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Abstract

The United States Supreme Court has devoted nearly a third of its religious freedom cases to questions of religion and education. While government has the power to mandate basic education for all children, the Court has held, parents have the right to choose public, private, or homeschool education for their minor children, and government may now facilitate that choice through vouchers and tax breaks. While the First Amendment forbids most forms of religion in public schools, it protects most forms of religion in private schools. While the First Amendment forbids government from funding the core religious activities of private schools, it permits delivery of general governmental services, subsidies, scholarships, and tax breaks to public and private schools, teachers, and students alike, and protects the autonomy of religious schools to hire coreligionist teachers. While the First Amendment forbids public-school teachers from offering religious instruction and expression in public-school classes and events, it permits public-school students to engage in private religious expression free from coercion. The amendment further requires that religious parties have equal access to public facilities, forums, and funds that are open to their nonreligious peers.

Keywords: education, religious schools, First Amendment, government funding, religious autonomy, equal access, religious freedom

Introduction

From the beginning of the republic, American education has been a major battleground for religious freedom. While state laws and constitutions have always governed education, all schools are also now subject to the First Amendment to the U.S. Constitution that guarantees that the government "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Nearly one-third of the United States Supreme Court's cases on religious freedom — 76 out of its 244 cases issued through 2022 — have addressed issues of religion and education; almost all of them have concerned state and local governmental laws and policies. For each Supreme Court case, there are scores, sometimes hundreds, of lower court cases, too.

The Supreme Court's cases on religious freedom and education address three main questions: (1) What role may government play in private religious education? (2) What role may religion play in public (government-run) education? And (3) What religious rights do parents and students have in public and private schools? The Court has worked out a set of rough answers to these questions, albeit with ample vacillations over the past century. This article will focus on the first question, concerning the role of government in private religious education, but touch on the other two as well, in

presenting the Supreme Court's main cases on religious freedom that are and will continue to be important for Christian higher education.

The Evolution of Government's Role in Religious Education

The role of government in private religious schools — particularly questions of government funding and support for religious schools — was hotly contested in the individual states long before the Supreme Court got actively involved. By 1921, 35 states had passed state constitutional amendments that barred state funding of religious schools. Moreover, in some states, various anti-Catholic and self-professed "secularist" groups pushed hard to eliminate religious schools altogether and to give public schools a monopoly on education.

In response, the Court developed a general argument about the place of private religious schools in modern society and the role that government could play in them. Private schools of all sorts, the Court repeatedly held, are viable and valuable alternatives to public schools, and parents and students have the right to choose between them. Private *religious* schools, moreover, allow parents to educate their students in their own religious tradition, a right that they must enjoy without discrimination or prejudice. Given that public education must be secular under the First Amendment prohibition of religious establishments, private education may be religious under the First Amendment protection of the free exercise of religion.

To be accredited, all private schools must meet minimum educational standards so that their graduates are not left culturally or intellectually behind their public school peers. Free exercise objections to these baseline requirements by schools, parents, or students are of little avail. But these private schools may teach these subjects from a religious perspective and add religious instruction and activities beyond them. They may favor teachers and students who share their faith. And these religious schools are presumptively entitled to the same government-funded "secular" services and support — school bus rides, textbooks, laptops, lab equipment, gymnasia, and more — that are made available to their counterparts in public schools.

The Supreme Court developed and applied this "accommodationist" logic, as it was called, from 1925 to 1971; abruptly reversed course in favor of strict separationism from 1971 to 1985; and since then has returned to a new variant of accommodationist logic, now often framed in "equal access" and "equal treatment" terms grounded in the First Amendment free exercise clause.

Accommodating Religious Education

The most important early religious school case was *Pierce v. Society of Sisters* (1925), which struck down an Oregon law requiring all children to attend public school. This law, the Court held, violated the rights of religious parents to choose where to educate their children, and the right of religious schools to offer them a form of Christian education. This early accommodation of religious schools and students

continued in a dozen cases into the early 1970s. *Everson v. Board of Education* (1947), for example, though offering sweeping rhetoric on the need for a high wall of separation between church and state, still held that states could provide school bus transportation to religious and public school children alike or reimburse the parents for the costs of using school bus transportation. “[C]utting off church schools [and their students] from these services, so separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate,” Justice Black wrote for the *Everson* Court. “But such obviously is not the purpose of the First Amendment. The Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”

The Court struck a similar tone in *Board of Education v. Allen* (1968), holding that states may offer secular textbooks and supplies to public and private schools and students alike. It continued this accommodationist tone in a trio of cases upholding government funding for construction of buildings at religious colleges and universities. In *Tilton v. Richardson* (1971), the Court rebuffed a challenge to a federal grant program sponsoring all manner of new buildings at public and private colleges and universities across the country — including library, science, and arts buildings at four church-related colleges. Chief Justice Burger wrote for the plurality that the act that created the grant program “was carefully drafted to ensure that the federally-subsidized facilities would be devoted to the secular and not the religious functions of the recipient institution.” This feature, together with the reality that most funding was directed to state, not religious, universities and colleges, was sufficient to ensure the act’s constitutionality.

