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Recommended Citation

Green, Steven (2001) "Critical Legal Issues Involving Vouchers," *St. John's Law Review*: Vol. 75 : No. 2 , Article 4.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol75/iss2/4>

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CRITICAL LEGAL ISSUES INVOLVING VOUCHERS

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The practice of using school vouchers for private religious schools has reached a critical threshold as both a legal and policy issue. The Milwaukee Parental Choice Program enacted in 1990, initially for nonsectarian schools, was expanded in 1995 to religious schools.¹ Although the 1995 amendments expanded student participation ten-fold,² the program remains severely under enrolled due to the lack of start-up schools. These schools failed to materialize as voucher proponents had promised. The Milwaukee program has been critically studied, and with its success measured by student performance, is inconclusive.

Educational scholars disagreed on testing methods and finds. An increase in parental satisfaction was the only result on which all sides agreed. Public voucher programs were also established in Cleveland, Ohio in 1996³ and in Florida in 1999, the latter's scope being statewide.⁴ Similar to the Milwaukee plan, these programs all involve religious schools and currently limit eligibility to low income children and children attending failing schools.⁵

As in Milwaukee, however, both programs have yet to take off. Student performance gains are equivocal and the expected influx of market-created schools has not materialized. Many scholars and analysts also question whether the voucher programs have provided any real benefit for public schools or the remaining public school students.

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¹ See *Jackson v. Benson*, 578 N.W.2d 602, 607-08 (Wis. 1998).

² See *id.*

³ See MICHAEL MINTROM, *POLICY ENTREPRENEURS AND SCHOOL CHOICE* 24 (Georgetown University Press) (2000).

⁴ See *id.* at 34 n.11.

⁵ See *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000); see also *Jackson*, 578 N.W.2d at 608.

If the expected votes in the voucher referenda in California and Michigan are any indication, public patience with vouchers, as the miracle cure for the ills of public education, may be waning.⁶ The time has come for voucher programs to prove themselves.

Voucher programs present a critical legal issue. Since 1992, vouchers or voucher-like programs have been challenged eleven times, with courts upholding vouchers for religious schooling in three instances, but striking such schemes in the remaining eight.⁷ This split-in-court holding has yet to induce action from the Supreme Court. In 1998, the high court denied *certiorari* in the Milwaukee decision, which upheld vouchers.⁸ The Supreme Court later denied review in three cases striking voucher programs.⁹ Of the two cases currently in litigation, the retrial in the Sixth Circuit of the Cleveland plan¹⁰ is the likely candidate to go all of the way to the Supreme Court. The high court has already intervened in the case by staying an injunction that had halted the program.¹¹ Most observers believe action by the Supreme Court is inevitable, though a decision in the Cleveland plan is probably two years off. While we await a court ruling, the policy and legal arguments continue to rage.

Proponents of school voucher programs make essentially three arguments for voucher programs that include religious schools. The first is that public schools are failing and in need of

⁶ See MINTROM, *supra* note 3 at 23, (stating that the “[e]fforts to introduce voucher programs have been rigorously resisted by representatives of the education establishment, and civil liberties groups have engaged in court battles to prevent the use of public dollars for education at religious and other private schools”).

⁷ See, e.g., *Simmons-Harris*, 234 F.3d at 948; *Strout v. Albanese*, 178 F.3d 57, 66 (1st Cir. 1999) (holding voucher program did not violate the Establishment, Equal Protection, Free Exercise, Due Process or Free Speech Clauses, and is therefore constitutional); *Bagley v. Raymond Sch. Dep't.*, 728 A.2d 127, 147 (Me. 1999) (holding voucher program did not violate the Free Exercise, Establishment, or Equal Protection Clauses, and is therefore constitutional); *Chittendentown Sch. Dist. v. Vermont Dep't. of Educ.*, 738 A.D. 539, 563-64 (Vt. 1999) (holding voucher program unconstitutional because it lacked appropriate restrictions); *Jackson*, 578 N.W.2d at 632 (upholding voucher program as constitutional).

⁸ See *Jackson v. Benson*, 525 U.S. 997 (1998).

⁹ See *Strout v. Albanese*, 528 U.S. 931 (1999); *Bagley v. Raymond School Dep't.*, 528 U.S. 947 (1999); *Andrews v. Vermont Dep't of Educ.*, 528 U.S. 1066 (1999).

¹⁰ See *Simmons-Harris*, 234 F.3d at 948 (noting that the circuit court affirmed the district court's decision finding that the voucher program was unconstitutional).

