CARSON V. MAKIN: PUBLIC FUNDING FOR PRIVATE RELIGIOUS SCHOOLS AND THE CONTINUED EROSION OF THE RELIGION CLAUSES

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ABSTRACT

In Carson v. Makin*, the Supreme Court ruled that Maine's nonsectarian requirement violates the Free Exercise Clause of the First Amendment. In doing so, the* Carson *decision effectively forces states to include private religious schools under their public benefit assistance funds and pay for religious education for its children. This ruling deviates from Supreme Court precedent which consistently recognized that states maintained some discretion to make religious decisions that neither the Establishment Clause prohibited nor the Free Exercise Clause required. The* Carson *decision creates a constitutional mandate for public funds to finance private religious teachings and practices, virtually destroying separation of church and state and giving rise to more social conflict and discrimination. This Comment argues that the Court's decision has a complete disregard for precedent, attempts to rewrite history to diminish separation of church and state as a bedrock principle of our nation, and rules in favor of religion which erodes the Court's constitutional neutrality. Next, this Comment will argue that* Carson *resulted in an incorrect decision because it contradicts the Framers' intent established in the first two clauses of the Constitution by neglecting constitutional neutrality and removing any discretion states previously had to make decisions regarding religion. Lastly, this Comment will discuss the unintended consequences* Carson *may have and provide a solution to combat funding private religious schools.*

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I. INTRODUCTION

The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] These two provisions, aptly named the Establishment Clause and the Free Exercise Clause, are the foundation of the principle known as the separation of church and state, which the

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[1] U.S. CONST. amend. I.

Framers sought to include in forming our new nation.[2] The importance of distinguishing the two clauses is rooted in the country's history and is not intended to apply to states, giving states the freedom to decide religious issues for themselves.[3]

For decades, the Court's religious jurisprudence has maintained constitutional neutrality as the bedrock principle of religion cases.[4] Many of the Court's important religion cases address whether it is appropriate for the government to provide funding to religious institutions. For example, suppose the state of Washington provides funding for a scholarship program for postsecondary education assistance, but does not provide funding when those funds are used to pursue a degree in devotional theology.[5] These are the types of decisions that the Supreme Court attempts to address through granting cert on certain religion cases. In the 1970s the Court introduced the concept of "play in the joints,"[6] allowing for some government action to be neither prohibited by the Establishment Clause nor required by the Free Exercise Clause.[7] The concept gives states some legislative leeway to make decisions to withhold public aid from religious institutions without violating either clause.[8] However, in contrast to years of precedent, the Court's three most recent religion cases involving the use of public funding to aid private religious education, have all but abolished the space between the two clauses[9] and attempt to rewrite the Court's jurisprudence on religion.[10]

This Comment will demonstrate that the Supreme Court's most recent Free Exercise case, *Carson v. Makin*, which held that states must include private religious schools under their public benefit assistance funds, has a complete disregard for precedent, attempts to rewrite history to diminish separation of church and state as a bedrock principle of our nation, and rules in favor of religion, eroding the Court's constitutional neutrality. Next, this Comment will argue that *Carson* resulted in an incorrect decision because it contradicts the Framers' intent established in the first two clauses

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[2] Wilson Huhn, *Analysis of* Carson v. Makin, 61 DUQ. L. REV. 50, 51-52 (2023).
[3] Gabrielle Gollomp, *Trinity Lutheran Church v. Comer: Playing "in the Joints" and on the Playground*, 68 EMORY L.J. 1147, 1153 (2019).
[4] Hunh, *supra* note 2 at 55.
[5] Locke v. Davey, 540 U.S. 712 (2004).
[6] *Id.* at 57.
[7] Gollomp, *supra* note 3, at 1150.
[8] Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (Breyer, J., dissenting).
[9] Huhn, *supra* note 2, at 59.
[10] Derek W. Black, *When Religion and the Public-Education Mission Collide*, 132 YALE L.J. F. 559, 560 (2022).

of the Constitution by neglecting constitutional neutrality and removing any discretion states previously had to make decisions regarding religion. Lastly, this Comment will discuss the unintended consequences of *Carson.*

