

Using My Religion: *Carson v. Makin* and the Status/Use (Non)Distinction

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For a brief, five-year period in American free-exercise jurisprudence, a curious theory gained sway over courts and commentators alike. It went something like this: Government can't discriminate against you because you are religious, but it can discriminate against you because you do religious stuff. Within a half decade of its positing, however, this theory of a "stuff" exception to the First Amendment's bar against religious discrimination has been discredited and discarded. The Supreme Court did the job in *Carson v. Makin*.¹

The "stuff" exception also went by another name: the "status/use distinction." Although the Free Exercise Clause prohibits government from denying an otherwise available public benefit because of the religious status, or identity, of the recipient, the theory suggested, it allows government to deny the benefit because of the religious use to which the recipient might put it, or the religious conduct in which the recipient might engage with it. The distinction was born of a plurality footnote in 2017's *Trinity Lutheran Church of Columbia, Inc. v. Comer*,² and immediately, opponents of educational-choice programs—that is, programs that provide aid to families to choose private alternatives to a public education³—began wielding it as a

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¹ 142 S. Ct. 1987 (2022).

² *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

³ Educational choice programs come in several forms: (1) voucher programs, which provide publicly funded scholarships that students can use to attend the private school of their parents' choice; (2) tax-credit scholarship programs, which also provide scholarships but are funded by private donations, incentivized by a tax credit to non-profit scholarship-granting organizations; (3) education savings account programs, which may be publicly funded or tax credit-incentivized, and which provide government-authorized savings accounts that parents can use on a wide array of educational

weapon to try to deprive families of religious options in such programs. It seemed the weapon might be removed from their arsenal in *Espinoza v. Montana Department of Revenue*, but the status/use distinction lived to see another day.⁴ In *Carson*, it could cheat death no more.

This article examines the short life and happy death of the status/use distinction. The article begins with the distinction's origin story in *Trinity Lutheran*, then recounts the distinction's dodge of a bullet in *Espinoza*. Next up is a discussion of *Carson*, the case that killed the status/use distinction. Finally, the article considers what *Carson* portends for the future of the educational-choice movement, exploring what the decision does—and does not—resolve in the seemingly unending legal war that public school teachers' unions and their allies have waged on educational choice.

I. *Trinity Lutheran*, Wherein the Status/Use Distinction Is Born

The status/use distinction (or at least the idea of such a distinction) was born at 10:09 a.m. on June 26, 2017.⁵ At that time, on that day, the Supreme Court handed down its decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, and tucked away inside was Footnote 3, the villain of our story.

Trinity Lutheran concerned the exclusion of a church-run preschool from a Missouri playground resurfacing program. The program provided direct, monetary grants, awarded on a competitive basis, to preschools and other nonprofits to purchase rubber paving materials made from scrap tires.⁶ In 2012, Trinity Lutheran Church Child Learning Center—a preschool and daycare center that operated under the auspices and on the property of Trinity Lutheran Church—applied for one of these grants. Despite ranking fifth among the 44 applicants that year, Trinity Lutheran did not receive one of the 14 grants ultimately awarded, because the state maintained “a strict and express policy of denying grants to any applicant owned or

services for their children; and (4) personal tax credit or deduction programs, which provide a tax credit or deduction to parents for educational expenses incurred for their own children's education.

⁴ 140 S. Ct. 2246 (2020).

⁵ Amy Howe, *Trinity Lutheran Church of Columbia Inc. v. Comer*, SCOTUSblog (June 26, 2017), <https://tinyurl.com/fyzhccay> (birth announcement by Amy Howe: “We have *Trinity Lutheran*, which is by the Chief Justice (for the most part, although not footnote 3).”).

⁶ *Trinity Lutheran*, 137 S. Ct. at 2017.

controlled by a church, sect, or other religious entity.”⁷ According to the state, this policy was mandated by a provision of the Missouri Constitution, commonly known as a “Blaine Amendment,”⁸ that provides, “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”⁹

Trinity Lutheran challenged its exclusion, and its case reached the Supreme Court. In an opinion authored by Chief Justice John Roberts, the Court held that Missouri’s exclusion violated the Free Exercise Clause of the First Amendment. The Court began its analysis by examining past precedent, which “repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.”¹⁰ Missouri’s policy did just that, “put[ting] Trinity Lutheran to a choice”: “participate in an otherwise available benefit program or remain a religious institution.”¹¹

The Court then rejected Missouri’s reliance on *Locke v. Davey* to support its exclusion.¹² In *Locke*, the Court upheld Washington’s exclusion of “devotional theology” majors—students pursuing a degree in “religious instruction that will prepare [them] for the ministry”—from a state scholarship program for college students.¹³ As the Court explained in *Trinity Lutheran*, Washington had “merely chosen not to fund a distinct category of instruction.”¹⁴ The plaintiff in that case, the Court added, “was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry,” which is “an ‘essentially religious endeavor.’”¹⁵ Trinity Lutheran, by contrast, “was denied a grant simply because of what it is—a church.”¹⁶

⁷ *Id.*

⁸ As discussed *infra* notes 27–31 and accompanying text. Blaine Amendments have a sordid history rooted in 19th-century, anti-Catholic bigotry.

⁹ Mo. Const. art. I, § 7.

¹⁰ *Trinity Lutheran*, 137 S. Ct. at 2019.

¹¹ *Id.* at 2021–22.

¹² 540 U.S. 712 (2004).

¹³ *Id.* at 715, 719.

¹⁴ *Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 721).

¹⁵ *Id.* (quoting *Locke*, 540 U.S. at 721) (emphasis in original); see also *id.* at 2024 (“The only thing he could not do was use the scholarship to pursue a degree in [devotional theology].”).

¹⁶ *Id.*

The Court then proceeded to hold that compliance with Missouri’s state constitutional proscription on aid to schools controlled by a “church, sect or denomination of religion” could not justify the playground grant program’s religious exclusion.¹⁷ But before doing so, the Court—four justices of the Court, actually—dropped a little footnote.

Now, Supreme Court footnotes rarely gain notoriety and even less frequently, infamy. Those that manage to achieve such status are typically known simply by their number. “Footnote 4” in *United States v. Carolene Products Co.* is an example.¹⁸ “Footnote 3” in *Trinity Lutheran* also made the cut, and it did not take long for it to do so: it was anointed “infamous” a mere nine minutes after the opinion was handed down.¹⁸

So, why the infamy? Here’s what Footnote 3 had to say:

This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.¹⁹

In those 27 words²⁰ was born the “status/use distinction”: the idea that although government may not withhold a benefit based on the would-be beneficiary’s religious status, or identity, it may withhold a benefit based on the religious use to which the would-be beneficiary might put it.²¹

As mentioned above, Footnote 3 was not part of the majority opinion in *Trinity Lutheran*. It was appended to what was, in all other respects, the majority opinion, but the footnote itself was joined only by four justices, depriving it of precedential value. And even those four justices did not actually *embrace* a status/use distinction—they

¹⁷ *Id.* at 2024–25.

¹⁸ Howe, *supra* note 5. Thankfully, as we shall soon see, Footnote 3 did not have quite the staying power of Footnote 4, which continues to haunt us.

¹⁹ *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality).

²⁰ Like other members of the 27 Club, Footnote 3 was not long for the world. See *The 27 Club: A Brief History*, Rolling Stone (Dec. 8, 2019), <https://tinyurl.com/yjx2ubyz>.

