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## Responses

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# AMERICAN EDUCATION'S CHANGING POLICY CONTEXT AND PRIVATE EDUCATION: A RESPONSE TO BRUNO V. MANNO

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As interesting as Dr. Manno's (1997) paper is, he did not adequately address his stated topic, *The Financial, Legal, and Political Context of Private Education*. In fact, his presentation is more a campaign-style speech on reinventing public education than it is a research paper on nonpublic schools. Even so, there are at least four major areas where he could have improved his paper.

First, in his discussion about giving power to consumers, Dr. Manno writes that today's system of public education is governed and directed by two entities: school boards and central offices. The importance of boards and central offices notwithstanding, there are at least two other key players that he should have addressed: teachers' unions and the courts.

My own ambivalence about unions aside, one has only to look at the leadership that the late Albert Shanker, president of the American Federation of Teachers, and his successor, Sandra Feldman, have asserted on the national level along with Bob Chase, president of the National Education Association, in espousing school reform (Shanker, 1990). Moreover, local union leaders such as Adam Urbanski (1988) in Rochester, NY, have made major contributions in reshaping the face of American public education. Even if these labor leaders have been ahead of the rank and file membership in addressing vital issues such as school reform and teacher professionalism, it is important to acknowledge the central role that unions have played since they emerged as a force in the educational process in the early 1960s (Haar, Lieberman, & Troy, 1994). Further, as illustrated by the insightful works of

Kerchner and Mitchell (1988) and Kerchner and Koppich (1993), it is evident that any serious study of contemporary American public education must take the role of unions into account.

Even more than unions, the judicial system, beginning with the Supreme Court's monumental ruling in ordering an end to state-sponsored segregation in public schools in *Brown v. Board of Education* (1954), has asserted a major role in shaping the national and local debate on education, both nonpublic and public. The key role of the courts is even more pronounced as witnessed by the monumental struggles associated with the nominations of Robert Bork and Clarence Thomas to the Supreme Court. As legislatures appear to have abdicated their responsibility for "making the law" and the Court has taken on more and more quasi-legislative duties, each appointment to the Supreme Court has taken on added significance. Regardless of whether one believes in judicial restraint, wherein the Court is expected to interpret the law, or judicial activism, under which the Court adopts a free hand in shaping the law as it sees fit, there can be no doubt that the Court is at the center of formulating educational policy.

The role of the Court as a kind of super-legislature with clearly defined boundaries between and among its members was highlighted by the Court's recent decision in *Agostini v. Felton* (1997). In *Agostini*, which is discussed below, the Court split as expected (Russo & Osborne, 1997) when Justices Kennedy and O'Connor, its key centrists, joined the conservative bloc of Chief Justice Rehnquist and Justices Scalia and Thomas in trumping the Court's liberal wing of Justices Bryer, Ginsburg, Souter, and Stevens.

When discussing the maxim about money following the child, more commonly referred to as the child benefit test, Dr. Manno's paper would have benefited greatly had he spent more time on *Agostini*, wherein the Court reversed its earlier ban against the delivery of Title I services onsite to students in religiously affiliated nonpublic schools. *Agostini* is not only arguably the most important case to impact upon nonpublic schools since *Lemon v. Kurtzman* (1971), but also is the latest iteration of the child benefit test that began to emerge with the Supreme Court's 1947 decision in *Everson v. Board of Education*. In *Everson*, its first ruling on the merits of the Establishment Clause in a school setting, the Court permitted the State of New Jersey to reimburse parents of children in nonpublic schools for the cost of transportation to school. In *Lemon* the Court enunciated the tripartite purpose, effect, and entanglement test that has shaped virtually all subsequent cases dealing with aid to nonpublic schools. Clearly, *Agostini* promises to have a tremendous impact on the future of how federal programs are delivered in nonpublic schools (Osborne & Russo, 1997).

Second, the sections of the paper that focused on results and accountability overlooked at least two potential legal pitfalls associated with national testing. The first concern revolves around the Tenth Amendment. Insofar

as education is a reserved power under the aegis of the state, the rationale that was present for federal involvement in desegregation (*Brown v. Board of Education*, 1954) or special education (Individuals with Disabilities Education Act, 1997) is simply not present with regard to national testing. As such, educational leaders should be well advised about this serious reservation before inviting further federal involvement in education.

