

RESPONSE

Historical and Comparative Reflections

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Professor Garnett's article,¹ though written before the 2016 presidential election, could not be better-timed. In January 2017 we entered a new era in the history of American education—one that she anticipated but that now is upon us in all its uncertainty and its possibility.

The first three-fifths of Professor Garnett's article is a remarkable historical overview of how we have come to the present situation while the last part discusses several current and potential legal issues; my comments, as a non-lawyer, will be directed primarily to the former.

In a review of half a century of American popular education, Professor Garnett chronicles the growing demand and support for various forms of parental choice of schools and shows how this phenomenon intersected, over the past decade, with the most determined attempt ever to support public schools and require them to become academically effective. Under the Bush Administration, unprecedented requirements for accountability for academic outcomes were attached to the attainment of federal funding. Early in the Obama Administration, lavish amounts of additional funding were granted under the same requirements. This approach simply did not work.

Arguably, public officials at all levels of government have drawn the following lesson from the NCLB debacle: public school reform is ultimately a Sisyphean task. The burden is too heavy, and the hill too steep. As a result, a case can be made that public school "reform exhaustion" has set in, an exhaustion which is deeply unfavorable to traditional public schools. While public schools have been by-and-large freed from the burden and

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1. Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1 (2017).

embarrassment of failing to meet the NCLB's adequate yearly progress requirement, the persistent struggles of public schools are (to varying degrees) now being addressed from outside, rather than inside, the public school sector—both by an infusion of competition, and, in some jurisdictions, by the ultimate accountability device: rather than attempting to fix public schools, public education officials are opting to close and convert them to charter schools.²

Professor Garnett's historical account, though succinct, is remarkably rich as well as accurate. I could confirm much of her discussion of the evolution of school choice from my own experience. From 1970 to 1991, I served as the official responsible for urban education and equity efforts for the Massachusetts Department of Education, including an urban-suburban choice program, the largest state-funded magnet school program in the country, and, in the 1980s, a strategic plan that abandoned residential assignments altogether and enrolled all students in ten cities on the basis of parental choice subject to racial balance goals. Although our original intention—and our legal leverage on school districts—was to achieve desegregation, we soon found that these choice strategies were a powerful way to improve the quality of urban education through the encouragement of school-level initiatives.

When I resigned from my government position to teach educational policy at Boston University, I published an article in *The Public Interest* endorsing the charter school idea as the next logical step, because it would address the “supply side” of schooling and supplement our efforts to put the “demand side” of parental choice to work for desegregation and school improvement.³

In short, I can attest to the accuracy of Professor Garnett's account of how school choice developed as an educational strategy. However, I would add that, just as “sector agnosticism” has emerged in response to the evident failure of No Child Left Behind⁴ (and of massive additional public expenditure), the first flourishing of choice strategies for public schools emerged because of frustrations with school desegregation based on mandatory school assignments. It had nothing whatsoever to do with Milton Friedman or market theories but everything to do with the need to develop a desegregation strategy that would avoid both political firestorms and the abandonment of urban public schools by white families.

2. Garnett, *supra* note 1 at 38.

3. Charles L. Glenn, *Controlled Choice in Massachusetts Public Schools*, 103 PUB. INT. 88 (1991).

4. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

This is a topic that I've never written about, despite a dozen or so books on other aspects of educational policy,⁵ so perhaps a few paragraphs of reminiscence are in order.

In 1965, Massachusetts adopted a law requiring districts with schools where fifty percent of enrolled students were “non-white” to adopt “racial balance” plans to end such “de facto” segregation;⁶ there was no requirement of a finding that the district had engaged in “de jure” unlawful segregation.⁷ However, when I joined the Massachusetts Department of Education in 1970, little had been done to comply with the 1965 law. Boston and several other districts had adopted plans involving school construction in racially mixed neighborhoods, and two “magnet schools”⁸ had just opened.⁹ My assignment (in addition to ongoing efforts to improve bilingual education and sex equity) was to step up enforcement of racial balance, but by the end of 1971, the State Board of Education found that Boston was not in compliance and that state funding should be suspended.¹⁰

In early 1973, the Massachusetts Supreme Judicial Court (“SJC”) ordered Boston to implement a racial balance plan and further required the State Board to provide a detailed scheme for Boston to implement if the city failed to develop its own plans.¹¹ Boston refused to cooperate, so in March 1973, my staff and I developed a plan for Boston involving the mandatory reassignment of thousands of students based upon their place of residence.¹² This was the plan, implemented

5. See, e.g., CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2000); CHARLES L. GLENN, *CHOICE OF SCHOOLS IN SIX NATIONS* (1989).

