

# THE RIGHT QUESTIONS ABOUT SCHOOL CHOICE: EDUCATION, RELIGIOUS FREEDOM, AND THE COMMON GOOD

Richard W. Garnett\*

As this Essay goes to press, the Supreme Court is considering whether Ohio's school-choice program violates the First Amendment to the United States Constitution.<sup>1</sup> In my view, the Ohio program is sound public policy, and it is consistent with the Justices' present understanding of the Establishment Clause.<sup>2</sup> I also believe that the Court will and should permit this experiment, and our conversations about its merits, to continue.<sup>3</sup> The purpose of this Essay, though, is not to predict or evaluate *ex ante* the Court's decision. Instead, my primary aim is to suggest and then

---

\*I thank Michael Barkey, A.J. Bellia, Nicole Stelle Garnett, Diane Meyers, John Copeland Nagle, John Robinson, Robert Vischer, and Eugene Volokh for their comments and assistance. Thanks are due also to Jeremy Samson and to the staff of the *Cardozo Law Review* for their help and patience. Parts of this Essay grew out of a talk given at the St. John's University School of Law in November of 2000. I should also note that I have elsewhere asked, and tried to answer, many of the questions raised here. See, e.g., Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001); Richard W. Garnett, *Brown's Promise, Blaine's Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999)); Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301 (2000).

<sup>1</sup> In late 2000, the United States Court of Appeals for the Sixth Circuit affirmed a lower-court ruling striking down Cleveland's school-choice program on First Amendment grounds. See *Simmons-Harris v. Zelman*, 234 F.3d 945, 961 (6th Cir. 2000). As expected, the United States Supreme Court agreed to review that decision. *Zelman v. Simmons-Harris*, 533 U.S. 983 (2001); see Charles Lane, *Supreme Court: On the Sidelines, for Now*, WASH. POST, Sept. 30, 2001, at A5 ("If the court upholds the Cleveland plan, it could reenergize a pro-voucher movement that stalled in recent years[.]").

<sup>2</sup> For a very different view, see, e.g., Editorial, *A Matter of Church and State*, N.Y. TIMES, Feb. 20, 2002, at A20 ("Even if the voucher program were not unconstitutional, . . . we would object to it because it drains human and financial resources from public education without solving the real problems facing American education.").

<sup>3</sup> Cf. *Washington v. Glucksberg*, 531 U.S. 702, 735 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

sketch a few broad themes that—once the decision comes down, the dust settles, and the “spin” subsides—could enrich our deliberations about school-choice proposals specifically, and also, more generally, about education, religious freedom, and democratic citizenship.

## INTRODUCTION

Not long ago, a commentator observed that it is “getting harder every day to be an informed and compassionate opponent of vouchers.”<sup>4</sup> After all, she noted,

[f]amilies of means can make choices about education. They move to neighborhoods with good schools. They can send their kids to private or parochial schools. Poor parents have no such choices. If their local schools are failing, their kids are trapped. And far too many of our schools are failing: This is the challenge that demands our attention.<sup>5</sup>

Arthur Levine, president of Columbia University Teachers College, agrees, though he puts the matter considerably more bluntly: “[T]o force children into inadequate schools is to deny them any chance of success. To do so simply on the basis of their parents’ income is a *sin*.”<sup>6</sup>

Should parents enjoy the right to decide where, what, and from whom their children will learn? More particularly, should governments provide poor and working-class parents the means necessary to make meaningful this right? The answer to these questions, I think, is “yes.” The point of this Essay, though, is to suggest that school choice is not simply a market-oriented reform tool; nor should the themes of the choice-in-education debate be limited to efficiency, effectiveness, competition, test scores, or profit. Instead, school choice is best viewed and framed as a moral question, as an “issue of civil rights and basic justice,”<sup>7</sup> as constitutive of the common good, and—for some—as a crucial aspect of parents’ responsibility and vocation to “participate in God’s creative activity”<sup>8</sup> by directing the education and formation

---

<sup>4</sup> Geneva Overholser, *Coming Around on Vouchers*, WASH. POST, Sept. 20, 1999, at A15.

<sup>5</sup> *Id.*; see also Paul E. Peterson, *A Liberal Case for Vouchers*, NEW REPUBLIC, Oct. 4, 1999, at 29.

<sup>6</sup> Arthur Levine, *Why I’m Reluctantly Backing Vouchers*, WALL ST. J., June 15, 1998, at A28 (emphasis added).

<sup>7</sup> John E. Coons, *Populism and Parental Choice*, FIRST THINGS, Nov. 2000, at 16.

<sup>8</sup> Pope John Paul II, *Familiaris consortio* [*Apostolic Exhortation on the Family*] ¶ 36 (St. Paul ed. 1981).

of their children.

Today there is widespread, though certainly not unanimous, agreement that “far too many” of our nation’s government schools<sup>9</sup> are failing.<sup>10</sup> To be sure, we have assigned these schools, their teachers, and their administrators a probably impossible amalgam of tasks. We ask them to form productive and tolerant citizens; inculcate decent habits, dispositions, and manners; impart knowledge, critical thinking, and practical skills; and even provide day care for over-extended and sometimes negligent parents. We should concede, therefore, that the problems facing government schools, and the reasons so many of them fall short, are complex and interrelated. Still, they *are* failing.<sup>11</sup>

Many have urged that we respond to this failure by introducing competition, empowering parents to choose from among a diverse array of schools, freeing schools from bureaucratic meddling and red tape, encouraging experimentation rather than standardization, weakening if not eliminating the government’s effective monopoly on publicly funded education, and—most controversially—including private and religious schools in the education-reform effort.<sup>12</sup> In May of 2001, for example, at

---

<sup>9</sup> The term “government schools” is not intended to be tendentious; it is, at least in this context, simply a more accurate term than “public schools.” See Coons, *supra* note 7, at 16 (noting the “widespread but false assumption that our state schools currently provide a truly ‘public’ education”); Rev. John J. Coughlin, *Common Sense in Formation for the Common Good—Justice White’s Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 ST. JOHN’S L. REV. 261, 272 (1992) (“The ideal of public education ought not to be confused with the institutional reforms that were dedicated to building a uniform system of schools . . . to replace the diversity and autonomy in public education that preceded the reform movement.”).

<sup>10</sup> See Overholser, *supra* note 4; see also Office of Educ. Research and Improvement, U.S. Dep’t of Educ., *NAEP 1999: Trends in Academic Progress: Three Decades of Student Performance* (Aug. 24, 2000), available at <http://www.nces.gov> (detailing evidence demonstrating that, despite decades of massive and steadily increasing funding, academic achievement in government schools has not improved, and troubling achievement gaps remain between rich and poor, and minority and non-minority students); Editorial, *The Education of a President*, WALL ST. J., June 19, 2001, at A22 (discussing NAEP results and stating that “[t]his is not simply failure. This is mass fraud. And in an economy that increasingly puts a premium on skills, this is a system condemning too many of these children to second-class citizenship in the American Dream.”).

<sup>11</sup> See generally DIANE RAVITCH & JOSEPH P. VITERITTI, *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* (1999); JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999); MYRON LIEBERMAN, *PUBLIC EDUCATION: AN AUTOPSY* (1993).

<sup>12</sup> For general background on the history and contours of the school-choice debate, see generally TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* (2001); JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA’S FIRST VOUCHER PROGRAM* (2000); VITERITTI, *supra* note 11; JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990); JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); see also Editorial, *A Voucher Test*, WASH. POST., June 4, 2001,

my own University of Notre Dame, President Bush chided those skeptical of his efforts to enlist the zeal of faith-based organizations, including religious schools, in the government's anti-poverty and social-welfare efforts. He reminded our graduates that "America has a long tradition of accommodating and encouraging religious institutions when they pursue public goals"<sup>13</sup> and insisted that while "government should never fund the teaching of faith, . . . it should support the good works of the faithful."<sup>14</sup> Just a few days later, though, the United States House of Representatives "dealt a final blow to President Bush's vouchers plan," a plan that its opponents insisted would have "drain[ed] needed funds away from the most imperiled public schools."<sup>15</sup>

And so it goes. Acres of trees, millions of ballots, billions of bytes, and nearly fifty years after Nobel Laureate Milton Friedman proposed a universal system of school vouchers that "would minimize the role of government in education and replace public schools with privately-run institutions supported by taxes,"<sup>16</sup> the debate over his and other school-choice proposals rages on. A recent spate of legislative proposals and enactments, court decisions, ballot-initiative fights, and book releases—combined with the Supreme Court's impending decision in the Cleveland voucher case—prompted one activist to announce recently that it is "High Noon" for vouchers.<sup>17</sup> Parental choice in education was, of course, front-and-center during the 2000 election cycle; it is discussed and dissected in our universities, churches, think tanks, learned journals, and publishing houses; and it has long been at the

---

at A18 ("Congress should be willing to explore what might come of giving more choices to some . . . low-income students."); Overholser, *supra* note 4 ("Could vouchers be a suitable companion to [other] improvements? . . . I've still got plenty of questions. But giving vouchers enough of a test to provide more answers begins to look like the right thing to do."); Michael S. Greve, *The End of Education Reform*, WEEKLY STANDARD, May 21, 2001, at 16 (arguing that "[w]ithout parental choice, accountability is a sham").

<sup>13</sup> Mike Allen, *President Urges War on Poverty*, WASH. POST, May 21, 2001, at A1.

<sup>14</sup> Tim Jones, *Bush Touts Faith-Based Aid to Poor*, CHI. TRIB., May 21, 2001, at 1.

<sup>15</sup> Juliet Eilperin & Dana Milbank, *House Panel Votes to Kill Private School Vouchers*, WASH. POST., May 23, 2001, at A1. The Senate did likewise a few weeks later, with Senator Clinton insisting that, although choice "sounds so good, . . . we know that vouchers do not help the students who need the help the most. They do nothing to help improve public schools. Vouchers only further segregate and stratify our public schools." Lizette Alvarez, *Senate Rejects Tuition Aid, a Key to Bush Education Plan*, N.Y. TIMES, June 13, 2001, at A28.

