

In *Carson v. Makin*, Supreme Court Prolongs Death of Blaine Amendments

Majority rules that Maine can't exclude religious schools from tuitioning program

By JOSHUA DUNN

THE LONG, PAINFUL DEATH of Blaine Amendments continues. *Carson v. Makin* provided an opportunity for the U.S. Supreme Court to inter them fully, but it declined to do so. In its 6–3 decision, announced in June 2022, the court essentially said that the infamous amendments, which forbid states from using public funds to support religious institutions, almost always violate the Free Exercise Clause of the First Amendment—but given what the court declined to say, Blaine Amendments could potentially survive in extremely limited circumstances.

The court initially began its slow-motion execution of

Blaine Amendments to state constitutions in 2017's *Trinity Lutheran v. Comer*, which held that Missouri acted unconstitutionally when, because of the state's Blaine Amendment, it rejected a religious school's grant application to resurface a playground. However, the 7–2 court majority said the state's denial was unconstitutional because of discrimination based solely on the religious *status* of the school. Potentially, discrimination based on religious *use* of state funds could be allowable. Then, in 2019's *Espinoza v. Montana*, the court ruled that excluding religious schools from a tax-credit scholarship program also amounted to unconstitutional discrimination



Dave and Amy Carson with their daughter Olivia at Bangor Christian Schools in Bangor, Maine. The Carsons are one of three families that sued the state over a student-aid program that excludes families who choose to send their children to schools that teach religion.

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based on religious status. Singling out citizens and institutions from a general program solely because they happen to be religious violated longstanding principles that religious believers cannot be excluded from receiving otherwise available benefits. After this, the status-versus-use distinction was clearly on life support. In *Carson v. Makin*, the court reduced the flow of oxygen without completely cutting it off.

The issue in *Carson v. Makin* was a 1982 Maine law that excluded religious schools from the state’s “tuitioning system,” which pays for students to attend private schools (Maine does not have a Blaine Amendment). In the rural state of Maine, a majority of school districts do not have secondary schools. To ensure that all students can attend high school, the state has paid for students to attend either a public school or a private school of their choice—which included religious schools until the 1982 law was enacted. Citing *Trinity Lutheran* and *Espinoza*, a First Circuit panel, which included retired Supreme Court Justice David Souter, upheld Maine’s law, saying that it discriminated based on religious use, not status, because religious schools could participate as long as they offered a nonsectarian education. This reasoning simply illustrated that the distinction between status and use was inherently unstable, since it really meant that religious schools could avoid being discriminated against as long they were not religious.

In *Carson v. Makin*, Chief Justice John Roberts, joined by justices Clarence Thomas, Samuel Alito, Brett Kavanaugh, Neil Gorsuch, and Amy Coney Barrett, did not eliminate the status-versus-use distinction but severely eroded it. Roberts concluded that simply labeling a funding restriction “use”-based did not offer it constitutional immunity. Instead, use-based restrictions also constitute religious discrimination and therefore must satisfy strict scrutiny: such restrictions must serve a compelling government interest and be narrowly tailored. This program did not meet that standard. He concluded that “there is nothing neutral about Maine’s program. 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.”

However, Roberts did not eliminate the status-versus-use distinction, leaving open the possibility that some forms of use-based discrimination could survive. For instance, he pointed out that the court had previously upheld a use-based restriction in *Locke v. Davey* (2004) as a very narrow exception based on the state’s interest in not subsidizing the training of clergy. But *Locke*, he said, “cannot be read beyond its narrow focus on vocational religious degrees to generally authorize

the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.”

Roberts also made certain to emphasize, as he did in *Espinoza*, that a state does not have to subsidize private education—but that once it does it must do so on a religiously neutral basis. That assurance, however, did not satisfy the dissenters, particularly Justice Stephen Breyer, who was joined by justices Elena Kagan and Sonia Sotomayor. Continuing the same

arguments Breyer made in his dissent in *Espinoza*, he argued that there is really no way to limit the majority’s reasoning, saying, “We have never previously held what the Court holds today, namely, that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.” He then asked if school

districts must now provide “equivalent funds to parents who wish to send their children to religious schools?” and whether “school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education?”

Sotomayor offered her own dissent that was not joined by Breyer or Kagan. She simply bemoaned the fact that the court even “started down the path” it did in *Trinity Lutheran* and was continuing, in her view, “to dismantle the wall of separation between church and state that the Framers fought to build.”

What does this decision mean going forward? In particular, this ruling will make it more difficult to refuse to allow religious organizations to run charter schools, even schools that want to provide explicitly religious instruction. That would seem to deny a generally available benefit on the basis of religion that could not survive today’s more limited understanding of constitutional use-based restrictions. Certainly, states and school districts that offer support for private schools will be hard-pressed to deny support to religious schools unless they happen to be the odd K–12 school that exists to train ministers. However, one could expect those that do deny that funding to come up with more elaborate use-based justifications. One should also expect litigation based on Breyer’s questions. Cabining the majority’s reasoning would seem to be difficult. But that also forces one to ask if Roberts, in his minimalist mode, is not confirming Zeno’s Achilles Paradox. Each decision, starting with *Trinity Lutheran* and continuing through *Carson v. Makin*, takes a step toward eliminating Blaine Amendments, but the court never seems to get all the way there.

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