

A Critique of School Choice, Substantive Neutrality, and Modern Religious Jurisprudence

Thesis Submitted in Partial Fulfillment
of the Requirements
of the Jay and Jeanie Schottenstein Honors Program

Yeshiva College

Yeshiva University

February 2024

Shalom Lefkowitz

Mentor: Professor Douglas Burgess, History

Introduction

In April of 2024 the New Jersey Senate proposed the Student Support Act¹, a bill intending to allocate some tens to hundreds of millions of tax dollars toward the instruction of K-12 students of “diverse” backgrounds attending “public and nonpublic schools.”² Critics of the act have described it as essentially implementing a voucher program, one of the many forms assumed by School Choice.³ School Choice is a broad term for state policies that subsidize educational alternatives to Public schools.⁴ The discourse around School Choice has gained increasing political relevance, with some of its fiercest proponents hailing from religious communities. While historically the government has steered away from sponsoring religious indoctrination of any kind,⁵ recent legal theories and Supreme Court rulings have shifted that once-hardline stance. In 2022 the Supreme Court issued the landmark *Carson v Makin* ruling, which rendered unconstitutional a Maine law precluding the application of vouchers to sectarian schools. The Court reasoned that this discriminated against religious parents and schools, depriving them of funding enjoyed by secular peers and therefore violating the Free Exercise clause. This ruling, although seemingly radical⁶, is in fact grounded in decades of incremental shifts in precedent and the publication of innovative legal theories. One of the keystones to this legal rearrangement has been the theory of Substantive Neutrality, which obliges the government to minimize its influence on religious choices. However, the premises of Substantive Neutrality have gradually been corrupted, coming to justify an undue favoritism towards religion in education.

In this essay I will first describe the relevant history, background, and details of education in the United States vis a vis School Choice and religious schooling. Next I will evaluate the government’s interests in providing public education, the extent to which religious education

¹ SB 3035 NJ 2024 <https://legiscan.com/NJ/bill/S3035/2024#:~:text=%22New%20Jersey%20Student%20Support%20Act,to%20certain%20nonpublic%20school%20students>.

² *Parents for New Jersey Student Support Act*, 2024. <https://www.parentsfornjstudentsupportact.com>

³ Dan Difilippo. April 4 2024. “‘School Choice’ Bill is Effort to Create a Voucher Program in New Jersey, Critics Say”. New Jersey Monitor. <https://newjerseymonitor.com/2024/04/04/school-choice-bill-is-effort-to-create-a-voucher-program-in-new-jersey-critics-say/>

⁴ Anayat Durrani, *What School Choice is and How it Works*. US News & World Report. April 14, 2023. <https://www.usnews.com/education/k12/articles/what-school-choice-is-and-how-it-works>

⁵ David Sehat, *The Myth of American Religious Freedom*. Oxford U.K: Oxford University Press, Ann Arbor, Michigan: MPublishing, University of Michigan Library. (2011).

⁶ Ian Millhiser, *The Supreme Court Tears a New Hole in the Wall Separating Church and State*. Vox. June 21, 2022

satisfies those interests, and the resulting implications on arguments which divert public funding toward religious schools. After that I will discuss the incentives provided through religious exemptions, influencing religious choices in opposition to the principles of Substantive Neutrality—although with its proponents’ approval. Finally I will look at the recent Arizona School Choice program as a case study to extrapolate potential outcomes associated with School Choice’s convergence with Substantive Neutrality.

I. Background

Despite advancements and reforms in federal social welfare programs in the 1940s and early 1950s⁷, inequality persisted. Racial segregation in housing, commerce, and education ran largely unchecked, leaving black communities at tremendous social and economic disadvantages.⁸ In 1954, the Supreme Court famously deemed segregation in schooling unconstitutional in *Brown v Board of Education* because, “separate educational facilities are inherently unequal.”⁹ In the context of the nascent Civil Rights movement, education was understood to be a key avenue for integration. Actually implementing desegregation, however, was no simple feat.

The emergence of School Choice in politics provided a means for Southern states to maintain segregated schools, obstructing efforts toward scholastic desegregation.¹⁰ Policy-makers argued that *Brown* simply required offering every child, regardless of race, the option to attend either Black or white schools. This interpretation permitted the exploitation of de facto realities and loopholes in order to skirt integration. For example, transportation of black children to schools in distant, predominantly white, neighborhoods was often left unprovided and unsubsidized. This led most Black parents to “choose” to keep their children at local, underfunded schools. Even when transportation was included, demographic realities tempered Black parents’ willingness to send their children to schools where they would face bullying from

⁷ E Berkowitz, K McQuaid. *Welfare Reform in the 1950s*. The Social Service Review. <https://pubmed.ncbi.nlm.nih.gov/10297797/>

⁸ A&E Television Networks. (n.d.). *Segregation in the United States – Meaning, Facts, & Legacy*. History.com. <https://www.history.com/topics/black-history/segregation-united-states>

⁹ Warren, E. & Supreme Court Of The United States. (1953) U.S. Reports: *Brown v. Board of Education*, 347 U.S. 483.

¹⁰ Bruce Fuller Ed., Richard Elmore, Ed. *Who Chooses? Who Loses? Culture, Institutions and the Unequal Effects of School Choice* (Sociology of Education Series). Teachers College Press, 1234 Amsterdam Ave., New York, NY 10027. June 15, 1996

peers and discrimination from faculty. Practically no white parents sent their children to black schools.¹¹ The U.S. Civil Rights Commission reported that “freedom of choice was preserving segregation and placing the entire burden for small-scale change on black students and their families.”¹²

Despite impediments and setbacks, integration efforts persisted through the 60s, when the burgeoning Civil Rights Movement spurred further educational reforms aimed at addressing disparities. In 1965 President Lyndon B. Johnson instituted the first official federal funding scheme for public education. The Elementary and Secondary Education Act, or ESEA, was part of Johnson’s broader War on Poverty and intended to serve low-income students in order to help close the achievement gap.¹³ This policy, alongside other federal endowment programs, have since served to incentivize compliance with anti-discrimination legislation. Eligibility for federal—and most state—grants are often conditioned upon a school’s adherence to anti-discrimination policies. Still, for years white populations organized “segregation academies”, private schools shielded from integration laws.¹⁴ However, by 1976, these academies lost their legal status.¹⁵ As School Choice’s became less politically viable for maintaining segregation, its association with segregation faded.¹⁶

By the 1980s School Choice resurged as a significant issue. The Reagan administration proposed significant cuts to federal education spending and promoted the idea of school vouchers as a way to enhance parental choice and competition between schools. A major factor contributing to the renewed support for School Choice was the publication of *A Nation At Risk*, an alarmist report on public education in the United States. It warned that the United States’ system was flailing as students lagged behind other countries in vital economic and academic benchmarks.¹⁷ School Choice was one of a few proposed solutions to the supposed pedagogic

¹¹ Ibid

¹² Ibid

¹³ *History and Background: School Finance*. ewa.org. (2024, March 8).

<https://ewa.org/issues/early-learning/history-and-background-school-finance>

¹⁴ Time. (1975, December 15). Education: Segregated Academies.

<https://time.com/archive/6817240/education-segregated-academies/>

¹⁵ *Runyon v. McCrary*, 427 U.S. 160 (1976), ruling that private schools discriminating on the basis of race are in violation of federal law

¹⁶ Fuller & Elmore, *Who Chooses? Who Loses?*, page 6

“By the 1980s, political conservatives had successfully detached the broadening debate over choice from the more painful desegregation issue. Yet at the local level choice was still deeply intertwined with the persisting question of how to reduce race-based inequity.”

