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Education Reform at the Crossroads: Politics, the Constitution, and the Battle over School Choice

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EDUCATION REFORM AT THE CROSSROADS: POLITICS, THE CONSTITUTION, AND THE BATTLE OVER SCHOOL CHOICE

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Let's face it – Toledo, Ohio in March (before the Mud Hens' season opens) does not spring to mind as a convention or conference hotspot. In fact, one of the participants in the "Education Reform at the Crossroads" symposium, Michael Meyer — a New Yorker — quipped that, for the amount the conference organizers spent to fly him and his fellow presenters to Toledo's not-quite-a-hub airport, they could just as easily have brought him to Paris. Now, not to malign (at least, not unfairly) a historically important American city,[1] but the typical law- or policy-oriented confab depends for its success on the prospect of at least one round of golf in the sun or maybe a five-star meal at the Dean's expense. It is, therefore, a powerful testament to the importance of education reform, and to the commitment of both supporters and opponents of school choice, that the Federalist Society's Religious Liberties Practice Group and the Stranahan National Issues Forum were able last March to attract to Toledo a blue-ribbon array of speakers and participants, some of whose remarks are excerpted in the pages that follow.

All kidding aside, my fellow conference organizers[2] and I knew at the time – and we have been proved correct in recent months[3] — that

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[1] No less a legal superstar than Brendan Sullivan got in trouble not long ago by disparaging in open court the creature-comforts of Toledo, calling it "the worst place in the world." *See* Ann Gerhart and Annie Groer, *Wholly Toledo: A Tour, Mr. Sullivan?* THE WASH. POST (March 30, 1999), at C3. It certainly isn't. *See Letters to the Editor, Holy Toledo,* THE WASH. POST (April 12, 1999), at A22 ("Unlike the District, Toledo is not full of uptight defense lawyers who can't bear to be away from the power set and Capital Grille for more than a week.").

[2] The success of the conference was due to the efforts of Leonard Leo and his staff at the Federalist Society; Ted Cruz, formerly with the Washington, D.C. law firm of Cooper, Carvin & Rosenthal and now with Gov. George W. Bush, Jr.'s presidential campaign; and Kory Swanson of the Stranahan National Issues Forum.

[3] *See, e.g.*, Simmons-Harris v. Zelman, 54 F. Supp.2d 725 (N.D. Ohio 1999) (enjoining Cleveland's school-choice program on the ground that it almost certainly violates the Establish-

northern Ohio (even in March) was an eminently appropriate setting for a discussion of the prospects for genuine reform in education, for parental empowerment, for young children's freedom, for equality, and for hope.

Notwithstanding the accusations muttered occasionally about its being ground zero for an imagined "vast right-wing conspiracy,"[4] the Federalist Society, in accord with its usual practice, worked with the Stranahan Forum to organize a debate and a dialogue, not a cheerleading session. The anti-choice positions were ably and well — if not equally — represented on the podium and among the attendees. Dr. Myron Lieberman, a longtime critic of the national teachers' unions,[5] was a presenter, as was Mr. Dal Lawrence, former President of the Ohio Federation of Teachers and a respected leader in public-education circles. Clint Bolick, lead litigator for the libertarian Institute for Justice and a passionate defender of school choice in the courts,[6] framed school choice as the "third great civil rights movement,"[7] while Michael Meyers of the New York Civil Rights Coalition, the scourge of those who spout cant on race, whether from the right or the left,[8] labeled himself the "heretic" and insisted that school-choice supporters are more interested in "self-interest" than civil rights. Jeffrey Sutton, former Ohio State Solicitor, and U.C.L.A.'s Eugene Volokh, a prolific First Amendment scholar,[9] squared off against Steven Shapiro

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ment Clause); Simmons-Harris v. Zelman, 120 S. Ct. 443 (1999) (staying district court's injunction); Simmons-Harris v. Zelman, 72 F. Supp.2d 834 (N.D. Ohio 1999) (striking down Cleveland's program as an Establishment Clause violation).

[4] *See, e.g.*, George E. Curry, Editorial, *Hillary Was Right*, EMERGE (Oct. 1999); Garry Wills, *Cabals and Courtiers*, THE AUSTIN-AM. STATESMAN (July 27, 1998), at A9; Don Van Natta, Jr. and Jill Abramson, *How a Secret Clique of Lawyers Kept Jones' Case Alive and Took it to Starr*, PITT. POST-GAZETTE (Jan. 24, 1999), at A13; Marc Fisher, *Starr Warriors: Behind the Special Prosecutor, a Battle-hardened Brigade*, THE WASH. POST (Feb. 3, 1998), at B1; *cf.* Dick Thornburgh, *Federalist Society Hardly Qualifies as a Fifth Column*, THE DETROIT NEWS (June 30, 1999), at A11.

