Liberals Versus Religion

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THE UNITED STATES Supreme Court's 5-4 decision in Zelman v. Simmons-Harris upholding the constitutionality of the Ohio school voucher program was not really as close as it seems, at least not if the quality of the constitutional arguments of the majority is weighed against the quality of the arguments of the minority. As in sports, the final score can be deceiving. But the tendencies of the bad arguments employed by the dissenters are revealing. Commonly, progressives or left-liberals criticize conservative judges for elevating abstract principle and formal rules over the real-life situations of the disadvantaged. Yet in their dissents, Justices Stevens, Souter, and Breyer displayed an aversion to people's actual choices in favor of choices made by the federal government, a strong preference for rigid principle over concrete political reality, and a strange solicitude for speculative future harm to the body politic at the expense of manifest actual harm to flesh and blood low-income citizens in the here and now. Since such tendencies seldom play so prominent a role in the thinking of the more liberal justices--who are more likely to emphasize context, pragmatic considerations, and substantive justice, particularly for the least well off in society--what brought these tendencies to the fore in the case of school choice? Judging by the intellectual inadequacies and overheated rhetoric of the dissents, the answer, I think, is anti-theological ire. The majority opinion, written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, is relatively straightforward. As a response to Cleveland's failed public schools, among the very worst in the nation, Ohio crafted a school choice program. The program gives low-income urban parents a variety of options for the education of their children, including cash vouchers that parents can use if they wish to send their children to participating public schools, or participating private schools, religious or secular. Of the parents who chose the voucher option in the 1999-2000 school year, 96 percent chose to send their children to religious private schools. But the families who chose

the voucher option--about 3,700--represent only about 5 percent of the more than 75,000 eligible Cleveland families; the rest chose other options offered by the program, including community schools, magnet schools, and remaining in public schools and receiving tutorial aid from the state. The majority opinion held that the Ohio program and those like it are constitutional, and do not violate the Establishment Clause of the First Amendment, so long as they are neutral in respect to religion and permit parents to exercise "true private choice." Private choice is truly exercised when "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Because of the variety of options that Ohio offers Cleveland schoolchildren and their parents, no reasonable observer, held Rehnquist, could view the program as advancing or endorsing religion. In choosing to use vouchers to send their children to religious schools, Cleveland parents, stressed Justice Thomas in his concurrence, were exercising their fundamental liberty to educate their children as they deem best. The dissenters disagreed vehemently. But among themselves they agreed that the harsh realities and unquestioned harms suffered by low-income, mostly minority schoolchildren in Cleveland should not be allowed to override the hallowed principle of strict separation of church and state for which, they asserted, the Establishment Clause has always stood. In his dissent, Justice Stevens showed his unyielding allegiance to the principle of strict separation by going so far as to argue that the magnitude of the educational deprivation suffered by the Cleveland students and the complexity and indirectness of the interaction between church and state in the challenged program (of which the majority made much) had no bearing on the Ohio program's constitutionality. Never mind "the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program," wrote Stevens. Never mind "the wide range of choices that have been made available to students within the public school system" (italics in the original). And never mind "the voluntary character of the private choice to prefer a parochial education over an education in the public school system." What was absolutely decisive in Justice Stevens's mind, and what rendered the "Court's decision profoundly misguided," was that in violation of the Establishment Clause, it "authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths." Such indoctrination can only lead to political disaster of monumental proportions: "I have been influenced," Justice Stevens concludes, "by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decision of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." Justice Souter, in a dissent joined by Justices Stevens, Ginsburg, and Breyer, decried the "doctrinal bankruptcy" of the majority's opinion. He too acknowledged that the situation in the Cleveland public schools was dire, but insisted that the rigid principle of strict separation left him no choice: "If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these." Souter, however, did not actually find the case a hard one. In the Ohio program, he