¹⁷ Kevin R. Kosar. (2011). *Ronald Reagan and Education Policy*. Studies In Governance and Politics. April 12, 2011

crisis. This approach likened the education sector to the Free Market, with government intervention stunting the organic system of supply and demand. Greater competition would theoretically force schools to improve and become more responsive to parental directives, while parents would have a greater say in what and how their children were taught. Bureaucrats, politicians and meddlesome teachers with their respective agendas were scapegoated as the source of America's supposed academic failings. School choice was positioned as cutting these meddlesome middlemen out of the educational process. Although *A Nation At Risk's* methodology and conclusions were challenged or debunked, it activated and polarized the politics of education in a profound and new way. *A Nation At Risk's* legacy remains influential to this day, representing a turning point in how education was viewed, now with an emphasis on economic components, ramifications, and models.^{18 19}

The 90's were a tumultuous period for both education policy and religious jurisprudence. In 1990, the Supreme Court issued the *Employment Division v Smith* decision, which introduced a new test for determining the constitutionality of a law affecting religious freedom. The Court concluded that, in order to pass muster, a law must be religiously neutral²⁰ and generally applicable. In other words, the law cannot be interpreted as targeting religion in any way, whether by explicit language or its disparate application to religious entities. If the law fails these criteria, it triggers a strict scrutiny analysis and must therefore serve to further a compelling state interest in the narrowest possible manner.²¹ If the law fails strict scrutiny then it violates the Free Exercise clause and must be struck down or amended.

In the same year as the *Smith* decision, Professor Douglas Laycock published an influential article on religious neutrality.²² The neutrality mandated by the constitution's religion clauses, and referenced in *Smith*, may be interpreted in various ways. Laycock outlines three:

¹⁸ For background into the development of a new perspective on education spurred by Milton, see Nancy MacClean. *How Milton Friedman Aided and Abetted Segregationists in His Quest to Privatize Public Education*. Institute for New Economic Thinking. September 27, 2021. Also, see Jeffrey Henig, *Who Chooses? Who Loses?*, page 100: "The groundwork laid by Martin Friedman in *Capitalism and Freedom* (1962) came to fruition in the 80s, when the association between school choice and free market theorists grew tighter and more explicit."

¹⁹ *Infra* note 88

²⁰ *General Principle of Government Neutrality to Religion*. Congress.gov. (n.d.). https://constitution.congress.gov/browse/essay/amdt1-3-1/ALDE_00013071

²¹ *Strict Scrutiny*. Legal Information Institute. (n.d.). https://www.law.cornell.edu/wex/strict_scrutiny#:~:text=Strict%20scrutiny%20is%20often%20used.law%20to%20achieve%20that%20interest

²² Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990)

formal neutrality, substantive neutrality, and disaggregated neutrality. Formal neutrality refers to the government's complete non-consideration of religion, also described as category neutrality.²³ On the other hand, substantive neutrality focuses on outcomes when examining legislation that may implicate religion. This could be understood as incentive neutrality, because when upshots are neutralized, citizens' incentives to behave more or less religiously are leveled out. This has also been articulated as the minimal encouragement or discouragement of religion and non-religion, thereby maximizing individuals' religious volunteerism.

The two practical considerations when comparing these modes of neutrality are *benefits* and *burdens*. Benefits might include tax credits, participation in funding schemes, or government subsidies. Burdens may include government regulations that forbid or impede religious practice (whether deliberately or incidentally). Formal neutrality demands that the government bestow upon religious entities benefits and exemptions identical to those received by counterparts of other religious—or non-religious—affiliation. This is due to formal neutrality's rejection of any categories that would differentiate religion in the law. Substantive neutrality, on the other hand, demands that religious entities receive the appropriate benefits and exemptions relative to other religious or non-religious groups, in order to minimize government influence on religious choice.²⁴ Laycock's typology also includes a third mode, disaggregated neutrality, in which a legislative or judicial body inconsistently applies both formal *and* substantive neutrality depending on the context. According to Laycock, this approach often neglects a vital comparison between the impacts of a policy's existence and its absence respectively.

The 1990s also saw the propagation of School Choice experiments and programs. The first charter school law was passed in Minnesota in 1991, and since then most states have adopted similar legislation.²⁵ Charter schools are publicly funded but operate with greater flexibility than traditional public schools, with admissions determined by random selection from

²³ In that the law recognizes no religious categories. Other scholars have independently developed similar typologies using this term

²⁴ Laycock, *Formal, Substantive, and Disaggregated Neutrality*, page 1005

“More important, substantive neutrality requires a baseline from which to measure encouragement and discouragement. What state of affairs is the background norm from which to judge whether religion has been encouraged or discouraged? This question also requires judgment; there is no simple test that can be mechanically applied to yield sensible answers.”

²⁵ *The NCES Fast Facts Tool Provides Quick Answers to Many Education Questions* (National Center for Education Statistics). National Center for Education Statistics (NCES) Home Page, a part of the U.S. Department of Education. (n.d.). <https://nces.ed.gov/fastfacts/display.asp?id=30>

a lottery.²⁶ Other experimental initiatives with vouchers were beginning in Milwaukee and Ohio. These programs showed variable success depending on different metrics of academic output and social impact, with directed or controlled choice projects showing the least signs of segregation.²⁷ These choice programs allow a degree of parental autonomy in enrollment, but not absolute independence. This might include administrators regulating admissions to mediate excessive racial clustering, or schools actively marketing themselves to appeal to multiple ethnic groups. Conservative policy-makers broadcasted the results of the experiments with relatively integrated outcomes without the premises that facilitated said outcomes,²⁸ in order to advance more laissez-faire models of School Choice.

By 2002, the Supreme Court permitted religious private schools' inclusion in eligibility for an Ohio voucher program.²⁹ This was at least in part due to the limited efficacy of a program which was reserved for non-sectarian schools—representing a small fraction of private schools overall—whose costs often dwarfed the subsidies provided through the vouchers. Folding religious schools into the program increased the number of schools eligible for vouchers by nearly fourfold, schools whose tuition left far fewer costs to be paid by parents out-of-pocket.³⁰ Despite friction in debates about separation of Church and State, school choice programs continued to spread throughout different states through the 2000s. In addition to charter schools and voucher programs, states also began issuing tax credits for parents who sent their children to private schools.³¹ The beginning of the 2000s also saw the passage of George W. Bush's No Child Left Behind Act, a significant federal education policy that aimed to improve educational outcomes by increasing standards and accountability. The law required states to test students annually in reading and math, and it imposed penalties on schools that did not meet performance

²⁶ *Understanding Charter Schools vs. Public Schools*. (n.d.-e).

<https://www.usnews.com/education/k12/articles/understanding-charter-schools-vs-public-schools>

²⁷ Fuller & Elmore, *Who Chooses? Who Loses?*, chapter 5

²⁸ *Ibid*, page 99: "Like most of the nation's first generation of magnet programs, the Montgomery County magnet program was initiated as a managed choice program (Henig 1989); its roots lay in a vision of proactive governance, not benign laissez faire....Accordingly, most advocates of a market-based choice system have adopted the racial neutrality thesis. But they have not hesitated to appropriate the experience of programs like that in Montgomery County to buttress their argument that choice and integration can be complementary."

²⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

³⁰ Danny Cohen-Zada and Moshe Justman. *The Religious Factor in Private Education*. Occasional Paper No. 53, National Center for the Study of Privatization in Education. Teachers College, Columbia University. July 2002.

³¹ Christina Cooke Fairbanks. *History of Parent-Driven Education: Part 6 – Vouchers, ESAS and Pre-Pandemic Private-School Choice*. Sutherland Institute. April 15 2024. <https://sutherlandinstitute.org/history-of-parent-driven-education-part-6-vouchers-esas-and-pre-pandemic-private-school-choice/#:~:text=Much%20like%20public%20charter%20schools,other%20private%20education%20choice%20programs>

benchmarks.³² The trend of creating unified national education benchmarks continued to characterize the 2010s with the Common Core State Standards Initiative, directed at achieving consistent and high standards across states.³³

However, the Common Core initiative faced criticism and resistance in various states due to concerns about federal overreach and a one-size-fits-all approach.³⁴ Mistrust in educational bureaucracy, the declining dominance of white-middle-class narratives in public education, and the shrinking employment dividends of secondary education continued to grow and breed disillusionment in public school systems.³⁵ This boosted School Choice's popularity, with the 2020s seeing the largest leaps in School Choice policy and State funded religious education.

