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ResearchReport

U.S. Supreme Court Decision in Carson v. Makin

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Issue

Summarize the June 21, 2022, U.S. Supreme Court decision *Carson v. Makin* (142 S.Ct. 1987 (2022)), about whether a Maine law that banned public tuition assistance funds from being used at private, religious high schools violates the Religion Clauses in the First Amendment to the U.S. Constitution.

Summary

In *Carson*, the Court struck down a Maine law that gives parents tuition assistance to enroll their child at a public or private nonreligious school of their choosing because their town does not operate its own public high school. The court found the law to be unconstitutional on the grounds that it violated the Free Exercise Clause of the First Amendment by excluding religious private schools but allowed funds to go to nonreligious private schools.

> ***First Amendment Religion Clauses***
>
> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…*
>
> --*U.S. Constitution*

The Court's vote was 6 to 3, with the majority voting to overturn the First Circuit Court of Appeals' decision that found the law constitutional. There were two dissenting opinions.

Case Background

Facts

The Maine program allowed parents who live in school districts that do not have their own high school, or do not have a contract with a school in another district, to send their child to a public or private high school of their choosing. The student's home district then forwards tuition to the chosen public or private school. The law creating the program barred funds from going to any private religious school.

The program exists because more than half of the state's school districts (legally called "school administrative units" or SAUs) do not operate a public high school due to the state's remote geography and low population density. To be eligible for the program, the Maine law requires a private school to be nonsectarian and meet certain other requirements.

In this case, the petitioners (two sets of parents), who lived in school districts that did not operate public high schools, challenged the tuition assistance program requirements which they felt would not award them assistance to send their children to religious private schools (specifically, Bangor Christian Schools (BCS) and Temple Academy). The petitioners sued the Maine education commissioner in federal district court in 2018, alleging that the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment. (The parents never officially applied to receive state tuition assistance for BCS and Temple Academy as they felt that would be a "futile" effort.)

Both BCS and Temple Academy are accredited by the New England Association of Schools and Colleges (NEASC), and both are clear about their religious missions. Both schools have an educational approach with religious beliefs entwined throughout the curriculum. In the stipulated record, both schools indicated that due to their Biblical standards, they do not hire teachers who are homosexual or transgender.

Procedural History

The petitioners challenged the nonsectarian requirement and sought declaratory and injunctive relief against this requirement. The district court rejected the petitioners' claims and sided with the respondents (the state and its education commissioner). The U.S. First Circuit Court of Appeals later affirmed the district court's decision. The petitioners then appealed to the U.S. Supreme Court, which agreed to hear the case.

Decision

Chief Justice Roberts wrote the majority opinion and was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

Question Before the Court

Key to the Court's decision in this case is the First Amendment to the Constitution, which states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This sentence contains both the Establishment Clause and the Free Exercise Clause, which have largely served to define the Unites States' separation of church and state. The Establishment Clause bars the government from promoting or establishing a religion, and the Free Exercise Clause prevents the government from hindering or inhibiting a citizen's right to freely worship as he or she chooses.

The issue before the Court was whether Maine's requirement that a private school be "nonsectarian" to be eligible under the program is a violation of the Free Exercise Clause.

State Laws

The Maine Constitution requires that towns "make suitable provisions, at their own expense, for the support and maintenance of public schools," (Me. Const., Art. VIII, pt. 1, § 1). In accordance with this, state law requires that every school-age child in Maine "shall be provided an opportunity to receive the benefits of free public education," (Me. Rev. Stat. Ann. Tit. 20-A, § 2 (1)).

Under the state's tuition assistance program, any district without a high school, or without a contract with one, must "pay the tuition … at the public school or approved private school of the parent's choice to which the student is accepted," (Me. Rev. Stat. Ann., Tit. 20-A, § 5204 (4)). To be approved for the tuition assistance program, private schools must meet certain requirements, including to either be NEASC-accredited or approved by the Maine Education Department. State law limits the tuition amount.

