

## THE RED TAPE WAR

BY DANIEL MCGROARTY

The High Court has spoken: Vouchers are constitutional—at least insofar as cities and states adhere to the essentials of the Cleveland school choice program, upheld by the Supreme Court in the waning moments of its 2002 session. But wait a minute: if school choice has won, how come voucher opponents have passed on waving the white flag of surrender, and have reached for the red tape instead?

After all, voucher opponents were the ones who had sought to litigate away what legislatures—in Wisconsin, then Ohio and Florida—had wrought. It was voucher opponents who sought to “federalize” the supposed constitutional crime of “public money funding religious schools,” turning first Milwaukee’s Parental Choice Program and then Cleveland’s modest-sized choice experiment into First Amendment offenses. It was voucher opponents who appealed losses in lower courts to keep their cases alive, and chest-thumped—to quote Barry Lynn of Americans United for the Separation of Church and State—that the Cleveland program posed “a historic showdown over government funding of religion,” in the “most important church-state case in the last half-century.”

And it was voucher opponents who, when they lost “the most important church-state case in the last half century”—changed the subject. Witness a statement from Americans United for the Separation of Church and State after the Cleveland ruling: “... the Supreme Court just upheld a voucher program in Cleveland, Ohio. The decision was extremely narrow.”

Now that’s constitutional chutzpah.

Of course, anyone surprised by this sort of spin is someone who clearly hasn’t followed the anti-voucher vendetta for very long, or come close enough to the controversy to feel the heat with which voucher opponents express their opposition to the idea that parents deserve the right to choose their child’s school.

For voucher opponents, the Supreme Court’s ruling merely triggers a change in tactics, aimed at achieving by other means the victory denied



them by the high court. Having failed at the federal level, voucher opponents have renewed their legal assault in state courts, pinning their hopes on century-old state constitutional language that echoes the bigoted Blaine Amendment, a mid-19th Century attempt to defend America’s Protestant purity against the influx of Irish Catholic immigrants.

Such is the last constitutional stand of voucher opponents: adopt the nullification arguments conjured by John C. Calhoun to save slavery and cite century-old language aimed at saving the nation from the influence of Catholics, immigrants and other undesirables. Now that the ACLU has embraced a platform worthy of the Knights of the White Camellia, that return trip to the Supreme Court should be a heck of a history show.

### SECOND FRONT

In addition to their decision to ignore the Supreme Court and seek anti-voucher rulings on the state court level, voucher opponents indicate they will open a second front—this one a “red tape war,” torturing the meaning of the word “accountability” until the only acceptable private school is one that transforms itself into a public school.

The key to understanding this strategy begins with the recognition that, for the public teachers’ unions at least, the suits to stop school choice were never really about the First Amendment. The Establishment Clause was merely the best way to federalize a case that was at bottom about money and control, and the loss of both as parents used vouchers to depart public schools. If the courts won’t oblige with an anti-voucher ruling, then find a friendly legislature—or at least a pliant one, with 50%+1 members PAC-fed by regular American Federation of Teachers and National Education Association contributions—or a regulatory agency like a state department of education, saddle any private school that steps forward to accept a voucher student with a costly and complex

array of rules and procedures, and call it *accountability*.

Forget the fact that if public schools were more accountable, much of the air would have seeped out of the school choice balloon many

Anti-voucher forces have made clear their intention to use “accountability” to impose a regulatory regime that would in fact be far more restrictive than that demanded of public schools.

years ago. Forget the fact that school choice studies suggest voucher programs produce more diversity and less segregated patterns of student enrollment. And forget the fact that voucher programs in Cleveland and Milwaukee serve significant populations of special needs students, in Milwaukee’s case, without any

upward adjustment in the value of a voucher. As Sandra Feldman, President of the American Federation of Teachers, wrote not long after the Supreme Court’s Cleveland ruling:

“If [the Supreme Court’s] decision brings new efforts to enact voucher legislation, we will fight these efforts. But we will also work with local, state and national policymakers to ensure that private schools that receive public funds are held accountable—just as public schools are.

This means these schools—just as public schools are—must be open to all students. They must comply with civil rights laws that protect against discrimination on the basis of race, creed, color, gender or national origin. These schools must serve all students, including those with disabilities. These schools must meet the same standards required of public schools and report to the public about student achievement, graduation rates and teacher qualifications.”