¹¹ See *Zelman v. Simmons-Harris*, 528 U.S. 983 (Supreme Court stayed an injunction pending “the disposition of the appeal by the United States Court of Appeals for the Sixth Circuit”).

reform. They point to low test scores and graduation rates among poor and minority students and international studies that rank American students in the middle among industrialized nations. Such figures, however, can be misleading. While minority achievement and graduation rates are at unacceptable levels, the gaps between white and black students have been narrowing. Student performance is up nationwide, more so among minority students.

I agree that some urban and rural schools are failing. Voucher proponents create the perception, however, that the only solution for failing schools is a voucher to a private school and that reforming public education is hopeless. These propositions ignore the significant improvements to public education that have occurred in recent years. Results from the National Assessment of Education Progress Test indicate that math scores have risen every year since 1990.¹² Goals 2000 has also shown impressive results in student performance and parental involvement nationwide.¹³ Initiatives such as the Wisconsin SAGE Program have shown that reducing class size is the single, most effective means of improving student performance, where African-American students narrowed the academic achievement gap with their fellow white students.¹⁴

In fact, students in the SAGE Program, on average, outperform Milwaukee voucher students even though they are drawn from the same ethnic and socioeconomic classes.¹⁵ Conversely, many private schools do not outperform public schools when factors such as class size, parental income education, and parental involvement are taken into account.

¹² See National Assessment of Educational Progress, *The Nation's Report Card: Mathematics 2000*, Executive Summary, at <http://nces.ed.gov/nationsreportcard/pubs/main2000/2001517.asp> (last visited Feb. 1, 2002).

¹³ See People for the American Way, *What's Wrong with School Voucher Proposals*, at <http://www.pfaw.org/issues/education/voucher.criteria.shtml> (last visited Jan. 16, 2002) (discussing improvement by various states).

¹⁴ See Rethinking Schools Online, *The Case for Smaller Classes* (Summer 2000), at http://www.rethinkingschools.org/Archives/14_04/small144.htm (last visited Jan. 16, 2002) (discussing reducing class sizes to improve academic performance of students).

¹⁵ See J.S. Online, *Class-Size Cuts to Expand to Almost 600 Students* (Aug. 21, 2000), at <http://www.jsonline.com/WI/082100/wi-sagesuccess082100235343.asp> (last visited Jan. 29, 2002) (stating the University of Wisconsin-Milwaukee School of Education's most recent study showed students in the SAGE performed better than students in comparison schools on the Comprehensive Basic Skills Test given in May 1999).

Voucher proponents argue that increased educational spending has not made public schools better. Spending statistics belie the claim that public schools cannot improve. Increasing spending to reduce class size, to fund universal pre-kindergarten, and to provide resources is the proven way to improve education, not diverting funds to private schools.

Thus, where schools are failing, we have the means to improve them through early intervention, reduced class size, increased classroom support, and taking a zero-tolerance stance on violence. Although we have the means, the will is often lacking. On the other hand, vouchers can never benefit more than a small number of children, result in the diversion of resources and divert attention away from true school reform, and therefore, are not the solution.

I am a lawyer, not an education analyst or social scientist. Therefore, I want to turn the discussion to the two legal arguments supporting vouchers, namely, that they further notions of equality, are permissible under neutral programs, and therefore, are generally available to religious and nonreligious schools alike. As you may surmise, discussions of equality and neutrality are never far removed from their policy implications, such that the legal and policy issues tend to merge.

The first argument is that vouchers provide greater educational opportunities for lower income children, allowing them to exercise the same choices that middle and higher income families enjoy. This is an attractive argument, particularly for those among us who have worked for greater economic and social justice. The response to this is that the compelling arguments for greater educational equality do not necessarily lead to providing vouchers, or ensuring greater educational opportunities. The flaw with the argument for educational opportunities is not in identifying educational equality as a principle, but in contorting it to fit voucher programs.

If greater equality is a goal, it is best achieved through a system of safeguards and controls that ensure that all recipients have similar access to similar products. This suggests a more highly centralized system of decision-making, not one in which decisions are delegated to individuals who have varying degrees of information, sophistication and motivation.

Reliance on market forces is a poor means of achieving greater equality. We have witnessed this in the economic arena

where the disparities between the wealthy and the poor have increased over the years. Our history and experience in the struggle for civil rights has shown that reducing oversight and enhancing private decision-making does not facilitate equality. Voucher programs were once used to perpetuate racial and educational inequality.¹⁶ Many within the civil rights community have grave concerns that vouchers will lead to greater economic and racial segregation.

