

Parochiaid Revived - In Disguise

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AUTHOR:

Hoeksema H.C.

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Editorial

Recently a colleague gave me a little brochure put out by an organization called Citizens For More Sensible Financing Of Education, with headquarters in Lansing, the state capital of Michigan. I have written for more information concerning both the organization and the proposal which it is promoting. But from the information in this brochure it appears that the proposal set forth in this brochure is nothing more than an attempt to revive parochiaid, or government financial support of private schools. However, this time the proposal is in disguise, the disguise of a tax-reform proposal. And while, perhaps, tax-reform may be attractive to some, even to many—and perhaps this very attractiveness is intended to be the lure—nevertheless, from the information I now have, it appears to me that this is a rather thinly veiled disguise. And, again drawing my conclusion from the information I now possess, it appears to me that the disguise is also deceitful and dishonest.

It is the avowed intent of this editorial to expose this disguise and to militate against the proposal.

Admittedly, this is a proposal which affects Michigan readers directly. Yet the issue of parochiaid in general is broader than that, and is of importance for readers in other states as well. In fact, it may safely be predicted that if the Michigan proposal would be approved by the voters in the proposed referendum, and if then the proposal would also be found to be constitutional, the same type of plan would be attempted in other states.

In the interest of fairness, I will quote *all* of the information furnished in the brochure. Before I do so, however, I must point out that the entire approach of this material is *oblique*. At no point does it attempt to leave the impression that this is a parochiaid proposal; the opposite is true. In fact, the whole attempt is to leave the impression of being a ,*tax-reform* proposal. The front cover of the brochure, for example, poses the question in large print, "Isn't there a more sensible way to finance education?" Now who would not be interested, in this day of unreasonable and increasing taxes, in a "more sensible way to finance education"? At the bottom of the front cover is a slogan which has been becoming increasingly popular, at least in Michigan: "Down With Property Tax—Up With Education." That's, of course, like being in favor of motherhood and apple pie! Moreover, the name of the organization itself gives no hint of being a pro-parochiaid

organization. Nevertheless, in the course of the information furnished, the proverbial cat comes out of the bag.

This is a proposal for a referendum, that is, to submit to a popular vote the following plan:

This proposal would place a referendum on the 1978 ballot, mandating the following changes:

1. All property taxes previously earmarked for educational operation purposes would be eliminated.
2. A statewide voucher system would be established allowing each child an allocation of state tax dollars to be applied to educating that child at a school of his or her parent's choice.
3. Restrictions relative to support of children in non-public schools would be removed.

Already here, of course, the question arises: what does item No. 3 have to do with the main thrust of the proposal? Besides, what does a voucher system have to do with more sensible financing? But let us allow the brochure to explain in full. I will quote the brochure in full. The only change I have made is the addition of numerals to the questions and answers, for the sake of reference. Under the heading of "Taxes" the following is presented:

1. Q. How do we currently pay for education?

A. The operational income for public schools is currently gathered from local property taxes in the amount of \$1.8 billion and state taxes amounting to \$1.3 billion.

2. Q. Why remove the property tax?

A. The present system of financing education is inequitable and unfair because property ownership in itself does not represent a true measure of a person's ability to pay. Families in homes of similar value can have widely different incomes, and yet pay the same property tax.

In addition, the archaic formula for state financing of education is based upon the amount of millage levied in each school district, and this has resulted in great disparities of educational opportunity from community to community.

3. Q. What changes will this make in the taxes collected by the state for education?

A. The proposal specifically prohibits the levy of property taxes for financing K-12 educational operations; it eliminates any use of property taxes to pay for school

operations. The proposal directs the Legislature to establish a program of general taxation for the support of education.

4. Q. How much of the property tax now goes for, the support of education?

A. In 1960 property taxes for public education in Michigan amounted to \$434 million. By 1976, that figure had increased to one billion, eight hundred million dollars!

This figure represents about 65% of all property taxes levied on a statewide average. This means that if your property taxes amounted to \$1,000, using the state average, \$650 of your property tax payment would be used to finance the operation of local public schools.

5. Q. How can these costs skyrocket when local millage requests are turned down repeatedly by the voters?

A. A millage issue is never closed until it passes. If defeated by the voters, the issue simply keeps showing up on the ballot until it is ultimately approved. Also, property tax revenue can be increased, through assessment without a vote, merely by re-evaluating local property. In the last 12 years, state equalized property values have increased 126% and millage levels have jumped 30%.

