

Public Justice Report--May/June, 1995

School Prayer, Free Speech, and Constitutional Justice

By James W. Skillen

WASHINGTON, DC--Here we go again. Will the courts be able correctly to interpret the Constitution's First Amendment this year? Does prayer in public schools support or violate religious freedom? What about a voluntary group of students on a public university campus publishing a Christian paper: should they be supported for what they are, or only if they speak "non-religiously"?

Let's start with school prayer--something that many zealous Republicans came to Washington in January to do something about. Perhaps the hottest case (not yet before the U.S. Supreme Court) comes from Pontotoc, Mississippi. For years, the local public school in Pontotoc has allowed students to read Scripture and pray at the beginning of the day--over the intercom system for the entire school. No one ever objected until Lisa Herdahl moved to town.

Before long, Herdahl decided to enlist the help of an ACLU attorney to protect her boys from the school prayer? Why? Because she believes in the separation of church and state, of church and school. Rev. William Sims, a local Baptist pastor, also believes in the separation of church and state, but he supports the schoolwide morning prayer because, he says, it's important "to reach people in first grade and let them know that God loves them." The community as a whole has "made a pledge to allow our children an opportunity to see the importance of Christ in their lives" [The Washington Post, March 26, 1995].

Restrictive Legal Opinions

Given the argumentative ruts in which the courts (and the American people generally) have restricted their arguments, there appear to be only two possible outcomes of the Pontotoc case. One is to support Ms. Herdahl, because she objects to prayer in the public school, and the Constitution is supposed to protect her children from an "establishment of religion," which is what a school prayer supposedly represents. Freedom from religion is a public right. Freedom for religion is to be protected in private only.

The second possible outcome would be for the courts to recognize the right of Pontotoc's majority to govern itself and its schools. Why should the community as a whole be stripped of its convictions just because one person objects? Doesn't that violate the whole principle of majority rule? Following this line of argument, supporters point out that the prayers are student-led and nondenominational; they are part of a community's culture. No student is forced to pray or join a church or become a believer.

The inadequacy of both lines of argument appears from the fact that they interpret the First Amendment as if only two human realities are involved, namely, the individual and the larger public. The first argument treats a person's right to "freedom from public religion" as the dominant purpose of the First Amendment. Religion is assumed to be a private matter. In other words, if tomorrow, a student in a school where no prayer is permitted were to go to court to appeal for protection of her right to exercise her religious freedom by being allowed to hear public prayer in the school, the courts would undoubtedly rule against her. Public entities have no religious

freedom. The second line of argument treats the town and schools and culture of Pontotoc as all part of a single, undifferentiated human entity, identified with its majority will and preferences.

No matter what way the courts rule on the Pontotoc case, most of us will feel that some injustice has been done. And we will be right. The only way to resolve this dispute is to recognize that religion cannot be confined to private quarters and that society consists of more than individuals and a single (undifferentiated) public. How will this help? Is there really a third path to follow toward a better outcome of this case?

Half Truths Misused

The truth on the part of the Pontotoc "public" is its awareness of Christianity's life, encompassing scope, including its public importance. The error of Pontotoc's citizens, however, is to believe that their town is simple, undifferentiated community of public law and Christian culture without distinction in which the majority should be free to rule on all things political, cultural, and educational.

The fact is that the town is made up of many communities and institutions and is not a simple whole. Pontotoc has more than one church and it legally allows citizens freedom of conscience, including the freedom not to be Christians. It does not (and may not) prohibit a Lisa Herdahl from moving to town. The people there work at different employments and participate in all kinds of institutions that are neither political nor educational nor ecclesiastical. To whatever extent a "Christian culture" is held in common, the social order is quite diverse, and no single body has authority to direct and govern the whole of that culture. Moreover, Pontotoc is set in a larger public-legal context of Mississippi and the United States. So the real question for government is not whether it may try to preserve a symbol of Christian culture in its public school, but how it should do justice to the people, churches, businesses, families, and the public community all at the same time.

Of course those who believe in Jesus Christ and who want to educate their children in the light of that faith ought to be free to do so. Justice demands that much. A single citizen should not be allowed to hold a political monopoly for her religion or point of view thereby making it possible for her to push the religion of others out of the public square. But the same protection from a politically enforced religion should also exist for citizens who are not Christians or who do not want prayer in their children's education. The question is how to do justice to all citizens at once.