Then in *Hunt v. McNair* (1973), the Court upheld a state program of funding the construction of similar “secular” buildings at various universities within the state, including a religiously chartered college. Again in *Roemer v. Board of Public Works* (1977), the Court upheld a state construction grant program that included five church-related schools among its 17 grant recipients. The Court counseled against too zealous an application of the principle of separation of church and state, given the reality and reach of the modern welfare state: “A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church.… [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.”

The Court stretched its furthest in accommodating religious education in *Wisconsin v. Yoder* (1972). Faced with a Wisconsin requirement to send children to school until they were 16, a community of Old Order Amish (dedicated to a simple, biblically inspired agrarian lifestyle) refused to send kids to high school, lest they be tempted by worldly concerns and distracted from learning the values and skills they would need to maintain an Amish life. After they faced fines for disobeying school attendance laws, the parents and community leaders filed suit, arguing that the state had violated their free exercise and parental rights.

The *Yoder* Court agreed and ordered that the Amish parents and students be exempted from full compliance with these mandatory school attendance laws. The

Court was impressed that the Amish "lifestyle" was centuries-old and "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." In the Court's view, compliance with the compulsory school attendance law would pose "a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." To exempt them was not to "establish the Amish religion" but to "accommodate their free exercise rights." This case is the classic example for the home schooling options now on offer in most states.

Separating Public and Religious Schools

But in *Lemon v. Kurtzman* (1971), the Supreme Court abruptly reversed course. Drawing on the strict separation of church and state logic of its earlier establishment clause cases — which prohibited religious teachers, prayers, Bible reading, and religious symbols in public, state-run school — the Court now adopted a firm policy against governmental aid to religious schools and against most forms of cooperation between religious and public schools, teachers, students, facilities, and programs. Parents and students have the right to make a clear choice between state-funded public schools and privately funded religious schools, the Court reasoned. The more clearly the operations and officials of these two schools are separated, and the more cleanly the religious schools are cut off from state funding and dependence, the better it is for all parties and for the First Amendment values that protect them. Public schools can stand on their own without the risks of undue religious influence or mixed messages to their students. Religious schools can stand on their own without the dangers of unwelcome political interference by or undue financial dependence upon the state.

In implementing this new logic, the *Lemon* Court crafted a three-part test to be used in all future cases arising under the First Amendment establishment clause, including those dealing with religious schools. To meet constitutional objections, the Court held, any challenged government law must: 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) not foster an excessive entanglement between church and state. The *Lemon* Court applied this test to strike down a state program that reimbursed schools for the costs of teaching state-mandated secular subjects, arguing that this improperly advanced the religious mission of these private schools, and risked too much entanglement between state officials and religious teachers in supervising the use of these funds.

Lemon left open the question whether the state could give aid directly to religious students or to their parents, as the Court had allowed in earlier cases. Two years later, the Court closed this door tightly in *Committee for Public Education v. Nyquist* (1973) and *Sloan v. Lemon* (1973), striking down state policies that allowed low-income parents to seek reimbursements from the state or tax deductions for some of the costs of religious school tuition. In *Nyquist,* Justice Powell characterized such policies as just another "of the ingenious plans of channeling state aid to sectarian schools." Responding to the state argument that "grants to parents, unlike grants to [religious]

institutions, respect the 'wall of separation' required by the Constitution," the Court declared that "the [primary] effect of the aid is unmistakably to provide desired financial support for non-public, sectarian institutions." Over the next decade, the Court issued 15 cases seeking to separate strictly public and private education.

Accommodation and Equal Treatment of Religious Education

But mandating strict separation of church and state in the educational sphere — while alluring for some in theory — ultimately proved unworkable in practice. It also raised questions of fairness to religious parents who had to pay both state school taxes and religious school tuition if they wished to educate their children in their own faith. Accordingly, the Supreme Court gradually moved back toward greater accommodation and state support for religious education. The Court eventually reversed three of its strict separationist cases on religious education, and it rejected strong state constitutional prohibitions on funding religious education when their application resulted in discriminatory treatment against religious students, parents, or schools.

