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# School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities

*Paul Finkelman\**

## I. INTRODUCTION

The State of Utah just dodged a bullet—an alleged silver bullet that was to cure the “problems” of public education. By an overwhelming vote, the people of Utah voted down the proposed school vouchers bill.<sup>1</sup> Patrick Byrne, the key supporter of the law—who spent millions of his own and his family’s money on the referendum—complained that the landslide defeat of the bill showed that voters in Utah “don’t care enough about their kids.”<sup>2</sup>

But whether the debate in Utah (or elsewhere) over school vouchers is even about quality education—about whether parents “care enough about their kids”—is an open question. Most enthusiasm for school vouchers comes from supporters of parochial schools, religious-based charter schools, or religious-based home schooling. Indeed, it would hardly be otherwise, since about eighty-four percent of all children in private schools in the United States are attending religious schools.<sup>3</sup> It is possible that widespread use of

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1. Glen Warchol, *Vouchers Go Down in Flames*, SALT LAKE TRIB., Nov. 7, 2007, at A12.

2. *Id.*

3. Editorial, *No to School Vouchers: Don’t Tax Americans to Pay for Religious Schools*, 54 CHURCH & ST. 230, Nov. 2001. CHURCH AND STATE is the official publication of Americans United for Separation of Church and State. The percentage quoted above is based on statistics gathered by the U.S. Department of Education. In Utah the percentage may be somewhat lower, but it appears that in Salt Lake County, the largest county in the state, about sixty percent of all children in private schools are in religious schools based on data gathered from

vouchers might lead to the creation of non-religious private schools, but this seems unlikely because the creation of a new school is extremely costly and vouchers are unlikely to provide enough money to pay for the creation of a new school. Vouchers might, however, lead to the creation of new religious schools, which would be funded by churches and denominations and then helped by vouchers. Thus, support for vouchers is, in the end, an endorsement of using state money to pay for private (overwhelmingly religious) schools. In Utah, ads in support of the bill “implied that good Mormons should support vouchers.”<sup>4</sup> Other supporters of the bill argued that passage of the referendum would be a blow against teachers unions, “liberals,” and government bureaucracy.<sup>5</sup> Those favoring the school voucher bill tried to tie the “opposition to liberal icons such as the American Civil Liberties Union, Senators Hillary Clinton and Ted Kennedy, and out-of-state unions.”<sup>6</sup> Indeed, in defeat Byrne claimed the school voucher vote was about “freedom,” implying that “freedom” would only come through school vouchers.<sup>7</sup> In fact, of course, it was about two other things: the agenda of those who support state aid to religious education and the agenda of those, like Byrne, who see school vouchers as a convenient horse to mount in their charge against political liberalism, unions, and any kind of government spending that does not involve the military or the police.

Ironically, Byrne never considered that his notion of “freedom” would involve supporting mostly religious education with taxpayer dollars, and that the very “freedom” he would create, would, in the end, undermine one of the central bedrock freedoms of American society: freedom of belief and practice, which is based on separation of religion and the state.<sup>8</sup> The supporters of the voucher bill never

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the Web site of the Private School Review. PRIVATE SCHOOL REVIEW, UTAH PRIVATE SCHOOLS, [http://www.privateschoolreview.com/state\\_private\\_schools/stateid/UT](http://www.privateschoolreview.com/state_private_schools/stateid/UT) (last visited Mar. 18, 2008) (scroll down and follow the “Salt Lake” hyperlink; approximately sixty-two percent of students listed attend a school with an explicitly religious name or a school listed as having an LDS affiliation).

4. Warchol, *supra* note 1, at A12. This was the position of supporters of the voucher bill and not the position of the Church of Jesus Christ of Latter-day Saints, which did not take a public position on the bill.

5. *See id.*

6. *Id.*

7. *Id.*

8. Data on the exact number of private schools in Utah and the religious breakdown is

explained how it would promote freedom to take money from a person of one faith, to support the religious institutions of another faith.

There are many public policy, intellectual, and education policy arguments against school vouchers. School vouchers undermine the public schools but never provide enough money to give a true private school option to all parents and children. Indeed, they function as a subsidy for the rich in two ways. First, by giving any funds to the wealthiest in society, as the Utah program would have, the vouchers provide a direct subsidy for private education to those who do not need a subsidy. Subsidies may help those people on the margins, who can use the subsidy to send children to private schools, thereby raising the overall revenue for private schools and lowering the overall costs for all people paying private-school tuition. A subsidy to private education is ultimately undemocratic, and it leads to an increase in separate education within our society, rather than a shared educational experience. Vouchers put the poorest and least-able families at risk because, in the end, vouchers will undermine educational quality in the public schools that those individuals with the fewest resources will still be attending.

These policy arguments, while important, only inform the larger mission of this Article, which is to explain the threat to religious freedom and religious liberty posed by school vouchers. Because nationally the majority of private schools are religious, school vouchers must inevitably breach the wall of separation<sup>9</sup> between

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very difficult to obtain. OnlineUtah.com provides the longest list of private schools. This list contains 103 schools—61 religious schools and only 42 non-religious. Furthermore, many of the secular schools are “special education” schools designed for children with disabilities or behavioral problems and would not be appropriate for most students. OnlineUtah.com, <http://www.onlineutah.com/privateschools.shtml> (last visited Mar. 18, 2008). The total number of schools also does not give the entire picture. For example, according to the Private School Review in Salt Lake County, only half of the high schools are religious, but they contain sixty percent of the private school students in the county. See Warchol, *supra* note 1, at A12. Thus, only forty percent of the private school students are in schools without a religious affiliation. Other examples of using simple numbers of schools illustrates this problem. According to Schooltree.org, Draper, Utah, for example, has five private schools—three religious and two non-religious. But the two that are “nonsectarian” have a total of 352 students enrolled; the three others are religious and have 2664. SchoolTree.Org, <http://utah.schooltree.org/Salt-Lake-County-Schools.html> (last visited Mar. 18, 2008).

9. This phrase was first used by Thomas Jefferson in his famous letter to the Danbury Baptist Association. Letter from Thomas Jefferson to Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), in *THE PORTABLE JEFFERSON*, at 303 (Merrill D. Peterson ed., 1975).

religion and the state. This Article argues that such a breach is ultimately dangerous not only to education, but also to religion and people of faith.

This Article argues that the people of Utah correctly rejected the most recent attempt at voucher implementation because vouchers harm both government and religion by breaking down the barriers that our nation has wisely set up between the two. Part II discusses the Jeffersonian tradition of separation of church and state and discusses how vouchers, including the proposed Utah program, would inexcusably compel individuals in society to support religion, while simultaneously failing to accomplish the objectives that "school choice" purports to provide. Part III discusses the history of Roger Williams and the lessons that can be gleaned from his experiences with both British and American intrusion into religious affairs. Specifically, Williams's experience shows that state involvement in religion is just as harmful to the religion as to the individual members of the state. Part IV explains how the same principles of government involvement in religion underlie the most recent voucher proposal in Utah and why the citizens of Utah wisely rejected the measure. Part V offers examples from three modern Supreme Court cases of how mixing religion and the government undermines and corrupts religious belief. Then Part VI concludes the piece.

## II. THE JEFFERSONIAN TRADITION OF SEPARATION OF RELIGION AND THE STATE AND THE PROBLEM OF SCHOOL VOUCHERS

Mr. Byrne claimed his bill was about freedom. However, his notion of freedom seemed to be narrowly focused on the idea that the state should provide money so parents can take their children out of public schools and enroll them—at state expense—in private religious schools. Indeed, the religious motivation behind the voucher movement is underscored by ads in favor of the program which "implied that good Mormons should support vouchers."<sup>10</sup> It is important to note that the LDS Church took no position on this bill, even though supporters of the bill "implied that good Mormons" should be in favor of it.

