EDUCATIONAL FREEDOM
IN URBAN AMERICA
Brown v. Board after Half a Century

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3. Freedom of Choice: *Brown*, Vouchers, and the Philosophy of Language

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Freedom of Choice: Introduction

> *I suppose you mean to say, Cratylus, that as the name is, so also is the thing, and that he who knows the one will also know the other, because they are similars, and all similars fall under the same art or science, and therefore you would say that he who knows names will also know things.*[1]
>
> — Socrates

Freedom and *choice* are concepts deeply embedded into the American political psyche. Each idea embodies the founding spirit of the Republic, as well as the ambition of our 18th century ''Charters of Freedom''—the Declaration of Independence, the Constitution, and the Bill of Rights.[2] Government officials have for more than 200 years struggled with the responsibility to incorporate freedom and choice into American society. The advancement or curtailment of freedom and choice will remain an energetic battle as long as these terms are used by organized interests seeking to advance their own particular ideology or goals.

The 20th century is replete with examples of organized interests advancing their own agenda by capturing the terms *freedom* and *choice* and using them to their own ends. Advocates of policies such as free housing for the poor, reproductive rights for women, and union membership all used *freedom* and *choice* to advance their particular political causes. But few policy topics reveal the schizophrenic nature of American politics when it comes to freedom and choice as well as education. It is here where modern anxiety about freedom and choice fuels two competing philosophies regarding the role of schooling in a democratic society.

Differing definitions of freedom and choice in education have competed for acceptance during the 20th century. The same battle

continues today. This is why organized interests remain in perpetual competition to define freedom and choice for our nation's schools. Although the meaning of these terms sounds seemingly straightforward, implementation of freedom and choice in American education has had a strange career. ''Freedom of choice'' in the 20th century gave birth to two private choice movements: one was fear-based, the other freedom-based. Each movement shares the identical ''freedom of choice'' name, but the latter movement suffers from mistaken identity.

The fear-based choice movement began in the South during the 1950s as a backlash against the Supreme Court's decision in *Brown v. Board of Education*, which required states to desegregate all public schools.[3] Southern states abused the rhetoric of ''freedom'' and ''choice'' to circumvent integration efforts by using sham ''school choice'' programs and threats of violence to preserve Jim Crow. Fear-based choice might have succeeded if it had not been for several federal court decisions between 1959 and 1969. In those cases, judges concluded that this type of ''freedom of choice'' was blatantly inconsistent with the U.S. Constitution and the American way of life.

The freedom-based choice movement began in the Midwest during the 1990s in opposition to academic mediocrity. Unlike programs created during the fear-based choice era, freedom-based choice sought to remedy the disparities between rich and poor students by providing vouchers to children from low-income families of all races to attend better schools. The U.S. Supreme Court in 2002 upheld this type of ''freedom of choice'' in *Zelman v. Simmons-Harris*.[4] The Court has thus recognized, if only indirectly, the ideological dissimilarity between these two freedom-of-choice movements.

Anti-voucher groups, however, do not acknowledge the important historical distinctions between the fear-based choice movement of the 1950s and the modern freedom-based choice movement. Instead, they lump the movements together to support their thesis that school choice is socially harmful, proclaiming that the 1990s voucher is nothing more than the 1950s tuition grant clothed in a corporate blue suit rather than a pearly white sheet. To opponents, the only private choice beneficiaries are conservative white (male) elites, and black schoolchildren and their parents are choice victims once again.[5] Anti-voucher groups promote these conclusions through the symbolic use of language. This is very important to know because, as

Elmer E. Schattschneider has pointed out, at the root of all politics, is the universal language of conflict.[6]

The use of language to affect public perceptions of vouchers will be exceptionally energetic in 2004. Unlike previous election cycles, political aspirants for the White House, Congress, or school board will have to discuss the merits of vouchers in the year *Brown* celebrates its golden anniversary. *Brown* has multiple meanings in our education lexicon, as do freedom of choice and vouchers. Therefore, the strategic use of language will remain a very important vehicle in this debate both for those who want to discredit private choice and for choice proponents who must explain to scholars and taxpayers alike how vouchers will not circumvent *Brown*.

This chapter focuses on the fear-based school choice movement of the 1950s and on the subsequent freedom-based movement of the 1990s, probing the similarities and differences between the two movements. It also describes direct-aid statutes in the form of tuition grants or vouchers enacted in Virginia, Louisiana, Arkansas, Alabama, South Carolina, Mississippi, Wisconsin, and Ohio, and reviews the modern voucher programs in Wisconsin and Ohio. [7]

Brown, Policy Image and Massive Resistance, 1954–1956

The nation's first private school freedom-of-choice movement occurred during one of the most controversial periods in the history of American education. What began initially as a symbolic legislative protest by southern policymakers against *Brown* evolved into a decade-plus political confrontation for the soul of public and private education. At the heart of the battle to reconstruct education in the South was a constitutional issue central to a Civil War fought less than a century earlier: States rights vs. federalism. The U.S. Supreme Court drew first blood in this battle on May 17, 1954.

The Court declared in *Brown v. Board of Education* that maintaining two public school systems—one white, one Negro—violated the federal equal-protection clause and deprived Negro students of equal educational opportunity.[8] This decision overturned in public education the ''separate but equal'' doctrine affirmed by the same judicial body in *Plessy v. Ferguson* (1896). *Brown* not only freed the Court from ''the burden of its history'' of support for segregation, *Brown* also marked the beginning of a new chapter in the American civil rights crusade for quality schooling. [9]

However, centuries of institutional norms that had kept Jim Crow at the head of his class do not crumble overnight with one defiant bang of a judicial gavel. *Brown* has had its fair share of victories and losses, and its legacy remains at the center of race relations and educational politics 50 years later. This is true because so much remains undone. The principles of *Brown* remain illusive at worst, or unfulfilled at best.[10] To appreciate *Brown*'s significance to public education in 2004, one cannot overlook its relationship to private education.[11] In an ironic twist of fate, the meaning and scope of *Brown* was shaped early on by federal court decisions striking down public funding of racially discriminatory private schools during the fear-based choice movement of the 1950s and 1960s.

It is no accident that the period of noncompliance with *Brown* in public education coincided with the rise in private school freedom of choice. From 1954 to 1964, very little desegregation occurred in public schools. For example, Negro student enrollment in desegregated public schools located in 11 states was only 2.14 percent by 1964. Executive and congressional assistance to full-scale desegregation during this period was sparse.[12] As for the judiciary, the U.S. Supreme Court's declaration of war in *Brown* was followed by an early withdrawal from the battle.[13] Southern resistance to *Brown* also slowed the movement to dismantle a dual system of education. Tuition grants were one of the South's most powerful tools of resistance. In fact, the tuition grant was used to shape the policy image of *Brown* between 1956 and 1964.

According to professors Frank R. Baumgartner and Bryan D. Jones, a policy image is created by the transformation of a private issue into a public concern.[14] Southern policymakers appalled by *Brown* quickly identified an important private issue that was not explicitly about race: *parental choice*. The concept of parental choice has enjoyed strong support throughout the history of Western Civilization.[15] The U.S. Supreme Court first recognized the constitutional significance of parental choice in education in the 1923 *Meyer v. Nebraska* decision.[16] Two years later, the Supreme Court in *Pierce v. Society of Sisters* said that schoolchildren were not merely ''creatures of the state.'' Rather, a parent has a constitutional right to decide whether a public or private school is best for a particular child.[17] Southern policymakers knew that parental choice was usually protected by the Constitution. So they had to transform it into a public concern

if they were to succeed in using its rhetoric to preserve racial segregation.

The primary public concern was *federal encroachment* into public education. Public opposition to *Brown* thus focused on preserving a state's traditional right to control its school system. Even the Supreme Court declared in *Brown* that education ''is perhaps the most important function of state and local governments.''[18] Southern policymakers used this language to create a dilemma for its citizens to consider: If the Supreme Court recognized a parent's right to choose where to send a child to school, and at the same time respected education as an important state function, then how could the court use *Brown* to prevent the creation of private school-choice programs, even if they effectively maintained racial segregation? With the private issue turned into a public concern, southern policymakers had to market the plan to its citizens. Before desegregation could begin in earnest, southern policymakers began using the popular protest language of massive resistance to foment opposition to *Brown*.

Virginia Sen. Harry F. Byrd was the symbolic pinnacle of massive resistance to desegregation in the Capitol Rotunda.[19] Byrd opposed *Brown*, and he knew millions of citizens did also, but without a strategy to transform a private issue into a public concern, no action could be taken. So Byrd came up with a strategy and put it into motion. By March 12, 1956, Byrd had successfully encouraged 101 of 128 congressmen from the South to sign the Declaration of Constitutional Principles. This document was commonly known as the ''Southern Manifesto.''[20]

The Southern Manifesto claimed that the Supreme Court's *Brown* decision was the product of naked power and abuse contrary to established principles of federal law. The Manifesto also warned, ''Outside agitators are threatening immediate and revolutionary changes in our public-school systems.'' If such social engineering proceeded unchecked, the Manifesto argued, it was ''certain to destroy the system of public education in some of the States.''[21] Ironically, the destruction of public education in some southern states did occur, but not through the efforts of *outside* agitators. Rather, it was accomplished by southern state legislators determined to implement Southern Manifesto-type public policies.

Eight of the 11 former Confederate States of America enacted versions of the Southern Manifesto. It was called an ''interposition

resolution.'' It purported to interpose a state's reading of the law between itself and an unfavorable Supreme Court decision. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Virginia each passed an interposition resolution between 1956 and 1958.[22]

This was not the first time in American history that a state had ever produced an interposition resolution. James Madison authored an interposition resolution for Virginia, and Thomas Jefferson did the same for Kentucky, to protest the passage of the Alien and Sedition Act of 1798.[23] During the 1950s, the interposition resolutions were written in response to a supposedly ''seditious'' decision from the U.S. Supreme Court. The core of each interposition resolution defined the state's right to ''interpose'' against the ''deliberate, palpable and dangerous'' abuse of powers by the federal government that are not granted by the U.S. Constitution.[24] All of the states borrowed parts of the Virginia interposition resolution, which was based a great deal on the original Virginia Resolution written by James Madison in 1798.[25]

With the exception of Florida, every state that passed an interposition resolution also enacted a tuition grant statute. North Carolina enacted a tuition grant statute even though it did not pass an interposition resolution. Arkansas, Georgia, North Carolina, and Virginia all enacted tuition grant statutes as a constitutional amendment approved by voters.[26] Alabama, Louisiana, Mississippi, and South Carolina enacted tuition grant statutes without a voter referendum. Interestingly, not every state with a tuition grant law used it to its full capacity. Georgia and North Carolina are two examples.