<sup>16</sup> VITERITTI, *supra* note 11, at 53. See generally Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

<sup>17</sup> Ron Unz, *High Noon for Vouchers*, NAT'L REV. ONLINE (June 20, 2000), at <http://www.nationalreview.com> ("Now, suddenly, a chain of unconnected events will decide the triumph or collapse of the voucher movement—by the end of the year.").

heart of our public conversation about the future, direction, and content of education reform.<sup>18</sup>

Still, “high noon” or not, the school-choice debate’s terms, tone, and labels, and its rhetorical moves and flourishes, are likely tediously familiar to anyone reading these words. They are so familiar, in fact, that one might reasonably wonder whether there could really be anything left to say on the subject, and whether there is any room for progress, or any reason to expect it. I believe and hope that there is.

Three questions have tended to dominate our discussions about choice-based education reform: *First*, are school vouchers constitutional, or does school choice violate the “separation of church and state” supposedly required by the First Amendment? *Second*, will school-choice “work”? And, *finally*, do the asserted “costs” of choice—namely, its purported effects on the government schools and their mission—outweigh its benefits?

These are, all agree, questions worth answering. I contend, *first*, that school-choice programs, even if they allow religious schools, and parents who choose them, to participate, need not “establish” religion in violation of the First Amendment. And, *second*, the research to date has convinced me that choice likely *would* “work”; that is, that it would improve the quality of American education. That said, I am under no illusions that this conclusion can or will ever be proved to the satisfaction of those for whom opposition to school choice is a matter of ideological commitment or constitutional principle.<sup>19</sup> In any event, though, as John Coons has stated, “the case for choice in education goes much deeper than . . . efficiency.” Rather, “[c]hoice . . . needs to be loved for its own sake, or at least for a reason more noble than its capacity to make life better for the producers.”<sup>20</sup> *Finally*, in response to the claim that choice would undermine the government’s schools and their mission, I submit that these schools have too long enjoy a privileged, but unexamined “baseline” status that cannot be easily justified. Although, for instance, the *New York Times* cheered recently when Congress dropped an “ill-considered voucher provision”—a provision which, in the *Times*

---

<sup>18</sup> For an excellent and up-to-date summary of choice-related education proposals and reforms across the country, see NINA SHOKRAH REES, SCHOOL CHOICE 2000: WHAT’S HAPPENING IN THE STATES (2000), available at <http://www.heritage.org/schools/2000> (last modified Dec. 7, 2000). This work is updated regularly at the Heritage Foundation website.

<sup>19</sup> Recall here the above-quoted remarks of Senator Clinton. See Alvarez, *supra* note 15.

<sup>20</sup> John E. Coons, *School Choice and Simple Justice*, FIRST THINGS, Apr. 1992, at 15.

view, would be a “dangerous drain on public school resources”<sup>21</sup>—the editors never explained how these “resources” came to be “public school resources,” rather than public *education* resources.<sup>22</sup>

These are, again, important questions, but I wonder if they get to the heart of the matter? These, after all, are the facts: When it comes to school choice, most Americans already have it; those who do not have it, want it; and those who do not have it are, by and large, those whose moral claims to it are the strongest.<sup>23</sup> Choice, remember, is neither a gimmick nor a novelty; rather, “[c]hoice is everywhere in American education.”<sup>24</sup> And yet, there are many—millions—of parents who have no choice but to send their children to failing government-run schools and who would rather send them elsewhere. These are, as Senator Judd Gregg reminded his colleagues recently, “real people who are locked in inner-city schools[,] who didn’t have the option for a better education like folks with more money, [and] who are seeing their children left behind.”<sup>25</sup> And, as NBC News commentator Tim Russert asked, during a debate between Senator Bill Bradley and Vice President Al Gore, “[w]hy don’t poor, minority moms with their kids, who could not possibly deal with the chaos of public

---

<sup>21</sup> Editorial, *How to Leave No Child Behind*, N.Y. TIMES, May 21, 2001, at A16; see also Helen Dewar, *Senate Drops Vouchers from Education Bill*, WASH. POST, June 13, 2001, at A12 (reporting Senator Kennedy’s objection that “vouchers would divert already scarce resources from public schools”); *A Matter of Church and State*, *supra* note 2 (complaining that the Ohio program “drains human and financial resources from public education”).

<sup>22</sup> Professor Eugene Volokh has observed, in response to the “drain on public resources” argument, that any “harm” inflicted on government schools by educational choice is just “an outcome of the fact that private school parents would no longer have to pay twice—once for the government-run education they found unsatisfactory and once for the privately run education they are buying in its stead.” Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 341, 362 (1999).

<sup>23</sup> VITERITTI, *supra* note 11, at 11-12 (noting that “choice already exists for many if not most Americans” and that “those who do not enjoy choice really want it for their own children”). Low-income citizens and racial minorities are more likely to support choice in education than are middle- and high-income whites. See, e.g., Michael W. Lynch, *Rampaging Toward Choice*, REASON, Jan. 2000, at 24, 26 (“Polls show that school choice is far more popular with minorities than with whites, and most popular with low- and modest-income minorities”); James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. TIMES, Dec. 27, 1997, at A1. But see William Raspberry, *A Little Knowledge Can Be a Meaningless Thing*, WASH. POST, Nov. 29, 1999, at A23 (suggesting that parents’ support for school choice is generally uninformed).

<sup>24</sup> *School Choice Is Widespread—Unless You’re Poor*, available at <http://www.schoolchoiceinfo.org.what> (last visited Apr. 21, 2002) (advertisement sponsored by the Black Alliance for Educational Options, quoting WHO CHOOSES, WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (Richard Elmore & Bruce Fuller eds., 1996)).

<sup>25</sup> Alvarez, *supra* note 15.

school, deserve a break?"<sup>26</sup>

Now, as I mentioned earlier, I am confident that the Court will hold, and that the current canon of relevant precedent both permits and requires it to hold, that religion-neutral school-choice programs are constitutional. That the Constitution permits us to experiment with such programs, though, does not mean that we should. We need to ask: what *reasons* are there for enhancing parents' ability to direct and control their children's education? This question invites, I think, not only numbers-crunching and data-grinding on the nuts-and-bolts of education reform—though such crunching and grinding is needed, too—but also deeper reflections about the purpose of education, the authority of the state, the integrity of the family, the demands of pluralism, political liberalism, and religious freedom, and the dignity of the human person.

Again—who should decide where, what, and from whom children will learn? Is the education of young people the prerogative of the contemporary liberal state, and its purpose the inculcation of government-approved dispositions, attitudes, and beliefs?<sup>27</sup> Or is education an obligation, vocation, and right of parents,<sup>28</sup> one that is inextricably linked to religious liberty<sup>29</sup> and political pluralism?<sup>30</sup> Is the point of choice-based reform simply to spur improvements in government schools through competition? Is it merely to more effectively and efficiently deliver data and transmit "skill sets"? Or is it to make good on the obligation of public authority to promote the authentic common good?

## I. DOES THE CONSTITUTION PERMIT SCHOOL CHOICE?

It would be reasonable—commendable, in fact—to oppose experimentation with religion-neutral school-choice programs if the Constitution did not permit them.<sup>31</sup> So—do such programs

---

<sup>26</sup> *Meet the Press: Vice-President Al Gore and Former Senator Bill Bradley Discuss Numerous Political Topics* (NBC television broadcast, Dec. 19, 1999) [hereinafter *Meet the Press*]. Mr. Russert's question went unanswered.

<sup>27</sup> See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIL EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

<sup>28</sup> See Pope John Paul II, *supra* note 8, ¶ 38 (referring to the "dignity and vocation" of families' "educational role").

<sup>29</sup> See, e.g., VITERITTI, *supra* note 11, at 117-44.

<sup>30</sup> See generally, e.g., Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

<sup>31</sup> See Overholser, *supra* note 4 ("There are two good reasons not to give poor families

breach the “wall of separation between church and state” often (but mistakenly) said to be required by the First Amendment’s “no establishment” command?<sup>32</sup> They do not. The better constitutional argument,<sup>33</sup> I think, is that governments may not discriminate against “religious ideas, religious people, [and] religious schools” in the administration of general-welfare and education-assistance programs.<sup>34</sup> That is, official hostility toward religious education and parents to choose it is neither required nor permitted by the First Amendment. Choice-in-education is more, not less, consonant than monopoly or “liberal statism”<sup>35</sup> with the religious freedom promised in our constitutional traditions and in our Constitution’s text.

Now, if one were to browse the tables of contents of the law reviews and elite journals of opinion, or watch the weekday-evening or Sunday morning talk shows, one might reasonably conclude that school-choice’s constitutionality is still an unresolved question. Actually, there is a remarkably wide and widening consensus that the “wall of separation” conjured by Justice Hugo Black in the 1947 *Everson* decision<sup>36</sup> is neither so high, nor so impermeable, that it forbids well crafted, non-discriminatory school-choice programs.<sup>37</sup> Professor Tribe has put it this way:

---

public money to give them choices . . . . [I]t might be unconstitutional because it could involve government support for religious schools.”).

<sup>32</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>33</sup> See *Good News Bible Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that the First Amendment neither required nor permitted discriminatory denial of access to public-school facilities to a religious student group).

<sup>34</sup> *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>35</sup> Stephen G. Gilles, *Liberal Parentalism and Children’s Educational Rights*, 26 CAP. U. L. REV. 9, 11 (1997) (discussing “liberal statism”); Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CAL. L. REV. 1059, 1065 (1999) (“When I say statism, I do not simply mean, as the formal definition would suggest, a preference for state solutions; I have in mind a sense of the state’s rightness, or goodness—an empirical belief that the state is less likely than the individual to make a moral error.”).