Mr. Byrne's claim that support for school vouchers was the

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10. Warchol, *supra* note 1, at A12.

equivalent of support for “freedom” is at odds with the long tradition, in law and politics, that freedom in America is rooted in what Thomas Jefferson called “the wall of separation between Church and State.”<sup>11</sup>

*A. Thomas Jefferson and the Idea of Separation of Church and State*

Under Jefferson’s theory of separation of religion and the government, freedom is only possible when individuals are not compelled to support someone else’s religion. The heart of this argument is found in Thomas Jefferson’s succinct statement of the issue in his 1779 proposal for a law creating religious freedom in Virginia:

To compel a man to furnish contributions of money for the propagation of [religious] opinions which he disbelieves *and abhors*, is sinful and tyrannical: that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness.<sup>12</sup>

Jefferson’s original bill did not pass, but in 1785 James Madison revived it, arguing in support of the bill that it would be wrong for the government to “force a citizen to contribute three pence only of his property for the support of any one establishment.”<sup>13</sup> This argument helped carry the day. The final bill, adopting most of Jefferson’s original language, was passed by the Virginia legislature as “An Act for Establishing Religious Freedom.”<sup>14</sup> The law (using Jefferson’s language) asserted that “no man shall be compelled to frequent or support any religious worship, place, or ministry

11. Letter from Thomas Jefferson, *supra* note 9.

12. Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd ed., 1950). For a discussion of the Jefferson Papers and legal scholarship, see Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45–84 (2006).

13. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, 300 (Robert A. Rutland & William M. E. Rachal eds., 1973).

14. Thomas Jefferson, An Act for Establishing Religious Freedom, in 12 STATUTES AT LARGE OF VIRGINIA 84 (William Waller Hening ed., 1823).

whatsoever.”<sup>15</sup> This has been a bedrock principle of American constitutional theory. Even where the Supreme Court has upheld state transfers of money to parochial schools,<sup>16</sup> such as in *Zelman v. Simmons-Harris*,<sup>17</sup> it has done so by effectively denying that the laws in fact were transfers of public money to religious schools.<sup>18</sup> In the cases upholding the use of public money for vouchers, the Court has accepted a fiction—a fiction that seems utterly absurd in light of the actual facts surrounding private schools—that the state money is not actually going to religious schools, but is instead going to individual parents to be spent on their children’s education. The Burger and Rehnquist Courts were willing to buy such arguments because the Justices could not have otherwise reached the results they clearly wanted to reach. Voters in Utah, however, were unimpressed by

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15. *Id.* at 86. Jefferson also believed that the public schools should not teach religion either, arguing that in a system of public education:

the great mass of the people will receive their instruction, the principal foundations of future order will be laid here. Instead therefore of putting the Bible and Testament into the hands of the children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history. The first elements of morality too may be instilled into their minds; such as, when further developed as their judgments advance in strength, may teach them how to work out their own greatest happiness, by showing them that it does not depend on the condition of life in which chance has placed them, but is always the result of a good conscience, good health, occupation, and freedom in all just pursuits.

THOMAS JEFFERSON, *Query XIV: Laws, in* NOTES ON THE STATE OF VIRGINIA 168, 183 (2002)

16. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding state program giving vouchers to parents who then gave them to religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding federal payments for sign language teachers in religious schools); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding scholarship program to attend a private Christian college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deductions for private school expenses, even though ninety-six percent of all deductions were for religious schools).

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

18. I realize the U.S. Supreme Court upheld the constitutionality of Ohio’s voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), but the Court could only do this by ignoring the facts of school vouchers and asserting that the voucher programs were “facially neutral” and did not give money to parochial schools. Chief Justice Rehnquist’s analysis in *Zelman* was disingenuous and in defiance of the facts of the case. *However*, it is important to understand that Chief Justice Rehnquist’s strategy of ignoring the facts of the case and the reality that the voucher money supported religious schools actually supports my point here. Even in *Zelman*, the Court recognized and accepted the idea that it would be unconstitutional to fund parochial schools.

such arguments, especially since they were made in conjunction with advertisements implying that Mormons had a religious obligation to support vouchers. Utah voters understood that, however it was packaged, the voucher law was about the state paying for religious education. This is especially the case since the non-religious schools in the state generally have the highest tuitions and thus, most people using vouchers would only be able to use them to go to the less-expensive religious schools.

### B. *The Problems with Vouchers*

It is hard to square the concept of school vouchers with the Jeffersonian-Madisonian principle that no person should have to support another person's religious beliefs, because the bottom line is that, despite whatever the Court said in *Zelman*, school vouchers take taxpayer dollars and give them to religious schools. Everywhere the concept comes up it is the supporters of religious education—at taxpayer expense—who also advocate vouchers.

In theory, the debate over school vouchers could be framed as a debate over how to achieve better schools and enhanced educational opportunity. Conservative politicians claim that this is their goal.<sup>19</sup> Conservative think tanks often claim they are trying to give “hope and freedom” to minority students,<sup>20</sup> yet rarely does one see a minority acting as a spokesman for the think tank. This is clearly the case in Utah, where representatives from Utah's conservative think tank, the Sutherland Institute, claimed that the voucher proposal would protect minority interests and enhance minority education.<sup>21</sup> But, despite such public claims by the Institute's spokesman,<sup>22</sup> the Sutherland Institute's web site proclaims its goals are limited government, fostering religion, and protecting private property.<sup>23</sup> There is no indication that the Sutherland Institute cares much about civil rights or racial equality. Rather, the sudden “discovery” of minority interests seems to be a convenient tactic to push its

19. Warchol, *supra* note 1, at A12.

20. Paul T. Mero, President, The Sutherland Inst., Address at Educational Choice: Emerging Legal and Policy Issues Seminar (Oct. 23, 2007).

21. *Id.*

22. *Id.*

23. The Sutherland Institute, <http://www.sutherlandinstitute.org/faq/details.asp?c=17> (last visited Mar. 18, 2008).



agenda of breaking down what Jefferson called “the wall of separation between Church and State,”<sup>24</sup> while at the same time undermining government per se. What is fundamentally a religious and anti-government agenda is masked as a plea for providing better education for minorities.<sup>25</sup> The Institute’s Utah Spending Clock (showing how much per second the State of Utah spends) combined with its strong support for religious values, suggests that the main support for school vouchers is from people who simply oppose taxation and government, except, perhaps, when government spending will support religion.<sup>26</sup>

These conservative supporters of school vouchers argue that vouchers will lead to school choice,<sup>27</sup> and choice, they argue will lead to better public schools. They assert that taking money from public schools to fund vouchers will also make the public schools better. They do not explain how public schools will become better if they have to operate on smaller budgets. They sometimes argue that by pulling students out of schools there will be no loss to the school budgets for per capita spending. But such arguments ignore the value of economies of scale or the cost of maintaining existing infrastructure. Because the voucher movement is tied to attacks on the entire notion of public schools, as well as teachers unions, there is an unstated premise that “less is more” will work because public schools are wasteful and, presumably, teachers are overpaid and do not do their jobs. Thus, in the theoretical world of voucher proponents, taking money from public schools will make the schools become more efficient, hence better. In an era when even the best-funded public schools are forced to ask for donations from parents and run bake sales, cookie sales, candy sales, raffles, and all sorts of other fundraisers to provide such “luxuries” as music and art classes, school bands, and even sports teams, it is hard to imagine how cutting school funds will improve public education.

