Justice Kagan Dissents

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In the Supreme Court's 5-to-4 ruling about a school-choice program in Arizona, Justice Anthony Kennedy's opinion leaves intact a program that has disbursed almost $350 million of state funds, most of it to schools choosing students on the basis of religion.

The holding all but overrules a landmark decision of the Warren court, Flast v. Cohen. As Justice Elena Kagan says powerfully in her first dissent, "by ravaging Flast in this way," the majority "damages one of this nation's defining constitutional commitments."

The First Amendment's establishment clause — "Congress shall make no law respecting an establishment of religion" — is meant to protect citizens even when they are not harmed. Before, under Flast, a taxpayer could ask a court to enforce this central right. Now, under this ruling, a taxpayer all but can't, and any government can use the tax system to avoid challenges to financing of religion.

The only difference between cases considered under Flast since 1968 and the current one is the means of government spending. In past cases, it has come through appropriations. In this case, the money comes through a tax credit: any taxpayer can redirect up to $500 of what he or she owes the state to a nonprofit that uses the money for scholarships. What the court calls a tax credit and Arizona calls a voluntary cash contribution is, concretely, a redirected tax payment.

Justice Kennedy, in an opinion clearly intended to overturn legal precedent, says that the program's financing comes from taxpayers taking advantage of this credit, not from the state, so the taxpayers bringing the lawsuit can claim no harm from the state and lacked standing to sue. To Justice Kagan, "this novel distinction," has "as little basis in principle as it has in our precedent." Whether a state finances a program with cash grants or targeted tax breaks, the effect is the same. Taxpayers bear the cost.

Since the Flast case, she writes, "no court — not one — has differentiated between these sources of financing in deciding about standing." In five cases where taxpayers challenged tax expenditures, the court has dealt with the merits "without questioning the plaintiffs' standing." The court has relied on some of these decisions as "exemplars of jurisdiction" in other cases. ("Pause on that for a moment," the justice entreats.)

When this case was argued last fall, the convolutions of the Arizona program seemed intended to mask its violation of the Constitution. The court's ruling is another cynical sleight of hand, which will reduce access to federal courts while advancing endorsement of religion.