Crafting a Court-proof Education Voucher

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INTRODUCTION

Although public education continues to serve nine out of ten of the nation's students, dismay over what they regard as its declining quality has prompted many parents to consider private schools as an alternative. To many families, however, the cost of private school tuition has been an insurmountable financial barrier. As a result, parents and policy makers have explored ways to make the private school alternative affordable to working and middle-class Americans. Two proposed methods are tuition tax credits and educational vouchers.

A tuition tax credit is a direct reduction in the amount of taxes owed by a family after all income adjustments have been made. Unlike a tax deduction, the cash value of a credit is the same for every taxpayer—assuming that he or she has a tax liability at least equal to the credit. Proposals for tax credit legislation have been introduced repeatedly in Congress, most seriously in 1978 and 1981. The measure has yet to win congressional approval.

An educational voucher, on the other hand, does not involve an adjustment to a family's tax liability, but instead is a fixed sum of money from the government which a parent can use only to "purchase" education at a primary or secondary school of that parent's choice. Proposed voucher systems have varied in their manner and method of operation, yet the goal in each case has been to enhance a family's freedom of choice in selecting the school that it feels will benefit its children most.

Opponents of tuition tax credits and educational vouchers warn that such devices would spur, among other things, increased segregation, abandonment of the public schools, and fiscal irresponsibility. These practical arguments have been answered effectively by a number of scholars.**{1}** But there remains the nagging question of constitutionality. This was answered for tuition tax credits in 1983 when the U.S. Supreme Court, in *Mueller* v. *Allen*, upheld the constitutionality of a Minnesota tax deduction for elementary and secondary educational expenses.

Vouchers are a more complicated matter for they represent, in effect, money that is actually provided by the government. This raises serious questions concerning indirect federal funding of schools. The issue has been argued in the courts for four decades. At times vouchers seem to be ruled acceptable, while at other times they have been rejected as unconstitutional or have been used to raise the specter of sweeping federal regulation of private schools. The latter issue was raised in the 1984 U.S. Supreme Court ruling on the *Grove City* case, in which a college was not allowed to use grant money given to students unless it followed federal procedures for assurance of compliance with federal regulations.

The *Grove City* decision does not necessarily establish constitutional guidelines for educational vouchers. Analysis of court decisions indicates that, as long as the language creating vouchers is carefully drafted to preempt unwanted government intrusions, emphasize equal access to other school systems, promote improved quality of education as well as freedom of choice, there is a good chance that vouchers will pass the constitutional test. Congressional advocates of vouchers should study the court decisions before they design voucher legislation. And even if there are early failures, much can be learned from them in crafting an ultimate, court-proof education voucher.

THE HISTORICAL IMPACT OF THE FIRST AMENDMENT

Since the vast majority of private schools are religious in orientation, the constitutionality question generally revolves around interpretation of the First Amendment. Both tuition tax credits and vouchers involve a government action that provides financial aid to parents. If religious schools are the primary beneficiaries of this aid, does this mean that government is in the business of promoting an establishment of religion? Much current discussion, as well as nearly every Supreme Court decision in the past 40 years, has ignored the historical context of the First Amendment. At the nation's founding, the American people clearly considered government aid to religion an exemplary use of its power-not something to be avoided at all cost. Religion, according to the founders, was an essential ingredient in a civilized nation. Supreme Court Justice Joseph Story noted in his *Commentaries on the Constitution* (1833) that "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."**{2}**

The words were backed up by government action: during the Confederation period, the Northwest Ordinance linked religion with good government.**{3}** The Land Ordinance of 1785 even set apart one plot in each township in the new territories for the erection of a school, in many cases established by a church group.

