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The Once and Future Promise of Religious Schools for Poor and Minority Students

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ABSTRACT. In *Carson v. Makin*, the Supreme Court provided the bookend to its 2002 decision in *Zelman v. Simmons-Harris*. Whereas *Zelman* held that the Establishment Clause permits the inclusion of religious options in educational-choice programs, *Carson* held that the Free Exercise prohibits their exclusion. Immediately, the public-school establishment decried the decision as a threat to the public-school system, predicting that it would exacerbate inequalities for poor and minority students and even lead to re-segregation. This Essay responds to those claims. It discusses religious schools' long history of providing educational opportunity to the most disadvantaged and marginalized students, the public-school establishment's similarly long history of opposing the opportunity that religious schools have provided those students, and the public-school establishment's complicity in causing, through residence-based school assignment, the very inequalities that have led such students to seek educational opportunity outside the public schools. The Essay concludes by calling on the establishment to end its hostility to religious schools and abolish its own practice of assigning students to public schools based on residence. *Carson* presents a chance to pursue a new and truly pluralistic approach to education, one that affords opportunity in all types of schools, whether public or private, religious or nonreligious. The public-school establishment should embrace that possibility if it is truly concerned for the interests of the students it purports to serve.

INTRODUCTION

In the early 1990s, when the modern educational-choice movement was in its infancy, two big questions loomed concerning the legality of educational-choice programs—that is, public programs that offer families funds to pay for tuition at the private schools of their choice: First, does the Establishment Clause

allow religious options in programs like this? Second, if so, may states nevertheless bar religious schools from these programs?

The Supreme Court resolved the first question two decades ago in *Zelman v. Simmons-Harris*.[1] The Court there held that so long as educational-choice programs 1) are neutral with respect to religion (meaning religious and nonreligious schools alike may participate) and 2) operate through private choice (meaning parents, rather than governments, select the schools their children will attend), the Establishment Clause allows choice programs to include religious schools.[2]

The Supreme Court resolved the second question this June in *Carson v. Makin*, holding that the Free Exercise Clause prohibits a state from excluding religious options from a program that allows parents to select nonreligious private schools.[3] The Court had already held that barring schools from an educational-choice program because of the schools' religious *status* violated the Free Exercise Clause;[4] still, opponents of choice insisted that states could nevertheless bar schools because of the religious *use* to which a student's aid might be put there — namely, religious instruction. *Carson* squarely rejected that argument, holding that a state may not exclude students from an educational-choice program "on the basis of their anticipated religious use of the benefits" that the program provides.[5]

By allowing religious schools to participate fully in such programs, the Supreme Court made it constitutionally possible[6] for far more students — particularly poor and minority students — to access an education outside a public-school system that has long failed them. Unsurprisingly, the public-school establishment — the National Education Association (NEA) and other organizations representing public-school teachers, administrators, superintendents, and boards — vehemently opposed the outcome in *Carson*.

As the establishment would tell it, *Carson* stands to harm rather than help poor and minority students. Even in the run-up to the decision, these organizations warned that expanding the breadth of options in educational-choice

1. 536 U.S. 639 (2002).

2. *Id.* at 649, 653.

3. 142 S. Ct. 1987, 2002 (2022).

4. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255-56, 2261 (2020).

5. *Carson*, 142 S. Ct. at 2002.

6. The Court's jurisprudence does not guarantee that poor and minority students (or any students, for that matter) will have access to educational-choice programs and, thus, greater access to a religious (or secular) private education. It is ultimately up to state legislatures to adopt such programs. *See Espinoza*, 140 S. Ct. at 2261 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

programs would "exacerbate inequality"[7] and "contribute to re-segregation."[8] And after the decision, the NEA's president issued a statement decrying the "radical ruling," which, she claimed, "erodes the foundation of our democracy."[9] In her view, and that of the public-education establishment, the Court had "undermined public schools and the students they serve in favor of providing funding for private religious schools that serve only a few."[10]

This Essay responds to those claims. It focuses on three issues that the public-school establishment has not adequately considered: the longstanding role that religious schools have played in educating marginalized students; the establishment's historical role in opposing religious schools and the opportunity religious schools have provided to such students; and the establishment's continuing role in perpetuating the educational inequality that leaves these students desperate for educational alternatives.

Part I of this Essay explores the proud history of religious schools in educating poor, minority, and other marginalized students — students whom public schools were often unwilling or unable to adequately serve. Part II then examines the public-school establishment's complicity in the educational inequality that these students have long experienced. Specifically, Section II.A surveys the long-running war that the establishment has waged against religious schools' ability to provide educational opportunity for marginalized students; it also considers how that war has influenced the development of the Supreme Court's education jurisprudence. Section II.B considers how the public-school establishment continues to contribute to segregation and inequality along racial, ethnic, and socioeconomic lines, particularly through residence-based school assignment. This Essay concludes by calling for the public-school establishment to support greater educational opportunity for all children through ending residence-based school assignments in the public system and embracing private educational choice for students who desire an education outside that system.

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7. Brief of National School Boards Association et al. as Amici Curiae in Support of Respondent at 24, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

8. Edward Graham, *Educators Push Back Against School Voucher Legislation*, NEATODAY (Feb. 17, 2022), https://www.nea.org/advocating-for-change/new-from-nea/educators-push-back-against-school-voucher-legislation [https://perma.cc/2Q6J-3JKB].

9. Staci Maiers, Press Release, Supreme Court Decision Funnels Taxpayer Dollars to Private Religious Schools (June 21, 2022), https://www.nea.org/about-nea/media-center/press-releases/supreme-court-decision-funnels-taxpayer-dollars-private-religious-schools [https://perma.cc/4S9L-JJTU] (quoting Becky Pringle, President of the National Education Association (NEA)).

10. *Id.*

I. THE HISTORIC IMPORTANCE OF RELIGIOUS SCHOOLS TO THE POOR AND MINORITIES

Throughout American history, religious schools have played a vital role in delivering educational opportunities to the most underserved children, especially the poor and racial, ethnic, and religious minorities. Sometimes religious schools have provided this opportunity with governmental assistance,[11] sometimes without. But almost invariably, religious schools provided an opportunity that these children could not obtain elsewhere.

A. Education of the Poor at and Around the Founding

Before our nation established public schools, governments commonly relied on religious schools to educate the poor.[12] In 1795, for example, the New York legislature appropriated money to support schools in the state and specifically authorized New York City to use its share of the funds "for the encouragement and maintenance of the several charity schools" regardless of whether the students educated were "the children of white parents or descended from Africans and Indians."[13] The city's Common Council, in turn, directed a portion of the funds to be "granted & distributed to & among the Charity Schools of the religious Societies in this City"[14] – specifically to Episcopal, Presbyterian, Dutch Reformed, German Lutheran, and Scotch Presbyterian charity schools as well as the African Free School.[15]

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11. In the Founding Era and early nineteenth century, governments at all levels – federal, state, and local – "provided financial support to private schools, including denominational ones," for the education of the poor, Native Americans, residents of the District of Columbia, freedmen, or others. *Espinoza*, 140 S. Ct. at 2258. Typically, that support took the form of direct institutional assistance: either monetary appropriations or land grants to the schools themselves. *See* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 150-69 (2020); RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 147-262 (1937). Modern educational-choice programs, by contrast, provide a benefit "to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

12. *Espinoza*, 140 S. Ct. at 2258 ("Local governments provided grants to private schools, including religious ones, for the education of the poor." (citing MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 318-19 (4th ed. 2016))).

13. Act of Apr. 9, 1795, ch. 75, 1795 N.Y. Laws 626, 628.

14. 2 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK, 1784-1831, at 281 (1917).

15. *Id.* at 296 (vote of Oct. 24, 1796). Although not a denominational school, the African Free School was "a joint effort of Anglicans and Quakers," and it taught religion as part of the curriculum. Graham Russell Hodges, *African Free School*, *in* 1 ENCYCLOPEDIA OF AFRICAN-AMERICAN CULTURE AND HISTORY 37, 37-38 (Colin A. Palmer ed., 2d ed. 2006).

Confronted with increasing ethnic and religious diversity in New York City, the legislature also started directing appropriations to institutions for religious minorities, including the Free School of St. Peter's Church (a Catholic school)[16] and a school run by the Shearith Israel Congregation, "the oldest Jewish synagogue in America."[17] By 1813, the legislature had created a state school fund, and New York City's portion was divided proportionately among charitable organizations and any religious congregations that provided a free education.[18]

The experience in New York was hardly unique. Around the turn of the nineteenth century, for example, the Pennsylvania legislature passed a series of laws providing Protestant institutions with grants to establish free schools and educate the poor.[19] And in 1802, the legislature passed what may have been the country's first school-voucher program;[20] this program allowed poor parents in Philadelphia to send their child to "any school in their neighborhood" at public expense, whether the school was church-run or not.[21]

B. Education of Black Children in the Antebellum Period

Religious schools also played an instrumental role specifically in educating Black children in the antebellum years.[22] (Not surprisingly, however, these efforts — which were often led by free Black people themselves — appear not to have received the same degree of governmental support as did education of the poor generally.[23])

Baltimore offers an interesting illustration of these efforts. Early in the nineteenth century, the American Bible Society conducted a school for Black children

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16. *See* Act of Mar. 21, 1806, ch. LXIII, 1806 N.Y. Laws 393.

