3-2-1982

Tuition Tax Relief: A Conduit for Regulation?

Steven Alan Samson
Liberty University, ssamson@liberty.edu

TUITION TAX RELIEF:

A CONDUIT FOR REGULATION?

Steven Alan Samson

March 2, 1982

The Nature of the Problem

What becomes of religious "free exercise" when the State creates institutions for "secular purposes" which exclude outwardly religious activities on the theory that Church and State must be kept separate? Such is the case we find today with respect to public education. The situation may be described--in answer to the question--as problematic at best.

The U. S. Supreme Court has handed down a series of decisions since Lemon v. Kurtzman, 403 U.S. 602 (1972), at 614, cautioning public authorities to avoid "excessive entanglement between government and religion." Some manner of commerce between Church and State is unavoidable because civic life is not so easily compartmentalized. Nevertheless, in banning religious activities from tax-supported schools, the State has created human preserves that are deliberately isolated from the normal flow of daily commerce. From a theological standpoint, the State has dedicated these schools, in effect, to a "holy" purpose, separating them from common or profane uses. By taking such actions, the State is presumably purifying these vessels and protecting their contents from environmental or ritual contaminants. It is not difficult to justify the taking of security precautions in national defense facilities in order to prevent infiltration by enemy agents. No such rationale is acknowledged, however, in the case of public schools. The explanation must involve the purposes for which public education is instituted.

This situation creates a number of constitutional dilemmas and must therefore be justified. Classifications based on religious distinctives and State-supported religious discrimination are prima facie constitutionally suspect. Such discrimination involves

the making of "invidious comparisons" which have the effect of placing some citizen-taxpayers in an inferior political status. A violation of civil rights by the State does not have to involve malicious intent. The key is a discriminatory "effect." Chief Justice Burger stated this principle well with respect to religious freedom in Walz v. Tax Commission, 397 U.S. 664 (1970), at 669:

> Each value judgment under the Religion Clauses must...turn on whether particular acts in question are intended to establish or interfere with religious beliefs or have the effect of doing so.

This would appear to be violated in the case of public schools. Taxpayers are compelled by law to support public schools, even though these institutions do not permit activities which are otherwise constitutionally guaranteed and which, it may reasonably be argued, have a direct relevance to any educational enterprise. Moreover, public schools are a unique case. Even soldiers and prisoners are not (yet) denied the services of clergy or the freedom to worship within the confines of tax-supported institutions. While perennial efforts are made to restrict tax exemptions for church property and exclude religious activities from all public facilities, such actions would effectually nullify the religious guarantees of the Constitution. They would also reduce some taxpayers--those who felt burdened by having to support religious discrimination--to the level of second class citizens. Some of them would affirm this is the case already by observing that religion is unconstitutionally established via public education because education is necessarily a religious activity, establishing and inhibiting particular religious beliefs.

The preemption of some religious viewpoints from public education may thus be construed as the establishment some other viewpoint as

orthodoxy. A recent federal district court decision in Arkansas illustrates this point. In overruling a law requiring equal time for presenting both the creation and the evolution versions of human origins in public classrooms, the judge undercut the basis for permitting the teaching of creation at all. His decision clearly established as "true" the evolution hypothesis and, by implication if not by forthright statement, disestablished as "false" the creation account. It is evident from this that the purpose of public education, as perceived by the federal judge, is indoctrination rather than the free exchange of ideas in the marketplace. Rival, unorthodox doctrines are thus ruled out of court. The control--by regulation or prohibition--of possible rivals is essential to the establishment of any monopoly or orthodoxy.

A monopoly may occur in the absence of competitors, when there is collusion, or when competitors are placed under legal restraints that favor a particular firm. It is hard to deny, for instance, that the U. S. Postal Service is a monopoly, even though it has a few competitors in specific areas of service, such as parcel delivery, and though alternative means of distant personal communication exist, such as the telegraph and the telephone. Likewise, public schools are distinguished by two features characteristic of a government monopoly:

1. They are paid for by taxation imposed by the police power of the people.
2. Attendance is compelled by that same police power and failure to attend brings a penalty under the law. (Ingram, 1959: 3)

As with any monopoly, some degree of state intervention into the affairs of competitors is thus inherent in our public education system. Through powers delegated to it by law, the public education bureaucracy--federal, state, and local--effectively sets the agenda

for all schools by setting the public example. It is able to do so because of sheer size. But it also lobbies Congress and state legislatures, directly or indirectly through its many allies, for laws that will set standards of performance that will affect all schools, private and religious as well as public. Private and church-affiliated schools must operate in the context of this government monopoly and adjust their programs accordingly, despite legal safeguards which restrict interference by the State. This was clearly understood by the majority in Pierce v. Society of Sisters, 268 U.S. 510 (1925), a decision which struck down an Oregon law that compelled all children to attend public schools:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship be taught, and that nothing be taught that is manifestly inimical to the public welfare. (at 534)

The success of private schools has long been an offense to many within the public education establishment. Abolition of tax exemptions, public services, and even the private schools themselves, has been perennially advocated. James Bryant Conant, for instance, once wrote that the "greater the proportion of our youth who attend independent schools, the greater the threat to our democratic unity." (Quoted in Ingram, 1962: 6) An educational free market is frequently characterized as destructive of public education. Efforts to abolish private education were blocked by the Supreme Court in Pierce, but on the basis of property values, not civil liberties. An awkward compromise has been the result, satisfying neither militant public education advocates or private educators. Standardization has still been the result, despite the Court's disclaimer, particularly as a result of federal legislation, even though "the child is

not the mere creature of the State." (268 U.S. 510, at 535) Such standardization has provided the State with additional leverage with which to control private education. A group of parents in Ohio were sued in 1974 for truancy--"failure to send children to school"--because the State held that the Christian school they attended did not meet the "minimum standards" set by the State Board of Education in 1970. (Grover, 1977: 5) The case was finally won by the parents on appeal in State of Ohio v. Whisner, 47 Ohio St. 2d 181 (1976). The Court held that

> these standards are so pervasive and all-encompassing that total compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children. (at 215)

What is true of minimum standards is likely to be no less true of tuition relief plans or any proposals that give the appearance of being subsidies. They are invitations to regulatory intervention. They are likely to help erase any distinctives that private education has to offer. The definition of education is being narrowed so that it is considered solely in the context of the practical preparation of children for the customary roles they are expected to assume as adult citizens. By implication, whatever is omitted is incidental and unimportant. Religious training is thus effectively preempted, even within nominally religious schools.

Increasingly, many--perhaps most--private schools have little to distinguish them from public schools other than the additional expense they involve to the families that send them there. The underlying educational philosophy that governs them may resemble that of the local public schools. Parental involvement may or may not be greater,

achievement scores may or may not be higher, and admission standards may or may not be highly selective. More important is the question of who sets the agenda. The standardization of teacher training, textbook selection, accreditation requirements, and curriculum content guarantee a high degree of comparability between public, private, and sectarian religious schools. The professional establishment that has grown over the last 150 years virtually assures what John Dewey called "a common faith." (Dewey, 1934) Even home education, which is getting increasing attention as an alternative, is likely to follow the lead of the professional orthodoxies.

What is the solution? The issues may be confronted at several points. The most obvious points are the pillars that uphold the public school system: taxation and compulsory school attendance. It is possible to have compulsory school attendance without tax-supported schools. It is also possible to have tax-supported schools without compulsory school attendance laws. Neither is likely without the other, and the drift in the post-Civil War period was in favor of both.

Some inroads have been made against the blanket application of compulsory school attendance laws. But even the Court's decision in Wisconsin v. Yoder, 406 U.S. 205 (1972), which excepted Amish parents from sending their children to school after the eighth grade, may make little more than a small dent in these laws. The tendency of public education advocates to press for a lengthening of the period of compulsory attendance may simply be nipped by exceptions made by the courts. There is nothing to prevent states from instituting mandatory pre-school except, perhaps, the state of public finances.

More attention is being given to introducing greater freedom of choice through various tax plans, despite the venerable custom of

using taxes for regulatory purposes. (Lee, 1973) Tuition tax credits and education vouchers have been proposed largely to overcome perceived financial inequities and to introduce greater freedom of choice or competition between schools. They have been opposed as elitist and ethnically or racially imbalanced. The question whether they may serve as conduits for greater government regulation has been largely ignored.

Proponents of tuition tax relief have advanced several plans during the last two decades designed to provide financial relief to families that send their children to private or church-affiliated schools. They are justified on the basis of free market theory, social equality, civil liberties, and religious freedom. (McCarthy, 1981: 175-1777) Controversies surrounding these plans have turned on two major points: the separation of Church and State, and the survival of public and/or private education. Dozens of national educational, labor, and public interest organizations have lined up on either side of the issue. The lines have remained fairly stable for several years.

The growing federal role in education since the Elementary and Secondary Education Act of 1965 has converged with a series of Supreme Court decisions on religious education to create a dilemma for church-affiliated and independent religious schools. Title IX of the 1972 ESEA amendments added a new regulatory dimension by stating that "if any students in a college receive federal assistance, the school must be classified as a 'recipient institution' and must comply with the hundreds of regulations imposed on Government-supported schools by the (then-) Department of Health, Education, and Welfare." (Time, April 24, 1978, p. 73) This rule has been applied against colleges, such as Hillsdale College in Michigan, which do not otherwise accept federal aid.

It is potentially as all-embracing as the Supreme Court's application of the Commerce Clause in the 1960s in support of the Civil Rights Act. It threatens the independence of private schools, and creates added Church-State entanglements in the case of religious schools. G. I. benefits and guaranteed student loans have served as a wedge for federal intervention into school policies and have had an untold impact on the operation of religious schools, which typically lose all identity as such within a generation or two of their founding.

Tuition tax credits and education vouchers likely would have similar consequences. But this question may be studied only through analogy. No such program has been in effect for more than a decade, although there have been programs that bear some resemblances to current proposals. Any such program would raise constitutional qurstions on at least two grounds: first, that their purpose and effect is to foster religion, and, second, that government stipulations or regulations over the use of such aid would foster "excessive entanglement." School administrators might find it financially and politically difficult to refuse such aid, just as city administrators find it difficult to explain a reluctance to get some of their local taxpayers' federal tax money back.

The fate of tuition tax relief plans may be inextricably bound up with the Church-State issue for political reasons. It is highly questionable that any plan that excluded religious schools would enjoy much popular support. These are tthe constitutional and political difficulties that must be confronted if any solution is to be found.