

## A Lower Wall Between Church and State: Vouchers or Charter Schools?

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### INTRODUCTION

Recent developments surrounding public school choice in the United States—namely in the forms of vouchers and charter schools—raise a host of concerns and questions regarding appropriate separations between church and state. Voucher programs that support religious schools and religiously affiliated charter schools point toward the possibility of a lower wall between church and state. In the realm of public education this wall has been constructed fairly rigidly by the courts, especially during the period from 1965 until fairly recently.<sup>1</sup> In this essay I investigate whether the current shift from a higher to a lower wall between church and state is promising or dangerous, and conclude that there are some reasons to view a lowered wall as a positive shift. Finally, I explain how both vouchers and charter schools are policies with potential to fulfill some of the promises of a lowered wall. I argue, however, that charters are a preferable option because they provide more mechanisms for protecting vital public interests in education.

### RECONFIGURING THE WALL BETWEEN CHURCH AND STATE

The involvement of religious leaders in the charter school movement and the use of public tuition vouchers toward religious education each suggest a move away from a strict separation between church and state in the realm of education. Is this move constitutionally defensible in light of the First Amendment's Establishment Clause? And, even if it is legal, is such a move a good idea? Skeptics, for instance, are wondering whether vouchers and charters are simply Trojan horses "in which religious and other special-interest groups have secreted themselves, seeking legal ways to tap into public money that has until now been denied them by courts, so they can indoctrinate children into narrow religious or political ideologies."<sup>2</sup>

Throughout the history of compulsory public education in the United States, educators, policy makers, and court justices have struggled to balance complex sets of interests in the education of children. The "public" interests guarded and regulated by the State, for instance, often appear to conflict with the "private" interests of parents and the particular communities to which they belong. Among such private interests is the desire of many parents to cultivate in their children's beliefs and values consonant with their religious faith. Because education in its most general sense is the primary means through which such beliefs and values are cultivated, the realm of formal public school education is often a site for tension between the interests of the State in maintaining neutrality toward religious doctrines versus the interests of parents and religious organizations in initiating young people into the particular doctrines of their given faith.

These sorts of tensions were at the fore of a landmark Supreme Court decision early in the twentieth century whereby the justices upheld the right of parents to

choose formal schooling for their children, including religious education. The 1925 case *Pierce v. Society of Sisters* arose in the context of Oregon's Compulsory Education Act, which compelled not only school attendance, but attendance at only public schools.<sup>3</sup> As a result of the *Pierce* decision, parents' rights to provide their children with a religious education have been protected within a private realm of educational options that is distinct from the public realm of education, which is provided at tax-payer expense and open to all children of school age.

Another crucial building block in the wall between church and state came with the 1971 Supreme Court decision in *Lemon v. Kurtzman*.<sup>4</sup> In response to challenges surrounding the appropriateness of state aid to private schools for things like teachers' salaries, textbooks, and instructional materials, the Court derived a three-pronged test for determining violations of the Establishment Clause, which has become known as its "*Lemon* test." As a result of the *Lemon* test, many forms of government aid were denied to religious schools for a little over a decade following the 1971 decision.<sup>5</sup> According to Amy Stuart Wells, the Court's reasoning during these years was "based on the argument that the 'primary effect' of such aid is to advance religion."<sup>6</sup> While proponents of religious schooling would clearly view this stance as problematic, and staunch advocates of the separation of church and state would likely applaud the Court, broader issues than simple allocation of federal dollars are raised by the judicial precedents of the *Pierce* and *Lemon* decisions.

#### PROBLEMATIC ASPECTS OF THE *PIERCE* AND *LEMON* DECISIONS

Combined, the results of the *Pierce* decision (granting parental rights to educational options within a private sphere of market choices) and the *Lemon* test (providing three criteria to ensure the separation of church and state in the realm of education) can be viewed as problematic in terms of the distinction between public and private spheres of education in the United States that they perpetuate. There are three implications of these decisions that are problematic in terms of how the Court has balanced public and private interests in education. First, the *Pierce* decision guaranteed the rights of parents to choose a private education for their children, including religious education. But this right is not extended to all parents. Rather, only those parents who can afford private school tuition are in a position to choose the type of education they desire for their children. This state of affairs heavily burdens parents without adequate financial resources to pay tuition in that they are denied the sorts of fundamental choices pertaining to their children's futures that other parents are able to exercise. Yet wealthier parents are also burdened in that they are expected to contribute to both taxes toward public education (if they are property owners) and tuition toward private education. In essence, they pay twice for their right to choose.

