

RACE RELATIONS AND MODERN CHURCH-STATE RELATIONS

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Abstract: Over the last fifty years, the evolution of church-state jurisprudence in the Supreme Court of the United States has closely paralleled developments in race relations in the country. This Article examines how developments in race relations may have facilitated both the rise of strict church-state separationism in the 1960s and 1970s and its decline in the last twenty years, tracing the course of church-state relations not only in the Court itself, but in the broader society. The Article specifically argues that the strict separationism of the 1960s and early 1970s partially stemmed from a concern for religious minority rights inspired largely by the struggle for equal rights for blacks. In turn, this Article argues that strict separationism has declined in the last twenty years as secular-oriented theologies of social activism have faced serious challenges and lost ground, and as developments in race relations have aided the rise of governmental aid to religious educational institutions.

INTRODUCTION

This Article concerns religion and race—two controversial subjects that have figured prominently in America's constitutional and political debates since World War II. In particular, I wish to trace some connections in the last fifty years between developments in church-state relations and developments in race relations. Recently scholars of the First Amendment's religion clauses have shown interest in how the Supreme Court's modern decisions on that subject might have been influenced by the political, social, and cultural context of recent decades: such factors as the changing attitudes toward Roman Ca-

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tholicism;¹ the rise of secularism in American culture;² the position of religious minorities;³ and so forth. Like some of that other work, this Article traces the course of church-state relations not only in the Court itself, but in the broader society.

It would hardly be surprising if developments concerning church and state in the last fifty years interacted with developments in the area of race, since the latter have been so central to constitutional law and moral-political debate—from the constitutional success of *Brown v. Board of Education*⁴ to the moral-political triumph of the civil rights movement to the current conflicts over how to define and achieve racial justice.⁵

The central story in church-state relations in the last fifty years has been the rise of a fairly strict separation of church and state as the overriding constitutional and moral ideal in the 1960s and 1970s, and the partial decline of that ideal from the 1980s through the present.⁶ The purpose of this Article is to discuss how developments in the area of race may have facilitated both the rise of strict church-state separationism in the 1960s and 1970s and its decline in the last twenty years. I do not claim that these connections have been crucial, or even especially direct. I claim only that developments in race relations helped to create an atmosphere, a set of general attitudes, that were hospitable first to the rise of church-state separationism and then to its decline.

I. CHURCH-STATE SEPARATIONISM IN THE CIVIL RIGHTS ERA

The movement for equal rights for African-Americans reached its height in the 1960s and early 1970s. In the early 1960s the national media focused attention on the nonviolent protest movement; in the mid 1960s the key civil rights statutes like the Civil Rights Act and the

¹ See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282, 359 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50-53, 57-58 (1997). See generally Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001).

² See George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 54-58 (1999).

³ See Stephen M. Feldman, *Religion-Clause Revisionism: Minorities and the Development of Religious Freedom* (Feb. 2002) (unpublished draft on file with author).

⁴ 347 U.S. 483, 495 (1954).

⁵ See DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* viii (2d ed. 1998) (*Brown* "has been the most important reference point for public law thinking since the 1950's.").

⁶ See Berg, *supra* note 1, at 151-72.

Voting Rights Act passed; and in the late 1960s and early 1970s the federal courts reached their greatest vigor in enforcing racial desegregation of schools through measures such as busing orders.

During this same period, in church-state matters, the Supreme Court made dramatic moves toward the strict form of church-state separationism.⁷ In the 1960s it struck down the longstanding practices of official prayers and Bible readings in the public schools,⁸ and in the early 1970s, in decisions such as *Lemon v. Kurtzman*, it began to restrict severely the provision of government aid to religious schools.⁹ In these years separationism became the dominant ideal for church-state matters not only in the courts, but more broadly among cultural elites such as the media, educators, and the government bureaucracy.

This section explores some possible relations between these two concurrent developments: it suggests how certain interpretations of the civil rights movement contributed to the cresting of church-state separationism and to separationism's distinctive features.

A. *Emphasis on Minority Rights*

At the most general level, the concern in the 1960s with the unjust treatment of blacks contributed to, and helped to reinforce, a concern for the treatment of other minorities, including religious minorities. A pervasive theme of the Warren Court's work, as various scholars have emphasized, was "to champion the legal position of the underdog and the outsider in American society"¹⁰—to carry out the notion of footnote four of *United States v. Carolene Products* that the courts should show special solicitude for "discrete and insular minorities" who are subject to discrimination and other mistreatment by the majority.¹¹ African-Americans, of course, were "the quintessential discrete and insular minority."¹² But the label could also apply, with a bit of a stretch, to those who publicly dissented from the generalized theism reflected in public school prayers—atheists, secularists, and some

⁷ See *Meek v. Pittenger*, 421 U.S. 349, 372 (1975); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832-33 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971); *Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

⁸ *Schempp*, 374 U.S. at 205 (Bible readings); *Engel*, 370 U.S. at 430 (prayer).

⁹ 403 U.S. at 607; see *Meek*, 421 U.S. at 372; *Nyquist*, 413 U.S. at 798; *Sloan*, 413 U.S. at 832-33.

¹⁰ See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 13 (1998).

¹¹ 304 U.S. 144, 153 n.4 (1938).

¹² See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 487 (2000).

prickly Christians who thought the prayers were too watered-down. Moreover, the quintessential American religious minority, Jews, denounced official religious exercises as a threat to their equal status—partly because some such exercises, such as the Lord's Prayer and the Bible readings in *School District v. Schempp*, were indeed Christian in orientation,¹³ but more broadly because the idea of majority rule on public religious ceremonies was dangerous in principle to Jews and other minority faiths.¹⁴

B. Ambivalence Toward Religion-Government Interaction

In addition, the course of race relations in the 1960s helped foster an ambivalent attitude among many elites about the public role of religion. Although the civil rights movement itself had a huge religious component, many in elite culture treated it primarily as a secular movement for social justice.¹⁵ Even for religious elites, their perceptions of the civil rights movement led to an ambivalent attitude toward the intertwining of religion and government. This attitude is exemplified in a theological outlook called "secular theology," which became popular in the 1960s among the leaders of mainline or liberal Protestantism, the faith that historically had been the most intertwined with American government and public life.¹⁶

Secular theology arose in the late 1950s and early 1960s as a response to the increasing secularization and urbanization of society.¹⁷ Basically, it taught that Christians should embrace the secular world and become active in its movements.¹⁸ Secular theology's best-known manifesto was Harvey Cox's 1965 book *The Secular City*; but the theology found its inspiration in some enigmatic lines from the prison let-

¹³ See 374 U.S. at 207-09.

¹⁴ See, e.g., GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* 100-45 (1995) (describing Jewish organizations' litigation campaign against theistic test oaths and school prayers and Bible readings).

¹⁵ See, e.g., MARK SILK, *SPIRITUAL POLITICS: RELIGION AND AMERICA SINCE WORLD WAR II* 125 (1988) ("From a secular standpoint, the civil rights movement [was simply] about . . . removing barriers to full participation . . . in American life. Religion, as such, could be seen as no more than instrumental to this comprehensive goal, to be pressed into service or decommissioned as the case demanded.").

