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The Story of Henry Adams's Soul: 
Education and the Expression of Associations

Richard W. Garnett†

In several cases handed down during the headline-grabbing October Term 1999,¹ the United States Supreme Court examined and re-committed itself to the freedom of association.² Freedom of association—or, more particularly, of “expressive association”³—is, of course, a “roomy” notion.⁴ And there is a real danger that the idea’s pleasant connotations, uncertain content, and hazy boundaries invite so much conceptual clutter that the “room” can quickly become a storage closet, whose door is best left shut so as to conceal the mess.⁵ Still, the

† Assistant Professor of Law, Notre Dame Law School. Thanks are due to Anthony J. Bellia, Nicole Stelle Garnett, Steffen Johnson, William K. Kel- ley, John Copeland Nagle, Steven Smith, and Eugene Volokh for their comments and criticism, to Fred Marczyk for his usual helpful research work, and to the editors and staff—particularly Katherine Moerke, David Selden, Michael Skoglund, and Monica Payne—of the Minnesota Law Review for their assistance and patience.

1. The 1999 Term was, everyone agrees, a blockbuster. See, e.g., Kathleen Sullivan, A Court Not Easy to Classify, N.Y. TIMES, June 29, 2000, at A31; Tony Mauro & Jonathan Ringel, An Explosive Year at the High Court, LEGAL TIMES, July 3, 2000, at 12.


3. See, e.g., Dale, 120 S. Ct. at 2451.

4. I owe this adjective to Professor Adam Samaha of the University of Minnesota Law School.

5. Cf. Dale, 120 S. Ct. at 2477 n.25 (Stevens, J., dissenting) (suggesting that the majority opinion’s “expressive association” analysis is “merely conclu- sory words, barren of analysis” (quoting Wooley v. Maynard, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting))).
basic ideas seem clear enough: we express and endorse ideas by
and through associating with others; associations, in turn,
transmit values and loyalties to us, and mediate between per-
sons and the state; and the First Amendment denies to gov-
ernment any right or power to standardize belief or impose or-
thodoxy by commandeering such expression or transmission.

By returning over and again to these fundamental points
in its recent decisions, the Court protected religious and ex-
pressive freedom in a manner true to the principle of subsidiar-
ity, 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."6 Not surprisingly, some of these ex-
pressive-association rulings were controversial, and their im-
lications remain unclear.

The point of this Essay is to highlight a sometimes-
overlooked feature of the freedom of expressive association. It
turns out that there are (at least) two, and not only one, ex-
pressive-association "stories": one is the account of how we ex-
press ourselves and shape our world by and through our asso-
ciations with others; the other is about how we are spoken to,
and how our character and values are formed by, those associa-
tions. Toward this end, this Essay examines two other recent
and high-profile cases—Mitchell v. Helms7 and Troxel v. Gran-

"In the American context," Currie adds, subsidiarity "means that the federal
government should not do what the states can adequately do for themselves."
Id. The principle of subsidiarity also plays a central role in Twentieth Cen-
tury Catholic social thought and has been explained by Pope John Paul II as
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.

Pope John Paul II, Centissimus annus [Encyclical Letter On the Hundredth
Anniversary of Rerum novarum] ¶ 48 (May 1, 1991), available at
http://www.newadvent.org/docs/ip02ca.htm; see also, e.g., 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 DISCON-
TENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996)). "Subsidiarity" is
also an important concept in the law of the European Community. See gener-
ally George A. Bermann, Taking Subsidiarity Seriously: Federalism in the
7. 120 S. Ct. 2530 (2000) (plurality opinion).
ville\(^8\)—in light of themes gleaned from last Term's expressive-association opinions. Granted, freedom-of-association questions were neither raised nor resolved in these two cases:\(^9\) Mitchell was yet another parochial-school-aid case of the "films good, projectors bad" variety,\(^10\) and Troxel involved parents' substantive-due-process objections to one State's unusually expansive and intrusive third-party-visitation law. That said, we will see that there are provocative thematic connections, if not tight doctrinal links, between the expressive-association cases, on the one hand, and the religion-, education-, and family-related matters addressed in Mitchell and Troxel, on the other. The hope is that identifying these connections will contribute to the contemporary debate over the purpose, content, and control of education in the liberal state, and also highlight the structural and educational functions of intermediate institutions—"neighborhood, family, church and voluntary associations"\(^11\)—and of their expression.

Part I is a short reflection on education, prompted by The Education of Henry Adams.\(^12\) "Education" sometimes seems little more than a focus-group buzzword, an "issue" that any sensible politico will include in his litany of priorities. The point of this first Part, though, is that education is best thought of as a process of formation, not merely of data delivery. This is why the liberal state and the intermediate associations of civil society will often—though, we should hope, not always—compete

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8. 120 S. Ct. 2054 (2000) (plurality opinion).

9. At least, not explicitly. I co-wrote an amicus curiae brief filed in Troxel by the Christian Legal Society and others that framed the questions presented in expressive-association terms. See Troxel, 120 S. Ct. at 2075 n.2 (Scalia, J., dissenting) (noting that freedom-of-association and free-exercise-of-religion claims were not before the Court).

10. See, e.g., Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); see also Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (noting that, under Meek and Wolman, "a State may lend to parochial school children geography textbooks that contain maps of the United States, but . . . may not lend maps of the United States for use in geography class").

11. Peter L. Berger & Richard John Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy 3 (1977). 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 Alexis de Tocqueville, Democracy in America 489-99 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000).

for the opportunity to educate, and thereby to impart loyalties, inculcate values, and shape character.¹³

Next, Part II offers some thoughts on the freedom of association and, more specifically, on the freedom of associations. It suggests that we focus on associations themselves, and on the content and function of their expression, no less than individuals’ expressive acts of associating. Accordingly, this Part examines briefly the structural and educational roles of the institutions and associations that shape personalities as they mediate between persons and the state.

Part III then discusses three cases—Boy Scouts of America v. Dale,¹⁴ California Democratic Party v. Jones,¹⁵ and Board of Regents v. Southworth¹⁶—that are the Court’s latest contributions to our continuing effort to sort out the constitutional and moral relationships among government, schools, parents, and children; and among the state, associations, and persons. It has been observed that “contemporary constitutional doctrine gives ‘civil society’ a relatively small protected domain,”¹⁷ but this Part aims to highlight the recent expressive-association cases’ healthy respect for the dignity of families, churches, and other subsidiary associations, a respect that, in turn, implies meaningful limits on the state’s own educational ambitions.

Finally, and against a backdrop of themes culled from these three cases, Part IV examines and evaluates the Mitchell and Troxel decisions. In Mitchell, a plurality of the Justices disavowed the Court’s longstanding suspicion toward one particular kind of intermediate association—Catholic schools—and toward those associations’ distinctive expression and mission.

¹³. In his Massey Lectures, Professor Carter discusses the demands of “loyalty” made by mediating associations—religious communities, in particular—and how education instills such loyalty. STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY (1998); see, e.g., id. at 27 (noting the “potentially subversive” nature of religious communities, “for the meanings that they discover and assign to the world may be radically distinct from those that are assigned by the political sovereign”); id. at 29-30 (“[R]eligions . . . demand forms of allegiance and thus of loyalty.”); id. at 79 (referring to the state’s “competing instruction”).

¹⁴. 120 S. Ct. 2446 (2000).
¹⁵. 120 S. Ct. 2402 (2000).
¹⁶. 120 S. Ct. 1346 (2000).
And in *Troxel*, the Court re-affirmed both the constitutional limits on the child-shaping prerogatives of government functionaries and the structural and moral priority of families. As these two cases illustrate, families and schools, no less than clubs, unions, and political parties, are mediating institutions that form, shape, and *educate* us by their expression. Thus, we see the importance of protecting not only individuals' freedom of expressive association, but also the freedom of associations and their expression, from undue state supervision and revision.

I. ASSOCIATIONS AND THE STORY OF HENRY ADAMS'S SOUL

*The Education of Henry Adams* opens with the author's late-in-life reflections on how his extraordinary career and character were shaped, almost irresistibly, by a "nest of associations"—by First Church, the State House, Beacon Hill, Harvard College, and so on.\(^{18}\) It is clear from the outset that *The Education* is more than the story of how information and technique were transmitted to a well-born Nineteenth Century Boston youth.\(^{19}\) Nor is the book an account of how Adams was groomed for good citizenship and public service in the early Common Schools. Although he duly notes the enthusiasm of his class for those purported seedbeds of democratic virtues,\(^{20}\) Adams confesses his own heretical suspicion of government schools, insisting, "All State education is a sort of dynamo machine for polarizing the popular mind; for turning and holding its lines of force in the direction supposed to be the most effective for State purposes."\(^{21}\)

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18. EDUCATION, supra note 12, at 3.
19. Indeed, Adams dismisses early on his "schoolmaster" as "a man employed to tell lies to little boys." *Id.* at 9.
20. *Id.* at 33 ("Social perfection was ... sure, because human nature worked for Good, and three instruments were all she asked—Suffrage, Common Schools, and Press. On these points, doubt was forbidden."); see also, e.g., CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 76 (1983) (describing the "ideology" of the common schools as "republicanism, Protestantism, and capitalism"). For more on the ideology of the common-school movement, see generally CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988); LLOYD P. JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925 (1987); JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 145-79 (1999).
21. EDUCATION, supra note 12, at 78; cf. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (noting that the objective of public education is
Adams is refreshingly free, as he wanders Zelig-like through the late Nineteenth Century in search of "education," of any illusions that he is a self-made man. Instead, The Education of Henry Adams is his exploration of the "nest of associations" that has made him what he is. "Education" turns out to be, for Adams, merely a convenient shorthand for the gradual and imperceptible shaping of personality, the construction of character, and the formation of—in today's jargon—"identity." It 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. In other words, although it would likely bemuse the famously post-religious Adams to hear it, his Education is really the "story of a soul."