In 2022, Arizona launched the boldest Choice program thus far in the form of universal educational savings accounts (ESAs). ESAs are essentially lump sums awarded to parents to spend on their child's education at their discretion, from private school tuition to homeschooling materials. Also in 2022, a series of Supreme Court decisions³⁶ culminated in the *Carson v Makin*. The ruling expanded the *Zelman* decision such that including religious academies in School Choice programs was not merely permissible, but mandatory. The year prior, in a symposium alongside colleague Thomas Berg, Laycock said:

“In the context of government benefits, the basic constitutional principles point in the same direction: forbidding government from favoring either religious choices or secular choices. That promotes neutrality in the ‘formal’ sense: giving aid on a religion-blind basis, i.e., without religious classifications. It also embodies voluntarism, or neutrality in the ‘substantive’ sense: i.e., creating neutral incentives that neither discourage nor encourage individuals’ religious choices. Offering benefits but withholding them if the recipient chooses a religious [educational] provider creates a powerful incentive against religious exercise.”³⁷

³² Alyson Klein. *No Child Left Behind: An Overview*. Education Week. March 13 2024. <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>

³³ Catherine Gewertz. *The Common Core Explained*. Education Week. April 4, 2024 <https://www.edweek.org/teaching-learning/the-common-core-explained/2015/09>

³⁴ Stan Karp. *The Problems with the Common Core*. Rethinking Schools. June 1, 2020. <https://rethinkingschools.org/articles/the-problems-with-the-common-core/>

³⁵ Fuller & Elmore, *Who Chooses? Who Loses?*, chapter 1

³⁶ Namely, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. (2017) and *Espinoza v. Montana Department of Revenue*, 591 U.S. (2020)

³⁷ Thomas Berg & Douglas Laycock, *Symposium: Espinoza, Funding of Religious Service Providers, and Religious Freedom*, SCOTUSBLOG (Bold and brackets my own)

This approach is difficult to reconcile with the United States' current reality, which sees billions of tax dollars devoted to religious indoctrination.³⁸ Even public schools are no longer safe from sectarianism, as numerous states have passed laws to impose the Ten Commandments³⁹, bible readings⁴⁰, and ministerial counselors⁴¹ onto public school students. It would appear that Substantive neutrality's imperative to "maximize religious volunteerism" has gradually evolved into a body of law that favors religion in education. This is unsurprising when considering the logical and factual mechanics underlying both School Choice and Substantive Neutrality.

II. Evaluating State Interests in Education & Religious Schooling

In religious jurisprudence, substantive neutrality has borne out what scholars have referred to as the Most Favored Nation (MFN) doctrine. According to the MFN doctrine, religious entities must be treated at least as well as any secular counterparts by a given law.⁴² Thus, if any secular institution receives an exemption from a law, or inclusion in a funding scheme, then its religious analogs must receive identical treatment. It is under the auspices of this doctrine that substantive neutrality has come so far in securing public funding for religious education. If secular private schools are eligible for vouchers and other School Choice programs, then religious schools must be too. However, one analytic component of the MFN doctrine has come to be severely overlooked, its comparability criterion.⁴³ Recall that the reasoning that girds the *Smith* test, Substantive Neutrality, and MFN is to prevent government targeting—whether incidentally or deliberately—of religious practice. Therefore, to trigger a strict scrutiny analysis, a secular exception must implicate the law's interest in a comparable manner to the complaining

³⁸ *Billions in Taxpayer Dollars Now Go to Religious Schools Via Vouchers*. The Washington Post. June 3, 2024.

<https://www.washingtonpost.com/nation/2024/06/03/tax-dollars-religious-schools/>

³⁹ Kevin McGill & Sara Cline. *New Louisiana Law Requiring Classrooms to Display Ten Commandments Churns Old Political Conflicts*. AP News. June 21, 2024.

<https://apnews.com/article/tn-commandments-louisiana-schools-religion-99b86fff51932374993c45ab3f0555c9>

⁴⁰ Sean Murphy. *Oklahoma State Superintendent Orders Schools to Teach the Bible in Grades 5 Through 12*. AP News. June 27, 2024.

<https://apnews.com/article/oklahoma-bible-schools-religion-ryan-walters-d15be2f74df2ffbbdfdc549569d06c4e>

⁴¹ *The Florida Senate*. House Bill 931 (2024) - The Florida Senate. (n.d.).

<https://www.flsenate.gov/Session/Bill/2024/931>

⁴² Faraz Sanei. *Reclaiming Establishment: Identity and the 'Religious Equality Problem'*. University of Kansas Law Review, 71(1), 1-76. 2022.

⁴³ Hlr. "A Law Unto Himself": *Free Exercise, (Un)equal Value, and the Future of Public Accommodations*. Harvard Law Review. March 11, 2024.

<https://harvardlawreview.org/print/vol-137/a-law-unto-himselfemp-div-v-smith-494-u-s-872-879-1990-quoting-reynolds-v-united-states-98-u-s-145-167-1879-free-exercise-unequal-value-and-the-future-of-public/>

religious party. If secular and religious entities respectively satisfy the interest of a neutral, generally applicable law in different ways, then their differential legal treatment presents no danger of “targeting” religion. In other words, there are instances where the exception of a religious entity from a law impedes the law’s interest, while a secular exemption aligns with the state interest. In that case, the secular and religious entities are not comparable, and the MFN does not apply. Given this condition, government interests in public education must be identified, along with how/whether different educational alternatives satisfy those interests.⁴⁴

With federal, state and local governments together paying around \$878.2 billion annually on public education,⁴⁵ one would expect multiple important aims to be accomplished. Although not recognized as a national right,⁴⁶ almost every state constitution ensures some form of K-12 public schooling. Nearly all 50 explicitly declare “public” or “common” in their prescriptions of State schooling, with about half mentioning that the education should be openly accessible and uniform, and a similar proportion discussing the gratuity of the education.⁴⁷ This is noteworthy because “public” may be interpreted—or emphasized—as meaning either costless or universally accessible.

These two interpretations also bear upon parallel interests of public education, illuminating a dual value to society. The first is economic in nature, encompassing advancements in opportunity, employability, health, and reduced chances of criminality for its beneficiaries.⁴⁸ Private schools may indeed provide the same or greater value than public schools on this axis of educational merit. However, there is another to consider. The nation’s founders and the authors of state constitutions promoted public education due to its profound democratizing power.⁴⁹ They argued that a functioning democracy requires an informed, civil, and educated electorate accustomed to the decorum and discourse embodied at educational institutions. School attendance has been shown through study after study to significantly strengthen civic participation and social cohesion.⁵⁰ On the other hand, educational inequality is shown to

⁴⁴ Sanei, *Reclaiming Establishment* & Harvard Law Review, “A Law Unto Himself”

⁴⁵ Melanie Hanson. *U.S. Public Education Spending Statistics*. EducationData.org, July 14, 2024.

<https://educationdata.org/public-education-spending-statistics>

⁴⁶ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)

⁴⁷ <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>

⁴⁸ Dana Mitra. *The Social and Economic Benefits of Public Education*. (n.d.-e).

https://www.elc-pa.org/wp-content/uploads/2011/06/BestInvestment_Full_Report_6.27.11.pdf

⁴⁹ *History and Evolution of Public Education in the US*. Center on Education Policy. (n.d.-d).

<https://files.eric.ed.gov/fulltext/ED606970.pdf>

⁵⁰ Mitra, *Benefits of Public Education*, pages 22-25

increase mistrust in both democratic institutions and fellow citizens.⁵¹ According to this metric of education, the more privatized and exclusive a school is, the more it diverges from the government interests of democratization and social cohesion. But not all private schools diverge from public education and its interests in the same way, to the same degree.

While secular private schools are not “open to the public” and require tuition, they are ultimately prohibited from considering applicants’ identities. If they do, they are liable for lawsuits and disqualification from certain federal and state funding.⁵² In this sense, non-sectarian private schools are at least theoretically accessible to anyone who can meet the academic and monetary prerequisites. While socio-economic inequalities—and resultant disparities in parental ability to help children with homework or employ tutors—may select for certain identities in secular private schools, this is not officially pursued by those schools or sanctioned by the government. However, the same cannot be said for religious schools, which are legally permitted to discriminate on the basis of race, religion, sexual orientation, and gender.⁵³ It is for this reason that religious schools do not satisfy the state interest of education in a manner comparable to public schools—or even non-sectarian private schools.

