

PUBLIC OPINION AND THE CULTURE WARS: THE CASE OF SCHOOL VOUCHERS

(Review of Terry Moe, *Schools, Vouchers, and the American Public* (2001))

Robert K. Vischer*

I. INTRODUCTION

As with many of society's "culture war" issues, the school voucher debate has spawned a wide range of academic and popular literature, a host of single-issue interest groups, and devoted grass-roots activism, almost all of which forcefully advocate unqualified acceptance or rejection of vouchers. From the very beginning of the debate, there has been surprisingly little middle ground. One of the founding fathers of the pro-voucher camp is Terry Moe, who, along with his coauthor, John Chubb, provided the academic manifesto of the modern voucher movement in *Politics, Markets and America's Schools*. The book's publication in 1990 helped put vouchers on the political and intellectual radar in this country through its revolutionary call for a complete reframing of school reform.

What separated *Politics, Markets and America's Schools* from previous entries in the school reform debate was the depth of its criticism and breadth of its call for change. Chubb and Moe laid out a carefully constructed indictment not only of the performance of public schools, but of the very structure of public education in this country. They contended that "the specific kinds of democratic institutions by which American public education has been governed for the last half century appear to be incompatible with effective schooling."¹ By their own admission, their take on the "culpability of prevailing institutions [could] not help being politically radical."² According to Chubb and Moe, the

* The author, a former associate at Kirkland & Ellis, will join St. John's University Law School as an Assistant Professor beginning in the 2002–2003 academic year.

Thanks to Joan Gottschall, Matt Stiegler, and Maureen Keller Vischer for their assistance.

1. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 2 (1990).

2. *Id.* at 18.

institutional structure of public education in America prevents schools from achieving excellence because “the most important prerequisite for the emergence of effective school characteristics is school autonomy, especially from external bureaucratic influence.”³

Their recommended solution was simple, but far-reaching: “public authority must be put to use in creating a system that is almost entirely beyond the reach of public authority.”⁴ Their chosen mechanism for doing so was a system in which students could select any participating school (including religious schools) in the state; that school would be paid a “scholarship” for the student made up of local, state, and federal funds in an amount to be determined by individual districts in conjunction with the state. Regulations would be minimal, and all students would be eligible to participate.⁵ The crux of the proposed system was the implementation of market principles. Chubb and Moe explained:

A market system is not built to enable the imposition of higher-order values on the schools, nor is it driven by a democratic struggle to exercise public authority. Instead, the authority to make educational choices is radically decentralized to those most immediately involved. Schools compete for the support of parents and students, and parents and students are free to choose among schools. The system is built around decentralization, competition, and choice.⁶

The revolutionary nature of their proposal was not lost on the authors. “Taken seriously,” they conceded, “choice is not a system-preserving reform. It is a revolutionary reform that introduces a new system of public education.”⁷

More than a decade has passed, and the voucher movement has made tremendous strides. Voucher programs in Florida, Milwaukee, and Cleveland have not only made school choice a reality for thousands of school children, but have solidified vouchers’ prominence on the political landscape. It is against this background that Moe has returned to survey the scene for which he was, in significant part, responsible. The picture he paints in *Schools, Vouchers and the American Public* is comprehensive and insightful, but even more remarkable is his approach to the subject, which offers important lessons for anyone engaged in the culture wars of twenty-first century America.

II. REFRAMING THE VOUCHER DEBATE

The eleven-year interlude since the publication of *Politics, Markets and America’s Schools* has produced a remarkable change in both tone and substance in Moe’s thinking on vouchers. This is understandable,

3. *Id.* at 23.

4. *Id.* at 218.

5. *Id.* at 219–22.

6. *Id.* at 189.

7. *Id.* at 217.

given that his previous work was, by necessity, a largely theoretical recasting of the way we think about school reform. In a sense, in 1990 Moe's thoughts on choice were written on a blank slate, as the school choice debate was just beginning. His current book benefits from years in which school choice has become a fixture of academic debate and reform proposals, and has made an indelible mark on the public consciousness. With this increasing prominence, vouchers have come under withering criticism from academics, politicians, and the public. Unlike many pioneers of social movements, Moe resists the temptation to become entrenched in a blind defense of his chosen cause. He readily acknowledges the merits of the criticisms leveled against vouchers, and indeed his new recommendations reflect the substance of those criticisms.

That is not to suggest that Moe's middle-ground approach stems from some sort of contrived "split the difference" calculation. Rather, it incorporates the wisdom reflected in the public's opinion regarding public education, private schools, and vouchers. In building a voucher policy reflective of public opinion, Moe not only closes the gap between school choice opponents and supporters, but he closes the gap between Americans' beliefs, values, and priorities, and the educational system under which they live. In this regard, Moe's book not only provides an important contribution to the voucher debate, but also presents a workable model for seemingly intractable rights-based conflicts in our legal culture.