²¹ Under this view of the law, for example, government could not withhold social security benefits from a retiree because she is religious, but it could prohibit her from tithing part of her social security income to her church.

merely left open the possibility of one.²² Meanwhile, Justice Neil Gorsuch, who, along with Justice Clarence Thomas, did not join Footnote 3, took issue with even the suggestion that a useful distinction between religious status and use could be made. In an opinion concurring in part, he said he “harbor[ed] doubts about the stability of such a line,” because “[o]ften enough the same facts can be described both ways.”²³ “Neither do I see,” he continued, “why the First Amendment’s Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status).”²⁴ For this reason, Justice Gorsuch concluded, “I don’t see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.”²⁵

But Justice Gorsuch’s view didn’t carry the day—yet. And because it didn’t, the idea of a constitutionally meaningful status/use distinction was born.

Nevertheless, *Trinity Lutheran* was a great victory for religious liberty, and, although not an educational-choice case, it was also widely viewed as a victory for educational choice. After all, opponents of choice had long argued that Blaine Amendments like the one Missouri relied on also prohibited educational-choice programs that included religious options. For decades, they had been weaponizing these provisions, challenging educational-choice programs in state courts under them, usually unsuccessfully.²⁶ *Trinity Lutheran* seemed to finally remove this weapon from their arsenal.

²² See *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part) (“[T]he Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*.”).

²³ *Id.* at 2025–26.

²⁴ *Id.* at 2026 (emphasis in original).

²⁵ *Id.*

²⁶ See, e.g., *Schwartz v. Lopez*, 382 P.3d 886, 899 (Nev. 2016) (rejecting Blaine Amendment challenge to publicly funded education savings account program); *Magee v. Boyd*, 175 So. 3d 79, 131–37 (Ala. 2015) (rejecting Blaine Amendment challenge to refundable personal tax-credit program and tax-credit scholarship program); *Meredith v. Pence*, 984 N.E.2d 1213, 1227–30 (Ind. 2013) (rejecting Blaine Amendment challenge to voucher program); *Kotterman v. Killian*, 972 P.2d 606, 617–25 (Ariz. 1999) (rejecting Blaine Amendment challenge to tax-credit scholarship program); *Jackson v. Benson*, 578 N.W.2d 602, 620–23 (Wis. 1998) (rejecting Blaine Amendment challenge to voucher program); *Niehaus v. Huppenthal*, 310 P.3d 983, 985–89 (Ariz. Ct. App. 2013) (rejecting

But then there was the matter of Footnote 3, and, here, educational-choice opponents found an opening. They began arguing that the status/use distinction floated in the footnote meant state constitutions *could* bar religious options in educational-choice programs. Why? Because religious schools engage in religious instruction; they *do* religious *stuff*. Opponents of choice insisted that even if *Trinity Lutheran* meant a state constitution could not bar a family's choice of school because it *is* religious, it could still bar a family from putting their educational-choice benefit to the *use* of procuring a religious education. Justice Gorsuch's warning—"Often enough the same facts can be described both ways"—had quickly come to fruition.

II. *Espinoza v. Montana Department of Revenue*, wherein the Status/Use Distinction Dodges a Bullet

Meanwhile, it wasn't just the usual suspects (read: public school teachers' unions) making this argument. Government bureaucrats hostile to educational choice joined the party. In Montana, after the state legislature enacted an educational-choice program that offered parents the choice of religious and nonreligious schools alike, the state's department of revenue—the agency charged with administering the program—promulgated a regulation barring religious options from it.²⁷ Why? Like Missouri in *Trinity Lutheran*, the department insisted the religious exclusion was necessary to comply with the state's Blaine Amendment, which provides, in part: "The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination."²⁸

Blaine Amendment challenge to publicly funded education savings account program); *Green v. Garriott*, 212 P.3d 96, 105–06 (Ariz. Ct. App. 2009) (rejecting Blaine Amendment challenge to tax-credit scholarship program); *Toney v. Bower*, 744 N.E.2d 351, 357–63 (Ill. Ct. App. 2001) (rejecting Blaine Amendment challenge to tax-credit scholarship program); see also *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211–12 (Ohio 1999) (rejecting compelled support clause challenge to voucher program). But see *Cain v. Horne*, 202 P.3d 1178, 1183–85 (Ariz. 2009) (invalidating voucher program under Blaine Amendment); *Bush v. Holmes*, 886 So. 2d 340, 347–61 (Fla. Dist. Ct. App. 2004) (invalidating voucher program under Blaine Amendment), *aff'd* on other grounds, 919 So. 2d 392 (Fla. 2006).

²⁷ *Espinoza*, 140 S. Ct. at 2252.

²⁸ Mont. Const. art. X, § 6(1).

A quick word regarding such state constitutional provisions is in order. Blaine Amendments are found in 37 state constitutions and have a sordid lineage steeped in 19th-century anti-Catholic bigotry.²⁹ At the time these provisions were originally adopted, public schools were overtly religious and nondenominational Protestant. Bible reading, hymn singing, and prayer recitation were common in the public schools, and it was the King James Version of the Bible that was read and Protestant hymns and prayers that were sung and recited.³⁰ It was not uncommon, moreover, for Catholic students to be beaten or expelled from their public schools for refusing to engage in these Protestant exercises.³¹

Despite the fact that the public schools were thoroughly religious, they were not controlled or operated by a church, sect, or denomination and, thus, not subject to the proscriptions on public funding contained in the Blaine Amendments. By contrast, Catholic schools—which the Church had begun establishing to provide an acceptable alternative to Catholic children—were. Thus, the twin aims of the Blaine Amendments: preserve the religious nature of the public schools while denying aid to Catholic schools.

Understanding this history is important. When opponents of parental choice in education rely on Blaine Amendments to take that choice away, they are not relying on some high-minded, noble principle of church-state separation. They are relying on vestiges of 19th-century anti-Catholic bigotry.

And the Montana Department of Revenue was all too happy to invoke such a vestige to justify banning religious options from the state's educational-choice program. But three mothers of children

²⁹ See Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. Sch. Choice 331, 337, 341 (2009). These provisions are named for Representative James G. Blaine, who attempted unsuccessfully to amend the U.S. Constitution to include a similar provision. *Id.* at 341. "Although their language varies, and some interpretation is involved in classifying a provision as a Blaine Amendment, [the author] considers any provision that specifically prohibits state legislatures (and often other governmental entities) from appropriating funds to religious sects or institutions, including religious schools, to be a Blaine Amendment." *Answers to Frequently Asked Questions About Blaine Amendments*, Institute for Justice, <https://tinyurl.com/3h9vpzun>.

³⁰ See, e.g., Lloyd P. Jorgenson, *The State and the Non-Public School, 1825–1925*, 90 (1987); see generally *id.* 69–110; Philip Hamburger, *Separation of Church and State 219–29* (2002).

³¹ See, e.g., *Donahoe v. Richards*, 38 Me. 376, 377–78 (1854); Jorgenson, *supra* note 30, at 90; Joan DelFattore, *The Fourth R* 49 (2004).

eligible for the program and wanting to use it to attend religious schools challenged the religious exclusion, alleging, like Trinity Lutheran had in challenging the religious exclusion from Missouri's scrap-tire program, that it violated their rights under the Free Exercise Clause of the U.S. Constitution. The case reached the U.S. Supreme Court two years after *Trinity Lutheran*, and it appeared the Court was poised to resolve the status/use question raised in that case.

