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# LEGAL DIMENSIONS OF EDUCATIONAL VOUCHERS

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In recent years, the concept of school choice has come to the forefront of public debate. Once considered a heresy against the creed of the common school, family choice proposals are slowly gaining increased support from across the political spectrum and promise to change the face of educational governance in America.

There are a number of permutations on the choice theme, including magnet schools within school districts, charter schools which essentially are public schools freed from many regulatory constraints and operated by outside groups, and school vouchers awarded to parents for payment of tuition at private schools. The voucher concept has proven the most problematic from both the legal and policy perspectives. The inclusion of religiously affiliated schools in these proposals forms the main point of contention. In recent years, publicly funded voucher programs have generated litigation in Florida, Ohio, and Wisconsin<sup>1</sup>, while voters in California, Colorado, Michigan, Oregon, and Washington have overwhelmingly rejected direct ballot initiatives for private school choice. The voucher question played a role, to some degree, in the presidential campaign of 2000 and marked a clear difference in policy perspective between the two leading candidates.

A number of organized groups have rallied together in opposition to the voucher concept. The most prominent among these are People for the American Way, the National Education Association, the American Federation of Teachers, the American Civil Liberties Union, Americans United for Separation of

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<sup>1</sup> See, e.g., *Bush v. Holmes*, 767 So.2d 668 (Fla. Dist. Ct. App. 2000); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), *affg sub nom. Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

Church and State, and the National Association for the Advancement of Colored People. Opponents perceive vouchers as a threat to the public school system and a diversion of tax dollars to private, and most significantly, religious schools. They raise the specter of the First Amendment's Establishment Clause and various state constitutional prohibitions against public funding of religious institutions.

The voucher concept has undergone a dramatic transformation since economist Milton Friedman introduced his free market proposal almost four decades ago. Friedman's idea of a pure voucher scheme would have granted a government subsidy to every elementary and secondary school student equal to average per pupil expenditures. His system would have been unregulated; the school could have been able to charge whatever the market would bear. Inefficiently run schools would have lost out in the competition of the marketplace.<sup>2</sup> The market theory now appears to have given way to an equality model originally advanced by John Coons and Stephen Sugarman, law professors at the University of California at Berkeley, who looked to vouchers as a means to advance education for the poor.<sup>3</sup> Unlike Friedman, who believed that family choice would equalize the social and private costs of child-rearing, Coons and Sugarman grounded their model in the belief that the family has a special knowledge and understanding of the child and therefore can make the most informed decision concerning the child's education.<sup>4</sup>

Within this context, the voucher concept is seen as a vehicle to promote equal educational opportunity and to bridge the widening achievement gap between the rich and the poor and particularly among minorities in urban areas. Fueled by the failures of court-ordered desegregation, federally funded remedial programs, and efforts to reform state financing systems to equalize educational opportunities across the economic and racial divide, it took almost two decades for their theory to take hold. An unusual alliance has now been forged between the

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<sup>2</sup> See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85-107 (The University of Chicago Press 1962); see also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICAN SCHOOLS* 186-91, 215-26 (The Brookings Institution 1990).

<sup>3</sup> See JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 7-16 (University of California Press 1978).

<sup>4</sup> See *id.* at 52-61.

political right and the left, one that has engaged business leaders, advocates for the poor, and more recently African-American political and educational leaders and clergy in a joint effort to build on the success of religiously-affiliated inner-city schools.<sup>5</sup> From the perspective of religious conservatives, school vouchers would allow parents greater discretion and wrest their children from an educational system that has lost its moral compass.<sup>6</sup>

Supporters in particular draw on a series of Supreme Court decisions beginning in the late 1980s where the Court upheld various education aid programs from which funds, services, or materials ultimately flowed to faith-based institutions.<sup>7</sup> These decisions, taken together, present several bright lines that may or may not be dimming among the various factions of the current Court. Among these lines are the following: (1) government aid to pervasively sectarian institutions can only be indirect and not direct; (2) aid must be allocated to a broad class of beneficiaries on the basis of religiously neutral criteria; (3) aid must be supplemental and not supplant the core educational program, at least at the elementary and secondary levels; and (4) any diversion of benefits to the school's religious mission must be de minimus at most.

Having side-stepped the issue in 1998 when it denied certiorari in a case from the Washington Supreme Court upholding that state's voucher program, the Court has yet to

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<sup>5</sup> See JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* 86–113 (The Brookings Institution 1999).

<sup>6</sup> See ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 1–9 (Yale University Press 2000).

<sup>7</sup> See *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding federal program providing materials and equipment to public and nonpublic schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding federally funded program offering supplemental remedial instruction on neutral basis to disadvantaged students attending schools); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding provision of funding by state university to student organization that published newspaper with Christian point of view not in violation of Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding provision of sign-language interpreter under federal Individuals with Disabilities Education Act of deaf student attending religious school); *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986) (upholding state vocational rehabilitation program awarding assistance payments to a blind student engaged in religious studies at Christian college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state tax deduction allowed to parents of public and nonpublic school children, including students attending religious schools).

rule on a voucher program.<sup>8</sup> Nevertheless, judging from the Court's most recent pronouncement, in June 2000 in *Mitchell v. Helms*,<sup>9</sup> at least four Justices now interpret case precedent to remove whatever constitutional barriers may have existed to the point where even direct aid to religiously affiliated schools would fall within the bounds of the Establishment Clause.<sup>10</sup> Only time will tell if that plurality can pull Justices O'Connor and Breyer—the widely considered swing votes on the issue—over to the voucher side. While their concurring opinion unequivocally opposes direct aid to religious institutions, that is not an issue with conventional voucher proposals. But they still express reservations about funding the core educational program of “pervasively sectarian” schools and the possibility that government funds might be diverted to support their religious mission.<sup>11</sup> These may or may not prove to be stumbling blocks to their endorsing a voucher program that includes adequate administrative safeguards against widespread support of religious teaching. Yet, even if the Court were to garner a majority consensus on the constitutionality of school vouchers, there still remains significant political skepticism over the potential policy implications that could flow from such a dramatic transformation in school governance and the relationship between the state and organized religion.

This panel brings together four experts in the field of law and education, each presenting interesting and individual views on the legal and policy dimensions of the educational voucher question. All of them have thoughtfully written on this topic while some have played a role in key litigation and legislative efforts. Their insights shed light on the contentious questions underlying what has become one of the most heated debates in education today.

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<sup>8</sup> See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

<sup>9</sup> 530 U.S. 793 (2000).

<sup>10</sup> See *Mitchell*, 530 U.S. at 801 (Thomas, J., plurality opinion).

<sup>11</sup> See *id.* at 836.