[5] *See* MYRON LIEBERMAN, THE TEACHER UNIONS (1997); MYRON LIEBERMAN, PUBLIC EDUCATION: AN AUTOPSY (1994).

[6] *See generally, e.g.*, Steven A. Holmes, *The Political Right's Point Man on Race*, THE N.Y. TIMES (Nov. 17, 1997), at A1; George Will, *Now Liberals Block School Door*, THE CHICAGO SUN-TIMES (Dec. 5, 1998), at 21.

[7] *See infra*, Speech of Clint Bolick.

[8] *See, e.g.*, Michael Meyers, *The Race Card Cuts Both Ways*, THE N.Y. POST (July 13, 1999), at 35; Michael Meyers, *Don't Cheer the Bleeding Hearts — Our Schools Need Truth Tellers Like Badillo, not Excuse Makers Like Crew*, THE N.Y. POST (June 8, 1999), at 41; Michael Meyers, *The Board of Education: Seven Bumbling Dwarves*, THE N.Y. POST (Sept. 29, 1998), at 25.

[9] *See, e.g.*, Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS, & PUB. POL'Y 341 (1999).

of the American Civil Liberties Union and Elliot Mincberg[10] of People for the American Way, both outspoken school-voucher opponents, in the courts and in the public square.

The conference's four panels tackled the education-reform and school-choice questions from a variety of perspectives — one panel, led by Cleveland's indefatigable councilwoman and education revolutionary Ms. Fannie Lewis, explored the history and increasingly visible politics of the school-choice debate — in particular, the marked increase in support for school choice among African Americans[11] — while another group focused on the constitutionality of including religious schools in voucher programs and on the historical connection between anti-Catholic nativism and the common-school movement.[12] A third panel discussed framing school-choice as a "civil rights issue"[13] and the fourth — which included political scientist and education researcher John Witte[14] and Brother Bob Smith, the president of Milwaukee's legendary Messmer High School[15] — addressed more specifically the available evidence of the success — or lack of it — of school-choice programs and charter schools.

The *George Mason Civil Rights Law Journal* has done a service by re-printing some of the statements given at the "Education Reform at the Crossroads" Conference. The diversity of views these statements reflect, and the variety of approaches the different speakers took to the topic, made the Conference, and make this issue of the *Journal*, a valuable addition to the education-reform debate.[16]

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[10] *See, e.g.,* Carole Shields and Elliot Mincberg, *Public Money for Religious Schools is Still Unconstitutional*, THE CAP. TIMES (Nov. 17, 1998), at 11A.

[11] *See, e.g.*, James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. TIMES (Dec. 27, 1997), at A1 (72% of black parents polled supported school vouchers); Rev. Floyd H. Flake, *How Do We Save Inner-City Children?* POL'Y REV. (Jan-Feb. 1999), at 48; Nina Shokraii Rees, *School Reform*, AM. ENTER. (Nov. 1998), at 60 (a 1997 poll found that 87% of African Americans between the ages of 26-35 support school choice).

[12] *See generally, e.g.*, JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 145-179 (1999).

[13] *See generally*, Sol Stern, *School Choice: The Last Civil Rights Battle*, CITY J. (Winter 1998), at 26.

[14] *See, e.g.*, Prof. John Witte, *The Milwaukee Voucher Experiment*, 20 EDUC. EVALUATION AND POL'Y ANALYSIS 229 (Winter 1998).

[15] *See* Ben Wildavsky, *Vouchers, Go Forth*, NAT'L J. (Nov. 14, 1998) ("Rigorously traditional in both its standards of discipline and its curriculum, the school sends four-fifths of its graduates on to college . . . And what has happened at Messmer exemplifies what many advocates of school choice would like to see happen around the country.").

[16] The remarks of some of the speakers mentioned in this introduction have not been reprinted.