A second argument is that schools will become better under voucher programs because the public schools will have to compete

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24. Jefferson, *supra* note 9, at 303.

25. The Sutherland Institute, <http://www.sutherlandinstitute.org/> (last visited Mar. 18, 2008).

26. *Id.*

27. Ironically, most of the supporters of “choice” in education vehemently oppose “choice” when it comes to other things in life, such as individuals choosing whom they can marry or whether or not to bear children.

with private schools, and, according to most neo-classical economic models, competition leads to better products. This theory of competition might work in the public schools, but there are great problems with it. Competition in the marketplace certainly leads to improvements of some products. But competition in the marketplace sometimes simply leads to lower prices for goods that are in fact inferior. Competition in the marketplace might lead to the educational equivalent of Wal-Mart or the Dollar Store—inexpensive, but hardly of the highest quality. Indeed, market theory would presume that if the salaries of teachers are cut, the best teachers will move to better-paying jobs in other districts or even other states. Thus, vouchers might lower the cost of education but only by lowering the quality.

We also know that real competition requires an even playing field and an open market. One of the problems with school vouchers is that they do not create such a market. Instead, private schools and charter schools are often able to cherry pick only the best students, or the easiest to teach. They can reject those with learning difficulties, physical disabilities, or social problems. The Utah voucher program, which the electorate rejected, apparently did not require that schools receiving vouchers accept children with disabilities.<sup>28</sup> Thus, the voucher program would leave students with disabilities—some of the most expensive students to educate—in public schools that had been stripped of many of their resources.

Furthermore, private schools generally do not have to accept students whose parents lack the time, ability, means, or interest to play a significant role in the education of their children. Some private schools *require* that parents volunteer for the school, which closes out many parents, especially working single parents. Thus, a voucher system would leave the public schools to educate those children who are most costly to educate—and to educate them with fewer resources.

Nor do school vouchers deal very well with equality. Despite the superficially attractive claims of some advocates that school vouchers will improve minority access to better schools, most private schools in this country discriminate—either directly or indirectly—in a variety of ways. Many religiously based schools will not admit children of a different faith. Those that do enroll children of all faiths

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28. See 2007 Utah Laws Ch. 4 (H.B. 148) (rejected by referendum).

often require that every student attend religious services. A voucher system might allow an inner-city parent to send a child to a better private school, but at the cost of forcing that child to pray outside the child's faith. In some cities, Roman Catholic Schools do not have any religious test for enrolling students,<sup>29</sup> but in doing so, these schools are using the carrot of possibly better private education in order to expose non-Catholic children to the Catholic faith. These schools are still religious in nature and often require students to attend prayer or study religion. In the South, "school choice" has long been associated with segregation and the creation of segregated academies to insure that white children did not have to go to school with blacks.<sup>30</sup> "In the southern United States, private schools flourished because of desegregation" and whites "formed their own academies" in response to integration.<sup>31</sup> Throughout the South are thousands of private academies whose sole purpose is to provide segregated education for white children.<sup>32</sup> Such segregation continues and is almost impossible to fight or defeat. Significantly, the development of new private schools, which "offered a haven to white middle class families[,] . . . damaged the public schools."<sup>33</sup> Meanwhile, existing Roman Catholic schools undermined integration because they kept a substantial number of white children out of the public schools, thus making integration more difficult.<sup>34</sup> The proposed Utah voucher law did not require schools accepting

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29. David S. Doty, Assistant Comm'r and Dir. of Policy Studies, Utah Sys. of Higher Educ., Address at Educational Choice: Emerging Legal and Policy Issues seminar (Oct. 23, 2007).

30. See, e.g., DAVID NEVIN & ROBERT E. BILLS, *THE SCHOOLS THAT FEAR BUILT* 7-9 (1976) (noting about 300,000 new students entered private schools in the South in response to integration from 1970 to 1975); Robert Collins Smith describes the creation of private all-white schools as part of Prince Edward County's decision to close its public schools rather than integrate. BOB SMITH, *THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951-1964* (1965). This left black children with almost no educational opportunity. The Supreme Court ordered the reopening of the public schools in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

31. JOSEPH WATRAS, *POLITICS, RACE AND SCHOOLS: RACIAL INTEGRATION, 1954-1994*, 55 (1997).

32. *Id.* at 56. Between 1964 and the 1970s, more than 200 private schools were started just in South Carolina. See David S. Doty, Assistant Comm'r and Dir. of Policy Studies, Utah Sys. of Higher Educ., Address at Educational Choice: Emerging Legal and Policy Issues Seminar (Oct. 23, 2007).

33. WATRAS, *supra* note 31, at 59.

34. GARY ORFIELD, *MUST WE BUS?* 61 (1978).

children with vouchers to accept all children without regard to religion or even race. There was no guarantee of equal opportunity or “equal protection” in this law.

Most elite private schools, colleges, and universities have an active affirmative action program for the children of the richest and most powerful people in the nation—it is called “legacy” admissions. Children of alumni are given preferential treatment in admissions decisions, which discriminates against those whose parents, or grandparents, or great-grandparents could not attend such schools. This issue is obviously better known for private universities<sup>35</sup> but exists for private grammar and secondary schools as well.

The most important part of private-school discrimination is economic. Vouchers systems, such as the one proposed in Utah, cannot solve this problem. If we gave school vouchers to *all* children, most would not be able to attend elite private schools because the voucher would not be enough. Furthermore, the schools that charge very high tuition could continue to exclude children on a class or economic basis by simply raising tuition above the voucher. That would keep out poorer students, but children already attending private schools would now have vouchers to add to their tuition dollars. Families on the margins—families that could almost afford private schools—might be aided by vouchers, but most families would not be able to add enough money to significantly affect where their child went to school. Indeed, in many instances where families are eligible for vouchers, the families do not use them because they cannot find the additional money necessary to pay private school tuition.<sup>36</sup>

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35. It is hard to imagine, for example, that George W. Bush would have been admitted to Yale had he not been the son and grandson of Yale graduates on his father's side, as well as the nephew of Yale graduates on the his mother's (Walker) side of the family. See Michael Kinsley, *How Affirmative Action Helped George W.*, CNN.COM/INSIDE POLITICS, Jan. 20, 2003, <http://www.cnn.com/2003/ALLPOLITICS/01/20/timep.affirm.action.tm/> (“If our President had the slightest sense of irony, he might have paused to ask himself, ‘Wait a minute. How did I get into Yale?’ It wasn't because of any academic achievement: his high school record was ordinary. It wasn't because of his life experience—prosperous family, fancy prep school—which was all too familiar at Yale. It wasn't his SAT scores: 566 verbal and 640 math.”).

36. Richard D. Kahlenberg, *The Problem of Taking Private School Vouchers to Scale*, The Century Foundation, June 27, 2002, at 2, available at <http://www.tcf.org/Publications/Education/vouchers.pdf>.

*C. Imagining a Voucher System That Leads to Better Education*

It is possible to imagine a voucher system that would seriously change education. Such a program would give vouchers to all children on a means test, so that those children from families with the highest incomes would get no money at all while those from families with the lowest incomes would get a share of the voucher money that would be much greater than the overall per capita amount available. As I note below, the Utah proposal attempted to split the difference on this issue. It offered money to even the wealthiest people in the state who surely did not need state help to send their children to private schools, but the proposal did not provide sufficient funds to allow the children of those people in the lowest economic strata to pay for private school.

A voucher system designed to provide better opportunities for children of the poorest people in America would also require that state or independent agencies accredit all private schools within the state. State money, after all, could not simply flow to unregulated schools. While parents would be free to use vouchers to send their children to any school, the state's obligation to the taxpayers would require that money could only go to accredited schools.