Of course, it is precisely because education is the process and craft of soul-making, and is as much about transmitting values and loyalties to our children as it is about outfitting them with useful data and "skill sets," that we care, argue, and even fight so much about it. We care about education not just because we think it matters what facts and figures our children and our fellow citizens know. We care because, we think, it matters what they value, it matters what—and in what—they believe, and it matters to and for what they aspire.

Consider Wisconsin v. Yoder: the Old Order Amish who in that case challenged their State's compulsory-school-attendance laws, and who insisted on their own right and duty to educate their children, did not want their children merely to absorb the mechanics of low-technology farming and traditional carpentry. Their real concern was that their children encour-

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22. See Edmund Morris, Introduction to EDUCATION, supra note 12, at viii (noting that Adams's story describes "his whole evolution as a human being"); cf. Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 635 (1980) ("[O]ne's intimate associations . . . have a great deal to do with the formation and shaping of an individual's sense of his own identity.").


ter and embrace the religious faith and the vocation to simplicity that give meaning to these mechanics and traditions. The community saw itself in the arena of education engaged in a soul-making competition with government, and saw their traditions and the state's ambitions as rival claimants for the loyalty of their children. And they were right.

Here is another example: fifty years before Yoder, Oregon made it a crime to send one's children to Catholic and other private schools. Charitably interpreted, the motives behind this move were complex. Most would agree, though, that its supporters were worried less that Catholic schools were failing to teach reading, math, or even good manners, and more that these schools were expressing the un-American teachings of the Roman Catholic Church. The law's defenders knew full well—perhaps they'd read Henry Adams—that education transmits more than information. They saw schooling as a chance to gain an edge in the competition with parents' superstitions and authoritarian religion for the allegiance of children. But in striking down the law as an unconstitutional in-


26. See CARTER, supra note 13, at 35 ("[A] religious community's efforts to transmit its understandings of the world over time—to ensure the survival of its narrative—will often be most vital, and also most at risk, in the education of the community's children.").


28. Compare VITERITTI, supra note 20, at 154-55 (noting that the Act "was cooked up in a campaign organized by the Ku Klux Klan and the Scottish Rite Masons"), with MACEDO, supra note 21, at 99 ("We should... also take account of legitimate considerations advanced on behalf of the Oregon law, for it was not simply motivated by anti-Catholic prejudice."). For a detailed and engaging account of the compulsory-education movement, the extent to which it was animated by nativism and anti-Catholicism, and the Supreme Court's response in Pierce, see WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994).

29. See Carter, Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later, 27 SETON HALL L. REV. 1194, 1203 (1997) ("[Pierce] must be understood in a historical context in which the Justices knew as well as anybody that the Oregon law was, in large part, an effort to destroy Roman Catholicism."); Richard W. Garnett, Taking Pierce Seriously: The Family, Religious Education, and Harm to Children, 76 NOTRE DAME L. REV. 109, 123-24 (2000) ("Oregon's law appears to have been motivated less by a desire to, say, do right by poor children... than by a fear that Catholic schools would do wrong to them.").

30. In a similar vein, fifty years earlier, Harper's Weekly warned that "the primary object of the Roman party is not the education of the children, but the
vasion of parents' fundamental freedoms, the United States Supreme Court made it clear in Pierce v. Society of Sisters that, in this competition anyway, our Constitution guarantees "the liberty of parents . . . to direct the upbringing and education of children."

Returning to the present, it is fair to say that, generally speaking, the arguments of contemporary liberal theorists for increased supervision by government of religious and private schools are often 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 meaningful life in and service to the liberal state. After all, the argument goes, the state can no more perpetuate itself without attending carefully to the dispositions of its citizens, than a religious community that does not evangelize each new generation can hope to thrive and survive. In Horace Mann's words, "[I]t may be an easy thing to make a republic; but it is a very laborious thing to make Republicans" or, indeed, to make faithful Old Order Amish. This "laborious thing" is what Adams would call "education."

maintenance and extension of the Roman Sect. The plan is to make the schools nurseries of Roman Catholicism—a plan which every good citizen should strenuously oppose." The Parochial Schools, HARPER'S WkLY., Apr. 10, 1875, at 294.

31. 268 U.S. at 534-35 (1925) (emphasis added); see also Meyer v. Nebraska, 262 U.S. 390, 400 (1923).


33. William A. Galston, Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory, 40 WM. & MARY L. REV. 869, 870 (1999) ("Liberal democratic citizens are made, not born . . . ."); AMY GUTMANN, DEMOCRATIC EDUCATION 39, 42 (1987) ("We are committed to collectively re-creating the society that we share . . . . The substance of this core commitment is conscious social reproduction."); GEORGE WILL, STATECRAFT AS SOULCRAFT 90-91 (1983) ("[M]en and women are biological facts, but . . . ladies and gentlemen fit for self-government are social artifacts, creations of the law.").

34. CARTER, supra note 13, at 45 (quoting Horace Mann, The Importance of Universal, Free, Public Education).

35. Chief Justice Burger observed as much in Yoder: "[C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be
II. WHAT ARE ASSOCIATIONS FOR?36

Like Henry Adams, we are all educated in and by a “nest of associations.” Granted, we cannot all have two Presidents in our immediate family. Still, like Adams, we are who we are, and flourish to the extent that we do, because of the associations in which we’re “nested” and by which we’re educated. And notice that these soul-making associations are not simply vehicles for self-actualizing choices by autonomous monads. They might be that, too, but they are more than just that. That is, while it is true that we speak and express ourselves through associations, we are also spoken to and formed by them and by their expression. We should therefore attend not only to the ways that government, by regulating associations’ activities, burdens the expression of individuals. We should also think and worry—as both The Education of Henry Adams and the Court’s recent expressive-association cases invite us to do—

forced to migrate to some other and more tolerant region.” 406 U.S. at 218. Justice Douglas’s concern, on the other hand, was that “[i]f a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.” Id. at 245-46 (Douglas, J., dissenting).


37. Cf. Macedo, Constituting Civil Society, supra note 32, at 428 (“[N]o one affiliation or set of affiliations [should] provide[] an unproblematic or simple answer to the question ‘who am I?’”).

38. Cf. First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 805 (1978) (White, J., dissenting) (“[T]here are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members . . . . Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression.”).


40. See The Supreme Court, 1999 Term—Leading Cases, 114 HARV. L. REV. 179, 262 (2000) (noting that the question presented in Dale is best framed as “whether the government may commandeer [the Boy Scouts’] expressive facilities as passive conduits for an ideological message the organiza-
about whether and how government supervision of associations' expression threatens, crowds out, and commandeers their educational, soul-making role.\textsuperscript{41}

There is, of course, weighty precedent for this approach. It was, after all, our dense web of voluntary associations, no less than our individualism, that most captured Tocqueville's attention:

Americans of all ages, all conditions, all minds constantly [form associations]. Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kinds: religious, moral, grave, futile, very general and very particular, immense and very small....\textsuperscript{42}

But the question remains: do our undoubted associational dispositions tell us anything about the protections the Constitution provides to associations' expression?

The First Amendment does not, by its terms, confer or protect a right of association—expressive, commercial, intimate, or otherwise.\textsuperscript{43} Still, it has long been "beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."\textsuperscript{44} Put in a slightly different way, the
"right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" has been said to "correspond" to, and be "implicit in," the right "to engage in activities protected by the First Amendment."45

This freedom of expressive association has several modes; it can be and is exercised in a number of ways. For example, the simple act of associating can itself be a form of expression. We often join clubs, affiliate with parties, donate to organizations, and even subscribe to magazines, simply to say something.46 We might not believe or even care whether our expressive act of association will somehow, further down the line, amplify or increase the purchase of our views.47 In fact, our purpose might not be to call others' attention to those views or values at all, but simply to confirm to ourselves that we hold them. In any event, it is the act of associating that is the

in the past, and it has underlain important decisions which have been formally ascribed to the application of other freedoms.

RICE, supra note 2, at xvi-xviii; see also ABERNATHY, supra note 2, at 173 ("Neither in the United States Constitution nor in the constitutions of the various states is there a specific statement of the right of association. Logically, however, it is clearly a right cognate to the right of assembly.").


That it is instrumental, though, does not mean the freedom of association is less than fundamental. As Tocqueville observed,

After the freedom to act alone, the most natural to man is that of combining his efforts with the efforts of those like him and acting in common. The right of association therefore appears to me to be almost as inalienable in its nature as [the right of personal liberty]. The legislator cannot wish to destroy it without attacking society itself.

TOCQUEVILLE, supra note 11, at 184; see also Pope Leo XIII, Rerum novarum [Encyclical Letter On the Condition of the Working Classes] ¶ 72 (1891), available at http://listserv.american.edu/catholic/church/papal/leo.xiii/rerum.novarum.html ("[M]an is permitted by a right of nature to form private societies .... [M]en are by nature inclined to associate."); id. ¶73 ("[Associations are] formed in accordance with natural right.").

46. For example, people often proclaim proudly that they are "card-carrying members of the ACLU."

47. Cf. Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam) ("A contribution serves as a general expression of support for the candidate and his views .... The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.").
statement—like wearing a button or putting a bumper sticker on a car—and that says by itself all we need and mean to say.

Sometimes, though, we affiliate with others in order to amplify, coordinate, and therefore make more effective the expression of our views. We associate not just to make a statement, but to get something done. True, we might join the AARP purely to express to the world solidarity with our fellow seniors, or to show our support for certain Medicare- or Social Security-related polices. But we might also associate for the additional purpose of speaking about these matters with harmonized and bundled voices. By associating we not only signal our own beliefs, we throw in our hand with like-minded others to propose, and perhaps impose, those beliefs on the world. Justice Harlan was right: “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .”