II. BACKGROUND

For decades, the Supreme Court recognized the importance of constitutional neutrality with respect to religion cases.[11] The Religion Clauses' ("Clauses") jurisprudence during the mid-twentieth century maintained the principle that a state cannot use its public school system to "aid one religion, aid all religions, or prefer one religion over another."[12] However, in attempting to remain neutral, the Court recognized that the states must have some discretion in navigating between the Clauses, called "play in the joints." This concept grants the State some leeway in determining whether the Free Exercise Clause requires a state to fund a religious institution or whether the Establishment Clause prohibits the State from taking such action.[13] Because the two clauses are frequently in tension with one another, former Chief Justice Berger stated that taken together, they attempt to chart a "course of constitutional neutrality"[14] with respect to government and religion. This tension is evinced when the government acts in a way that creates an exemption to a generally applicable law solely for religious organizations. It may be argued that the government action violates the Establishment Clause, but should the government not create the exemption, religious institutions can argue that the government is violating the Free Exercise Clause.[15] The tension, as seen in the 1970 seminal case *Walz v. Tax Commission of City of New York*[16], displayed the necessity for the concept of "play in the joints," which remained a guiding principle among Religion Clauses cases until the early 2000s, when the Supreme Court began to erode the concept in *Trinity Lutheran Church of Columbia, Inc. v. Comer.*[17]

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[11] Huhn, *supra* note 2, at 55.
[12] Carson, 142 S. Ct. at 2003 (Breyer, J., dissenting).
[13] *Id.* at 2004.
[14] Carson, 142 S. Ct. at 2004 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (Breyer, J., dissenting,)).
[15] Gollomp, *supra* note 3, at 1159.
[16] Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970)
[17] Huhn, *supra* note 2, at 57; Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017)

In *Trinity Lutheran*, Missouri's Department of Natural Resources created a program where both public and private schools, including nonprofit daycare centers, could receive grants to assist in purchasing recycled tires to resurface playgrounds.[18] Out of forty-four applicants, Trinity Lutheran Church Child Learning Center ranked fifth but was ultimately denied the funding because the Department had a policy of "denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[19] Since the church was denied the grant for simply being a church and asked to renounce its religious charter in order to participate in the grant program,[20] the Court held that states have less freedom to adopt their own antiestablishment policies that are more robust than the Constitution.[21] This ruling creates a predicament for states when trying to remain religiously neutral and takes a stricter approach to antiestablishment than the Establishment Clause itself requires.[22]

However, prior to the erosion of "play in the joints" in *Trinity Lutheran*, the Supreme Court coupled that concept with a status-use distinction when considering whether public funds for religious purposes were prohibited by the Establishment Clause but permitted by the Free Exercise Clause.[23] When applying the status-use distinction to school funding, the Court developed a difference between the *use* of the funds and the *recipient* of the funds.[24] The status-use distinction was applied in the 2004 case *Locke v. Davey*, where the Court held that a state could prohibit the use of state funding when those funds would be used for a religious purpose such as studying for the ministry.[25] But thirteen years later, in *Trinity Lutheran*, the Court again used the status-use distinction and held that it was a violation of the Free Exercise Clause to deny a religious preschool a state funded grant to improve the safety of their playground simply because of the status of the recipient as a church.[26]

It is the ruling of *Trinity Lutheran* that changed the tide on the Religious Clauses cases and allowed the Supreme Court to chart a new path regarding religious jurisprudence. The status-use distinction was applied, expanded, and then discredited in *Trinity Lutheran* and the two subsequent

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[18] *Id.* at 453.
[19] *Id.* at 456.
[20] *Id.* at 465.
[21] Gollomp, *supra* note 3, at 1186.
[22] *Id.*
[23] Huhn, *supra* note 2, at 60.
[24] *Id.* at 59.
[25] Locke v. Davey, 540 U.S. 712 (2004).
[26] Huhn, *supra* note 2, at 60.

Supreme Court cases, *Espinoza v. Montana Department of Revenue*[27] and *Carson*.[28] Further, the well-established constitutional neutrality all but vanished in these same cases.[29]

In *Trinity Lutheran*, the Court held that Missouri had to open its subsidy program to religious organizations arguing that the state violated the Free Exercise Clause when it discriminated against the school based on its status as a *religious* school.[30] The program was available to any other school so long as it was not "controlled by a church, sect, or other religious entity."[31] Chief Justice Roberts attempts to distinguish *Locke* from *Trinity Lutheran* using this status-use distinction, but this attempt is a superficial stretch that even concerned Justice Gorsuch.[32] In his concurrence, Justice Gorsuch stated that he "harbored doubts about the stability of such a line,"[33] adding that he believed the reliance on the status-use distinction was insufficient given that the facts can be described both ways.[34] Relying on the status-use distinction is a fickle interpretation of facts that cannot lead to successful jurisprudence.[35] Further, the Court in *Trinity Lutheran* found that there was no room for "play in the joints" here and that if a denial of benefits to religious bodies is not required by the Establishment Clause, then it is forbidden by the Free Exercise Clause.[36] With that ruling, the Court started to change years of precedent shrinking the room for states to make decisions broader than the Constitution and clearly defining the status distinction.[37]