<sup>36</sup> *Everson*, 330 U.S. at 1. In *Everson*, Justice Hugo Black laid an unstable foundation for the entire edifice of the Court’s Establishment Clause case law and imposed an unhistorical historical gloss on the Clause, one that has distracted courts and distorted public debate ever since. The historical account on which Justice Black relied in *Everson* has been widely criticized. See, e.g., John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949) (“The First Amendment has been stood on its head. And in that position it cannot but gurggle nonsense.”). It appears that Justice Black’s views on the constitutionality of aid to students at religious schools were colored by, among other things, his anti-Catholicism. See, e.g., *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 251-52 (1968) (Black, J., dissenting); see also ROGER K. NEWMAN, HUGO BLACK 87, 104, 137 & n. 521 (1994). For another Justice’s quite different historical account, see *Wallace v. Jaffree*, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting).

<sup>37</sup> For a few recent discussions of this question, see generally John H. Garvey, *What Does the Constitution Say About Vouchers?*, 44 B.B. J. 14 (2000); Steffen N. Johnson, A



"Any objection that anyone would have to a voucher program would have to be policy-based and could not rest on legal doctrine. One would have to be awfully clumsy to write voucher legislation that could not pass constitutional scrutiny . . . . [A]id to parents . . . would be constitutional."<sup>38</sup> This is because, as Professor Joseph Viteritti has observed,

[t]he Rehnquist Court has promulgated a set of legal principles that makes it possible for the government to provide tuition assistance to parents of children who attend religious schools so long as such aid is administered in a neutral fashion and students attend such schools as a matter of parental choice.<sup>39</sup>

Thus, Professor Tribe predicts, "the Court would uphold an educational voucher scheme that would permit parents to decide which schools, public or private, their children should attend."<sup>40</sup>

This is not the place for detailed argument about the real meaning or first principles of the First Amendment, or about how exactly one should go about identifying the text's true import. My aim is not to settle all disputes about what those who drafted and ratified the First Amendment meant, or were understood to mean, when they proscribed federal laws "respecting an establishment of religion."<sup>41</sup> Nor is it to identify the grand unifying theory of the Religion Clause,<sup>42</sup> or even to exhaustively trace its zig-zag trail

---

*Civil Libertarian Case for the Constitutionality of School Choice*, 10 GEO. MASON U. CIV. RTS. L.J. 1 (1999/2000); Volokh, *supra* note 22; Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375 (1999); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1999).

<sup>38</sup> *Not the Unusual Suspects: The Most Wanted Quotes on Vouchers and School Choice*, POLICY REV. ONLINE (Jan.-Feb. 1999), at <http://www.policyreview.com/jan99/quotes.html> (last visited Jan. 8, 2002).

<sup>39</sup> VITERITTI, *supra* note 11, at 143.

<sup>40</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-10, at 1223 (2d ed., Foundation Press 1988).

<sup>41</sup> For an excellent and comprehensive account, see GERALD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987). For a more general overview of religious freedom in America, see, e.g., JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 149-84 (2000); JOHN NOONAN, *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998).

<sup>42</sup> For an argument that there is no such grand theory, and that the Framers and ratifiers intended merely to disable the new federal government from interfering with the religion-related decisions of the various States' legislatures, see STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995). Whether or not Professor Smith is right about this (I believe that he is), there is no reason to think that the Constitution was intended to require discrimination against religion, religiously-motivated choices, religious institutions, or religious schools. See Volokh, *supra* note 22, at 351 ("[M]y sense of the Framers' worldview is that they did not think the government was required to discriminate against religion.").

through the *United States Reports*. More modest claims will suffice, for now.

Justice Holmes famously and provocatively asserted, “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>43</sup> And although I like to think that there is quite a bit more to the legal enterprise than did Justice Holmes, it is enough to say simply that the First Amendment permits choice-based education reform because, in light of the current body of case law and doctrine, the Supreme Court will most likely use the Cleveland case to make explicit what is already implicit in its most recent and relevant decisions—namely, that school-choice programs provide benefits to parents and children, not to religion and churches, and are therefore permissible policy choices, not unconstitutional “establishments” of religion.

The Court’s most recent school-aid decision, *Mitchell v. Helms*,<sup>44</sup> warrants this confidence.<sup>45</sup> In that case, six Justices agreed that the Establishment Clause permits state and local governments to loan “educational materials and equipment”—library books, computers, televisions, *etc.*—purchased with federal funds directly to religious and private schools.<sup>46</sup> Although creative courts and lawyers can and will distinguish the program at issue and the questions presented in *Mitchell* from those raised in the school-choice context,<sup>47</sup> most believe that this ruling signals, if it does not determine, the constitutional fate of school-choice experiments.<sup>48</sup> Both Justice Thomas’s plurality opinion and Justice O’Connor’s concurring opinion—joined, to the surprise of some, by Justice Breyer—emphasized the importance in school-aid cases of two factors, both of which are present in the school-choice context: *first*, the “neutrality” of the program’s eligibility and benefit-disbursement criteria and, *second*, the role of intervening

---

<sup>43</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

<sup>44</sup> 530 U.S. 793 (2000).

<sup>45</sup> That said, Professor Laycock has wisely warned against taking too much for granted in this area. See Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 53 (2000) (“If you take *Rosenberger*, *Agostini*, and *Mitchell* to their logical conclusion, vouchers are constitutional—but no one should assume the cases will be carried to their logical conclusion.”).

<sup>46</sup> *Mitchell*, 530 U.S. at 801 (describing details of the program in question). For a more detailed analysis of the questions and issues presented in *Mitchell*, see David S. Petron, *Finding Direction in Indirection: The Direct/Indirect Aid Distinction in Establishment Clause Jurisprudence*, 75 NOTRE DAME L. REV. 1233 (2000).

<sup>47</sup> See, e.g., *Simmons-Harris v. Zelman*, 234 F.3d 945, 960-61 (6th Cir. 2000).

<sup>48</sup> See, e.g., Jodi Wilgoren, *Court Ruling Fuels Debate on Vouchers for Education*, N.Y. TIMES, June 29, 2000, at A27; Chester E. Finn, Jr. & Charles R. Hokanson, Jr., *Court Ruling Augurs Well for Vouchers*, WALL. ST. J., June 29, 2000, at A26.

and independent “private choice.”<sup>49</sup> Justice Thomas pointed out, for example, that the resources at issue were made available on the basis of criteria having nothing to do with religion, and that they reached religious schools not by government *fiat* but only if and to the extent that individual parents selected such schools for their children.<sup>50</sup> Similarly, Justice O’Connor observed that the program “[did] not define aid recipients by reference to religion” and did not “result[] in governmental indoctrination.”<sup>51</sup>

*Mitchell* is a welcome step in the Court’s gradual rehabilitation of its Establishment Clause doctrine.<sup>52</sup> Still, *Mitchell* notwithstanding, the United States Court of Appeals for the Sixth Circuit affirmed recently a lower federal court’s decision striking down the Cleveland program on Establishment Clause grounds,<sup>53</sup> holding that the program “has the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause.”<sup>54</sup> The Sixth Circuit misread the relevant precedents and missed the import of *Mitchell*;<sup>55</sup> again, its decision is being reviewed, and

---

<sup>49</sup> 530 U.S. at 809-14.

<sup>50</sup> *Id.* at 830.

<sup>51</sup> *Id.* at 848-49 (O’Connor, J., concurring in the judgment). Although Justice O’Connor was careful to insist that the “neutrality” of a government program is not outcome-determinative in cases involving “direct” aid to religious schools, nothing in her opinion calls into question the centrality of private choice to the constitutional analysis of a true voucher program. *See id.* at 841-42 (O’Connor, J., concurring).

<sup>52</sup> It is worth noting that, two years before the Court’s decision in *Mitchell*, the Wisconsin Supreme Court provided an excellent blueprint for the eventual definitive resolution of the First Amendment questions posed by school-choice programs. *See Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998) (rejecting Establishment Clause challenge to Milwaukee’s Parental Choice Program). As in *Mitchell*, the key factors in the *Jackson* court’s analysis were the *neutrality* of the program and the role of *private choice* in determining at which schools—public or private, religious or secular—parents and children used their educational benefits. *See Jackson*, 578 N.W.2d at 613-18. The Supreme Courts of Ohio and Arizona have taken a similar approach in recent cases. *See Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

<sup>53</sup> *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *affirming*, 72 F. Supp. 2d 834 (D. Ohio. 1999).

<sup>54</sup> *Zelman*, 234 F.3d at 961. As for the emphasis placed by the *Mitchell* and other courts on neutral criteria and private choice, the court concluded that the Cleveland program—although neutral on its face with respect to religion—was not *really* neutral, because most of the schools that had chosen to participate in the program were religious. *See id.* at 958-59. And, the court concluded, parents’ “private choice” to use benefits received through the program at either secular or religious schools was “illusory,” because no public schools and few non-religious private schools had elected to participate and to receive voucher recipients. *See id.* at 959-60.

<sup>55</sup> Judge Ryan, in a scathing dissent, suggested that the court’s misreading of the controlling cases was no accident.

[T]he majority opinion is nothing more than an attack upon the philosophical and cultural desirability of publicly funded educational choice for the poor. This case and its result—sentencing nearly 4,000 poverty-level, mostly minority,

should be reversed, by the United States Supreme Court.<sup>56</sup>

Step back for a moment, though, from precedents and doctrine: Surely it is clear, both as a matter of law and as a matter of common sense, that the Constitution is not violated simply because money that was once in a government account somehow finds its way to a church or religious institution? Social Security beneficiaries, veterans, government employees, college students, and even lottery winners receive funds from the government, and many of them donate or pay portions of those funds to churches, schools, and charities. No one thinks "religion" is thereby "establish[ed]," even if religious organizations or institutions benefit in some way from such donations. School choice, rightly understood, empowers parents, not government, to choose to direct funds to religious schools. And when parents do so, they are not unconstitutionally "establishing" religion any more than if they were government employees whose entire income is delivered via government checks, or if they were to pay tuition using benefits received through a social-welfare program like Temporary Assistance for Needy Families or Social Security, or if their decisions were made possible only through the government's generous decision to subsidize their lifestyle decisions through the home-mortgage deduction.<sup>57</sup>

The crucial point here is that the First Amendment limits *government* conduct; it has nothing to say about private action (other than to suggest that private assembly, speech, and worship are worth protecting).<sup>58</sup> Indeed,

---

children in Cleveland to return to the indisputably failed Cleveland public schools from which, in many cases, they escaped as long as three years ago—is an exercise in raw judicial power having no basis in the First Amendment or in the Supreme Court's Establishment Clause jurisprudence.