In both of these modes of expressive association, the association itself—the entity, the group, the noun—is, for the most part, instrumental to some other end. The associations’ importance consists primarily in serving as a vehicle for the self-expression of autonomous individuals. The association itself is either a “procedural device for coordinating large numbers of similar interests” or a place holder for the particular message

48. NAACP v. Alabama, 357 U.S. at 460; see also GARVEY, supra note 36, at 133 (discussing the claim that “[p]eople form groups in order to advance their own interests more effectively”).

49. Roberts, 468 U.S. at 618 (“The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.”); id. (noting that “the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment”).

50. Id. at 618 (“The Constitution guarantees freedom of association . . . as an indispensable means of preserving other individual liberties.”); see also GARVEY, supra note 36, at 143 (noting that, for some, “[a]ssociations exist to promote the freedom of their members. . . . The organizational entity deserves constitutional protection because it is an instrument of the faithful for advancing their religious beliefs.” (footnote omitted)); The Supreme Court, 1999 Term—Leading Cases, supra note 40, at 262 (“[T]he right to associate receives legal recognition only in its instrumental capacity to protect free speech, insofar as its abridgment significantly abridges an organization’s expression.”); Neil Weinstock Netanel, Cyberspace 2.0, 79 Tex. L. Rev. 447, 487 (2000) (book review) (suggesting that the institutions of civil society are “sanctuaries” for individual self-expression); id. at 486 (“Associational life . . . has inherent value for personal development and individual autonomy.”).

51. GARVEY, supra note 36, at 149.
the individual sends by his own "speech through association."\textsuperscript{52}

The association is a "proxy," a pass-through, a verb.\textsuperscript{53}

There is another way, though, to think about the freedom of association. Following Henry Adams, we might focus more on associations themselves and on the role mediating institutions play in safeguarding political liberty and restraining government power. The Court observed in Dale that the freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas."\textsuperscript{54} In other words, associations are about social structure as much self-expression. They get in the way just as they facilitate. They are the hedgerows of civil society. They are wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge.\textsuperscript{55}

We might remember here Robert Bolt's A Man for All Seasons, in which St. Thomas More asks his son-in-law, who has just insisted he would "cut down every law in England" to "get after the Devil":

[When the last straw was down, and the Devil turned round on you—where would you hide,... the laws all being flat? This country's planted thick with laws from coast to coast... and if you cut them down... d'you really think you could stand upright in the winds that would blow then?\textsuperscript{56}]

Similarly, for all our attachment to the rhetoric and values of individualism, autonomy, and self, who among us could hope to "stand upright in the winds" of benevolent statism without the cover of mediating associations?

This all goes to show that associations have a \textit{structural}, as well as a vehicular, purpose. They hold back the bulk of government and are the "critical buffers between the individual and the power of the State."\textsuperscript{57} They are "laboratories of innova-


\textsuperscript{53} The Supreme Court, 1999 Term—Leading Cases, supra note 40, at 264 (noting that "association enjoys protection as a de facto proxy for expression").

\textsuperscript{54} Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2451 (2000).

\textsuperscript{55} See ROBERT A. NISBET, THE QUEST FOR COMMUNITY 202 (1953) ("Totalitarianism has been well described as the ultimate invasion of human privacy. But this invasion of privacy is possible only after all the social contexts of privacy—family, church, association—have been atomized."); Abner S. Greene, Government of the Good, 53 VAND. L. REV. 1, 7 (2000) ("[The Constitution's] combination of structure and rights prevents the concentration of power that is the harbinger of despotism.").


\textsuperscript{57} Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984); see also Peter L. Berger & Richard John Neuhaus, Peter L. Berger and Richard John Neuhaus
tion" that clear out the civic space needed to "sustain the express

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sion of the rich pluralism of American life." Associations

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are not only conduits for expression, they are the scaffolding

associations

around which civil society is constructed, in which personal

freedoms are exercised, in which loyalties are formed and

transmitted, and in which individuals flourish.  

Having shifted our focus from the act of associating to the

structural role of associations themselves, we might turn our

attention next from the expressiveness of that act to the ex-

pression of those associations. In so doing, we see yet another

sense, or mode, of the freedom of association. It turns out that

we not only speak through associations and rely on mediating

institutions for the civic space in which to engage in such ex-

pression, but we are also, as Adams suggested, spoken to and

formed by them. Indeed, this is one reason why associations

are able to play their structural role, described above, as soci-

ety's hedgerows. It is not only that they are concentrations or

blocs of political power, which can be marshalled against that

of the state; they are also the state's competitors in the arena

of education and formation. In Roberts, for instance, the Court

observed that "certain kinds of personal bonds"—certain asso-

ciations—"have played a critical role in the culture and tradi-

tions of the Nation by cultivating and transmitting shared ide-

als and beliefs."  

59 Those "ideals and beliefs" have been

Respond, in TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 145, 148

(Michael Novak ed., 1996) ("[Voluntary associations] stand between the pri-

vate world of individuals and the large, impersonal structures of modern soci-

ety. They 'mediate' by constituting a vehicle by which personal beliefs and

values could be transmitted into the mega-institutions.").

58 BERGER & NEUHAUS, supra note 11, at 36 (1977); see also Roberts, 468 U.S. at 622 (noting that associations are "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority").

59 See CARTER, supra note 13, at 69 ("Civil society relies for its continuation on a broad panoply of voluntary and involuntary relationships that might create community in the sense of a place where members may feel that a degree of allegiance is owed: religious tradition, family, friendship, neighbor-

hood, profession."); Michael W. McConnell, The Problem of Singling Out Relig-

ion, 50 DE PAUL L. REV. 1, 21 (2000) ("Civil society [is the] network of voluntary associations, mediating between individuals and the state, that shape and develop public values and culture."); Kai Nielsen, Reconceptualizing Civil Society for Now: Some Somewhat Gramscian Turnings, in TOWARD A GLOBAL CIVIL SOCIETY 41, 44 (Michael Walzer ed., 1995) ("By civil society . . . I mean the public space between large-scale bureaucratic structures of state and economy on the one hand, and the private sphere of family, friendships, personality, and intimacy on the other." (citation omitted)).

60 Roberts, 468 U.S. at 618-19; see also McConnell, supra note 59, at 21
expressed and projected by individuals, through associating; they have also been instilled, "cultivat[ed]," and "transmitt[ed]" to persons by and through intermediate associations. Thus, associations are, as Peter Berger and Richard John Neuhaus have put it, "Janus-faced institutions, facing both 'upward' and 'downward.'"\(^6^1\)

This way of thinking about associations and their expression can usefully be contrasted with the approach outlined by Professor Karst in his study of the freedom of "intimate association."\(^6^2\) Karst treats—and praises—associations primarily (though, of course, not exclusively) as vehicles for choice-fueled self-discovery: "It is," he tells us, "the choice to form and maintain an intimate association that permits full realization of the associational values we cherish most."\(^6^3\) Even "intimate" associations like marriages and families, in the end, derive their meaning and worth from their status as chosen, and are evaluated primarily in terms of their potential as means to self-actualization.\(^6^4\)

There is certainly something to this view. Clearly, a "chosen... association can serve... as a statement of self-identification in a way that cannot be matched by an association imposed by force of law."\(^6^5\) Still, something is missing from this picture. Karst's account seems not to capture entirely what it is that associations are, do, and are for. His primary emphasis on choice and autonomy leads him perhaps to under-rate the importance of a crucial anthropological and moral fact about the human person, namely, that we are "intrinsically, not contingently, social. We are born to communion, to rationality," and to association.\(^6^6\) The point here is not only the obvious bio-

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\(^{61}\) Berger & Neuhaus, supra note 57, at 148.

\(^{62}\) See generally Karst, supra note 22 (discussing the expressive qualities of association).

\(^{63}\) Id. at 637.

\(^{64}\) Id. at 637-52; see also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[t]he marital couple is not an independent entity... but an association of two individuals each with a separate intellectual and emotional makeup."). But see GARVEY, supra note 36, at 135 ("Individualism supposes that people form and join groups as one way of exercising protected freedoms more effectively. But organizations may come first, and joining may not be voluntary.").

\(^{65}\) Karst, supra note 22, at 637.

\(^{66}\) Jean Bethke Elshtain, The Dignity of the Human Person and the Idea
logical one—we are all the physical products of two others—but also a claim about our development, capacities, ends, and flourishing.

So, it is not just that we express ourselves by choosing to associate; we who do the choosing are products, at least in large part, of our given—not chosen—"nest of associations." But what does all this tell us about the freedom of associations? As Dean Garvey has argued, freedoms are not just indifferent vehicles for self-expression, or autonomy-for-autonomy's sake; freedoms "let us do [good] things." Thus, the freedom of association matters not only because it facilitates individuals' choices and expression, but also because associations do good things. In particular, they educate us. And, as mediating, buffering institutions they are the fibres of civil society and create the space in which authentic education is possible. Within this space, the expression of free and independent associations competes with the liberal state for the honor of shaping our souls.

III. THREE CASES, THREE THEMES

We have seen so far that education is more than the transmission of data; it includes the inculcation of values, beliefs, and loyalties. And, this Essay has argued that "association" should serve not only as a verb denoting a mode of individual "free speech," or even only as a noun referring to a vehicle for such expression. We should also make a place in our

of Human Rights: Four Inquiries, 14 J.L. & RELIGION 53, 57 (1999-2000). Professor Elshtain adds, in this vein, "The view of the self as an 'autonomous' and sovereign chooser is so deeply entrenched that in late twentieth century America, at least, it is simply part of the cultural air we breathe." Id. at 58.

67. Indeed, when it comes to the "the kinds of organizations that are most important in the lives of many people: families, churches, and similar associations[,] [m]embership . . . is imposed rather than chosen." GARVEY, supra note 36, at 135.

