



# DROP COFFERS

*Richard W. Garnett & Benjamin P. Carr*

“COFFERS.” WHEN WE HEAR OR READ THE WORD, what do we picture? Buried treasure on the Isle of Monte Cristo?<sup>1</sup> The dragon Smaug’s stolen riches, piled deep under the Lonely Mountain?<sup>2</sup> Maybe we dimly remember a line of Shakespeare<sup>3</sup> or Chaucer.<sup>4</sup> If one is male and of a certain age, the word might bring to the surface suppressed memories of the all-nighters and arcana associated with Dungeons & Dragons. And, if one is a justice of the Supreme Court of the United States, one’s thoughts might turn to the checking account of St. Jerome Catholic School in Cleveland.<sup>5</sup>

Saint Jerome is one of the parochial schools attended by low-income students in Cleveland with the help of tuition aid, or “vouchers,” disbursed through Ohio’s Pilot Project Scholarship Pro-

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<sup>1</sup> ALEXANDRE DUMAS, THE COUNT OF MONTE CRISTO 204 (David Coward ed., Oxford University Press 1990).

<sup>2</sup> J.R.R. TOLKIEN, THE HOBBIT: OR THERE AND BACK AGAIN (1936).

<sup>3</sup> WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2 (“He hath brought many captives home to Rome, whose ransoms did the general coffers fill”). This passage is quoted in *Lakeside v. Oregon*, 435 U.S. 333, 346 n.6 (1978) (Stevens, J., dissenting), although not in the context of religious education.

<sup>4</sup> GEOFFREY CHAUCER, THE CANTERBURY TALES 296 (Nevill Coghill trans., 1951).

<sup>5</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 687 n.2 (2002) (Souter, J., dissenting).

gram. That Program was upheld (barely) by the Supreme Court in its 2002 *Zelman v. Simmons-Harris* decision. Writing for the majority, Chief Justice Rehnquist concluded that the Program did not violate the First Amendment's Establishment Clause because it was "entirely neutral with respect to religion" and involved "true private choice."<sup>6</sup> In dissent, however, Justice Souter lamented the majority's willingness to allow such "purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools."<sup>7</sup> One could hardly blame the pastor and principal at St. Jerome if they thought, after reading the Court's opinion, that they should be so lucky as to have, like Edmond Dantès, a collection of coffers at the ready.

It seems to have become a staple of church-state caselaw that religious schools and institutions have "coffers."<sup>8</sup> More than 30 years ago, in *Tilton v. Richardson*, the Court held that the Establishment Clause permitted federal construction grants to religiously affiliated colleges and universities, on the ground that the "secular education" provided by these institutions was not so "permeated" by religion as to justify the assumption that religion might "seep[] into the use" of the publicly funded facilities.<sup>9</sup> Justice Douglas insisted, however, that "even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal."<sup>10</sup> Three years later, in *Wheeler v. Barrera*,<sup>11</sup> a case involving federally funded programs for "educationally de-

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<sup>6</sup> *Id.* at 662.

<sup>7</sup> *Id.* at 695 (Souter, J., dissenting).

<sup>8</sup> See Richard W. Garnett, *Common Schools and the Common Good: Reflections on the School-Choice Debate*, 75 ST. JOHN'S L. REV. 219, 219 n.4 (2001) ("In Establishment Clause cases having to do with private-school-funding questions, it is common for courts to assume that religious schools – like pirate ships or dragons' lairs, apparently – have 'coffers,' rather than 'checking accounts.'").

<sup>9</sup> 403 U.S. 672, 680, 680-81 (1971).

<sup>10</sup> *Id.* at 697 (Douglas, J., dissenting).

<sup>11</sup> 417 U.S. 402 (1974).