*Id.* at 974.

What is perhaps most surprising about the Sixth Circuit's decision, though, is that it flies in the face of the Supreme Court's November 1999 decision to stay, pending appeal, the decision entered by the district court. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999). The Sixth Circuit acknowledged the stay order, but said nothing about its significance. *Zelman*, 234 F.3d at 950.

<sup>56</sup> The Court's recent decision in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), provides additional reasons for optimism. In that case, the Court held that the First Amendment neither permits nor requires government officials to discriminate against a Christian youth group, on the basis of its religious viewpoint, in providing access to public-school facilities after school hours. Writing for the majority, Justice Thomas emphasized yet again the constitutional importance of a program's *neutrality* toward religion. Justice Breyer concurred in part, noting that government neutrality is one, "but only one," of the considerations relevant to deciding whether a government policy violates the Establishment Clause. 533 U.S. at 127.

<sup>57</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 226 (1997).

<sup>58</sup> See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring) ("[T]here is a crucial difference between government speech endorsing

[t]he very same conduct can be either constitutionally protected or constitutionally forbidden, depending on whether those who engage in it are acting in their 'private' or their 'public' capacities. If a group of people get together and form a church, that is the free exercise of religion. If the government forms a church, that is an establishment of religion. One is protected; one is forbidden.<sup>59</sup>

Americans are permitted, for example, to teach our children that Catholicism is true. The government, however, is not permitted an opinion on the matter.<sup>60</sup> And so, when government allows and enhances freedom of educational choice, and refuses to discriminate against religious schools or to single out religion, religious expression, and religious belief for special disadvantage,<sup>61</sup> it respects, rather than undermines, First Amendment commands.<sup>62</sup>

## II. COULD SCHOOL CHOICE "WORK"? SHOULD IT MATTER?

Notwithstanding the recent setbacks in Congress and in the Sixth Circuit, more and more centrists, liberals, and progressives, who might be ideologically predisposed to suspicion toward privatization schemes generally, and perhaps also toward the distinctive and particularistic missions of religious schools, have confronted the widespread failure of government schools and the toll this failure exacts from the disadvantaged. As a result, it seems that a consensus is beginning to form around the idea that perhaps the time has come for prudent and reasonable

---

religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”).

<sup>59</sup> Michael W. McConnell, *“God Is Dead and We Have Killed Him!”: Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 184.

<sup>60</sup> See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1872) (“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”).

<sup>61</sup> See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not . . . impose special disabilities on the basis of religious views or religious status.”); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (“[G]overnment may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits.”).

<sup>62</sup> Several courts and commentators have recognized that not only does the First Amendment’s Establishment Clause not require discrimination against religious expression and institutions, it *forbids it*, as do the Free Exercise and Free Speech Clauses of the First Amendment, and the Fourteenth Amendment’s Equal Protection Clause. See generally, e.g., Richard W. Garnett, *Brown’s Promise, Blaine’s Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999)); Volokh, *supra* note 22; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Litigation*, 61 NOTRE DAME L. REV. 311 (1986). The Supreme Court’s decision in *Good News* would appear to provide additional support for this view.

experiments with charter schools, vouchers, tuition tax-credits, and other choice-based reforms. As one convert put it recently, “[a]s a parent of an urban public high-school student, I flinch at anything that drains resources from public schools. But I have a choice. Keeping them from others because of a vague threat seems increasingly hard to justify.”<sup>63</sup> Even the doubters seem willing to concede a limited place for vouchers, “in conjunction with broad reforms.”<sup>64</sup> “I’ve still got plenty of questions,” one such skeptic insists, “[b]ut giving vouchers enough of a test to provide more answers begins to look like the right thing to do.”<sup>65</sup> Elite opinion-makers like the *Washington Post* agree: “Offering vouchers does not take away the obligation to improve troubled public schools. But it’s also true that too many students pay dearly, and for the rest of their lives, because they have no alternative to a failing public school.”<sup>66</sup>

This new openness to experimentation is both promising and justified. I am confident that giving parents the ability to exercise meaningfully their moral and constitutional right to educate their children as they see fit will, in fact, improve public education—i.e., the education of the public—and, more specifically, offer new opportunities to disadvantaged children. But am I *sure* about this? *Can* we be sure? Should we wait until we *are* sure? No, no, and no.

Professor Viteritti observed a few years ago that

[b]ehind the choice debate that has occupied policymakers so intensely for the past 10 years is the fantastic notion that someday a group of dispassionate experts will objectively reach a judgment to determine whether or how it is safe to translate the explosive idea [of choice] into policy without incurring unwitting harm.<sup>67</sup>

The *Washington Post*, for example, called recently for limited voucher experiments that “might help some individual students trapped in failing public schools while also providing useful data to inform the long-running debate about vouchers’ potential

---

<sup>63</sup> Overholser, *supra* note 4; see also, e.g., William Raspberry, *Selling Out Our Schools*, WASH. POST, June 15, 2001, at A33 (reporting Dr. Howard Fuller’s question, “[d]on’t the middle-class opponents of choice worry that their opposition condemns poor children to schools their own children have long since escaped?”).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; see also James Q. Wilson, *Why Not Try Vouchers?*, N.Y. TIMES, Apr. 27, 2001, at A27 (observing, with respect to vouchers and other “Charitable Choice”-type proposals, “[b]efore trying anything on a national scale, perhaps we should mount an experimental demonstration program in a few cities where these ideas can be tested.”).

<sup>66</sup> *A Voucher Test*, *supra* note 12, at A18.

<sup>67</sup> Joseph P. Viteritti, *School Choice: Beyond the Numbers*, EDUC. WEEK, Feb. 23, 2000, at 38.

effects.”<sup>68</sup> Viteritti insists, though, that just as it is “fantastic” to expect iron-clad expert consensus about, or validation of, choice-in-education, it is “absurd” to think that “we should not try choice until it can be proven to work, since it is impossible to demonstrate the viability of any idea that has not been given a chance.”<sup>69</sup>

Fantastic or not, the search for a definitive judgment continues, and hardly a month goes by in which a new panel of experts does not announce new “findings” or “conclusions” concerning the “effectiveness” of those few public and private school-choice programs currently up and running.<sup>70</sup> For some choice supporters, every up-tick in fourth-graders’ reading scores is a vindication of the power of market competition; likewise, for some opponents, every experiment that fails to achieve dramatic gains over the status quo exposes the hubris of the boosters of choice and competition.<sup>71</sup> As I have already mentioned, those who contend that school choice would reduce, not increase racial segregation; that choice would improve, not threaten, the lot of low-income and center-city students; that a choice-based education system would result, on balance, in a better educated citizenry; and that students whose parents are permitted to choose their schools will, for the most part, be as, if not more, tolerant, respectful, decent, and public-minded as today’s government-educated children appear to me to have the better of the argument.<sup>72</sup> But, in

---

<sup>68</sup> *A Voucher Test*, *supra* note 12.

<sup>69</sup> Viteritti, *supra* note 67.

<sup>70</sup> There is no way to do justice here to the massive and growing body of choice-related empirical scholarship. For a few examples, see Paul E. Peterson & David E. Campbell, *An Evaluation of the Children’s Scholarship Fund* (May 2001), available at <http://www.ksg.harvard.edu/pepg>; Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (Feb. 2001), available at <http://www.ksg.harvard.edu/pepg>; Jay P. Greene, *A Survey of Results from Voucher Experiments: Where We Are and What We Know* (July 2000), available at [http://www.manhattan-institute.org/html/cr\\_11.htm](http://www.manhattan-institute.org/html/cr_11.htm); Paul E. Peterson *et al.*, *An Evaluation of the Cleveland Voucher Program After Two Years* (June 1999), available at <http://www.ksg.harvard.edu/pepg>. Much more data and research relating to educational choice are available at and through the following web sites, to name only a few: The Program on Educational Policy and Governance, at <http://www.ksg.harvard.edu/pepg>; The Black Alliance for Educational Options, at <http://www.schoolchoiceinfo.org>; The Center for Education Reform, at <http://www.edreform.com>; and The Brookings Institution, at <http://www.brook.edu>.

<sup>71</sup> See, e.g., Alvarez, *supra* note 15 (reporting reasons given by Senators Clinton and Kennedy for opposing President Bush’s proposed modest school-choice experiment).

<sup>72</sup> For research suggesting that school choice contributes to racial integration in education, see, e.g., Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (Oct. 8, 1999), available at <http://www.ksg.harvard.edu/pepg>; Jay P. Greene, *A Survey of Results from Voucher Experiments: Where We Are and What We Know* (July 2000), available at [http://www.manhattan-institute.org/html/cr\\_11.htm](http://www.manhattan-institute.org/html/cr_11.htm) [hereinafter *A Survey of Results*]; Howard L. Fuller & George A. Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools* (June 2000), available at

Viteritti's words, "not everyone would agree. Nor will they ever[.]"<sup>73</sup> I agree. There is no point to waiting, and no justification for waiting, for the data to demonstrate to everyone's satisfaction the need for, and soundness of, choice-based reform. After all, I suspect that opposition to choice owes less to worries about holes in the research than to a cluster of concerns about the job security of union members and public employees, the place of religious education and discourse in a liberal society, and the moral and civic balkanization thought to be associated with the privatization of education. And so, what if we were to resign ourselves to the fact that the numbers, data, models, and statistics will always be difficult for reasonable, well-meaning people to decipher? In other words, as Professor Viteritti puts it, why not "call it a draw?"<sup>74</sup> Instead of bickering about the meaning and significance of the information we have managed to glean from those few school-choice experiments that have managed to survive the gauntlet of litigation and regulation, why not ask whether good reasons exist, in the face of widespread demand by deserving parents, for *refusing* to embrace choice? Instead of saddling reformers with the burden of demonstrating, with Aristotelian rigor, the efficiency and effectiveness of choice,<sup>75</sup> why not flip the question around—*Why not?* Parents want choice—why should they *not* have it?