68. Id. at 2. That is, "[t]he law leaves us free to do x because it is a good thing to do x." Id. For example, our law does and ought to protect religious freedom, not merely because religious belief is one possible reflection among many of autonomy, or because such freedom is instrumentally necessary to secure civil peace, but because "religion is important" and a "good thing." Id. at 42, 49; see also John H. Garvey, An Anti-Liberal Argument for Religious Freedom, 7 J. CONTEMP. LEGAL ISSUES 275, 283 (1996) ("The best reasons for protecting religious freedom rest on the assumption that religion is a good thing.").

69. Garvey sets out his own account of the freedom of "groups"—particularly churches. See GARVEY, supra note 36, at 123-54.
thinking for the ways expression and education flow back to persons from associations, shaping those who speak and the messages they wish to express. That is, we should focus both on the messages conveyed by individuals to the world through their acts of associating, and on the messages conveyed through associations' expression to individuals about the world. This is because associations are not only instrumentally valuable; they are also alternative sources of meaning and education, and are essential both to genuine pluralism and to freedom of thought and belief.

What does all this have to do with the Supreme Court's expressive-association docket, and with the contemporary debates about education and the degree to which the state may or should supervise the expression of families, schools, churches, and other associations? This Part tries to build a connection by reviewing briefly the Court's recent freedom-of-association cases and by drawing out a few of their more salient themes.

A. OCTOBER TERM 1999 AND THE FREEDOM OF EXPRESSIVE ASSOCIATION

*California Democratic Party v. Jones*[^70^] involved a challenge to yet another California ballot initiative. California's voters eliminated the State's traditional "closed" partisan primary election system, in which only party members could vote for that party's nominee, and replaced it with a "blanket primary" system, in which all registered voters, regardless of party, could vote for any candidate, regardless of party. In other words, under the new blanket-primary system, anyone who wanted to was entitled by law to participate in selecting the spokesperson, and therefore the message, of, say, the Republican, Green, or Peace and Freedom Party.

Seven Justices agreed that the blanket primary violated the Democratic Party's fundamental "rights of association."[^74^] As Justice Scalia put it, the blanket-primary requirement "forces political parties to associate with—to have their nomi-

[^70^]: 120 S. Ct. 2402 (2000).

[^71^]: *Id.*

[^72^]: *See id.* (describing the two different forms of primary elections).

[^73^]: *See id.* at 2408 ("[T]he nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.").

[^74^]: *Id.* at 2406; *see also id.* at 2414 ("The burden Proposition 198 [which created the blanket primary] places on petitioners' rights of political association is both severe and unnecessary.").
nees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.75 The Court found this “forced association”—this “stark repudiation of freedom of political association”76—unjustified by any compelling state interests and, indeed, supported by few valid ones.77 The blanket-primary requirement, after all, “has the likely outcome—indeed,... the intended outcome—of changing the parties’ message.”78 The Court insisted, however, that official unhappiness with, or disapproval of, an association’s message, and a preference for others, are simply impermissible bases for restrictions on expression.79

Next, Board of Regents v. Southworth80 involved, inter alia, a freedom-of-association challenge to the University of Wisconsin’s allocation of mandatory student-activity fees to political and ideological groups.81 If, in California Democratic Party, a group sought to protect its own message from being garbled by unwelcome interlopers, in Southworth, the complaint came from those who claimed they were being compelled to associate with messages and groups they would just as soon leave alone.

Like many colleges and universities, the University of Wisconsin charges students at its Madison campus a nonrefundable, mandatory student-activities fee. These fees are collected, pooled, and “used in part to support student organizations engaging in political or ideological speech.”82 Some students argued that, by requiring them to support financially organiza-

75. Id. at 2409.
76. Id. at 2412.
77. Indeed, in the Court’s view, the interests asserted by the State—i.e., encouraging “moderation” or “centrism” in parties’ nominees—“reduce to nothing more than a stark repudiation of freedom of political association.” Id. at 2411-12.
78. Id. at 2412; see also id. at 2414-15 (Kennedy, J., concurring) (“The true purpose of this law... is to force a political party... to change the party’s doctrinal position on major issues.”).
79. See id. at 2412 (disapproving laws whose only “object [is] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law[s] choose to alter it with messages of their own” (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 578 (1995)); see also Cal. Democratic Party, 120 S. Ct. at 2405 (noting that the blanket-primary initiative had been “[p]romoted largely as a measure that would ‘weaken’ party ‘hard-liners’ and ease the way for ‘moderate problem-solvers’”).
81. Id. at 227.
82. Id. at 221.
tions with which they disagreed, or to whose purposes, values, and messages they strongly objected, the University was commandeering their speech. In these students' view, just as the California blanket-primary statute had forced political parties to open their message to revision by outsiders, the allocation of the required fees to support the groups' rival messages unconstitutionally pressed into service their own expression.83

The Court disagreed. Although sensitive to the objecting students' concerns,84 the Court was satisfied, in the end, that the students' freedom of expression was adequately protected by a requirement that the fees be allocated on a viewpoint-neutral basis.85 After all, the Court reminded us, such a viewpoint-neutral funding mechanism had been found in Rosenberger v. Rector & Visitors of University of Virginia86 to guarantee that the expression of a university-funded religious newspaper could not reasonably be regarded as the expression of the University.87 There is, the Southworth Court insisted, a "symmetry" here: students who object to the messages of organizations funded with student-activities fees are assured, by the viewpoint-neutrality of the disbursal policies, that they are associating with a more general educational project—with the creation and maintenance of an "open dialogue"—and not with the values or expression of particular organizations.88

Finally, in Boy Scouts of America v. Dale,89 the Justices reaffirmed that the Constitution permits a private group to exclude those whose leadership or participation might cloud, or even contradict, its message.90 The New Jersey Supreme Court

83. See id. at 229 ("Respondents alleged, inter alia, that imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment.").

84. Id. at 232. (noting the "high potential for intrusion on the First Amendment rights of the objecting students").

85. See id. at 233-34 ("We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle."). The Court concluded that the student-referendum mechanism did not guarantee the constitutionally required "viewpoint neutrality" in the allocation of the fees. Id. at 233.


87. Southworth, 529 U.S. at 233 (discussing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)).

88. Id.

89. 120 S. Ct. 2446, 2451 (2000).

90. Id. at 2451, 2458 ("[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organi-
had held that the Boy Scouts violated that State's public-accommodations law by revoking the membership of James Dale, an assistant scoutmaster, after Dale, who is gay, began speaking publicly about his sexual orientation. The New Jersey court was unmoved by the Boy Scouts' expressive-association claim, insisting that its message and purpose would not be undermined by Dale's own expression or activism, and also that any burden on the Scouts' right of association was justified by the State's own compelling interest in eliminating "the destructive consequences of discrimination from our society."  

The Supreme Court reversed. The Court determined that the Boy Scouts is an association that "engages in expressive activity," that it regards homosexuality as inconsistent with its values, that it was not the place of the New Jersey Supreme Court to second-guess the Scouts on this point, and that requiring the Scouts to retain Dale as a scoutmaster would "surely interfere with [its] choice not to propound a point of view contrary to its beliefs." And so, the Court concluded, the New Jersey court's effort to require that the Scouts accept Dale "runs afoul of the Scouts' freedom of expressive association."

B. COMMON THEMES: REASONABLE PLURALISM, JUDICIAL HUMILITY, AND SUBSIDIARITY

These three cases deserve, and will no doubt receive, a great deal of thoughtful attention, study, and comment. For
present purposes, though, it is enough to note briefly three related and common themes.

First, the Court in these cases appears not to resist, and seems even to accept, the inevitability of reasonable disagreement on important political and moral questions. In Dale, for example, the Chief Justice notes in passing that the Boy Scouts have one view with respect to the morality of homosexual conduct, while many others in contemporary society subscribe to another. Neither the traditional nor the more latitudinarian view is pronounced correct and neither is criticized. Similarly, in California Democratic Party, the majority's point is not that the blanket primary's supporters' preference for "moderate" rather than polarizing or "ideological" candidates is ill-founded, but simply that the Constitution does not permit the government to accommodate that political preference at the expense of political parties' freedom of expression.

Second, the Court also acknowledges candidly its own and government's limited competence and prerogative to resolve authoritatively such disagreements. Given that there are, after all, "many reasonable... worldviews that are compatible with good citizenship,... it is neither necessary nor desirable to at-

98. See, e.g., Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies... [which are] contrary to the profound beliefs and sincere convictions of some of its citizens."); id. at 232 ("It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs.").

99. 120 S. Ct. at 2457.

100. See id. ("The First Amendment protects expression, be it of the popular variety or not. ... And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."); Southworth, 529 U.S. at 229 ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.").

The dissenters in Dale were less willing to suspend judgment on this matter: "Unfavorable opinions about homosexuals have ancient roots... Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine." 120 S. Ct. at 2477 (Stevens, J., dissenting); see also id. at 2478 (Stevens, J., dissenting) (asserting that the Scouts' policy is "the product of a habitual way of thinking about strangers"); id. at 2479 (Souter, J., dissenting) ("The fact that we are cognizant of th[e] laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.").

101. See Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2414 (2000) (suggesting alternative means of ensuring "more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association").
tempt to force disagreement." In the Court's view, its task is not to side with either camp in the "Culture Wars," and certainly not to end them, but only to enforce the Constitution's guarantee that persons and associations may speak for themselves, and cannot be required by government to endorse or promote the values of others. Government is, of course, free to promote, and even to require, non-discrimination in truly public contexts, but it cannot homogenize civil society by pressing into service the expression of mediating associations. Similarly, although government can, to some extent, regulate political associations' conduct in pursuit of clean elections and public confidence, it cannot decide that these associations are saying the wrong thing, and require them to say something else. "In a free society," as Justice Kennedy put it in Califor-
nia Democratic Party, "the State is directed by political doctrine, and not the other way around."109

Finally, the Court appears in these cases not only to be reconciled to the "fact of reasonable pluralism,"110 and appropriately humble about its own moral capacities, but also to appreciate the importance of the principle of subsidiarity.111 That is, the Court seems to acknowledge—and even celebrate—the place of mediating associations, their expression, and their diversity in civic life.112 The Court seems to respect and welcome the moral independence of intermediate institutions and to accept the fact of competition between these associations and government for the beliefs and loyalties of individuals. The Court recognizes what we discussed above, namely, that this moral independence and competition promote individual freedom by creating channels and vehicles for expression, by check-

view a particular expression as unwise or irrational." (citation omitted)); id. at 2458 ("[The law] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.").

