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Introduction to Symposium: Educational Choice: Emerging Legal and Policy Issues

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Introduction to Symposium: *Educational Choice: Emerging Legal and Policy Issues*

American educators and policymakers generally acknowledge a peaceful, profitable co-existence between public and private education, which lends itself to an overall healthy national educational environment. There are occasions, however, when the nation's private and public educational interests seem at odds. On such occasions, the law acts not only as a moderator of differing interests, but places them in a larger context of constitutional and social values not exclusively linked to educational quality. One such contentious arena of differences, the concept of public money providing vouchers for private schooling, was born in the 1950s as one of the attempts by economist Milton Friedman to apply free-enterprise principles to non-economic institutions. Since then, the voucher concept has evolved, developed, mutated, and grown in strength—from an idea in Friedman's head to its implementation in a variety of forms and places throughout the nation. In so doing, it has met or failed a number of legal challenges in its course.

One of the more recent state voucher initiatives gained national attention for its breadth and, some would say, audacity. In February 2007, the Utah State Legislature passed two educational-choice bills, which promised a vouchers-for-private-schools program, nationally unprecedented in its scope. Under the Utah laws as conceived, all current public school students would be entitled to a voucher, the value of which would be graduated according to family income and redeemable at any participating, accredited private school, secular or sectarian. Voucher values would range from $3000 per child for the lowest-income families to $500 per child for those with the highest incomes.

Passage of these bills created a furor and debate throughout the state over educational values and priorities. Threats of judicial challenges to the voucher laws were tempered and delayed by the state attorney general's reading that they would likely pass state constitutional muster and by the lieutenant governor's determination in April 2007 that voucher opponents had gathered sufficient signatures on a petition to require a referendum on the question.

Meanwhile, educational professionals and reformers from throughout the country sat up and took notice, and, for a time, all eyes were on Utah's school choice initiatives. Observers, scholars, and interested parties raised questions: given the eligibility of religious schools to receive the state vouchers, would such a broad entitlement, linked more to parental and student values than to widespread patterns or prospects of public school failure, survive challenges under the U.S. Constitution? The U.S. Supreme Court, in its landmark 2002 decision, *Zelman v. Simmons-Harris*,[1] allowed a liberal construction of voucher entitlement laws that brought sectarian schools within their embrace. In *Zelman*, however, unlike the schools in Utah, the Cleveland inner-city schools had been deemed virtual disasters, failing to meet even minimal academic standards for large numbers of students.

Assuming, however, that the Utah laws could pass U.S. constitutional tests—and that assumption was widespread—would they, as the attorney general suggested, survive a constitutional challenge in Utah state courts? Some thought not. After all, the Utah Constitution, like those of so many other states, specifically prohibits public school appropriations from *directly* supporting sectarian institutions.[2] Other states with strong voucher movements and similar constitutional provisions (often modeled on the nineteenth century's failed "Blaine Amendment" to the U.S. Constitution), were as interested in how Utah would answer this question as were many Utahans.

The question also remained, even if school vouchers made good law, of whether they make good public policy. Given the furor of the debate, not only within the state but—as soon highlighted by the Utah debate—throughout the country, Brigham Young University Law School, its International Center for Law and Religion Studies, and the Brigham Young University McKay School of Education brought together many of the nation's constitutional and education law experts to attempt to give light to the voucher question. In a two-day forum held in October 2007, a number of top scholars and lawyers, some who had litigated the voucher question before the U.S. Supreme Court, came together to discuss and debate the implications of Utah's legislation for the national school-choice movement.

1. 536 U.S. 639 (2002).
2. UTAH CONST. art. X, § 9.

Symposium sponsors made every effort to execute a balanced program of voucher proponents and opponents, academics and litigators, attorneys and policy pundits. Their objective was to produce a written record of the debate that would, regardless of the outcome of Utah's referendum, help frame the national discourse and encourage parties on all sides of the voucher issue to promote programs that would meet the highest demands of the law and public interest.

The resulting record comprises this edition of the Brigham Young University Law Review. Those symposium presenters whose articles were solicited and accepted for publication in this Review represent a wide range of opinions on the validity and value of school vouchers. Most, but not all of the authors, are lawyers. Those who are not address, nonetheless, the implications of school-choice law for American political, social, and educational institutions. The following pages summarize the content and arguments of the articles in this volume.

