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Religion and Education Policy: Where Do We Go From Here?

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American schooling faces so many dilemmas and difficulties right now that some wonder whether the United States will be able to retain any edge whatever in the increasingly competitive global economy. Even if the U.S. thrives, many worry about the growing distance between our well-educated and our poorly-educated citizens-between those who will make it and those who may not. On top, or perhaps at the bottom of all this, is evidence of a growing diversity in our society. Perhaps we have entered a stage of history where the pluralism of cultures, viewpoints, and talents is so great that a single "common school" will no longer prove adequate or desirable.[1]

After several decades of attempts to reform education by political and bureaucratic mandates, a growing number of critics are now arguing that all such efforts to stem "the rising tide of mediocrity" will fail because they do not go to the root of the system's difficulties.[2] The fault with the entire system, according to John Chubb and Terry Moe, for example, exists precisely in its centralized, political, and bureaucratic structure.[3] An open system of plural choice that uses market mechanisms and puts control in the hands of individual schools and parents will have to be instituted before good schools become the rule rather than the exception across the country.[4]

However, every argument for fundamental system reform immediately runs up against the criticism that an open, pluralistic system will aggravate at least two severe injustices. First, it will aggravate racism and/or the exclusion of the most needy students in our society.[5] Second, it will violate the first amendment's establishment clause because public monies will end up in the hands of religious schools.[6]

The contemporary dilemmas and difficulties of American schooling, therefore, involve such basic issues as religious freedom, racial justice, the extent of government's control of education, equity arid fairness for parents and educators, and the economic future of American society. The particular debate over religion and education policy opens an important window on these vast and weighty matters. In fact, a resolution of the multiple problems associated with education and the first amendment may help to point the way to a resolution of many other difficulties in contemporary law and public policy.

I. A GLANCE AT HISTORY

Writing in the 1970 case of Lemon v. Kurtzman,[7] Supreme Court Justice William 0. Douglas commented:

While the evolution of the public school system in this country marked an escape from denominational control and was therefore admirable as seen through the eyes of those who think like Madison and Jefferson, it has disadvantages. The main one is that a state system may attempt to mold all students alike according to views of the dominant group and to discourage the emergence of individual idiosyncrasies.[8]

Four years later, in Meek v. Pittenger,[9] then-Associate justice William Rehnquist objected to the majority's reasoning as follows:

The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question ....[10]

These two comments expose many of the key issues at stake in a struggle that dates back to the early nineteenth century, when a new public philosophy emerged to support an experiment in public education. The philosophy to which I refer was shared, in its essential features, by Thomas Jefferson,[11] Noah Webster,[12] Benjamin Rush,[13] and Horace Mann,[14] among others. It continues to structure the language and reasoning of Supreme Court decisions and American public debate to the present day.[15]

A. Education for the New Republic

Jefferson and other early American leaders were concerned for the continuing vitality of the republic. If, in the future, the young country experienced a growing diversification of states, families, churches, and schools, these leaders wondered whether the nation would hold together without some means of inculcating and promoting common republican virtues. The answer to which many of them came was the idea of a common public school.[16]

Note this important aspect of their answer: they assumed that government could legitimately develop schools as an extension of its responsibility to promote common citizenship and republican values. That assumption originated in Greek and Roman traditions[17] which were revived during the Renaissance and imbibed by many of the educated leaders of the eighteenth century.[18] Jefferson and others came to believe that, in the years to come, the new republic could not depend on the existing, diversified efforts of moral and civic education.[19] A common school was needed to bind all citizens of the republic together.

1. The Philosophy of the Individual and the Universal

Thinking of education as an integral function of the political order did not arise in a vacuum. That idea was part of a more embracing philosophy of society, human nature, freedom, and civic community. For our purposes here, I will focus attention primarily on Jefferson's thinking in order to outline the structure of this philosophy, one that vacillates between two centers of gravity.

The first center of gravity is the individual person; the second is the universal law of nature embracing both physical necessity and moral obligation.[20] The two centers of gravity are dependent on one another and at the same time opposed to one another, like two poles of a planet's magnetic field.[21] The individual, in Jefferson's view, possesses rights and autonomy by virtue of, and in relation to, the universal law of nature. The universal law of nature, in turn, defines the rights and moral obligations of all free, sovereign individuals.[22] Any rightful organization or association is constructed by individuals who remain bound by the rational and moral demands of the universal law.[23]

A seldom-noticed characteristic of this philosophy is that it lacks a clear and substantive idea of the republic. It has even less to say about the distinct natures and purposes of family, school, church, and economic enterprises. This omission results because the philosophy of individual natural rights conceives of human beings and society much as the Stoics had earlier.[24] Any social order has as its reference points the two poles of the individual and the universal natural law. The highest, most universal institution that individuals can construct is a republic that, in principle, has no definable limits save to guarantee the rights and freedoms of individuals and to help them realize their moral, rational nature. By definition, individual citizens in a republic will not confront problems of conflicting allegiances to their homes, schools, churches, and businesses as long as their actions accord with the rational and moral principles of the natural law.

The individual, from this point of view, lives independent and free of all bondage and subjection, except to the moral law of nature--the counterpole of her own inner rational and moral nature. At one pole of reality stands the free and independent person, while at the other pole stands the universal moral law that represents the common moral sense of every individual. At some points in Jefferson's writings, one finds him emphasizing the priority of the individual.[25] At other points, he stresses the superiority of the republic as the highest embodiment of moral humanity.[26] As an individual, each person is bound only by conscience; within the public realm, a single will of the majority directs the society as if it were a one-willed moral being, bound by and embodying the same moral sense. The private rights of individuals should be protected at one pole, just as the right of the majority should be granted freedom at the other pole to carry the republic forward. In the public arena the minority willingly submits to the will of the majority, as if to its own rational and moral will.

2. The Relationship of the Individual and the Universal in the Common Schools

The rationale for a common public school arose from this philosophy. Jefferson, Mann, and others assumed, on the one hand, that the rational and moral autonomy of each individual must he respected and nurtured. On the other hand, they believed the republic should hang together by a common will, reaffirming the universal moral order that binds all individuals and makes possible their independence and autonomy. Education should be the process whereby individuals are brought to maturity--each to her own autonomous independence as well as to a common sharing in the universal, rational and moral order of the republic.

Looking at human society from this perspective, one will not view schools, families, churches, and other institutions as equal and diverse partners in a complex society where each is distinguishable from the state and deserving of independent legal recognition. Rather, they will be recognized as voluntary associations built by individuals and therefore dependent ultimately on the individual's autonomy in private and on the republic's majority will in public. Education (and therefore schools) will be treated as an extension of the republic's desire to bring its immature citizens to individual as well as republican maturity.

Jefferson and other advocates of the common school did not believe that they would be discriminating unjustly against the existing families, independent schools, and churches in society if they set up government-backed common schools.[27] They assumed instead that the moral training conducted in most homes, churches, and independent schools was, by definition, private training and thereby insufficient for full maturation in the republic.[28] Philosophically and institutionally they took for granted that the chief "principal" in education is the government of the republic.[29] It, therefore, ought to establish the proper "agencies" for the republic's education.

