US Supreme Court authorizes school vouchers: a simultaneous assault on freedom of thought and public education

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The First Amendment to the United States Constitution sought to guarantee freedom of thought in word and deed—freedom of speech and freedom of the press; freedom to associate, peacefully assemble, and petition the government for redress; and, critically, freedom of and from religion.

Underscoring its signal importance to the country's Enlightenment-steeped founders, the very first clause of the First Amendment prohibited Congress from making any law respecting the establishment of religion. As Thomas Jefferson explained, the purpose of the "Establishment Clause" was to build "a wall of separation between Church and State." That prohibition was later extended to the several states shortly after the Civil War by the adoption of the Fourteenth Amendment.

On June 27 the right-wing majority of the US Supreme Court took a pile driver to that wall of separation. The Court decided in a 5-4 ruling in the case *Zelman v. Harris-Simmons* that Ohio's school voucher program, which funds almost all of the tuition for low-income Cleveland students who attend private religious schools, did not violate the Establishment Clause.

To reach this result the Court's majority was forced to depart sharply from longstanding Supreme Court jurisprudence, and to otherwise engage in factual distortion and verbal and logical subterfuge. That this sweeping social intervention occurred for political reasons is transparent: school vouchers have long been the main educational program of right-wing opponents of both public education and constitutional prohibitions against government sponsorship of religion.

The Court's ruling is not only an open assault on the First Amendment. It also encourages the spread of school voucher programs, and thus promotes the siphoning of tax dollars from already under-funded public schools in order to subsidize private institutions. It is an attack on public education and the democratic and egalitarian impulses that historically underlay the establishment of the public school system.

The facts in the Cleveland case are not complicated or obscure. Cleveland's largely minority school system has been a dismal failure in educating its students, so much so that a federal court ordered the Cleveland district placed under state control. The Ohio State Legislature passed a law permitting parents of low-income students in any school district placed under state control to receive up to $2,250 a year in tuition aid if their children attended a private school.

Over 80 percent of the private schools in Cleveland are religious, and their tuition fees are, on average, much lower than those of other private schools. As a result, in 1999-2000, the school year considered by the Court, over 96 percent of those students who attended private schools under the tuition aid program attended sectarian schools. Over $8 million in public funds in that year alone went to teach religious doctrine to 3,700 poverty-level students.

The fact that a law authorizing the use of public funds to pay for the indoctrination of school children in particular religious faiths is a law respecting an establishment of religion within the meaning of the First Amendment was seemingly settled by the Supreme Court long ago. In 1947, in *Everson* v. *Board of Ed. of Ewing*, which inaugurated the modern era of establishment doctrine, the Court stated the principle in words from which there was no dissent: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

How did the Court's right-wing majority engineer its way around this unequivocal ban? Through sophistry and chicanery.

In the opinion authored by Chief Justice William Rehnquist, the majority conceded that past Supreme Court rulings uniformly prohibited laws intended to aid religious schools, or laws whose "practical effect" would be to advance religion. Then the majority proceeded to ignore the inescapable fact that a program under which almost all non-secular tuition is paid by public funds necessarily advances religious instruction.

As Justice David Souter explained in his dissenting opinion, the result of the ruling is that "Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic."

The *New York Times* in a June 28 editorial put it no less bluntly: "Tax dollars go to buy Bibles, prayer books, crucifixes and other religious iconography. It is harder to think of a starker assault on the doctrine of the separation of church and state than taking taxpayer dollars and using them to inculcate specific religious beliefs in young people."

The majority wrongly purported to find support for its current position in the trend revealed in cases decided over the last half century. Beginning in 1969, the Court in some cases permitted aid to religious schools if the aid was clearly used for secular as opposed to religious purposes. But the proponent of the aid had to overcome a presumption against such a conclusion.

For example, in the *Nyquist* case in 1973, the Court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to private schools. The *Nyquist* Court rejected the idea that the aid passed to parents rather than directly to schools immunized the program, since the effect of the aid was unmistakably to provide financial support for nonpublic, sectarian institutions. Instead the Court focused on what the public money bought when it reached the endpoint of its disbursement.

Starting in 1983, the Court approved funding schemes, but only if the amounts were small and hence unlikely to afford substantial benefits to

religious schools, and only when offered "neutrally," i.e., without regard to a recipient's religious character, and when paid to a religious institution only because of the substantively "free choice" of some private individual. This shifting of focus onto neutrality and private choice, in addition to the issue of aiding religious activity, began with the *Mueller* decision in 1983. There, Justice Rehnquist, who has long had an unstated agenda of fostering religious education, first had a chance to author an opinion on the subject and begin to chip away at the wall. Nevertheless, subsequent cases permitted aid in neutral and free choice situations only in circumstances where any aid to religion was isolated and insubstantial.

