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When Religion and the Public-Education Mission Collide

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ABSTRACT. The Supreme Court has chosen education as a primary stomping ground for rewriting Free Exercise Clause doctrine. Two decades ago, a divided Court gave states the option to fund religious education. Recent cases invert that analysis. Now a solid majority mandates that states fund religious schools any time they fund other private schools. State efforts to prevent public funds from promoting religious indoctrination are purportedly no different than other forms discrimination. Close analysis further suggests that the Court is implicitly affording superstatus to religious interests and dismissing long-standing important state interests. As a result, its new doctrines will wreak havoc across a number of education policies and daily school practices. The victim will be educational equity and adequacy for traditionally disadvantaged students.

INTRODUCTION

The Supreme Court in *Carson v. Makin*[1] declared unconstitutional Maine's attempt to ensure that rural students without access to a local public high school could receive a private secular education. The decision, while unsurprising, is astounding. The lack of surprise sadly speaks to how unabashedly and consistently this Court has been willing to capsize conventional wisdom and precedent in recent years.[2] Once the Court held in *Trinity Lutheran v. Comer* in 2017 that

1. 142 S. Ct. 1987 (2022).

2. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1972), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)); Town of Greece v. Galloway, 572 U.S. 565, 591 (2014) (upholding the practice of inviting ministers to pray at the beginning of town board meetings); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022) (upholding a football coach's right to lead student-athletes in prayer; distinguishing the case from other school cases where prayers initiated by school officials were unconstitutional; and writing that the Establishment Clause precedent *Lemon v. Kurtzman* is dead); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct.

Missouri had to open its playground-subsidy program to a religious organization,[3] the astute observer—or cynic—could see the writing on the wall.[4] The Court was picking low-hanging fruit along a path to rewrite its jurisprudence on religion. So it was no surprise that the Court, five years later in *Carson*, would not care about Maine's intent to avoid funding the inherently religious endeavors of proselytization and indoctrination—particularly in the context of Maine's state-constitutional duty to provide all students a publicly funded education.[5]

Yet *Carson* comes with an added touch of irony. The Court has justified its shifting religion jurisprudence in the name of equity. The Court thus puts itself on the side of angels by claiming that it is stopping "odious" "discrimination."[6] Ever since *Trinity Lutheran*, including in *Carson*, the Court has coopted the language of sex and race discrimination, suggesting that preventing individuals from using public money on religious activities is little different than denying individuals the right to participate in programs based on the color of their skin or their sex. Religious exclusions, the argument goes, mirror race or sex discrimination because they deny an "otherwise"-qualified religious individual or organization access to a "generally available" benefit.[7]

2012, 2024-25 (2017) (requiring the state to make funding available to churches and their affiliates). These approaches reach beyond individual rights to the administrative state as well. *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 1 (2017) ("Eighty years on, we are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal.").

3. *Trinity Lutheran*, 137 S. Ct. at 2024-25.

4. *See, e.g.*, Edward Correia, Trinity Lutheran Church v. Comer*: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J.L. & RELIGION 280, 280 (2017) (writing that "from inconsequential facts," *Trinity Lutheran* derives "far-reaching principles" that "create[] a broad anti-discrimination principle . . . that . . . will lead to direct state financial assistance to religious organizations, including churches, far beyond any period in recent history"); Andrew A. Thompson, 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, 1079 (2018) ("More than being merely wrongly decided, *Trinity Lutheran* has the potential to work an unacknowledged revolution in the Court's Religion Clauses jurisprudence. On the one hand, the holding takes the Free Exercise Clause into broad and uncharted new waters that are well beyond the facts and reasoning of seminal precedent.").

5. *See Carson*, 142 S. Ct. at 2013 (Sotomayor, J., dissenting) (criticizing the Court for "upend[ing] constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars"); *see also* Carson v. Makin, 979 F.3d 21, 38 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022) (quoting Maine's concern about the "inculcation and proselytization" of students).

6. *Carson*, 142 S. Ct. at 1996.

7. *Trinity Lutheran*, 137 S. Ct. at 2019, 2024; *Carson*, 142 S. Ct. at 1997; *see also* Correia, *supra* note 4, at 288-90, 294-97 (explaining the Court's appropriation of a discrimination framework and the problems with that framework).

Using education as the stomping grounds for vindicating supposed religious oppression—rather than recognizing that education is its own special case as the Court traditionally had done[8]—works its own cruel irony because public education is saddled with so many other obvious and pressing inequities and inadequacies.[9] The Court has not only shown relatively little interest in those shortcomings, but it is also now likely to make matters worse. Public education is under normative and fiscal attack.[10] Culture wars on race, gender, and politics are beating on the schoolhouse door and eroding faith in a fundamental pillar of our democracy.[11] The public-education system, meanwhile, has been bleeding resources since the Great Recession.[12]

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8. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (applying the First Amendment "in light of the special characteristics of the school environment"); New Jersey v. T.L.O., 469 U.S. 325, 337, 340-41 (1985) (recognizing the need to take school context into account and the need for flexibility in applying the Fourth Amendment); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (citing the "special needs" of schools as a basis for permitting schools to engage in suspicionless searches).

9. *See, e.g.*, G. Bohrnstedt, S. Kitmitto, B. Ogut, D. Sherman & D. Chan, *School Composition and the Black-White Achievement Gap*, U.S. DEP'T OF EDUC. 3-4 (2015), https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015_methodology.pdf [https://perma.cc/REP9-4BZG] (finding a large, persistent racial-achievement gap); Gary Orfield, Jongyeon Ee, Erica Frankenberg & Genevieve Siegel-Hawley, Brown *at 62: School Segregation by Race, Poverty and State*, UCLA C.R. PROJECT 3 (2016), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf [https://perma.cc/H56V-PHGY] (finding that the share of "intensely segregated" schools has more than tripled since 1988); Natasha Ushomirsky & David Williams, *Funding Gaps 2015: Too Many States Still Spend Less on Educating Students Who Need the Most*, EDUC. TR. 1 (2015), https://files.eric.ed.gov/fulltext/ED566665.pdf [https://perma.cc/7FTK-FDAN] (finding funding gaps of $1,200 per pupil for schools serving predominantly low-income students and gaps of $2,000 per pupil for schools serving predominantly minority students).

10. DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 17-31 (2020) (detailing recent attempts to undermine and redefine public education).

11. *See generally* Gabriella Borter, Joseph Ax & Joseph Tanfani, *School Boards Get Death Threats amid Rage over Race, Gender, Mask Policies*, REUTERS (Feb. 15, 2022), https://www.reuters.com/investigates/special-report/usa-education-threats [https://perma.cc/G4EH-GTXP] (describing schools as sites of COVID-related political standoffs); Lydia Saad, *Confidence in Public Schools Turns More Partisan*, GALLUP (July 14, 2022), https://news.gallup.com/poll/394784/confidence-public-schools-turns-partisan.aspx [https://perma.cc/J7E6-J362] (showing all-time lows in public-school confidence from Republicans but steady confidence from Democrats). For a seminal analysis of education as a pillar of democracy, see CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (1983).

12. *See* Danielle Farrie & David G. Sciarra, *$600 Billion Lost: State Disinvestment in Education Following the Great Recession*, EDUC. L. CTR. 2 (2021), https://edlawcenter.org/assets/$600%20

Private-school tuition subsidies will not resolve any of these problems. History reveals that these subsidies originally grew out of racism.[13] Though much has changed, the private-school sector remains disproportionately white[14] and resistant to diversity, equity, and inclusion — especially for LGBTQ youth.[15] The Court's opinion in *Carson* only throws fuel on the fire of this privatization movement, blessing an additional constituent for private-school funding and laying down a doctrine that will invite even more aggressive and dangerous free-exercise claims. The theory underlying *Carson* does not end with mandatory access to private-tuition subsidies. It extends all the way to public-school coffers, insisting that reserving public funds for the exclusive use of public schools discriminates against religion.[16] This radical theory has absolutely no grounding in current law,[17] but five years ago, neither did the principle just announced in *Carson*.

Billion/$600%20Billion%20Lost.pdf [https://perma.cc/JA5L-C7VB] ("In the decade following the Great Recession, students across the U.S. lost nearly $600 billion from the states' disinvestment in their public schools.").

13. *See infra* notes 143-164 and accompanying text.

14. *See Statistics About Nonpublic Education in the United States*, U.S. DEP'T OF EDUC. (Dec. 2, 2016), https://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html [https://perma.cc/PKS3-84WG].

15. *See, e.g.*, *infra* note 157 and accompanying text; Derek W. Black & Rebecca Holcombe, *Could Public Money Finance Private-School Discrimination, Religion and Fake History?*, USA TODAY (Apr. 12, 2021), https://www.usatoday.com/story/opinion/2021/04/12/public-money-private-schools-religion-science-history-column/7121202002 [https://perma.cc/5MGD-RZSB] (raising the possibility that the Court's decision in *Espinoza* might allow states to discriminate); *A Tradition of Segregation and Resistance in the Deep South States*, S. EDUC. FOUND. (2016), https://southerneducation.org/publications/a-tradition-of-segregation-and-resistance-in-the-deep-south [https://perma.cc/A7UZ-N73V].

16. *See, e.g.*, Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, MANHATTAN INST. 7 (Dec. 2020), https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf [https://perma.cc/DNH9-HUP6] (arguing that after *Espinoza*, states must allow religious charter schools); Philip Hamburger, *Is the Public School System Constitutional?*, WALL ST. J. (Oct. 22, 2021), https://www.wsj.com/articles/public-school-system-constitutional-private-mcauliffe-free-speech-11634928722 [https://perma.cc/UTZ4-Q63W] (arguing that the public-school system is unconstitutional as a site of government-mandated indoctrination).

17. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) (stating that a state need not subsidize private religious education); *see also* Derek W. Black, *NEPC Review: Religious Charter Schools: Legally Permissible? Constitutionally Required?*, NAT'L EDUC. POL'Y CTR. (Jan. 2021), https://nepc.colorado.edu/sites/default/files/reviews/NR%20Black_0.pdf [https://perma.cc/S786-2V5W] (evaluating the methodology of analysis calling for religious charter schools); Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. (forthcoming Mar. 2023) [hereinafter Black, *Future of Public Education*] (on file with author) (identifying the limits of the Court's recent free-exercise cases and their irrelevance to the claim for religious charter schools).

States, to be clear, are not entirely without recourse or blame. They could eliminate vouchers altogether. That would be the wise choice.[18] Political trends, however, make that choice highly unlikely in those states already committed to vouchers.[19] The issue now is whether those states will ensure some level of equity in their private-school voucher programs. They cannot exclude religious schools from these voucher programs by using the grey area between the Establishment and Free Exercise Clauses—*Carson* effectively eliminated that "play in the joints."[20] Instead, states can still adopt religiously neutral criteria that will indirectly exclude religious and other institutions that refuse to conform to or meet those criteria. Getting states to accept the hard work of defining and enforcing such criteria, however, will be an uphill battle. They are, after all, the ones that have sought a free market without many state-imposed conditions. But for those who would, *Carson* flashes as a red warning sign.

This Essay proceeds in four Parts. Part I explains *Carson*'s holding and rationale, then analyzes what *Carson* changed and took away. Part II explores the burden that *Carson* now places on public schools and education policymakers, focusing on the narrow discretion the Court affords them in dealing with issues of religion. Part III argues that *Carson* elevates religious interests over those of educational equity and adequacy for three reasons: First, vouchers and private schools are historically intertwined with resistance to school integration—a legacy that persists in certain respects today. Second, current evidence indicates that private schools, including ones receiving vouchers, are not open to all students and sometimes actively exclude LGBTQ families in particular. *Carson* only further complicates policy solutions to these equity problems. Third, *Carson* opens the door to additional voucher growth and the corresponding inequities that are destabilizing public education itself. Part IV briefly reflects on the Court's increasing willingness to find and vindicate religious discrimination—but not other forms of discrimination—and what it means for the future of antidiscrimination.