Parental responsibility in education, by definition, should remain subservient to the more universal association of individuals in the republic. And the role of churches and "uncommon" schools should be accommodated to the central and superior responsibility of government for the common good.

Writing to John Adams in 1813, Jefferson explained that his plan for education in Virginia was part of a larger program to replace an "artificial aristocracy" (including the clergy) with a "natural" one.[30] In much the same way that Jefferson thought kings and wealthy aristocrats tyrannized people's lives and properties, he believed the clergy tyrannized people's minds .[31] He wanted Virginia and the United States to rise above all tyrannies and elevate the people to freedom and self-rule. This program could succeed only if an equality of condition could be nurtured among the people, raising all of them to that level where they would be able by their own powers and judgment "to select the able and good for the direction of their government.[32] How could this be done? By means of a uniform, common education for every citizen.

Notice the tension here between individual freedom and the common molding of all citizens. This is the tension highlighted by Justice Douglas's remark in Lemon.[33] For Jefferson, the free individual would be the "perfectly homogeneous" American.[34] Each person would become mature and free, in other words, by sitting at the feet of the same "natural," government-appointed, educational "aristocrat" who would help raise all to an equality of condition.[35]

3. The Sacred/Secular Polarity Distinguished

Note that the polar framework of this philosophy is not necessarily connected to the polarity of religion and secularity. The connection between the individual/universal polarity and the sacred/secular polarity was not firmly established until the 1840s. In fact, for Jefferson, the common schools would definitely be inculcating religious and moral values.[36] They would not be "neutral" or "secular" in our contemporary sense of those terms. The important distinction for Jefferson was between the universal, common moral order represented in society by the republic and its majority will, on the one hand, and the private realm of individual freedom, on the other hand. Education worthy of a vital republic should not be left in the hands of less than universal, private parties. What Jefferson wanted to elevate in public and what he wanted to keep in private can be distinguished, respectively, as the universal and non-parochial vs. the individual and the merely parochial. The universal order of law and morality was clearly connected with "nature's God," but the religious and moral character of a common school education would be universal and not parochial.

Of course, these distinctions make sense only from the point of view of Jefferson's philosophy. And that is precisely what allows us to see, at a later point in history, how fully dogmatic and parochial Jefferson's philosophy really was. Although Jefferson believed that his republican philosophy was common and universal, it was, in fact, only one among many viewpoints. Jefferson's plan, if successful, would amount to nothing less than the public establishment of an educational system that would allow a dominant faith or moral viewpoint to exclude all others in the public realm.

In some of his private letters, Jefferson showed some awareness of his bias. For example, he "confessed his hope that the changes brought about by a public school system would include 'a quiet euthanasia of the heresies of bigotry and fanaticism which have so long triumphed over human reason.[37] Though Jefferson would not have called it dogmatic, believing his convictions

simply to be the truth, his plan would substitute the "dogma" of rationalistic empiricism and enlightened moralism for the Christian dogmas that were at the time guiding many families, schools, and churches.[38]

The aim of this essay is not to debate the extent of Jefferson's parochialism but rather to show how his philosophy guided him and others to their political and educational conclusions. Those conclusions, in turn, laid the foundations for the common school system that began to be established in the 1840s. Jefferson's philosophy and the subsequent establishment of the common school, I contend, lie at the root of conflicts over religion and schooling that have continued up to this very day.

B. Nineteenth Century School Controversies

During the 1840s, the jousting between religious sects and thinkers such as Horace Mann began to delineate the battlelines for the great school wars fought in New York and Boston.[39] At that time a common school system actually began to take shape under political, bureaucratic governance. And at that time the connection was made between the private/public distinction and the sacred/secular distinction. New York and Boston were experiencing large Catholic immigrations. Many feared that the common public order was threatened. When Catholics began to appeal for public support of their schools on the same basis that the Protestant schools received support for theirs, the fears of the majority mounted. The largely Protestant majority in each city reacted to the pluralizing threat by making the argument that their own schools were common and "nonsectarian" but that the Catholic schools were parochial and "sectarian." They engineered the circumstances politically to give public backing and funding only to the so-called "nonsectarian" common schools.[40]

At the time, no one thought of these common schools of the majority as "secular" or "non-religious." The majority's successful effort against the Catholics, however, led to the institutionalization of a system of government-established, government-funded, government-run schools acceptable to the majority and distinguished from what they called the "sectarian" schools of the Catholic immigrants. The public-legal consequence was to establish the distinction between "public" common schools and private "sectarian" schools. Both sets of schools served the public purpose of training citizens, and both were religiously biased--one largely Protestant, the other largely Catholic. But one system became identified with the universal, rational, public order within the framework of Jefferson's philosophy, while the other was relegated to the arena of private choice and subjected to legal and financial discrimination.

C. Common Schools in the Twentieth Century

As American society diversified and became more secularized over the next 100 years, the common public schools changed to reflect majority public opinion. Given the framework established in the 1840s, there seemed to be no alternatives to the gradual elimination of various aspects of the common schools that did not accord with majority will and the legal protection of individual rights. Eventually, Bible readings and prayers were removed from the public schools.[41] Discrimination against non-government schools was formalized and solidified. Government-run schools became ever more fully identified with what was thought to be "non-religious," while non-government schools were identified with "privacy" and "sectarianism.[42] By the time the Supreme Court began to take up a significant number of school cases in the 1930s and 1940s, the ruling Jeffersonian philosophy (modified by the religious/secular distinction and the

later impact of John Dewey's pragmatism[43]) was simply assumed as the unquestioned starting point for citizens and Justices alike. [44]

The Supreme Court heard very few school cases before the 1940s, but the 1925 case of Pierce v. Society of Sisters[45] is central to both this area of law and this argument. In that case, the Court upheld the right of parents to choose schools for their children other than those established by the State of Oregon, a right that had been denied by an Oregon law.[46] On the face of it, the Court's decision would seem to contradict what I have just argued, namely, that a public school monopoly, founded on the Jeffersonian philosophy, had come to dominate American schooling after the 1840s. According to Pierce, parents do have a fundamental right to choose the agency of education for their children.[47] The educational "principalship" of parents for their children must be respected.[48] This decision seems to call into question the state's preeminent right to appoint the agencies for the education of its citizens.[49] The parental right of choice must be allowed to stand, the Court ruled.

In fact, however, the Pierce case simply brings to light the contradictions and inequities inherent in what by that time was already a well-established system. The Court in Pierce did not overturn state primacy in education. All that it did was to offer parents the right to opt out of the system if conscience required and they could afford to do so.[50] Full parental principalship in public education was not acknowledged. Oregon was allowed to continue the practice of channeling all public funds and public recognition to its own agencies of education. After Pierce, Oregon merely had to tolerate the private right of parents to opt out of the public system at their own additional expense.

