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A FAVORABLE LEGAL ENVIRONMENT FOR VOUCHER PROGRAMS

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A pressing legal issue at the close of the millennium is the use of public tax dollars to assist parents, especially lower income parents, with the rising tuition at private schools. The idea of vouchers, as they have been commonly named, has been argued in legal circles for decades. However, the 1990s have seen a particular urgency on this issue as several states have passed legislation implementing pilot programs. This article summarizes the current state of the debate, reviews significant legal cases, and highlights the differences among individual states in their interpretation and application of the law. While maintaining that a properly designed voucher program could pass constitutional review by the U.S. Supreme Court, the author argues that broader public policy and justice issues are at stake.

On Monday, November 9, 1998, the United States Supreme Court issued a number of orders, disposing of a total of 124 appeals ranging from capital cases to less substantial matters (67 U.S.L.W. 3321-22, 1998). Each of these cases jockeyed for one of the approximately 150 places on the Supreme Court's argument docket, a chance to be heard and decided by the nation's highest court out of the more than 7,000 appeals filed annually. On that day, the United States Supreme Court declined to hear a case from the Wisconsin Supreme Court involving a challenge to the Milwaukee parental choice program (*Jackson v. Benson*, 1998). Under the Court's rule of procedure, four of the nine justices must vote to hear a case to add it to the docket. Only one justice expressed any opinion and only in that one case: "Justice Breyer would grant [the petition]" (*Jackson v. Benson*, 1998). On the calendar of events in the United State Supreme Court, this action is among the most trivial, and the Court simply decides not to hear a case. However, the educational program

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at issue, representative of a class of programs under consideration in more than a dozen states in the last 18 months, is a critical concern.

The voucher question, illustrated by the Milwaukee program, is a serious and complex public policy question. Millions of dollars of public resources and the educational fate of thousands of school children across the country are at stake. This kind of case, it would seem, would be ideally suited for the United States Supreme Court to resolve. More than that, both opponents and proponents of the program asked the Court to review the case and settle the issue of constitutionality. Briefs were filed from public interest groups across the country urging the Court to hear the case. But it didn't. This procedure did not affect the legal merits of the action of the Wisconsin Supreme Court.

The Court believes in state experimentation, and on more than one occasion has referred to the states as "a legal laboratory" in which social experimentation and new ideas may be tried. The Court also recognizes that, in a country as richly diverse and pluralistic as the United States, no one answer can apply to every set of circumstances. Indeed, on broad public policy issues, the Court often would prefer that the states initially attempt to resolve a problem, thereby building a record of relevant social facts for future applications. In medical decision making, for example, the Court has confirmed that the diversity of approaches in the states needs to be encouraged (*Cruzan v. Director*, 1990; *Washington v. Glucksberg,* 1997).

At the same time, the Court is aware of its role as an important public institution having a constitutional obligation not to allow states to experiment in areas where experimentation is not possible. Put another way, when a particular kind of action is presumptively unconstitutional, the Court has ruled in similar circumstances that the states should not be allowed to experiment. To take one example, the Court's involvement in abortion, criticized by many, is one sign of its willingness to deny states power where the Court believes the Constitution provides otherwise, at least under certain circumstances. Taking this presumption one step further, one can speculate that if the Court believed that voucher programs as illustrated by the Milwaukee program were presumptively unconstitutional, it should have granted the request to hear the case and ruled accordingly. Thus, one can seek some comfort that, under some sets of circumstances, vouchers can be constitutional. And, in an appropriate case, the Court will so rule based on the context of the current debate and an application of the developments in the Court's recent jurisprudence. Both will be examined here.

CONSIDERATIONS FUELING PUBLIC DEBATE

Private industry and leading economic theorists have pointed out the imperfections in public education and the inequality in education financing, shortcomings which they believe will be mitigated by expanding the range of

competition among schools through certificate or voucher programs. A number of legislative programs have moved forward to permit parents a greater range of educational opportunities, allowing for enrollment across public school district lines and educational choices that now include magnet and charter schools, most of which are funded through public revenue. In many programs, the parents have been given access to the per pupil share of the state's educational budget to give them the ability to spend those resources at a chosen school. These programs have engendered a great deal of acrimonious debate. The goal of some private economic theorists is to level the playing field and allow students to find the best educational places among the various educational institutions. In turn, schools would be more competitive. Eliminating religious schools from the equation substantially diminishes the range of choice because religiously affiliated education is the largest nongovernmental piece of the educational pie. Although the idea of vouchers or certificates has been under consideration for several decades, the involvement of private economic and industrial entities as their champions is relatively recent.