A. *The Polarized Voucher Debate*

In sharp contrast to Moe's work, the majority of entries in the ever-expanding voucher debate acknowledge no middle ground, much less a middle ground shaped by public opinion. Instead, the debate is portrayed as the clash of absolutes, with either end of the spectrum as the only tenable positions. Pro-voucher forces appeal to the American ideal of liberty, arguing that freedom of educational choice should not be restricted to those who can afford it, especially when low-income students are most in need of the means by which to escape their failing public schools. Anti-voucher forces invoke the American ideal of equality, arguing that our egalitarian democracy depends on universal public schooling to equip students with the tools of citizenship. Under this view, vouchers would preclude the collective formation of citizens, exacerbating the stratification and segmentation of society in the process. Depending on which side of the struggle is making itself heard, vouchers represent either the great savior of American education, or the irreversible demise of education as a collective societal endeavor. Every new

study of student performance and anecdote of educational successes or failures are enlisted in the anti-voucher or pro-voucher cause.⁸

Academia's offerings on vouchers, while perhaps less brazen, are, for the most part, just as firmly planted in the good versus evil mindset. In one camp, vouchers are portrayed as "the primary civil rights goal of the millennium,"⁹ which will "deliver on the sacred promise of equal educational opportunities for all of America's school children."¹⁰ Allowing some students to remain trapped in failing public schools due to their inability to afford private school tuition is a glaring social injustice. Seen in this light, those who oppose vouchers are essentially "insist[ing] that poor children must continue to be thrown over the trench walls like so much cannon fodder."¹¹ When anti-voucher arguments are evaluated against this background of educational liberty informed by social justice, they are often dispatched with little substantive analysis.¹²

The opposing camp takes a much different view. To voucher opponents, the story of failing public schools told by voucher supporters is nothing more than "propaganda as history."¹³ Far from being the tool of liberation for millions of disadvantaged students, "vouchers are merely the latest in a long line of attempts by sectarian special interests to channel public money to church-related educational institutions."¹⁴ In this regard, "[t]he primary beneficiaries of a voucher plan will be in the nearly five million students already attending non-public schools and the religious bodies that sponsor those schools."¹⁵ Further, vouchers are written off as threats to "community or collective responsibility," as well as "a convenient rationale for failing to address racial oppression."¹⁶

Even where the arguments are based on clear and accessible reasoning, one gets the sense that voucher supporters and opponents are discussing entirely different subjects. Voucher supporters see an unjust public school system that marginalizes religious belief and consigns poor, predominantly minority students to inept schools from which they cannot escape. To supporters, for example, the current educational regime's "imposition of burdens on religious belief, the drive toward homogenization, and the undermining of minority religious views are illiberal, as well

8. Reflecting the all-encompassing spirit of spin, the American Federation of Teachers even took advantage of the recent terrorism attacks to insist that September 11 should remind us "that our civic life and the development of our values rest heavily on our public schools." Sandra Feldman (AFT President), *Survival Lessons* (advertisement in Oct. 15, 2001 issue of *The New Republic*).

9. Clint Bolick, *Solving the Education Crisis Through Parental Choice*, 11 STAN. L. & POL'Y REV. 245, 249 (2000).

10. *Id.* at 245.

11. Nicole Stelle Garnett & Richard W. Garnett, *School Choice, The First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 362 (2000).

12. See, e.g., MIKEL HOLT, NOT YET "FREE AT LAST" 209-10 (2000).

13. Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 406 (1997).

14. EDD DOERR ET AL., THE CASE AGAINST SCHOOL VOUCHERS 37 (1996).

15. *Id.* at 15.

16. O'Brien, *supra* note 13, at 407.

as unnecessary.”¹⁷ A religion-friendly resolution is impossible outside of school choice because “[r]eligious equality cannot coexist with a governmental monopoly that is designed to take children in their formative years and assimilate them into a strictly secular educational culture.”¹⁸ Opposition to school choice “exacerbates the problem of an educational system that has an inherent tendency to infringe on . . . religious exercise rights.”¹⁹

On the other side, voucher opponents dismiss the hope purportedly offered by vouchers as “[t]hematic curriculums, faddish approaches, untested innovations, and alternative staffing [which] can be implemented with little accountability and few measures of success and effectiveness.”²⁰ Voucher programs without stringent regulations prompt even harsher criticism, as such programs are said to carry “inherent dangers of perpetuating and increasing inequality of educational opportunity, particularly by class, under the seemingly neutral guise of choices by individuals.”²¹ In the anti-voucher world, reform proposals are viewed through the prism of equality, and vouchers are found wanting every time.

Both sides’ rhetoric²² presents the American public with an unappealing choice: embrace vouchers and forsake equality, or reject vouchers and forsake liberty. By framing the debate in such stark terms, both pro- and anti-voucher advocates have forced the public to disregard its own deeply held beliefs before choosing a side. This unnecessary disconnection of public policy from public opinion ensures that victory by either side in the voucher debate risks alienating many individuals from the educational system, regardless of the form that system ultimately takes.

17. Garnett & Garnett, *supra* note 11, at 362.

18. Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569, 583.

19. Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 768 (1997).

20. Stephen L. Gessner, *The Dangers of Fashionable Education Reform*, 11 STAN. L. & POL’Y REV. 235, 240 (2000).

21. Sharon Keller, *Something to Lose: The Black Community’s Hard Choices About Educational Choice*, 24 J. LEGIS. 67, 95 (1998).

22. As reflected by the cited comments, most skirmishes in the voucher debate occur at the theoretical level. But even where statistics play a role, the data usually are ambiguous and meager enough to justify whatever preconceived notions the particular author may bring to his or her analysis. Compare JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION* 112–56 (2000) (urging reluctance to embrace vouchers based on statistical analysis of Milwaukee program), with JAY P. GREENE ET AL., *THE EFFECTIVENESS OF SCHOOL CHOICE IN MILWAUKEE: A SECONDARY ANALYSIS OF DATA FROM THE PROGRAM’S EVALUATION*, available at <http://www.ksg.harvard.edu/pepg/op/evaluate.htm> (Aug. 30, 1996) (concluding, based on same statistics, that students remaining in Milwaukee voucher program for three to four years experienced significant academic improvement).