---

<http://www.schoolchoiceinfo.org/research>. For more on the student-achievement question, see generally William J. Howard *et al.*, *Test Score Effects of School Vouchers in Dayton, Ohio, New York City, and Washington, D.C.: Evidence from Randomized Field Trials* (Aug. 2000), available at <http://www.ksg.harvard.edu/pepg>; A Survey of Results, *supra*; Cecelia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q.J. ECON. 553-602 (1992). On whether school choice and competition could improve the performance of government schools, see Frederick Hess *et al.*, *Coping with Competition: How School Systems Respond to School Choice*, available at <http://www.ksg.harvard.edu/pepg>; Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (Feb. 2001), available at <http://www.schoolchoiceinfo.org/research>. Finally, for studies suggesting that religious and other private schools succeed in inculcating civic virtue and public values, see, e.g., *A Survey of Results, supra*; Christian Smith & David Sikkink, *Is Private School Privatizing?*, FIRST THINGS, Apr. 1999, at 16.

<sup>73</sup> Viteritti, *supra* note 67.

<sup>74</sup> *Id.*

<sup>75</sup> As Professor Viteritti has observed, the "would it work" question is made more difficult by the fact that school choice is rarely given a chance to work. *Id.* at 38 ("[M]ost [choice programs] have been designed to limit real competition. . . . Yes, theoretically the effect of market competition is measurable empirically, but no, we cannot fully assess it under the existing plans."). See generally Paul E. Peterson & Chad Noyes, *Under Extreme Duress, School Choice Succeeds*, in DIANE RAVITCH & JOSEPH P. VITERITTI, *NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION* (1999).



### III. THE COSTS OF CHOICE? ON HOSTAGE-TAKING AND SOCIAL REPRODUCTION

The point of this Essay so far has been to suggest that we put aside for now two often-asked questions about school choice—Is school choice constitutional? Will it work?—and instead shift the burden of persuasion to those who oppose choice-based experiments. Such a shift by no means ends our public conversation, though, or predetermines its outcome. The new question presented—Why *not*?—is just the beginning.

One common response to this question goes something like this: Notwithstanding the expressed desire of many parents for more choices, better services, and enhanced opportunities for their children, school choice should *still* be rejected, because voucher schemes would inevitably undermine the government schools and their mission. “We can’t permit school choice,” the argument goes, “because vouchers will take children, and therefore money, away from the public schools, where both are desperately needed.”<sup>76</sup> As the *New York Times* put it, it is “irrelevant” that “many poor families . . . regard the program as a lifeline.”<sup>77</sup> The fact remains, the *Times* insists, that voucher programs “drain[] human and financial resources from public education[.]”<sup>78</sup> In a similar vein, the president of the San Francisco School Board, Jill Wynns, recently explained why, in her view, it was “philosophically” unacceptable for a for-profit corporation to run a school, and why, therefore, a charter school that has apparently enjoyed great success with inner-city children should nonetheless be closed: “Any parent is going to say,” she conceded, “‘I want more for my kid.’ But at the expense of everyone else? *No*.”<sup>79</sup>

Even if we were to concede—though there is no reason we should—that expanding parental choice in education would harm government schools, and the children who attend them, the fact is, as Professor Eugene Volokh has observed, that “the Constitution does not have a You May Not Hurt Government-Run Schools Clause[.]”<sup>80</sup> This is not to say, of course, that we should be

---

<sup>76</sup> See, e.g., *Meet the Press*, *supra* note 26 (then-Vice-President Gore speaking); Alvarez, *supra* note 15 (recounting statements made by Senators Clinton and Kennedy).

<sup>77</sup> *A Matter of Church and State*, *supra* note 2.

<sup>78</sup> *Id.*

<sup>79</sup> Deroy Murdock, *Parents v. Educrats*, NAT’L REV. ONLINE (May 31, 2000), at <http://www.nationalreview.com>.

<sup>80</sup> Volokh, *supra* note 22, at 360.

indifferent to the possibility that choice and competition could negatively affect government schools. It does suggest, though, that bare assertions about, say, “cream skimming” or “draining resources,” standing alone, are not particularly powerful arguments against choice.<sup>81</sup> The question remains, after all, why concerns about stability of the government-school system, or the job security of its employees, should trump the desire of some low-income children to leave for something better.

It is worth remembering here that the present near-monopoly over public education enjoyed by the government schools in the United States is an anomaly.<sup>82</sup> Supreme Court and other boosterism notwithstanding,<sup>83</sup> there is nothing given or sacrosanct about it. If it were to turn out—again, there is no reason to think it would—that giving parents and children more options somehow worked to the detriment of government schools and public employees, one reasonable response might be, “so what?” Of course, there are powerful, perhaps even convincing, rejoinders one could make to such a response, but they should be proffered and debated, rather than assumed. Certainly, the overriding consideration should be what is best for *children*, not what is best for teachers and schools. They are not necessarily the same thing.<sup>84</sup>

---

<sup>81</sup> With respect to the “cream skimming” argument (*i.e.*, the claim that school choice will lure away only the best students from failing public schools, leaving the most troubled children behind), research suggests that, in fact, low-achieving children are more likely to use vouchers to leave government schools. *See, e.g.*, John F. Witte, *First Year Report—Milwaukee Parental Choice Program*, at 8-9 (1991); *see generally* Howard L. Fuller, *The Saturation Campaign of Lies and Distortions About Educational Vouchers* (Mar. 2000), available at <http://www.schoolchoiceinfo.org/servlets/SendArticle/30/saturcam.pdf> (last visited Jun. 6, 2002).

<sup>82</sup> *See, e.g.*, Ted Forstmann, *Break Up the Education Monopoly*, WALL ST. J., Sept. 9, 1999, at A26:

The U.S., we are led to believe, was founded upon a system of government-provided education; tinker with it, and you tinker with the underpinnings of our democracy. In reality, government-delivered education—*a.k.a.* ‘public education’—wasn’t established until roughly a century after our country’s founding. The system it replaced—the system of education our country was founded upon—was characterized above all by diversity, competition and choice.

*Id.* *See generally* ANDREW J. COULSON, *MARKET EDUCATION: THE UNKNOWN HISTORY* (1999).

<sup>83</sup> *See, e.g.*, *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring). Justice Brennan wrote:

It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.

*Id.*

<sup>84</sup> Over a century ago, one observer complained, “we have made a sort of God out of

More to the point, the insistence of some choice opponents that “we need your child to prop up the public schools” is, from a moral point of view, no more palatable, and should be no more convincing, than any other hostage-taking argument:

Students shouldn’t be means to the end of improving government schools—government schools should be a means to the end of improving each student.

Good students aren’t just tools that are available for the government to use in order to improve the quality of its schools (or even to improve the quality of education of other, not-so-good students). It’s wrong to deprive the good students of educational choices so they can remain trapped in government schools for the government schools’ benefit. Even if there are good arguments for not helping parents who choose to send their kids to private schools, “we need your kid at the government school to make the school better” is not among them.<sup>85</sup>

Columnist William Raspberry poses the question this way: “[L]ook at it from the viewpoint of parents who grab at the chance to get their children into better schools: Should they be required to keep their children in bad schools to keep those schools from growing worse?”<sup>86</sup> I do not think that they should. And, in response to the congresswoman who justified her opposition to President Bush’s vouchers initiative by asking, “[h]ow can we in good conscience select a few children from a school system to get vouchers and leave the rest of the children behind?”,<sup>87</sup> one might answer, “how can we *not*?” While we debate the effects of escape, “too many students pay dearly, and for the rest of their lives.”<sup>88</sup>

There is another common, related response to the “why not?” question: For some, the concern is not simply, or merely, that government schools will close or cut back, but instead that their *mission*—to create a well-educated and tolerant citizenry that is united by certain shared values and loyalties and, at the same time, by its appreciation for our ethnic, cultural, and religious diversity—will be undermined. The fear is not just that private schools will “win out” in a competitive market for education, but that such a win would balkanize our communities and hamstring the civic development of our children, as private schools transmit an unhealthy sectarian narrowness and fail to foster the desired

---

our common school system. It is treason to speak a word against it.” VITERITTI, *supra* note 11, at 151 (citation omitted).

<sup>85</sup> Volokh, *supra* note 22, at 361.

<sup>86</sup> Walter Raspberry, *Not Enough Lifeboats*, WASH. POST, Mar. 9, 1998, at A19.

<sup>87</sup> Eilperin, *supra* note 14.

<sup>88</sup> *A Voucher Test*, *supra* note 12.

degree of public engagement. We might think of this as the “bowling alone”<sup>89</sup> or “social capital”<sup>90</sup> argument.

We need not embrace the statism inherent in some theorists’ views of education<sup>91</sup> to agree that the health of civil society depends crucially on the formation, development, and training of capable and decent persons who are concerned with and motivated by the common good. We can agree with, for instance, Professor Viteritti that “a well educated citizenry is among the most critical factors for ensuring the stability of a democracy” and that “public education”—rightly understood—“serves as a foundation for American democracy as we know it.”<sup>92</sup> It turns out, though, that “Catholic, Protestant, and nonreligious private schooling and home schooling families are consistently *more* involved in a wide spectrum of civic activities than are families of public school children.”<sup>93</sup> Indeed, religious schools have, throughout our history, played a crucial role not in balkanizing us but in “advancing the democratic ethos”:

Research shows that adults who have attended parochial schools display high levels of patriotism, tolerance, and civic involvement. . . . If designed appropriately, school choice programs would be particularly beneficial to poor communities, not only extending educational opportunities, but also invigorating civic life and addressing the larger problem of political inequality that besets economically disadvantaged people.<sup>94</sup>

As two leading researchers concluded, “Private schooling, it turns out, is anything but privatizing.”<sup>95</sup>

---

<sup>89</sup> See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

<sup>90</sup> See, e.g., Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1578 (2001) (“Societies are high in social capital when trusting attitudes prevail and cooperative activities abound among citizens. The phrase is meant to identify a central feature of good citizenship and the importance of social networks to sustaining it: virtuous citizens are active in cooperative groups, associations, and social networks.”).

