www.latimes.com /opinion/story/2022-06-21/supreme-court-religion-maine-schools-church-and-state-first-amendment

Op-Ed: A ruinous Supreme Court decision to dismantle the wall between church and state

Erwin Chemerinsky 6/21/2022

On Tuesday, the Supreme Court took another major step toward obliterating the wall separating church and state by holding that the state of Maine is constitutionally required to subsidize religious education when it pays for private secular education. The implications of this decision in mandating government financial support for religion are enormous.

The 1st Amendment says that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." In 1947, the Supreme Court ruled that the prohibition against the establishment of religion applied to the actions of state and local governments. All nine justices in that case agreed that this provision is best understood through the words of Thomas Jefferson, that there should be a wall separating church and state.

For decades, the court applied this principle in limiting the ability of the government to provide financial support for religious activities, including for religious schools. This followed James Madison's view that it was abhorrent to tax people to support the religions of others. The central idea is that the government and its use of funds should be secular.

But now the law has shifted dramatically, and not only is the Supreme Court allowing aid to religious schools, it is saying that it is constitutionally required.

The case decided on Tuesday, Carson vs. Makin, involved a Maine law that applies in areas that are too rural to support public school systems. In those areas, school administrative units provide funds for parents to send their children to private schools. Maine requires that the money be used in secular, not sectarian schools. Maine says that its goal is to provide a free, nonreligious education for every student.

Two families who wanted to send their children to religious schools challenged to the Maine law, arguing that not subsidizing religious education violated their free exercise of religion. The court's 6-3 decision, split on ideological lines, ruled in favor of the challengers, holding that not having the public pay for religious education when it pays for nonreligious education violates the Constitution.

This majority opinion, written by Chief Justice John G. Roberts, completely ignores the 1st Amendment's prohibition on the establishment of religion. As Justice Stephen Breyer pointed out in his dissent, "the Establishment Clause forbids a State from paying for the practice of

religion itself. And state neutrality in respect to the teaching of the practice of religion lies at the heart of this Clause."

Until five years ago, the court never in American history had held that the free exercise of religion required the government to subsidize religion. But in the 2017 case Trinity Lutheran vs. Comer, the court held that Missouri violated free exercise of religion when it subsidized the resurfacing of playgrounds in public schools and secular private schools but not religious schools. Roberts, who also wrote that opinion, included a footnote stressing that the case addressed only the issue of granting money for "playground resurfacing," not other "religious uses of funding."

The court now blows apart the wall of separation — already damaged by the Trinity Lutheran case — by declaring that any time the government subsidizes private education it is constitutionally required to pay for religious education. This also means that if Maine does not want to financially support religious education, it must deny funds for secular private education as well.

The decision has huge implications for many spheres of public policy. Throughout the country, including in California, public school systems pay for charter schools. The law has always maintained that publicly financed charter schools must be secular. But now with this decision, there is a strong argument that the refusal to pay for religious charter schools violates free exercise of religion.

There is no stopping point and no reason this approach would be limited to the school context. If the government provides funds for historic preservation of buildings, it will be required to subsidize maintaining churches, synagogues and mosques. If the government pays for alcohol or drug rehabilitation programs, it will have to subsidize faith-based programs.

There has long been a debate over whether the government could even provide such assistance to a religious group or whether its choice to do so would be an impermissible establishment of religion. Now, though, the court's conservative majority is saying that a subsidy for religion is constitutionally mandated. It is basically cutting the establishment clause out of the Constitution.

Soon before leaving the Supreme Court, former Justice Sandra Day O'Connor observed: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" Unfortunately, Roberts and the conservatives offer no answer to this question.

Erwin Chemerinsky is dean of the UC Berkeley School of Law and a contributing writer to Opinion. He is the author, most recently, of "Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights."