

# JUDGMENT DAY FOR SCHOOL VOUCHERS

## *A discussion of the constitutionality of the Cleveland School Voucher Plan*



THE PEW  
FORUM  
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*A November, 2001 panel discussion sponsored by the Pew Forum on Religion and Public Life, in association with the Georgetown University chapters of the American Constitution Society and the Federalist Society, considered issues raised by *Zelman v. Simmons-Harris*, the Cleveland, Ohio, school voucher case that was heard by the United States Supreme Court in February, 2002. The conversation featured constitutional scholars and litigators who have played key roles on both sides of the case. After a brief overview of the case by moderator Melissa Rogers, executive director of the Pew Forum on Religion and Public Life, panelists made informal remarks and then took questions from the audience.*

MELISSA ROGERS: I'd like to begin by briefly discussing the background on *Zelman v. Simmons-Harris* for those of you who may not be familiar with the case. I will then turn to each of the panelists for a short presentation, and we'll conclude our discussion by turning to the audience for questions and comments regarding the issues raised.

In 1995, the Ohio General Assembly adopted the Ohio Pilot Scholarship Program in response to an order of the U.S. District Court that placed the Cleveland School District under the control of the state due to poor performance and management of the school system in that district. The voucher program that was created through the legislation applies to any school district that has been put under such an order by the court. At present, the Cleveland School District is the only one that qualifies as such. The program provides scholarships to kids in grades kindergarten through 8th, and it applies to all the children residing and attending school in the Cleveland School District. The program gives preference to low-income families

and pays in accordance to family income. For example, in the low-income program, the program pays 90 percent of private school tuition up to \$2,250. The scholarship is made payable to the parents of the children, and then the parents are required to endorse the check over to the school they select.

What kind of schools may participate in this voucher program? Private schools that are within the boundary of the Cleveland School District may participate, as well as public schools that are adjacent to the Cleveland School District, although none have chosen to do so yet. There are also state programs providing tutorial assistance to students who choose to stay in Cleveland public schools. In addition, the state operates programs that have created community and magnet schools that are somewhat set apart from the public school system.

The parties in the *Zelman* case agree that during the 1999-2000 school year, 96 percent of the students participating in this program went to religious schools, and

82 percent of the participating schools were themselves religious. The record also indicates that at one time during the program's course, as many as 22 percent of the participating students went to non-religious schools. The money that comes to the schools via the scholarship program may be used for any purpose. In other words, it's not restricted from religious use.

In 1996, the plaintiffs brought suit in state court, challenging the constitutionality of the program under both the state constitution and the federal Establishment Clause – the clause requiring that the government not establish religion. In 1999, the Ohio Supreme Court ruled in favor of the plaintiffs on the basis that the voucher program violated the one-subject rule, a technical rule that the Ohio legislature placed on the legislation. The court rejected, however, the plaintiffs' claim that the program violated the Establishment Clause. Subsequently, the legislature fixed the technical, one-subject rule problem with the Ohio scholarship program while keeping the other elements of the program the same, and the program resumed. The plaintiffs came back later in 1999, this time in federal district court.

In August, 1999, shortly before the school year was to begin, the District Court granted the plaintiffs a preliminary injunction enjoining the voucher program, and the defendants immediately appealed to the Sixth Circuit Court of Appeals. A few days later, the District Court modified its order somewhat, partially staying its injunction, in effect staying the part that would have prevented the students who had been a part of the program from continuing in the scholarship program, but still keeping the students who would have been new to the program from participating. The defendants appealed the part of the preliminary injunction that was not stayed to the Sixth Circuit and to the U.S.

Supreme Court. And in November of 1999, the Supreme Court, by a vote of five to four, granted the defendants' request to stay the entire injunction, pending the lower court's review of the case. The District Court later ruled in favor of the plaintiff, finding that the voucher program was unconstitutional under the Establishment Clause. In December, 2000, the Sixth Circuit affirmed that conclusion.

At that point, the state decided to take the matter to the Supreme Court, and they filed for a *writ of certiorari* in May of 2001. Significantly, in June of 2001, United States Solicitor General Ted Olsen, President Bush's appointee, urged the court to take the case. On September 25, 2001, the petition was granted by the Supreme Court. In November, 2001, the petitioners filed their brief with the court, and in early December the other side will file, according to the 30-day rule. Oral argument in the case will be heard on February 20, 2002.

The crux of the matter, and what I think we'll spend a lot of time talking about today, is the question of whether the voucher plan has the forbidden primary effect of advancing religion, which would be prohibited by the Constitution. Of course, this case is a very important case in and of itself because the school voucher matter has been hotly contested for many years, and so the decision just on the school voucher issue will be tremendously important. But the case also could have important implications for the relationship between church and state in the future. There are any number of matters that are controversial in terms of the relationship of tax funds and religious institutions. Most recently, we have been consumed with the debate over President Bush's faith-based initiative, and the voucher case has the potential to set some important benchmarks on these matters.

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## ROBERT DESTRO

MELISSA ROGERS: We will hear first from Robert Destro, professor of law and director of the Interdisciplinary Program of Law and Religion at the Catholic University of America's Columbus School of Law. Bob formerly served as interim dean there and as a commissioner on the U.S. Commission on Civil Rights. He has submitted an *amicus* brief in favor of

the constitutionality of the voucher program on behalf of the Center for Education Reform. Bob also happens to be a native of Ohio.

The Cleveland voucher case is about control. It's about who controls the education of children in the City of Cleveland. It is ironic in many respects that this case

comes up to the Supreme Court as another chapter in the ongoing desegregation struggle in Cleveland, because if there is anything that is clear in the history of church-state relations, it's that discrimination in public school systems on the basis of religion has been rampant since at least the mid-1840s. All you have to do is go back and look at cases where the kids were disciplined for refusing to read the Bible, or refusing to do various and sundry other things that were required up until the Supreme Court eliminated mandatory school prayer and Bible reading in the 1960s.

One of the interesting things that Melissa said is that in this case, the Sixth Circuit's record, and certainly the record of the District Court, has been largely unsullied by either the facts or the historical context in which this case erupts. Over the years that Judge Battisti sat on the Northern District of Ohio's bench riding herd on the Cleveland School Board, he consistently enraged a lot of people in town. He said that Cleveland was a melting pot city that never melted. If you drive through the east and west sides of Cleveland, you will see very discrete ethnic enclave neighborhoods. They are very stable neighborhoods, but they have never really "melted" together. It's still, according to one of the experts that testified in the case, one of the most segregated school system areas in the whole country. The question is how do you fix this?

One way would be to forget about the Establishment Clause question and to focus instead on desegregating the school system. It's apparent that all of the attempts to "do equity" that *Brown v. the Board of Education* and subsequent cases have given us have not worked. The state has thrown up its hands. It tried to take over and run the district itself and that still didn't work. They restructured the school board; that didn't work.

They put in various and sundry education reforms; that didn't work. Finally, a lot of parents said, if you can't do the job, just give us the money and we'll go find a solution ourselves. And so the State of Ohio stuck its toe in the water and gave the kids 90 percent of the tuition of a private school, up to \$2,250. Not very many private schools will accept an amount that low for tuition, but everybody concedes that this is more or less an experiment.

The State has also made available full tuition if a child wants to transfer to a suburban public school. Most of the suburban schools simply don't have enough room to take the kids, and that's why they don't participate. It's not that they would lose money on the deal – they actually get more money if the kids transfer.

Again, I want you to think about this case as a question of control. The question is: "Who is in charge of these children's destinies – their parents or the school board?" What the plaintiffs in this case have argued, in effect, is that these kids should be trapped in the public school system because we can't trust teachers in parochial schools to know how to teach math, how to teach English, or other subjects. In fact, we can't trust them with much at all because they just might teach religion.

Even though it costs \$5,000 per student to educate a kid in a public school, the plaintiffs figure that if we transfer even a fraction of that money – half of that money – to a parochial school, somehow we are advancing religion. That is one of the most patently absurd factual assertions I've ever heard in my life. If it costs \$5,000 to fund a secular education, then \$2,250 doesn't even get you the full cost of a secular education, much less pay for the advancement of religion.

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## CHARLES LAWRENCE

MELISSA ROGERS: Thank you, Bob. Professor Charles R. Lawrence has joined us as well, representing the home team at Georgetown here for us today. He has been a visiting professor at Harvard, Berkley, UCLA and USC. He is the author of numerous articles on the First Amendment and on race relations, and he currently serves as an at-large member of the Board of Education of the D.C. public schools.