Additionally, in an ideal voucher program, every school would *have to* accept all qualified students. Furthermore, every accredited school would *have to* accept vouchers. For children from the poorest families, it would be reasonable to require all schools to accept vouchers as full tuition. This would be the only way that the voucher system would enable all children to be able to go to any private school in the state. There could be no discrimination on the basis of race, faith, geography, or disability. Presumably, such a program might allow same-sex schools, but not same-faith or same-race schools. There could be admissions tests and other qualifications. Some schools would put children into uniforms; some high schools might have ROTC programs that would include some military training. Some would be vocational, others academic. Some might be language immersion schools. Some would specialize in math and science, others in the humanities, and others in the fine and performing arts. The existing public schools would continue, but they would have to compete with other schools for students.

Students would apply to schools with voucher in hand. Schools would compete for student vouchers with programs and promises of excellence, discipline, opportunity, or a great football team. Parents

and children would make choices.

But, to make sure that equal opportunity truly existed in this system, the schools could not cherry-pick students on the basis of race, class, religion, or disability. If a school had a standard—perhaps a specific score on the newly created GSAT (Grammar School Aptitude Test), MSAT (Middle School Aptitude Test), and the HSAT (High School Aptitude Test)—then the school would have to accept all students who met that qualification.

Under such a regime, all curriculums would have to be subject to state oversight because the private schools would be overwhelmingly funded by tax dollars, and in some cases—perhaps many cases—would replace the public schools. If all public schools had to compete for students, it is easy to imagine that in some communities the existing public schools would simply disappear. But, because the Utah Constitution, like *every other* state constitution, requires the state to provide a free public education for all school-age children, the voucher system would have to require that all schools meet basic state requirements for a proper education.<sup>37</sup>

Similarly, there would have to be protection of children from religious and racial discrimination. Religiously based schools would be allowed to teach their religious subjects; they could even require attendance in theology courses. But, attendance at prayer could not

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37. *E.g.*, N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated.”); UTAH CONST. art. X, § 1 (“The Legislature shall provide for the establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.”). For all other states, see ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, § 1; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

be required because that would place an insurmountable, and unconstitutional, barrier to those of other faiths. In this sense, the schools would be like Catholic or Jewish hospitals that have a crucifix or mezuzah on each room, but take all patients and cannot force those patients to attend prayers. The school cafeteria could serve whatever food it wanted, but presumably, it could not force a Moslem or Jewish student to eat pork, or a Hindu to eat meat. We could imagine a one-way regulation on this issue: a Muslim school could ban pork and require that children only eat food in the cafeteria that did not violate Islamic law, but a Catholic school could not require that a Muslim student eat pork in the cafeteria.

Such a system could allow for massive school choice, and it might lead to better education. But, this is not the goal of most proponents of school vouchers. They do not envision multicultural private schools, under state supervision, which replace current private schools. Nor can they seriously argue that vouchers will provide substantial educational opportunity to poor children.

Advocates of school vouchers talk about educational choice and about allowing poor children to attend better schools, but it is hard to take these claims at face value. The proposed Utah bill, for example, would have provided from \$500 to \$3000 to each student based on need and family size. Such small amounts would not have enabled any truly poor or disadvantaged children to attend a high-quality private school. The top amount of \$3000, which would only go to the families with incomes of \$30,000 or less, would not go very far in many schools. The Sutherland Institute in Salt Lake claims that the average tuition rate for most private schools in Utah is \$4500.<sup>38</sup> However, the Institute gets this result by removing what it calls "outlier" schools from the averages. The Institute defines outliers as all schools with tuition of \$10,000 a year or more.<sup>39</sup> This rather simplistic analysis also removes some of the very best schools in the state. The Intermountain Christian School in Salt Lake currently charges \$4720 for elementary tuition—very close to the

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38. THE SUTHERLAND INSTITUTE, THE ABC'S OF VOUCHERS—AVERAGE TUITION (2007), available at <http://www.sutherlandinstitute.org/uploads/averagetuition.pdf>. These numbers are based on a survey of sixty-four schools out of the eighty-eight that, according to the Institute, "currently fit HB 148's standard for participation in the school voucher program." The Institute gives no indication of which schools did or did not provide tuition information for the Institute's "average."

39. *Id.*

Sutherland Institute average—and it is conceivable that a lower-middle-class family might be able to come up with the \$1720 differential. But middle school is \$5245 and high school is \$6205.<sup>40</sup> It is impossible to imagine how a truly poor family would find the \$1720 differential for grammar school, much less the \$3205 differential for high school. In 2003, the Waterford School, a college preparatory school in Sandy, Utah, charged \$9600 for grades one through three, \$11,025 for grades four through seven, and \$13,600 for grades eight through twelve.<sup>41</sup> Presumably, more recent figures would be higher. Judge Memorial Catholic High School in Salt Lake charges \$8360 *plus* fees for high school. Juan Diego Catholic High School, which is in Salt Lake County, charges \$8522 plus assorted fees for all grades. Those charges are just to get into the door, and they are paid before the student's parents buy the first pencil. Reid Elementary School in Salt Lake County charges a flat \$8500 for all grades. Rowland Hall St. Marks School, also in Salt Lake County, charges \$12,450 for kindergarten through fifth grade and \$14,710 for sixth through eleventh. For that final year, twelfth grade, the tuition is \$15,040. It is hard to imagine how many poor parents, working class parents, or even most middle-class parents, will find an extra \$12,000 or more to send a child to that elite private school. Schooling may be cheaper outside the Salt Lake City metropolitan area, but it is no bargain. The Cache Valley Learning Center in Logan charges \$5100.<sup>42</sup> Where would the lower-middle-class or poor families find the extra \$2100 just for the tuition at this school? These figures suggest that vouchers will not actually help most children in the state attend the very best private schools—the kind of preparatory schools that regularly send graduates to the most elite colleges and universities in the nation. Vouchers will, however, help upper-middle-class families a little by providing \$500 to a \$1000 for families making \$150,000 a year. Such a voucher would be a small bonus to these families but, in the end, would probably not affect their decision to send their children to elite private schools.

The proposed Utah bill was clearly not designed to enable poor, or even middle-class, children to attend elite private schools. Under

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40. Data based on telephone calls to these schools made on October 22, 2007.

41. Tim Westby, *Private School Primer: Alternatives to Public Education Abound in Utah*, UTAH BUS., June 1, 2003, at 60, 62.

42. Data based on telephone calls to these schools made on October 22, 2007



the proposed law's voucher system, the best education in the best schools in Utah would not have been any more within the reach of most people in the state. What the proposed law would do is provide a taxpayer subsidy for upper-middle-class and wealthy parents who are already sending their children to expensive private schools and, more importantly, provide a taxpayer subsidy for upper-middle-class (and wealthier) parents who are currently sending their children to parochial schools. In effect, it would be a subsidy for religious education at relatively high taxpayer expense. It is possible that under this law a few children would attend less-expensive (and often religious) private schools, such as New Tyme in Midvale, Utah, where the elementary tuition is only \$3600 and the high school is \$4500.<sup>43</sup> Similarly, in 2003 the Deseret Academy charged \$3500 for primary school, \$3800 for middle school, and \$4000 for high school, while the Anchor Christian Academy charged only \$1575 a year for any grade level. The St. Joseph Elementary School in Ogden charged \$3500 for kindergarten through eighth grade.<sup>44</sup> Only one of these relatively inexpensive schools has a tuition rate that is under the maximum voucher amount. Thus, what the voucher system would do is strengthen religious schools at the expense of public schools. To put it another way, the law would take taxpayer dollars and funnel them to the religious institutions that comprise more than half of the private schools and private school students in Utah,<sup>45</sup> thereby, in effect, tithing the taxpayers to support religious institutions that may or may not reflect their own religious values.