Second, the *Pierce* decision is also problematic in that it assumes that virtually any sort of education provided in the private sphere will satisfy state interests, which the *Pierce* Court defined as including the "public welfare" and promoting good "moral character and patriotic disposition." The decision leaves unclear, however, precisely how such interests are to be protected in a private sphere largely autonomous from state scrutiny. In a parallel fashion, the particular interests of parents and other community members are not well represented in the public sphere of educa-

tion, especially in the case of religious interests. Critics of this trend claim that public school efforts at neutrality are actually not neutral at all. Wells reports that “a growing number of jurists have come to criticize the *Lemon* test itself, labeling it ‘hostile to religion.’”<sup>7</sup> Third, and finally, the division between perpetuating an array of particular educational values in the private sphere, including religious values, and perpetuating only shared, secular values in the public sphere hinders a richer plurality of values that might benefit both spheres.

Philosopher of education Tom Green offers a set of conditions that suggest a model for societal institutions quite different from the distinct split currently encouraged by the combination of the *Pierce* and *Lemon* decisions. Green outlines the following five conditions as necessary for pluralism:

- 1) the society must contain institutions designed to permit, or even encourage, the expression of different value commitments in specific behavior; 2) alternative value choices must be available everywhere in the society; 3) such value choices must be available to people of roughly equal legal status and approximately equal educational opportunity; 4) the choices available to members of the society must be fundamental enough to produce significant differences between people in their attitudes and outlook on the world; and 5) those differences must not be so fundamental as to be divisive.<sup>8</sup>

Green’s conditions suggest that pluralism requires societal institutions that bridge the current divide between fairly heterogeneous and homogeneous spheres of values in the realm of education. His model calls for institutional mechanisms that encourage diverse value commitments and make value choices accessible to people in an equal manner. Perhaps a refashioning of the strict divide between public and private education that resulted from *Pierce* and *Lemon* would allow such institutional models to flourish. More recent Supreme Court decisions and policy initiatives promoting school choice suggest that the climate might be ripe for such a refashioning.

#### SCHOOL CHOICE POLICIES AS MECHANISMS FOR LOWERING THE WALL

Both vouchers and charter schools provide some remedies to the problematic implications of *Pierce* and *Lemon* described above. Each option, for example, provides poor families with educational choices previously restricted to parents able to afford private school tuition. Each option also has the potential to pluralize the specific types of educational opportunities available to all children who are compelled to receive some minimal level of schooling. The primary area in which vouchers and charters differ is with respect to their ability to promote and protect public interests. Because vouchers privatize parental choices, and thus the expenditure of public money, the possible level of accountability to public interests is minimal. Charter schools, on the other hand, because they are public entities, combine choice and heterogeneity without sacrificing public accountability.

#### VOUCHERS

Public vouchers that would provide all parents with means to choose the type of education most in keeping with the values they hope to cultivate in their children are an appealing prospect for some, both in terms of parental interests and diverse approaches to educational goods. Many proponents of vouchers view them as an ideal mechanism for ensuring state interests in providing a minimal level of

education to all children, and in providing such education equitably to all children. In addition, voucher advocates laud this mechanism as a means for the State to support such educational interests without being too heavily involved in the actual provision of a specific type of education. In other words, this mechanism heightens the liberty of parents to choose a specific variety of education provided by a particularistic educational organization rather than the neutral-among-all-parties variety of education traditionally provided by the State.

Francis Schrag is one such advocate of what he refers to as a “voucher scheme.” He defends vouchers on the grounds that indirect state support of education for all will maximize significantly diverse educational options for parents. Schrag’s voucher scheme is an example of the specific sort of institutional mechanism that would promote the rich level of value pluralism that Green calls for. Schrag is a proponent of William Galston’s model of a “Diversity State”—a polity committed to promoting and protecting pluralism on the level of “deep diversity.”<sup>9</sup> Drawing upon Galston’s distinction between superficial and deep diversity, Schrag describes deep diversity as having to do with the stances from which individuals make particular choices, *à la* Galston, “[d]eep diversity is a matter of the availability of different *stances*, not the availability of [superficial things like] different foods” [emphasis in original].<sup>10</sup> Both Galston and Schrag see a society that is able to accommodate religious and secular approaches to the good life as epitomizing “deep diversity.” Schrag explains,

[t]he reason that a society hospitable to both religious and secular viewpoints presents the paradigm of a society committed to deep diversity is because for the religious person, so many choices in daily life are derived from a basic stance that contrasts sharply with that of the secularist.<sup>11</sup>