Maine instituted the nonsectarian requirement in 1981 (Me. Rev. Stat. Ann., Tit. 20-A, § 2951(2)). Prior to that, parents could choose to direct tuition assistance payments to private religious schools. The legislature banned that option after the state attorney general issued an opinion that public funding of private religious schools violated the Establishment Clause of the First Amendment.

As both the First Circuit Court and the Roberts opinion noted, in enforcing this requirement the Maine Education Department said that a school is considered sectarian, and therefore ineligible to

receive state funding under the program, if it is associated with a particular faith or belief system and presents the educational program through the lens of the faith. However, the department stated that association or affiliation with a religious institution alone is not the primary factor in determining sectarian status.

Related Cases

Justice Roberts focuses on two previous Supreme Court cases as precedent for the majority opinion in *Carson*. The first is *Trinity Lutheran Church of Columbia, Inc. v. Comer*, (137 S.Ct. 2012 (2017)). At issue in *Trinity Lutheran* was a Missouri program that offered grants to qualifying nonprofit organizations for installing cushioning playground surfaces. The Missouri Department of Natural Resources had a policy of denying these grants to any applicant owned or controlled by a church, sect, or other religious group. The Trinity Lutheran Church Child Learning Center submitted a grant application but was denied on the grounds that the center was operated by a church. Roberts notes the Supreme Court found that allowing Missouri to "discriminate [...] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" would be a violation of the Free Exercise Clause (*Id*. at 2015).

In a later decision, *Espinoza* v. *Montana Department of Revenue* (140 S.Ct. 2246 (2020)), the Court reached the same decision. In this case, a Montana program gave tax credits to donors who sponsored scholarships to private school tuition. The Montana Supreme Court held that the program, to the extent that it included religious schools, violated a provision of the Montana Constitution that barred government aid to any school controlled in whole or in part by a church, sect, or denomination (Art. X, § 6(1)). Montana then terminated the program, thus preventing the petitioners from accessing scholarship funds they otherwise would have used at religious schools. Roberts wrote, "We again held that the Free Exercise Clause forbade the state's action."

"A state need not subsidize private education," Roberts quoted from *Espinoza*, "[b]ut once a state decides to do so, it cannot disqualify some private schools solely because they are religious," (140 S.Ct. at 2261).

Applying the Related Cases

Roberts states that all that is necessary to resolve *Carson* is to apply *Trinity Lutheran* and *Espinoza*:

> Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistant payments here. And like the daycare center in *Trinity Lutheran*, BCS and Temple Academy are disqualified from this generally available benefit "solely because of their religious character" [. . . .]

> Our recent decision in *Espinoza* applied these basic principals in the context of religious education that we consider today. There, as here, we considered a state benefit program under which public funds flowed to support tuition payment at private schools. And there, as here, that program specifically carved out private religious schools from those eligible to receive such funds. While the wording in the Montana and Maine provisions is different their effect is the same: to "disqualify some private schools" from funding "solely because they are religious" (142 S.Ct. 1987, 1997).

Addressing the First Circuit Decision

The First Circuit offered two grounds upon which to distinguish Maine's nonsectarian requirement from the Supreme Court's decisions in *Trinity Lutheran* and *Espinoza,* and Roberts wrote that neither was sufficient.

First, the First Circuit found the Maine program to be constitutional and distinct from *Trinity Lutheran* and *Espinoza* because Maine's goal was to provide "a rough equivalent of the public school education that Maine may presumably require to be secular but that is not otherwise accessible" (979 F. 3d, at 44). Roberts notes that there are numerous important differences between the education offered at private schools that are permitted under the Maine law and Maine public schools. These include the following, among others:

1. private schools are not required to accept all students, as public schools generally are;

2. the free public education that Maine is providing is not free when parents choose permitted private schools whose tuition is much greater than the tuition assistance amount in the Maine program (the parents pay the remaining amount); and

3. the curriculum at participating private schools is not required to conform with Maine public schools (e.g., NEASC-accredited schools are exempt from state requirements; schools approved by the education department are exempt from most state requirements unless at least 60% of their students receive tuition assistance through the program).

