FREE EXERCISE OR FORCED ESTABLISHMENT? WHY THE SUPREME COURT GOT *CARSON V. MAKIN* WRONG AND WHAT VERMONT CAN DO ABOUT IT

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INTRODUCTION

Vermont and Maine are the only two states to offer school choice programs.[1] These programs allow districts that do not operate their own public school to send their students to approved schools in other districts.[2] Historically, these two states have been careful to avoid violating the

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1. DOUGLAS R. HOFFER, VERMONT STATE AUDITOR, REPORT NO. 21-0101-K-12 SCHOOLS: MORE STUDENTS ATTENDING VERMONT APPROVED INDEPENDENT [PRIVATE] SCHOOLS AND FEWER ATTENDING OUT-OF-STATE SCHOOLS AT PUBLIC EXPENSE (2021).

2. *Id.*

Establishment Clause by excluding religious private schools from their school choice programs. However, in *Carson v. Makin*, the Supreme Court struck down the Maine program as unconstitutional because it excludes religious schools.[3] This decision had major implications for Vermont's school choice program. Both Vermont and Maine have struggled to comply with the decision while upholding their long-held prohibition of state-sponsored religious activity.

This Article analyzes *Carson v. Makin* in the context of Establishment and Free Exercise Clause jurisprudence. This Article argues that the Supreme Court erred in prohibiting states from preventing public funds from going to religious schools. Part I examines the background of educational funding and traces the recent developments in Establishment and Free Exercise Clause cases. Part II analyzes the Court's indifference both to the extensive history of church and state separation in public schools and the implications of the *Carson* holding. Finally, Part III considers the responses of the states directly affected by *Carson*—Vermont and Maine—and argues that the legislation passed in those states is unlikely to prevail when challenged.

I. THE HISTORY OF THE RELIGION CLAUSES

The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[4]

These words represent such important ideals that the Founders placed them at the beginning of the Bill of Rights. The Constitution does not prohibit government support of religious people or organizations because they are equal to their secular counterparts.[5] However, the Establishment Clause prohibits government support of religious activity such as "worship, proselytizing, and religious indoctrination."[6]

The First Amendment especially affects educational funding. Groups have clashed over whether the Establishment Clause prohibits the Government from funding religious education, or whether families are

3. Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 789 (2022).

4. U.S. CONST. amend. I.

5. Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1776 (2023).

6. *Id.*

entitled to public funds to freely exercise their religion.[7] This conflict is not new and is, in fact, deeply rooted in the United States' history.

A. The History of Religion in the Constitution

Although the First and Fourteenth Amendments prevent state support for religious education, many wanted the Constitution to further expand the separation of church and state.[8] In his 1875 Message to Congress, President Grant urged the need for "a specific prohibition against the use of public funds for sectarian education . . . ."[9] The *Blaine Amendment*, which was passed by the House of Representatives in 1876, was the first of six proposed amendments that addressed antiestablishment.[10] The *Blaine Amendment* explicitly prohibited public revenue from being used to support any school either controlled by a religious or anti-religious organization, or where religious or anti-religious tenants are taught.[11]

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7. Howard Weiss-Tisman, *Vermont School Choice Scrutinized as Legislature Responds to U.S. Supreme Court Decision*, VT. PUB. (Feb. 16, 2023), https://www.vermontpublic.org/local-news/2023-02-16/will-a-u-s-supreme-court-decision-end-vermonts-school-choice-system; Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 5, 2023), https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html; Kate Cohen, *Taxpayers Shouldn't Be Paying for Religious Schools*, WASH. POST (June 27, 2023) https://www.washingtonpost.com/opinions/2023/06/27/oklahoma-public-religious-school-church-state-funding/.

8. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 218–19 (1948).

9. *Id.* at 218.

10. HERMAN V AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY, H.R. DOC. NO. 353, Pt. 2 at 277, 278 (1897). *See, e.g.*, 4 CONG. REC. 205 (1875); 5 CONG. REC. 440–41 (1876); H.R. Res. 163, 44th Cong. (1st Sess. 1876); 7 CONG. REC. 252 (1878); 10 CONG. REC. 107 (1880).

11. AMES, *supra* note 10. The *Blaine Amendment*, as passed by the House of Representatives, read in total:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made, or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

Although it narrowly failed to pass the Senate,[12] the *Blaine Amendment* and the public's reaction to it are critical to understanding the nation's history of antiestablishment.[13] One of the concerns surrounding the Amendment was federalism. Senator Kernan, who read the Amendment in the Senate, argued that "[t]he framers of the Constitution believed . . . that it was wiser and better that the people of the several States should reserve to themselves and exercise all those powers of government which related to home rights . . . ."[14] However, senators also voiced concern for religious freedom, noting that there would be "no liberty, according to modern ideas, without entire separation of church and state."[15] They recognized the sensitive relationship between education and religion, and strongly advocated for guarding the "perfect freedom of religious opinion."[16] As is often pointed to by critics of the *Blaine Amendment*, the debates reflected hostility towards Catholics, which was pervasive in America at the time.[17] However, the larger constitutional issues that surfaced in the debate show that the issue of the separation of church and state persists throughout history.

States also sought to prohibit religious influence on public education. Since the founding of the United States, citizens have protested the use of taxpayer funds to support religious leaders, "which was one of the hallmarks of an 'established' religion."[18] Both before and after the Fourteenth Amendment was ratified, many states excluded religious education from public schools and prohibited financial support of religious

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4 CONG. REC. 5580 (1876).

12. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. PUB. POL'Y 551, 573 (2003) ("[The *Blaine Amendment* vote] was short of the necessary two-thirds majority for passage and submission to the states, killing the proposed amendment to the federal Constitution."); McCarley Elizabeth Maddock, *Blaine in the Joints: The History of Blaine Amendments and Modern Supreme Court Religious Liberty Doctrine in Education*, 18 DUKE J. CONST. L. & PUB. POL'Y 195, 209 (2023) (noting that the vote fell two votes short of meeting the two-thirds threshold).

13. *See infra* Part II.B.

14. 4 CONG. REC. 5580 (1876).

15. *Id.* at 5589.

16. *Id.* at 5585.

17. Maddock, *supra* note 12, at 208.

18. Locke v. Davey, 540 U.S. 712, 722 (2004). For example, see "A Bill Establishing A Provision for Teachers of the Christian Religion" in Virginia. *Id.* at 722 n.6. The bill sought to tax citizens to support "Christian teachers," but was rejected after a public outcry. *Id.*; *see* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 853 (1995) (Thomas, J., concurring) (explaining the purpose of the bill was to support "clergy in the performance of their function of teaching religion"). As a result, the Virginia Bill for Religious Liberty was enacted instead, which guaranteed "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." A Bill for Establishing Religious Freedom, *reprinted in* 2 PAPERS OF THOMAS JEFFERSON 546 (J. Boyd ed. 1950).

schools.[19] This included formal prohibitions on using tax funds to finance religious worship or support any place of worship.[20] States did not consider it a free exercise violation to exclude religious leaders from public funding.[21] It is important to note, however, that this separation of religion and education "was not due to any decline in the religious beliefs of the people."[22] Rather:

> The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered.[23]

The Supreme Court has long recognized that "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools."[24] This sentiment can be seen by tracing the Court's jurisprudence regarding both the Establishment and Free Exercise Clauses.

B. Establishment Clause Cases

The Court has often considered cases that balanced the Establishment Clause with funding of religious organizations. In the very first Establishment Clause decision, *Bradfield v. Roberts*, the Court upheld a federal grant to Providence Hospital, a facility operated by a Roman Catholic order.[25] The grant funded a new wing in the hospital to treat patients with infectious diseases.[26] In upholding the grant, the Court pointed out that patients treated in the wing would not be subject to religious

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19. Lupu & Tuttle, *supra* note 5, at 1771–72.

20. *E.g.*, GA. CONST. art. I, § I, para. IV. The paragraph reads:

> No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Id.; PA. CONST. art. I, § 3 ("[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent . . . ."); N.J. CONST. art. I, § 4; DEL. CONST. art. I, § 1; KY. CONST. § 5; VT. CONST. ch. I, art. 3; TENN. CONST. art. I, § 3; OHIO CONST. art. I, § 7 (similar).