While specifically addressing the state's (now defunct) school-choice proposals, former Utah Governor Dr. Olene S. Walker's introductory piece provides a legal, philosophical, and practical framework through which to regard vouchers more generally. The Governor disfavors them, it is clear. For one thing, in her view, the Utah State Constitution should be read as to limit their application. In declaring that "the legislature shall provide for the establishment and maintenance of the state's education systems" which "shall be free from sectarian control" and, again later, the state may not "make any appropriations for the direct support of any school or educational institution controlled by any religious organizations,"[3] the Utah Constitution, Governor Walker suggests, precludes vouchers for religiously owned or operated schools.

She also argues that by removing from the classroom good students who often act as mentors and role models to their peers, vouchers will have a tendency to undermine public education, a cornerstone of America's democratic way of life. Furthermore, the Governor asserts, the poor would not have been able to afford to attend Utah's private schools on the limited voucher stipend offered anyway, making the law in large measure self-defeating.

3. UTAH CONST. art. X, §§ 1, 9.

In principle more friendly to vouchers, Professor William W. Bassett's article, *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, provides a historical survey of the U.S. Supreme Court's positions in relation to public funding of religious schools. Professor Bassett focuses mainly on the Court's treatment of Catholic schools throughout the years—in cases such as *Everson*, *Aguilar*, and *Mitchell*—and he tracks a diminishing bias against religiously affiliated schools.

Also looking at school choice through a national lens, Professor Douglas Laycock's *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments* examines the Supreme Court's historically shifting position in relation to the twin jurisprudential doctrines expressed in *Everson*: the "no-aid to religious schools" principle and the "nondiscrimination" principle. Rather than ascribing the shift to a change in the Court's makeup, Professor Laycock identifies other factors contributing to this phenomenon.

Having shown under Professors Bassett and Laycock that vouchers have fared quite well under U.S. federal constitutional tests, this volume then logically shifts its focus to state constitutions. In *The Insignificance of the Blaine Amendment*, Professor Steven K. Green argues against the constitutional significance of the failed amendment campaign of 1875. While according the Blaine Amendment due significance as a political and social event, Professor Green disputes the conventional wisdom that the failure of the federal amendment prompted the adoption of the state prohibitions or that it significantly contributed to the development of nonsectarian and no-funding principles. Rather, he sees the Blaine Amendment as a significant exercise in partisan politics, but one that was not designed to significantly change the constitutional rules governing church-state relations or public education. Instead, the Blaine Amendment was viewed by its proponents as simply codifying a constitutional principle that mosr already believed. Professor Green argues that, in light of its limited contribution to the constitutional dialogue, the Blaine Amendment receives "inordinate attention" from scholars and, ultimately, that this fixation on a single event makes us less inclined to appreciate the other influences from history on the srate-funding question and what they might mean for current controversies.

According to Supreme Court litigator Mr. Clint Bolick, in *The Constitutional Parameters of School Choice*, under *Zelman* "the kids won" the first round of the litigation battle for school choice. While he admits ro being a partisan in this debate—he favors all types of school choice and labors strenuously to promote and defend them—here he attempts to be as objective as possible in describing the current state of the law, noting that it is important that policymakers and advocates clearly understand the legal lay of the land, as to be able to ascertain and navigate the realm of the possible.

Although both sides in the litigation battle over school choice have had their victories—and the end is nowhere in sight—according to Mr. Bolick, the threat of litigation should not deter earnest reformers from pushing forward. While a careful review of applicable state constitutional provisions might counsel a difference of approach in some situations—tax credits rather than vouchers in some states and public charter schools in states whose constitutions foreclose private school choice—they provide no reason for reformers to surrender. Even in states thar have adverse precedents, courts can change their minds and new judges may see things differently.

Professors Scorr Ellis Ferrin and Pamela R. Hallam turn the attention to Utah-specific challenges. In *Utah's Voucher Experiment: Some Persisting State Constitutional and Educational Adequacy Concerns*, they discuss issues with the Utah voucher program that they felt were not addressed in the legislative or policy discussions about the bills. They assess the insufficiency of federal anti-discrimination laws as a barrier against the use of public funds by private schools for the dissemination of inappropriate messages, the state and federal establishment clause threats to universal funding of any religious school, and the greater potential that attention to educational adequacy has in meeting the needs of low-income and minority students.

