

Audience Participation

Panel One Audience

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AUDIENCE PARTICIPATION

PROFESSOR PERRY: I'm not an expert on this aspect of the non-establishment jurisprudence. Although reasonable people of good faith can certainly disagree about school vouchers as a policy matter and school choice as a policy matter, we are now past the point where reasonable people can disagree as a matter of good faith about whether school vouchers, appropriately designed, are offensive to the establishment laws. Eugene Volokh wrote an essay in the *Notre Dame Journal of Law, Ethics and Public Policy* that essentially blows out of the water every conceivable argument that school vouchers are unconstitutional.¹ So one could be vigorously opposed to school vouchers as a matter of public policy for some of the reasons we've heard today and yet concede that the political process is constitutionally free to put them in place. The making of bad constitutional arguments is a distraction from good policy arguments against vouchers, so as a spectator of the constitutional arguments, to me these arguments are no longer serious.

MR. GREEN: I think that is directed at me. My job would be a lot easier and I could go back to teaching law school if the Court would go ahead and rule on this issue. The Supreme Court, of course, has not, and I take umbrage with your phrasing of that. We deal with what the Court gives us. We deal with the phrasing they give us; we deal with the arguments they give us. Granted, I'm not saying it's purely positive.

My organization, as well as other organizations, is actively involved in the process by helping to formulate and structure the law. But, Professor Perry, I think this is at least a recognized fifty-year tradition the establishment calls "jurisprudence." Whereas I acknowledge the role of lawyers, that they have to be conscious of certain moral obligations, etc., we are also taught in law school that we vigorously defend and represent our clients and our perspectives. If the position is clearly something that is so unrealistic and has no basis in law, that is a different issue,

¹ See Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

but they were talking about a very long-standing constitutional tradition here. The Court has yet to rule on this and has been very equivocal in its statements on these factors.

Therefore, you may be right, and I actually think that if you can come up with a good voucher plan, then there is probably a majority of the justices who would uphold that. I do not see that in practice because the Ohio State Legislator could have required every public school in the Cleveland area to participate in the voucher program to make it truly a universal program, they decided not to do that. They could have done, as Joe said, upped the amount of money in that program. There are many things they could have done, and they have not done that as of yet. So you may be right, but I do not think that the argument is completely over with yet.

MR. VITERITTI: I do not think there is a long-standing separationist tradition in this country. I think that is mythology. I think the high wall of separation is braced in one decade of our history during the 1970s. It was a very confused period also because of the kind of decisions made by the Supreme Court, even beyond *Lemon*² and other decisions. They were very conflicted and did not serve as a serious guide to formulating policy. Nevertheless, we have a long history of accommodation in this country.

When the Constitution was written, most education was in the hand of clergy, and their fees were paid for through local taxes. It did not start out with a separationist tradition, and it is a very complicated history that does not allow us, even looking very carefully, to say that separation is a deep-seated part of our culture, because it's not.

MR. GARNETT: I agree, I suppose, with Professor Perry that I think the constitutional question has been settled. I think the Supreme Court has ruled on this question. I think it is worth adding that a lot of people who might be thought of as sharing my view of the Establishment Clause would still be against vouchers because of a fear that it will undermine the religious mission of religious schools. I think that is a serious argument. I think the constitutional argument is settled. I am sort of convinced, on the policy grounds of helping kids, that choice is a good idea. But, I think we should think long and

² See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

hard, if we care about the distinctive religious mission of Catholic schools, whether the danger of government regulatory strings following federal money would undermine the mission and make the costs not worth the benefit. That could be a serious problem.

PARTICIPANT: I guess I have to say that I do think it is still an interesting question. I think Professor Garnett is correct that the question is about whether education is a public function or family function. If it is a public function, then the question is whether we can create a system of choice that allows the creation of schools that could not be created directly by the public.

If it is a question of families, then I agree that it is largely a settled issue. But, the underlying notion of whether education is about something public or something private is unsettled. I think that leaves the constitutional question open. I do want to observe one thing that a former colleague and current friend of mine who wrote about the abortion question taught me many years ago: that one should always be suspicious of people who make arguments about others who cannot make them for themselves, including children. One of the things that concerns me about the question of school choice, even the use of the word "choice" with respect to the issues about vouchers in charter schools, is that we, those of us who talk about it and who are not the children whom it affects, tend not to talk about the hardest questions. We tend to talk, as Ms. O'Brien suggests, out of self-interest, and that troubles me.

It troubles me that we do not talk about the fact that maybe the problem with the schools that are performing the least well is a problem that takes place within the families of the children who are performing the least well. That problem will go with those children to every school. We do not discuss that because it is scary to talk about parents in low-income families being bad parents. It is scary, politically, to talk about that.