21. *Locke*, 540 U.S. at 723 ("[E]arly state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars . . . .").

22. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948).

23. *Id.*

24. *Id.* at 231.

25. 175 U.S. 291, 292 (1899).

26. *Id.* at 293.

indoctrination.[27] Rather, the grant would be used for standard medical treatment.[28] Therefore, the grant was not to a sectarian corporation, and its purpose of maintaining a hospital was not a religious activity.[29]

Fifty years later, the Court emphasized the need for the separation of church and state in *Everson v. Board of Education of Ewing*.[30] The Court declared "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[31] In *Everson*, the Court upheld a New Jersey program that reimbursed parents for transportation costs to private schools, including parochial schools.[32] The Court emphasized that the program did not give money directly to any religious schools, but rather provided a program to help all students get to and from accredited schools.[33] Therefore, the character of the aid—reimbursing transportation costs rather than directly funding religious education—was determinative.[34] In ruling that the program was constitutional under the Establishment Clause, the Court explained that a State "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude . . . the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[35]

This "high and impregnable" wall approach started to soften in *Lemon v. Kurtzman*, which examined the question of whether states could provide aid directly to private religious schools.[36] The Court struck down both programs at issue, holding that the programs violated the Establishment Clause by allowing "excessive entanglement between government and religion."[37] Crucially, *Lemon* turned on the issue of funding religious instruction, rather than giving aid to a religiously affiliated entity.[38] This distinction can be clearly seen in *Tilton v. Richardson*, which was decided

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27. *Id.* at 297–98.

28. *Id.*

29. *Id.* at 299–300.

30. 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting) ("[W]e have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.").

31. *Id.* at 18.

32. *Id.* at 17.

33. *Id.* at 18.

34. *Id.* at 16–18.

35. *Id.* at 16 (emphasis omitted).

36. 403 U.S. 602, 606 (1971). In what would signal the future of the separation between church and state, Chief Justice Burger declared that rather than a wall, the line was "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614.

37. *Id.* at 614.

38. *Id.* at 615.

in the same term as *Lemon*.[39] In *Tilton*, the Court upheld a statute that permitted construction grants at religiously affiliated colleges and universities.[40] The Court held that because the facilities benefitting from the program would only be used for secular education, the program did not violate the Establishment Clause.[41]

C. Free Exercise Cases

A close reading of Free Exercise cases reveals the tension between the Free Exercise Clause and the Establishment Clause. In *Locke v. Davey*, the Court addressed the difference between state constitutional law and the Federal Establishment Clause.[42] At issue was a publicly funded scholarship program that explicitly prohibited participants from using funds to study devotional theology.[43] The program was implemented to comply with the Washington State Constitution, which prohibited public funding of religious exercise or instruction.[44] The pivotal question was whether Washington could prohibit indirect funding of religious instruction without violating the Free Exercise Clause.[45]

The majority concluded that training for secular and religious professions are "not fungible," and therefore any different treatment was not hostility toward religion.[46] In his dissent, Justice Scalia argued that because the program funded training for all secular professions, it must also fund training for religious professions.[47] However, "[t]he State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on [scholarship recipients]."[48] Drawing on the history of the State's antiestablishment interests, the Court concluded that the exclusion of vocational religious instruction from the program was constitutional.[49]

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39. Tilton v. Richardson, 403 U.S. 672, 672 (1971).

40. *Id.* at 679–80.

41. *Id.* (finding that the program "authorize[d] grants and loans only for academic facilities that w[ould] be used for defined secular purposes and expressly prohibit[ed] their use for religious instruction, training, or worship").

42. 540 U.S. 712, 719 (2004).

43. *Id.* at 715–17.

44. WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.").

45. Locke v. Davey, 540 U.S. 712, 719 (2004).

46. *Id.* at 721.

47. *Id.* at 726–27 (Scalia, J., dissenting).

48. *Id.* at 725 (majority opinion).

49. *Id.*

D. Trinity Lutheran, Espinoza, and New Interpretations of Free Exercise

In recent years, the Court has turned in a new direction when interpreting the Religion Clauses. Thirteen years after *Locke*, the Court further interpreted that decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[50] The public program at issue provided funds for playground resurfacing *directly to recipients*, but was challenged because it expressly excluded a church from participation in the program.[51] The Court asserted that the program discriminated against the church because it was excluded solely because of its religious character.[52] This created a choice for Trinity Lutheran: participate in the program or remain a religious institution.[53] This was unconstitutional because conditioning benefits on a recipient's willingness to surrender its religious status penalizes its free exercise.[54] In *Trinity Lutheran*, Chief Justice Roberts formulated the status-use distinction.[55] Chief Justice Roberts distinguished *Locke*'s restriction based on the *use* of the scholarship because here, Missouri was excluding the church based on its *status* as a religious institution.[56] Critically, the decision was limited by a footnote that specified "[t]his 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."[57] This left the question of whether the status-use distinction was limited to this case, a question which the Court resolved in *Espinoza v. Montana Department of Revenue*.[58]

Espinoza further restricted states' abilities to prevent public funds from going to religious schools.[59] The challenged scholarship program granted a tax credit to any taxpayer who donated to a participating student scholarship organization.[60] A family whose child was awarded a scholarship through the program could use it at any "qualified education provider,"[61] which could not be restricted to a particular type of school.[62] In

50. 582 U.S. 449, 453–54 (2017).
51. *Id.* at 462.
52. *Id.*
53. *Id.*
54. *Id.* (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion)).
55. *Id.* at 469 (Thomas, J., concurring); *see infra* notes 116–19 and accompanying text.
56. *Id.* at 464 (majority opinion).
57. *Id.* at 465 n.3.
58. 591 U.S. 464, 475–78 (2020).
59. *Id.* at 485–87 (holding that a state cannot disqualify religious private schools from state subsidies solely because they are religious).
60. MONT. CODE ANN. § 15-30-3103(1) (2019); *id.* § 15-30-3111(1) (2019).
61. *Espinoza*, 591 U.S. at 467–69. A qualified education provider is one that meets certain accreditation, testing, and safety requirements. MONT. CODE ANN. § 15-30-3102(7).

accordance with the "no-aid" provision of the Montana Constitution,[63] the Montana Department of Revenue changed the definition of "'qualified education provider' to exclude any school 'owned or controlled in whole or in part by any church, religious sect, or denomination.'"[64] This rule was challenged by three mothers who sought to use the scholarship program to fund their children's education at a private Christian school.[65]

In evaluating the program, the Court relied heavily on *Trinity Lutheran*'s status-use distinction.[66] Montana argued that *Trinity Lutheran* did not govern because the no-aid provision turned on the use of the funds for religious education rather than the religious character of the recipients.[67] However, the Court flatly rejected this reasoning.[68] The Court held that this was unconstitutional discrimination, recognizing that parents who wished to send their children to religious schools were barred from the program solely based on "the religious *character* of the schools."[69] The Court also rejected any Establishment Clause concerns, pointing to the indirect nature of the financial support under the program.[70] The Court held the scholarship program unconstitutional, stating that 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."[71]

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62. *Espinoza*, 591 U.S. at 469 (citing MONT. CODE ANN. § 15-30-3103(1)(b); § 15-30-3111(1)).

63. The provision states in full:

> [Aid prohibited to sectarian schools . . . .] The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

MONT. CONST. art. X, § 6(1).

64. *Espinoza*, 591 U.S. at 470 (quoting MONT. ADMIN. R.42.4.802(1)(a) (2015)).

65. *Id.*

66. *Id.* at 475–78.

67. *Id.*

68. *Id.* ("The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran* . . . ."). The Court also invalidated the application of the Montana Constitution to the policy at issue, concluding that "[g]iven the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have 'disregard[ed]' the no-aid provision and decided this case 'conformably to the [C]onstitution' of the United States." *Id.* at 488 (quoting Marbury v. Madison, 1 Cranch 137, 178 (1803)).

69. *Id.* at 484 (emphasis added).

70. *Id.* at 485 ("[T]his Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices.").