B. Moe's Search for the Middle Ground

In *Schools, Vouchers, and the American Public*, Moe offers a better way. He shows that the voucher debate is not a winner-take-all match between freedom and equality, and he does so by bringing the public into the center of the debate. Specifically, Moe relies on extensive survey data to extract a discernible framework of public opinion regarding vouchers from the extremist rhetoric of pro-voucher and anti-voucher advocacy. The result is a new course for vouchers that likely assuages at least some critics' fears while enhancing the viability of the voucher movement. He ultimately recommends vouchers not as a matter of absolute entitlement, but as a reform measure to be pursued as the public deems prudent.²³

Moe's deference to public opinion does not mean that he simply replicates survey data into public policy. Rather, he looks for the values and priorities underlying the data in order to build a voucher model that embodies the public's deeply held beliefs. The model's value derives not only from its political feasibility, but from the substantive wisdom produced by social consensus. Make no mistake—Moe is still firmly in the pro-voucher camp. But his analysis is valuable for taking public opinion seriously and, more importantly, for charting a future course derived in part from the substance of the concerns reflected in the public's values and priorities.

Moe's conclusions are not only important, but accessible, for he successfully avoids the tedium that so often plagues empirically based policy analysis. His book is a statistics-heavy breakdown of survey data tracking the public's views on public and private schooling, school reform, and vouchers. And while Moe's explanations of the data are detailed enough to satisfy the most demanding number-cruncher, he relegates most of those explanations to an appendix so as not to detract from his far more engaging substantive analysis. As for the latter, he focuses on extracting the essential truths from the data and using them to shape voucher policy. Moe's findings not only appear to have had a significant impact on his own beliefs about vouchers, but they should help reframe the entire voucher debate in this country.

At the outset, Moe contends that his "aim here is not to convince anyone that vouchers are a good thing," but "simply to understand what is going on" through "an account of politics and public opinion that is faithful to the evidence, makes good sense, and is capable of withstanding the expert scrutiny of others."²⁴ That is not to say that his personal sentiments are not evident throughout the book, for he consistently betrays his fondness for vouchers.

23. TERRY MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 340–43 (2001).

24. *Id.* at 11.

For example, in a nod to his own leanings, Moe recounts the familiar litany of objections to vouchers, but does so in a reasonably objective light, without veering into the realm of caricature. Not surprisingly, he dispatches the objections with equally familiar, but not always entirely convincing, rejoinders. This is almost a perfunctory exercise, however, for Moe is merely providing the background for the heart of his analysis: an in-depth analysis of the public's views on vouchers, and an extrapolation of those views into feasible policy proposals.

Moe readily acknowledges the conflict of long-held American values embodied in the voucher debate. It may seem surprising that American education has traditionally given short shrift to vouchers in light of our "widely shared beliefs in personal freedom, markets, and limited government," but Moe recognizes that "libertarian values are just one segment of the larger American value system," which also includes equality, justice, and democracy.²⁵ In light of such complexity, "even if the public school system were a direct reflection of the underlying culture, it would probably *not* turn out to be a market-driven system that minimizes the role of government."²⁶ In other words, "[i]f the people could have their way, the libertarians would be disappointed."²⁷

That is only the first of many assertions Moe offers which run counter to the conservative orthodoxy reflected in much of traditional voucher advocacy. He also finds reasonable, for example, the public's risk-averse reluctance to vouchers, recognizing that "there are risks involved in shifting wholesale from the traditional system to a voucher system."²⁸ More broadly, he recognizes that the traditional conservative orthodoxy is no longer as relevant as it once was. Politically, Moe emphasizes, the future of vouchers lies with an unusual alliance of religious conservatives and the urban poor. This alliance is potent for a number of reasons, not the least of which is the embarrassment it causes to the liberal coalition opposing vouchers, which "finds itself defending demonstrably bad inner-city school systems against demands for reform by the very constituents it claims to represent—while these constituents, for lack of any other option, are driven to seek support from new conservative allies."²⁹

Whatever groups end up carrying the banner for vouchers, they face a formidable task in light of Moe's recognition of a truth that often escapes notice: "Americans like the public school system."³⁰ In fact, surveys over the years "provide strong, consistent evidence that the American public looks more favorably on the public school system than one might expect given the hypercritical perspective so widely shared by

25. *Id.* at 15–16.

26. *Id.* at 16.

27. *Id.*

28. *Id.* at 270.

29. *Id.* at 34.

30. *Id.* at 345.

elites.”³¹ Most parents—especially public school parents—“are reasonably satisfied with what they are getting overall, particularly on academics.”³² Indeed, “people express higher levels of satisfaction the closer the schools are to their own lives.”³³

Even apart from satisfaction with the public schools, the voucher movement is hampered by what Moe refers to as “public school ideology,” which describes many Americans’ view of a public school system “as an expression of local democracy and a pillar of the local community.”³⁴ Subscribers to this view “tend to regard as subversive any notion that private schools should play a larger role in educating the nation’s children.”³⁵ This mindset likely explains why two-thirds of Americans say the public schools deserve support even when they are performing poorly.³⁶ Moe acknowledges that Americans “are clearly not raw material for a radical reform movement aimed at transforming the entire school system.”³⁷ Accordingly, the voucher movement “must attract support from a public that is actually quite sympathetic to the existing system.”³⁸

That said, support for public schools should not be mistaken for unwavering devotion. Few believe that public schools are doing a terrific job, and most think that there is considerable room for improvement.³⁹ Moe’s findings reveal that Americans are dissatisfied with specific aspects of public schooling, most notably schools’ failure to provide equal educational opportunities to low-income and minority students. Further, most Americans are *relatively* dissatisfied with public schools, for they believe that private schools are superior.⁴⁰

In contrast to the revolutionary rhetoric of many voucher advocates, Moe concludes that “Americans are most likely to be comfortable with a strategy of incremental change” in the use of vouchers.⁴¹ Most appear to favor “beginning with smaller programs for needy children and moving over time to a more inclusive system.”⁴² And appeals to self-interest will only go so far. Low-income parents from poorly performing districts base their support of vouchers on personal interests, but other segments of society tend to emphasize the broader social consequences. As a result, the voucher movement “can only succeed in its larger mis-

31. *Id.* at 44.