The existing situation in our day is this: State and local governments (with federal and judicial support) assume the principal responsibility for the schooling of all citizens. They generally seek to fulfill that responsibility by means of their own state-established agencies-the public common schools. Within this legal framework for education, the authority of parents over their children is incorporated into the general civic governing structure for the local public school. In other words, with respect to the education of children, the state assumes that parents generally will exercise their responsibility through their membership in the political community, where they can vote for school board members as well as for local, state, and federal officials. Parental principalship in education, consequently, is swallowed up in government's principalship. Thus, by definition, public agencies (the common schools) are treated as belonging to the parents by virtue of their citizenship.

Alternatively, parental authority may be exercised by a private choice to opt out of the public system of government schools. This choice does not deprive parents of their civic rights, and therefore they may continue, if they wish, to exercise responsibility in the public school arena-perhaps even by serving on the local school board. Nor does the limited ability to opt out relieve parents of their obligation to pay taxes for the government-run schools that they choose not to use. Public law treats the choice to opt out as a private choice that must be supported at additional personal expense. Clearly, then, parental primacy does not rule in the public governance of education, even though private parental initiatives have not been eliminated altogether.

II. OUR PRESENT PREDICAMENT

The distinctions that now exist in the laws governing education in the United States represent multiple ambiguities, contradictions, and historical accidents that continue to produce confusion and stir up controversy. The Supreme Court, for example, has been trying for years to decide how

much government money can be channeled to the "secular" aspects of "private" religious education.[51] It has also repeatedly faced the opposite problem of how much "religious" activity can be carried on within the public "secular" schools.[52] The Court has not been able to resolve these and other unanswerable questions, such as how much freedom parents and teachers may enjoy inside the public schools, or what kind of "public" purpose is served by "private" schools, or how much "religious" opinion a public school teacher may convey as a matter of her first amendment rights.[53]

To illustrate the present predicament, consider the Supreme Court's 1963 decision, Abington School District v. Schempp.[54] The Court struck down a Pennsylvania law that required Bible reading in the public school. According to the Court, the Pennsylvania law violated the establishment clause of the first amendment. Writing the majority opinion, justice Clark said:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality.[55]

These words carry the full weight of the history of education and religion in America. Justice Clark took for granted that religion is unambiguously private and exists entirely outside the public order. That assumption led him to overlook one of the central institutions in our society that has, until very recently, helped to "exalt" religion in our society, namely, the public schools. He refers to the home, church, and individual heart as the great centers of religion. But this is simply a repetition of the central dogma of Jeffersonian philosophy, augmented as it was by the "secular/sectarian" distinction of the mid-nineteenth century. In fact, however, schools, both government-run and independent, were the centers of Christian training for decades into the nineteenth century, and even by the end of the last century, Protestantism controlled the ethos of the so-called nonsectarian schools. Today, many non-government schools continue to serve a high religious purpose in the lives of millions of Americans,

Justice Clark also had no doubt that government can be neutral toward the "citadel of the individual heart and mind" while it simultaneously controls and finances the public school system. And yet, the government-established common schools, controlled by local and state institutions, are not and never have been religiously neutral entities. They were not designed to be neutral as Jefferson and others conceived them; they were not neutral when they were controlled by Protestants; they were not neutral when Bible reading was required; and they are not neutral today even though the dominant ideology insists that they are.[56]

The question that justice Clark apparently did not consider is one that goes to the underlying assumptions of the philosophy that he simply took for granted. Can the state be neutral with regard to "the relationship between man and religion" while it prejudicially funds and governs one system of schools and discriminates against all other schools? Can the state claim to be acting with neutrality toward religion at the same time that it assumes to itself the prerogative of deciding what is religion and what is not? Can the state be neutral at the same time that it chooses between those religions that it will recognize and those that it will discount in the field of education?

Government should treat all its citizens evenhandedly and without discrimination. There is no question that justice demands this kind of neutrality. But precisely on these terms of

evenhandedness and nondiscrimination, the present structure of education is unjust. The problem begins with the blinders that belong to the ruling philosophy that hides from view the reality of families and a diverse range of schools. Governments and the Supreme Court have not yet adequately accounted for or begun to treat these institutions fairly. There is no justification for reducing them to inferior contractual expressions of individual privacy within the Jeffersonian polarity between the individual and the universal, or to treat the government's schools as departments of state. Governments have no right to predefine families and schools as being either exclusively religious" or exclusively "secular." The Constitution provides no basis for government to decide unilaterally to control schooling while ignoring the preexisting roles of families and non-government schools.

As I will argue below, there can be no just way of respecting the educational process and the rights of families without treating the actual diversity of schools and families in a nondiscriminatory and equitable fashion. The effort to make education a single, exclusive, homogeneous service that governments deliver directly to citizens inevitably distorts the very nature of education in the eyes of many citizens. Children are not merely immature individuals in a republic. They are simultaneously children in homes, members of churches, students, playmates, and much, much more. The fundamental assumptions of Jefferson's philosophy are mistaken and inadequate to deal with a complex, differentiated, and religiously plural society. At least some schools can only be treated justly if, like families, churches, and many business enterprises, they are not incorporated as departments of state. To ignore the diverse opinions and convictions of even a minority of families and teachers in the United States by treating them as publicly irrelevant is to ignore the demands of justice for a nondiscriminatory treatment of all citizens.

John Chubb and Terry Moe are correct that the reform of schooling cannot succeed within the present system.[57] But whereas Chubb and Moe emphasize choice and markets to achieve a higher quality of schooling across the country, I wish to stress pluralism and diversity in order to achieve justice for all.

Return for a moment to the Pierce case. The Supreme Court held there that parents should have the right to choose schools, including non-government schools, for their children.[58] But it did not challenge the preeminence of state principalship in education. Thus, at best, the decision recognized that parental authority in education cannot be discarded altogether. At worst, however, it seemed to seal forever the second-class status of parents in the arena of education. This act of discrimination against parents (and against any non-government schooling agency that parents might wish to choose) is usually justified, as we have seen, by the argument that the parent's choice of a non-government school is a private, usually religious, choice that ought not to be supported by equitable public funding because that would entangle the 'secular" government in the establishment of religion.

Look again, however, at what is distorted by this bias. Pierce did not deal with families and schools in their own right. It forced them into the predefined boxes of individual/universal, private/public, religious/secular, sectarian/nonsectarian. This distortion can be exposed by asking some simple questions that are unanswerable, or at least not answerable univocally, within that framework. Consider the following:

"Are families and schools religious or secular institutions?" They could be either or both at the same time, of course, depending on who answers the question.

"If a school truly helps students to become mature, competent, and employable adults as well as respectful citizens, does it perform a public or a private service?" Most would answer that such a service is obviously public. But how, then, do we account for all the so-called private schools that perform precisely this public service?