The substantive neutrality and MFN arguments for religious schools’ inclusion in public funding schemes rests on their comparability with non-sectarian counterparts who are eligible for funding. They are indeed comparable in one sense, that they provide at least similar opportunities for economic attainment and mobility.⁵⁴ This approach accords with Milton Friedman’s utilitarian, economic vision of schooling which has come to dominate American educational discourse in the form of a pre-vocational tunnel vision.⁵⁵ Under this individualized perspective, it makes sense why private schools—and religious schools alongside them—would merit inclusion in public funding schemes. Based on these premises, religious schools’ exclusion from funding

⁵¹ Ibid, page 30

⁵² See the exemptions to Title VI of the Civil Rights Act of 1964 prohibiting discrimination based on race, color, or national origin in admissions, hiring, and other areas, and Title IX of the Education Amendments of 1972 prohibiting discrimination based on sex in education programs and activities, and Section 504 of the Rehabilitation Act prohibiting discrimination based on disability, including the placement of students in segregated classes or facilities

⁵³ *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 US __ (2020)

⁵⁴ Mitra, *Benefits of Public Education*

⁵⁵ Jennifer C. Berkshire, Jack Schneider. *Why “Fund Students, Not Systems” is a Recipe for Disaster*. The Nation. June 18, 2024. <https://www.thenation.com/article/society/public-schools-choice-vouchers-privatization/>, and see Wilson, *Racialized Religious School Segregation*

eligibility would function as a penalty on a religious choice, requiring the expansion of the program to encompass religious schools.

However, as established above, this presumption of comparability is incomplete. It neglects the important structural, societal implications and interests involved in public education. Parochial schools do not offer the same accessibility, social cohesion and democratic facilitation as any non-sectarian school—public or private. These schools’ inherent religious particularism, along with their legal permission to discriminate, set them apart from any other kind of education. Their incomparability and disappointment of the state interest in education would disqualify religious schools from receiving public funding on the same grounds as schools that do satisfy the state interest. This incomparability—and its neglect by Substantive Neutrality advocates—remains pertinent when discussing specific problems associated with funding religious education.

In addressing critics of Substantive Neutrality, Professor Laycock responds to Noah Feldman and issues with the direction of public tax dollars toward religious indoctrination. Feldman broadly divides the American electorate into “values evangelists” and “legal secularists.”⁵⁶ The former group represents a loose coalition of religious communities bound together by traditionalism and common political ends. The latter group is defined by their commitment to religious neutrality in the law, although in practice secularism runs counter to most religious political aims.⁵⁷ Feldman’s proposition to achieve neutrality essentially boils down to a compromise between these two ideological camps: greater religious pomp and acknowledgement in the public sphere as well as minimal public money spent toward religion. This supposedly satisfies the foremost priorities of each group, with legal secularists granting more religious aesthetics because they get to “win” on finances. In challenging this position, Laycock argues that legal secularists actually ought to be content with the distribution of public monies to religious schools. Although their taxes would pay for the indoctrination of their opponents’ ideology, the inverse is also true; religious folks pay taxes paying for non-sectarian education they disagree with. This means that ultimately a sort of equilibrium is achieved.⁵⁸

⁵⁶ Douglas Laycock. *Substantive Neutrality Revisited*. 110 W. Va. L. Rev. (2007). Available at: <https://researchrepository.wvu.edu/wvlr/vol110/iss1/9>

⁵⁷ Noah Feldman. *Divided by God: America’s Church-State Problem--and What We Should Do About It*. Farrar, Straus and Giroux. 2013.

⁵⁸ Laycock, *Substantive Neutrality Revisited*, page 2007:

“Any grievance on behalf of the taxpayer is further ameliorated by the fact that his money is spread, on an equal opportunity basis, across schools teaching a wide range of views. His money goes to schools he supports as well as

This response assumes a compartmentalized perspective, neglecting religious schools' exclusivity. A tax-payer's objection to funding religious education is not simply that they disagree with *what* is being taught, but also limitations imposed on *who* is eligible for the education that they are funding. Even if religious individuals may not want their children to attend public schools or secular private schools, they retain the choice. Secularists, on the other hand, *do not* necessarily have the option to send their children to religious schools that their taxes have paid for. In other words, funding religious education funnels public monies into organizations that are entirely insulated from the public's say or interest. Secular private schools receive government funding and grants, and are viable for state vouchers because they are completely subject to the State's laws, including those that bar entry on an identity basis. The same is not true for religious schools, which are largely shielded from audits and discrimination lawsuits.

The Free Exercise clause has been leveraged to fund religious schools through filters of Court precedent, Substantive Neutrality, and MFN doctrine. This is problematic because sectarian schools are actually not comparable to non-sectarian ones with respect to their fulfillment of the legislative language and intent guaranteeing public education. These schools' incongruence with secular counterparts centers primarily around their relative inaccessibility, which fails to promote democratic participation and civic tolerance to the same extent as other schools. This incomparability remains ignored when only ideological challenges—and not participational objections—to funding religious schools are acknowledged.

III. The Contradiction of Categories in Substantive Neutrality Theory

In addition to religious schools' incomparability with non-sectarian schools are the inconsistencies within Substantive Neutrality's application. The key issue is that introducing categories *inherently* creates incentives and disincentives. This principle is readily accepted in the context of conditions on benefits, but when it comes to exemptions, categories seem fairly tolerable. This contradiction is especially relevant in the context of education, where there is a simultaneous rejection of categories that would block aid to religious schools and an assertion of

to those he opposes, and the schools he supports also get taxes from his ideological enemies. The ideological benefit and burden to each taxpayer is small to begin with, and it tends to balance out.”

categories that provide religious schools with exemptions. This asymmetry is justified because it supposedly minimizes the government's influence on religious choices. However, even exemptive categories may provide advantages that constitute an encouragement of religion in certain contexts. This becomes clearer when analyzing a recurring example in Laycock's writings on the subject of neutrality: Catholic and Jewish sacramental exemptions from Prohibition-era alcohol bans.⁵⁹

Laycock argues that formal neutrality—foregoing religious categories and therefore religious exemptions—would have placed a substantial burden upon worshippers' religious volunteerism. Wines used for sacraments, *kiddush* rituals, and other religious ceremonies would have been banned, forcing adherents to either break the law or defy their religion. The more substantively neutral alternative was a religious exemption, which had a comparatively negligible impact on religious volunteerism.⁶⁰ However, historically-speaking, this was simply not the case. It is documented that the Prohibition-era actually saw a marked rise in the amounts of sacramental wine required by churches, which “increased by millions of gallons a year.” Many people took advantage of rabbinic exemptions and “congregations” with “rabbis” began pouring from the masses, with no clear way of determining who was sincerely Jewish.⁶¹ From this instance it is clear that regulatory exemptions from Prohibition encouraged religious identification as Jewish or Catholic. While this is not to argue against said exemptions, it is still important to point out where exclusions may serve to sway citizens' religious decision-making. Shifting this concept back to the educational sphere, Professor Laycock concentrates on funding schemes and their impact on religious volunteerism. What remains under-explored are what factors motivate parents to send their children to the schools they do, as well as the impact *exemptions* have on educational religious volunteerism.

⁵⁹ Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, page 1000

⁶⁰ *Ibid*, page 1016:

“As I have already noted with respect to Prohibition, a law that penalizes religious conduct discourages religion. The discouragement is often severe, as when the penalty is criminal punishment [...]. But in many of the cases, an exemption for conscientious objectors **has only a de minimus tendency to encourage any aspect of religion**. The exemption is substantively neutral; the lack of an exemption is not.”

