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WHY VOUCHERS ARE UNCONSTITUTIONAL, AND WHY THEY'RE NOT

Abner S. Greene*

To answer the question whether school vouchers are unconstitutional when used for religious schools, I will first consider the role the Establishment Clause plays in our constitutional scheme, and will suggest that the core value promoted by the Establishment Clause is not jeopardized by voucher programs. I will also respond to Dean Sullivan's argument that voucher programs are invalid under the Establishment Clause because they represent a kind of government speech promoting religion. Then I will turn to the Free Exercise Clause, and will maintain that compelling a citizen to support financially someone else's religious institution disrupts the voluntarist baseline of free exercise. Because of the distinctiveness with which our Constitution treats religion, we should construe the Free Exercise Clause as mandating pro rata taxpayer refunds of voucher money used to support another's church or synagogue. Next, I will outline the doctrinal argument against certain voucher programs. Finally, I will add a word about Pierce v. Society of Sisters, suggesting a new framework for thinking about public and private schooling.

I. VOUCHERS AND THE ESTABLISHMENT CLAUSE

A. The Hegemony of Dominant Religions

What does the Establishment Clause prevent that the Free Exercise Clause doesn't already prevent? Since the Free Exercise Clause already forbids government from coercing religious belief or practice, the Establishment Clause must have content beyond an anti-coercion rule. Most would agree that the Establishment Clause prevents government from establishing a preferred religion. Is that the end of the matter?

The better view is that the religion clauses together ensure religious pluralism, which means that the dominant religion may not use government to advance its doctrinal religious ends, and

* Professor, Fordham University School of Law. B.A. 1982, Yale University; J.D. 1986, University of Michigan.
2. 68 U.S. 510 (1925).
which also means that the dominant religion may (and in some cases must) aid minority religions. Three lines of Supreme Court case law should be considered correct under this anti-hegemony view of the Establishment Clause.

In the first line of cases, the Court four times invalidated laws on the ground that they were enacted for a predominantly religious purpose, i.e., that the dominant religion had sought to advance its doctrinal religious ends through the use of law. Thus, in *Epperson v. Arkansas*, the Court ruled that the legislature had been impermissibly captured by a fundamentalist lobby, and that the resulting ban on the teaching of evolution in public schools was invalid because it was based on a predominantly religious purpose. In *Edwards v. Aguillard*, the Court forbade a state from achieving an end run around *Epperson*, by invalidating a law that required creation science to be taught if evolution were taught. Again, the Court located an impermissible dominant religious purpose behind the law. Similarly in *Stone v. Graham* and *Wallace v. Jaffree*, the Court invalidated laws because they were each animated by a predominantly religious purpose. This line of cases should stand, for it serves as a bulwark against the manipulation of the legislative process to serve the doctrinal ends of a dominant religion.

In the second line of case law, the Court correctly required the removal of the creche atop the staircase inside the Allegheny County Courthouse, on the ground that a reasonable observer would conclude that the government was endorsing the Christian faith. Governmental use of religious symbols on government property is another way for the dominant religion to use law to achieve hegemony, and such symbols should be invalidated. Thus, the Court was probably wrong not to invalidate a governmentally sponsored creche in a public park in *Lynch v. Donnelly*, although the association of the creche with the government as sponsor was less clear there than in the *Allegheny* case. And the Court was probably correct in the *Allegheny* case not to invalidate a large menorah placed on public property next to a

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7. 472 U.S. 38 (1985) (law mandating a moment for silence or prayer at the beginning of the public school day).
large Christmas tree, because a reasonable observer would not assume the government was endorsing a minority religion.

In the third line of cases, the Court correctly invalidated government-sponsored prayer in public school. The proper justification for the school prayer cases is a structural one: the government should have no role in advancing prayer, for the risk is too high that the dominant religion will use such occasions to advance its doctrinal ends. I would not rely, as the Court did in Lee v. Weisman, on a psychological coercion theory to invalidate school prayer.