6. Q. Is the proposal a shift from property tax to income tax?

A. No, the proposal does not mandate a shift. It is likely, though, that the Legislature will proportionately increase the personal income tax and the single business tax within the current constitutional requirements in order to generate the funds necessary to finance schools. The Legislature may also consider other forms of taxation, such as excise tax, sales tax, intangibles tax, etc.

7. Q. Will this proposal hurt business and industry?

A. No. On the contrary, the proposal removes the educational property tax from business and therefore does not penalize a business for owning property. Business taxes which are now contributed to the General State Fund would be expected to increase to the amount of property tax eliminated.

8. Q. Won't I lose my one chance to reject school millage at

the ballot box if this referendum passes?

A. Yes, school millages would be unnecessary since that large portion of property tax now earmarked for operational educational support would be eliminated from property tax payments. However, you gain a greater opportunity to exercise economic control over your child's education through receipt and use of individual vouchers. Funding and control go hand in hand; this greatly enhances the voucher.

Now we are not interested so much in the tax aspect of the proposal. Yet we must remember that this is intended as an attractive part of the whole proposal. In itself, of course, there is nothing wrong with a proposal to reform the method of taxation. I suppose, too, that property owners can be attracted by a proposal which somehow wants to lift the burden of school taxes from property owners only and to spread that burden around to *all* taxpayers. Yet we must remember that under the terms of this proposal the over-all tax burden will be increased tremendously. Why? The proposal wants to include payment for the education of all present non-public school students. I do not have the statistics at hand on the number of private school students in Michigan; but it is large. And it does not require a tax expert to figure out that if state taxes are going to support the students of private schools at about the same rate as public school students are now supported, this is going to increase the total bill by an enormous amount. In other words, for the general public this proposal is after all not so very attractive! Besides, in the second place, it is almost an axiom of government that the farther away from the citizens the control of taxes gets, the less voice the citizens have, the higher the taxes go; and, once they are up, it is extremely difficult to get taxes down. The proposal admits (Q. & A. 8) that we will lose the power of the ballot box on school millage. It foolishly claims greater economic control. The truth is that the control will be with the *legislature*, not with the citizens. And in the legislature the education lobby and the teachers' lobby are some of the most powerful! The conclusion? Taxes for educational purposes will go up, up, up! Some may call this more sensible financing of education. I demur.

The next subject treated in the brochure is "The Voucher System." On this subject there are the following questions and answers:

9. Q. What is a voucher?

A. A voucher is a certificate representing a sum of money issued by the state to parents for the education of their children.

10. Q. How will a voucher system work?

A. Under a voucher arrangement each school child, or parent, would be issued an authorization which could be redeemed at any state-approved school. The voucher would be applied toward the cost of the child's education during that school year, with the exact amount determined by a formula which would encompass a wide variety of factors bearing on costs in the district and the needs of the child. When cashed at a school where tuition costs exceed the voucher payment, parents of the

child would be required to make up the difference.

11. Q. Will the proposal change school district boundaries?

A.No. The proposal itself will not change school district boundary lines. The Legislature has determined the current school district boundaries and retains the authority to change these boundaries. It is anticipated that the Legislature will recognize the need to increase the choices available to parents and students among public schools. The freedom to attend non-public schools has never been geographically restricted, since there are no legislatively defined attendance areas for non-public schools.

12. Q. This voucher system of providing funds to each student individually is pretty radical. How do we know it can work?

A.The feasibility of this type of arrangement was thoroughly tested with great success in the federal government's GI Bill education provision, which provided veterans with the economic opportunity to select the type of education and school of their choice.

13. Q. Will total state funding result in more state control if this voucher system becomes a reality?

A.No. The proposal grants no additional power for state regulation of public or non-public schools. The proposal does not change or add any statutory controls by the state. (As an example, acceptance of the GI Bill did not result in added government control of schools, either public or private.)

14. Q. What could be some other beneficial results of the voucher proposal?

A.1. Parents and students could freely choose the type of school and type of education they desired.

2. A more equitable and reasonable formula for financing education would be created. (i.e. educational payments to individuals, not to school institutions.)

3. Competition between schools would provide incentive to upgrade standards.

4. Parents will become more actively involved with schools.

5. Schools would be motivated to develop better course offerings.

6. Parents would finally have a voice in the education of their children by exercising

their own economic decisions through a voucher.

We have the following comments on the proposed voucher system:

1. First of all, this voucher system is definitely NOT a part of tax-reform, nor can it be justified as being "more sensible financing of education." The fact of the matter is that if this proposal were limited to the present system of public schools, the voucher system would not even be necessary, would, in fact, be unnecessary red tape. The simple fact is that at present the State of Michigan distributes state aid to the public schools on a per-pupil-formula. All that is necessary is that the state be informed of the number of pupils enrolled in a given school or school district, and an equivalent amount of aid is given to that school district on the basis of a certain amount per pupil. No voucher system is needed.