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18. *See Research*, PUB. FUNDS PUB. SCHS., https://pfps.org/research [https://perma.cc/YCA5-JWGB] (summarizing research explaining why vouchers are not good public policy).

19. *See infra* notes 165-174 and accompanying text.

20. *See* Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (Breyer, J., dissenting) (writing that the "majority also fails to recognize the 'play in the joints'" (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017))).

I. OVERSIMPLIFYING THE COMPLEX

A. Religious Discrimination Despite the Facts

The education program at issue in *Carson* was not a typical voucher program but rather a unique response to Maine's geography. Many areas of the state are so sparsely populated that operating a public high school is either infeasible or economically inefficient.[21] Indeed, more than half of Maine's school districts do not operate a public high school.[22] Maine's constitution and implementing statutes, however, require the state to deliver public education to all students, regardless of where they live.[23] As a practical compromise, Maine has long operated a program whereby local districts can ensure access to education through alternative means. Local districts can (a) contract with a nearby public or private school to receive their students or (b) pay tuition at the public or private school that individual families select.[24] The aim was ensuring access to opportunities that are equivalent to the public education that students would otherwise receive in their district.[25]

In 1981, however, the Maine legislature amended the provision to prohibit districts from contracting with or paying tuition to "sectarian" schools.[26] The stated purpose of the exclusion was to ensure students received a secular education equivalent to a public education, not to discriminate against religion.[27] Maine did not preclude all religiously affiliated schools from participating in the program. In fact, some religiously affiliated schools have participated.[28] "Affiliation or association with a church or religious institution is [but] one potential

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21. *See id.* at 1993 (majority opinion).

22. *Id.*

23. ME. CONST. art. VIII, pt. 1, § 1; ME. REV. STAT. ANN. tit. 20-A, § 2(1) (1991).

24. *See* ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (2007).

25. *See* Carson v. Makin, 979 F.3d 21, 36 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022). The parties jointly stipulated that Maine's Department of Education may recognize private schools as providing equivalent instruction for the purpose of fulfilling the state's public-education obligation, Joint Stipulated Facts ¶ 11, Carson v. Makin, 401 F. Supp. 3d 207 (D. Me. 2019) (No. 18-cv-00327), though the Court later rejected equating the two types of instruction. *See Carson*, 142 S. Ct. at 1999.

26. *See Carson*, 142 S. Ct. at 1994.

27. *See Carson*, 979 F.3d at 43-44.

28. After the Court granted certiorari, it was discovered that Chief Justice Roberts's son attended one of the private religious schools that participates in Maine's program. Amy Howe, *Justices Add One Religious-Rights Case to Docket but Turn Down Another*, SCOTUSBLOG (July 2, 2021, 11:04 AM), https://www.scotusblog.com/2021/07/justices-add-one-religious-rights-case-to-docket-but-turn-down-another [https://perma.cc/3BR6-8XD2].

indicator of a sectarian school" and "not dispositive."[29] Rather, Maine's primary inquiry was "what the school teaches" and how it presents material.[30] It excluded only those schools that used public money for the "religious purposes of inculcation and proselytization."[31]

The *Carson* plaintiffs alleged that the state's refusal to fund tuition at their sectarian schools infringed on their rights under the Free Exercise Clause of the First Amendment.[32] The First Circuit Court of Appeals rejected the claim, finding that Maine's policy legitimately attempted to avoid using public money for the proselytization and inculcation of religion.[33] Supreme Court precedent, the First Circuit wrote, clearly distinguished between "discrimination . . . based on the recipient's [religious] affiliation" and "discrimination . . . based on the religious use to which the recipient would put" government aid;[34] because religious schools could participate in the program so long as they provided a secular education to students, the program was a use restriction rather than status-based religious discrimination.[35]

The Supreme Court viewed the facts and law much differently. According to the Court, Maine's policy was clearly unconstitutional based on the Court's recent holdings in *Trinity Lutheran Church of Columbia, Inc. v. Comer*[36] and *Espinoza v. Montana Department of Revenue*.[37] *Trinity Lutheran* involved a Missouri state program that subsidized the cost of resurfacing playgrounds at nonprofit organizations with recycled rubber.[38] Trinity Lutheran, a religiously affiliated daycare center, applied for funds to resurface its playground, but the state agency rejected its application based on its religious status.[39] The state intended to ensure a separation of church and state,[40] but the Court in *Trinity Lutheran* recharacterized the policy as discrimination that "target[s] the religious for 'special disabilities'

29. *Carson*, 979 F.3d at 38 (quoting the Maine Department of Education explaining how it determines if a school satisfies the program's "nonsectarian" requirement).

30. *Id.*

31. *Id.* (quoting Brief of Defendant-Appellee A. Pender Makin at 39, *Carson*, 979 F.3d 21 (No. 19-1746)).

32. *Id.* at 25.

33. *See id.* at 46.

34. *Id.* at 38.

35. *Id.*

36. 137 S. Ct. 2012, 2015 (2017).

37. 140 S. Ct. 2246, 2262-63 (2020).

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

39. *Id.*

40. *See id.* at 2024.

based on their 'religious status.'"[41] All Trinity Lutheran was requesting, in the Court's estimation, was the right "to compete" equally with everyone else for a benefit it was otherwise qualified to receive.[42] Missouri's denial, the Court held, violated the Free Exercise Clause. But had the state precluded applicants from putting the money to "religious use" rather than excluding them altogether based on status, Chief Justice Roberts hinted, the result might have been different.[43]

Three years later in *Espinoza v. Montana Department of Revenue*, the Court applied *Trinity Lutheran*'s status-based-exclusion rule to a Montana program that subsidized private-school tuition.[44] Based on a state constitutional provision that prohibited the use of government aid to religious schools, Montana extended those subsidies only to students attending secular schools.[45] Montana argued its policy was substantively distinct from the one at issue in *Trinity Lutheran*. In Montana's view, its exclusion was not status-based discrimination that gave a benefit to one group of persons while denying the same benefit to religious persons. Rather, the exclusion was an attempt to limit how public funds were used.[46] Any student, regardless of their religious beliefs, was eligible to use the funds to attend private school.[47] They just couldn't use state funds for religious instruction.[48]

The Court, however, found no difference between Montana's exclusion and that of Missouri in *Trinity Lutheran*: "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools."[49] While Montana theoretically may have tried to limit how public funds were used, the actual policy did "not zero in on any particular 'essentially religious' course of instruction at a religious school."[50] Instead, the policy

41. *Id.* at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

42. *Id.* at 2022.

43. *Id.* at 2022-23. Chief Justice Roberts authored the majority opinion, but the footnote in which he hinted at the status/use distinction received only a plurality of the votes. *See id.* 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* . . . . Respectfully, I harbor doubts about the stability of such a line." (citation omitted)).

44. 140 S. Ct. 2246 (2020).

45. *Id.* at 2252.

46. *See id.* at 2255.

47. *Cf.* MONT. CODE ANN. § 15-30-3102 (imposing no restrictions on which students could receive the funds based on their religious beliefs).

48. *Espinoza*, 140 S. Ct. at 2252.

49. *Id.* at 2255.

50. *Id.* at 2257.

"hinged solely on religious status."[51] The Court concluded that "[s]tatus-based discrimination remains status based" and therefore unconstitutional "even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."[52]

The Court in *Carson* found that Maine was doing exactly the same thing as the states in *Trinity Lutheran* and *Espinoza*—discriminating against religious schools "solely because of their religious character."[53] In the Court's framing, Maine had extended a "generally available" benefit—tuition payments—to all students in districts without a public high school, and the state statute did not condition that benefit on students receiving any particular type of education.[54] Its requirement that the schools be "nonsectarian," the Court reasoned, was simply status-based discrimination, not a requirement of a particular type of education.[55]

The notion that Maine was ensuring access to the equivalent of a free public education through this "nonsectarian" provision[56] did not help the state, either. Maine's program, the Court emphasized, funded private education, not public education, and the state did not require that the education those private schools provided be the equivalent of public education.[57] Private schools could effectively teach whatever they wanted so long as their status was nonsectarian.

Had the Court stopped there, its opinion may have carried relatively little import. One could contest the Court's reading of the facts, but having found what it deemed status-based discrimination, the Court could have simply resolved the case with the rule of *Espinoza*. The Court in *Carson*, however, went further to rule out the notion that that "religious use" limitations might be permissible under some other set of facts. "That premise," the Court wrote, "misreads our precedents."[58] The Court reasoned that a school's religious status and its religious activities are inextricably linked, both in theory and practice.[59] Thus,

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51. *Id.* at 2256.

52. *Id.*

53. Carson v. Makin, 142 S. Ct. 1987, 1996 (2022) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

54. *See id.* at 1998-99.

55. *See id.*

56. Brief for Respondent at 6-7, *Carson*, 142 S. Ct. 1987 (No. 20-1088) ("Simply put, Maine does not offer parents a choice of publicly funded alternatives to public schools; rather, Maine allows parents . . . to obtain a public education for their children . . . .").

57. *See Carson*, 142 S. Ct. at 1999-2000.

58. *Id.* at 2001.

59. *Id.*

in the Court's view, use-based restrictions are not "any less offensive to the Free Exercise Clause" than status-based exclusions.[60]

B. Dismissing the Distinction Between Status and Use

Notwithstanding the Court's claims to the contrary, a lot was at stake doctrinally and practically in *Carson*. The Court did not simply apply *Espinoza* to an idiosyncratic Maine program. If *Carson* appears pedantic on its face, it is only because the Court has so consistently sided with religious interests over state interests that the result felt like a foregone conclusion. Recognizing as much, states have hesitated to rely on yesterday's precedent because they are confident it will be gone tomorrow[61] — and they are wise to do so. *Carson* confirms that the policy grounds on which states can safely exercise their discretion are narrow. And in a world in which private-education programs and partnerships are rapidly expanding,[62] the risks of violating the Free Exercise Clause lurk in the corners of nearly every policy decision.

Any explicit attempt to separate church and state is almost sure to draw a free-exercise challenge.[63] Free-exercise plaintiffs' high rate of success in recent Supreme Court cases all but incentivizes such challenges.[64] Free-exercise advocates are so emboldened that they are challenging facially neutral provisions that

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60. *Id.*

61. Analysis by the National Conference of State Legislatures, for instance, warned after *Espinoza*: "[Courts are] likely to strike down school voucher programs and other state programs that exclude religious schools and institutions. The decision weakens state no-aid provisions that have been broadly applied." Benjamin Olneck-Brown, *What* Espinoza v. Montana Department of Revenue *Means for States*, NCSL BLOG (July 8, 2020), https://www.ncsl.org/blog/2020/07/08/what-espinoza-v-montana-department-of-revenue-means-for-states.aspx [https://perma.cc/H3H5-WEJX]; *see also* Lola Duffort, *Vermont Can't Discriminate Against Religious Schools. But Can Those Schools Discriminate Against Kids?*, VTDIGGER (May 5, 2021), https://vtdigger.org/2021/05/05/vermont-cant-discriminate-against-religious-schools-but-can-those-schools-discriminate-against-kids [https://perma.cc/MH72-5R8L] (discussing the difficulty of deciding new state policy following *Espinoza*).

62. *See generally* Valerie Strauss, *Privatization of Public Education Gaining Ground, Report Says*, WASH. POST (Apr. 18, 2022), https://www.washingtonpost.com/education/2022/04/18/privatization-of-public-education-gaining-ground [https://perma.cc/GX6A-H3C5] (explaining how the advocacy movement to privatize public education is growing).

