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School Choice in the Courts

By Melanie L. Looney

"Most of the opposition to choice has been targeted at voucher programs that allow participation by religious schools."

As the quality of public education has declined, Americans have sought to introduce competition into the education arena. Polls show widespread support for alternatives, particularly among minorities and parents in urban areas. [See the Public Support for School Choice sidebar.] Political leaders in a number of states have responded by expanding educational opportunities.

Among the alternative educational opportunities now available are: (1) intradistrict transfer programs limited to public schools, (2) restricted voucher programs that allow students to use public funds to attend public or private nonreligious schools, (3) unrestricted voucher programs that embrace public, private and religious schools, (4) charter schools within the public education system, (5) tax credits for tuition and fee payments for school expenses (whether public, private or religious) and (6) home schools. While each of these alternatives has drawn criticism, most of the opposition and litigation has been targeted at unrestricted voucher programs which allow participation by public, private and religious schools.

The unrestricted vouchers are targeted by opponents as a violation of the First Amendment's Establishment Clause, which they contend requires a total separation of church and state activities. The Supreme Court has ruled on a number of education-related cases in this area. Over the past half-century, the Court's interpretation of the Establishment Clause has evolved to create three distinct tests in *Lemon*, *Mueller* and *Agostini*. Most recently the Court continued to apply the *Agostini* test when it ruled in *Mitchell v. Helms*[1] that government neutrality towards religion, rather than complete separation, is required by the Establishment Clause. This and previous cases may provide insight into how the High Court will rule on the school choice cases now making their way through the state courts.

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Public Support for School Choice

To understand the debate regarding school vouchers, one must understand public opinion on the performance of the public schools. The 31st Annual Phi Delta Kappa/Gallup Poll published in September 1999 found that fewer than half of the adults surveyed nationwide would give public schools in their community a grade of A or B. When asked about public schools in the nation as a whole, only 26 percent gave them a grade of A or B, while 66 percent gave them a grade of C, D or F. When the respondents were asked directly about school choice – assuming cost was not a consideration – only 51 percent would leave their child in their current public school. Thirty-nine percent (39 percent) would move their child to a private or religious school.

Respondents were also asked whether parents and students should be given the choice of selecting a private school to attend at public expense. This option was favored by nearly half of the respondents who are nonwhite (49 percent), between the ages of 18 and 29 (48 percent), from the West (52 percent) or from urban areas (48 percent). Current public school parents favored publicly supported choice among public, private and religious schools by 60 percent to 38 percent, with 70 percent of nonwhites in favor.

Respondents were also asked if they would favor or oppose vouchers which could be used to pay part of the tuition at a private or religious school. Fifty-two percent of respondents favored such a system, as did an even larger majority of current public school parents, 59 percent.

Clearly, current public school parents, and especially minority public school parents, favor school choice, and of the alternatives most respondents favored vouchers that allow parents to choose where to send their children and their tax dollars, be it a public, private or religious school.

Source: 31st Annual Phi Delta Kappa/Gallup Poll, published September 1999, available at http://www.kiva.net/~pdkintl/kappan/kpol9909.htm

The need for alternatives to traditional public schools is clear. The alternatives must be able to withstand challenges to their constitutionality.

Constitutionality of Unrestricted Voucher Programs

The battlelines with regard to unrestricted voucher programs are drawn in the First Amendment. The First Amendment, ratified on December 15, 1791, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …" Legal precedents over the years have divided the above sentence fragment into two smaller pieces — the Establishment Clause and the Free Exercise Clause. Jurisprudence has treated these two clauses as if they appeared in separate documents rather than the same sentence. Court decisions have rarely focused on the balance required to make both clauses effective. And as the composition of the Supreme Court has changed over time so have the arguments and boundaries said to be created by the Establishment Clause.

"It is clear the founders intended the government to neither promote nor prohibit religion."

The proponents of school choice programs that include religious schools argue that any public money flowing to religious schools is the result of free and independent choices of the parents. Therefore, a voucher program that includes private nonreligious schools but excludes private religious schools would violate the Free Exercise Clause. The opponents of such programs argue that any money that flows to a religious school, regardless of whether it is directly from government or indirectly through parents via vouchers, would violate the Establishment Clause. When both the Establishment Clause and the Free Exercise Clause are read together, it is clear that the founders intended the government to be neutral with regard to religion, neither promoting nor prohibiting it. Yet because the Supreme Court decides cases after isolating these clauses, conflicting standards result.

