The Forest and the Trees

The Divide Between Judicial Holdings and Public Perception in Religion Law

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Ask those who carefully follow the Supreme Court, and they will tell you that—for good or bad, depending on their perspective—the current Supreme Court has reduced to near rubble the metaphorical wall separating church and state. In recent years, the Court has done more to allow government funding for the projects and messages of religious groups than ever before. Yet public perception (at least as measured by the media) has failed to register this substantial victory for religion. Instead, most people have fixated on the relatively few defeats. This fixation has led them to miss the forest for the trees.

Although the modern Court occasionally strikes down efforts to include religion in public life, it does so rarely. Moreover, it does so only in cases involving symbolic endorsement of religion rather than those involving what some might say matters more for the role of religion in society: the distribution of government money. Before we go blaming (or praising) the Court for frustrating popular efforts to allow religious values to shape our citizenry, we ought to examine the track record.

Consider the Establishment Clause cases of the recent past. In 1995, the Court authorized the use of state university funds to pay the printing costs of a student-run religious publication. In 1997, the Court permitted public school employees, paid with public funds, to provide remedial instruction onsite at parochial schools. In 2000, the Court allowed the distribution of computers and other equipment, bought with public funds, to parochial schools. In 2002, the Court approved the use of publicly financed vouchers to pay for parochial school tuition. In each of these cases, the only restrictions were that the services or funds be made available to religious groups or institutions as a part of a larger program that included non-religious beneficiaries, and as the result of private choice rather than governmental action.

These Court decisions have left little of the ban on governmental funding of religious activity that once animated Establishment Clause jurisprudence. And what little they leave will be tested further in the future. For example, will they permit the provision of welfare services by religious institutions (so called "charitable choice" programs), or overturn state constitutional amendments that flatly prohibit state funding of parochial schools (so-called "Blaine Amendments")?

Against these funding cases, consider the one case in which the current Court dealt a blow to religion under the Establishment Clause. In 2000, the Court prohibited student-led prayer at public high school football games. This case generated a backlash of efforts to circumvent its spirit, with groups breaking into "spontaneous" organized prayer at high school sporting events and devising more creative ways to allow individual student speakers to deliver religious invocations. Public universities eager to maintain their "official" prayer ignored the case entirely, claiming that it only applied to the high school level and below.

Some recent lower court rulings have produced similar public outcry, if not resistance. A number of lower federal courts have held unconstitutional the posting of the Ten Commandments in government buildings. Another ruled unconstitutional the recitation by public elementary school children of the words "under God" in the Pledge of Allegiance. The immediate public reaction to the Pledge case, in particular, was that the illegitimately activist court (often derogatorily labeled "liberal," even though one of the judges in the majority was a Republican appointee) was trying to rid the country of religious values. Indeed, the reaction to the Pledge case was so overwhelming that it overshadowed notice of the pro-religion voucher decision that the Supreme Court handed down the very next day.

The public reaction to the Establishment Clause cases of late has been off the mark. It is true that the courts, including the Supreme Court, have rejected overt attempts at governmental endorsement of religious practices or values. But these cases merely nip at the edges. They do not touch the expanding core of cases that permit government funding of religious institutions in their endeavors to shape citizens. The truth is that, in the current climate, religion wins more often than not. And it wins most significantly in the money cases.

Whether this is a good state of affairs is not the issue here. The point for present purposes is simply to flag the divide between judicial holdings and public perception that often gets the better of us. As lawyers and as citizens, we are obligated to move past misperception that often inflames passion and clouds deliberation on important and controversial issues such as these. Fight for or against the Court's religion clause jurisprudence, but make sure you know what you are fighting about. ■

NEIL BRAKE