I want to speak to the issues in the case from several perspectives. One is as a constitutional scholar, asking what outcome the precedent dictates. One is as a school board member in an urban district, not all that different from the one that Bob described in Cleveland; an urban district that has been under a desegregation order even longer than Cleveland; an urban school district that is still largely segregated; an urban school district in which most white children attend private schools.

I also want to think about this case within the context of my concern about whether the outcome will best serve the values of equality and justice. I want to give particular attention to those children who continue to be systematically denied the right to learn in this city and in Cleveland, children who are, for the most part, black or Latino.

I'm concerned about the outcome of this case as a parent. I want my children to be educated in schools where they can make friends with children from many different religious backgrounds, whose families represent every class and race. I want my children to go to schools where all children are taught to value and care for – not just to tolerate – children who are different from themselves, where they are inculcated to the secular values of citizenship and democracy, and where the primary concern of the school is not to indoctrinate children in the beliefs of a particular religion. Finally, I am concerned about the outcome of this case because I am an individual with a deeply held faith. As a religious person I am afraid that the outcome of this case may diminish our freedom to hold and practice our beliefs without coercion or stigma caused by the state's support of one religion or another, even if it be my own.

Having said that, there are a couple of things I want to say about what I think are the key constitutional issues in this case. It is important to see that the underlying focus of the Establishment Clause is about freedom of religion. The Establishment Clause is directly connected to the Free Exercise Clause. It protects freedom of belief by guarding against the state coercion, indoctrination, endorsement, and stigma that occur when one religion is favored over another. It also prohibits the state from supporting one religion over another, what is known as the neutrality principle.

It's important to think about the fact that ever since Jefferson first proposed public schools, they have played a central role in the vitality of our democracy. In cases like *Ambach v. New York* and *Bethel School District No. 403 v. Fraser*, the Supreme Court has emphasized the public school's central role as an inculcator of values. Proponents of school vouchers often argue that giving parents a choice removes the nexus between the government's support of a religious school and the government, so that this is no longer direct government-supported schooling. The analogy is often drawn between this case and the case where a mother takes her government salary and chooses to

spend it in a sectarian school, or takes a tax rebate and chooses to go to the local Catholic school and spend it on tuition.

I would argue that if you look carefully at what's going on here, a more apt analogy is drawn between this case and a city that turned over a large number of its public schools to the Catholic Diocese of Cleveland and said, "We've decided you can do a better job of educating the poor children in this district. We'll hand their education over to you." Mr. Destro says that this is a case about not trusting Catholic or any other kind of religious teachers to know that their job is to teach math or teach physics rather than religion. But one of the things that is a matter of record in this case is that none of these schools is claiming that it won't try to teach these children religion. All of them, as religious schools, say that a central part of their mission is to try to inculcate in these children the centrality of faith.

So this is not like some of the earlier cases where the court has said, for example, that these are public school teachers who are coming into school just to teach math and we have to try to figure out whether it's possible for a public school teacher to just teach math in a religious school. This is a case about money being given to religious schools to carry out their primary mission. Many, if not most, of these schools make no claim that their teachers will try to distinguish between secular teaching and religious teaching. Certainly, as a religious person, I do not believe that religious schools should be forced to exclude religious values from their teaching.

Finally, I just want to briefly mention one other point that brings us back to the facts and the history of this case. It's important to remember that this case started out, as Melissa noted, as a remedy to a judicial decree in a desegregation case. The court's remedy gave the chief state education officer the power to run the Cleveland School District, and then the state legislature adopted a statute giving parents the option of taking this voucher and spending it where they choose. When we think about this voucher plan as a judicial remedy to a desegregation case, it's important to consider what other remedies might have been given to these parents but were not. This question is key because, for Establishment Clause purposes, we need to ask whether this voucher plan really gives parents a free choice, whether these parents really freely chose to send their children to religious schools.

I would argue that, in fact, what has happened to these poor black parents is that they've been denied the remedy (or choice) of sending their children to school with the children of affluent white parents in the suburbs around Cleveland. They were denied that by *Milliken v. Bradley* in the Supreme Court. They've been denied the remedy of real equal funding by *San Antonio School District v. Rodriguez*. They've been denied all of the remedies (choices) that would have given their children a quality education, an educational opportunity equal to that of their more prosperous neighbors. While people keep talking about the achievement gap, members of Congress – most of

whom represent districts where kids are in the public schools – will not give us the remedy of adequately funding the schools.