Education Aid in Federal Courts

The case law in this area is convoluted and confusing, especially in light of the somewhat conservative shift of the Court in recent years [See the Federal Case Timeline sidebar]. The Court began discussing First Amendment issues as they relate to education more than 50 years ago in *Everson v. Board of Education of Ewing Township.*[2] In that case the school district was reimbursing parents for bus fare when children took public transportation to religious schools. The *Everson* decision focused on the content of the aid provided (the "what" question) and whether it was secular in nature.[3] The Court determined that the reimbursement was secular in nature and was not aid to the religious schools. In other words, the aid was constitutional because it did not further the religious purpose of the schools. The Court reviewed a similar

Federal Case Timeline

1947	*Everson*	Reimbursement of bus transportation approved.
1968	*Allen*	Loan of secular textbooks allowed.
1971	*Lemon*	Teacher supplement to private school teachers who taught only secular subjects prohibited.
		(created three-part test for programs under Establishment Clause)
1973	*Nyquist*	Three programs assisting religious schools serving low-income students prohibited.
1983	*Mueller*	State tax deduction for education expenses allowed.
		(changed focus of analysis from "what" to "how")
1986	*Witters*	State aid to blind student to attend religious college approved.
1993	*Zobrest*	Providing interpreter for deaf child in religious school allowed.
1997	*Agostini*	Public teachers providing remedial education at religious schools allowed.
		(created new test focusing on *Mueller* logic)
2000	*Mitchell*	Loan of instructional materials allowed.

issue in *Board of Education v. Allen* in 1968.[4] In *Allen*, the issue was the loan of textbooks on secular subjects to students attending religious schools. The Court again saw this assistance as secular in nature and declared such aid to be constitutional.

In recent decades, as cases relating to school funding and educational assistance have proliferated, the Court has adopted three successive tests for analyzing these First Amendment cases.

"Lemon created a three-part court test that legislation had to pass."

The *Lemon* Test. The 1971 *Lemon v. Kurzman*[5] case addressed a salary supplement given by the state of Rhode Island to teachers in private schools who only taught subjects available in the public schools, used only materials available in public schools and agreed not to teach courses in religion. In Rhode Island, 25 percent of the state's students were enrolled in private schools, but all of the money in this program was going to Roman Catholic schools, since 95 percent of the state's private schools were Catholic, and no non-Catholic schools applied for the supplement. From this case the Court developed the *Lemon* test, which states: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;[6] finally, the statute must not foster 'an

excessive government entanglement with religion.'"[7] [See the sidebar on Tests of Laws.] The Court determined that the supplement violated this test and stated that it "cannot … refuse here to recognize that teachers have a substantially different ideological character from books."[8]

In 1973, *Committee for Public Education and Religious Liberty v. Nyquist*[9] challenged three specific programs that provided grants for repair and maintenance of religious schools, partial tuition reimbursement and income tax credits. All three programs were directed at schools that served largely low-income children. The Court determined all three to be unconstitutional entanglements between government and religion, promoting religion as defined in the *Lemon* test.

Tax Deductions and *Mueller*. The 1983 decision in *Mueller v. Allen*[10] signaled a shift in the way the Court reviewed these types of cases — away from looking at "what" was purchased or provided and toward "how" the funding reached the school.[11] In *Mueller*, the Court addressed a Minnesota statute that allowed state taxpayers to deduct the expenses of tuition, textbooks and transportation for their children attending an elementary or secondary school. The deduction was available for expenses incurred at both public and private schools. The Court determined that the deduction did not have the primary effect of advancing religion, as it was merely one of many deductions available under Minnesota law. The Court based its opinion on two key

*"*Mueller *upheld aid resulting from a decision of individual parents."*

Tests of Laws Under Establishment Clause

LEMON TEST (1971)
(1) Does the law have a secular purpose?
(2) Does it have the "primary effect" of advancing or inhibiting religion?
(3) Does it cause an "excessive entanglement with religion?"

MUELLER ANALYSIS (1983)

- Focus on "how" the money gets to the religious schools, not on "what" the aid was or "what" it purchased.
- Key factors are neutrality – programs available to public, private and religious schools – and choice – parents/students independent decisions.