Except it didn't. To be sure, the Montana Department of Revenue insisted that Montana's Blaine Amendment "has the goal or effect of ensuring that government aid does not end up being used for 'sectarian education' or 'religious education'"—that is, ensuring government aid is not put to a religious *use*.³² And without the exclusion, it maintained, the aid provided by the educational-choice program "could be used for religious ends by some recipients, particularly schools that believe faith should '*permeate*' ['] everything they do."³³ In the department's view, then, it was all about religious use: by barring religious options, it was simply engaging in the good kind of religious discrimination, not the bad kind the Court denounced in *Trinity Lutheran*.

But Chief Justice Roberts, writing for the Court, saw things as more statusy than usey. Montana's Blaine Amendment, he explained, "bars religious schools from public benefits solely because of the religious character of the schools" and "bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school."³⁴ The provision thus "discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations 'owned or controlled by a church, sect, or other religious entity.'"³⁵ Thus, in Roberts's view, the case "turn[ed] expressly on religious status and not religious use."³⁶

The good news in this was that Montana's bar to religious options in the state's educational-choice program met the same fate as

³² Espinoza, 140 S. Ct. at 2256 (quoting *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603, 609, 613–14 (Mont. 2018), *rev'd and remanded*, 140 S. Ct. 2246 (2020)).

³³ *Id.* (alteration and emphasis in original) (quoting Br. for Respondents at 39).

³⁴ *Id.* at 2255.

³⁵ *Id.* at 2256 (quoting *Trinity Lutheran*, 137 S. Ct. at 2017).

³⁶ *Id.*

the religious exclusion in Missouri's playground resurfacing program: the Court held it unconstitutional. The bad news was that the status/use distinction lived to see another day, and to continue being wielded as justification for denying parents religious options in educational choice programs.

Opponents of those programs, while obviously unhappy with the outcome, found comfort in the fact that the Court had shown mercy on the status/use distinction. For example, Ron Meyer, a lawyer who has represented the Florida Education Association in legal challenges to educational-choice programs in that state, breathed a huge sigh of relief that the Court had "simply" concluded that benefits were "being withheld solely because of the religious character of the school" and didn't "reach into whether those monies were used to inculcate students."³⁷ There was no doubt that Meyer and his colleagues in the anti-parental-choice camp saw *Espinoza* as a green light to continue—or at least not a red light to stop—attacking educational-choice programs because of the religious use to which they allow a parent to put their child's benefit.

But if *Espinoza* wasn't a red light to stop use-based discrimination against religious schools and the parents who choose them, it was at least a yellow one. For one thing, the Court suggested that religious status and religious use were not mutually exclusive. "Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses," Chief Justice Roberts wrote for the Court.³⁸ As one commentator³⁹ suggested at the time, this statement "could indicate sympathy for Justice Gorsuch's position that status and use ultimately collapse into each other—that they are two sides of the same coin."⁴⁰ Moreover, the chief stressed that nothing in the Court's opinion was "meant to suggest that we agree with the Department [of Revenue] that some lesser degree of scrutiny applies to discrimination against

³⁷ Mary Ellen Klas, Ruling on Religious Schools Could Steer More Public Money to Private Schools, Tampa Bay Times (July 1, 2020), <https://tinyurl.com/3u6vns45>.

³⁸ *Espinoza*, 140 S. Ct. at 2256.

³⁹ Your scribe.

⁴⁰ Michael Bindas, The Status of Use-Based Exclusions & Educational Choice after *Espinoza*, 21 *Federalist Soc'y Rev.* 204, 216 (2020).

religious uses of government aid.”⁴¹ Finally, citing Justice Gorsuch’s concurring opinion in *Trinity Lutheran*, the chief expressly acknowledged that “[s]ome Members of the Court . . . have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status.”⁴² These statements provided hope to educational-choice supporters that when the Court finally *did* reach the viability of the status/use distinction, it would put it to rest.⁴³

And speaking of Justice Gorsuch . . . he again issued a concurring opinion, echoing the one he had authored in *Trinity Lutheran*.⁴⁴ “Maybe it’s possible to describe what happened here as status-based discrimination,” he opined, “[b]ut it seems equally, and maybe more, natural to say that the State’s discrimination focused on what religious parents and schools *do*—teach religion.”⁴⁵ In the end, however, he insisted that “[c]alling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.”⁴⁶

Justice Gorsuch was prescient.

III. *Carson v. Makin*, wherein the Status/Use Distinction Dies (Mostly)

While the Supreme Court was resolving *Espinoza*, another educational-choice case involving a religious exclusion was making its way through the lower courts. That case—the hero of our article—was *Carson v. Makin*.

⁴¹ *Espinoza*, 140 S. Ct. at 2257. In reviewing the status-based discrimination in *Trinity Lutheran* and *Espinoza*, the Court applied “strict scrutiny”—the most searching level of judicial scrutiny and the one least deferential toward the government. “[I]n upholding the religious use-based exclusion in *Locke v. Davey*,” by contrast, “the Court applied what many lower courts and commentators considered a standard short of strict scrutiny.” Bindas, *supra* note 40, at 216.

⁴² *Id.* (citing *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part)).

⁴³ See Bindas, *supra* note 40, at 117–18.

⁴⁴ Justices Thomas and Alito also authored concurring opinions. Justice Alito’s focused on the bigoted origins of the Blaine Amendments. See *Espinoza*, 140 S. Ct. at 2267 (Alito, J., concurring).

⁴⁵ *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring) (emphasis in original).

⁴⁶ *Id.*

A. *The Program and the Exclusion*

Carson concerned a tuition assistance program for high school students in Maine. The Pine Tree State has a lot of pine trees; it's pretty rural. Consequently, many towns do not operate a public high school. If a school district neither operates its own high school nor contracts with a particular private or public high school to educate the resident students of the district, the district must pay tuition, up to a statutory maximum, "at the public school or the approved private school of the parent's choice at which the student is accepted."⁴⁷

Participating families may send their children to schools inside or outside the state—even outside the country—and school districts have paid for students to attend some of the most elite, blue-blood prep schools (think Avon Old Farms, the Taft School, and Miss Porter's).⁴⁸ But although students can—and have—attended school in Santa Barbara, California, under the program, they cannot (or, before *Carson*, could not) attend a Jewish day school in their Maine hometown, or an Islamic school, or the school in their local Catholic parish in Augusta. That is because Maine, beginning in 1980, forbade parents from choosing any school the state deemed "sectarian."

Before 1980, parents were free to choose such schools, and hundreds of students attended them annually under the program. But the state barred sectarian options after the Maine attorney general, in 1980, opined that including them as a choice in the program violated the federal Establishment Clause.⁴⁹ The legislature then codified this bar in a statute providing that a student's chosen school must be "nonsectarian."⁵⁰

Now, it wasn't at all clear that the Establishment Clause prohibited the participation of religious schools in educational-choice programs back in 1980. But even giving the attorney general the benefit of the doubt, once the U.S. Supreme Court held, in 2002, that the Establishment Clause did *not* prohibit the participation of religious schools in educational-choice programs, it should have been pretty clear that

⁴⁷ Me. Stat. tit. 20-A, § 5204(4).

⁴⁸ *Id.* §§ 2951(3), 5808.