71. *Id.*

II. CARSON V. MAKIN: A STEP IN THE WRONG DIRECTION

Carson v. Makin further limited the power of the Establishment Clause. In deciding *Carson*, the majority showed indifference to the original meaning of the Establishment and Free Exercise Clauses. Instead, the Court continued its recent trend of catering to majority religions with little regard for the real-world implications.

This Part argues that the decision is wrong for three major reasons. First, the Court failed to consider the history of antiestablishment in the United States, especially in the individual states. Second, this decision flies in the face of precedent regarding the status-use distinction. Third, the Court ignored the practical implications of its decision, leaving the door open to expanding this ruling into countless other realms where the Establishment Clause previously reigned supreme.

A. The Supreme Court Strikes Down Maine's Program as Unconstitutional

In *Carson*, the Supreme Court addressed Maine's "nonsectarian" requirement for its tuition assistance program.[72] The Court held that such a requirement violated the Free Exercise Clause.[73] Maine operates a tuition assistance program for families that live in a school district that neither operates its own public school nor contracts with a particular public or private school.[74] Under the program, the district must "pay the tuition . . . at the public school or the approved private school of the parent's choice at which the student is accepted."[75] To be approved, a private school must either be accredited by the New England Association of Schools and Colleges or approved by the Maine Department of Education,[76] and must meet specified curricular requirements.[77]

Under the nonsectarian requirement, any school receiving tuition assistance payments must be "a nonsectarian school."[78] This provision was added in 1981 after the Maine Attorney General decided that public funding

72. Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 789 (2022).

73. *Id.*

74. *Id.* at 767.

75. ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (West 2021).

76. *Id.* §§ 2901(2), 2902 (West 2021).

77. *See, e.g.*, *id.* § 2902(2) (requiring private schools to use English as the language of instruction); *id.* § 2902(3) (requiring private schools to meet the curricular requirements of public schools); *id.* § 2902(6)(c) (requiring private schools to maintain a student-teacher ratio of no more than 30:1). The curricular requirements do not apply to schools accredited by the New England Association of Schools and Colleges. ME. REV. STAT. ANN. tit. 20-A, § 2901(2) (West 2021).

78. *Id.* § 2951(2).

of private religious schools violated the Establishment Clause.[79] The Maine Department of Education "considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith."[80] It is this nonsectarian requirement that was struck down in *Carson*.[81]

In *Carson*, two families challenged the tuition assistance program when their religious schools of choice did not qualify for the program.[82] Specifically, the families alleged that the nonsectarian requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.[83]

When considering the issue, the Supreme Court relied on the principles from *Espinoza* and *Trinity Lutheran*. The Court agreed with the plaintiffs that the state was unfairly excluding eligible schools from participating in the tuition assistance program solely because of their religious status.[84] The Court cited its longstanding holding that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." [85] Therefore, paying tuition for schools only so long as the schools are not religious is discrimination against religion.

Carson represented a major victory for school choice advocates because it requires states with school choice programs to fund private religious schools.[86] The Court offered a number of options to rural states that oppose funding religious education. These suggestions included expanding their public school system, increasing transportation, providing tutoring, remote learning, and partial attendance, or operating their own boarding schools.[87] However, under *Carson*, any state with a school choice program can no longer exclude a religious school because of its religious nature or instruction.

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79. *Carson*, 596 U.S. at 775. This provision remains in effect despite the Supreme Court later holding that "a benefit program under which private citizens 'direct government aid to religious schools wholly as a result of their own genuine and independent private choice' does not offend the Establishment Clause." *Id.* (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002)).

80. Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 38 (1st Cir. 2020).

81. *Carson*, 596 U.S. at 789.

82. *Id.* at 775.

83. *Id.* at 776.

84. *Id.* at 789.

85. *Id.* at 778.

86. *Id.* at 785.

87. *Id.*

B. The Court's Indifference to the Original Meaning of the Establishment and Free Exercise Clauses

In *Carson*, the Court paid little attention to the historical meaning of the Religion Clauses. Although the Court recognized the state's desire to comply with the Establishment Clause, it also pointed out that this was not a valid basis for a Free Exercise violation.[88] Under *Espinoza* and *Trinity Lutheran*, an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise . . . ."[89] Thus, the state's antiestablishment interest is not sufficient justification for excluding religious schools from any "generally available public benefit because of their religious exercise."[90] This view of the state's antiestablishment interest ignores the power granted to the states under federalism, and fails to consider the long history of antiestablishment under the Religion Clauses.[91]

Despite being an originalist Court, the majority paid little attention to the historic tradition of respecting states' individual decisions as "individual laboratories" of new ideas.[92] *Locke* showed "unsurprising deference to state discretion" regarding the separation of church and state.[93] Such deference is critical in the education realm, because historically, states used varied approaches to antiestablishment laws regarding schools.[94] As Justice Sotomayor explained in her *Trinity Lutheran* dissent, "[e]very state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws."[95] These disestablishment efforts were

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88. *Id.* at 781.

89. Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 484 (2020) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017)); *see also* Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("[T]he state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause . . . .").

90. *Carson*, 596 U.S. at 781.

91. *See supra* Part I.A.

92. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

93. Lupu & Tuttle, *supra* note 5, at 1784.

94. *See supra* notes 18–24 and accompanying text.

95. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 481 (2017) (Sotomayor, J., dissenting); *see also id.* at 481 n.5 (Sotomayor, J., dissenting) ("When the States dismantled their religious establishments, as all had by the 1830's, they did so on their own accord, in response to the lessons taught by their experiences with religious establishments.").

based on the argument that religious influence in government harms both the government and religion.

For example, Virginia rejected a general religious assessment bill after the Revolution.[96] The bill required citizens "to 'pay a moderate tax or contribution annually' for the support of the Christian religion."[97] Although the bill allowed taxpayers to designate the Christian denomination that would receive their assessment, it was met with opposition, including from James Madison.[98] Madison wrote his famous *Memorial and Remonstrance* to raise support in opposition to the bill.[99] Madison argued that "[i]n the matters of religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."[100] Due in part to Madison's efforts, Virginia instead passed the Bill for Establishing Religious Freedom, which provided that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[101]

Virginia's model was not unique among the other new states.[102] Pennsylvania's Constitution contained a clause providing that "no man can of right can be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent."[103] New Jersey and Delaware added similar clauses to their constitutions in 1776 and 1792.[104] In fact, by the end of the 18th century, all but the New England states showed "little enthusiasm for maintaining religious establishments of any kind."[105] However, the *Carson* majority paid no attention to this well-documented and widespread historical tradition.

Rather, the majority implied that the anti-Catholic animus present during the mid- to late 19th century was the driving force behind no-

96. STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY 58 (2022).

97. *Id.*

98. *Id.* at 58–59.

99. *Id.* at 59.

100. *Id.* Madison raised three main arguments against religious establishments. *Id.* First, religious and civil entities operate in different jurisdictions and should not be combined. *Id.* Second, religious establishments violated the idea of a society built on equal conditions, specifically with regard to religious equality. *Id.* Third, religious establishments were actually harmful to religion as they were "adverse to the diffusion of the light of Christianity." *Id.* Notably, the Court has fallen away from addressing any of these ideas and failed to mention any of them in *Carson.*

101. *Id.* at 58–60.

102. Lupu & Tuttle, *supra* note 5, at 1783.

103. PA. CONST. art. I, § 3.

104. Lupu & Tuttle, *supra* note 5, at 1782.

105. GREEN, *supra* note 96, at 55; *see also* Lupu & Tuttle, *supra* note 5, at 1782 (explaining that states formed "in the early years of the Republic followed the same pattern of prohibiting compelled support for religion").

funding provisions.[106] Therefore, the majority argued, these no-funding provisions should be given little weight to support Maine's exclusion of religious schools from its program.[107] This argument fails for two reasons. First, this Court has previously upheld an executive order based on animus towards other non-majority religions, undercutting the implication that religious animus should completely invalidate the significance of historical legislation.[108] Furthermore, "[i]t is simply implausible to assert that anti-Catholic animus was the basis for the prohibition on compelled support for religion."[109] Although there were anti-Catholic sentiments at the time, these sentiments were not determinative in the opposition to public funds going to religious institutions.[110] In fact, efforts to fund Episcopalian and Presbyterian schools failed even before significant Roman Catholic immigration occurred.[111] Therefore, failing to address these no-funding provisions overlooks a deeply held historic tradition of rejecting state-compelled support for sectarian education.