AGOSTINI TEST (1997)
(1) Does the law have a secular purpose?
(2) Does the law have the primary effect of advancing or inhibiting religion by:
  (a) Resulting in government indoctrination?
  (b) Defining its recipients by reference to religion?
  (c) Creating an "excessive entanglement" with religion?
* Continues focus from *Mueller* on neutrality and choice.

factors: (1) the deduction was available for the educational expenses of all parents, whether their children attended public, private or religious schools; and (2) the deduction provided aid to religious schools only as a result of decisions of individual parents, not directly from the state to the schools. Thus, the Court determined that these indirect consequences did not run afoul of the Establishment Clause.

Aid to Disabled Students. The new approach in *Mueller* was tested in the 1986 case of *Witters v. Washington Dept. of Services for the Blind*.[12] In *Witters*, a blind man sought to use his state assistance to further his education toward a career in the ministry at a private religious college. The state aid provided under the program was paid directly to the student, who then sent it to the educational institution. Clearly, any aid that flowed to the religious institution did so as a result of the choice made by the individual recipient, as the funds were available to the disabled in a neutral manner. Again, the focus was on the recipient's decision rather than on the source of his funds or "what" the funds purchased.

The Court extended the decisions in *Mueller* and *Witters* when it addressed *Zobrest v. Catalina Foothills School District*.[13] In *Zobrest*, the parents of a deaf child enrolled at a religious school sought an interpreter for their child under a state program for the disabled. In 1993 the Court ruled that "[g]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion, … are not readily subject to an Establishment Clause challenge just because [religious] institutions may also receive an attenuated financial benefit."[14] The program involved in this case distributed benefits to any qualifying disabled child without regard to the religious or nonreligious, public or private nature of the child's school. The Court returned to its *Mueller* and *Witters* analyses, holding that by "according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a [religious] school only as a result of individual parents' private decisions." The Court noted that the child, not the school, was the primary beneficiary of the program.

"Agostini *reiterated that neutral programs would not be invalidated simply because government funds passed to a religious school.*"

The *Agostini* Test. In the 1997 case of *Agostini v. Felton*,[15] the Court overturned decisions in two earlier cases, *Aguilar v. Felton*[16] and *School Dist. of Grand Rapids v. Ball*.[17] The issue in *Agostini* was the provision of remedial education to low-income students by public employees at religious schools. In this case as in *Zobrest*, *Witters* and *Mueller*, the Court found that the program provided benefits to all persons who met the eligibility requirements without regard to type of school attended (public, private or religious). The Court found the benefits provided to be particularly similar to those in the *Zobrest* and *Witters* cases and upheld provision of these services. In so concluding, the Court modified the *Lemon* test and replaced it with a new *Agostini* test. It said

the Court would henceforth consider two factors related to the Establishment Clause: (1) whether the law had a secular purpose and (2) whether it had the primary effect of advancing or inhibiting religion. The effect question was to be determined by whether the law (a) resulted in government indoctrination, (b) defined its recipients by reference to religion or (c) created an excessive entanglement.[18] This new test made excessive entanglement merely a factor and not a determinant in the consideration of effect. This case reiterated that neutral programs would not be invalidated simply because government funds passed to a religious school.

***Mitchell* and Government Neutrality.** The most recent case, *Mitchell v. Helms*[19], was decided by the Court on June 28, 2000, in a 6-3 decision. The Louisiana case dealt with federal funds given to school districts for equipment purchases. The funds were allocated to both public and private schools based upon enrollment and without regard to religious affiliation, provided all the schools were nonprofit. The plaintiffs challenged the loan of equipment such as computers, televisions and VCRs as a violation of the Establishment Clause because (1) it allowed the use of federal funds in religious schools (via the equipment) and (2) the items could be used for religious instruction.