⁴⁹ Me. Op. Att'y Gen. No. 80-2 (1980).

⁵⁰ 1981 Me. Laws 2177 (codified at Me. Stat. tit. 20-A, § 2951(2)). Maine also has a tuition assistance program for elementary school students, Me. Stat. tit. 20-A, § 5203(4), and the now-invalidated sectarian exclusion in Section 2951(2) applied to it, as well.

the Establishment Clause did not prohibit the participation of religious schools in educational-choice programs.⁵¹ Yet the state went right on excluding them.

Enter the Carsons and Nelsons. These Maine families lived in towns that neither operated a public high school nor contracted with a school to educate the resident children of the town, so they were entitled to the tuition assistance benefit. Both families thought a religious school was the best fit for their children, but that was not an option under the program. The Carsons were able to afford tuition on their own and therefore decided to forgo the benefit and send their daughter to a religious high school. The Nelsons, however, could not afford to go without the tuition assistance and so made the difficult choice to send their children to a nonreligious high school, even though they knew it was not the best school for them.

The circumstances of these two families demonstrate well the fundamental constitutional problem with Maine's religious exclusion: A family could either exercise their right to choose a religious school for their children, in which case they had to forgo their statutory right to the tuition assistance benefit, or they could exercise their statutory right to the tuition assistance benefit, in which case they had to forgo their constitutional right to send their children to a religious school. They could have one or the other, but they could not have both.

B. Litigation in the Lower Courts

In 2018—shortly after *Trinity Lutheran* had been decided but while *Espinoza* was still making its way through the lower courts—the families challenged Maine's "sectarian" exclusion in federal court, claiming it violated, among other things, their rights under the federal Free Exercise Clause. They were not the first plaintiffs to challenge the exclusion. Four other challenges, dating back to the 1990s, had been filed, and each one failed.⁵² But something had happened since those earlier cases: *Trinity Lutheran*, in which the Court held that the Free Exercise Clause prohibits discrimination in public

⁵¹ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁵² *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999); *Eulitt ex rel. Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004); *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006).

benefits based on religious status. Maine had long applied its sectarian exclusion based on the religious status of the excluded schools, so, in light of *Trinity Lutheran*, the exclusion seemed sure to fail.⁵³

But Maine wised up. Whereas, before *Trinity Lutheran*, the state excluded schools based on religious status, the state shifted its focus to religious use in the wake of the decision. Now, as the state's commissioner of education explained during discovery in *Carson*, "affiliation or association with a church or religious institution" is "not dispositive." Rather, the Department of Education examines whether the school, "in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith."⁵⁴ "The Department's focus," according to the commissioner, is "on what the school teaches through its curriculum and related activities, and how the material is presented."⁵⁵ It was clear that Maine was going to ride the status/use distinction as far as it could.

The district court ruled against the Carsons and Nelsons and upheld the religious exclusion. According to the court, the last decision of the U.S. Court of Appeals for the First Circuit upholding the sectarian exclusion⁵⁶ had not been "unmistakably cast . . . into disrepute" by *Trinity Lutheran*.⁵⁷ And why had it not, according to the district court? Because of Footnote 3.⁵⁸ "It is certainly open to the

⁵³ See *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 n.4 (10th Cir. 2008) (explaining that Maine "declined funding the entire program of education at the disfavored schools, based on their religious affiliation"); *Strout*, 178 F.3d at 66 (Campbell, J., concurring) ("The Maine tuition statute was narrowed in 1981 to exclude religiously-affiliated schools[.]"); *Bagley*, 728 A.2d at 147 (Clifford, J., dissenting) (noting the state "excludes sectarian schools from the choices available to the parents *solely* because of religious affiliation").

⁵⁴ Def. Robert G. Hasson, Jr.'s Resps. to Pls.' First Set of Interrogs. No. 7, *Carson v. Makin*, 142 S. Ct. 1987 (2022) (No. 20-1088).

⁵⁵ *Id.*

⁵⁶ *Eulitt*, 386 F.3d 344.

⁵⁷ *Carson v. Makin*, 401 F. Supp. 3d 207, 211 (D. Me. 2019), *aff'd*, 979 F.3d 21 (1st Cir. 2020), *rev'd and remanded*, 142 S. Ct. 1987 (2022).

⁵⁸ As the district court explained, the four justices who joined the footnote did "not address religious uses of funding," *id.* (emphasis omitted) (quoting *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality)), and Justice Stephen Breyer, in an opinion concurring in the judgment, "[e]ff[ect] the application of the Free Exercise Clause to other kinds of public benefits for another day." *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in judgment)).

First Circuit” to revisit its earlier ruling, the court concluded, but “it is not my role to make that decision.”⁵⁹

The Carsons and Nelsons appealed to the First Circuit, which heard oral argument in the case on January 8, 2020, two weeks before the Supreme Court heard argument in *Espinoza*. The First Circuit, however, did not issue its opinion until four months after *Espinoza* was decided, presumably wanting to see how the Supreme Court would resolve the constitutionality of Montana’s religious exclusion before ruling on the constitutionality of Maine’s. The Supreme Court, of course, struck down Montana’s exclusion, and the First Circuit, in turn, *upheld* Maine’s.

So, what gives? Footnote 3, of course, plus a recharacterization of the tuition assistance program itself.

The First Circuit began by acknowledging that it had to consider the constitutionality of Maine’s sectarian exclusion “afresh in the light of” *Espinoza*, as well as *Trinity Lutheran*.⁶⁰ But unlike the religious exclusions in those cases, the court determined, Maine’s exclusion did not turn solely on religious “status”—that is, “the aid recipient’s affiliation with or control by a religious institution.”⁶¹ Noting the exclusion’s “focus on what the school teaches through its curriculum and related activities, and how the material is presented,” the court concluded that it turned on “the religious use that [the school] would make of [a student’s aid] in instructing children.”⁶²

Having determined that the exclusion fell on the “use” side of the status/use distinction (a distinction that, again, the Supreme Court had not actually endorsed, but merely posited), the First Circuit then addressed the appropriate level of scrutiny to apply in reviewing its constitutionality. The court noted that although *Espinoza* and *Trinity Lutheran* had held that strict scrutiny—the most searching form of judicial scrutiny⁶³—applies to religious status-based discrimination, those decisions “expressly left unaddressed the level of scrutiny applicable to a use-based restriction.”⁶⁴ With no holding from the

⁵⁹ *Id.*

⁶⁰ Carson, 979 F.3d at 32, rev’d and remanded, 142 S. Ct. 1987.

⁶¹ *Id.* at 37.

⁶² *Id.* at 40 (quoting Def. Robert G. Hasson, Jr.’s Resps. to Pls.’ First Set of Interrogs. No. 7).

⁶³ See *supra* note 42.

⁶⁴ Carson, 979 F.3d at 34.