2. Of course, this voucher system is designed with parochial aid in view. Notice that Question and Answer 11 already makes mention of non-public schools. Question and Answer 12 speaks of "the type of education and school of their choice." Question and Answer 13 again mentions non-public schools. And Question and Answer 14 suggests that "Parents and students could freely choose the type of school and type of education they desired." The whole voucher system is designed with parochial aid in view. But the strategy is to have the funds go to parents, and, of course, to *all* parents, rather than directly to schools. By this strategy they think to avoid the charge that this aid is unconstitutional because the state is supporting religious education. I am no lawyer, and surely not an expert on constitutional law. But it seems to me the ruse is so transparent that a child can discern it.

3. Can you begin to imagine the endless miles of red tape (and expense) involved in a voucher system? Furnish a voucher to every parent for every school-age child? And in this connection, let no one talk to me about the GI Bill! I and members of the Theological School Committee had abundant experience with its red tape during the late 1940s and again recently. And this is presented as "more sensible" financing of education?

4. The brochure makes the claim that this will not result in more state control. True, the proposal as such grants no more powers of state regulation. But do not forget that already in Q. and A. 8 the brochure itself has argued that "Funding and control go hand in hand." Do not forget that the state will hold the purse strings over both public and nonpublic schools: for the state has the power to grant or not to grant vouchers. Where does the control lie? With the parents? No, with the state which grants the vouchers. *Funding and control go hand in hand*. Perhaps the proposal itself grants no further powers of control. But the principle of control through funding is implicit in this proposal. And the potential for state control is plainly present. As far as our parental schools are concerned, we must avoid this like the plague!

(to be continued)

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Parochiaid Revived—In Disguise!

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Hoeksema H.C.

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Editorial

Last time we began to consider the proposal for a referendum in Michigan which would submit to the voters a constitutional amendment providing for a so-called "voucher system" of paying for education. This would include the children of *all* parents; and these vouchers, which would be provided to the parents, could be used at both private and public schools. We saw, too, that this proposal is under the guise of an alleged more sensible method of financing education: it would get rid of the real estate tax as a means of paying for general education costs, and substitute some other method of taxation (probably increased income taxes) which would be up to the state legislature.

The elements mentioned above—and criticized in our previous editorial—constitute parts of the *disguise* of this parochiaid proposal. In the first place, the voucher system constitutes an *indirect* method of state support of private schools. In the second place, the elimination of the local tax millage, while it does by no means guarantee a more sensible method of financing, nevertheless does enable this parochiaid proposal to *parade* as a tax-reform proposal.

The next section of the informational bulletin addresses the parochiaid issue directly. It is entitled "Non-Public School Student Participation." Under this heading we find the following questions and answers:

15. Q.—Isn't this just another attempt to get Parochiaid approved and implemented?

A.—No. This proposal presents a complete reform of the system of financing all education K-12, not merely of the dispersal of funds. This concept would consider the educational needs of each child individually, without consideration for religious or economic circumstances. It would give the same right of choice to all parents.

16. Q.—Is this proposal constitutional?

A.—It is impossible to predict what the U.S. Supreme Court, or the Michigan Supreme Court, will do, especially in cases that involve the religious freedom rights of parents in the education of their children. But it appears that this voucher proposal, as designed, would be general legislation benefiting all children in all schools, and would meet the accepted criteria of constitutionality which the Court has previously laid down in many different cases.

17. Q.—*Would parochial schools be able to maintain their standard admission requirements and their own religious philosophy under the voucher system?*

A.—Yes. Civil rights laws allow such schools to restrict enrollment to "own religion only" status and states have no jurisdiction in this regard. In addition, civil rights laws could be more strictly enforced, preventing the maintenance of racially segregated schools by imposing sanctions upon voucher reimbursement.

Now it should be perfectly obvious to any reader that Question and Answer 15 are *dishonest*, and deceptively so. The answer to this question is not No, but Yes. If I am having meat and potatoes for dinner, and someone asks me, "Are you having meat for dinner?" I do not answer, "No," but, "Yes, and I am also having potatoes." So here the answer should be, "yes, and it is paired with a proposal to reform the system of financing all education, K-12." Not only so, but there is evidence that parochiaid is one of the *main elements* of the proposal. Furthermore, according to information which I have received from the office of Citizens For More Sensible Financing Of Education, "some of the Board members are also members of the Michigan Association of Non-Public Schools." In fact, no fewer than seven of the total Board membership of sixteen are in some way directly connected with non-public schools. Of the other nine it is impossible to tell from the information furnished whether they have any such connection. Now you may depend on it that such people as Dr. Philip Elve (National Union of Christian Schools), who also recently plugged this proposal in *The Banner*, and Sister Maryellen Harmon (Archdiocesan Office of Education, Detroit) and Supt. Donald L. Kell (Lutheran Schools of Mich.-Missouri Synod) and other such private and parochial school personnel have their eye chiefly on this one element of the proposal: parochiaid. It was outlawed once before in Michigan. But they are determined, in one way or another, to win the day for parochiaid! Beware of them!

But there is a fundamental fallacy also in Answer 15. The last sentence states: "It would give the same right of choice to *all* parents." This is a myth which has long been promoted by parochiaid pushers. The simple fact is, however, that parochiaid as such has nothing to do with *rights*. It has nothing to do with *equal* rights. Parochiaid, whether in this form or any other, has to do with *money*. And this voucher proposal apparently has to do with *equal* money. We already have the *rights*. All parents have the same right to choose whether to send their children to a public school or a non-public school. That right is already guaranteed by law. Parochiaid proponents should quit talking about rights and should frankly admit that they are interested in somehow obtaining state funds for private schools.

In the third place, it should be pointed out that a proposal such as this will mean that, in effect, we Protestant Reformed parents will be helping to pay for Roman Catholic schools, for Lutheran schools, for non-religious private schools, and for any others who choose to come under the voucher system.

In the fourth place, the grave danger of all parochiaid, of whatever form, is not avoided by this

proposal. The assurances of Question and Answer 17 are insufficient to quiet fears in this regard. The simple fact is—and history shows this to be increasingly true in every sphere in our country—that what the government pays for the government controls. And it is easy to see how the state simply by holding over our heads the club of threatened withdrawal of voucher funds or voucher eligibility could exercise control over schools and parents. In this regard we should not be lulled to sleep by allusions to civil rights laws and constitutional guarantees. Do not be deceived into thinking that the government(s) in our land have fundamentally a benign and generous attitude toward the cause of Christ, and that they will be more than happy to lend support to genuinely covenantal and antithetical education. Nor must we dream that the public school forces will be happy to see Christian schools placed on an even footing financially. The contrary is true. Another campaign for parochial aid will only serve to arouse the ire of the public school forces and to move them to seek the destruction of the Christian school movement, as they have before.

In the fifth place, while I certainly do not pretend to be any kind of expert on constitutional law, it seems to me that a child can understand that this is unconstitutional. Article VIII, Section 2 of the Michigan Constitution is pertinent here, and is one of the articles which this referendum purposes to amend. The first paragraph requires the legislature to maintain a system of free public schools without discrimination. The second paragraph now reads as follows:

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school. (*italics added*)

In the proposed amendment the italicized words above ("tuition voucher") will be eliminated. Then the last sentence will be made to read as follows:

The legislature may provide for the transportation of students to and from any school, and notwithstanding any other provision of this constitution, the legislature shall provide for the issuance of an educational voucher to each child in attendance at public and nonpublic elementary and secondary schools to be applied toward the cost of that child's education in the school of his or her parent's or guardian's choice.

Notice that *twice* the words "directly or indirectly" occur in this article, and that it is plainly the emphatic intention of the constitution to prohibit any kind of state financial support of nonpublic schools. The proposed amendment clearly seeks to avoid a formal contradiction by the words "notwithstanding any other provision of this constitution." Nevertheless, the contradiction of the intent of Article VIII is obvious. An "educational voucher" (the same as a "tuition voucher") is an *indirect* way of paying public monies to maintain a private, denominational, or other nonpublic school. And it is a *direct* way of supporting the attendance of a student at a nonpublic school. For according to the brochure from which we have quoted our information, "A voucher is a certificate representing a sum of money issued by the state to parents for the education of their children."

How any court of law could wink at this obvious attempt to circumvent the plain intent of the constitution is beyond me.

There are a few more questions and answers in the brochure, but they are of no importance with respect to the parochiaid issue. We will not discuss them.

Our advice is:

1. Do not sign the petition for a referendum if you are approached. If the whole proposal can be kept off the ballot, so much the better!
2. If the proposal appears on the ballot, be sure to vote against it!
3. If you get the opportunity, speak up against the proposal and warn other Christian school supporters of its dangers. It is nothing but an attempt to revive the same old parochiaid—but in disguise!

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Vote No!

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Hoeksema H.C.

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Editorial

Some months ago we reported to you about a new attempt in the State of Michigan to bring about parochiaid, that is, state funding of non-public schools. The proposal, promoted chiefly by the same forces (including Christian School men) which formerly tried to legalize parochiaid, was a kind of two-edged sword. On the one hand, it proposed the elimination of property taxes as the chief source of school revenue; and it would require the state government to provide some other means of tax support (at state level) to fund the schools. In this day of so-called "tax rebellion" this was, of course, the "candy" which was designed to attract votes. On the other hand, it proposed a voucher system, according to which every school-age child would receive a tuition-voucher which could be turned in at *any* school, public or private, to pay for his education.

In earlier editorials we called this nothing but a thinly disguised parochiaid proposal, although the forces promoting it tried not to leave this impression on the public and even called their organization by a name which would not hint at parochiaid, "Citizens for More Sensible Financing of Schools." We were not the only ones to recognize this as a parochiaid proposal. The traditional foes of parochiaid among the public school forces also recognized this, and the "Council Against Parochiaid" has been actively opposing the new proposal.

It is not our intention at this time to offer further critique of the proposal, but to report on progress made in the effort to get the proposal on the ballot in the November election which will soon be held.

On September 9 *The Grand Rapids Press* reported that the petitions to place this proposal on the ballot apparently had enough signatures and that the Board of State Canvassers had decided that the proposal was to appear on the November ballot as Proposal H.

On September 28 *The Grand Rapids Press* in an Associated Press dispatch reported that a group called the Council Against Parochiaid had taken to the Michigan Supreme Court "11 specific objections in its lawsuit over whether the proper petition form was used and whether it was circulated properly." It should be kept in mind that this was not a lawsuit concerning the constitutionality of the proposal itself, but only a suit as to the propriety of the proposal's place on the November 7 ballot.

On September 29 it was reported in *The Grand Rapids Press* that the lawsuit by the Council Against Parochiaid was rejected and that the proposal will indeed appear on the November 7 ballot.

What the outcome in the November election will be is difficult to predict. There is a profusion of proposals on the ballot, including more than one about taxes. This might tend to work against Proposal H. It could, however, also have the opposite effect. The fact that loud voices are being heard about the necessity of cutting taxes may also work in favor of Proposal H. That, however, powerful and large forces oppose Proposal H is also a fact; and these could well succeed in their efforts to defeat it at the ballot box.

Even a favorable vote, of course, should not affect the attitude of our schools and people. If parochiaid is principally wrong and dangerous—and it is—then we cannot accept it even if it is available.

But if it is principally wrong, then we should also take advantage of the opportunity to express ourselves in the voting booth. We should vote No, not for the reasons which public school supporters put forth, but for our own reasons of principle.

We urge our Michigan readers to vote on November 7, and to vote NO!

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Government Aid to Christian Schools

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Lanting James

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The Reader Asks

We have asked James Lanting, editor of our "Church and State" column to respond to this question.

- Ed. Comm.

For the past few years the State of Illinois has sponsored a Pupil Transportation Reimbursement program. Illinois, and perhaps other states in similar programs, offer parents of nonpublic schools a partial reimbursement for costs of busing their children to Christian schools, if the school confirms attendance. There is also talk about tuition vouchers becoming available to parents of our Christian schools. The argument is made that these forms of government aid are merely permissible assistance to the parents rather than government aid to our schools. What should be our position regarding receiving such aid?

Garrett Flikkema

Lansing IL

Response:

Some Reformed Christians refuse any governmental aid or benefits as a matter of principle. This would include a refusal, I suppose, of Medicare, Medicaid, social security disability payments, flood disaster relief, farm assistance programs, college tuition grants, low interest loans for college education, etc.

But perhaps a more reasoned approach toward government aid or cost reimbursement (especially education costs which Christian school taxpayers pay twice!) would be for Christians to deny or refuse such aid when the aid is accompanied by a realistic threat of corresponding and unwanted government control over the recipient or the use of the funds.

This threat has always made parochial and private schools wary of receiving government direct aid for tuition and books. The old adage of "He who pays the fiddler calls the tune" is generally

applicable to substantive government aid programs. And if tuition vouchers payable to parents would necessarily entail the threat of government intrusion and regulation causing us to compromise our Reformed educational principles or relinquish control, it would seem prudent to refuse these vouchers.

This is not to say, however, that all cost reimbursement programs should be summarily rejected. For example, it is hard to see how school milk subsidy programs or the Illinois Pupil Transportation Reimbursement program (\$80 per year reimbursed to parents busing children more than 1 ½ miles from non-public school) pose a realistic threat to government control over the schools these children attend. Moreover, the fact that the school officials must notify the parents of this program annually, and certify attendance by the pupil, hardly raises the specter of dreaded government control.

Finally, your specific concern regarding the Illinois Pupil Transportation Reimbursement program now appears to be a moot point. The Illinois legislature has not appropriated any funds to this program for the '93/'94 school year and the Reimbursement Office of the State Board of Education recently informed me that this program has been abandoned for lack of funds.

James Lanting

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Recent Developments in Church and State Law

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Church and State

Mr. Lanting, a member of South Holland Protestant Reformed Church, is a practicing attorney.

Lutheran Church — Missouri Synod Radio Station Escapes FCC Affirmative Action Demands

The Federal Communications Commission (FCC) regulates the licensure of radio stations and scrutinizes applications for license renewals. One such FCC regulation requires license renewal applicants to satisfy equal employment opportunity (EEO) guidelines forbidding discrimination because of race, color, religion, national origin, or sex. Moreover, stations are specifically compelled to "adopt an affirmative action EEO program targeted to minorities and women."

The Lutheran Church — Missouri Synod owns and operates an AM station and an FM station, both located on the Concordia Seminary Campus in Clayton, Missouri. The AM station's format was religious and non-commercial, while the FM station featured a classical music format with a religious orientation and some religious programming. Citing the stations' religious mission, the church insisted that most employees of the stations have knowledge of essential Lutheran doctrine.

After review of the church's radio renewal application, the FCC determined that the church's hiring practices were illegal. Admitting that FCC policies exempt religious broadcasters from the ban on religious discrimination, the FCC nonetheless limited this exemption to "employees reasonably connected to the espousal of religious philosophy over the air." Thus the FCC ruled that the exemption from religious discrimination would not apply to religious station employees such as receptionists, secretaries, engineers, and business managers, for whom knowledge of Lutheran doctrine would presumably be "unnecessary." The FCC also found that the church had not made sufficient efforts to recruit minorities for these positions.

The church appealed this remarkable FCC ruling to a federal court of appeals, arguing that the

FCC imposed EEO regulations as a whole interfered with the church's ability to prefer Lutherans in hiring station employees. The church also contended that the EEO guidelines as applied to the religious radio station violated the Religious Freedom Restoration Act, the Free Exercise Clause, and other constitutional guarantees.

The federal court ruled in favor of the Lutheran Church — Missouri Synod, declaring unconstitutional the FCC's requirement that religiously formatted radio stations must give preferential treatment to minorities in its hiring decisions as opposed to hiring those persons with knowledge of Lutheran doctrine. Rejecting the FCC notion of requiring the religious station "to make race-based hiring decisions" while ignoring knowledge of religious doctrine for most employees, the court ruled that unless the FCC had evidence that the church had demonstrated actual racial preference in its hiring decisions, the government claims of discrimination must be dismissed.

Commentators have suggested that this is an important ruling, not only for churches, but also for other religious organizations as well. This federal court decision reaffirms the right of a Christian organization to practice hiring preferences for employees who embrace a knowledge of the organization's faith commitment.

Federal Appellate Court Affirms Convictions of Abortion Protesters

Several years ago Congress adopted a new federal criminal law primarily targeting abortion clinic protesters. The Freedom of Access to Clinic Entrances Act (FACE) provides criminal and civil penalties for those convicted of obstructing ingress or egress to abortion clinics. Eleven members of an anti-abortion group called the Lambs of Christ physically blockaded all the entrances of a New York Planned Parenthood clinic. They prevented access to the building by chaining themselves to the doors or welding themselves to large objects such as a car or picnic table. Although they did not engage in any violence, they practiced "passive resistance" while being removed by local law enforcement agencies.

The federal trial court convicted all defendants of violating FACE, imposed sentences, and ordered restitution to the clinic for the property damage caused by their activities. On appeal, the defendants argued that FACE was unconstitutional under the Commerce Clause and the Free Speech Clause.

Addressing the defendants' Commerce Clause argument, the federal appellate court declared that Congress has the power to enact legislation "to prevent the inhibition or diminution of interstate commerce." But how are abortions related to "interstate commerce"? Reviewing the legislative history of FACE, the court found that Congress had stated that "women travel interstate to obtain reproductive health services" and that "doctors travel state to state and often cover great distances to perform abortions." Moreover, the court found that "clinics purchase medical and other supplies in interstate commerce." Accordingly, because abortion clinics are in these ways involved in "interstate commerce," Congress has the raw legislative power to regulate such activities.