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106. Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 788–89 (2022) (citing Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 482 (2020) ("[M]any of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s . . . . '[I]t was an open secret that 'sectarian' was code for 'Catholic.'"') (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion))).

107. *Carson*, 596 U.S. at 788–89.

108. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 700, 710–11 (2018) (declining to credit Trump's statements that his goal was "total and complete shutdown of Muslims entering the United States" and upholding the "Muslim ban"); *id.* at 728 (Sotomayor, J., dissenting) ("Based on the evidence in the record, a reasonable observer would conclude [Presidential Proclamation No. 9645] was motivated by anti-Muslim animus.").

109. Lupu & Tuttle, *supra* note 5, at 1782–83.

110. Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. REV. 295 (2008).

> The Blaine Amendment had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation. Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times.

Id. at 296. *See also* Mary Jane Morrison, *Dictionaries, Newspapers, and "Blaine Amendments" in State Constitutions in the 21st Century*, 7 UNIV. ST. THOMAS J.L. & PUB. POL'Y 204, 219 (2013) ("The best evidence of what the drafters and ratifiers of Blaine clauses meant is what they said; in all but five state constitutions, they used words that apply to all religious schools or all private schools [not just Catholic or 'sectarian' ones]."); Drummond v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 7–9 (Okla. 2024) (discussing why the Oklahoma Constitution's prohibition on public funding was not modeled after the *Blaine Amendment* but rather was intended to protect religious freedom).

111. Lupu & Tuttle, *supra* note 5, at 1783.

C. Misapplication of Precedent

Carson diverged from prior cases regarding school funding and religion. Chief Justice Roberts' majority opinion ignored the Court's long-standing precedents to obtain its objective of integrating religious education into the public-school framework.[112] Notably, the Court ignored *Everson*, which expressly stated: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or *whatever form they may adopt to teach or practice religion.*"[113] As a result in that case, New Jersey was not allowed to use tax funds to support any "institution which teaches the tenets and faith of any church."[114] However, the *Carson* majority erroneously ignored this distinction.[115]

The Court also failed to follow the established status-use distinction.[116] In *Trinity Lutheran*, the Court emphasized that the discrimination against religious exercise was "the refusal to allow the Church—*solely because it is a church*—to compete with secular organizations for a grant" through the public benefit program.[117] Even further, the Court distinguished *Locke*'s use-based restriction because in *Locke*, "the State had 'merely chosen not to fund a distinct category of instruction.' Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he

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112. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (explaining that the Free Exercise Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government"); Norwood v. Harrison, 413 U.S. 455, 462 (1973) (finding that parochial schools are not entitled "to share with public schools in state largesse, on an equal basis or otherwise"); *see also* Sloan v. Lemon, 413 U.S. 825, 834–35 (1973) (holding that a state may fund private secular school but not religious private schools through tuition reimbursement program without violating the Equal Protection Clause).

113. Everson v. Bd.of Educ. of Ewing, 330 U.S. 1, 16 (1947) (emphasis added).

114. *Id.* at 16.

115. Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 789 (2022) ("*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."). In *Locke*, the Court relied on a Washington Supreme Court case in finding that "majoring in devotional theology is akin to a religious calling as well as an academic pursuit." Locke v. Davey, 540 U.S. 712, 721 (2004); *see also* Calvary Bible Presbyterian Church v. Bd. of Regents, 436 P.2d 189, 193 (Wash. 1967) (en banc) (holding public funds may not be expended for "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct").

116. *Carson*, 596 U.S. at 781("[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.") (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652–63 (2002)).

117. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 463 (2017) (emphasis added).

proposed *to do*—use the funds to prepare for the ministry."[118] This is the status-use distinction in practice. If a state discriminates based on the *status* of a church, that is impermissible. But a state is allowed to limit the *uses* of public funds. *Espinoza* did not change this interpretation. Rather, the *Espinoza* Court further emphasized that discrimination based on religious status is distinct from discrimination based on religious use.[119]

The controversy in *Carson* was not simply that the schools were religious organizations. Rather, the program excluded schools that were engaged in religious instruction.[120] Maine attempted to distinguish *Trinity Lutheran* and *Espinoza* on the grounds that the restrictions in those cases were "solely status-based religious discrimination," while the challenged Maine provision "imposes a use-based restriction."[121] The majority flatly rejected this argument.[122] In its cursory treatment, the majority explained that although *Trinity Lutheran* and *Espinoza* forbade discrimination on the basis of religious status, they "never suggested that use-based discrimination is any less offensive to the Free Exercise Clause."[123] This put an end to any possibility of states using use-based restrictions to prevent public tuition funds from going to religious schools.

This status-use distinction is precisely the analysis the majority should have applied in *Carson*. The Maine program excludes religious schools not because of their affiliation with a specific religion, but rather because of the way in which the money will be *used*.[124] If a school's teachings are imbued with religion, it cannot receive public money.[125] "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its

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118. *Id.* at 464 (emphasis in original) (citations omitted) (quoting *Locke*, 540 U.S. 712, 721 (2004)).

119. Espinoza v. Mont. Dep't Revenue, 591 U.S. 464, 477 (2020) (explaining that, like *Trinity Lutheran*, the case before it "turn[ed] expressly on religious status and not religious use").

120. *See Carson*, 596 U.S. at 786.

121. *Id.* (quoting Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 35, 37–38 (1st Cir. 2020)).

122. *Id.* at 786–87.

123. *Id.* at 787.

124. *See* Carson *ex rel.* O.C. v. Makin, 979 F.3d at 38 (1st Cir. 2020)

> The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented. . . . whether a school is 'nonsectarian' depends on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide. . . . [s]ectarian schools are denied funds not because of who they are but because of what they would do with the money—use it to further the religious purposes of inculcation and proselytization.

Id. (citations omitted).

125. *Id.*

functions are subsumed in the religious mission."[126] The schools at issue in *Carson* easily fit within this description, and thus the aid diverted to them logically is in advancement of religion.[127]

Although some argue that status-use is illogical in the context of education, the deep influence that religious doctrine has on the teachings at most religious schools is why the status-use distinction is so critical.[128] Public education is a special realm in the context of the Religion Clauses. States must ensure that they provide access to public education in a nondiscriminatory manner that does not violate the Equal Protection Clause and other antidiscrimination laws.[129] Although the Court has not recognized a fundamental right to public education, it has refused to treat it "merely [as a] governmental 'benefit' indistinguishable from other forms of social welfare legislation."[130] Religious schools must meet state requirements to satisfy state compulsory education laws.[131]

Schools are also unique because of the way religion influences education at religious schools. The Court has previously held that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[132] In fact, most religious schools use their religious teachings as a benefit of the education that they provide.[133] Therefore, providing public funds to private religious schools

126. Hunt v. McNair, 413 U.S. 734, 743 (1973).

127. *See infra* note 128.

128. *See, e.g.*, Blake E. McCartney, *A Case Against School Choice: Carson Ex Rel. O.C. v. Makin And The Future Of Maine's Nonsectarian Requirement*, 73 ME. L. REV. 313, 330 (2021) ("Because religious status and use are so enmeshed, it makes little sense for the constitutionality of a law to turn on whether it excludes a religious entity from a benefit based on its religious status or religious use.").

129. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregation of schools on the basis of race violated the Equal Protection Clause).

130. Plyler v. Doe, 457 U.S. 202, 221 (1982). Many states, including Vermont, have recognized a fundamental right to education under their individual constitutions. *See* VT. CONST. ch. II, § 68 ("[A] competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth."); Brigham v. State, 166 Vt. 246, 258, 692 A.2d 384, 391 (Vt. 1997) (per curiam) (pointing out that "education was the *only* governmental service considered worthy of constitutional status") (emphasis in original).

131. Everson v. Bd.of Educ. of Ewing, 330 U.S. 1, 18 (1947) ("[P]arents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.") (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

132. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 753–54 (2020).