17. Storslee, *supra* note 11, at 158 (citing Act of Apr. 9, 1811, ch. CCXLVI, § XLIII, 1811 N.Y. Laws 328, 333-34).

18. LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 15 (1987).

19. Storslee, *supra* note 11, at 162 & nn.294-97.

20. *Id.* at 162.

21. Act of Mar. 1, 1802, ch. MMCCXLVII, § 1, 17 STATUTES AT LARGE OF PENNSYLVANIA FROM 1802 TO 1805, at 81 (1915); *see also* Storslee, *supra* note 11, at 162 (explaining this voucher program).

22. *See generally* CARTER G. WOODSON, THE EDUCATION OF THE NEGRO PRIOR TO 1861: A HISTORY OF THE EDUCATION OF THE COLORED PEOPLE OF THE UNITED STATES FROM THE BEGINNING OF SLAVERY TO THE CIVIL WAR (2d ed. 1919) (providing an overview of the education of Black children during this time); David Freedman, *African-American Schooling in the South Prior to 1861*, 84 J. NEGRO HIST. 1 (1999) (same).

23. *See* M. Reginald Gerdes, *To Educate and Evangelize: Black Catholic Schools of the Oblate Sisters of Providence (1828-1880)*, 7 U.S. CATH. HISTORIAN 183, 190 (1988).

in the city.[24] Then, in 1810, an African American Methodist minister named Daniel Coker opened his own school for Black students.[25] By the 1830s, several other Black Methodist and Episcopal ministers had established their own schools.[26] In fact, Frederick Douglass cotaught at a school for Baltimore's Black children with a white man in 1833.[27]

Catholics likewise established a number of schools for Black students in Baltimore during this time. The Oblate Sisters of Providence, an order of Black sisters, operated Saint Frances Academy for Colored Girls with the permission of the Archdiocese of Baltimore.[28] The sisters taught Catholics and non-Catholics alike—as well as the poor, orphans, and paying students[29]—and the school continues to operate to this day.[30] The Oblates would go on to establish five more schools in Baltimore as well as schools in Philadelphia, St. Louis, New Orleans, and Washington, D.C.[31]

Religious educators hardly limited their efforts to northern cities; nor did they strive to assist only free Black people. Throughout the South, largely white religious societies educated slaves while it was legal, and some continued to do so at great peril even after many southern states criminalized the practice.[32]

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24. *Id.* at 188.

25. *Id.*; *see also* WOODSON, *supra* note 22, at 140-41 (explaining Daniel Coker's school).

26. WOODSON, *supra* note 22, at 141; Freedman, *supra* note 22, at 32-33.

27. Freedman, *supra* note 22, at 30-31.

28. *See* Vernon C. Polite, *Making a Way Out of No Way: The Oblate Sisters of Providence and St. Frances Academy in Baltimore, Maryland, 1828 to the Present*, *in* GROWING UP AFRICAN AMERICAN IN CATHOLIC SCHOOLS 62, 64 (Jacqueline Jordan Irvine & Michèle Foster eds., 1996); Gerdes, *supra* note 23, at 186-87.

29. *See* Gerdes, *supra* note 23, at 188-90.

30. The oldest continually operating, predominantly Black Catholic high school in the United States, Saint Frances, continues to educate students (girls and boys) from largely Black neighborhoods of Baltimore. *See History and Tradition*, SAINT FRANCES ACAD., https://sfacademy.org/about-us/history-tradition [https://perma.cc/A4VH-WDPT]; Adelaide Mena, *This 200 Year-Old Black Catholic School Is a 'Gem' in Baltimore's Inner City*, CATH. NEWS AGENCY (Feb. 21, 2017), https://www.catholicnewsagency.com/news/35481/this-200-year-old-black-catholic-school-is-a-gem-in-baltimores-inner-city [https://perma.cc/KWL3-NPH4] ("[T]he school is the oldest continually operating black educational facility in the United States, predating the founding of Cheyney University of Pennsylvania—the nation's oldest Historically Black College—by nearly a decade.").

31. Gerdes, *supra* note 23, at 190-98; *see* WOODSON, *supra* note 22, at 141.

32. Storslee, *supra* note 11, at 156 n.256. Prior to the Civil War, largely in reaction to the activities of preachers such as Nat Turner and Denmark Vesey, "[s]outhern state legislatures enacted laws restricting slave religion and literacy out of fear that the Bible offered a moral foundation for emancipation." Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237, 237 (2007); *see also* Akhil Reed Amar, *The Bill*

C. Education of the Freedmen

After the Civil War, religious schools, especially those spearheaded by northern missionary organizations, disproportionately helped educate the Freedmen. Because of the extremely low literacy rate among the newly liberated Black population, the Freedmen's Bureau "coordinated and financed schools in cooperation with the educational activities of northern missionary societies," which sought to "uplift the freed slaves and their children through religion, education, and material assistance."[33] Of course, these missionary schools were highly unpopular with many whites in the South, some of whom "used violence to discourage any kind of education for [Black people]."[34]

Undeterred, the northern missionaries persisted in their efforts. From 1865 to 1890, churches, missionary groups, and the Freedmen's Bureau established hundreds of private Black institutions—largely elementary and secondary schools, but also institutions of higher education.[35] Many of these institutions were established by Black people themselves with funding from the Disciples of Christ and African Methodist Episcopal Church among other congregations.[36] Others were funded by largely white, Christian missionary organizations, such as the American Missionary Association, Freedman's Aid Society, Presbyterian Board of Missions for Freedmen, and American Baptist Home Mission Society.[37] These organizations founded more than thirty Black colleges, including some of the historically Black colleges and universities that still operate to this day, such

of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1216 (1992) ("Teaching slaves to read (even The Bible) was a criminal offense punished severely in some states.").

33. JULIAN B. ROEBUCK & KOMANDURI S. MURTY, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: THEIR PLACE IN AMERICAN HIGHER EDUCATION 23 (1993); *see also* Knight v. Alabama, 787 F. Supp. 1030, 1073 (N.D. Ala. 1991) ("Northern white missionaries . . . opened schools that taught blacks liberal curricula and equal rights."), *vacated in part and rev'd in part on other grounds*, 14 F.3d 1534 (11th Cir. 1994).

34. *Knight*, 787 F. Supp. at 1073 (quoting the testimony of historian Dr. J. Mills Thornton). The Report of the Joint Committee on Reconstruction—commissioned by Congress prior to considering the Fourteenth Amendment—is replete with instances of southerners threatening and harassing teachers for educating the freedmen. *E.g.*, H.R. REP. NO. 39-30, pt. I, at 112; *id.* pt. II, at 43, 47, 86, 112, 150, 154, 183, 203, 254-55, 267-68; *id.* pt. III, at 115, 146; *id.* pt. IV, at 63, 67, 79, 82.

35. ROEBUCK & MURTY, *supra* note 33, at 25.

36. Walter R. Allen, Joseph O. Jewell, Kimberly A. Griffin & De'Sha S. Wolf, *Historically Black Colleges and Universities: Honoring the Past, Engaging the Present, Touching the Future*, 76 J. NEGRO EDUC. 263, 267 (2007); ROEBUCK & MURTY, *supra* note 33, at 26.

37. Kenley H. Obas, *The History of Historically Black Colleges and Universities and Their Association with Whites*, 4 INT'L J. EDUC. & HUMAN DEVS. 1, 2 (2018); ROEBUCK & MURTY, *supra* note 33, at 26.

as Morehouse College, Clark Atlanta University, Fisk University, Shaw University, Benedict College, Talladega College, Rust College, Morgan State University, and Tougaloo College.[38]

One of the very purposes of the Fourteenth Amendment was providing a constitutional basis for the federal government's support of private, largely religious, schools to educate the freedmen during Reconstruction when existing public and private schools in the South were either unavailable or unwilling to do so.[39] President Johnson's hostility to these educational efforts prompted him to twice veto bills to extend the Freedmen's Bureau in 1866, purportedly on constitutional grounds.[40] Before overriding the second veto, Congress approved the Fourteenth Amendment, resolving any issues of constitutional infirmities.[41]

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From the Founding through Reconstruction, religious schools played a vital role in educating the poor and minorities when these groups had little opportunity elsewhere. Of course, that work continued beyond Reconstruction. But this Essay will leave the matter there and address a separate trend that began during Reconstruction: the public-school establishment's relentless campaign to prevent religious schools from continuing to provide opportunity to poor and minority students.

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38. Obas, *supra* note 37, at 3; ROEBUCK & MURTY, *supra* note 33, at 26.

39. These federal efforts, undertaken by the Freedmen's Bureau, were necessary even in slave states that had remained in the Union during the war. Maryland, for example, had established a public-school system in 1864, but most counties did not operate enough schools for African Americans until after 1872, when the legislature passed a law requiring a public school for African Americans in each district. *See* W.A. Low, *The Freedmen's Bureau and Education in Maryland*, *MD. HIST. MAG.*, Mar. 1952, at 29, 31-32 ("The work of the [Freedmen's] Bureau came at a time when state support of education was non-existent for Negroes and in its infancy for whites. . . . [T]he State made legal provisions for a uniform system of free public schools in its constitutions of 1864 and 1867, but Negro education was ignored or denounced at official levels."); Act of Apr. 1, 1872, ch. 377, ch. XVIII, § 1, 1872 Md. Laws 629, 650.

40. Letter from President Andrew Johnson to the Senate of the United States (Feb. 19, 1866), *in* 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3596, 3620 (1897).

41. JACOBUS TENBROEK, EQUAL UNDER LAW 201 (1965) ("The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt."); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1092 (1866) (statement of Rep. Bingham) (discussing opposition to the Freedmen's Bureau as evidence of the need for the amendment).