¹⁶ See ROBERT T. HANDY, *A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES* 200 (2d ed. 1984); MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* 260-61 (1970).

¹⁷ See generally HARVEY COX, *THE SECULAR CITY: SECULARIZATION AND URBANIZATION IN THEOLOGICAL PERSPECTIVE* (1965).

¹⁸ See COLIN W. WILLIAMS, *WHERE IN THE WORLD? CHANGING FORMS OF THE CHURCH'S WITNESS* 24-27, 75-76 (1963).

ters of Dietrich Bonhoeffer, the anti-Nazi theologian and martyr, who wrote near his death about Christianity needing to adapt to a "religionless" world.¹⁹ Bonhoeffer's letters became extremely influential among mainline Christian scholars and in their seminaries.²⁰ As one historian of this period has written, mainline Protestant activists "were deeply attracted to [Bonhoeffer's] ideas about the church in a religionless world 'come-of-age,' of the church simply 'being there for others,' taking its part 'in the social life of the world, not lord[ing] it over men [and women], but helping and serving the world.'"²¹ For secular theology, the proper relation of Christianity to society can be summed up in the model of "the Servant Church in a Secular World."²² The two concepts in this phrase shed light on the mainline elite's ambivalent attitude toward church-state intertwining, and how the civil rights movement fueled that ambivalence.

1. The Servant Church

In their social teaching, secular theologians largely reacted against the religion of the 1950s, which they perceived to be complacent and self-centered, concerned primarily with the numbers on its attendance rolls and the comfort of its members. A host of books around 1960 criticized the "suburban captivity" of Protestantism: its lack of concern for the needs of the poor and downtrodden, and the irrelevance to those people of traditional preaching about personal conversion and being "saved."²³ The director of missions for the National Council of Churches (NCC), Colin Williams, charged Protestantism with having "surrender[ed] to its own worldly security" and become "imprisoned within the expensive facades of buildings."²⁴

¹⁹ DIETRICH BONHOEFFER, Letter of April 30, 1944, in *LETTERS AND PAPERS FROM PRISON* 279–82 (Eberhard Bethge ed., 1972). See generally COX, *supra* note 17.

²⁰ See COX, *supra* note 17, at 1–3; WILLIAM HAMILTON, *THE NEW ESSENCE OF CHRISTIANITY* 12 & n.1 (rev. ed. 1966); D.L. MUNBY, *THE IDEA OF A SECULAR SOCIETY AND ITS SIGNIFICANCE FOR CHRISTIANS* 88–91 (1963); PAUL M. VAN BUREN, *THE SECULAR MEANING OF THE GOSPEL* 1–7 (1963). See generally *THE PLACE OF BONHOEFFER: PROBLEMS AND POSSIBILITIES IN HIS THOUGHT* (Martin E. Marty ed., 1962).

²¹ JAMES F. FINDLAY, JR., *CHURCH PEOPLE IN THE STRUGGLE: THE NATIONAL COUNCIL OF CHURCHES AND THE BLACK FREEDOM MOVEMENT, 1950–1970*, at 122 (1993) (final brackets in original) (quoting WILLIAMS, *supra* note 18, at 100).

²² See WILLIAMS, *supra* note 18, at 79–80.

²³ See PETER L. BERGER, *THE NOISE OF SOLEMN ASSEMBLIES* 35–36, 38 (1961); PIERRE BERTON, *THE COMFORTABLE PEW* 80–84 (1965); MARTIN E. MARTY, *THE NEW SHAPE OF AMERICAN RELIGION* 98–102 (1959). See generally GIBSON WINTER, *THE SUBURBAN CAPTIVITY OF THE CHURCHES* (1961).

²⁴ WILLIAMS, *supra* note 18, at 59.

Williams, whose books were "widely distributed and discussed within the mainline churches,"²⁵ argued that the church instead should be a "servant" to the world, caring not for itself but for the needy—that is, focusing on social justice rather than "churchly" concerns.²⁶ The head of the NCC's commission on race relations stated that "[a] society in conflict over justice is a most familiar place for a Christian man to find himself. . . . [H]is basic calling is always to give his life away for others."²⁷ Likewise, Gibson Winter, who coined the "suburban captivity" phrase, argued that unless Protestantism exerted itself for the needy, it would lose its reason for being, for "[w]hat is given to the Church is hers only on behalf of the world."²⁸

The civil rights movement crystallized these insights—indeed it provided much of the impetus for them. At best, the secular theologians held, the comfortable white churches had failed to promote racial equality and understanding, and at worst, especially in the South, they had fought to preserve the unjust order of inequality and segregation.²⁹ Protestantism's failure to promote racial justice was a prime example of "introversion—care for itself; with the abject failure to 'care for others,'" wrote Colin Williams;³⁰ thus "the race crisis must be seen as the work of Christ in which the church is being called to undergo radical change."³¹ But, he added, the involvement of churches (black and white) in the black freedom movement was a "case study" of how churches could play their true role as servants to the world.³²

This new religious attitude was mostly hostile to the traditional trappings of civil religion, such as official school prayers, that mainline Protestants had once championed. For the secular theologians, such practices epitomized American religion's self-satisfaction and its concern with its own privileged status.³³ Culturally dominant Protestantism had not just failed to confront pervasive injustices like segre-

²⁵ FINDLAY, *supra* note 21, at 30.

²⁶ See WILLIAMS, *supra* note 18, at 24–27, 75–76.

²⁷ *Id.* at 122 (quoting Robert Spike, *The Negro Rights Revolution: Questions in Midstream* (Nov. 29, 1963) (on file in NCC Archives)).

²⁸ WINTER, *supra* note 23, at 177.

²⁹ See S. JONATHAN BASS, *BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING, JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE "LETTER FROM BIRMINGHAM JAIL"* 12–13 (2001). See generally DONALD E. COLLINS, *WHEN THE CHURCH BELL RANG RACIST: THE METHODIST CHURCH AND THE CIVIL RIGHTS MOVEMENT IN ALABAMA* (1998).

³⁰ COLIN W. WILLIAMS, *WHAT IN THE WORLD?* 92 (1964).

³¹ *Id.* at 46.

³² *Id.* at 82–83.