There is renewed interest in promoting competition among schools. As in the private industry model to which some economists and other analysts were drawn, many believed it possible to stimulate schools to do better by improving the level of competition between public and private schools. This involved, for some, creating a market situation, breaking the "monopoly" of public education. To fuel this competition there must be available a range of choices, which includes religious schools because the absence of religious schools creates a less than honest system of choice. In Milwaukee, for example, the first set of school choice initiatives did not include religiously affiliated schools. The program was championed by an African American state legislator who strongly believed in expanding educational opportunities in the city. After that program survived its state constitutional challenge, the program was amended to include religiously affiliated schools, thereby expanding the number of places available for students in Milwaukee (citing *Davis v. Grover*, 1992; *Jackson v. Benson*, 1998). Whether concern is focused on competition, fairness, funding equity, or redistribution of resources, school choice initiatives have grown dramatically in the last few years. In the end, the school choice system may illustrate the difference between strong schools and weak schools. Strong schools, regardless of resources, have involved and committed parents. School choice maximizes, in theory and in practice, the ability of parents to be personally committed to a school.

Another important development of the current debate has been that other programs involve customer choice in the delivery of public services. In 1990, for example, Congress passed legislation to create a comprehensive child care program. A key component of that program was issuance of a child care certificate to a qualified parent redeemable at any eligible child care provider,

regardless of the provider's religious affiliation (Child Care and Development Block Grant, 1990). There have been no judicial challenges to the implementation of the child care certificate program. Notwithstanding the fact that many programs occur in religiously affiliated schools, many believe that providing child care is a public welfare function, not an educational one, not readily subject to the rigid body of law minimizing governmental involvement with religion (*Meek v. Pittenger*, 1975). By all accounts, the child care program is working quite well.

Another example is the "charitable choice provision" in welfare reform legislation passed by Congress in 1996 as a comprehensive overhaul of the federal welfare system. In providing that the preponderance of welfare services be delivered at the state level, funded by federal block grants to states, Congress added an important feature (Personal Responsibility and Work Opportunity Act, 1996). Section 104 allows for the involvement of religiously affiliated social service providers in the delivery of welfare services. There is little evidence, however, supporting whether the program of charitable choice in fact delivers the kind of quality services that its proponents promised. Nonetheless, the Supreme Court has indicated that the mere inclusion of religiously affiliated providers as possible participants in the delivery of social services does not, by itself, invalidate the program (*Bowen v. Kendrick*, 1988). Charitable choice, although still a subject of much discussion, has an established foothold in the public consciousness in the delivery of social services.

Educational choice has always been a part of the educational establishment. In fact, in some parts of the country, public school districts do not have high schools and those districts have made other arrangements for educating secondary school students, such as issuing vouchers to parents to allow them to purchase high school education in an accredited secondary school. In Maine and Vermont, however, parental efforts to include religious high schools in these programs were rebuffed on state (*Chittenden School District v. Vermont Department of Education*, 1999) and federal constitutional grounds (*Bagley v. Raymond School District*, 1999). In other instances, privately funded voucher programs began in different urban areas allowing for the attendance of qualified students at private and religiously affiliated schools. Privately funded scholarship programs are operating in Indianapolis and New York City, for example. Whatever the reason, school choice has become part of the political landscape and an educational reality throughout the country.

FEDERAL CONSTITUTIONAL REVIEW

In 1973, the Supreme Court ruled in two cases from New York and Pennsylvania that tuition reimbursement programs designed for parents whose children were enrolled in private schools were unconstitutional (*Committee for Public Education v. Nyquist*, 1973; *Sloan v. Lemon*, 1973). These decisions came on the heels of 1971 cases holding that direct cash assistance to support religiously affiliated primary and secondary schools in various parts of the United States was an unconstitutional subsidy to religion. The Court found that because of the overtly religious mission of the schools it was not constitutionally permissible to aid the secular education provided in these schools without at the same time aiding the religious mission (*Lemon v. Kurtzman*, 1971). In *Lemon*, the Court held that for a law to pass muster under the Establishment Clause it must (1) have a secular purpose, (2) neither advance nor inhibit religion as its primary effect, and (3) avoid excessive entanglements between religion and governmental authority. The test evolved from a secular "purpose and effect" rubric in *Walz v. Tax Commission* (1970) and was thought to unify the Court's treatment of these issues. It has long been criticized by members of the Court and by commentators, including this author (Chopko, 1992).

Calling the 1973 parental assistance programs a subterfuge to skirt the Supreme Court's 1971 rulings, the Court invalidated these programs despite the acknowledged important public purpose of assisting parents in the education of their children. The Court reserved for another day an important public policy question, namely, the validity of a scholarship program that was made available to parents without regard to the "sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" (*Nyquist*, 1973). The Court intimated that such a program would likely be found to be constitutional and be broad, neutral with respect to religion, available to all parents, and create no incentives for or against religion. In the intervening years, the Court confirmed the validity of this observation.