A notable early example of this shift back was *Witters v. Washington Department of Services for the Blind* (1986), where the Court upheld a state program that furnished aid to a student attending a Christian college. The program provided funds directly to visually impaired students "for special education and/or training in the professions, business or trades" at programs of their choice. Mr. Witters' condition qualified him for the funds. His profession of choice was the Christian ministry, and he sought funds to attend a Christian college in preparation. The state agency denied funding on grounds that this was direct funding of religious education in violation of the federal and state prohibitions on religious establishment. The Court disagreed. The policy served a secular purpose of fostering educational and professional choice for all, including the handicapped. It involved no entanglement of church and state. Its primary effect was to facilitate this student's professional education, which happened to be religious. As Justice Marshall wrote for the Court, "In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual not by the State."

In several more cases over the next two decades, the Court repeated this holding that indirect state aid to religious education through the private choices of parents or students was constitutionally permissible. The most consequential — and controversial — of these cases was *Zelman v. Simmons-Harris* (2002), which upheld an Ohio school voucher program that enabled parents to choose among public or private (religious) education for their children. Chief Justice Rehnquist wrote for a sharply divided Court that the primary effect of the program was not to advance religion but to enhance educational choice for poor students and parents living in a notoriously failing public school district. "Where a government aid program is *neutral* with respect to religion, and provides assistance directly to a *broad class of citizens*, who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent *private choice*," there is no establishment of religion. "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably

attributable to the individual, not the government, whose role ends with the disbursement of the funds."

In its three most recent cases, the Supreme Court has held that the First Amendment free exercise clause mandates that religious schools, parents, and students be given equal access to government support made available to all others. In *Trinity Lutheran Church v. Comer* (2017), Missouri excluded a church-run school (that met all the criteria) from a state program that reimbursed schools for the costs of resurfacing its playgrounds with a new rubber surface supplied by the state's recyclers. Missouri argued that it was simply applying its state constitutional prohibition on funding religious education. The Court held this to be a violation of the free exercise clause. "Here there is no question that Trinity Lutheran was denied a grant simply because of what it is — a church," Chief Justice Roberts wrote for the Court. State laws imposing "special disabilities on the basis of . . . religious status" alone are permissible only if the state has a "compelling interest" for doing so, and a general state constitutional prohibition on funding religious education is not compelling enough. What is being funded here is rubber asphalt, not religious education.

In *Espinoza v. Montana Department of Revenue* (2020), the Court widened this equal access logic. In this case, Montana offered its citizens state tax credits if they made donations to nonprofit organizations that awarded scholarships for private school tuition. But the state program would not allow scholarships to go to private religious school students, since the state constitution prohibited all state aid to religious education. Three mothers whose children could not get scholarships to attend a Christian school filed suit under the free exercise clause, claiming religious discrimination contrary to the free exercise clause. The *Espinoza* Court agreed. The state's "interest in creating greater separation of church and State than the Federal Constitution requires 'cannot qualify as compelling' in the face of the infringement of free exercise here."

The Court repeated this ruling in *Carson v. Makin* (2022). The state of Maine had a longstanding tuition assistance program that allowed parents who lived in thinly populated rural school districts without their own public high school to use public funds to attend a public or private school of their choice, including schools outside Maine. But the state would provide assistance only if the chosen school was not "sectarian" — based on the state's review of the school's curriculum, practices, character, and mission. Citing *Trinity Lutheran* and *Espinoza,* the Court struck down this policy as a violation of the free exercise clause. These private schools are disqualified from state public funds "solely because they are religious," the Court determined, and that is unconstitutional discrimination against religion. The state may "not exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."

Labor and Employment in Religious Schools

The First Amendment requires that religious organizations, including religious schools, be given room to carry out their unique missions and functions. This is partly because religious organizations are places where many individuals manifest their free exercise rights. But the First Amendment "gives special solicitude to the rights of religious organizations" as such, the Court noted recently, protecting a "religious group's right to shape its own faith and mission," and "bar[ring] the government from interfering" with its internal decisions over membership and leadership.

Reflecting this basic teaching of "religious autonomy," as it is called, legislatures often exempt religious employers from various labor, employment, and civil rights laws, including those that prohibit discrimination based on "race, color, religion, sex, and national origin." Title VII has two exemptions that apply to religious employers. The first is in Section 702 of the Civil Rights Act of 1964[1], which includes:

"This title [subchapter] shall not apply to an employer with respect … to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

The second is in Section 703 of the Civil Rights Act[2], which includes:

"Notwithstanding any other provision of this title [subchapter] … it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."