The protesters also argued that FACE discriminates against those persons who are "ideologically or morally opposed to abortions." The court disagreed, claiming that "pro-choice" protesters are also prosecuted for violating the statute.

The court also pointed out that the protesters may nonetheless exercise their free speech rights by displaying signs, distributing literature, and by "speaking conversationally anywhere or anytime they choose," activities which are quite different from blockading entrances to the clinics.

Finally, the convicted protesters argued they lacked the requisite criminal intent since their sole objective was "to save the lives of unborn children." The court disagreed, holding that regardless of what the protesters' "ultimate purpose" may have been, they nonetheless blocked the clinic intending to prevent abortions, and accordingly violated FACE.

U.S. Supreme Court Allows Wisconsin Tuition Voucher Plan to Stand

The school choice movement promoting tuition vouchers for private and parochial schools gained unprecedented momentum recently when the U.S. Supreme Court refused to review Wisconsin's controversial school voucher program. Early last summer, Wisconsin's top court had ruled that the Milwaukee Parental Choice Program (MPCP) was constitutional even though it made state money available to religious schools, because the tuition reimbursement was payable to the parents, who then had the choice of selecting a public or private school. The controversial decision was immediately appealed to the U.S. Supreme Court by voucher opponents who insist that such vouchers breach the constitutionally mandated separation of church and state.

But, by an 8-1 vote, the U.S. Supreme Court refused to review the Wisconsin decision, thus lending its informal "approval" to the Milwaukee voucher program. The supreme courts of four other states are currently considering voucher programs similar to the Wisconsin tuition reimbursement plan, and any or all of those decisions will likely also be appealed to the highest court in the land. But for now, anyway, the Supreme Court justices are declining to embroil themselves in a growing national debate over the use of public funds by private religious and parochial schools.

The experimental Milwaukee program currently would provide up to \$70 million for some 15,000 low-income students to attend private schools, whether religious or secular. The detractors insist that such schemes will divert sorely needed resources from public schools already in desperate financial need. Proponents argue vouchers allow poor students the opportunity to choose quality schools and force inferior public schools competitively to improve their educational programs.

The U.S. Supreme Court's refusal to consider the Wisconsin voucher program will be interpreted as a partial victory for both sides, although it is clear that the Wisconsin program will now serve as a prototype for other states considering similar tuition reimbursement schemes. Still unanswered also is the ongoing concern of parental schools regarding the nature and extent of government regulations and intrusion that is inevitably linked to state funding of private organizations.

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U.S. Supreme Court Approves Vouchers for Private Schools

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"In sum, the Ohio voucher program is entirely neutral with respect to religion. It provides [tuition aid] directly to a wide spectrum of individuals.... It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold the program does not offend the Establishment Clause."

Zelman v. Simmons-Harris, U.S. Supreme Court

(June 27, 2002) (majority opinion)

"The [tuition voucher] money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach ... all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the papacy in Catholic schools, the truth of Reformed Christianity in Protestant Schools, and the revelation to the Prophet in Muslim schools.... *** Establishment Clause ... doctrinal bankruptcy has been reached today."

Zelman v. Simmons-Harris, U.S. Supreme Court

(June 27, 2002) (dissenting opinion)

Voucher Victory

In what constitutional scholars are now describing as the Court's most significant church/state

decision in fifty years, a bitterly divided U.S. Supreme Court recently approved the constitutionality of state funded tuition vouchers paid to religious schools. Opponents of tuition vouchers had successfully argued for decades in state and federal courts that the receipt of state funds by private religious schools violated the Establishment Clause of the First Amendment ("Congress shall pass no law respecting an establishment of religion..."). After a decade of intentional silence on the contentious voucher programs operating in Wisconsin, Florida, and other states, the Court finally decided to adjudicate the constitutionality of Ohio's Pilot Project Scholarship Program. In a 5-4 decision, the Court held that because the Ohio program was "neutral with respect to religion" and since the voucher funds were not paid directly to the schools but rather to the parents who then made a "private choice" for religious education, the Ohio program passed constitutional muster.

Ohio's Voucher Program

Ohio's Pilot Project Scholarship Program provides tuition aid for certain students in the troubled Cleveland City School District to attend participating public or private schools of their parent's choosing and tutorial aid for students who choose to remain enrolled in public schools. Both religious and non-religious schools in the district may participate, as well as public schools in adjacent school districts. Tuition aid is distributed to parents according to financial need, and where the aid is spent depends solely upon where parents choose to enroll their children. In the 1999-2000 school year, 82% of the participating private schools had a religious affiliation, none of the adjacent public schools participated, and 96% of the 3,700 students participating in the scholarship program were enrolled in religiously affiliated schools.

