

# Dismantling the wall between church and state: The case of public education

*Using public funds to pay for religious schools comes perilously close to allowing government funding of religious proselytization.*

By **Tina Cheuk and Rand Quinn**



**T**oday, a relatively small but fast-growing number of the nation's K-12 students (nearly half a million across 29 states and the District of Columbia) attends a private and perhaps religiously affiliated school thanks to their parents' use of public financing mechanisms that include vouchers, tax-credit scholarships, and, in some cases, education savings accounts (EdChoice, 2018).

We understand the impulse behind the decision to take advantage of such options. Indeed, one of us (Tina Cheuk) is now wrestling with that decision herself. As a direct beneficiary of excellent primary and secondary schools, funded predominately by local tax dollars, Tina strongly supports public schooling. Yet, as she moves toward entering her daughter's name into the district lottery to get a seat for kindergarten, she is also keeping an eye open for private school options — including parochial schools, even though her family is not religious.

As a scholar whose work aims to increase equitable learning opportunities for all students, Tina can't help but worry about what happens when families, lured by vouchers and other financial incentives, leave the public schools. In the zero-sum game of educational funding, when families draw public funds to cover private school costs, the public schools lose dollars. And if the loss of dollars leads to a reduction in quality, then the decision to exit the system becomes more tempting. As more dollars leave the public schools, school quality declines further, more parents choose to leave, and so on, resulting in a downward spiral.

We've closely observed the recent rhetoric on school choice since Betsy DeVos was nominated to become the U.S. secretary of education in January 2017. The growing trickle, potentially a wave, of tax dollars being channeled toward private schools, many of which have religious affiliations, is of deep concern to us. Three spheres of influence — the courts, the executive branch, and public opinion — are now operating in concert to normalize such uses of public financing, and as a result, we are beginning to see significant erosion of the wall separating church and state. (See, for example, McCarthy, 2016.)

## Weakening the wall through the courts

Opponents of publicly funded school voucher programs (and other government programs that provide financial incentives to enroll in private schools) argue that the diversion of public aid to religious schools violates the

Establishment Clause of the First Amendment, which prevents the government from advancing or hindering religion. The argument was most prominently tested in the 2002 Supreme Court case *Zelman v. Simmons-Harris*.

The case concerns a school voucher program for low-income families in Cleveland, Ohio. The voucher program was established in 1995 as part of a larger effort to improve the educational outcomes of Cleveland's 75,000-plus students. By the 1999-2000 school year, a small fraction of the district — just over 3,700 students — were participating in the program. Ninety-six percent of these participants applied their vouchers of up to \$2,250 to religiously affiliated private schools. In 1999, the ACLU filed a lawsuit on behalf of Ohio taxpayers challenging the constitutionality of the program by claiming that it advanced religion, in direct violation of the Establishment

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Clause. Both a federal district and an appellate court ruled in favor of the complainants, but the rulings were reversed by the Supreme Court in a 5-4 decision. The majority opinion noted that Cleveland's program offers vouchers to a "broad class of individuals defined without reference to religion." And because families make independent and private choices as to where their voucher funds go, held the majority, the program was not at odds with the Establishment Clause.

However, in his dissent, Justice John Paul Stevens argued that — regardless of the private choice made by voucher recipients — students using vouchers to attend religious schools receive "religious indoctrination at state expense" and, thus, the Cleveland program does run afoul of the Establishment Clause. Further, in an additional dissent, Justice David Souter — joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer — noted that constitutional limitations to government, such as the one under consideration, must remain intact even if providing greater options for Cleveland families relegated

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**TINA CHEUK** (tcheuk@stanford.edu, @ELLStanford) is a doctoral candidate in the Graduate School of Education at Stanford University in Stanford, Calif. **RAND QUINN** (raq@upenn.edu, @randquinn) is an associate professor in the Graduate School of Education at the University of Pennsylvania in Philadelphia.