Georgia voters ratified a ''private school amendment'' in 1954. Seven years later Georgia legislators enacted a tuition grant statute. It was on the books as late as 1967, but it was inactive.[27] The North Carolina tuition grant statute was a paper tiger as well. Legal historian Davison Douglas has noted that by the time the first student applied for an education expense grant to attend a private school in North Carolina, the statute had already been deemed unconstitutional.[28]

The name of each school-aid statute varied, though ''tuition grant'' is a commonly accepted name for this direct-aid program.[29] In Louisiana it was called an education expense grant. South Carolina called its school-aid plan a state scholarship grant. Virginia had multiple names for its school-aid plan: tuition grant, state scholarship, and

local scholarship. Despite these various euphemisms, each tuition grant spelled racial discrimination. Tuition grants during the 1950s and 1960s were part of larger movement maturing in the South that made the rhetoric of ''freedom of choice'' popular during this period of massive resistance.[30] Virginia, Louisiana, Arkansas, Alabama, South Carolina, and Mississippi all used the phrase, to varying degrees, to rally support for their goal of preserving Jim Crow education.

Fear-Based Choice: 1956–1969

> *If we can organize the Southern States for massive resistance to this order [*Brown*], I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South.*[31]
>
> — Sen. Harry F. Byrd (D-Va.)

Virginia

The Virginia General Assembly in 1956 approved its first tuition grant statute. Its purpose was to circumvent *Brown*. Similar statutes were enacted between 1958 and 1960.[32] Private, nonsectarian schools were the original recipients of the tuition grant.[33] Virginia legislators extended tuition grants to public schools in 1959 in response to state and federal court decisions that prohibited Virginia officials from simply abolishing public schools while making public money available for private education.[34] Some Virginia counties complied with the law. Prince Edward County was not one of them.[35]

Prince Edward County instead closed all public school doors to both white and Negro students from 1959 to 1964. White-only private academies founded by the Prince Edward County Foundation opened during that period, and the tuition grant became a source of revenue to the academies. Not all eligible white schoolchildren enrolled in a Foundation academy. Some white schoolchildren received no formal education at all during the five-year school closure. Nearly two-thirds of Negro schoolchildren did not.[36] The U.S. Supreme Court eventually decided to intervene directly because Prince Edward County repeatedly ignored court orders to open its public schools.

In 1964, the U.S. Supreme Court decided in *Griffin v. County School Board of Prince Edward County* that the closing of public schools,

combined with providing public funds to racially segregated private schools, violated the equal protection clause.[37] Public schools in Prince Edward County finally had to open their doors to all students. The Supreme Court, however, did not say that Virginia's tuition grant statute was itself unconstitutional. Therefore, Virginia parents continued to use tuition grants to pay for private education.

By 1964, Virginia had spent more than $10 million to fund tuition grants.[38] The vast majority of this money supported private schools that denied admission to Negro students. But in 1969, a federal district court in *Griffen v. State Board of Education* said Virginia's entire tuition grant scheme violated the equal protection clause. Therefore, ''the entire law must go.''[39] This decision put to rest a 13-year battle by Virginia to use a tuition grant to circumvent *Brown*.

Louisiana

Louisiana enacted four education expense grant statutes between 1958 and 1967.[40] The 1958 statute authorized grants ''for children attending non-sectarian non-public schools where no racially separate public school is provided.''[41] In no other state did the tuition grant play such a significant role in the development of private education than in Louisiana. Sixteen private schools were in operation in Louisiana before the 1954 *Brown* decision. The New Orleans metropolitan area was home to 15 of the 16 schools. In 1962, 33 private schools were in operation. The number rose to 60 by 1967.[42]

The State Board of Education and the local parish board initially administered the grants.[43] In 1960, policymakers created the Education Expense Grant Fund. The sole purpose of the Fund was to divert public money from the Louisiana Public Welfare Fund to discriminatory private schools. In 1961, the legislature transferred $2.5 million from the Public Welfare Fund to the Education Expense Grant Fund.[44] Eligibility for a grant was often triggered by a school closing. Voters in St. Helena Parish, for example, voted to close its public schools in favor of education expense grants to pay for private education.

In 1961, a federal district court in *Hall v. St. Helena Parish School Board* invalidated the use of tuition grants in St. Helena Parish. The court said, ''Grants-in-aid, no matter how generous, are not an adequate substitute for public schools.''[45] The U.S. Supreme Court affirmed this decision in 1962.[46] Public aid to private schools in

general, however, was not ruled unconstitutional. Louisiana legislators responded to the *Hall* decision by enacting a third tuition grant statute.

This third statute, Act 147, was passed in 1962. It shifted grant management responsibility to the Louisiana Financial Assistance Commission. During the 1962–63 school year, the Commission issued 7,093 tuition grants. Four years later the number increased to 15,177 tuition grants.[47] By 1967, Louisiana had spent more than $15 million on children attending private schools.[48] But 1967 was also the beginning of the end for the Louisiana tuition grant program.

In 1967, a federal district court said in *Poindexter v. Louisiana Financial Assistance Commission* that the 1962 tuition grant statute violated the equal protection clause. The court also concluded that the tuition grant was a fruit of Louisiana's desire to use public money to maintain the operation of schools exclusively for white children. The U.S. Supreme Court affirmed this decision.[49] In 1968, a federal district court in *Poindexter v. Louisiana Financial Assistance Commission* invalidated Act 99: Louisiana's fourth grant statute. The purpose of Act 99, according to the federal court, was discrimination. The U.S. Supreme Court affirmed this decision in 1968.[50] The *Poindexter* decisions put an end to Louisiana's 10-year endeavor to use private school aid to circumvent *Brown.*

Arkansas

The Arkansas General Assembly in 1958 passed two acts in response to *Brown*. Act 4 empowered the governor to close public schools anywhere in Arkansas to avoid racial integration. Act 5 authorized the Arkansas Commission of Education to use a state tuition grant to pay for education at a public school located outside of a student's district, or at a private school when the governor closed a student's public school.[51] Governor Oval Faubus used his authority on September 12, 1958, to close all senior high schools in the capital city of Little Rock.[52]

In 1959, a federal district court in *Aaron v. McKinley* said that Act 4 and Act 5 were unconstitutional. Act 4 violated the equal protection and the due process clauses of the Fourteenth Amendment. The court also said Governor Faubus's school closing proclamation of September 12, 1958, denied Negro and white students the right to

attend a public senior high school within Little Rock. The U.S. Supreme Court affirmed this decision in 1959.[53]

Alabama

''Segregation Now! Segregation Tomorrow! Segregation Forever!'' is a slogan popularized by Governor George Wallace during his 1963 inaugural speech.[54] Governor Wallace used this slogan to define Alabama-style resistance to school integration. Higher education was the first test case. On June 11, 1963, Governor Wallace physically blocked two Negro students from entering the doors of a University of Alabama administration building. President John F. Kennedy federalized the Alabama National Guard later that day in preparation for a possible confrontation with the governor. Federal authorities returned to the University of Alabama the next day and asked Governor Wallace to move aside. Governor Wallace acquiesced.[55] This symbolized the beginning of a new era for higher education in Alabama and the South. However, Governor Wallace's promise to keep segregation alive remained intact. With the higher education battle lost, Governor Wallace turned his attention to secondary education.

On September 2, 1963, Governor Wallace sent Alabama state troopers to surround Tuskegee High School to avoid school integration. Ultimately, Tuskegee High closed its doors to both Negro and white students. Some white students transferred to segregated public high schools elsewhere in Alabama, and others enrolled in the private, white-only Macon Academy.[56] Financial support for the Macon Academy was obtained under a statute enacted by the Alabama legislature in 1957. This statute authorized payment of tuition grants to parents with children in any city where the public schools were closed.[57] Governor Wallace lobbied state employees for money to fund a ''private school foundation'' for white students.[58] Governor Wallace's plan for secondary education was put to rest by a 1964 federal court decision.

In *Lee v. Macon County Board of Education*, a federal district court in Alabama invalidated the 1957 statute. The court said that grant-in-aid payments to a segregated private school were unconstitutional for two reasons. First, the statute's illegitimate purpose was to further segregation in the public schools. Second, tuition grants were only available to students in a city where public schools were closed. The

court, however, did not say that Alabama's grant-in-aid statute was unconstitutional on its face.[59] This left the door open for future use of tuition grants.

In 1965, Alabama legislators approved a new tuition grant statute. However, it met the same fate as the first statute. In 1967, a district court stated in *Lee v. Macon County Board* that the 1965 statute was no different from the 1957 statute. It was another attempt by Alabama officials ''to circumvent the principles of *Brown*.''[60] The court also said the 1965 statute was ''born of the same effort to discriminate against Negroes,''[61] and was simply designed to ''assist private discrimination.'' The U.S. Supreme Court affirmed this decision in 1968.[62] Federal courts relied on the *Lee* decision(s) when they invalidated tuition grant programs in Virginia, Louisiana, and South Carolina.

South Carolina

South Carolina began its formal protest to *Brown* in 1952, the year voters supported a constitutional amendment to abolish the state's public school system.[63] In response to the *Brown* decision, South Carolina legislators adopted a segregation policy in every session from 1954 through 1961.[64] In 1963, policymakers enacted a state scholarship grant statute. Act 297 made a state scholarship grant available to any student between six and 20 years of age. Various groups in South Carolina voiced concern about the constitutionality of the statute, and a district court placed a temporary restraining order on Act 297 in 1965.

Three years later a court finally held the scholarship grant statute unconstitutional. After reviewing historical records associated with the enactment of the statute, a federal court in *Brown v. South Carolina State Board of Education* said Act 297 was unconstitutional. The judges concluded that the state scholarship grant had at its core the ''purpose, motive and effect . . . to unconstitutionally circumvent the requirement first enunciated in *Brown v. Board of Education*.'' The U.S. Supreme Court affirmed this decision in 1968.[65]

Mississippi

Mississippi enacted its tuition grant statute in 1964. It authorized cities, towns, and counties to levy taxes on their residents to provide

public money to current *and* future nonsectarian private school students in Mississippi.[66] Responsibility for tuition grant administration was given to the Mississippi Educational Finance Commission. Many grassroots organizations supported the law. The White Citizens' Council was one of them.

The White Citizens' Council was formed in Indianola, Mississippi, in 1954.[67] One aim of the Council was to resist the public-school integration mandate announced on ''Black Monday''—a euphemism for the May 17, 1954, *Brown* decision.[68] Years later, some Council chapters expanded their mission to include preserving racial segregation in private schools. This decision helped to influence the rise of white segregated private academies during the late 1960s, although the exact level of involvement is vague.[69] Nonetheless, it is well known that this movement did not mature without assistance from Mississippi law.

