US Supreme Court decisions attack separation of church and state and workers' rights

Ed Hightower
9 July 2020

In a pair of 7-2 decisions handed down Wednesday morning, the Supreme Court of the United States granted religious and religion-linked institutions unprecedented and unreviewable authority over their employees, undermining the democratic principle of the separation of church and state.

The court's ruling in *Our Lady of Guadalupe School v. Morrissey-Berru* permits employment discrimination at religious schools, while the ruling in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* deprives women workers at religion-linked institutions—including hospitals—of contraception and family planning services.

Wednesday's rulings follow another major attack on the separation of church and state this term in *Espinoza v. Montana*, which sanctioned the use of tax-deductible scholarship donations to fund religious schools, further undermining public education.

The facts at issue in *Our Lady of Guadalupe School*, which consolidated two separate cases by lay teachers at Catholic schools, testify to the anti-working-class character of the resulting precedent.

One plaintiff—Kristen Biel—worked as a fifth-grade teacher at St. James School in Los Angeles. Prior to teaching at the Catholic school, she had no formal religious training, such as in a seminary. The school did not require her to be Catholic in order to teach there. She taught English, spelling, reading, literature, mathematics, science and social studies. Her religious duties were limited to telling students when it was time for prayers, though a student led the prayers, and making sure the students were orderly at chapel services.

After Biel advised school administrators of a recent diagnosis of breast cancer and her intention to undergo chemotherapy, the school declined to renew her employment contract for the next school year. She filed a complaint with the Equal Employment Opportunity Commission alleging discrimination for a disability (cancer) and was allowed to sue St. James School under federal law.

The other plaintiff in *Our Lady of Guadalupe* taught at a Catholic school under similar circumstances, the main difference being that she alleged age discrimination when her employment status was downgraded from full- to part-time.

Under existing federal law, religious schools receive some deference in employment discrimination cases that concern leaders of a church or faith. This "ministerial exception" protects churches or other religious organizations in decisions about the hiring and firing of ministers or leading spiritual figures, especially those with theological training. Rabbis, priests, ministers, pastors and imams would all qualify for the ministerial exception.

Underlying the ministerial exception is the notion that the courts should not second guess internal religious decisions—perhaps firing a priest—that may hinge on interpretation of religious doctrine, dogma or belief. The church itself, so the logic goes, probably knows its own beliefs better than a court of law and stands in a better position to determine if a minister should be hired or fired for failing to conform to the church's religious beliefs.

According to Justice Samuel Alito's opinion for the court's majority, a religious school could designate nearly anyone as a "minister," and thus claim legal immunity from federal anti-discrimination laws. Notably, one of the plaintiff-teachers deemed to be a "minister" was not even a Catholic. As a result of this ruling, therefore, the law now sets the bar as to what constitutes a "minister" so low that virtually any employee of a religious school can be stripped of federal anti-discrimination protection.

The same tortured logic that converts a non-Catholic elementary school teacher into a Catholic minister could easily be applied to the school's custodian, librarian, nurse or cook. Discrimination—whether based on race, ethnicity, gender or sexual orientation—can flourish under the fig leaf justification of the free exercise of religion. Employees of religious schools have essentially no job security or legal

protection from discrimination.

While a dissent by Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, challenges this exception-turned-rule, Justices Steven Breyer (appointed by Bill Clinton) and Elena Kagan (appointed by Barack Obama) joined in Alito's opinion in full. One could hardly offer better proof of the hollowness of their "liberal" credentials.

Kagan did write a concurring opinion in the second case, *Little Sisters*, which Breyer joined. That case concerns legal requirements under the Affordable Care Act (ACA, or Obamacare) that employer-sponsored health insurance plans cover contraception and other women's health care needs (known as the contraceptive mandate). Hiding behind the largely inscrutable minutiae of administrative law, Kagan in her opinion upholds the Trump administration's decision to allow a broad exemption for religion-linked institutions.

She writes: "Sometimes when I squint, I read the law as giving HRSA [Health Resources and Services Administration] discretion over all coverage issues: The agency gets to decide who needs to provide what services to women. At other times, I see the statute [ACA] as putting the agency in charge of only the 'what' question, and not the 'who.' If I had to, I would of course decide which is the marginally better reading."

Kagan insists that the legal doctrine of *Chevron* deference—requiring that a court defer to a government agency's interpretation of an ambiguous statute—forces her to affirm the Trump administration's administrative rules attacking reproductive rights. A working-class woman might tell Kagan, "While you 'squint' and split hairs, I decide between medicine and groceries."

In her dissent, Ginsberg cites government estimates that 70,500 to 126,400 women of childbearing age "will experience the disappearance of the contraceptive coverage formerly available to them." She also points out that the cost of popular IUD (intrauterine device) forms of birth control constitutes nearly a month's wages for a woman earning the minimum wage. Sotomayor joined in this dissent.

Justice Clarence Thomas, a seething enemy of the separation of church and state, wrote the majority opinion, a fact that bears some political significance in its own right. While his opinion in *Little Sisters* concerns technicalities of administrative law and statutory interpretation, Thomas' concurrence in *Espinoza* just last week speaks more directly to his disdain for the separation of church and state, describing decades of precedent on the fundamental democratic notion as a "trendy disdain for deep religious conviction."

While the rulings in *Our Lady of Guadalupe School* and *Little Sisters* do not so directly discuss the First Amendment of the US Constitution, they trample on it. That old stronghold against tyranny begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

For all their prattle about "originalism" in interpreting the US Constitution, Thomas, Alito and the court's reactionary majority carve out one exception after another to the "Establishment Clause," cloaking their dirty work by claiming to protect "free exercise" of religion.

The logic of their jurisprudence tends toward a general religious immunity or exemption from secular law up to and including the Bill of Rights.

Thomas and company speak for powerful, aristocratic interests terrified at the prospect of socialist revolution at a time when class tensions have begun to boil over. Part of restructuring social life to preserve their privileges requires uprooting all remnants of revolutionary democratic consciousness remaining in bourgeois law, for fear that otherwise such heritage "communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion," to use Thomas' words.

Put another way, what use does American capitalism have for Enlightenment values—reason, science, equality? Would not medieval virtues—subservience, piety, hierarchy and acceptance of one's social standing—better serve a ruling class whose opulence would have made kings and noblemen blush?

Consider the precedents set in *Espinoza*, *Our Lady of Guadalupe School* and *Little Sisters* taken together and their impact on social life: the law of the land now permits that 1) religious schools can supplant secular public schools, 2) the teachers and other employees at religious schools can be fired for virtually any reason and 3) employees of any religious institution must fend for themselves to obtain basic health services.

The rulings represent a judicial counterrevolution running parallel to the social one waged against the working class by the White House, the legislature and the capitalist class as a whole.