ct attorneys and create uni-
tion rules across the state.
lized system would operate
w statewide Department of
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e bill, SB542, DAs would sur-
onsibility for child support
A new state agency would be
ersee county collection agen-
ating under the same rules.
ys the new system would be
existing resources and $40
l to district attorneys above
llecting child support. A simi-
3196, by Assemblywoman
l, D-Santa Monica, is working
ugh the Assembly. Both bills
ate a single state agency to
niform system of child sup-
tion in all 58 counties that
it easier to track deadbeats.
has one of the nation's worst
collecting unpaid child sup-
wo measures provide blue-
dly needed reform.

— San Francisco Chronicle

tem

ase.
s have taken the brunt of the
enberg is correct when he
the system has flaws not of
attorneys' making. At both
l federal level, the legislative
o reimburse the state and
welfare payments to single
l their kids. What interests
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ay and what is realistically
A father suddenly hit with
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ose. Amnesty programs for
interest payments need to
....
hild support out of district
fices is a good first step, but
fix all that ails the system.

— Sacramento Bee

yee performance, he's deal-
ıblic employees who can
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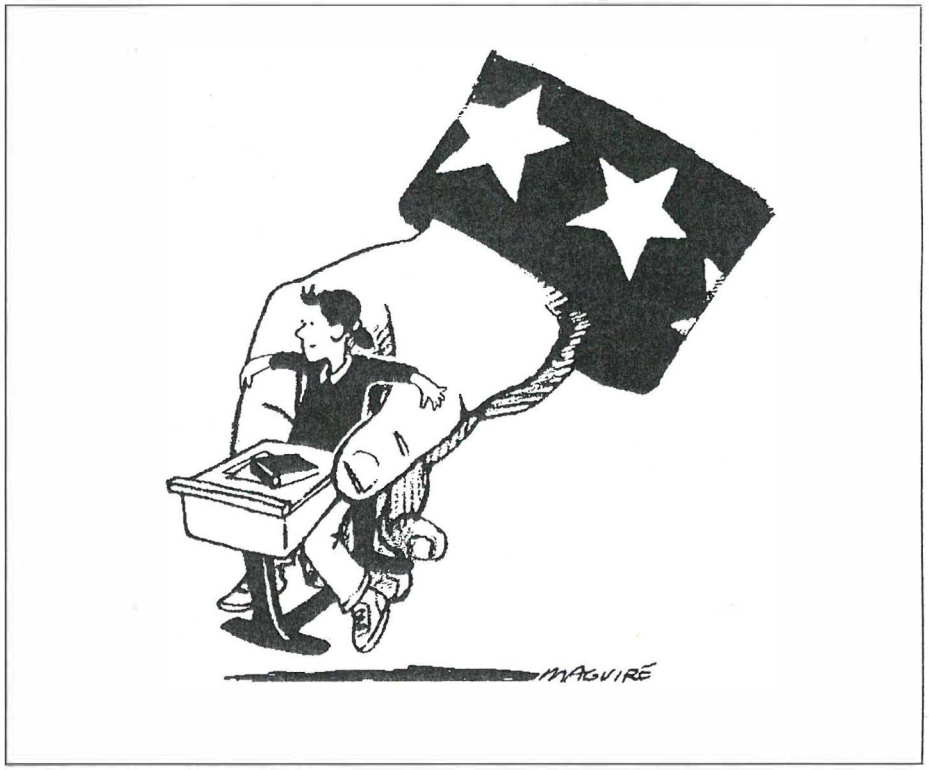
Getting Educated About Vouchers

Constitutional Right to Choice Applies Equally To Abortion And Schools

By Mitchell Kelter



In the debate over school vouchers, few realize that the California Constitution mandates equal funding for private and public schools. Our state Supreme Court has held, "The Legislature need not subsidize any of the costs associated with [education]. ... However, once it chooses to enter the constitutionally protected area ... it must do so with genuine indifference. It may not weigh the options open to the [parents] by its allocation of public funds."