Supreme Court on this score, the First Circuit subjected the exclusion to mere rational basis review, the least searching form of scrutiny (that is, the most deferential toward the government).⁶⁵ This, notwithstanding that the Supreme Court, in *Espinoza* itself, stated that nothing in its opinion was “meant to suggest that . . . some lesser degree of scrutiny applies to discrimination against religious uses of government aid.”⁶⁶

The First Circuit then concluded that the exclusion survived such review. In so doing, it recharacterized the benefit at issue, defining it not as the relevant statute defined it (tuition to use at a public or private school of the parent’s choosing⁶⁷), but rather as the “rough equivalent of [a Maine] public school education.”⁶⁸ And because Maine can “permissibly require” a public school education “to be secular,” the Court then reasoned, it can “impose[] a use-based ‘non-sectarian’ restriction on the public funds that it makes available for the purpose of providing a substitute for . . . public educational instruction.”⁶⁹

The First Circuit’s conclusion in this regard was curious. For one thing, the schools to which the Carsons and Nelsons wanted to send their children satisfied the state’s compulsory attendance laws and thus provided all the substitute for a public education the state requires. Moreover, the First Circuit’s reasoning—a secular education is a nonsectarian education—was utterly tautological. In the end, the court simply redefined the benefit in a way aimed at justifying the very discrimination that Maine was engaged in—a point that, as we shall see, would not be lost on the Supreme Court.

C. SCOTUS Does the Deed

The Supreme Court granted certiorari to review the First Circuit’s decision and, after five years of birthing (the idea of) a status/use distinction, put it in the ground.

The Court began by pronouncing that the case was resolved by “[t]he ‘unremarkable’ principles applied in *Trinity Lutheran*

⁶⁵ *Id.* at 40 n.7.

⁶⁶ *Espinoza*, 140 S. Ct. at 2257.

⁶⁷ See Me. Stat. tit. 20-A, § 5204(4).

⁶⁸ *Carson*, 979 F.3d at 44.

⁶⁹ *Id.* at 43, 44.

and *Espinoza*.⁷⁰ Like the church-run preschool in *Trinity Lutheran* and the excluded schools in *Espinoza*, it noted, the schools to which the Carsons and Nelsons wished to send their children with the tuition benefit were “disqualified from [a] generally available benefit ‘solely because of their religious character.’”⁷¹

In this light, the Court held that strict scrutiny applied to the religious exclusion and, as in *Trinity Lutheran* and *Espinoza*, had no problem concluding that the exclusion failed such review. The state’s original justification for the exclusion—the attorney general’s 1980 opinion that barring religious options was necessary to comply with the Establishment Clause—was no justification at all, the Court explained, because the Court had already held, in *Zelman v. Simmons-Harris*,⁷² that “a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.”⁷³ “Maine’s decision to continue excluding religious schools from its tuition assistance program after *Zelman*,” the Court continued, sought to “promote[] stricter separation of church and state than the Federal Constitution requires.”⁷⁴ But the Court noted that it had already held, “in both *Trinity Lutheran* and *Espinoza*, [that] such an interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling” so as to satisfy strict scrutiny.⁷⁵ The exclusion, in short, was unconstitutional.

When he got to this point in the opinion the day it came down, your scribe (also counsel for the Carsons and Nelsons) was at once relieved (“We won!”) and dejected (“What about the status/use distinction?!?!”). The Court, it seemed, had once again dodged the question of whether there is a constitutionally meaningful distinction between the two forms of discrimination, and it seemed we would have to continue fighting attempts to bar religious options from educational-choice programs as opponents of those programs, like Maine had done with respect to *Espinoza*, invited lower courts

⁷⁰ Carson, 142 S. Ct. at 1997 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

⁷¹ *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2021) (emphasis added).

⁷² See *Zelman*, 536 U.S. at 652–53.

⁷³ Carson, 142 S. Ct. at 1997.

⁷⁴ *Id.* at 1998.

⁷⁵ *Id.* (omission in original) (internal quotation marks omitted).

to simply ignore the Supreme Court's decision in *Carson*: "That case? No, no, no. That case was all about religious *status*. We're talking religious *use*. Totally different."

But your scribe kept reading, and suddenly the opinion—heretofore "unremarkable," in the chief justice's words—warranted remark. "The First Circuit attempted to distinguish our precedent," the Court observed, "by recharacterizing the nature of Maine's tuition assistance program in two ways, both of which Maine echoes before this Court":

First, the panel defined the benefit at issue as the "rough equivalent of [a Maine] public school education," an education that cannot include sectarian instruction. Second, the panel defined the nature of the exclusion as one based not on a school's religious "status," as in *Trinity Lutheran* and *Espinoza*, but on religious "uses" of public funds. Neither of these formal distinctions suffices to distinguish this case from *Trinity Lutheran* or *Espinoza*, or to affect the application of the free exercise principles outlined above.⁷⁶

Now we were getting somewhere.

Regarding the first point—the First Circuit's recharacterization of the tuition assistance program as providing the equivalent of a public education—the Supreme Court curtly noted that "the statute does not say anything like that."⁷⁷ According to the statute, the Court explained, "[t]he benefit is *tuition* at a public *or* private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education."⁷⁸

But it wasn't just the text of the statute that belied the First Circuit's characterization, it was also the operation of the tuition assistance program. "The differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important," the Court observed.⁷⁹ It proceeded to list some of them. Unlike Maine public schools, participating private schools "do not have to accept all students," while "[p]ublic schools

⁷⁶ *Id.* (quoting *Carson*, 979 F.3d at 44) (citations omitted) (alteration in original).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1998–99 (emphasis in original).

⁷⁹ *Id.* at 1999.

generally do.”⁸⁰ Unlike a public education, moreover, the education provided at private schools participating in the tuition assistance program “is often *not* free”; some “charge several times the maximum benefit that Maine is willing to provide.”⁸¹ “[T]he curriculum taught at participating private schools,” meanwhile, “need not even resemble that taught in the Maine public school”; in fact, schools accredited by the New England Association of Schools and Colleges (NEASC) are entirely exempt from the public schools’ curricular requirements and may implement “their own chosen curriculum.”⁸² And unlike Maine public schools, “[p]articipating schools need not hire state-certified teachers,” and they “can be single-sex.”⁸³ “In short,” the Court concluded, “it is simply not the case that these schools, to be eligible for state funds, must offer an education that is equivalent—roughly or otherwise—to that available in the Maine public schools.”⁸⁴

With the utter mismatch between the First Circuit’s characterization of the program and the program’s actual operation laid bare, it became clear that the First Circuit had simply allowed Maine to describe the benefit provided by the program in a way that would justify the state’s discrimination. “[T]he definition of a particular program can always be manipulated to subsume the challenged condition,” the Court noted, “and to allow States to ‘recast a condition on funding’ in this manner would be to see ‘the First Amendment . . . reduced to a simple semantic exercise.’”⁸⁵ As the Court pointedly observed, Montana could have characterized its program in *Espinoza* as providing a substitute for, or rough equivalent of, a public education and, under Maine and the First Circuit’s logic, carried on with its discrimination.⁸⁶ The Court did not intend such a flimsy holding

⁸⁰ *Id.*

⁸¹ *Id.* (emphasis in original).

⁸² NEASC has no curricular requirements of its own; it applies certain “standards and indicators” to assesses how a school implements whatever curriculum it has chosen to implement. *Id.* (citing NEASC, Standards—20/20 Process (rev. Aug. 2021)), <https://tinyurl.com/2s5uj3mv>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1999 (quoting *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 215 (2013)).