32. *Id.* at 345.

33. *Id.* at 45.

34. *Id.* at 87.

35. *Id.*

36. *See id.*

37. *Id.* at 55.

38. *Id.* at 345.

39. *Id.* at 55.

40. *Id.* at 346.

41. *Id.* at 353.

42. *Id.* at 355.

sion if it convinces Americans that vouchers are in the public interest.”⁴³ To do so, Moe cautions, advocates must guard against the potential drawbacks of vouchers that have been raised by opponents.⁴⁴ For example, Moe acknowledges that “even among the less advantaged, the parents most likely to go private are those who are better educated,” which “threatens to create inequities, as the most motivated parents take greatest advantage of the benefits of choice.”⁴⁵ Compounding this trend, Moe notes that “private schools may find these advantaged parents (and their children) desirable, and may discriminate against poor and minority families.”⁴⁶ To his credit, Moe does not brush off such criticism, but rather reminds voucher advocates “to take them into account as they think about the proper design of choice systems.”⁴⁷

In furtherance of this public interest, and undoubtedly to the consternation of many voucher supporters, Moe finds that the public strongly supports government regulation of private schools that participate in a voucher program. “By massive majorities, they support rules to hold private schools accountable for quality education—through curriculum and teacher-qualification requirements,” and even “regulations to promote social equity by requiring private schools to admit all applicants.”⁴⁸ Support for regulation of private schools participating in voucher programs is strikingly high among private school parents as well as public school parents, and voucher supporters as well as opponents.⁴⁹ Moreover, it is not merely the less intrusive measures—such as teacher certification requirements—that are favored. Sixty-one percent of Americans believe that any school participating in a voucher program should be required to admit all students who apply.⁵⁰ And amazingly, 82% say that “religious schools should be required to admit students of all religions on an equal basis.”⁵¹ Moe concedes that Americans, while they favor competition and choice, “do not think good outcomes will emerge automatically through the unfettered operation of the market.”⁵²

Not all of Moe’s findings flout conventional wisdom. For example, he confirms that Americans “overwhelmingly believe that, if a voucher system were adopted, religious schools should be included.”⁵³ The extent of this belief is staggering: 79% think parents should be able to use

43. *Id.* at 354.

44. *See id.* at 166.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 355.

49. *Id.* at 299–301.

50. *Id.* at 302.

51. *Id.* at 303.

52. *Id.* at 300. Moe is certainly not the first voucher advocate to call for government regulation of participating private schools, *see, e.g.*, JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999), but his endorsement of regulation is striking in light of his previous advocacy of market principles.

53. MOE, *supra* note 23, at 354.

vouchers to attend religious schools, “while only 11 percent think the choice should be restricted to nonreligious schools.”⁵⁴ Among *public* school parents, the percentage favoring inclusion of religious schools rises to eighty-three.⁵⁵ The inclusion of religious schools is crucial to the viability of voucher programs, of course, given that they enroll 85% of private school students.⁵⁶

Religious schools’ practical importance, however, should not obscure the broader lesson imparted by the survey data. The most powerful force behind the voucher movement is not religious, political, or ideological, but rather socioeconomic; put simply, “less-advantaged families in low-performing districts want new options for their kids.”⁵⁷ This requires a fundamental alteration of the traditional portrayal of the voucher movement. Those who are most dissatisfied with public schools are predominantly low-income, African American residents of low-performing school districts.⁵⁸ While members of the public who support vouchers and are informed about the relevant arguments are more likely to be Republicans, “the uninformed (and far more numerous)” supporters of vouchers are more likely to be Democrats.⁵⁹ And contrary to conventional wisdom, he finds that supporters of racial diversity are *more* likely to support vouchers.⁶⁰

Moe’s conclusions have a myriad of strategic implications for the school voucher movement. Foremost among them is the fact that voucher supporters “need to resist the impulse to attack the public school system, and instead promote voucher programs that are designed to improve and contribute to the existing system rather than destroy or privatize it.”⁶¹ They also need to structure voucher programs to target disadvantaged students, “and to put explicit emphasis on equity and diversity” in doing so.⁶² And any program that is to be politically viable must “get away from free markets and embrace a regulated approach” in recognition of “the public’s concern for accountability, fairness, and equity.”⁶³

The persuasive authority of Moe’s findings is enhanced by the relative stability of public opinion regarding vouchers. In this regard, Moe concludes that “outside of rare, expensive campaigns, elites cannot expect to influence mass public opinion in a major way.”⁶⁴ This is based, in turn, on three findings: first, that “the systematic manipulation of public

54. *Id.* at 295–96.

55. *Id.* at 296.

56. *Id.* at 394.

57. *Id.*

58. *Id.* at 347.

59. *Id.* at 351.

60. *Id.*

61. *Id.* at 355.

62. *Id.*

63. *Id.*

64. *Id.* at 358.

opinion on a grand scale is very difficult and expensive, and neither elite camp can afford to pursue this strategy (in a serious, sustained way) in the normal course of affairs”;⁶⁵ second, public opinion has not changed very much in recent years despite both sides’ efforts to “get their messages out”;⁶⁶ and third, when it comes to vouchers, “there is a certain core to people’s thinking that is not so easily manipulated and . . . will continue to shape their views over the long haul.”⁶⁷

Moe sees a bright future for vouchers in American education, but “[t]hey will turn out to be very different . . . from the free-market ideal that most traditionalists have long had in mind” because “the programs will be regulated to ensure democratic accountability and promote social equity.”⁶⁸ And as deeply rooted as vouchers might become, “the public schools will not disappear or somehow be destroyed in the process,” for the “policymakers who actually design the voucher programs . . . will favor designs that help the public schools to adapt, improve, and ultimately prosper.”⁶⁹ Whether Moe’s rosy prognosis comes to fruition is, to a certain extent, beside the point. Much more crucial is the fact that Moe, one of the pioneers of the modern school voucher movement, has planted the movement’s flag firmly on the middle ground.