63. For example, litigation over reconciling Vermont's prohibition against compelled support of religion with the Free Exercise Clause is long running. *See generally* A.H. *ex rel.* Hester v. French, 985 F.3d 165, 170-74 (2d Cir. 2021) (discussing this litigation history).

64. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020).

do not even target religion but simply exclude religious schools along with all other private schools from public funds.[65]

Most importantly, *Carson* eliminated the distinction between use- and status-based restrictions. That distinction would have provided states a clear rule to eliminate directly and transparently the possibility that taxpayer dollars—dollars raised under the auspices of providing public education—would be used for religious instruction, indoctrination, and proselytization. Without a rule like this, maintaining the boundary will be challenging, sufficiently so that many states and districts will likely forego trying.[66] The Court's suggestion that it did not break with precedent and that those who think otherwise misunderstood precedent is cavalier.

While no prior Court decision had explicitly upheld use-based limitations as constitutional, the Court had clearly recognized that a distinction between use and status limitations exists and could be significant. Chief Justice Roberts, who authored the majority opinions in both *Trinity Lutheran* and *Espinoza*, took care to note in *Trinity Lutheran* that the "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."[67] Responding in concurrence to those two lines, Justice Gorsuch, joined by Justice Thomas, argued that no meaningful distinction exists between religious-status and religious-use exclusions.[68] Even if this distinction could be drawn in theory, they urged the Court to reject it.[69]

Precedent prior to *Trinity Lutheran*, though not using the phrase "use," also strongly supported the distinction. Most notably, *Locke v. Davey* had held in 2004 that a state could decide, without running afoul of the Free Exercise Clause, "not to fund a distinct category of [religious] instruction."[70] There, Washington State extended college scholarships to high-achieving students; those who attended religious schools could receive a scholarship as long as they did not pursue

65. *See, e.g.*, Bishop of Charleston v. Adams, 584 F. Supp. 3d 131 (D.S.C. 2022).

66. As Justice Breyer argues, anything short of this bright line would have "force[d] Maine into the position of evaluating the adequacy or appropriateness of the schools' religiously inspired curriculum." Carson v. Makin, 142 S. Ct. 1987, 2009-11 (2022) (Breyer, J., dissenting). Now, even that difficult work would appear off the table, and something more fact-intensive would have to take its place.

67. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

68. *Id.* at 2026 (Gorsuch, J., concurring).

69. *Id.* ("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.").

70. Locke v. Davey, 540 U.S. 712, 721 (2004).

degrees in "devotional theology."[71] The Court affirmed the state's substantial interest in refusing to fund what was effectively preparation to become a minister.[72]

In *Espinoza*, the Court explicitly raised the issue of use restrictions again. Chief Justice Roberts wrote for the majority that Montana's voucher-program restrictions amounted to status-based discrimination, so he reserved the religious-use question, just as he had in *Trinity Lutheran*.[73] In his concurrence, Justice Gorsuch responded even more forcefully to this reservation. He allowed that the most natural interpretation of Montana's policy—and one that the evidence supported—was that Montana was attempting to limit the use of public money for religious instruction rather than discriminating solely based on religious status.[74] However, for Gorsuch, his disagreement with Roberts on this issue only proved his own point that both types of restrictions worked the same harm on the free exercise of religion.[75] Thus, the Court should reject use restrictions just as it rejected status-based restrictions.[76]

The dissenters in *Espinoza* ironically agreed that the line between use and status was thin, but they arrived at the opposite constitutional conclusion as Justice Gorsuch. Because they believed use restrictions like those in *Locke* were plainly permissible, they reasoned that so, too, must be status restrictions that are designed to achieve the same end.[77] Chief Justice Roberts may have disagreed with that notion, but the fact that he nonetheless twice reserved use restrictions and resisted calls to overturn *Locke* strongly suggested that he, along with a majority of the Court, might very well have upheld certain use restrictions. So, while *Carson* did not explicitly reverse any precedent, it invalidated a distinction that prior cases indicated was important. Indeed, the lower court in *Carson* had rested its decision on the very notion that use restrictions were constitutional.[78]

Use restrictions marked the line between discriminating against an entity because of who it is and setting the terms on which any entity can participate in

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71. *Id.* at 715.

72. *Id.* at 719, 725.

73. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255-56 (2020) ("This case also turns expressly on religious status and not religious use.").

74. *See id.* at 2275 (Gorsuch, J., concurring).

75. *See id.* at 2275-76.

76. *Id.* at 2276.

77. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2285 (Breyer, J., dissenting); *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2028 (2017) (Sotomayor, J., dissenting) ("The Establishment Clause does not allow Missouri to grant the Church's funding request [for a playground] because the Church uses the Learning Center, including its playground, in conjunction with its religious mission.").

78. *See* Carson v. Makin, 979 F.3d 21, 37 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1987 (2022).

a public program. While policing that line to ensure use restrictions are not proxies for religious discrimination may be difficult in some instances, use restrictions are not the same as status-based religious discrimination any more than a school rule against handing out candy canes is the same as discrimination against Santa Claus. Schools have entirely legitimate nutritional reasons—as well as sticky hands and scattered sugar flakes—to prohibit candy canes. We would second-guess such a rule only if the facts indicate some malevolent agenda underlies the health explanation. The same rationale should have been followed in *Carson*: we (and the Court) should have second-guessed Maine's policy only if the facts indicated invidious discrimination. Now, rather than directly and transparently prohibiting religious activity and indoctrination that are at odds with public goals—and were recognized as such by no less than Thomas Jefferson and James Madison as early as the 1770s[79]—states must search for other, indirect means to protect the sanctity of their programs lest they be labelled as religious discriminators.

C. Eliminating the "Play in the Joints"

Beyond taking away use restrictions, *Carson* also added to a consistently expanding approach to the Free Exercise Clause that has substantially shrunk the "play between the joints"[80] of the Free Exercise Clause and Establishment Clause. The Court had long recognized that this play between the joints is necessary[81] because the Clauses, if taken to their logical extremes, clash with one another.[82] An expansive or absolutist view of the Establishment Clause might find that releasing students from study hall to do their Friday-morning prayers unconstitutionally furthers religion,[83] while an expansive view of the Free

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79. *See* Everson v. Bd. of Educ., 330 U.S. 1, 11-13 (1947); *see also* Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 3, 11 (1951) (explaining that, in Madison's view, using tax money to support religion was an unconstitutional establishment of religion).

80. Locke v. Davey, 540 U.S. 712, 718 (2004) ("[Although] the Establishment Clause and the Free Exercise Clause[] are frequently in tension[,] . . . we have long said that 'there is room for play in the joints' between them." (citations omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))).

81. *Id.* at 718-19.

82. *Id.* at 719.

83. The Court's earliest Establishment Clause cases in public schools involved a similar set of facts. *See* Ill. *ex rel.* McCollum v. Bd. of Ed., 333 U.S. 203, 222-31 (1948) (discussing the history of religious released-time programs and striking down the one at issue in the case). The Court's precedents, however, have substantially evolved since then. *Compare* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (finding that New York's tax and tuition reimbursement programs" both have the "impermissible effect of advancing the sectarian activities of religious schools"), *with* Mueller v. Allen, 463 U.S. 388, 396-401 (1983)

Exercise Clause might find that refusing to excuse those same students from study hall violates their free-exercise rights.[84]

The Clauses cannot peacefully coexist if the Court applies a robust concept of both—and nothing in the text of the First Amendment suggests that either Clause should dominate the other.[85] Allowing for play in the joints between the Clauses resolves the problem by acknowledging that the bounds of the Clauses' protections and prohibitions do not start and stop at the same place. Rather, a zone of permissible activity exists between the two: "a State [can] further anti-establishment interests by withholding aid from religious institutions [or religious accommodations for individual people] without violating the Constitution's protections for the free exercise of religion."[86] The inverse is true, too: a state can make reasonable religious accommodations for individuals without violating the Establishment Clause.[87]

In *Espinoza* and *Carson*, the States argued they were trying to steer clear of any Establishment Clause violation by limiting the benefits to secular education.[88] Their position made sense given that, at least until 2002, conventional wisdom indicated that governments violated the Establishment Clause when they cut checks for religious education.[89] In *Zelman v. Simmons-Harris*, the Court recognized a significant exception to the general rule, announcing that a different analysis applies when families rather than governments direct the funds to the religious schools.[90] But the Court did not hold that states could freely fund

(holding that a tax deduction to parents for expenses in educating their children does not violate the Establishment Clause), *and* Zelman v. Simmons-Harris, 536 U.S. 639, 643-44 (2002) (upholding voucher payments to religious schools).

84. The plaintiff in *Locke*, for instance, argued that anything short of legislation that was religiously neutral on its face was presumptively unconstitutional. *Locke*, 540 U.S. at 720. The Court rejected that notion. *Id.*

85. The Court in *Walz* reasoned that "rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." 397 U.S. at 669.

86. Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (Breyer, J., dissenting).

87. *See generally* Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359 (2007) (synthesizing the Court's precedents on religious accommodations).

88. *See Carson*, 142 S. Ct. at 1994; Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020).

89. The law in this area has been riddled with exemptions for indirect funding and funding for nonreligious content; many cases produced no majority opinion, but the principle that states could not directly fund religious activity or purposes stood strong. *See* DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 753 (3d ed. 2021).

90. *See* 536 U.S. 639, 652-53 (2002).

religious education in any way they wanted or that the Free Exercise Clause demands that government provide religious schools access to public funds.[91]

Zelman, however, is just one of many recent cases in which the Court has shrunk the scope of the Establishment Clause.[92] The Court has, at the same time, used that shrinking scope to justify expanding the Free Exercise Clause, reasoning that a state's desire to prevent Establishment Clause violations is no defense to a Free Exercise Clause claim unless the state is preventing an actual violation of the Establishment Clause.[93] The practical effect of this approach, lamented the dissents in *Carson*, is to eliminate the "play in the joints" between the Establishment and Free Exercise Clauses.[94] The Clauses are now "joined at the hip," leaving states very little (if any) discretion when dealing with issues of religion.[95] Any policy explicitly involving religion seriously risks violating one Clause or the other.

II. PUBLIC EDUCATION'S NEW BURDEN

Precluding use restrictions and shrinking the play in the joints create serious implications for education in particular. Many people of religious faith believe their way of life is under assault and that government itself is marginalizing religion to the point where it has no place left in public life.[96] The anxieties this perception creates, though not caused by schools, often play out in schools.[97] And when they do, they have a tendency to make their way to the Supreme

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91. *See id.* at 662-63.

92. *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Van Orden v. Perry, 545 U.S. 677 (2005).

93. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421-22 (2022) (rejecting the school district's position that a football coach's prayer violated the Establishment Clause, holding instead that the restriction on the coach's prayer violated the coach's free-exercise right); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260-62 (2020) (rejecting Montana's concern that funding religious schools would violate its state-constitution anti-religious-establishment interests, holding instead that the restriction on using scholarship money for religious schools violated the plaintiffs' free-exercise rights).

94. *See* Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (Breyer, J., dissenting); *id.* at 2012 (Sotomayor, J., dissenting).

95. *Id.* at 2005 (Breyer, J., dissenting).

96. *See, e.g.*, Kelly Shackelford, Opinion, *Religious Freedom Is Under Attack Like Never Before*, NEWSWEEK (Aug. 5, 2020, 2:06 PM EDT), https://www.newsweek.com/religious-freedom-under-attack-like-never-before-opinion-1523094 [https://perma.cc/6573-X3HJ].

97. *See* Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & EDUC. 1, 1-2, 8 (2009) (arguing that the multitude of controversies over religion in schools stems from schools' institutional mission of teaching citizenship).