³³ See PAUL L. STAGG, *THE CONVERTED CHURCH: FROM ESCAPE TO ENGAGEMENT* 13–14 (1967).

gation, it had actually hampered the fight against them by encouraging the illusion that America was a "Christian nation."³⁴ Robert Alley, a leading opponent of school prayers from the 1960s to the present, testified to Congress in 1966 that official prayers were "more akin to a national cult than to the faith of the New Testament."³⁵ Reflecting later, he added that "[t]he Sermon on the Mount was generally ignored by white citizens in [the 1950s]. . . . Nothing in our recent past so clearly identifies the shallowness of the public religious sentiments of the era than does the fundamentally unjust treatment of black citizens."³⁶ It was no accident, the critics claimed, that the most publicly "Christian" part of the nation, the South, also maintained the most obvious and severe form of racial injustice.³⁷ The Episcopal bishop of Chicago praised the school prayer decision, *Engel v. Vitale*, because it "dissipates the myth that ours is a Christian country [and] should clear the air and put the challenge squarely up to the churches and Christian parents."³⁸ Colin Williams criticized other traditional elements of civil religion—restrictive moral legislation, Sunday closing laws, tax exemptions for churches—as examples of the church being served by the state rather than acting as servant itself.³⁹

The critics explicitly tied the failures of Protestant churches to the fact that they were "established," culturally if not legally, in what legal scholars commonly call the "de facto" establishment.⁴⁰ As one white Baptist civil rights activist put it, the American church was "ingrown in its preoccupation with itself" and "wedded as a culture-religion to the established and accepted way of life," and it needed to be "converted toward the world."⁴¹ Colin Williams celebrated the "removal of the scaffolding of Christendom and establishment and the deliverance of the Christian fellowship into an open world," to seek justice and freedom for all people.⁴² Such statements were a variation on a recurring argument for church-state separation, one

³⁴ See Testimony of Robert S. Alley before the Senate Subcommittee on Constitutional Amendments (Aug. 8, 1966), reprinted in ROBERT S. ALLEY, *SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT* 247 app. at 250 (1994).

³⁵ *Id.*

³⁶ ALLEY, *supra* note 34, at 104–05.

³⁷ See BASS, *supra* note 29, at 12–13.

³⁸ ALLEY, *supra* note 34, at 122 (quoting Bishop Gerald Burrill).

³⁹ See WILLIAMS, *supra* note 18, at 79–80.

⁴⁰ See, e.g., MARK DeWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 11 (1965).

⁴¹ STAGG, *supra* note 33, at 11.

⁴² WILLIAMS, *supra* note 30, at 64.

going back to the writings of Roger Williams: the idea that a close identification between church and state will undermine the church's integrity and distinctive mission.⁴³ Many Protestant leaders drew precisely that lesson from the civil rights movement, and for that reason (among others) they hailed the death of the de facto Protestant establishment.

2. "In a Secular World"

The civil rights movement may have sought social justice rather than churchly privileges, but it was still a significantly religious movement, with preachers as its leaders and congregations as its key organizational base. How then could it serve as a source of support for a strong separation between church and state? Indeed, the new activists in the white mainline churches commended the civil rights movement precisely because it had rejected the idea that the church had a "separate sphere" from the state—a mission to meet only "spiritual" and not "material" needs—and therefore should stay out of politics.⁴⁴ As Stephen Carter puts it, any "distaste for explicit religious argument in the public square cannot accommodate the openly and unashamedly religious rhetoric of the nonviolent civil rights movement."⁴⁵ In this light, does the cresting of civil rights and church-state separationism together in the 1960s reflect a paradox, rather than a natural conjunction?

The simple answer to this would be that church-state separationism, even in its strict form, does not mean a separation of religious ideas or groups from political activity. No less a separationist than Justice Brennan wrote, in an eloquent concurring opinion, that government may not "fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."⁴⁶ This proposition finds further support in the Court's upholding of religiously inspired anti-abortion measures in *Harris v. McRae*⁴⁷ and

⁴³ See HOWE, *supra* note 40, at 6.

⁴⁴ WILLIAMS, *supra* note 30, at 36–37.

⁴⁵ STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 227 (1993).

⁴⁶ *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

⁴⁷ 448 U.S. 297, 326 (1980).

from language in other decisions.⁴⁸ Indeed, in *Harris*, the NCC, liberal Protestantism's ecumenical body—and a vigorous proponent of both separationism and abortion rights—filed an amicus brief disavowing the claim that religious involvement in the passage of the Hyde Amendment rendered the measure an establishment, and “reaffirm[ing]. . . . the right of religious groups to participate fully in the political process.”⁴⁹

But there has also been another current among separationists, on the Court and in the culture, deeming a law invalid or inappropriate if it rests *only*, or too greatly, on religious rationales or motivations. This current shows up in some of the decisions invoking the “secular purpose” prong of the Establishment Clause test,⁵⁰ especially in *Epperson v. Arkansas*, the 1968 decision that struck down a law against the teaching of evolution on the ground that “fundamentalist sectarian conviction was and is the law’s reason for existence.”⁵¹ It shows in Justice Stevens’s claim that laws based on the notion that life begins at conception unconstitutionally “endorses a particular religious tenet”⁵² and “foment . . . disagreement” among religious views on abortion.⁵³ It shows in the efforts of many commentators to distinguish appropriate religiously influenced laws from those laws that reflect a solely or essentially religious judgment.⁵⁴ All of these arguments say essentially that laws may be substantially the product of religious motivations, but they must be justifiable in secular terms, or must not rest solely or necessarily on the imposition of a theological judgment. Frequently these arguments take the form of a distinction

⁴⁸ See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 670 (1970) (“Adherents of particular faiths and individual churches frequently take strong positions on public issues. . . . Of course, churches as much as secular bodies and private citizens have that right.”).

⁴⁹ Brief of Amicus Curiae on Behalf of the National Council of Churches of Christ in the U.S.A. at 14, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79–1268), reprinted in 115 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 599, 617 (Philip B. Kurland & Gerhard Casper eds., 1980).

⁵⁰ See *Lemon*, 403 U.S. at 612.

⁵¹ 393 U.S. 97, 108 (1968).

⁵² *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 568 (1989) (Stevens, J., dissenting).

⁵³ *Id.* at 571 (Stevens, J., dissenting) (quoting *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 651 (1989) (Stevens, J., dissenting)).

⁵⁴ See, e.g., PETER S. WENZ, ABORTION RIGHTS AS RELIGIOUS FREEDOM 188–89 (1992) (arguing that “religion may legitimately matter where the death penalty, the environment, and animals are concerned” because these involve “secular values,” but that many anti-abortion laws are invalid because “the personhood and right to life of young fetuses is a religious matter”); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 89 (2002) (interpreting the Establishment Clause requirement of secular purpose to mean “that government may not declare religious truth”).

between civil rights laws (appropriate religious motivation) and anti-abortion or anti-gay-rights laws (inappropriate theological imposition).⁵⁵

The secular theology model of the 1960s, despite its endorsement of religiously motivated activism, supported such limits on explicit religious involvement in lawmaking, and provided a framework under which mainline Protestant leaders embraced such limits. In secular theology, the *servant* church operated in the *secular* world—serving the world's needs on the world's own terms, not demanding that the world conform to the church.⁵⁶ Again, this view stemmed from a reading of Bonhoeffer's oracular statements about how the church should act in a "religionless" world "come of age";⁵⁷ and again it was profoundly shaped by the example of the civil rights movement.