Instead, the Cleveland voucher plan gives poor black parents \$2,250. That doesn't pay tuition at Sidwell Friends, it doesn't get you into Georgetown Day, or the Cathedral School, or their equivalents in Cleveland. The Cleveland voucher gets you to a Catholic school in a poor urban community that is not very different from the public school you were attending. And voucher proponents call this choice.

## JAY SEKULOW

MELISSA ROGERS: Thank you. We're very pleased to have Jay Sekulow here. He is chief counsel for the American Center for Law and Justice. Jay has the impressive distinction of having argued before the Court nine times. Many of you have probably read about two of his cases – *Board of Education v. Mergens* and *Lamb's Chapel v. Center Moriches Union Free School District* – in your constitutional law classes. They are very significant decisions in church-state relations, and Jay argued successfully in both of them.

The area of agreement here seems to be that the Cleveland schools were in trouble and something had to be done. So a voucher program was put in place allowing parental choice. The parties concede, and the court acknowledges, that this is not a situation where the program was established for the purpose of advancing religion. This was a program established because the schools in Cleveland needed improvement. A voucher program vesting control to parents was a legitimate option. To exclude religiously affiliated schools would show hostility towards religion, which is specifically prohibited by the Establishment Clause.

I would draw an analogy to the cases involving access to school facilities, or to government buildings, by religious groups. It's in a little different context, but I think the same principle applies. The argument is made that if we take government money and allow religious groups to use facilities, we therefore violate the Establishment Clause and church-state separation. The Supreme Court has consistently said – in *Lamb's Chapel*, in *Mergens*, and most recently in *Good News*

*Club v. Milford Central School* – that if you have a neutrally available program to allow groups to use your facilities, you cannot exclude religious groups from participating simply because they are religious. That is true even if government dollars are involved. And yet what is the basis upon which the objection is made here to the voucher program in Cleveland? The objection is that religious schools are going to participate.

I don't think that the fact that 82 percent of the schools involved in this particular case were religious schools shows an Establishment Clause problem. I think it shows that the secular counterparts of these schools are still engaging in discriminatory practices that make it difficult for less affluent children to attend. I think Sidwell Friends should simply say, "There's a problem in Washington, D.C., in the public schools and we're going to help out." I think that if you adopt a voucher program in this city, Sidwell Friends should make some scholarships available so that the \$2,250 provided by the city, coupled with scholarships that the well-off people at Sidwell Friends give, can allow these kids to go to school. Let's not penalize religiously affiliated schools because they are willing to offer alternatives in Cleveland and in other places.

These are never easy cases. This case, in particular, has broader implications than just the Cleveland School District, and the Supreme Court realizes that. In this case, taxpayer money is being returned to parents. Two choices that have to be made as part of the mechanics of this program are very important: first, the parent has to decide to opt their child out of the existing public

school in Cleveland; and second, the parent has to decide where that child will go to school. I think the fact that the parent is the one making the choice – and the fact that there are secular counterparts available – provides a neutral program.

The different views on how the Establishment Clause relates to this will be argued – fairly aggressively, I suspect – in February. The fact of the matter is that we have to look at the Establishment Clause in a totality of circumstances. It's very easy to say that dollars are going to religious groups here and that's a bad thing. That's an easy answer, but I don't think it's the correct answer. The Establishment Clause has multiple parts and, among other things, it was designed to prevent overt hostility to religion. You can't draw a statute that says, we're going to allow vouchers and choice in the educational process, but we're going to exclude the Torah Day School, St. Pius High School and the Lutheran School. That is targeted discrimination, it is

viewpoint discrimination, it is treating religious adherents – or religious schools – as second-class citizens.

I'm trying to balance the dual aspects of the Establishment Clause here. The parties have conceded, and the Sixth Circuit acknowledges, that this program was not created to advance religion. The question of excessive entanglement is also raised. But on that point, there is no problem because the parent endorses the voucher check over to the specific school. I suspect that Justice O'Connor would be sympathetic to the concept that when you have a program that has secular alternatives, there shouldn't be a constitutional problem. And I think that to argue that this program advances religion because it happens to be that religious schools agreed to participate, and parents are choosing religious schools, is to penalize both the religious schools and the parents who choose religious schools. That's inappropriate as well.