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One statement in particular — which is reprinted here — is of special interest. Professor Joseph Viteritti's remarks provided a "preview of coming attractions" for his then-unreleased-but-now-in-stores-everywhere book, *Choosing Equality: School Choice, The Constitution, and Civil Society.* This excellent book wonderfully re-frames the terms of the choice debate, shifting the focus from competition and efficiency to themes of racial equality and civil society.[17] Viteritti grounds the case for choice not in the free-market theories of Milton Friedman, but in the soaring rhetoric of *Brown v. Board of Education*[18]:

> [Education] is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably expect to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.[19]

Choice, then, is not simply about jump-starting hidebound education bureaucracies. It is, on this view, about making good on *Brown*'s promise – a promise that remains (not for lack of spending or legislating) unfulfilled.[20]

As Professor Viteritti puts it, framed as an equality issue, the case for school choice is grounded in four powerful, but simple, points: (1) "some people have it [*i.e.*, middle-class suburbanites and wealthy city-dwellers] and some don't"; (2) "whether one has it or doesn't is very much a matter of class"; (3) "those who don't have it, want it"; and (4) "those who don't have it, need it." So framed, the "pro-choice" defense of vouchers would seem to occupy the moral high ground, demanding better opportunity for poor children in the face of govern-

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[17] *See generally*, Richard W. Garnett, *The Justice of School Choice*, THE WKLY. STAND. 34-36 (Dec. 13, 1999) (reviewing JOSEPH VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)).

[18] 347 U.S. 483 (1954).

[19] *Id.* at 493.

[20] *See* Viteritti, *supra* note 13, at 23-52.

ment monopoly and entrenched, self-interested teachers' unions. It is, perhaps ironically, the opponents of choice who today embrace the unsettling proposition that millions of poor children must be held hostage in troubled and dangerous schools, lest the institution of The Public School be undermined or the mission of religious schools advanced or endorsed.[21] Professor Viteritti's remarks — as well as those of other Conference participants — make the point, but it is worth highlighting here: School choice is simple justice.[22]

Lurking beneath the surface of all discussion of and litigation about school choice — and sometimes at the center of such discussions[23] — is our Nation's 150 year tradition of suspicion and, occasionally, outright hostility, toward Catholic schools. Scholars are increasingly sensitive to the fact — and it is a fact — that America's "common school tradition" owes as much to religious prejudices and nativism as it does to the ideals embraced in the rhetoric of Dewey and his modern followers. The common-school movement, we now know, was as much about Americanizing immigrant Catholics and Jews and venting the day's widespread religious anti-Catholicism — what Arthur Schlesinger, Sr. once called "the deepest bias in the history of the American people" — as it was about creating capable and self-governing citizens.[24]

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[21] *See generally*, Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 375, 385-392 (1999) (discussing the "crumbling argument" against school-choice programs that include religious schools and the anti-Catholic roots of that argument).

[22] *See* John E. Coons, *School Choice as Simple Justice*, FIRST THINGS (Apr. 1992), at 15-16.

[23] *See, e.g.*, David Boldt, *Editorial: School Choice and Anti-Catholicism*, PITT. POST-GAZETTE (June 16, 1999), at A23 ("It has been said that anti-Catholicism is the anti-Semitism of the liberal intellectual. And, as anyone who has dealt with the issue learns, anti-Catholicism runs like an underground river beneath the public debate on school choice, inside and outside legislatures. In my own discussions of school choice, I have often gotten responses like, 'I just don't want the Catholics to get all that money,' spoken without a hint of the implicit bigotry."); William O'Donell, *Letter to the Editor: If Catholics Are in the Political Arena They Should Expect Criticism*, PITT. POST-GAZETTE (June 23, 1999), at A16; Andrew M. Greeley, *Wisconsin Voucher Decision Fuels anti-Catholicism*, RALEIGH NEWS & OBSERVER (June 26, 1998), at F2.

[24] For a detailed account of this history, see Brief of the Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners, Mitchell v. Helms, 119 S. Ct. 2336 (1999) (No. 98-1648) (on file with author). *See also*, CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925 (1987); VITERITTI, *supra* note 13, at 145-179; Edward M. Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*," 46 EMORY L.J. 43 (1997); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38 (1992).

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I mentioned above that, notwithstanding its absence from the list of policy-wonk hotspots, the University of Toledo was an especially appropriate venue for a searching examination of the school-choice issue. This is true, if only because Toledo is not far from Cleveland and, at the time the Conference took place, everyone on both sides of the school-choice fence was nervously awaiting a decision from the Ohio Supreme Court on the fate of Cleveland's school-choice experiment.