The call for school vouchers comes almost entirely from proponents of parochial education. The goal of vouchers is not to send average kids to Choate or Exeter or Utah's Waterford School; it is to provide state funding for children who are already attending private, often religious, schools in Utah. The advertisements supporting the voucher plan, which stressed the religious aspects of

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43. The cost of an excellent private elementary and secondary education in Utah is relatively low, although the Sutherland Institute reported that one school in the state charges \$52,200 a year and another charges \$35,000. Significantly, the Institute found a number of schools charging between \$10,000 and \$15,000 a year but did not include them in its averages. This once again underscores the reality that school vouchers will not level the educational playing field. They may in fact make it less level. THE SUTHERLAND INSTITUTE, *supra* note 38.

44. Westby, *supra* note 41, at 62.

45. See *supra* notes 3 and 8.

the plan, underscore this.<sup>46</sup> In this sense, honest participants in the debate about school vouchers ought to come out of their closet and stop talking about educational reform. The issue is really quite simple: should we use tax dollars to fund private and parochial schools? Should we subsidize private education and religious faith with taxpayer dollars? Should we subsidize private and religious education while at the same time undermining the state constitutional requirement to provide a free public education to all children? The Utah legislative service notes that a voucher system would cost the state between \$43 million and \$60 million more than it would to send the same children to public schools.<sup>47</sup> We might logically ask, how much better would Utah be if the state put that money into public schools to enhance the educational opportunity of all children in the state?

The proponents of taxpayer subsidies for private—usually religious—education argue that they are forced to pay for public schools that they do not want to use. This is an underwhelming argument. All taxpayers pay for programs and projects without receiving direct or even indirect benefits. Taxes rarely translate directly into benefits for taxpayers, states, or even regions. At the federal level this is obvious. Some states—like Utah—get far more back from the federal government than they send to Washington; others send more money to Washington than they get back.<sup>48</sup> The same is true for counties and cities. It is also true for individuals. Public schools are actually one of the few publicly funded institutions that benefit everyone, either directly or indirectly. A better-educated workforce increases the GDP, which has a positive impact on all

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46. See *supra* note 4 and accompanying text at *supra* note 4. Again, it is important to reiterate that the advertising suggesting “good Mormons” should support vouchers was not sanctioned by the LDS Church, but was rather a ploy by proponents of vouchers to gain support. The fact that the referendum was overwhelmingly defeated in a state where the majority of voters are Mormons illustrates that many (perhaps most) Mormons did not think that their faith required them to support school vouchers.

47. Citizen’s State Referendum Number 1: Impartial Analysis, “Fiscal Impact,” available at <http://le.utah.gov/lrgc/impartial.pdf>.

48. For example, in 2005 Utah received \$1.61 from the federal government for every dollar sent to Washington from Utah. New Mexico led the way with a \$5.00 return for every dollars sent to the national government. By contrast, New York received only twenty-four cents for every dollar it sent to Washington and Minnesota, ranking last, got only nineteen cents back. NATIONAL PRIORITIES PROJECT, FEDERAL DOLLARS: WHAT CAME TO AND LEFT YOUR STATE IN 2005, [http://www.nationalpriorities.org/publications/what\\_came\\_to\\_and\\_left\\_your\\_state\\_in\\_2005](http://www.nationalpriorities.org/publications/what_came_to_and_left_your_state_in_2005) (last visited Mar. 24, 2008).

Americans. Even those who do not have children benefit from public education. Moreover, almost all Americans are related to people who attended public schools, even if they personally attended private schools. To the extent that vouchers weaken the public schools, they harm everyone.

The Jeffersonian critique of school vouchers<sup>49</sup> is one that resonates deeply in American society. It is a bad idea to take money from taxpayers to support religious institutions. This goes to the heart of “freedom” as Americans have always understood the concept—the freedom not to be coerced into supporting someone else’s faith. There is, however, an alternative American tradition that would lead us to reject school vouchers because they threaten religious institutions. This is a sometimes-forgotten tradition, but one that people of faith should remember and venerate.

### III. THE DANGER OF VOUCHERS FOR RELIGION AND THE STORY OF ROGER WILLIAMS

For people of faith, vouchers raise a more complicated question. A successful voucher program would inevitably lead to state interference with, and superintendence over, religious institutions. If parochial schools accept vouchers, they open themselves to greater regulation by the state. In a democracy, it cannot be otherwise. There must be accountability. Every dollar of state funds that flows to a religious school increases the likelihood of government oversight and interference with the mission of the school. The claim that the money goes to parents or children may work in the short run, but in the long run it cannot hold up. The result of a successful voucher program would be that an increasing portion of the state budget would end up in the parochial schools and that in some places, as suggested above,<sup>50</sup> public schools might be effectively or actually replaced by private religious schools. This would naturally lead to greater state supervision of, and interference with, religious schools and religious institutions.

This leads us to Roger Williams, the first proponent of separation of religion and the state in the American colonies. A deeply religious man, uncompromising in his devotion to his faith, Williams

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49. *See supra* Part II.A.

50. *See supra* Part II.C.

understood the danger of mixing religion and government: in the end, religion would lose—and faith would be compromised. Williams wisely realized that the state was always stronger than any faith, church, or denomination; and he found that, when the two are mixed, religion would have to make compromises. He understood that any establishment of religion—that is, any government financial support of religion—would harm dissenting faiths more than mainstream faiths. On the other hand, he equally understood that an established faith was more likely to be corrupted by the state than an independent faith.

### *A. The Early Life of Roger Williams*

Williams learned early in life the dangers to faith of combining religion with the government. It is a lesson that can be instructive today. A brief history of Williams's life and thought illustrates the dangers posed to religion when it gets mixed up with the state.<sup>51</sup>

Williams was born in 1603, the son of a well-to-do merchant who died when Williams was about seventeen. Williams, clearly an astoundingly bright young man, caught the attention of Sir Edward Coke, who became the patron of the precocious Williams. Thus, as a teenager Williams was taking short hand notes in the Court of the Star Chamber. This was during the reign of King James I, when the Star Chamber was increasingly a court used to oppress religious dissenters. It was here that Williams probably first began to consider the dangers of mixing religion and the state. He saw firsthand—and took down in shorthand—the way in which a religiously motivated government might oppress those with different views.

In 1621, Coke helped Williams obtain a scholarship to Charterhouse, which was already on its way to becoming one of England's most prestigious private schools (called "public schools" in England). He graduated in 1624 and then went to Cambridge, where he earned a BA in 1627. In 1629, Williams earned an MA at Cambridge, but never received the degree because he refused to take the required oath to support the hierarchy of the Church of England. Instead, that year he became a Puritan minister and also

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51. Much of the material on Williams's life is drawn from the sources cited throughout this Part. For information on Williams, see generally OLA ELIZABETH WINSLOW, *MASTER ROGER WILLIAMS* (1957).

the personal chaplain to Sir William Masham, a wealthy Puritan.<sup>52</sup> He fell in love with Jane Whalley, the daughter of a wealthy and powerful landowner in Nottingham. She was also a cousin of Oliver Cromwell and the sister of Edward Whalley, who would serve as a judge in the treason trial of King Charles I and sign the King's death warrant. However bright and promising Williams was, he lacked the social class to marry into such a powerful family.<sup>53</sup> Instead, in December 1629 he married Mary Bernard, a young woman working as a servant in a Puritan family.<sup>54</sup> His middling social status did not prevent him from working closely with leading Puritans such as Thomas Hooker, John Cotton, and John Winthrop as they planned the creation of the Massachusetts Bay Colony.

