



Cut down the constitution for school choice? Beware the devil

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My favorite scene from *A Man for All Seasons*, the Robert Bolt play about the execution of Sir Thomas More for his silent opposition to Henry VIII, is when More is begged by family members to arrest Richard Rich, the man whose deception about More would eventually seal More's death warrant. At this point in the story, there is no evidence that Rich has broken the law. Here's the exchange, but it is better watched than read:

Alice More: Arrest him!

More: Why, what has he done?

Margaret More: He's bad!

More: There is no law against that.

Will Roper: There is! God's law!

More: Then God can arrest him.

Alice: While you talk, he's gone!

More: And go he should, if he was the Devil himself, until he broke the law!

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's— and if you cut them down—and you're just the man to do it—do

you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law for my own safety's sake.

This is a terrific dialogue, but why reproduce it for a school choice Wonkathon, especially when I, like the others writing here, think choice is a great thing? Because it is the Constitution—the foundational federal law—that determines what the federal government may or may not do, and we ignore it, or willfully violate it, at great jeopardy to ourselves, even when we think our goal is immensely valuable. We must always ask *first*, before considering anything else, if something we may want the federal government to do is authorized by the Constitution. Because what will we do when the Constitution has been flattened, including by encouraging private school choice, and the devil turns ‘round on us?

Alas, aside from Lindsey Burke’s spot-on entry, the Constitution has been mentioned barely at all in this wonk extravaganza, and its prohibitions against federal action even less so. But those prohibitions are real. The federal government is given no authority to meddle in education outside of civil rights enforcement via the fourteenth amendment; control over the District of Columbia and federal installations under Article I, Section 8; and control over federal lands under Article IV, Section 3. It simply has no authority to broadly involve itself in education.

But what of the general welfare and spending clauses? Isn’t the federal government empowered to do anything it wants under those as long as the action serves the broad national interest? No. As James Madison made clear in Federalist no. 41, those clauses simply explain why the enumerated powers that follow are given:

For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars.

Alexander Hamilton, too, wrote that the powers of the national government were few and defined. Discussing the “necessary and proper” clauses in Federalist no. 33, he stated:

[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if the clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, *and vesting it with certain specified powers* [italics added].

This is all true about federal authority, you might be thinking, but hasn’t this view of the Constitution fallen into obscurity? Washington has been heavily involved in education for decades. Rather than fighting it, why not make it do something good?

Indeed Washington has been entrenched in education for several decades, but that actually furnishes powerful testimony against shunting the Constitution aside. The federal government has spent trillions of dollars on K–12 education over the decades, with little proven benefit to show for it, certainly relative to the money spent. And though snapped back a bit by the Every Student Succeeds Act, the decades-long federal trajectory has been to take ever-more power from state and local governments, reaching the brink of dictating *exactly what children will learn* with its recent Common Core coercion. And of course it has: When government directs

funding, it will naturally attach strings, and will do so bluntly either when things appear not to be working, or truly are ineffective. Our march from compensatory funding in the 1960s to Common Core coercion and teacher evaluation dictates in the Obama era attest to this, as do attacks on choice programs based on unsubstantiated fears.

There is, alas, no compelling reason to believe that a federal school choice program—even scholarship tax credits or expanded 529 plans—would not eventually succumb to the almost inescapable regulation incentive, and this time what should be truly independent schools—real *choices*—would be the victims. Indeed, many well intentioned choice supporters who want dollars spent effectively would *start* by attaching rules that put regulatory tentacles directly into private schools. As John Schilling argued in his Wonkathon entry, a federal scholarship tax credit program should “include common sense financial and academic accountability, ensuring that the program is responsible to taxpayers and working for students.”

What is “common sense” accountability to one person—say an advocate of educational freedom—would likely be far different from what a teachers union leader might think. And both may have conceptions at odds with what many parents and educators might believe is appropriate, or even crucial, to their conception of good education. Perhaps not everyone thinks Common Core is a desirable set of curriculum standards. But the federal government largely succeeded in coercing states to adopt it for public schools, and may well have done the same to ostensibly private schools had federal choice been significant a few years back.

But can’t such homogenization occur at state levels? Absolutely. That is why federalism—the reservation of widespread power to states and people—is so important. While one state may opt for onerous “common sense” regulations, another may have a lighter touch, or none at all. These “laboratories of democracy” allow different views on right and wrong policy to coexist; enable experimentation to take place without endangering the entire country should things go wrong; and even pit states in a bit of a competition to enact effective policies to attract residents and businesses. None of this would exist in school choice were the federal government to become the monopoly choice provider.

Federalism—the Constitution—is a fundamental good that we abandon at great peril to real, powerful school choice, and to ourselves. If we cut down the Constitution to get at the public school monopoly, what will we do when those who hate—or even just worry about—choice turn on private schools? The schools and families will have nowhere left to hide, the foundational law having being made flat.

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