Court. The Court's recent free-exercise decisions, rather than achieving balance, are increasing the likelihood of even more aggressive claims against public education. Navigating these recent decisions and the new cases they might spark will also impose new burdens on schools—a result that the Court, until now, has insisted it should avoid.

A. Inviting Challenges to Public Education Itself

As Justin Driver astutely concludes, "[P]ublic school[s] ha[ve] served as the single most significant site of constitutional interpretation within the nation's history."[98] Schools, more than any other institution, capture the "nation's cultural imagination," reflect its "social concerns," and "illuminate[] both the hopes and the fears" of the people.[99] So it is in the school that the country so often wages war over its most sensitive and controversial issues.[100] And the Court is particularly apt to engage the controversies. True to history, four of the Court's last six major free-exercise cases have involved education.[101] All have swung in favor of those asserting free exercise of religion with the Court painting religion as the victim of overzealous state policy.

Cases of a similar sort will surely follow. School-choice advocates, even before *Carson*, expressed their intent to extend *Espinoza*'s logic to other school policies.[102] The most immediate targets are state laws that preclude religious entities from operating charter schools.[103] School-choice advocates' holy grail, however, is to delegitimize public education itself, particularly in states that lack subsidies for private-school tuition. School-choice advocates argue that tax-supported public schooling coerces families to accept a learning environment that indoctrinates their children with ideas hostile to their own; thus, families have an

98. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 9 (2018).

99. *Id.* at 10-11.

100. *See id.* at 9-12.

101. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (relating to education); Carson v. Makin, 142 S. Ct. 1987 (2022) (relating to education); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (relating to education); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (relating to education); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (relating to social services); Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017) (relating to daycare services).

102. *See, e.g.*, GARNETT, *supra* note 16, at 5.

103. *See id.*

affirmative right to government resources to support their private-school choices.[104]

A few years ago, these claims would have sounded silly. Not a shred of constitutional doctrine supported them. No court had hinted that states should open themselves to religious charter schools. To the contrary, lower courts relied on the Establishment Clause to ensure secular charter schools did not unconstitutionally advance religion.[105] The claim that a state's exclusive support for free public education is unconstitutional would have sounded even stranger. State constitutions mandating that states establish and support public schools date back to the Founding in several instances and were ubiquitous by the 1860s.[106] And over the last century, the Court has repeatedly emphasized the centrality of public education to the nation's democratic project and individuals' chances in life.[107]

In *Brown v. Board of Education*, the Court famously wrote:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance

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104. *See* Hamburger, *supra* note 16; *see also* Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, 43 NOMOS: AM. SOC'Y POL. & LEGAL PHIL. 87, 104-06 (2002) (arguing that public schools do not promote truly common values as the values taught there conflict with the curriculum of certain religious schools).

105. *See, e.g.*, ACLU v. Tarek ibn Ziyad Acad., 643 F.3d 1088, 1091 (8th Cir. 2011) (concerning an Establishment Clause claim that a public charter school preferred or promoted Islam through its practices); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897 (W.D. Mich. 2000) (relying on the Establishment Clause to assess a public charter school's practices and finding no violation on the facts).

106. BLACK, *supra* note 10, at 51-72, 95-111; Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 783-94 (2018).

107. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("[P]ublic schools [are] a most vital civic institution for the preservation of a democratic system of government."); Ambach v. Norwick, 441 U.S. 68, 75-76 (1979) (recognizing that teachers perform a task "that go[es] to the heart of representative government" and that public education is a "fundamental obligation" of government (alteration in original) (internal quotation marks omitted) (citations omitted)); Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (recognizing that public education is vital to citizenship and democracy); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (emphasizing that public education reinforces fundamental democratic values); Plyler v. Doe, 457 U.S. 202, 221 (1982) (observing that the Court has often observed the importance of public education in promoting democracy and opportunity); *see also* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 7-11 (1992) (arguing that public schools perform a number of necessary functions for preserving American democratic institutions).

> of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[108]

Even in *Pierce v. Society of Sisters*, a case in which the Court upheld families' right to opt out of public education at their own expense, the Court recognized the legitimacy and primacy of the state's interest in education. Though a state may not be able to compel public-school attendance and thereby preclude private schools, "[n]o question is raised concerning the power of the State reasonably to regulate [private] schools" in all respects, including to ensure that "certain studies plainly essential to good citizenship [are] taught, and that nothing be taught which is manifestly inimical to the public welfare."[109] In short, a long list of historical practices and judicial precedents indicated that the Free Exercise Clause does not meaningfully affect the state's authority to operate public schools.[110]

Yet *Carson* is, as one of the dissenters recognized, a capstone in a growing list of cases that caution against taking precedent and conventional wisdom for granted.[111] Through most of the 1990s, the Court was clear that government should not fund religious instruction or provide direct aid to religious schools.[112] In the 2000s, the Court dramatically eroded and reversed those positions. Most notably, the Court in *Zelman v. Simmons-Harris* upheld an Ohio program that paid for students' tuition at private schools, including religious schools.[113] While the tuition funds could be used at any private school, eighty-two percent of participating schools were religious, and ninety-six percent of participating students were enrolled in religious schools.[114] Evidence also indicated that these numbers did not reflect families' personal religious convictions. Two-thirds of families who used the vouchers to send their children to religious schools indicated that

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108. *Brown*, 347 U.S. at 493.

109. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

110. For an analysis debunking the application of *Carson* to charter schools, see Black, *supra* note 17.

111. *See* Carson v. Makin, 142 S. Ct. 1987, 2013 (2022) (Sotomayor, J., dissenting) ("[I]n just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.").

112. The Court firmly rejected federal funding for religious schools in *Aguilar v. Felton*, 473 U.S. 402, 414 (1985), but reversed itself in *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997), abandoning the presumption that public-school teachers providing services in religious schools would effectively advance religion.

113. Zelman v. Simmons-Harris, 536 U.S. 639, 643-44 (2002).

114. *Id.* at 647.

they "did not embrace the religion of those schools" but that the religious school was the only or best option available to them.[115]

Notwithstanding the possibility that the Ohio program incentivized attendance at a religious school, the Court found the program constitutional under the notion that the state was only indirectly funding education. Students arrived at a religious school not due to the state's choice but as a result of the "independent choices of private individuals."[116] *Carson* and *Espinoza* now hold not only that a state *may* fund private religious schools through programs like those in *Zelman* but also that those programs *must* fund religious schools.[117] In other words, what was once constitutionally prohibited is now constitutionally required. The Court's school-prayer precedent has followed a similar trajectory. The Court had consistently held that prayers led, directed, or facilitated by state officials were unconstitutional,[118] but in 2022, the Court held that the Constitution required a school district to permit a football coach to initiate and lead his student-athletes in prayer.[119]

These cases would defend states seeking to deepen their relationships with and financial support of religion while rebuking those aiming to avoid the appearance of favoring or coercing religion. Embedded in these cases is the notion that religion has become the victim of discrimination and overzealous secularism.[120] Thus, no matter how unsupported today's free-exercise charges against

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115. *Id.* at 704 (Souter, J., dissenting).

116. *Id.* at 649 (majority opinion).

117. *See* Carson v. Makin, 142 S. Ct. 1987, 2000 (2022) ("[A] '[s]tate 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 v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020))).

118. *See* Engel v. Vitale, 370 U.S. 421, 424-25 (1962); Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985); Lee v. Weisman, 505 U.S. 577, 586-87 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

119. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022).

120. *See, e.g.*, *Espinoza*, 140 S. Ct. at 2254 (noting that the Free Exercise Clause protects against laws that "impose special disabilities on the basis of religious status" (quoting Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2021 (2017))); *id.* at 2255 (explaining that the Free Exercise Clause prohibits laws that penalize religion and describing an unconstitutional Missouri law as "discriminat[ing]" against a church "simply because of what it is—a church" (internal quotation marks omitted) (quoting *Trinity Lutheran*, 137 S. Ct. at 2016)); *id.* at 2257 (framing a state law as "putting the school to a choice between being religious or receiving government benefits"); *id.* at 2259 (explaining that state no-aid laws, which prohibit states from funding religious schools, have a "checkered past" and were "born of bigotry"); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022) (writing that to uphold the school's restriction on a coach's prayer would be "a sure sign that our Establishment Clause jurisprudence had gone off the rails"); *Kennedy*, 142 S. Ct. at 2431 ("In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First

charter-school and public-education policy may be, the Court's new perspective portends a tomorrow in which it is sympathetic to these charges.

B. Complicating Everyday Policy and Practices

The drastic shift in the Court's Religion Clauses doctrines is important not just because of the radical transformation it could signal for wide-reaching education policies but also because of its potential consequences for the everyday problems that arise in schools. What of a parent's challenge to the reading list that has only secular books?[121] What of the church that wants to run the after-school childcare program at the public school? What of the church organization that wants to hand out Bibles at school or make its books available for purchase at the book fair?[122] What of the student who refuses to read an assigned book that includes LGBTQ characters or comply with the school's antiharassment policies?[123]

Amendment's double protection for religious expression, it would have us preference secular activity.").

121. Fights over reading lists and assigned textbooks are common causes of litigation. *See, e.g.*, Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 801 (5th Cir. 1989); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 579 (6th Cir. 1976); Cary v. Bd. of Educ., 598 F.2d 535, 536-39 (10th Cir. 1979); Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1059-61 (6th Cir. 1987). Kevin G. Welner has observed the tension between school administrations and teachers on questions of curriculum. *See* Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. REV. 959, 960-61 (2003). But the Court's recent free-exercise jurisprudence may potentially produce additional tension between students and all school actors. Recent objections to and controversies over books on topics pertaining to racial and LGBTQ issues signal that those cases are coming. *See generally* Alia Wong, *"The Perfect Target"? Movement to Ban Books from Schools Brings Vitriol Toward Librarians*, USA TODAY (Aug. 24, 2022, 2:14 PM ET), https://www.usatoday.com/story/news/education/2022/08/23/book-bans-schools-have-landed-librarians-activists-crosshairs/10310002002 [https://perma.cc/UP5L-8RPH] (describing how controversies over books available for children in libraries have led to harassment of librarians); Dana Goldstein & Stephanie Saul, *A Look Inside the Textbooks that Florida Rejected*, N.Y. TIMES (May 7, 2022), https://www.nytimes.com/2022/04/22/us/florida-rejected-textbooks.html [https://perma.cc/3BK3-HYDU] (discussing math textbooks that were rejected by the Florida Department of Education because they included social-emotional learning).

122. *See generally State and Church FAQ: Bible Distribution in Public Schools*, FREEDOM FROM RELIGION FOUND., https://ffrf.org/faq/state-church/item/14034-bible-distribution-in-public-schools [https://perma.cc/L77B-BLE3] (indicating that although Bible distribution in schools is illegal, the organization has received decades of complaints regarding the practice).

123. These objections are significant enough that they have even made their way into state law in some instances. *See generally* Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017) (cataloging state and federal curriculum laws that are hostile to LGBTQ people).

Carson makes clear that a state's ability to disentangle itself from religion and religious controversy has substantially narrowed in these situations: A state may have real and pressing concerns about funding religious institutions or instruction or about indirectly incentivizing students to engage in religious activities, but the Court now treats school policies that explicitly attempt to police the boundaries of religion as automatically suspect.[124] According to *Carson*, efforts to limit the use of public resources for religious activity are the same as drawing a religious-status distinction: both are discrimination.[125] This approach suggests it is no longer enough for schools to avoid policies that actively interfere with religion; they must actively accommodate religion, not just as a matter of discretion but also as a matter of the private actor's religious entitlement.[126]

None of this is to say states and schools are without any options when navigating these situations. But they now bear a substantial burden to avoid situations in which religion dictates the terms of schools' engagement with private actors. Public schools cannot easily pursue their own ends — even if those ends have nothing to do with religion — without considering the potential religious repercussions. Their policies and positions will have to be finely tuned, often by attorneys rather than educators. The burden is high enough that a school might understandably decide to simply not offer certain opportunities at all. Why run the book fair if it will inevitably devolve into a fight over religion? Why rely on the private sector for help with school services if it will bring religious influences into the school environment? Why craft narrow policies to address narrow problems, as with Maine's subsidies for rural high-school students, if it will force funding of religious instruction? For those schools that feel they must still provide these opportunities, one could maybe forgive them for throwing up their hands in disgust, dropping any pretense of rules and regulations, and letting the chips fall where they may. Something, they might calculate, is better than nothing, even if the state cannot control what the something will become.