⁶¹ *American Prohibition Law: Fake Rabbis and Other Loopholes*,

<https://about.proquest.com/en/blog/2018/american-prohibition-law-fake-rabbis-and-other-loopholes/>

<https://www.nytimes.com/1922/10/15/archives/new-rules-govern-sacramental-wine-are-more-stringent-in-attempt-to.html?searchResultPosition=1>

Pelz and den Dulk⁶² evaluate two theories of parental choice concerning enrolment in religious schools. The first formulation—called the social identity theory—posits that parents are driven to send their children to schools that reflect their denominational affiliation, both ideologically and demographically, in order to preserve their children’s association with their sect. The second—called the secular goods theory—contends that there are other factors of sectarian education that draw in parents who are unaffiliated with the school’s specific faith tradition. A study of trends in the “market shares” of overall student population registered in different types of private and religious schools between 1990 and 2011 considered School Choice policies, religious affiliation, religiosity, and socioeconomic variables. The results showed modest evidence for the social identity theory, but even more data supporting the secular goods theory.⁶³ A significant portion of the shifts associated with the secular goods theory can be attributed to a rise in a religiously-unspecific traditionalism, which de-emphasizes particular denominational teachings in favor of a more general religious environment. However, there are certain “secular goods” that seem to exist completely independent of religion, such as “the religious work ethic (Feess, Mueller, and Ruhnau 2014), religion’s capacity to instill an internal locus of control (Garner and Cole 1986; Johnson 1992), and the relationship between religiosity and discipline, particularly in avoiding behaviors damaging to academic achievement.” According to the National Center for Education Statistics, “only 38 percent of students in private religious schools had parents who indicated that the religious orientation of the school was very important when choosing a school.”⁶⁴ They claim that the strong moral foundation and focus on character building that is unique to religious private schools is a major appeal, even for those parents without a specific religious affiliation. Academically speaking, a meta-analysis that included ninety studies found “that attending private religious schools is associated with the highest level of academic achievement among the three school types [public, secular private, religious private], even when sophisticated controls are used to adjust for a variety of factors, including socioeconomic status, race, gender, and selectivity.”⁶⁵ Religious schools “place a high

⁶² Mikael L. Pelz and Kevin R. den Dulk. *Looking Within or Reaching Out?: The Effects of Religion on Private School Enrollments in an Era of School Choice*. *Politics and Religion*, 11 (2018), 79–115. © Religion and Politics Section of the American Political Science Association, 2017 doi:10.1017/S1755048317000499 1755-0483/18. Calvin College

⁶³ Ibid page 105, “Our models yield more evidence for the secular goods theory. Private schools are increasingly drawing from a larger pool of consumers with no direct religious ties to these schools.”

⁶⁴ *Why Do So Many Parents Choose Private Religious Schools?*. Noah Webster Educational Foundation. October 2, 2023. <https://nwef.org/2022/02/26/why-do-so-many-parents-choose-private-religious-schools/>

⁶⁵ Ibid

premium on a moral code” which means that many activities parents may find undesirable are more policed than at secular counterparts. While it is clear that religious schools are already incredibly appealing to parents—even for non-religious reasons—what remains obscure is the degree to which their appeal can be traced to government policies.

As discussed above,⁶⁶ religious private schools have unparalleled authority in selecting their student bodies, far more than even non-sectarian private schools. Exemptions from laws prohibiting discrimination by religion, sex, and race, grant them incredible associational freedom.⁶⁷ Even when individual intent and overt racial bias is disregarded, School Choice has been consistently shown to lead to segregation.⁶⁸ School Choice proponents often rely on a racially neutral Free Market model, meaning that “preferences and needs for different types of schools are distributed among the population in a racially neutral pattern.”⁶⁹ Racially neutral assumptions do not consider the ethnic stratification of the United States’ social hierarchy and accompanying variation in different racial groups’ priorities—particularly when making educational choices.⁷⁰ Because of this reality, when schools participating in undirected School Choice programs cater to certain interests, they are also indirectly selecting for certain racial groups. The result is increased rates of segregation, which in recent years “have regressed to those seen in the late 1960s: 69% of Black students and 87% of White students attend a school where they are the predominant race.”⁷¹

Although racist sentiment is difficult to demonstrate empirically, racial politics and discourse are more easily tracked. The growing presence of diverse ethnic populations in the public school system has been disruptive to long-accepted standards and perspectives in education. There are now far more competing views and interests in the public school ecosystem than there was in a history largely dominated by the “white middle class agenda”⁷². As diversity—and commitments to honor it—have grown, tensions have inflamed over topics such as

⁶⁶ See footnote 52

⁶⁷ See Alfred Avins. *What is a Place of Public Accommodation*. Marquette Law Review, 52(1), 1-74. (1968). and Marc Rohr. *Association, Privacy and the Private Club: The Constitutional Conflict*. Harvard Civil Rights-Civil Liberties Law Review, 5(2), 460-471. (1970).

⁶⁸ Kalinda Ukanwa, Aziza C. Jones, Broderick L. Turner Jr. *School Choice Increases Racial Segregation Even When Parents Do Not Care About Race*. Proceedings of the National Academy of Sciences of the United States of America. 119(35):e2117979119. Aug 30, 2022. doi: 10.1073/pnas.2117979119. Epub 2022 Aug 22. PMID: 35994665; PMCID: PMC9436322.

⁶⁹ Fuller & Elmore, *Who Chooses? Who Loses?* page

⁷⁰ Ukanwa, Jones, Turner Jr. *School Choice Increases Racial Segregation*

⁷¹ Ibid, page 1

⁷² Fuller & Elmore, *Who Chooses? Who Loses?*

CRT and gender studies in education. While these issues are largely blown out of proportion⁷³, they are still perceived as important⁷⁴ by voters and political commentators. The growing consciousness of race, gender, and sexuality in public schools have pressed the discontented toward private options.

Socio-economic and political phenomena that contribute to segregation also intersect with and compound religious interests. Religious parents are influenced by social identity theory⁷⁵, which includes demographic clustering. One of their main priorities when deciding on a school is the religious makeup of the available schools, with parents tending to select educational environments that have higher proportions of coreligionists.⁷⁶ When many prominent faiths are at least somewhat correlated with specific cultures and races,⁷⁷ the inevitable consequence is further segregation.⁷⁸ A 2016 survey⁷⁹ showed that white students are disproportionately overrepresented at religious schools when compared to public counterparts; the opposite was true for hispanic students. While nonsectarian private schools also had slightly above-average numbers of white students, it was to a noticeably lesser degree when compared to the disparities at conservative Christian, affiliated religious, and unaffiliated religious schools.⁸⁰

As troubling as these patterns are in terms of segregation and inequality, they also challenge the premises of Substantive Neutrality through their encouragement of religion.

⁷³ Phil McCausland. *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*. July 1, 2021.

<https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945>

⁷⁴ Libby Stanford. *What Education Issues Did Voters Care About Most? Hint: It Was Not Critical Race Theory*. Education Week. December 20, 2022.

<https://www.edweek.org/policy-politics/what-education-issues-did-voters-care-about-most-hint-it-was-not-critical-race-theory/2022/12>

“But the political divide over those issues remains significant. More than 40 percent of voters still labeled fears of indoctrination, critical race theory, and LGBTQ agendas as a major factor in their election decisions, according to results from the poll.”

⁷⁵ Pelz & den Dulk. *Looking Within or Reaching Out?* page 85

⁷⁶ Danny Cohen-Zada, Moshe Justman. *The Religious Factor in Private Education in the United States*. In: Carvalho, JP., Iyer, S., Rubin, J. (eds) *Advances in the Economics of Religion*. International Economic Association Series. Palgrave Macmillan, Cham. 2019. https://doi.org/10.1007/978-3-319-98848-1_12.

⁷⁷ Michael Lipka. *The Most and Least Racially Diverse U.S. Religious Groups*. Pew Research Center. July 27, 2015. <https://www.pewresearch.org/short-reads/2015/07/27/the-most-and-least-racially-diverse-u-s-religious-groups/>

⁷⁸ Erika K. Wilson. *Racialized Religious School Segregation*. The Yale Law Journal Forum. November 17, 2022.

⁷⁹ *School Choice in the United States*: National Center of Education Statistics. 2019.