After ratification of the Constitution, there was little protest when the Congress provided lands for churches in the West, subsidized missionaries among the Indians, and maintained chaplains in the Armed Forces—a practice that continues today, as does the opening of congressional sessions with prayer. In addition, states made grants to private schools, most of which were church related. The predominant interpretation of the First Amendment did not ban any aid to any religion in general.**{4}** Only in the 1920s and 1930s, as the Court began to incorporate the Bill of Rights into the Fourteenth Amendment's due process clause, was the corner turned on the question of government aid to religion.**{5}**

The first direct instance of the Court acting on the establishment clause of the First Amendment was in the 1947 *Everson* case, 156 years after the amendment was added to the Constitution. In this decision, Justice Hugo Black argued for a wall of separation between church and state that was to remain "high and impregnable." He asserted that government cannot pass laws that "aid one religion, aid all religions, or prefer one religion over another."**{6}**

Black's wall of separation and his insistence that government cannot aid *any* religions at all have since become the cornerstone for all Supreme Court decisions on the establishment of religion clause of the First Amendment. The trouble is, explains constitutional scholar Walter Berns, that *Everson* was based upon a faulty reading of history. Berns explains that Black relied on the arguments made by the American Civil Liberties Union, which assumed that Thomas Jefferson and James Madison were the guiding lights in the formulation of the First Amendment. Were that true, then Jefferson's attitude (he first advanced the idea of a "wall") would have been widely disseminated at the time. The truth is that he did not make the statement until 1802, eleven years after the amendment was added. Madison's input, meanwhile, also was minimal.**{7}**

Since American federal and state governments gave financial aid to religion prior to the *Everson* decision, and *Everson* is based on faulty history, the Supreme Court has been gravely mistaken in its conclusions about the relation of government to religion. An examination of the early history of America reveals that, as long as government does not set up one religion or denomination as the officially sanctioned state religion, public aid to religion in general should be considered constitutional.**{8}**

TUITION TAX CREDITS

Despite the faulty basis of Court decisions, legislators who favor tuition tax credits and voucher programs must deal with the reality of today's interpretation. They must find ways to phrase legislation to escape the stricture of the courts so that the law will not be overturned.

Among the roadblocks thrown in the way of tuition tax credits are: dire predictions of renewed segregation, talk of the demise of the public school system, and warnings that the credits will drain the federal treasury. Perhaps the

most threatening argument has been the contention that a tax credit is the same as federal funding of private schools, thus bringing it into conflict with the First Amendment's establishment clause.

Tax Breaks and Subsidies

A tax break, whether in the form of a deduction or a credit, is not the same as a direct governmental subsidy. The only way it could be the same would be if it were argued that all income belongs to the government, and that any money left in a citizen's pocket after taxes amounts to a subsidy. As education analyst Lawrence Uzzell has remarked, "We must reject the proposition that there is no moral or economic distinction between policies which let people keep their own earnings and policies which grant them the earnings of others. To refrain from stealing my sandwich is not the same thing as giving me a free lunch."**{9}**

The rules by which the Internal Revenue Service operates support the position that tax benefits are not the same as direct subsidies. Whereas all federal agencies dispensing financial aid are required to devise regulations concerning that assistance, the IRS has never been asked to do so. Tax deductions and credits are clearly not considered the equivalent of direct aid.**{10}**

The Supreme Court *Walz* decision of 1970 found that state tax exemptions for religious institutions were constitutional because the absence of government oversight of church finances actually reduced the involvement of church and state. This *Walz* verdict made a clear distinction between tax exemptions and government funding, stating categorically that tax exemptions were not grants and did not represent government funding.**{11}**

A consistent application of the tenets in *Walz* should have rendered tuition tax credits unnecessary. Since the Court has declared that church schools are integral parts of churches and that the schools' mission is the same as that of the churches, these schools should have the same legal status as the churches themselves, able to receive funds from parents as tax-deductible contributions. Were this the case, there would be no need to wrangle over tuition tax credits.**{12}**

Constitutionality of Credits

It was not until the 1983 case of *Mueller v. Allen* that the constitutionality of tuition tax credits was formally tested in the Supreme Court. The case challenged the constitutionality of income tax credits for education allowed by the state of Minnesota. The Minnesota law covered all educational expenses for all children in elementary and secondary education. In a slim five to four judgment, the Court declared the law valid, opening the way for future tuition tax credit measures.