For example, white students attended 24 of the 25 private schools in Mississippi during the 1965–66 school year. Sixty-seven percent of those white private schools refused to admit any black students. During the 1967–68 school year, no black students were enrolled in 48 of the 49 Mississippi state-tuition grant-supported private schools. Saints Academy was the only private school in Mississippi with a black population.[70]

A group of black parents filed a suit in 1966 against the Mississippi Educational Finance Commission. The U.S. government intervened in the case on behalf of the parents under the Civil Rights Act of 1964.[71] After examining the records related to the statute, a federal district court in the 1969 *Coffey v. State Educational Finance Commission* decision said that the program was unconstitutional, observing that Mississippi's ''tuition grants have fostered the creation of private schools'' that catered to white students eager to ''avoid desegregated public schools.''[72] The district court also said that Mississippi's tuition grant program ''will significantly encourage and involve the State in private discriminations.''[73] Mississippi had spent more than $3.2 million on private school education at that time.[74]

The fear-based freedom-of-choice movement came to an end in 1969. Federal courts said that tuition grants could no longer serve as a conduit to circumvent *Brown*, or to promote racial discrimination in public or private education. Private school freedom of choice, in the form of direct aid, remained dormant for many years, except

for a few small-scale experiments. System-wide private choice in urban education did not again become a reality until the 1990s.

Freedom-Based Choice: 1990–2003

> *What hinges on this decision [*Zelman*] is whether the promise of* Brown v. Board of Education *of an equal educational opportunity is going to be realized. If we have to go outside the public sector, then that's what we have to do.*[75]
>
> — Constitutional Attorney Clint Bolick

The 1990s breathed new life into American education. Private school freedom of choice became vogue again, but this time it came without the ugly ideology of racial separatism and hatred.[76] True to the organic meaning of freedom of choice, the 1990s movement made parental decisionmaking and academic uplift its two most essential components. The Midwest is home to this private choice movement. Milwaukee and Cleveland, each with a unique history of experimentation with freedom of choice in public education, are the primary big-city school districts now experimenting with freedom-based private choice.[77]

Wisconsin

Governor Tommy Thompson signed into law the Milwaukee Parental Choice Program on April 27, 1990.[78] This was a crowning achievement for a legislative battle shepherded by state representative Polly Williams (D-Milwaukee) and black leaders in the Milwaukee community.[79] The goal of MPCP is to provide a voucher to lower-income public and private school parents in search of a quality education for their child. Parental eligibility for a voucher is means tested. Only households with an income at, or below, 1.75 times poverty-level guidelines established by the federal Office of Management and Budget are eligible to participate in MPCP.[80]

Legal battles against MPCP were common during the 1990s. One contentious issue was the use of public funds to pay for private education. MPCP's breach between the separation of church and state was another issue. From 1990 to 1998, only private, nonsectarian schools were eligible for participation in MPCP. Wisconsin legislators amended MPCP in 1995 to include religious schools, but court

Table 3-1
STUDENT ENROLLMENT IN MILWAUKEE PARENTAL CHOICE PROGRAM: 1990–2003

Academic School Year	Private Schools	Student Enrollment
1990–91	7	300
1991–92	6	512
1992–93	11	594
1993–94	12	704
1994–95	12	771
1995–96	17	1,288
1996–97	20	1,616
1997–98	23	1,497
1998–99*	83	5,761
1999–00	90	7,575
2000–01	100	9,238
2001–02	102	10,497
2002–03 (*est.*)	103	11,350

* Inclusion of religious schools after 1998 decision.

SOURCE: Milwaukee Parental Choice Program, Informational Paper 29, Wisconsin Legislative Fiscal Bureau, January 2003, p. 3.

decisions blocked religious school participation. In 1998, the state's highest court put this issue to rest.

In *Jackson v. Benson*, the Wisconsin Supreme Court said MPCP was constitutional, and participation of religious schools in it did not violate the religious establishment provision of the Wisconsin constitution.[81] The U.S. Supreme Court declined to address the decision. Since 1998, both student enrollment and the number of private schools participating in MPCP increased dramatically (see Table 3-1).

The largest single-year student-enrollment increase occurred during the 1998–99 school year. Student enrollment jumped 4,264 students from the 1997–98 school year total. This increase was larger than the total number of students enrolled in MPCP from 1990 to 1996. As of January 2003, an estimated 102 private schools served approximately 11,621 Milwaukee students in grades K–12.[82] The maximum voucher amount for 2003–04 is estimated to be $6,020.00 per student. [83]

Ohio

Governor George Voinovich signed into law the Cleveland Project Scholarship Program on June 30, 1995.[84] This effort was championed by city council member Fannie Lewis (D-Cleveland).[85] Like MPCP, the Cleveland voucher program is means tested. Households with an income at, or near, 200 percent of the federal poverty level are eligible for the state to pay 90 percent of a school's tuition, and up to the voucher maximum of $2,250 per year. Families in this income bracket are responsible for paying no more than $250 toward payment of private school tuition.[86] Households with an income above 200 percent of the federal poverty level are eligible for the state to pay 75 percent of a school's tuition cost, and up to the voucher maximum of $1,875 per year. Parents with incomes below the 200 percent threshold are given first consideration for a voucher.[87]

Legal battles against the Cleveland voucher program were common. Cleveland, unlike Milwaukee, allowed religious schools to participate in its choice program right away. This made involvement between church and state a central legal issue. The first challenge to the law began in a state court in 1996, and then it moved to the federal judiciary. On December 11, 2000, the U.S. Court of Appeals for the Sixth Circuit said Cleveland's voucher program was unconstitutional.[88] The U.S. Supreme Court reversed this decision. In *Zelman* (2002), the Supreme Court said Cleveland's voucher program did not violate the federal establishment clause.[89]

In the 2002–03 school year, 5,147 students in 50 private schools participated in the Cleveland program—up significantly from the student enrollment of 1,994 during the 1996–97 school year.[90] The average income for Cleveland choice participants is $18,750 a year. And according to 1999 data, racial minorities accounted for approximately 74 percent of all voucher students. African-Americans were 60 percent of choice students. Hispanics and others were 13.4 percent of choice students. Whites were 26.6 percent of choice students, and their participation is increasing. [91]

Two Freedom-of-Choice Movements: Similarities and Differences

Laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment

> *of particular needs . . . And the bottom problem is: What is below the surface of the words and yet fairly a part of them.*[92]
>
> — Justice Felix Frankfurter

Private school freedom-of-choice movements of the 1950s and 1990s have similarities and differences. The decision to focus solely on choice similarities, or choice differences, is at the heart of today's debate about vouchers in American education. Little attention is given to comparing and contrasting choice similarities and differences. Below are some results from such a comparison.

Religion

During the fear-based choice era, the states of Virginia, Louisiana, Arkansas, Alabama, South Carolina, and Mississippi enacted tuition grant statutes that forbade religious school participation.[93] In contrast, all of the freedom-based choice programs allow students to attend religious or nonreligious schools. Therefore, church-state battles that arose during the 1990s were practically nonexistent during the fear-based choice movement of the 1950s and 1960s.

Schools

During the fear-based choice era, Virginia, Louisiana, and Arkansas allowed a student to use a tuition grant at public *or* private schools. Alabama, South Carolina, and Mississippi tuition grants were redeemable only at private schools. Today, Ohio vouchers are redeemable at public *and* private schools. In Wisconsin, only private schools are eligible for vouchers.

In 1962, Louisiana became the only state to waive a requirement that a private school must be a nonprofit organization to qualify for a tuition grant. This statute provided a way for entrepreneurs to open new schools with public funds.[94] No other early tuition grant legislation enacted in Virginia, Arkansas, Alabama, South Carolina, or Mississippi made for-profit organizations eligible for a tuition grant.

Students and Parents

During the fear-based choice era, public school students were eligible for tuition grants in Virginia, Arkansas, Alabama, and South Carolina. The rationale for this policy was simple. Parents with children in a public school likely to be integrated by a federal court

order needed an escape. The tuition grant was the passport. White parents used this option more often than black parents. In certain locales in Virginia and Louisiana, only white parents were eligible for a tuition grant. In Mississippi, however, students who attended a private school, or planned to attend a private school, were eligible for tuition grants. Today, both private and public school students are eligible for vouchers in Wisconsin and Ohio (see Tables 3-2 and 3-3).

The fear-based and freedom-based choice movements share similarities. These similarities, however, pale compared with the ideologically differences between them. Ideology is at the heart of America's choice debate, and it is ideology that segregates fear-based choice from freedom-based choice.

Still, anti-voucher groups choose to focus solely on private choice similarities. Their goal is to prove that a voucher is a step backward in the direction of state-sponsored racism and private school discrimination. Philosophy of language is their tool of choice.

Freedom of Choice: Interest Groups and the Philosophy of Language

> *[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.*[95]
>
> — Sir William Blackstone

David B. Truman observes in *The Governmental Process* that special-interest groups tend to form around one or more shared attitudes. They achieve their political goals, Truman writes, by using these shared attitudes to influence public opinion in their favor.[96] In the field of education policy, anti-voucher interest groups such as teacher unions actively seek to influence public opinion against vouchers. There are also interest groups such as the Black Alliance for Educational Options that work to influence public opinion in favor of vouchers.[97]

The National Association for the Advancement of Colored People and People for the American Way are both leading voucher opponents.[98] In 1997, the two groups jointly created the Partnership for

Table 3-2
ELIGIBILITY FOR PUBLIC AID DURING FEAR-BASED CHOICE MOVEMENT: 1956–1969

State	For Use at a Nonsectarian Private School Only	For Use at a Public School or Nonsectarian Private School	For Public School Students Only	For Private School Students Only	For Public and Private School Students
Virginia	*	X	X		
Louisiana	*	X			X
Arkansas		X	X		
Alabama	X		X		
South Carolina	X		X		
Mississippi	X			X	

*Original statute included private schools only.

SOURCES: Virginia (public schools): *Race Relations Law Reporter* 1 (1956): 1094. Virginia (tuition grants): *Race Relations Law Reporter* 4 (1959): 191 (''grants for children in public schools outside of the locality''). Louisiana (tuition grants): *Race Relations Law Reporter* 3 (1958): 1062–63 (a student with no public school available due to closing, or assigned to a public school attended by members of another race, or assigned to a school against parental wishes was eligible for an education expense grant in 1958). Louisiana (tuition grants): *Race Relations Law Reporter* 7 (1962): 922 (for student in private school, or student ''eligible'' for admission into a public school). Arkansas: *Aaron v. McKinley*, 173 F.Supp 944, 951 n. 2 (1959). Alabama: See generally *Lee v. Macon County Board of Education*, 231 F.Supp. 743 (1964). South Carolina (tuition grants): *Race Relations Law Reporter* 8 (1963): 711. Mississippi (tuition grants): *Race Relations Law Reporter* 9 (1964): 1499, 1501.