⁸⁶ *Id.* at 2000.

with such an easy workaround: “[O]ur holding in *Espinoza* turned on the substance of free exercise protections, not on the presence or absence of magic words.”⁸⁷

With the attempted recharacterization of the benefit out of the way, the Court turned to the main⁸⁸ event: the status/use distinction. The Court began its consideration of that issue by recalling two statements it had made in *Espinoza*: (1) “that the strict scrutiny triggered by status-based discrimination could not be avoided by arguing that ‘one of its goals or effects [was] preventing religious organizations from putting aid to religious uses’”; and (2) “that nothing in our analysis was ‘meant to suggest that we agree[d] with [Montana] that some lesser degree of scrutiny applies to discrimination against religious uses of government aid.’”⁸⁹ *Espinoza* (and *Trinity Lutheran* before it), the Court explained, “never suggested that use-based discrimination is any less offensive to the Free Exercise Clause.”⁹⁰

The Court then explained why it had never suggested that there was a constitutionally meaningful distinction between religious status and use in those cases: teaching and passing on the faith are part and parcel of *being* a religious school. Quoting its decision in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court stressed that “[e]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”⁹¹ Moreover, attempting to give effect to a status/use distinction “by scrutinizing whether and how a religious school pursues its educational mission would . . . raise serious concerns about state entanglement with religion and denominational favoritism.”⁹²

Finally, there was the matter of *Locke v. Davey*, in which the Supreme Court itself had upheld a religious exclusion that it subsequently described as turning on the “use” to which Joshua Davey wished to put his scholarship: vocational instruction for the ministry.

⁸⁷ *Id.*

⁸⁸ Maine?

⁸⁹ Carson, 142 S. Ct. at 2001 (quoting *Espinoza*, 140 S. Ct. at 2257) (alterations in original).

⁹⁰ *Id.*

⁹¹ *Id.* at 2001 (quoting *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020)) (emphasis in original).

⁹² *Id.*

"Locke's reasoning," the Court noted, "expressly turned on what it identified as the 'historic and substantial state interest' against using 'taxpayer funds to support church leaders.'"⁹³ After explaining that there was no comparable state interest against allowing state aid to flow to religious schools generally, the Court declared, "Locke 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."⁹⁴

And with that, the Court invalidated Maine's religious exclusion, holding that "[r]egardless of how the benefit and restriction are described"—as turning on religious status or religious use—"the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise."⁹⁵ And unlike in *Trinity Lutheran* and *Espinoza*, there were no concurring opinions this time around, no disagreement among the justices in the majority. Even Justice Gorsuch, who had tried unsuccessfully to strangle the status/use distinction in its crib, was now satisfied.

However, there were dissenting opinions—two of them. Justice Stephen Breyer, whom Justice Elena Kagan joined and Justice Sonia Sotomayor partly joined, stressed the importance of recognizing some "play in the joints" between the religion clauses of the First Amendment—the idea that there is space between what the Establishment Clause permits and what the Free Exercise Clause requires.⁹⁶ This "play," "constitutional leeway," or "wobble room," as Justice Breyer alternatively called it, permits states to include religious options in an educational-choice program but does not *compel* them to do so.⁹⁷ "State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent," he opined, and maintaining some leeway between the religion clauses was necessary to "allow[] States to enact laws sensitive to local circumstances while also allowing this Court

⁹³ *Id.* at 2002 (quoting Locke, 540 U.S. at 722).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Carson, 142 S. Ct. at 2009 (Breyer, J., dissenting).

⁹⁷ *Id.* at 2005, 2009.

to consider those circumstances in light of the basic values underlying the Religion Clauses.”⁹⁸

Justice Sotomayor authored her own dissenting opinion, and she took us back to her dissenting opinion in *Trinity Lutheran*. Whereas, in that case, Justice Gorsuch had sought to kill the status/use distinction because of its instability and the fact that “free exercise” encompasses both belief *and* action, Justice Sotomayor had sought to kill it for the opposite reason: because she viewed both status- and use-based exclusions as perfectly permissible. She reiterated that point in *Carson*, saying the “Court should not have started down this path five years ago.”⁹⁹

Justice Sotomayor also bemoaned the “practical” result of the Court’s decision: it “directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction” and, “while purporting to protect against discrimination of one kind, . . . requires Maine to fund what many of its citizens believe to be discrimination of other kinds,” such as discrimination based on sexual orientation or gender identity.¹⁰⁰ The majority directly responded to these charges, noting that the Court’s decision (1) does not *require* states to subsidize private education, but simply requires religious neutrality if they decide to do so;¹⁰¹ and (2) does not address whether a state may exclude schools based on their “particular policies and practices.”¹⁰²

IV. What *Carson* Means for the Educational-Choice Movement . . . and What It Doesn’t Mean

Carson is hardly a simple application of “[t]he ‘unremarkable’ principles applied in *Trinity Lutheran* and *Espinoza*,” as Chief Justice Roberts suggested.¹⁰³ It killed the status/use distinction, killed the Blaine Amendments, and effectively left *Locke v. Davey* for dead.

⁹⁸ *Id.* at 2005, 2007.

⁹⁹ *Carson*, 142 S. Ct. at 2012 (Sotomayor, J., dissenting).

¹⁰⁰ *Id.* at 2014.

¹⁰¹ *Id.* at 2000 (majority op.) (“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.’”) (quoting *Espinoza*, 140 S. Ct. at 2261).

¹⁰² *Id.* at 1998 n.*. As the Court noted, “the law rigidly excludes any and all sectarian schools regardless of particular characteristics.” *Id.*

¹⁰³ *Id.* at 1997.

And by putting these things to rest, the Court removed the most significant legal cloud that remained over educational-choice programs: the constitutionality of state bars to religious options.

Opponents of educational choice, however, are a dogged bunch, and they will not simply pack up and go home in the wake of *Carson*. They did not do so after *Zelman*, they did not do so after *Espinoza*, and they will not do so now. There are still legal questions surrounding educational choice that *Carson* did not resolve, and opponents of choice will undoubtedly seize on those issues in their relentless campaign to remove the educational opportunity that choice programs provide.

*A. Carson Removes the Most Significant Legal Cloud Linger-
ing Over Choice . . .*

The status/use distinction, state Blaine Amendments, and *Locke v. Davey* have been an unholy trinity for the educational-choice movement. Three entities in one anti-choice object, that trinity has been invoked in statehouses and courthouses by those seeking to prevent new choice programs from passing or to smite those that do pass. No more.

1. The Status/Use Distinction: Gone

Perhaps the most obvious consequence of the *Carson* decision is that opponents of educational choice can no longer argue that religious use-based exclusions in educational-choice programs are permissible. Use-based discrimination is no less offensive to the Free Exercise Clause than status-based discrimination is, the Court explained, in part because “[e]ducating young people in their faith . . . lie[s] at the very core of the mission of a private religious school.”¹⁰⁴ In other words, the religious “use” that Maine found offensive flows *directly from* the religious status of the excluded schools. Discrimination against them because of their religious conduct is discrimination against the religious status that impels that conduct. Of course, the same is true of the parents who choose such schools, whose religious status impels them to seek a religious education for their child.

