Maine’s Tuition Assistance

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- When parents accept government money to pay for their children’s schooling, it always comes with strings.
- What are the limits can a state place on where their tuition assistance go?
- Can a state single out religious or sectarian organizations to be denied the ability to participate in their programs?

When parents saw what their children were being taught during the COVID-19 school shutdowns, school choice has been a topic of increased interest. If government schools were going to substitute political theory for reading, writing, and arithmetic, parents wanted another choice. Most people cannot afford private schools, and others cannot dedicate the time to home schooling. Since the people pay for these government schools through their taxes, shouldn’t they be able to use that money for better options?

As the most rural state in the union, Maine is in a unique situation.

Maine’s Constitution provides that the State’s legislature shall “require . . . the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.”… In accordance with that command, the legislature has required that every school-age child in Maine “shall be provided an opportunity to receive the benefits of a free public education,”

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While the Constitution of the State of Maine requires towns to provide for public schools, some districts do not have a secondary school. Maine enacted a program to allow parents in these districts to designate another secondary school for their children to attend, either in another district or a private school, and the state would send money to the school to help defray costs. Of course, with money comes strings, which two families got caught in.

David and Amy Carson sought tuition assistance to send their daughter to Bangor Christian Academy, while Troy and Angela Nelson sent their son to Temple Academy, but could not afford to also send their daughter. There was one problem for these two families though; since 1981, Maine has limited tuition assistance to "nonsectarian" schools. While both schools met the state's requirement of being accredited by the New England Association of Schools and Colleges (NEASC), the schools did not qualify as "nonsectarian".

Petitioners sued the commissioner of the Maine Department of Education, alleging that the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The District Court rejected petitioners' constitutional claims and granted judgment to the commissioner. The First Circuit affirmed.

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Let's start with the complaint. As I've said more than a few times before, this cannot be a First Amendment issue because the law in question did not come from Congress.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

U.S. Constitution, Amendment I

This detail didn't seem to influence the Supreme Court's opinion:

The Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions."

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It's worth noting that the court did not come to this opinion based on the language of the Constitution. Rather, they once again placed the opinions of previous courts above the supreme law of the land.

While this requirement cannot violate the First Amendment to the United States, it does violate the Constitution of the State of Maine.

All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship;

Maine Constitution, Article I, Section 3

As the suit. alleges, Maine's policy also violates the Fourteenth Amendment's Equal Protection Clause.

nor shall any State … deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

Does Maine's "nonsectarian" requirement violate the rights of its citizens to equal protection of the law?

The First Circuit held that the "nonsectarian" requirement was constitutional because the benefit was properly viewed not as tuition payments to be used at approved private schools but instead as funding for the "rough equivalent of the public school education that Maine may permissibly require to be secular."

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The First Circuit Court of Appeals thought the requirement was constitutional because, in their minds, the money wasn't a tuition payment but school funding. Meanwhile I'm not quite sure what that has to do with the constitutionality of the requirement. Can the State of Maine create public schools that are required to be secular? Yes.

But the statute does not say anything like that. The benefit provided by statute is tuition at a public or private school, selected by the parent, with no suggestion that the "private school" must somehow provide a "public" education.

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According to the First Circuit it's OK to discriminate if the funding is for the equivalent of a public education, but not if it's for tuition? Thankfully, the majority of the court did not agree.

Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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Dissent

Justice Breyer dissented with the opinion, and was joined by Justices Kagan and Sotomayor.

The First Amendment begins by forbidding the government from "mak[ing] [any] law respecting an establishment of religion." It next forbids them to make any law "prohibiting the free exercise thereof."

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As I've already shown, the First Amendment forbids Congress, not "the government"; that came from the Supreme Court. Which makes the next quote even more disturbing.

The Court today pays almost no attention to the words in the first Clause while giving almost exclusive attention to the words in the second.

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Actually, the Supreme Court as a whole paid no attention to the words of the First Amendment, period. Like any good lawyer, Justice Breyer is good at playing with words to support his opinion.

The majority also fails to recognize the " 'play in the joints' " between the two Clauses. … That "play" gives States some degree of legislative leeway. It sometimes allows a State to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution's protections for the free exercise of religion.

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The Constitution doesn't have any 'joints' to play with. The First Amendment strictly prohibits Congress (not the states), from abridging the people's right to exercise their religion. What Justice Breyer refers to as "antiestablishment interests"

seems more like anti-religious interests.

In my view, Maine's nonsectarian requirement falls squarely within the scope of that constitutional leeway. I respectfully dissent.

Carson et al. v. Makin – Dissent

It should be no surprise that a justice of the Supreme Court placed their own preferences above the actual language of the law, and that is not the only place Justice Breyer got it wrong.

We have never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.

Carson et al. v. Makin – Dissent

As the majority pointed out, nothing in their opinion claims the state must fund religious education.

The dissents are wrong to say that under our decision today Maine "must" fund religious education. … Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not "forced upon" it. … The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own.

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Conclusion

As I've already pointed out, the majority of the court sided with the parents. Yes, they claimed that Maine's

“nonsectarian” requirement violated the First Amendment.

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

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However, since the First Amendment specifically prohibits Congress from passing laws abridging the free exercise of religion, it appears once again the court got to the right answer, but for the wrong reasons. What Maine’s “nonsectarian” clause did by singling out religious schools for discrimination, was violate the Equal Protection Clause of the Fourteenth Amendment.

So where does that leave this case?

Maine may provide a strictly secular education in its public schools. But BCS and Temple Academy—like numerous other recipients of Maine tuition assistance payments—are not public schools. In order to provide an education to children who live in certain parts of its far-flung State, Maine has decided not to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of their choice. Maine’s administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient’s religious exercise.

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While we should take the win, I think constitutionally minded Americans should also learn from the court’s mistake. We may be happy with the outcome, but all it would take for the next group of parents to be discriminated against is a court with a couple of different justices on it.

The Establishment Clause does not require government to be hostile to religious observances or organizations. While there are plenty of government actors, including judges, who may disagree, the Establishment Clause does not require a secular government, it only prohibits a national church. Those who have stoked the fears of America becoming a theocracy have used the misinterpretation of Jefferson's "separation of church and state" to effectively do what they claim to be avoiding: Establishing a national religion of secularism. This case is one small step for religious freedom in America. Hopefully, it will lead to a giant leap towards liberty for all.

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