Table 3-3
ELIGIBILITY FOR PUBLIC AID DURING FREEDOM-BASED CHOICE MOVEMENT: 1990–2003

State	For Use at a Nonsectarian or Sectarian Private School	For Use at a Public School or Private School	For Public School Students Only	For Private School Students Only	For Public and Private School Students
Wisconsin	X				X
Ohio	X	X*			X

*Cleveland parents can use a voucher to attend alternative public schools.

SOURCES: Wisconsin Statutes Annotated §119.23(2)(a) (2001), and Ohio Revenue Code Annotated §3313.97.5 and §3313.977.

Public Education to promote an anti-voucher, pro-public school message.[99] The American Civil Liberties Union also opposes vouchers for reasons similar to those voiced by the NAACP.

For example, groups like the NAACP and the ACLU are concerned about the possible segregative effects of voucher programs, both inside private school classrooms and in the public school systems that voucher recipients ''leave behind.'' This concern is not limited to Milwaukee or Cleveland. It is a national concern. In 1997, ACLU legislative representative Terri Schroeder recalled the history of the old, fear-based choice movement to predict that voucher programs, if widely implemented, would produce segregative effects nationwide. ''These [white, segregation] academies [of the 1950s and 1960s], which discriminated in admission based on race, allowed communities to continue de facto segregation.'' Taking this analogy to its logical conclusion, Schroeder said, ''The same could easily reoccur around the county if modern voucher plans are adopted.''[100]

Such concerns about private school aid, racial politics, and choice are not wholly unwarranted.[101] Private choice was once used to support racial discrimination in schools, and vouchers could be used for the identical purpose. So our collective determination not to resurrect Jim Crow-inspired education choice with public money is important, and most voucher enthusiasts support this objective. But voucher enthusiasts part ways with the anti-voucher camp when it grossly misappropriates fear-based choice ideology across space and time, wedding two very different sociopolitical eras, and two equally divergent educational agendas, through the careful misuse of language.

Philosophy of language is the study of relationships between words, ideas, and intentions. The discipline dates back to antiquity. Plato was an early student of language,[102] as was Aristotle. Enlightenment thinkers, including Thomas Hobbes, René Descartes, and John Locke were interested in the conceptual framework of language. But philosophy of language did not emerge as a major preoccupation within the field of philosophy until the 20th century.[103]

Philosophy of language is important to the study of the private school freedom of choice movement because the symbolic use of language has become an extremely important part of public discourse on this issue.[104] Philosophy of language reveals that anti-private choice groups use at least two strategies to discredit vouchers. The first is an iconographic reference I refer to as the ''tuition

grant-voucher quandary.'' The second is of a type that philosophers call semiotics, which I will refer to as the ''segregation academy'' metaphor.

Iconographic Reference: The Tuition Grant-Voucher Quandary

An iconographic reference is a communicative technique used to identify and link familiar cultural images in society. The goal of an iconographic reference is to establish a conceptual link between a referent (a specific thing) and a positive or negative value judgment.[105] In the case of the voucher debate, choice opponents create an iconographic reference between school choice *referents*—fear-based freedom of choice, tuition grants, and vouchers—and a *value judgment*—racism is wrong. Their goal is to use this iconography to convince the public that a voucher, or a ''private school tuition voucher,''[106] is a racist freedom-of-choice scheme that is as harmful to black schoolchildren today as it was during the 1950s and 1960s.

Freedom-of-choice opponents use voucher-specific iconographic references to incite suspicion against private choice among the general public, and in the black community in particular. Examples of voucher-specific iconographic references vary. Some link race and education, such as NAACP president Kweisi Mfume's statement, ''vouchers don't educate, they segregate.'' Linking religious themes to education is also common. Reverend Wendell Armstrong said at a 1999 anti-voucher rally in Detroit, ''The wolves are coming in the shape of vouchers, dressed in sheep's clothing.''[107]

Brown and the history of segregation are popular items for creating voucher-specific iconographic references. In 2003, Rep. Elijah E. Cummings (D-Md.) and Rep. Robert C. ''Bobby'' Scott (D-Va.) in honor of the 49th anniversary of *Brown* said, ''Vouchers were the very scheme used in Virginia to fund segregated academies.''[108] In 2002, Barry Lynn, executive director of Americans United for Separation of Church and State, said, ''It's sad to say this, but the history of vouchers didn't begin yesterday. . . . It began after the *Brown v. Board of Education* decision.''[109]

Choice opponents use voucher-specific iconographic references in an attempt to establish guilt by association—to ensure, symbolically, that the sins of the fear-based choice movement of the 1950s haunt its modern offspring: vouchers. In addition to the extravagant misuse of simile, these references are flawed because they treat a 1950s

tuition grant and a modern voucher as synonymous. This is incorrect. A tuition grant is not a voucher, in name or ideology. Neither is the administration of private choice in Milwaukee or Cleveland today identical to the administration of private choice in Prince Edward County, Virginia, decades ago. Federal courts, which interest groups often call upon to determine the constitutionality of direct-aid programs in education, have rarely if ever treated tuition grants and vouchers interchangeably during either choice movement.

A survey of federal court decisions delivered between 1954 and 1969 shows multiple uses for the term ''voucher.''[110] For example, the word ''voucher'' was used in relation to jury duty, reimbursement, and payment for travel expenses. Most often a voucher was referenced in cases dealing with voting.[111] When the U.S. Supreme Court referenced vouchers and schools, it was related to payment of an educational expense, or a state appropriation of money to a college.[112] Throughout the history of the fear-based choice movement, no federal court invalidated a voucher program because of racial discrimination in education. Extension of this survey produced similar results.

At least 35 U.S. Supreme Court decisions delivered between 1970 and 2003 referenced the term ''voucher.'' Financial transactions were the most referenced use for the term. One voucher reference was made to food stamps.[113] References between vouchers and schools were mostly for educational payments. During this 33-year period, no federal court invalidated a voucher program because of racial discrimination. The federal courts have never found that a voucher served as a financial incentive to maintain racial discrimination in private education during, and after, the fear-based freedom-of-choice movement. This was not the case for early tuition grants.

A survey of federal court decisions delivered between 1954 and 1969 indicates less legal dexterity for the term ''tuition grant.'' Its use was overwhelmingly synonymous with discrimination in education. Virginia, Louisiana, Arkansas, Alabama, South Carolina, and Mississippi provide examples of this. A similar result occurred from a survey of U.S. Supreme Court decisions delivered between 1970 and 2003.

For example, the U.S. Supreme Court in *Committee for Public Education & Religious Liberty v. Nyquist* (1973) invalidated a New York tuition grant statute, because parents with children not enrolled in

private schools were ineligible for a tuition grant. Racial discrimination was not a factor in this tuition grant case.[114] Racial discrimination and tuition grants were a topic of interest in *Norwood v. Harrison* (1973).[115] In *Norwood*, the U.S. Supreme Court said that a Mississippi statute that permitted state officials to loan textbooks to schoolchildren in attendance at a racially segregated private school was unconstitutional.

In conclusion, although the tuition grant versus voucher analysis may seem trivial at first glance, it is not. Such distinctions are important when, as here, the practical-political goal of a speaker is to entice endorsement rather than to merely inform.[116] An awareness of common voucher-specific iconographic references is important to our understanding how interest groups define—or misrepresent—freedom-of-choice ideology in American education.

Semiotics and the "Segregation Academy" Metaphor

In *The Politics of Misinformation*, Murray Edelman writes that images dominate human communication and thinking. This is why images ultimately become the means by which we negotiate change in our world.[117] ''Segregation academy'' is an emotionally powerful slogan that not only conjures bad feelings in the heart but also invokes vulgar images in the mind. Voucher opponents know this, and they misuse the ''segregation academy'' cliché to generate feelings of fear and racial mistrust. For example, the Reverend Jesse Jackson said, ''The same ideology that supported *Plessy*, opposed *Brown*, and inspired the formation of all-White academies, is now behind the school voucher issue.''[118]

Education activist Jonathan Kozol is another voucher opponent who uses emotionally charged language to instill fear. While on his mission to discover and reveal to the world the ''savage inequalities'' that persist in American education, Kozol touches on the voucher issue. Kozol dislikes vouchers. He considers them dangerous, particularly because voucher money, could ''be used for a David Duke school or a right-wing militia school or a Louis Farrakhan school.''[119] Statements like this demonstrate that Kozol is more interested in the rhetoric of hate than the rhetoric of hope. No such academy is actually operating in Milwaukee or Cleveland with support of a voucher. In fact, the probability that a ''segregation academy'' will ever open in either city is very unlikely because anti-discrimination

provisions in the voucher law prohibit spending public money at such schools. In any event, such schools could not accept vouchers under the anti-discrimination provisions of the voucher laws. Nevertheless, the ''segregation academy'' imagery, despite Kozol's predatory sensationalism, is not without historical resonance.

A report published by the U.S. Commission on Civil Rights documented the rise of the ''segregation academy'' in the South during the mid-1960s. The Commission estimated that 200 segregated private schools were open in six southern states by 1967. Louisiana had 65 all-white schools. Beginning in 1963, South Carolina had 44 segregated private schools. In Mississippi, 30 of the 35 segregated private schools were created between 1965 and 1967. Alabama had 13 private schools for whites only, and Virginia had 30.[120] So examples do exist of state officials assisting a ''segregation academy'' during its early years. However, today's voucher-redeeming private ''academy'' is nothing like the ''segregation academy'' of the past. Only by using semiotics and the ''segregation academy'' metaphor can anti-voucher groups support this conclusion.

Semiotics is a philosophical study more than a technical one.[121] It is concerned with the way humans use written and spoken language to represent our worldview to each other, as well as with signs coded in everyday messages.[122] Semiotics is equally interested in the social and political significance of ''word-signs.''[123] Symbols also play a role in semiotics. A symbol, according to Charles D. Elder and Roger W. Cobb, is a human invention by which an object receives meaning through discourse.[124] In this example, a voucher is the object to which human language gives meaning—both good and bad.

At the root of semiotics is metaphor. Metaphors, according to Deborah Stone, are prevalent in policy language. Metaphors serve as devices we use to draw comparisons between objects.[125] The symbolic power a metaphor gives to language is supported by two concepts. The first concept is *transfer*. Two components of *transfer* are ''replacement'' and ''substitution.'' The second concept is *similarity*. Two components of *similarity* are ''likeness'' and ''analogy.''[126]

A statement made by Rep. Jesse Jackson Jr. (D-Ill.) in response to the U.S. Supreme Court's decision to uphold school vouchers in *Zelman* is an example of the ''segregation academy'' metaphor in action. ''After the 1954 *Brown* desegregation decision, which was

directed mainly at Southern Jim Crow public schools, white protestant private religious academies sprung into existence to avoid integration.''[127] Jackson made a metaphorical link between the rise of the ''segregation academy'' in the South as a result of *Brown*, and voucher-redeeming private religious ''academies'' in Ohio.

Thus, the rise of ''white protestant . . . private religious academies'' is a potent *metaphor* for private schools operating in Cleveland (or Milwaukee): religious and sectarian. A voucher is a ''replacement'' for tuition grant. Cleveland (or Milwaukee) is a ''substitute'' for Prince Edward County, Virginia. And ''like'' the ''segregation academy'' of the South, vouchers are financed by state money. The ''analogy'' being ''segregation'' academies in both eras would not likely exist without financial backing from the state. Therefore, today's freedom-based choice movement is identical to yesteryear's fear-based choice movement.

Jackson's use of semiotics to support the uniform private-choice thesis finds support from law professor Steven K. Green. Green was a lawyer for the groups that opposed the Cleveland voucher program, so it is not surprising that Green holds dear the conviction that vouchers are incapable of promoting equality for disadvantaged city schoolchildren. Green also believes that it is manipulative for anyone to build a bridge to connect vouchers, equality, and *Brown* because it promotes an illusion about private schools. The history of fear-based choice in America is a guide to what could happen today. Green concludes, ''Choice will lead to self-segregation and inequality of opportunity.''[128] Green, like Jackson, relies on metaphors to support a uniform private-choice thesis.

Donald A. Schön and Martin Rein have said that when naming and framing a policy issue, a metaphor is the process by which ideas are transported across time. The goal of this metaphor process is to make the ''familiar and the unfamiliar come to be seen in a new way.''[129] Green uses the metaphorical phrases ''like'' and ''similar'' to carry fear-based choice ideology across time. For example, Green said, ''*Like* current voucher programs, the freedom of choice plans commonly. . . .'' ''*Similar* to the current debate [about parental choice].'' ''*Similar* to the current voucher plan, the 'freedom of choice' programs [of old].''[130] Not everyone agrees that the metaphorical comparison is valid. Professor John Eastman, in a reply to Green's

article, made note of Green's attempt to compare the choice movements in order ''to tarnish the voucher movement with the brush of racial segregation.''[131]

Green and Jackson use similar techniques to build a symbolic bridge of segregation to connect the old, fear-based choice to the modern, freedom-based choice. To test the uniform private-choice thesis, it is necessary to compare and contrast the history of each choice movement from five perspectives.

First, Jackson is correct that private schools served as a safe-haven for white parents eager to avoid integration after the *Brown* decision. Green is correct that federal courts neutralized tuition grants in South Carolina, Louisiana, Virginia, Mississippi, and Alabama. Green, however, credits the tuition grants' benefits to private schools rather than to racial discrimination itself as the reason for their demise.[132] He thus wrongly focuses on a symptom rather than on the underlying disease of fear-based choice.

Private education was merely a symptom. State financing of racial discrimination was the disease federal courts sought to remove root and branch. This is why public funding of private education is not necessarily the evil of fear-based choice. For some reason, voucher opponents fail to acknowledge two U.S. Supreme Court decisions in effect during the fear-based choice movement. Each decision upheld the use of public money to pay for educational services at private religious schools.

In *Cochran v. Board of Education*, the U.S. Supreme Court upheld a Louisiana statute that provided for the purchase of textbooks for students in religious schools.[133] Circuit Judge John Minor Wisdom noted this distinction in his 1967 decision invalidating Louisiana's tuition grant program: ''The free lunches and textbooks Louisiana provides for all its schoolchildren are the fruits of racially neutral benevolence. Tuition grants are not the products of the same policy.''[134] Therefore, racial discrimination, not public support of private schools per se, was the culprit. In fact, federal courts invalidated public support for the ''segregation academy'' in Virginia, Louisiana, Arkansas, and Mississippi under the equal protection clause.

During the 14-year history of the Milwaukee voucher program, no federal court said a voucher violated the federal equal protection clause or otherwise circumvented *Brown*. The same is true for the 9-year history of the Cleveland voucher program. By contrast, federal

courts invalidated tuition grants in Arkansas, Alabama, South Carolina, and Mississippi within one to five years of operation. Ten and 13 years, respectively, passed before Louisiana and Virginia tuition grant programs met the same fate. Therefore, the history of fear-based choice is not identical to the history of freedom-based choice (see Table 3-4).

Second, race is not a factor in voucher eligibility. White, black, Hispanic, and other parents can enroll their children into a racially diverse private school if they choose—and without fear that the state will close a public school, and city or church officials will pass a ''white-only'' voucher resolution to protest their decisions. Such responses were common during the 1950s and 1960s. Therefore, the history of fear-based choice is not identical to the history of freedom-based choice.

Third, tuition grant statutes in Virginia, Louisiana, Arkansas, Alabama, and South Carolina were enacted before 1964. Mississippi is the exception. The passage by Congress of the Civil Rights Act of 1964 provided the government with a way to deal head-on with racial segregation in private education.[135] In 1967, for example, two federal courts relied upon the Civil Rights Act of 1964 as part of their rationale for invalidating tuition grants in Alabama and Louisiana. The U.S. Supreme Court affirmed both decisions.[136]

By contrast, the Ohio voucher statute requires its private schools ''not to discriminate on the basis of race, religion, or ethnic background.'' The Wisconsin voucher statute requires its private schools to comply with guidelines of the Civil Rights Act of 1964.[137] Thus far, no federal court has said that the Ohio or Wisconsin voucher statute violates the Civil Rights Act of 1964. Therefore, the history of fear-based choice is not identical to the history of freedom-based choice.

Fourth, eligibility for a tuition grant in Virginia, Louisiana, Arkansas, and Alabama was triggered by a school closing.[138] In Virginia, Chapter 68 of 1956 called for the closing of any public school that became integrated, either ''voluntarily or under compulsion of any court order.''[139] Section 6 authorized the governor to assign a student to another public school, especially when ''mixing of white and colored children constitutes a clear and present danger'' to the welfare of the Virginia.[140] In Arkansas, Act 4 of 1958 gave Governor Faubus the authority to close any public school in the state. Factors

Table 3-4
FEDERAL COURT TREATMENT OF TUITION GRANTS (1954–1969) AND VOUCHERS (1990–2003)

State	Tuition Grant Use/Statute Violated Equal Protection Clause[1]	Tuition Grant Use/Statute Circumvented Brown[2]	Closing of Public School (can or did) Trigger Tuition Grant Use[3]	Voucher Use/Statute Did Not Violate Equal Protection Clause[4]	Voucher Use/Statute Did Not Circumvent Brown[5]
Virginia	X	X	X		
Louisiana	X	X	X		
Arkansas	X		X		
Alabama		X	X		
South Carolina		X			
Mississippi	X				
Wisconsin				X	X
Ohio				X	X

(continued next page)

Table 3-4

FEDERAL COURT TREATMENT OF TUITION GRANTS (1954–1969) AND VOUCHERS (1990–2003) *(Continued)*

[1] Virginia: *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 225 (1964); *Griffin v. State Board of Education*, 239 F.Supp. 560, 565 (1965); and *Griffin v. State Board of Education*, 296 F.Supp. 1178, 1180 (1969). Louisiana: *Hall v. St. Helena Parish School Board,* 197 F.Supp. 649, 651 (1961), *aff'd mem.*; *St. Helena Parish School Board v. Hall*, 368 U.S. 515 (1962); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F.Supp. 833, 835 (1967), *aff'd mem.*; and *Louisiana Financial Assistance Commission v. Poindexter*, 389 U.S. 571 (1968). Arkansas: *Aaron v. McKinley*, 173 F.Supp. 944, 945 (1959), *aff'd mem. sub non.*; and *Faubus v. Aaron*, 361 U.S. 197 (1959). Mississippi: *Coffey v. State Educational Finance Commission*, 296 F.Supp. 1389, 1392 (1969).

[2] Virginia: *Allen v. County School Board of Prince Edward County*, 198 F.Supp. 497, 502–03 (1961); and *Griffin v. Board of Supervisors of Prince Edward County*, 339 F.2d. 486, 492 (1964). Louisiana: *Hall v. St. Helena Parish School Board,* 197 F.Supp. 649, 656 (1961), *aff'd mem.*; and *St. Helena Parish School Board v. Hall*, 368 U.S. 515 (1962). Alabama: *Lee v. Macon County Board of Education*, 267 F.Supp. 458, 476 (1967), *aff'd mem. sub. nom.*; and *Wallace v. United States*, 389 U.S. 215 (1967). South Carolina: *Brown v. South Carolina State Department of Education*, 296 F.Supp. 199, 202–03 (1968), *aff'd per curiam*; and *South Carolina State Department of Education v. Brown*, 393 U.S. 222, (1968).

[3] Virginia: *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233 (1964). Louisiana: *Hall v. St. Helena Parish School Board,* 197 F.Supp. 649, 651 (1961), *aff'd mem.*; and *St. Helena Parish School Board v. Hall*, 368 U.S. 515 (1962). Arkansas: *Aaron v. McKinley*, 173 F.Supp. 944, 945 (1959), *aff'd mem. sub nom.*; and *Faubus v. Aaron*, 361 U.S. 197 (1959).

[4] The NAACP filed an equal protection clause challenge to MPCP in 1998. The Wisconsin Supreme Court did not ''assume as true the legal conclusions pled by the NAACP.'' *Jackson v. Benson*, 578 N.W.2d 602, 631–32. No federal court said the Cleveland voucher program violated the equal protection clause.

[5] No federal court said Milwaukee or Cleveland vouchers circumvented *Brown*.

that could result in a school closing included (1) threats of potential violence to humans or property from school integration, (2) the presence of federal troops in or around Arkansas public schools, and (3) the demise of educational standards due to desegregation.[141] This is the type of fear-based ideology that opened the door to tuition grants in the South.

By contrast, neither the governor of Wisconsin nor Ohio had to shut public school doors to trigger the voucher statutes. Neither did Wisconsin and Ohio legislators disregard their states' obligation to provide public education to Milwaukee and Cleveland students in favor of private school vouchers. Justice Sandra Day O'Connor noted this fact in her concurring opinion in *Zelman*. During the 1999–2000 school year, Ohio spent $114.8 million on magnet schools, $9.2 million on community schools, and $8.2 million on private school vouchers.[142] Therefore, the history of fear-based choice is not identical to the history of freedom-based choice (see Table 3-4).

Fifth, the U.S. Supreme Court's support of voucher-redeeming religious schools in Cleveland is not analogous to support for the ''segregation academy'' model. In *The Politics of Massive Resistance*, Francis M. Wihoit said the Supreme Court resolved this issue when it affirmed *Green v. Connally*. In *Green*, a district court said that racially segregated private schools in Mississippi could not receive the same tax benefit afforded to other educational or charitable organizations.[143] The Supreme Court did not stop there. In *Runyon v. McCrary*, the Supreme Court struck down federal funding of discriminatory private schools.[144] In *Bob Jones University v. United States*, the Supreme Court said that a private school could lose its tax-exempt status for practicing discrimination.[145] By contrast, no federal court has invalidated Wisconsin or Ohio voucher programs for supporting a ''segregation academy'' with public money.

Voucher opponents' use of semiotics and the ''segregated academy'' metaphor to support a uniform private-choice thesis fails to hold up to historical analysis. Fear-based choice is ideologically dissimilar to freedom-based choice, but this fact does not eliminate the possibility that private choice can produce the type of segregation that *Brown* sought to end forever. Private choice has this potential, but it also has the propensity not to do so. Interest groups genuinely interested in education can achieve the latter

goal by identifying—and avoiding—past private-choice mistakes. Freedom-based private choice is not perfect, nor is it a panacea. But focusing solely on similarities, real and manufactured, between it and the old fear-based choice, while failing to acknowledge the blatant dissimilarities between these two movements, is counterproductive to our nation's aim: to provide quality education to all students.

Freedom of Choice: Conclusion

> *Then a name is an instrument of teaching and distinguishing natures as the shuttle is of distinguishing the threads of a web.*[146]
>
> — Socrates

In conclusion, a comparative analysis of private school freedom-of-choice movements in America proves the 1950s version is ideologically dissimilar to the 1990s version. Fear-based private choice was nurtured by the ''Southern Manifesto,'' while freedom-based private choice has its ambition rooted in our ''Charters of Freedom.'' It is also worth noting that the horrors associated with the misuse of public money for private discrimination—in 1959 or in 2004—is not a problem endemic to freedom of choice in education. Rather, it is a painful commentary about the human heart. James Madison reminds us in *Federalist 51* that ''if men were angels, no government would be necessary.''[147] Men used tuition grants irresponsibly during the fear-based choice movement, and government institutions stepped in to correct hateful policies created by the spirit of an unreconstructed heart. The same governmental responses are available to us today.

This comparative analysis also shows the black community as a beneficiary of freedom-based choice, unlike its counterpart during fear-based choice. To consciously turn a blind-eye to this dissimilarity in choice outcome for the black community does a great disservice to the civil rights movement. It also overlooks the wonderful gains made in education during the last 50 years. In fact, hanging a scarlet letter R (for racism) around the neck of a voucher to cheapen its appeal to the black community is unproductive for two reasons.

First, it arrests our nation's ability to fully comprehend what was happening in America during the 1950s. Second, it devalues our

appreciation for what was *not* happening in America during the 1990s when private choice gained popularity again. Therefore, it is more productive to look at private choice similarities and differences across time. If we do so, our nation and its educators can approach this controversial policy issue in a way that will support, rather than corrupt, honest dialogue about how best to use vouchers to deliver educational services to *Brown's* grandchildren in big city America.

Notes

1. Edith Hamilton and Huntington Cairns, eds., *The Collected Dialogues of Plato* (Princeton, N.J.: Princeton University Press, 1961). See *Cratylus* 435(d-6 to e-3), p. 469.

2. Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Alfred Knopf, Inc., 1997), p. ix.

3. *Brown v. Board of Education*, 347 U.S. 483 (1954) [herein *Brown I*]. *Brown v. Board of Education*, 349 U.S. 294 (1955) [herein *Brown II*].

4. 536 U.S. 639 (2002).

5. See generally Commentary, ''*Black Spinelessness in High Places: D.C. Mayor Sells Out on Vouchers—For Nothing*!'' BlackCommentator.com at http://www.blackcommentator.com/41/41_commentary.html. And Makani N. Themba, ''*School 'Choice' and Other White Lies,*'' SeeingBlack.com at http://www.seeingblack.com/x051701/vouchers.shtml.

6. Elmer E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960), p. 2.

7. This chapter does not address public school freedom-of-choice movements in either era nor does it deal with modern indirect-aid statutes such as tax credits or tax deductions.

8. *Brown I* at 493.

9. J. Harvie Wilkinson III, *From* Brown *to* Bakke: *The Supreme Court and School Integration: 1954–1978* (New York: Oxford University Press, 1979), p. 23. *Plessy v. Ferguson,* 163 U.S. 537 (1896).

10. See Jack M. Balkin, ed., *What* Brown *Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York: New York University Press, 2002); James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Past* (New York: Oxford University Press, 2001); Mark Whitman, *The Irony of Desegregation Law 1955–1995: Essays and Documents* (Princeton, N.J.: Markus Wiener Publishers, 1998); Derrick Bell, ed., *Shades of* Brown*: New Perspectives on School Desegregation* (New York: Teachers College Press, 1980); and Richard Kluger, *Simple Justice* (New York: Vintage Books, 1975). But also see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1993).

11. Modern-day school-choice advocates rarely give consideration to the relationship between *Brown* and nondiscrimination policies it helped to establish for private schools that receive public money. Failure to acknowledge this relationship underestimates the importance of *Brown*'s legacy to American public *and* private education.

12. Mark G. Yudof, David L. Kirp, and Besty Levin, *Education Policy and the Law* (3d ed.) (New York: West Publishing Company, 1992), pp. 479–482. See page 479 for 2.14 percent reference. Cited from Harrell R. Rodgers and Charles S. Bullock, *Law*

and Social Change: Civil Rights Laws and Their Consequences (New York: McGraw-Hill, 1972), p. 18. See generally Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* (New York: Wiley-Interscience, 1969).

13. Lino A. Graclia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (Ithaca, N.Y.: Cornell University Press, 1976), p. 37.

14. Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993), p. 26.

15. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); and *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

16. 262 U.S. 390, 401(1923).

17. 268 U.S. 510, 535 (1925).

18. *Brown I* at 493.

19. Ira M. Lechner, ''Massive Resistance: Virginia's Great Leap Backward,'' *Virginia Quarterly Review* 74 (1998): 632 n. 4; Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South during the 1950s* (Baton Rouge, La.: Louisiana State University Press, 1997), p. 111; and Francis M. Wilhoit, *The Politics of Massive Resistance* (New York: George Braziller, 1973), p. 77.

20. Bartley, *The Rise of Massive Resistance*, p. 116.

21. *Congressional Record—Senate*, Vol. 102, part 4, March 8, 1956, to March 27, 1956, p. 4460.

22. Davison M. Douglas, *Reading, Writing & Race: The Desegregation of Charlotte Schools* (Chapel Hill, N.C.: University of North Carolina Press, 1995), p. 33.

23. Paul Clark, ''*Reviving the Doctrine of Interposition*,'' 1998 Marks the Bicentennial of Madison and Jefferson's Call for States to Resist the Federal Government. Available at http://www.localsov.com/cls/reviving.htm. See also Ralph Ketcham, *James Madison: A Biography* (Charlottesville, Va.: University of Virginia Press, 1990), pp. 394–397.

24. Irving Bryant, ''Madison and Interposition,'' *New South* 11 (1956): 6.

25. Bartley, *The Rise of Massive Resistance*, p. 131. The U.S. Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958) denied the constitutional validity of any interposition resolution to thwart federal law.

26. Wilhoit, *The Politics of Massive Resistance*, p. 77 (Virginia), and p. 139 (North Carolina). Florence B. Irving, ''Segregation Legislation by Southern States,'' *New South* 12 (1957): 3 (Arkansas).

27. Irving, ''Segregation Legislation by Southern States,'' p. 3, and Jim Leeson, ''Private Schools for Whites Face Some Hurdles,'' *Southern Education Report* 3 (1967): 14.

28. Davison M. Douglas, ''The Rhetoric of Moderation: Desegregating the South during the Decade after *Brown*,'' *Northwestern University Law Review* 89 (1994): 94, n. 6.

29. ''Tuition grant'' is a name used often, though not solely, in the subheading of *Race Relations Law Reporter* to describe private-school aid statutes of the 1950s and 1960s. Most of those statutes were racially discriminatory.

30. Scholars of massive resistance agree that it began in 1956 with Senator Byrd. Sen. Strom Thurmond from South Carolina played a key role as well. The demise of massive resistance, however, is open for debate. One view is that the fall began where it was born: Virginia. Governor Almond's January 28, 1959, speech to the Virginia General Assembly calling for moderation marked the end of massive resistance in that state, setting in motion the slow death of massive resistance in the South. And the slow death continued until the signing of the 1964 Civil Rights Act. See Wilhoit, *The Politics of Massive Resistance*, pp. 213–230. Numan V. Bartley believes

massive resistance first lost initiative in the upper South from 1958–59 and later in the Deep South during the 1960s. Reasons other than passage of the 1964 Civil Rights Act played a roll as well. See Bartley, *The Rise of Massive Resistance: Race and Politics in the South during the 1950s*, pp. 320–322, 341.

31. Ira M. Lechner, ''Massive Resistance: Virginia's Great Leap Backward,'' *Virginia Quarterly Review* 74 (1998): 632.

32. *Race Relations Law Reporter* 3 (1958): 1241; *Race Relations Law Reporter* 4 (1959): 191; and Chapter 448, *Race Relations Law Reporter* 5 (1960): 521.

33. Chapter 58, *Race Relations Law Reporter* 1 (1956): 1094–1096; and Chapter 62, *Race Relations Law Reporter* 1 (1956): 1097–1098.

34. See generally *Harrison v. Day*, 200 Va. 439 (1959), and *James v. Almond*, 170 F.Supp. 331 (1959).

35. Scholarly books about the subject include Matthew D. Lassiter and Andrew B. Lewis, eds., *The Moderates' Dilemma: Massive Resistance to School Desegregation in Virginia* (Charlottesville, Va.: University of Virginia Press, 1998); Alexander Leidholdt, *Standing Before the Shouting Mob: Lenoir Chambers and Virginia's Massive Resistance to Public-School Integration* (Tuscaloosa, Ala.: University of Alabama Press, 1997); James W. Ely Jr., *The Crisis of Conservative Virginia: The Byrd Organization and the Politics of Massive Resistance* (Knoxville, Tenn.: University of Tennessee Press, 1978); Robert Collins Smith, *They Closed Their Schools; Prince Edward County, Virginia, 1951–1964* (Chapel Hill, N.C.: University of North Carolina Press, 1965); Benjamin Muse, *Virginia's Massive Resistance* (Bloomington, Ind.: University of Indiana Press, 1961).

36. *Allen v. County School Board of Prince Edward County*, 198 F.Supp. 497 (1961), pp. 501–502; and Wilkinson II, *From* Brown *to* Bakke, p. 99.

37. 377 U.S. 218, 225 (1964).

38. Jerome C. Hafter and Peter M. Hoffman, ''Segregation Academies and State Action,'' *Yale Law Review* 82 (1973): 1445 n. 58.

39. *Griffin v. State Board of Education*, 296 F.Supp. 1178, 1180, 1182 (1969).

