CC3183 7.5.22 Tuesday (No email on July 4)

Peter Greene, Senior Contributor at Forbes.com: "The Hammer That Breaks the Church State Wall Has Hit Public Education Once Again. What Parts of Our School System Will It Bring Down?"

In this article, Greene observes "that the through-line on the court's free exercise decisions is that the free exercise of religion is not possible without taxpayer subsidy." Those who want their religious expression funded by taxpayers, rather than personal sacrifice, should examine the strength of their religious convictions. In II Samuel 24:23-24, after a man by the name of Araunah offered to give King David a place to build an altar and a sacrifice, King David said, "No, but I will certainly buy it from you for a price; for I will not offer burnt offerings to the Lord my God that cost me nothing." (NASB)

Religious folks should not be asking the public to fund their brand of religion.

The Hammer That Breaks The Church State Wall Has Hit Public Education Once Again. What Parts Of Our School System Will It Bring Down?

Peter Greene, Senior Contributor
I look at K-12 policies and practices from the classroom perspective.
Jun 24, 2022,09:14am EDT

Say this for John Roberts; he writes opinions that are clear and straightforward, in language that even non-lawyers can follow. In Carson v. Makin, he lays out the same exact reasoning that pleased conservative fans of religion in Trinity Lutheran and Espinoza, taking us one step further down the road toward a country where taxpayers are required to fund private religious activities.

In particular, we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits.

And as that applies in this case regarding Maine's system of funding education for students whose town has no school of its own:

The State pays tuition for certain students at private schools— so long as the schools are not religious. That is discrimination against religion.

Therefore, the court's majority declares that the taxpayers must fund private religious schools.

This flips the First Amendment's handling of religion on its head, but that is simply following the precedent that this court set when it decided Trinity Lutheran v. Comer. At the time of that decision, Noah Feldman, professor of law at Harvard University and former clerk to U.S. Supreme Court Justice David Souter, wrote:

It's the first time the court has used the free exercise clause of the Constitution to require a direct transfer of taxpayers' money to a church. In other words, the free exercise clause has trumped the establishment clause, which was created precisely to stop government money going to religious purposes.

Or, as Justice Sontomayor says in her dissent:

After assuming away an Establishment Clause violation, the Court revolutionized Free Exercise doctrine by equating a State's decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status.

The Supreme Court has gone there in steps; Trinity found that public funds can be used by a church for ordinary secular purposes like paving a parking lot, then Espinoza found that public funds can be spent on a private school that just happens to be run by a church. With Makin, which involves two schools that by policy exclude LGBTQ persons as well as those not "born again," we arrive at the conclusion that taxpayer dollars can be used to fund a very religious, openly discriminatory schools.

The schools named in the suit have said that they will not accept taxpayer funding if accepting those dollars would require them to stop discriminating. And in fact, Maine got ahead of the Supreme Court by passing an amendment to the state's anti-discrimination law expressly forbidding certain types of discrimination by any school that accepts public funds. But opponents of the church-state wall have been working on that issue as well.

The court is also expected to rule on Kennedy v. Bremerton School District, in which a high school coach is suing for the right to lead students in prayer while performing his duties as a district employee. Should the court decide in his favor, we will be inching further toward a world in which taxpayers must fund private religious education, but the state cannot exercise any oversight of overtly religious and discriminatory behavior.

The through line on the court's free exercise decisions is that the free exercise of religion is not possible without taxpayer subsidy. At this point, the wall between church and state is beginning to look less like a wall and more like the later stages of a game of Jenga. What comes next

In his dissent, Justice Breyer points some possible outcomes:

What happens once "may" becomes "must"? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education? What other social benefits are there the State's provision of which means—under the majority's interpretation of the Free Exercise Clause—that the State must pay parents for the religious equivalent of the secular benefit provided?

That first question is a big one. If the state funds education through public schools, is it now discrimination for them not to also fund private religious schools

Other questions will likely arise before that one. CU Boulder Professor Kevin Welner, who directs the National Education Policy Center, points out that the ruling does open the door to religious charter schools, also setting up what he calls "the outsourcing of discrimination." Equally troubling, it sets the stage for the government picking winners and losers among various religious schools.

If lack of state funding is, as Roberts asserts, discrimination against a religion, exactly who will decide the conditions of religious equity in the eyes of the state? As Breyer points out, “Members of minority religions, with too few adherents to establish schools, may see injustice in the fact that only those belonging to more popular religions can use state money for religious education.” How is the state expected to resolve such “discrimination”?

Justice Sontomayor offers the last word on this new shift:

In 2017, I feared that the Court was “lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.” Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.

The notion that it is discrimination to deny religious schools a share of taxpayer dollars is the hammer that just keeps busting holes in the wall separating church and state for education. Time will tell where it will land next.

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