Three years later, in 2020, *Espinoza* expanded the definition of status-based discrimination, holding that "even if one of the . . . goals or effects [of the State program] is preventing religious organizations from putting aid to religious uses,"[38] it remains unconstitutional status-based discrimination. In expanding the status distinction to include using public

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[27] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).
[28] Huhn, *supra* note 2, at 60; Carson, 142 S. Ct. 1987.
[29] Black, *supra* note 10 at 559-60.
[30] Huhn, *supra* note 2, at 60.
[31] Trinity Lutheran, 582 U.S. at 455.
[32] *Id.* at 469-470 (Gorsuch, J., concurring).
[33] *Id.* at 469.
[34] *Id.*
[35] Andrew A. Thompson, *NOTE: Trinity Lutheran Church of Columbia, Inc. v. Comer and the "Play in the Joints" Between Establishment and Free Exercise of Religion*, 96 TEX. L. REV. 1079, 1089 (2018).
[36] *Id.* at 59.
[37] Black, *supra* note 10, at 565.
[38] *Id.* at 567 (quoting *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020)).

funds for religious purposes, the Court ruled that Montana's bar to religious schooling options in the state's educational-choice program was unconstitutional. Additionally, following the ruling in *Zelman v. Simmons-Harris*[39], the *Espinoza* Court ruled once more that the state's attempt to steer clear of an Establishment Clause violation was fruitless.[40] In *Zelman*, the Court held that so long as private citizens themselves direct government funding to aid religious schools, there is no Establishment Clause violation, thereby creating a large exception to the general rule that government funding aiding religious education is a violation of the Establishment Clause.[41] Using the *Zelman* reasoning, the *Espinoza* Court shrunk the scope of the Establishment Clause and effectively expanded the Free Exercise Clause stating, again, that there was no room for "play in the joints" here.[42]

Continuing in the same vein as the *Trinity Lutheran* and *Espinoza* rulings, the Court in *Carson* overruled the status-use distinction and eliminated the "play in the joints" concept altogether, significantly limiting the scope of the Establishment Clause.[43] With the *Carson* holding, the Court opened the flood gates for Free Exercise challenges because of the recently high success rate for these challenges.[44] Further, because of the elimination of the status-use distinction, the Court muddles a clear line that would ensure that taxpayer dollars and public funds are not being used to aid religious education.[45] Without this boundary it will be increasingly difficult, if not impossible, for states to maintain the separation of public funds and religious education.[46]

III. CARSON V. MAKIN

A. Facts

Maine has a unique rural geography that makes it difficult or unfeasible for many school districts to operate a secondary school.[47] In fact, fewer than half of Maine's school administration units (SAUs) operate a public high school.[48] However, Maine's constitution requires that the state

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[39]Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
[40] Black, *supra* note 10, at 572.
[41] *Id.*
[42] *Id.* at 573.
[43] *Id.* at 573.
[44] *Id.* at 568.
[45] *Id.* at 569.
[46] *Id.*
[47] Carson, 142 S. Ct. at 1993.
[48] *Id.*

provides public education to all students.[49] As such, Maine supplies a program of tuition assistance for parents who live in districts that do not operate a public high school.[50] Under this program, if an SAU does not operate or contract with a public high school, then the SAU must "pay the tuition . . . at the public school or the approved private school of the parent's choice."[51] To be approved to receive these payments, a private school must meet certain basic requirements: the school must be currently accredited by a New England association of schools and colleges or separately approved for attendance purposes.[52]

In 1981, Maine amended the provision adding the requirement that any school receiving funding must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution."[53] Because of this "nonsectarian" requirement, the Carsons and the Nelsons, who both live in areas where their respective SAUs do not operate or contract with any nearby secondary schools, were unable receive the tuition assistance for their selected private schools.[54] The Carsons chose to send their daughter to Bangor Christian Schools (BCS), a sectarian school, and paid for the tuition themselves.[55] The Nelsons, however, were unable to send both of their children to private school without the aid of the tuition assistance program and therefore chose to send their daughter to Erskine Academy, a secular private school, and their son to Temple Academy, a sectarian school.[56] Neither BCS nor Temple Academy qualify as "nonsectarian" and neither are eligible to receive tuition payments under Maine's tuition assistance program.[57]

B. Procedural History

In 2018, the petitioners brought suit against the Commissioner of the Maine Department of Education.[58] They alleged that the "nonsectarian" requirement violated the Establishment and Free Exercise Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth

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[49] *Id.*
[50] *Id.*
[51] *Id.* (quoting ME REV. STAT. ANN. tit. 20-A, 5204(4) (2008)).
[52] *Id.*
[53] *Id.* at 1994 (quoting ME. REV. STAT. ANN. Tit. 20-A, §2951(2)).
[54] *Id.* at 1994-95.
[55] *Id.* at 1994.
[56] *Id.*
[57] *Id.* at 1995.
[58] *Id.*

Amendment.[59] The District Court rejected the petitioners' claims and granted judgment to the Commissioner basing its decision on Circuit precedent that upheld the "nonsectarian" requirement.[60]

The petitioners appealed to the First Circuit Court of Appeals, which upheld the District Court's decision in favor of the Commissioner.[61] The First Circuit's decision came in the months after the Supreme Court's review of *Espinoza*.[62] The First Circuit Court of Appeals reasoned that the "nonsectarian" requirement was distinguishable from the ruling in *Espinoza* on two grounds.[63] First, the state bars BCS and Temple Academy from receiving funds "based on the religious use that they would make of it in instructing children."[64] Second, Maine sought to provide a rough equivalent of the public school education that would be secular.[65] The United States Supreme Court granted certiorari.[66]

C. Majority Opinion

Chief Justice Roberts authored the majority opinion and Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett joined him. The Supreme Court reversed the First Circuit Court of Appeals, determining that Maine's "nonsectarian" requirement violates the Free Exercise Clause of the First Amendment.[67] Chief Justice Roberts began by reviewing the previous Religion Clauses jurisprudence, *Trinity Lutheran* and *Espinoza*, taking care to note how each state program violated the Free Exercise Clause and did not survive the strict scrutiny standard.[68] Chief Justice Roberts then stated that the principles applied in both *Trinity Lutheran* and *Espinoza* suffice to resolve the present case.[69] The majority opinion argues that Maine's program is not neutral and despite the interest in separating church and state, that argument is not compelling "in the face of the infringement of free exercise."[70]

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1996.
[67] *Id.* at 2002.
[68] *Id.* at 1997.
[69] *Id.*
[70] *Id.* at 1998 (first quoting *Espinoza*, 140 S. Ct. 2246; then quoting *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. at 446).

Chief Justice Roberts admonished the First Circuit's attempt to distinguish the nature of Maine's tuition assistance program from precedent.[71] First, he rejected the claim that Maine's tuition assistance payments were to be used as funding for the "rough equivalent of the public school education that Maine may permissibly require to be secular."[72] Chief Justice Roberts dismisses this claim because the Maine statute does not say anything to that effect, but instead states that it will pay tuition at a public or private school.[73] Further, he holds that in practice, Maine provided tuition assistance to other private schools.[74] Moreover, he argued that the differences between public and private schools are numerous and that the program's operation and previous assistance to secular private schools demonstrates that in order to be eligible for state funds, the schools do not need to offer an education that is equivalent to what is available in Maine's public schools.[75] Chief Justice Roberts references *Espinoza* emphasizing that, "[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."[76]

Similarly, the majority dismissed Maine's second argument that Maine's restrictions were a use-based restriction and not a status-based restriction that the Court held was unconstitutional in both *Trinity Lutheran* and *Espinoza*.[77] The Court argues that though the holdings in the previous two cases stated that it was unconstitutional to discriminate on the basis of religion, use-based discrimination is not any less offensive.[78] Chief Justice Roberts reasons that inculcating faith based teachings are at the core of any private religious schools, so distinguishing whether and how tuition assistance is used at these private religious schools puts the State in a precarious position regarding religion and denominational favoritism.[79] With this rejection, the majority effectively strikes down the status-use distinction claiming "the prohibition on status-based discrimination under

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[71] *Id.*
[72] *Id.* (quoting *Carson*, 979 F.3d 21, 44 (2020), U.S. App. LEXIS 34196 (1st Cir. Me., Oct. 29, 2020)).
[73] *Id.* at 1998-99.
[74] *Id.* at 1999.
[75] *Id.*
[76] *Id.* at 2000 (quoting *Espinoza*, 140 S. Ct. 2246).
[77] *Id.*
[78] *Id.* at 2001.
[79] *Id.* (citing *Our Lady Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)).

the Free Exercise Clause is not a permission to engage in use-based discrimination."[80]

Lastly, the majority distinguishes the present case from *Locke* by narrowing the interpretation of *Locke*.[81] *Locke* upheld a restriction against pursuing a vocational religious degree, but the funding could be and was used for theology courses.[82] With this attenuated reading, the Court reasons that there is "no 'historic and substantial' tradition against aiding [private religious] schools," thus creating a tradition test and ruling that the tuition assistance benefit operates to exclude otherwise eligible schools based on their religious exercise which violates the tradition of aiding such schools.[83]

