Is Parochial School Choice Unconstitutional?

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Today, the Wisconsin Supreme Court will hear arguments in *State ex rel Tommy G. Thompson v. Jackson and Milwaukee Teachers' Education Assn., et al.* The case represents the latest round of a political battle that began in the early 1980s when inner-city parents from Milwaukee's failing public school system began to demand a greater voice in their children's education. Frustrated at every turn by the state's educational establishment, they learned a bitter political lesson: Parents cannot control the education of their children unless they have control over the money that buys it.

The legal issue in *Thompson* is straightforward: How much choice shall Milwaukee's parents have in the education of their children? In *Davis v. Grover* (1992), the Wisconsin Supreme Court affirmed the constitutionality of the Legislature's decision to let poor parents have the same right to buy their children's education that is now enjoyed by Milwaukee's more affluent residents. School choice, then, is already legal in Wisconsin with only one "catch": The choice is limited to public and private schools that are not religiously affiliated. The issue in *Thompson* is whether *full* freedom of choice in education is prohibited by the Wisconsin or U.S. constitutions.

Deprived by the Wisconsin Supreme Court of the ability to challenge choice per se, public school monopolists now wrap themselves in the First Amendment, arguing that when parental choice extends to public schools, First Amendment and Wisconsin state prohibitions against the establishment of religion are violated.

But *Thomas* is not a case about changing the contours of the wall between church and state. One can accept the very same rules on government aid to religious institutions now in place (the oft-vilified "*Lemon* test") or Justice Sandra Day O'Connor's so-called "endorsement analysis" and still vote to support the Milwaukee school choice experiment. The Supreme Court has long held that when the parents or the student make the choice of school, and the program is open to all who qualify without regard to the choice of otherwise-qualified educational institutions available, the First Amendment does not require that religiously affiliated institutions be treated like pariahs.

In *Witters v. Washington Department of Services for the Blind*, for example, the U.S. Supreme Court decided that (unlike the Washington state constitution) the First Amendment did not prohibit the state from paying school tuition for a blind student who was otherwise eligible for public financial assistance when his choice happened to be divinity school. As long as the control of the decision making as to where the money is allocated is in the parent or (for the college-aged) in the student, the parents' choice of a religiously affiliated school, as opposed to an Afrocentric private or state-run public school is (or should be) constitutionally irrelevant.

That reasoning was applied in *Mueller v. Allen*, a case involving Minnesota state income tax deductions for expenses relating to tuition, textbooks and transportation to public and private schools, and in *Zobrest v. Catalina Hills School Dist.*, which involved providing sign-language interpreters for students in religiously affiliated schools. The GI Bill, Pell Grants and programs designed to "mainstream" children with disabilities proceed from the same assumption.

The Wisconsin state constitution should be interpreted in the same manner. Though it prohibits the teaching of religion in the public schools, it explicitly recognizes that parents can choose to have their children released from those schools to attend religious instruction if they so desire. Thus, if the Wisconsin Supreme Court is to reject the proposed choice plan on state constitutional grounds, it would have to hold that the state constitution requires something it (and the federal Constitution) explicitly prohibits: religious discrimination.

When, as here, the state opens up school choice to all schools *but* those that consider religion to be a valid component of the education of the young, the state is making an unconstitutional statement about the role of religion in education that no amount of pontificating about separation of church and state will disguise.

Witters is on point here as well; for the Washington Supreme Court, citing that state's constitution, still denied Larry Witters the choice so freely available to others with his disability. Dissenting, three Washington State Supreme Court justices reminded the majority that the anti-religious-education provisions of the Washington state constitution are vestiges of a period in which rabid anti-immigrant, anti-Catholic, anti-Jewish, anti-Mormon and anti-black prejudice was rampant in America. Only by ignoring that history can one subscribe to the offensive view that only government knows what is "best" for the children of the poor, of racial and ethnic minorities, and of the religiously unenlightened.

The Wisconsin school choice program under attack is not perfectly structured. It sends a check to the school, but the school cannot cash it until the parent countersigns. In a perfect world, the check might go to the parents, or into a spending account in the name of each child, whose parents could use a debit card to pay for needed education services at any school that suits the child's particular needs. But surely the constitutionality of the law cannot turn on who receives a check that cannot be cashed without a parent's signature.

In our view, the only legitimate ground on which to oppose the Wisconsin experiment has nothing to do with constitutional law. If you support the concept of the "common school" and view the state-run public school as the only vehicle capable of inculcating our shared traditions, culture and commitment to representative democracy, we can understand your position, but view it as far too narrow in today's pluralistic society.

Look around you. The folks who run and attend private schools, both religious and secular, are Americans just like you. If there is a "vision" of the values we hold dear in education, then let us work together to articulate it and design a core curriculum that will convey its central elements. Let public funds support that core, along with all essential extracurricular activities children need for healthy educational development, and leave the choice of the best educational environment to the parents.

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