40. The Louisiana legislature enacted hundreds of bills to circumvent *Brown*. For this chapter, the focus is on four private-school aid statutes only. See Act 258, *Race Relations Law Reporter* 3 (1958): 1062 (first statute); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F.Supp. 833, 842 (1967) for Act 3 of 1960, *aff'd mem.*, 389 U.S. 571 (1968) [herein *Poindexter* (1967)] (second statute); *Poindexter* (1967), p. 843 for Act 147 of 1962 (third statute); and *Race Relations Law Reporter* 12 (1967): 1604 (Act 99 was the fourth statute).

41. *Race Relations Law Reporter* 3 (1958): 1062.

42. *Poindexter* (1967) at 846.

43. *Poindexter* (1967) at 841, and Liva Baker, *The Second Battle of New Orleans: The Hundred-Year Struggle to Integrate the Schools* (New York: Harper Collins, 1996), p. 297.

44. *Poindexter* (1967) at 843.

45. *Hall v. St. Helena Parish School Board*, 197 F.Supp. 649, 659 (1961).

46. *St. Helena Parish School Board v. Hall*, 368 U.S. 515 (1962).

47. *Poindexter* (1967) at 848.

48. Hafter and Hoffman, ''Segregation Academies and State Action,'' p. 1445 n. 58

49. *Poindexter* (1967) at 835, *aff'd mem.*, 389 U.S. 571 (1968). The establishment of a three-judge district court to hear tuition grant cases was a requirement pursuant to 28 U.S.C. §2281 and §2284 with respect to injunctions of state statutes.

50. *Poindexter v. Louisiana Financial Assistance Commission*, 296 F.Supp. 686 (1968) [herein *Poindexter* 1968], *aff'd per curiam sub nom. Louisiana Educ. Comm'n for Needy*

Children v. Poindexter, 393 U.S. 17 (1968). The court ruled the purpose and motive of Act 99 was discriminatory, even though the program had not yet begun operation. The court relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) to invalidate a statute even before it goes into effect based on predications of what could happen.

51. *Frithugh v. Ford*, 230 Ark. 531, 532 (1959).

52. It is worth noting that on September 1, 1958 (the same day Governor Faubus closed Little Rock senior high schools), the U.S. Supreme Court ruled in *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) that the constitutional right of Negro students not to be discriminated against by the governor or state legislature on the grounds of race is a principle stated in *Brown*.

53. *Aaron v. McKinley*, 173 F.Supp 944, 945 (1959), *aff'd mem. sub non. Faubus v. Aaron*, 361 U.S. 197 (1959).

54. Wilhoit, *The Politics of Massive Resistance*, pp. 86, 88.

55. David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: Vintage Books, 1988), p. 269.

56. *Lee v. Macon County Board of Education*, 231 F.Supp. 743 (1964), p. 747 [herein *Lee I*].

57. *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (1967), p. 476, *aff'd mem. sub. nom. Wallace v. United States*, 389 U.S. 215 (1967) [herein *Lee II*].

58. *Lee I* at 748.

59. *Lee I* at 754.

60. *Lee II* at 476.

61. *Lee II* at 476–477.

62. *Aff'd per curiam sub nom* in *Wallace v. United States*, 389 U.S. 215 (1967).

63. John A. Allen, ''The Tax-Exempt Status of Segregated Schools,'' *Tax Law Review* 24 (1969): 411.

64. Jim Lesson, ''The Crumbling Legal Barriers to School Desegregation,'' *Southern Education Report* 2 (1966): 12.

65. *Brown v. South Carolina State Board of Education*, 296 F.Supp. 202 (1968), *aff'd per curiam*, 393 U.S. 222, (1968).

66. Tuition Grants—Mississippi: *Race Relations Law Reporter* 9 (1964): 1500. Also see *Coffey v. State Educational Finance Commission*, 296 F.Supp. 1389 (1969), p. 1390. Language in the statute leaves open for debate its applicability to public school students.

67. Wilhoit, *The Politics of Massive Resistance*, p. 49. See also Hafter and Hoffman, ''Segregation Academies and State Action,'' p. 1448 n. 69.

68. Kenneth T. Andrews, ''Movement—Countermovement Dynamics and the Emergence of New Institutions: The Case of 'White Flight' Schools in Mississippi,'' *Social Forces* 80 (March 2002): 916.

69. Ibid., pp. 922–923.

70. *Coffey* at 1392.

71. 42 U.S.C. 2000c-6. Civil actions by the Attorney General.

72. *Coffey* at 1392.

73. Citing *Reitman v. Mulkey*, 387 U.S. 369, 381, (1967), found in *Coffey* at 1392.

74. Hafter and Hoffman, ''Segregation Academies and State Action,'' p. 1445 n. 58. Student enrollment in white academies ballooned to more than 40,000 one year after the *Coffey* decision. Reasons for the increase are beyond the scope of this chapter. See generally Andrews, ''Movement—Countermovement Dynamics and the Emergence of New Institutions: The Case of 'White Flight' Schools in Mississippi'' (2002).

75. NewsHour with Jim Lehrer, available at http://www.pbs.org/newshour/bb/law/jan-june02/vouchers_2-20a.html. For a good history of the voucher movement, see Clint Bolick, *Voucher Wars: Waging the Legal Battle over School Choice* (Washington: Cato Institute, 2003).

76. Private school aid programs were operating for decades in Vermont and Maine before vouchers arrived in Milwaukee and Cleveland. However, the introduction of vouchers in Milwaukee and Cleveland put the topic of private school aid on the forefront of policy debate in ways Vermont and Maine did not. For information about Vermont and Maine (and Florida), see http://www.schoolchoiceinfo.org/facts/index.cfm.

77. A great deal of scholarly treatment is available dealing with the good, bad, and ugly aspects of school vouchers in Milwaukee and Cleveland. Consensus within academia is mixed about the success or failure of these programs. See generally R. Kenneth Godwin and Frank R. Kemerer, *School Choice Tradeoffs: Liberty, Equity, and Diversity* (Austin, Tex.: University of Texas Press, 2002); David L. Brennan, *Victory for Kids: The Cleveland School Voucher Case* (Beverly Hills, Calif.: New Millennium Press, 2002); Frederick Hess, *Revolution at the Margins: The Impact of Competition on Urban School Systems* (Washington: Brookings Institution, 2002); Terry M. Moe, *Schools, Vouchers, and the American Public* (Washington: Brookings Institution, 2001); Mikel Holt, *Not Yet ''Free At Last'': The Unfinished Business of the Civil Rights Movement* (Oakland, Calif.: Institute for Contemporary Studies, 2000); John F. Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* (Princeton, N.J.: Princeton University Press, 2000); Elchanan Cohn, ed., *Market Approaches to Education: Vouchers and School Choice* (Tarrytown, N.Y.: Pergamon, 1997); Jeffrey R. Henig, *Rethinking School Choice: Limits of the Market Metaphor* (Princeton, N.J.: Princeton University Press, 1994); and Peter W. Cookson Jr., *School Choice: The Struggle for the Soul of American Education* (New Haven, Conn.: Yale University Press, 1994).

78. Wisconsin Statutes Annotated §119.23 (2001).

79. Moe, *Schools, Vouchers, and the American Public*, pp. 32–34; and Holt, *Not Yet ''Free At Last,''* pp. 59–78.

80. Wisconsin Statutes Annotated §119.23(2)(a)(1) (2001).

81. 578 N.W. 2d 206, 620 (1998), *cert. denied*, 525 U.S. 997 (1998).

82. Department of Public Instruction, Milwaukee Parental Choice Program—Facts and Figures as of February 2003. See http://www.dpi.state.wi.us/dfm/sms/choice.html.

83. Department of Public Instruction, Milwaukee Parental Choice Program—Frequently Asked Questions—2003–04 School Year. See http://www.dpi.state.wi.us/dfm/sms/choice.html. The per student amount paid to each MPCP private school is not $6,020 automatically. Only the actual tuition amount is paid to the school. For example, if tuition at private school A is $3,000, then MPCP will pay only $3,000.

84. Nina Shokraii Rees, *School Choice: What's Happening in the States* (Washington: Heritage Foundation, 2000), p. 130. To maintain consistency, I refer to the Cleveland Project Scholarship Program as the Cleveland voucher program.

85. Moe, *Schools, Vouchers, and the American Public*, pp. 37–38.

86. Ohio Revenue Code Annotated §3313.978(A) and (C)(1).

87. Ohio Revenue Code Annotated §3313.978(A), and Kaleem Caire, ''Cleveland (OH) Scholarship and Tutorial Program'' (2002). Copy in author's files.

88. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

89. 536 U.S. 639 (2002). On April 16, 2003, Colorado Governor Bill Owens signed into law a statewide voucher program.

90. SchoolChoiceInfo.org, ''School Voucher Enrollment Growth'' available at http://www.schoolchoiceinfo.org/facts/index.cfm?fpt_id=5&fl_id=2.

91. SchoolChoiceInfo.org available at http://www.schoolchoiceinfo.org/facts/index.cfm?fpt_id=6&fl_id=2, citing Kim Metcalf, ''Evaluation of the Cleveland Scholarship Program and Tutoring Grant Program, 1996–99,'' Indiana Center for Evaluation, September 1999.

92. Justice Felix Frankfurter, ''Some Reflections on the Reading of Statutes,'' *Columbia Law Review* 47 (1947): 533. Quote found in *Poindexter* (1967) at 837 n. 16.

93. This does not mean that no religious school in the six southern states ever received a tuition grant. The point is simply to indicate the intent of the statute.

94. *Poindexter* (1967) at 843.

95. Blackstone, Commentaries 61 (8th ed. 1778). Heydon's Case, 3 Co. Rep. 7a, 7b, 76 *Eng. Rep.* 637 (1584). Quote found in *Poindexter* (1967) at 837 n. 15.

96. David B. Truman, *The Governmental Process: Political Interests and Public Opinion* (Berkeley, Calif.: Institute of Governmental Studies, 1993), pp. 33–34, 216–217. For additional study of interest groups, see Mark P. Petracca, *The Politics of Interests: Interest Groups Transformed* (San Francisco: Westview Press, 1992).

97. Black Alliance for Educational Options Web site http://www.baeo.org/home/index.php. For varying perspectives on school vouchers in the black community, see David A. Bositis, *Education: 2002 National Opinion Poll*, pp. 7–8 available at http://www.jointcenter.org/publications/details/opinion-poll/n-NOP-education-2002.html.

98. Moe, *Schools, Vouchers, and the American Public*, p. 27, and People for the American Way, ''Why Vouchers Won't Work,'' available at http://www.everychildcounts.org/. See also ''Myths and Facts About School Vouchers'' at http://www.pfaw.org/pfaw/general/default.aspx?oid=1427.