### *B. Williams in Massachusetts*

In December 1630, Williams left England aboard the *Lyon* for the newly created Puritan colony, arriving in Boston on February 5, 1631. Governor John Winthrop noted in his diary that the *Lyon* "brought Mr. Williams (a godly minister) with his wife."<sup>55</sup> Williams was immediately offered a pulpit of the Puritan church in Boston, but declined the offer unless the church agreed to become Separatist—that is, unless the church abandoned the Puritan goal of purifying the Church of England and became a Separatist church.<sup>56</sup>

Puritans and Separatists had almost identical theological views but differed dramatically in their relationship to the Church of England. Puritans considered themselves to be members of the Church of England (also called the Anglican Church), which was the established church in England. In that sense, they were not revolutionaries challenging the ties between the political and religious hierarchy in England. Rather, Puritans, as their name implied, wanted to reform, or "purify," the Anglican Church. Separatists, like Williams, believed that the Church of England was beyond redemption and that only by separating from the Church of

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52. *Id.* at 72.

53. *Id.* at 82.

54. *Id.* at 87.

55. JOHN WINTHROP, 1 WINTHROP'S JOURNAL: HISTORY OF NEW ENGLAND 57 (James Kendell Hosmer ed., 1908) [hereinafter WINTHROP DIARY].

56. EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 103-05 (2d. ed. 1999).

England could they achieve a Godly life on earth. These differences were religious and theological, but they were also deeply political. By rejecting the Church of England, Separatists were also implicitly rejecting a component of the authority of the King and the government of England.

The Puritan church in Boston seemed ready to accept Williams's terms, in part because many Puritans were in fact sympathetic to the Separatist critique of the Church of England, and in part because Williams himself was such a charismatic and brilliant man. But Governor Winthrop intervened. Winthrop admired Williams and remained friends with him throughout most of their lives.<sup>57</sup> However, Winthrop was also a political leader who understood that a Separatist church in the heart of the new colony would be politically unwise, even dangerous to the colony's autonomy.

Thus, from the moment he arrived in Boston, Williams saw the threat to freedom of conscience and personal holiness caused by an alliance between religion and the state. Winthrop was no Archbishop Laud,<sup>58</sup> and the Massachusetts government was hardly the Star Chamber. But the issues were the same: the government, in order to sustain the established church and maintain its own political authority, had to crack down on dissenters and had to limit religious freedom.

In response to this series of events, Williams began to develop his own theory of separation, arguing that the state should not be allowed to enforce the "first table" of the Ten Commandments—prohibitions on blasphemy, heresy, idolatry, or Sabbath breaking.<sup>59</sup> Along these lines, Williams concluded that the government should not be able to force people to attend church.<sup>60</sup> At the time, the government in Massachusetts had the power to fine or otherwise

57. JAMES CALVIN DAVIS, *ON RELIGIOUS LIBERTY: SELECTIONS FROM THE WORKS OF ROGER WILLIAMS* 13 n.9 (2008).

58. William Laud, Bishop of London (1628–1633) and Archbishop of Canterbury (1633–1645), was the intolerant supporter of King Charles I. Laud, a member of the King's Privy Council, was notorious for his use of the Star Chamber for prosecuting religious dissidents. He was largely responsible for the prosecution, torture, and execution of many Puritan leaders in the 1630s, including John Lilburne, William Prynne, Henry Burton, and John Bastwick. He was a hated symbol of the ruthless oppression of King Charles I, and in 1645 he was beheaded by an order of Parliament. See generally WILLIAM HALLER, *THE RISE OF PURITANISM* (1938); C.V. WEDGWOOD, *THE KING'S PEACE* (1955).

59. WINTHROP DIARY, *supra* note 55.

60. MORGAN, *supra* note 56, at 111.

punish those who did not attend church. After this experience, Williams was increasingly unrestrained in his criticism of the Church of England, claiming it was run by drunkards and whores.<sup>61</sup>

Williams left Boston after Winthrop forced the church to reject separatism and thus withdraw its offer to hire Williams. He then went to Salem, where the local church was already essentially Separatist. However, Winthrop soon persuaded that church to withdraw its offer to Williams.<sup>62</sup> The young minister then left the Massachusetts Bay Colony for the Plymouth Colony, which had been founded by Separatists. While in Plymouth, from 1631 to 1633, he became increasingly critical of the relationship between religion and the state in general, and the relationship between Puritan Massachusetts and the royal regime. Williams questioned the right of settlers to live on Indian land, and declared that the King's claim that he had the authority to give land grants was "a solemn public lie."<sup>63</sup> He similarly charged the King with blasphemy for referring to Europe as "Christendom."<sup>64</sup>

Williams returned to Salem in 1633 as an "assistant minister" but continued to question the right of the King to give land to the settlers without the consent of the local Indians. While Williams was minister in Salem, John Endecott, who was from Salem, cut the St. George's Cross out of a British flag. This was consistent with Williams's view that the King had no right to appropriate religious symbols for political use. Williams was not charged for this desecration of the flag; but Williams knew Endecott well, and most everyone in Massachusetts assumed that it was Williams's preaching that led to Endecott's act, which bordered on treason.<sup>65</sup> The General Court eventually sanctioned Endecott by prohibiting him from holding any public office for one year.<sup>66</sup> This mild sentence was due to the fact that Endecott persuaded the Court of his sincere religious belief on the subject and that he did it "out of tenderness of conscience, and not of any evil intent."<sup>67</sup> Once again, Williams saw

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61. *Id.* at 105 (quoting Winthrop, who rebukes Williams for using such language to describe members of the Church of England).

62. *Id.* at 105-06.

63. WINTHROP DIARY, *supra* note 55, at 116.

64. *Id.* at 116-17; MORGAN, *supra* note 56, at 108; WINSLOW, *supra* note 51, at 108.

65. WINSLOW, *supra* note 51, at 114-16.

66. Endecott would later become governor of the colony.

67. WINTHROP DIARY, *supra* note 55, at 150.

how the mixing of religion and state undermined faith. Here, someone was punished for expressing his religious views because the state had used religious symbols to shore up its political authority. The state stifled religious expression because the state insisted on determining the legitimate use of holy symbols. Religion was subordinated to politics.

Williams was later brought before the courts because of his public insistence that a “magistrate ought not to tender an oath to an unregenerate man.”<sup>68</sup> Williams believed that an oath to God, taken by a sinner, could have no value. If the state required an oath from an unregenerate man, the state was complicit to blasphemy; thus, it was wrong for the state to ask for such oaths. The solution, of course, was for the state not to conscript God in implementing the state’s business. An affirmation, not based on “swearing” under the name of God, would have sufficed. The state did not need God to implement its civil policies of seeking fidelity to the government or insuring that those who testified in court would tell the truth.

In 1634, the colony passed legislation requiring that all residents take an oath to support the colony. The oath taker agreed to be obedient to all laws and to submit to the authority of the magistrates. The oath naturally enlisted religion in the cause of politics. Scrupulous Christians, like Williams, refused to take the oath, risking expulsion from the colony. Eventually, the colony stopped administering the oath. This victory was costly because Williams earned the undying enmity of most of the leaders of the colony.

In the summer of 1635, the members of the Salem Church made Williams their first minister.<sup>69</sup> This was done without consulting any other churches, which was the norm, although not required by any law. Shortly after this appointment, the town of Salem petitioned the Massachusetts legislature—known as the General Court—to settle a land dispute with neighboring Marblehead.<sup>70</sup> The General Court refused to consider the petition until the Salem Church dismissed Williams from its pulpit.<sup>71</sup> This is a particularly egregious example of the danger of intertwining religion and government. The people in

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68. *Id.* at 149.