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## ELLIOT MINCBERG

**MELISSA ROGERS:** Our final panelist is Elliot Mincberg. Elliot is general counsel and legal and educational policy director for People for the American Way Foundation. He has served as co-counsel on a number of voucher cases, including the one in Cleveland, but also the cases in Milwaukee, Pennsylvania and Florida. He was previously a partner at Hogan and Hartson law firm, and then he left to go make big bucks at People for the American Way Foundation. (Laughter.)

I'll talk today about four particular reasons why I think vouchers, in general, and in Cleveland, in particular, are wrong. The first and most important reason – and this would be true even if the schools weren't religious – is that voucher programs harm public school kids by diverting money and efforts from improving those schools. In Cleveland, after the end of this year, \$43 million will have been diverted that would have gone to disadvantaged people in Cleveland.

There are 70,000-plus kids who attend the public schools in Cleveland who get no benefits at all from this program. In fact, there is a case that's very important in the background – the *Coalition for Fiscal Equity* case – in which the Ohio Supreme Court (no bastion

of liberalism) ruled three times that the Ohio system for funding public education violates the state constitution because it is so inadequate. And despite that, the state has not fixed that problem. Instead, when it had control of Cleveland, what it did was provide vouchers of \$2,250 for fewer than 4,000 kids – not at all a solution to these problems, but one that makes it harder to solve these problems.

Second, vouchers really provide choice for schools, not for kids. Take, for example, the Milwaukee program. Both Milwaukee and Cleveland are supposed to use random selection to select kids for vouchers. That's their way into private schools, but what about the way out? In Milwaukee, statistics show that between 23 and 44 percent of the kids in voucher schools leave the program every year. They drop out – or are pushed out – because they don't make the grade. Private schools can do that. Is it really a choice, therefore, under those circumstances? Special education kids can be, and are, rejected by voucher schools in Cleveland and elsewhere.

The third problem I want to talk about for a minute is what I call the accountability dilemma, and it goes like this: Private schools have every right to be private, to

teach in their schools what they choose, to promote religion if they want to, to give tests or not give tests. They are, after all, private schools. But when we as taxpayers pay for somebody to go to a school, whether it's private or public, we have the right to demand accountability, to demand academic standards, to demand that health and safety codes be met. I'll just give one example. One voucher school remained in the Cleveland program for over two years even though it was in continual violation of fire codes, had lead paint in the walls that was eight times the recommended levels for kids, and, in fact, didn't provide adequate education by any standards.

Finally, I want to talk about what the Supreme Court's going to be talking about – the church-state issue. That, after all, is the only issue the Supreme Court can look at. The principle here goes back to first principles, to the principles of Madison and Jefferson. The principle is that taxpayer money should never be demanded from any taxpayer to support a religion they don't agree with. This was spelled out in response to what might be called the nation's first voucher program. In 1784, there was a Virginia proposal to levy a tax to support teachers of the Christian religion. Each taxpayer would decide to what society of Christians the money would go, or could direct that his tax dollars not support a religious society at all but instead support seminaries of learning – not unlike, one might argue, the choices that are involved in the voucher program. Madison's famous response said no. "Not even three-pence," Madison said – they had three-pence then – "should be demanded of a taxpayer to support religion." And that's the fundamental principle that this program violates.

The Supreme Court recognized that principle in 1973 in *Committee for Public Education and Religious Liberty v. Nyquist*, where there was a voucher-type program involving tuition reimbursement for people who sent their kids to private schools in New York. The argument there was just the same argument we've heard here: It's their choice whether they're going to send their kids to religious schools or not. But the court recognized that public schools, by definition, at the K-12 level, are free, so you're not really exercising a choice in that regard. Inevitably, the effect of a program that directs money to private schools in that way is to support religion.

In Cleveland it's even worse because, as it has been pointed out, the limit is \$2,250, which excludes most non-religious schools that don't have the advantage of having their churches subsidize their education. Some of the private schools don't have a church or synagogue that can provide the subsidy that those religious schools quite appropriately are providing. And the result is that taxpayer money will inevitably go to support religious schools and, as Professor Lawrence pointed out, schools which, even if they do an excellent job at teaching kids math and reading, have as their main purpose the promotion of their particular sectarian religious views. I would defend to the death their right to do that. But what I would also defend is the right of all taxpayers not to be required to send their money to support somebody else's religion. That principle was good enough for Madison and Jefferson. And I'm hopeful that the Supreme Court will agree that the principle still applies today.