D. Justice Breyer's Dissenting Opinion

The dissenting opinion is authored by Justice Breyer and joined by Justice Kagan.[84] Justice Sotomayor also joined the dissent apart from Part 1-B and in turn authored her own dissent.[85] Justice Breyer's dissent hinges on two issues: (1) the lack of import the majority gives to the Establishment Clause and (2) the failure of the majority to recognize the "play in the joints" between the two Clauses.[86]

Justice Breyer starts with a brief overview of the two Religion Clauses stating that though the two clauses are often in tension with one another, they are nevertheless complementary and attempt to maintain constitutional neutrality with respect to government and religion.[87] Given the difficulty of drawing a hard line between the two Clauses, Justice Breyer emphasizes the importance of the concept "play in the joints."[88] He reiterates the significance of leaving room for states to navigate the Clauses' competing objectives as they decide whether to fund certain religious activities.[89] He fears the majority effectively abandons the longstanding doctrine of "play in the joints" because they failed to mention it in their opinion.[90] In adding to Justice Breyer's fears, he emphasizes that the majority's holding now requires states to use public funds to pay for

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[80] *Id.*
[81] *Id.* at 2002.
[82] *Id.*; Locke v. Davey, 540 U.S. 712 (2004).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 2003-04.
[88] *Id.* at 2004.
[89] *Id.*
[90] *Id.*

religious education, a stark deviation from the previous and optional, "may,"[91] which was precedent for 20 years.[92]

The dissent also criticizes the majority by asserting that the principles applied in *Trinity Lutheran* and *Espinoza* resolve this case, objecting to the majority's reasoning that Maine's tuition program is similarly status-based.[93] Instead, Justice Breyer argues that "it is religious activity, not religious labels, that lies at the heart of this case."[94] Lastly, he argues that Maine's nonsectarian requirement is constitutional because it supports the goal of the Religion Clauses and eliminates the possibility for potential social conflict.[95] He believes that the Religion Clauses generally give Maine the right to remain neutral and not fund religious schools, and it is a violation of Establishment Clause to hold otherwise.[96]

E. Justice Sotomayor's Dissenting Opinion

In Justice Sotomayor's brief dissent, she brings up three main points.[97] First, she expresses her concern that the Court started down a path five years ago with *Trinity Lutheran* that it should not have.[98] At that point, the Court started to diminish the concept of "play in the joints" and continued to erode the principle that the Establishment Clause prohibited the government from funding religious exercise.[99] Further, she states her concern that the status-use distinction is immaterial in both "theory" and "practice"[100] which results in a requirement that states use public funds for private religious schools.[101]

Second, Justice Sotomayor emphasizes that the majority's increasingly expansive view of the Free Exercise Clause risks swallowing the space between the two Religion Clauses.[102]

Lastly, she finds the majority's opinion especially perverse because the Establishment Clause requires public education to be secular and neutral as to religion and the *Carson* holding directly contradicts those propositions,

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[91] *Id.* at 2006 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)).
[92] *Id.*
[93] *Id.* at 2006-07.
[94] *Id.* at 2007.
[95] *Id.* at 2010.
[96] *Id.* at 2010-12.
[97] *Id.* at 2012.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 2013.
[101] *Id.*
[102] *Id.* at 2014.

arguing that separation of church and state now "becomes a constitutional violation."[103]

IV. ANALYSIS

The Court incorrectly decided *Carson* because the majority ruling further erodes constitutional neutrality while simultaneously attempting to rewrite the history of our nation and forego the bedrock principle of separation of church and state. This Section will argue that the Court improperly eliminated the status-use distinction and "play in the joints" which shrinks the space between the two clauses and ultimately violates the Establishment Clause of the First Amendment. Additionally, this Section will argue that the Court's attempt to rewrite history downplays the importance of separation of church and state and gives room for discrimination, which is buried in the nature and history of private schools to begin with.

A. Carson Continues to Erode Constitutional Neutrality in Favor of Revising Religious Jurisprudence

The jurisprudence of Religion Cases long held that though there is tension between the two Clauses, the government must remain neutral in matters of religion.[104] Dating back to 1970, the Court established the concept of "play in the joints"[105] to allow for religious exercise to exist without government sponsorship.[106] However, the importance of constitutional neutrality and legislative leeway for states to make decisions on the use of their public funds is lost on the majority, which in turn demands that states are required to use state funds to support private religious schools or risk a constitutional violation.