"How should we identify a school that makes no religious claim?" If the government runs it, most would identify it as an ordinary "secular, public school." But what if it is a non-government school? Obviously, here the religious/secular distinction is of no help in deciding how to identify the school. Why, then, should government withhold public funding from a school which makes no religious claims but which does want to organize itself apart from the political, bureaucratic structure of government-run schools? The only conceivable basis for a judgment that public funds should be withheld from such a school is that the government has traditionally insisted on giving its tax dollars only to its own schools. In other words, since the government holds a monopoly on the public funding of education, it is justified in directing its dollars only to its own agencies. But why should such a decision be called public, or nonsectarian, or neutral, or just?

In the 1983 case Mueller v. Allen,[59] the Supreme Court upheld Minnesota's small effort to provide some tax relief to parents who send their children to non-government schools.[60] However, the traditional legal rationale for both the state law and the Court's decision remained unchanged. Government continues to assume the role of first principal in education and directs educational monies in a highly disproportionate measure to its own schools. Those who choose non-state schools are still viewed as "opting out." Even though Minnesota parents who choose non-government schools now receive a little tax relief, it remains minor compared with the benefits gained by public school parents. A little financial relief for "private" school parents only underscores rather than resolves the continuing inequity of the private/ public, sacred/secular distinction.[61]

With regard to the religious/secular, sectarian/nonsectarian distinction, let us now pose some further questions. Jefferson judged that a representative government which reflects the will of the majority may legitimately govern the republic-the public order-precisely because it represents the universal community of moral individuals.[62] I have already pointed out that Jefferson's universalism at this point subordinated to the state all human associations that were less universal. Later this supposedly universal public order came to be called "secular" in contrast to the multiple "religious" groups that were allowed to flourish in private beyond the common terrain of the republic. But why should this public order be called a "secular" thing? On what grounds does the government have a right to grant itself a monopoly over what it defines as "secular"? Does this mean that governmental sovereignty over everything "secular" should have no limits as long as individual rights are protected? Or, if we look at this matter from the opposite side, we may ask: "On what grounds does government have the right to decide that 'religion' should belong primarily if not solely to churches or church-related institutions and to the privacy of the individual's heart and mind?"

The first amendment does not mention families and schools. In fact, it does not even mention churches. The way it is often interpreted, however, is to identify religion with churches and private conscience and to assume that government may enjoy a monopoly over what it defines as "secular." In the school cases, the courts do not typically recognize families and schools as having independent identities separate from church and state or from the "religious" and the "secular." But is it not true that family life and education and business can be as "secular" as politics? If so, then on what grounds may government claim a monopoly over everything "secular"? Likewise, is it not

true that many families and schools and even many businesses identify themselves as religious? If so, then how may the courts justify their treatment of churches and private conscience as the exclusive preserves of "religion"?

The present predicament in which we find ourselves seems to allow for no escape. The institutionalization of schooling, the formalizing of certain language categories, a much-disputed but still dominant public philosophy-all of these are among the elements intertwined in a complexity that has left the Supreme Court and the broader public in a state of confusion and ambiguity over religion and education. What must be done?

III. THE SYSTEM MUST BE CHANGED

Resolving these confusions and difficulties will require some important changes in the public law governing education. That resolution is likely to emerge, however, only if certain fundamental assumptions change.[63] Let us begin with the assumption about "principalship" and "agency" in education.

Most of our common law now takes for granted that parents bear the "principal" responsibility for their minor children.[64] The major exception or exclusion to this rule occurs in the realm of education, as just noted. That exception, I believe, is an error and one of the basic causes of the present confusion in education policy. Making this judgment is not to suggest that parents should hold an exclusive monopoly over their children and that government should do nothing for them. Parental principalship in the home does not require isolated privatization of children. Children are also citizens who have basic rights that should be protected by government. But public justice for citizens cannot be upheld by government if it denies or infringes the rights and responsibilities of parents. To begin to resolve the difficulties involved in the relation of education to religion will require acknowledging that the "principalship" of parents should also extend to the education of their minor children.

Parental principalship cannot be assumed, however, without rejecting once and for all government's claim to that principalship. The basic Jeffersonian assumption, revived in the Renaissance and dating back to ancient Greece, [65] must be relinquished. This change of assumptions need not lead to an idea of complete "privatization." That would occur only if we continued to hold to the polar conception inherent in Jefferson's individualist/universalist philosophy. In place of that framework, I would insist on the necessity of recognizing the rights and identity of non-governmental institutions such as families and schools. These institutions are not reducible to either individual contracts or departments of state. What are the implications of this shift in assumptions and outlook?

Public law should recognize people in society as more than individuals and citizens. People are also family members, church members, and much more. With respect to the education of children, the proper response of government should be to acknowledge the family, with its inherent parental responsibility for the care of minor children, and at the same time recognize its own responsibility for the public protection of all citizens, families, churches, and so forth. I will say more about government's responsibility below.

Hand in hand with the shift that recognizes the family's identity and parental principalship in education must also go a new acknowledgement of what constitutes an "agency" of education. Throughout American history, we have had many different kinds of schools. The government's

own schools have never educated all children. Prior to the 1840s, most schools were independent of direct government management. Even after the 1840s, a significant percentage of American schools remained independent.[66] This fact alone demonstrates that educational agencies need not be government owned and operated in order to function as agencies of an education that performs a public service. It also shows that a school is not really an extension of government. Even government schools usually possess a sufficient autonomy (ranging from independent budgets to separate elections for school board members) to indicate that the "public" character of those schools does not derive from their absorption into general bureaucratic processes.

The point here is that all agencies of education themselves require just treatment as schools by government. Under the polarized scheme of individual/universal (private/governmental), schools are reduced to either individual privacy or governmental extension, the same as most everything else in the human world. But that does not permit the appreciation, in public law, of the unique identities of schools as distinguished from other non-governmental and governmental institutions in society.

A school is an agency of education. It is built on a philosophy of education; it hires teachers trained in different disciplines; it stands in loco parentis[67] for minor children. A school, therefore, must master a particular, differentiated art that has to do with nurturing children toward intellectual (and other kinds of) maturity in a way that complements and wins the trust of parents who are responsible for those very same children. Students in a school take on a role that can be distinguished from that of child in a family and citizen in a state. Schools, in other words, are schools and not simply extensions of families or the government. They have a life of their own. To do justice to schools, therefore, government has to acknowledge them in their own character just as it should recognize families as having their own character. Government does not represent citizens as autonomous republican individuals. It deals with citizens who are at one and the same time family members, school participants, business owners or laborers, and so forth.

The rightful recognition of schools as independent entities will not require that the government relinquish all responsibility for education or that it privatize all schooling. Once again, this would be the logical consequence only if we were to insist on the polar framework of individual/universal, private/governmental. To do justice to the agencies of education, in my opinion, does not even require that government close down all of its own schools. Rather, government should begin to deal with schools, including its own, as distinct agencies of education rather than as an extension of itself. Then it should do what a just government ought to do, namely, treat all agencies of education justly and without discrimination.