## DISCUSSION

**MELISSA ROGERS:** Thank you very much for the really excellent presentation of each panelist. You put a lot on the table for us to consider now. I want to open the floor to questions at this time.

**QUESTION:** I'm from the Georgetown Law School. I went to public schools and I am from a middle-class background. I was wondering if each of the panelists would tell us whether or not they attended public or private schools, what type of schools their children attend and how that has affected their decisions.

**ROBERT DESTRO:** I have two kids – one goes to a public school and the other one goes to a Catholic school. I went to Catholic school and then to a state university. Has it affected my choice? In some basic ways, yes. I chose schools for my children based on what I thought was the best learning environment for them. But I can tell you that in North Arlington, where I live, the Catholic school that my daughter attends is far more integrated – economically, ethnically and racially – than the public school that my son attends.

**CHARLES LAWRENCE:** From kindergarten through the second grade, I went to a very fancy private school in New York City. From third grade through high school, I went to public schools. Both of my children are in D.C. public schools. My choice is largely influenced by the social education that they are receiving through their exposure to the diversity of children in the public schools that they attend.

I am opposed to the voucher program that Jay Sekulow proposed earlier in the program, a voucher that would only go to non-sectarian private schools. Mr. Sekulow's proposal would avoid the church-state issues presented in the Cleveland case, but it does not respond to my concern that vouchers will make it more difficult for society to fulfill its responsibility to teach children from diverse cultures and backgrounds to understand and appreciate one another. The pro-voucher position ignores our collective responsibility for the education and inculturation of children. Instead it assumes that we have met that responsibility when we give parents the dollars and allow them to send their children to schools that continue to be segregated by race and class.

In the District of Columbia we have experienced first hand the fallacy in the argument that school choice will produce better schools. Although we have a few very good charter schools in the school district, we also have a significant number that are substandard by anyone's measure. Parents from these inferior schools come to the school board and ask us to do something about the facilities or about the principal. And I have to tell them, their only solution is to exercise their choice in the market. The people who promoted these schools tell you that the solution is not to complain to the school board but to take your dollar and spend it someplace else. The market gives these parents a choice in theory but not in fact.

**JAY SEKULOW:** I went to public school through high school, and both my college and law school were private. My oldest son, who is a senior at George Washington University, attended both public and private schools and was home-schooled as well. My youngest son, who just turned 16 about a week ago, received his Associate of Science degree in film at age 16. We home-schooled him and he's very gifted in film and video, so he was able to get his college degree and complete his high school degree at the same time.

**ELLIOT MINCBERG:** I went to public school from kindergarten through eighth grade and I went to private school in high school. My kids have primarily attended public school. Those experiences have reinforced for me the argument that with private schools, the choice is really the choice of schools, not kids. I had to take an academic test to get into the private school I attended and that wouldn't have done very much good for most poor kids in public schools in Chicago where I grew up.

**QUESTION:** My question is for Mr. Mincberg. You mentioned Madison's belief that the tax resources of private citizens shouldn't go to support religious beliefs they don't hold. How would you respond to the claim that many religious people make that, in fact, public schools are not neutral, but put forward a humanistic religious view and a philosophy that is frequently opposed to the religions of many people, particularly in areas of sexuality or origins?

At the time of Madison maybe there was more agreement – and therefore more possibility for neutrality – but today I think people would argue that is not the case and leads to the necessity of a solution like school vouchers.

**ELLIOT MINCBERG:** I find that solution extraordinarily dangerous because it threatens the whole notion that we can achieve neutrality in our public schools. I think for the most part we have achieved that – the vast majority of public schools do that very well. A number of us in this room were involved a few years ago in putting together some guidelines on religious expression in the public schools that allow kids to express religion in an appropriate way and at the same time ensure that the school is neutral.

A few years ago, we were involved with a case in Mississippi of a family that attended a public school that didn't follow such guidelines, a school that broadcast prayer over the intercom. Newt Gingrich was asked about the case and he said that the solution was vouchers because then that woman could go to an atheist school (in fact, she was a Methodist, but Newt didn't know that) and other people could go to Jewish schools and Catholic schools and everyone would be happy.

I think that would be a very bad thing for American education. We've done a reasonably good job of making sure the public schools really are neutral, that

they don't promote or denigrate religion, and we can and should continue to do that.