Due in no small part to the tenacity of Conference participants Ms. Bert Holt and Cleveland Councilwoman Fannie Lewis,[25] Ohio enacted in 1995 a Pilot Project Scholarship Program which provided to poor children in failing Cleveland-area schools modest vouchers that could be used to attend participating public, private, or religious schools. After a few predictable years of litigation, the Ohio Supreme Court ruled that the inclusion of religious schools in the general, neutral Program did not violate the First Amendment.[26] Within just a few weeks, voucher opponents were back in court — this time, the United States District Court — re-submitting the same Establishment Clause arguments against the re-enacted Program the Ohio Supreme Court had already rejected.[27]

Just one month later, Judge Solomon Oliver blocked religious-school participation in the choice program, holding that the voucher opponents' challenge had a "strong likelihood of success" because the "government cannot provide for scholarship assistance to students which supports religious instruction or indoctrination."[28] Judge Oliver

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[25] *See* Amity Shlaes, *A Chance to Equip My Child*, THE WALL ST. J. (Feb. 23, 1998), at A22.

[26] Simmons-Harris v. Goff, 711 N.E.2d 203 (1999). The court went on to invalidate the program on technical, state-law grounds.

[27] The argument that religious-school participation in a neutral school-choice program violates the Establishment Clause was also rejected by the Wisconsin Supreme Court in Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602, *cert. denied*, 119 S. Ct. 466 (1998); *see also* Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (1999), *cert. denied*, 120 S. Ct. 283 (1999). The Ohio court's holding seems consistent with relevant Supreme Court precedent. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1985); Rosenberger v. Rector & Visitors of the Univ. of Virginia., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). *But see* Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 329 (1999); Bagley v. Raymond School Dept., 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999).

[28] Simmons-Harris v. Zelman, 54 F. Supp.2d 725, 732 (N.D. Ohio 1999).

admitted that his decision, issued just 18 hours before the new school year opened, would cause substantial disruption but insisted there was "no substantial possibility that [he would] ultimately conclude in their favor."[29] Defenders of the choice program appealed immediately to the Sixth Circuit and, after weeks went by with no word, the State of Ohio asked the Supreme Court for an emergency stay of Judge Oliver's ruling. On November 5, by a 5-4 vote, the Supreme Court granted that request.[30]

The Supreme Court's short stay order obviously created no headline-grabbing constitutional precedent. It "merely" allowed several thousand poor children in Cleveland to stay in their chosen schools and fanned hopes that the Court will eventually permit meaningful educational reform. Precedential or not, the short order suggests that the Court would, if necessary, adhere to its recent rulings that the Constitution requires neutrality, not hostility, toward religious schools.[31] Of course, even more telling than the five Justices' vote to grant the stay could be the other four Justices' decisions to register their disagreement in public. It might not be possible to know whether Justices Kennedy and O'Connor will conclude that the Court's recent Establishment Clause cases permit religious schools to participate in choice programs, but it is plain as day that the four-Justice, strict-separationist coalition will hold when the time comes. Right or wrong, Judge Oliver's stay order might have forced the Supreme Court's hand.

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It was an honor to be a part of the "Education Reform at the Crossroads" symposium, and special thanks are again owed to all the distinguished and dedicated advocates and activists — choice supporters and opponents — who skipped Paris to talk about education in

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29 *Id.* at 741.

30 Zelman v. Simmons-Harris, 120 S. Ct. 443 (1999) ("Treating the application as a request for a stay of the preliminary injunction, the application for stay presented to Justice Stevens and by him referred to the Court is Granted. The preliminary injunction entered by the United States District Court for the Northern District of Ohio, case No. 99 CV 1740, on August 24, 1999, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Sixth Circuit. Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer would deny the application for stay.").

31 *See id.*

Toledo. As for the fate of school choice, in Ohio and elsewhere, stay tuned.[32]

[32] On December 20, 1999, Judge Oliver granted the choice opponents' motion for summary judgment, and held that the Ohio Pilot Scholarship Program violated the Establishment Clause. Simmons-Harris v. Zelman, 72 F. Supp.2d 834 (N.D. Ohio 1999). He concluded: "Because of the overwhelmingly large number of religious versus nonreligious schools participating in the Voucher Program, beneficiaries cannot make a genuine, independent choice of what school to attend. A program that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools." *Id.* at 865. Judge Oliver's ruling – which, in my view, is clearly wrong for many reasons, not the least of which is its mangling of Supreme Court precedent – has been stayed pending appeal to the United States Court of Appeals to the Sixth Circuit. As of the time of this writing, the case is set to be briefed in that court in the Spring of 2000. It appears likely, then, that the United States Supreme Court will have another chance to consider the Ohio Program.