The core cases where Section 702 applies are easy. A synagogue does not have to hire a Baptist minister to serve as its rabbi or read the Torah. A denominational Christian seminary can dismiss a dean or professor who converts to Islam. The marginal cases raise harder questions. Does the religious hiring exception — or "ministerial exception" as it is called — apply to non-clerical or non-ordained employees of the religious organization, such as teachers, secretaries, groundskeepers, suppliers, or janitors? What if the religious line-drawing by the religious employer adversely affects a party who is part of an otherwise protected class under the Civil Rights Act? Do women, say, who are denied ordination or religious leadership positions because of religious teachings have a sex discrimination claim under the Civil Rights Act? Or what of same-sex parties who are denied employment or membership because a religious group teaches that homosexuality is sinful?

The Supreme Court has provided only limited guidance to address these hard questions, although it has strongly affirmed the constitutionality of the ministerial

exception. In *Presiding Bishop v. Amos* (1987), the Court upheld Section 702 against an establishment clause challenge, and further allowed its application to a non-clerical employee. Amos was a building engineer for a gymnasium open to the public and owned and operated by the local Latter-Day Saints Church. He was dismissed from his position because he was no longer a member in good standing of that church. He sued, claiming religious discrimination in violation of the Civil Rights Act. The church defended its decision by invoking the religious hiring exception in Section 702. Amos argued the exception didn't apply in this case since he was an engineer, which was a secular position, not a religious one. Moreover, he argued, Section 702 violated the establishment clause because it unduly favored religious employers and employment over all others. Why should a public gym run by a church be able to religiously discriminate against an engineer when an identical public gym run by a local business corporation cannot do so? The Court applied Section 702 and held for the church, and it also upheld the constitutionality of this provision. The establishment clause does not forbid Congress from allowing religious organizations to hire members only of their own faith for both secular and religious jobs, the Court concluded. It was no establishment of religion for Congress to give more protection to religious employers than might otherwise be required by the Constitution. Such "benevolent neutrality" is not an "unlawful fostering of religion."

These early precedents led several lower courts to give ample deference to religious schools, colleges, and universities to set their own standards of admission, employment, and discipline. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the Court reinforced this deference by grounding the ministerial exception in the First Amendment. Hosanna-Tabor was a church that operated a small K-8 school with both "called" and "lay" teachers. Cheryl Perich was a called teacher, which meant she had completed theological studies at a religious college, been endorsed by a local church district, passed an oral examination, and performed various spiritual functions in the school, including leading chapel and teaching Bible. When she became ill and took disability, the school filled her position with a lay teacher. She recovered and planned to return, but the school did not want her back. After some back-and-forth, ultimately the school board and church congregation revoked her call and fired her. Perich filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging that she had been wrongly terminated in violation of the non-retaliatory firing provisions of the Americans with Disabilities Act.

A unanimous Court held for the Hosanna-Tabor church and school. "The establishment clause prevents the government from appointing ministers, and the free exercise clause prevents it from interfering with the freedom of religious groups to select their own," Chief Justice Roberts wrote for the Court, citing precedents that went back to the 1215 Magna Carta. To force a church to "accept or retain an unwanted minister, or punish a church for failing to do so" would "interfere with the internal governance of the church." This would violate the free exercise clause, "which protects a religious group's right to shape its faith and mission through its appointments." Further, it would violate the establishment clause by involving the government in "ecclesiastical decisions" over the polity, property, membership, and leadership of the church, all of which are

forbidden to courts. The Court accepted Hosanna-Tabor's characterization of Perich as a "called teacher" who fit into the ministerial exception. The Court also refused to second-guess the church's stated religious reason for firing her — that she violated its commitment to internal dispute resolution. "Such "a pretext inquiry," Justice Alito wrote in concurrence, stood in tension with "principles of religious autonomy."

The Court held similarly in *Our Lady of Guadalupe School v. Morrissey-Berru* (2020). This case involved two private Catholic schools under the Archbishop of Los Angeles. Each school was committed to "religious instruction, worship, and personal modeling of the faith" and held its teachers to those Catholic standards. Agnes Morrissey-Berru and Kristin Beil were both lay teachers on annual contracts. Both had some religious training and taught religion courses at their schools. They worshipped and prayed with their students each day, and they counseled and catechized them in the Catholic faith. Both were discharged for underperformance. Both sued. Morrissey-Berru claimed age discrimination because she had been replaced by a younger teacher. Biel claimed retaliatory firing because she had requested a leave of absence to undergo breast cancer treatment. The religious schools claimed the ministerial exception. The teachers countered that they were not ministers; they were lay people, with only modest religious training. They did not hold themselves out as ministers, and indeed could not be ministers since the Catholic Church ordained only males as ministers. The Supreme Court held for the schools, citing *Hosanna-Tabor* as dispositive. These two teachers performed even more ministerial functions in their schools than Cheryl Perich had performed at Hosanna-Tabor, the Court found. That left their employment status within the jurisdiction of the schools and diocese.