In *Mueller v. Allen* (1983), the Court ruled that a Minnesota tax deduction program that was available to all parents for educational expenses, regardless of where incurred, was constitutional. Parents could deduct expenses regardless of the schools they chose for their children. The Court ruled that any benefit that flowed to religious schools was indirect and the result of genuinely independent private choices by parents. The Court noted that it would be "loath" to rule on the validity of a properly designed public program, if parents in fact used it according to their own private wishes (*Mueller*, 1983).

Three years later, in *Witters v. Washington Department of Services for the Blind* (1986), the Supreme Court ruled that the Constitution did not bar the award of a scholarship to a disabled student because that student wanted to

spend his scholarship at a college so that he might become a minister. The Court found that providing a scholarship based on the criteria that the person seeking the scholarship was disabled and might benefit from rehabilitative services did not trigger any concerns under its interpretation of the Establishment Clause. The Court reviewed the program as a whole and found it to be neutral, available to all, and broadly participatory. It is important to note, however, that on remand, the Washington Supreme Court invalidated the scholarship on state constitutional grounds and the U.S. Supreme Court declined to review that decision. This decision by the Washington state courts is an important point for consideration of voucher programs. Federal constitutional concerns are only part of the puzzle, especially in those states that have so called "Blaine Amendments" in their constitutions which forbid public assistance to religious education. Some states strictly interpret those restrictions and some do not. The point is that state law must also be considered.

In 1993, in *Zobrest v. Catalina Foothills School District,* the Court ruled that the reimbursement to parents for educational assistance provided to their deaf son to attend a Catholic high school under the Individuals with Disabilities Education Act (IDEA) was constitutional. In that case, the public school district conceded that had the parents chosen an educational setting other than a religious school for their son the school district would have provided reimbursement. The school district also conceded, for federal constitutional purposes, the validity of the *Mueller* and *Witters* decisions. The state tried to limit those cases by arguing that the Constitution would not support the use of an instructor on the premises of a religious school. The Supreme Court made short shrift of the argument. Like the other programs discussed, the Court noted that this program, too, was a broadly available public benefit, neutral as to the question of religion, that created no incentives for or against religious schools. In other words, parents were able to make the best possible selection under the scope of that program for the education of their children.

Finally, in 1997, in *Agostini v. Felton*, the Supreme Court confirmed that its view on the Establishment Clause had changed in the intervening 25 years. The procession from *Nyquist* in 1973 to *Agostini* in 1997 illustrates that the design of the program is most important for federal constitutional purposes. In *Agostini,* the Court ruled on a request by New York City to be relieved of an injunction entered in 1985 against the provision of federal Title I remedial education services on the premises of religious schools. New York had expended millions of dollars and countless years of work trying to make alternative delivery of services work. The City noted a shift of the Supreme Court's concerns away from the doctrinal rigidity that characterized the 1985 decision. Indeed, the Court had changed its views on the Establishment Clause. The Court was more interested in what the record showed about the

program and the design of the program in general, rather than hypothetical or speculative results about what might happen. Relying on *Witters* and *Zobrest,* the Court noted that it did not adhere to a bright line rule that any or all "governmental aid that directly aids the educational function of religious schools is invalid" (*Agostini* at 2011). The Court found that the public assistance was made available to qualified individuals and that assistance found its way indirectly to religiously affiliated schools "only as a result of the genuinely independent and private choices of individuals" (*Agostini* at 2012). This line of federal Supreme Court cases shows that vouchers can be constitutional. It will be up to other courts to apply them.

STATE DECISIONS DIVERGE

The Ohio legislature found that parents in the Cleveland school district were deprived of adequate educational alternatives and provided that low income parents could choose alternative public and nonpublic schools, including religiously affiliated schools, for the educational assistance of their children. In addition, as designed, the legislature provided that parents could choose a certificate for an alternative school or choose a public school assistance program which provided tutors and other educational assistance directly to them to supplement the free public education. An equal number of scholarships and tutorial grants was to be made available (R.C. 3313.975 and 33313.978 (B)). A state trial court judge in Franklin County, Ohio upheld the program against the constitutional challenge (*Gatton v. Goff,* 1996). An intermediate court reversed, finding that the program as applied was unconstitutional (*Simmons-Harris v. Goff,* 1997).