<sup>91</sup> See, e.g., MACEDO, *supra* note 27; MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* (1999); GUTMAN, *supra* note 27; BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). For detailed critiques of these arguments, see, e.g., Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000); Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149 (1999); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

<sup>92</sup> VITERITTI, *supra* note 11, at 180-81.

<sup>93</sup> Smith & Sikkink, *supra* note 72, at 16.

<sup>94</sup> VITERITTI, *supra* note 11, at 183.

<sup>95</sup> Smith & Sikkink, *supra* note 72, at 16. These researchers’ findings might usefully be compared to those of Robert Putnam, in his study of government and civic engagement in

In other words, I do not think it can reasonably be said today—even if perhaps it once could—that school choice or private schooling is a retreat from, or abandonment of, the American ideal of the “common school.”<sup>96</sup> The research and data, again, suggest otherwise. In fact, “Catholic schools more nearly approximate the ‘common school’ ideal of American education than do public schools.”<sup>97</sup> Indeed, “there is nothing parochial about most Catholic schools these days.”<sup>98</sup>

That said, even as we tout the success of religious schools in this regard, we would do well to cultivate a healthy skepticism about the “ideal” itself. In particular, we might recall that the common-school movement was nurtured and animated in large part by suspicion and hostility toward the Roman Catholic Church, its teachings, its perceived ambitions, and its schools. It is fair to say that, for at least a century, the education debate and the defense of government schools were inseparable from the respectable anti-Catholicism of America’s judicial and intellectual elites.<sup>99</sup> This is neither special pleading nor the rhetoric of

---

Italy. ROBERT PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993). He concluded that

[m]embership rates in hierarchically ordered organizations (like the Mafia or the institutional Catholic Church) should be negatively associated with good government; in Italy, at least, the most devout churchgoers are the least civic-minded. . . . Good government in Italy is a by-product of singing groups and soccer clubs, not prayer.

*Id.* at 175-76; see also Macedo, *supra* note 90 (discussing and supplementing Putnam’s work and conclusions).

<sup>96</sup> See Peter Beinart, *Degree of Separation*, NEW REPUBLIC, Nov. 3, 1997, at 6.

<sup>97</sup> JAMES COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT* 185 (1982); see also Joseph M. O’Keefe, S.J., *What Research Tells Us About the Contributions of Sectarian Schools*, 78 U. DET. MERCY L. REV. 425 (2001) (offering “reflections on the contributions of sectarian schools to the common good”).

<sup>98</sup> Terry Golway, *The Modern Mosaic of Catholic Education*, AMERICA, May 28, 2001, at 6 (“Catholic schools are no longer the homogenous institutions of the past, and today’s Catholic school graduates will go into the world as prepared as any children for the diverse and complex world of the 21st century.”); Macedo, *supra* note 90, at 1586.

In his study of America, Putnam found that mainline Protestant and Catholic churches seem to help mobilize civic engagement. They have the qualities of bridging associations. Instead of monopolizing their congregants’ attention or discouraging wider social involvements, members of these communities tend to become involved in helping to lead secular civic groups.

*Id.*

<sup>99</sup> See generally VITERITI, *supra* note 11; CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925* (1987); DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* (1974); John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997). But see MACEDO, *supra* note 27, at 88 (“It is too simple to say that the early common schools were in the business of ‘Protestantizing’ Catholic immigrants. . . . To a significant degree, the common schools represented a shared civic vision. Convergence on that vision could not . . . be taken for granted.”).

grievance; it is simply a fact. The hopes of Horace Mann, John Dewey, and their successors for a cohesive and engaged citizenry formed in the crucible of government education went hand-in-hand with their aggressive protestantizing, and then secularizing, aspirations. As Professor John Coons has noted, “[t]he machinery of public monopoly was chosen specifically by brahmins . . . to coax the children of immigrants from the religious superstitions of their barbarian parents.”<sup>100</sup> It is not entirely clear that much has changed in this regard. In the course of laying out their theories of the appropriate function of education in a secular, liberal society, many theorists are increasingly candid in their criticisms of authentically religious education, and increasingly wary of the destabilizing and divisive potential of traditional religious beliefs.<sup>101</sup>

These two responses to the “why not?” question—*i.e.*, that school choice would undermine both the institutions and the mission of the American system of public education—open the door to important conversations about the purpose of education and the prerogatives of the state. They deserve and require a response—a more detailed response, of course, than I could or have tried to provide in this Essay. In my view, though, it should not be enough for those who oppose increased opportunities for choice in education merely to raise the specter of government-school embarrassment. Lack of government confidence in its own product is no reason to protect that product, particularly not at the expense of disadvantaged and at-risk children. I would also submit that “public” education is not reducible to education in government-owned buildings, by government employees, according to government-sanctioned methods and curricula. To recognize as much is not to charge down the path of social division and disengagement. Public-mindedness and civic engagement need not require involvement in government-run or state-sanctioned institutions.<sup>102</sup> After all, as Tocqueville emphasized, and as many contemporary civil-society thinkers have re-

---

<sup>100</sup> Coons, *supra* note 20, at 19 (“Today that antique machinery continues its designated role, and if this function was ever benign, it has long since ceased to be so.”).

<sup>101</sup> See, e.g., MACEDO, *supra* note 27, at 147 (“Some religious beliefs are at odds with liberalism itself. We should tolerate the intolerant . . . but we need not bend over backwards to make life easy for them.”); JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS* (1998). Similar views have, unfortunately, also been expressed in the opinions of Supreme Court Justices. See, e.g., *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 711 (1994) (Stevens, J., concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 244-47 (1971) (Douglas, J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971) (Douglas, J., concurring).

<sup>102</sup> See, e.g., Coons, *supra* note 7, at 22. (“To render coherent the debates on education we would need to give correct names to the phenomena at issue, exercising self-restraint in the use of ‘public.’”).

discovered, a healthy and vibrant democracy requires not only a state, but also intermediate institutions and voluntary associations to serve as buffers, and to mediate relations, between the individual and that state.<sup>103</sup> In any event, to the extent opposition to choice is grounded in romantic attachment to an imagined common-school ideal, to a totalizing version of liberalism, or to various religious and anti-religious prejudices, it is irreconcilable both with the historical record and with our professed embrace of genuine pluralism and religious freedom.

#### IV. TOWARD A NEW CONVERSATION

As I said at the outset, my goal with this Essay is to propose a revised agenda for our public conversations about education reform and school choice. My aim is to shift the focus of the debate from the Establishment Clause, empirical analysis, and efficiency to broader questions about education, pluralism, religious freedom, and the common good.<sup>104</sup> In suggesting such a shift, I am in good company. After all, Professor Coons has made the case, in a short essay now nearly ten years old, that

[s]hifting educational authority from government to parents is a policy that rests upon basic beliefs about the dignity of the person, the rights of children, and the sanctity of the family; it is a shift that also promises a harvest of social trust as the experience of responsibility is extended to all.<sup>105</sup>

These “larger reasons for believing in choice” are, he insisted, “equal in dignity to those that underlie our great constitutional freedoms.”<sup>106</sup>

In this last Part, then, I want to highlight some of these “larger reasons for believing in choice” by drawing on several of the animating themes in the “social teaching” of the Catholic

---

<sup>103</sup> There is, of course, a huge and exploding literature on voluntary associations—the “little platoons” of democracy—and their place in civil society. The best place to start is still ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489-99 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1838). See also, e.g., PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977).

<sup>104</sup> For a related discussion, see Richard W. Garnett, *Common Schools and the Common Good: Reflections on the School-Choice Debate*, 75 ST. JOHN'S L. REV. 219 (2001).

<sup>105</sup> Coons, *supra* note 20, at 15.

<sup>106</sup> *Id.*

Church.<sup>107</sup> To be sure, each of these themes deserves, requires, and has received *far* more detailed and nuanced treatment than I provide here. I should also emphasize that these themes, and the Church's claims about them, are intended to have more than a narrowly sectarian or particularistic appeal. They sound not only in faith, but also in social philosophy; they draw on reason no less than on revelation. They are an invitation to dialogue, extended "to all people of good will."<sup>108</sup> I mean, and I hope, for this Essay to be a similar invitation.

A. *Solidarity and the Preferential Option for the Poor*

It is worth remembering that school choice's intellectual and rhetorical roots are in the War on Poverty as much as the social conservatism of the so-called Religious Right or the individualism of libertarian economists.<sup>109</sup> It should therefore come as no surprise that many contemporary advocates for choice-based reform tend to frame the issue in terms of social justice and equal opportunity. It is, after all, a fact—one for which no citation should be required—that, to the extent our government-run public schools are failing, their failure is falling most heavily on poor people. The widespread recognition of this fact, and the corresponding claim that expanding and subsidizing parental choice in education is a way of offering hope and opportunity to many low-income people, connects nicely with the basic theme in Catholic social thought of a "preferential option for the poor." As Pope Leo XIII put it more than a century ago, in what one of his successors once called the *Magna Carta* of the Church's modern social teaching, "the poor and helpless have a claim to special consideration. The richer population have many ways of protecting themselves, and stand less in need of help from the State; those who are badly off have no resources of their own to fall back upon."<sup>110</sup>

---

<sup>107</sup> "Catholic Social Teaching" is a term commonly used to denote the body of encyclical letters and conciliar declarations—starting with Pope Leo XIII's *Rerum novarum* (1891), and including, for example, John Paul II's *Centesimus annus* (1991) and *Veritatis splendor* (1993)—in which the Church has addressed all men and women of good will concerning the morality of the social order. See, e.g., CATECHISM OF THE CATHOLIC CHURCH § 2419-2425 (Paulist Press 1994) (providing an overview of the "social doctrine of the Church") [hereinafter CATECHISM]. For a brief introduction to this body of teaching, see, e.g., MICHAEL SCHOONYANS, INTRODUCTION TO THE SOCIAL TEACHING OF THE CHURCH (1992).