C. Ironically Disregarding Educational Burdens

The irony of schools' new situation is that conservative Justices have traditionally expressed outrage when the Court has constitutionalized standards that impose administrative burdens on schools or interfere with policy decisions. Those burdens, they have urged, detract from the educational opportunities that

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124. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (writing that the application of "strict scrutiny" to the state's attempt to avoid funding religion was "unremarkable" even though the state constitution requiring that avoidance was more than a century old).

125. Carson v. Makin, 142 S. Ct. 1987, 2001 (2022).

126. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415 (2022).

schools provide, not enhance them. Take, for example, due process for school suspensions. In *Goss v. Lopez*, the dissent complained that applying due process to suspensions "would interfere more extensively in the daily functioning of schools" than almost any other ruling it could imagine.[127] Given the number of discipline problems that arise, "school authorities would have time to do little else" other than hold hearings.[128] But the process does not end in the schoolhouse, the dissent argued. Rather, the result is an "indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom."[129]

So incensed by the burden, two years later, those dissenters became the majority in *Ingraham v. Wright* and refused to apply *Goss*'s informal hearings to corporal punishment. The Court reasoned that corporal punishment was well rooted in historical practice and that applying "a universal constitutional requirement would significantly burden the use of corporal punishment as a disciplinary measure."[130] Similarly, in *San Antonio v. Rodriguez*, the majority infamously refused to address gross funding disparities because "this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels" on matters of education policy.[131]

This Essay does not suggest that due-process protections or any other constitutional requirements are inappropriate in schools; rather it argues that the Court has regularly afforded those burdens substantial weight, sometimes even to the detriment of students' rights. While the conservative Justices may have been the most concerned about administrative burdens, all members of the Court tend to take those concerns seriously — even if they weigh them differently. Administrative burden explains why the majority in *Goss* insisted that formal due process was unnecessary; the disciplinarian would typically only need to "informally discuss the alleged misconduct with the student" prior to making a suspension decision.[132]

The majority in *Carson*, however, expressed no sympathy for the challenges the state faced in ensuring access to constitutionally mandated education nor any sympathy for what it would take to transform Maine's program into one that still served the state's interests. The Court's silence on these matters is all the more striking given that the supposed burden on students in *Carson* was, it would

127. Goss v. Lopez, 419 U.S. 565, 591 (1975).

128. *Id.* at 592.

129. *Id.* at 594.

130. Ingraham v. Wright, 430 U.S. 651, 680 (1977).

131. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

132. *Goss*, 419 U.S. at 582.

seem, minimal. *Goss* involved a complete exclusion from school for weeks and a permanent stain on students' records;[133] in *Carson*, by contrast, the state was paying for students' tuition at a private school of their choice so long as the instruction delivered therein met the state's standards.[134] For the past half century and across a variety of constitutional rights, the Court's precedents have generally required — or at least relied on — a substantial invasion of students' rights to justify invalidating a state law.[135]

In balancing the gravity of the private interest at stake against those of the state, the Court in *Carson* would have been wise to recall the vigorous debate from *Goss* before crossing a new doctrinal bridge. The *Goss* dissent, even if wrong on its final doctrinal conclusion, cautioned:

> No one can foresee the ultimate frontiers of the new "thicket" the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process. Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil . . . . In these . . . situations, claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification . . . . [The final result will be that] the discretion and Judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system.[136]

In sum, rather than simply fielding cultural and religious disputes that inevitably land on its docket, this Court has increasingly invited them by taking an ever-expanding view of the Free Exercise Clause. As a result, it has put public schools and public-education policy on defense across multiple fronts, big and small,

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133. *See id.* at 568-69.

134. *See* Carson v. Makin, 142 S. Ct. 1987, 1993-95 (2022).

135. *See Goss*, 419 U.S. at 576 (contrasting the "total exclusion from the educational process for more than a trivial period," to which due process applies, with "insubstantial" invasions of rights); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) ("We have recognized that even a limited search of the person is a substantial invasion of privacy."); Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("There is, of course a de minimis level of imposition with which the Constitution is not concerned." (emphasis removed)); *see also* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 910 (2011) ("The nature of [the Court's] analysis [in *Zamora v. Pomeroy*] demonstrates that the plaintiff passed the threshold test by establishing a greater than de minimis interference with his constitutionally protected property interest in receiving a public education . . . .").

136. *Goss*, 419 U.S. at 597-99.

and made schools' basic work more difficult. While interfering with the work of public education was once anathema to the Court, it is now par for the course, at least in matters of religion.

III. RELIGION OVER EQUITY

The ultimate travesty of *Carson*, however, is not administrative burden or practical uncertainties. It is the collision course the Court has set between equal educational opportunity and religion. Equal educational opportunity traditionally meant ensuring access and resources for traditional victims of discrimination — racial and ethnic minorities, low-income students, women, students with disabilities, and LGBTQ students. The Court purports to have done little more than add religion to this list of disadvantaged students. But that notion assumes a blank slate on which all of those identities are equal when, in fact, the playing field is already slanted against traditional victims of discrimination and towards religion. The broader context suggests *Carson* just handed religion an advantage in an escalating contest over public-education resources and antidiscrimination protections.

Over the past decade or so, publicly financed private-education programs have steadily depleted scarce resources from public schools.[137] Even worse, these programs are often unconcerned with or intentionally hostile to the equity values that normally guide publicly financed education programs.[138] For some families, that is the draw. The *Carson* decision now ensures that a new and potentially larger constituency will demand more of those funds and assert free-exercise challenges to resist governmental regulation when they receive them.

States can and should avoid these stability and equity problems by eliminating their voucher programs. But that solution, which the Court in *Carson* seems to raise to absolve itself of the harmful effects of its decision,[139] disregards the status quo. The ship has already sailed. Roughly two-thirds of states already

137. *See* Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1391-92 (2018).

138. *See id.* at 1395-1401 (demonstrating how these programs result in an inequitable distribution of educational resources); Bayliss Fiddiman & Jessica Yin, *The Danger Private School Voucher Programs Pose to Civil Rights*, CTR. FOR AM. PROGRESS 2 (2019), https://files.eric.ed.gov/fulltext/ED596183.pdf [https://perma.cc/QYN4-ZAH3] ("While public school systems must accept and educate all students, private schools — even those that accept public support through vouchers or other state or federal programming — may refuse to serve certain students, with limited options for parents [to] advocate for their children.").

139. *See Carson*, 142 S. Ct. at 1997.

operate programs offering public financing for private education in some form,[140] and at least some of those programs rested on the promise that they would not fund religious instruction.[141] While states could refrain from funding vouchers for students who are not already in the system, taking benefits away from current recipients before they finish their education is highly unlikely if not unfair. Even voucher opponents would hesitate to support a policy that would abruptly and involuntarily force students out of their current educational environments.[142]

The more realistic prospect is that voucher programs will grow even more now that the Court has fully legitimized and required funding for religious education. The constituents who previously may have seen these programs as beyond their reach now have every reason to join forces with other private schools for the expansion and liberalization of the programs. And whether their growth and liberalization fund secular or religious schools, history strongly suggests that these programs will retract rather than expand equal opportunity.

A. A Sector Predicated on and Resistant to Equity

The first voucher programs in the country emerged in direct response to public-school desegregation.[143] For example, when courts forced states to integrate schools, Virginia took the position that it was better to close integrated public schools altogether and pay for students to attend private schools, which

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140. Jacob Fischler, *What Parents Need to Know About School Vouchers*, U.S. NEWS (Oct. 22, 2021), https://www.usnews.com/education/k12/articles/what-parents-need-to-know-about-school-vouchers [https://perma.cc/PVY2-TYFY]. These programs vary from traditional vouchers to scholarship programs, tax credits, and more. Kevin G. Welner captures these various new iterations under the umbrella term neovouchers. *See, e.g.*, KEVIN G. WELNER, NEOVOUCHERS: THE EMERGENCE OF TUITION TAX CREDITS FOR PRIVATE SCHOOLING 5-29 (2008).

141. *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 327 (2008) ("[T]hirty-eight states have express [state constitutional] provisions limiting or prohibiting public funding to religious schools . . . .").

142. *See, e.g.*, Jeremy P. Kelley, *Ohio Lawmakers Move to Change Private-School Voucher System*, DAYTON DAILY NEWS (Feb. 6, 2020), https://www.daytondailynews.com/news/local-education/ohio-lawmakers-move-change-private-school-voucher-system-stops-state-takeovers/Kuoph8FJGon8SKFEyKfCPP [https://perma.cc/2K7V-UR2C] (discussing a bill that would prohibit new vouchers but grandfather in students who had already received them); Shailagh Murray, *Obama Offers D.C. Voucher Program Extension for Existing Students*, WASH. POST (May 6, 2009), http://voices.washingtonpost.com/44/2009/05/06/obama_proposes_extending_dc_vo.html [https://perma.cc/F7CB-TE9H].

143. STEVE SUITS, OVERTURNING *BROWN*: SEGREGATIONIST LEGACY OF THE MODERN SCHOOL CHOICE MOVEMENT 12-17 (2020); S. EDUC. FOUND., *supra* note 15.

would presumably remain segregated.[144] In *Griffin v. Prince Edward County*, the Supreme Court declared this scheme unconstitutional.[145] Reaching that conclusion, however, was difficult.

The Court indicated it had no direct authority to compel states to operate public schools or refrain from closing them as a general matter.[146] Instead, the Court's decision rested on much narrower grounds: "Virginia law, as here applied, unquestionably treats the school children of Prince Edward differently from the way it treats the school children of all other Virginia counties. Prince Edward children must go to a private school or none at all; all other Virginia children can go to public schools."[147] While this scheme alone would not have been unconstitutional in the Court's view, the unequal opportunity combined with an obvious racially discriminatory motive crossed the constitutional threshold.[148]

The decision in *Griffin* effectively killed the voucher movement for decades.[149] Core voucher supporters had predicted that the movement would gain traction among the Black community, but history proved them wrong. Since racism was the only motivation for the voucher policy and that motivation was unconstitutional, Black consumers saw no legitimate reasons to buy into the scheme. In fact, African American students went without education in Prince Edward County from 1959 to 1963 rather than accept the offer of setting up private Black schools.[150] Vouchers resurfaced on a small scale in the 1990s for religious and sometimes purportedly equal-opportunity reasons, but the voucher movement still had not gained the traction its supporters had assumed it would.[151]

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144. *See* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 221 (1964).

145. *Id.* at 225, 233-34.

146. *Id.* at 229-30 (accepting another court's holding that "each county had 'an option to operate or not to operate public schools'"). Elsewhere, I argue that the conclusion that federal law does not compel the operation of public schools is flawed and contradicted by historical practices but remains relevant for the purposes of exploring the racial history of vouchers. *See* Black, *supra* note 106, at 823-24 (explaining the mandate for education and critiquing *Griffin*).

147. *Griffin*, 377 U.S. at 230.

148. *Id.* at 231.