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. For all other families, the program pays 75% of tuition costs, up to \$2,875, with no co-payment cap. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school.

Ohio's Scholarship Program also included the funding of "community" or charter schools, which are funded under state law but are run by independent boards enjoying the academic independence to hire their own teachers and determine their own curriculum. These community schools can have no religious affiliation and are required to accept students by lottery. Such community schools received state funding of \$4,518 per student, twice the funding received by a participating private school.

Finally, the Ohio Scholarship Program also established "magnet" schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. Such schools receive state funds of \$7,746 per student. Some 13,000 students were enrolled in the Cleveland magnet schools created by the Ohio Scholarship Program.

True Private Choice

A majority of the Supreme Court held that the Ohio Scholarship Program did not offend the Establishment Clause because it was a program of "true private choice." The parents residing in the beleaguered Cleveland school district had the option of sending their children to a public school, community schools, magnet schools, or a religious or nonreligious private school. Because the Ohio program was "neutral with respect to religion" and because the program entailed a private choice by parents, the Court ruled that the scholarship program does not result in an establishment of religion by the government, notwithstanding the fact that substantial state funds are indirectly received by private religious schools:

... where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause....*** The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of the benefits.

Other Government Aid to Religious Institutions

Justice Sandra Day O'Connor, filing a concurring opinion supporting the majority's approval of the Ohio program, noted that Ohio's Scholarship Program, resulting in some \$8.2 million paid to private schools in Cleveland, "pales in comparison to the amount of funds that federal, state, and local government already provide to religious institutions." She pointed out that churches enjoy real estate tax exemptions; clergy qualify for federal tax breaks on income used for housing expenses; Christian colleges receive student loans, Pell Grants, and G.I. Bill funds; religiously affiliated hospitals receive some \$45 billion in Medicare and Medicaid benefits; individuals receive tax deductions for charitable contributions to churches. And she catalogued many other legislative schemes where state funds are received or benefits enjoyed by churches and other religious organizations. Justice O'Connor concluded that the state scholarship money flowing to private religious schools in the Ohio program "is neither substantial nor atypical of existing government programs" that benefit many religious organizations.

The Dissent

Justices Souter, Stevens, Ginsburg, and Breyer filed a vigorous dissent, arguing that the Ohio voucher program is unconstitutional since it is essentially "a scheme that systematically provides tax money to support schools' religious missions." This result, the minority opinion contended, is a violation of the First Amendment, which prohibits government establishment of religion. Citing a 1947 Supreme Court school aid opinion, the dissent insisted that:

No tax in any amount, large or small, can be levied to support any religious activities

or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion.

The dissent contended that the "majority's twin standards of neutrality and free choice" are contrary to decades of case precedent, are all about "jettisoning substance entirely in favor of form," and stand "in defiance of every objective supposed to be served by the bar against establishment."

Governmental Regulation of Private Schools?

But in addition to its contention that the Ohio voucher scheme violated traditional Establishment Clause jurisprudence, the dissent also raised the ominous spectre of the inevitable corollary to governmental aid — governmental regulation:

...governmental largesse brings government regulation. The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating schools may not "discriminate on the basis of ... religion," which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non-believers. Indeed, a separate condition in the Ohio program that "the school ... not ... teach hatred of any person or group on the basis of religion," could be understood to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others if they want government money for their schools. *** When government aid goes up, so does reliance on it; the only thing likely to go down is independence. A day will come when religious schools [receiving state funds] will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

The Future for Choice

Constitutional scholars have opined that in terms of practical impact, "nothing else compares" with this decision on vouchers because school choice has the potential for affecting the education of tens of millions of American children. The Supreme Court's ruling sends the educational choice debate back to the states, where its opponents have vowed to fight in the legislatures and state courts. Voucher opponents have also threatened to sponsor state legislation that will closely regulate and monitor all private schools participating in the various voucher programs.

Accordingly, although the Court's voucher decision earlier this summer will give needed impetus to the charter and magnet school movement, it remains fairly certain that, like the Ohio program, private religious schools that participate in these government voucher programs will be threatened with forfeiture of their autonomy and independence in such areas as admission criteria, curriculum content, teacher certification, and other such fundamental issues. Thus, although the voucher decision clearly reflects an encouraging recent trend on the Court toward more equal treatment of religion, the decision has little promise for parental Christian schools which are understandably wary of losing their independence by submitting to loathsome governmental regulation which inevitably accompanies the receipt of government funds.

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