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Richard W. Garnett

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COMMON SCHOOLS AND THE COMMON GOOD: REFLECTIONS ON THE SCHOOL-CHOICE DEBATE

RICHARD W. GARNETT†

Thank you very much for this timely and important discussion on school choice, religious faith, and the public good.

First things first—Steven Green is right: The Cleveland school-voucher case is headed for the Supreme Court.¹ And I am afraid that Mr. Green is also correct when he observes that the question whether the First Amendment permits States to experiment with meaningful choice-based education reform will likely turn on Justice O'Connor's fine-tuned aesthetic reactions to the minutiae of Ohio's school-choice experiment.

My own view is that her concurring opinion in *Mitchell v. Helms*,² read with and in light of her earlier opinion for the Court in *Agostini v. Felton*,³ suggests strongly that she will vote to uphold the Ohio program. More specifically, I believe that she will conclude that the program uses religion-neutral criteria to empower parents, that it is parents—not the government, who select from a diverse menu of schools, public and private, religious and secular—the option they believe is best for their children, and therefore, that the choice experiment does not run afoul of the Establishment Clause. And she will not, I predict, credit the arguments that the number of religious schools participating in the choice program, or the dollar amount of the vouchers made available, or the desperation brought on by the

† J.D., Yale Law School; B.A. Duke University. Assistant Professor of Law, Notre Dame Law School.

¹ Not long after this conference, the United States Court of Appeals for the Sixth Circuit affirmed a decision by the United States District Court for the Northern District of Ohio that the Cleveland choice program violates the First Amendment's Establishment Clause. See *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir., Dec 11, 2000). On September 25, 2001, the United States Supreme Court agreed to review the case. *Zelman v. Simmons-Harris*, 122 S.Ct. 23 (2001). As this volume was going to press, oral argument in the case was set for February 20, 2002.

² 530 U.S. 793 (2000).

³ 521 U.S. 203 (1997).

sorry state of Cleveland's public schools, somehow renders parents' choices less-than-free, and therefore insufficient to break the link between the government, on the one hand, and the "coffers" of religious schools, on the other.⁴

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Putting aside for now the particulars of the Cleveland case, though, I would like to propose for your consideration a few thoughts on the notion of the "common good" and its implications for the school-choice and education-reform debates. As you know, I have been blessed with the chance to teach law at Notre Dame, a Catholic school, and I suppose this is one reason why I have acquired the habit of liberally sprinkling terms like "the common good" atop my conversations about the Constitution, the First Amendment, and the place of religion in the public square of civil society. The term has, to be sure, a pleasant, pious, ring to it. Not long ago, though, a colleague and friend of mine—himself a formidable scholar in the law-and-religion area—asked, with good-natured exasperation, "What does this 'common good' business *mean*, anyway?"

This is a fair question. Terms like "the common good" are often deployed as much for their gauzy connotations and evocative pull as for their content. Stanley Fish has observed, in his usual chiding manner, that "'free speech' is just the name we give to verbal behavior that serves the substantive agendas we wish to advance."⁵ By the same token, to invoke "the common good" is often to do little more than send a less-than-subtle announcement that, whatever the day's dispute, "I'm on the side of the angels; I'm not selfish, I'm for 'the common good.'" So, when we gather at conferences like this, and when we ask whether law, religion, and education can or ought to cooperate to serve the common good, what exactly are we talking about?

Take, for example, the issue of school choice. I have been convinced—in no small part by my fellow panelist, Professor

⁴ In Establishment Clause cases having to do with private-school-funding questions, it is common for courts to assume that religious schools—like pirate ships or dragons' lairs, apparently—have "coffers," rather than "checking accounts." See, e.g., *Mitchell*, 530 U.S. at 848, 867 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 228; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

⁵ STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO* 102 (1994).

Joseph Viteritti⁶—that our society generally, and poor children in particular, would be well served by breaking the government's monopoly on publicly funded education, by better respecting religious freedom and family autonomy in schooling, and by empowering all parents, regardless of income, to decide where, what, and from whom their children will learn. In short, I believe that school choice is a good idea, that it is just, and that it is constitutional. Others disagree. In any event, though, if we hope to make any progress in our now-over-150-years-old dispute over which better serves the common good—parental control and choice in education or government monopoly over public education, we should take care to nail down our benchmark.