With respect to government itself, we also need a new perspective and some new assumptions. Government does have the responsibility to secure public justice for all its citizens. As I have argued, however, this should mean the protection of various human institutions and associations that are neither individual persons nor departments of state. It should, indeed, be government's responsibility to guard individuals, families, and schools from unjust discrimination. The Greek Orthodox Church should enjoy the same public rights and protection as the Presbyterians or the Baptists or any other church. A black child should have the same public rights and privileges as a white or oriental child.

When it comes to education, therefore, government may well decide that fairness, equity, and equal opportunity for all of its citizens necessitate that each child be required to benefit from a free education up to a certain age. To promote this public purpose, government may, quite properly,

decide to tax citizens widely and generally to raise the funds for a "free" education. It may, quite properly, pass various laws to protect the public health and welfare in connection with the educational process. Many questions about the education of citizens are proper for governments and legislatures to entertain and answer: Should schooling be required up to a certain age or only up to the passing of certain standard tests? Should every child be required to learn English? To master some American and Western history? To participate in driver's education? Though these and many other questions might not find ready answers, they are legitimate questions for governments to ask and to answer for the sake of the just treatment of all citizens.

Having said this, however, my contention is that henceforth all of these questions and answers about government's actions ought to be handled on the basis of a new public-legal system for education that arises from the changed assumptions outlined above. Public law from now on ought to recognize parental principalship in the education of children as well as the right of all schools to be treated fairly. What are the implications of all these shifts put together?

First, parental choice in the schooling of children will have to be respected by government without discrimination. The present form of choice allows parents either to use the district common school or to opt out of that system at their own expense. This choice, grounded as it is in the assumption of governmental principalship, is simply unjust. For many with low incomes the choice does not exist, and it is an unfair choice even for those with sufficient incomes to enable them to make it. If parents are truly the principals in the education of their children, then the only way government can do justice to them is to accept and grant legal recognition of that principalship. No matter how much good the government wants to do for its citizens through education, no matter how hard it tries to engineer education reforms that will improve schooling, so long as it tries to do this while denying parental rights, it will only perpetuate injustice.

Second, this shift will require the just treatment of all agencies of education. The only way that genuine parental choice from among different educational agencies can be realized is if public law no longer gives discriminatory favors to the government's own schools. In other words, coincident with recognizing parents as the principals in the education of their children, government must honor, without discrimination, those agencies of education that parents choose. Every school should have the same legal and financial opportunity to open its doors to the public.

There are numerous means, which need not be described here, by which a genuine diversity of schools can be treated equitably in public law. What is clear from the argument, however, is that tax credits or vouchers, for example, while perhaps helping to alleviate some of the financial burden for parents who select existing "private" schools, will not be enough to do full justice in this case. They might offer a first step in the direction of greater equity, but as long as government schools are treated as the only legitimate public schools, then public monies and legal privileges for "private" education will never be distributed in truly proportionate amounts. In fact, I am prepared to argue that it is generally unjust and illegitimate for public funds to be spent for private purposes. The reason that educational tax credits or vouchers are even considered today is that most citizens recognize that non-government schools do serve a public purpose. The way to deal with all schools justly will be to recognize the public service that all schools fulfill. This will mean treating all such "agencies" of education, both government and non-government schools, as eligible for parental selection without legal or financial discrimination.

Now, then, let us approach the issue of religion and education. Given the new set of assumptions and policy implications, what will happen if some parents select a school that happens to be run by

a church or is grounded in an explicit religious philosophy of education? If the government supports such a school, whether directly or indirectly, will it not become illegitimately entangled in religion or run the danger of establishing a religion?

To the contrary, the framework just outlined shows that if government were not to allow parental choice of "religious" schools on the same basis as it allows choice of other schools, it would be discriminating against those parents and against some or all religions. An establishment danger would arise only if the government decided to give special benefit to those who attend the schools of one church but not to those who attend the schools of a different church. In fact, an illegitimate establishment exists now by virtue of the fact that the government grants privileges to its own schools in discrimination against non-government schools. It thereby institutes a viewpoint or philosophy that displaces all others. Many now charge that the public schools in effect establish "secular humanism." Clearly in the mid-nineteenth century, the establishment was one of moralistic Protestantism. Whatever the philosophy of education imposed in government-run schools that receive privileged recognition, the effect is the same: a violation of the first amendment's establishment clause. The only way to avoid an establishment of religion is to institute a fair and equitable distribution of education benefits (financial and otherwise) that follow parental choice among a diversity of schools.[68]

Think, by way of analogy, of the chaplaincy program in the armed services.[69] Here the government commissions, pays for, and houses official representatives of various ecclesiastical bodies for their service to those in the armed forces. As long as the government refrains from giving disproportionate benefit to one denomination over another, and as long as the men and women are free to make their own religious choices, then there is neither undue entanglement nor an establishment.

Religion, in the context of education, should be treated in public law as having an educational qualification. In other words, government's general public purpose (the Supreme Court would say the "secular purpose") in promoting education is to enable every child to gain access to the schooling of his or her parent's choice. If the legislation that implements this purpose recognizes parental principalship and educational agency, then its "general public ('secular') purpose" will be fulfilled when all parents are able freely to choose the school they want for their children without legal or financial penalty. If the conscience of some parents requires a Catholic parochial school, and the conscience of others leads them to a Jewish or Moslem school, and the conscience of others demands a non-religious school, then government will have done justice to all parents and to all schools if it treats them all equitably with proportionate funding and with the same legal recognition. No religion is thereby established. In fact, this is the only way for the government to keep from establishing either religion or nonreligion in its own specially privileged agencies. Parents should be free to choose; schools should be free to offer educational services; and government should treat all parents and educational agencies the same.

By not discriminating among parental choices or schools, the government thereby achieves true neutrality that is neither indifference nor hostility toward the religion or nonreligion of any parent or school. And by recognizing schools as schools and families as families, the government does not compromise the independence or integrity of any religious organization that happens to run a school, whether that organization is an educational association, a church, or a business. Government keeps its attention focused on the equitable treatment and promotion of the general, educational, public purpose that all schools are supposed to serve.

In this respect, the entire issue of religion vs. secularity is dissolved and schooling is removed from the illegitimate bind in which it was placed beginning more than a century and a half ago. The contrast of religious/secular, sectarian/nonsectarian, was a mistaken dichotomy in the first place. It would never have become an issue had it not been for the way the nineteenth-century Protestants tried to exclude Catholic schools from public recognition on the grounds of their parochialism and sectarianism. It would never have become an issue if Americans had not mistakenly identified religion with privacy and with churches alone. Religion is not simply what goes on in churches and in some individual consciences. It is also the way many people choose to live, including the way they choose to raise and educate their children. Government has no constitutional right to pre-define the limits and scope of religion. Nor does it have the concomitant right to grant itself a monopoly over the so-called "secular" world.