133. In *Carson*, the schools Plaintiffs wished to send their children to had "a mission of 'instilling a Biblical worldview' in its students, with religious instruction 'completely intertwined' in its curriculum and the Bible as its 'final authority in all matters.'" Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 27 (1st Cir. 2020) (internal quotation marks omitted).

veers dangerously close to "devolv[ing] into an unlawful fostering of religion."[134] It is for precisely this reason that the Court must pay careful attention to the use of public funds in religious schools. Thus the necessity of the status-use distinction in the religious education context.

D. Looking Forward: The Implications of Carson

Placing *Carson* in the context of other recent cases shows its dangerous implications. The most damaging blow to the Establishment Clause came in *Kennedy v. Bremerton School District*, which was handed down on June 27, 2022, just six days after *Carson*.[135] In *Kennedy*, the Court laid to rest the "play in the joints" doctrine.[136] Instead, the Court imposed a harmonious analysis of an individual's rights under the Free Exercise Clause and the government's duties under the Establishment Clause.[137] *Kennedy* negates a public school's ability to use Establishment Clause concerns to justify limiting its employees' free exercise of religion in school.[138] *Carson* and *Kennedy* together leave troubling unanswered questions about state funding of religious schools. If the state gives funds to religious schools, can it impose any limitations on the actions of the school? Does the refusal to pay for religious charter schools also violate the free exercise of religion?[139] Does the Establishment Clause have any meaning in the education context?

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134. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (internal quotation marks omitted).

135. 597 U.S. 507, 507 (2022).

136. This phrase was first coined in Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970). There, Chief Justice Burger wrote "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* This idea was seen in Justice Breyer's dissent in *Carson*, where he wrote that, taken "[t]ogether [the Religion Clauses] attempt to chart a 'course of constitutional neutrality' with respect to government and religion." Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 791 (2022) (Breyer, J., dissenting) (quoting *Walz*, 379 U.S. at 669). *Kennedy* rejected the application of the "play in the joints" doctrine. Rather, the Court concluded there was no "sound reason to prefer one constitutional guarantee over another." *Kennedy*, 597 U.S. at 542–43.

137. *Kennedy*, 597 U.S. at 543 ("In truth, there is no conflict between the constitutional commands before us. There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause.") (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (1963)) (Goldberg, J., concurring))). The Court stressed that any concerns about a potential Establishment Clause violation could not justify "actual violations of an individual's First Amendment rights." *Id.*

138. *Id.*

139. Religious charter schools are the latest development in the controversy over public funding for religious education. Sarah Mervosh, *A Religious Charter School Faces Pushback from the Charter School Movement Itself*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/us/oklahoma-religious-charter-school.html. Charter schools are funded by taxpayer dollars but are run independently. *Id.* Oklahoma has approved a Catholic charter school that includes Catholic instruction, a move that was quickly challenged. *Id.* In June 2024, the

Perhaps most concerning about *Carson* is the door it opens to requiring religious equivalents for other social benefits.[140] Unlike previous cases, the Court gave no indication that this decision was limited to Maine's specific tuitioning program.[141] Constitutional law scholars have argued that there is "no reason this approach would be limited to the school context."[142] Rather, it is possible that any government funding of a secular program would require subsidizing the equivalent faith-based programs.

III. THE CONSTITUTIONALITY OF MAINE AND VERMONT'S RESPONSES TO *CARSON* AND OTHER POSSIBLE SOLUTIONS

Vermont and Maine are the most affected by *Carson* because they are the two states that operate school choice programs. This Part analyzes how they might reconcile *Carson* with their state laws. First, this Part examines Maine's changes to its Human Rights Act (HRA) and argues that the new language will likely be struck down under the First Amendment. Second, this Part looks at Vermont's attempt at compliance and analyzes a recent lawsuit brought by a religious school alleging further discrimination. Third, this Part explores other potential solutions, including several bills that the Vermont Legislature recently introduced.

A. Maine's Response and the Subsequent Litigation

In response to the Supreme Court's impending decision in *Carson*, Maine acted quickly to counteract a potentially adverse decision. Just after the petition for certiorari was filed with the Supreme Court, Maine amended its HRA in three ways:

• Removed a provision exempting "any education facility owned, controlled or operated by a bona fide religious corporation, association or

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Oklahoma Supreme Court held that the school violated the Oklahoma Constitution and the Establishment Clause, and that the Free Exercise Clause "would not override the legal prohibition under the Establishment Clause." Drummond v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1, 9, 14, 15 (Okla. 2024). The United States Supreme Court granted certiorari in January 2025. *Supreme Court to Hear Oklahoma Case Involving Nation's First Religious Public Charter School*, ACLU (Jan. 24, 2025) https://www.aclu.org/press-releases/supreme-court-to-hear-oklahoma-case-involving-nations-first-religious-public-charter-school.

140. *Carson*, 596 U.S. at 795 (Breyer, J., dissenting).

141. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 465 n.3 (2017) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

142. Erwin Chemerinsky, *Op-Ed: A Ruinous Supreme Court Decision to Dismantle the Wall Between Church and State*, L.A. TIMES (June 21, 2022), https://www.latimes.com/opinion/story/2022-06-21/supreme-court-religion-maine-schools-church-and-state-first-amendment.

society" from complying with provisions relating to discrimination on the basis of sexual orientation.[143]

• Added a religious neutrality provision requiring that "to the extent that an educational institution permits religious expression, it cannot discriminate between religions in so doing."[144]

• Added an unlawful educational discrimination provision preventing schools that receive public funds from discriminating on the basis of religion, sexual orientation, and gender identity.[145]

Under these changes, most of Maine's religious schools would likely be ineligible to receive tuition assistance payments.[146] However, Maine has also shown that it is not opposed to allowing religious schools to participate in its tuition program. Cheverus High School in Portland has been approved to receive tuition funds after complying with the new requirements.[147] Although all of these changes have been challenged, a close look at the educational nondiscrimination provision (Section 4602) reveals why Maine's response acts as a cautionary tale for Vermont.

Religious schools quickly challenged the resulting legislation, seeking to participate in the tuition assistance program. Crosspoint Church (Crosspoint), the church that operates one of the two private schools that brought suit in *Carson*, filed suit in March 2023 in federal district court in Maine.[148] Crosspoint sought an injunction barring Maine from enforcing Section 4602, and a declaratory judgment that the provision is unconstitutional as applied to Crosspoint.[149] In February 2024, a district court judge denied Crosspoint's motion for a preliminary injunction, concluding that Crosspoint was unlikely to succeed on the merits.[150]

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143. 5 M.R.S. § 4602(4) (amended 2021). The new language specifies that "[n]othing in this section . . . [r]equires a religious corporation, association or society that does not receive public funding to comply with this section as it relates to sexual orientation or gender identity . . . ." § 4602(5)(C).

144. § 4602(5)(D).

145. § 4602(1).

146. Lana Cohen, *Federal Lawsuit Challenges Maine's Limits on Public Funding for Religious Schools*, PORTLAND PRESS HERALD (June 14, 2023), https://www.pressherald.com/2023/06/14/federal-lawsuit-challenges-maines-limits-on-public-funding-for-religious-schools/ ("Among other things, schools would have to commit to non-discriminatory hiring and enrollment practices, allow students to express gender-identities different than those assigned at birth and allow students of religious beliefs different than those taught at the school an equal opportunity to pray and practice religion.").

147. Robbie Feinberg, *Bangor Church Sues Over Law Requiring Its School to Accept LGBTQ Students, Staff to Get Public Funds*, ME. PUB. (Mar. 28, 2023), https://www.mainepublic.org/courts-and-crime/2023-03-28/bangor-church-sues-over-law-requiring-its-school-to-accept-lgbtq-students-staff-to-get-public-funds.

148. Complaint, at 1, Crosspoint Church v. Makin, No. 1:23-cv-00146-JAW (D. Me. 2023), ECF No. 1.

149. *Id.* at 26.