Therefore, under the majority's reasoning, given the above differences between Maine's public and private schools, the fact that public schools offer nonsecular education and some private schools offer secular education is just another permissible difference once Maine chose not to operate schools in rural areas of the state, but rather to offer funds that parents may direct to private schools of their own choosing. Roberts reiterates, "As we held in *Espinoza*, a 'State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious'" (142 S.Ct. at 2000).

Second, Justice Roberts states, the First Circuit reasoned that Maine's program bars BCS and Temple Academy from receiving funding based on the religious use of the funding in instructing

children, which is distinct from *Trinity Lutheran* and *Espinoza* that banned status-based religious discrimination. Roberts and the majority did not find the distinction between organization status and organization uses of the funds to have significant bearing on the question.

In a brief to the court, Maine noted that it "has not broadly excluded private schools simply because they are affiliated with or controlled by a religious organization. Rather, a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith." Roberts writes that such an approach misreads the precedents of *Trinity Lutheran* and *Espinoza*: "We held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause" (142 S.Ct. at 2001). In other words, because these two decisions prohibited status-based religious discrimination, they do not by default allow use-based religious discrimination.

Roberts also wrote for the majority that the prospect of the state scrutinizing how a religious school pursues its mission would raise separate issues of entanglement and possible denominational favoritism. Maine argued that it does not conduct such scrutiny when approving private schools' eligibility for program funding, but rather relies on the schools to self-identify as nonsectarian. (The First Circuit decision also notes that neither BCS nor Temple Academy had applied for the program, so they were never deemed unqualified.)

Dissents

Breyer Dissent

Justice Breyer wrote the dissent and was joined by Justice Kagan. Justice Sotomayor joined for part of the dissent and also wrote her own dissent.

Religion Clauses of the First Amendment

Breyer writes that the Constitution's First Amendment forbids the government from making any law that establishes religion (Establishment Clause) and at the same time forbids the government from making any law that prohibits the free exercise of religion (Free Exercise Clause). He argues the majority decision pays almost no attention to the first part of this doctrine, while almost exclusively focusing on the second part. Breyer writes that these clauses, together referred to as the "Religion Clauses," simultaneously represent "complementary values" even though they are often seen as creating tension (*Cutter* v. *Wilkinson*, 544 U.S. 709, 719).

Quoting previous cases, he notes, "Together they attempt to chart a 'course of constitutional neutrality' with respect to government and religion. They were written to help create an American

Nation free of religious conflict that had plagued European nations with 'governmentally established religion[s]'" (142 S.Ct. at 2004).

Breyer agrees with the majority that the court has previously found that a state may allow, through the independent choices of private recipients of a government's neutral benefit program, funds to flow to a religious organization. But in *Carson*, he disagrees with the majority, writing that the decision ignored precedent that gives states the freedom to decide whether or not to fund certain religious activities, especially when they have "strong, establishment-related reasons for not doing so." He writes that states have some discretion when balancing the two religion clauses of the first amendment. This area of discretion has been referred to various cases as "room for play in the joints" between the clauses.

Breyer writes that this concept of room between the clauses "reflects the fact that it may be difficult to determine in any particular case whether the Free Exercise Clause *requires* a State to fund the activities of a religious institution, or whether the Establishment Clause *prohibits* the State from doing so." He noted that the court's past practice is to give states general principals to follow while also allowing states some degree of freedom to create policies that fit their circumstances. He states that Maine's "nonsectarian requirement falls squarely within the scope of that constitutional leeway."

Applying Previous Cases

Breyer disagrees with the majority that the question in *Carson* is resolved by *Trinity Lutheran* and *Espinoza* based on the fact that the latter two cases prohibited status-based religious discrimination by a state, while the issue before the Court in *Carson* is focused on use-based religious discrimination by a state.