Programs that fund religious schools often do not raise the sort of problem raised by the religious purpose, symbols, and prayer cases. If the funding program is general—i.e., if the government funds secular as well as religious schools—then the program does not advance the doctrinal ends of the dominant religion, for many religions might be aided. It is possible that in a particular jurisdiction at a particular time a voucher program might be used primarily to bolster the religious schools of the dominant sect. If this could be shown, the program should be invalidated under the Establishment Clause. But in many (perhaps most) cases a voucher program will benefit the schools of many religions. Such programs do not violate the Establishment Clause because the hegemony of the dominant religion is not thereby established.

The concern often raised about such general funding programs—that some government money is going to church coffers—is a serious matter, but is better considered as a Free Exercise Clause concern. I turn to that in Part II.

B. The Government Speech Problem

Dean Sullivan offers another approach to invalidating voucher programs under the Establishment Clause. She describes two cases dealing, in part, with the attribution of the speech of one actor to another actor. In Rosenberger v. Rector & Visitors of the University of Virginia, the Court held that governmentally compelled student activity fees could be used to fund an evangelical Christian student newspaper, so long as the fees also

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funded a wide range of nonreligious student speech. The Court reasoned, in part, that because the fees were available broadly, people would not attribute the religious speech (or any of the funded speech) to the government. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,*\(^{15}\) the Court held unconstitutional a state law's required inclusion of a gay and lesbian group marching with their banner in a St. Patrick's Day parade against the wishes of the parade's private sponsors. The Court reasoned that people would attribute the group's message to the sponsors, thus violating the sponsors' right not to be associated with ideas with which they disagreed.

Sullivan maintains that if voucher money is used to fund religious schools, the religious message advanced by those schools will be attributed to the provider of the funds, the government. That is, she says the attribution of X's speech to Y in the voucher case is like that in the parade case (reasonable observer would make such an attribution) and not like that in the student fees case (reasonable observer would not make such an attribution).\(^ {16}\) This argument is weak. Cases such as *Hurley* do reveal situations in which the speech of one might be attributed to another. But other cases, such as *Rosenberger* and cases involving classic public forums such as parks and streets, involve a multitude of private speakers, none of whose messages are attributable to the property owner, the government. The generality of voucher programs, combined with the fact that each family, and not the government, decides how to use the voucher money, belies Sullivan's argument, and renders voucher programs far closer to cases such as *Rosenberger* and classic public forums than to cases such as *Hurley*. The reasonable observer would not attribute to the government the message of any school benefited by voucher money. Rather, such an observer would assume that the government is funding all schools, and thus is supporting the message of none. To be sure, when the government runs a monopoly and supports only the public schools, then one might reasonably attribute the content of the curriculum to the government. I would even agree that in a world of both public schools and voucher-supported private schools, one might reasonably attribute the content of the public school curriculum to the government. But because the voucher program is general and because parents, and not the government, decide where money from each voucher ends up, one would not reasonably attribute the content of the private school classroom (religious or secular)

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to the government. I agree with Sullivan that government may not endorse religion, but disagree that voucher programs constitute such an endorsement.

II. VOUCHERS AND THE FREE EXERCISE CLAUSE

The two principal Establishment Clause arguments against the use of vouchers for religious schooling fail—(1) most voucher programs will not operate to advance the doctrinal interests of the dominant religion, but rather to support all religions; and (2) the reasonable observer would not attribute the doctrinal message of religious schools to the provider of the funds, the government. But a Free Exercise Clause objection remains, and it is a serious one. Our conception of free exercise stems from a voluntarist conception of religion. Religion must be voluntarily chosen, not compelled. (Even if religion is a duty, and not a choice, it is a duty to God and not to the state.) Forcing me to spend my money on religious doctrines with which I disagree (and even, perhaps, with which I agree, but put that to one side) is improper because it violates this voluntarist baseline of free exercise. The compulsion here isn’t as bad as forcing me to practice another’s religion (or to cease from practicing my own), but it is still problematic.