6. MASS GEN. LAWS ANN. ch. 71, § 37C (West 2016).

7. See Boston Public Schools, *Desegregation-era Records Collection*, Boston City Archives 2 (2008), http://www.cityofboston.gov/Images_Documents/Guide%20to%20the%20Desegregation-era%20Records%20collection_tcm3-23340.pdf [<https://perma.cc/A8GA-4CW2>] (providing a timeline of legislation related to the desegregation of public schools in Boston).

8. “Magnet schools” are school-system-operated schools enrolling their students on the basis of parental choice rather than residential assignment.

9. See Boston Public Schools, *supra* note 7 (discussing how both one wing of the Hennigan School and the Lee School opened in 1971 as a part of the city racial imbalance plan).

10. Jeremy Wolf, *A Timeline of Boston School Desegregation, 1961–1985*, CIVIL RIGHTS AND RESTORATIVE JUSTICE PROJECT AT NE. U. SCH. OF L.13, <http://www.racialequitytools.org/resourcefiles/Boston%20Desegregation%20Timeline.pdf> [<https://perma.cc/WU6D-8S68>] (citing Nina McCain, *Hub, 2 Cities Ruled Imbalanced; State Freezes \$30m in School Aid*, BOSTON GLOBE, May 30, 1971).

11. *School Comm. of Boston v. Bd. of Ed.*, 292 N.E. 2d 338 (Mass. 1973); see also *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (permanently enjoining the school committee from discriminating on the basis of race in public schools and ordering that the committee develop plans to prevent future de jure segregation).

12. MASS. TASK FORCE ON RACIAL IMBALANCE, *REVISED SHORT TERM PLAN TO REDUCE RACIAL IMBALANCE IN THE BOSTON PUBLIC SCHOOLS* (April 25, 1973),

ineptly by Boston in September 1974, that encountered massive resistance in white neighborhoods and gave the city a national reputation for racial conflict.¹³

Earlier in 1974, Judge Arthur Garrity of the United States District Court for the District of Massachusetts also ruled that the State Board's plan be implemented when he found that Boston had committed de jure segregation, and thus his authority was added to that of the SJC.¹⁴ He then ordered development of an even more extensive plan, in which we did not play a role, and this was implemented in September 1975 with further turmoil.¹⁵

The one bright spot of this 1975 plan was the inclusion of ten magnet schools. Over the subsequent years, these became a focal point of educational improvement.¹⁶ At the state level, we learned from the success of these schools (my two eldest sons attended one of them) and the negative effects of mandatory reassignments that, as we approached other cities across the Commonwealth, we should apply a choice-based strategy as often as possible. In 1974, the legislature helped by amending the 1965 Racial Imbalance Act to provide millions of dollars of discretionary funding to encourage voluntary desegregation.¹⁷

Over the next fifteen years we worked with sixteen Massachusetts cities to develop choice-based assignment plans by making schools sufficiently attractive and distinctive that parents would voluntarily send their children to other neighborhoods for the education offered. Eventually, we helped ten cities, including Boston, develop "controlled choice" assignment plans, administered through parent information centers, that abolished residence-based assignments altogether.¹⁸ Any parent in the "controlled choice" systems seeking to enroll a child for the first time, in a different school or at a different level of schooling, went to a state-funded parent information

https://archive.org/stream/revisedshortterm00mass/revisedshortterm00mass_djvu.txt
 [https://perma.cc/F8E7-6P25] (adopted and ordered into effect by the Massachusetts Board of Education on June 25, 1973).