In his majority opinion, Justice William Rehnquist cited five reasons for allowing the tax credit:

1. The benefits would meet the test of legitimate tax deduction—they would contribute to the public welfare (by promoting education) and reduce involvement between church and state, a reference to the *Walz* decision;
2. The credits would benefit church schools only indirectly—the parents would receive the tax relief and would make the decision where to send their children, thereby eliminating any government partiality toward religion;
3. The class benefiting is broad--the law applied to all parents of school-age children, whether they sent the children to public or private schools;
4. The law provided equity for parents of children in private schools—in consideration of the fact that "they bear a particularly great financial burden in educating their children"; and
5. The law was no danger as an establishment of any particular religion.**{13}**

Because of this decision, boundaries are set for proponents of tuition tax credit. The "safe" ground is to ensure that any proposed law would apply to parents of public school as well as private school children. Tax credit proponents, moreover, can take comfort in Rehnquist's remarks concerning equity for parents who chose private

schools and in the assurance that the Court did not consider these benefits to be an establishment of religion.

EDUCATION VOUCHERS

The *Mueller* decision did not settle the issue for vouchers since they require government funding. With a tax credit, the government simply does not take a person's money; with a voucher, money that already is collected is then disbursed for the purpose of meeting educational expenses. Such disbersal requires government oversight and hence raises the specter of possible entanglement of government and religion.

The legal question turns on who receives the voucher payments. If they were to go directly to a private school, this surely could be considered government advancement of religion, an action prohibited by *Everson*. This would not be the case were the voucher money provided to the parents. They then could decide whether to cash the voucher and which school would receive the benefit. This would be a form of indirect funding to private schools, with the schools receiving funds only by the parents' free choice. As such, the Court should have no problem with it.

The Legal History

The 1947 *Everson* case, the initial ruling on the establishment clause of the First Amendment, provides the first indication of how the Court views indirect funding. In *Everson*, the Court approved state reimbursement to parents of children in nonpublic schools for costs of transportation, stating that since the aid went to the parents, rather than the schools, it did not violate the establishment clause. *Everson* thus allows indirect aid to parents of children in private schools.

Then in the 1948 *McCollum* decision, the Court touched on the issue, disallowing religious instruction on school grounds during school hours, even though the instruction was diversified and voluntary. Because the instruction was taking place in a building receiving public funds, the Court viewed it as indirect government sponsorship of religion. In this case, the indirect connection was not allowed.

In the 1952 *Zorach* decision, however, the Court allowed released time for religious instruction off school grounds during school hours. This amounts to indirect funding of religious instruction since government-sponsored "time" was involved. In the *Zorach* decision Justice William O. Douglas significantly modified Justice Black's *Everson* opinion on the separation of church and state. Douglas commented: "The First Amendment … does not say that in every and all respects there shall be a separation of Church and State.… We are a religious people whose institutions presuppose a Supreme Being.… When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."

In the 1963 *Schempp* case, daily Bible reading and prayer in public schools were declared unconstitutional because they infringed on the rights of those in the classroom who were not religious. The basis for the decision was that the schools were funded by government and any funds going to aid a certain religious viewpoint would be wrong, as stated in *Everson*.

The central importance of *Schempp*, however, was the Court's ruling that government funds for schools must have a secular purpose and that the primary effect should neither advance nor inhibit religion. For the remainder of the 1960s, these two tests were regarded as the signposts to follow regarding constitutionality. As such, in the 1968 *Allen* case the Court allowed New York State to loan state-selected and state-approved textbooks to children in private schools that were church connected. The rationale for this decision was that the aid directly benefited the parents and students, not the church school. Here again, indirect funding seemed acceptable.