Carson, moreover, eliminates the status/use distinction in areas beyond educational choice. Although the case concerned an

¹⁰⁴ *Id.* at 2001 (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2064).

educational-choice program, in which aid is provided to *individuals* and flows to schools only by the intermediating choice of parents, the language of the opinion reaches institutional aid scenarios as well. The Court, after all, dismissed the status/use distinction as one of “form[,]” rather than substance, and one that did not “suffice[] to distinguish this case from *Trinity Lutheran* or *Espinoza*, or to affect the application of the free exercise principles outlined” in those cases.¹⁰⁵ While *Espinoza*, like *Carson*, was an educational-choice (individual aid) case, *Trinity Lutheran* was not: it involved direct, monetary assistance to a religious institution. Yet *Carson* says the same free-exercise principles apply in both contexts. Moreover, the Court stressed that the difficulty Maine encountered in enforcing its use-based exclusion “suggests that *any* status-use distinction lacks a meaningful application not only in theory, but in practice as well.”¹⁰⁶

This last point was not lost on Justice Sotomayor in dissent, who regretted that her “fear has come to fruition: The Court now holds for the first time that ‘any status-use distinction’ is immaterial in both ‘theory’ and ‘practice.’”¹⁰⁷ In her view, it seems, *Carson* is an “unequivocal rejection of the status/use distinction,” one that not only prevents reliance on a status/use distinction to bar religious options from educational-choice programs, but also “ensures that states and lower courts can no longer rely on arguments about religious ‘use’ to deny religious organizations equal access to generally available government funding programs.”¹⁰⁸

2. Blaine Amendments: Gone

Carson also finished the job of killing off the Blaine Amendments as obstacles to educational choice.¹⁰⁹ *Espinoza*, of course, had already done much of that work. Montana had argued that compliance with

¹⁰⁵ *Id.* at 1998.

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.* at 2013 (Sotomayor, J., dissenting).

¹⁰⁸ Nick Reaves, Religious Autonomy in *Carson v. Makin*, Harv. J.L. & Pub. Pol’y Per Curiam (Summer 2022 No. 18), <https://tinyurl.com/5aykasmy>.

¹⁰⁹ Although *Carson* removed conventional Blaine Amendments (those that bar aid to religious schools) as obstacles to choice, there are Blaine variants, sometimes referred to as “public/private” Blaine Amendments, which prohibit aid to *all* private schools, whether religious or not. As discussed *infra* Part IV.B.2. these provisions remain an obstacle to choice in a small handful of states.

its Blaine Amendment justified its exclusion of religious options from the state's educational-choice program. The Supreme Court rejected that argument, observing that the text of the state's Blaine Amendment "discriminates based on religious status" and "bars religious schools from public benefits solely because of the religious character of the schools."¹¹⁰ Applying that status-based provision to bar religious options from an educational-choice program, the Court held, violated the Free Exercise Clause of the federal Constitution.

But Blaine Amendments can be couched in more "use"-based language, as well. In addition to barring public funding to schools or other institutions that *are* religious (in the words of Montana's Blaine Amendment, schools "controlled in whole or in part by any church, sect, or denomination"¹¹¹), many Blaine Amendments target specific religious conduct. Those of Arizona, Utah, and Washington, for example, provide that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction."¹¹² After *Espinoza* was decided, educational-choice opponents could argue that such use-based language was still enforceable, given that *Espinoza* turned solely on the status-based proscription in the text of Montana's Blaine Amendment.

That argument, thankfully, is now gone. Interestingly, it is gone because of a decision in a case arising out of Maine, which, although the home state of James G. Blaine, does not have a Blaine Amendment. Rather, Maine's sectarian exclusion was rooted in statute alone. Yet the Supreme Court's invalidation of the statute makes perfectly clear that, even if the statute had instead been a state constitutional provision, it would have been just as doomed under the Free Exercise Clause. The Court, after all, directly analogized Maine's statute to Montana's Blaine Amendment: "While the wording of the Montana and Maine provisions is different," the Court noted, "their effect is the same." Both, in other words, impermissibly target religious exercise. So, although "*Espinoza* held that a provision of the Montana Constitution barring government aid to any school 'controlled in whole or in part by any church, sect, or denomination' violated the Free Exercise Clause," a Blaine Amendment that employs more

¹¹⁰ *Espinoza*, 140 S. Ct. at 2255, 2256.

¹¹¹ Mont. Const. art. X, § 6(1).

¹¹² Ariz. Const. art. II, § 12; Utah Const. art. I, § 4; Wash. Const. art. I, § 11.

“usey” language (e.g., “religious worship, exercise, or instruction”) will unquestionably meet the same fate in the wake of *Carson*.

3. *Locke v. Davey*: (Mostly) Gone

And although we cannot quite bid *Locke v. Davey* good riddance, that opinion is unlikely to show its face around the educational-choice debate anymore. For nearly two decades, it was the favorite case of the National Education Association (NEA) and other opponents of educational choice, who would trot it out to legislators and judges and say, “Look, state law *can* bar educational-choice programs that include religious options.” And those legislators and judges were often convinced. In fact, the *last* time it upheld Maine’s sectarian exclusion, the First Circuit read *Locke* “broadly,” well beyond its focus on vocational religious instruction.¹¹³ The court refused to “restrict its teachings to the context of funding instruction for those training to enter religious ministries,” or to limit it “to certain education funding decisions but not others.”¹¹⁴ In other words, the court read it as authorizing the wholesale exclusion of religious options in educational-choice programs.

In *Carson*, the Supreme Court flatly rejected such a reading of *Locke* and expressly cabined the decision to the vocational religious instruction at issue in the case: “*Locke* 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.”¹¹⁵ Short of overruling it or limiting it to litigants named Gary Locke and Joshua Davey, the Court could have done nothing more to make clear there is no more mileage left in *Locke*.

B. . . . but the Legal Battles Regarding Choice Are Not Over

With so much resolved, there is lots to celebrate. But as discussed below, several federal constitutional questions concerning educational choice remain unanswered after *Carson*: for example, whether participation in educational-choice programs may be conditioned on a school’s compliance with nondiscrimination requirements

¹¹³ Eulitt, 386 F.3d at 355.

¹¹⁴ *Id.*

¹¹⁵ *Carson*, 142 S. Ct. at 2002.

concerning sexual orientation and gender identity; the federal constitutionality of applying “public/private” Blaine Amendments to bar educational-choice programs; and the constitutionality of religious charter schools.

There are, to be sure, other issues that will need to be resolved. Robert Chanin, former chief counsel for the NEA, once vowed that educational-choice opponents would attack choice programs under any “Mickey Mouse provisions” they could find in state constitutions.¹¹⁶ After their loss in *Carson*, the NEA and its cronies will no doubt get mousier, but the battles they wage will increasingly turn on state, not federal, law. Only the remaining federal issues are discussed below.

1. Sexual Orientation and Gender Identity Conditions

No sooner had the Court’s Public Information Office made the *Carson* opinion available than Maine Attorney General Aaron Frey fired off a press release continuing to defend the very religious discrimination the Court had just held unconstitutional.¹¹⁷ Rather than undertaking a sober reflection of the opinion and what it required of the state, Attorney General Frey attacked the schools that the Carsons and Nelsons desired for their children, criticizing them for their religious beliefs and calling them “inimical” to and “fundamentally at odds with values we hold dear,” such as “tolerance,” “understanding,” and “divers[ity].”¹¹⁸ Then, apparently not having learned the lesson of *Masterpiece Cakeshop*¹¹⁹—and apparently forgetting that it was an erroneous opinion of the Maine attorney general that embroiled the state in *Carson* and four other lawsuits spanning three decades—Attorney General Frey announced his “inten[t] to

¹¹⁶ Clint Bolick, *David’s Hammer: The Case for an Activist Judiciary* 138 (2007).

¹¹⁷ Office of the Maine Att’y Gen., Statement of the Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin* (June 21, 2022), <https://tinyurl.com/4vt3wacu>.