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to underperforming public schools was an otherwise appropriate policy solution. A half-century earlier, in *Everson v. Board of Education* (1947), the Court determined that taxes cannot 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.” By allowing the Cleveland voucher program to continue, argued Souter, the majority was, in essence, overruling settled law. “The money,” he pointed out, “will thus pay for eligible students’ instruction not only in secular subjects but in religion as well.”

The shift away from the precedent set by *Everson* continued with *Trinity Lutheran Church v. Comer* (2017), in which the Court ruled 7-2 in favor of a Missouri church-based preschool and day care center that sought eligibility for a state program that provided grants for playground resurfacing. In Justice Sonia Sotomayor’s dissent, joined by Justice Ginsberg, she emphasized the high stakes of this case, noting that it blurred the lines between church and state since payments from the government can now be used to “fund improvements to the facilities the Church uses to practice and spread its religious views.”

These rulings loosening the ways tax dollars can flow into religious institutions will likely be tested again as a new Supreme Court justice replaces the retiring Justice Anthony Kennedy. As of this writing, the Senate has held confirmation hearings for Trump-nominated Brett Kavanaugh, who has stated that “religious organizations cannot be, or should not be, discriminated against and that treating . . . religious organizations equally — in other words, on a level playing field with nonreligious organizations — is not a violation of the Establishment Clause” (Walsh, 2018). If we are to use his past statements as a guide to his juridical beliefs and future decisions, Kavanaugh may well align his position with those of the majority in *Zelman*, which held that channeling tax dollars to religious institutions in the form of vouchers does not offend the Establishment Clause.

## Rewriting regulatory boundaries at the U.S.

### Department of Education

Secretary of Education Betsy DeVos’ rhetoric clearly demonstrates her desire to expand school choice options, including vouchers (which her department has largely rebranded as scholarships). By repeatedly associating school choice with enrollment in private and religious schools, she has contributed to a broader change in the narrative about school choice itself, helping to undermine the assumption that choice refers to parents’ selection of one of several *public* school options. And in the meantime, as she has traveled the country making soaring speeches about choice, budgetary documents and the Federal Register show that her department has quietly gone about the work of reshaping policies, regulations, and guidance related to federal K-12 funding, making it easier to funnel tax dollars to private and religious schools.

To be clear, the secretary has directed her department to chip away at the wall separating church and state by making it easier for the federal government to fund private institutions, including religious entities, to educate our students. Indeed, DeVos has made these intentions fully transparent by stating her opposition to the Blaine Amendments, which prohibit public funds to be used in religiously affiliated educational institutions, that most states long ago wrote into their state constitutions (following a failed 1875 effort to write such a prohibition into federal law). For example, in a May 2018 speech to the Alfred E. Smith Foundation, which has strong ties to the Roman Catholic Church, DeVos remarked, “These [Blaine] amendments are still on the books in 37 states . . . [They] should be assigned to the ash heap of history and this ‘last acceptable prejudice’ should be stamped out once and for all” (Klein, 2018). And the following month, in a commentary in *Education Week*, DeVos again challenged the “prejudice” against providing public support for private education, pointing to countries where “private’ and ‘public’ schools alike are valued and recognized for educating students in meaningful ways, thus contributing to the public good” (DeVos, 2018).

While the Every Student Succeeds Act (ESSA) of 2015 placed restrictions on the federal government’s ability to influence state and local decision making about K-12 education, DeVos does have some power to change how federal funds flow to states and their schools. One of the primary functions of the Department of Education is to manage and disburse billions of tax dollars across a range of categorical programs (Title I, II, III, and so on), which are bound by the rules and regulations inscribed by prior administrations. However, the department also

has control of a significant amount of discretionary funding, and it is here that DeVos may have some room to operate.

For precedent, she need only look to her predecessor Arne Duncan, who used \$4.35 billion of discretionary funds provided under the 2009 American Recovery and Reinvestment Act (ARRA) — commonly known as the stimulus package — to advance his own school reform agenda, creating Race to the Top and other federal programs that had powerful (if not welcome) effects on state and local educational systems. DeVos does not have anywhere close to that level of funding at her disposal, but she does have considerable resources. Most important, she has proposed \$500 million for Opportunity Grants, which are designed to expand school voucher programs and tax-credit scholarships (U.S. Department of Education, 2018). In the October 12, 2017, Federal Register, “empowering families to choose a high quality education” (with an implication that this includes private schools) was listed first among the department’s 11 priorities, and DeVos has consistently described it as such in her remarks at choice-friendly venues.