13. Meghan E. Irons, et al., *History Rolled in on a Yellow School Bus*, THE BOSTON GLOBE, Sept. 6, 2014.

14. *Morgan*, 379 F. Supp. 410.

15. *Id.*; see also Moakley Archive and Institute, *Busing In Boston: A Research Guide*, SUFFOLK U. 2, http://www.suffolk.edu/documents/MoakleyArchive/BusingInBostonResearchGuide_2015.pdf [https://perma.cc/J62C-9FR4] (summarizing Phase II of Boston's desegregation plan that began in September 1975).

16. Gene I. Maeroff, *Boston Tests Magnet Schools Today to Lure Students*, THE NEW YORK TIMES, Sept. 8, 1975 at 22.

17. MASS GEN. LAWS ANN. ch. 71, § 37C (West 2016).

18. Glenn, *supra* note 3.

center (four in Boston, twenty-one statewide) for counseling on the options available and to indicate ranked choices. At the end of the application period, these applications were processed in random order and preferences satisfied as long as consistent with racial integration goals for each school. According to an unpublished analysis by my staff, greater than seventy percent of parents statewide received their first choice, and more than ninety percent of parents received one of their first three choices. Although racial integration was always the underlying reason for these choice-based policies, it soon became evident that the enhancement of school autonomy and the need to convince parents of school quality introduced a new dynamic into urban education.

In short, the adoption of parental choice, rather than residential assignment, as the basis for school attendance energized urban school systems and made parents empowered and accountable for fundamental decisions about their children. I subsequently worked with Chicago, Mobile, San Diego, and other urban districts as they sought to put these forces to work for school improvement.

Unfortunately, the public education status quo has remarkable powers of resistance, and in too many cases, parental choice became just another bureaucratic mechanism untethered to real autonomy and accountability. But that's another story, and we can only repeat Professor Garnett's observation that "public-school reform is ultimately a Sisyphean task. The burden is too heavy, and the hill too steep."¹⁹

Although, for a few years, I was numbered among those who believed that properly constructed school choice policies would be sufficient to achieve fundamental change in American schools, I eventually grew convinced that only a balanced strategy could do the job. Such a strategy requires three elements: *freedom* of parents to make decisions about the education of their children (implying the right to homeschooling, subsidized private schooling, and choice among public schools); *autonomy* of educators to create and maintain distinctive schools without excessive government interference; and appropriate *accountability* exercised by government to ensure that the instruction and resources provided to every child are adequate.²⁰

A fundamental conceptual distinction lies behind this three-fold strategy: between *instruction* (the process of acquiring skills and knowledge) and *education* (the process of developing character and a

19. Garnett, *supra* note 1 at 38.

20. See generally 1 BALANCING FREEDOM, AUTONOMY, AND ACCOUNTABILITY IN EDUCATION (Charles L. Glenn & Jan De Groof eds., 2012).

coherent worldview).²¹ Parents should be the ultimate deciders about the *education* of their children, and government should determine what skills and basic knowledge every young citizen should acquire through *instruction*. The community of educators in a school or group of schools should determine what appropriate mix of instruction and education would meet the general expectations of government and the specific expectations of those parents who have chosen to entrust their children to those educators.

There are many examples of attempts in other countries to strike this appropriate balance. Under the sponsorship of the European Association for Education Law and Policy (ELA), of which I am a founding member, several co-authors and I published a study of many national systems of schooling.²² We created a profile for each country studied and sought to detail the following: the extent to which parents can choose schools (with or without financial consequences); the extent to which the government sets curricular guidelines or imposes consequences for inadequate academic performance; and the degree of flexibility for educators in finding their own ways to satisfy both parents and government.

Finding the right balance among these three policy dimensions involves limitations on each of the parties: parents should not be free to deny their children adequate instruction in knowledge and skills, nor should government be free to use its authority to impose beliefs—or an agnosticism about beliefs. Educators, while free to exercise their professional judgments as to methods of teaching and organizing school life, should be able to do so only to the extent that parents are willing to entrust their children to those educators and the government is satisfied that those children are safe and adequately instructed.

