

VOUCHERS, THE CONSTITUTION AND THE COURT

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I want to talk briefly about some of the policy issues that Jeff Sutton and others have raised, return quickly to the Establishment Clause, and then spend the remaining time discussing some of the state constitutional and non-constitutional issues that will continue to pose serious legal problems for voucher programs.

In terms of the policy issues, Jeff Sutton gave you one view of the Cleveland program, and some advocates will give you a similar view of Milwaukee's voucher program, but largely overlooked is that we have already found serious problems with those programs. In Cleveland, it has been found that a large percentage of those children in the program are not children coming from public schools; instead, they are children that were already in private schools. So, the money is being used to subsidize families that have already enrolled their children in private schools. This is true in Milwaukee and other programs as well.

The state audit in Cleveland found serious financial problems in the first year that the program was in operation. These problems included a cost overrun of over a million dollars of the five million that was supposed to have been spent, most of it being used to subsidize taxicab rides for children to attend private schools in Cleveland.

With respect to income, again, the latest audit is showing that a number of families that are qualifying for the voucher program in Cleveland are making over \$50,000 a year, not \$6- or 7,000 as was suggested. The completed state educational audit has demonstrated there are no significant educational advantages produced by vouchers in Cleveland, even though these families are presumably very motivated and chose an alternative program. Indeed, the Brennan schools are at the very bottom, below even the much-reviled public schools, in the education outcomes that they are producing.

Moreover, the money that is being provided for vouchers in Cleveland and Milwaukee is draining public schools, not producing a

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surplus as has been suggested. As a consequence, desperately needy and under-funded public schools are finding money taken away as a result of the voucher school programs.

For example, there is a terrific program in Wisconsin called SAGE, which substantially reduces class sizes and has made other beneficial reforms in public schools. There is non-controvertible evidence that there has been an immediate impact within a year or two of substantially improving performance at low-performing public schools. However, Wisconsin has placed a cap on the SAGE program in Milwaukee. Thus, a poor child outside of Milwaukee has a one in two chance of being in the SAGE program. A poor child inside Milwaukee has a one in six chance of being in the SAGE program. Instead, if the money being used for vouchers in Milwaukee were devoted to SAGE, all of the poor-performing children in Milwaukee's poor schools could get those benefits now. Therefore, before we even get to the legal arguments, those are reasons why using state money on vouchers is, indeed, a bad policy choice.

But with respect to the legal issues, it is important to point out that it is not discrimination against religion if religion does not get a subsidy. Indeed, that is the precise ruling the Supreme Court came to in the area of abortion, for example, where the Court ruled that it was not a violation of the right to choose for the state to refuse to fund abortion procedures.

Returning to the GI Bill argument that we continue to hear repeatedly, the "Why can't we get money and decide what to do with it" claim, the situation concerning college is different from school voucher programs. Under the GI Bill, the government benefit—that would be the scholarship, if you will—is fully available without regard to the type of institution where it is used. It costs money to go to college whether you go to a public or a private college, and therefore providing a GI bill doesn't tend to subsidize only one particular choice.

That's not true with respect to vouchers because by definition, at least under our current system, vouchers are available by definition, only for choices outside the public schools, which means by definition private, which means, by definition, in most instances religious institutions benefit.

To use an analogy, it is as if your government paycheck, which is now available for use at any institution whatsoever, instead was lim-

ited so you can shop at only ten stores, and eight out of those ten stores sold religious merchandise. This is effectively what voucher programs do and that is why they are substantially different, in our view, from the GI Bill or similar kinds of programs.

But beyond all of those arguments which have been discussed pretty thoroughly by members of our panel before, you have the state arguments as well. Let me talk briefly about the state establishment clause, the so-called Blaine amendment. It is simply not true that because some legislators may have been motivated by anti-Catholic feelings that it is enough to overturn those state establishment clause provisions. Many others were concerned that funding would be distributed and used by religious institutions within the states involved in voucher programs. But, there is no question that states can go further than the federal government, not only in the establishment clause, but in a whole range of different areas. Thus, we do not think that the attacks that have been leveled against state anti-establishment clause provisions will be successful, but we'll have to wait and see what happens.

Even beyond the establishment clause issues at the state level, there is a whole range of other barriers at the state level and beyond to voucher programs. Jeff Sutton alluded to some of these already. In the Ohio Supreme Court, the uniformity and single subject rules are likely to command, at least based on the oral argument in the Supreme Court, a majority of the state Supreme Court ruling against vouchers before you ever get to federal or state establishment clause issues.

Similarly, in an administrative case in New Jersey and in a pending state court case in Pennsylvania, the administrative agency or court ruled that voucher programs were illegal, but not because of religion issues. Instead, voucher programs were illegal because the local school boards that tried to take tax money for religious and other non-public education simply did not have the power under state law to divert money in that way. Those kinds of barriers will continue to be barriers even as these sorts of programs are suggested around the country.

Finally, you have the problem that was alluded to by one of our earlier speakers of what was called strings, or essentially accountability. The fact of the matter is that private schools are private because in large measure, they don't depend upon public taxpayer funds. But

if, in fact, as now occurs in Milwaukee, private schools are to depend upon public taxpayer funds, the public has the right—indeed, many would argue, the obligation—to demand accountability as a result.

Take for example the state of Wisconsin, where currently, very little accountability has been imposed on the program. But there is one mandate, and that is the requirement of random selection. Indeed, random selection was one of the key or at least one of the important reasons why the voucher program managed to pass state constitutional muster. In looking at the random selection plans that are required to be submitted by voucher schools in Wisconsin, we and the NAACP found that, in fact, many of them are not operating random selection plans at all. Some provide specifically for preferences for Catholic students, some provide for preferences for children with Montessori experience, and some provide preference for parishioners, for example. We, along with the NAACP, filed a complaint with the State Department of Public Education, and many of the voucher schools have been threatened with cut-off of the voucher funds because of refusal to comply with that particular state accountability requirement. That's just in Wisconsin.

But, for example, take Texas, which was referred to this morning as another area where vouchers are being debated. In fact, one of the proposed state voucher laws would require that voucher schools may not refuse to enroll children on the basis of residence, race, national origin, ethnicity, academic achievement or athletic ability. Another requirement provides that just as with public schools, voucher schools in Texas must provide bilingual education programs and services for kids that want them. A third requires that voucher schools may not expel students unless the student engages in an activity for which they could have been expelled from a public school. And a fourth requires voucher schools to provide for the same educational performance as will be demanded under the new legislation in Texas with respect to public schools. Schools that do not comply with these accountability requirements can be expelled from the voucher program. As a result, a number of Texas conservatives have approved voucher legislation.

Those are just a few examples of the accountability that has been and will be imposed upon voucher schools under those circumstances. I'll quote from a source that you wouldn't expect People for the American Way Foundation to quote from, a Heritage Foundation

publication *Policy Review*, in an article by Doug Dewey, who also opposes vouchers on conservative grounds. Dewey concludes:

It is well documented that every government that has subsidized private and religious schools, from Australia to France to Canada, has diminished their autonomy and blurred their distinction from state schooling. Vouchers offer private schools in America the same fate even before the government slaps new regulations on participating schools.

This reasoning, from a conservative libertarian perspective, is an important reason to oppose vouchers, regardless of the Establishment Clause and policy reasons that Steve Shapiro and I and many people across the country believe are reasons why government taxpayer funding should not be used for voucher schools.