"In Mitchell, *the Court again emphasized the importance of individual decisions that direct funds to religious schools."*

The *Mitchell* case was delivered in a plurality opinion — a six-member majority agreed on the final decision but not for identical reasons. All six justices reiterated the criteria established in *Agostini*. Four of the six justices signed the majority opinion, which focuses on government indoctrination and defines it as a neutrality question. In discussing neutrality, the Court stated that "[i]f the religious, irreligious and areligious are all alike eligible for governmental aid, no one can conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[20] The Court again emphasized the importance of private, individual decisions that direct funds to religious schools, stating "[i]f numerous private choices, rather than the single choice of government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot … grant special favors that might lead to a religious establishment."[21]

The principal argument by the plaintiffs in the *Mitchell* case that any aid to religious schools is always impermissible because it subsidizes religion was found by the majority to be "inconsistent" with case law. They also rejected the argument that aid must actually pass through the hands of the private individuals making the choices.

Mitchell and *Agostini* bode well for the constitutionality of unrestricted voucher programs that embrace public, private and religious schools, such as the Cleveland, Ohio, program discussed below, which legal experts believe will be chosen by the Court as the first direct challenge to vouchers.

School Choice in State Courts

Milwaukee Vouchers. With these cases as the backdrop, the first specific attacks on school voucher programs began with the Milwaukee, Wis., program. The Wisconsin program that eventually came under attack was an unrestricted voucher program. The Wisconsin Supreme Court found that it did not violate either the Establishment Clause or the state constitution.[22] The state's High Court held that the benefits were made available to both religious and nonreligious education institutions neutrally and that any benefits to religious institutions flowed from the choices of the individual parents. The case was appealed to the U.S. Supreme Court, which in 1998 declined to review it and thus allowed the state court decision to stand.[23]

"The U.S. Supreme Court declined to review the Wisconsin Supreme Court's upholding of the Milwaukee program."

Arizona Tax Credits. In Arizona the battle was not over a voucher program per se, but over a $500 state tax credit for donations to school tuition organizations that provide scholarships for any student to attend a private secular or religious school. Any taxpayer who donated funds to school tuition organizations could get a credit of up to $500 on the state income tax return unless the donor directed use of the funds to any of his or her dependents. In *Kotterman v. Killian*,[24] the Arizona Supreme Court upheld the credit stating that "Arizona's statute provides multiple layers of choice. Important decisions are made by two distinct sets of beneficiaries—taxpayers taking the credit and parents applying for scholarship aid in sending their children to tuition-charging institutions… Thus, the schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents."[25] The Court specifically noted that there was little, if any, difference between the level of choice available under Arizona law and the choice available under the Minnesota deduction addressed in *Mueller*. The Arizona Supreme Court's decision was appealed to the U.S. Supreme Court, which in 1999 declined to review it and allowed the lower court decision to stand.[26] While Arizona's plan is not specifically a voucher program, the Court's action in letting the decision stand may signal its willingness to allow vouchers for religious schools at some later date. At least 32 school tuition organizations have been established, and about $75 million has been made available for private school tuition payments in Arizona.[27]

Cleveland Vouchers. The Ohio legislature and courts faced a more urgent situation. The Cleveland City School District was ordered to be taken over by the state due to educational and fiscal crises. In addition, the legislature approved a pilot program of "alternative school" scholarships and tutorial grants for students staying within the Cleveland district. The scholarship program was open to all private schools in the district and public schools in the adjacent districts. None of the public schools in the adjacent districts chose to participate. The amount of scholarship aid was tied to the family's income

level, and the maximum was $2,500. Tutorial grants were limited to $500. An equal number of scholarships and grants were awarded each school year.

On appeal, the Ohio Supreme Court held that the program did not violate the Establishment Clause or state constitutional provisions.[28] The program was challenged in the federal courts in the summer of 1999. A federal district judge found the program violated the Establishment Clause and issued an injunction against it. Later the same federal judge modified the injunction to allow those students who had previously participated to remain in the program but refused to allow any new students. When the decision was appealed to the U. S. Supreme Court, the justices overturned the injunction pending a final decision in the case.[29] This was the first time the Court had spoken directly on a case involving school choice. Legal experts think that action may signal the Court's willingness to hear the Ohio case.

The challenges in Maine and Vermont are unique to their education systems. Both states force school districts that do not operate secondary schools to pay the tuition of students at "approved independent schools" or public schools in other districts.