109. 120 S. Ct. at 2416.
111. See supra note 6 (defining "subsidiarity").
112. See Dale, 120 S. Ct. at 2451 (observing that freedom of association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984))); id. at 2454 (noting that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment"); Cal. Democratic Party, 120 S. Ct. at 2408 ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); Southworth, 529 U.S. at 231 (noting the "importance" of associations such as universities, labor unions, and bar associations to the "fulfillment of... personal aspirations" and "potential"); id. at 1356 ("The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, ... and political subjects in their extracurricular campus life outside the lecture hall.").

For an examination of political parties' positions as voluntary associations in civil society, see generally Steven G. Calabresi, Political Parties as Mediating Institutions, 61 U. CHI. L. REV. 1479 (1994).

And, it is worth noting that the Court in Dale and California Democratic Party referred regularly to the association in question as "it" and not "they." See Dale, 120 S. Ct. at 2452 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values [it seeks to instill]"); Cal. Democratic Party, 120 S. Ct. at 2411 ("Ordinarily, ... being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it.").
ing the state's ideological ambitions, and by sustaining a true public square between persons and state.\textsuperscript{113}

These three are, to be sure, overlapping and complementary themes. They neither capture entirely nor exhaust the significance of the \textit{Dale}, Southworth, and California Democratic Party cases. Still, they stand out clearly and cohere in support of the general observation that this Court, in the latest expressive-association decisions, appears healthily resigned to the crooked timber of free society.\textsuperscript{114}

\section*{IV. SCHOOLS, FAMILIES, AND THE EXPRESSION OF ASSOCIATIONS}

The goal so far has been to sketch an approach to the Court's recent freedom-of-expressive-association cases, one that focuses as much on the expression of associations as on expression through association, and as much on the messages we receive from associations as on those we send through them. The argument for this approach is built on the claim that the ability and right of mediating institutions to form, shape, and educate us through their expression is vital to a thriving civil society and necessary for authentic human freedom.

This Part is a kind of "test run" for this approach; it examines the Court's \textit{Mitchell} and \textit{Troxel} decisions in freedom-of-association terms. So read, the \textit{Mitchell} case turns out to be not just another fact-bound application of the "Lemon test,"\textsuperscript{115}

\textsuperscript{113} \textit{Dale}, 120 S. Ct. at 2451 (noting that freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas"); \textit{see also Cal. Democratic Party}, 120 S. Ct. at 2416 (Kennedy, J., concurring) ("When the State seeks to regulate a political party's nomination process as a means to shape and control political doctrine and the scope of political choice, the First Amendment gives substantial protection to the party from the manipulation.").

\textsuperscript{114} Immanuel Kant famously insisted, "Out of timber so crooked as that from which man is made nothing entirely straight can be built." ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY xi (Henry Hardy ed., 1991) (quoting Immanuel Kant, \textit{Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht} (1784)).

\textsuperscript{115} See \textit{Lemon v. Kurtzman}, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion \ldots finally, the statute must not foster "an excessive government entanglement with religion"). In \textit{Mitchell v. Helms}, a plurality observed that the \textit{Lemon} test had been "modified" in \textit{Agostini v. Felton}, 521 U.S. 203 (1997), and that, "for purposes of evaluating aid to schools," courts should examine only the first and second \textit{Lemon} factors. 120 S. Ct. 2530, 2540 (2000) (plurality opinion).

For analysis and critique of \textit{Lemon}, see generally \textit{Lamb's Chapel v. Center}
but also a vindication of families' and religious associations' expressive and educational freedom. Similarly, *Troxel* can be read not only as a case about third-party-visitation disputes, but also about the independence of the family, the dignity of its educational vocation, and the limits the Constitution imposes on the homogenizing ambitions of government.

A. *Mitchell v. Helms*: Religious Schools as Mediating Institutions and "Indoctrination" as Expression

In *Mitchell v. Helms*, 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 to religious and private schools. Fifteen years after the program in question (Chapter 2) was challenged in a Louisiana federal district court, the Court held that providing "secular, neutral, and nonideological" assistance directly to authentically religious—or, in Establishment Clause argot, "pervasively sectarian"—schools, on a per-child basis, did not have the "primary effect of advancing or inhibiting religion," and therefore did not run afoul of the First Amendment's no-establishment rule.
Justice Thomas wrote for the four-Justice plurality. The key question, as he saw it, was whether Chapter 2 had the "primary effect of advancing or inhibiting religion." Justice Thomas concluded that it did not. More particularly, he reasoned that Chapter 2 did not "result[] in governmental indoctrination" because "any religious indoctrination that occurs in these schools could [not] reasonably be attributed to governmental action." This conclusion rested on two crucial features of the program: "neutrality" and "private choice." That is, Chapter 2 resources are made available on the basis of criteria having nothing to do with religion, and benefits disbursed by the government reach religious schools not by official fiat but only to the extent that individual parents select and their children attend such schools.

Justice O'Connor, joined by Justice Breyer, concurred in the judgment. She agreed with Justice Thomas that "Chapter 2 does not define aid recipients by reference to religion" and that the program does not "result[] in governmental indoctrination." She could not agree, though, that the "neutrality" of a government program will always be outcome-determinative—particularly not in cases involving "direct" aid to religious schools. In such cases, even when aid is allocated according

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122. Id. (plurality opinion)
123. Id. (plurality opinion) ("We . . . hold that Chapter 2 is not a 'law respecting an establishment of religion.'").
124. Id. at 2541.
125. Id. at 2541-47 (discussing the importance of these features in the Court's other relevant Establishment Clause decisions).
126. Id. at 2552 ("The program makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof.").
127. Id. at 2541-42. "Chapter 2 aid . . . reaches participating schools only as a consequence of private decision making. Private decision making controls because of the per capita allocation scheme, and those decisions are independent because of the program's neutrality." Id. at 2552-53 (internal quotations and citations omitted).
128. Id. at 2572 (O'Connor, J., concurring) ("Given the important similarities between the Chapter 2 program here and the Title I program at issue in Agostini, respondents' Establishment Clause challenge must fail.").
129. Id. at 2561 (O'Connor, J., concurring).
130. Justice O'Connor expressed concern with the plurality's "rule of unprecedented breadth" and specifically with Justice Thomas's "near absolute" emphasis on the neutrality of the Chapter 2 program and his lack of interest in the possibility of "diversion" of funds to "religious indoctrination." Id. at 2556 (O'Connor, J., concurring) ("[T]he plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs."). For more on the nature and importance of the distinction between
to formally neutral criteria, there is a heightened danger that the assistance will be perceived by reasonable observers as an endorsement of religion. Neutral criteria are not enough, and any "actual diversion" of government aid to the advancement of religion is unconstitutional.\textsuperscript{131}

Mitchell is welcome step in what many see as the Court’s gradual rehabilitation of its Establishment Clause doctrine.\textsuperscript{132} But Mitchell can also be read, consistent with the approach suggested here, as a case about the freedom of expressive association and the importance of associations’ expression. Two aspects of the decision are especially worth emphasizing.

First, it seems fairly clear after Mitchell that—whatever their merits as policy proposals\textsuperscript{133}—“school choice” programs are permitted by the First Amendment, even if they do not exclude religious schools.\textsuperscript{134} In a nutshell, these programs provide public funds to help parents pay for their children’s education, even if the children attend private and religious schools, so long as the schools meet the programs’ education-related eligibility criteria. These funds are allocated to parents on the

\textsuperscript{131} Mitchell, 120 S. Ct. at 2558, 2556 (“[T]he plurality’s approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.”). It is important to note that, for Justice O’Connor, it is actual diversion to the advancement of religion, and not “reasonable divertibility,” that invalidates a school-aid program. Id. at 2565-66 (rejecting the claim that “we should treat as constitutionally suspect any form of secular aid that might conceivably be diverted to a religious use”). In her view, however, there was no evidence in the record of any significant “actual diversion.” Id. at 2569 (noting that the “safeguards employed by the program [against such diversion] are constitutionally sufficient”). But see id. at 2591-96 (Souter, J., dissenting) (insisting both on the divertibility of the aid in question and that aid had in fact been diverted).

\textsuperscript{132} For one (among hundreds) helpful summary and critique of this doctrine and an account of its evolution, see, for example, JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 149-84 (2000).

\textsuperscript{133} See generally 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); VITERITI, supra note 20; JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA’S FIRST VOUCHER PROGRAM (2000).