First, the secular theologians argued that the church should listen to and learn from the secular world.⁵⁸ Colin Williams's motto, influential among mainline leaders, was to "let the world write the agenda":⁵⁹ "to be not so much the *source* of light for the world by bringing it *from* the church," but "to be out there learning what Christ is doing in the world."⁶⁰ A mainline Baptist leader in Virginia called for the church to hear "what the sociologist, political scientist, artist, poet, writer, journalist, etc., are saying, since God may be speaking through them."⁶¹ Again, the movement for secular justice for black Americans was seen as the perfect example: in Colin Williams's words, an "urgent cry of God from the world," a "call from God . . . out of the midst of the revolution."⁶²

As a corollary, the church should be at least cautious, and even reluctant, in using explicit religious language in its work in society. Colin Williams, for example, commended the example of the civil rights movement, where Christians could join with non-Christians "on the common secular ground of ethical language" to address "justice, order, peace, freedom, . . . the common human questions."⁶³ One leading theologian has summed up how the 1960s outlook cautioned against explicit God-talk in society: "[T]he place for the celebration of

⁵⁵ See WENZ, *supra* note 54, at 188–89.

⁵⁶ See WILLIAMS, *supra* note 18, at 79–80.

⁵⁷ See BONHOEFFER, *supra* note 19, at 279–82.

⁵⁸ See WILLIAMS, *supra* note 18, at 75–76.

⁵⁹ *Id.* at 75.

⁶⁰ WILLIAMS, *supra* note 30, at xix.

⁶¹ STAGG, *supra* note 33, at 57.

⁶² WILLIAMS, *supra* note 18, at 102 n.18; WILLIAMS, *supra* note 30, at 85.

⁶³ WILLIAMS, *supra* note 30, at 65, 84.

orthodox faith was in . . . a 'hidden discipline' in a catacombs church, while up on the surface in the secular world a silent 'Christian presence' in simple acts of mercy and justice was the meaning of mission."⁶⁴ In secular theology, religious faith became little more than "an attitude that energizes action."⁶⁵

This outlook fits comfortably with many of the legal distinctions offered between appropriate and inappropriate religious involvement in politics. Political activists, it is almost universally agreed, may be motivated by religious faith.⁶⁶ But in explaining and defending their positions publicly, it is asserted, they ought to restrict themselves to secular reasons, for these are "publicly accessible": citizens of all faiths (and of no faith) can understand and accept them.⁶⁷ Thus John Rawls explained that the civil rights movement, as led by Dr. King, comports with the ideal of "public reason" because, although "[r]eligious doctrines clearly underlie King's views and are important in his appeals," "they are expressed in general terms: and they fully support constitutional values and accord with public reason."⁶⁸

Another corollary of the secular model, also relevant to church-state issues, was that the church should respect the secular government's role in promoting freedom and progress and should defer substantially to government agencies in that realm. For Colin Williams, the "world come of age" meant that the state no longer followed the lead of the church by enforcing "pietist" moral norms; rather, the state's social justice activities could now directly "serv[e] Christ's ultimate purpose of bringing the whole creation to unity in him."⁶⁹ In that light, he said, "the role of the Church is to train the laity for service in these ministries within the State."⁷⁰

This enthusiasm for state provision of social services certainly fits with one strain of separationism: an opposition to any public support of religious social agencies, and sometimes a flat distrust of those agencies. As one student of church-state conflicts has noted, separationism in the 1960s partly rested on an increasingly prominent secu-

⁶⁴ GABRIEL FACKRE, *Theology Ephemeral and Durable*, in *RESTORING THE CENTER: ESSAYS EVANGELICAL AND ECUMENICAL* 11, 15 (1998).

⁶⁵ DOUGLAS SLOAN, *FAITH AND KNOWLEDGE: MAINLINE PROTESTANTISM AND AMERICAN HIGHER EDUCATION* 135 (1994).

⁶⁶ See JOHN RAWLS, *POLITICAL LIBERALISM* 250 & n.39 (1994). See generally KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

⁶⁷ See generally GREENAWALT, *supra* note 66.

⁶⁸ RAWLS, *supra* note 66, at 250 & n.39.

⁶⁹ WILLIAMS, *supra* note 18, at 79-80.

⁷⁰ *Id.* at 80.

larism that insisted "that public functions should be publicly performed. . . . It is felt that to leave a matter to 'private initiative' is to insure that it will be done incompetently, prejudicially or not at all."⁷¹

In the 1960s, therefore, many mainline Protestant leaders—heavily influenced by their interpretation of the civil rights movement—concluded that "de facto" establishment practices such as school prayers were inimical to social justice, that Christians should be involved in politics but not be too explicit or exclusive about their religious faith in doing so, and that the primary providers of social services should be secular institutions like the state. I do not claim that this theology directly affected the Supreme Court; the Justices may not have read Harvey Cox or Colin Williams. But if these views were embraced by the leaders of mainline Protestantism—the faith which historically had most pursued the idea of a "Christian America"—it is hardly surprising that more secular elements in the elite would hold similar, perhaps even more secular-minded, views. Thus it is not surprising that a secular-oriented form of separationism became dominant among elites in this period.

C. Suspicion of "Private Choice"

As has already been noted, the 1960s and early 1970s saw an increased embrace of the government's role in performing social services and a heightened suspicion of religious and other agencies.⁷² This too had a strong civil rights dimension. During the same years in which the Court was invalidating most forms of government aid to religious private education, it was also vigorously trying to integrate public schools—to make up for years of delay in enforcing *Brown*⁷³—and was invalidating state measures supporting private education that might threaten the integration effort. Between 1968 and 1973 the Court shifted from a limited approval of loaning textbooks to parochial students in *Board of Education v. Allen*⁷⁴ to a nearly absolute ban on parochial aid in *Committee for Public Education and Religious Liberty v. Nyquist*.⁷⁵ In the same five years, the Court invalidated a southern school district's "freedom of choice" plan because it would perpetuate

⁷¹ *Id.*

⁷² See *supra* note 71 and accompanying text.

⁷³ 347 U.S. at 495.

⁷⁴ 392 U.S. 236, 238 (1968) (upholding loans to students of textbooks in secular subjects).

⁷⁵ 413 U.S. at 798 (striking down maintenance grants direct to religious schools and tax credits and tuition supplements to low-income families).

segregation,⁷⁶ affirmed busing orders as a desegregation measure,⁷⁷ and finally, in contrast with *Allen*, struck down the provision of textbooks to racially segregated private schools in Mississippi in *Norwood v. Harrison*.⁷⁸ Previous works, including my own, have already traced the connection between the two lines of decisions.⁷⁹

Conceptually, the Court's decisions in race cases broke down a clear line between state-sponsored and private discrimination. The Court invalidated some forms of government action even though they could be characterized as simply implementing "private choice"—and thereby rejected the primary conceptual argument for equal aid to religious schools. In striking down the plan in *Green v. County School Board*, the Court said that "freedom of choice" could not be "an end in itself," but "only a means to . . . the abolition of the system of segregation and its effects."⁸⁰ In *Norwood*, the Court reasoned that the provision of textbooks to parents "inur[ed] to the benefit of the [discriminatory] private schools themselves."⁸¹ Race decisions of the 1960s also expanded the state action doctrine to reach discrimination by non-governmental actors like the coffee shop on the grounds of a municipal parking lot in *Burton v. Wilmington Parking Authority*⁸²—indeed, at least one Justice suggested that any entity that received government aid thereby became a state actor for all Fourteenth Amendment purposes.⁸³ For the Court to endorse fully the parental choice argument for school aid would have been at conceptual war with its approach in race discrimination cases.