Maine's Tuition Program. Before 1981, Maine parents were able to select either religious or nonreligious institutions and have the tuition paid by their school district. In 1981 the Maine legislature, relying on an opinion from its attorney general, made religious schools ineligible for the program to prevent an Establishment Clause challenge. After the program was restricted to secular schools, it was challenged in two separate suits: *Bagley v. Raymond School Dept.*[30] in the state courts of Maine and *Strout v. Albanese*[31] in federal court. Opinions in the two cases were issued within one month of each other.[32] In both suits the families challenged the limitation excluding religious schools as a violation of the Free Exercise Clause, the Establishment Clause and the Equal Protection of the laws under the Fourteenth Amendment. In both decisions the respective courts determined that the program's exclusion of religious schools did not violate any of the families' rights. The families filed appeals to the U. S. Supreme Court, which chose not to hear the suits and allowed the decisions to stand.[33]

"The Maine cases looked only at whether excluding *religious schools from tuition programs violated rights."*

Both decisions stressed that these cases were different from previous education cases. Previous cases that dealt with religious schools involved flows of public money into the schools; these cases dealt with the exclusion of religious schools from available monies. They forced the courts to consider *only* whether such exclusions accord with the prohibitions of the Establishment Clause. The Maine courts found that the Maine legislature had amended its program to withstand an Establishment Clause challenge under recent legal decisions in that area. Both the state and federal courts acknowledged that later cases had seemingly indicated significant shifts in this area, but both left any future changes to higher courts.

Both courts also noted that they *might* have viewed the matter differently if the program had included a safeguard where any money that went to religious schools was restricted to secular educational purposes. The courts did not rule out future inclusion of religious schools in a program incorporating such restrictions.

Vermont's Tuition Program. In Vermont, the legislature never modified the tuition program to make religious schools ineligible. Vermont did not require that an "approved independent school" prohibit use of taxpayers' funds for religious training or instruction. The Vermont tuition program was challenged in *Chittenden Town Sch. Dist. v. Department of Educ.*[34] on both state and federal grounds. In deciding the case, the Vermont Supreme Court noted that in earlier, similar cases the state's courts had analyzed the First Amendment issue because "the federal law was clear and the court was uncertain of the outcome under… the Vermont Constitution," but noted that the federal law "has become less clear."[35] Accordingly, the Court chose to make its decision solely on state constitutional grounds, precluding appeals to the federal court system.

"The Vermont Court made its decision solely on state constitutional grounds, and left a window of opportunity for change."

The Vermont families made the same arguments as did the families in Maine, but the key to the Vermont decision was the wording of the state statute: "[N]o person ought to, or of right can be, compelled to attend any religious worship, or erect or support any place of worship…"[36] Under that clause, the Court determined that the tuition program *must* be limited to nonreligious schools and thus denied the request for reimbursement by the state of tuition payments to religious schools. The Court did leave open a window of opportunity, should the Vermont legislature choose to exercise it. Specifically, the Court stated, "we conclude that the Chittenden School District tuition-payment system, with no restrictions in funding religious education, violates (the Vermont Constitution). The major deficiency in the… system is that there are no restrictions that prevent the use of public money to fund religious education… We decide only that the current statutory system, with no restrictions on the purpose or use of the tuition funds violates Article 3."[37] This statement appears to allow the state legislature to authorize tuition payments to religious schools by limiting the use of the funds to education, not religious instruction. Again, this legal precedent is limited to Vermont.

Florida's Statewide Vouchers. In 1999, Florida enacted the nation's first and only statewide voucher program. This unrestricted program provides "Opportunity Scholarships" to students in chronically failing schools — schools whose test scores fail to meet the minimum state standard for two out of four years.[38] During the first year of the program, only two Pensacola schools met the criterion. Fifty-three scholarships were awarded to students from these schools.[39]

An estimated 60,000 students at 78 other Florida schools were alerted that they might be eligible for these scholarships in the 2000-2001 school year.[40] The students and the schools improved their academic achievements and all 78 schools earned at least a D on the state tests. A study by the Alexis de Tocqueville Institute's Teacher Choice Program found that the voucher program had forced the public schools to change by injecting competition into the system.[41] For example,

- First grade class sizes fell to 18 students in 104 low-performing Broward County schools.
- In the 26 worst Miami-Dade County schools, 210 new teachers were hired.
- In Miami-Dade County schools, $11 million in federal funds was shifted to increase math and reading instruction.[42]

"Florida's voucher program impelled the public schools to make reforms."