In order to outline an educational regime that he views as more appropriate than Galston’s ill-considered endorsement of the model currently supported in the United States, Schrag offers what he terms “a radical conjecture.” He claims that:

The surest way to protect deep diversity is to *eliminate* state *provision* of secular public schooling. Under a voucher scheme of some kind in which parents chose schools that conformed to their own educational philosophies reflecting their own diverse views of the good life, the issue [of balancing church-state interests in public schools] would simply not arise. Religious communities could infuse religious worship into every aspect of schooling while secular parents could eliminate it entirely.<sup>12</sup>

This proposal addresses the problematic aspect of *Pierce* and *Lemon* surrounding heterogeneity of private institutions versus homogeneity of public institutions that I discussed above. Under Schrag’s scheme public money would flow to private institutions, thus making more porous the boundary between church and state. In this manner, the heterogeneity previously ensconced within the private sphere of education would be formally publicized and made available to all families. But within such a scheme, how would state interests in the “public welfare” (*Pierce*)—including access to equal opportunities, safety requirements, and preparation for democratic citizenship, for example—be accounted for?

According to Schrag, his call for a voucher scheme does not imply a complete lack of state regulation. He is careful to explain this point:

Let me clarify what I mean by elimination of state provision of schooling. I do not mean that the state would be relieved of its responsibility for supplying adequate resources for children's education.... Clearly, the citizenry has legitimate interests in the education, to say nothing of the safety, and health of all children, which clearly justifies some regulation of the educational process.... The level and kind of regulation that might be needed is not something that can be decided by any set of abstract principles.<sup>13</sup>

Despite Schrag's proviso that his voucher scheme eliminates state *provision* of schooling but not all state *regulation*, I find his proposal insufficient. Similar to the problematic aspect of the *Pierce* decision whereby state interests are burdened, Schrag's scheme also gives short shrift to public oversight of vital state interests. Granted, he emphasizes public interests in things like health and safety. But he downplays another category of important interests—those interests having to do with preparing students for liberal democratic citizenship. These interests require that young people be inculcated with shared *democratic values and capacities*, both of which are essential for participating in democratic processes as future citizens.

Schrag's defense of a voucher scheme as the most appropriate educational regime for Galston's Diversity State privileges the liberal principle of tolerance for diverse stances in a way that undermines two other crucial aspects of a liberal democratic society—individual autonomy and shared, rational bases for democratic decision making. In the first case, parents' visions of the good life trump children's interests in gaining capacities to reflect critically on various approaches to a good life, and then to autonomously choose paths for themselves. In the second case, tolerance for deep diversity is privileged over principles such as mutual respect that are necessary for democratic governance to flourish.

In my view, Schrag's defense of voucher schemes is one of the strongest cases for vouchers that one might make. He addresses a variety of relevant interests ranging from societal pluralism to parental liberty to egalitarian opportunity. But his case for vouchers still falls short in much the same way that the *Pierce* decision falls short—*both arguments presume that virtually any sort of education will fulfill state interests*. When it comes to state interests in the civic preparation of future democratic citizens I do not agree that this is the case. Rather, I contend that voucher schemes provide insufficient mechanisms for ensuring public oversight, and hence are not adequately accountable to public interests. Charter schools, however, are public entities. Even though they are fairly autonomous entities, charter schools are subject to public regulation to a degree that allows state interests in democratic education to be satisfied without sacrificing the diversity of their particular educational missions.

#### CHARTER SCHOOLS

Charter schools pluralize education in much the same way that vouchers do in that they make available a diverse array of schooling options to all families. In addition, charter policies share with voucher schemes the strength of equalizing choice options among wealthy and less privileged families. But charter school policies offer an additional strength that vouchers lack; they offer a more appropriate institutional mechanism for balancing shared and particularistic values, including possibly religious values, within the sphere of public education. In this regard,

charters offer a policy option that pluralizes educational opportunities not by privatizing them, but rather by enhancing public education itself.<sup>14</sup>

Like the private schools supported by voucher schemes, charter schools provide a diverse array of schooling options in that each school has a particular mission combined with a unique educational strategy for fulfilling this mission. But unlike private schools, charter schools are subject to public scrutiny and deliberation, and are ultimately accountable to formal regulation by public bodies (for example, state-level Departments of Education or local school boards). Although charter schools can create curriculum different from that implemented in state-run public schools (indeed this curricular freedom is a primary reason for opening or choosing a charter school), no charter school will be authorized to create such a curriculum until some public entity has deemed its overarching mission as consonant with public interests. This distinction between vouchers and charters is crucial; some level of public oversight over what kids learn ensures that charter schools can be held accountable to fulfilling public interests in individual autonomy and democratic capacity-building in ways that private schools supported by public vouchers simply cannot be.