II. THE PUBLIC-SCHOOL ESTABLISHMENT'S CONTRIBUTION TO EDUCATIONAL SEGREGATION AND INEQUALITY

The public-school establishment is complicit in perpetuating the educational inequality that poor, minority, and other marginalized students have long experienced and that religious schools have long tried to relieve. It has contributed to that inequality in two primary ways: 1) for the last century and a half, it has actively fought the ability of religious private schools to provide opportunity to such students; and 2) today, it maintains public-school assignment policies that segregate along racial, ethnic, and socioeconomic lines. Each of these efforts has contributed greatly to the inequities that marginalized students suffer.

A. The Public-School Establishment's Attack on Religious Schools' Ability to Educate the Poor and Minorities

Beginning during Reconstruction and through today, the public-school establishment has supported—and often led—campaigns to preserve its control over education by thwarting the ability of private religious schools to deliver opportunity to the most vulnerable and underserved children. It has done so through various means, such as supporting the Blaine movement that targeted Catholic schools in the late nineteenth century; championing "language" laws aimed at ethnic and religious minority students of Lutheran and Catholic schools; supporting Oregon's law forcing religious schools to close; and, more recently, waging legal war against religious schools' participation in programs that offer financial aid to low-income families. The establishment has couched these efforts as necessary to ensure that education serves the assimilating, democratizing, and Americanizing functions necessary to sustain our Republic. In reality, however, the efforts have aimed just as much at preserving the public-school system's monopoly on education and ensuring that private religious schools cannot effectively serve families who desperately seek the opportunity they provide.

1. Anti-Catholicism and the Public-School Movement

The very origins of the public-, or "common-," school movement are enmeshed with hostility toward private religious education for minorities. As Charles L. Glenn has explained, nineteenth-century Protestant Americans viewed the Catholic Church as "a menacing limitation upon national unity and progress" and "widely believed . . . that the very nature of Catholic schooling

was contrary to fundamental principles of American life."[42] Thus, the education reformers (largely Protestant ministers[43]) who established the early public schools in the mid-nineteenth century ensured that these schools were "nonsectarian." Far from nonreligious, nonsectarian meant Protestant; "sectarian" was disparaging code for Catholic.[44]

When Catholic immigration increased as the nineteenth century progressed, the Protestant character of the nascent public schools became increasingly problematic. Catholic students were often beaten or expelled for refusing to engage in Protestant religious exercises in their public schools.[45] After Catholics' efforts to secure better treatment in the public schools failed, they lobbied for a share of the school funds to operate their own schools.[46] A virulent anti-Catholic and anti-immigrant backlash erupted,[47] as did a push to legally bar public funding of "sectarian" schools.

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42. CHARLES L. GLENN, THE AMERICAN MODEL OF STATE AND SCHOOL: AN HISTORICAL INQUIRY 156 (2012).

43. *See generally* JORGENSON, *supra* note 18, at 31-54 (illustrating how Protestant ministers reformed the American education system).

44. *See id.* at 38 ("The term *sectarian schools* was an important part of the public schoolmen's lexicon. It was usually intended to mean 'Catholic schools,' and the term was one of disparagement."); *see also id.* at 38-54 (explaining how the term "sectarian" carried a discriminatory connotation); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020) (noting that the mid-nineteenth century was "a time of pervasive hostility to the Catholic Church and to Catholics in general"); *id.* at 2270 (Alito, J. concurring) ("[I]t was an open secret that 'sectarian' was code for 'Catholic.'" (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion)); GLENN, *supra* note 42, at 162-63 (explaining that "sectarian" was used to disparage non-Protestant Americans and non-Protestant kinds of thinking).

45. *E.g.*, Donahoe v. Richards, 38 Me. 376, 377-79 (1854) (upholding the expulsion of Bridget Donahoe, a Catholic student in Ellsworth, Maine, for refusing to engage in Protestant religious exercises); Commonwealth v. Cooke, 7 Am. L. Reg. 417, 418-20 (Bos. Police Ct. 1859) (dismissing the prosecution of a Boston public-school teacher who beat Catholic student Tom Wall for not participating in the school's Protestant exercises); JOAN DELFATTORE, THE FOURTH R: CONFLICT OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS 49 (2004) (recounting a grand jury's decision not to indict a public-school teacher in Shirley, Massachusetts, after he severely beat Catholic siblings Mary and John Hehir for refusing to read from the King James Bible).

46. A few areas of the country made efforts to accommodate religious minorities. *See, e.g.*, GLENN, *supra* note 42, at 160 (noting that in the early 1840s, New York City "allow[ed] voters in each ward to determine to what extent their schools would have a Protestant or Catholic flavor").

47. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193-251 (2002) (explaining how some Protestant Americans asserted the principle of separation of church and state against Catholicism).

Out of this milieu arose the nativist Know-Nothing party in the 1850s.[48] Working with state public-school officials and Protestant clergy, the Know-Nothings secured legislation in several states to deny public funds to "sectarian" schools and compel Bible reading (the King James Version popular with Protestants) in public schools.[49] "At a time when traditional American values seemed to be threatened by vast waves of immigration, the Know-Nothing party promised to reinvigorate and preserve a homogenous Protestant culture."[50]

2. The NEA's Role in the Nativist Blaine Movement

Although the fires (like the Know-Nothings) subsided during the Civil War, they were stoked again after the war. This time, the National Teachers Association — then the name of the NEA[51] — was responsible for the stoking.

The NEA was founded in 1857 and since then has been "the leading national organization concerned with the educational establishment";[52] indeed, it forms the very foundation of the public-school establishment. And from its inception, it "was dominated by a Protestant outlook."[53] The organization viewed "the public school as the great 'melting pot' of American society. Into it would go people of every foreign nationality, creed, and loyalty; out of it would emerge Americans."[54] Of course, by "Americans," the NEA meant citizens who subscribed to the white, Protestant ideals that the organization itself espoused. It was the task of the public schools, in this view, "to wean immigrant children from their foreign religions"[55] — "to replace faith in a foreign God with faith in America."[56]

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48. *See* GLENN, *supra* note 42, at 164-65; JORGENSON, *supra* note 18, at 69-110 (describing the rise of the nativist "Know-Nothing" movement and its success in preventing Catholic schooling).

49. *See* JORGENSON, *supra* note 18, at 69, 72.

50. *Id.* at 71.

51. The NEA was known as the National Teachers' Association from 1857 to 1870 and the National Educational Association from 1870 to 1908. *See* R. McLaran Sawyer, *The National Educational Association and Negro Education, 1865-1884*, 39 J. NEGRO EDUC. 341, 341 (1970). This Essay uses "NEA" to refer to the organization in all periods.

52. *Id.*

53. DAVID TYACK, THOMAS JAMES & AARON BENAVOT, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 164 (1987).

54. R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 361 (1953).

55. Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CALIF. L. REV. 1059, 1081 (1999).

56. Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1197 (1997).

To that end, in 1866, the president of the NEA called for public schools to "train the young to be religious," instilling in them "a spirit of devotion and faith in the most important truths of our holy religion"—that is, Protestant Christianity—while working "most diligently [to] inculcate not sectarian doctrines."[57] Bible reading in the public schools became a rallying cry at the organization's annual meetings,[58] and in 1869, the NEA approved a resolution urging that the Bible be "devotionally read, and its precepts inculcated in all the common schools of the land," while also advocating against "the appropriation of public funds for sectarian institutions."[59]

The NEA found a champion in James G. Blaine. In 1875, Blaine, a Maine congressman gearing up for a presidential run the following year, introduced a federal constitutional amendment to prohibit public funding of sectarian (that is, Catholic) schools.[60] Though the amendment barely failed in the Senate,[61] many states—under the NEA's charge—enacted analogous provisions into their respective constitutions over the next few decades.[62] Throughout the late nineteenth century, speakers at the NEA's annual conventions called for preserving the nondenominationally Protestant nature of the public schools while also explicitly targeting the Catholic Church and its "foreign element."[63]

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57. James P. Wickersham, *An American Education for the American People*, *in* NAT'L EDUC. ASS'NS, PROCEEDINGS AND LECTURES OF THE NATIONAL TEACHERS' ASSOCIATION 23, 42 (1866).

58. *See* JORGENSON, *supra* note 18, at 133-34.

59. *Proceedings of the National Teachers' Association at its Ninth Annual Meeting (Tenth Session)*, *in* NAT'L EDUC. ASS'NS, PROCEEDINGS OF THE NATIONAL EDUCATIONAL ASSOCIATIONS 1, 23 (1869); *accord* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 301-02 (2001).

60. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 50, 53-54 (1992). As subsequently revised, the proposed amendment "attempted to close every possible loophole through which public money might flow to religious schools, then added that nothing in this elaborately separationist provision should 'be construed to prohibit the reading of the Bible in any school or institution.'" Jeffries & Ryan, *supra* note 59, at 301-02.

61. Green, *supra* note 60, at 57-68.

62. As the Supreme Court in *Espinoza* noted, "[t]he Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree.'" Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (quoting Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (plurality opinion)); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 721 (Breyer, J., dissenting) ("[Anti-Catholic sentiment] played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for 'sectarian' (*i.e.*, Catholic) schooling for children.").