So, what is “the common good”? My answer is rooted in a particular religious tradition—my own—but will not, I hope, be dismissed as merely sectarian. For Roman Catholics, 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.”⁷ It “chiefly consists in the protection of the rights, and in the performance of the duties, of the human person[,]”⁸ and “resides in the conditions for the exercise of the natural freedoms indispensable for the development of the human vocation.”⁹

Now, there is a lot packed into those two sentences, and some of my fellow speakers at this conference will likely have more to say about the idea of the common good in Catholic social teaching. Still, the little that I have said is enough to highlight two noteworthy and relevant features of this complex idea: *First*—and perhaps counter-intuitively—the “common good” should be regarded as the means, not the end; and *second*, the end toward which the common good is the means is not the well-being of the state or the success of their various projects, nor is it a utilitarian “greatest good for the greatest number.”¹⁰ It is,

⁶ See JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999); see also Richard W. Garnett, Review Essay, *Brown's Promise, Blaine's Legacy*, 17 CONST. COMMENT. 651 (2000) (reviewing CHOOSING EQUALITY).

⁷ Pope Paul VI, *Gaudium et spes*, in THE DOCUMENTS OF VATICAN II 283–84 (Walter M. Abbott ed., Joseph Gallagher, Trans., 1966).

⁸ Pope Paul VI, *Dignitatis humanae*, in The Teachings of the Second Vatican Council 366, 372 (1966).

⁹ THE CATECHISM OF THE CATHOLIC CHURCH § 1907 (1994).

¹⁰ See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154 (1980)

instead, the authentic happiness of persons. That is, the common good is that set of "conditions of social life" *through which* we all—"individuals, families, and groups"—enjoy our rights, flourish, and become what we ought and are *called* to be. It is the dignity of each *particular* human person—who thrives in political community with others yet bears alone the "weight of glory"¹¹—that ultimately serves as the benchmark for the *common good*.

In other words, the Catholic understanding of the common good is *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 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?"

This thumbnail-sketch understanding of the common good provides, I think, an interesting route into the contemporary controversies about the place of religion in education and public life generally, and about school choice specifically. For more than a century now, the struggle between the state, on the one hand, and parents, families, and civil society, on the other, for control over children's education has been in large part the struggle for the rhetorical and emotional power of terms like the "common good" and the "common school." And it is this struggle that has, perhaps more than anything else, but certainly more than the text or history of the First Amendment, shaped the courts' understanding and application of the Establishment Clause in school-funding cases.

This means that the answer to the question, "does the First Amendment permit school choice?," will likely end up depending not so much on any imagined intent of the Framers to "erect a 'wall of separation between church and state,'"¹² or on a

(observing that the notion that "the common good" is "the utilitarian 'greatest good for the greatest number'" is "not merely practically unworkable but intrinsically incoherent and senseless").

¹¹ C.S. LEWIS, *THE WEIGHT OF GLORY AND OTHER ESSAYS* (Touchstone ed. 1996).

¹² *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high

supposed Founding-era consensus around the views of James Madison, Thomas Jefferson, or Roger Williams, or on any particular “first principles” of religious freedom,¹³ but instead on the degree to which the Court remains willing to constitutionalize the views of those for whom the mission of religious (primarily Catholic) schools is at odds with their understanding of the common good and the mission of the “common schools.” Thus, the case for choice requires its supporters to re-focus on, re-define, and, in a sense, re-claim the common good as our standard.

Now, as I said a few minutes ago, it is clear to me that the current canon of relevant precedent permits—and probably requires—the Supreme Court to hold that school choice is constitutional. This is the right answer. But it is not the right answer only because it is where we should arrive after tracing our way through fifty years of zig-zagging caselaw, from *Everson*,¹⁴ through *Mueller*¹⁵ and *Witters*,¹⁶ to *Mitchell*.¹⁷ It is also the right answer because it coheres best with the better view of the common good. After all, properly understood, school choice is not simply a matter of spurring improvements through competition, or even about delivering publicly funded education in a fairer way, especially to low-income and minority students; it is about *authentic religious, political, and personal freedom*. It is not just about solving in a cost-effective fashion the government’s problems or meeting its asserted need for well-trained workers and citizens, but about promoting the dignity and flourishing of parents and children, in families and communities. Understood in this way, school choice is, I believe, one of those “conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.”¹⁸

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and impregnable. We could not approve the slightest breach.”)