99. People for the American Way, ''Partners for Public Education,'' available at http://www.everychildcounts.org/. See also ''Myths and Facts About School Vouchers,'' available at http://www.pfaw.org/pfaw/general/default.aspx?oid=1427.

100. American Civil Liberties Union, Press Release, October 9, 1997. ''House Narrowly OKs Discriminatory Voucher Scheme; Defying Senate, President, and American Public.'' Available at http://archive.aclu.org/news/n100997a.html.

101. See generally Molly Townes O'Brien, ''Private School Tuition Vouchers and the Realities of Racial Politics,'' *Tennessee Law Review* 64 (1997): 359; and Helen Hershkoff and Adam S. Cohen, ''School Choice and the Lessons of Choctaw County,'' *Yale Law & Policy Review* 10 (1992): 1.

102. Maria Baghramian, ed., *Modern Philosophy of Language* (London: J. M. Dent, 1998); pp. xix–xxx.

103. Ibid., p. xxx.

104. See generally Murray J. Edelman, *The Symbolic Uses of Language in Politics* (Urbana, Ill.: University of Illinois Press, 1985).

105. Bruce Hawkins, ''Ideology, Metaphor, and Iconographic Reference,'' in *Language and Ideology: Volume III: Descriptive Cognitive Approaches*, ed. René Dirven, Roslyn Frank, and Corlelia Ilie (Philadelphia: John Benjamins Publishing Company, 2001), p. 32.

106. Molly Townes O'Brien, ''Private School Tuition Vouchers and the Realities of Racial Politics,'' p. 406.

107. Evan Thomas and Lynette Clemetson, ''A New War Over Vouchers,'' *Newsweek*, November, 22, 1999, p. 46.

108. Rep. Elijah E. Cummings (D-Md.), ''CBC [Congressional Black Caucus] Special Order Commemorating the 49th Anniversary of *Brown v. Board of Education*,'' House of Representatives—May 14, 2003. See http://www.house.gov/cummings/cbc/cbcspeech/sp051403.htm; and Rep. Robert C. ''Bobby'' Scott (D-Va.), ''Remarks of Congressman Robert C. 'Bobby' Scott on Behalf of the 49th Anniversary of the *Brown v. Board of Education* Supreme Court Decision.'' See http://www.house.gov/scott/press/remarks_Brown_vs_Board_of_Education.htm.

109. *NewsHour with Gwen Ifill*, http://www.pbs.org/newshour/bb/law/jan-june02/vouchers_2-20a.html.

110. Survey conducted on Lexus-Nexus search engine. Searches from 1954–1969 for ''voucher'' and ''school'' and ''tuition grant'' were done for district, appellant, and Supreme Court decisions. Searches from 1970–2003 for ''voucher'' and ''school'' and ''tuition grant'' focused on Supreme Court decisions.

111. Examples include, but are not limited to, *Darcy v. Handy*, 130 F.Supp. 270 (1955) (jury); *Wirtz v. Healy*, 227 F. Supp. 123 (1964) (travel expense); and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (voting).

112. *USA v. Beacon Musical Instruments Co.*, 135 F.Supp. 220 (1955) (educational payment); and *Powe v. Miles*, 407 F.2d. 73 (1968).

113. Examples of voucher used in U.S. Supreme Court decisions between 1970–2003. *Hubbard v. U.S.*, 514 U.S. 695 (1995) (transaction); *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (voting); and *Blum v. Bacon*, 457 U.S. 132 (1982) (food stamps). Here are four references for voucher and education made between 1970 and 2003. *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (audit voucher); *U.S. v. Lopez* 514 U.S. 549 (1995); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (voucher for disabled student); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Cleveland voucher).

114. 413 U.S. 756 (1973).

115. 413 U.S. 455 (1973).

116. Fred R. Dallmayr, *Language and Politics: Why Does Language Matter to Political Philosophy* (Notre Dame, Ind.: University of Notre Dame Press, 1984), p. 3.

117. Murray Edelman, *The Politics of Misinformation* (New York: Cambridge University Press, 2001), pp. 11–12.

118. ''School Vouchers: Few v. All,'' *Rainbow/Push* VII, Issue 9 (2002). See http://www.rainbowpush.org/weeklyfax/2002/RPF_02_21_02.pdf .

119. Quote found in Jonathan Kozol, ''Falling Behind: An Interview with Jonathan Kozol,'' *The Christian Century*, May 10, 2000, pp. 541–543. See http://www.religion-online.org/cgi-bin/relsearchd.dll/showarticle?item_id=1990.

120. Allen, ''The Tax-Exempt Status of Segregated Schools,'' p. 412, and Note, ''Federal Tax Benefits to Segregated Private Schools,'' *Columbia Law Review* 68 (1989): 924; David Asaki, Michael A. Jacobs, and Sharon Y. Scott, ''Racial Segregation and the Tax-Exempt Status of Private Educational and Religious Institutions,'' *Howard Law Journal* 25 (1982): 546 n. 7; and Mark I. Silberblatt, ''Denial of Tax Exempt Status to Southern Segregated Academies: *Green v. Kennedy* (D.D.C. 1970),'' *Harvard Civil Rights/Civil Liberties Law Review* 6 (1970): 179.

121. David Lidov, *Elements of Semiotics* (New York: St. Martin's Press, 1999), p. 4.

122. David Sless, *In Search of Semiotics* (London: Croom Helm, 1986), pp. 1, 10.

123. Jack Solomon, *The Signs of Our Times: The Secret Meaning of Everyday Life* (New York: Harper & Row Publishers, 1988), p. 9.

124. Charles D. Elder and Roger W. Cobb, *The Political Uses of Symbols* (New York: Longman, 1983), p. 29.

125. Deborah Stone, *Policy Paradox* (New York: W. W. Norton & Company, 1997), p. 148. For a different perspective on metaphor, see Donald Davidson, *Inquires into Truth and Interpretation* (New York: Oxford University Press, 2001) (''. . . metaphors mean what the words, in their most literal interpretation, mean, and nothing more.''), p. 245.

126. Winfried Noth, *Handbook on Semiotics* (Bloomington, Ind.: Indiana University Press, 1990), p. 128.

127. Editorial by Rep. Jesse Jackson Jr (D-Ill.), Truthout, ''Vouchers: Illegitimate Cure for Legitimate Concerns.'' See http://www.truthout.com/docs_02/06.28C.jjj.vouch.htm.

128. Steven K. Green, ''The Illusionary Aspect of 'Private Choice' for Constitutional Analysis,'' *Willamette Law Review* 38 (2002): 556–557. See pp. 556–557 for Green's reference to equality and choice. For a supportive view of this position, see Joseph Vitteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (Washington: Brookings Institution, 1999), pp. 11–15.

129. Donald A. Schön and Martin Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (New York: Basic Books, 1994), pp. 26–27.

130. Green, ''The Illusionary Aspect of 'Private Choice' for Constitutional Analysis,'' pp. 565–566. Emphasis added.

131. John E. Eastman, ''The Magic of Vouchers Is No Sleight of Hand: A Reply to Steven K. Green,'' *Willamette Law Review* 38 (2002): 205.

132. Green, ''The Illusionary Aspect of 'Private Choice' for Constitutional Analysis,'' p. 565.

133. 281 U.S. 370 (1930). The other case is *Everson v. Board of Education*, 330 U.S. 1 (1947). The Court upheld a New Jersey statute to pay the cost for transporting parochial schoolchildren. Robert S. Alley, ed., *The Constitution & Religion: Leading Supreme Court Cases on Church and State* (Amherst, N.Y.: Prometheus Book, 1999), pp. 45–47.

134. *Poindexter* (1967) at 835.

135. Allen, ''The Tax-Exempt Status of Segregated Schools,'' p. 411, and Note, ''Federal Tax Benefits to Segregated Private Schools,'' pp. 924, 947.

136. *Lee II* (1967) at 466 (Alabama), *aff'd mem. sub. nom. Wallace v. United States*, 389 U.S. 215 (1967). *Poindexter* at 836 (Louisiana), *aff'd mem.*, 389 U.S. 571 (1968).

137. Ohio Revenue Code Annotated §3313.976(4) (West Supp. 2002); and Eastman, ''The Magic of Vouchers Is No Sleight of Hand: A Reply to Steven K. Green,'' p. 205. See Wisconsin Statute Annotated §119.23(4)-(5)(2001), and 42 U.S.C. 2000d for 1964 Civil Rights Act.

138. Virginia, Louisiana, and Alabama later removed this requirement.

139. Public Schools—Virginia: Chapter 68 *Race Relations Law Reporter* 3 (1958): 1103.

140. *Harrison v. Day*, 200 Va. 439, 443 n. 1 (1959).

141. Ibid.

142. *Zelman* at 664.

143. 330 F.Supp. 1150 (1971), *aff'd sub. nom. Coit v. Green* 404 U.S. 997 (1971). Wilhoit, *The Politics of Massive Resistance*, p. 154.

144. 427 U.S. 160 (1976).

145. 461 U.S. 574 (1983).
146. Hamilton and Huntington, *The Collected Dialogues of Plato*, p. 426. See *Cratylus* 388 (c 1–3).
147. Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1961), p. 322.

decision as critical as *Brown*. Certainly, the pro-choice movement, like the desegregation movement, means much more for minority students and their families than for other Americans.

For decades, and despite a host of compensatory reforms, the sizable gap in educational performance between blacks and whites has remained roughly the same. According to the National Assessment of Educational Progress, black eighth-graders continue to score about four grade levels below their white peers on standardized tests. Nor is this gap likely to close as long as we have, in President Bush's words, ''one education system for those who can afford to send their children to a school of their choice and one for those who can't.''

When parents choose a neighborhood or town in which to live, they also select, often quite self-consciously, a school for their children. That is why various Internet services now provide buyers and real-estate agents with detailed test-score data and other information about school districts and even individual schools. But there is a catch: the mobility that makes these choices possible costs money. It is no accident that children lucky enough to be born into privilege also attend the nation's best schools.

African-Americans are often the losers in this arrangement. Holding less financial equity and still facing discrimination in the housing market, they choose from a limited set of housing options. As a result, their children are more likely to attend the worst public schools. Richer, whiter districts rarely extend anything more than a few token slots to low-income minority students outside of their communities.

It is thus unsurprising that blacks have benefited most when school choice has been expanded. In multi-year evaluations of private voucher programs in New York City, Washington, D.C., and Dayton, Ohio, my colleagues and I found that African-American students, when given the chance to attend private schools, scored significantly higher on standardized tests than comparable students who remained in the public schools. In New York, where the estimates are most precise, those who switched from public to private schools scored, after three years, roughly nine percentage points higher on math and reading tests than their public school peers, a difference of about two grade levels. If reproduced nationwide, this result would cut almost in half the black-white test-score gap.[6]