63. JORGENSON, *supra* note 18, at 134 (quoting John Jay, *Public and Parochial Schools*, *in* NAT'L EDUC. ASS'N, JOURNAL OF PROCEEDINGS AND ADDRESSES: SESSION OF THE YEAR 1889, at 152, 172 (Topeka, Kan., Publ'g House 1889)); *see also id.* at 53-54 (explaining that Protestant leaders urged public schools to undertake "moral indoctrination" by using the Bible).

That the NEA was a prime mover in this effort is unsurprising—"[a]nti-Catholicism had pervaded the NEA from its founding."[64] And that bigotry persisted. In 1891, for example, the organization's Committee on State School Systems warned that "[f]oreign influence has begun a system of colonization with a purpose of preserving foreign languages and traditions and proportionately of destroying distinctive Americanism."[65] These foreigners, the committee warned, "are among us in large and influential numbers, who refuse to send to the public schools, who insist upon the exclusive control and direction of the education of their children."[66] "They fear the public schools because they are American in spirit," the committee proclaimed, "and they insist upon parochial schools, not merely in the interest of religion but of religion in a foreign tongue."[67] "Why do they do it?" the NEA committee asked. "The answer," the committee said, "is simply this: they are foreigners. They have come, unavoidably bringing their customs, habits, attachments, and traditions of another land, and all in a tongue which is the channel of every thought, feeling, and religious sentiment."[68] And the remedy, the committee declared, "is the assimilating power of a public free-school system."[69]

The Blaine amendments were one step in achieving this goal. By imposing a constitutional bar to religious schools receiving public aid, the amendments sought to undermine the many nonpublic, primarily Catholic schools that served populations who were underserved by or uncomfortable in the nascent public schools. The public-school establishment, in other words, aimed to remove the educational alternatives available to these students and funnel them into the very public schools that were not meeting their needs. There, students would be made into "good" Americans.

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64. Kraig Beyerlein, *Educational Elites and the Movement to Secularize Public Education: The Case of the National Education Association*, *in* THE SECULAR REVOLUTION: POWER, INTERESTS, AND CONFLICT IN THE SECULARIZATION OF AMERICAN PUBLIC LIFE 160, 185 (Christian Smith ed., 2003).

65. *Report of the Committee on State School Systems: Compulsory Education*, *in* NAT'L EDUC. ASS'N, JOURNAL OF PROCEEDINGS AND ADDRESSES: SESSION OF THE YEAR 1891, at 294, 295 (1891).

66. *Id.*

67. *Id.* at 296.

68. *Id.* at 295.

69. *Id.* at 296. The committee also urged "the limitation of immigration to the moral and industrious, and the limitation of the elective franchise by excluding the grossly ignorant and vicious classes." *Id.* at 297. If policies like this were implemented, it explained, "the educational problem will be somewhat relieved." *Id.*

3. Targeting Religious Schools for Black Children

Sadly, the public-school establishment's campaign to create a school system that reflected its white, Protestant, nativist ideals did not end with the nineteenth century; it continued with equal vigor into the twentieth. Acting on paternalistic attitudes about the type of education that would best serve religious, ethnic, and racial minorities, public-school officials advocated for laws that operated to restrict educational opportunity for minorities and impede the ability of religious schools to provide minorities with educational alternatives.

This should not be surprising. The NEA, for one, has had a tortured relationship with race throughout its existence. Although the organization's leadership called for equal educational opportunity (if not integrated schools) for Black children in the immediate wake of the Civil War,[70] by the 1880s it was eager to accommodate educators from the South to become a truly national organization. It elected as its president Gustavus J. Orr, former Superintendent of Public Instruction of Georgia. Orr urged northern members of the Association to "view the Negro through the eyes of those who knew him best" — that is, southern educators — and the organization "accept[ed] . . . the Southern educator as the expert in Negro education."[71]

The consequences were predictable: southern officials not only failed Black children by providing inferior public schools, but also targeted the better opportunity that those children found in religious schools. Florida provides a particularly egregious example. The day after Easter 1916, three Catholic nuns were arrested for teaching Black children in St. Augustine.[72] The state legislature had

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70. *See* Paul K. Adams, *Speaking Plainly: James P. Wickersham on Education and Reconstruction*, 90 J. LANCASTER CNTY. HIST. SOC'Y 87, 92 (discussing the call for universal public education for all races in James P. Wickersham's 1866 inaugural address as president of the National Teachers' Association).

71. Sawyer, *supra* note 51, at 343. This accommodation of the South had significant consequences in later years. The NEA, for example, refused to involve itself in *Brown v. Board of Education* and did not support the litigation effort, even by amicus brief. RICHARD D. KAHLENBERG, TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY 35-36 (2007). After the Supreme Court decided the case, the NEA reproduced the opinion in the *NEA Journal* with no comment. Rolland Dewing, *The National Education Association and Desegregation*, 30 PHYLON 109, 113, 112 (1969). The NEA did not officially express support for *Brown* until 1961 — *seven years* after the decision — and it did not completely desegregate its local affiliates until 1969. KAHLENBERG, *supra*, at 36. And when, in the wake of *Brown*, Congress conditioned receipt of federal funding for public education and school construction on school districts' integration efforts, "[t]he NEA fought th[e] policy vigorously." Dewing, *supra*, at 112-14. The NEA thought tying the two issues together was a threat to "the old feudal pattern of local control in the South and elsewhere, which the NEA's local and state affiliates considered essential to American education." *Id.* at 112.

72. Joseph Butsch, *Negro Catholics in the United States*, 3 CATH. HIST. REV. 33, 42 (1917).

passed a law three years earlier—at the urging of the state's superintendent of public instruction—entitled "An Act Prohibiting White Persons from Teaching Negroes in Negro Schools."[73] It provided that "it shall be unlawful in this State, for white teachers to teach negroes in negro schools, and for negro teachers to teach in white schools."[74]

The nuns were acquitted after Judge Gibbs held that the law was unconstitutional as applied to private schools and could be applied lawfully only to public schools. His opinion leaned heavily on the right of the sisters to pursue a lawful calling:

> Has a white teacher any the less right to sell his services to negro pupils than a white doctor to negro patients . . . ? Such a law amounts to class legislation depriving teachers of privileges which are not denied to any other class of citizens and it violates . . . the right of a citizen to be free in the enjoyment of all his faculties and be free in the use of them in all lawful ways when they do not infringe upon the equal rights of others.[75]

In some ways, the opinion's emphasis on the nun's right to pursue a calling foreshadowed the U.S. Supreme Court's private-school-protective decisions in *Meyer v. Nebraska*[76] and *Pierce v. Society of Sisters*[77] less than a decade later.

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73. 1913 Fla. Laws 311; JOE M. RICHARDSON & MAXINE D. JONES, EDUCATION FOR LIBERATION: THE AMERICAN MISSIONARY ASSOCIATION AND AFRICAN AMERICANS, 1890 TO THE CIVIL RIGHTS MOVEMENT 30-31 (2009).

74. Act of June 7, 1913, 1913 Fla. Laws 311, 311.

75. Barbara E. Mattick, Ministries in Black and White: The Catholic Sisters of St. Augustine, Florida, 1859-1920, at 179 (Mar. 24, 2008) (Ph.D. dissertation, Florida State University) (internal quotation marks omitted) (quoting *Ex parte* Sister Mary Thomasine, Law No. 778, Docket No. 3, at 97 (Fla. Cir. Ct. 1916)); *see also* David P. Page, *Bishop Michael J. Curley and Anti-Catholic Nativism in Florida*, 45 FLA. HIST. Q. 101, 110-11 (1966) (explaining Judge Gibbs's opinion); Stephen Kerber, Park Trammell of Florida: A Political Biography 190 (1979) (Ph.D. dissertation, University of Florida), https://ufdcimages.uflib.ufl.edu/AA/00/02/64/63/00001/parktrammellofflookerb.pdf [https://perma.cc/5VR6-E6NA] (explaining the Florida incident).

76. 262 U.S. 390, 399, 401 (1923) (holding that the liberty protected by the Fourteenth Amendment includes "the right of the individual to contract, to engage in any of the common occupations of life, [and] to acquire useful knowledge" and that a Nebraska law barring teaching foreign languages had "attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own").

77. 268 U.S. 510, 536 (1925) ("Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule . . . in . . . cases where

The 1913 law, championed by Florida's top public-school official, was intended to enforce racial hierarchies, but it effectively restricted education access for Black children. Judge Gibbs's judgment enjoining its enforcement protected the religious private schools seeking to serve those children, and it therefore protected the children themselves. It also marked the beginning of a consistent judicial pushback against public-school-establishment policies that have restricted opportunity for poor and minority students.

4. Support for the Language Laws

In the wake of the First World War, the public-school establishment's ire turned away from religious schools' efforts to teach racial minorities and again toward their education of ethnic and religious ones. The NEA led the post-First World War drive to enact "language laws" restricting the teaching of foreign languages in public *and private* elementary schools. These laws, fueled largely by anti-immigrant (often anti-German) bigotry, took special aim at "Lutheran-sponsored schools," which "often taught classes in German or Scandinavian languages," as well as the Catholic Church, which "established separate ethnic parishes offering primary and secondary schooling in the language of the Czech, Polish, German, Lithuanian, or Italian immigrant."[78] The laws, in short, threatened to reduce the educational opportunities available to vulnerable immigrant children.

The NEA championed these laws to force immigrants to learn English at the expense of their native languages. For example, in 1919, the NEA adopted a resolution calling for the "[l]egal provision for the use of English as the language of instruction in all schools" as well as "[l]egal provision for compulsory classes in Americanization for all illiterates and all who are not able to read and write the English language with a proficiency equivalent to a sixth-grade standard, which standard shall be necessary for admission to citizenship of the United States."[79]

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injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.").

78. Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1005 n.25 (1992); *see also* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 62 (1994) (noting that "Catholics and Lutherans actively opposed the enactment of language laws"). Although Woodhouse believes that other, less ignoble goals also played a role in the enactment of the language laws, she recognizes that nativist bigotry was a significant factor. *See* Woodhouse, *supra*, at 1003 ("I do not claim that bigotry played no role in shaping public opinion. By all accounts, it played a large and shameful role.").

79. *Report of the Committee[e] on Resolutions*, *in* NAT'L EDUC. ASS'N, 57 ADDRESSES AND PROCEEDINGS OF THE NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES 25 (1919).

Thankfully, the Supreme Court recognized that these laws were unconstitutional, at least in their most extreme versions, when it set aside the conviction of Robert T. Meyer for the crime of teaching Bible stories in German at a Lutheran school.[80] The NEA's campaign to curtail the freedom of private religious schools to teach ethnic and religious minorities in their native tongue had backfired, resulting instead in nationwide precedent recognizing the constitutional right of private educators to teach, "the right of parents to engage [them] so to instruct their children," and "the power of parents to control the education of their own."[81]

5. The Push for Compulsory Public Education

Undeterred, the public-school establishment tried to undermine private religious schooling in the early 1920s by enacting compulsory-public-education laws: laws requiring that every child attend not just school but a *public* school. Though only Oregon approved a law like this, Nebraska, Michigan, Washington, Ohio, Oklahoma, and California also tried to enact similar ones.[82] Like the Blaine and language-law movements before it, the compulsory-public-education campaign was rooted squarely in anti-Catholic and anti-immigrant nativism.[83]

Oregon's measure received support "from the educational establishment of the state, including the *Oregon Teacher's Monthly*" (the official journal of the Oregon State Teachers' Association) and "a large proportion of public school teachers."[84] Around the same time, the *Oregon Teacher's Monthly* also endorsed an American Legion campaign for Americanization, which called for instruction in English only and loyalty oaths.[85]

The NEA, meanwhile, trumpeted the measure's passage in a piece called *Educational Achievements—1922*, which surveyed NEA officials and public-education leaders in each state regarding "the one educational achievement in the State

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80. *Meyer*, 262 U.S. at 397, 403.

81. *Id.* at 390, 400.

82. Woodhouse, *supra* note 78, at 1016; *see also* ROSS, *supra* note 78, at 134-47 (discussing campaigns in Michigan and Washington).

83. GLENN, *supra* note 42, at 157 ("It was this continuing and deeply rooted perception that Catholic schooling was a problem that led to the Oregon legislation struck down by *Pierce v. Society of Sisters* in 1925.").

84. Patrick J. Ryan, Pierce v. Society of Sisters, *in* 2 ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD: IN HISTORY AND SOCIETY 678, 678-79 (Paula S. Fass ed., 2004).

85. David B. Tyack, *The Perils of Pluralism: The Background of the* Pierce *Case*, 74 AM. HIST. REV. 74, 83 n.34 (1968); TYACK ET AL., *supra* note 53, at 172-73.

which they thought most significant."[86] The state NEA director for Oregon responded that it was "[t]he passage of the compulsory education bill which abolishes all private and parochial schools and forces all children of compulsory school age to attend the public schools."[87]

To its credit, the NEA eventually adopted a resolution grudgingly "recogniz[ing] that citizens have the right to educate their children in either public or private schools."[88] But it only did so two years *after* the Oregon measure had passed. And even then, it prefaced the resolution by declaring that "the American public school [i]s the great nursery of broad and tolerant citizenship and of a democratic brotherhood."[89] Its words made clear that the Association continued to believe public schools were best suited to produce loyal Americans.

The compulsory-public-school-attendance measure that the NEA had touted as an "educational achievement" backfired, like the Nebraska language law, when the Supreme Court invalidated it several years after its enactment in *Pierce v. Society of Sisters*.[90] The Court's opinion recognized that "[t]he child is not the mere creature of the State," that parents have a constitutional right "to direct the upbringing and education of children under their control," and that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[91] In short, a state law that threatened to force all children into a single public-school system largely hostile to the cultures, traditions, and needs of immigrant and minority children resulted instead in a Court ruling that secured nationwide precedent preserving the right of private schools to provide educational alternatives to such children.

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86. *Educational Achievements—1922*, 12 J. NAT'L EDUC. ASS'N 41, 41 (1923).

87. *Id.* at 43.

88. *Report of Committee on Resolutions*, *in* NAT'L EDUC. ASS'N, 62 ADDRESSES AND PROCEEDINGS OF THE NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES 54, 54 (1924).

89. NAT'L EDUC. ASS'N, *supra* note 88, at 54; *see also The American Public School*, 13 J. NAT'L EDUC. ASS'N 192, 192 (1924) (reprinting an editorial from the *Washington Herald* stating that "[a]ttacks on private schools are attacks on individual liberty" but also claiming that "the difference between the public school and the private school is the difference between absolute democracy and class privilege"). Indeed, the same year, the *Journal of the National Education Association* ran an editorial by the NEA's state director for Minnesota warning of the "menace" of "unassimilated foreign elements" in American cities. *Our National Association*, 13 J. NAT'L EDUC. ASS'N 77, 77 (1924). "There are communities in this country," the piece declared, "containing more Italians than Rome, and more Russians than Moscow. These men and women—potentially good citizens—have had little contact with American life and often have failed to appreciate the purposes and ideals of our American democratic institutions." *Id.*

90. 268 U.S. 510 (1925).

91. *Id.* at 534, 535.

6. *Targeting Religious Schools' Participation in Educational-Choice and Other Public-Benefit Programs*

By this point, the public-school establishment had failed to destroy private education through laws such as Florida's restricting interracial instruction, Nebraska's restricting foreign-language instruction, and Oregon's banning private schools altogether. Later in the twentieth century, the establishment retrained its focus where its campaign against religious schools had begun: prohibitions on state aid to the schools and the children they educate.

Although the NEA had opposed state and federal aid for religious schools throughout the 1900s, the matter came to a head toward the end of the century when states began adopting voucher programs that enabled poor, largely minority students to pursue an education outside the public system that had long failed them.[92] Despite the fact that these programs were designed to aid students rather than the schools they chose to attend,[93] the NEA and other national and state public-school organizations insisted that the programs impermissibly funneled money to religious schools in violation of the Federal Constitution and various state constitutions.

Through direct litigation and amicus support, the NEA, National School Boards Association, and other public-education-oriented groups used the Establishment Clause and state Blaine Amendments to attempt to bar religious private schools from participating in educational-choice and other public-benefit programs alongside their secular counterparts. A study of "separationist advocacy . . . in cases regarding state aid to elementary and secondary sectarian schools" from 1971[94] through 2002[95] found that the NEA, National School Boards Association, and Committee for Public Education and Religious Liberty

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92. The first voucher program of the modern era was adopted in 1989 by the Wisconsin legislature for students in the (dismal) Milwaukee public-school system whose family income did not exceed 175 percent of the federal poverty level. Davis v. Grover, 480 N.W.2d 460, 463 (Wis. 1992); *see also id.* at 470 (cataloging the failures of the Milwaukee public-school system and calling the consequences "shocking"). The legislature amended the law to allow religious options in 1995. Jackson v. Benson, 578 N.W.2d 602, 608 (Wis. 1998).

93. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002) (discussing "educational assistance programs that, like the program here, offer aid *directly to a broad class of individual recipients*" (emphasis added)).

94. In 1971, the Supreme Court decided *Lemon v. Kurtzman*, which articulated a test that would factor in Establishment Clause analysis for the next forty years. 403 U.S. 602 (1971).

95. In 2002, the Supreme Court decided *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which allowed states to include religious schools in school-voucher programs. *See supra* note 1 and accompanying text.

(PEARL)[96] were among the most active participants on the separationist side during this period;[97] the study also found that the NEA and PEARL were widely viewed as leaders of the separationist coalition, initiating meetings and helping develop litigation strategy.[98] In fact, the NEA's own lawyers (as well as lawyers from the American Federation of Teachers) litigated *Zelman*, a challenge to Ohio's voucher program for poor, mostly minority students in the Cleveland City School District.[99] Counsel of record at the Supreme Court for the plaintiffs challenging the program was Robert Chanin, chief counsel for the NEA.[100]

The public-school establishment's assault on religious options in educational-choice programs continued for the next two decades. The NEA and National School Boards Association filed amicus briefs supporting attempts to bar religious schools from these programs under the Establishment Clause in *Arizona Christian School Tuition Organization v. Winn*;[101] under a state Blaine

96. The Committee for Public Education and Religious Liberty was a coalition of organizations, including the NEA, "committed to maintaining the First Amendment's guarantee of separation of church and state in our nation's public schools." *National Committee for Public Education and Religious Liberty*, NAT'L CTR. SCI. EDUC. (Oct. 1, 2008), https://ncse.ngo/national-committee-public-education-and-religious-liberty [https://perma.cc/KQ26-WRQG].

97. Ronald B. Millar, Coalition Networks and Policy Learning: Interest Groups on the Losing Side of Legal Change, at ii (2005) (Ph.D. dissertation, Virginia Polytechnic Institute and State University) (on file with the author).

98. *Id.* at 195-96.