¹³ See JOHN WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 37–55 (2000).

¹⁴ *Everson*, 330 U.S. at 1.

¹⁵ *Mueller v. Allen*, 463 U.S. 388 (1983).

¹⁶ *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986).

¹⁷ *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁸ Pope Paul VI, *supra* note 7.

Few have engaged questions about education, the Constitution, and the common good as thoughtfully and provocatively as did John Courtney Murray. The reflections of this once-controversial Roman Catholic priest on the American experience of democracy, pluralism, and freedom—set out in his 1960 volume, *We Hold These Truths*—were enormously influential in the production of the Second Vatican Council's Declaration on Religious Freedom, *Dignitatis humanae*.

The Council opened in October of 1962. More than a decade before the Council, though, the United States Supreme Court in *Everson* had constitutionalized a strange brew of rational religion, strict separationism, and anti-Catholicism, stating that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."¹⁹ The Court re-affirmed this approach the next year in *McCullum*.²⁰

In response to these landmark decisions, the respected *Journal of Law and Contemporary Problems* hosted a symposium—much like this one—on the First Amendment and the role of religion in American public life. Murray was one of the participants. True, he was not, as he was quick to note, a lawyer, but no matter: "The constitutional law written in the *Everson* and *McCullum* cases is obviously not what is called learned law; consequently, one who is not a lawyer, learned in the law, may speak his mind on it."²¹ The title of Murray's essay, *Law or Prepossessions?*, was taken from Justice Jackson's opinion in *McCullum*, and it reflected Murray's conclusion that, in both cases, the Court's holding and history were made, not found. As he put it, in *Everson* and *McCullum*, "The First Amendment has been stood on its head. And in that position it cannot but gurgle nonsense."²²

Re-reading Murray's essay, and reflecting on it in the context of contemporary discussions about education, state power, religion, and the idea of the common good, I was struck both by Murray's prescience, and also by how little the terms of the debates have changed. Our string-cites and footnotes are longer today, but those of us who litigate or write in these areas

¹⁹ *Everson*, 330 U.S. at 18.

²⁰ *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948).

²¹ John Courtney Murray, *Law or Prepossessions?*, 14 J.L. CONTEMP. PROBS. 23, 23 (1949).

²² *Id.* at 33.

today could go back fifty years and feel right at home at the *Law and Contemporary Problems* symposium with Murray and his colleagues.

Murray offered in his essay four “conclusions”²³ with respect to the *Everson* and *McCullum* decisions specifically, and the Court’s approach to the Establishment Clause and education more generally. Each of these short reflections is, even today, remarkably rich; each could serve as a subject for detailed study. Today, though, the following brief comments will have to suffice.

First, Murray observed, before it was common to observe, that neither the Establishment Clause story told in the *Everson* and *McCullum* opinions, and on which the Court purported to build its “wall of separation” metaphor, nor the metaphor itself, can be taken seriously. As he stated, “When one has performed the very modest feat of scholarship involving in mastering the historical data that determine the meaning of the First Amendment as first formulated and ratified, one is driven to the conclusion that, if [the Justices] are essaying history, it is only in a Voltairean sense. The tricks they plan on the dead are astonishing.”²⁴ I agree. The First Amendment had never meant previously what it meant the day after *Everson* was decided.²⁵ I would say that the account in *Everson* is a “myth,” too often embraced, except that I am inclined to agree with C.S. Lewis’s observation that myths are stories aimed at pointing us toward the truth.²⁶

This is not to say that I know what the Establishment Clause *really* means, either, or even that I know exactly which interpretive tools I should be employing to help me resolve the

²³ *Id.* at 40. Murray concluded: (1) the Court’s decisions in *Everson* and *McCullum* are “unsupported, and unsupportable by valid evidence and reasoning”; (2) the “relationship of separation to the free exercise of religion is destroyed”; (3) “in the field of education, the result is juridical damage to the freedom of religion and to the natural rights of parents”; and (4) “this damage is particularly harmful in the existent religious and educational situation . . . the Court has sided with the wrong set.” *Id.*

²⁴ *Id.* at 28.