150. Crosspoint Church v. Makin, 719 F.Supp.3d 99, 103 (D. Me. 2024).

However, the court noted that because the case presents "novel constitutional questions in the wake of . . . *Carson v. Makin*," it expected a more authoritative ruling from the First Circuit Court of Appeals.[151]

Crosspoint makes three major arguments against Section 4602 under the Free Exercise Clause. First, the changes in the law are derived from religious hostility and are designed to circumvent *Carson*.[152] Second, Section 4602 is not generally applicable because single-sex schools are exempt from all of Section 4602's educational non-discrimination principles.[153] Third, there is no compelling state interest to prohibit Crosspoint's religious exercise or to exclude it from the tuition program.[154]

If this suit makes its way to the Supreme Court, the Court will not be sympathetic to Maine. It is likely the Court will find that Section 4602 is not neutral towards religion and thus is subject to a strict scrutiny analysis.[155] Under this analysis, Maine is unlikely to satisfy its burden to show that the restrictions on Crosspoint serve a compelling interest and are narrowly tailored to achieve that interest.[156] Therefore, the Supreme Court will likely invalidate Section 4602.

First, Maine will struggle to show that Section 4602 came from a position of neutrality.[157] The Maine Attorney General made it clear in a statement that he intends to continue excluding religious schools from the tuition program. Expressing his disappointment with the decision, he stated:

While parents have the right to send their children to such schools, it is disturbing that the Supreme Court found that parents also have the right to force the public to pay for an education that is fundamentally at odds with values we hold dear. I intend to explore with Governor Mills' administration and members of the Legislature statutory amendments to

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151. *Id.* Crosspoint filed an appeal to the First Circuit on September 19, 2024. *See* Opening Brief of Appellant Crosspoint Church at 1, Crosspoint Church v. Makin, No. 24-1590 (1st Cir. 2024).

152. Complaint, *supra* note 148, at 20–21.

153. *Id.* at 20.

154. *Id.*

155. *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990) (noting a government policy is not neutral if it is "specifically directed at . . . religious practice"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (holding that failure to meet either the neutrality or general applicability test is sufficient to trigger strict scrutiny).

156. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (holding that laws burdening religious practice must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest).

157. *See id.* at 540 (discussing factors relevant to assessing governmental neutrality, including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body").

address the Court's decision and ensure that public money is not used to promote discrimination, intolerance, and bigotry.[158]

These comments heavily implied that any later legislation would be a deliberate attempt to circumvent the decision. Although Crosspoint does not frame its beliefs as "discrimination, intolerance, [or] bigotry," it is unmistakable that the Maine Attorney General was referring to conduct based on "sincerely held" religious beliefs.[159] Members of the Court have disagreed on whether lawmaker statements may be considered in determining whether a law intentionally discriminates on the basis of religion.[160] However, these comments will likely be sufficient for the Court to find that Section 4602 was not neutral.[161]

At the same time, Section 4602 is likely to be found generally applicable. A government policy fails the general applicability requirement if it provides "a mechanism for individualized exemptions."[162] However, the exemptions claimed by Crosspoint do not have the same effect as those previously struck down by the Court.[163] The single-sex school exemptions are not made on an individualized basis, but rather exempt a category of eligible schools. Despite this general applicability, Section 4602 will be subject to a strict scrutiny analysis because it lacks neutrality.

Furthermore, the Court may agree that Section 4602 conditions Crosspoint's participation in a generally available program on Crosspoint "forfeiting its right to operate [the school] in accordance with its religious

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158. *Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in Carson v. Makin*, OFF. OF THE ME. ATT'Y GEN. (June 21, 2022), https://www.maine.gov/ag/news/article.shtml?id=8075979.

159. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022). Crosspoint's complaint against Maine stated that students must adhere to Crosspoint's code of conduct, which prohibits students from "engaging in immoral conduct, including sexual activity outside of marriage as defined in the Statement of Faith, or identifying as a gender other than their biological sex." Complaint, *supra* note 148, at 9. Teachers must also follow "biblical standards of conduct, including those relating to sexual behavior; the use of alcohol, drugs, and tobacco; lewd public dancing; gambling; and any other activity that would hinder a teacher's religious testimony." *Id.*

160. *Church of the Lukumi Babalu Aye*, 508 U.S. at 540–42; *id.* at 558 (Scalia, J., concurring in part and concurring in judgment).

161. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (1993) (explaining that the Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures"); Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 639 (2018) ("The official expressions of hostility to religion . . . were inconsistent with what the Free Exercise Clause requires.").

162. Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2020) (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

163. *See id.* at 535 ("Like the good cause provision in *Sherbert*, [the law at issue] incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner.").

beliefs."[164] Crosspoint would have to abandon practices that it claims are central to the practice of its faith, and to religious education, to be eligible to participate in the tuition assistance program.[165] However, abandoning religious practices poses a substantial burden on Crosspoint's free exercise, which alone is sufficient to trigger strict scrutiny.[166]

The Court has been clear that any "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise."[167] Therefore, no state can claim the Establishment Clause as a compelling interest in excluding religious schools from funding programs. If Maine can put forth another compelling interest, such as equal protection for all students attending state-funded schools, then there is a chance that the HRA will be upheld. On the balance, however, the current Court is unlikely to look favorably on Maine's attempt to subvert the *Carson* ruling.

B. Vermont's Response and Subsequent Litigation

Like Maine, Vermont has struggled to balance compliance with *Carson* with its tradition of separating religion and public education. Vermont's school choice system is similar to Maine in its approval requirements for private schools (called independent schools in Vermont). The State Board of Education must approve independent schools if they "substantially

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164. Complaint, at 19, Crosspoint Church v. Makin, No. 1:23-cv-00146-JAW (D. Me. 2023).

165. This entanglement between religious practice and religious education shows the thorniness of this issue, and the need for the (abandoned) status-use distinction discussed above. *See supra* notes 123–29 and accompanying text.

166. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id.

167. Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 484–85 (2020) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 466 (2017)); *see also* Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("[T]he state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause . . . .").

[comply] with all statutory requirements," or if the school is accredited by any agency recognized by the State Board for accrediting purposes.[168]

In contrast to Maine, there is no statute defining sectarian education in Vermont.[169] The Vermont Supreme Court decision in *Chittenden Town School District v. Department of Education*, which relied on the Compelled Support Clause of Article 3 of the Vermont Constitution, prohibits state funding for private religious schools.[170]

Article 3 states:

That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be *compelled to* attend any religious worship, or erect *or support any place of worship*, or maintain any minister, *contrary to the dictates of conscience* . . . .[171]

Relying on the historical context of the Vermont Constitution and decisions from other states,[172] the court in *Chittenden Town* concluded there is "no way to separate religious instruction from religious worship."[173] Because the program at issue had "no restrictions that prevent the use of public money to fund religious education," it violated the Compelled Support Clause.[174] Since *Chittenden Town*, Vermont has not reimbursed tuition to any religious schools—until *Carson*.

Following *Carson*, the Vermont Agency of Education acted to comply with the decision. In September 2022, then Secretaryof Education Dan French issued guidance to superintendents advising to follow the decision.[175] Under *Carson*, school districts could not use the Compelled Support Clause of the Vermont Constitution to deny

168. VT. STAT.ANN. tit. 16, § 166(b) (West 2024). A moratorium on all new independent school approvals was enacted on July 1, 2023. Peter D'Auria, *2 Vermont Private Schools Get Last-Minute Approval Before Moratorium*, VTDIGGER (July 6, 2023), https://vtdigger.org/2023/07/06/2-vermont-private-schools-get-last-minute-approval-before-moratorium/.

169. Chittenden Town Sch. Dist. v. Dep't of Educ., 169 Vt. 310, 317, 738 A.2d 539, 545 (1999).

170. *Id.* at 311–12, 738 A.2d at 541–42. In *Chittenden Town*, the Vermont Supreme Court considered whether tuition reimbursement for sectarian schools violated the Compelled Support Clause of the Vermont Constitution. *Id.* at 311, 738 A.3d at 541. When the Chittenden School Board allowed tuition reimbursement to the Mount Saint Joseph Academy, a Catholic secondary school, the Commissioner of Education revoked state aid from the district. *Id.* at 314, 738 A.2d at 543.

171. VT. CONST. ch. I, art. 3 (emphasis added).

172. *Chittenden Town*, 169 Vt. at 328, 337–38, 738 A.2d at 552, 559.

173. *Id.* at 342, 738 A.2 at 562.

174. *Id.* at 343, 738 A.2d at 562.