The majority opinion attempts to minimize this new requirement by arguing that Maine has alternatives to allowing parents to use the tuition assistance for private schools, such as contracting with specific schools. However, it adds that "[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."[107] But forcing states to increase funding

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[103] *Id.*
[104] *See* Huhn, *supra* note 2, at 56.
[105] *Id.* at 57 (referencing the seminal case *Walz v. Tax Commission of City of New York*, 397 U.S. at 669).
[106] Carson, 142 S. Ct. at 2004.
[107] *Id.* at 2000 (quoting *Espinoza*, 149 S. Ct. 2246).

for or open additional public secondary schools in rural areas would greatly burden states to take on extraordinary measures simply to avoid a First Amendment violation. Additionally, increasing spending to avoid a brush with the First Amendment puts Maine's taxpayers in a precarious situation, forcing them to fund religious schools that are not in alignment with their own beliefs.

Furthermore, this statement then turns on the status-use distinction that the Court effectively eliminates in its opinion. The Court argues that use-based restrictions are no less offensive than status-based restrictions, essentially invalidating the status-use distinction that the Court has deemed important in prior cases.[108] With this invalidation, the Court eliminates a distinction that states a clear and effective rule to reject the possibility that taxpayer dollars would be used for religious purposes and ideologies that the taxpayer may disagree with.[109] Without this boundary, states will have to play gatekeeper in determining the adequacy and appropriateness of religious curriculum.[110] The state's officials must now review the religious teachings of private religious schools and try to reconcile those religious teachings with the state's approved curriculum and standards,[111] which do not "include any sort of religion in them."[112] States are now in an unfavorable position, but must attempt to reconcile the religious curriculum with Maine's civic-focused education.[113]

Together with the elimination of both the status-use distinction and the "play in the joints" concept, the majority shrinks the scope of the Establishment Clause and uses the expanding scope of the Free Exercise Clause to justify it.[114] However, there is nothing in the text of the Constitution that suggests that one clause should dominate over the other and by permitting the expansive scope of the Free Exercise Clause, and requiring states to fund private religious schools, the states risk a constitutional violation of either clause when dealing with any policy that involves religion.[115] Ultimately, what was once prohibited by the Constitution is now required by it.[116] Additionally, by removing both

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[108] Black, *supra* note 10, at 568, 570.
[109] *Id.* at 569.
[110] Carson, 142 S. Ct. at 2011 (Breyer, J., dissenting).
[111] *Id.* (quoting a Maine legislator discussing the nonsectarian requirement).
[112] *Id.* (quoting a different Maine legislator cautioning on the difficulties of reconciling the two curriculums).
[113] *Id.* at 2010-11.
[114] Black, *supra* note 10, at 573.
[115] *Id.* at 572-73.
[116] *Id.* at 577.

concepts, the Court strips states of any freedom they once had to choose whether they fund certain religious activity or if they have strong establishment-related reasons for not doing so.[117]

Because of the lack of State freedom and the expanding scope of the Free Exercise Clause, the Court erodes their constitutional neutrality and continues to rewrite religious jurisprudence arguing that religion is the victim and the Court must be sympathetic.[118] Moreover, by diminishing the space for states to enact laws that are sensitive to their citizens, the Court undermines the basic intent of the Religion Clauses and minimizes the equal importance of the Establishment Clause in favor of an all-encompassing Free Exercise Clause.[119]

B. The Supreme Court Continues to Ignore the Framers' Intent and Rewrites Our Nation's History, Allowing Room for Discrimination

The Religion Clauses of the Constitution are the first two provisions that appear in the First Amendment.[120] The Framers felt that they were so important that they intentionally listed them first in the Bill of Rights. As Thomas Jefferson said, "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[121] The intent of the proponents of the Religion Clauses is to avoid religious strife[122] and maintain a wall of separation of church and state.[123] The majority neglects the longstanding principle of separation of church and state, ignoring the intent of the Framers, while simultaneously rewriting our nation's history[124] to include a tradition of government subsidies for religious education.[125]

The Court's holding in *Carson* frustrates the Framer's original intent regarding separation of church and state when it holds that there is "no 'historic and substantial' tradition against aiding [private religious]

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[117] Carson, 142 S. Ct. at 2004 (Breyer, J., dissenting).
[118] Black, *supra* note 10, at 577-78.
[119] Carson, 142 S. Ct. at 2005.
[120] *See* Huhn, *supra* note 2, at 51 (explaining the Religion Clauses).
[121] Carson, 142 S. Ct. at 2005 (Breyer, J., dissenting, quoting Thomas Jefferson).
[122] *Id.*
[123] Huhn, *supra* note 2, at 52-54.
[124] It is important to note that not all historians agree about the meaning and original purpose of the religion clauses. *See generally* Phillip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986) and Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, THE J. OF CONST. L. 8:4 (2006).
[125] *Id.* at 61.

schools,"[126] grossly misstating our country's history.[127] Undeniably, there is a longstanding tradition of not using public funds to support religious schools.[128] In fact, thirty seven states have Blaine Amendments in their state constitutions, whose origins date back to the nineteenth century.[129] These amendments are used by states to ensure that public funds are not used to aid any sectarian school.[130] However, the Court erodes the importance and effect of the Blaine Amendments through its decision in *Espinoza*.[131] In *Espinoza*, Chief Justice Roberts argues that the Blaine Amendments are a status-based discrimination and therefore unconstitutional.[132] This ruling created space for government support of religious education in public schools for the first time.[133]

Because *Espinoza* introduces the "tradition" of aiding religious schools, the *Carson* Court finds an opening to expand that tradition. The Court uses a tradition test taken from *Town of Greece v. Galloway*[134], in which the Court upheld the practice of a sectarian prayer at the beginning of a town board meeting because it was tradition.[135] Taking the same approach in *Carson*, the Court finds that there has been tradition of using public funds to aid religious schools.[136] But the Court misconstrues the two years since the *Espinoza* ruling into years of tradition,[137] dismissing the

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[126] Carson, 142 S. Ct. at 2002 (referencing the reasoning in *Locke v. Davey*, 540 U.S. 712, 722, 725 (2004)).
[127] Huhn, *supra* note 2, at 61.
[128] *Id.*
[129] *See* Michael Bindas, *Using my Religion: Carson v. Makin and the Status-use (Non)Distinction*, 2022 CATO SUP. CT. REV. 163, 168-69 (2022) (explaining Blaine Amendments and their troubled history stating that there is evidence that Blaine Amendments were adopted to persecute Catholics). *See also*, Gollomp, *supra* note 3, at 1159 (recounting the Blaine Amendments as a way to prevent public money from supporting religious education specifically in a time where anti-Catholic sentiment was on the rise due to an increase in Roman Catholic parochial schools). *See e.g.*, McCarley Elizabeth Maddock, *Article: Blaine In the Joints: The History of Blaine Amendments and Modern Supreme Court Religious Liberty Doctrine in Education*, 18 DUKE J. CONST. LAW & PUB. POL'Y 195 (2023) (demonstrating the history of the Blaine Amendments by showing the two sides of the argument – a long and admirable history of separation of church and state or one that reflects hate and anti-Catholic bigotry).
[130] *Id.*
[131] *Id.* at 169-70.
[132] *Id.* at 170-71.
[133] Huhn, *supra* note 2, at 60.
[134] Town of Greece v. Galloway, 572 U.S. 565 (2014).
[135] Huhn, *supra* note 2, at 60.; Town of Greece, 572 U.S. at 584.
[136] Carson, 142 S. Ct. at 2002.
[137] Huhn, *supra* note 2, at 61.

intent of the Framers altogether and turning separation of church and state into a constitutional slogan, not a constitutional commitment.[138]

Moreover, in claiming that there is a tradition of aiding religious schools and requiring states to use public funds to aid religious schools, the majority overlooks the history that private religious schools grew out of systemic racism.[139] After *Brown v. Board of Education*, both nonsectarian and sectarian private schools increased in quantity[140] because segregationists were interested in maintaining all-white schools and perpetuating white exclusivity.[141] Today, while the makeup of private schools has changed slightly, the schools are still disproportionately white and resistant to diversity.[142] Additionally, many do not accept nontraditional students and families and are becoming increasingly less inclusive, almost acting like twenty-first century havens for cultural discrimination.[143] Importantly, private schools are not held to the same constitutional and federal standards that public schools are when it relates to discrimination, resulting in little protection against discrimination in private schools when it arises.[144] The two religious schools at the heart of *Carson* have engaged in discriminatory practices that would never be allowed at public schools.[145] Temple Academy will not admit a student who comes from a same-sex household or identifies as homosexual or transgender.[146] Bangor Christian School teaches their ninth-grade students to "refute the teachings of the Islamic Religion."[147] As a result, taxpayers are funding religious indoctrination as well as religious education.[148]