Echoing ESSA’s authors, DeVos (2018) herself has argued that “lasting and positive changes to education cannot and should not be mandated by the federal government.” In practice, though, DeVos has, much like Duncan, favored the aggressive use of discretionary funds to influence local decisions. By using the Opportunity Grants as leverage, she could have a lasting effect on state- and district-level policy making, diverting attention and resources from public schools to a range of private educational institutions, many of which are dedicated to religious instruction and indoctrination.

## Persuading the American public

The extent to which the Department of Education can fully realize DeVos’ policy goal of expanding school vouchers will likely hinge on the levels of public support for and opposition to her agenda. And lately, advocates on both sides — those who fear the privatization of public education and those who hope to direct public funds to private schools — have intensified their efforts to sway the court of public opinion.

In April 2017, shortly after DeVos’ confirmation, we conducted an online poll of 1,000 adults to gauge their attitudes and beliefs about school vouchers. We weighted our sample so that it is representative of the demographics and political interests of the U.S. adult population. We found that about half of adults support publicly funded school vouchers while almost a third are opposed

(Quinn & Cheuk, 2018) and that public opinion on school vouchers varied across the political spectrum. Not too surprisingly, respondents who identified as liberal had more negative views of school vouchers than those who identified as conservative. Digging deeper, though, we found the most pronounced differences to reside in our respondents’ religious views and their identified religion. Adults who claimed that religion is important to their lives were much more supportive of school vouchers than those who did not. Nearly two-thirds of adults who identify as “born again” or evangelical Christians expressed support for publicly funded school vouchers. Additionally, those who identified as Protestants and Catholics expressed significantly greater support for school vouchers than those who were atheist or agnostic or who describe their religion as “nothing in particular.” We suspect that these differences have to do mainly with the fact that vouchers can be used for tuition at religious schools, thereby expanding the accessibility of faith-based education to the wider public.

Harvard researcher Paul Peterson (2017) has noted that both the *Education Next* and PDK polls have shown an upward climb in voucher support in recent years, the steepest gains occurring since 2015, while, during this same period, voucher opposition fell by 18 percentage points. Support



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continued to climb in the 2018 *Education Next* poll (Cheng et al., 2019); the 2018 PDK poll did not include questions on vouchers.

However, public debates and opinions about school vouchers have far outpaced the available research findings on the outcomes and effects of voucher programs, which are far from conclusive. Recent studies, for example, have found that while vouchers may improve graduation rates, they may not lead to higher levels of academic achievement (Epple, Romano, & Urquiola, 2017), and in some cases they produce negative effects (Dynarski et al., 2018). With respect to broader political conversations around expanding choice options through school vouchers, public opinion across demographic subgroups and their relative influence on policy makers may have ripple effects on schools – public, private, and religious – in the coming years.

## As the wall crumbles: A call to action

The definition of “public” education is changing rapidly and radically in our current political landscape. We opened this article discussing the tension between private choice and public good, a tension that increasing numbers of families encounter as the national dialogue about publicly funded school vouchers, tax-credit scholarships, and education savings accounts continues to play out. As educators, we have to recognize the fine line that is being crossed as increased public funds are used to subsidize religious instruction, when perhaps these same dollars could be better invested in improving public schools that are protected as secular spaces.

Since nearly two-fifths of the U.S. adult population is highly religious (Pew Research Center, 2018), there are opportunities for religious groups and their allies to reshape what the wall between the Church and the State looks like. It’s essential that educators and others who care about the

public in public education organize so that tax dollars do not end up serving what many churches see as their core function – proselytizing. As Justice Stevens stated in his 2002 dissent in *Zelman*, “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.”

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