175. Letter from Secretary of Education, Dan French to Superintendents (Sept. 13, 2022).

tuition payments to religious-approved independent schools.[176] The guidance stressed, however, that "tuition can *only* be paid to a public school, an approved independent school, [or] an independent school meeting education quality standards . . . ."[177] Under Vermont State Board of Education Rule 2200, a school seeking approval is required to provide documentation of:

A statement of nondiscrimination, [posted on the school's website and included in the school's application materials], that complies with the Vermont Public Accommodations Act, Title 9 Vermont Statutes Annotated, Chapter 139 and the Vermont Fair Employment Practices Act, Title 21 Vermont Statutes Annotated, Chapter 5, Subchapter 6.[178]

This requirement means that independent schools must affirmatively agree not to discriminate on the basis of religion, sexual orientation, or gender identity as a condition of receiving public tuition funds.

In 2023, the Vermont Agency of Education denied Mid Vermont Christian School (MVCS) independent school status based on its refusal to sign the statement of nondiscrimination.[179] In response, MVCS filed a federal lawsuit against the Interim Secretary of Education and other school district officials alleging a Free Exercise violation.[180] Like the Maine lawsuit, MVCS alleges religious hostility and challenges Rule 2200 as neither neutral nor generally applicable.[181] However, MVCS also alleges a

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176. *Id.* "Requests for tuition payments for resident students to approved independent religious schools or religious independent schools that meet educational quality standards must be treated the same as requests for tuition payments to secular approved independent schools or secular independent schools that meet educational quality standards." *Id.*

177. *Id.* (citing VT. STAT. ANN. tit. 16, § 828) (West 2022).

178. 22 000 004 VT. CODE R. § 2223.2.1(a) (2023). The Vermont Public Accommodations Act provides that:

> An owner or operator of a place of public accommodation . . . shall not, because of the . . . marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.

VT .STAT. ANN. tit. 9, § 4502(a) (West 2024). The Vermont Fair Employment Practices Act prohibits, among other things, employers from discriminating against employees or potential employees "because of . . . religion . . . sexual orientation, [and] gender identity . . . ." VT. STAT. ANN. tit 21, § 495(a)(1) (West 2024).

179. Peter D'Auria, *In Vermont Schools, Conservative Legal Groups Have Become a Potent Force*, VTDIGGER (Dec. 18, 2023), https://vtdigger.org/2023/12/18/in-vermont-schools-conservative-legal-groups-have-become-a-potent-force/.

180. Verified Complaint at 48, Mid Vt. Christian Sch. v. Bouchey, No. 2:23-cv-00652-kjd (D. Vt. Nov. 21, 2023). In June 2024, a federal district court denied MVCS's motion for a preliminary injunction under rational basis review; an appeal is pending in the Second Circuit. Opening Brief for Appellants at 2, Mid Vt. Christian Sch. v. Saunders, No. 23-cv-00652 (2d. Cir. Aug. 30, 2024).

181. Verified Complaint at 51, Mid Vt. Christian Sch. v. Bouchey, No. 2:23-cv-00652-kjd (D. Vt. Nov. 21, 2023).

violation of the Free Speech Clause because of the requirement to publish statements of nondiscrimination on its website.[182]

Rule 2200 has a fair chance of being upheld in this lawsuit. Unlike the Maine response to *Carson*, Vermont has not shown outright hostility to religious groups receiving public funding. Rule 2200 applies to all independent schools applying for approval with no exceptions.[183] This makes it generally applicable.[184] However, MVCS argues that the exemptions within the Vermont Public Accommodations Act (Act) mean that the Act is not generally applicable.[185] As Rule 2200 is the regulation challenged in the lawsuit, the Court should decline to address whether the Act is generally applicable. Instead, the Court should focus on Rule 2200, which is generally applicable.

In contrast to Maine, Vermont has not implemented any restriction on the types of religious exercise allowed in approved schools as long as the school complies with the antidiscrimination requirements.[186] In the absence of religious hostility, it is possible that Vermont can demonstrate to the Court that the antidiscrimination requirements are rooted in the Equal Protection Clause rather than the Establishment Clause.[187] However, this could be a difficult argument to make. The classification most affecting religious schools—sexual orientation—has not been recognized as a suspect classification by the Court.[188] As laws affecting free exercise are subject to strict scrutiny—and the Court has recently shown extreme sympathy to plaintiffs claiming free exercise violations—the Court is more likely to focus on the free exercise implications rather than any equal protection concerns.[189]

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182. *Id.* at 54. The lawsuit also alleges violations of MVCS's right to religious autonomy and expressive association, as well as parents' fundamental right to direct the upbringing of their children. *Id.* at 60. For the sake of brevity and comparison, this Article focuses mainly on the antidiscrimination requirements as they apply to the treatment of students.

183. *See* VT. CONST. ch. I, art. 3.

184. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

185. Verified Complaint at 52, Mid Vt. Christian Sch. v. Bouchey, No. 2:23-cv-00652-kjd (D. Vt. Nov. 21, 2023).

186. 22 000 004 VT. CODE R. § 2223.2.1(a)(2023).

187. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that Equal Protection Clause requires an "exceedingly persuasive justification" for gender-based distinctions in educational admissions).

188. The Court has suggested that discrimination against LGBTQ+ people can violate the Equal Protection Clause but did not decide on the applicable level of scrutiny. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that the Fourteenth Amendment requires states to grant and recognize marriages between two people of the same sex).

189. *See supra* notes 131–32.

This lawsuit is unique from Maine's because of the free speech element. Rule 2200 requires any approved independent school to publish a nondiscrimination statement on its website.[190] MVCS argues that this "compels [MVCS] to speak in accordance with the State's views on gender identity and restricts its speech to the contrary."[191] This adds an extra layer of difficulty for the State of Vermont, as the First Amendment gives double protection to religious speech.[192] However, because prior cases involving the free exercise of religion within public schools have not involved state-funded private religious schools, the Court has yet to address this question.[193] Although it is difficult to predict how this lawsuit will be resolved, the free exercise concerns demonstrate the difficulty of entangling religious schools with state funding. Thus, the importance of the now defunct status-use distinction.[194]

C. Other Potential Solutions for Vermont

Perhaps in part due to *Carson*, Vermont Governor Phil Scott and Education Secretary Zoie Saunders recently proposed a total overhaul of the Vermont education system.[195] The proposal, introduced in bill form in February 2025, includes some colossal changes to Vermont's education finance and governance systems.[196] These changes include consolidating Vermont's 52 supervisory unions into five regional school districts, using a foundation formula to fund education, and drastically changing the current school choice system.[197]

The proposal leaves it to the individual school boards to adopt a policy on K–8 school choice between public schools operated by the district.[198] But independent school choice would be available only for grades 9–12.[199] A school board would designate at least one public or independent school to

190. 22 000 004 VT. CODE R. § 2223.2.1(a)(2023).

191. Verified Complaint at 55, Mid Vt. Christian Sch. v. Bouchey, No. 2:23-cv-00652-kjd (D. Vt. Nov. 21, 2023).

192. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022).

193. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000) (holding that the school district violated the Establishment Clause by allowing a student to pray "over the public address system" before football games at a public school).

194. *See supra* notes 123–29 and accompanying text; 22 000 004 VT. CODE R. § 2220 (2023).

195. Ethan Weinstein, *Gov. Phil Scott's 'Education Transformation' Bill Hits the Legislature, All 176 Pages of It*, VTDIGGER, (Feb. 25, 2025), https://vtdigger.org/2025/02/25/gov-phil-scotts-education-transformation-bill-hits-the-legislature-all-176-pages-of-it/.

196. H. 454, 2025 Gen. Assemb., Reg. Sess. (2025).

197. *Id.*

198. *Id.*

199. *Id.*

receive students who wish to attend a "school choice school."[200] If there are more than the designated number of residents who wish to participate in the school choice program, the district would use a lottery system to determine which students can participate.[201] Crucially, to become a "school choice school," the school must be an approved independent school, and at least 51% of students must be publicly funded as of July 1, 2025.[202]

The Vermont-National Education Association teachers' union and the Vermont School Boards Association have criticized the plan for expanding school choice.[203] The proposal undercuts public schools while creating school choice where none is needed by allowing students to opt into school choice in districts that already meet students' needs through public schools. Conversely, the proposal would constrain school choice in districts where it supplements the public school system.[204]

This drastic change in the school choice system, if enacted, would render many of *Carson*'s implications moot. Of the 15 religious schools that received public funds in 2023, none of them had more than 51% publicly funded students.[205] Therefore, none of them would be eligible for public funds under H. 454.