Currently, this concern with compulsion provides no doctrinal basis for rejecting vouchers, but perhaps we can borrow from the free speech case law. The Court has, beginning with West Virginia State Board of Education v. Barnette,17 decided a series of cases involving compelled speech. Sometimes the Court has invalidated laws compelling speech;18 other times it has upheld such laws.19 Locating a cogent analytical line between these two sets of cases is difficult, and I will not attempt to do so here. Moreover, the very existence of a category called compelled speech (or the right not to speak) is open to question, on the ground that if a reasonable observer would know that one’s speech is compelled, that observer would not necessarily associ-

17. 319 U.S. 624 (1943).
ate the content of the speech with the speaker, and therefore, so long as dissent is open, the Free Speech Clause is, arguably, not violated. I have written about this elsewhere.  

For present purposes, I want to discuss neither the general category of compelled speech nor the difficult distinctions among the compelled speech cases. Rather, I want to focus on one of the cases, Abood. There, the Court struck down governmentally compelled fees from nonunion members when used by the union to support ideological causes.  
The portion of the dues used for ideological causes would have to be refunded. The Abood principle writ large would dramatically change the way government operates: all taxpayers would be eligible for pro rata refunds for government speech with which they disagree (e.g. National Endowment for Democracy, National Endowment for the Arts, public schools, libraries, museums, etc.). No court, though, has come close to applying Abood this broadly. Perhaps this is because of administrative concerns: i.e., perhaps in theory Abood should be applied broadly to include taxpayer pro rata refunds, but in practice this would be too cumbersome. Or, maybe the theory behind Abood is limited to compelled speech in a narrower setting, such as unions or bar associations. Whatever the reason for the failure to extend Abood, there is no serious chance it will be extended.  

The Abood principle, it seems to me, has great salience in the free exercise area. Forcing me to support another’s religion undercuts a core free exercise value, by disrupting the voluntarist baseline of free exercise. Perhaps Abood should be writ large in the religion setting where it will not be in the speech setting; perhaps we ought to read the Free Exercise Clause as compelling pro rata refunds of taxpayer money used for vouchers to support someone else’s religious schools. Note that this approach would

20. See Greene, supra note 11.

21. The portion of the fees used for collective bargaining was allowed to stand, on the theory that such bargaining benefited nonunion members and union members alike, and because of free-rider concerns. See Abood, 431 U.S. at 221-23.

22. I would argue that Abood itself was incorrectly decided. No reasonable observer would attribute the union’s ideological speech to any particular member, and any given member retains full rights to dissent, on his or her own nickel, from the union’s position. Thus, we should conclude that the Free Speech Clause was not violated. The Free Exercise Clause, though, embodies different concerns, which I discuss in the text.

not invalidate vouchers generally; a refund requirement is different from a facial invalidation.

To extend the *Abood* principle for religion while not extending it for nonreligious speech requires an argument that religion is special, distinctive. This is the big issue confronting religion clause scholars today: to what extent must we treat religion as distinctive for both establishment and free exercise purposes? The racial equal protection cases, from *Brown* through *Adarand*, have instantiated a vigorous principle of formal equality in our constitutional jurisprudence. According to this principle, government may neither favor nor disfavor citizens based on race, gender, religion, and perhaps sexual orientation. Applied to the religion clauses, we see the Court and commentators increasingly permitting support for religion so long as such support is part of a more general package, and rejecting exemptions and accommodations for religion unless those exemptions and accommodations are themselves general. To overcome this application of formal equality to the religion clauses, one needs a persuasive theory of religious distinctiveness, of how the Establishment Clause and the Free Exercise Clause sometimes require religion to be specially disfavored and specially favored.

I have argued elsewhere that religious faith is different in kind from secular faith, to nonbelievers and believers alike, and therefore, that laws based predominantly on express religious argumentation should be invalid under the Establishment Clause, for they specially disenfranchise nonbelievers who have no access to the extrahuman source of normative authority backing such laws. As a counterweight to this disfavoring, I have argued that the Free Exercise Clause requires exemptions for religious practice from general legislation, at least as a prima facie matter. In this way, there is a political balance of the religion clauses; we keep religion out of politics and politics out of religion.