III. THE CULTURE WARS AND PUBLIC OPINION

Just as the voucher debate pits liberty against equality, many issues in our “culture wars” are portrayed as the unyielding clash of absolutes. Whenever these debates are framed as all-or-nothing battles in which one side’s deeply held values will be disregarded, proponents of views that do not prevail not only lose out on that particular issue, but feel alienated from the government and disconnected from the prevailing conception of the common good.

Moe offers an alternative that is grounded in the real world, but aspires to the loftiest ideals of our democracy. The important issues of our day need not inexorably lead to all-out struggles between competing worldviews or belief systems. If participants in the debates were to make an effort to understand and incorporate the public’s beliefs and values—rather than selectively “spinning” survey data as another weapon in their arsenals—the culture wars could gradually make way for societywide efforts to understand each other and reach at least some semblance of common ground.

The point is not to resolve intractable social issues through simple majority rule. Rather, the objective should be to establish a workable

65. *Id.* at 357.

66. *Id.* at 357–58.

67. *Id.* at 358.

68. *Id.* at 390.

69. *Id.* at 390–91.

social consensus before becoming entrenched in the language of individual rights and nonnegotiable principles—especially where the resort to such language does not resolve the dilemma. This may be true in two contexts: first, where the applicability of the right or principle to a particular context is unclear; and second, where clearly applicable rights or principles come into direct conflict. In such situations, simply clinging to one's own conception of the interests at stake without acknowledging the opposing view short circuits the process through which truly democratic resolutions can be reached.

The key to Moe's approach is his willingness not only to extract the core values reflected in public opinion, but to allow those values to inform his own perspective. The infrequency with which such gestures of compromise and respect occur in our rights-based debates is underscored by applying Moe's approach to other contexts. Three prime examples of debates that have largely forsaken the building of social consensus are abortion, gun control, and stem-cell research.

A. Abortion

The abortion debate embodies both situations where arguments framed in absolute terms can be problematic—a woman's right to choose clashes with a fetus's right to life, and the right to choose is alternatively extended and restricted as courts are faced with new factual scenarios where the right's applicability is very much in question. But this conundrum is largely unacknowledged in the abortion debate. It is difficult to imagine a member of Operation Rescue acknowledging that requiring a woman to carry her baby to term represents a significant intrusion on her autonomy, or a member of the National Abortion Rights Action League conceding that partial-birth abortion is a morally troubling act under any recognizable definition of morality. In the abortion debate, the middle ground is essentially vacant.

For the most part, academics further polarize the debate—albeit through loftier language than that used by the street-level participants. Many abortion-rights advocates have pushed beyond the framework of *Roe v. Wade*, urging that, even if the fetus “has the rights of a born person, because of the position it is in, it does not have a right not to be killed.”⁷⁰ Put even less delicately, “[t]he quantity and quality of the fetus's harm to a woman when it imposes a nonconsensual pregnancy on her justifies the use of deadly force to stop it.”⁷¹ They ground the right to abortion in “the due process liberty right to engage in sexual activity without aiming to reproduce,”⁷² the “Thirteenth Amendment and equal

70. Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1053 (1997).

71. Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1060 (1999).

72. Walen, *supra* note 70, at 1139.

protection rights of women not to be burdened with a uniquely demanding bad samaritan law,"⁷³ religious freedom,⁷⁴ and even the Fifth Amendment's Takings Clause to the extent that "[r]egulations that limit or prohibit a woman from terminating a pregnancy take from her, in effect, the most precious of all property rights: the right to exclude."⁷⁵ Regulations imposed on the exercise of the abortion right are simply efforts to regain control of the pregnant woman, and "make[] sense only if the woman is an isolated, power-hungry, unthinking, unreflective, ignorant, nonconsulting, incapable, socially-distancing and cut-off person."⁷⁶ This line of argument does not recognize the killing of the fetus as even being relevant to the abortion debate. Rather, the debate "is driven by profoundly different views about a woman's place in society: Is a woman free to pursue her own goals like a man, balancing career and family, or should she put family ahead of career?"⁷⁷

On the other side, the killing of the fetus is too often the *only* relevant consideration in the abortion debate. *Roe v. Wade* is "the ultimate embodiment of the cultural revolution . . . as it represents the willingness of the revolution to kill for sexual freedom."⁷⁸ The regime of legalized abortion arose from the "unprincipled will to private power," which "closed down public reason on the abortion question."⁷⁹ *Roe's* progeny simply solidified anti-abortion citizens' sense of disenchantment from the legal system, leading some to undertake violence in support of their cause. This "[a]nti-abortion lawlessness," according to one commentator, "is but a passing thorn on a broad branch of disenchantment; no one can yet see what other thorns, leaves, or flowers that branch will grow."⁸⁰

At one level, the polarization of the abortion debate appears to be justified, for the country is nearly evenly split among those who consider themselves "pro-choice" (47%) and those who consider themselves "pro-life" (45%).⁸¹ These measures tell only part of the story, however. For

73. *Id.*

74. Kimberly J. Cook, *Abortion, Capital Punishment, and the Politics of "God's Will"*, 9 WM. & MARY BILL RTS. J. 105, 136 (2000) ("I believe it is within the personal judgment of the individual woman when to bear children, and if religious freedom is to be protected, it is outside the state's authority to limit that choice for women in any way.").