A seemingly simple solution for Vermont indeed is to stop payments to private schools altogether. Ending payments to all private schools, regardless of religious status, would mean that no tax revenue is going to religious organizations while maintaining the neutrality required by the First Amendment.[206] However, functionally eliminating many of the independent school choice schools has a detrimental impact on the rural parts of the state. Many students who participate in school choice attend

200. *Id.*

201. *Id.*

202. *Id.*

203. Alison Novak, *Senate Leader Says School Choice Expansion Is Off the Table*, SEVEN DAYS (Feb. 11, 2025), https://www.sevendaysvt.com/news/senate-leader-says-school-choice-expansion-is-off-the-table-42859752.

204. Lola Duffort, *Capitol Recap: School Choice . . . For All?*, VT. PUB. (Feb. 7, 2025), https://www.vermontpublic.org/local-news/2025-02-07/capitol-recap-school-choice-for-all (quoting Education Secretary Zoie Saunders "[t]his would likely reduce the number of independent schools receiving public tuition").

205. Ethan Weinstein, *Since 2021, Vermont's Religious Schools Have Received an Increasing Amount of Public Education Money*, VTDIGGER (Mar. 13, 2024), https://vtdigger.org/2024/03/13/since-2021-vermonts-religious-schools-have-received-an-increasing-amount-of-public-education-money/.

206. *See supra* note 136.

schools that only accept a few public students.[207] These schools would be shuttered under the proposal.

Another solution suggested by the Court in *Carson* is to expand the public school system, thereby eliminating the *need* for a school choice system.[208] However, adding public schools in any state, but especially in Vermont, is a costly endeavor. During the 2018–2019 school year, 3,407 students attended approved independent schools.[209] It is highly unlikely that all of those students will be easily incorporated into the existing public schools, so new public schools will need to be built. This is not a simple task. The State of Vermont is currently facing a whopping $6.3 billion dollars in construction costs just to maintain the state's 384 school buildings.[210] Building a new school costs even more: Burlington's new high school is projected to cost $210 million.[211] Although this may have seemed like a simple solution to the majority in *Carson*, the high price tag makes it an unlikely solution for states that rely so heavily on school choice.

Similarly, the Court in *Carson* suggested a hybrid education system that allowed for "some combination of tutoring, remote learning, and partial attendance . . . ."[212] Hybrid education would potentially fill the gap created by eliminating school choice. Notably, the Court failed to describe exactly how this would equate to in-person attendance—perhaps because the Court recognized the absurdity of such a proposal. Although some families may homeschool their children or use remote learning programs, that is a far cry from imposing this option on families who live too far away from a physical school. If Vermont offered this as an alternative to in-person education, rural families might be forced to accept it rather than being able to opt for in-person education.[213] Imposing remote options would very

207. Ethan Weinstein, *Gov. Phil Scott's 'Education Transformation' Bill Hits the Legislature, All 176 Pages of It*, VTDIGGER (Feb. 25, 2025), https://vtdigger.org/2025/02/25/gov-phil-scotts-education-transformation-bill-hits-the-legislature-all-176-pages-of-it/.

208. Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 785 (2022).

209. HOFFER, *supra* note 1.

210. Ethan Weinstein, *House Panel Confronts 'Eye Popping' Cost of School Construction Needs*, VTDIGGER (Jan. 3, 2024), https://vtdigger.org/2024/01/03/house-panel-confronts-eye-popping-cost-of-school-construction-needs/.

211. Katherine Huntley, *Cost of Building New Burlington High School Going Up*, WCAX (Sept. 5, 2023), https://www.wcax.com/2023/09/05/cost-building-new-burlington-high-school-going-up/.

212. *Carson*, 596 U.S. at 785.

213. *See infra* note 224 and accompanying text.

likely violate the requirement of "providing every school-age child in Vermont an equal educational opportunity."[214]

The Vermont Legislature has considered several bills that would address the State's concerns about *Carson*. However, even a cursory examination of the two most recent bills shows that they create the same problems as Rule 2200 and will likely be challenged on the same grounds.

First, S.202 was introduced in the Vermont Senate in January 2024.[215] S.202 functions mainly to codify Rule 2200, specifically the antidiscrimination requirements discussed above.[216] It is possible that the legislature will wait to see how Rule 2200 fares in the MVCS lawsuit before moving forward with this bill. However, any such law is likely to be met with a similar challenge by religious schools seeking approved independent school status.

Second, H.820 was introduced in the Vermont House in January 2024.[217] H.820 requires public school districts that do not maintain a public elementary or high school to designate up to five public or approved independent schools.[218] These schools would essentially serve as the district's public schools. The purpose of the bill is to limit the amount of public money going to out-of-state private schools.[219] It would also ensure that educational opportunities are available to all Vermont students regardless of socioeconomic status.[220] However, H.820 still requires approved independent schools to comply with the Act and the Vermont Fair Employment Practices Act, both required under Rule 2200.[221] Therefore, it would function the same as both Rule 2200 and S.202. It is likely that if H.820, if passed with this requirement, is likely to be quickly challenged.

Furthermore, H.820 was quickly met with public outcry, especially from rural Vermonters. Critics have been quick to point out that the Vermont public school system is facing increasing operational costs and that independent schools save the state money by limiting the public-school infrastructure.[222] Independent schools are also a critical part of Vermont's

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214. Brigham v. State, 166 Vt. 246, 249, 268 (1997) (per curiam) (holding that "the state must ensure substantial equality of educational opportunity throughout Vermont") (emphasis omitted).

215. S. 202, 2024 Gen. Assemb., Reg. Sess. (2024).

216. *See* VT. CONST. ch. I, art. 3.

217. H. 820, 2024 Gen. Assemb., Reg. Sess. (2024).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *See* Kelly Pajala, *Kelly Pajala: Supporting Independent Schools and School Choice*, BRATTLEBORO REFORMER (Jan. 25, 2024), https://www.reformer.com/opinion/columnists/kelly-pajala-supporting-independent-schools-and-school-choice/article_63ec9f1a-ba00-11ee-95d1-

educational system; as of July 2020, 45 of the State's 110 school districts did not operate either an elementary or a secondary school.[223] Any significant changes to the Vermont school choice system must consider implications for districts without a public school.[224] Therefore, until Vermont is better positioned to expand its public school system, eliminating school choice altogether would pose new problems regarding equal access to education.

CONCLUSION

The majority in *Carson* got it wrong. Upending constitutional doctrine, the Court mandated that taxpayers subsidize religious education in an opinion inconsistent with decades of precedent. Nothing in the Constitution requires this decision.

Instead of applying the established status-use distinction, the Court pretended that no such distinction ever existed. To do so, it ignored both legal precedent and the text of the Constitution. The Court also ignored all practical implications of its decision. Rather, the majority's perverse decision prohibits any separation of church and state in state-funded private education.

Carson created an impossible situation for states that do not want to fund religious private schools. This can be seen in Maine's subsequent legislation, which is unlikely to withstand a challenge before such a conservative court. Vermont, however, has crafted a better solution with neutral antidiscrimination requirements that apply to all independent schools seeking public funding. The other potential solutions explored in this Article demonstrate the difficulty of this issue. Although the simplest solution is to eliminate school choice in Vermont, this path would be devastating. School choice is a critical part of the education system in Vermont. Without it, rural Vermont children will be left without equal educational opportunities.

None of these issues mattered to the *Carson* majority. Through a faltering historical analysis, the Court warped the Religion Clauses far beyond their original meaning. In doing so, the Court created conflict where previously there was harmony. The shortsightedness of this decision is unmistakable. Why should we dismantle the wall of separation that has served us so well for so long? The Court has no answer to this question.

4babe92e0915.html (arguing that Vermont's $6 billion capital construction needs should be the legislature's priority).

223. HOFFER, *supra* note 1.

224. *See supra* notes 206–14 and accompanying text.

Rather, it continues its destruction of the Establishment Clause with reckless abandon.