The second concern associated with testing raises three serious questions about such assessment. The first problem revolves around what is to be tested. President Clinton and others have called for testing in English and mathematics. But backers of testing have not spoken about social studies or science. Moreover, if social studies or English is tested, it remains to be seen who will control the content of the subject matter on the examination. As reflected by ongoing battles with advocates of political correctness in the curriculum, this can quickly become a major controversy. The second difficulty surrounds who will be tested. Yes, students are taking the test, but it is not evident whether these measures are subterfuges for measuring the effectiveness of teachers and parents. The third inquiry concerns whether assessment will be conducted by means of standardized or authentic measures or combinations of these formats, each of which carries significant baggage.

In a related vein, the firestorm of legal controversy surrounding outcomes-based education is likely to be resurrected in the event that proponents of testing proceed with a plan that has not addressed these related concerns. Further, even if these differences can be resolved, it is unclear how the data will be used if parents, school personnel, policy makers, and others in the educational enterprise have not reached a consensus on this important question in advance.

The third major area where Dr. Manno needed to expand and clarify his thoughts revolved around school choice, especially in relation to vouchers and tuition tax credits or deductions. As attractive as the idea of vouchers may be, his reliance on the statement of Tribe that "given the existing doctrine about the separation of church and state, I do not see a serious First Amendment problem in a reasonably written voucher program" (p. 11) has yet to be borne out. In fact, pending appeals to the Supreme Courts of Ohio and Wisconsin respectively, voucher plans in Cleveland (*Simmons-Harris v. Goff*, 1997) and Milwaukee (*Jackson v. Benson*, 1997) have been struck down as unconstitutional. Yet, even if the statutes that gave rise to these programs are upheld, Dr. Manno did not address the adage that "control follows the dollar." In other words, many parents, including my wife and me, have enrolled our children in outstanding Catholic schools (Chaminade-Julienne High School and Holy Angels School in our case) because we share the religious values and attitudes that can be explicitly incorporated into the courses of study that our children receive. If the federal or state government were to provide direct financial assistance, there is the possibility that they may

wish a larger voice in the way the schools are governed. My wife and I, undoubtedly along with many other parents, do not wish to risk compromising our schools in this manner.

Based on the Supreme Court's decision in *Mueller v. Allen* (1983) upholding the constitutionality of a law from Minnesota that granted state tax deductions for tuition, transportation, and books, this is an area that Dr. Manno should have explored in more detail. Even so, he was on the mark in stating that in light of *Mueller*, the fight for school choice is going to have to be waged on a state-by-state basis. Moreover, given the ease of documenting tax deductions, coupled with their relatively minimal impact on state coffers, this might be the better route to pursue, rather than tax credits, when seeking additional financial assistance for parents and schools.

As further evidence of the need to address educational change at the state level, the home schooling movement provides a good example of how a relatively small but highly mobilized group can change the law. A movement that educates anywhere from 500,000 to 1,500,000 children, depending upon whose estimates are relied upon, home schoolers have succeeded in raising the number of states with statutes from 2 in 1982 to at least 32 in 1996 (Russo & Gordon, 1996). If the parents of children in nonpublic schools displayed the same commitment to obtaining resources for education as their home school counterparts have to their movement, then they would already have obtained the equity and aid that they seek.

Fourth, in light of his calls to deregulate education in order, as he puts it, to be more "consumer-oriented," Dr. Manno's analysis creates an unresolved tension. Not only does he fail to offer an adequate explanation of how deregulation will help to make education more responsive to market forces, but he also sets conflicting expectations relative to educators and students. On the one hand, he argues that the recruitment of educators should not be limited to graduates of university-based training programs. Rather, he suggests that "individuals with sound character who know their subjects, want to teach children, and are willing to work with master teachers to learn the art and craft of teaching should be permitted to teach and administer in the new American public school" (p. 13). Yet, on the other hand, he has spoken of the need to increase measures of student learning.

Dr. Manno's focus is ironic. It strikes me as odd that he wishes to up the ante on students (a reasonable proposition in itself), but is willing to hire individuals who have not undergone appropriate professional development to lead and teach in the schools. Clearly, American colleges and universities can do a better job in preparing teachers and administrators. However, Dr. Manno failed to make a cogent argument to justify his proposition that schools should be free to employ individuals who lack appropriate professional backgrounds.

In sum, regardless of whether we agree with each other on the future shape of nonpublic education, it is critical to discuss this topic of vital importance because the shape that it takes will impact upon our personal, and our nation's, most precious resource, our children.

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