

## The Breakfast Club

### Constitutional Minute for 28 June 2022

Note: I already had this essay mostly prepared when news of the concealed carry and abortion decisions were announced. I don't intend to ignore those two pivotal opinions; I'll address them soon.

#### Removing Another Brick from the Wall of Separation

I didn't write a Constitutional Minute last week, but I did take the opportunity, at least at the Yorktown and Newport News club meetings to discuss the Supreme Court announcement on June 21st of their opinion in [Carson v. Makin](#), which involved the State of Maine's policy granting tuition assistance (essentially, vouchers) to parents in the remote parts of the state, which had no public schools, so that the parents could pay for their children's education at private schools, as long as they were not private Christian schools. The Court declared that discriminating against Christian schools in in this regard amounted to discrimination against religion and would not be tolerated.

I was sorry to see Chief Justice Roberts chose to write the *Carson* opinion himself and not assign it to Justice Gorsuch, which would have made some previous essays I wrote on this topic more prescient.

In April 2017, Neil Gorsuch's controversial nomination to join the Supreme Court, replacing the iconic but now deceased Antonin Scalia was a very big deal. That Republicans in control of the Senate would keep Scalia's seat open in an election year and deny Barack Obama the opportunity to confirm Merrick Garland's nomination had the Left donning sackcloth and ashes with much wailing and gnashing of teeth. For this and other reasons, the death of the republic was [predicted](#).

But five years on, it appears the republic persists, for the moment at least.

In 2017, I was certain (OK, hopeful) that Neil Gorsuch's appointment would eventually result in the Court beginning to dismantle the "impenetrable wall of separation" the Court had erected in 1947 in the famous case of [Everson v Board of Education](#). *Everson* had decided that reimbursing parents for using public transportation to send children to either public or parochial schools did not violate the First Amendment's Wstablishment Clause; but the decision also created the infamous "wall of separation" doctrine that the Left would then capitalize on for the next 70 years. Both majority and dissenting opinions agreed that the "wall" must be observed. "*Everson* marked a turning point in the interpretation and application of disestablishment law in the modern era," says Wikipedia.

The issue of separation of church and state has been hotly contested in America since well before the Constitution and the first Amendment came into existence. James Madison fought tirelessly for religious freedom. His friend Thomas Jefferson was more proud of authoring Virginia's Act for Establishing Religious Freedom than he was of serving as President -- he ordered the former and not the later mentioned in his epitaph.

I published [this essay](#) on April 16, 2017 and [this one](#) the following week. Back then it was not unusual for me to crack out a 7-8 page, 2000-3000 word essay each and every week; there seemed to always be a constitutional issue in the news to write about and I had more time on my hands. I was hopeful at the time that a Justice Neil Gorsuch, a person with a deep respect for natural law, would be a boon to the

court. I was very disappointed by his subsequent authoring of [Bostock V. Clayton County, Georgia](#), but life goes on.

Anyway, back to the issue at hand; in 2017 the issue was whether churches could participate in a publicly-funded program which provided playground rubberized mulching. The Court said they must be allowed to participate; the money was supporting an entirely non-religious purpose and to do otherwise was discrimination against religion.

There is a caution we must consider in the *Carson* opinion; with government money often comes government control. In the past, many conservatives have balked at school voucher programs encompassing Christian schools for this reason. Will public tuition money coming into Christian school budgets require those schools to accommodate public policies? Must homosexual and transgender students be accepted if the school's Statement of Faith excludes them? Must Christian schools now teach evolution as truth in place of the Creation story? The Court in *Carson* said these issues were not within its scope, so they remain unanswered. No doubt if school voucher programs proliferate after *Carson*, the Left will try to attach these conditions, but there is ample SCOTUS opinion ([Fulton v. Philadelphia](#)) which says this coercion of religious belief will not be permitted.

Here in Virginia, we already have a tuition tax credit program which encompasses private Christian schools.<sup>i</sup> It does not provide direct payments to parents to cover the cost of tuition (the donations go directly to schools). The program was created by the Assembly to assist low-income families in moving their kids from public into private schools, including Christian schools. It provides a hefty tax credit (65% of the donation amount) to donors, whether individuals or companies, but more traditional schools voucher programs have also been discussed in Virginia from time to time.

So what will happen to the "Wall of Separation" doctrine in the years ahead? John O. McGinnis, writing in [Law & Liberty](#), shares my view that Tuesday's decision is a full frontal attack on "Separationism." In other words, it "removes another brick." In McGinnis' opinion, "Other cases will get more headlines this term. But *Carson* may prove the most important in the long run."

What will be the reaction from the Left when the *Carson* opinion sinks in? The concealed carry and abortion decisions will take center stage for awhile, but just as the 11<sup>th</sup> Amendment overturned a Supreme Court opinion,<sup>ii</sup> we might see Democrats attempt a Constitutional amendment to try to overturn *Carson* and rebuild their "wall." Such an effort will fail, but they may try anyway since even a futile effort will pull in a lot of donations.

It is going to be an exciting summer.

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<sup>i</sup> [https://www.doe.virginia.gov/school\\_finance/scholarships\\_tax\\_credits/](https://www.doe.virginia.gov/school_finance/scholarships_tax_credits/)

<sup>ii</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)