I have already shown that families and schools are independent actors in both the "secular" world as well as in the "religious" world. In order to treat parents and schools as well as every citizen justly, the government must concentrate its full attention on the welfare of the entire public order, always seeking to implement policies that serve the general public interest. If its public-welfare mandates happen to include education for every citizen, then government should see to it that its mandate can be carried out in ways that do justice to the full diversity of children, parents, teachers, schools, and other organizations involved in education. That some citizens insist on making education part of their religious practice while others prefer to identify schooling as something irreligious or non-religious presents no challenge to the government's general public purpose.

If, on all of these terms, government no longer lays claim to principalship in the education of citizens, and if it recognizes with full equity all the agencies of education, and if it treats schooling as schooling rather than as something divided between religious privacy and public secularity, then how can it guarantee to every child the public protection and assistance demanded by the norm of public justice? This question leads us quite naturally into that wider realm of public concern for racial nondiscrimination and for the needs of educationally disadvantaged children--concerns that lie beyond the issues of religious freedom and non-establishment. Given the purposes of this essay, I will venture only so far as to indicate how the new framework presented here can help to meet some of these other concerns.

Government must, of course, maintain the essentials of public fairness for every citizen. These essentials undoubtedly include such things as "free" education for all, no racial discrimination, no undue hardship (and probably special assistance) for the handicapped and new immigrants. Most of these characteristics of a just society are not related only to education, and, in fact, many of them have not been adequately implemented within the present framework of public education. A new pluralistic system, I believe, will provide a much better framework for doing justice to all. In any case, an ongoing public commitment to promote a just society is part and parcel of the argument for justice that I have been making here. Local, state, and federal governments, along with the courts, will have to continually update laws and change policies to make sure that education is offered in an equitable manner to every citizen.

The public-legal framework for education that can do justice to parents, schools, children, and the full range of religious convictions without fostering racial discrimination or overlooking those with special needs might look something like this:[70]

Proportionate public funding and equitable legal recognition would flow either directly or indirectly to each and every school.

1. Each school (educational agency) would be legally recognized in its own independent integrity, having the right to define and maintain its own philosophy of education-no matter how religious or nonreligious.

2. Each school, in keeping with its legal independence, would be free to govern itself as it chooses and to hire and fire its teachers in accord with its publicly-stated purpose, educational philosophy, and behavioral standards.

3. While each school would have the right to maintain its own identity and integrity, including, for instance, the freedom to be small or large, to serve only boys or only girls, or to specialize in particular vocational or academic subjects, it should have no right to discriminate in its admissions or dismissal policy on grounds beyond those that define its stated purpose. In other words, an all-girls school could, of course, turn away boys, but it could not turn away any girls black or white, rich or poor. An all-Moslem school would be allowed to turn away Christians or atheists, but it could not turn away black or Indian Moslems. Moreover, no school would be allowed to charge more in tuition than the amount of the per-pupil subsidy granted by the government to support a "free" education for every child. A school would certainly be free to raise additional grants and voluntary gifts to support its program. But it could not demand an amount above the standard government subsidy as a condition for admission.

4. Parents would be free to choose any school for their children, without governmental interference or discrimination, as long as they agree to honor the independent integrity of the school they select. For example, parents would have no legal right, after entering their children in a religious school, to press a legal suit to remove that religion from the school. Or, after their children had entered a school that is governed by an association of participating parents, a family would have no legal right to demand that the school change its governance structure. Parents' rights would include the freedom to enter and to exit a diversity of schools without compulsion and without financial discrimination. The school's rights would include the freedom to offer its services on the basis of its own, freely chosen identity. Internal governance and philosophy changes within a school would be the school's prerogative, with the requirement that it be truthful and open in communicating its true nature and purpose to the public.

5. In keeping with parental principalship, public law should also recognize the right of parents to pursue home schooling. Here the government's interest in the safety and health of its citizens would operate somewhat differently than in the case where government is dealing with independent schools. In general, the state's interest should be to protect every child's opportunity of gaining access to the public order. Thus, government may require parents to demonstrate that their children have achieved certain competencies at different stages of development.

6. For purposes of protecting and promoting the general welfare, governments may lay down certain general requirements for all schools, but not in an underhanded way that would give the government room to violate the principles just articulated. A state's law might, for example, say that every child in that state must study some of that state's history. It might require that every school participate in an accreditation agency of its own choice or demonstrate that its students meet certain standards of educational competency. As with all construction projects, a city or state would be free to require that school buildings meet certain construction codes and safety standards.

These six points are listed only to illustrate some of the implications of the argument made here. They are not offered as an exhaustive answer to all the questions of education policy. Many issues have been left untouched. For example, a statewide income tax (or some other kind of tax) might prove to be more equitable than the current property tax basis for raising educational monies.[71] The limits of the government's obligation to provide school transportation has not been settled here.[72] The means of distributing equitably the public's investment in school buildings and equipment remains to be settled. Many schools that are now "private" may want to maintain their privacy and not accept funding within this pluralistic system, and I see no reason why they should be denied the right to pursue such a course.

These and countless other issues of concern to the public can be faced as a new pluralistic system unfolds. If the American people can achieve a new consensus that government should promote education by respecting parental principalship and the independence of schools, then all other matters of justice for education can be taken up within a new context and perspective. This proposal will open up the markets, the parental choices, and the school governance opportunities that Chubb and Moe recommend." But it will do so in a manner that seeks to promote justice for all.

NOTES:

1 See C. Glenn, The Myth of the Common School (1988).

2 The phrase "rising tide of mediocrity" is from the report of the National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform (1983).

3 Chubb & Moe. Politics, Markets, and the Organization of Schools, 82 Am. Pol. Sci. Rev. 1065 (1988). See also M. Lieberman, Privatization and Educational Choice 57-151 (1989); D. Tyack, The One Best System (1974).

4 See, e.g., Lawrence & Arons, The Manipulation of Consciousness: A First Amendment Critique of Schooling, in The Public School Monopoly: A Critical Analysis of Education and the State in American Society 225 (R. Everhart ed. 1982) [hereinafter Public School Monopoly); Smith, Nineteenth-Century Opponents of State Education: Prophets of Modern Revisionism, in id. at 109; Spring, The Evolving Political Structure of American Schools, in id. at 77.

5 See A. Gutmann, Democratic Education 32-33 (1987). See generally D. Ravitch, The Great School Wars (1974).

6 The first amendment to the federal Constitution provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . U.S. Const. amend I. See M. Lieberman, supra note 3, at 195-99 (discussing Supreme Court cases effecting family choice in education).

7 403 U.S. 602, 625 (1971) (Douglas, J., concurring).

8 Id. at 630.

9 421 U.S. 349 (1974).

10 Id. at 395 (Rehnquist, J., concurring in the judgment in part and dissenting in part).

11 See, e.g., J. Conant, Thomas Jefferson and the Development of American Public Education 88-93 (1963) (Jefferson's proposed "Bill 79 of 1779 for the 'More General Diffusion of Knowledge"'). See generally Crusade Against Ignorance: Thomas Jefferson on Education (G. Lee ed. 1961) [hereinafter Crusade Against Ignorance].