Effectively ignoring those limits from prior cases, in the current ruling Rehnquist and the Court majority hung their constitutional hats on the supposed neutrality of the Ohio funding scheme and the exercise of private choice by parents of school children. As Justice Souter explained in his dissenting opinion in *Zelman,* a majority of the Court has now for the first time effectively junked the practical test of the extent to which government funds are aiding religious schools as the key constitutional consideration, in favor of the purely "formal" criteria of neutrality in offering aid and private choice in directing it.

Yet, as Justice John Paul Stevens stated clearly in his separate dissenting opinion, the voluntary character of the private choice to prefer a parochial education over education in the public school system is "quite irrelevant" to the question of whether the government's choice to pay thousands of dollars for religious indoctrination is constitutionally permissible. Justice Steven Breyer in his dissent agreed: "The majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination." In fact, the "scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported."

Either way, persons who oppose the religion of the sectarian schools that receive the aid are forced to commit their tax dollars to support religious indoctrination. Justice Stevens concluded: "[T]he Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds."

What Justice Souter's dissent politely calls the majority's "empty formalism" in applying this new, stripped-down neutrality/private choice test is, in reality, playing fast and loose with the facts. Rehnquist claims that because the Ohio law provides that poor parents who choose to keep their children in public school can receive aid to pay tutors, the law is neutral as to choice between public and private schools. Rehnquist and the majority choose to overlook the fact that the tuition subsidy for public school students is only $324 for the poorest children, thousands of dollars less than the tuition credit for private schools.

Rehnquist and the majority further claim that the Ohio program is more than neutral because spending on public school students exceeds $4,000 per year, community schools (public schools with their own governing boards) receive slightly more per year, and magnet schools (public schools focused on one subject) receive over $7,000 per pupil per year, all more than the private school tuition credit. Rehnquist even argues that private and religious school tuition is actually disfavored compared to public school funding. But, as the dissents point out, none of this funding passes through the private hands of parents, eliminating the logical link of the majority's private choice test.

As Justice Souter explains, the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all, and thus no choice to avoid religious schools. Thus, "neutrality as the majority employs the term is, literally, verbal and nothing more." It places no meaningful constitutional limits on religious school use of public funds.

Apart from the majority's warped logic and methodology, the substance of the situation facing Cleveland school parents belies any characterization of their choice as "free." For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious. Almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools.

Justice Breyer elaborates on this in his dissent: "There is, in any case, no way to interpret the 96.6 percent of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6 percent reflects, instead, the fact that too few non-religious school desks are available and few but religious schools can afford to accept more than a handful of voucher students."

Both Justices Stevens and Breyer in their dissents express concern about the risk of religious strife arising from the Court's ruling and the consequent weakening of the foundation of democracy and harm to the nation's "social fabric." The establishment clause of the First Amendment was motivated in substantial part by the desire of the founders to avoid the hundreds of years of religious wars that had plagued Europe. Justice Stevens alludes to current religious strife around the globe. Breyer points out that establishment clause neutrality is even more important in the present century, with the nation composed of numerous religions, as compared to the few existing at the time of the country's founding.

Justice Clarence Thomas, in an opinion concurring with the majority, would go even further in destroying the Constitution. Thomas's theory is that the states should be freer than Congress to promote and establish religion. His pretext is that urban public schools have failed minority and poor children, creating segregation of educational opportunity years after *Brown v. Board of Education* outlawed racial school segregation. He writes: "Although one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity."

Thomas utilizes the cynical and reactionary arguments of black nationalism to justify further attacks on educational opportunities and democratic rights for all children, black as well as white. He writes contemptuously: "While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: Most black people have faced too many grim, concrete problems to be romantics."

Justice Stevens in his dissent makes the obvious point that the answer to failing public schools is a serious program to improve the public school system, not the promotion of religious schools. He writes: "[T]he solution to the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards obviously required massive improvements unrelated to the voucher program [which covered only 5 percent of Cleveland students anyway], not unconstitutional aid to religious schools."

No section of the American financial oligarchy or political establishment is interested, however, in making the economic commitment required to provide every child with a decent public education.

The democratic and egalitarian tradition of public education continues to resonate with the majority of the public, which, according to polls, opposes voucher programs by a lopsided margin. With the constitutional decks cleared, the battle will return to state legislatures, where the right wing will introduce new voucher schemes, whose ultimate aim is the dismantling of public education.

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