149. *See* James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 567 (2007) ("Despite the efforts of conservative Christians and others in the 1980s and early 1990s, vouchers and tuition-tax-credit proposals failed much more often than they passed.").

150. *See Griffin*, 377 U.S. at 223.

151. James Forman characterizes the rise and fall of vouchers as a story of race, religion, and politics in which Black interests were not always aligned with those of religious advocates who were attempting to leverage Black communities for their own ends. Forman, *supra* note 149, at 567 ("Politically, voucher leaders sought to expand their constituency beyond libertarians and

As for white families, many were determined to leave the public schools during desegregation—with or without a voucher. A number of private schools—often called "white academies"—flourished as they opened or expanded to receive those families.[152] Admittedly, those schools and their patron families' motivations for attending them are more diverse today, but the private-school sector remains overwhelmingly white, a stark contrast to the public-school sector. White families are more than twice as likely to enroll in private school as Black families.[153] As of 2015, white students made up sixty-nine percent of private-school enrollment but less than half of public-school enrollment.[154]

The other demographic reality is that the private-school sector is heavily religious. Nearly seventy percent of private schools are religiously affiliated, and seventy-eight percent of private-school students are enrolled in those private schools.[155] While many religiously affiliated schools tolerate—and sometimes welcome—nontraditional students, too many do not. Some are apparently becoming less welcoming, serving as twenty-first century cultural-flight havens. As public schools have become more accepting in terms how they teach and treat students,[156] some private schools are becoming less inclusive, particularly regarding LGBTQ students. In North Carolina, Florida, and Indiana, for instance,

religious voters, and they chose minority residents in low-income areas . . . . These interrelated themes came together to produce a voucher movement with a public face, intellectual rationale, and legal defense that were quite different from those of the values-oriented movement that preceded it.").

152. White enrollment in private schools in the fifteen southern states rose by forty-three percent after *Brown*. *A History of Private Schools and Race in the American South*, S. EDUC. FOUND., https://southerneducation.org/publications/history-of-private-schools-and-race-in-the-american-south [https://perma.cc/J24Q-QPFD]; *see also* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 76 (explaining that government support of white academies continued through other means and was "difficult to counter").

153. Jongyeon Ee, Gary Orfield & Jennifer Teitell, *Private Schools in American Education: A Small Sector Still Lagging in Diversity*, UCLA C.R. PROJECT 14-15 (Mar. 5, 2018), https://escholarship.org/uc/item/6213b2n5 [https://perma.cc/CED4-NFT7].

154. *Id.*

155. *Statistics About Nonpublic Education in the United States*, U.S. DEP'T OF EDUC. (Dec. 2, 2016), https://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html [https://perma.cc/PKS3-84WG].

156. *Cf.* Bobbi M. Bittker, *LGBTQ-Inclusive Curriculum as a Path to Better Public Health*, 47 AM. BAR ASS'N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/lgbtq-inclusive-curriculum-as-a-path-to-better-public-health [https://perma.cc/3JBY-QEL7] (discussing state laws that promote inclusive curricula).

LGBTQ students and families attempting to enroll at religious schools using vouchers have been turned away.[157]

The textbooks in some of these schools are also problematic, routinely espousing antiscience and white-centric ideologies. The *Orlando Sentinel* reported that some Florida voucher schools teach students that dinosaurs and humans lived together, God intervened to prevent Catholics from dominating North America, slavery benefitted its victims by exposing them to Jesus Christ, and most Black and white southerners lived in harmony.[158] Other investigative reporting on private-school textbooks revealed similarly disturbing curriculum regarding race, science, religion, and democratic values.[159] For instance, "three of the most popular textbook sources used in private schools throughout the US . . . describe slavery as 'black immigration.'"[160]

The enrollment and curriculum practices present students of color, LGBTQ students, secular families, and those interested in a diverse and intellectually open environment with a loaded board. These schools may look like excellent opportunities to some families but closed doors to others. That, choice advocates

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157. *See* Brian Gordon, *N.C. Religious Schools with Anti-LGBTQ Policies Receive Top Opportunity Scholarship Dollars*, STARNEWS ONLINE (Aug. 27, 2020, 10:57 AM ET), https://www.starnewsonline.com/story/news/education/2020/08/27/nc-religious-schools-with-anti-lgbtq-policies-receive-top-opportunity-scholarship-dollars/113590174 [https://perma.cc/SNC7-Q2R4]; Leslie Postal & Annie Martin, *Anti-LGBT Florida Schools Getting School Vouchers*, ORLANDO SENTINEL (Jan. 23, 2020, 11:24 AM), https://www.orlandosentinel.com/news/education/os-ne-voucher-schools-lgbtq-discriminate-20200123-s5ue4nvqybcgrbrxov5hcb46a4-htmlstory.html [https://perma.cc/ZWV7-MFEN]; Julia Donheiser, *Choice for Most: In Nation's Largest Voucher Program, $16 Million Went to Schools with Anti-LGBT Policies*, CHALKBEAT (Aug. 10, 2017, 6:30 AM EDT), https://www.chalkbeat.org/2017/8/10/21107318/choice-for-most-in-nation-s-largest-voucher-program-16-million-went-to-schools-with-anti-lgbt-polici [https://perma.cc/XT8F-UWK5]; Ryan Quinn, *Some of WV's Largest Private Schools Call Homosexuality a Sin. An Advancing Bill Would Help Fund This Teaching*, CHARLESTON GAZETTE-MAIL (Feb. 16, 2021), https://www.wvgazettemail.com/news/education/some-of-wv-s-largest-private-schools-call-homosexuality-a-sin-an-advancing-bill-would/article_595da6f7-9be9-5462-ae78-2f72074eb281.html [https://perma.cc/9YZJ-L73B].

158. Leslie Postal, Beth Kassab & Annie Martin, *Private Schools' Curriculum Downplays Slavery, Says Humans and Dinosaurs Lived Together*, ORLANDO SENTINEL (June 1, 2018, 5:00 AM), https://www.orlandosentinel.com/news/education/os-voucher-school-curriculum-20180503-story.html [https://perma.cc/2Z78-9MH3].

159. *See, e.g.*, Rebecca Klein, *The Rightwing US Textbooks that Teach Slavery as "Black Immigration,"* GUARDIAN (Aug. 12, 2021, 7:00 AM EDT) [hereinafter Klein, *The Rightwing US Textbooks*], https://www.theguardian.com/education/2021/aug/12/right-wing-textbooks-teach-slavery-black-immigration [https://perma.cc/SQ4R-TLZJ]; Rebecca Klein, *These Textbooks in Thousands of K-12 Schools Echo Trump's Talking Points*, HUFFINGTON POST (Jan. 15, 2021, 9:11 AM EST), https://www.huffpost.com/entry/christian-textbooks-trump-capitol-riot_n_6000bce3c5b62c0057bb711f [https://perma.cc/L975-KU8F].

160. Klein, *The Rightwing US Textbooks*, *supra* note 159.

say, is okay because the objective is providing pluralistic educational opportunities.[161] The fact that some schools are not for everyone makes them exactly right for some. The objective of public education and, by extension, publicly financed education programs, however, has always been and must continue to be the creation of common ground, not ideological silos.[162] That is, the public-school project is built on guaranteeing nondiscrimination, promoting civic virtue, refraining from indoctrination (religious or otherwise), and focusing on values that unite rather than divide; public schools also, quite simply, bring students from racially, economically, and religiously diverse backgrounds together in common experiences.[163] Absent that goal, the case for public support of education begins to fall apart.[164]

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161. *See, e.g.*, McConnell, *supra* note 104, at 87.

162. *See* Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 448-58, 477-80 (2013).

163. Of course, our public schools are far from fully meeting their goals. Yet, the fact that the animating goal of uniting across differences distinguishes and justifies the public-education project.

164. Some may wonder whether *public* schools are the ones becoming less accepting in many states and cities. *See, e.g.*, Anthony Izaguirre & Adriana Gomez Licon, Associated Press, *"Don't Say Gay" Law Brings Worry, Confusion to Florida Schools*, PBS NEWS HOUR (Aug. 15, 2022, 2:59 PM EDT), https://www.pbs.org/newshour/education/dont-say-gay-law-brings-worry-confusion-to-florida-schools [https://perma.cc/UH9U-XXEV] (describing that opponents of Florida's new law on sexual-orientation discussion in public schools find it "toxic" and "discriminatory" (internal quotation marks omitted) (quoting a high-school teacher)). These observers may, therefore, argue that perhaps private schools are the best way parents can ensure their children receive a tolerant education. This notion, however, misses the mark. Public schools are not becoming less accepting; rather, it is the very fact that they have become more accepting that has triggered state legislatures (not schools) to pass hostile laws like the one in Florida. *See, e.g.*, Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 736 (2022) (explaining that anti-Critical Race Theory bills and other "Backlash Bills" attempt to "stymie, roll-back, or otherwise obstruct efforts to realize a more racially egalitarian society"). These backlash laws, moreover, are probably unconstitutional or at the very least unlawful under federal antidiscrimination laws. *See, e.g.*, Ian Millhiser, *The Constitutional Problem with Florida's "Don't Say Gay" Bill*, VOX (Mar. 15, 2022, 12:30 PM EDT), https://www.vox.com/2022/3/15/22976868/dont-say-gay-florida-unconstitutional-ron-desantis-supreme-court-first-amendment-schools-parents [https://perma.cc/2D9A-4C6U] (arguing the Florida law is unconstitutionally vague); Engy Abdelkader, *Are Government Bans on the Teaching of Critical Race Theory Unconstitutional?*, ABA J. (Oct. 7, 2021, 10:22 AM CDT), https://www.abajournal.com/columns/article/are-government-bans-on-the-teaching-of-critical-race-theory-unconstitutional [https://perma.cc/R2X4-FL9N] ("[A]nti-CRT bills that bar the discussion of racism and bias in the classroom are likely unconstitutional."). *But see* Mike Schneider, Associated Press, *Judge Again Tosses Challenge to Florida's "Don't Say Gay" Bill*, PBS NEWS HOUR (Oct. 21, 2022, 7:11 PM EDT), https://www.pbs.org/newshour/politics/judge-again-tosses-challenge-to-floridas-dont-say-gay-bill [https://perma.cc/857W-VAMS]. Even if ultimately upheld, it will not be that antidiscrimination laws and the Constitution are inapplicable to public schools; rather,

B. When Expanding Freedom Shrinks Equity and Adequacy

To be clear, states have largely created these problems for themselves. The rhetoric driving these programs emphasizes educational freedom for all,[165] but the facts indicate a real danger that it is educational freedom for only some. States have, for the last decade, hurriedly dumped an expanding pot of money into these private schools[166] with little more than a slogan to justify the expansion. Quality standards, antidiscrimination, and effects on public education have too often been an afterthought. One need look no further than America's intense and sometimes violent polarization to appreciate that at this very moment the country direly needs common ground, even playing fields, and a public-education system designed to deliver those goals, not a further fracturing of public education that sends everyone running for their own corners in the private sector.

Following the Great Recession, vouchers experienced exponential growth.[167] Florida, for instance, was previously spending under $100 million a year subsidizing private-school tuition.[168] By 2017, it was spending $1 billion a year.[169] This year, it will spend $1.3 billion.[170] In the early 2000s, Florida was one of only

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the facts of the specific cases brought before the courts would not violate the statutes and Constitution. Private schools, on the other hand, can discriminate with reckless abandon even if many or most private schools choose not to discriminate.

