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School Vouchers: Bad for Our Children and Dangerous for Our Liberty

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SCHOOL VOUCHERS: BAD FOR OUR CHILDREN AND DANGEROUS FOR OUR LIBERTY

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A fundamental objective of People For the American Way Foundation and its members is to promote public education and religious liberty, which brings us straight to the subject of school vouchers. Religious liberty, from our perspective, has two critical elements. One element is the free exercise of religion in this country. We spend a lot of time defending that right in legislation, in litigation and in other situations. The second aspect of religious liberty is the separation of church and state, which also ensures the ability of every citizen to feel like an insider, not an outsider, in our culture. This is something that has helped America avoid the terrible religious conflicts we see, not just in the Middle East, but also in so many countries throughout the world. It is with that background that we come to the issue of school vouchers.

This Gilvary symposium has framed the issue as the pros and cons of school choice, but that is really not accurate. Choice is something that is not at all new to education. For many years, we have had magnet schools and specialty schools. In Cambridge Massachusetts, there is a controlled choice program in which all public schools are chosen by parents. There are many ways in which there can be choice for parents and students in the context of public schools. What is different about today's subject is the notion of using public, compelled taxpayer dollars to support private, primarily religious, schools. That is where the objections come in and where the conflicts arise.

School vouchers are bad as a matter of policy and unconstitutional as a matter of law for four basic reasons. First, vouchers harm our public schools and public school children. Second, vouchers produce choice for private schools, not for parents and students. Third, vouchers create serious problems of accountability and produce an inherent accountability dilemma. Finally, school vouchers, at least as structured in Cleveland, violate fundamental principles of religious liberty and separation of church and state protected by our Constitution.

In terms of the harm vouchers cause to public schools and public school kids, the main problem is the drain of scarce dollars that are so critical to making our public schools work for the more than 90 percent of our children who attend those public schools. Cleveland is a prime example. After the 2001 school year, the Cleveland program will have cost taxpayers more than forty-three million dollars, the vast majority of which is taken

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from disadvantaged pupil impact aid that otherwise would have gone to the most disadvantaged children in Cleveland public schools.

Some voucher advocates assert that school vouchers result in fewer public school students to educate, so that solves the problem. The facts clearly refute this claim for two very important reasons. First, a large proportion of the students in the Cleveland voucher program were never in public schools. In fact, legally they do not have to be in public schools, contrary to the impression that voucher supporters create. A recent study showed that a third of the voucher students in Cleveland during the year 2000 were already enrolled in private schools before receiving vouchers. They went straight to private schools, so taxpayer dollars were taken from the public treasury and used to support voucher schools. Second, studies have shown that because those voucher students that do leave the public schools come from so many different schools, the result is that public school overhead costs cannot be reduced. The official KPMG consulting firm study in Cleveland found, in essence, that what the voucher program does is subtract taxpayer dollars without subtracting any of the costs. The net result is almost the same costs for public schools to educate students, but a lot fewer taxpayer dollars. Indeed, the evidence also shows that in Ohio in particular, because of other subsidies that are provided through schoolbooks and other aid for private schools, it was estimated that during most of the 1990s, Ohio spent more taxpayer dollars on the students in voucher schools than it did on the students in 90 percent of Ohio's public schools.

The tangible harm is clear: diversion of money and effort from the crucial task of improving the public schools. For example, in the second year of the voucher program, the voucher program in Cleveland exceeded its budget by percent. Where did the money come from? It was taken from public school treasuries, even though the public schools had to borrow against future revenues just to stay open.

A second example has to do with all-day kindergarten. In one recent year in Cleveland, the budget got so tight that the schools had to eliminate all-day kindergarten, with two exceptions. One exception was magnet schools and the other exception was voucher schools. Virtually, the only children who could go to all-day kindergarten that year were those who entered the voucher program.

The third example is one with which all citizens of Ohio are quite familiar: the terrible situation with respect to the funding of public schools in Ohio. Three times, the Ohio Supreme Court, which is certainly no bastion of liberalism, has decided that the Ohio funding formula for public schools is woefully inadequate and violates the state constitution. Most recently, the court said that if the legislature would simply increase funding substantially for public schools, the court would be prepared to find the

system constitutional. So far the legislature has refused to do so. Every year, as funding for vouchers increases, funding for public schools is not provided the way it needs to be. The diversion of funding and effort is a serious problem with respect to vouchers.

Despite proponents' claims, vouchers really provide choice for private schools, not for students and parents. We have more evidence of this from Milwaukee because it is an older program. Both in Milwaukee and Cleveland, students are supposed to be selected for voucher schools by lottery, which is supposed to eliminate any selectivity. In fact this doesn't happen, because voucher schools do the choosing, either through the back door or through the front door. In Milwaukee, the evidence shows that from year to year, the number of students who drop out -- or many believe are pushed out -- of voucher schools ranges from 23 to 44 percent of the kids in the program. If a student doesn't cut the mustard, he or she can be shown the door. Private schools can do that. They are, after all, private schools. But that means the choice belongs to the private schools, not to the students and the parents.

Similarly, the People For the American Way Foundation and the NAACP did a study in Milwaukee of the actual admissions practices of schools that are supposed to be doing random selection and found that many of them were not. One school, for example, had a supposed random selection plan that in fact had preferences and ranked preferences (other than for siblings) in the following order: 1) Catholic students in their own parish; 2) other Catholic students; and 3) non-Catholic students. That is not a random selection program. In fact, the state Department of Public Instruction found in 2000 that there were at least seven voucher schools that, in practice, violated the random selection program requirement regarding student admissions and improper school fees.

In Cleveland, the evidence shows, for example, that the limitations on the schools in the program have limited any so-called choice overall. In theory, the Cleveland program is open to any private school and even to suburban public schools. There has never been a single suburban public school, however, that has ever agreed to participate in the Cleveland voucher program. The state has never required them to participate, although it clearly has the power to do that, just as it has required Cleveland to pay the cost of the program. Because tuition is set at a limit of around $2,500 per year, the result is to exclude most non-religious private schools. In fact, about 80 percent of the schools in the Cleveland program are religious schools, and 96 percent of all Cleveland voucher slots are in religious schools.

In addition, the voucher program does not really provide choice to poor children in Cleveland. For example, students who need special education

can be and are excluded. Contrary to what many believe, there is no income limit in the Cleveland voucher program, so that students can get into the program at any income level whatsoever. In fact, in 1999-2000 almost 40 percent of the students in the program were above the poverty line, including some with incomes more than twice the poverty level. Indeed, the official responsible for running the supposedly random selection lottery admitted that at one point, the selection process that was used appeared to favor higher-income students over poorer children.

The third issue is accountability and the accountability dilemma. Private schools have a very important right to be private. In general, a religious school has a right to teach religion and to run its school, to test or not test its students, and to teach its curriculum the way it wants to. When we as taxpayers support a school, however, we have rights as well. We have rights to demand accountability, that curriculum be taught in an appropriate way, that schools have safety codes and that students be tested to make sure they are actually learning. Put these things together and you have an inherent conflict. The result of that conflict, in too many cases, has been a serious accountability problem.

Cleveland again provides a number of examples. One school that was in the voucher program operated for two years despite the fact that its 110-year-old building had no fire alarm or sprinkler system and was under a fire watch requiring staff to check for fires every thirty minutes. Lead-based paint, which can cause brain damage in children, was found in the school at a level eight times greater than generally regarded as safe. The school had to repay nearly $70,000 in tax dollars because it was getting voucher money for students who were not in the schools at all. Similar problems at another state-funded voucher school were compounded by clearly inadequate classroom instruction; the school was a parent run video school where students sit in front of a TV and watch recorded lessons being given by an on-screen teacher. There are many other examples as well. The problem of ensuring the accountability that we as taxpayers have the right to demand is a serious issue with respect to vouchers.