<sup>108</sup> See, e.g., *Evangelium vitae* [*The Gospel of Life*] (1995) (introduction).

<sup>109</sup> See, e.g., VITERITTI, *supra* note 11, at 53-57; Coons, *supra* note 7.

<sup>110</sup> Pope Leo XIII, *Rerum novarum* (1891).



This stance—this “preferential love”<sup>111</sup>—is grounded not in paternalism, *noblesse oblige*, or even in political radicalism, but in a recognition of the dignity of every human person.<sup>112</sup> The point is not merely maintenance, but empowerment.<sup>113</sup> In a sense, this preferential option can be seen as simply one translation of the “Golden Rule”—the call to love one’s neighbor as oneself.<sup>114</sup> The connection between this call to solidarity with the poor, on the one hand, and our conversations about education, on the other, should be clear, even if the precise policy implications of the call are not. Just as many school-choice supporters decry the fact that, because of failing schools, “too many students pay dearly, and for the rest of their lives,”<sup>115</sup> John Paul II has emphasized that education is “an indispensable component of the evangelical preferential option for the poor.”<sup>116</sup>

Now, it must be conceded that reasonable people of good will, trying in good faith to think in solidarity with the disadvantaged, and to act—and to legislate—in accord with the “preferential option,” will likely disagree about the policies to be pursued. Some will insist—mistakenly, in my opinion—that school choice is yet another benefit for the well-off, and a threat to the already precarious situation of the schools that serve the poor. My point here is simply that this theme challenges us at the very least to question the fairness and wisdom of policies that keep poor children trapped in schools that policymakers would never permit their own children to attend, even as it also challenges us to evaluate any proposed ameliorative policy initiatives with an eye to how they will serve these same children.

### B. *Subsidiarity*

Another animating theme in contemporary Catholic social teaching—one that should also be, like the “preferential option for the poor,” accessible to those standing outside the Catholic tradition<sup>117</sup>—is the principle of “subsidiarity.” Subsidiarity, in a

<sup>111</sup> CATECHISM, *supra* note 107, § 2448.

<sup>112</sup> See, e.g., John Paul II, *Sollicitudo rei socialis* [On Social Concern] ¶¶ 39, 42 (1987).

<sup>113</sup> U.S. Catholic Bishops, *Economic Justice for All* [Pastoral Letter on Catholic Social Teaching and the U.S. Economy] ¶ 88 (1986).

<sup>114</sup> *Id.*

<sup>115</sup> *A Voucher Test*, *supra* note 12.

<sup>116</sup> ZENIT, *Education Is Key Part of “Option” for the Poor, Pope Says* (Jan. 29, 2001), available at <http://www.zenit.org>.

<sup>117</sup> See Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 108 (2001) (“[T]he fact that its roots are in Catholicism does not make subsidiarity inaccessible to arguments of logic and public policy.”).

nutshell, is the “principle of limited government” according to which “[t]he state should do only what cannot effectively be done by private action, and whenever possible the individual should make his own decisions.”<sup>118</sup> It should be emphasized, though, that the Church’s claim is not that localism is to be preferred for its own sake, or at all costs. The teaching reflects not a hostility to public action, or even to governmental initiative. Rather, it is built on an appreciation of the social nature and destiny of the human person, and for the contributions of mediating structures and associations both to the vitality of civil society and to the authentic flourishing of persons.<sup>119</sup> The point of the subsidiarity principle is not so much to dictate any particular policy choice—after all, reasonable people will disagree about how the theme might best be implemented “on the ground”—as to suggest an attitude, an orientation, and an aspiration.

Turning back to the matter of education generally, and school choice specifically, it seems clear that there should be a place in our conversations for the principle of subsidiarity.<sup>120</sup> John Paul II has urged, for example, that the “mission of education . . . always be carried out in accordance with a proper application of the principle of subsidiarity.”<sup>121</sup> To opt for school choice is, after all, to opt for diversity, pluralism, experimentation, mediating

---

<sup>118</sup> David P. Currie, *Subsidiarity*, 2D GREEN BAG 359 n.1 (1998); see also Pope John Paul II, *Centesimus annus* [Encyclical Letter on the Hundredth Anniversary of *Rerum novarum*] ¶ 48 (1991), which notes that subsidiarity is the principle according to which a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.

*Id.*; Mary Ann Glendon, *Civil Service*, NEW REPUBLIC, Apr. 1, 1996, at 39, 40 (“Subsidiarity [is] the principle of leaving social tasks to the smallest social unit that can perform them adequately.”) (reviewing MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996)); Vischer, *supra* note 117, at 103 (defending the claim that “the strictly conservative portrayal of subsidiarity misconstrues the nature of the Catholic social theory from which the principle arises”).

<sup>119</sup> See, e.g., Vischer, *supra* note 117, at 116. Vischer states that: Subsidiarity is not a knee-jerk shunning of government authority . . . . Rather, subsidiarity is a principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives. In this regard, the focus is on fostering the vitality of mediating structures in society. *Id.*; Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1849-56 (2001) (discussing function and importance of mediating associations).

<sup>120</sup> See, e.g., Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 144-145 (2000) (urging a connection between parents’ constitutional right to educate their children in religious schools and the subsidiarity principle).

<sup>121</sup> Pope John Paul II, *Letter to Families* ¶ 16 (1994).

associations (e.g., religious schools), and families over centralization, monopoly, stasis, and homogeneity.

Moreover, implicit in the subsidiarity principle is the recognition that mediating associations not only form and instruct us, they play a political role as well, serving as the “critical buffers between the individual and the power of the State.”<sup>122</sup> They are the scaffolding around which civil society is constructed, in which personal freedoms are exercised, loyalties are formed and transmitted, and individuals flourish.<sup>123</sup> The claim, in other words, is not merely that the principle of subsidiarity can help us find our way toward a more efficient and effective delivery of services, but also that the principle, and the values it embodies, promotes human freedom more generally.<sup>124</sup>

### C. *Education, Family, and Vocation*

The family, in Catholic social thought, is both the “first and vital cell of society”<sup>125</sup> and the primary “educating community.”<sup>126</sup> Put another way, the family is “the first school of the social virtues that are the animating principle of the existence and development of society itself.”<sup>127</sup> Accordingly, and consistent with the principle of subsidiarity, it is the obligation of the public authority not to usurp families’ tasks, but rather to “give [them] all possible aid to enable them to perform their educational role properly.”<sup>128</sup>

<sup>122</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984); see also Peter L. Berger & Richard John Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond*, in *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 145, 148 (Michael Novak ed., 1996) (“[Voluntary associations] stand between the private world of individuals and the large, impersonal structures of modern society. They ‘mediate[]’ by constituting a vehicle by which personal beliefs and values could be transmitted into the mega-institutions.”).

<sup>123</sup> See generally Garnett, *supra* note 119.

<sup>124</sup> See, e.g., J. Verstraeten, *Solidarity and Subsidiarity*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 135 (David A. Boileau ed., 1994) (observing that subsidiarity expresses “a duty of the community to . . . give [its members] the possibility to develop themselves to the fullest as people.”).

<sup>125</sup> Pope John Paul II, *supra* note 8, ¶ 42 (quoting Second Vatican Ecumenical Council, *Apostolicam actuositatem* [Decree on the Apostolate of the Laity] ¶ 11); see also, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”); *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (noting the important role of the family in “promot[ing] a way of life through the instruction of children”).

<sup>126</sup> Pope John Paul II, *supra* note 8, ¶ 40.

<sup>127</sup> *Id.* ¶ 42.

<sup>128</sup> *Id.* ¶ 40; see also John Finnis, *Virtue and the Constitution of the United States*, 69 *FORDHAM L. REV.* 1595, 1601 (2001) (noting, among other things, that the government’s role is “subsidiary” to that of “families, schools, and other institutions of civil society” when it comes to “inculcating civic virtue”).

But what is “education”? What is the task given to families, and the *vocation* entrusted to parents? Properly understood, education is as much about transmitting values, commitments, and faith to children as it is about outfitting them with useful data and “skill sets.” Education is

the indivisible process of acquiring beliefs, premises, and dispositions that are our windows on the world, that mediate and filter our experience of it, and that govern our evaluation and judgment of it. Education is what attaches us to those goods and ends that attract, almost gravitationally, our decisions and actions.<sup>129</sup>

In fact, in his *Letter to Families*, Pope John Paul II goes so far as to suggest that the educator is “a person who ‘begets’ in a spiritual sense.”<sup>130</sup>

This is precisely why we *care* so much about education, and why the debates concerning choice-based reform are as heated as they are. It *matters* to us, not just what our children know, and what they can do, but also what they value, what they believe, and *who they are*. This is why, John Paul II suggests, the raising and education of children can “be considered a genuine apostolate.”<sup>131</sup> It is also why education is no less a mission for many contemporary liberal theorists, for whom schooling is not only a means of staffing the needs of the American economy but also a way for the state to gain an edge in its competition with parents’ morality and “intolerant” religion for the allegiance of children. It often seems that arguments against vouchers, and for increased supervision by government of religious and private schools, are less about the technical skills these schools do or do not provide to their students than the extent to which they fail to transmit the values, habits, and attitudes thought necessary for liberal citizenship.<sup>132</sup> Education is an opportunity to impart loyalties and inculcate values; it is the arena of character formation and the value of soul making.<sup>133</sup>

The point here—the claim proposed in the Church’s social doctrine—is that school choice not only promotes competition,

---

<sup>129</sup> Garnett, *supra* note 119, at 1846.