As we considered the many variations on this balance of policies-in-tension, it became evident how easily any of these three parties can come to exert excessive influence over the educational process. In many cases, it is government that seeks to use popular schooling as an instrument of social control and influence the consciousness of its subjects.²³ In other cases, the education profession takes upon itself the

21. See generally CHARLES L. GLENN, *Respecting Religion and Culture in Schools: An International Overview*, in HANDBOOK OF EDUCATIONAL POLITICS AND POLICY 284 (Bruce Cooper et al. eds., 2014); CHARLES L. GLENN, *Educating Citizens: Who Is Doing That in the United States?*, 8 ITALIAN J. SOC. OF EDUC. 56 (2016); CHARLES L. GLENN, *Balancing the Interests of State and Citizens*, 9 J. SCHOOL CHOICE: INT'L RES. & REFORM 139 (2015).

22. 1–4 BALANCING FREEDOM, AUTONOMY, AND ACCOUNTABILITY IN EDUCATION (Charles L. Glenn et al., eds., 2012).

23. CHARLES L. GLENN, CONTRASTING MODELS OF STATE AND SCHOOL: A COMPARATIVE HISTORICAL STUDY OF PARENTAL CHOICE AND STATE CONTROL (2011); CHARLES L. GLENN, THE MYTH OF THE COMMON SCHOOL (1988).

job of indoctrinating children with values and convictions at odds with those of their parents.²⁴ Additionally, parents and local communities can have a limiting effect on what schools are able to teach, though this influence is less common today than it was in the past.²⁵

Thus, striking the right balance is a challenge not only in crafting policies but also in faithfully enforcing them.

In practice, the countries that seem to achieve this balance most successfully are those with “sector-agnostic” provisions for schooling, in which privately operated and government-operated schools stand on much the same footing. The Dutch model, described in some detail in my books cited above, combines considerable school-level autonomy and parental choice among schools with high academic expectations for all schools.²⁶ About seventy percent of Dutch pupils attend non-government schools.²⁷ Schools of a religious character predominate at the elementary level, and these schools enjoy a constitutional guarantee for their distinctive worldview (*richting*).²⁸ The closest analogy to the situation of most Dutch schools is to American charter schools, if the latter were allowed to have a religious character; while managed by non-government boards, they are not as “private” as are American private schools in the sense of standing altogether outside of what is considered the system of public education.²⁹

To illustrate this last point, in my twenty years (1971–1991) as a manager in the Massachusetts Department of Education, I cannot recall a single occasion in the Commissioner’s weekly cabinet meetings when private schools—which enrolled about twelve percent of the k-12 students in Massachusetts at the time³⁰—were discussed. They were simply off our radar screen.

My own experience and research, then, thoroughly support the account provided by Professor Garnett of the evolution of American educational policy toward an openness to a variety of forms of control as well as delivery of schooling.

24. See, e.g., MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* (2002)**Error! Main Document Only.**

25. See WILLIAM W. CUTLER III, *PARENTS AND SCHOOLS: THE 150-YEAR STRUGGLE FOR CONTROL IN AMERICAN EDUCATION* (2000).

26. Charles L. Glenn & Paul Zoontjens, *The Netherlands*, in 2 *BALANCING FREEDOM, AUTONOMY, AND ACCOUNTABILITY IN EDUCATION*, 345 (Charles L. Glenn & Jan De Groof eds., 2012).

27. *Id.*

28. *Id.*

29. *Id.* That is, Dutch private (*bijzondere*) schools, whether faith-based or pedagogy-based, are considered fully part of the public provision of schooling.

30. For the data that were used to calculate this statistic, see NAT’L SURVEY FOR EDUC. STATISTICS, <https://nces.ed.gov/> [<https://perma.cc/8GMY-3WHA>].

It is the second part of her article that introduces new considerations for me: that “as charter school opponents have begun to argue, the public funding of charter schools ought to be legally impermissible to the same extent (if any) as the public funding of private schools.”³¹ Related is the question whether charter schools should not be allowed, as are private schools, to have a religious character. Lawrence Weinberg has explored this latter question in a book (originally his dissertation under my supervision).³² I believe that it is crucially important for the future of non-elite (and thus overwhelmingly religious) private school options; charter schools are one of the factors that are driving hundreds of them out of existence, thus limiting the options to which parents should be entitled.