The Court might have distinguished broadly between aid to religion and aid to racial discrimination, on the ground that free exercise of religion has a positive constitutional and moral status that private racial discrimination does not—indeed, *Norwood* recognized that point in the narrow context of textbook loans.⁸⁴ It might also have emphasized that parental "choice" in the race context was tainted by

⁷⁶ *Green v. County Sch. Bd.*, 391 U.S. 430, 441 (1968).

⁷⁷ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 213–14 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 30 (1971).

⁷⁸ 413 U.S. 455, 464–65 (1973).

⁷⁹ See, e.g., Berg, *supra* note 1, at 158–60; Laycock, *supra* note 1, at 61–62.

⁸⁰ 391 U.S. at 440 (quoting *Bowman v. County Sch. Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)).

⁸¹ 413 U.S. at 464.

⁸² 365 U.S. 715, 715–17 (1961).

⁸³ See *Lemon*, 403 U.S. at 632–33 (Douglas, J., concurring) ("Where the government activity is the financing of the private school, the various limitations or restraints imposed by the Constitution on state governments come into play.").

⁸⁴ See 413 U.S. at 468–70.

recent state-sponsored segregation that did not exist with respect to religion.⁸⁵

Nevertheless, as a practical matter, religious schools (which make up the vast majority of private schools) were tarnished because they seemingly posed a threat to the desegregation campaign.⁸⁶ To be sure, the schools that were intentionally founded to escape public school integration—the Protestant “Christian academies” that multiplied in the South—often refused state aid; the Mississippi textbook loans in *Norwood* were atypical. But the schools that did seek state aid—the Catholic parochial schools—could also pose a threat to desegregation. As I have discussed in earlier work, it was believed that the parochial schools might end up as a haven for white flight even if the clergy and administrators did not intend them to do so.⁸⁷ The NCC’s spokesman on religious liberty issues warned in 1966 that parochial schools “might succeed in carrying out a *de facto* form of racial segregation with federal funds”; and in 1967, the New York chapter of the NAACP vowed to oppose parochial school aid “in any way, shape or form, because it only helps those who would skirt legislation on desegregation.”⁸⁸ As Douglas Laycock has shown, these arguments, cast in constitutional terms under the Equal Protection Clause, were among the challenges raised by the *Lemon* plaintiffs, who included the NAACP’s Pennsylvania chapter.⁸⁹ Laycock observes that in the *Lemon* opinions “every Justice took note of the issue” of alleged racial discrimination, and he concludes that “it is hard to believe that no Justice was influenced by it.”⁹⁰

Catholic educators acknowledged the problem. The education director for the U.S. bishops, Msgr. James Donohoe, gave speeches in the late 1960s warning that Catholic schools were serving as “escape valves” for anti-integration whites; and dioceses in Dallas and elsewhere stopped accepting transfer students from public schools in the early 1970s, vowing “not to let our schools become havens for segrega-

⁸⁵ *Green*, for example, emphasized that the rejection of the formal “freedom of choice” plan took place “[i]n the context of the state-imposed segregated pattern of long standing,” which the school board had to take “steps adequate to abolish.” See 391 U.S. at 437.

⁸⁶ See Berg, *supra* note 1, at 158–59.

⁸⁷ *Id.*

⁸⁸ Martin Gansburg, *Bias in State Seen at Critical Stage*, N.Y. TIMES, Feb. 6, 1967, at 1, reprinted in RICHARD E. MORGAN, *THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA* 46 (1968) (quoting Dr. Eugene Reed).

⁸⁹ See Laycock, *supra* note 1, at 61–62 & nn.116, 117.

⁹⁰ *Id.* at 62.

tionists."⁹¹ And "[w]hether or not they [facilitated] white flight, Catholic schools were still likely to be nearly all-white, because very few blacks were Catholic."⁹² Moreover, in the late 1960s and early 1970s the church was closing hundreds of schools around the country because of sharp falloffs in student enrollment and in the number of priests and nuns available as teachers; it was widely expected that inner-city schools would be closed in disproportionate numbers, thereby increasing the "whiteness" of the parochial schools.⁹³ Even many Catholics appeared to agree with an editor at the Catholic magazine *Commonwealth* that "unlike the public school, the parochial school is hardly a microcosm of the larger society. Containing neither religious nor racial mix, . . . the Catholic school becomes in the minds of many a handicap for the child."⁹⁴ Given the prevalence of such judgments among even Catholic elites, it is little wonder that the Court of the early 1970s decided not to treat state aid to religious schools as an acceptable implementation of private choice.

II. RACE RELATIONS AND THE DECLINE OF SEPARATIONISM

In the last twenty years, however, strict church-state separationism has declined, not only in the courts but in the broader culture. This section suggests some ways in which developments concerning race have traced this change in church-state relations, and even contributed to the change. The chief move away from separationism has come in the area of government aid to religious institutions; the Court is more and more willing to permit such aid on equal terms as aid to secular entities (although perhaps with some remaining separationist limitations).⁹⁵ Separationism has also given way to an equality-

⁹¹ *Books in Review: Briefly Noted*, 88 CHRISTIAN CENTURY 1103, 1103 (1971).

⁹² Berg, *supra* note 1, at 159.

⁹³ *Id.* at 159 & nn.210-11 (citations omitted).

⁹⁴ John Deedy, *Trouble for the Catholic Schools*, N.Y. TIMES, July 4, 1971, § 4, at 7.

⁹⁵ The unbroken string of decisions approving particular forms of aid since the early 1980s now includes *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Dept. of Servs.*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). Two of the most recent decisions, *Mitchell* and *Agostini*, overrule separationist decisions from the 1970s. *Mitchell*, 530 U.S. at 808; *Agostini*, 521 U.S. at 235. Each decision in the last two decades includes qualifying language suggesting that other forms of aid might remain unconstitutional, see, for example, *Agostini*, 521 U.S. at 230-33; but the trend is obviously away from separation and toward a principle of treating religious entities equally in evaluating aid.

oriented approach under the Free Exercise Clause,⁹⁶ and on the question of religious exercises in public institutions, separationism has not expanded far beyond the ban on state-sponsored exercises in schools.⁹⁷ But I am most concerned with the retreat from separationist positions on school aid, and with how developments concerning race have been conducive to that change.

A. *Challenges to the Secular Model of Social Welfare*

One important change related to race and poverty has affected the course of church-state relations in the broader culture, and probably to an extent in the courts. The secular-oriented theologies of social activism that were ascendant in the 1960s, and that contributed to the rejection of government aid to religious social-welfare institutions, have faced serious challenges in the last twenty years and have lost ground.

For one thing, as I already noted, the fact that the civil rights movement and church-state separationism crested together in the 1960s actually involved a significant paradox, given the public political role of both black and white churches in the movement. And the black church plainly remains a central social and political institution for African-Americans today—indeed, the leading expert on the subject, C. Eric Lincoln, goes so far to say that “there is no disjunction between the Black Church and the black community.”⁹⁸ Any community in which a religious institution occupies such a major public role is likely to display at least some ambivalence about the tenets of strict church-state separationism, and the record bears this out with respect to African-Americans. As a demographic group they are the strongest supporters of voucher programs for private schools,⁹⁹ and among the

⁹⁶ *Employment Div. v. Smith*, 494 U.S. 872, 877–81 (1990) (holding that religious practice may be substantially restricted if pursuant to a neutral and generally applicable law).