[https://nces.ed.gov/programs/schoolchoice/ind_03.asp#:~:text=Black%20students%20made%20up%20the,Catholic%20schools%20\(16%20percent\).](https://nces.ed.gov/programs/schoolchoice/ind_03.asp#:~:text=Black%20students%20made%20up%20the,Catholic%20schools%20(16%20percent).)

⁸⁰ Ibid, “This indicator groups private schools into the following five categories based on the school’s religious orientation: Catholic, conservative Christian, affiliated religious (schools that are affiliated with denominations other than Catholic or conservative Christian), unaffiliated religious (schools that have a religious orientation or purpose but are not affiliated with any specific denomination), and nonsectarian (schools that are not religiously affiliated).”

Parents' social identity motives, combined with religious communities' ethnic demographics, and parochial schools' license to discriminate result in schools that are more segregated. Whiter schools tend to enjoy greater resources,⁸¹ in turn pulling in non-religious parents who are motivated by the pursuit of “secular goods.” In this way, discrimination exemptions constitute an indirect, but significant, encouragement of religious choices. This is further apparent in the way religious schools are increasingly viewed as refuges from the political specter of radical teachings.⁸²

That being said, it could be argued that in this case the alternative to exemption—prohibiting religious schools from discriminating—would severely burden them and their religious practice. Indeed, they would not have the ability to pass on their religious traditions exclusively to whom they deem fit. It is reasonably assertable that the absence of such exemptions would discourage religion more than their presence encourages it. However, there is practically no literature that even seeks to evaluate and balance these considerations through a Substantive Neutrality framework. What is even more concerning than anti-discrimination exemptions are ones that more blatantly fail a Substantive Neutrality analysis, encouraging religion more than their absence would discourage it.

A major benefit received by clergy in the United States is the Parsonage tax-exemption. This was originally an income tax exclusion on housing provided to ministers in their 24/7 roles tending to their congregations. The exemption was expanded through the 20th century to include direct cash compensations for housing—rather than in-kind housing itself—as well as broadening eligibility for “ministers” whose specific role and relationship to the employing Church became much vaguer. The expansion of Parsonage far exceeded the bounds placed on housing tax exclusions for comparable employees of secular organizations. Legislatively speaking, these expansions coincided with other Cold War attempts to distinguish the United States from “godless” communists.⁸³ Modern-day defenders of Parsonage exemptions make sprawling claims about an overall, holistic “neutrality” achieved through Parsonage when examining the

⁸¹ Clare Lombardo. *Why White School Districts Have So Much More Money*. NPR. February 26, 2019. <https://www.npr.org/2019/02/26/696794821/why-white-school-districts-have-so-much-more-money#:~:text=%22For%20every%20student%20enrolled%2C%20the,primarily%20of%20students%20of%20color>.

⁸² Wilson, *Racialized Religious School Segregation*, page 625

⁸³ Adam Chodorow. *The Parsonage Exemption*. U.C. Davis Law Review. 51(3) 849-910, page 858. 2018.

entirety of the tax codes. However, this claim proves unfounded when actual, rigorous analyses of the tax codes are conducted.⁸⁴

The issues with Parsonage became more apparent through a series of cases involving colleges affiliated with the Church of Christ, which “designate[s] *all* adherents as ministers.” Employees at these colleges were filing for Parsonage exemptions on their taxes, far beyond expected numbers and roles. At Abilene Christian College, professors in secular subjects such as “English, History, Psychology, Music, and Physical Education,” filed as ministers, as did their Director of Business Services and Director of College Relations and Alumni. In *Jobe v. Commissioner* the IRS attempted to block a basketball coach at Oklahoma Christian College from claiming Parsonage exemption, but dropped the case before it went to trial. This is of particular relevance to a Substantive Neutrality analysis, which seeks to strike the balance of minimal encouragement/discouragement of religion and non-religion. While withdrawing the tax exemption might make it nominally harder for earnest ministers to make a living, the burden would be to no greater degree than what is already faced by comparable secular employees who’s housing compensations are taxed. That is to say, the government would not be discouraging the choice of a religious vocation any more than it discourages the choice of a non-religious job. On the other hand, the tax exemption arguably encourages non-religious teachers and faculty to teach at religious schools, where a significantly smaller share of their salary may be taxed. This in turn confers a benefit onto the religious institutions themselves, as “allowing these schools to offer professors, administrators, and even basketball coaches tax-free housing gives them a significant advantage when competing with other universities [...]” Despite the fact that revoking Parsonage laws would be Substantively Neutral, the exemptions remain extant and many Substantive Neutrality advocates remain silent.⁸⁵

Another important religious exemption is immunity from the purview of the NLRB. Since 1979⁸⁶ religious schools have had autonomy from labor laws protecting teachers’ ability to unionize and bargain for wages. Some have criticized the Court’s decision as overly aggressive in its avoidance of answering constitutional issues. Rather than providing a framework through which teachers at religious schools could bargain for wages in ways that do not infringe on

⁸⁴ Ibid

⁸⁵ Ibid. See *Ministers’ Compensation & Housing Allowance*. Internal Revenue Service. (n.d.-a). <https://www.irs.gov/faqs/interest-dividends-other-types-of-income/ministers-compensation-housing-allowance/ministers-compensation-housing-allowance>

⁸⁶ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)

religious sensibilities, the Court instead carved out a sprawling, larger-than-necessary exemption. Because of this broadness, the NLRB exemption currently enjoyed by religious schools also seems to fail a substantive neutrality analysis. Qualifications for the exemption, including publicly identifying as a religious institution, present significant business implications that may serve to deter exploitation by insincere opportunists. However, it is conceivable that skirting labor laws could outweigh the cons for at least some schools. While this is admittedly a relatively weak incentive for religious identification, the exemption's absence would present an even lesser discouragement of religion. That is to say, the current exemption precludes analyzing the religious entity's claimed burden and their religious sincerity—generally permissible judicial inquiries. If these inquiries were allowed, there would be ways to circumvent specific terms or engagements that are religiously offensive. For example, if a parochial school finds a health insurance plan that includes contraceptives to be religiously offensive, there is practically nothing teachers can do currently. Structured and mediated bargaining could result in terms that have the schools pay for a religiously benign benefit, such as dental insurance, in place of the contentious one. Because schools are exempt wholesale from this bargaining, regardless of the context or the details, they are able to retain money that would otherwise be spent on higher wages and extensive benefit plans. This advantages the exemption's beneficiaries far more than they would be burdened by the exemption's absence.⁸⁷

While independently the parsonage and NLRB exemptions are troubling enough, together they may contribute to lowering tuition at religious schools. Economist Caroline Hoxby estimates that Catholic elementary schools are, at least in part, “implicitly subsidized by teachers who are members of religious orders and accept minimal payment.” In surveys studying geographic breakdowns of religion and tuition spending, regions with higher proportions of Catholics were found to “have a larger share of teaching services donated by members of religious orders (worth 30 to 35 percent of costs).”⁸⁸

A faith component is undeniable in the acceptance of reduced wages at religious schools, but further inquiry into other contributing factors is limited.⁸⁹ Still, it is not outlandish to consider

⁸⁷ Charlotte Garden. *Religious Employers and Labor Law: Bargaining in Good Faith*, 96 *B.U. L. Rev.* 109 (2016). <https://digitalcommons.law.seattleu.edu/faculty/769>

⁸⁸ Caroline M. Hoxby. *What Do America's "Traditional" Forms of School Choice Teach Us about School Choice Reforms?* FRBNY Economic Policy Review. March 1998.

⁸⁹ National Center for Education Statistics (NCES). *The Patterns of Teacher Compensation*. Statistical Analysis Report. (1996). Page 54

how exemptions from union bargaining might work together with Parsonage tax exclusions to add another dimension to the situation. On the one hand, if religious schools were bound by the same labor laws as their secular counterparts, they would be forced to devote more of their budgets to teacher salaries and/or distributing employment benefits, in turn raising tuition prices. Additionally, Parsonage exemptions may lead a portion of teachers to be more willing to accept lower pre-tax salaries, as their net gains are cushioned by the tax exemption. In this way, exemptions for religious teachers and for religious schools would work in concert to reduce school spending on faculty salaries. These reduced expenditures would in turn contribute to the lower tuitions of religious schools compared to non-sectarian private schools. These exemptions could therefore be serving as indirect subsidies on religious education, incentivizing parents to select religious schooling over more expensive non-sectarian options.