99. *Zelman*, 536 U.S. at 644 (noting that most children in the Cleveland City School District "are from low-income and minority families," that "[f]ew of these families enjoy the means to send their children to any school other than an inner-city public school," and that "[f]or more than a generation, . . . Cleveland's public schools have been among the worst performing public schools in the Nation").

100. *See* Brief for Respondents Doris Simmons-Harris et al., *Zelman*, 536 U.S. 639 (No. 00-1751), 2001 WL 1636772; *see also* Brief for Petitioner, Taylor v. Simmons-Harris, 533 U.S. 976 (2001) (No. 00-1779), 2001 WL 1663809, at *24 ("That this program is about education, not religion, is nowhere more evident than in the identities of the prime movers behind this litigation, the National Education Association (*Simmons-Harris* respondents) and American Federation of Teachers (*Gatton* respondents)."). The National School Boards Association filed an amicus brief in support of the NEA's position. Brief of National School Boards Association et al. as Amici Curiae in Support of Respondents, *Zelman*, 536 U.S. 639 (No. 00-1779), 2001 WL 34092026.

101. 563 U.S. 125 (2011). *See* Brief of National School Boards Association et al. as Amici Curiae in Support of Respondents, *Winn*, 563 U.S. 125 (2011) (Nos. 09-987, 09-991), 2010 WL 3806527.

Amendment in *Espinoza v. Montana Department of Revenue*;[102] and under a state statute in *Carson v. Makin*.[103]

These attacks on religious schools have fared about as well for the public-school establishment as had their prior attacks in Florida, Nebraska, and Oregon. The litigation only confirmed that parents have "the right[] . . . to direct 'the religious upbringing' of their children,"[104] that the Constitution protects the ability of parents to do so "by sending their children to religious schools,"[105] and that a state cannot disqualify private, religious schools from an educational-choice or other public benefit program, whether because of their religious status[106] or because they engage in religious instruction.[107]

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Poor, minority, and immigrant children have long relied on religious schools to procure an education that respects and meets their needs, but the public-school establishment has consistently pursued policies that threaten to restrict or destroy the opportunity that these schools provide to the most vulnerable children. The establishment campaigned for the Blaine Amendments in the second half of the nineteenth century to hamstring Catholic schools educating religious and ethnic minorities; it facilitated the prosecution of Catholic nuns for educating Black children in Florida in the early twentieth century; it championed "language laws" targeted at Lutheran and Catholic schools providing educational opportunity to immigrant children; it supported a law aimed at shuttering Catholic schools in Oregon; and it has led and supported efforts to bar religious schools from participating in educational-choice programs designed to help disadvantaged students obtain a quality education. Thankfully, this century-and-a-half-long campaign backfired: the arc of Supreme Court jurisprudence has bent

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102. 140 S. Ct. 2246 (2020). *See* Brief of American Federation of Teachers et al. as Amici Curiae in Support of Respondents, *Espinoza*, 140 S. Ct. 2246 (2020) (No. 18-1195), 2019 WL 6114662; Brief of National School Boards Association et al. as Amici Curiae in Support of Respondents, *Espinoza*, 140 S. Ct. 2246 (2020) (No. 18-1195), 2019 WL 6114658.

103. 142 S. Ct. 1987 (2022). *See* Brief of National Education Association et al. as Amici Curiae in Support of Respondent, *Carson*, 142 S. Ct. 1987 (No. 20-1088), 2021 WL 5098229; Brief of National School Boards Association et al. as Amici Curiae in Support of Respondent, *supra* note 7.

104. *Espinoza*, 140 S. Ct. at 2261 (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)).

105. *Id.*

106. *Id.* at 2256.

107. *Carson*, 142 S. Ct. at 2001-02.

consistently toward protecting the rights of religious schools and the right of parents to choose them.

B. A More Productive Approach

If the public-school establishment were truly concerned with providing greater educational opportunity to minority students, it would look inward at the public-school system itself. In addition to its century-and-a-half-long campaign against religious and other private schools — schools that have often provided educational opportunities to the most vulnerable students — it has actively engaged in and continues to engage in practices that deny equal opportunity in the public schools themselves. By ending these practices as well as its long campaign against religious schools, the public-school establishment could help usher in a robust mix of public and private schools that would help ensure every child can access an education that will meet her needs.

Perhaps most damagingly, the public-school establishment continues to maintain geographically drawn school districts and "attendance zones": the geographic zones within a school district that determine the public school a student will attend based on her residential address.[108] Approximately eighty percent of public-school students in this country attend a school to which they are assigned based on residence.[109] Drawing these boundaries (perhaps gerrymandering is the more appropriate word),[110] both between and within districts, often results in adjacent schools with wildly different racial and socioeconomic makeups — and wildly different qualities.[111]

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108. Tomas Monarrez & Carina Chien, *Dividing Lines: Racially Unequal School Boundaries in US Public School Systems*, URB. INST. CTR. ON EDUC. DATA & POL'Y 2 (Sept. 2021), https://www.urban.org/sites/default/files/2022-03/dividing-lines-racially-unequal-school-boundaries-in-us-public-school-systems.pdf [https://perma.cc/3SXW-9NXQ] ("Virtually every school district in the country bases its student assignment rules on school attendance boundary (SAB) systems (or 'catchment areas').").

109. Meredith P. Richards, *The Gerrymandering of School Attendance Zones and the Segregation of Public Schools: A Geospatial Analysis*, 51 AM. EDUC. RSCH. J. 1119, 1120 (2014) ("Despite the growing emphasis on public school choice, . . . roughly four fifths of public school students still attend the traditional school to which they are geographically assigned.").

110. *Id.* at 1123 ("[R]ecent research directly examining contemporary public school attendance zones has demonstrated that attendance zone boundaries are highly gerrymandered." (citation omitted)); *see also id.* ("[E]mpirical evidence on the gerrymandering of contemporary attendance zones indicates that school attendance zone gerrymandering is severe, and may be worsening over time.").

111. TIM DEROCHE, A FINE LINE: HOW MOST AMERICAN KIDS ARE KEPT OUT OF THE BEST PUBLIC SCHOOLS 185-215 (2020) (providing a sample of schools from fifteen different cities that are within the same district and share an attendance-zone boundary but have significantly different demographics and student performance); *see also* Monarrez & Chien, *supra* note 108, at

The practice of assigning children to schools based not on their needs but on their home addresses (read: wealth) relegates poor and often minority students to public schools that are far more likely to be underperforming or failing. Unable to afford the substantially higher home prices in areas where the assigned public school is high-performing, these students are effectively priced out of a free high-quality public education.[112] And the problem perpetuates itself because the concentration of low-income students in high-poverty public schools is one of the biggest predictors of racial disparity in educational achievement.[113]

Worse, recent research has demonstrated a significant correlation between public-school quality and the racist redlining maps of President Franklin D. Roosevelt's administration. Between 1935 and 1940, the Home Owner's Loan Corporation (HOLC), a federal agency that provided mortgage relief to troubled borrowers, developed a series of color-coded maps of more than two hundred cities throughout the country, assigning one of four grades (A through D) to residential neighborhoods based on the supposed degree of risk for lenders in making housing loans in the neighborhoods. Areas graded "A" were deemed "desirable" and colored green, reflecting minimal risk; those graded "D" were colored red and deemed "hazardous."[114] The maps were based on explicit racism: the notes accompanying them often attributed high populations of racial, ethnic,

27, 44 (presenting data that "[r]acially unequal school boundaries are more likely to be district jurisdictional lines" and that these lines "often coincide with . . . redlining maps").

112. Vanessa Brown Calder, *Zoned Out: How School and Residential Zoning Limit Educational Opportunity*, SOC. CAP. PROJECT 2 (2019) ("[T]he average U.S. ZIP code associated with the highest quality . . . public elementary schools has a 4-fold ($486,104) higher median home price than the average neighborhood associated with the lowest quality . . . public elementary schools ($122,061)."); *see also* Thomas J. Nechyba, *The Social Context of Vouchers*, *in* HANDBOOK OF RESEARCH ON SCHOOL CHOICE 289, 289-308 (Mark Berends, Matthew G. Springer, Dale Ballou, Herbert J. Walberg & Ann Primus eds., 2009) ("Residence-based admission to publicly-funded schools . . . creates an *actual* public school system that, while nominally offering free public education to all, restricts access to high quality schools to higher income households . . . [and] lead[s] to relatively high levels of residential and school segregation . . . .").

113. *See* Sean F. Reardan, *School Segregation and Racial Academic Achievement Gaps*, 2 RUSSELL SAGE FOUND. J. SOC. SCIS. 34, 47 (2016) ("Racial segregation is strongly associated with racial achievement gaps, and the racial difference in the proportion of students' schoolmates who are poor is the key dimension of segregation driving this association."); *id.* at 35 ("[T]he disparity in average school poverty rates between white and black students' schools . . . is consistently the strongest correlate of achievement gaps.").