Can such an argument extend to vouchers, to require pro rata refunds for taxpayer money used for vouchers to support someone else's religious schools? I think it can. If we accept the argument that religion is a distinctive form of belief, then even if we do not accept *Abood*, or do not accept its extension to broad

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28. Id. at 1633-43.
taxpayer relief, we can still accept the *Abood* principle applied to compelled exaction of money from me to pay for your church school. Such compulsion disrupts the voluntarist baseline of our conception of free exercise, and an exemption from that portion of my tax money that goes to fund the religious schools of others both restores that baseline and provides an appropriate counterweight to the disabilities required by the Establishment Clause.

### III. Doctrine and Vouchers

Current Supreme Court Establishment Clause doctrine would invalidate some voucher programs, while allowing others. Four factors are relevant when examining public aid to religious schools. First, is the program general, *i.e.*, does it fund religious schools only or religious schools as part of a larger package? Second, is the funding direct, *i.e.*, does the government money go straight to the religious school, or does it pass through other hands first? Third, is the choice of where the funds go dictated by the government or by private citizens? Fourth, is the government money that goes to the religious school segregated there for nondoctrinal uses?

In *Committee for Public Education and Religious Liberty v. Nyquist*, the Court invalidated a New York law providing for tuition reimbursement and tax deductions for parents of children attending secular and religious private schools. Although the money did not go directly to the religious schools, and although parents and not the government chose how the money was used, the law flunked the first and fourth factors listed above. That is, the law was deemed not general because it benefited private schools only, and not public schools. The Court reached this conclusion even though the aid benefited both secular and religious private schools. Additionally, the law did not ensure that the aid was eventually used for nondoctrinal purposes only.

In *Mueller v. Allen*, the Court upheld a Minnesota law allowing tax deductions for tuition, textbook, and transportation expenses for parents of children in both public schools and in secular and religious private schools. As in *Nyquist*, the second and third factors were easily met—the money did not go directly to the coffers of the religious schools, and individual parents rather than the government chose the beneficiaries. Although arguably the deductions for textbook and transportation expenses were properly segregated to ensure that such funds were not used for doctrinal purposes, no such segregation was

required for tuition expenses. The Court was silent on this fourth factor, however; in upholding the Minnesota law, it neither discussed this aspect of Nyquist nor attempted to distinguish it. On the first factor, the Court distinguished Nyquist by reasoning that whereas the New York program was insufficiently general, failing to include public school expenses, the Minnesota program solved that problem by permitting deductions for both public and private schools.

As I understand the case law, focusing on Nyquist and Mueller, a voucher program that satisfied factors one, two, and three would be upheld. That is, it would have to be sufficiently general, benefiting public and private schools alike, with private schools including secular and religious; funds could not go directly to the religious school coffers; and the choice of where government money flowed would have to be made by individual citizens rather than by the government. The fourth factor—whether the funds in question are segregated to ensure they do not go to doctrinal uses—seems irrelevant after Mueller.

The Wisconsin law at issue in the most famous state voucher case to date satisfies neither factor one nor two; yet, the state supreme court upheld the law. The law allows a certain percentage of students in the Milwaukee public schools to attend private schools—either secular or religious—at taxpayer expense. The state must send the check for the tuition money to the private school, and the parent or guardian must restrictively endorse the check for the private school's use. This program fails the first factor because, like the program in Nyquist, it funds only private schools (albeit secular and religious) and not public schools also. It fails the second factor because the money flow cannot fairly be deemed indirect. By requiring that the check be sent to the private school, made out to the parent but restrictively endorsed to the school, the law requires what can only be considered a direct payment to the school. Regarding the first factor, the Wisconsin Supreme Court failed to see the difference between Nyquist and Mueller. Although the court explained that the third factor was met—parental rather than governmental choice of schools—it failed to discuss the second factor, indirectness, which was not met. The Wisconsin law should have been invalidated. With some adjustments—providing a more general voucher program to include public schools as well as private ones; requiring that the voucher money go to the parents, with the parents then sending the voucher money to the schools in

question—voucher programs such as Wisconsin's should be upheld, under current case law.