⁹⁷ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (upholding right of religious groups to engage in activities in school rooms on same terms as other groups); *Marsh v. Chambers*, 463 U.S. 783, 793–95 (1983) (upholding prayers in legislative sessions).

⁹⁸ C. ERIC LINCOLN, *RACE, RELIGION, AND THE CONTINUING AMERICAN DILEMMA* 96 (1984); see also Dena S. Davis, *Ironie Encounter: African-Americans, American Jews, and the Church-State Relationship*, 43 CATH. U. L. REV. 109, 129–30 (1993) (“It is simply not possible to understand the phenomenon of black political activism without coming to terms with the ubiquitous presence of the black church.”).

⁹⁹ In a 1997 survey, sixty-two percent of blacks supported vouchers compared with forty-nine percent of the total population. LOWELL C. ROSE ET AL., *THE 29TH ANNUAL PHI DELTA KAPPA GALLUP POLL OF PUBLIC ATTITUDES TOWARD THE PUBLIC SCHOOLS* 48–49 (1997). In another, fifty-seven percent of blacks supported vouchers compared with forty-

strongest supporters of public school prayers;¹⁰⁰ African-American congregations have shown a particularly strong interest in "charitable choice" and President Bush's plan for increasing the role of religious agencies in providing government-funded social services.¹⁰¹

There is anecdotal evidence as well. A largely black, middle-class high school in suburban Atlanta, after a fatal stabbing on the campus, held a "Motivational Assembly" in the gymnasium complete with a sermon and altar call from a local black pastor.¹⁰² Surgeon General Joycelyn Elders, in a series of speeches calling on urban churches to combat drugs, violence, and teenage pregnancy, complained that "[we] always talk about the separation of church and state. Well, I want to forget about all this separation and let's try to integrate church and state so we can come together and begin to do things . . . for the people in our communities."¹⁰³ No doubt the call for church-state cooperation by many African-American leaders stems in part from a judgment that social problems in the black community are urgent and that any method that might address them should be given a try. But it also stems from the fact that religion is a very public institution in the African-American community.

These observations about African-American attitudes toward church and state are obviously generalizations, and matters may vary according to persons and issues. Martin Luther King, Jr., for example, endorsed the school prayer decision, *Engel v. Vitale*, as "sound and

seven percent of whites. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 5-6 & nn.14-16 (1999) (citing DAVID BOSITIS, 1997 NATIONAL OPINION POLL—CHILDREN'S ISSUES 7 (Joint Center for Political and Economic Studies 1997)). For further statistics, see *Zelman*, 122 S. Ct. at 2488 n.7 (Thomas, J. concurring), and figures cited therein.

¹⁰⁰ See Davis, *supra* note 98, at 112 (citing STEVEN M. COHEN, THE DIMENSIONS OF AMERICAN JEWISH LIBERALISM 44 (1989)) (reporting that seventy-four percent of African-Americans supported an amendment to permit prayer in public schools, compared with seventy-one percent of non-Jewish whites).

¹⁰¹ For example, a recent national survey study showed that "64% of predominantly African-American congregations were interested in government funds" to provide social services under the charitable choice plan, as compared with forty-five percent of congregations overall. See White House Office of Faith-Based and Community Initiatives, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs* n.7 (Aug. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/08/unlevelfield2.html> (citing Mark Chaves, *Religious Congregations and Welfare Reform: Who Will Take Advantage of "Charitable Choice"?*, 64 AM. SOC. REV. 836, 839, 841 (1999)).

¹⁰² *Id.*

¹⁰³ Associated Press, *Elders Attacks Family Planning Limits: Medicaid 'Had to Be Developed by a White Male Slave Owner'*, WASH. POST, Feb. 27, 1994, at A14, available at 1994 WL 2273634.

good, reaffirming something [the separation of church and state] that is basic in our Constitution."¹⁰⁴ And established African-American civil rights groups such as the NAACP still generally hew to strict separation, for example opposing school vouchers before the Supreme Court this past Term in *Zelman v. Simmons-Harris*.¹⁰⁵ My only point is that for deep historical, sociological, and theological reasons, there is ambivalence among African-Americans toward the strict separation of church and state.

Explicit religious teaching in social ministries is a hallmark not only of the black church, but also of another religious group, white evangelical Protestants, who have ascended in prominence in public affairs in the last twenty-five years, as their mainline counterparts have shrunk in numbers and influence.¹⁰⁶ In the 1960s, evangelicals still maintained their post-Scopes Trial disengagement from politics and mainstream culture; they did not offer a public alternative to the secular theology model of social involvement being embraced by the mainliners.¹⁰⁷ But in recent years, evangelicals not only have organized politically they, together with many African-American evangelicals, have articulated a distinctive model of social and urban ministry.¹⁰⁸ In this model, as evangelical writer Stanley Carlson-Thies has summarized,

[e]ffective help is "Compassionate, Personal, and Spiritual," . . . and such assistance cannot be delivered by government agencies. Rather, it is provided by churches, religious agencies, and Christians individually, who engage the poor as whole persons, as spiritual and moral as well as physical beings. Truly useful assistance is thoroughly religious: it is transformative, helping people to turn their lives around,

¹⁰⁴ See POWE, *supra* note 12, at 189 (citing William Beane & Edward Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. LAW 475, 482 (1964)).

¹⁰⁵ See Brief of the NAACP Legal Defense and Education Fund, Inc. et al. as Amici Curiae at 3, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777, 00-1779), available at 2001 WL 1638648.

¹⁰⁶ See Jeffries & Ryan, *supra* note 1, at 340-58.

¹⁰⁷ See Howard E. Kershner, *The Church and Social Problems*, CHRISTIANITY TODAY, Mar. 4, 1966, at 35.

¹⁰⁸ See Stanley W. Carlson-Thies, "Don't Look to Us": *The Negative Responses of the Churches to Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 667, 682 (1997).

and it does not simply dispense benefits because someone is needy.¹⁰⁹

Similarly, leading evangelical Marvin Olasky argues that “[s]piritual as well as material help [i]s a matter of obligation[, and] ‘there [i]s nothing invidious in being preached to.’”¹¹⁰

In th[e evangelical] worldview, no area of a person’s life can be adequately considered in isolation from the spiritual, and spiritual well-being has a profound effect on the psychological, physical, social and economic dimensions of a person’s life as well. A vibrant personal faith . . . brings the transforming power of a transcendent God that guides and empowers changes in motivations, attitudes, and behaviors—such as saying no to drugs and yes to family responsibilities.¹¹¹

This model might be called “conversionist” because of its emphasis on personal conversion of the needy. Evangelicals of the 1960s likewise affirmed the ability of “spiritual power” to “conquer poverty and solve other social problems.”¹¹² But only in the last twenty years have evangelicals gained broader public prominence and influence for their views.¹¹³

While the mainline model of secular ministry helped support the separationist idea that “pervasively sectarian” institutions should not receive government funds, the evangelical “conversionist” model—with its call for explicit religious teaching in social welfare work—has provided an impetus for greater inclusion of pervasively religious institutions in funding programs. The prime example is the concept of “charitable choice” embodied in the 1996 welfare reform and in recent proposals by President Bush. Some evangelical organizations complained that separationist restrictions denied them state aid for their ministries unless they secularized their operations: for example, removing religious symbols from premises, hiring workers without reference to their religious commitments, and eliminating proselytizing.