The two Pensacola schools also saw positive changes. Students remaining in these schools got a longer school year, lower teacher-pupil ratio, greater focus on core subjects and increased tutoring.[43] In "Competing to Win," retired *Washington Times* education journalist Carol Innerst reported that the voucher program was having an "uplifting effect" on the public schools.[44]

Despite the program's success in improving education, it faces state court challenges from the National Association for the Advancement of Colored People (NAACP) and the teachers' unions. In March 2000 a state circuit judge ruled the program unconstitutional under Florida's constitution.[45] The teachers' unions requested that the judge stop the program while the case was on appeal, but that request was denied.[46] The case remains on appeal.

Future Direction of the Courts

With Vermont, Florida and other states considering arguments that their constitutions are more restrictive than federal law, future suits by school choice opponents are likely to focus on these state issues, which may forestall federal court decisions . However, it is not clear that such decisions cannot be re-litigated in federal court. School choice supporters may assert that state court decisions deprive citizens of rights afforded under dual (federal and state) citizenship.

The current federal case law and Supreme Court views suggest that unrestricted voucher programs allowing neutral participation by public, private and religious schools are likely to withstand constitutional scrutiny by the current Court. The Court has allowed payments directed by students or parents to the institution of their choice, and has not required that money pass through individual student or parent hands. Thus, direct payments or direct loans to

religious schools do not violate the Establishment Clause. However, the Court has continued to require a "genuine and independent choice" regarding the institution designated to receive the aid.

The state court challenges appear to require that the aid not be used in any religious instruction or worship. This requirement, while seemingly simple, would be difficult to administer and even more difficult to monitor.

Another important change facing school choice supporters and opponents is the composition of the Court. The Court currently has two broad groups of justices — on the conservative side, Chief Justice Rehnquist and Associate Justices O'Connor, Kennedy, Scalia and Thomas; on the liberal side, Associate Justices Stevens, Breyer, Ginsburg and Souter. The majority of this Court's opinions have been 5-4 decisions, generally on the conservative side. Most legal experts expect at least three and perhaps four justices to retire in the next four years, two from the conservative side (including the Chief Justice) and one or two from the liberal side. The next president will likely appoint almost half of the Supreme Court, including the Chief Justice. Such appointments could shift the balance of the court, changing its interpretation of the Establishment Clause.

"The Court has continued to require a 'genuine and independent choice' by students or parents regarding payments to religious schools."

Conclusion

With many of the new voucher programs coming under legal attack, little empirical data is available on the programs' effectiveness. While the current data are encouraging, no meaningful debate of the available alternatives is feasible until large testing and data analyses are completed. Accordingly, the National Research Council and others have proposed a "large and ambitious" experiment to determine the value of school choice programs.[47] The multi-district, 10-year voucher experiment proposal was included in the council's September 1999 report on school finance. The council, an independent, federally financed arm of the National Academy of Sciences, stated that such a study would furnish essential data on whether, and to what degree, tuition vouchers for private schools could boost achievement of students, especially those in poor, urban areas. Until such a study is completed or existing programs have created sufficient data, the debate over vouchers will continue and America's children will remain in failing public schools.

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NOTE: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any bill before Congress.

Notes

[1] *Mitchell v. Helms*, 530 U.S. ____ (2000), slip opinion available at http://www.supremecourtus.gov.

[2] *Everson v. Bd. of Ed. of Ewing Township*, 330 U.S. 1 (1947).

[3] Nathan Lewin, "Are Vouchers Constitutional?" *Policy Review,* No. 93, January-February 1999, available at http://www.policyreview.com/jan99/lewin.html.

[4] *Board of Education v. Allen*, 392 U.S. 236 (1968).

[5] *Lemon v. Kurzman*, 403 U.S. 602 (1971).

[6] *Board of Education v. Allen*, *supra*, at 243.

[7] *Lemon v. Kurtzman*, *supra*, at 612-613, citing *Walz v. Tax Comm'n*, 397 U.S. 664,674 (1970).

[8] *Lemon v. Kurtzman*, *supra*, at 617.

[9] *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973).

[10] *Mueller v. Allen*, 463 U.S. 388 (1983).

[11] Lewin, "Are Vouchers Constitutional?" p.8.

[12] *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).

[13] *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

[14] *Id*. at 8-14.

