

Courts and (Neo)Vouchers: When (if Ever) Should We Be Surprised?

By: Kevin Welner- June 26, 2013

Last week, I wrote a brief post here and on the *Washington Post's* "AnswerSheet" blog about a recent court decision in New Hampshire striking down a law that provided funding to private religious schools through an approach that I call a "neovoucher," which is becoming increasingly common around the U.S. On the Hoover Institution's "Education Next" blog, the Cato Institute's Jason Bedrick has criticized the court decision as well as my comments about that decision.

In particular, Mr. Bedrick takes issue with my comment that the court's ruling is "unsurprising." Simply put, I found the trial court's decision to be unsurprising because it's so solidly grounded in the New Hampshire constitution. But I should also acknowledge, perhaps to Mr. Bedrick's pleasure, that I also wouldn't be surprised to see the state supreme court reverse.

Honestly, I don't know why my surprise or lack thereof is of any import, but my point -- which I *do* think is important -- is that the neovoucher approach is carefully designed to avoid the clear intent of the constitutional provision. Some courts will see the circuitous route traveled by the neovoucher money as I do (as a distinction without a difference). Other courts will leave open the neovoucher loophole.

In using the word "loophole," it should be said that the lawyers who designed the neovoucher approach were doing what lawyers are hired to do: to find a work-around that will allow their clients to follow a desired path notwithstanding a law intended to block that path. This isn't a criticism -- as a former attorney, I've teased out my share of loopholes. But as a policy matter and as a legal matter, I side with those judges who pierce through the intricate veil and focus on the substance.

Why do some courts (and some justices) reach one conclusion while other courts/justices reach the opposite conclusion? To some extent this is due to different language in each state constitution and to different legal precedents interpreting that different language. To some extent, it's also because of the different "zone of judicial constraints" in different states and at different times. And to a large extent it's simple because courts are highly political bodies, and the decisions of justices are often driven by their political leanings. We acknowledge this when we say things like, "I'm voting for X for president because s/he will appoint justices I agree with."

So yes, Mr. Bedrick has a point. The technical differences between vouchers and neovouchers do allow for courts to uphold the latter when the former couldn't constitutionally survive. This is what likely happened in Arizona. But it didn't work -- so far, at least -- in New Hampshire. Nor should it.