Actually, the opinion concerned reproductive, not school, choice and referred to "child-bearing" not "education," and "pregnant woman," not "parents." *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 285 (1981). But the reasoning applies to both.

The *Myers* court held that the state may neither directly prohibit a constitutionally protected choice such as abortion (or private education), nor indirectly inhibit the choice through discriminatory funding, when only one choice receives state subsidy. Thus, if the Constitution protects the choice between childbirth (or public schools) and abortion (or private schools), the state may not subsidize only one.

The link between educational and reproductive choice has long been evident to the U.S. Supreme Court. In 1925, the court first recognized the Constitution protects parents' right to select their children's school, secular or religious. In striking down an Oregon law banning nonpublic schools, the court held, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty," to decide how the child is taught. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The Supreme Court cited *Pierce* in *Roe v. Wade*, 410 U.S. 113, 153 (1973), as proof that there are personal liberty or privacy interests that the state must respect.

Four years after *Roe v. Wade*, the court upheld Connecticut's reimbursement of a poor woman's costs for childbirth but not abortion. *Maher v. Roe*, 432 US. 464 (1977). The court held that the state could not prohibit the exercise of a constitutional right but could inhibit it. If the state could not favor one protected choice over the other, the *Maher* court explained, the state could not fund public education without similarly supporting private education. See also *Harris v. McRae*, 448 U.S. 297, 318 (1980).

But in *Myers*, the California Supreme Court, interpreting the state Constitution, disagreed, finding instead that the individual's freedom to choose demanded state neutrality. *Myers* found that funding birth but not abortion imposed a financial incentive to choose birth and forgo abortion, which impermissibly burdened a woman's choice.

The *Myers* court tried, unpersuasively, to show that reproductive choice deserved state neutrality, but educational choice did not. The court opined that *Pierce* meant only that the state could not prohibit private activities (education, abortion), not that the nongovernmental providers were entitled to state support. Accordingly, the state could legitimately favor its own providers over private ones.

That argument overlooks the nature of reproductive choice and educational choice. *Roe v. Wade* guarantees the individual may choose *whether* to obtain an abortion; *Pierce* guarantees the right to choose *from whom* to receive an education (and thus its nature).

A funding preference for state-provided abortions over private ones thus does not affect the choice of whether to obtain an abortion, but a preference for state-provided education over private education does affect the choice of from whom to receive an education. (If post-*Roe v. Wade* cases have constitutionalized the right to obtain an abortion from a private source, then the *Myers* argument contradicts the case's primary holding. The state could not favor one constitutionally protected choice (public abortion) over another protected choice (private abortion).)

Professor Michael McConnell explained how selective state funding undermines the right to obtain a private education more than it impedes abortion access. Michael McConnell, "The Selective Funding Problem: Abortions and Religious Schools," 104 Harv.L.Rev. 989 (1991) As *Maher* noted, the state need not subsidize birth or abortion, and a poor woman is no less able to afford an abortion when the state volunteers to underwrite childbirth.

But while the state need not support any schools, the state's subsidizing public education surely does make private education less accessible. The compulsory tax payments that support public schools leave parents less able to afford private education.

Notwithstanding the rational reasons for promoting birth over abortion, the state Supreme Court held the state may not use discriminatory funding to encourage that choice. This logic applies with equal or greater force to education: The benefits of public education may not come at the expense of parents' right to choose.

The California Supreme Court may want to follow the U.S. Supreme Court and allow the political majority to encourage certain choices (birth, public education) while still protecting the alternatives (abortion, private education). But favoritism cannot be forbidden in the context of abortion and permitted in the context of education. In *Roe v. Wade*, the late Justice Harry Blackmun made clear that the same constitutional liberty that protects the choice of whether to bear children protects the choice of how to rear them.

Mitchell Kelter is an appellate attorney in Los Angeles.