12 Webster, On the Education of Youth in America, in Essays on Education in the Early Republic 43 (F. Rudolph ed. 1965) [hereinafter Essays on Education].

13 Rush, Plan for the Establishment of Public Schools, in id. at 3.

14 Rudolph, Introduction, in id. at xv-xvi.

15 The discussion which follows is a summary of a more elaborate presentation in R. McCarthy, J. Skillen & W. Harper, Disestablishment a Second Time: Genuine Pluralism for American Schools 15-51 (1982) [hereinafter Disestablishment a Second Time]. See also C. Glenn, supra note 1, at 63-145; R. Healey, Jefferson on Religion in Public Education (1962); Little, The Origins of Perplexity: Civil Religion and Moral Belief in the Thought of Thomas Jefferson, in American Civil Religion 185 (R. Richey & D. Jones eds. 1974); Little, Thomas Jefferson's Religious Views and their Influence on the Supreme Court's Interpretation of the First Amendment, 26 Cath. U.L. Rev. 57 (1976).

16 See, e.g., T. Jefferson, Notes on Virginia, in The Life and Selected Writings of Thomas Jefferson 187, 262-66 (A. Koch & W. Peden eds. 1944) [hereinafter Selected Writings of Jefferson]. In his argument for the 1779 education bill before the Virginia Assembly, Jefferson simply takes for granted that the government should initiate government run and funded schools. Throughout the text, Jefferson uses passive tense verbs that do not always explain "who" is making the decisions within this state-initiated program. Since Jefferson proposed a legislative enactment, we must simply assume that the passive tense refers to the state. See id. at 263.

17 Under the Greek conception of the structure of the polis, education was the primary responsibility of the city's rulers. See F. Coulanges. The Ancient City: A Study on the Religion, Law and Institutions of Greece and Rome 221 (1956); H. Marrou, A History of Education in Antiquity 103-05 (G. Lamb trans. 1956).

18 See Letter to William Short (Oct. 31, 1819), in Selected Writings of Jefferson, supra note 16. at 693-97. See also Notes on Virginia, in id. at 264; Letter to Peter Carr (Aug. 19, 1785), in id. at 374-75; Letter to Joseph Priestly (Jan. 27, 1800), in id. at 554-55; Letter to Benjamin Rush (Apr. 21, 1803), in id. at 566-70; Chinard, Thomas Jefferson as a Classical Scholar, I Am. Scholar 133 (1932).

19 See, e.g., T. Jefferson, Autobiography, in Selected Writings of Jefferson, supra note 16, at 49-51; Notes on Virginia, in id. at 262-68; Letter to George Wythe (Aug. 13. 1786). in id. at 394-95; Letter to Joseph Priestly (Jan. 27. 1800), in id. at 554-55; Letter to Peter Carr (Sept. 7, 1814), in id. at 642-50.

20 Notes on Virginia, in id. at 274-75; Letter to James Monroe (May 20, 1782), in id. at 364; Letter to John Adams (Apr. 11, 1823), in id. at 705-07; Letter to Peter Carr (Aug. 10, 1787), in id. at 430.

21 See Little, supra note 15, at 185; G. Wills, Inventing America 208-17, 229-47 (1978); Letter to George Wythe (Aug. 13. 1786). in Selected Writings of Jefferson, supra note 16, at 394-95; Letter to Joseph Priestly (Jan. 27, 1800), in id. at 554-55; Letter to Peter Carr (Sept. 7, 1814), in id. at 642-49.

22 A Summary View of the Rights of British America, 1774, in Selected Writings of Jefferson, supra note 16, at 293.94; Letter to Thomas Law (June 13, 1814), in id. at 636, 638.

23 Letter to A Committee of the Danbury Baptist Association (Jan. 7. 1802), in id. at 332; Notes on Virginia, in id. at 265; Letter to Benjamin Rush (Sept. 23, 1800), in id. at 558.

24 See, e.g., Letter to William Short (Oct. 31, 1819). in id. at 693.97.

25 See, e.g., Act for Establishing Religious Freedom (1779), in id. at 311-13: Letter to Peter Carr (Aug. 10, 1787), in id. at 429-33.

26 See, e.g.. Letter to James Madison (Dec. 20. 1787), in id. at 440: Letter to William Bache (Feb. 2, 1800), in id. at 556; Letter to Baron Alexander Von Humboldt (June 13, 1817), in id. at 681; Letter to James Smith (Dec. 8, 1822), in id. at 703.

27 See, e.g., J. Conant, supra note II, at 88-93; R. Healey, supra note 15, at 187; R. Heslep, Thomas Jefferson and Education 88 (1969); R. Honeywell, The Educational Work of Thomas Jefferson 148 (1931).

28 Rudolph, Introduction, n Essays on Education, supra note 12, at ix-xxi.

29 Id. See also Crusade Against Ignorance, supra note 11. at 19.

30 Letter to John Adams (Oct. 28, 1813). in Selected Writings of Jefferson, supra note 16, at 632-34.

31 Id. at 634.

32 See supra text accompanying notes 7-8.

33 See Crusade Against Ignorance, supra note 11. at 59; R. Healey, supra note 15, at 117-39.

34 See D. Tyack, Turning Points in American Educational History 85, 88 (1967).

35 Letter to John Adams (Oct. 28. 1813), in Selected Writings of Jefferson, supra note 16, at 632-34.

36 See generally R. Healey, supra note 15, at 159-77.

37 Disestablishment a Second Time, supra note 15, at 43.

38 Id. at 43. For further information on the religion's influence and involvement in education in early America, see C. Glenn, supra note I, at 146-78.

39 C. Glenn, supra note I. at 179.204.

40 See generally Disestablishment a Second Time, supra note 15, at 52-72; V. Lanie, Public Money and Parochial Education: Bishop Hughes. Governor Seward, and the New York School Controversy (1968); D. Ravitch, supra note 5; McCarthy, Public Schools and Public Justice, in Democracy and the Renewal of Public Education 57 (R. Neuhaus ed. 1987) [hereinafter Democracy and Renewal].

41 In 1963, the Supreme Court ruled that prayer and reading from the Bible for purposes other than study were a violation of the first amendment's establishment clause. Abington School District v. Schempp, 374 U.S. 203 (1963).

42 For the history of these developments, see Disestablishment a Second Time, supra note 15. at 52.72; C. Glenn, supra note I. at 146-78, 219-35, 249-51; D. Ravitch, supra note 5, at 43-64, 79-91, 189-209; L. lannoccone, Changing Political Patterns and Governmental Regulations, in Public School Monopoly, supra note 4, at 295-324.

43 See generally J. Dewey, A Common Faith (1934).

44 See McCarthy, supra note 40, at 73-90.

45 268 U.S. 510 (1925).