Given the preferred desirability of charter versus voucher policies in terms of the relationship between church and state, two questions remain: (1) would religious institutions be interested in opening themselves to such public scrutiny? and, if so, (2) could they offer schools with missions and curriculum that would sufficiently satisfy public interests? The response to the first question appears to be resoundingly affirmative given the reactions of New York City ministers to that state's recently passed charter law, ensuing interest from Chicago ministers, and parallel efforts in states around the country. This leaves the second, and much thornier, question. Is it possible for private and public, sectarian and secular interests to be appropriately balanced within the institutional model provided by charter schools? Perhaps if a religious institution could articulate its mission in appropriately public ways and outline a curriculum for a charter school that would be non-sectarian, yet might promote some of the group's cherished values, it might satisfy public interests and pass constitutional muster.

Skeptics of religious leaders' interest in charter schools see it as a simple ploy to get public funding for sectarian schools. But there are reasons above and beyond the lure of a steady income stream that might also attract religious institutions to the charter school movement. Within a public school climate that many people view as actively hostile toward religion, charters suggest an opportunity to enliven the teaching of particular values within public education. According to one interested observer of the potentials of charter schools for those of religious faith:

a strong case can be made that American public schools, in general, have moved far beyond neutrality regarding religion and are actually in many cases hostile to religion, either through their silence on the topic (even as a matter of legitimate study) and/or by trivializing the significance of religious commitment. Accordingly, charter schools would seem to be a legitimate way for people of faith commitment, not to create religious schools at public expense, but to create tuition-free schools, open to all persons, that would be compatible rather than incompatible with their values.<sup>15</sup>

Charter schools offer the possibility of schools that are compatible with the values of specific groups of people, including religious groups, because they are formed around particularistic missions and they are schools of choice—parents and students voluntarily choose whether or not they wish to be affiliated with such a mission. Due to these features, charters appear more likely than traditional, geography-based public schools to bring together a group of like-minded people to create a school community based on shared values. Such a community also would provide a site for inculcating values in children, thereby continuing the particular tradition of a group.

But how can public charter schools teach religious values without violating even the thinnest notion of separation between church and state? Because a wide array of values are shared by members of diverse religious and secular traditions, the teaching of values need not be viewed as problematic for public charter schools. As Gail Sorenson explains, teaching values would not be at odds with maintaining some level of separation between church and state because “[the First Amendment] would not prohibit the teaching of moral or ethical values that might coincide with one or more religious traditions.”<sup>16</sup> Given this, the task for a religiously affiliated charter school would be to devise a curriculum that would allow it to teach particular values without promoting these values according to religious doctrine. In other words, members of a religious group would need to bracket their faith-based reasons for values, more widely held and more particularistic values alike, and encourage students to think critically about the variety of reasons that one might subscribe to these values. School time would need to be reserved for creating what John Rawls refers to as an “overlapping consensus” based upon public, secular reasons for the values shared within the school community.<sup>17</sup>

Such curricula would need to provide students with opportunities to adopt values not based upon religious belief, but upon careful reasoning and considered judgment. According to Sorenson this distinction between believing and thinking is both pivotal and achievable. She asserts that:

Public schools would perform a miseducative function if they taught students to believe rather than to think... Fortunately, there are many religious and nonreligious individuals and groups who support the public teaching of creative, critical thinking (including different kinds of justifications for religious and scientific views, for example) and who do not see that endeavor as incompatible with the essentially private development of belief or conscience.<sup>18</sup>

The encouragement of critical thinking and the articulation of public, secular reasons for shared values need not be incompatible with the development of religious belief or conscience because the latter ends can be sought outside of the formal school curriculum. A religious group involved with a charter school, for instance, would still have opportunity to teach young people within its membership particularistic, sectarian justifications for values within the context of a religious education that was distinct from school-sponsored educational programs.