165. Numerous lawmakers have supported a so-called "Education Freedom Pledge." *Families in America Deserve to Have Power over Their Children's Education*, EDUC. FREEDOM PLEDGE, https://www.edfreedompledge.com [https://perma.cc/G6SB-AVXP]. Betsy DeVos popularized the notion while Secretary of Education. *See* Laura Meckler, *DeVos Defends Billions in Education-Spending Cuts to Skeptical House Democrats*, WASH. POST (Mar. 26, 2019, 6:27 PM EDT), https://www.washingtonpost.com/local/education/devos-defends-billions-in-education-spending-cuts-to-skeptical-house-democrats/2019/03/26/9a0c7a38-4ff3-11e9-88a1-ed346f0ec94f_story.html [https://perma.cc/E3B6-KZB9].

166. *See* Black, *supra* note 137, at 1385–90.

167. *Id.*

168. Off. of Indep. Educ. & Parental Choice, *Corporate Tax Credit Scholarship Program: June Quarterly Report 2009*, FLA. DEP'T OF EDUC. 1 (June 2009), https://www.fldoe.org/core/fileparse.php/7558/urlt/FTC_Report_Jun2009.pdf [https://perma.cc/7NJM-AEU2].

169. Leslie Postal, Beth Kassab & Annie Martin, *Florida Private Schools Get Nearly $1 Billion in State Scholarship, with Little Oversight,* Sentinel *Finds*, ORLANDO SENTINEL (Oct. 17, 2017, 11:30 PM), https://www.orlandosentinel.com/news/education/os-florida-school-voucher-investigation-1018-htmlstory.html [https://perma.cc/RC35-FZ84].

170. Mary McKillup & Norin Dollard, *Florida's Hidden Voucher Expansion: Over $1 Billion from Public Schools to Fund Private Education*, EDUC. L. CTR. & FLA. POL. INST. 1 (Sept. 2022), https://uploads-ssl.webflow.com/5cd5801dfdf7e5927800fb7f/6329b85d1c60404f4b2897e2_2022_ELC_REPORT_final.pdf [https://perma.cc/3YM4-MBSB].

five states operating voucher or voucher-like programs.[171] Now, more than half do.[172] With state legislators introducing a dizzying number of new voucher and subsidy bills since 2021 alone, all trends point toward even further growth.[173] Wisconsin, for instance, has increased its expenditures on vouchers by nearly 700% between 2015 and 2020.[174]

While these programs are typically touted as giving disadvantaged students the same choice as more financially advantaged students,[175] they don't operate that way. First, a look at the fine print of these bills reveals that although the earliest programs made benefits available only to low-income families,[176] states have steadily eliminated or raised those caps.[177] In fact, that policy shift alone

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171. Mark Berends, *The Current Landscape of School Choice in the United States*, 103 PHI DELTA KAPPAN 14, 16 (2021); Bush v. Holmes, 919 So. 2d 392, 400 (Fla. 2006) (describing Florida's 2002 reauthorization of its voucher program).

172. *See 50-State Comparison: Private School Choice*, EDUC. COMM'N OF THE STATES (Mar. 24, 2021), https://www.ecs.org/50-state-comparison-private-school-choice [https://perma.cc/SH7G-7E98] (cataloguing charter-school laws); *see also* Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 438-39 (2016) (discussing exponential growth in student enrollment and expenditures).

173. *See* Alan Greenblatt, *School Choice Advances in the States: Advocates Describe "Breakthrough Year,"* 21 EDUC. NEXT 18 (2021), https://www.educationnext.org/school-choice-advances-in-states-advocates-describe-breakthrough-year [https://perma.cc/KUF9-2KFK]. Public Funds Public Schools maintains a searchable database of all voucher bills. *See Bill Tracker*, PUB. FUNDS FOR PUB. SCHS., https://pfps.org/billtracker [https://perma.cc/S9C7-4NDC].

174. *See* Ruth Conniff, *Tracking the Growing Cost to Taxpayers of Private School Vouchers*, WIS. EXAMINER (May 7, 2021, 7:00 AM), https://wisconsinexaminer.com/2021/05/07/tracking-the-growing-cost-to-taxpayers-of-private-school-vouchers [https://perma.cc/P7GA-MWL8].

175. *See, e.g.*, Yesenia Robles, *Betsy DeVos Defends Vouchers and Slams AFT in Her Speech to Conservatives*, CHALKBEAT COLO. (July 20, 2017, 6:29 PM EDT), https://co.chalkbeat.org/2017/7/20/21102737/betsy-devos-defends-vouchers-and-slams-aft-in-her-speech-to-conservatives [https://perma.cc/8N4P-TMP9].

176. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 646 (2002); Jackson v. Benson, 578 N.W.2d 602, 617 (Wis. 1998); *cf.* Forman, *supra* note 149, at 550-52 (suggesting that the one of the initial rationales behind vouchers was that low-income and minority parents should have a right to send their children to private schools and that early voucher programs targeted low-income families).

177. *See, e.g.*, Derek Black, *Voucher Movement Finally Coming Clean? New Push Is All About Middle Income Students*, EDUC. L. PROF BLOG (July 31, 2015), https://lawprofessors.typepad.com/education_law/2015/07/voucher-movement-finally-coming-clean-new-push-is-all-about-middle-income-students.html [https://perma.cc/86E4-7ZQ7]; Ana Ceballos & Colleen Wright, *DeSantis Signs $200 Million Expansion in Florida for Private School Vouchers*, TAMPA BAY TIMES (May 11, 2021), https://www.tampabay.com/news/florida-politics/2021/05/11/desantis-signs-200-million-expansion-in-florida-for-private-school-vouchers [https://perma.cc/4PWR-L6ZA]; Patti Zarling, *10 Things to Know About Private School Vouchers*, GREEN BAY PRESS GAZETTE (Aug. 1, 2015, 10:00 AM CT), http://www.greenbaypressgazette

explains much of the increase in voucher expenditures because the core constituency for vouchers—religiously and conservatively motivated middle-class families[178]—is now eligible to receive vouchers. Second, while states have increased the dollar amounts of the benefits, tuition costs substantially exceed the value of those benefits at many private schools.[179] These voucher programs can lower the cost of attendance for families who may have gone to these schools anyway, but they do not easily open the doors to those schools for the most economically disadvantaged families.[180] Third, putting those fiscal issues aside, state laws do not require private schools to accept all voucher students.[181] Private schools continue to pick and choose from student applicants based on academic credentials and other factors, such as behavioral history.[182]

Fourth, states are doing very little to protect students from discrimination in private schools. A 2019 study revealed that fewer than half of states' voucher and voucher-like programs prohibited race discrimination.[183] And the prohibitions that do exist do not necessarily extend protection beyond the enrollment process.[184] In other words, while a private school accepting vouchers might be precluded from denying a student admission based on race, few states require fair treatment once the student actually enrolls.[185] Fewer than one in four prohibit

.com/story/news/education/2015/08/01/things-know-private-school-vouchers/30983793 [https://perma.cc/4JVH-VA93].

178. *See* Forman, *supra* note 149, at 550 (indicating that voucher proponents were white, religious, and conservative, not the poor Black students who so often served as poster children for the movement).

179. *Cf.* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-712, SCHOOL CHOICE: PRIVATE SCHOOL CHOICE PROGRAMS ARE GROWING AND CAN COMPLICATE PROVIDING CERTAIN FEDERALLY FUNDED SERVICES TO ELIGIBLE STUDENTS 25-26 (2016) (finding that thirteen of twenty voucher programs did not cap private-school tuition, which would allow those schools to assess additional costs on students, and that tuition rates ranged from $5,541 per year to $26,266 per year). These schools often also assess additional fees. *Id.* at 26.

180. It is also worth emphasizing that many of these programs are open to students who had never previously attended a public school. *School Voucher Laws: State-by-State Comparison*, NAT'L CONF. STATE LEGISLATURES, (Aug. 28, 2014), https://www.ncsl.org/research/education/voucher-law-comparison.aspx [https://perma.cc/2RD8-83NJ].

181. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 179, at 26 (finding that sixteen of twenty programs allowed private schools to use admissions criteria).

182. *Id.* at 27.

183. FIDDIMAN & YIN, *supra* note 138, at 3 fig.2.

184. *See, e.g.*, *id.* at 4 (discussing discrimination in dress codes and noting that while Internal Revenue Service (IRS) rules prohibit 501(c)(3) organizations from adopting explicitly discriminatory rules, the rules do not reach beyond that).

185. I separately theorize, however, that while the schools themselves may not be liable for discrimination, federal law (under certain circumstances) obligates states to monitor those

disability discrimination, and an even smaller sliver of state voucher programs — fewer than one in five — prohibit sex discrimination.[186] Only twelve percent protect against sexual-orientation discrimination and only five percent against gender-identity discrimination.[187] By contrast, constitutional and federal law precludes all these forms of discrimination in public schools.[188]

States are apparently pursuing choice for choice's sake. Schools receiving voucher benefits are practically unaccountable for their educational outcomes. At most, some states require private schools to administer standardized exams, and except for the rarest exceptions, the schools are not meaningfully accountable for those results.[189] Florida, for instance, does not require private schools to administer state assessments.[190] Louisiana technically does, but the requirement applies only to schools that enroll more than forty voucher students, and the test scores need only exceed the equivalent of an F on the state's scoring system.[191] Unsurprisingly, studies increasingly show that student performance dips rather than increases when students enroll in private schools through these programs.[192]

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programs for discrimination and prevent it where appropriate. Black, *Future of Public Education*, *supra* note 17, at 28-33.

186. FIDDIMAN & YIN, *supra* note 138, at 3 fig.2.

187. *Id.*; *see also* Quinn, *supra* note 157 (describing a West Virginia bill that would provide vouchers to private schools, many of which "hold exclusionary religious beliefs").

188. *See, e.g.*, Off. for C.R., *Know Your Rights*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/know.html [https://perma.cc/XJ5G-R9AG] (listing the antidiscrimination provisions the Department enforces in public schools); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (applying the Equal Protection Clause to race discrimination in public schools); United States v. Virginia, 518 U.S. 515 (1996) (applying the Equal Protection Clause to gender discrimination in state universities); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (applying the Equal Protection Clause to disability discrimination in public schools prior to the enactment of federal statutes prohibiting disability discrimination in schools).

189. *See* NAT'L CONF. STATE LEGISLATURES, *supra* note 180.

190. Josh Cunningham, *Accountability in Private School Choice Programs*, NAT'L CONF. OF STATE LEGISLATURES 4 (Dec. 2014), https://www.ncsl.org/documents/educ/AccountabilityInPrivateSchoolChoice.pdf [https://perma.cc/TW94-K9UM].

191. *Id.*

192. *See, e.g.*, Jonathan Mills & Patrick Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement after Four Years* 4 (Univ. of Ark., Dep't of Educ. Reform, Working Paper 2019-10, 2019), https://ssrn.com/abstract=3376230 [https://perma.cc/BGC9-NDH8] (finding that students enrolled in private schools with vouchers "performed noticeably worse on state assessments than their [public-school] control group counterparts"); Ann Weber, Ning Rui, Roberta Garrison-Mogren, Robert B. Olsen, Babette Gutmann & Meredith Bachman, *Evaluation of the DC Opportunity Scholarship Program: Impacts Three Years After Students Applied*, INST. OF EDUC. SCIS. 4 (May 2019), https://ies.ed.gov/ncee/pubs/20194006/pdf/20194006.pdf [https://perma.cc/H6WH-FHEM] (finding no noticeable effect or improvement on achievement from private-school enrollment through vouchers); R. Joseph

These problems are all the more concerning given the disinvestment in public education since the Great Recession. In the first couple of years of the recession, states were routinely cutting ten to twenty-five percent from public-school budgets[193] while driving loads of new resources to the private sector.[194] That trend in public-school funding continued well after state tax receipts had fully rebounded. Almost a decade after the recession, more than half of the states continued to fund public education at a lower level in real-dollar terms than they had prior to the recession.[195] One study found that "students across the U.S. lost nearly $600 billion from the states' disinvestment in their public schools" in the decade following the Great Recession.[196] In short, states were starving public schools and incentivizing exit to private schools.

