

Council for American Private Education

CAPE outlook

Voice of America's private schools

U.S. Supreme Court to Hear School Choice Case December 2

Another school choice battle is about to be fought before the U.S. Supreme Court, and the lineup on both sides is all too familiar. In one camp are the American Civil Liberties Union, the National Education Association, the National School Boards Association, and a host of other anti-choice groups. The other side includes the Becket Fund for Religious Liberty, the Black Alliance for Educational Options, the Council for Christian Colleges and Universities, the Institute for Justice, the U. S. Conference of Catholic Bishops, and even the United States of America, represented by Solicitor General Theodore B. Olson.

Not to be lost in the crowd, however, are the principal contenders: petitioner Gary Locke, Governor of Washington, and respondent Joshua Davey. They, of course, give the case, *Locke v. Davey*, its name. They also give it its content.

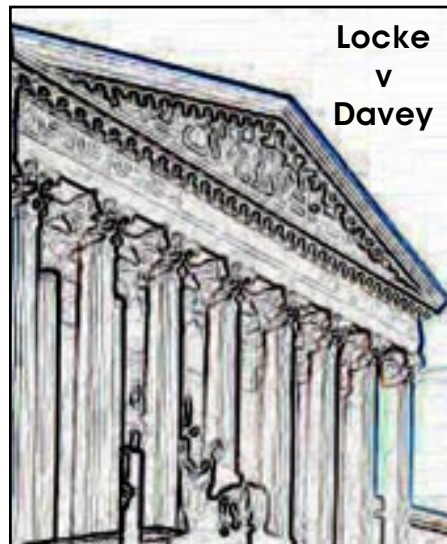
In 1999, Joshua Davey was awarded one of Washington State's Promise Scholarships, designed to help academically talented low- and middle-income students attend college within the state. But when officials discovered that Davey was majoring in pastoral ministry, they stripped him of the scholarship, citing state statutory and regulatory prohibitions on aid to students pursuing a degree in theology taught from a religious perspective. Davey challenged the decision in federal district court, where he lost, and then appealed to the Ninth U.S. Circuit Court of Appeals, where he won.

In July 2002, the appeals court ruled that the state's policy was an infringement on Davey's right to the free exercise of his religion. It also held that the state's constitutional prohibition against aid for religious instruction was not "a compelling reason to withhold scholarship funds for a college education from an eligible student just because he personally decides to pursue a degree in theology." Governor

Locke brought an appeal to the U.S. Supreme Court, which is slated to hear the case December 2.

1st and 14th Amendments

Davey's brief, filed by Jay Alan Sekulow of the American Center for Law & Justice (ACLJ), claims that the state's denial



of Promise Scholarships solely to theology majors runs afoul of the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.

Governor Locke, represented by Attorney General Christine O. Gregoire, argues that his state's constitution (Article 1, Section 11) prohibits the use of public money for religious instruction and that the federal Constitution does not require the state to provide scholarships to divinity students. Article I, Section 11 reads in part, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

But the ACLJ brief counterclaims that

no provision in a state constitution may trump rights protected by the federal Constitution. Here's where the case takes on national significance. Thirty-six other state constitutions have restrictions similar to Washington's that ban state aid for religious instruction and schools. Known as Blaine amendments (after James G. Blaine, speaker of the U.S. House of Representatives from 1869 to 1875), they have been interpreted by various state officials, lawmakers, and judges to disallow programs of assistance (e.g. textbooks and bus transportation) to children in religious schools that would otherwise be considered valid under the federal Constitution. A broad ruling by the Supreme Court could strike a severe or even fatal blow to Blaine restrictions. Indeed, various briefs filed by school choice supporters encourage the high court to do just that.

Rooted in Religious Bigotry

The Becket Fund for Religious Liberty reminds the court of the anti-Catholic bigotry that prompted the enactment of state Blaine amendments during the 19th century and early years of the 20th century. Referring to this anti-religious bias, the Becket brief says, "This case presents the court with the opportunity to expose it and condemn it, once and for all — to tear out, root and branch, the state constitutional provisions that have enforced religious discrimination in the funding of education for well over a century."

Similarly, the Institute for Justice explores in its brief the roots of religious bigotry behind Blaine amendments and argues that while the court need not invalidate Washington's Blaine language *in toto*, it must "overrule interpretations of it that conflict with federally protected rights." Commenting on the brief, IJ attorney Richard Komer, who authored it, said, "State constitutions' religion clauses

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- American Montessori Society
- Association Montessori International—USA
- Association of Christian Schools International
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Evangelical Lutheran Church in America
- Friends Council on Education
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Seventh-day Adventist Board of Education
- Solomon Schechter Day School Association
- Southern Baptist Association of Christian Schools
- Toussaint Institute for Historically Black Independent Schools
- United States Conference of Catholic Bishops
- 28 Affiliated State Organizations

a coalition of national associations serving private schools K-12
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Senate Postpones D.C. Voucher Vote

Following five days of intermittent debate in the Senate on the voucher plan for the District of Columbia, Republican leaders last month postponed action on the proposal, essentially conceding they do not have the 60 votes needed to ward off a Democratic filibuster. The measure, part of the appropriations bill for the District, will likely be brought back for Senate consideration later this month, possibly as part of an omnibus spending bill that would be harder to block.

Calling the threatened filibuster “an incredibly cynical act,” New Hampshire Senator Judd Gregg (R) said a minority of members were essentially saying “tough luck” to the children who would stand to benefit from the program. And referring to D.C. Mayor Anthony Williams’ request for the measure, Gregg said the message of filibuster organizers was that they could “run the city of Washington better than the mayor.”

In mid-September, Williams invested considerable effort mustering Senate support for what would be the first federally funded voucher program in the nation. His lobbying burst apparently won over enough senators to sustain an up-down vote on the proposal, though not enough to overcome a filibuster.

Gregg told the Senate that the mayor and some other city officials were willing to promote vouchers because they believe children in poor-performing schools “should have a shot at the American dream by having the skills they need to succeed.”

Senator Lamar Alexander (R-TN) added his voice to the debate by debunking the claim that the proposal would be the “first diversion of federal funds to private schools in our history.” He reminded his colleagues of the GI Bill for veterans and the federal scholarship and loan pro-

grams, which he described as “the most successful social legislation in the history of our country” and which enable students to attend the public or private college of their choice.

Recalling his days as president of the University of Tennessee, which at the time enrolled about 30,000 students, the senator said it never occurred to him to come to Washington and implore lawmakers, “Please don’t allow any of these students to go to Vanderbilt or to Fisk University because it might take money away from our school.” He said he saw “the value of giving Americans choices of colleges and universities.” The result of the 60-year experiment with federal vouchers for higher education, he said, has been to help create “the best colleges in the world.”

Before pulling the voucher bill, Senate and

Bush Administration officials worked behind the scenes with Senators Mary Landrieu (D-LA) and Tom Carper (D-DE) on amendments that might have ensured their support and possibly that of other senators, but those negotiations ultimately broke down. The Senate, however, did approve, by voice vote, an amendment offered by Senator Dianne Feinstein (D-CA) requiring that voucher students be taught by teachers with a college degree and be assessed by the same tests used to assess public school students.

On September 9, the House of Representatives voted 209-208 to support a voucher plan very similar to the one before the Senate. Both plans would provide up to \$7,500 to low-income families to enable children to attend a private elementary or secondary school within the District. In awarding the vouchers, priority would be given to students who currently attend public schools identified for improvement. The Senate plan earmarks \$13 million for the program, and the House plan, \$10 million.



Senator Lamar Alexander (R-TN)

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are the last legal refuge for school choice opponents—and the high court is poised to take that away.” He added, “For too long, choice opponents have hidden behind discriminatory state policies that deny constitutional rights to free speech, freedom of religion and equal protection to certain families, just because they select religious schools.”

The brief filed by the U.S. Conference of

Catholic Bishops claims the case “provides an opportunity to lay to rest the suggestion...that state governments are allowed to violate federal constitutional rights and implement a policy of hostility to religiously motivated persons.” The brief goes on to say that “this sort of rank governmental discrimination must be rejected finally and for good.”