[15] *Agostini v. Felton*, 521 U.S. 203 (1997).

[16] *Aguilar v. Felton*, 473 U.S. 402 (1985).

[17] *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

[18] *Agostini*, *supra*, at 233-234.

[19] *Mitchell v. Helms*, *supra*.

[20] *Id.*, at p.10 of slip opinion.

[21] *Id.*, at p.11 of slip opinion.

[22] *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998).

[23] *Jackson v. Benson*, 119 S.Ct. 466, 142 L.Ed.2d 419 (1998), noting that Justice Breyer would have granted certiorari.

[24] *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999).

[25] Id. at 281 and 614.

[26] *Kotterman v. Killian*, 120 S.Ct. 283, 145 L.Ed.2d 237 (1999).

[27] NCPA Policy Digest, October 5, 1999, citing Linda Greenhouse, "Justices Again Avoid Church School Aid Issue," *New York Times*, October 5, 1999; and Frank J. Murray, "Supreme Court for Second Time Allows Vouchers," *Washington Times*, October 5, 1999, available at http://www.ncpa.org/pi/edu/pd100599a.html.

[28] *Simmons-Harris v. Goff*, 1997 Ohio App. Lexis 1766 (1997).

[29] "U.S. Supreme Court Speaks on School Choice," November 5, 1999, Milton and Rose D. Friedman Foundation, www.friedmanfoundation.org/success_stories.htm.

[30] *Bagley v. Raymond School Dept.,* 1999 Me. 60, 728 A.2d 127 (1999).

[31] *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999).

[32] *Bagley v. Raymond School Dept.,* 1999 Me. 60, 728 A.2d 127 (1999) on April 23, 1999, and *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) on May 27, 1999.

[33] *Bagley v. Raymond School Dept.,* 120 S.Ct. 364, 145 L.Ed.2d 285 (1999), and *Strout v. Albanese*, 120 S.Ct. 329, 145 L.Ed.2d 256 (1999).

[34] *Chittenden Town Sch. Dist. v. Department of Educ.,* 738 A.2d 539 (1999).

[35] Id. at 546.

[36] Id., citing Chapter I, Article 3 of the Vermont Constitution.

[37] Id. at 562-563.

[38] "Opponents Sue to Stop First Statewide School Voucher Program," Associated Press/ *Palm Beach Post and News*, June 22, 1999.

[39] George A. Clowes, "Judge Strikes Down Florida Vouchers," *School Reform News*, May 2000, http://www.heartland.org/education/may00/florida.htm.

[40] Steve Bosquet, "Vouchers Are Out — Writing Scores Credited for Grade Jump," *Miami Herald*, June 20, 2000, http://www.herald.com.

[41] George A. Clowes, "Vouchers Leverage Change for Remaining Students," *School Reform News*, May 2000, http://www.heartland.org/education/may00/leverage.htm.

[42] Ibid.

[43] Ibid

[44] Robert Holland, "Vouchers Motivate Florida Educators," *School Reform News*, June 2000, http://www.heartland.org/education/jun00/florida.htm.

[45] Clowes, "Judge Strikes Down Florida Vouchers."

[46] "Judge Rules Florida Vouchers Can Continue," *School Reform News*, June 2000, http://www.heartland.org/education/jun00/judge.htm.

[47] Kerry A. White, "NRC Report Calls For Voucher Experiment," *Education Week*, September 15, 1999, available at http://www.edweek.org/quicksearch/02nrc.h19.

About the NCPA

The National Center for Policy Analysis is a nonprofit, nonpartisan research institute founded in 1983 and funded exclusively by private contributions. The mission of the NCPA is to seek innovative private-sector solutions to public policy problems.

The center is probably best known for developing the concept of Medical Savings Accounts (MSAs). The *Wall Street Journal* called NCPA President John C. Goodman "the father of Medical Savings Accounts." Sen. Phil Gramm said MSAs are "the only original idea in health policy in more than a decade." Congress approved a pilot MSA program for small businesses and the self-employed in 1996 and voted in 1997 to allow Medicare beneficiaries to have MSAs.

Congress also relied on input from the NCPA in cutting the capital gains tax rate and in creating the Roth IRA. Both proposals were part of the pro-growth tax cuts agenda contained in the Contract with America and first proposed by the NCPA and the U.S. Chamber of Commerce in 1991. Two other recent tax changes — an increase in the estate tax exemption and abolition of the 15 percent tax penalty on excess withdrawals from pension accounts — also reflect NCPA proposals.