The intermediate court segmented the program into pieces and reviewed only the piece designed for parents who desired to choose alternative schools to the Cleveland public schools. It found that the scholarship program for alternative schools was weighted in favor of religious schools because the suburban public schools had decided not to participate in the program. Thus, the court believed, without public schools to choose from parents were compelled to pick private schools which were largely religious in affiliation. The court said that the legislature's program was flawed, creating a financial impact in favor of religiously affiliated schools (*Meek v. Pittenger,* 1975). On May 27, 1999, the Ohio Supreme Court reversed the federal constitutional conclusions about the program. The Court found that whatever link was created between the government and religion was indirect, depending completely on the genuinely free choices of individual parents. The Court went on to note that no government actor is involved in religious activity, works in a religious school, or provides incentives to attend. Although the Court invalidated a subsection of one part of the statute, it upheld the program applying the lessons of the *Agostini* decision. The Court, however, struck down the

program on a state law issue, and the legislature has recently given attention to passing new legislation that corrects that technical deficiency. (*Simmons-Harris v. Goff*, 1999)

Another key constitutional decision was reached by the Supreme Court of Wisconsin in June 1998. In *Jackson v. Benson*, the court ruled that the Milwaukee Parental Choice Program was constitutional, relying in part on the fact that religiously affiliated private schools were part of the range of educational choices available to low income Milwaukee parents. The court's decision is important not only for the conclusion it reaches, but also for the substantial care exercised in evaluating relevant precedent, especially analyzing the facts that would be important to any decision on further review.

The Wisconsin Supreme Court concluded that the amended Milwaukee Parental Choice Program was constitutional. "First, eligibility for benefits under the amended [program] is determined by 'neutral, secular criteria that neither favor nor disfavor religion,' and aid 'is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" (*Jackson v. Benson* at 617 (para. 42), *quoting Agostini*, 117 S. Ct. at 2014). All lower income parents were eligible to participate in the program and were entitled to an equal share of the per pupil public aid regardless of the school they chose to attend. Parents were therefore able to select the educational opportunities they deemed best for their children (*Jackson v. Benson* at 617 (para. 43), citing *Davis v. Grover*, 480 N.W. 2d 460, 1992). "Second, under the amended [program], public aid flows to sectarian private schools only as a result of numerous private choices of the individual parents of school-age children" (*Jackson v. Benson* at 618 (para. 45)). State assistance was made payable directly to the parents but on a restricted basis whereby they could only endorse the checks to the selected schools. The only way in which money would flow to a school is by the individual decision of the parent and not on any other basis. The Court rejected as unpersuasive the argument that most of the financial benefits of the program would flow ultimately to religiously affiliated schools. Citing the line of U.S. Supreme Court cases previously discussed, the Wisconsin Supreme Court focused on the benefits flowing to the beneficiaries, not on the money actually expended by the government, confirming the precedence of design over utilization (*Jackson v. Benson* at 619 n. 17 (para. 47)). The Court recognized that parents had the ability to choose from a broad array of educational alternatives including "Milwaukee district schools, magnet schools, charter schools, suburban public schools, trade schools, schools developed for students with exceptional needs, and now sectarian or nonsectarian private schools" (*Jackson*, 578 N.W. 2d at 618, n.16 (para. 43)).

In sum, the work of the Wisconsin Supreme Court, like the line of U.S. Supreme Court decisions on which it rests, confirms that indirect assistance programs such as vouchers have a valid purpose: to enhance the educational

choices of parents and support parents in their most fundamental role, education. They have a valid indirect effect in that money flows to religious providers (or nonreligious providers) based entirely on the independent and private choices of the parents. Using the touchstone provided by the Supreme Court, vouchers provide no "sponsorship, financial support, or active involvement of the sovereign in religious activity" (*Walz v. Tax Commission*, 1970). In short, vouchers can be constitutional.

IMPORTANT PUBLIC QUESTIONS

Even if a voucher program is designed that passes scrutiny of the U.S. Supreme Court's criteria, it must still be carefully considered for the impact that it may have on education and the interaction between parents and government:

- What will be the impact on public education? Will parents be empowered to seek and support appropriate schools? Will schools be encouraged to improve the quality and content of the education they offer? Does the program encourage support for the public schools?
- Does the program offer sufficient support to lower income parents?
- What will be the impact on education finance? Are educational resources being diverted, or is funding for education increasing across the board?
- Where the program involves religious schools, does the program require that the schools limit or modify their religious programs in order to participate? Would the program limit the religious schools' abilities to charge realistic tuition and fees? Would participation trigger regulation that the school considers unacceptable or invasive?

These questions are only part of the difficult public policy issues that must be evaluated by all concerned about education and the possibility of a voucher program. No program that is properly designed will test the federal constitutional limits. However, that being said, each community and each state must decide what will work best for it. Raising a false claim about the federal Constitution in such instances only diverts the debate.

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