

Introduction

Subtle Forms of Circumvention

On January 23, 1964, seven-year-old Bryan Poindexter and his mother Lorraine went to the office of Principal Ethel Walker of the private Ninth Ward Elementary School at 1231 Japonica Street, New Orleans, Louisiana. Lorraine attempted to enroll Bryan in the school, but the principal refused to meet them. A legal battle was about to begin. Following the public school desegregation landmark *Brown v. Board of Education* (1954),¹ Louisiana had created “tuition grants,” a program awarding parents public money for private – segregated – education, and schools such as Ninth Ward Elementary sprung up to cater to new demand. The state paid students \$2 per day to attend segregated private schools, while most black children – Bryan among them – were confined to public schools rapidly hemorrhaging whites and funds. The National Association for the Advancement of Colored People pursued the Poindexters’ case, and on August 26, 1967, the district court for the Eastern District of Louisiana struck a blow to the white supremacist regime by striking down the tuition grants in its decision *Poindexter v. Louisiana Financial Assistance Commission*.²

¹ *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

² *Poindexter v. Louisiana Financial Assistance Commission*, 275 F Supp 833 (E.D. La. 1967). This decision was the second of four *Poindexter* rulings: 258 F Supp 158 (E.D. La. 1966) disposed of the defendants’ motion to dismiss the suit. The US Supreme Court affirmed the district court’s judgment in *Louisiana Financial Assistance Commission v. Poindexter*, 389 US 571 (1968). After these rulings the state attempted to resurrect the tuition grants, which were again struck down in *Poindexter v. Louisiana Financial Assistance Commission*, 296 F Supp 686 (E.D. La. 1968).

Forty-four years later, two armies of litigants bristling with amicus curiae briefs met in Washington, DC, to fight for the future of Arizona's tax credit voucher scholarships, a program funding parents' choice of private, mostly religious, education through tax credits. Pastor Glenn Dennard, his wife, Rhonda, and their five children joined Luis Moscoso and his family as parent-intervenors³ in the suit defending the vouchers. Battle-weary after a decade of lower-court litigation, their opponents were a group of Arizonan taxpayers led by community organizer Kathleen M. Winn, history professor Diane Wolfthal, librarian Maurice Wolfthal, and educationalist Lynn Hoffman. On April 4, 2011, the US Supreme Court found in favor of the scholarship parents, by upholding the program as constitutional in *Arizona Christian School Tuition Organization v. Winn*.⁴

Two legal decisions, four decades apart. At issue in both cases were voucher programs granting parents public money for private education.⁵ One program was deemed constitutional; the other was not. Seemingly disparate, these programs were united by a crucial political maneuver: an effort to distance the government from legally contentious policy goals – the subsidy of segregated, or religious, education. In both cases, policymakers pursued their aims through private service mechanisms, using third-party organizations, individuals, or the tax system to provide benefits. This book unpacks this distancing phenomenon by asking how elites use policy design and rhetoric to advance their policy goals when those goals become legally controversial.

Since *Brown v. Board of Education*, Louisiana's segregationists had been desperate to deploy state power to prevent the mixing of black and white students without seeming to do so. They applied a veneer of constitutionality by policy delivery, channeling money through parents and delegating administration to private commissions. But the veneer was thin. Segregationists failed to obscure their true purpose

³ Parent-intervenors are parents who join ongoing litigation because they claim an interest related to the subject of the lawsuit, in this case school vouchers.

⁴ *Arizona Christian School Tuition Organization v. Winn*, 563 US 125 (2011).

⁵ For simplicity, in this book, I use the term "voucher" to mean all programs that pay tuition at private K–12 schools. I show in Chapter 2 that vouchers come in many different designs and demonstrate in Chapter 6 that the use of the term "voucher" is highly politicized. My use of the term is a space-saving shorthand. Where needed, I use the term "tax credit voucher" or "tax credit scholarship" to indicate voucher programs that are funded through tax expenditures instead of direct appropriation.

in communications. They trumpeted their efforts to combat the federal government, using nakedly racist language and boasting about the artifice that supported segregation. In *Poindexter*, the court found them out.

For a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. Ten years after *Brown*, declared policy became undeclared policy. Open legislative defiance of desegregation orders shifted to subtle forms of circumvention.... *But the changes in means reflect no change in legislative ends.* (Wisdom 1967) [italics added]

The court concluded with a flourish: “The United States Constitution does not permit the State to perform acts indirectly through private persons which it is forbidden to do directly” (Wisdom 1967).

