot be replaced by institutional power that runs roughshod over nonconforming students and teachers. Conscience must give way only when the substance of the individual's conscience-driven claim directly threatens the realization or maintenance of the institutional identity previously staked out by the school.<sup>103</sup> School choice brings a skeptical eye toward individual conscience not because it seeks to replace dissent with a white-washed government indoctrination zone. Rather, school choice seeks to maximize the efficacy of parents' child-forming decisions in a way that takes values, and value pluralism, seriously. Under a one-size-fits-all approach to public education, conscience provides a voice to individuals who do not fit. In the currently unfolding era where public education does not presume that one size will suffice, the role of conscience is considerably less clear.

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103. In this regard, the dynamic reflects the import of the Supreme Court's reasoning in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), in which the Court upheld the Scouts' associational right to exclude an openly gay scout leader when the organization interpreted its mission of teaching boys to be "morally straight" to warrant such an exclusion.