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prived” children attending non-public schools, Justice Douglas again invoked – again in dissent – the specter of brimming “coffers.”<sup>12</sup>

Now, it might have been that fascination with churches’ “coffers” was an idiosyncrasy of Justice Douglas’s alone, one that would leave the Court when he did.<sup>13</sup> But it wasn’t, and it didn’t. In 1993, the Court considered a First Amendment challenge to the use of public funds to pay the interpreter for a deaf student attending a Catholic high school.<sup>14</sup> Chief Justice Rehnquist contended that the case was made relatively “easy” by the fact that “no funds traceable to the government ever find their way into sectarian schools’ coffers.”<sup>15</sup> Four years later, Rehnquist’s quick observation was on the way to black-letter status. In *Agostini v. Felton*, Justice O’Connor reasoned that sending public-school teachers, paid through federal funds, to provide remedial education to eligible children in parochial schools was constitutionally permissible because “[n]o Title I funds ever reach the coffers of religious schools[.]”<sup>16</sup> A few years later, in her crucial concurring opinion in *Mitchell v. Helms*, en route to her conclusion that the Establishment Clause permitted local governments to loan federally funded computers and other educational materials to private and religious schools, she again emphasized that “no [federal] funds ever reach the coffers of religious schools.”<sup>17</sup> In dissent, Justice Souter warned of the “risk of diversion” of public money to religious education “when aid in the form of government funds

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<sup>12</sup> *Id.* at 430 (Douglas, J., dissenting) (“Yet if the State could finance a church at three pence *per capita*, the principle of ‘establishment’ would be approved and there would be no limit to the amount of money the Government could add to church coffers.”).

<sup>13</sup> Justice Douglas once noted that, “[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business.” JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* 184–85 (2003).

<sup>14</sup> *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

<sup>15</sup> *Id.* at 10.

<sup>16</sup> 521 U.S. 203, 228 (1997).

<sup>17</sup> 530 U.S. 793, 867 (2000) (O’Connor, J., concurring).

makes its way into the coffers of religious organizations[.]”<sup>18</sup> And, as was noted above, Souter also employed “coffers” in his 2002 *Zelman* dissent.

The justices are not alone in finding the word both descriptive and evocative. The use of “coffers” by the Court to describe parochial schools’ bank accounts has, no surprise, been both quoted and mimicked in the lower federal courts.<sup>19</sup> Furthermore, at least seven state court opinions, including six supreme court opinions from four different states, have used “coffers” in the context of religious education.<sup>20</sup>

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<sup>18</sup> *Id.* at 891 (Souter, J., dissenting). In his plurality opinion, by contrast, Justice Thomas referred simply to “government aid” to religious schools. *Id.* at 807.

<sup>19</sup> See, e.g., *Steele v. Indus. Dev. Bd. of Metro. Gov’t*, 301 F.3d 401, 437 (6th Cir. 2002) (“[a religious university] received a flow of funds into its coffers provided by a loan from the board.”); *Freedom from Religion Foundations, Inc. v. Bugher*, 249 F.3d 606, 613 (7th Cir. 2001) (“We note that *Agostini* does not hold that government funding that directly flows to ‘the coffers of religious schools’ would survive an Establishment Clause challenge”); *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501, 515 (6th Cir. 2001) (“The Court, in addition to acknowledging that the government program at issue in [*Zobrest*] was neutral and was not skewed toward religion, noted that ‘no funds traceable to the government ever find their way into sectarian schools’ coffers.”); *Strout v. Albanese*, 178 F.3d 57, 64-65 (1st Cir. 1999) (“That state funds would flow directly into the coffers of religious schools in Maine were it not for the existing exclusion cannot be debated.”) (quoting *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 147 (Me. 1999)); *Columbia Union College v. Clarke*, 159 F.3d 151, 160 (4th Cir. 1998) (“But *Agostini* does not hold that government funding that directly flows to ‘the coffers of [a pervasively sectarian] religious school [.]’ to fund the entire budget for many of the college’s core educational courses would survive an Establishment Clause challenge.”); *Helms v. Picard*, 151 F.3d 347, 366 (5th Cir. 1998) (“The surcharge never reaches, in any meaningful way, the general coffers of the parochial schools.”); *Russman by Russman v. Sobol*, 85 F.3d 1050, 1053 (2d Cir. 1996) (“[T]he funds traceable to the government do not ‘find their way into the sectarian schools’ coffers.” (quoting *Zobrest*, 509 U.S. at 10)); *United States v. Mississippi*, 499 F.2d 425, 436 (5th Cir. 1974) (“the effect of the city’s aid was substantial because it saved the private school large amounts of money. . . . which could be used to increase the size of the private schools’ coffers.”).