75. Susan E. Looper-Friedman, "Keep Your Laws Off My Body": *Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 256 (1995).

76. Elizabeth Reilly, *The "Jurisprudence of Doubt": How the Premises of the Supreme Court's Abortion Jurisprudence Undermine Procreative Liberty*, 14 J.L. & POL. 757, 814 (1998); see also Kathryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119, 1166 (1999) (arguing that parental notice provisions reflect view of pregnant woman as "someone who has no right to self-determination, whose body can be conscripted as a means of expression for the views and beliefs of others").

77. Walen, *supra* note 70, at 1055-56.

78. David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 145-46 (1995).

79. John Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361, 379 (1998).

80. Smolin, *supra* note 78, at 150.

81. The Gallup Organization, *Majority of Americans Say Roe v. Wade Decision Should Stand* (Jan. 22, 2001), available at <http://www.gallup.com/poll/releases/pr010122.asp>.

one thing, the vast majority of Americans do not view abortion as exclusively a matter of personal choice, as only 28% believe that abortion should be legal under all circumstances.⁸² But even fewer equate abortion with murder, as only 19% believe that abortion should be illegal under all circumstances.⁸³ Within the dominant middle ground, respondents favor significant restrictions on abortion: 38% of Americans believe that abortion should be legal only in a few circumstances, while only 11% believe that it should be legal in most circumstances.⁸⁴ Altogether, 39% of Americans say abortion should be totally or mostly legal, and 57% say abortion should be mostly or totally illegal.⁸⁵ Pro-life forces can take only limited comfort in these data, for Americans' discomfort with abortion does not translate into a mandate for wholesale change. Only 34% of respondents would like to see stricter abortion laws, and only 30% believe that *Roe* should be overturned.⁸⁶ The abortion debate would surely lose some of its bitterness if both sides could bring themselves to acknowledge that the vast majority of Americans favor at least some limitations on the availability of abortion, but oppose its outright prohibition. Such a step would not close down the debate entirely, but it might at least give rise to a previously unseen middle ground.

A ban on so-called partial-birth abortions would seem to represent such a middle ground, as 63% of Americans favor a law prohibiting the procedure except where necessary to save the life of the mother.⁸⁷ Instead of seeing ground for potential compromise, however, the familiar combatants have simply ratcheted up the ferocity of the battle. Abortion-rights advocates acknowledge that the opposition, by focusing on partial-birth abortion, has "created a moral crusade on whose bandwagon many people are jumping,"⁸⁸ but they insist that "[t]he law oversteps its bounds . . . when, having identified an appropriate health care objective, it attempts *for reasons other than patient health and welfare* to intrude into the physician/patient relationship by detailing the precise medical procedures that will be considered permissible or impermissible for achieving the valid objective."⁸⁹ As with abortion laws in general, the killing of the fetus is afforded no role in the ethical debate by opponents of laws banning partial-birth abortions.⁹⁰ Even members of the Supreme Court find it "impossible" to "understand how a State has any legitimate

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Cook, *supra* note 74, at 133.

89. Ann MacLean Massie, *So-Called "Partial Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 304 (1998).

90. See, e.g., Nadine Strossen, *Contemporary Challenges to Privacy Rights*, 43 N.Y.L. SCH. L. REV. 195, 200 (1999) (describing victims of partial-birth abortion bans as "poor women, and that means disproportionately women of color and young women").

interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of [her] constitutional liberty.”⁹¹ Pro-choice advocates insist that the determination of what constitutes an “accepted medical procedure” must come from the medical community, not legislators, and in this regard, “abortion is no different from any other medical procedure.”⁹² Such polarizing statements are unnecessary to protect the fundamental right to abortion, but serve simply to deprive the public of any meaningful voice in a debate that matters deeply to many Americans. To the extent that both pro-life and pro-choice advocates portray the partial-birth abortion debate as signaling the future viability of *Roe* itself, the debate’s all-or-nothing terms have rendered the middle ground essentially unrecognizable.

B. Gun Control

The battle over gun control, at least in academic circles, lies in the competing collective right and individual right interpretations of the Second Amendment. The collective right theory holds that the Amendment merely gives the states the right to form militias, while the individual right theory holds that the Amendment gives citizens the right to possess guns. The constitutionality of gun control measures turns on the distinction, and adherents to each position defend their ground in absolute terms. To individual right proponents, the collective right theory “is unrealistic, ideologically driven, and too poorly explained by its own adherents to justify its continued *existence* in American jurisprudence.”⁹³ Besides having “been all but orphaned by the legal academy,”⁹⁴ the theory “is not just wrong, but frivolous—something that no knowledgeable person can honestly argue in light of modern research.”⁹⁵ Not surprisingly, the pedigree and future prospects of the individual right theory are presumed to be considerably brighter by the theory’s proponents.⁹⁶

Collective right theorists express a different perspective, concluding that “judged by the conventional criteria of constitutional adjudication, the case for a robust individual right to own firearms enforceable against

91. *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (Stevens, J., concurring).

92. *Massie*, *supra* note 89, at 380.

93. Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71, 73 (2000) (emphasis added).

94. *Id.* at 110.

95. Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 359 (1994).