\textsuperscript{134} For a (very) 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 Civil Libertarian Case for the Constitutionality of School Choice, 10 GEO. MASON U. CIV. RTS. L.J. 1 (1999/2000); Eugene Volokh, Equal Treatment Is Not Establishment, 13 NOTRE DAME J.L. ETHICS & PUB. POLY 341 (1999).
basis of criteria having nothing to do with religion—income, place of residence, quality of the local public schools, etc.—and no money ever finds its way to the "coffers" of religious schools unless there is an intervening, individual, private choice by a parent that such a school is best for her child.\textsuperscript{135}

Both the plurality and concurring opinions in \textit{Mitchell} indicate that choice programs more or less of the kind just described should survive Establishment Clause review.\textsuperscript{136} Such programs are consistent with the "principles of neutrality and private choice" that Justice Thomas emphasized,\textsuperscript{137} and also with the views set out in Justice O'Connor's concurrence. Remember that, although she and Justice Breyer were reluctant to accord talismanic significance to a direct-aid program's formal neutrality, they also made clear their view that "true private-choice programs" differ from "per-capita-aid programs."\textsuperscript{138} Under the former, the use of government aid for "the advancement of religion" is "wholly dependent on the student's private decision," and there is little danger the aid will create the impression that the government endorses a school's religious activities or instruction.\textsuperscript{139}

Second, it is worth noting that the \textit{Mitchell} plurality noisily distanced itself from some of the Court's Establishment Clause precedents, going out of its way to downplay the constitutional significance of an aid-receiving school's "pervasively sectarian" character.\textsuperscript{140} Justice Thomas insisted that the ques-

\textsuperscript{135.} The Court has acquired the unfortunate habit in school-aid cases of assuming that religious schools have "coffers" rather than, say, "checking accounts." \textit{See Mitchell}, 120 S. Ct. at 2562 (O'Connor, J., concurring); \textit{Agostini v. Felton}, 521 U.S. 203, 228 (1997); \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1, 10 (1993).

\textsuperscript{136.} \textit{But see} \textit{Simmons-Harris v. Zelman}, 234 F.3d 945 (6th Cir. 2000) (invalidating the Cleveland voucher program as a violation of the Establishment Clause). \textit{Zelman} was quite wrongly decided; it should and likely will be reversed. \textit{See Judgment Day}, WALL ST. J., Dec. 12, 2000, at A26. That said, Professor Laycock has wisely warned against taking too much for granted in this area. Douglas Laycock, \textit{The Supreme Court and Religious Liberty}, 40 CATH. LAW. 25, 53 (2000) ("If you take \textit{Rosenberger}, \textit{Agostini}, and \textit{Mitchell} to their logical conclusion, vouchers are constitutional—but no one should assume the cases will be carried to their logical conclusion.").

\textsuperscript{137.} \textit{Mitchell}, 120 S. Ct. at 2542 (plurality opinion).

\textsuperscript{138.} \textit{Id.} at 2559 (O'Connor, J., concurring). Justice Breyer joined Justice O'Connor's concurrence.

\textsuperscript{139.} \textit{Id.} (O'Connor, J., concurring).

\textsuperscript{140.} \textit{Id.} at 2550-52 (plurality opinion) ("The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. . . . But that period is one that
tion in school-aid cases should be whether a school is capable of advancing effectively the government's secular purpose, not whether the school's curriculum or character crosses a purported line between permissible and excessive degrees of religiosity. The kind of "trolling through a person's or institution's religious beliefs" required by such line-drawing is, he asserted, both "offensive" and constitutionally unnecessary. The plurality also pointed out the historical connection between the Court's use and constitutionalization of the "pervasively sectarian" category and the anti-Catholicism that has, on too many occasions, clouded policies, decisions, and debate about education. Justice Thomas performed a valuable service by exposing the unsightly pedigree of this category, which has too often served as little more than a judicial means of laundering previous generations' prejudices.

Given these two points, Mitchell contributes to our discussion of the freedom of association in at least three ways. First,

the Court should regret, and it is thankfully long past.

141. Id. at 2551 (plurality opinion). Justice Thomas noted, [T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. ... [S]o long as the aid is made available on a neutral basis, the pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would ... reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

Id.

142. Id. (plurality opinion). For an example of such "trolling," see id. at 2592-93 (Souter, J., dissenting).

143. Id. at 2551-52 (plurality opinion). ("[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow .... This doctrine, born of bigotry, should be buried now."). But see id. at 2597 (Souter, J., dissenting) (criticizing "the plurality's choice to employ imputations of bigotry and irreligion as terms in the Court's debate").

144. The Mitchell plurality was apparently assisted by the amicus curiae Brief of the Becket Fund for Religious Liberty, Mitchell v. Helms, 120 S. Ct. 2530 (2000) (No. 98-1648) (on file with author). Although it is not possible here to demonstrate conclusively or document exhaustively the point, it is simply a fact that suspicion of the Roman Catholic Church, and concerns about some of its teachings, have long shaped, if not dictated, constitutional doctrine in the educational arena. For a helpful introduction to this issue, see John T. McGreevey, Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960, 84 J. AM. HIST. 97 (1997); see also, Ira C. Lupu, The Increasingly Anachronistic Case Against School Vouchers, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 385-92 (1999) (describing the place of anti-Catholicism and negative stereotypes about Catholic education in the development of modern Establishment Clause doctrine).
and most straight-forwardly, school choice makes available to parents new opportunities for expression through association. As Professor Gilles has argued, "Parents are... 'speakers' for First Amendment purposes when they communicate indirectly with their children through the speech of schools, teachers, home tutors, or other educational intermediaries." And this is true not only when parents speak through such intermediaries, but also when they make "decisions about whether, when, and through which such intermediaries they prefer to communicate with their children." Put simply, parents speak—both to their children and to the world—when they make decisions about what, where, and from whom their children will learn:

Schools that are freely chosen are the proxies for parental ideas that seek entry into the public dialogue. Today those who can afford to do so often choose a school precisely because it preserves and projects a certain deposit of belief. The school is a loudspeaker for those who freely support it with their presence and wish to cooperate in its message.

Second, Mitchell's apparent validation of nondiscriminatory school-choice programs—i.e., programs that do not exclude authentically religious schools—highlights the structural, mediating role of associations themselves. After all, it is reasonable to think that well crafted school-choice programs could not only invigorate already-existing intermediate institutions—namely, religious schools—but also spur the creation of new ones. The point here is not just that school choice is likely to


146. Id. at 1018.

147. John E. Coons, School Choice as Simple Justice, FIRST THINGS, Apr. 1992, at 17; see also supra notes 60-61 and accompanying text (discussing expression through association).

148. See supra notes 57-59 and accompanying text (discussing the structural role of associations and their expression).

149. That said, some argue that school-choice programs will undermine and compromise the religious mission and mediating capacities of religious schools. Indeed, some regard such programs as an opportunity to subject such schools to more exacting scrutiny and oversight. See, e.g., James G. Dwyer, School Vouchers: Inviting the Public into the Religious Square, 42 WM & MARY L. Rev. 963 (2001). It cannot be denied that the increased government regulation and oversight that could be expected to follow school-choice funds threaten these schools' integrity and authenticity:

The concerns about "strings" are reasonable. Distinctively religious institutions are vital to a healthy civil society. These institutions can play that role only if they are independent of government control. Religious institutions "are the giant rocks on which civil society rests."
strengthen associations by encouraging competition and entrepreneurship in education. It is also that, by committing itself to diversity, pluralism, and choice, and by abandoning the notion that the government's monopoly in the provision of publicly funded education is the constitutional and moral baseline,\textsuperscript{150} the state retreats, if only a little, from the public square, leaving just a little more room in civil society for the little platoons of democracy to thrive, to mediate, and—for better or worse—to educate.

Finally, by repudiating its former emphasis on the "pervasively sectarian" character of religious schools—or, more accurately, of Catholic schools\textsuperscript{151}—the plurality in Mitchell sent an important message about the expression of these associations and the nature of education. Recall that the Court's "pervasively sectarian" category, like our Nation's longstanding (though dissipating) unease about Catholic schools generally,\textsuperscript{152} has for the most part reflected concerns about and objections to what these schools say. We saw in Part I that education is the process by which the expression of associations shapes souls. This was, for the Court, precisely the problem. Put differently, the Court's problem with the expression of these particular associations—i.e., "pervasively sectarian" schools—was that this expression was not education, but "indoctrination."

The term "indoctrination" litters the Court's school-aid cases—even Mitchell—but it is a "term more often used... than explained."\textsuperscript{153} It has served primarily to denote the nar-
row, sectarian, and divisive expression of Catholic schools, and as a foil for the citizen-building, unifying, educational expression of the government’s schools.\textsuperscript{154} Justice Douglas, for example, asserted in \textit{Lemon} that “sectarian” schools exist not for the common good but to “give the church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses.”\textsuperscript{155} In support, he quoted at length a notorious anti-Catholic tract:

“In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.”\textsuperscript{156}

A few years earlier, dissenting from a decision permitting states to loan textbooks to parochial-school students, Justice Black had railed in similar terms against the educational expression of Catholic schools:

\begin{quote}
It is implicit in the history and character of American public education that the public schools serve a uniquely \textit{public} function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort . . . . This is a heritage neither theistic nor atheistic, but simply civic and patriotic.
\end{quote}

\textsuperscript{154} As Justice Brennan stated in \textit{Abington Township School District v. Schempp},

\textit{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 . . . . This is a heritage neither theistic nor atheistic, but simply civic and patriotic.} 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring).


\textsuperscript{156} \textit{Id.} at 635 n.20 (Douglas, J., concurring) (quoting \textit{LORAINÉ BOETTNER, ROMAN CATHOLICISM} 360 (1962)). The late-Nineteenth Century preacher and education reformer Horace Bushnell had voiced similar concerns, warning that children in Catholic schools “will be shut up in schools that do not teach them what, as Americans, they most of all need to know . . . . They will be instructed mainly into the foreign prejudices and superstitions of their fathers, and the state, which proposes to be clear of all sectarian affinities in religion, will pay the bills!” \textit{Glenn, supra} note 20, at 229 (quoting Horace Bushnell).
The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked.\footnote{157} It seems, then, that by "indoctrination" the Court cannot have meant—and those who continue to use the term today cannot mean—much more than the effective transmission of ideas, values, or ways of thinking that do not cohere entirely with those of the state. If this is true, though, then—as we saw in Part I—it is hard to see how "indoctrination" is anything other than the expression of one's competitor in the project of forming persons and shaping souls, or how the pervasively-sectarian category reflects anything more than official disagreement with certain associations' expression.\footnote{158} After all, the liberal state, no less than "pervasively sectarian" schools and other mediating, possibly dissenting, associations in society, is not and cannot be indifferent to the beliefs and values, the totems and taboos, of its citizens.\footnote{159} This is why, as Henry Adams observed, "[a]ll State education is a sort of dynamo machine for polarizing the popular mind; for turning and holding [it] in the direction supposed to be the most effective for State purposes."\footnote{160}

\footnote{157. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 251-52 (1968) (Black, J., dissenting); see also id. at 260 n.9 (Douglas, J., dissenting) (warning of the "creeping sectarianism" in Catholic schools' instruction, even in nominally secular subjects).