114. *See* Lindsey M. Burke & Jude Schwalbach, *Housing Redlining and Its Lingering Effects on Education Opportunity*, HERITAGE FOUND. 3 (Mar. 11, 2021), https://www.heritage.org/sites/default/files/2021-03/BG3594_1.pdf [https://perma.cc/R9YL-9NTK]; Dylan Lukes & Christopher Cleveland, *A Lingering Legacy: The Relationship Between 1930s HOLC "Redlining" Maps and School Funding, Diversity, and Performance* 6, (Annenberg Inst., Brown Univ., EdWorkingPaper No. 21-363, 2021).

and religious minorities—Black people, Jews, Asians, and Hispanics, among others—as the reason for a "D" grade.[115]

Today, "racially unequal school boundary lines often coincide with the HOLC redlining maps," which were implemented "to create racial and ethnic inequality in wealth and to perpetuate segregation."[116] Recent empirical research has demonstrated that "schools and districts located today in historically redlined D neighborhoods have less district per-pupil total revenue, larger shares of Black and non-White student bodies, less diverse student populations, and worse average test scores relative to those located in A, B, and C neighborhoods."[117] The correlation between the maps and school boundaries today is strong evidence that these unequal boundaries "are a vestige of racist policies of an earlier era."[118]

Even apart from the relationship of today's boundaries to this episode in historical bigotry, school-attendance zones empower bureaucrats to perpetuate extreme inequalities in education through arbitrary line drawing. As Meredith P. Richards has demonstrated, "attendance zones are gerrymandered in ways that exacerbate racial/ethnic segregation," particularly "in districts experiencing rapid racial/ethnic change," and they "serve to reinforce racial/ethnic disparities in schools."[119] Attendance zones have been correctly criticized as "a license to discriminate" and the cause of "sharp inequalities of opportunities for families who live in the same neighborhood."[120] As Tim DeRoche pointedly explains, "Wealthier families cram into the attendance zones of desirable schools, and

115. RICHARD ROTHSTEIN, THE COLOR OF LAW 64 (2017); Lukes & Cleveland, *supra* note 114, at 6-7; *see* DEROCHE, *supra* note 111, at 62.

116. Monarrez & Chien, *supra* note 108, at 44; *see also* DEROCHE, *supra* note 111, at 64-65 & figs.3.1-.7 (providing examples of correlation between redlining maps and attendance-zone boundaries in Los Angeles, Brooklyn, Dallas, Indianapolis, and Seattle); Burke & Schwalbach, *supra* note 114, at 6 (showing the correlation of a redlining map and the attendance-zone boundaries in Columbus).

117. Lukes & Cleveland, *supra* note 114, at 1.

118. Monarrez & Chien, *supra* note 108, at 44; *see also id.* at 29 ("[T]he legacy of racist government practice of the past plays a role in explaining unequal school boundaries today."); Lukes & Cleveland, *supra* note 114, at 46 (describing the "stubborn association" of redlining maps with current educational outcomes and "the transmission of past neighborhood inequality to the present"); Burke & Schwalbach, *supra* note 114, at 5 ("[B]ecause of the tight connection between housing and schooling, the impact [of redlining maps and discriminatory Federal Housing Administration policies] on education opportunity remains in the 21st century.").

119. Richards, *supra* note 109, at 1150-52; *see also* Monarrez & Chien, *supra* note 108, at v ("Unequal school attendance zones do not only perpetuate racial and ethnic segregation, they amplify inequality between students of color and their white peers, all while being almost right next to each other.").

120. DEROCHE, *supra* note 111, at 54, 67.

poorer families are boxed out. Because income and wealth disparities correlate with racial differences, this inevitably leads to more racial separation as well."[121]

In fact, even as neighborhoods have become more racially integrated since the early 1980s, public schools have become more segregated or, at best, have plateaued.[122] Likewise, students have been increasingly sorted by household income within and across public-school districts in recent decades.[123] According to Richards, "This suggests that schools, which served as mechanisms of racial integration after *Brown*, now are not only reproducing existing patterns of

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121. *Id.* at 63.

122. *See* Meredith P. Richards, Kori J. Stroub, Julian Vasquez Heilig & Michael R. Volonnino, *Achieving Diversity in the* Parents Involved *Era: Evidence for Geographic Integration Plans in Metropolitan School Districts*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 65, 66 (2012) ("Since the 1980s, the *de facto* segregation of schools has rapidly intensified, especially in the South and for Hispanic/Latino populations. Indeed, during the 1990s the proportion of Black students in majority-White schools decreased 13 percentage points, to a level not seen since 1970."); *see also* Richards, *supra* note 109, at 1119 ("Despite the strong association between where students live and where they attend school, segregation trends for public schools have been much less promising than residential trends."); Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, C.R. PROJECT 7 (Sept. 2012), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf [https://perma.cc/3EEJ-8UZN] ("[S]egregation has increased dramatically across the country for Latino students, who are attending more intensely segregated and impoverished schools than they have for generations."); Orfield et al., *supra*, at 9 ("In spite of the dramatic suburbanization of nonwhite families, 80% of Latino students and 74% of black students attend majority nonwhite schools (50-100% minority), and 43% of Latinos and 38% of blacks attend intensely segregated schools (those with only 0-10% of white students) across the nation."); Charles T. Clotfelter, *Are Whites Still Fleeing? Racial Patterns and Enrollment Shifts in Urban Public Schools, 1987-1996*, 20 J. POL'Y ANALYSIS & MGMT. 199, 200, 218 (2001) (examining changes in segregation in 238 metropolitan areas between 1987 and 1996 and finding an overall increase in segregation); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. REV. 1563, 1573 (2003) ("Nationally, public school segregation increased slightly from 1990 to 2000."). *But see* Kori J. Stroub & Meredith P. Richards, *From Resegregation to Reintegration: Trends in Racial/Ethnic Segregation of Metropolitan Public Schools, 1993-2009*, 50 AM. EDUC. RSCH. J. 497, 523, 526 (2013) (finding that "the racial/ethnic resegregation of public schools observed over the 1990s has given way to a period of modest reintegration" but adding that "metropolitan areas with more rapid population growth and greater increase in racial/ethnic diversity generally experienced smaller declines in segregation than metropolitan areas with more stable compositions").

123. *See, e.g.*, Ann Owens, Sean F. Reardon & Christopher Jencks, *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RSCH. J. 1159, 1181-83 (2016) (finding that sorting by income increased fifteen percent across public-school districts from 1990 to 2010 and more than forty percent within public-school districts from 1990-2012).

residential segregation, but may also be actively facilitating segregation beyond residential patterns."[124]

Nevertheless, the public-school establishment continues to assign students to schools based on their residences rather than their needs. To be sure, the advocates of the status quo recognize the strong link that a child's address can have with the quality and demographics of her assigned school. The NEA, for example, recognizes that "[h]ousing and school policies have a strong reciprocal effect on patterns of racial and economic segregation."[125] Yet the organization has been cool on public-school-choice programs (not to mention private-school-choice ones) that would empower parents rather than school district officials to decide which schools their children should attend.[126]

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124. Richards, *supra* note 109, at 1120; *see also id.* at 1122 ("[S]chool districts in the post-*Brown* era responded to desegregation pressures by locating schools and drawing their attendance boundaries to intensify segregation and undermine integration efforts. Evidence from current zoning proceedings and case studies suggests that districts continue to draw racially inequitable boundaries." (citations omitted)). This failure of the public-school system has recently drawn criticism from abolition constitutionalists Helen Hershkoff and Nathan Yaffe, who equate the assignment of poor and minority students to failing public schools as confinement:

> We use the word "confined" consciously, for the state's assignment of Black, Brown, and poor children to particular public schools is not random or ad hoc. Rather, it begins with the state's decision to apportion educational opportunity by districts within limited geographic areas that sort children by race and class. The legal boundaries of these school districts confine the child within a fixed geographic space, prohibiting the child from attending schools in more affluent neighborhoods and enforcing that prohibition by criminal punishment when necessary. Spatial confinement inevitably produces economic confinement, stunting the child's lifetime ability to acquire the income and assets needed to achieve geographic mobility.

Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. CENT. L. REV. 1, 4 (2020) (footnote omitted); *cf.* Gary B. v. Whitmer, 957 F.3d 616, 638, 640 (6th Cir.) ("Compulsory school attendance laws are a restraint on Plaintiffs' freedom of movement . . . . It seems beyond debate that confining students to a 'school' that provides no education at all would be an arbitrary detention, prohibited by the common law's understanding of due process tracing back to the Magna Carta."), *vacated and reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

125. *Housing and Schools: The Importance of Engagement for Educators and Education Advocates*, NAT'L EDUC. ASS'N & POVERTY & RACE RSCH. ACTION COUNCIL 2 [hereinafter *Housing and Schools*], http://www.prrac.org/pdf/NEA-PRRAC_housing-schools.pdf [https://perma.cc/B7CU-2YPE]; *see also* John Rosales, *Fulfilling the Promise of* Brown v. Board*: From School and Housing Policies to the Courts*, NEATODAY (May 10, 2019), https://www.nea.org/advocating-for-change/new-from-nea/fulfilling-promise-brown-v-board-school-and-housing-policies [https://perma.cc/6E5J-P945] (quoting the director of NEA's Human and Civil Rights Office as stating that "[h]ousing and school policies are inextricably linked and deeply affect patterns of school funding and academic success").