**ROBERT DESTRO:** Let me just add another aspect to this discussion. School finance is an area where I think people don't pay attention to history. Catholic schools didn't arise by accident. There was a big fight within the Catholic Church – largely led by Archbishop Hughes of Cincinnati – about whether or not Catholics should send their kids to public school. Hughes actually joined the city school board in Cincinnati and eventually quit when Catholic kids were beat up because they refused to read out of the King James Version of the Bible. So, one could say – accurately – that the Catholic schools were actually formed as a reaction to the hostility of the public school system to Catholics and their beliefs.

If you want a good take on this, look in *Everson v. Board of Education* itself. In the dissenting opinion of Justice Jackson, he says specifically, “Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values.” He says that “It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.”

**CHARLES LAWRENCE:** Let me just make one more point here. When I first got out of law school I worked at a legal services office called The Harvard Center for Law and Education where some of us were trying to put together model voucher legislation. I was persuaded by a friend of mine that there was great value in developing the model legislation. And at that point in time I had a great deal of sympathy toward vouchers.

Yet our proposal differed substantially from the paltry voucher that the Cleveland children have to spend at existing schools. These practical differences bring me to my current opposition to vouchers. We put together a proposal that would have created money for transportation, that would have required private and public schools to hold open a certain number of positions for

people who were poor, and for the purpose of achieving racial integration. Our proposal would have required desegregation. All of these things are essential in a nation where a central theme in our history has been racial discrimination, and where we count on education to be a leveling factor. We built all of these equalizing elements into our model legislation, and all of the pro-voucher politicians ran like hell from that voucher proposal. There wasn't a person that we could find in a legislature to support it. If you were to take that proposal to President Bush, he would not support it either. He's for vouchers but he's not for a voucher program that includes clear regulations to promote equality and equalize financing.

**QUESTION:** I want to get back to the neutrality question. Jay, you depict this program as something that neutrally allows kids to go to whatever school they want, and although you can use rhetorical flourishes about discrimination against religion, the Establishment Clause means that there are lots of things that religion can't do. You can say anything you want over the loudspeakers at a football game, but not a prayer, and we don't call that discrimination.

The Establishment Clause has even been construed until now to place actual restrictions on religion versus other things. But leaving that to one side and taking your assumptions that a neutral program would work, how can you argue that this is neutral and not about advancing religion? In every single one of these programs, 92, 94, 98 percent of the kids are in Catholic schools. And there's a reason for that, which is that the voucher is only for \$2,250. The Roman Catholic Church subsidizes education in order to inculcate religion and everyone passing a voucher program knows that Catholic schools are the only ones that the kids will be able to afford. That's where all the kids go. Sidwell Friends isn't going to take all kids from the Cleveland Public Schools. I don't see how this particular program – where you have 96 percent Catholic schools – can be anything but advancement of religion.

**JAY SEKULOW:** The statute did not say, we're going to have Catholic schools as the alternative. It happens to be that in that particular locale, the Catholic schools are the ones that are willing to take these students. Don't penalize the Catholic schools. If you had secular counterparts that were willing to do it, they would be welcome as well. The one principle that

everybody keeps ignoring is that no one is compelling these kids to go to school there. You don't have to go to a private school.

Where I disagree, respectfully, of course, is this: I don't think we should have a common dumbing-down of the public schools. In other words, all the public schools are lousy therefore nobody gets to go out of the public schools because that wouldn't be fair because there's not equality. If the public schools are failing, give alternatives.

**QUESTION:** My question is for Mr. Mincberg. Isn't there aid directly to denominational schools – government aid? Is the panel saying to us that this is new? I read studies that showed that 22 percent of the revenues of private schools, including denominational ones, are from government. So what new issue is raised by vouchers?

**ELLIOT MINCBERG:** The answer is, where it's been permitted, like in *Mitchell v. Helms* involving computers, like in *Agostini v. Felton* involving people going into religious schools to teach, Title I has been set up in a way in which the funding is not supposed to advance the religious mission of the school. That's one of the conditions, for example, on the Title II agreement that each of the schools is supposed to sign, saying they promise to use this for non-religious purposes, et cetera.

Now, some of us who weren't too crazy about the Court's decision might or might not agree with that, but at least in theory the money that's provided doesn't go for religious purposes. But that is a different situation than vouchers, where this is totally unrestricted money. Once parents sign over the money to voucher schools, it goes into the school coffers – to use a phrase that Justice O'Connor often uses – and they can use it any way they want to, including to promote and inculcate religion. And, indeed, the record in the Cleveland case shows that most of them say that the promotion and inculcation of religion is integrally entwined with their educational mission.