46 Id. at 534-35. See also S. Arons, Compelling Belief: The Culture of American Schooling (1986); Arons, The Separation of School and State: Pierce Reconsidered, 46 Harv. Educ. Rev. 76 (1976).

47 Pierce, 268 U.S. at 534-35.

48 Id. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right" to prepare the child to fill his place in society.).

49 Note, however, that the Court did not rule that states must have no role in education. The Court noted, "No question is raised concerning the power of the State reasonably to regulate all schools…." Id. at 534.

50 The Court refused to allow "the State to standardize its children by forcing them to accept instruction from public teachers only." Id. at 535.

51 See, e.g., Mueller v. Allen, 463 U.S. 388 (1983) (holding states can permit the deduction of expenses for tuition, textbooks and transportation from state income tax); Lemon v. Kurtzman, 411 U.S. 192 (1973) (three-part test to determine whether government money given to a school violates the establishment clause of the first amendment); Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding the loan of public-school textbooks to parents of children attending non-public schools).

52 See, e.g.. Mergens v. Board of Educ., 867 F.2d 1076 (8th Cir.), cert. granted, 109 S. Ct. 3240 (1989) (public school required to allow students to use school premises for Christian Bible study meeting).

53 The following discussion depends on Disestablishment a Second Time, supra note 15, at 73-106.

54 374 U.S. 203 (1963).

55 Id. at 226 (emphasis added).

56 On the non-neutrality of education, see Baer, American Public Education and the Myth of Value Neutrality, in Democracy and Renewal, supra note 40, at 1.

57 See supra note and accompanying text.

58 Pierce, 268 U.S. at 535.

59 463 U.S. 388 (1983).

60 Id. at 402.03.

61 For evaluations of Mueller, see Mueller v. Allen and Tuition Tax Credits, 16 Educ. Freedom 1(1983).

62 Letter to James Madison (Dec. 20, 1787), in Selected Writings of Jefferson, supra note 16. at 440-41; Letter to Baron Alexander von Humboldt (June 13, 1817), in id. at 681; Notes on Virginia, in id. at 262-65.

63 The remainder of this essay is dependent on Skillen. Changing Assumptions in the Public Governance of Education: What Has Changed and What Ought to Change. in Democracy and Renewal, supra note 40, at 86-115. See also R. McCarthy, D. Oppewal, W. Peterson & G. Spykman, Society, State, and Schools: A Case for Structural and Confessional Pluralism (1981) [hereinafter Society, State and Schools].

64 See, e.g.. Sims v. Virginia Elec. Power Co., 550 F.2d 929. 933 (4th Cir.), cert. denied, 431 U.S. 925 (1977) (interpreting Virginia law as imposing the duty to support a child on both father and mother); Alexander v. Alexander, 494 So. 2d 365 (Miss. 1986) (duty to support child is a continuing legal and moral obligation and is a vested right of the child); In re Estate of Peterson, 66 Wis. 2d 535, 540, 225 N.W.2d 644, 646 (1975) ("Under the common law, parents had and have a legal obligation to support and maintain their minor children under certain circumstances."); Alaska Stat. § 25.20.030 (1983) (duty of parent to maintain child); Conn. Gen. Stat. § 45.43 (1981) (father and mother are joint natural guardians with duties and obligations); Md. Fam. Law Code Ann. § 5-203 (1984) (parents are joint natural guardians).

65 See supra notes 17-19 and accompanying text.

66 See J. Coleman & T. Hoffer, Public and Private High Schools (1987) (comparing contemporary government-run and independent high schools); C. Glenn, The Myth of the Common School 207-35 (1988) (discussing early alternatives to the common schools); M. Katz, Class. Bureaucracy,

and Schools: The Illusion of Educational Change in America 3-55 (1975) (discussing four different types of school structures existing in America prior to the organization of public, bureaucratic systems after the 1840s); D. Ravitch, The Great School Wars 3-76 (1974) (outlining the circumstances of independent schooling in New York City prior to 1842); G. Smith, Nineteenth-Century Opponents of Education: Prophets of Modern Revisionism, in The Public School Monopoly: A Critical Analysis of Education and the State in American Society 109-44 (R. Everhart ed. 1982) (discussing existing alternatives to the common school in the 19th century). For an earlier study, see 0. Kraushaar, American Nonpublic Schools: Patterns of Diversity (1972).

67 See, e.g.. Whitfield v. Simpson 312 F. Supp. 889 (D. III. 1970) (finding teachers and school officials bear the same responsibility for children as do parents, in upholding the constitutionality of a statute permitting expulsion from school for gross misconduct). The Supreme Court, however, has overruled several state court determinations that school officials acted in loco parentis for purposes of Fourth Amendment immunity. See, e.g., New Jersey v. T.L.O., 469 U.S. 325 (1985). Justice White, writing for eight members of the Court, found:
"[s]uch reasoning is in tension with contemporary reality and the teachings of this Court .... More generally, the Court has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'"
Id. at 336 (citation omitted). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather they act in furtherance of publicly mandated educational and disciplinary policies. Id.

68 For more discussion of religious freedom, group rights, and establishment clause interpretation, see generally Esbeck. Establishment Clause Limits on Governmental Interference with Religious Organizations. 41 Wash. & Lee L. Rev. 347 (1984); Esbeck. Religion and the Neutral State: Imperative or Impossibility. 15 Cumb. L. Rev, 67(1984): Gedicks, Toward a jurisprudence of Religious Group Rights, 1989 Wis. L. Rev. 99 (1989).

69 See, e.g., 10 U.S.C. § 3073 (1988) (authorizing chaplains for the Army); 10 U.S.C. § 8067(h) (1988) (authorizing chaplains for the Air Force). The purposes of the Military Chaplains Association of the United States of America, established by 36 U.S.C §1 311317 (1988), are:
(a) [t]o safeguard and to strengthen the forces of faith and morality of our Nation; (b) to perpetuate and to deepen the bonds of understanding and friendship of our military service; (c) to preserve our spiritual influence and interest in all members and veterans of the armed forces; (d) to uphold the Constitution of the United States; and (e) to promote justice, peace, and good will.
Id. § 313.

70 For a more elaborate discussion of present and future alternatives see, J. Coons & S. Sugarman, Education by Choice: The Case for Family Control (1978); Society, State and Schools, supra note 63, at 136-44, 170-208; Chubb & Moe, supra note 3.

71 The issue of public school finance has been frequently litigated. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. I (1973); Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed mem., 320 N.C. 790. 361 S.E.2d 71 (1987); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989). For at, excellent discussion of public school finance litigation, see Note, To Render Them Safe; The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation. 75 Va. L. Rev. 1639 (1989).

72 For a recent case on this issue, see McNair v. Oak Hills School Dist., 872 F.2d 153 (6th Cir. 1989) (holding school district need not provide transportation to private school for handicapped child, whose handicap was unrelated to decision to attend private school).

73 See supra note 3 and accompanying text.