The AFT argument finds an echo at the ACLU:

“In short, federal funding to schools under this program [the Cleveland voucher program] would come with a free ticket to ignore the civil rights laws that have protected students in federally-funded education programs from harmful discrimination for decades.”

#### ACCOUNTABILITY AS A WEAPON

What the AFT and ACLU seek sounds benign enough. Who, after all, is going to bang

the drum for unaccountable schools? In practice, however, anti-voucher forces have made clear their intention to use “accountability” not simply to saddle choice schools with the same bureaucratic burden that hampers public school innovation and autonomy, but to impose a regulatory regime that would in fact be far more restrictive than that demanded of public schools, as a means of driving private schools away from voucher programs. To paraphrase Chief Justice John Marshall, the power to regulate is the power to destroy.

For veterans of the voucher movement, this is a case of “déjà vu, all over again.” Witness Milwaukee, site of the groundbreaking Parental Choice Program passed in 1990. Even before the program took effect, Bert Grover, state superintendent and an outspoken foe of vouchers, used his regulatory authority to attempt to impose massive compliance costs on the inner-city private schools stepping forward to participate in the Milwaukee choice program. Arguing that a hypothetical special needs student might elect to use a voucher to enroll at a private school, Grover used the choice mechanism against the fledgling program, demanding that each school must prepare itself to accept a student with any and all conceivable disabilities. Having made that assumption, Wisconsin’s state superintendent served notice on prospective choice schools—then weeks away from the start of a new school year—that they would be expected to show proof of the requisite renovations of classrooms, doorways, bathrooms, hallways and playgrounds, as well as the hiring of special counseling, evaluation and teaching staff capable of handling the full array of special needs students. Grover took this stance while opposing any adjustment in the value of the voucher, then \$2,500 per student, when public school special needs students are funded at two-to-five times the average per-pupil expenditure, depending on the severity of their disability—and in spite of the fact that no public school was held accountable for providing the same range of special needs services under one roof.

In the end, only a letter from the federal Department of Education prevented anti-voucher forces from winning the first regulatory battle in the red tape war. As the trial judge who rebuffed Wisconsin’s effort to impose a crushing

compliance burden on choice schools wrote, “I am not persuaded that this program turns private into public schools.”

Expect the Wisconsin skirmish to be repeated in statehouses and departments of education in the years ahead, wherever school choice programs exist or are established. Such is the educational nihilism of the enemies of choice: if the worse cannot be made better, then make the better worse.

#### ACCOUNTABILITY’S ULTIMATE ARBITER: THE PARENT

In their insistence that voucher schools are accountable to no one, voucher opponents ignore the ultimate arbiters of accountability: Parents. After all, the passage of a private school choice program does not compel a single child to abandon his or her public school. No parent is forced to enroll their child via a voucher, and all parents—should they come to question the quality of education at their school of choice, as some have—are free to choose a different private school or accept a public school placement. As Roberta Kitchen, single mother of five and plaintiff in the Cleveland court case, told this author, “Just because a school is private doesn’t mean it’s perfect.” Indeed, Kitchen has transferred some of her children several times in the search to find a school that offers the best pedagogical fit. Her point: the right to choose her child’s school—a choice routinely exercised by more affluent parents—should not be limited by lack of income.

For years, voucher opponents have psychologized that school choice is really about reli-

gious indoctrination or destroying public schools or subsidizing the rich or all of the above—anything but its stated claim of allowing parents, regardless of their income level, to control the educational fate of their children. And yet, as Freud famously said, sometimes a cigar is just a cigar. Sometimes school choice is just that: school choice. For many of the parents I have met over the last decade, school choice is less about the primacy of private over public schools than it is about having what wealthier Americans take for granted: the freedom to choose.

Contrary to the aspersions voucher opponents cast on parents like Roberta Kitchen and public officials benighted enough to take her concerns seriously, everyone wants accountable schools. For that very reason, we need to recognize the anti-school choice campaign for what it is: an attempt to use the banner of accountability to mask an effort to disenfranchise parents who make choices voucher opponents simply don’t like.

*Daniel McGroarty, Senior Director of White House Writers Group and Adjunct Fellow with the Milton and Rose D. Friedman Foundation, has published two books on school choice: Break These Chains and Trinnetta Gets a Chance. This article first appeared in the Milton and Rose Friedman Foundation’s School Choice Advocate.*

---

We need to recognize the anti-school choice campaign for what it is: an attempt to use the banner of accountability to mask an effort to disenfranchise parents who make choices voucher opponents simply don’t like.