<sup>130</sup> Pope John Paul II, *Letter to Families* ¶ 16 (1994).

<sup>131</sup> *Id.*

<sup>132</sup> See generally MACEDO, *supra* note 27; Amy Gutmann, *Religious Freedom and Civic Responsibility*, 56 WASH. & LEE L. REV. 907 (1999); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000). For the different argument that many religious schools harm children by failing to equip them with the critical-thinking skills, moral flexibility, and self-esteem they need to flourish, see DWYER, *supra* note 101.

<sup>133</sup> See generally STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* (1998).

efficiency, and reform, it is also more consistent than monopoly or government indoctrination with the freedom and moral responsibilities of parents, and with the integrity and dignity of the family. Certainly, this is an argument that resonates strongly with leading themes in American constitutional law. Over seventy-five years ago, in *Pierce v. Society of Sisters*,<sup>134</sup> the Supreme Court affirmed the fundamental right of parents to direct and control the upbringing and education of their children, insisting that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>135</sup> It is, the Court added, the constitutional right of parents, and not the prerogative of the state, “to direct the upbringing and education of children.”<sup>136</sup> As Professor Viteritti observed, however, for many parents, “the promise of . . . *Pierce*”—that is, the promise that parents could “send their children to schools that reflect their own values”—“remains a hollow promise, conditioned to a large degree by the economic position of parents.”<sup>137</sup> By the same token, a conversation about choice and vouchers that was inspired by the animating themes of Catholic social teaching would take seriously the claim that, just as a lack of options threatens to condemn children to sub-standard training and reduced opportunities, it tends also to undermine the ability of poor parents and families to exercise their right, and to fulfill their vocation, to educate their children.

#### D. *Education and Religious Freedom*

Professor Viteritti has observed that “[t]he calculus of religious liberty in a free society is determined by the measure of religiously motivated thought and action that is insulated from public authority.”<sup>138</sup> Accordingly, choice in education can, is, and should be defended as a crucial and constitutive element of authentic religious freedom. To permit and facilitate educational choice, the argument goes, is to appreciate that, for many, education is a profoundly religious enterprise, one that is “rooted in the primary vocation of married couples to participate in God’s

---

<sup>134</sup> 268 U.S. 510 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel v. Granville*, 530 U.S. 57 (2000) (“The liberty interest at issue in this case . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

<sup>135</sup> *Pierce*, 268 U.S. at 535.

<sup>136</sup> 268 U.S. at 534-35 (1925) (emphasis added); see also *Meyer*, 262 U.S. at 400.

<sup>137</sup> VITERITTI, *supra* note 11, at 143.

<sup>138</sup> *Id.* at 165.

creative activity.”<sup>139</sup> When education is seen as a “ministry,” and when parents and their chosen agents are regarded as “the first heralds of the Gospel for their children,”<sup>140</sup> the connection between education reform and religious freedom is apparent.

More than fifty years ago, John Courtney Murray highlighted this connection between school choice, on the one hand, and religious liberty and pluralism, on the other.<sup>141</sup> Murray reminded his readers that, as a matter of constitutional law, the right and the duty of parents to “direct and control” the upbringing and education of their children trump the aims of the state and are the “pivotal point of a democratic system.”<sup>142</sup> In so doing, he both echoed and anticipated powerful statements to this effect by the Council Fathers at Vatican II, who identified choice in education as one of the “conditions favorable to the fostering of religious life” that governments are obligated to create and uphold.<sup>143</sup> It was, for them, a requirement of religious liberty that “government must acknowledge the right of parents to make a genuinely free choice of schools.”<sup>144</sup>

Now, people of good will might well conclude that Murray and the Council Fathers were mistaken, and that—while constitutional—government efforts to increase parental choice in education will not, in fact, promote and protect religious freedom. Some might fear, for instance, that school-voucher programs would result in religious schools and institutions becoming dependent on government funds. Or, they might worry that such programs could open the doors of religious schools to an array of intrusive and secularizing regulations that these schools might lack the will power or the foresight to resist.<sup>145</sup> The point here is simply to suggest that we shift our focus from the technicalities and niceties of First Amendment doctrine and instead frame our education-reform discussions around, and evaluate our educational policies with reference to, a rich understanding of authentic religious freedom and of the right and obligation of the human person to search for and cling to God.<sup>146</sup>

---

<sup>139</sup> Pope John Paul II, *supra* note 8, ¶¶ 36, 38.

<sup>140</sup> *Id.* ¶ 39.

<sup>141</sup> John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949).

<sup>142</sup> *Id.* at 36.

<sup>143</sup> *Dignitatis humanae* [Declaration on Religious Freedom] ¶ 6 (1965).

<sup>144</sup> *Id.* ¶ 5.

<sup>145</sup> See, e.g., Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 339-41 (2000) (discussing the “regulatory strings” concern).

<sup>146</sup> See *Dignitatis humanae*, *supra* note 143, ¶ 2.

It is in accordance with their dignity as persons . . . that all men should be at once

E. *The Common Good*

In the end, the measure of any public-policy proposal or experiment should be its relation to, and effect upon, the common good. This is easy to say—*too* easy, perhaps. What *is* the “common good”? Is it just a cliché? How is its pursuit distinguishable from the homogenizing aims of the common-school movement and the secularizing ambitions of its contemporary theoretical descendants?

For Roman Catholics, and in the social teaching of the Catholic Church, the “common good embraces the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.”<sup>147</sup> It “consists in the protection of the rights, and in the performance of the duties, of the human person[.]”<sup>148</sup> and “resides in the conditions for the exercise of the natural freedoms indispensable for the development of the human vocation.”<sup>149</sup>

Clearly, there is a lot worth saying about these few sentences. Note, in particular, that the “common good” cannot be equated simply with the good of the government, state, or group. Nor is it merely the “greatest good for the greatest number.”<sup>150</sup> Of course the good of the community is to be desired, but, in the end, it is the dignity of each *particular* human person—who, to be sure, truly thrives in political community with others—that ultimately must be the end of, and benchmark for, the *common* good. That is, the common good is a set of “conditions of social life” through which we all enjoy our rights, flourish and are fulfilled, and become what we ought and are *called* to be. Seen this way, the Catholic understanding of the common good is both *anti-statist*, in that it incorporates the principle of subsidiarity, and the insight that the person, the family, and the mediating associations of civil society

---

impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth.

*Id.*

<sup>147</sup> *Gaudium et spes* [Pastoral Constitution on the Church in the Modern World] ¶ 74; CATECHISM, *supra* note 107, § 1906.

<sup>148</sup> *Dignitatis humanae*, *supra* note 143, ¶ 6; CATECHISM, *supra* note 107, § 1907 (“[T]he common good presupposes *respect for the person* as such”). This does not mean that Catholic teaching regards the well-being of the state as irrelevant to the common good. See, e.g., CATECHISM, *supra* note 107, § 1908 (“[T]he common good requires the *social well-being and development* of the group itself.”).

<sup>149</sup> CATECHISM, *supra* note 107, § 1907.

<sup>150</sup> See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154 (1980).

are prior in dignity and right to the state; and it is *personalist*, in that its focus and end is the authentic development of the human person in community over the claims, goals, and values of government. The “common good” question—in the school-choice context, as everywhere else—is, in the end, an *anthropological* question; it is, “what is good for the person?” and not, “what is good for the state and its institutions?”

What does all this mean for our school-choice discussions? Just this—the subtext (if not the text itself) of the “who decides?” debate in education has for the most part been a fight over the rhetorical purchase of terms like the “common good” and the “common” or “public” school.” As I suggested earlier, the twists and turns of the Supreme Court’s First Amendment case law reflect, in large measure, the degree to which the Court has been willing to constitutionalize the views of those for whom the mission of religious schools is at odds with their understanding of the common good. As the Court in *Mitchell* and other decisions repairs gradually the harms done during these twists and turns, it is worth making the case that school choice should be pursued not simply because it is constitutionally permissible, but because it serves and coheres with the common good, and with authentic religious and political freedom.

Indeed, the case for choice *must* be framed explicitly in such terms. The argument must be made that what we too quickly call our “public” school system is, in Professor Coons’ words, “an inward-turning monopoly that . . . serves only itself [and that] goes out of its way to disfavor the working class and the poor who cannot escape its grasp”<sup>151</sup> and who are, in effect, “captive audiences” for whatever ideological “gospel” government decides to deliver.<sup>152</sup> Educational choice is the surest and fairest route to the truly common good and, by extension, to the fulfillment and flourishing of every child. It is, in other words, one of those “conditions of social life” that is constitutive of the common good.

### CONCLUSION

As I write, on February 20, 2002, reports are starting to filter in from friends, colleagues, and news reporters about the oral arguments heard today in *Zelman*, the Ohio school-choice case. It appears that the lawyers’ arguments and the Justices’ questions

---

<sup>151</sup> John E. Coons, *Is Choice Still a Choice?*, FIRST THINGS, Aug./Sept. 1994, at 10.

<sup>152</sup> Coons, *supra* note 7, at 22.



have boosted the cautious optimism of those who support school choice and who believe choice programs are constitutional. We will see.

As I said at the outset, I think that the Court *should* uphold the Ohio program, which does not unconstitutionally endorse, coerce, fund directly, or otherwise “establish” religion. The argument here, though, has been that school choice is not simply a matter of spurring improvements through competition, or of delivering publicly funded education in a fairer way; it is about *authentic religious, political, and personal freedom*. The point of educational choice is not simply to meet in a cost-effective fashion the government’s asserted need for well-trained workers and citizens, but rather to promote the dignity and flourishing of parents and children in families, associations, and communities.

I believe that this way of framing the issues and posing the questions, coupled with a searching engagement with some of the prominent themes in contemporary Catholic social teaching, sets the stage for a productive, and perhaps even inspiring, public conversation about education, religious freedom, social justice, and the common good.

