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A New Age for Jewish Day Schools? The U.S. Supreme Court Upholds the Constitutionality of School Vouchers

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At issue:

The U.S. Supreme Court's decision upholding Cleveland's school voucher program is already being described as a landmark American case concerning the always contentious question of the proper degree of separation between church and state. Its full significance will be seen in the years to come, as local authorities expand or create school voucher programs and tuition tax credit plans in reliance on the high court's new ruling. Whether or not the Court's decision ultimately leads to a situation in which Jewish school students in the United States can rely on significant assistance from the local and federal governments, it is certain that the Cleveland decision will come to be seen as a turning point in the development of American attitudes towards government support for parochial schools.

Background:

As Jewish schools throughout the United States continue to grow both in absolute numbers and in the size of their student bodies, Jewish communities are dealing with serious issues regarding their funding. Individual families are facing growing tuition expenses at these schools, and for many of them, the cost of Jewish education has become prohibitive. American Jewish communities do not benefit from the type of significant government financial support which has helped Jewish day schools to survive in many Western countries, such as Great Britain, France, Australia and Canada. These other countries are not constrained by the constitutional limitations imposed on the American government with respect to the financing of religious institutions.

But because of the tremendous financial pressure now faced by the Jewish schools in the United States, American Jews have recently been revisiting an old internal ideological debate about the value of government support for Jewish education. Traditionally, mainstream American Jewish advocacy groups have opposed both direct and indirect government funding for religious schools on the ground that it violates the constitutionally mandated separation of church and state. However, some Jewish organizations, especially those affiliated with the Orthodox community, have consistently favored and lobbied for a variety of government measures that provide some financial support for Jewish day schools. And as the Conservative movement's day schools have grown in size and numbers, there have been more voices raised within that community in support of vouchers and other government aid programs.

Several state and local governments in different parts of the United States (such as Florida and the city of Milwaukee in Wisconsin) have established tuition voucher programs in order to help parents who turn to private schools because of the deficiencies of the public schools in the area. Practical opposition to these programs has come generally from groups who claim that the money used to finance the vouchers would be better spent on improving public schools. Furthermore, the constitutional argument against vouchers has been that they allow government money to be directed to parochial schools, in violation of the American constitutional prohibition against the government's "establishment" of religion. Jewish groups have supported both sides of the debate, but in recent years there has been more movement towards support for vouchers and other forms of government support for parochial schools.

The voucher case

On June 27, 2002, the United States Supreme Court issued its first ruling on the constitutionality of such vouchers, in the case of *Zelman v. Simmons-Harris*. In its landmark decision, the Court held that a government aid program will not violate the American Constitution even if the majority of its indirect beneficiaries are religious institutions. The *Zelman* case dealt with a program aimed at children living in a Cleveland school district whose public schools were performing dismally. The voucher program was created in response to this crisis, and provided - among other things - for direct tuition aid to be paid to parents who chose to send their children to private schools in the same school district. The Court held that since the program gave parents equal opportunities to send their children to religious or non-religious schools, it involved no impermissible government support for religion - even though as a factual matter 96% of the participants in the program used the vouchers to attend private parochial schools.

Opponents had argued that the high percentage of participating students who were using the vouchers so as to attend private parochial schools showed that the program was, in effect, primarily aiding religion. The Court's rejection of this argument was based on the principle that the constitutionality of government aid does not depend on a particular statistical makeup of the beneficiaries. In other words, the courts will not strike down a voucher program only because - or even if - the vast majority of those schools that ultimately receive the financial support are parochial schools. Many see this principle as having a wider implication - namely, that voucher programs which provide assistance to parents of parochial school students do not necessarily violate the constitutional ban on the government's establishment of religion.

What happens now?

In the American federal system, most aspects of education are controlled by the states. Thus, individual states will now decide whether to continue or initiate voucher or other school aid programs - the Court's decision does not require that such programs be established. As noted above, several states already have voucher programs in place and others are entertaining various proposals to create or expand them. Because the Court's decision only provides guidelines regarding these other existing and proposed

programs, its most immediate impact is to be found in what it did not do. Had the decision gone the other way and the Court had declared vouchers to be unconstitutional, the states that run such programs would probably have cancelled them in anticipation of their being eventually struck down. For the same reason, many of the proposed programs would have been permanently shelved. So the most immediate effect of the decision is that it does not "kill" existing and future voucher programs.

The decision will also shape future programs, as well as the expansion of the existing programs. States will now try to design voucher programs that conform to the principles enunciated in the Zelman decision - namely, that the programs must be religiously neutral, and must allow the parents themselves to choose whether the funds are to be used in religious or non-religious educational environments. Obviously, any such program would have to have a secular purpose; it could not be created for the express purpose of benefiting parochial schools or for easing the financial burden on parochial school parents, specifically.

The battle lines are drawn

The demographics of those who support or oppose school voucher programs are unusual. It is generally perceived as a "conservative" issue, because it involves a "free market" approach to education, as well as government support of private institutions and indirect support of religious schools, including those affiliated with generally conservative Christian and Jewish religious groups. But in practice, much of the support for school voucher programs comes from precisely those groups that are generally associated with liberal politics - namely, inner city minority groups, who are the most disadvantaged by poor quality public schools. On the other hand, some conservative suburbanites are unenthusiastic about programs that benefit private and parochial schools because they themselves have chosen to live in the neighborhoods they live in precisely because of the high quality of their public schools, and pay high property taxes for this privilege.

Thus, former New York Democratic senator Daniel Patrick Moynihan is a strong supporter of school vouchers and of the Zelman decision specifically. In an article in the Washington Post, Moynihan noted with satisfaction that "the Democratic Party can claim to be prophetic and support school vouchers." Writing in the New York Times, Jeffrey Rosen, the legal affairs editor of The New Republic, described the decision as "embrac[ing] a healthy vision of religious neutrality." Nevertheless, many analysts warn that the enactment of new voucher programs would depend on voucher proponents being able to drum up support from uninterested conservative suburbanites. They will also have to overcome opposition from powerful teachers' unions who continue to oppose vouchers because they fear the negative impact such programs could have for public school funding.

The implications for Jewish education

The immediate reactions to the Zelman decision from the various Jewish groups who are involved in the issue have been the predicted ones - the Union of Orthodox Jewish Congregations and Agudath Israel have hailed the decision, and groups such as the American Jewish Congress have indicated their disappointment. However, both sides do acknowledge that, on the one hand, the constitutionality of the measure will no longer be a significant issue, while on the other hand it will still be quite some time before many Jewish schools are receiving any kind of significant government support.

On the other hand, there are already tax credit programs for private school parents in place in some states (albeit, not many with large Jewish populations) - programs which are not directed specifically at lower income families, and they have already been upheld by the Supreme Court. The Zelman decision certainly strengthens the argument for the constitutionality of those plans as well as that of the voucher programs, and will hopefully encourage their expansion and their adoption in more states where they are likely to have an impact on the Jewish educational systems. If the main principle enunciated in Zelman was that ensuring parental choice in education is a legitimate governmental goal, then such programs are likely to withstand constitutional challenges and may very well herald the beginning of a new era for Jewish education in the United States.