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The Honorable James J. Gilvary Symposium on Law, Religion and Social Justice: A Schoolhouse Divided

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FOREWORD

THE HONORABLE JAMES J. GILVARY SYMPOSIUM ON LAW, RELIGION & SOCIAL JUSTICE: A SCHOOLHOUSE DIVIDED

*Professor Lori Shaw**

A SCHOOLHOUSE DIVIDED: THE DEBATE OVER SCHOOL CHOICE

The schoolhouse—long the center of young lives and the center of communities—has become the center of controversy. Few Americans would dispute that education is vital to the future of our youth and the future of our nation. Almost from its beginning, the nation's laws have recognized the fundamental right to improve one's lot through education.¹ Today, a spirited, and often bitter, debate has arisen as to how best to provide that education.²

Public schools, once the mainstay of the educational system, have come under increasing attack, leading to state-sponsored experiments with school voucher programs³ and charter school programs.⁴ Proponents of such programs fervently believe that the choices they provide not only improve educational opportunities for those students who participate, but spur traditional public schools to improve their performance. Opponents of such programs are just as fervent in their belief that school choice

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¹ See e.g. Northwest Ordinance of 1787 art. III ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.") (available at <http://www.yale.edu/lawweb/avalon/nworder.htm>); Ohio Const. art. I, § 7 ("Religion, morality, and knowledge . . . being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.").

² This debate has generated a recent spate of legal scholarship. See generally Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L. & Pol. 301 (2000); Steffen N. Johnson, *A Civil Libertarian Case for the Constitutionality of School Vouchers*, 10 Geo. Mason U. Civ. Rights L.J. 1 (1999-2000); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 Tulane L. Rev. 563 (2001).

³ See e.g. Ohio Rev. Code Ann. §§ 3313.975-3313.979 (West, WESTLAW through June 6, 2001) (establishing Pilot Project Scholarship Program).

⁴ See e.g. Ohio Rev. Code Ann. §§ 3314.01-3314.20 (West, WESTLAW through June 6, 2001) (establishing "community schools").

initiatives divert desperately needed funds from public schools and may serve as a front for state-sponsorship of religious schools.

On October 16-17, 2001, the University of Dayton School of Law hosted the inaugural Honorable James J. Gilvary Symposium on Law, Religion & Social Justice.⁵ *A Schoolhouse Divided: The Debate Over School Choice*, which focused on the legal, moral, and economic issues surrounding the controversy over school choice. The Gilvary Symposium seeks to promote the public good by providing a forum for a civilized public dialogue, which embraces diversity of thought. Indeed, a central component of the inaugural Gilvary Symposium was its Town Hall Meeting. Each biennial Gilvary Symposium will address a different legal issue with significant moral, religious and social justice implications.

In my view, we could not have selected a more timely and critical issue for our inaugural Gilvary Symposium. On September 25, 2001, the United States Supreme Court granted certiorari in three cases involving a First Amendment challenge to Ohio's Pilot Project Scholarship Program.⁶ For the first time, the Supreme Court will be forced to rule directly on the constitutionality of a school voucher program.⁷ The American educational system stands at an important crossroads.

The essays that follow are representative of the views expressed during the Gilvary Symposium.⁸ Both authors have served on the front lines of the school voucher battle. Elliot Mincberg, vice-president and legal and education policy director for People for the American Way, has served as co-counsel in a number of important religious freedom cases, including the challenge to Ohio's Pilot Project Scholarship Program. Edward B. Foley, former state solicitor of Ohio, briefed and argued the Pilot Project

⁵ The symposium honors the memory of the late James J. Gilvary, a University of Dayton alumnus and chair of our Board of Trustees, whose life embodied our motto, "Learn, Lead, and Serve." Judge Gilvary was a beloved figure within the Dayton legal community. A leader in the fight to make justice available to all, Judge Gilvary served as president of the Dayton Bar Association and the Legal Aid Society of Dayton. He also helped found the Dayton Volunteer Lawyers Project.

⁶ *Hanna Perkins School v. Simmons-Harris*, 122 S. Ct. 23 (2001); *Taylor v. Simmons-Harris*, 122 S. Ct. 23 (2001); *Zelman v. Simmons-Harris*, 122 S. Ct. 23 (2001). The United States Court of Appeals for the Sixth Circuit ruled that the Pilot Scholarship Program "constitutes an impermissible infringement under the Establishment Clause of the First Amendment." *Simmons-Harris v. Zelman*, 234 F.3d 945, 963 (6th Cir. 2000).

⁷ In 1998, the Wisconsin Supreme Court held that Wisconsin's school choice program does not violate the Establishment Clause of the First Amendment. *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998). The United States Supreme Court declined to grant certiorari. *Jackson v. Benson*, 525 U.S. 997, 997 (1998).

⁸ David Mathews, president and chief executive officer of the Kettering Foundation and former United States Secretary of Health, Education and Welfare, provided our opening remarks. Michael Guerra, president of the National Catholic Educational Association, and Bella Rosenberg, assistant to the president of the American Federation of Teachers, were featured speakers. Local education experts, Thomas Lasley, Doug Mangen, Charles Russo, Richard Saphire, Donald Thompson and Judy Whelley, joined in our Roundtable Discussion. To hear an audio recording of the Gilvary Symposium's public events, visit our web site at <http://www.law.udayton.edu/conferences/gilvary>.

Scholarship Program case in both the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit. We hope that these essays provide you with a deeper understanding of the issues surrounding school choice and inspire you to take part in the public dialogue on this issue.