Due to a desire to somehow combine secular opportunities with their religious missions some leaders are considering offering religious instruction before and after formal charter school hours.<sup>19</sup> This particular practice might tread too close to the edge of “excessive entanglement” due to questions such as whether charter school

resources would be used for religious instruction and whether non-participating students would feel pressure from peers or teachers to join the classes. But the larger point is that religious groups are interested in identifying ways to offer both a sound secular education to interested families and a particularistic religious education to those who share their faith. According to Chaim Lauer, executive vice president of the Board of Jewish Education (who is among other leaders of Jewish groups considering the possibility of the new charter legislation in New York), “[t]he challenge is to provide quality secular education and to find ways within the law to also teach the religious heritage.”<sup>20</sup>

Although charters with particularistic missions seem likely to attract families that already share those values, a broader audience might also be attracted to a school regardless of its mission. Emerging research evidence on charter schools indicates that families choose these schools for a number of reasons including dissatisfaction with existing public schools and a willingness to try almost any other option with the hope that it will be better. This sort of trend, combined with the lottery-based admissions processes mandated in most states, suggest that not all students attending a specific charter school will come from a family or religious group whose values directly converge with those of the school. Thus, the demands for a secular curriculum combined with a relatively diverse student body will encourage charter schools to explicitly communicate reasons for the importance of the specific values that they cherish to others who may not share those values. Such processes of communicating and providing widely accessible reasons are important endeavors that support public interests in cultivating shared democratic values and capacities within charter schools.

A lowered wall between church and state in the realm of education offers the potential of an equalized and pluralized public sphere of educational choices. Voucher and charter school initiatives each fulfill this potential in some respects, but only charter policies do so in such a way that holds schools receiving public funds accountable to public interests. As Martin Hoffman argued in an op-ed piece in the *New York Times*:

On their behalf, and on behalf of their teachers, we must protect and promote opportunities such as charter schools provide. But we must also be vigilant that the doors being opened do not allow entrance to those eager to make a buck off the demise of public education or to play fast and loose with sacred constitutional principles.<sup>21</sup>

Charter schools operate under mechanisms of state regulation that make such vigilance possible.

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1. For more historical context see Amy Stuart Wells, *Time to Choose: America at the Crossroads of School Choice Policy* (New York: Hill and Wang, 1993), 167-85.

2. Martin Hoffman, “Charter Schools Are Not A Threat,” *New York Times*, Op-Ed section, 6 January 1999, A27.

3. *Pierce v. Society of Sisters* 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925).

4. *Lemon v. Kurtzman* 403 U.S. 602, 91 S. Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

5. See, for example, *Committee for Public Education and Religious Liberty v. Nyquist* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) and *Aguilar v. Felton* 105 S. Ct. 3232 (1985).



6. Wells, *Time to Choose*, 174.
7. *Ibid.*, 180.
8. Mark Yudof, David Kirp, and Betsy Levin. *Educational Policy and the Law*, 3d ed. (St. Paul, MN: West Publishing, 1992), 18; originally from Tom Green, "Schools as Communities," *Harvard Education Review* 39 (1969): 221.
9. Francis Schrag, "Diversity, Schooling, and the Liberal State," *Studies in Philosophy and Education* 17 (1998): 30-31. See also William Galston, "Two Concepts of Liberalism," *Ethics* 105 (April 1995): 516-34.
10. Schrag, "Diversity, Schooling, and the Liberal State," 30.
11. *Ibid.*, 30.
12. *Ibid.*, 33, emphasis in original.
13. *Ibid.*, 34.
14. In this claim my position is similar to that of New York City Baptist minister Dr. Walker who says that he is interested in beginning a charter school in order to "enhance the public system, not privatize it." Anemona Hartcollis, "Religious Leaders Map Plans to Use New Law for Publicly Financed Charter Schools," *New York Times* <<http://www.nytimes.com/library/national/regional/122998ny-edu-charter.html>> accessed 29 December 1998, 3.
15. Excerpted from a posting to the listserv <[charterschools@listserve.syr.edu](mailto:charterschools@listserve.syr.edu)> by an individual subscriber on 29 December 1998.
16. Gail Sorenson, "Religion and American Public Education: Conservative and Religious Agendas and the U.S. Constitution," *Education and Urban Society* 28, no. 3 (May 1996): 296.
17. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) and Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), 95-119 for discussion of the formation of an "overlapping consensus" within pluralistic societies.
18. Sorenson, "Religion and American Public Education," 301.
19. Hartocollis, "Religious Leaders Map Plans," 3 and Anemona Hartcollis, "Test-Tube Babies: Private Public Schools," *New York Times* <<http://www.nytimes.com/library/review/010399charter-schools-review.html>> accessed 6 January 1999, 1.
20. Hartocollis, "Religious Leaders Map Plans," 3.
21. Hoffman, "Charter Schools Are Not A Threat," A27.