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PERSPECTIVE

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Pay to pray or pray to play?

By Mitchell Keiter

The Supreme Court decided *Carson v. Makin* (20-1088) yesterday, holding Maine violated parents' Free Exercise rights by excluding religious schools from its program subsidizing private school tuition for families with no nearby public school. The Court will soon decide the term's other case concerning religion in schools, *Kennedy v. Bremerton Sch. Dist.* (21-418), where a coach is challenging his school's order not to pray on the 50-yard line immediately after games. The *Carson* decision enables religious activity, but this does not guarantee a ruling favoring the coach. The same imperative of neutrality that supported the *Carson* challenge might well support Bremerton's restriction.

The First Amendment commands that religious exercise be the product of personal conscience, not governmental pressure. There was pressure against religious activity in Maine; families forfeit almost $150,000 of state aid per child (from K-12) if they choose religious schooling, which they must replace with their own funds ("pay to pray"). But the pressure worked in the other direction in *Kennedy*, as the coach's prayers, sometimes during mandatory team meetings, could have pressured players to participate; one atheist confirmed he joined because he feared losing playing time if he abstained ("pray to play").

Kennedy is peculiar; unlike *Carson* and almost all Supreme Court cases, its facts are uncertain. Not only do the parties dispute circumstances like the players' location during the prayer, but the record spans several years, so different dates involve different circumstances. For example, Kennedy conceded he prayed during mandatory meetings but insisted he stopped that practice. The Supreme Court's role might be less to decide whether the coach "wins" or "loses" than to clarify the boundaries of protected and forbidden conduct. The outcome is particularly hard to predict as the justices seemed to agree that the school district erred in perceiving the school unconstitutionally *endorsed* the coach's prayer, because the real problem was the coach could have *coerced* the players.

Santa Fe and *Mitchell*

The Court reached a split outcome 22 years ago in resolving two cases resembling *Kennedy* and *Carson*. There was football game prayer in *Santa Fe Independent Sch. Dist.*, 530 U.S. 290 (2000), where students elected one student to lead the stadium in prayer, which thereby granted the religious majority the exclusive use of the public address system. But a central purpose of the Establishment Clause is to prevent the majority from favoring its own institutions and denying equal benefits to others. The Court found the election "encourage[d] divisiveness" and threatened "coercion" on students who did not wish to participate.

There was neither coercion nor a divisive competition for resources when the government distributed computers to all schools. *Mitchell v. Helms*, 530 U.S. 793 (2000). Students, whether "religious, irreligious, and areligious," received equal benefit, so there was no incentive to choose a religious school. To the contrary, there would have been a disincentive if, as in Maine, they were excluded. Resources were directed not by the majority's "special favor" but the free choice of each individual family.

Carson rested on this same neutrality principle. States, as Justice Breyer's *Carson* dissent observed, must neither favor nor inhibit any particular religion, and that same imperative commands neutrality between religion and nonreligion generally. Maine effected the very favoritism for the (nonreligious) majority that the Court rejected in *Santa Fe*.

Breyer asserted *Mitchell* and its progeny hold only that states *may* fund religious schools, not that they *must*, as *Locke v. Davey*, 540 U.S. 712 (2004), held Washington could choose to fund scholarships to study secular subjects but not theology. *Carson* confined *Davey* to forbid training clergy, though there was another ground for distinguishing the two programs. The religious study in *Locke* was instead of secular study, whereas in *Carson* it was in addition to it. Washington simply declined to fund religious study, but Maine *penalized* it by withdrawing all the funding otherwise available for students' secular study just because they also pray or study the Bible. (See Keiter, An unconstitutional condition on religious exercise , Daily Journal, Dec. 8, 2021.)

Mitchell explained a state does not subsidize religious education where it provides equal aid to religious schools, and the religious schools provide a full secular education. "[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." So long as religious schools teach math and English as effectively as secular ones, and receive no extra funds, state funding does not "further" religion.

Justice Breyer also objected that not all religions will be able to operate a school, so some will not be able to benefit from the program. The short answer is that a religion's small size is not a state-imposed obstacle (*Maher v. Roe*, 432 U.S. 464, 474 (1977)), and many parents might still prefer a school operated by a different denomination than a completely secular option. Moreover, it can be religious minorities who benefit most from additional choices. For example, because many athletic contests are played on Saturdays but not Sundays, Sunday sabbath observers can both play on their

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team and observe their day of rest, but Saturday observers must choose between religious observance and extracurricular participation. Only if they attend a school that accommodates their schedule can they fully participate in these activities.

In 2000, most justices favored either both the *Mitchell* aid and the *Santa Fe* prayer (Rehnquist, Scalia and Thomas) or neither (Stevens, Ginsburg, and Souter). The swing bloc of Kennedy, O'Connor and Breyer, however, voted with the majority in each. Though only the three liberals (now including Breyer) objected to equal funding in *Carson* (as in *Mitchell*), it is possible that other justices will join them in curtailing the coach's prayer. That is because *Kennedy* arguably involves more coercion than *Santa Fe*. Spectators might face peer pressure to pray, but the *Kennedy* pressure came from the coach, who could reward or penalize players. Far from being indifferent to players' participation, he invited opposing players to join (with their coach's support). Casting doubt on the voluntariness of player participation is the lack of any such prayer when the coach was absent.

Political pressures

Lurking beneath the surface of both oral arguments was the problem of political coercion. Kennedy contended schools have less leeway to constrain teachers' religious expression than their political expression, whereas the school insisted the standard is the same. In practice, however, schools constrain religious speech much more than political speech. Graduation orations may not "employ the machinery of the state to enforce a religious orthodoxy" (*Lee v. Weisman*, 505 U.S. 577, 592 (1992)), but many now enforce a political orthodoxy that can seem just as exclusionary.

Justice Kagan correctly observed how impressionable 16-year-olds can be, and how they might follow the coach's lead to earn his favor. This observation is even stronger for children half that age, yet the same classrooms where teachers may not post religious symbols are filled with partisan political messages that can be more divisive than prayer. Breyer was correct to cite Thomas Jefferson's dictum that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," but wrong to presume it is only theological opinions to which some taxpayers might object. *See Janus v. AFSCME, Council 31*, 138 S.Ct 2448, 2464 (2018).

The purpose of limiting religion in public schools was not to suppress it but to ensure families maintained control over their children's upbringing. Public schools were created to teach children the skills they need to succeed in public life, like reading and writing, adding and subtracting; more contentious questions were for the home.

That division of labor has broken down, as even math and reading classes have become politicized. (See e.g. Kabbany, Math training that calls showing work 'white supremacy culture' may be added to Calif. curriculum framework, The College Fix, Apr. 5, 2021); Linge & Levine, Over $200K spent on drag queen shows at NYC schools, records show, N.Y. Post, June 11, 2022.) For this reason (and COVID shutdowns), many families are leaving public schools, a process that will likely continue regardless of how the Court decides *Kennedy*.