The case is *Locke v. Davey*, U.S. Supreme Court, Case No. 02-1315.

Princeton Scholar: Reform Research Undermines Reform

Conventional education researchers and scholars are so doctrinaire in their support of the common school that, despite the overwhelming evidence of failure in many urban public schools, they cannot bring themselves to support fundamental reform. That's the charge leveled by Joseph P. Viteritti, visiting professor in the Department of Politics at Princeton University, in a provocative piece that appears in the most recent issue of *Political Science Quarterly*.

According to the author, the concept of the common school is a basic dogma of the "American civic religion," which many researchers of high regard accept "as an act of faith." Their unquestioning adherence to the common school model causes them to sidestep some pivotal issues, to overlook large-scale failure, and to dismiss calls for school choice as "mischievous and ill conceived." Viteritti calls attention to the "paradoxical tendency" of researchers to "resist parental choice in education, all the while seeming to espouse democratic ideals."

A central and undeniable fact uncovered by education research, according to Viteritti, is the black-white achievement gap. "National test scores indicate that the average black twelfth-grader reads at the same level of proficiency as the average white eighth-grader." The lag in performance has been persistent. "Despite years of political advocacy on behalf of disadvantaged minorities, the political system has failed to produce the kinds of structural and policy changes that are needed to make urban schools responsive to the needs of most students who attend them."

While not a cure-all for the achievement gap, school choice initiatives would give poor people the same opportunities as their middle-class peers: the chance to choose a school that works. The "central policy question" for Viteritti, and one involving moral and social justice dimensions, is not whether school choice should exist, but whether it should be extended to "our least fortunate citizens."

Citing name and verse, Viteritti takes on distinguished scholars in the fields of history, economics, and political science. One by one, he counters their attacks on choice. Reacting to those who say that choice experiments represent a "lifeboat mentality" that would rescue a few kids while ignoring the rest, Viteritti imag-

ines a "luxury liner filled with academic pundits watching the ship of urban education descend to the bottom of the sea." Instead of rushing to save anyone, the pundits "urge passengers to stay on board," as they admire "the ship's original blueprints and tell stories of a more lustrous past when the vessel served so many voyagers so well."

In response to scholars who portray school choice supporters as focused on "private rather than public" goals or "self interests instead of the common welfare," Viteritti notes that black and Hispanic parents form the country's largest constituency for choice. "If their desire to attain a decent education for their children can be deemed an act of self-interest, it is the kind of self-interest our democratic system was designed to channel into worthy public ends."

Turning to the issue of political empowerment, Viteritti says the most fundamental dilemma of urban school politics is that parents with children in the worst public schools lack the resources for political efficacy. A targeted choice program focused on disadvantaged families would help "adjust the political equation between the influential and weak." By having the opportunity to withdraw children from public schools, low-income families would "obtain leverage over an institution that has ignored their legitimate needs for decades."

After reviewing and analyzing key examples of the scholarly literature on school reform, Viteritti concludes there is something "basically wrong with the prevailing conversation." What's wrong is this: "The burden of proof has been placed very heavily on those who seek alternatives to the common school model, as if the system were doing just fine." For Viteritti, the question of whether to extend school choice to disadvantaged families is not an empirical question, but a normative one. "It is the kind of question to which political scientists trained in a moral philosophical tradition should be especially attuned." In a democracy, it is essential "to give people similar opportunities to decide where their children attend school." Indeed, the burden of proof should fall on those who would retain the status quo.

"Schoolyard Revolutions: How Research on Urban School Reform Undermines Reform" is available at <http://www.psqonline.org/>.



Supplemental Services

In an effort to promote the supplemental services component of the No Child Left Behind Act, U.S. Department of Education officials last month hosted an information exchange forum at the U.S. Capitol. Participants talked about how the program operates and offered suggestions on how it could function more smoothly.

Under Secretary of Education Eugene Hickok called supplemental services "a fantastic opportunity for America's kids" and said that parents and the public tend to view the program positively. But at the same time he acknowledged that some school districts have failed to adequately promote the new initiative.