It is scary to talk about the union busting that is implicit, the fact that most schools run with an 80 to 85 percent personal services budget and the only way we can provide an education for considerably less money than the public schools do it is by operating outside the funding requirements of the collective bargaining agreements of the public schools. If we do not like those agreements, and there are lots of reasons not to like those

agreements, we should engage with that on the table in full force frontally, not end run it behind. We should engage the fact that entities like parochial schools, that can also be seen as institutions with obligations that speak to the public good, are really not offering new seats in new schools. They are offering zero marginal cost seats that could be filled right now at almost no cost for the vacant seats that exist in parochial education. I am not aware of any studies anywhere that show the big players in parochial education opening schools or offering to open schools, new seats, and new classes in order to accommodate the vast numbers of children who might benefit from choice.

Those kinds of questions are hard questions to talk about because they involve us talking to each other about ways in which we fail. I am talking about our failure.

GOVERNOR HUGH CARY: Just a point of information. If the gentleman would like to see a study that indicates what can be done in this state, New York State, I invite his attention to the study. I was fortunate enough to head a commission that was charged by the New York State Department of Education to study the impact on the so-called parochial schools on the influx of children who badly needed some kind of education and were put into that school. We found out that there were more children at risk in the parochial schools than in the public schools. Many poor children, language-impaired children, and learning-impaired children were in those schools, but they did not have money to accommodate additional enrollment. That is part of the answer to the question. They do not have the money to accommodate the education. They went there out of desperation and they are in those schools today. That study is six years old. Let me suggest one more thing. This exact issue was joined in 1960 when I went to Congress. I had been out of St. John's for only eight years. We confronted the very same arguments about opening schools and increasing enrollment for quality education. One argument was: if you siphon money out of the public system, it would fail. What did we do?

President Lyndon Johnson signed a bill to put more money into, as far as I know, business education and quality education. We defeated the arguments and were given new federal money. Children in the private schools participated in these programs. I helped write those bills with Adam Clayton Powell, who, I think, was an ardent advocate of civil rights. The bill passed because

Lyndon Johnson saw that it was needed as part of the civil rights program.

This is a civil right we are addressing—giving money to the children and equalizing the program. Listen to Robert Reich. He is an ardent advocate of civil rights. He suggests increasing the monument to public schools and private schools by means of voucher or anything else you want to do.

We feed children by the school lunch program. There is no discrimination. The program is based on need. We found out that kids could not learn because they did not get a hot meal at least once a day. I point to the record of success, all of which dealt with the problem in equity. How do you equalize it? You have to do it with money. If you are going to put up the argument, you will destroy the system and we go nowhere.

We studied the school system in New York City. We found that the least factor in terms of quality education was class size. The capacity of the teacher to handle the class was the single most important item. The argument that we are going to reduce class size has one basis: It is self-interest. It is to increase the number of teachers, qualified or unqualified, to join the union. Let us get rid of those arguments and get down to how we help the union under the Child Development Act theory. Let us find a way with vouchers and cash.

I remind you that the welfare program cashed out and put money in the hands of people in present law. There is now an earned income credit. If you want to help parents educate their children, increase the earned income credit by any amount of money to allow that parent to take the money and find a school to educate the child. You do not need vouchers. The earned income credit will suffice.

MS. O'BRIEN: May I respond very briefly? I think we should look realistically with a sense of history at both our successes and failures in public education. We will understand that requiring the wealthy to educate the poor is a task that requires constant effort that we cannot give up on. We should celebrate our successes in public education and acknowledge that the failures in public education are our failures.

MR. VITERITTI: I think it is an interesting idea. It would require a whole redesign of the school financing system, which I think is something worth discussing, but I do not think we have time today.

There is, however, one point that I would like to make. I think the idea of choice is to let poor parents speak for themselves. There is no one up here who could properly speak for them, or anybody else in this room. The way of choice is to allow poor parents, to make the choices themselves. You go out and visit these schools, meet with parents and you realize that is what they want to do. Part of our problem is we do not think they know enough to make decisions on behalf of their kids. When you speak to them, you realize most of them do.

There are some inadequate parents, a lot of poor and inadequate parents, also a lot of wealthy middle class inadequate parents, too. I do not think parents caring about their children are correlated to economics. I think most parents care about their children, and I think, when given an opportunity, they will do what is best for the children.

They are limited by a lack of resources. Choice is really the liberal state glorified. It is redistributing economics. It is giving people public resources to purchase private services in the public good, which is really the definition of liberal economics. I think it is a full way of empowering parents and not letting us speak for them.