²⁵ See *id.* at 40 (“[T]he absolutism of [*Everson*] . . . is unsupported, and unsupportable, by valid evidence and reasoning—historical, political, or legal—or on any sound theory of values, religious or social.”). *cf.* *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) (“It is impossible to build sound constitutional doctrine upon a mistaken understanding of Constitutional history . . .”).

²⁶ See C.S. LEWIS, *MIRACLES: A PRELIMINARY STUDY* 161 n.1 (1947) (Myth is the “real though unfocused gleam of divine truth falling on human imagination”).

matter. My colleague Steven Smith has argued that the Establishment Clause embodies no single theory of church-state relations, and enshrined in national law no particular fixed principles of religious liberty. Instead, the Clause is a jurisdictional provision—nothing more, nothing less—designed to leave the matter of church-state relations in the hands of the States' legislatures.²⁷ This seems plausible to me.

Still, notwithstanding doubts about my own grasp of the Clause's true meaning, I am fairly sure that Murray was right, and that the *Everson* and *McCullum* Justices' breezy certitude that the First Amendment constitutionalized their particular brand of separationism, and their particular notion of religion, is unfounded. I am convinced that the results in these cases, and the stories they tell about religion, education, and government, have their roots less in the Framing of the Constitution than in the nativism and anti-Catholicism of the Common School movement, the rise of the Know Nothing Party, and the failed campaign for the Blaine Amendment.²⁸ If this is true, then to understand *Everson* will require that we turn our attention from Madison to, for example, the anti-immigrant backlash of the 1920s, which spawned a variety of homogenizing education-related enactments and eventually prompted the Supreme Court in *Pierce*²⁹ and *Meyer*³⁰ to vindicate the fundamental right of parents to choose to educate their children in private religious schools. And, to understand the opinions of Justices Black and Rutledge, we will need to confront the then-still-powerful influence of what Mark DeWolfe Howe called the "de facto Protestant establishment,"³¹ and re-appreciate the fact that, as my colleague John McGreevy has observed,³² *Everson* was decided against a backdrop of widespread elite suspicion toward Catholicism, Catholic schools, and the motives and capacities of Catholic voters.

²⁷ See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

²⁸ See generally, VITERITTI, *CHOOSING EQUALITY*, *supra* note 6, at 145-79; CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925* (1987).

²⁹ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

³⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³¹ MARK DEWOLFE HOWE, *A GARDEN AND THE WILDERNESS* 31 (1965).

³² John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997).

So, what if *Everson* did not incorporate the considered judgment of those who drafted and ratified the First Amendment but rather “laundered” the anti-popey of later times? Then what? Will the United States Supreme Court be willing to admit, perhaps in a school-choice case, that for over fifty years it has been on the wrong track, distinguishing and re-distinguishing cases built on unsound foundations? I do not know. That said, Justice Thomas’s recent plurality opinion in *Mitchell v. Helms* could well have set us on the road to recovery when he acknowledged the unattractive origins of the Court’s practice of treating “pervasively sectarian” schools as suspect participants in public-welfare programs. As he stated, “Opposition to aid to ‘sectarian’ schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’ This doctrine, born of bigotry, should be buried now.”³³

Second, Murray insisted that *Everson* and *McCullum* did not, by constitutionalizing their version of separationism, reject the imposition of sectarian orthodoxy. Instead, the Justices *established* just such an orthodoxy. As Justice Rutledge observed, Madison’s views—echoed and endorsed by the Justices—rested on the premise that “religion [is] wholly a private matter.”³⁴ But this is a theological claim: In Murray’s words, the “ultimate ground” of “Madison’s concept of separation of church and state” is “a religious absolute, a sectarian idea of religion And no other grounds may be assigned for its absoluteness but its theological premise.”³⁵

To state that true religion is privatized religion is to make a religious statement. The claim might be correct, but it is still religious. Murray noted the irony that “[i]n order to make separation of church and state absolute, [the Court] unites the state to a ‘religion without a church’—a deistic view of

³³ *Mitchell v. Helms*, 530 U.S. 793 (2000).

³⁴ *Everson v. Bd. of Educ.*, 330 U.S. 1, 39 (1947). For a powerful and insightful critique of the “privatization” of religion wrought by the Court’s Religion Clause decisions, see Gerard V. Bradley, *Dogmatomachy: A “Privatization” Theory of the Religion Clause Cases*, ST. LOUIS U. L.J. 275 (1986).

³⁵ Murray, *supra* note 21, at 30.

fundamentalist Protestantism."³⁶ He insisted, though, that, given the Justices' premises, "[i]t is not more legitimate to adopt Madison's particular theory of religion in its relation to organized society"³⁷ than for the state to endorse any other religious dogma.

Here, Murray seems to have anticipated Cardinal Bevilacqua's remarks earlier today about the contemporary and pervasive expectation that faith is and should be, by its very nature, private. Even the promotional materials for this conference assert that "religion was once considered a deeply personal matter," though believers are today starting to engage the world. If Murray were here, I imagine he would remind us that the notion that religious faith is "purely private," and something to be checked at the door of civil society by believers who venture into the controversies of public life, is both bizarre and ahistorical. Certainly, for much of our history and for many believers today, religious faith has not been, and cannot be, "purely private," but instead inspires and requires public worship, civic engagement, and community-transforming activity. In *Dignitatis humanae*, for instance, we read that the "social nature of man itself requires that he should give external expression to his internal acts of religion" and that "he should profess his religion in community."³⁸ And so, while a consensus might well have emerged at the time of the Founding around the *institutional* separation of church and state, such separation was rarely, if ever, thought to require what Richard John Neuhaus has called a "naked public square."³⁹ In Murray's view, the First Amendment was not thought to disable government from creating a climate in which religious faith and religious freedom could thrive. Quite the contrary: "Separation of church and state . . . is simply a means, a technique, a policy to implement the principle of religious freedom."⁴⁰

Now, it could be that Murray overemphasizes the instrumental nature of the First Amendment's non-

³⁶ *Id.* at 31.

³⁷ *Id.*

³⁸ *Dignitatis humanae*, *supra* note 8, ¶ 3.

³⁹ RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 25 (1984) ("In everyday fact, people do not and cannot bifurcate themselves so at one moment they are thinking religiously and at another secularly, so to speak.")

⁴⁰ Murray, *supra* note 21, at 32.

establishment norm. Still, his observation rings true: an excessively privatized and individualistic notion of religion was constitutionalized in *Everson* and continues to shape constitutional doctrine today. The Court would do well to revisit this view. If religious freedom is—and it is—one of those “conditions of social life” that is essential to authentic personal fulfillment, then the common good—not merely the privatized, behind-the-doors good of individuals, but the *common* good that helps promote authentic freedom for all—might be better served by Murray’s views than by the “prepossessions” enacted in *Everson*.

Third, Murray was concerned that the Court’s “absolute”⁴¹ approach threatened to obscure, and even to denigrate, the longstanding and important mission of religious schools. The Court seemed in *Everson* and *McColum* to stamp its approval on the notion that education is the province and charge of the state, not the family or parents. We read in these opinions lofty, almost religious, paeans to the “unifying” role of government schools, coupled with warnings about the dangers of division posed by their “sectarian” counterparts.⁴² The Court constitutionalized the century-old rhetoric of the Common School movement, its Progressive successors, and school-choice opponents, and bestowed the mantle of “unifier” on the government’s public-school monopoly.

But, as Murray took care to emphasize, the Court got things backwards, reversing the place of parents and state in the educational arena. The role of the former was seen as providing the raw materials for, and supporting the task of, the latter, rather than vice-versa. A quarter-century earlier, though, in *Pierce*, the Court had held that parents’ right and duty to “direct and control” the upbringing and education of their children trumps the standardizing aims of the state.⁴³ The Second Vatican Council sounded the same theme in *Dignitatis humanae*, insisting that “government . . . must acknowledge the right of parents to make a genuinely free choice of schools.”⁴⁴ This right, for Murray, is the “pivotal point of a democratic system.” Yet, “like the smile on some sort of disembodied educational Cheshire

⁴¹ Murray, *supra* note 21, at 40.

⁴² See, e.g., *McColum v. Bd. of Educ.*, 333 U.S. 203, 214 (1948).