Lisa Herdahl's (and the ACLU's) truth is the recognition that Pontotoc as civic community is not a community of faith but a community of public law that is obligated to do justice to every citizen. Herdahl's error, however, is in believing that under the principle of "no establishment" government should impose her view of life on everyone in the public square by confining all other views to private quarters. Unfortunately, the courts have been on this side of the argument for a long time, so it no longer seems strange to find the courts insisting that religion should always be pushed into privacy if anyone objects to its public appearance.

The problem with this argument is that there is nothing in the First Amendment that grants such power to governments or to a single citizen. All citizens are supposed to enjoy the free exercise of their religion, and the First Amendment says nothing about religion being a purely private affair. Rather, the responsibility of government, in the light of the First Amendment, is to do public justice

to all citizens, including both the cultural Christians of Pontotoc and the Lisa Herdahls of this society.

Finding a New Path

There is a way to do justice in this situation, but it requires the recognition of both the public reality of religion as well as society's complex character, which is made up of more than only individuals and an undifferentiated "public." In keeping with the principle by which churches are distinguished from the state, Pontotoc (and any other town or city) must get beyond thinking of itself as an undifferentiated religious-political-educational community. Pontotoc is a civic entity whose government deals with other kinds of institutions and with citizens who hold different faiths. With respect to the school-prayer controversy, the place to start is by recognizing the difference between schools and civil government.

Pontotoc, Mississippi, and eventually the U.S. Supreme Court, in keeping with the true meaning of the First Amendment, should allow the families in Pontotoc to set up and choose different schools to meet their differing educational needs. This should be permitted without any financial or legal discrimination among government-run and independent schools. In this way, Rev. Sims and others who want prayer in the school (and perhaps an even greater expression of Christian faith) will be free to have such a school in the public arena with public tax support. Those who, like Ms. Herdahl, want a school without prayer, will be equally free, without any discrimination, to have their children educated in such a school at public expense.

Only in this fashion can justice be done to all families and faiths in a complex and diverse society. Government remains non-discriminatory, neither imposing ("establishing") a single religion or non-religion on all citizens nor pushing any group's religion out of the public arena. Citizens enjoy the practice of their convictions in all areas of life, both public and private. And each of the diverse institutions of the community receives its just due. Instead of government-run schools remaining battlegrounds for a winner-take-all political victory by one side, the schools should become free of government, free to diversify and to serve all citizens. More than one type of school should receive public recognition, just as more than one church now receives public recognition in America. Schools must be disestablished just like churches were once disestablished. All families could then be treated with respect, and neither a majority nor a minority would be allowed to drive others into second-class status. The diverse schools will then be appreciated for the public (and not merely the private) roles they play in Pontotoc and in every other town or city.

The University of Virginia Case

Regarding another First Amendment battle, the U.S. Supreme Court will soon hand down a ruling on the case of *Rosenberger v. The Rector and Visitors of the University of Virginia*. The university charges every student an activity fee, some portion of which goes to fund student-initiated publications. Christian students requested university support for their magazine *Wide Awake*, which is published "to challenge Christians to live, in word and deed, according to the faith they proclaim, and to encourage students to consider what a personal relationship with Jesus Christ means."

The university refused to fund the Christian magazine even though it does fund publications by Muslim and Jewish student groups, which it recognizes as cultural rather than religious.

The Christians who publish Wide Awake are making their argument on "free speech" grounds rather than on "religious freedom" grounds. The university is responding by saying that it supports free speech but not when it is sectarian and overtly religious, because then the university would be guilty of "establishing" a religion on the public campus.

Although the Rosenberger case is very different from the one in Pontotoc, Mississippi, the principles in dispute are the same. In both cases, "public" should not be used as the equivalent of "non-religious." In fact, if the Justices have eyes to see it, they will recognize that the bias against evangelical Christians at Virginia arises from a deeply religious, public worldview that insists on forcing anything it does not approve out of the public square. It is simply unjust for a university to compel all students to pay an activity fee but then to bar some students from benefiting equally from those fees. The violation here is very much like the one where government collects taxes for lower education from everyone but then refuses to fund some of the schools chosen by parents.

The only way to do justice to all students at Virginia and to all families in Pontotoc is to respect the public practice of religion and to treat all religions (and non-religious professions or worldviews) with equal fairness. Neither Pontotoc nor the University of Virginia will be wrongly establishing a religion by respecting the religious and speech freedoms of their students. In fact, public openness to religious diversity is the only way to keep government from establishing religion.