IV. RECONSIDERING PIERCE

Underlying the voucher debate is a question about the proper division of authority between parent and state over children. Children are not generally deemed fully autonomous; someone other than a child must be in charge of many aspects of the child's life. We generally permit parents great leeway regarding decisionmaking for their children, but we do so, I believe, not because the parents have "rights" over their children, but rather because, for a variety of reasons, parents are in a better position than the state to make such decisions. Parental choice regarding their children is subject to state intervention when the parent abuses or neglects the child, and this can involve physical, emotional, medical, and, I would argue, educational abuse or neglect. Although I would not suggest that sending children to private schools (or home-schooling the children) rises to parental abuse or neglect, there is another argument that the Pierce "right" to send children to private school should be reconsidered.

Our constitutional structure is one of multiple repositories of power, and it is irreducible. By multiple repositories of power, I refer to the various mechanisms by which power is fractured; these include structural devices such as separation of powers, judicial review, and federalism, as well as various rights, such as speech, press, voting, and petition (the political process rights) plus religion and family (the rights to form separate communities of value). By irreducible, I mean that our constitutional structure is predicated on no foundation, neither of centralized power nor of fractured rights, and on a theory neither of democracy nor of liberty. The assumption that parents must have the right to school their children as they wish violates both of these

32. Even with this correction, voucher programs would still exhibit a problem different from that present in either *Nyquist* or *Mueller*. In those cases, parents received tax breaks or tuition reimbursement; no money of any kind went from government to school. In a voucher program, voucher money targeted for education might be sent first to parents, but they could then spend that money only by sending it on to the school. Thus, the government's money, embodied in the voucher, would end up in the school's coffers. This is a more direct connection between government and religious school than was present in either *Nyquist* or *Mueller*, and it will certainly be a ground for arguing the invalidity of voucher programs.


34. See Greene, *supra* note 3.
principles. It assumes a foundation of fractured rights over centralized authority by assuming that parents must (finances permitting) have the power to exit the local public school system and teach their children as they wish (subject to some, minimal state oversight). In so doing, the *Pierce* assumption—although, on one view, assuring multiple repositories of power by countering the state's schooling monopoly—in fact ensures that children will get their basic education not from multiple sources, but rather from their parents or their parents' agents alone. Requiring all children to attend public schools, while leaving parents free during non-public-school hours to teach their children at home or at church or synagogue, would ensure that all children are exposed to multiple sources of authority and of knowledge. Overruling *Pierce* would free up funds used for private schooling and would direct parental energies at improving the public schools. Different public schools would, of course, focus on different values, and parents would still therefore have significant input into the curriculum of their local public schools. But we would remove some children from the monopoly of their parents and substitute a plural system of education.

This argument against *Pierce* might seem in tension with my earlier argument supporting pro rata refunds for taxpayer money used for religious schools. That argument depended upon a robust conception of free exercise, of the rights of religious people to exit the public order through (prima facie) exemptions from generally applicable law when such law infringes on religious belief and practice. My argument against *Pierce* seems to privilege the centralized authority, and seems to neglect my earlier argument for opt-outs. The two arguments are, however, consistent. The earlier argument for exemptions did not consider the unique status of children. Because children are properly deemed not fully autonomous, they cannot be the recipients of exemption rights as adults are. We could, of course, extend the exemption argument to the rearing of children. That is, we could defend *Pierce* on the ground that the Free Exercise Clause requires exemptions from the public school system (or, more generally and problematically, that this is required by substantive due process, to include secular as well as religious schools). By insisting that all children attend public school, one might argue, we do harm to those religions that do not countenance exposing their children to multiple sources of value, both those of the public school and the home and religious institution. By overruling *Pierce*, the argument would go, we would establish a new foundationalism of centralized power, contradicting my earlier defense of a system of exemptions.
We cannot, however, have it both ways. Either we require public schooling, ensuring that children are exposed to multiple sources of value, or we keep *Pierce*, counteracting the public school monopoly but ensuring that the formal education of children is dictated solely by parental choice. The first option harms religions that insist on nonexposure to competition; the second option harms the ability of each child to become an adult who can then choose what sort of religious or secular life he or she wishes to lead. The anti-foundationalism and multiple repositories of power predicates of our constitutional order, it seems to me, mandate the first option.