158. Cf. Mitchell, 120 S. Ct. at 2551 (plurality opinion) ("[It is most bizarre that the Court would ... reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.").

159. Edmund Burke observed that "it is the interest, and it is the duty, ... of government to attend much to opinions." Edmund Burke, Speech on the Petition of the Unitarians (May 11, 1792), in \textit{7 THE WORKS OF THE RIGHT HON. EDMUND BURKE} 39, 44 (Little Brown, 9th ed. 1889); see also \textit{supra} notes 32-35 and accompanying text (noting that the health and survival of the liberal state depends on the creation of citizens of a particular disposition).


160. \textit{EDUCATION, supra} note 12, at 78. Justice Douglas lodged a similar complaint against Catholic schools. \textit{See Allen,} 392 U.S. at 260 n.9 (Douglas, J., dissenting) ("[Catholic schools'] creeping sectarianism ... keeps the students continually reminded of the sectarian orientation of his education.").
The *Mitchell* plurality's rejection of the pervasively-sectarian category can therefore be read as a rejection also of the Court's previous assumption that there is something particularly un-education-like or otherwise unworthy about what authentically religious schools do. These schools, like the government's schools, transmit values and form persons, implicitly and explicitly, through their teachers' speech and witness, their curricula, their trappings, and their expression. To be sure, as the early proponents of the Common Schools feared and many contemporary liberal theorists recognize, these associations often speak with a different voice, invoke different premises, appeal to different loyalties, and transmit different—not always praiseworthy—values. In doing, they provide some shelter from the often hostile winds of the secular state's citizen-creating aspirations. Benjamin Rush once called for a "general and uniform system of education" that would "render the mass of the people more homogenous and thereby fit them more easily for uniform and peaceable government." The *Mitchell* plurality's refusal to attach an epithet like "indoctrination" to associations' expression affirms, if only implicitly, the

161. *See* Mark Tushnet, *Thinking About the Constitution at the Cusp*, 34 AKRON L. REV. 21, 22 (2000) (observing that schools have an "implicit curriculum—the things that are taught by, or through, the way a school room is organized, the way teachers and students treat each other, and the like").

162. *See supra* notes 20-21, 28-35 and accompanying text. This is why some have argued that even private schools must be required to embrace and transmit the state's messages, and the set of values, loyalties, and traits that the state deems necessary for useful citizenship. *See* GUTMANN, *supra* note 33, at 115-23; *see also* Russell Hittinger, *The Future of the Papacy: A Symposium*, FIRST THINGS, Mar. 2001, at 28, 29 (recalling "Bismarck's Kulturkampf, when the Prussian state interrupted the governance of the Catholic Church . . . on the basis of the state's interest in promoting its own culture through education").


164. *See* BOLT, *supra* note 56, at 66; Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1121 (1999) ("The State is hostile or unfriendly to religion in its very essence."). Indeed, as a historical matter, parochial schools in this country were a response to the aggressive Protestantism of the government's purportedly non-sectarian common schools. *See generally* GLENN, *supra* note 20.

165. GLENN, *supra* note 20, at 89 (quoting Benjamin Rush).
place and role of mediating institutions in educating persons and in hamstringing the ambition of the liberal state.

B. Troxel v. Granville: The Family as the "First and Vital Cell of Society"\textsuperscript{166}

In Troxel v. Granville,\textsuperscript{167} the Washington Supreme Court had struck down that State's third-party-visitation statute as inconsistent with parents' fundamental right to direct and control the upbringing and education of their children.\textsuperscript{168} That unusually expansive statute permitted "any person" to petition for court-ordered visitation of someone else's child "at any time," and authorized courts to grant such a petition, over custodial parents' objection, whenever visitation would serve the child's "best interest." No deference to parents' objections, nor any showing that the visitation requested is necessary to avoid harm to the child, was required.\textsuperscript{169} Insisting that parents "have a right to limit visitation of their children with third persons," that parents, not judges, "should be the ones to choose whether to expose their children to certain people or ideas," and that it is not for the state "to make significant decisions concerning the custody of children merely because it could make a 'better' decision," the Washington court invalidated the statute.\textsuperscript{170}

A majority of the Justices shared the Washington court's concerns about the breadth and intrusiveness of the statute.\textsuperscript{171} Justice O'Connor, joined by three other Justices, found particularly offensive the fact that the statute required "no deference" to parents' wishes and accorded their decisions no "presumption of validity."\textsuperscript{172} Instead, "the Washington statute places the best-interest determination solely in the hands of the judge.

\textsuperscript{166} Familiaris consortio, supra note 116, ¶ 42 (quoting Second Vatican Ecumenical Council, Apostolicam actuositatem [Decree on the Apostolate of the Laity] ¶ 11 (1965)).

\textsuperscript{167} 120 S. Ct. 2054 (2000).


\textsuperscript{169} For more detailed discussions of the statute, see WASH. REV. CODE. Section 26.10.160(3) (2001). See generally Smith, 969 P.2d at 23, 30; Troxel, 120 S. Ct. at 2051-64 (plurality opinion).

\textsuperscript{170} Smith, 969 P.2d at 31.

\textsuperscript{171} Although Justice Scalia dissented, he did so not because he was untroubled by the statute's intrusiveness, but because of his well-known rejection of the substantive-due-process theory on which the Court relied in invalidating the statute's application. Troxel, 120 S. Ct. at 2074-75 (Scalia, J., dissenting).

\textsuperscript{172} Id. at 2061 (plurality opinion).
Should the judge disagree with the parents' estimation of the child's best interest, the judge's view necessarily prevails. The Constitution, in her view, requires more; it "does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." The Washington statute purported to do just that and therefore was, as applied to *Troxel*'s facts, unconstitutional.

Six Justices wrote opinions in *Troxel*—the most in any case from the 1999 Term. The details and implications of the case's reasoning and holding are not entirely clear. Still, the Court re-affirmed that the "liberty" protected by the Four-

173. *Id.* (plurality opinion).
174. *Id.* at 2064 (plurality opinion). It is important to note that Justice O'Connor did not endorse the Washington Supreme Court's conclusion that the fundamental constitutional rights of parents to direct the upbringing of their own children "require[] all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.*; cf. *In re Smith*, 969 P.2d at 28-30; Garnett, *supra* note 29, at 135 ("If we take *Pierce* seriously, state supervision of parents' educational authority is justified only to prevent harm to a child and not to inculcate those values that the State believes will best serve its own, or the child's, 'best interests.'").
175. *Troxel*, 120 S. Ct. at 2064 (plurality opinion).
176. For a detailed summary and analysis of these opinions, see *The Supreme Court 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 229 (2000).
177. In a concurring opinion in *Troxel*, Justice Thomas noted,

I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.... The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.

120 S. Ct. at 2068 (Thomas, J., concurring); see also William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 185 (2000) (noting that the Court "has never specifically stated that the right of parents to direct the education of their children is actually a 'fundamental' right that would trigger strict judicial scrutiny of legislation that affects that right").
178. Compare *Troxel*, 120 S. Ct. at 2065 (plurality opinion) ("We ... hold that the application of [the statute] to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters."); *with id.* at 2065 (Souter, J., concurring) ("The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case."); *and id.* at 2068 (Stevens, J., dissenting) ("The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington.... [T]he State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face.").
teenth Amendment includes parents' fundamental freedom to "make decisions concerning the care, custody, and control of their children." The Court embraced again the commitment to family integrity, parental authority, and limited government it had made over fifty years earlier in Prince v. Massachusetts: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Indeed, as the Court famously observed in Pierce v. Society of Sisters, it is not just the "function and freedom" of parents, but also their "right, coupled with the[ir] high duty, to recognize and prepare" their children for these obligations. "The child," after all, "is not the mere creature of the state."

The Court's consistent defense of the family's substantial, though certainly not absolute, independence in matters of child rearing and education is increasingly counter-cultural. Some regard Pierce as a Lochner-esque anachronism, or perhaps even as patriarchal propaganda, more than as a principled recognition of parents' educational rights and obligations. Still, while there is likely some truth in these rival—perhaps "revisionist"—accounts, Pierce and Troxel are best read not as a judicial validation of parental ownership or of dominion over their children but as reminders of the moral limits on the claims of the liberal state, the independence of associations, and the importance of civil society.