If there is any playing field that the Supreme Court should be worried about, it is the uneven one described above. Under their constitutions, states have duties—long demanded and underwritten by the federal government—to deliver adequate, equal, and nondiscriminatory education to all.[197] *Carson*, on the premise of religion as victim, ignores both the uneven playing field and states' public-education duty. And contrary to the state-policy deference the Court invokes in almost every other significant education issue,[198] *Carson* affords the state none, insisting basic education policy is religious discrimination.

Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School*, 37 J. POL'Y ANALYSIS & MGMT. 783, 784 (2018), https://edre.uark.edu/_resources/pdf/berendslectureimpactindiana.pdf [https://perma.cc/4WV5-GVB3] (finding achievement loss in Indiana's voucher program); Martin Carnoy, *School Vouchers Are Not a Proven Strategy for Improving Student Achievement*, ECON. POL'Y INST. 3 (Feb. 28, 2017), https://files.eric.ed.gov/fulltext/ED579337.pdf [https://perma.cc/UL6S-VSBX] (surveying research and finding no support for the notion that vouchers improve student achievement).

193. Michael Leachman, Nick Albares, Kathleen Masterson & Marlana Wallace, *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Jan. 25, 2016), https://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf [https://perma.cc/ZH8H-Z67B]; Bruce D. Baker, David G. Sciarra & Danielle Farrie, *Is School Funding Fair? A National Report Card*, RUTGERS UNIV. EDUC. L. CTR. 8 (4th ed. 2015), https://edlawcenter.org/assets/files/pdfs/publications/National_Report_Card_2015.pdf [https://perma.cc/HL58-CUTD].

194. Black, *supra* note 172, at 431.

195. Leachman et al., *supra* note 193, at 4 fig.2.

196. Farrie & Sciarra, *supra* note 12, at 2.

197. *See* Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1081-95 (2019).

198. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40-42 (1973) (extending deference on education-funding policy); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) (indicating that constitutional rights "are different in public schools than elsewhere" and warrant a lower standard); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988) (deferring to the school on matters of curriculum in the context of students' competing

IV. RELIGIOUS SUPERSTATUS?

The Court's expanding view of the Free Exercise Clause raises the question whether religious rights are assuming a superstatus and may at some point swallow antidiscrimination rights. This notion ought to be preposterous. For the past half century, the federal government has built a statutory antidiscrimination regime that applies to public elementary and secondary schools and all institutions of higher education that receive federal funds, including both public and private colleges and universities.[199] Several states have adopted their own analogous provisions, at times extending even broader antidiscrimination rights than the federal government.[200] The Court has never recognized a freestanding religious exemption from complying with these statutes.[201] To do so now would work enormous changes to the status quo.

Yet, as a practical matter, the Court's doctrine has seemingly inched closer toward elevated status for religious claims. According to *Carson*, if a state dictates that its voucher programs should fund only secular education, students who want to use the state's money on religious instruction can claim religious discrimination[202]—even though those students remain fully eligible to take part in the program on the same terms as every other student. In other words, the student's goals trump those of the state. By contrast, Black students and women have little to no constitutional leverage to dictate and change the terms of public education programs simply because those programs might exert some exclusionary or unwanted effect on them.[203] In particular, the law appears not to be able

First Amendment interests); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (holding that schools can inculcate values and limit a student's speech in school-sponsored activities); *see also* Grutter v. Bollinger, 539 U.S. 306, 308 (2003) (deferring to the university's judgments on the educational benefits of diversity); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 298 (2013) (recognizing that a university deserves deference).

199. *See generally*, Off. for C.R., *supra* note 188 (listing the antidiscrimination provisions the Department enforces in public schools).

200. *See, e.g.*, Maine Human Rights Act, ME. REV. STAT. tit. 5, §§ 4601-02 (2022); Minnesota Human Rights, MINN. STAT. ANN. § 363A.13 (2022).

201. The Court, in fact, upheld IRS's withdrawal of tax-exempt status from Bob Jones University, which had claimed a religious exemption for its racially discriminatory admissions policies. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

202. Carson v. Makin, 142 S. Ct. 1987, 1999-2000 (2022).

203. This statement derives from the Court's intentional-discrimination standard for race and sex. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252, 265-66 (1977) (holding that plaintiff must show intentional race discrimination—that race was a motivating factor—to support claims under the Equal Protection Clause); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that an awareness of the gender or racial impacts of a policy is not enough for claims under the Equal Protection Clause but rather that plaintiffs must show that the government acted "because of," not merely "in spite of," those impacts).

to reach the status quo of racial inequity.[204] And so, too, does the active disregard of policies' impacts on racial minorities and women. Consider, for instance, a state that mandates all school plays henceforth to be reenactments of *Beowulf*—an Anglo-Saxon epic—or *Lord of the Flies*—an all-boy story. Though females and students of color can certainly perform roles in these plays, many are likely to feel discomfort or complete exclusion. Even if the state knew in advance that its policies would have a serious disparate impact, these disadvantaged students have no obvious constitutional recourse.[205]

Rather than take seriously the continuing inequalities in school finance,[206] school discipline,[207] access to quality curriculum and teachers,[208] and student assignments,[209] the Court's standards for race and sex discrimination have grown stricter.[210] Plaintiffs not only must show intentional policies that result in predictable harms to minoritized groups,[211] they must show that a specific government actor adopted a specific course of action with the motive of harming the minoritized group. In the Court's words, the decisionmaker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable [racial] group" or women.[212]

For example, it was not enough to show that race was a factor in Georgia's death-penalty system and that Black defendants were far more likely to receive

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204. *See generally* Liz Sablich, *7 Findings That Illustrate Racial Disparities in Education*, BROWN CTR. CHALKBOARD (June 6, 2016), https://www.brookings.edu/blog/brown-center-chalkboard/2016/06/06/7-findings-that-illustrate-racial-disparities-in-education [https://perma.cc/8X8A-TELY] (surveying various racial disparities).

205. *See Feeney*, 442 U.S. at 279.

206. Ivy Morgan & Ary Amerikaner, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*, EDUC. TR. 11 (2018) (charting racial funding gaps), https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/2014/09/20180601/Funding-Gaps-2018-Report-UPDATED.pdf [https://perma.cc/KN3F-Q438].

207. Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS INST. (Jan. 18, 2018), https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research [https://perma.cc/4SPL-9SH4].

208. Sablich, *supra* note 204.

209. *See, e.g.*, Orfield et al., *supra* note 9, at 3 & fig.2 (2016), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf [https://perma.cc/R6DQ-EQAB] ("African American and Latino students are increasingly isolated, often severely so.").

210. *See, e.g.*, Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 564-69 (2006) (explaining how the Court has made it progressively more difficult to show the intent necessary to establish a violation of the Equal Protection Clause).

211. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

212. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

the death penalty than whites, even after holding all other factors constant.[213] Though racial bias was apparent across the system,[214] criminal defendants challenging the state's death penalty had to show that a particular prosecutor or jury harbored racial motivations.[215] The stringent intent requirement holds for statutory claims, too—plaintiffs currently cannot bring disparate-impact claims under Title VI, for example.[216]

While the Court was raising the standards for plaintiffs to establish discrimination, the Court was also tightly constraining states' ability to voluntarily remedy these disparities themselves. Again, racial disadvantage, racial harm, or racial segregation was not enough.[217] To adopt a race-conscious remedy, for instance, the state had to show that it had a compelling interest—typically remedying its own intentional discrimination—and that its policy solution was narrowly tailored in multiple respects.[218] In short, religious "disadvantage" is seemingly actionable regardless of the state's motivations and goals whereas race and sex disadvantages are rarely actionable or remediable.

Comparisons aside, the Court in *Fulton v. City of Philadelphia* also recently sided with religion in a case involving a conflict between antidiscrimination policy and the free exercise of religion.[219] The Court held that Catholic Social Services had a constitutional right to an exemption from the city's antidiscrimination policies.[220] To be clear, the Court's holding was narrow: Catholic Services was entitled to a religious exemption only because the city's policy included a

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213. McCleskey v. Kemp, 481 U.S. 279, 286-91 (1987) (summarizing the evidence of racial bias in the capital-punishment system).

214. *Id.*

215. *Id.* at 297 ("[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").

216. *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that the Title VI disparate-impact regulations did not provide a private right of action and overruling several circuits' decisions to the contrary, such as Powell v. Ridge, 189 F.3d 387, 397-400 (3d Cir. 1999), which recognized a private cause of action to enforce Title VI regulations under both the regulations themselves and § 1983); Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) (permitting a private right of action under Title VI implementing regulations); N.Y. Urb. League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1996); *see also The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 498 (2001) (discussing the Court's sharp break in *Alexander v. Sandoval* with prior decades' recognition of disparate-impact claims).

217. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-99 (1989).

218. *Id.* at 493.

219. Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

220. *Id.* at 1878 (indicating that plaintiffs had a right to an exemption unless the city had a "compelling reason" for the denying such an exception (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990))).

formal mechanism for granting exceptions.[221] Under those circumstances, the policy was not generally applicable.[222] The Court left in place the doctrine that religion is not entitled to exemptions from neutral, generally applicable laws and policies.[223] That doctrine — first articulated by Justice Scalia's majority opinion in *Employment Division v. Smith* as a hedge against chaos[224] — now hangs by what may be the narrowest of threads.[225] If the Court overruled this doctrine, then a no-exceptions antidiscrimination policy could well fall.

In short, the Court's evolving jurisprudence suggests that even if religion has not achieved formal elevated status, as a practical matter, religious challenges just keep winning and something resembling superstatus is the next logical step. This result would be the cruelest irony for public schools and their most marginalized students, who confront far more serious circumstances than limits on how they can spend public dollars in the private sector. One can only hope that at some point practical reality and historical truth will serve as a buffer against an aggressively expanding Free Exercise Clause. Otherwise, the country's antidiscrimination regime itself stands in harm's way.

CONCLUSION

Trinity Lutheran may have preordained the result in *Carson* five years ago, but *Carson* stings public-education supporters, school officials, and policymakers nonetheless. *Carson* extended *Trinity Lutheran*'s principle of religious antidiscrimination to its outer reaches, affording religion something of a superstatus seemingly above that of race or sex. It is no longer acceptable for a state to seek neutrality on matters of religion by separating itself from religion. The state must instead open its doors to religion and accommodate various religious adherents' personal interests and pursuits, even when they conflict with those of the state, undermine public education, and threaten equity for traditionally disadvantaged students. The Court has all but invited individuals to bring free-

221. *Id.* at 1879.

222. *Id.*

223. *Id.* at 1881.

224. *Smith*, 494 U.S. at 885 (rejecting the notion that religious conviction permits a man "to become a law unto himself" because that idea "contradicts both constitutional tradition and common sense" (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879))).

225. Three members of the Court wanted to overturn *Employment Division v. Smith*. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring in the judgment). The majority declined to do so, stating that it had "no occasion to reconsider that decision here." *Id.* at 1881. The Court, of course, had also twice refused to decide the issue of use restrictions in the cases leading up to *Carson* only to reject them in *Carson*.

exercise claims any time public policy occasions some inconvenience for those individuals' religious interests.

The inequity in greenlighting those religious claims while ignoring the prevalent discrimination in the private sector against other students based on race and gender is striking. So, too, is the inadequacy and inequity that privatization threatens for all public-education students. It is a brave new world indeed.

Professor of Law, University of South Carolina School of Law. *I would like to thank the editors of the* Yale Law Journal *for inviting me to write this Essay and for all of the excellent support and suggestions they have provided along the way. I would also like to thank Dean William Hubbard for supporting my research.*