126. Aaron Y. Tang, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103, 1134 & n.139 (2011) ("Casual observers of the politics of school reform have long recognized the first group that strongly opposes school choice: teachers

The NEA's solution to the problem is instead to encourage "educators and education advocates" to "become involved in housing and land use policy," helping to draw more integrated attendance zones or enact policies that will lead to more integrated neighborhoods.[127] The top proposal? Ironically, vouchers. Not education vouchers, which enable parents to send their children to a better-performing school *today*, but rather housing vouchers,[128] which *may* lead to more integrated neighborhoods and better-performing public schools over time. The "benefit" of this policy, according to the NEA, is that it will "reduc[e] student turnover and churning by *keeping children in the same school attendance zone*."[129]

Yet even assuming housing vouchers could yield some of the positive outcomes the NEA predicts, they are an incomplete solution at best. Because other economic and social realities—for example, employment or familial ties—can make moving one's household impracticable even with a housing voucher, eliminating residence-based school assignment (or at least adopting other meaningful public-school-choice reforms) would do far more to increase integration in the public schools and inject the competition among them that is necessary if increased performance is to be expected. Moreover, even though housing vouchers might inject some competition *among* the public schools, they (like the elimination of residence-based school assignment or the adoption of public-school-choice policies) still would pose no competitive threat to the public-school system itself. Only private educational-choice programs can do that. Finally, the fact remains that even the best public school is not the best school for every child. Children are unique; they have unique educational needs. A robust educational

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unions. Although unions do not oppose public school choice with the same vigor as they oppose private vouchers, the unions' first-line policy response is to resist both versions of choice for fear that public school choice may represent the initial slide down a slippery slope to a completely privatized system where teachers unions have little or no sway." (footnotes omitted)).

127. *Housing and Schools*, *supra* note 125, at 2-3; *see also* Rosales, *supra* note 125 (quoting the director of NEA's Human and Civil Rights Office, who stressed the importance of "educators and education advocates who support school integration . . . engag[ing] with housing officials and mak[ing] recommendations on attendance zones and school district boundaries"). Experience shows that the process of redrawing attendance zones is commonly "captured" by wealthy (often white) parents and other special interests who are concerned with two things: ensuring *their* children remain in the highest performing public schools and protecting *their* property values. *See* Monarrez & Chien, *supra* note 108, at 2 ("High-income groups have been known to leverage their political influence to ensure that school boundaries remain inequitable. . . . It is obviously not a coincidence that high-quality public schools often serve areas populated exclusively by affluent white residents.") (citing DeRoche, *supra* note 111); DeRoche, *supra* note 111, at 36-41 (recounting successful efforts by wealthy parents in Chicago, Dallas, and Atlanta to prevent reassignment of students).

128. *Housing and Schools*, *supra* note 125, at 5.

129. *Id.* at 3 (emphasis added).

marketplace with public and private options—not the current public-school monopoly—will best ensure that every child can access an education that will meet her specific needs.

Nevertheless, the public-school establishment continues its fight to deny religious and other private schools the ability to provide educational alternatives to poor and minority students, while also defending the very public-school policies that have left poor and minority students in need of those alternatives. It attacks educational-choice programs that provide opportunity to these children even as the public-school system actively segregates students by race, ethnicity, and wealth.

CONCLUSION

Interestingly, the redlining practices that still leave their mark on so many public-school attendance zones targeted not only Black neighborhoods but also neighborhoods with high proportions of religious and ethnic minorities.[130] In fact, the Federal Housing Administration's chief economist "saw ethnicity as a key to predicting [real estate] value" and "graded various nationalities in the order of their real estate desirability," the lowest being "Russian Jews of the lower class," "South Italians," "Negroes," and "Mexicans" in descending order of desirability.[131] As Antero Pietila explains, in the instructions that HOLC provided to its mapmakers, "American business and professional men" of Charles Lindbergh's "Nordic type and Episcopalian faith were held up as ideal residents" and "made the perfect score" while "[a]ny deviation from that norm, whether by race, religion, ethnic background, recent immigration, or economic status, lowered the score."[132]

Redlining contributed to white flight from urban neighborhoods in the mid-twentieth century as did other pernicious housing and banking practices.[133] However, largely because of the institutional nature and geographical parish structure of the Catholic Church,[134] Catholics tended to remain in their

130. *See* GERALD GAMM, URBAN EXODUS 40-41 (1999).

131. ANTERO PIETILA, NOT IN MY NEIGHBORHOOD 62 (2010).

132. *Id.* at 64 (internal quotation marks omitted).

133. *See generally* GAMM, *supra* note 130, at 30-55 (recounting how arson, redlining, and blockbusting in Jewish-majority areas of Boston helped fuel an exodus of Jews out of those neighborhoods).

134. *See generally id.* at 17-24 (explaining differences regarding membership, rootedness, and authority in Jewish and Catholic houses of worship and examining how they impacted neighborhood succession in Boston's Jewish and Catholic neighborhoods); MICHAEL T. MALY & HEATHER M. DALMAGE, VANISHING EDEN: WHITE CONSTRUCTION OF MEMORY, MEANING, AND IDENTITY IN A RACIALLY CHANGING CITY 10 (2016) ("Comparing the structure of Jewish

neighborhoods for longer periods of time,[135] even if not always comfortable with their new, increasingly Black, and usually non-Catholic neighbors.[136] In time, however, many Catholics did leave for the suburbs, and many urban Catholic schools "adapted to a new role of educating poor, predominantly minority, students," whether Catholic or not.[137] As of 2010, for example, forty percent of students in New York City's Catholic schools were non-Catholic, ninety-four percent were minorities, and more than half lived below the poverty line.[138]

As Gerald Gamm has noted, the Catholic Church—as a religious entity—may not be nearly as relevant in such neighborhoods as it once was, "[b]ut the church—the Catholic parish, with its monumental, outdated structures—is at least still present in these neighborhoods," and the "array of [church] programs to assist the urban poor . . . is the logical consequence" of that presence.[139] In these areas, Catholic schools continue to "anchor and preserve city neighborhoods by providing an alternative to struggling urban public schools and elite

synagogues and the Catholic church reveals different institutional rules surrounding membership, rootedness, and governance of each church. The Catholic parish system defines membership geographically. Churches are viewed as permanent structures that root parishioners in that place. . . . In addition, the Catholic church's rules on authority follow a hierarchical structure of governance, where the parish 'does not exist apart from a priest and a hierarchy.' . . . . Understanding this structure provides a deeper understanding of the serious commitment white Catholics had for their neighborhoods, as well as their fear of integration." (quoting GAMM, *supra* note 130, at 19)).

135. *See* MALY & DALMAGE, *supra* note 134, at 10 ("Compared with other religious groups, members of the Catholic church historically have remained in their neighborhoods and resisted integration and racial change. White Protestants and Jews were more likely than white Catholics to flee their neighborhoods.").

136. There was no shortage of resistance among parishioners and clergy to the increasing Black (and usually non-Catholic) presence in formerly Catholic neighborhoods, but a hostile response was hardly uniform. *See* JOHN T. MCGREEVY, PARISH BOUNDARIES 260 (1996) (explaining that, "[b]y the 1940s, two 'Catholic' traditions offered competing views of the Church's role" with respect to African Americans and neighborhood succession: one "pictured tightly knit, homogenous parishes and schools" while the other "worked to eradicate the bigotry implicit in such narrow definitions of community").

137. MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY 27 (2014); *see also id.* at 23-24 (discussing how the efforts of priests and sisters at Saint Sabina's on Chicago's South Side resulted in a transition, largely free of racial hostility, from a formerly Irish parish to "perhaps the preeminent African American parish in Chicago" today—one that continues to maintain a "thriving school"); MCGREEVY, *supra* note 136, at 252-60 (discussing how, after a period of resistance and hostility, Jesuits at Gesu parish and school in Philadelphia worked to integrate new Black residents, the school became one of the "few stable institutions" in the neighborhood, and Black students composed ninety-five percent of the school's population in 1991).

138. BRINIG & GARNETT, *supra* note 137, at 32.

139. GAMM, *supra* note 130, at 283.

private schools."[140] So, too, do the schools of many other religious denominations and faiths.[141]

The public-school establishment should welcome the opportunity that religious schools provide and end its century-and-a-half-long hostility toward them. It should also reflect on its own complicity in creating the very conditions that have led so many poor and minority students to seek an education outside the public system. By maintaining residence-based school-assignment policies, which so often trap the most vulnerable children in the worst performing schools, and opposing educational-choice programs, thereby denying those children any alternative to their assigned schools, the public-school establishment is harming the very children it purports to serve.

The decision in *Carson* presents an opportunity to pursue a new approach to education: a pluralistic approach that embraces all types of schools — public and private, religious and nonreligious — and that empowers every child to access the school that will best serve her rather than the school to which the government assigns her. The biggest obstacle to such an approach is the public-school establishment, and it is time for the establishment to get out of the way.

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140. BRINIG & GARNETT, *supra* note 137, at 165.

141. Between 1999 and 2015, for example, enrollment in Islamic schools more than doubled, growing by 125 percent, and enrollment in Jewish schools grew by 68 percent. Nat'l Ctr. for Educ. Stats., *School Choice in the United States: 2019*, U.S. DEP'T OF EDUC. 67 tbl.3.5 (2019), https://nces.ed.gov/pubs2019/2019106.pdf [https://perma.cc/JY6S-8NVS]. "In fall 2015, of the 34,600 private elementary and secondary schools in the United States, 20 percent were Catholic schools, 12 percent were conservative Christian schools, 9 percent were affiliated religious schools, 26 percent were unaffiliated religious schools, and 33 percent were nonsectarian schools." *Id.* at 20. "[S]chools with nine religious affiliations accounted for 69 percent of the total private elementary and secondary school enrollment, and each of these types of schools enrolled 50,000 or more students: Roman Catholic (2,082,700 students), Christian, no specific denomination (876,400 students), Jewish (334,400 students), Baptist (239,200 students), Lutheran Church — Missouri Synod (158,300 students), Episcopal (103,700 students), Amish (68,800 students), Presbyterian (56,100 students), and Seventh-Day Adventist (53,300 students)." *Id.* at 26.