The government program in *Trinity Lutheran* provided funding for playground surfaces to make them safer, and the Court ruled religious institutions should be prohibited from accessing those funds based upon their status as religious institutions. Breyer argues that making funds available to make playgrounds safer is "readily distinguishable" from prohibiting a public school tuition program from providing assistance to private religious schools where the assistance can be used for many religious uses, including paying the salary of religious teachers. Furthermore, Breyer cites the Maine education commissioner's position that affiliation with a church or religion was not enough in Maine's eyes to disqualify a school. Instead, Maine chose not to fund only the schools that promote the particular faith or beliefs and present education through the lens of the faith. Breyer wrote, "These distinctions are important. The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion."

As for *Espinoza*, Breyer notes that it is similar to *Trinity Lutheran* in that in *Espinoza*, Montana denied scholarship funds from being used at any private school owned or controlled by a church, religious sect, or denomination. The denial was based solely on religious status and not on religious use.

He further notes that Maine makes this distinction when determining whether a school is nonsectarian. Breyer refers to the Circuit Court decision quoting the education commissioner's response to the court, which indicates that the state primarily looks at what the school teaches through its curriculum and related activities to determine whether it is nonsectarian. A school fails to meet the requirement (and is deemed "sectarian") only if it both (1) is "'associated with a particular faith or belief system'" and also (2) "'promotes the faith or belief system with which it is associated and/or presents the [academic] material taught through the lens of this faith'" (979 F. 3d at 38).

Breyer reasons that the schools in the Maine case satisfy both the conditions to be deemed sectarian. BCS has educational objectives that include "lead[ing] each unsaved student to trust Christ as his/her personal savior and then follow Christ as Lord of his/her life," and "develop[ing] within each student a Christian world view and Christian philosophy of life" (142 S.Ct. at 2008). Similarly, Temple Academy promotes religion through academics. Its "educational philosophy is based on a thoroughly Christian and Biblical world view" (*Id.* at 2008*)*.

Breyer notes that in past cases the Court has found that for religious institutions the connection between their central mission and educating the youth in the faith is so close that teachers at these schools act as "ministers" for purposes of the First Amendment (*Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S.Ct. 2049 (2020)).
In closing, Breyer states:

> I emphasize the problems that may arise out of today's decision because they reinforce my belief that the Religion Clauses do not require Maine to pay for religious education simply because, in some rural areas, the State will help parents pay for a secular education. After all, the Establishment Clause forbids the State from paying for the practice of religion itself. And state neutrality in respect to the *teaching* of the practice of religion lies at the heart of this Clause… There is no meaningful difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's children (142 S.Ct. at 2012).

Sotomayor Dissent

Justice Sotomayor joined Breyer in most of his dissent but added additional points in her own dissent. She essentially believes that *Trinity Lutheran* was a mistake and the *Carson* decision amplifies the mistake.

She sees *Trinity Lutheran* as sharply veering away from holdings that recognized the "play in the joints" between the two religion clauses: "After assuming away an Establishment Clause violation, the Court revolutionized Free Exercise doctrine by equating a State's decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status" (*Id.* at 2013). *Trinity Lutheran* was limited, she points out, to discrimination based on religious identity ("status") rather than to the use of the funding.

She writes:

> [T]oday's decision directs the State of Maine (and by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction [. . .] In addition, while purporting to protect against discrimination of one kind, the Court requires Maine to fund what many of its citizens believe to be discrimination of other kinds [. . .] ([i.e.,] BCS's and Temple Academy's policies denying enrollment to students based on gender identity, sexual orientation, and religion) (*Id.* at 2014).

"It is irrational," she writes, "for this Court to hold that the Free Exercise Clause bars Maine from giving money to parents to fund the only type of education the State may provide consistent with the Establishment Clause: a religiously neutral one" (*Id.*) She indicated the decision is leading the country to a place where the separation of church and state, once a pillar of legal concepts, becomes a constitutional violation.

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