69. *Id.* at 155.

70. *Id.*

71. MORGAN, *supra* note 56, at 112; WINTHROP DIARY, *supra* note 55, at 155.



Salem considered it a “heinous sin”<sup>72</sup> for the civil government to try to dictate to them who they could have as a preacher. In the end, however, Salem (and religious liberty) lost. The colony’s government was powerful enough to crush religious dissenters by forcing them to accept the majority’s view of what constituted legitimate religious behavior.<sup>73</sup> Soon political pressure combined with pressure from other ministers and churches forced the Salem Church to abandon its support for Williams.

### *C. Expulsion from Massachusetts*

Shortly after the loss of this position, all of the ministers in the colony assembled to examine Williams, and in the end they condemned him for disseminating “dangerous opinions against the authority of the magistrates.”<sup>74</sup> In October 1635, the magistrates, acting on this condemnation, ordered Williams expelled from the colony.<sup>75</sup> The four charges against him were all tied to religion in one way or another.<sup>76</sup>

The General Court charged that Williams had denied the legitimacy of the King’s charter to the Massachusetts Bay Colony.<sup>77</sup> This charge was based on his belief that the King had no authority from God to take land from the Indians. Second, the General Court prosecuted Williams because he had insisted that the civil authorities exceeded their power by requiring oaths or prayer attendance.<sup>78</sup> Williams argued that oaths—which were always “under God”—and

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72. MORGAN, *supra* note 56, at 112.

73. This of course is similar to the conduct of the United States Government toward the Church of Jesus Christ of Latter-day Saints (LDS Church) in the late nineteenth century. In 1887, the U.S. Congress revoked the LDS Church’s charter in the Utah Territory and seized all property owned by the LDS Church. The Supreme Court upheld this in *The Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890). See generally Edwin B. Firmage, *Mormon Free Exercise in Nineteenth-Century America*, in RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 317–25 (Paul Finkelman ed., 1999). In 1890, the LDS Church renounced polygamy, and in 1894, Congress passed legislation to return property to the Church, which was fully accomplished in 1896. Throughout this period, Utah statehood was held hostage because of prejudice against the LDS Church and its doctrines. Finally, in 1896, Congress admitted Utah into the Union.

74. WINTHROP DIARY, *supra* note 55, at 154.

75. *Id.*

76. *Id.*

77. *Id.* at 162.

78. *Id.*

prayers had nothing to do with civic or political obligations of people. In essence, he argued that the government had no business using its resources and powers to support or require what were essentially religious acts. He also argued that oaths and prayers from those who were not true Christians were blasphemous, and thus by requiring them, the government sullied and undermined true religious values.

His third charged offense was based on his insistence that the Church of England was a “false” church, and that Puritans should not attend the Anglican Church when they returned to England. Unlike the magistrates trying Williams, who might have criminalized such activity (just as they criminalized failure to attend church in Massachusetts), Williams would not have forced people not to attend the Anglican Church while in England, although he might have expelled them from his church in Massachusetts if they did not attend Anglican service in England. Finally, the most important charge against Williams stemmed from his persistent assertion that the government had no jurisdiction over the religious beliefs and activities of the people. Williams argued that the government could only regulate “the bodies and good, and outward state,” of the people, not their consciences, beliefs, or religious practices.<sup>79</sup>

The leaders of Massachusetts Bay made plans to ship him back to England, where he would doubtless have been arrested by the government of King Charles I. In January 1636, Williams escaped to what is present-day Rhode Island, where he purchased land from the Narragansett Indians and founded the colony of Providence, which allowed full religious freedom.<sup>80</sup> By 1655, Jews had moved to the colony, and they started their own congregation in 1658. In 1660, Quakers, generally considered dangerous rabble-rousers and troublemakers, were allowed to settle in the colony. Williams had no love for the Quakers—finding them at best tiresome. In 1676, he wrote his tract *Fox Digged out of His Burrowes*, attacking the founder of the Quakers, George Fox, and one of his associates, Edward Bouroughs. However, Williams saw no reason to persecute Quakers. He understood that toleration, not persecution, was the key to religious salvation.

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79. ROGER WILLIAMS, *Mr. Cottons Letter Lately Printed, Examined and Answered*, 1644, in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 41 (Perry Miller ed., 2005).

80. WINTHROP DIARY, *supra* note 55, at 168.

*D. The Lessons of Williams for Modern Times*

So, where does the story of Williams fit into the modern debate over school vouchers? Williams's understanding of the dangers of combining religion with government and his life's experience speak to Americans today. His career illustrates the danger to religion of allowing the government to become involved, even in a positive way, with religion. Williams thought people ought to attend church and listen to sermons, but he was opposed to mandatory church services because he did not want churches cluttered up with those who did not want to be there. He believed that forcing people to attend church would, in effect, constitute blasphemy against the church. Similarly, he railed against the tie between the English government and the Church. He became a Separatist in part because he saw how the English government corrupted the Church. Williams knew, for example, that prayer should come from the heart, not from a *Common Book of Prayer* produced by the government. He rejected the new translation of the scriptures—what is known as the King James Bible—because he knew that this translation was authorized by the government and that it was tainted by political decisions and political goals of the translators.<sup>81</sup>

#### IV. THE DANGER OF SCHOOL VOUCHERS TO RELIGION AND PEOPLE OF FAITH

The movement for school vouchers would threaten religion in the two ways that Williams experienced. First, vouchers would lead to government regulation of religion. This would be inevitable if vouchers were used to support religious schools. And, as we have seen, most private schools in the United States are religious. Schools that accept vouchers would, in the end, have to accept increased regulation. This is the nature of democracy, and it cannot be otherwise. Taxpayers deserve accountability and auditing.

Second, vouchers in the end would lead people of faith to make compromises with their own beliefs. Once the spigot of money is turned on, and parochial schools come to count on and plan for government subsidies, the schools—and the religious institutions that support them—will become dependent on government money.

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81. ADAM NICOLSON, *GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE* 38, 60, 72–76 (2003).

They will thus compromise their own values to make sure they can receive government funds. In other words, government support for religion will water down and weaken religion, not strengthen it.

#### V. EXAMPLES OF MODERN CORRUPTION OF RELIGION

Three modern cases—*Engel v. Vitale*,<sup>82</sup> *Lynch v. Donnelly*,<sup>83</sup> *Van Orden v. Perry*<sup>84</sup>—illustrate this problem. All involve governmental attempts to endorse or support religion while trying to appear theologically and denominationally neutral.

*Engel* is well-known as the first school prayer case. That case centered on the New York State Regents Prayer, which, in theory, every child in a New York public school said every morning.<sup>85</sup> The text of the prayer was self-consciously non-sectarian and non-denominational. The entire prayer, said just before the recitation of the Pledge of Allegiance, was as follows: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”<sup>86</sup> Such a statement would hardly be recognized as “prayer” in any meaningful way by people of faith who take religion seriously. There is no mention of Jesus or Christ, central to the millions of Catholic and Protestant children who recited the prayers. The archaic language—“Thee” and “Thy”—was a tip of the hat to the King James Version of the Bible, which was an anathema to Catholics and basically irrelevant to Jews. Students did not pray on their knees, as Catholics and some Protestants would have, male students did not cover their heads, as Jews would have, and no one lay down facing Mecca in the Islamic tradition. The rote recitation lacked the emotional content of spontaneous prayer of Mormons and some evangelical Protestants. It was monotheistic in language, leaving Hindus wondering “which” almighty God the prayer might be addressed to, and theistic in tone, no doubt leaving Buddhists at a loss. The prayer was nor in Hebrew, Greek, Latin, or German, as might have been the tradition of Jews,

82. 370 U.S. 421 (1962).