Other landmark cases in the early 1970s, such as *Lemon* (1971) and *Nyquist* (1973), dealt primarily with direct subsidies or with the issue of tax exemptions. Consequently, the decision on indirect funding in *Allen* remains the standard for analyzing voucher proposals.

The Grove City College Case

Early in 1984, the Court's ruling in *Grove City College v. Bell* led to a fundamental reexamination of the status of vouchers. Grove City College is a private, religiously oriented institution that has always refused to accept direct aid from the government. About 140 of its 2,200 students, however, were receiving Basic Educational Opportunity Grants, while 342 had taken out Guaranteed Student Loans. Such indirect assistance may be similar to the proposed educational vouchers because the money went to the students rather than to the college.**{14}**

But the Carter Administration Department of Education decided that Title IX of the Education Amendments of 1972 made the college a recipient of federal funds through these indirect grants. The Department then ordered the college to complete the forms used to assure compliance with Title IX regulations or else the students would risk losing their federal grants.

Grove City contested the Department of Education's interpretation of the matter and thus refused to file the forms. In response, the Department started proceedings to declare the students ineligible to receive the funds. The case was carried to the Supreme Court, which ruled that Title IX requires Grove City to provide assurance of compliance. The Court added, however, that federal government oversight can apply only to the college's financial aid department rather than the college as a whole.**{15}**

The decision has raised disturbing questions about the extension of government regulation over indirect assistance, for the Court ruled that assistance to a student implied assistance to at least part of the institution itself. Does this mean that, when parents receive voucher money and spend it at the school of their choice, the government then gains some control over the private schools that received the voucher payments? To be sure, *Grove City* case does not parallel exactly the proposed voucher systems. The Court ruling, for example, was based narrowly on the wording of Title IX of the Education Amendments of 1972. The case also concerned college level education rather than elementary or secondary schools. Still, Grove City could be seen as setting a precedent, which government agencies may try to apply to vouchers.

IMPLICATIONS OF COURT DECISIONS

Interpreting the twists and turns of the Supreme Court concerning church-state relations is clearly complicated. Despite its weaving over the past four decades, the Court has established a three-part test to determine the constitutionality of aid to religion:

1. All government funding must have a secular purpose;
2. Its primary effect must not be the advancement of religion; and
3. It must not entangle the state excessively in church affairs.**{16}**

The Secular Purpose Test

As determined in the *Mueller* verdict, the education of American citizens, whether in a public or a private school, has a distinctively secular purpose, even though a religious motivation might also exist. The object of education is to produce enlightened citizens who can be trusted to make intelligent decisions on the governance of the country. Both tuition tax credit and voucher proposals would meet this criterion.

The Primary Effect Test

It is undeniable that, simply by making religious schools more accessible to those with lower incomes, tuition tax credits and vouchers might incidentally advance religion. Yet the primary object of both proposals is to make alternative education available to families and, especially in the case of the tax credits, to recompense parents who choose a private school but must continue to pay taxes for the public system. Justice Rehnquist in his *Mueller* opinion described the issue as a matter of equity. *Mueller* also indicates that tuition tax credits are acceptable if they allow all parents to claim deductions or credits for educational expenses, whether their children attend private

schools or not. In this way, the credits are not solely for the benefit of those parents who patronize religious schools. Vouchers naturally would include all students.

The Entanglement Test

Tuition tax credits require no government oversight and, according to *Walz*, actually reduce church-state involvement. Entanglement, however, could create problems for vouchers. If *Grove City* becomes the standard for indirect funding, then the government will have a right to intervene in the affairs of all private schools that accept vouchers. Yet the conditions of the *Grove City* case do not necessarily cover all or even most voucher situations.

DESIGNING VOUCHER LEGISLATION

In the Chapter One Program for Disadvantaged Children, the Reagan Administration has tried to create a voucher system allowing parents to use the money at the school of their choice. To counter the possible charges that these vouchers are federal assistance to private schools, the Program is worded carefully, stating:

> Payments made by a local educational agency to a private school or to another local educational agency pursuant to an educational voucher program under this chapter shall not constitute Federal financial assistance to the local educational agency or private school receiving such payments, and use of funds under this chapter received in exchange for a voucher by a private school or by a public school located outside of the school district in which the eligible child resides shall not constitute a program or activity receiving Federal financial assistance.

The Chapter One voucher proposal is still before Congress. It is a promising attempt to bring the voucher concept in line with Supreme Court rulings. Another approach is that of equal access. Congress recently passed legislation giving religious groups the same right of access to public school facilities as other student groups enjoy. It thus could be argued that all students need equal access to all types of schools in order for them to be certain of obtaining the best education available.

To meet the tests implied by the various Court rulings, the quality of education must be central to every voucher proposal. Vouchers must continue to have as their primary goal improved education for all American children. Vouchers would help achieve this because they would force schools to demonstrate competence to attract students. The virtual monopoly currently enjoyed by the public school would be challenged, stimulating competition that would revitalize public education.

Finally, a successful voucher proposal must stress the virtues of freedom of choice. It must be emphasized that, because of financial constraints, far too many parents cannot choose where to educate their children. Result: many children suffer from poor education. Vouchers would alleviate that situation.

CONCLUSION

The benefits of education vouchers are so apparent that the nation must try to establish such a system. By making sure that it serves secular purposes, does not mainly advance religion, and avoids entangling the state excessively in church affairs, a voucher program should meet the standards established by the Constitution and thus survive predictable challenges in the courts. At worst, if certain aspects of a voucher system were declared unconstitutional, the reasons for the ruling could be used to craft a better approach. The system is too important to the U.S. education system for its proponents to be intimidated by threats of a challenge in the Supreme Court. A voucher program ultimately can be crafted to meet that challenge.

NOTES

{1} See Thomas W. Virtullo-Martin, "The Impact of Taxation Policy on Public and Private Schools, in Robert B. Everhart, ed., *The Public School Monopoly* (San Francisco: Pacific Institute for Public Policy Research, 1982); Jeremy Rabkin, "Educational Choice vs. Racial Regulation: Non-Discrimination Safeguards and the Tuition Tax Credit Bill," (Washington, D.C.: LEARN, Inc.); Lawrence A. Uzzell, "Issue Brief: Tuition Tax Credits," (Washington, D.C.: LEARN, Inc.).

{2} Walter Berns, "The Confusion of Political Choices and Constitutional Requirements: The Perspective of a Legal Historian," in Edward

McGlynn Gaffney, Jr., ed., *Private Schools and the Public Good: Policy Alternatives for the Eighties* (Univ. of Notre Dame Press, 1981), p. 194.

{3} Daniel D. McGarry, "The Advantages and Constitutionality of Tuition Tax Credits," *Educational Freedom*, Spring-Summer 1982, p. 38.

{4} *Ibid.*

{5} Thomas Ascik, "The Role of the Courts," in *A New Agenda for Education* (Washington, D.C.: The Heritage Foundation, 1985), pp. 4-5.

{6} McGarry, *op. cit*., p. 17.

{7} Berns, *op. cit*., pp. 192-194; McGarry, *op. cit*., p. 39.

{8} Berns, *op. cit*., p. 185.

{9} Uzzell, *op. cit*., p. 4.

{10} Rabkin, *op. cit*., p. 4.

{11} McGarry, *op. cit*., p. 18.

{12} *Ibid*., p. 33.

{13} Daniel D. McGarry, "The Mueller v. Allen Case, 1983," *Educational Freedom*, Spring-Summer 1983, pp. 1-5.

{14} U.S. Supreme Court Reports, Vol. 79 L Ed. 2d, 4/13/84, pp. 516, 534.

{15} *Ibid*., pp. 532-533.

{16} Roger A. Freeman, "Educational Tax Credits," in Everhart, *op. cit*., p. 474.