In an assault from the other side of the Utah situation, *Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*, by Misters Daniel E. Witte and Paul T. Mero, supports vouchers by contending that anti-voucher arguments, which gravitare toward an idealized view of the common good, are rooted in a disturbing public school paternalism that tells socio-disadvantaged students that the system was created to benefit them. The authors support their claim by analogy ro the

historical case of General Richard Henry Pratt's paternalistic approach to the education of minorities following the Civil War. They outline similarities between Pratt's ideals and those of modern proponents of government-sponsored education and conclude that greater modes of parental choice, such as school vouchers, enable a society to avoid such paternalism.

Three articles that follow shift the argument from the direct domain of the law and look more carefully at the social and policy implications of laws that might permit educational choice entitlements. In a quantitative analysis of the effects of school voucher programs, Professor Patrick J. Wolf's *School Voucher Programs: What the Research Says About Parental School Choice* draws heavily on research within the social sciences and concludes that almost all reliable studies demonstrate significant student improvement from vouchers.

Quite in contrast, however, in *The Effects of Vouchers and Private Schools in Improving Academic Achievement: A Critique of Advocacy Research*, Professor Christopher Lubienski and Peter Weitzel challenge the use of achievement data in the assessment of vouchers for private schools. After briefly reviewing the history of voucher programs and the role of achievement outcomes in voucher advocacy, they also examine research on student achievement in public and private schools and challenge the claim that private schools are more effective than public schools at raising student achievement. Specifically analyzing the claims of a "consensus" about the effectiveness of voucher programs in improving student outcomes, Professor Lubienski and Mr. Weitzel posit that researchers supported by voucher advocacy organizations use flawed methodology, misrepresent the findings of other research studies, and selectively ignore studies that contradict their claims. In an effort to rebut such studies, they examine and present the results of recent large-scale studies regarding student achievement in public and private schools that suggest that public schools do remarkably well in comparison to private schools when student background is considered.

Professor David E. Campbell turns the argument around and assesses a domain in which public schools have traditionally been deemed to hold an advantage. His article, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, draws upon previous literature to define the specific

purposes of civic education and to show how civic instruction contributes to civic involvement. In so doing, he concludes that civic education facilitates future participation in political activity by cultivating community service, civic skills, political knowledge, and political tolerance. Because many advocate public schooling as the sole means of creating an informed and engaged electorate, Professor Campbell addresses the effectiveness of public versus private schools in teaching civil involvement. Using data from a large national survey of parents and adolescent children, his paper analyzes the effects of public and private education on community service, civic skills, political knowledge, and political tolerance and concludes that students in private schools generally perform better on multiple indicators of civic education. He addresses what these results mean for the civic consequences of voucher programs and recommends further empirical studies with a special focus on charter schools.

In one of two concluding pieces written from opposing perspectives, lawyer-historian Professor Paul Finkelman contributes *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities.* Professor Finkelman's article places the current debate squarely in the historical context of church-state and education contentions. Consequently, he concludes that school-voucher programs tend to be motivated by desires to divert tax money to religious ends, and thus should be seen as an unconstitutional establishment of religion, unwise for policy as well as legal reasons.

In a rather conciliatory piece, *Beyond the Free Market: The Structure of School Choice*, Professor Terry M. Moe, often considered one of the founding fathers of the voucher movement, steps back from the prevalent arguments both in favor of and against vouchers and other school-choice systems. He observes that, in addition to selecting the "right" system of educational choice, the actual implementation of the system can make a significant difference in its prospects for success. Professor Moe compares the design, implementation, and efficacy of the major voucher programs in Milwaukee, Washington, D.C., Cleveland, and others, and concludes the volume with the assessment that the optimal future of our educational system may lie somewhere between absolute government control and free-market free-for-all.

As will be clear from reading these articles, school-choice questions will continue to face America for some time to come. It is hoped and expected that this volume will bring light to the issues for those who continue the fight for better education throughout the nation. The Utah referendum defeated that state's voucher initiatives—for now at least, say their proponents—but that defeat and the animated discussion that preceded it have done nothing to stop similar initiatives throughout the country from running their course. On the contrary, voucher plans and proposals are alive and well. This issue of the Law Review should provide valuable insights and guidance to those embroiled in the most heated centers of the national school-choice debate.

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