<sup>20</sup> See, e.g., *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 694 (Va. 2000) (“These factors include . . . whether state funds reach religious schools’ coffers[.]”); *Bagley*, 728 A.2d at 147 (“That state funds would flow directly into the coffers of reli-

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To be sure, there are all kinds of entities that, in the law reports, have “coffers”: In Supreme Court opinions alone, the term has been used to describe the resources of the national government,<sup>21</sup> the States,<sup>22</sup> large corporations,<sup>23</sup> political parties,<sup>24</sup> labor unions and bar associations,<sup>25</sup> etc. A few minutes in Westlaw’s various databases confirms that parochial schools are in good company, and are hardly singled out, in having “coffers.”

Nevertheless, there are good reasons to think that courts should drop “coffers” from their thinking about religious-school-funding cases in particular. Although leading dictionaries assure us that, notwithstanding the word’s romantic, exotic connotations, it denotes simply a “strong box in which money or valuables are kept”<sup>26</sup> – something like what Vice President Al Gore envisioned for Medicare surpluses, perhaps – we think the word’s use in school-funding cases taps into prejudices and suspicions that it is long past time we

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gious schools in Maine were it not for the existing exclusion cannot be debated.”); *Neal v. Fiscal Court, Jefferson County*, 986 S.W.2d 907, 911 (Ky. 1999) (“A distinctive element to New York’s program was that no funds designated for the program ‘ever reach the coffers of religious schools.’” (quoting *Agostini*, 521 U.S. at 228)); *Springfield Sch. Dist. v. Dep’t of Educ.*, 397 A.2d 1154, 1171 (Pa. 1979) (“In the cases before us, no state monies reach the coffers of these church-affiliated schools.”); *Rawlings v. Butler*, 290 S.W.2d 801, 806 (Ky. 1956) (“However, we would have a different question if these Sisters were but the conduits through which public school funds are channeled into the coffers of the Catholic Church.”); *McDonald v. Parker*, 110 S.W. 810, 812 (Ky. 1908) (“Nor can it be denied that the Constitution forbids the diversion of any money raised by taxation for public education into the coffers of any denominational school.”); *Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App. 1997) (“Further, because the IDEA provided a sign language interpreter rather than money, the court found that ‘no funds traceable to the government ever find their way into sectarian schools’ coffers.” (quoting *Zobrest*, 509 U.S. at 10)).

<sup>21</sup> See, e.g., *Fischer v. United States*, 529 U.S. 667, 677 (2000).

<sup>22</sup> See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 109 (2004).

<sup>23</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 263 (1976) (opinion of White, J.).

<sup>24</sup> See, e.g., *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 125 n.13 (2003).

<sup>25</sup> See, e.g., *Board of Regents v. Southworth*, 529 U.S. 217, 240 (2000) (Souter, J., concurring).