¹⁰⁹ *Id.*

¹¹⁰ MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* 9 (1992) (quoting GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY* 33 (1984)).

¹¹¹ Ronald J. Sider & Heidi Rolland Unruh, *Evangelism and Church-State Partnerships*, 43 J. CHURCH & ST. 267, 276 (2001).

¹¹² See, e.g., Kershner, *supra* note 107, at 35.

¹¹³ See Jeffries & Ryan, *supra* note 1, at 340–58.

ing from all aspects of the recipient's activities.¹¹⁴ Charitable choice addressed several of these complaints—it permitted religious symbols and religion-based hiring—although not all of the complaints, because under charitable choice religious agencies still could not proselytize in the programs directly receiving government funds.¹¹⁵ The ascent of charitable choice to the top of the national agenda (before September 11, 2001) shows the extent to which Americans are willing to depart from separationist principles in order to address problems of poverty. But charitable choice has also run into serious roadblocks, both constitutional and political, which show that the separationist model still retains strength.¹¹⁶

B. Religious Schooling and Racial Integration

The other key element of 1960s attitudes on religion and race discussed in Part I has also changed in the last twenty-five years. There is now far less reason to dismiss religious schools as props for racial segregation.

At the outset, it is worth noting that racial integration is not the dominant ideal in civil rights that it was thirty years ago. Thus, even if religious schools did undercut racial integration, that effect might be more acceptable to supporters of civil rights today—even to African-Americans—if the religious schools brought countervailing advantages. A 1998 national survey of black parents reported a “distinctive lack of energy and passion for integration” and found that eighty-two percent preferred schools to focus on achievement instead.¹¹⁷

More importantly, however, religious schools—at least the largest group, Catholic schools—now appear not to undercut racial integration, but to promote it. As early as 1971, the generally separationist magazine *The Christian Century* noted that while voucher systems could be “manipulated” to frustrate desegregation, nevertheless because of

¹¹⁴ See Stanley Carlson-Thies, *Charitable Choice: Bringing Religion Back into American Welfare*, 13 J. POLICY HIST. 109, 110–15 (2001). See generally WELFARE REFORM AND FAITH-BASED ORGANIZATIONS (Derek Davis & Barry Hankins eds., 1999).

¹¹⁵ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604A (West 2002).

¹¹⁶ See, e.g., *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 982 (W.D. Wis. 2002) (striking down direct state grant to faith-based alcohol and drug rehabilitation program, although leaving open whether contract-for-services mechanism used in federal charitable choice would be constitutional).

¹¹⁷ PUBLIC AGENDA FOUNDATION, TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC SCHOOLS 11, 26 (1998) (quoted in VITERITTI, *supra* note 99, at 33 & n.60).

"despair over public schools," "inner city blacks in growing number feel they have a stake in keeping parochial schools alive."¹¹⁸ Ensuing events have strengthened this sentiment. It is not just that the public schools themselves remain highly segregated in fact because of white flight to the suburbs, economic disparities between races, and the Supreme Court's rejection of interdistrict busing.¹¹⁹ In addition, Catholic schools have compiled a substantial record of serving racial minorities, especially in the largest cities. As a result of the church's vigorous (and costly) efforts to maintain inner-city schools,¹²⁰ black enrollment in Catholic elementary schools nearly doubled between 1970 and 1980 to over eight percent of the students, four times the percentage of blacks in the church overall.¹²¹ The percentage of students in the largest inner-city Catholic systems who are black is twenty to twenty-five percent, and the percentage of minorities overall about fifty percent.¹²² Moreover, studies have indicated that the positive differential in student performance in parochial over public schools is especially great for minority students, and strongest for the minority students who are the most disadvantaged.¹²³

A similar picture of service to and integration of minorities emerges from studies of the current school choice programs in Cleveland and Milwaukee. In Cleveland as of 1999, nineteen percent of voucher recipients attended a private school with a racial composition within ten percent of the overall racial composition of metropolitan Cleveland, while only five percent of public school students in the area were in comparably integrated schools.¹²⁴ Although more than

¹¹⁸ *School Daze, Policy Maze*, 88 CHRISTIAN CENTURY 1071, 1071 (1971).

¹¹⁹ See *Milliken v. Bradley*, 418 U.S. 717, 752 (1974).

¹²⁰ A 1979 statement of the American bishops vowed that "[n]o sacrifice can be so great, no price can be so high, no short-range goals can be so important as to warrant the lessening of our commitment to Catholic education in minority neighborhoods." ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD 52-53 (1993) (quoting NATIONAL CONFERENCE OF CATHOLIC BISHOPS, BROTHERS AND SISTERS TO US 13 (1979)).

¹²¹ See Thomas Vitullo-Martin, *How Federal Policies Discourage the Racial and Economic Integration of Private Schools*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES 25, 28-29 (Edward McGlynn Gaffney, Jr. ed., 1981).

¹²² See *id.* at 30 (quoting statistics from New York and Chicago Catholic school systems); see also BRYK, *supra* note 120, at 69 (Catholic high schools nationwide had twenty-two percent minority enrollment in 1990).

¹²³ See, e.g., Andrew M. Greeley, *Catholic High Schools and Minority Students*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD, *supra* note 121, at 6, 11.

¹²⁴ Jay P. Greene, *Choice and Community: The Racial, Economic, and Religious Context of Parental Choice in Cleveland* 7-8 (Oct. 8, 1999), available at <http://www.school-choiceinfo.org/servlets/SendArticle/31/Clevint.pdf>.

sixty percent of public school students in the area attended schools that were nearly all-white or all-minority (ninety percent one way or the other), the figure for choice students in private schools was about fifty percent.¹²⁵ In Milwaukee, the "racial isolation" figure (students in schools more than ninety percent white or minority) was fifty percent of public school students, forty-three percent of private school students, and only thirty percent of religious private school students.¹²⁶

In a thoughtful recent article, Rob Vischer acknowledges that the current universe of religiously affiliated schools appears to reduce rather than increase racial segregation, but he argues that "[o]nce vouchers are adopted on a widespread basis," segregation will increase because "[a] functioning market will supply [additional] schools based on families' cultural, religious, and even racial preferences, providing new avenues for school segregation to occur."¹²⁷ Vischer may have a point, but his analysis and conclusion are speculative for several reasons. First, critics of vouchers raised the same warnings about even limited programs, and the warnings proved to be largely unfounded; large numbers of parents sought what they perceived to be better education for their children even if it meant sending them to a school operated by a different religious denomination. Second, the record of Catholic schools since the 1970s shows that a religious denomination may, as a matter of theological and social commitment, make vigorous efforts to attract and serve students of other faiths and of races that are distinct minorities within the denomination.¹²⁸ Third, it seems likely that some significant number of the new schools spurred by a voucher program will be Catholic, and thus part of a system that has proven its ability to attract and serve students of varying races: by no means all of the schools will be the white or black evangelical type that Vischer particularly suggests will promote segregation.¹²⁹ Finally, any segregating effect from expanded vouchers must

¹²⁵ *Id.* at 7.