In the Supreme Court’s 2011 *Winn* decision, the controversy was religious, not racial, because most vouchers are used at religious schools. Like Louisiana’s segregationists, Arizona’s legislators had been stung by previous court verdicts. After a 2009 defeat by the state supreme court on religious entanglement grounds, policymakers got creative. By funding the program through tax credits rather than direct legislative appropriation, and having private organizations administer the scholarships, policymakers sought to avoid the First Amendment challenge. An enormously complicated piece of administrative machinery obscured the role of public money. Supporters were careful to avoid mentioning benefits to religious schools, focusing instead upon benefits to children. The Supreme Court majority was satisfied that the tax credit design distanced church from state: “Any injury the objectors may suffer are not fairly traceable to the government” (Kennedy 2011). The court’s four liberal dissenters were unpersuaded: “A subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other” (E. Kagan 2011).

Both *Poindexter* and *Winn* dealt with efforts to distance the government from legally controversial policy purposes, with varying success. A white supremacist regime, hitherto free to pursue its policy objectives openly, sought to minimize the appearance of state action in an attempt to circumvent legal challenges. Facing church–state jurisprudence prohibiting public aid for religious institutions, policymakers utilized tax credits to avoid religious entanglement. In both cases, policymaking elites and advocates acted strategically to pursue their

objectives amid hot-button political contestation. In this book, I show that when policymakers anticipate legal losses, they turn toward purposefully obscure communications strategies and hidden, private delivery mechanisms.

The Growth of the Hidden State

Hidden, delegated, or “submerged” forms of governance have expanded rapidly across America in health care, education, housing, and many other policy arenas over the past several decades (Hackett 2017; K. J. Morgan and Campbell 2011; Faricy 2011; Mettler 2010; Hacker 2002). These governance arrangements utilize private organizations and the tax system to deliver government social policy, accentuating the role of individual choice in social policy marketplaces and attenuating the connections between consumer-citizens and the state. Since 2008, tax credit programs funding private K–12 tuition have tripled in number, the amount devoted to the home mortgage interest deduction rose 24 percent, and the net federal subsidy of health-care plans for under-65s reached \$704 billion, with projected future rises (Joint Committee on Taxation 2008, 2013; Congressional Budget Office 2017).

The rapid growth of privatized forms of governance presents a puzzle, because such policies apparently offer policymakers few opportunities to claim credit for policy successes, and exacerbate government’s principal-agent problems by delegating functions to others. Such policies are also typically regressive, often expensive and involve government growth “under the radar” – that is, failing to register with most ordinary voters – issues of concern to both liberals (worried about their distributive consequences) and conservatives (publicly committed to shrinking the state). So why do privatized forms of governance pass, grow, and spread?

The explanation lies in the strategic use of *attenuation* to avoid political and legal challenges when losses are likely. Attenuation is the process by which policymakers in local, state, or federal government hide the state’s role in promoting a particular policy output. One way to distance the state from certain policy goals is to utilize third-party organizations or the tax system to deliver a benefit (attenuated delivery). Another is to obscure the state’s role in delivering certain policy outputs through communications strategies (attenuating rhetoric). In this book, I argue that doubling up two forms of *attenuated governance* – pursuing

both attenuated delivery and attenuating rhetoric together – helps policies pass and survive by thwarting legal opposition.

Scholars root the growth of the submerged state in a conservative public philosophy's dominance of public discourse over the past thirty years (Mettler 2009). Conservatives deploy third-party delivery or tax system funding arrangements to create the appearance of public spending restraint. Once passed, the programs acquire a fiercely protective interest group support network consisting of the private beneficiaries of government subsidy. Any efforts to reform or eliminate such policies are hobbled by an enthusiasm gap born of informational asymmetries between beneficiaries and the public.

This explanation is sound but incomplete. The thirty-year time frame overlooks the fact that hidden forms of governance predate this conservative era by at least four decades. In addition, emphasizing the *political* stability of hidden governance obscures the ways in which such policies are also insulated from successful *legal* challenges. Their political and legal advantages extend beyond the appearance of public spending restraint to the achievement of multiple state purposes under the radar, from regulation of private providers to more contentious goals. And attenuation strategies are pursued by both conservatives and liberals – white supremacists and racial egalitarians, accommodationists and secularists, and communitarians and individualists – when those elites expect their policy commitments to arouse strong oppositional advocacy and lose in court.

Suzanne Mettler's submerged state is a form of policy design, whereas attenuated governance has both rhetorical and design dimensions. This book disaggregates attenuated governance into its constituent parts: rhetorical framing and policy delivery. Drawing upon the case of school vouchers – an umbrella term used in this book to denote programs that pay tuition at private K–12 institutions, including tuition grants, education savings accounts, and vouchers funded either by direct appropriation or through tax credit scholarships – I argue that policies are more likely to be successful if they *combine* deeply attenuated policy delivery with deeply attenuating rhetoric. By “successful” I mean more likely to be passed into law and upheld in court and less likely to be overturned by voter referendum or subjected to legal challenge. As Clint Bolick, former voucher litigator for the Goldwater Institute, argues, “Any successful reform strategy is necessarily at least a two-step process, legislative and judicial” (Bolick 2003, 17). True success is broader than mere program passage; it must be sustained (Patashnik 2008).