Limits on Religious Autonomy for Religious Schools

This right of religious schools and other religious organizations to engage in such religious line-drawing is not unlimited, however. *Bob Jones University v. United States* (1983) was an early case on point. This case involved a Christian university that challenged the revocation of its federal tax-exempt status due to the university's religious beliefs that interracial dating and marriage were unbiblical. In their view, God created "separate races," who must remain separate, and they applied this teaching in their employment and admissions policies. In 1970, the Internal Revenue Service (IRS) concluded that it could no longer legally justify granting tax-exempt status to any private religious schools that practiced racial discrimination. The IRS notified the university of the change in policy and threatened to revoke the school's tax-exempt status if it persisted in its racial line-drawing practice. The school made no changes and thus lost its tax-exempt status, exposing it to hefty new income tax liability and shutting it off from tax-deductible donations. The university sued the IRS, arguing violations of the free exercise clause.

The Court held for the IRS. Chief Justice Burger made clear that tax exemption was a legislative privilege, not a constitutional right, and that the IRS had the authority to revoke the university's tax-exempt status for violating "a fundamental public policy." Given the long series of statutes and cases that have sought to remove the badges of

chattel slavery and the ravages of racial prejudice in American history, Burger wrote, "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."

This old precedent has come back into conversation since the Supreme Court's cases of *Obergefell v. Hodges* (2015) declared the constitutional right to same-sex marriage and *Bostock v. Clayton County* (2020) found that discrimination against gay or transgender workers constitutes "sex discrimination" under Title VII of the Civil Rights Act. Some religious schools and seminaries, including CCCU institutions, are theologically opposed to same-sex or trans-sex parties, activities, and couples. The question is whether exclusion of those parties from admission, membership, employment, leadership, or other benefits at the religious school is a form of protected "religious line-drawing" or unprotected "sex discrimination." Even if it is viewed as protected "religious discrimination," could a local, state, or even national government revoke that school's tax-exempt status or other government benefits or funding as a result? These issues are now being tested in legislatures and courts.

Recent Trends in the Court

Over the past century, the Supreme Court's First Amendment cases have swung back and forth between more tolerant "accommodationist" and more stringent "separationist" approaches to the relations between government and religious schools. The Court has sometimes digressed and occasionally reversed itself, prompting loud academic and public commentary. Part of this back-and-forth is typical of any constitutional law in action, and it further reflects the reality that shifts in bigger constitutional doctrines like federalism, judicial review, and separation of powers inevitably produce shifts in more specialized areas like First Amendment religious freedom. "Constitutions work like clocks," American founder John Adams once put it. To function properly, their "pendulums must swing back and forth," and their mechanisms and operators must get "wound up from time to time." Given the centrality and controversiality of both religion and education in American life, it is inevitable that such pendular swings in the Court's cases on religion and education will continue.

Two decades ago, after completing a long run of strict separationist cases, the Supreme Court seemed content to leave many religious freedom and education questions to statutes and to states, reflecting its new appetite at the time for separation of powers and federalism. Federal statutes, like Section 702 of the Civil Rights Act, were thought to provide enough religious freedom protection, including in the education field. And with softened standards of First Amendment review, state and local governments were able to engage in greater local experimentation in their schools, following the logic of federalism.

Many states, however, building on 19th century state constitutional restrictions on religious educational funding, and 21st century attacks on religious freedom altogether, began to provide far less protection for religious freedom in education. In response, the Supreme Court of late has again weighed in heavily in favor of religious freedom,

including in the area of religious education where it has issued seven major cases in the past decade, from *Hosanna-Tabor* 2012 to *Carson* in 2022. These cases have strengthened constitutional and statutory protections for religion in education and relaxed limits on government actions and funding for religious schools, parents, and students. Compared to a generation ago, religious parents and students now have more educational choice, and religious schools have more equal access to general governmental support and more autonomy to make their own internal employment decisions. But these are only very recent Supreme Court precedents, and they remain constantly contested in public debates and tested in local courts and legislatures. Religious schools and parents alike would do well to remain vigilant to protect religious freedom in religious education.

[1] Specifically, Section 702(a), 42 U.S.C. § 2000e-1(a).

[2] Specifically, Section 703(3), 42 U.S.C. § 2000e-2(e).