¹²⁶ Howard L. Fuller & George Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools* (June 2000), available at <http://www.schoolchoiceinfo.org/servlets/SendArticle/6/integ600.pdf>. The various studies indicating that religious schools serve minorities and achieve better integration than public schools are summarized in Brief for Amici Curiae on Behalf of the Association of Christian Schools et al. at 8-19, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (Nos. 00-1751, 00-1777, 00-1779), available at 2001 WL 1699133.

¹²⁷ Robert K. Vischer, *Racial Segregation in American Churches and Its Implications for School Vouchers*, 53 FLA. L. REV. 193, 203 (2001).

¹²⁸ See *supra* notes 120-123 and accompanying text.

¹²⁹ Vischer, *supra* note 127, at 207-13.

be discounted, as Vischer acknowledges, by the high levels of segregation in public schools, particularly in large metropolitan areas.¹³⁰

Whatever the future effects of vouchers may be, the record of many private schools in the past twenty years has been one of integration of, and service to, minorities. That development helps explain why the strongest supporters of school vouchers are blacks, minorities in general, and low-income people. One need not go so far as Justice Thomas did this Term in *Zelman* when he suggested that school choice is the best way to "arm minorities to defend themselves from some of discrimination's effects."¹³¹ The case for exploring parental choice in education has substantially strengthened—on moral and constitutional grounds—because it no longer is tarnished with the stain of racial segregation.

C. Separationism's Decline and Minority Rights

Finally, to put this subject in its broad context, it is worth returning to the connection, previously discussed, between church-state separationism and minority rights in general. I earlier argued that the strict separationism of the 1960s and early 1970s partially stemmed from a concern for religious minority rights inspired largely by the struggle for equal rights for blacks.¹³² If that is so, then does the partial rollback from strict separationism in the last twenty years conversely reflect a disregard for, or trampling of, religious minority rights?

This brief section can only touch lightly what is a complex subject. In the area of public government expressions of religion—school prayers and other exercises and ceremonies—it is almost certain that allowing such ceremonies works some discriminatory imposition on the religious minorities who dissent from the views reflected in the government's actions. The question is not whether there is such a discriminatory imposition, but how significant it is and whether it is outweighed by the majority's interest in expressing its beliefs without directly coercing others.¹³³ But the Rehnquist Court has not rolled back

¹³⁰ See *id.* at 196–97.

¹³¹ *Zelman*, 122 S. Ct. at 2484 (Thomas, J., concurring).

¹³² See *supra* notes 10–14 and accompanying text.

¹³³ This is the debate, for example, over the recent United States Court of Appeals for the Ninth Circuit decision striking down the inclusion of "under God" in the Pledge of Allegiance. Compare *Newdow v. United States Congress*, 292 F.3d 597, 608 (9th Cir. 2002) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., dissenting)) ("To be sure, no one is obligated to recite this phrase, . . . but it borders on sophis-

separationism significantly in this area—indeed, it has reaffirmed much of the ban on officially sponsored religious exercises and displays¹³⁴—and perhaps this reflects the continuing effect of a concern for the dissenting religious minority.

By contrast, the Court has downplayed minority rights in departing from separationism in a second area: the question whether religious activity and institutions should ever be exempted from generally applicable laws under the Free Exercise Clause. Under *Employment Division v. Smith*¹³⁵, there is no constitutional right to exemptions in most cases, and Justice Scalia's majority opinion in *Smith* explicitly locates this result in the primacy of democratic decisionmaking over minority rights. In holding that religious accommodations are rarely constitutionally required but may be granted by statute, *Smith* acknowledges "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but concludes: "that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."¹³⁶

The final major category of recent decisions are those upholding the equal participation of religious entities in government aid programs, culminating in the approval of school vouchers under the Establishment Clause in *Zelman*. These decisions likewise amount to a departure from the strict "no aid" separationism of the 1970s; but their consequences for minority religious views is more complicated and uncertain. It can be argued, as Alan Brownstein has done in thoughtful recent articles, that providing vouchers or other aid to religious organizations is harmful to many minority religious believers, because (a) many "live in communities where there are not enough people of their faith to allow for the development of a religious school" and will suffer "if . . . educational services are fragmented along religious lines," and (b) many will be "unable to compete for

try to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.'"), *with id.* at 614 (Fernandez, J., dissenting) ("[S]uch phrases . . . have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion. . . . I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted.").

¹³⁴ See, e.g., *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Allegheny*, 492 U.S. 573.

¹³⁵ 494 U.S. at 890.

¹³⁶ *Id.*

jobs funded by public resources . . . solely because they do not subscribe to a particular religious faith."¹³⁷

Yet it can also be argued that the inclusion of religious entities in benefits programs helps many people with minority religious views. As Brownstein acknowledges, school aid programs help "parents [who are] trying to educate their children according to their religious faith, but [are] worrying about how they can continue to pay their children's tuition bills."¹³⁸ And many families with non-mainstream religious views are precisely those most likely to be alienated from the secular ethos of the public schools and to consider a religious school alternative. The inclusion of religious schools in aid programs may be very important to such groups' ability to operate their own schools. The brief filed in *Zelman* by several Orthodox Jewish groups—members of a quintessential religious minority—explains the situation. The brief states that "Jewish education is a key, if not the key, to Jewish continuity and survival"; "Jewish religious school education is the most reliable means of teaching the values of the Jewish faith to Jewish children"; but "[m]any Jewish schools, especially those that service children from low-income backgrounds, struggle mightily to meet skyrocketing budgets," and "many Jewish parents are financially unable to pay even the minimum necessary to gain entrance to a Jewish day school"; and programs such as the voucher system upheld in *Zelman* "enable parents with even the most modest means to select [Jewish and other] alternatives to designated public schools."¹³⁹

In this light, the provision of equal aid to religious entities seems at worst ambiguous with respect to the condition of religious minorities. Unlike the case of government-sponsored religious expression in the public schools, a truly neutral program of aid that is open to various religious organizations among other recipients has the potential to make the lot of religious minorities in America easier rather than harder.

¹³⁷ Alan E. Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 877 (1999) [hereinafter Brownstein, *Evaluating School Voucher Programs*]; see also Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 252–66 (1999).

¹³⁸ Brownstein, *Evaluating School Voucher Programs*, *supra* note 137, at 877.

¹³⁹ Brief of National Jewish Commission on Law and Public Affairs ("COLPA") as Amicus Curiae in Support of Petitioners, at 3–4, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (Nos. 00–1751, 00–1777, 00–1779), available at 2001 WL 1480708.