Another NCPA innovation is the concept of taxpayer choice — letting taxpayers rather than government decide where their welfare dollars go. Sen. Dan Coats and Rep. John Kasich have introduced a welfare reform bill incorporating the idea. It is also included in separate legislation sponsored by Rep. Jim Talent and Rep. J. C. Watts.

Entitlement reform is another important area. NCPA research shows that elderly entitlements will require taxes that take between one-half and two-thirds of workers' incomes by the time today's college students retire. A middle-income worker entering the labor market today can expect to pay almost $750,000 in taxes by the time he or she is 65 years of age, but will receive only $140,000 in benefits — assuming benefits are paid. At virtually every income level, Social Security makes people worse off — paying a lower rate of return than they could have earned in private capital markets. To solve this problem, the NCPA has developed a 12-step plan for Social Security privatization.

The NCPA has also developed ways of giving parents the opportunity to choose the best school for their children, whether public or private. For example, one NCPA study recommends a dollar-for-dollar tax credit up to $1,000 per child for money spent on tuition expenses at any qualified nongovernment school — a form of taxpayer choice for education.

The NCPA's Environmental Center works closely with other think tanks to provide common sense alternatives to extreme positions that frequently dominate environmental policy debates. In 1991 the NCPA organized a 76-member task force, representing 64 think tanks and research institutes, to produce *Progressive Environmentalism*, a pro-free enterprise, pro-science, pro-human report on environmental issues. The task force concluded that empowering individuals rather than government bureaucracies offers the greatest promise for a cleaner environment. More recently, the NCPA produced *New Environmentalism*, written by Reason Foundation scholar Lynn Scarlett. The study proposes a framework for making the nation's environmental efforts more effective while reducing regulatory burdens.

In 1990 the NCPA's Center for Health Policy Studies created a health care task force with representatives from 40 think tanks and research institutes. The pro-free enterprise policy proposals developed by the task force became the basis for a 1992 book, *Patient Power*, by John Goodman and Gerald Musgrave. More than 300,000 copies of the book were printed and distributed by the Cato Institute, and many credit it as the focal point of opposition to Hillary Clinton's health care reform plan.

A number of bills before Congress promise to protect patients from abuses by HMOs and other managed care plans. Although these bills are portrayed as consumer protection measures, NCPA studies show they would make insurance more costly and increase the number of uninsured Americans. An NCPA proposal to solve the problem of the growing number of Americans without health insurance would provide refundable tax credits for those who purchase their own health insurance.

NCPA studies, ideas and experts are quoted frequently in news stories nationwide. Columns written by NCPA experts appear regularly in national publications such as the *Wall Street Journal, Washington Times* and *Investor's Business Daily*. NCPA Policy Chairman Pete du Pont's radio commentaries are carried on 359 radio stations across America. The NCPA regularly sponsors and participates in *Firing Line Debate*, which is aired on 302 public broadcasting stations. The NCPA each year sponsors 22 one-hour televised debates on the PBS program *DebatesDebates,* seen in more than 170 markets.

According to Burrelle's, the NCPA reached the average household 10 times in 1998. More than 36,000 column inches devoted to NCPA ideas appeared in newspapers and magazines in 1997. The advertising value of this print and broadcast coverage was more than $56 million, even though the NCPA budget for 1998 was only $4 million.

The NCPA has one of the most extensive Internet sites for pro-free enterprise approaches to public policy issues, www.ncpa.org, receiving about one million hits (page views) per month. All NCPA publications are available online, and the website provides numerous links to other sites containing related information. The NCPA also produces an online journal, *Daily Policy Digest,* which summarizes public policy research findings each business day and is available by e-mail to anyone who requests it.

What Others Say about the NCPA

"...influencing the national debate with studies, reports and seminars."

— TIME

"...steadily thrusting such ideas as 'privatization' of social services into the intellectual marketplace."

— CHRISTIAN SCIENCE MONITOR

"Increasingly influential."

— EVANS AND NOVAK

"The NCPA is unmistakably in the business of selling ideas...(it) markets its products with the sophistication of an IBM."

— INDUSTRY WEEK

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