held, "every objective underlying the prohibition of religious establishment is betrayed." Indeed, for Souter the "enormity of the violation" was all but unprecedented. Citing a sentence fragment from Jefferson's "Bill for Establishing Religious Freedom" in Virginia, Souter appeared to embrace the uncompromising view that any tax money that in any way reaches a religious organization is antithetical to freedom. Then, citing a sentence fragment from Madison's "Memorial and Remonstrance," Souter seemed to argue that every form of indirect aid to religion involves the state in the shackling of young minds. And citing no authority and offering not a scintilla of evidence from any source, he warned of a political crisis stemming from the "divisiveness permitted by today's majority." Justice Breyer, in a dissent joined by Stevens and Souter, proclaimed that he wrote separately "to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict." According to Breyer, "avoiding religiously based social conflict" has always been the underlying purpose of the Establishment Clause. Citing University of Chicago law professor Philip Hamburger's exhaustively detailed new book "Separation of Church and State," Breyer creates the impression that in the 20th century the Court elaborated an Establishment Clause jurisprudence that strictly separated church from state in large measure to protect Catholic minorities from persecution by Protestant majorities. Permitting the Ohio program, according to Breyer, represents an abandonment of the obligation to protect minorities. Indeed, he believes the program to be "contentious" and "divisive" and to promise "great turmoil" and "religious strife," though like Souter he fails to offer any evidence that the Ohio program has actually generated these unhappy consequences. The more liberal justices, then, were in agreement that school vouchers fall afoul of the doctrine of strict separation of church and state, and that strict separation serves the core purpose of the Establishment Clause, which is to avert the breakdown of social and political life that comes from conflict over religion. This interpretation of the Establishment Clause and the doctrine of strict separation, however, is wrong. And just why is demonstrated at great length by the very scholarship on which Breyer relied--Philip Hamburger's richly documented study of the history of the doctrine of separation of church and state. Contrary to Justice Breyer, what Hamburger actually shows is that "the constitutional authority for separation is without historical foundation." In the 18th century, according to Hamburger, the Establishment Clause was thought by most Americans to protect religious liberty by preventing establishment of religion by the federal government, but not to interfere with a variety of common contacts and cooperation between church and state. Indeed, the Constitution's prohibition on the establishment of religion by Congress was seen as consistent with--and a protection of--the establishments of religion that existed at the time in several states. In that context, Jefferson represented a distinctly minority view. He advanced the doctrine of strict separation as an expression of his general anticlericalism, seeking to go beyond the prohibition on national establishments to a ban on contacts and cooperation between church and state. The doctrine of strict separation picked up steam in the mid-19th century, and reached full speed in the 20th century Establishment Clause cases. Throughout its history, Hamburger emphasizes, the doctrine has been primarily used not to enlarge the sphere of religious liberty, which was the original purpose of the Establishment Clause, but to restrict

and subvert the liberty of religious minorities. Contrary again to Justice Breyer's view, in the 19th and 20th centuries strict separation of church and state was not the principle that restrained intolerance of Catholics. Rather, as Hamburger demonstrates, strict separation was used to advance that intolerance: Protestants with nativist sympathies invoked it to deny aid to Catholic schools, while at the same time they saw it as permitting public aid to public and private schools that taught a generalized Protestantism. From the perspective of those who led the way in building up the authority of the doctrine of strict separation in 20th century constitutional law, what was "divisive" was not the subtle establishment of a majority (Protestant) religion (or later the establishment of a secular orthodoxy), but the reluctance of Catholics to send their children to the majority's public schools and thereby participate in the establishment of Protestantism (and later of secular orthodoxy). Eventually the anti-Catholic implications of the doctrine of strict separation were broadened to include a more general suspicion of all religious organizations. So while Justice Breyer and his fellow dissenters are wrong about the historical lineage of the doctrine of strict separation and the actual purposes to which it has been put, they share a purpose with strict separationists of the past. Betraying a hostility to any religious education different from the education the majority receives, the more liberal justices use the doctrine of strict separation to limit the reach of such religious education. The hostility can be seen in their rhetorical strategy, which cuts against Court precedent: They focus on where government money ends up--religious schools--and downplay how it gets there--private decisions made by parents to improve their children's educational opportunities. The hostility of the more liberal justices to the use of government funds at religious schools in turn often seems to be rooted in hostility to religion itself. This hostility or prejudice can be seen in Justice Stevens's equation of education at religious schools with "indoctrination." It can be seen in Justice Souter's view that religious education deprives the faithful of freedom of mind. And it can be seen in the view expressed most forcefully by Justice Breyer that religious education is incurably divisive. The not-so-subtle message of all of the dissents is that religion teaches intolerance and encourages anti-democratic propensities, and for this reason the state must limit to the extent possible the flow of government money to religious organizations. Vouchers are not a solution to all of the ills of our nation's public schools, though they can be crafted to be consistent with efforts to reform failing public schools, and indeed thoughtful proponents of vouchers see them as part of such reform. Furthermore, vouchers have held little appeal for the suburban middle class, whose members are generally satisfied with the public schools that their children attend. But vouchers and school choice receive strong support from some low-income parents who want alternatives to the broken down public schools their state and city governments offer them. An interpretation of the Establishment Clause that forbids such programs is in tension with the imperatives of justice. As it happens, such an interpretation is also in tension with the original and more constitutionally sound understanding of the Establishment Clause. Peter Berkowitz teaches at George Mason University School of Law and is a research fellow at the Hoover Institution at Stanford University.