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War Against Vouchers

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If you think kids are all the same, and that monopolies are the key to quality and efficiency, consider moving to Florida. As of this week, a uniform government bureaucracy is the only legal approach to public education in the Sunshine State.

For six years, students in Florida's failing public schools have been able to switch to a private school of their parents' choosing, using the state funds allocated for their education. No longer. The "Opportunity Scholarship" voucher program was struck down last Thursday by the state Supreme Court in a sweeping decision with national implications.

Unlike previous school-choice cases, *Bush v. Holmes* did not hinge on the use of public funds at religious schools. Instead, five of the seven presiding justices ruled that school vouchers violate the "uniformity" clause of Florida's Constitution. Far from being an arcane and forgotten technicality, this clause was amended and re-approved by voters just eight years ago: It mandates, among other things, "a uniform, efficient, safe, secure and high quality system of free public schools that allows students to obtain a high quality education." If only wishing could make it so.

What the new wording fails to consider is that a homogenized government bureaucracy is not necessarily compatible with efficiency and quality. By this point in American history, we should know better. After more than a century of honing its public school system, Florida has managed an on-time graduation rate of just 57%, placing it third from last nationally. Its composite SAT score is the fourth lowest among the states. And it isn't as though the rest of the country is excelling on the world stage.

When Americans took the International Adult Literacy Survey in the mid-1990s, nearly a quarter of 16- to 25-year-olds displayed only the most rudimentary skills. In the decade since, the verbal ability of U.S. college graduates has declined, according to results released last month from the National Assessment of Adult Literacy. On tests of mathematics and science, our high-school seniors are among the worst performers in the industrialized world. It is to this millstone of educational dysfunction that Floridians -- and, to a lesser extent, the voters of every other state -- have tied their children.

The full heft of that millstone can be gleaned from the oral arguments in *Bush v. Holmes*. At one point, an unnamed justice asked the attorney for voucher opponents: "You would

agree, would you not, that whether [voucher schools] have been an overwhelming success or an utter failure, is, really, irrelevant to whether the program is constitutional." The answer was a resounding "yes." In other words, legislators may not consider alternative educational arrangements, no matter how effective they might be.

To be fair, most Florida voters probably had no idea that the 1998 education amendment would preclude alternative K-12 options. In all likelihood, they saw it as a toothless but well-intentioned attempt to improve public school performance. That is not how the state Supreme Court chose to interpret it. While the constitution does not say that uniform government-run schools must be the only public education program policymakers can adopt, the court majority inferred the existence of an implicit requirement to that effect.

In a dissenting opinion joined by Justice Raoul Cantero, Justice Kenneth Bell argued that there was no "textual or historical" basis for that inference. In fact, it should not have mattered who was right, because Florida case law admonishes the courts to adopt any reasonable interpretation of a statute that supports its constitutionality. Instead, the majority in *Bush v. Holmes* appears to have looked for an excuse to do the opposite.

Florida's Supreme Court was not, after all, the first to consider this issue. In *Jackson v. Benson*, the Wisconsin Supreme Court upheld Milwaukee's voucher program for private schools, despite the fact that Wisconsin is one of the 14 other states with a uniformity clause. The court in *Jackson*, like Justices Bell and Cantero, concluded that only public schools were required to be uniform. One state's rulings are not binding in another, but the Wisconsin case demonstrates a reasonable interpretation of a uniformity clause that is compatible with school vouchers.

Regardless of its cogency, the ramifications of *Bush v. Holmes* are monumental. Florida has three remaining school choice programs: the McKay voucher program for disabled students; a business tax credit for donations to private scholarship funds; and a charter school law.

For political reasons, McKay is almost certain to go unchallenged. It's doubtful that the public school employee unions who targeted the Opportunity Scholarships will want to be seen as curtailing the choices of disabled children. Even if McKay were challenged, it would almost certainly survive. The majority in *Bush v. Holmes* held that programs targeted at disabled children are a special case, beyond the pale of the uniformity clause.

Florida's tax credit program would fare less well. Though it avoids the use of public money (the donated funds are never collected in taxes in the first place) and hence would pass some of the hurdles laid down by the court, it, too, allows families to obtain varied educational experiences tailored to the needs of their children.

Finally, Florida's ruling appears to make charter schooling unconstitutional. A specific point made by the justices in striking down the Opportunity Scholarships is that they allow private schools to offer curricula different from that found in regular government schools. So do charter schools.

Every other state with a school choice program and a uniformity clause untested in its courts can expect to feel the heat. Arizona, which has education tax credits and charter schools, is apt to be a prime target. Minnesota, Colorado, Oregon and North Carolina, among others, all have uniformity clauses and at least one school-choice program vulnerable to attack.

Meanwhile, come this June, the more than 700 mostly low-income students currently in Florida's Opportunity Scholarship voucher program may be herded back into the very public schools that vouchers allowed them to flee. Unless the Constitution of Florida -- and other states -- is amended, they may not be the only ones.

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