<sup>26</sup> 3 THE OXFORD ENGLISH DICTIONARY 440 (2d ed. 1989).

abandoned. Ever since Martin Luther complained, in the 27th of his 95 Theses,<sup>27</sup> about Johann Tetzel’s marketing pitch for indulgences – “As soon as the coin in the coffer rings, the soul from purgatory springs” – the word has been hard to separate from all those things – smells, bells, rituals, and rites – that are thought mysterious, even malevolent, about the Roman Catholic Church. It is well established, and now widely appreciated, that the history of the “schools question” and some justices’ approach to that question have been shaped by anti-Catholic themes and tropes.<sup>28</sup> The question has long been framed in terms of what Justice Rutledge once called “a fight by the Catholic schools to secure this money from the public treasury,”<sup>29</sup> or – in the words of one of Justice Black’s correspondents – “an entering wedge for more and more taxes to be diverted to the political Roman Catholic Hierarchy[.]”<sup>30</sup> Even today, school-choice proposals often run up against the charge that they represent little more than efforts by the Catholic bishops to fleece the taxpayers.<sup>31</sup> The reality – *i.e.*, the Catholic schools that would educate low-income voucher recipients are nothing like money-making operations<sup>32</sup> – is easy to miss, when one is thinking about “coffers.”

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<sup>27</sup> “There is no divine authority for preaching that so soon as the penny jingles into the money-box, the soul flies out [of purgatory].”

<sup>28</sup> See Richard W. Garnett, *Education Reform at the Crossroads: Politics, the Constitution, and the Battle Over School Choice*, 10 GEO. MASON U. CIV. RTS. L.J. 107, 111 (2000) (noting “our Nation’s 150 year tradition of suspicion and, occasionally, outright hostility, toward Catholic schools”).

<sup>29</sup> JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 185 (2003).

<sup>30</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 467 (2002).

<sup>31</sup> An editorial cartoon appearing in the *Detroit Free Press* played on similar sentiments that the Catholic schools were “pulling a hoax on people to get their money.” Ron Dzwonkowski, *Commentary Tough, Not Bigoted*, DETROIT FREE PRESS, Sept. 28, 2000, at 20A (defending cartoon depicting a “device that shreds the constitutional separation of church and state, ‘sucks millions out of public education’ and throws up a smoke screen to cover, in effect, the shifting of tax dollars to Catholic schools”).

<sup>32</sup> See, *e.g.*, Archdiocese of Chicago Office of Catholic Schools, *Annual Report 2006*, schools.archdiocese-chgo.org/pdf/annual\_reports/annual\_report\_06.pdf.

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Like the words “sectarian,”<sup>33</sup> “indoctrination,” and “inculcation,”<sup>34</sup> “cooffers” is a term that – in the parochial-schools context anyway – demeans and distracts more than it describes. It is a word that suggests a plan by religious institutions and schools that provide valuable public services to scurry off to a dark and Gothic place – “coffer” shares roots with “coffin,” after all – with ill-gotten gains, for underground purposes. In our view, it’s time to drop “cooffers,” and to let St. Jerome school have a checking account.



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<sup>33</sup> See generally Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian”*, 7 TEX. REV. L. & POL. 1 (2002); Richard A. Baer, Jr., *The Supreme Court’s Discriminatory Use of the Term “Sectarian”*, 6 J.L. & POL. 449 (1990).

<sup>34</sup> See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 814 (2000) (“When such an incentive does exist, there is a greater risk that one could attribute to the government any indoctrination by the religious school”); *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 386 (1985) (“[teachers at religious schools] are expected during the regular schoolday to inculcate their students”); *Wheeler v. Barerra*, 417 U.S. 402, 431 (“Parochial schools are tied to the proclamation and inculcation of a particular religious faith”); *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971) (“Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.” (quoting L. Boettner, *ROMAN CATHOLICISM* 360 (1962))); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 23 (1947) (“[the Roman Catholic Church] relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.”). But see, e.g., Bradley, *supra* note 33, at 9 (“It is surely not the ‘mission’ of Catholic school to ‘indoctrinate’ pupils . . . . Indeed, a separate Catholic school system was started in this country to protect Catholic school children from the scandal of aggressive Protestantism in the public schools.”); Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 375, 385 (1999) (describing some opinions as “open and conspicuous tracts about the pervasive religious indoctrination thought to accompany the system of Catholic education”).