96. See, e.g., Stephen P. Halbrook, *Personal Security, Personal Liberty, and the “Constitutional Right to Bear Arms”*: *Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 434 (1995) (arguing that right of an individual to possess arms was considered by the Fourteenth Amendment’s framers “as the most fundamental protection for the rights of personal liberty and personal security”).

either the federal or state governments has not been made.”⁹⁷ To gun control advocates, arguments offered in opposition to gun control legislation are based on “myth” constructed by groups like the National Rifle Association (NRA).⁹⁸ The prevalence of guns is an “epidemic” that has “changed the national landscape.”⁹⁹ Those who support the epidemic through an individual right interpretation of the Second Amendment have committed, in the words of former Chief Justice Burger, “fraud on the American public.”¹⁰⁰

Given the public’s views, the debate over whether the Second Amendment guarantees an individual’s right to own guns may be beside the point. Sixty-two percent of Americans oppose banning the possession of handguns by private individuals.¹⁰¹ But regulating that ownership is another matter: 89% of Americans favor a five-day waiting period for gun purchases, 79% favor requiring registration of all handguns, and 68% favor banning the manufacture, sale and possession of semi-automatic assault weapons.¹⁰² Only 9% of Americans think that gun control laws should be less strict than they are today, while 60% think they should be more strict.¹⁰³

Gun rights advocates like the NRA routinely invoke the “slippery slope” argument in challenging the sort of incremental regulations favored by the public—a strategy that is employed in the debates over myriad other social issues, including school vouchers.¹⁰⁴ Contrary to the specter of the slippery slope, Americans seem perfectly capable of supporting reasonable gun control measures without weakening their fundamental opposition to any outright prohibition on gun possession. A politician who hopes to ban the individual possession of handguns through a slow but steady increase in the piecemeal regulation of gun ownership faces a very tough road. In fact, Americans have become more opposed to an outright prohibition even as incremental regulations have been implemented.¹⁰⁵ In ignoring the middle ground clearly prescribed by the public, gun rights advocates have unnecessarily widened the gap between gun control supporters and opponents, choosing ideological entrenchment over social consensus.

97. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 345 (2000).

98. Melissa Ann Jones, Note, *Legislating Gun Control in Light of Printz v. United States*, 32 U.C. DAVIS L. REV. 455, 456 (1999).

99. Sarah Brady, *Working for a Safer America*, 10 ST. JOHN’S J. LEGAL COMMENT. 77, 77–78 (1994).

100. *MacNeil/Lehrer Newshour: Violence in America* (PBS television broadcast, Dec. 16, 1991), quoted in Brady, *supra* note 99, at 82.

101. Gallup survey dated Aug. 29–Sept. 5, 2000, at <http://www.gallup.com/poll/topics/Guns.asp>.

102. *Id.* (survey dated Feb. 8–Feb. 9, 1999).

103. *Id.*

104. See WITTE, *supra* note 22, at 208 (acknowledging vouchers’ ability to “shake up” failing inner-city school districts, but cautioning against “slippery slope” to universal vouchers).

105. See Gallup survey dated Aug. 29–Sept. 5, 2000, *supra* note 101 (tracking increase of opposition to outright prohibition from 36% in 1959 to 62% in 2000).

C. Stem-Cell Research

The debate over government funding of stem-cell research has only recently been joined on any widespread basis, but it has already shown signs of being a future flash point of the culture wars. To some, the “fact that stem cells might be obtained from ‘leftover’ [in vitro fertilization] embryos who will ‘die anyway’ does not lessen their human dignity, nor our duty to respect that dignity.”¹⁰⁶ The images invoked are, at the very least, memorable. One commentator drew an explicit parallel between the Clinton Administration’s proposed stem-cell regulations and the Greek legend of Thyestes, who unknowingly feasted on a pie made from his own butchered children.¹⁰⁷ Others opposed to stem-cell research have invoked the specter of Nazi medical experimentation for the principle that “the utilitarian devaluation of one group of human beings for the alleged benefit of others is a price we simply cannot afford to pay.”¹⁰⁸ We are told that “[t]he prospect of government-sponsored experiments to manipulate and destroy human embryos should make us all lie awake at night.”¹⁰⁹

At the other end of the spectrum, the tone is quite different. Given the legality of abortion in this country, some insist that “the ethical and moral controversies encircling the abortion debate have no standing in the decision to legalize and support fetal tissue transplantation research.”¹¹⁰ Under this view, “the actual transplantation of tissue from dead human fetuses, by itself, should be no more problematic nor objectionable to public policy than dissecting cadavers or transplanting their organs.”¹¹¹

Contrary to the black-and-white rhetoric of both sides, the American public is decidedly ambivalent about stem-cell research. Forty-nine percent of Americans believe stem-cell research is morally wrong, but over 70% believe that it might nevertheless be necessary—including 31% of those who think that it is morally wrong.¹¹² Only 36% of respondents believe that an embryo created in a laboratory should be given the same protection as all other human lives, but a majority opposes funding for research on stem cells derived from embryos that were developed spe-

106. Sharon M. Parker, Comment, *Bringing the “Gospel of Life” to American Jurisprudence: A Religious, Ethical and Philosophical Critique of Federal Funding for Embryonic Stem Cell Research*, 17 J. CONTEMP. HEALTH L. & POL’Y 771, 808 (2001).

107. Thomas John Babbo, *Begging the Question: Fetal Tissue Research, the Protection of Human Subjects, and the Banality of Evil*, 3 DEPAUL J. HEALTH CARE L. 383, 383–84 (2000).

108. Ctr. for Bioethics & Human Dignity, *On Human Embryos and Medical Research: An Appeal for Ethically Responsible Science and Public Policy*, 16 ISSUES L. & MED. 261, 265, 269 (2001).

109. *Id.* at 264.

110. Jose L. Gonzalez, *The Legitimization of Fetal Tissue Transplantation Research Under Roe v. Wade*, 34 CREIGHTON L. REV. 895, 924 (2001).

111. *Id.* at 897.