83. 465 U.S. 668 (1984).

84. 545 U.S. 677 (2005).

85. I say *in theory* because the high school in my home town in Watertown, New York, located in far upstate New York, used the Protestant version of the Lord’s Prayer, despite the presence of a significant number of Roman Catholic students and a smattering of Greek Orthodox, Russian Orthodox, and Jewish students.

86. *Engel*, 370 U.S. at 422.

Greek Orthodox, Roman Catholics (in the pre-Vatican II era), or Lutherans. It was not scripturally based, as Jews and Protestants would have expected, nor was it a prayer of the heart. It was in fact not much of a prayer at all. It was exactly what we would expect from a state agency trying to create a prayer that would offend no one, side with no one, and not run counter to anyone's faith.

Roger Williams would have seen the irony of this and understood the blasphemy. He would have explained that the state cannot prescribe prayer because prayer comes from the heart. He would also have noticed, and condemned, the political implications of the prayer. The Regents Prayer was neither personal nor religious. It was not about the soul, or about right and wrong. Rather, it was essentially a *political* act, as the state required each child in school to pray for the employees of the state ("our teachers") and the national political structure ("our Country"). It was a conscripted pledge of theistic devotion to the political hierarchy. The bottom line, which Williams understood, is that when the state becomes a religious actor, it does not do so to save souls but to prop up government institutions.

A similar result came out of *Lynch v. Donnelly*,<sup>87</sup> which ironically came from Rhode Island. The case involved the city of Pawtucket, Rhode Island, which every year erected a nativity scene on public land. Chief Justice Warren Burger described the city's efforts at the beginning of the case:

The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. All components of this display are owned by the City.<sup>88</sup>

In a five-to-four decision the Court upheld the constitutionality of this display on public land. In his opinion, Chief Justice Burger noted that "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only

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87. 465 U.S. 668 (1984).

88. *Id.* at 670.

when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.”<sup>89</sup> Here the Court concluded, correctly, that the display was not “motivated wholly by religious considerations.”<sup>90</sup> Indeed, the display was mostly motivated by commercial interests. The city wanted to attract shoppers to the downtown during the Christmas shopping season.

In his dissent, Justice Brennan asserted that “it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket’s nativity scene dilutes in some fashion the crèche’s singular religiosity.”<sup>91</sup> Justice Brennan would have barred the display on the very logical grounds that the crèche is one of the two most holy symbols of Christianity and that any public display of a crèche (except in a museum or some other educational or artistic setting) *had* to be an endorsement of the Christian faith.<sup>92</sup> Brennan’s logic is unassailable.

The majority, however, rejected it because the crèche in this case was camouflaged by clowns, candy canes, “an elephant and a teddy bear, hundreds of colored lights, a large banner that read ‘SEASONS GREETINGS,’” and of course Santa and his reindeer.<sup>93</sup> In other words, the Court upheld the crèche precisely because it was not displayed in a reverent or holy setting.

This is precisely the same reason that Justice Breyer provided the deciding vote in *Van Orden v. Perry*,<sup>94</sup> to uphold the right of the State of Texas to display a Protestant text of the Ten Commandments on public land.<sup>95</sup> The text of the Ten Commandments on this monument was cluttered with religious and non-religious symbols, including an American eagle and a pyramid with an eye in it.<sup>96</sup> The monument itself was surrounded by other monuments that had nothing to do with religion. It was precisely for

89. *Id.* at 680.

90. *Id.* at 680.

91. *Id.* at 697 (Brennan, J., dissenting).

92. *Id.* at 695.

93. *Id.* at 668, 671.

94. 545 U.S. 677 (2005).

95. On the nature of this monument, see *Van Orden*, 545 U.S. at 717–18 (Stevens, J., dissenting); and Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477 (2005).

96. *Van Orden*, 545 U.S. at 681 (majority opinion).

these reasons that Justice Breyer found the monument permissible. Justice Breyer upheld the right of Texas to display the monument because “[t]he physical setting of the monument, moreover, suggests little or nothing of the sacred.”<sup>97</sup>

*Lynch* and *Van Orden* illustrate the danger of government using religious symbols for “secular” purposes. In *Lynch*, the city used one of the most holy symbols of Christianity to stimulate economic activity. It did so by displaying this symbol in a context that many Christians would doubtless find blasphemous. The city took the crèche and surrounded it with clowns, candy canes, cutouts of elephants and all sorts of other things that had no connection to the birth of Jesus, Christianity, or the religious message of Christmas. While many Christians might not be offended by this, those who take their faith seriously should surely have been concerned, not only with the method of display—the baby Jesus juxtaposed with a clown—but also with the purpose—using the holy scene of the birth of Jesus to attract customers to the downtown stores.

In *Van Orden*, the use of the Ten Commandments monument was equally suspect to people of faith. The monument was developed by the Fraternal Order of Eagles (FOE). The Hollywood producer Cecil B. DeMille supported the placement of these monuments because it allowed him to get favorable publicity for his movie *The Ten Commandments*. In the 1950s, DeMille sent the stars of that movie, Charlton Heston and Yul Brenner, to dedicate FOE monuments around the country.<sup>98</sup> Thus, once again, a religious text was used to support a commercial purpose. Nothing could have been more horrifying to Roger Williams, *except* perhaps the use of the text for political purposes. But, like the prayer at issue in *Engel*, the Ten

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97. *Id.* at 702 (Breyer, J., concurring).

98. *See, e.g.*, Grand Aerie Convention Proceedings, 1955, at 120 (“Your commission has also enjoyed the cooperation of Paramount Pictures in the production of ‘The Ten Commandments’ which will be released for showing the Fall of 1956, and Mr. Cecil B. DeMille has agreed to participate with our fraternity in the presentation of a granite monolith containing the Ten Commandments as maybe arranged by this commission. Mr. DeMille will present Mr. Charlton Heston, cast in the role of Moses, who will also participate in such public dedication as may be arranged.”); Manuel Meyers, *Modern Moses*, THE EAGLE, Feb. 1957, at 16–17 (describing Charlton Heston dedicating a Ten Commandments monument in North Dakota); *Why We Need the Ten Commandments*, THE EAGLE, Sept. 2001, at 5–6 (with pictures from 1955 of Yul Brenner dedicating a Ten Commandments monument in Milwaukee); *see also* The 10 Commandments Muddle, CHI. TRIB., June 28, 2005, at C18 (discussing the joint efforts of the Fraternal Order of Eagles, director Cecil B. DeMille, and various actors distributing *Ten Commandments* monuments nationwide).

Commandments monument at issue in *Van Orden* was also political. The monument in Texas, like all the other FOE monuments, features an American flag, an American eagle, and the Masonic pyramid with an eye that appears on the one-dollar bill. Here the Ten Commandments were hijacked to support commerce, patriotism, and two different fraternal orders.

## VI. CONCLUSION

These cases and the history of religious freedom in the colonies underscore the dangers of school vouchers for people of faith. Once the money flows to religious schools they will be forced to compromise their faith and their autonomy. Meanwhile, public schools will be starved for assets, non-religious people will resent their tax dollars supporting religious institutions, and it is unlikely that most poor children will get a better education. The cost of vouchers will be too high for everyone. Wisely, in 2007 the people of Utah understood that. Their experience is a vital lesson for the rest of the nation.