Under supplemental services, eligible low-income students who attend persistently failing public schools are entitled to extra academic help, such as tutoring and computer-assisted instruction, delivered outside the regular school day. Parents choose a service provider from a list approved by the state, and the school district then pays the provider directly. Despite the direct payment, supplemental services providers, according to USDE guidance, are not considered recipients of federal funds.

Although private, including religious, schools are eligible providers of supplemental services, and many are located in the areas targeted by the program, few so far have elected to participate. For-profit vendors, on the other hand, have jumped at the chance.

The USDE has developed resources to help private schools and other organizations become supplemental services providers. An online "how to" Webcast is available at <http://www.connectlive.com/events/supplemental/>, and a user-friendly toolkit is available at <http://www.ed.gov/admins/comm/suppsvcs/toolkit.html>.

Return service requested

CAPE notes

U.S. Secretary of Education Rod Paige last month named 214 public and private elementary and secondary schools as the first ones to be honored under the new No Child Left Behind–Blue Ribbon Schools Program. The new program recognizes schools that make significant progress in closing the achievement gap or whose students achieve at very high levels.

Paige congratulated the principals, teachers, parents, and students of the award-winning schools. He said the schools are “national models of excellence that others can learn from and are meeting President Bush’s mission to ensure that every child learns, and no child is left behind.”

Schools will be honored at an awards ceremony with Secretary Paige in Washington, D.C., October 30–31.

CAPE, the proud coordinator of the program for private schools, joins Secretary Paige and the nation’s education community in congratulating all winning schools, including the 47 private schools whose names appear below.

Private School Awardees

Annunciation Catholic Academy, Altamonte Springs, FL • Antonian College Preparatory High School, San Antonio, TX • Ascension Catholic School, Melbourne, FL • Baymonte Christian School, Scotts Valley, CA • Beacon Coun-

try Day School, Greenwood Village, CO • Blessed Sacrament School, Burlington, NC • Catholic High School, Baton Rouge, LA • Chinese Christian Schools, San Leandro, CA • Christ Lutheran School, West Covina, CA • Christian Heritage Academy, Northfield, IL • Cin-



cinnati Country Day School–Elementary School, Cincinnati, OH • Cincinnati Hills Christian Academy Elementary School, Cincinnati, OH • Covington Latin School, Covington, KY • Dowling High School, West Des Moines, IA • First Presbyterian Day School Elementary School, Macon, GA • Fuchs Mizrachi School–Lower School, University Heights, OH • Guardian Angels School, Clawson, MI • Holy Name of Jesus School, Indialantic, FL • Holy Trinity Catholic School, Grapevine, TX • Linton Hall School, Bristow, VA • Mountain View Academy, Greeley, CO • Pinecrest School Thousand Oaks, Thousand Oaks,

CA • Providence Day School, Charlotte, NC • Randolph School, Huntsville, AL • Ravenscroft School, Raleigh, NC • Roncalli High School, Indianapolis, IN • Saint Albert the Great School, North Royalton, OH • Saint Barnabas Episcopal School, DeLand, FL • Saint Bernadette School, Silver Spring, MD • Saint Edward the Confessor School, Metairie, LA • Saint Joseph Catholic School, Marietta, GA • Saint Joseph’s High School, South Bend, IN • Saint Jude Catholic School, Indianapolis, IN • Saint Jude the Apostle Catholic School, Atlanta, GA • Saint Louis School, Batesville, IN • Saint Luke School, Barrington, RI • Saint Monica Catholic School, Dallas, TX • Saint Patrick School, Chatham, NJ • Saint Paul’s Elementary School, Sellersburg, IN • Saint Peter Catholic Elementary School, Kirkwood, MO • Saint Raphael the Archangel School, Louisville, KY • Saint Stephens Lutheran School, Hickory, NC • St Petersburg Christian School, St. Petersburg, FL • The Hebrew Academy, Huntington Beach, CA • Villa Madonna Academy, Villa Hills, KY • Village Christian Schools, Sun Valley, CA • Walsingham Academy Lower School, Williamsburg, VA.

Further information on the program is available at <http://www.capenet.org/brs.html>.