The equality model also assumes that voucher systems will always be limited to lower income children, but that assumption cannot be made. Many of the leading voucher proponents do not come out of the same social justice tradition as the Catholic Church and support vouchers for their libertarian, free-market qualities and have no intent in limiting vouchers to improving the educational situation of the poor. For example, the Institute for Justice, a participant in all the voucher litigation, also opposes affirmative action. Its litigation director has told me that he sees low income vouchers as a first step to vouchers for middle and upper class children. The California voucher referendum to be voted on this Tuesday will provide \$4,000 for every student, including those already enrolled in private schools, regardless of need or income level. The Catholic Church in California has not taken a position on that referendum because of that very issue. Reliance on a free-market model is an ineffective way of achieving education equality.

Any equality model must include provision for all children, not just a few. Equality must mean equal opportunity for all. Voucher programs will not reach more than a small number of children, thus leaving behind the vast majority of children in the same apparently failing schools. Again, relying on the market model, proponents claim that vouchers will indirectly reform those schools through increased competition. This reliance on market models is an ineffective way of achieving equality.

Even if the market model worked, there has not been an explanation of why equality demands an immediate response for a small number of children but that the vast majority of children can wait for their education opportunity to trickle down via the

¹⁶ See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 374-87 (1996) (noting that the tuition voucher movement arose in reaction to African-American efforts to gain an education for citizenship).

market. Voucher programs drain necessary resources from the originating schools, take away the most motivated parents and highest achieving children and divert attention away from true system-wide reform. The way to achieve true educational equality is to institute those necessary changes that will benefit all children, not just a few through a voucher.

The second legal argument for voucher programs is that vouchers are permissible because they provide a neutral benefit to children attending both religious and nonreligious schools. Thus, they do not create incentives toward religious education as long as the government structures a program in a manner that neither favors nor disfavors recipients on the basis of religion and extends any benefits on an evenhanded basis. Therefore, the Establishment Clause is not offended when some of the funds end up in the possession of religious entities or pay for religiously oriented activity.

This constitutional schema, bolstered by a series of Supreme Court decisions touting neutrality as a hallmark of religion clauses,¹⁷ has emerged as the legal rationale for vouchers and was most apparent in the Wisconsin Supreme Court's 1998 decision upholding the constitutionality of the Milwaukee Parental Choice Program.¹⁸ Coupled with this neutrality argument is the assertion that any public monies that do flow to a religious school will do so only as a result of the private choices of the parents and children, the so-called private choice factor.

This version of neutrality, evenhanded treatment of religious entities under generally applicable laws, has come to be viewed as the counterpoise to the more separationist non-advancement position in Establishment Clause jurisprudence. It is most visible in the recent holding in *Mitchell v Helms*,¹⁹ where the plurality embraced neutrality as the sole operative principle in Establishment Clause adjudication.

Justice Thomas identified government indoctrination as the

¹⁷ See *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (recognizing precedent that upheld a neutrally available program because it did not "creat[e] [a] financial incentive for students to undertake sectarian education") (quoting *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481, 488 (1986)); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993).

¹⁸ See *Jackson v. Benson*, 578 N.W.2d 602, 613-18, 620 (Wis. 1998), cert. denied, 525 U.S. 997 (1998) (holding that the voucher program at issue was constitutional).

¹⁹ 530 U.S. 793 (2000).

evil to be avoided and asserted that “[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that [occurs] . . . has been done at the behest of the government.”²⁰ Justice Thomas’ view of neutrality and constitutionality thus rests entirely on the breadth of the class. Assuming the aid is ideologically neutral and made generally available to religion and nonreligion alike, then it matters not that public aid is actually used for religious purposes. Therefore, any use of that aid to indoctrinate cannot be attributed to the government and is, thus, not of constitutional concern. Private choice, not government indoctrination, occurs if neutrally available aid first passes through the hands of numerous private citizens who are free to direct the aid elsewhere; the government has not provided any support of religion. For the plurality, however, while private choice is a way of assuring neutrality, there is no reason why the Establishment Clause requires such a form.²¹

The distinction between direct and indirect aid is irrelevant, as is the degree of independent choice so long as the aid is neutrally given.²² Ironically, four members of the Court have apparently gone a step beyond vouchers even before they have heard the first voucher case and find third-party choice unnecessary under a neutral program.²³

Justice Thomas’s opinion commanded only a plurality, with Justices O’Connor and Breyer concurring only in the result.²⁴ That concurrence must be seen as controlling, not merely in *Mitchell*, but on the issue of vouchers generally. Importantly, Justice O’Connor rejected the plurality’s neutrality argument, calling it “a rule of unprecedented breadth for the Establishment Clause challenges to government school-aid programs.”²⁵ Justice O’Connor returned to her analysis five years earlier in *Rosenberger v. Rector and Visitors of Univ. of Va.*²⁶ where she asserted the equal historical and jurisprudential pedigree of the no-funding principle. She claimed, the Court’s earlier holdings touting the importance of neutrality “provide no precedent for

²⁰ *Id.* at 809.