Religious schools appeal to a diverse market of parents for a multitude of reasons. Many of these are due to qualities inherent to the schools and the communities that they serve, and voluntary decisions, independent of government policy. However, there are other advantages that religious schools have over non-sectarian ones that are directly tied to legislative and judicial stances. First, religious schools' exemption from anti-discrimination laws encourages religion due to the convergence of religious school's associational considerations and advantages with the inertia of segregative tendencies. The mechanics of segregation are compounding, with schools dominated by white and privileged students enjoying disproportionate amounts of resources, in turn attracting—and selecting for—more white people. In addition to this, exemptions from the NLRB and Parsonage tax exclusions may work in concert to help subsidize religious tuition costs. When religious schools are on average significantly cheaper than non-sectarian private options,⁹⁰ parents are influenced to select religious schools. Even when disregarding the obstacles in proving this tuitional encouragement, NLRB exemptions and parsonage exemptions individually do not pass Substantively Neutrality muster.

These incentives are particularly troubling when religious schools are made eligible for vouchers and other school choice programs. When government funding is “neutralized” across all schools, the remaining distinctions between them become sharper. Some of these

⁹⁰ Danny Cohen-Zada & Moshe Justman, *The Religious Factor in Private Education* (2002), “In Cleveland, a state-funded pilot voucher program gave low-income a choice between religious and nonsectarian private schools, and almost all chose religious schools: the vouchers were large enough to cover tuition in religious schools but not in private nonsectarian schools, and the participating families could not afford to top them up.

distinctions—such as heightened segregability, freedom from legal and social teaching conventions, and possible exemption-based subsidies on tuition—are bestowed by the government, essentially corralling children into religious schools.

IV. The Arizona Case Study and Potential Outcomes

In reviewing potential long-term consequences of School Choice and Substantive Neutrality, Arizona is an apt case study. Described as conducting “the ultimate experiment in school choice”⁹¹ Arizona has deployed the boldest and most expansive School choice program in the nation in the form of ESAs, education savings accounts. Beginning in 2011, select children with disabilities were given access to accounts with funds in order to improve their educational options. A series of incremental expansions to the program culminated in universal student eligibility for ESAs in 2022, regardless of socioeconomic status—or history of attending public school. The Arizona Department of Education estimates that almost half of the students registered for ESA’s—which carry a median amount of \$7,200—have never attended public schools. Some critics interpret this as evidence that School Choice programs essentially foot the bill for the foregone educational choices of the wealthy as much as they expand options for the under-privileged. Even more troubling is the trend of private schools raising their tuition prices. Many schools, in the wake of ESA legislation, have increased prices by as much as 10-20%, more than can be accounted for by inflation alone.⁹² Proponents of school choice have dismissed these and other issues as “growing pains”, inevitable byproducts of introducing the new system; before the newly free education market can reach equilibrium, it will be disrupted. However, one of the most relevant “growing pains” predicted by school choice advocates has exponentially exceeded expectations. Education expenditures in the 2023-2024 school year have reached more than \$900 million, far surpassing the anticipated \$65 million budget.

⁹¹ Sarah Mervosh. *\$7,200 For Every Student: Arizona’s Ultimate Experiment in School Choice*. The New York Times. July 24, 2023. <https://www.nytimes.com/2023/07/24/us/arizona-private-school-vouchers.html>

⁹² Neal Morton. *Arizona Gave Families Public Money for Private Schools. Then Private Schools Raised Tuition*. The Hechinger Report. November 27, 2023 <https://hechingerreport.org/arizona-gave-families-public-money-for-private-schools-then-private-schools-raised-tuition/#:~:text=Hungerman’s%20own%20research%2C%20conducted%20in,prevent%20church%20closures%20and%20mergers>

“Some schools made modest increases, often in line with or below the [overall inflation](#) rate last year of around 6 percent. But at nearly half of the schools, tuition increased in at least some grades by 10 percent or more. In five of those cases, schools hiked tuition by more than 20 percent – much higher than even the [steep inflation](#) that hit the Phoenix metro area and well beyond what an ESA could cover.”

This meteoric strain on Arizona’s budget has signaled another alarming outcome, namely the potential for Arizona’s education sector to privatize. Public education advocates have warned that the newly massive budgetary weight of education—in conjunction with Arizona’s new tax cuts—will leave “slashing programs and services as the only viable tool in a depleted toolbox.” Jennifer C. Berkshire and Jack Schneider write in *A Wolf at the Schoolhouse Door* that “school choice advocates envision a future in which education is ‘unbundled’—just as cable TV packages have been largely replaced by a custom-curated collection of à la carte shows and streaming apps.” This prediction is beginning to bear out in Arizona and other states with ESA programs, as parents select classes and products from an “Amazon-like marketplace of education vendors.” New micro-school companies are beginning to emerge, such as Prenda, whose business model purports to mirror that of Airbnb. As public education spending becomes more unwieldy and impractical under School Choice policies, it may be increasingly abandoned. This would leave a vital public good overly—and perhaps entirely—privatized.⁹³

These consequences of School Choice—subsidizing private education and/or begetting further privatization—and their strain on the government’s interests are exacerbated by religion. Legal commentator and professor at the University of Texas School of Law Steve Vladeck said of the *Carson v Makin* decision that, “Although framed as a school-choice ruling, it’s hard to see how this won’t have implications for a far wider range of state benefit programs – putting government in the awkward position of having to choose between directly funding religious activity or not providing funding at all.”⁹⁴

In the context of subsidizing private schools, research has shown that voucher programs “significantly boost the bottom line of churches that operate private schools and likely prevent church closures and mergers.”⁹⁵ School choice has been explicitly marketed as a method for “saving catholic education.”⁹⁶ Joshua Cowen, a professor of education policy at Michigan State University, has said that “Vouchers are at least partly about bailing out financially distressed church schools [...] Once school vouchers come to town, taxpayers become the dominant source of revenue for churches.”

⁹³ Berkshire & Schneider, “*Fund Students, Not Systems*” is a Disaster

⁹⁴ Ariane de Vogue, Tierney Sneed, & Chandelis Duster. *Supreme Court Says Maine Cannot Exclude Religious Schools From Tuition Assistance Programs* | *CNN Politics*. CNN. June 21, 2022. <https://www.cnn.com/2022/06/21/politics/supreme-court-religious-schools/index.html>

⁹⁵ Morton, *Arizona Gave Families Public Money for Private Schools. Then Private Schools Raised Tuition.*

⁹⁶ *Catholic Schools*. American Federation for Children. July 23, 2024. <https://www.federationforchildren.org/catholic-schools/>

Alternatively, if government spending on education in general is rolled back through increasing privatization, religion overall would still benefit. The welfare state can be—and has been—viewed as thwarting the dominant influence of religion.⁹⁷ Social welfare has supplanted religious charitable organizations in serving communal needs. This includes government spending on public education, which is the most statistically significant indicator of a nation’s “de-churching”, e.g. the decrease in attendance of houses of worship over time.⁹⁸ As the state devotes more resources to education, it plays a greater role in shaping the nation's young minds, specifically from particularistic ethno-religious tendencies to a more uniform alignment with the modern sensibilities of the secular nation state.⁹⁹ Depending on how privatized the education sector becomes, the vacuums left by expansive public school systems would likely favor religious schools, which would be left among the most affordable options (at least for their level of quality). In this way, privatization would contribute to “re-churching” by filling the desks of Church-affiliated schools with those seeking the best, most affordable options.