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[138] Carson, 142 S. Ct. at 2014 (Sotomayor, J., dissenting).
[139] Vania Blaiklock, Esq., *The Unintended Consequences of the Court's Religious Freedom Revolution: A History of White Supremacy and Private White Christian Schools*, 117 NW. U. L. REV. ONLINE 46, 47-48 (2022).
[140] *Id.* at 55; Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[141] Blaiklock, *supra* note 139, at 56.
[142] Black, *supra* note 10, at 562.
[143] *Id.* at 585-86.
[144] Black, *supra* note 10, at 590-91.
[145] Bangor Christian Schools and Temple Academy have said they will not change their policies to receive public funding. Suzanne Eckes, Preston Green, *Carson v. Makin: Implications for Students' Civil Rights in Taxpayer Funded Religious Schools*, CANOPY FORUM (Sept. 28, 2022), https://canopyforum.org/2022/09/28/carson-v-makin-implications-for-students-civil-rights-in-taxpayer-funded-religious-schools/.
[146] Brief in Opposition for Respondent at 11, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).
[147] Brief in Opposition for Respondent at 9, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).
[148] Suzanne Eckes, Preston Green, *Carson v. Makin: Implications for Students' Civil Rights in Taxpayer Funded Religious Schools,* CANOPY FORUM (Sept. 28, 2022),

With the *Carson* ruling, the Court is adding to the systemic discrimination by singling out religious discrimination[149] as odious to the Constitution,[150] more so than other forms of race or sex discrimination.[151] Thus, not only is *Carson* contradictory to the Framer's original intent, but it also requires Maine and subsequently other states to use taxpayer money to fund other forms of discrimination based on these private religious school policies and practices.[152]

However, there is a solution to the clear violation of the Framers' intentions and the mandate for states to use public funds to aid private religious institutions created by *Carson*. The solution is for states to adopt religiously neutral criteria in their tuition assistance programs to ensure that they will not be indirectly funding private religious institutions.[153] Additionally, these states can take a more proactive role in contracting with specific schools,[154] providing a list of acceptable schools, or in turn do a deep dive into the curriculum that is taught at these private religious schools to ensure the curriculum aligns with the state's goals.

Further, a state could tailor an anti-discrimination law to serve a compelling governmental interest, such as protecting students from experiencing discrimination at private religious schools.[155] Prior to the ruling, Maine's governor did just that by signing a new law that ensures religious schools do not discriminate against students or employees based on their gender identities.[156] Other states can and should follow suit. Lastly, the state could bar funding schools that deliberately discriminate on the basis of sex, race, or sexual orientations.[157] States can avoid sending taxpayers' dollars to private schools and instead direct all its money to public schools

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https://canopyforum.org/2022/09/28/carson-v-makin-implications-for-students-civil-rights-in-taxpayer-funded-religious-schools/.

[149] Blaiklock, *supra* note 139 at 48.

[150] Carson, 142 S. Ct. at 1996.

[151] Black, *supra* note 10, at 593-94.

[152] Carson, 142 S. Ct. at 2014 (Sotomayor, J., dissenting).

[153] Black, *supra* note 10, at 563.

[154] Carson, 142 S. Ct. at 2014 (Sotomayor, J., dissenting).

[155] Suzanne Eckes, Preston Green, *Carson v. Makin: Implications for Students' Civil Rights in Taxpayer Funded Religious Schools*, CANOPY FORUM (Sept. 28, 2022), https://canopyforum.org/2022/09/28/carson-v-makin-implications-for-students-civil-rights-in-taxpayer-funded-religious-schools/.

[156] ME. STAT. TIT. 5, § 4572 (2024).

[157] John R. Vile, *Carson v. Makin (June 21, 2022)*, FREE SPEECH CENTER (Dec. 15, 2023), https://firstamendment.mtsu.edu/article/carson-v-makin/

effectively avoiding a constitutional violation all together.[158] And while this will be an uphill battle for states, it is one worth embarking on to ensure that their taxpayers' dollars are not funding private religious schools that are in direct contradiction with their beliefs or discriminate against other marginalized groups.

V. CONCLUSION

After *Carson*, the Supreme Court will continue to erode their neutrality in favor of supporting Free Exercise of religion claims and eliminating any room for states to make decisions. The majority failed to recognize the bedrock principle of separation of church and state that the Framers fought to build; instead, they attempt to manipulate our nation's history to create an illusion that there is a tradition of aiding private religious schools. The result of this decision creates a constitutional mandate for public funds to finance private religious teachings and practices, effectively destroying separation of church and state and giving rise to more social conflict and discrimination.

[158] Mark Joseph Stern, *The Supreme Court Just Forced Maine to Fund Religious Education. It Won't Stop There.*, SLATE (June 21, 2022, 2:04 PM), https://slate.com/news-and-politics/2022/06/carson-makin-supreme-court-maine-religious-education.html