²¹ *See id.* at 830–32.

²² *See id.* at 813–14.

²³ *See id.* at 801.

²⁴ *See id.* at 836.

²⁵ *See id.* at 837.

²⁶ 515 U.S. 819 (1995).

the use of public funds to finance religious activities."²⁷

Justice O'Connor's rejection of neutrality as the axiom for Establishment Clause adjudication is highly significant, for it is upon a neutrality theory that private choice relies. Justice O'Connor does not reject the importance of neutrality in aid cases; neither do Justices Stevens, Souter and Ginsburg. She would likely uphold a neutral program that contained several safeguards against funds being used for indoctrination. But the plurality's unwillingness to temper its view and bring O'Connor into their fold indicates a fundamental disagreement on the ordering of Establishment Clause values and on how those values apply in the real world. Justice Thomas' failure to address O'Connor's concerns means that her vote in a close voucher program may turn on which block is more responsive to those concerns. In essence, the plurality missed a golden opportunity to secure O'Connor's vote on vouchers, on an arguably easier case.

In *Mitchell*, Justice O'Connor appeared to embrace the concept of private choice. She used the word "choice" throughout her discussion.²⁸ This choice of words suggests that she will differentiate between programs that offer a true universe of options and those that merely use a third person to direct the financial benefit to a religious institution. She would consider factors that include not only the available applications of the aid, but also whether the program creates incentives for religious use; whether the program by policy or practice defines recipients by reference to religion; and the degree of independence the recipient has in exercising his or her choice. She stated, "the choices must be truly independent and meaningful."²⁹ The analogy she offered is that of an employee donating a portion of his government-issued paycheck to a religious institution.³⁰

This example was first provided in *Witters v. Washington*

²⁷ *Id.* at 847 (O'Connor, J. concurring).

²⁸ *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring) ("[T]he distinction between a per-capita aid program and a true private choice program is important when considering aid that consists of direct monetary subsidies.").

²⁹ *Id.* at 810.

³⁰ *See id.* at 841 (supporting the proposition that the Establishment Clause is not violated when funds of the state are conveyed to a religious institution); *see also Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986).

Department of Services for the Blind,³¹ but *Witters* was arguably an easier case than one under a voucher program. Larry Witters was awarded his benefit based on some independent criteria, his visual disability, which provided him a greater ownership interest in the aid as well as greater control over its use. The aid was more like his money, which he could then apply to a true variety of options. That was the second crucial factor for the Court, as it relied on the wide variety of applications of the scholarship at the college level, all of which charged tuition, while commenting that it was unlikely that any other recipient would use the scholarships in a religious program.³²

In contrast, under the Cleveland Voucher Program, the vouchers are used only in private schools.³³ Public schools do not participate in the program.³⁴ Eighty-two percent of the schools are religious and approximately ninety-six percent of the students attend religious schools.³⁵ The small universe of options, as designed by the Ohio legislature, means the program creates incentives for religious use. Justice O'Connor should find this problematic.

In *Mitchell*, Justice O'Connor, as she did in *Agostini v. Felton*,³⁶ identified several factors beyond the neutrality of a program that have in the past been crucial for constitutionality of aid programs. Those factors include whether public funds reached the "coffers of religious schools,"³⁷ whether the aid was actually diverted for religious uses, and whether the aid supplanted obligations and expenses the schools would otherwise have assumed.³⁸ The extent to which she views these additional factors as effective in a private choice situation is uncertain, but one could see them becoming more crucial, depending on the circumstances of a particular case. If, for example, voucher recipients constituted a high percentage of students attending

³¹ 474 U.S. 481 (1986).

³² *See id.* at 488.

³³ *See Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000). The circuit court, citing Ohio Rev. Code § 3313.976(C) (1995), noted that "[p]ublic schools in districts adjacent to the district in which the voucher program is implemented may also register for the program and 'receive scholarship payments on behalf of parents,' but none of the public schools . . . have done so." *Id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ 521 U.S. 203, 230–33 (2d Cir. 1997).

³⁷ *Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring).

³⁸ *See id.*

religious schools such that the schools' existence was dependent on the voucher funds, then Justice O'Connor might elevate the significance of the supplement-versus-supplant factor.

As a result, neutrality remains an insufficient principle to support vouchers. A majority of the Court will require something more akin to the factors identified by Justice O'Connor in her *Agostini* and *Mitchell* opinions. In some instances, choice may be a factor leading to constitutionality of a program, but other concerns about subsidization and incentives, as well as, the universe of options will need to be addressed. In conclusion, equality and neutrality are important constitutional principles, but they each are inadequate to justify the average voucher program.