Professor Garnett points out that:

litigation asserting that prohibitions on religious charter schools themselves violate the First Amendment may be the only short-term strategy for eliminating statutory mandates that charter schools be “secular.” The Supreme Court has repeatedly asserted that both the Free Exercise and Establishment Clauses prohibit the government from either favoring or disfavoring religious individuals or institutions, and the United States Court of Appeals for the Tenth Circuit has relied upon this rule to invalidate the exclusion of religious schools from a public scholarship program. On the other hand, the Court of Appeals for the First Circuit has twice rejected the claim that the exclusion of religious high schools from a statewide private school choice program violated the First Amendment and Equal Protection Clause.³³

I’ve served as an expert witness in four cases—the most notable being the Douglas County, Colorado case currently pending before the U.S. Supreme Court³⁴—challenging state constitutional provisions forbidding public funding of schools with a religious character (Baby Blaines). My testimony in each case was based upon the history of anti-Catholic bias that was so clearly behind the adoption of these provisions. In addition to the First Amendment considerations mentioned by Professor Garnett, I would contend that the Equal Protection Clause of the Fourteenth Amendment could be invoked against such discrimination. Although these cases involved state funding for private religious schools, it seems to me that the arguments have equal force against the state charter school legislation that discriminates on the basis of religion.

Professor Garnett suggests, in a footnote, however, that:

31. Garnett, *supra* note 1 at 8.

32. LAWRENCE WEINBERG, RELIGIOUS CHARTER SCHOOLS: LEGALITIES AND PRACTICALITIES (2007).

33. Garnett, *supra* note 1 at 50–51.

34. See *Andrew F. v. Douglas Cnty. School Dist.* RE-1, 137 S. Ct. 29 (2016) (granting cert. on Sept. 29, 2016).

the political opposition to lifting the ban on religious charter schools would presumably be at least as fierce as opposition to private school choice (perhaps more so because there is more money at stake) and the political support tepid, since religious organizations might well, for a host of reasons (including anxiety about a loss of autonomy), prefer that states enact private school choice laws.³⁵

Here I am inclined to disagree—not as to the fierceness of opposition, but as to the readiness of organizations supporting faith-based schools to support such measures. Having served for many years as an at-large board member of the Council for American Private Education, I can certainly attest from our regular and sometimes heated discussions that the more financially secure independent schools are resistant to anything that could lead to more government oversight, but the financial situation of many—perhaps most—faith-based schools is such that the charter school option could be an attractive lifeline. This of course presents challenges regarding the amount of government oversight and the degree of protections for religious and academic freedoms, which brings us back to our study of how different countries supervise private and public schools.

In this case, as in so many others, it is the fine details of policy design and implementation that can make all the difference. “Sector agnosticism” opens the door to creative policy design that can bring new energies and problem-solving skills to American education. However, it requires careful attention to implementation, lest the same old managerial mindset impose the same one-size-fits-all rigidities. The unfortunate result might be that the private and charter schools that offer so many encouraging examples of fine education would be forced into the mold of traditional public schooling.

The crucial action, then, will be at the state level, though one hopes with encouragement from new leadership in the federal Department of Education. Professor Garnett points out that the “Utah Supreme Court concluded that the Utah Constitution gave the legislature plenary power to structure the state’s educational system to advance the goals of an educated populace, including by establishing nontraditional public schools like charter schools.”³⁶ What I have called the “myth of the common school”³⁷ should not be allowed to prevent the flourishing of a whole panoply of forms of organization of schooling, and of schools with distinctive character. Over these next years, we should see exciting developments in many states, accompanied by new pressures to impose external requirements that limit distinctiveness and school-level problem-solving.

35. Garnett, *supra* note 1 at 50 n.197.

36. Garnett, *supra* note 1 at 65.

37. See generally GLENN, THE MYTH OF THE COMMON SCHOOL, *supra* note 23.