¹¹⁸ *Id.*

¹¹⁹ *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018) (invalidating, under the Free Exercise Clause, a remedial order of the Colorado Civil Rights Commission ordering the defendant to serve same-sex couples, in part because public comments of the commission members evinced hostility toward the defendant’s religious views). Note to public officials: If you don’t like someone’s religious views, don’t say so publicly.

explore with Governor Mills's administration and members of the Legislature statutory amendments to address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry."

Commentators cheered on Attorney General Frey, urging him to "outmaneuver" the United States Supreme Court and "avoid the consequences of [its] ruling."¹²⁰ How? By banning the Carsons' and Nelsons' chosen schools because of their views and policies on sexual orientation and gender identity.

Now, this article is not going to attempt to resolve—or even wade into—the debate over whether state anti-discrimination laws can be enforced to bar religious persons or organizations from otherwise available public benefit programs because of their policies on things such as same-sex marriage or the nature of sex/gender. The Supreme Court will presumably resolve those issues in time, and your scribe trusts that it will resolve them with respect and tolerance for the concerns of both advocates for LGBTQ rights and advocates for religious liberty.¹²¹ Suffice it to say that *Carson* did not resolve them, because Maine barred *all* religious schools, regardless of their policies on such issues¹²²—a fact the Kent School found out when it was barred under the religious exclusion even though it does "not tolerate discrimination against students or employees based on," among other grounds, "religious creed," "sex," "sexual orientation," and "gender identity."¹²³

2. "Public/Private" Blaine Amendments

Nor does *Carson* resolve the federal constitutionality of applying so-called public/private Blaine Amendments to bar educational-choice programs entirely. Public/private Blaine Amendments prohibit aid

¹²⁰ Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. Times (June 23, 2022), <https://tinyurl.com/2p8muhd6>. Note to everyone, including public officials: If your goal is to "outmaneuver" the Supreme Court to "avoid" its rulings, don't say so publicly.

¹²¹ Similar issues are already being litigated in the lower courts. See Reaves, *supra* note 109, at 7 & nn.53–54.

¹²² *Carson*, 142 S. Ct. at 1998 n.*. One commentator, however, has observed that in resolving *Carson*, the Court relied on the religious autonomy principles underlying cases such as *Our Lady of Guadalupe* and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, and, in his view, "confirmed that religious organizations must have the freedom to operate in accordance with their beliefs." Reaves, *supra* note 109, at 1, 4–5, 7.

¹²³ Welcome from Old Main, Kent-School.edu, <https://tinyurl.com/bdzh3v9a>.

to *all* private schools, whether religious or nonreligious. Alaska's is representative: "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."¹²⁴

While quite a few states have such provisions, most state courts have appropriately interpreted them as barring only aid to private *schools*—not aid to students who attend private schools. Thus, jurisprudence in most states with these provisions allows for private educational choice. But in a few states—for example, Alaska, Massachusetts, and Hawaii—courts have interpreted them to preclude even programs that aid students.¹²⁵

Applying these provisions to bar educational-choice programs violates the federal Constitution, notwithstanding the fact that, unlike conventional Blaine Amendments, they are neutral with respect to religion, at least in their language.¹²⁶ For one thing, they condition availability of a public benefit on parents' surrender of their constitutional right, recognized in *Pierce v. Society of Sisters*,¹²⁷ to send their child to a private school, much the same way Montana and Maine conditioned the availability of an otherwise available public benefit on the surrender of parents' right to choose a specifically religious private school for their child.¹²⁸ Moreover, the Supreme Court has long held that "the First Amendment bars application of [even] a neutral, generally applicable law" if it burdens conduct involving certain "hybrid" rights, including, specifically, the free exercise of

¹²⁴ Alaska Const. art. VII, § 1.

¹²⁵ See, e.g., Opinion of Justices to Senate, 514 N.E.2d 353 (Mass. 1987); Sheldon Jackson Coll. v. State, 599 P.2d 127 (Alaska 1979); Bloom v. Sch. Comm. of Springfield, 379 N.E.2d 578 (Mass. 1978); Spears v. Honda, 449 P.2d 130 (Haw. 1969).

¹²⁶ While they are neutral in their language, such provisions have the same object as, and were motivated by the same animus underlying, conventional Blaine Amendments, which can give rise to free exercise problems. See *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–46 (1993).

¹²⁷ 268 U.S. 510 (1925).

¹²⁸ See *Espinoza*, 140 S. Ct. at 2261 (recognizing that parents have "the right[] . . . to direct the religious upbringing of their children," that "[m]any parents exercise that right by sending their children to religious schools," and that Montana's Blaine Amendment "penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one") (internal quotation marks and citations omitted).

religion combined with “the right of parents . . . to direct the education of their children.”¹²⁹ And “public/private” Blaine Amendments create a structural barrier that, like the state constitutional amendment invalidated by the Supreme Court in *Romer v. Evans*,¹³⁰ makes it “more difficult for one group of citizens than for all others to seek aid from the government,” which “is itself a denial of equal protection of the laws in the most literal sense.”¹³¹ *Carson* does not speak to these issues, but they will undoubtedly be litigated in future cases.

3. Religious Charter Schools

Finally, and despite an abundance of media commentary suggesting otherwise, *Carson* was never going to resolve the question of whether states with charter school laws may or must allow for religious charter schools. Charter schools “are privately operated but publicly funded,” and “they are universally designated by law to be ‘public schools.’”¹³² Some within the educational-choice movement, however, argue that they are not state actors for federal constitutional purposes and, thus, are “essentially programs of private-school choice.”¹³³ Others within the educational-choice movement, including the National Alliance for Public Charter Schools, disagree strongly.¹³⁴

Carson does nothing to resolve that disagreement. It did not involve charter schools and does not bear on the question of whether they are state actors and, thus, subject to the restrictions of the

¹²⁹ *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990); see also *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay).

¹³⁰ 517 U.S. 620 (1996).

¹³¹ *Id.* at 633.

¹³² Nicole Garnett, *Are Religious Charter Schools Coming Soon?*, N.Y. Daily News (June 27, 2022), <https://tinyurl.com/bdz8yfrf>.

¹³³ *Id.*; see also Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, Manhattan Inst. (Dec. 1, 2020), <https://tinyurl.com/2p8brta4>.

¹³⁴ See, e.g., Lisa Scruggs, *Separation of Church and School: Guidance for Public Charter Schools Using Religious Facilities*, Nat’l All. for Public Sch. (2015), <https://tinyurl.com/yj49kmd7> (“Public schools, whether traditional or charter, are generally considered government entities. Accordingly, like all government actors, they must comply with the Establishment Clause, which is part of the First Amendment to the U.S. Constitution.”).

Establishment Clause. The question of religious charter schools, therefore, will have to await another day.

Conclusion

Carson will forever be associated with *Trinity Lutheran* and *Espinoza*, and rightly so. But it is also the bookend to another decision: *Zelman*. In *Zelman*, the Court held that the Establishment Clause permits religious options in educational-choice programs, and in *Carson*, it held that the Free Exercise Clause prohibits their exclusion, regardless of whether that exclusion is couched in terms of status or use. The two primary federal constitutional issues that have plagued the modern educational-choice movement have now been resolved, and they have been resolved resoundingly in favor of choice. The war will go on, because, again, the enemies of choice are a dogged bunch. But the two major battles have been won.