Psalm 48
Isaac Watts (1674–1748)

Great is the LORD, our God,
and let His praise be great;
He makes His churches His abode,
His most delightful seat.
These temples of His grace,
how beautiful they stand,
the honors of our native place
and bulwarks of our land!

Oft have our fathers told,
our eyes have often seen,
how well our God secures the fold
where His own sheep have been.
In ev'ry new distress
we'll to His house repair,
recall to mind His wondrous grace,
and seek deliv'rance there.

Far as Thy Name is known,
the world declares Thy praise;
Thy saints, O LORD, before Thy throne,
their songs of honor raise.
With joy Thy people stand
on Zion's chosen hill,
proclaim the wonders of Thy hand,
and councils of Thy will.

How decent and how wise!
How glorious to behold!
Beyond the pomp that charms the eyes,
and rites adorned with gold.
The God we worship now
will guide us till we die;
will be our God while here below,
and ours above the sky.

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ΤΩ ΚΡΟΝΟΥ ΚΑΙΡΩ

In the Nick of Time

A Good Decision
Kevin T. Bauder

Good news out of Washington is uncommon enough these days that it is worth commenting on. Good news for religious people—including Christians—is even less common. This week, however, has brought some good news in the form of a Supreme Court decision, *Carson v. Makin*.

The decision was about a program in which the state of Maine provided tuition assistance to enable a limited number of qualifying parents to send their children to private schools. To receive this assistance, however, parents had to send their children to "nonsectarian" schools, i.e., schools that were not religious. In other words, a generally available public benefit was being withheld from people who chose to use that benefit in a religious venue.

The argument for Maine's restriction is straightforward. It rests upon the principle embodied in the non-establishment clause of the First Amendment, which prohibits Congress from making any law respecting an establishment of religion. This principle has been applied by the courts, not only to Congress but also to governing bodies at every level. It has been widely understood to prohibit any governmental body from expressing any level of support for any religious activity or position. It has been further understood to apply not merely to particular religions, but to religion in general, as opposed to non-religion or even irreligion. Consistently applied, this principle states that governments must never provide any kind of support, no matter how indirect, to any religion or religious entity. This is the kind of thinking that has led, among other things, to bans on publicly funded nativity scenes and courtroom displays of the Ten Commandments.

This line of argument makes a kind of facile sense. If strictly applied, however, it would render much of life unnavigable. For example, imagine that government-issued Social Security checks came with the proviso that none of that money could be donated to religious causes. Or imagine that municipalities routed public roads around religious organizations so that those organizations would not have access to the public good of transportation. Or imagine that the roads were there, but that the government prohibited the use of the roads to go to church or to do other religious work.

The point is that *public* means *public*. Once a good has been placed at the disposal of the public, then the members of the public must be the ones to decide how that good will be used. The government administers Social Security as a public good. It builds roads as a public good. Since these are *public* goods, then members of the public must be the ones to determine whether the good will be used for religious purposes.

So here is a basic principle—governments are not providing support to religion when public goods are used for religious purposes by private individuals. In fact, if a government chooses to withhold access to public goods from religious institutions, it is actually discriminating against those institutions. It withholds goods that would otherwise be available, and it withholds them on purely religious grounds.

This is where the free exercise clause of the First Amendment comes into play. The free exercise clause debars Congress from prohibiting the free exercise of religion. To withhold a good which is otherwise available to the public, and to withhold that good by reason of religion alone, must be construed as an attempt to suppress the free exercise of religion. By withholding public goods from religious people or institutions, governments are tangibly discriminating against religion in general and the specific religions that those people and institutions represent.

This is the principle that guided SCOTUS in its majority opinion. Writing for the court's six-justice majority, Chief Justice Roberts said,

> The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise....
>
> 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.

Dissenting from the majority were three justices: Breyer, Kagan, and Sotomayor. Predictably, they appealed to the non-establishment clause in favor of Maine's policy. In his dissent, Justice Breyer wrote,

> Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education.... [T]his Court's decisions in *Trinity Lutheran* and *Espinoza* prohibit States from denying aid to religious schools solely because of a school's religious status—that is, its affiliation with or control by a religious organization.... But we have never said that the Free Exercise Clause prohibits States from withholding funds because of the religious use to which the money will be put....
>
> Maine's decision not to fund such schools falls squarely within the play in the joints between those two Clauses. Maine has promised all children within the State the right to receive a free public education. In fulfilling this promise, Maine endeavors to provide children the religiously neutral education required in public school systems.... The Religion Clauses give Maine the ability, and flexibility, to make this choice.

The virtue of Justice Breyer's argument is that it does recognize a tension between the two religion clauses of the First Amendment. More radical is Justice Sotomayor's dissent, which acknowledges no tension at all.

> This Court continues to dismantle the wall of separation between church and state that the Framers fought to build....
>
> If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens.

For Sotomayor absolutely, and for Breyer to a lesser degree, governments ought to withhold public goods from religious people and institutions simply because they are religious. They favor a form of church-state separation that actively excludes religion from public benefits. The implications of this position are genuinely frightening.

In short, the court's majority decision is a good one. It is not a magic bullet that will redress all ills, but it is a modest step in the defense of religious liberty. But it also carries its own dangers.

Schools that accept public funding run the risk, at some point, of being subjected to governmentally dictated public policies that may not even be enacted in laws. In other words, a religious institution that accepts public funding in any form may at some point be required to implement decrees such as President Biden's recent "Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals." Consequently, religious institutions ought to think carefully before accepting *any* governmental benefit. In some cases, such benefits are necessary (for example, public roadways). In other instances, the price tag may be too high.

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This essay is by Kevin T. Bauder, Research Professor of Historical and Systematic Theology at Central Baptist Theological Seminary. Not every one of the professors, students, or alumni of Central Seminary necessarily agrees with every opinion that it expresses.