⁴³ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

⁴⁴ Pope Paul VI, *supra* note 8.

cat, [it] begins to fade under the Court's unsettling stare."⁴⁵

Here, as elsewhere, Murray has proved remarkably prescient. An observer of or participant in the lively education-and-democracy debate can only be struck by the degree to which the statist education themes of the Common School and Progressive movements have re-surfaced in the "civic republicanism" of a number of prominent scholars.⁴⁶ It is said that the liberal state may, should, and must take charge of the task of citizen creation in order to guarantee the development of a deliberative temperament and liberal tolerance. Notwithstanding *Pierce* (the heart of which was re-affirmed in *Troxel v. Granville*⁴⁷), it is safe to say that elite opinion tends to regard religious schools with, at best, condescending or wary tolerance and, increasingly, with suspicion or even hostility. More and more, it is accepted as given that the state has a moral right and obligation to make sure the child becomes what the state wants the child to be. But this is not the function of education, nor would education, so conceived, really serve the overriding end of the common good, namely, enabling all of us to become the persons we *ought* to be.⁴⁸

And so, when it takes up the school-choice question, the Court ought to jettison *Everson's* baggage—its bad history, its hidden religious preferences, and its unease with parochial schools—and confront squarely the degree to which a baseline of government monopoly in education was mistakenly constitutionalized, and to bad effect. It ought to haul into daylight the extent to which the government schools' monopoly, and the precedents that support it, have compromised the First Amendment rights and fundamental constitutional liberties of religious families who cannot afford the price of exit. And it should first expose and then reject the statist premise of choice opponents that education is the charge of government, and that government-supervised education in the government's schools are the baseline from which any departure must be justified.

Finally, Murray was, once again, ahead of his time in

⁴⁵ Murray, *supra* note 21, at 36.

⁴⁶ See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000).

⁴⁷ 530 U.S. 57 (2000).

⁴⁸ See generally, e.g., Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001).

warning that the Court in *Everson* had turned its back on genuine pluralism, and instead taken sides on contested questions, to advance its ersatz ideal of unity. Murray was appropriately skeptical of the “fuzzy mysticism”⁴⁹ that seemed to emanate from the Court’s discussions of the unifying role of government education. We should be, too. Murray could have been speaking today when he stated that “[w]hatever spiritual mission of promoting unity government may have, it is conditioned . . . by its primary duty of promoting justice, guaranteeing an order of rights, [and] insuring the equality of differences.”⁵⁰ Responding to the Justices’ apparent fear of religious “pressures” being brought to bear on children in public schools, and of the “divisiveness” that must inevitably accompany such pressures, Murray noted that “this naiveté is too extreme to be credible.”⁵¹ After all, “the atmosphere of the public schools is *not* free from pressures In fact, the whole weight of the system tends to be thrown against the children’s religious conscience.”⁵²

Here again, Murray is speaking directly to the contemporary school-choice debate. *Of course* children should not be coerced or pressured by government into religious observance. But neither should they be discouraged, distracted, or confused by government if they and their families desire to integrate such observance into their lives. With respect to religion, school choice imposes on no one; it simply lifts the burden of disintegration that the government’s schools tend to place on those who cannot afford to leave.

* * * * *

I have tried to suggest that Murray’s half-century-old essay has as much, if not more, to add to our conversations about education reform as does the usual “parse the cases” analysis of the Supreme Court’s Establishment Clause precedents. As I mentioned at the outset, the Court should permit carefully crafted choice plans to proceed, though my purpose has not been to provide a sneak preview of the *amicus curiae* brief that I will file when the time comes. Yes, Mr. Green and I—and many

⁴⁹ Murray, *supra* note 21.

⁵⁰ *Id.* at 38.

⁵¹ *Id.* at 39.

⁵² *Id.*

others, too—will continue to distinguish and re-distinguish cases like *Nyquist*,⁵³ *Mueller*, and *Witters*. Still, I wonder if the enterprise will really be anything but a sport until we rethink our ideas about education and the common good, in light of the anti-statist and personalist values mentioned earlier.

School choice is constitutional. It serves the common good, though not just because the government, the state, or the community benefits. Instead, as I have tried to suggest, building on Murray's observations, it is because choice in education both promotes and is an expression of religious freedom. It coheres with a proper and limited notion of the government's role in education, and does not confuse the good of the state with that of the person. In the end, it is, I submit, no less than one of "the conditions for the exercise of the natural freedoms indispensable for the development of the human vocation."⁵⁴

⁵³ 413 U.S. 756 (1973).

⁵⁴ THE CATECHISM OF THE CATHOLIC CHURCH § 1907 (1994).