Finally, school vouchers, at least as structured in Cleveland, are unconstitutional. This goes back to first principles, to the church-state principle that was critical to Madison and Jefferson that taxpayer money should never be demanded from any taxpayer to support a religion with which he does not agree. Madison spelled out this critical aspect of religious liberty in response to what might have been the nation's first voucher proposal. In 1784, a time when public schools as we know them did not exist and most schools were affiliated with churches, a Virginia proposal would have levied a tax to support "teachers of the Christian religion." Each taxpayer would decide "to what society of Christians" the money would be paid or could direct that his tax dollars not support a

religious society but instead support "seminaries of learning" -- choices not unlike the "parental choice" claims advocated by voucher supporters today. In his famous Memorial and Remonstrance Against Religious Assessments, which is considered a key basis for the First Amendment, Madison explained that not even "three pence" should be demanded of a taxpayer that would support religion in this way. Madison's powerful argument prevailed, and Virginia instead enacted Jefferson's "Bill for Religious Freedom," making clear that no one could be "compelled to frequent or support" religion. That principle was similarly incorporated into our First Amendment.

The Supreme Court has recognized this principle as well. In the 1970s, New York had adopted a sort of a voucher program, which provided tuition reimbursement for parents who sent their children to private schools. The argument was made that it was the parents' choice whether to send their children to religious schools. The Supreme Court ruled that program unconstitutional in *Committee for Public Education v. Nyquist.*[1] The Court recognized, however, that because the reimbursement applied only to private schools, 85 percent of which were religious, this was not genuine, independent choice. Instead, the Court explained, the inevitable effect of the program as a whole was to fund religious schools with taxpayer dollars, violating the Establishment Clause.

If anything, it is even clearer that the Cleveland voucher program is unconstitutional, based on these principles. In New York, a parent could choose any private school, regardless of tuition. In Cleveland, by limiting the program to schools with tuition under around $2,500, the state has skewed the program towards religious schools that, as the Court of Appeals found, generally have lower tuitions. In fact, as of the last year that the statistics were kept, 80 percent of the schools and 96 percent of the slots in the voucher program in Cleveland were for religious schools. Is it really genuine, independent choice when vouchers are provided in that situation? Instead, it is like giving a group of people a check and saying that they can spend their checks at any of ten stores, but nine of them sell only religious merchandise. A few individuals may be able to find some non-religious merchandise, and some may want to buy religious merchandise, but overall it is not genuine independent choice. It is not like Pell grants or the G.I. Bill for higher education, where both public and private colleges charge tuition, where scholarship money genuinely flows to different schools as a matter of individual choice, and where government funds are not skewed toward private, religious schools. Instead, as with vouchers in Cleveland, it

[1] 413 U.S. 756 (1973).

is a program that has been structured in a way that overall, government funds will inevitably flow to support religion through individual parents' actions. That is a key question the Supreme Court must answer in the Cleveland case: is the program genuine independent choice or is it a program structured so that government funds will inevitably flow to private religious schools.

The voucher schools in Cleveland are indeed quite religious. As the court of appeals noted, one Cleveland voucher school, for example, requires students to "pledge allegiance to the Christian flag and to the Savior for whose Kingdom it stands." The "cardinal objective" of education at another Cleveland voucher school is to "develop devotion to God as our Creator, Redeemer, and Sanctifier." In general, these schools have every right to operate that way and I would be the first one to defend that right of private religious schools. What these schools do not have the right to do, under our Constitution, is to receive compelled taxpayer dollars to support those objectives. As the Court of Appeals explained, the Cleveland voucher program involves granting state aid "directly and predominantly to the coffers of private, religious schools.[2]" That is the reason we hope the Supreme Court will agree that the program is unconstitutional.

Anyone who thinks they can predict how the Court will actually rule has a very valuable crystal ball. It is fair to say that the Court will probably be closely divided and that Justice O'Connor will play a key role. Based on her opinions, perhaps the critical issue will be, under the actual facts of the case, is this genuine independent choice or is it a program that, as a whole, inevitably supports religion and does exactly what Madison didn't want us to do -- compel taxpayers to help finance religion. It is critical that we adhere to the principles articulated by our founders. If we do not, our nation will begin to walk down a road that, in the long run, will seriously threaten the religious liberty of all Americans.

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[2] *Simmons-Harris v. Zelman*, 234 F.3d 945, 960 (6th Circuit 2000), *cert. granted*, 122 S. Ct. 23 (2001).