112. The Gallup Organization, *Update: Americans’ Views on Stem Cell Research* (Aug. 14, 2001), available at <http://www.gallup.com/poll/releases/pr010814.asp>.

cifically for research.¹¹³ It may not be surprising, then, that President Bush's middle-ground approach—under which federal funding would be used for research on existing stem-cell lines, but not for future research that would destroy additional embryos—garnered 60% support.¹¹⁴ Supporters and opponents of government funding would be wise to take these numbers into account as they chart their future strategies.

D. *The Relevance and Limitations of Public Opinion*

To many, juxtaposing the rhetoric used by policy advocates against the middle-ground sentiment of the public may appear to be an intriguing, but utterly irrelevant exercise. To a certain extent, the American legal system embodies an intentional disconnect between public opinion and rights-based discourse. And in most circles, this is considered a good thing. After all, as reflected by the history of the lynch mob in this country, “public sentiment and legal judgment have a complicated and often uneasy relationship.”¹¹⁵ It almost goes without saying that “[s]ome decisions on matters of faith or private conscience must be immunized by judges from majoritarian political resolution so that individuals may be self-governing on such matters one by one.”¹¹⁶ Samuel Pillsbury, for example, sensibly points out that “[t]he moral legitimacy of slavery or abortion or the death penalty or gay marriage cannot be determined by a simple public opinion poll any more than television ratings determine the aesthetic quality of the shows rated.”¹¹⁷

But surely there is a material difference between aesthetic quality, which exists strictly in the eye of the beholder, and moral judgment expressed through society's laws. At a minimum, the policy-making and policy-influencing elites who banter over the most contentious issues should be informed in their debates by the deeply held beliefs and values of the public. To the extent that there is a collective aspect of the judgment underlying lawmaking, social consensus should at least play a part.

But is informing the debate the extent of public opinion's function? If so, the function is far from dispositive, for “[b]eing informed by the views of the people is not the same as being made accountable to them.”¹¹⁸ Nor should it be, for majority rule is an undeniably inappropriate ground for the resolution of many rights issues.¹¹⁹ But in all of the

113. *Id.*

114. *Id.*

115. Samuel H. Pillsbury, *Stories, Law & Hard Reality*, 4 GREEN BAG 2d 219, 222 (2001).

116. Kathleen M. Sullivan, *Epistemic Democracy and Minority Rights*, 86 CAL. L. REV. 445, 450 (1998).

117. Pillsbury, *supra* note 115, at 222.

118. Sullivan, *supra* note 116, at 448.

119. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). It is worth noting, however, that public opinion has been expressly considered by courts in certain contexts, *see, e.g.*, *Compassion in Dying v.*

examples discussed above, paying more attention to public opinion would pose no inherent threat to the established individual rights at issue. Among other reasons, the public rarely shows any inclination for dramatic expansion or constriction of existing rights. Instead, the public generally stakes out the middle ground, resisting the tendency shown by many cultural, intellectual, and political elites to entrench themselves in the language of absolutes. In doing so, the public proves itself much more adept than the elites at recognizing the complexities inherent in any debate where cherished values come into direct conflict.

This does not, however, mean that public opinion embodies a reflexive embrace of the status quo, for the particular values and priorities reflected in the public's expressed beliefs often speak volumes about the path by which basic social consensus can be reached on issues that seem hopelessly contentious. If the culture war participants would spend less time trying to shape public opinion, and more time trying to learn from it, they may perceive a workable framework around which to craft a collective course of action.

Attaching greater significance to the public's views does more than simply heighten the political feasibility of a proposed course of action. It effectively brings the public into the debate, energizing them with a newfound knowledge of their own relevance to the important policy decisions of our time. Too often, the culture war debates reflect an advocacy of the extremes, encompassing the views of only those Americans who occupy either end of the ideological spectrum. Those who occupy the vast middle are relegated to being increasingly passive observers of a debate presented in terms with which they do not identify. They are unheard, alienated, and eventually apathetic. By contrast, to the extent that individuals see their own priorities and values reflected in real-world policy, they gain a sense of connection with the broader, frequently impersonal, and seemingly distant society. In this regard, advocacy groups have the opportunity to function as mediating structures—forming a bridge between individuals and the wider world—if they resist seeking out new battlefields for the culture wars, and find new energy for building common ground.

Washington, 79 F.3d 790, 810–12 (9th Cir. 1996) (discussing increased public approval of doctor-assisted suicide before holding that ban on assisted suicide violated due process rights), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997), and is thought to be the motivation for many Supreme Court rulings in recent years. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336 (1998) (“It might strike many as paradoxical, to say the least, that the scope of constitutional protections has been defined so often with reference to the preferences of popular majorities. Yet, that has been the result of the Court’s adherence to the ‘majoritarian paradigm’ that came to dominate constitutional law in the latter half of the twentieth century.”).

IV. CONCLUSION

Terry Moe has replaced the winner-take-all collision of freedom versus equality with a school voucher proposal built on both freedom and equality. In doing so, Moe has demonstrated how members of our pluralist democracy—even those members with strongly held beliefs—can loosen the logjam of rights-based debates without loosening their claims to the rights themselves. Consciously or not, Moe has contributed to a workable rights-based discourse in post-modern America. He has not watered down his views in order to make them agreeable, and he has by no means brought closure to what will likely continue to be a rancorous debate over the future role of vouchers in this country. He has, however, made a sincere effort to expand his understanding of vouchers to encompass the hopes and fears reflected in public sentiment. And, crucially, he has allowed his new understanding to impact not only the tone of his advocacy, but the substance of his proposals, thereby elevating the increasingly neglected middle ground. This is a valuable lesson not just for participants in the school voucher debate, but for those on both sides of the culture wars who have embraced the unforgiving language of absolutes instead of engaging the public in the process of building social consensus.