Again, they have every right to do that, but the Establishment Clause says that they don't have a right to do that with taxpayer dollars. When you're talking about the Establishment Clause argument, the inevitable fact of that is that the vast majority of the money will go to support religion.

**QUESTION:** When you look at this program, you need to consider the other options that are also available here such as charter schools, which are publicly funded, such as the open enrollment programs, as well as the scholarship programs, as well as magnet schools within the district. Can you really just focus on this one choice and say it's the only one?

**ELLIOT MINCBERG:** There is no option for public school choice outside Cleveland. Not a single public school has ever done it and the economic incentives are set up to make it virtually impossible. And as to charters and magnet schools, that's sort of like saying, well, you have the option to stay at your regular school. The Supreme Court has never looked at it that way. You have to look at the program, and the program is the voucher program in which 96 percent of the slots are religious.

**QUESTION:** What is the constitutional – not policy-based – problem with allowing a voucher program where no money goes for religious schools, understanding that there is no right to education underneath our constitutional system?

**ROBERT DESTRO:** Under most state constitutions you do in fact have a constitutional entitlement to a free public education. In Ohio, the entitlement is to a “thorough and efficient system of public schools.” The Ohio Supreme Court ruled that the voucher program is not inconsistent with that requirement, but in a series of other cases, it also has said that the public school financing system is neither thorough nor efficient anywhere in the State.

When you talk about subsidizing religion in this case there's a big problem. The problem is that financially it doesn't work out that way. It's actually quite the opposite. It's the private schools that are subsidizing the public schools. Each one of the kids in a private school would be entitled under Ohio law to at least \$5,000 in the public school system, plus a capital contribution. Every single kid who does not go to a public school is saving the state that much money.

A few years ago, the Catholic schools of Cincinnati said, “Okay, take them.” Naturally, the school board in Cincinnati went nuts. They wanted to know what they would do with all the additional children, and how they would pay for the additional expense.

Dismantling the public school monopoly is worse than trying to dismantle the Microsoft operating system monopoly. (Laughter.) And why? Because if you're going to give kids inter-district remedies and say, okay, you can go to school in Cleveland Heights now – but Cleveland Heights' school system is bursting at the seams – where are they going to put the kids? So, if you're really going to open up the market – and I agree with Charles that the market is not open – many of the public schools would fight like crazy if you went for a full-cost-of-tuition voucher.

**ELLIOT MINCBERG:** I agree that there is no federal constitutional problem with a voucher program for non-religious schools. There may be state constitutional problems in some states, but in the federal Constitution the only barrier is clearly the Establishment Clause. You could do it, but the voters have rejected it in just about every state.

**QUESTION:** I want to challenge Professor Lawrence's assumption that the market for schools is currently competitive, and that the explanation for the fact that 90-something percent go to Catholic schools is because currently only Catholic schools can effectively compete with the monopoly that aids public schools. Your argument is that we can't have vouchers because there are only Catholic schools out there. My argument is that there would be other kinds of schools if there wasn't a monopoly.

**CHARLES LAWRENCE:** The restrictions of the market in education that I'm concerned about don't

just have to do with the small amount of money that these children have to spend, although that's largely the point. My concern also has to do with what it takes to start a school. I'm not blaming the Catholic Church for the fact that 96 percent of the schools receiving the Cleveland voucher are Catholic. Catholic schools are interested in teaching religion, but they also have had a mission to serve poor children. Catholic schools were among the first schools to desegregate.

Voucher advocates profess to offer poor black parents a choice to send their children to better schools, but these same advocates have opposed equalizing funding between rich and poor districts, they have opposed inter-district busing plans, they have opposed affirmative action. I question the motives of those who would oppose reforms that redistribute wealth and privilege and then claim they are creating equal opportunity for poor children by giving them a two thousand dollar voucher to spend in a poor neighborhood in Cleveland.

**ELLIOT MINCBERG:** You could, in theory, eliminate public schools altogether, take the money that is allegedly there and say to parents, spend this money anywhere you want to. Under those circumstances, what you talk about might happen. I think it would be a terrible idea. But under the current system as it exists, and given the limitations that are inevitably put on voucher programs, it is inevitable that the vast majority of the schools will be religious. That's happened in Cleveland, and that's happened in Milwaukee where they have very few non-religious schools.

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