179. Id. at 2060 (plurality opinion); see also id. at 2066 (Souter, J., concurring); id. at 2068 (Thomas, J., concurring).
181. Id. at 166. Of course, the Court in Prince rejected the objecting parents' claim. Id. at 170.
182. 268 U.S. 510 (1925).
183. Id. at 535.
184. Id.
185. See Carter, supra note 29, at 1194 ("When scholars meet to discuss the great pantheon of constitutional rights, . . . we are not much concerned with the right to direct the upbringing of children; indeed, I suspect that many scholars disbelieve in it . . . .")
187. MACEDO, supra note 21, at 99.
188. See generally Garnett, supra note 29.
In fact, *Troxel*, like *Mitchell*, can usefully be read as a case about expressive association and the expression of associations. First, *Troxel* is a freedom-of-expressive-association case in that it re-affirms the prerogatives of families to constitute themselves, and of parents to educate their children, in accord with their values and beliefs, and thereby to communicate those values and beliefs to the world, even when they are different from those preferred by the state. In this respect, *Troxel* complements *Mitchell*. As we have already seen, parents' educational decisions—about where their children will attend school, who will be their teachers, with whom they will learn, and so on—are expressive. Parents are "speakers' for First Amendment purposes when they communicate indirectly with their children through the speech of schools, teachers, home tutors, or other educational intermediaries."189 *Troxel* reminds us that the same can and should be said of child-rearing generally: parents express themselves—to their children and to the world—when they instruct, guide, discipline, and communicate with their children; families express themselves—to their members and to the world—when they constitute themselves and direct their activities in accord with certain truths and aspirations.190 As with other associations, the "formation of [a family] is the creation of a voice . . . ."191

Nothing about this point should strike us as particularly novel. The Court has observed, for example, that "it is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."192 In a similar vein, Justice Souter noted in *Troxel* that decisions about things so prosaic as a child's playmates are, at bottom, decisions about—and

190. *Id.* at 1015. Professor Gilles adds,

Consider the daily education of, say, a three-year-old. From reading a story, to identifying objects and colors, to reiterating the rules against biting and fighting, to picking out dinner and treats at the grocery store, to hugs and kisses at bedtime, parental nurturing and education pervasively consists of speech and other communicative acts directed toward the child.

*Id.; see also* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977) (noting the important role of the family in "promoting [a way of life through the instruction of children" (quoting Wisconsin v. Yoder, 406 U.S. 205, 231 (1971))); *Familiaris consortio*, *supra* note 116, ¶ 36 ("[T]he family is the first school of those social virtues which every society needs.").

expression about—the child's "social and moral character." And the Washington Supreme Court recognized that parental decisions about everything from third-party visitation to Boys Club football and Saturday morning cartoons are, in the end, decisions about ideas—ideas that are transmitted to the child and that are endorsed and expressed to outsiders in those decisions.

*Troxel* is consistent and consonant with the themes of this Essay in confirming that we express ourselves to the world in the way we constitute and orient our families and by educating our children in accord with certain goods, that our families mediate between persons and the state, and that our families form, shape, and educate us by their expression and aspirations. Adams knew this; he observed on the opening page of his *Education* that the path of his education, broadly understood, could not have been more a product of his family "[h]ad he been born in Jerusalem under the shadow of the Temple and circumcised in the Synagogue by his uncle the high priest."

In *Troxel*, as in *Dale* and *California Democratic Party*, the Court accepts the moral and ideological pluralism that follows in the wake of expressive association and associations' expression. *Troxel* teaches that government may not insist—however much it might like to—that parents not tell their children that, say, American militarism is evil, or George W. Bush stole Florida, or abortion is murder, or Jesus is Lord. The state may

193. *Troxel*, 120 S. Ct. at 2067 (Souter, J., concurring).
194. *In re Smith*, 969 P.2d 21, 31 (1998), aff'd sub nom. *Troxel*, 120 S. Ct 2054 (2000) (plurality opinion) (noting that "parents should be the ones to choose whether to expose their children to certain people or ideas").
195. See *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) ("Through the intimate relationships of the family, our children are nurtured, tutored in the values and beliefs of our society, and prepared for life."); Gilles, *supra* note 145, at 941 ("Parents' loving efforts to transmit their values help form their children's characters, enable them to learn what it is to have a coherent way of life, and develop their capacity to enter into caring, long-term relationships with others."). Jean Bethke Elshtain observed recently, in a similar vein, that "[o]ne aim of maintaining a robust civil society, beginning with families, is to forestall concentrations of power at the top. A second aim lies in the recognition that only many small-scale institutions enable citizens to cultivate democratic civic habits and to play an active role in civil life." Jean Bethke Elshtain, *Families and Civil Goods*, in *MARRIAGE AND THE COMMON GOOD* 107, 109 (Kenneth Whitehead ed., 2001).
196. *EDUCATION*, *supra* note 12, at 3.
197. But see *Dwyer*, *supra* note 32, at 158 ("[P]arents . . . might justifiably be proscribed from expressing sexist views in the presence of children in a way that damages children's self-esteem.").
not tell parents who are deciding, say, which friends’ influences are likely to be beneficial, or whether their child is ready for contact football, or for a PG-13 movie, or for a date with the class president, or “do what you want, as long as it is what we want, too.” And this is because, when making these and other decisions, parents are not merely setting rules, they are expressing and communicating their values to their children, to the community, and even to the state. By keeping a watchful eye on the forces and influences that shape a child—for whose character and conduct society will rightly hold them accountable—parents are, in a very real sense, speaking and teaching about what is important. The state may not, in the usual course of things, co-opt these messages.

_Troxel_ not only confirms that we speak through our families, and that the family is an expressive association, but also that the family is a mediating and buffering institution, another of the hedgerows that—as we saw in Part II, complicate the terrain of a well constituted civil society and around which the state and its own messages must navigate. The family is a vehicle for expression, but it is also the “first and vital cell of society.” Like other expressive associations, it not only me-


199. _See_ Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (noting that the law at issue would “deprive parents of [a] fair opportunity to procure for their children instruction which they think important and we cannot say is harmful”); _cf._ Roberts v. U.S. Jaycees, 468 U.S. 609, 633 (1984) (O’Connor, J., concurring) (“Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”).

200. _See_ David E. Steinberg, _Children and Spiritual Healing: Having Faith in Free Exercise_, 76 NOTRE DAME L. REV. 179, 195 (2000) (“[T]he family, through the production of numerous diverse citizens, promotes social diversity and checks factional behavior as expressed through the authority of the majoritarian state.” (quoting David J. Herring, _Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes_, 5 S. CAL. INTERDISC. L.J. 205, 215 (1997))); Elshtain, _Families and Civil Goods_, supra note 191, at 109 (“Families and churches are surely the most important of all [mediating institutions] for these are our primary character forming institutions.”); Tushnet, _supra_ note 17, at 381 n.9 (“I will treat the family as an institution of civil society.”); id. at 386-91 (discussing the Court’s treatment of the family as an institution of civil society).

201. _See_ _Familiaris consortio_, _supra_ note 116, ¶ 42; _see also_ Jordan v. Jackson, 15 F.3d 333, 342 (1994) (“To say that the ‘institution of the family is
diates as it educates, it *competes* with government for the character of children and citizens. It is not merely the translator of the state's preferred messages, it is the state's *rival*. *Troxel*—like *Pierce* before it—is a reminder that our Constitution accepts and protects this rivalry, and, as a general matter, neither authorizes nor permits government to revise, correct, or censor the associations' expression simply because it prefers a competing message or its own.\(^{202}\) Plato lost;\(^{203}\) this is a competition that, for the most part, the Constitution has determined parents should win:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with deeply rooted in this Nation's history and tradition' . . . borders on understatement. The unitary family is the foundation of society." (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1997))).

\(^{202}\) *See* Troxel v. Granville, 120 S. Ct. 2054, 2064 (2000) (plurality opinion) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."); *id.* at 2066-67 (Souter, J., concurring) ("Meyer's repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision' than the objecting parent had done." (footnote omitted)); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 581 (1995) ("Disapproval of a private speaker's statement does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others."). As the Washington Supreme Court observed,

Some parents . . . will not care if their child is physically disciplined by a third person; some . . . will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas. *In re* Smith, 969 P.2d 21, 31 (Wash. 1998).

Relatedly, Judge Bork has observed that "in *Pierce* the state wanted to do more than ensure that certain subjects and ideas were taught; it wanted to make sure that other ideas were not taught." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 49 (1990). For this reason, Judge Bork argued, *Pierce* could (and, in his view, should) have been decided as a First Amendment, rather than as a substantive-due-process, case. *Id.* at 48-49.

\(^{203}\) *See* Bowen v. Gilliard, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting) ("Plato offered a vision of a unified society, where the needs of children are not met by parents but by the government, and where no intermediate forms of association stand between the individual and the state. The vision is a brilliant one, but it is not our own . . . ." (citations omitted)).
the high duty, to recognize and prepare him for additional obliga-
tions.\textsuperscript{204}

CONCLUSION

Starting with Henry Adams's recollections about his "nest of associations," this Essay opened with a reflection on the nature of education. It observed that education is more than the delivery of useful information; it is also, for better or worse, the process of shaping souls. This is, as we saw in Part II, not surprisingly a task which the state would just as soon assign to itself. In fact, though, the state competes with the mediating institutions of civil society, and its expression competes with that of associations, for the privilege of educating. The freedom of expressive association, then, is not only the freedom enjoyed by individuals of expressing themselves through their associations, but also the freedom of associations to serve and speak as rival sources of values and loyalties.

Part III then suggested three complementary themes in the latest expressive-association cases that point toward this latter form of freedom: acceptance of reasonable pluralism and of the inevitability of moral disagreement, appropriate judicial humility in the face of such disagreement, and recognition of, if not appreciation for, the integrity, independence, and expression of mediating associations. Finally, Part IV used these themes as a bridge to the Court's decisions in \textit{Mitchell} and \textit{Troxel}, and approached these latter cases with an eye toward the function and importance of associations' expression, as well as expressive association, in achieving the values toward which these themes point. This Part's—and this Essay's—modest suggestion is that we supplement our view of the freedom of association, and of associations generally, as means of individual self-expression with an appreciation for the mediating and educating function of associations themselves.

Education is the process and vocation of shaping souls. Now more than ever, though, the shape our souls ought to take, and the ends toward which they ought to be directed, are contested matters. Education is, therefore, in many ways a contest that the liberal state, no less than any other, wants to win and is invariably tempted to "fix." But associations and their expression get in the way.

\textsuperscript{204} Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
In its recent decisions, the Court has beat back efforts by government to control the terms of our debates by editing or co-opting our expression as it passes through associations. We ought also to be on guard—and it appears that the present Court is appropriately wary—against the state's efforts to silence the potentially subversive expression of its educational rivals, and thereby to control the debate by standardizing the debaters.