The above arguments appear to be challenged by religiously preferential pricing implemented by parochial schools. While Arizonan private schools of all kinds have been raising prices, some religious providers have been doing so at disparate rates for students who are and are not denominationally affiliated with the school. Phoenix’s Saint Theresa Catholic School “reserved its biggest price hike – of about \$1,800, or nearly 15 percent – for non-Catholic students in the elementary grades.” Beginning in the 2023-2024 academic year, Chandler’s Seton Catholic high school charged non-catholic students \$4,675 more than their Catholic peers. “The college prep academy requires families to secure verification from their parish to receive the discount.” One might conclude from this that certain religious schools welcome students regardless of religious affiliation, but still dissuade those not of their ilk from enrolling by making it more expensive. According to Laycockian neutrality, however, money is more than enough to influence people’s religious decisions. When all options are rendered “neutral” with respect to government subsidization, the availability of a “conversion” discount would shift this

⁹⁷ Richard Godden. *How the Church of England Abolished Itself Through the Welfare State*. Transatlantic Blog, Acton Institute. June 18, 2018.

<https://www.acton.org/publications/transatlantic/2018/06/18/how-church-england-abolished-itself-welfare-state>
Rev. Robert A. Sirico. *Religion and the Welfare State*. Religion and Liberty, The May and June 1992 Issue. VOLUME 2, NUMBER 3. Reposted JULY 20, 2010.

<https://www.acton.org/pub/religion-liberty/volume-2-number-3/religion-and-welfare-state>

⁹⁸ Raphaël Franck and Laurence R. Iannaccone. *Religious Decline in the 20th Century West: Testing Alternative Explanations*. Public Choice, vol. 159, no. 3/4, 2014, pp. 385–414. *JSTOR*, <http://www.jstor.org/stable/24506428>.

⁹⁹ *Ibid*

neutrality. If money is enough to sway a religious person to make a non-religious choice, then the inverse also follows. While the government has no direct say over how a school determines its pricing, it is troubling that these preferential policies encouraging conversion are embraced by Arizona's public funding apparatus.

School Choice programs are yielding some concerning outcomes. In Arizona this means increasingly covering the tuition of private schoolers who would otherwise pay it anyway, potentially leading to an eventual privatization of the education sector. Furthermore, most of those private schoolers are attendees of religious schools, indirectly but significantly supporting said schools financially. If this bankrupts the state, forcing them to reduce or altogether halt public education spending, compared to most other institutions, religious schools are relatively well situated to survive and even thrive in a privatized academic ecosystem. Thus, the Arizona case shows that the "awkward position" of the State described by Vladeck may ultimately be a win-win for Church.

Conclusion

In recent decades, advancements in school choice policies and Substantive Neutrality rhetoric have disrupted the centuries-long dynamic of Church-State relations. The State generally used to leave religious entities alone, foregoing sponsoring them while also exempting them from certain laws. Now, religious schools are receiving billions of tax-dollars annually, based on faulty premises and inconsistencies. Religious schools' access to exemptions and funding are compartmentalized, with different standards of neutrality applied in each context. This is the defining characteristic of the third type in Laycock's model, disaggregated neutrality, and neglects the ways in which the two contexts interact with one another.

For one, the current Substantive Neutrality jurisprudence supposes that religious schools satisfy the state interest in education in a comparable manner to non-sectarian schools. However, compared to secular schools, religious schools fail to contribute to social cohesion and democratization. Tax-payers' dollars should not be allocated to schools that fail to contribute to the original intent of legislation guaranteeing public education, to schools where their children may be denied entry simply for who they are. Because religious schools do not comparably satisfy the state's interest in funding education, strict scrutiny should not be triggered when they

are excluded from said funding. However, formal neutrality is nevertheless asserted in this context, apparently even precluding the consideration of relevant differences between schools that arise from existing exemption categories.

Furthermore, because formal neutrality is only applied to benefits and not to exemptions, categories are permitted when deciding if a religious entity will receive a unique exclusion from a policy. Yet categories *inherently* beget incentives, not just when distributing benefits but exemptions as well. Prohibition exemptions encouraged people who wanted to circumvent the law to identify as religious; so too the exemptions enjoyed by religious schools and teachers incentivize enrolment. Religious categories in discrimination law, labor relations law, and tax law alone stand to encourage even non-religious parents to select religious schools. While some of these examples might individually pass a substantive neutrality test, others undeniably fail. Their perpetuation rests on a disaggregated substantive neutrality, which fails to appropriately weigh the significant incentives provided by exemptions against the relatively lighter burdens their absences would impose.

Laycock has claimed that formal and substantive neutrality “point in the same direction”¹⁰⁰ when it comes to funding religious education; a more even perspective would further acknowledge that the two neutralities similarly align for exemptions, at least in certain contexts. The failure to recognize this has resulted in a unified religious jurisprudence that is at least somewhat disaggregated. As Professor Laycock wrote in 1990¹⁰¹,

Another way to disaggregate neutrality is to shift back and forth among different versions of neutrality without explanation. If you think that neutrality with respect to government-imposed burdens means that churches and believers never get an exemption (formal neutrality), but that neutrality with respect to government benefits means that churches can never participate (disaggregated substantive neutrality), you had better have a good explanation. The most obvious explanation is simply hostility to religion. If you have the opposite preferences, you are equally in need of a good explanation.

The current Court’s jurisprudence is based on a disaggregated neutrality, displaying the “opposite preferences” referenced in the quote above. Religious schools are treated with formal neutrality regarding government benefits and with disaggregated substantive neutrality when it comes to

¹⁰⁰ Thomas Berg & Douglas Laycock, *Symposium: Espinoza, Funding of Religious Service Providers, and Religious Freedom*, SCOTUSBLOG

¹⁰¹ Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, page 1008

government-imposed burdens. Religious categories that bear on religious schools ability to fulfill the state interest in education are ignored to secure funding. Neutralizing the government's positive influence on educational choice sharpens those advantages stemming from exemptions.

This disaggregation has practical ramifications which can be seen in real-time with the recent Arizona ESA program. On one hand, the state is sponsoring religious indoctrination, in some cases saving churches from “closures and mergers”. On the other hand, budgetary strains are signaling a looming privatization of the education sector, which could serve to “rechurch” an increasingly secular American society. If public funding benefits are negated overall, remaining exemptions for religious schools would give them a leg up on secular competition.

There exist different avenues for correcting this disaggregation. On the one hand, injecting formal neutrality—thereby removing special religious exemptions—into discrimination, tax, and labor relations laws would eliminate the incentives they produce. On the other hand, retracting formal neutrality from funding schemes—thereby reintroducing categories—and prohibiting funding indoctrination would rebalance the government’s hands on the scales of parental decision-making. The former approach is perhaps less realistic, with obstacles in establishing a plaintiff with standing. Despite their significance, the individual harm of these policies are incredibly difficult to litigate. Tax laws are notoriously difficult to challenge,¹⁰² the impact of labor laws are more structural than personalized¹⁰³ and discrimination suits are designed to deal with one protected identity at a time, not to prosecute the dual axes of race and religion that are implicated in religious schools’ admissions.¹⁰⁴ Meanwhile, the latter approach to reintroduce religious categories into funding has the advantage of returning to the status quo, restoring the precedent which has existed for so long. Regardless of which path is taken, either is ultimately dependent on a favorable Supreme Court decision, which seems unlikely under the current Roberts Court. Because of the potentially entrenching power of School Choice and Substantive neutrality convergence¹⁰⁵, it seems that for now the most that can be done is preventing the passage of School Choice legislation. This option was exercised in June of

¹⁰² Chodorow, *The Parsonage Exemption*, pages 866-867

¹⁰³ Garden, *Religious Employers and Labor Law*, page 154

¹⁰⁴ Wilson, *Racialized Religious School Segregation*, pages 625-626

¹⁰⁵ Sanei, *Reclaiming Establishment*, page 4:

“But see *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254-57 (2020) (reasoning that a **“leveling down”** prompted by a judicial order validating Montana's no-aid constitutional provision **should be invalidated because it was** guided by an incorrect understanding regarding what the First Amendment actually required and was, in any case, **motivated by discriminatory animus against religious entities**), (my emphases)

2024, when New Jersey's Support Students Act failed to pass,¹⁰⁶ protecting the state from slipping into disaggregated religious neutrality.

¹⁰⁶ SB 3035 NJ 2024