Legal Battles in the States

Judicial action at both state and federal levels is key to the survival and growth of school vouchers because these policies activate constitutional questions about race, religion, and civic institutions. “Lose the courts, lose the war” (MacLean 2017, 229). Existing accounts of the submerged state omit the role of the courts, yet elites’ concerns about legal challenges help drive political behavior as they focus upon legal vindication (Glendon 1991; Tulis and Mellow 2018). As De Tocqueville famously wrote, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question” (De Tocqueville 1998, 110). Legal challenges to vouchers come at *state*, as well as federal, level, because state constitutions are thronged with educational mandates, prohibitions, obligations, and positive rights (Zackin 2013). Many of the greatest legal obstacles and opportunities lie at the state level. I demonstrate in this book that state lawmakers forestall legal opposition by strategically utilizing attenuated governance: downplaying the role of the state and deploying private delivery mechanisms to avoid constitutional challenges.

This is an account of policymaker learning and *elite*, rather than mass, feedback effects. Much recent work deals with the effect of privatized delivery upon public attitudes (Ellis and Faricy 2011; Gingrich 2014), whereas I examine elites’ strategic use of attenuation to survive judicial scrutiny. Attenuated governance is primarily aimed at fending off legal challenges (although it can also serve to reduce the likelihood of political challenges) by providing courts with a powerful rationale in favor of program constitutionality: the idea that *the state is not involved* in a constitutionally suspect policy output.

Unlike the public, judges and justices are not hoodwinked by the hidden nature of tax expenditures,⁶ nor is their decision-making swayed by a program’s popularity or distributional consequences but rather by ideas and ideology, institutional preservation, policy design, and determinations of policymaker intent. Case law is a source of policy feedback because courts are constrained by precedent (Stone Sweet 2002) and because court decisions provide information to policymakers and advocates about which policy designs and communications strategies are most likely to survive in future.

⁶ A tax expenditure is a policy tool that allows policymakers to spend money through the tax code.

Conservatives, in particular, have been astonishingly successful at utilizing attenuated governance to achieve their ends. Patiently, tactically, and iteratively, over more than sixty years of voucher litigation, conservatives have honed their legal strategy by testing different communications strategies and policy designs in court. Although, as I show in Chapter 1, both liberals and conservatives have incentives to attenuate when they fear legal losses, the privatization strategy meshes well with many conservatives' preference for market-based policy solutions. Today's explosion of school vouchers is the result of decades of policymaker learning about which sorts of programs and communications are most resilient in the face of legal attack.

Organization of the Book

The first two chapters lay out the analytical frameworks that animate this book. Chapter 1 explains why policymakers have an incentive to engage in attenuation by situating the politics of the hidden state within America's *three foundational identity struggles*: age-old, divisive, and recurrent contestation over race, religion, and civic institutions. Elites use attenuated governance to pursue their policy goals amid intensive contestation when more visible programs would be struck down as unconstitutional. Sometimes these programs are also electorally unpopular, but policymakers' chief fear is a legal one – that opposition groups will mobilize and hostile judges will strike their programs down.

Chapter 2 demonstrates that disaggregating the hidden state into underlying dimensions is theoretically valuable. The rhetorical and policy design dimensions are analytically separable. They occur in different spheres of political activity: policymaker communications and policy design. Combining these two dimensions produces different sorts of politics, with implications for the survival and growth of submerged policies. I term these phenomena “two dimensions of attenuated governance.”

In the next six chapters, I show how particular policy designs and communications strategies help programs pass, survive, and grow, avoiding legal entanglements and opposition mobilization. This book demonstrates that while passage, growth, and spread of attenuated policies can occur under many circumstances, such policies are most likely to succeed when policymakers combine a deeply attenuated policy design with a deeply attenuating communications strategy.

These *doubly distanced* policies provide one major advantage to policymakers: distancing the government from legally contentious

purposes. “Legally contentious purposes” are policy goals that attract substantial constitutional controversy, whether support for racially segregated institutions, defunding public education, subsidy of religious activity, policing voter access to the polls, abortion counseling, contraceptive provision, or other polarizing issues. Attenuated governance deemphasizes the role of government in attaining these controversial goals. By placing responsibility for program management with third-party organizations or individual service users, policymakers can avoid or limit pushback.