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ARTICLES

Neutrality and School Choice: Two Cheers for *Carson v. Makin*

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In 2022 the Supreme Court decided the case of *Carson v. Makin*, a First Amendment free-exercise case centering on the constitutionality of the exclusion of religious schools from Maine's school tuition assistance program. In a 6–3 decision, the Court held that the exclusion of religious schools violated the Free Exercise Clause of the Constitution. The dissenting opinion of Justice Breyer, in contrast, argued that the State acted within its power in excluding religious schools from the program. Notably, both opinions appeal to the concept of neutrality to justify their decision. In this article, I analyze the role neutrality plays in the case. I argue that the concept of neutrality does not operate as an absolute standpoint from which it is possible to judge whether public aid to religious schools is justified. Finally, I conclude that the majority's opinion will result in further litigation.

In 2022 the Supreme Court decided the case of *Carson v. Makin*,[1] a First Amendment free-exercise case centering on the constitutionality of Maine's school tuition assistance program. Maine's tuition assistance program was designed in a way that the State would pay the tuition for school-age children at approved private schools of the parents' choice in certain rural districts. In 1981, in response to concerns that the program violated the Constitution's Establishment Clause by directing public money to private sectarian schools, the legislature passed legislation excluding religious schools from participating in the program. Under the terms of the altered program, schools participating in the program had to be "nonsectarian . . . in accordance with the First Amendment of the United States Constitution."[2] When two families were denied access to Maine's tuition assistance program due to the sectarian nature of the school they had selected for the education of their children, they brought suit, alleging an infringement of their free-exercise rights. In a 6–3 opinion, the Court decided that Maine's exclusion of sectarian schools from the tuition assistance program was an unconstitutional violation of the Free Exercise Clause of the Constitution.

The Court's decision in the *Carson* case was relatively unsurprising. Two years prior, while the *Carson* case was working its way through the lower courts, the Supreme Court had decided the case of *Espinoza v. Montana Department of Revenue*,[3] which dealt with a very similar set of facts. However, while the *Carson* case primarily represents a solidification of the principles that animated

1 596 U.S. ___ (2022).

2 Me. Rev. Stat. Ann., Tit. 5, §2951(2).

3 591 U.S. ___ (2020).

the Court's decision in *Espinoza*, there are some subtle differences between the two cases that prevent the straightforward application of these principles to the facts of the *Carson* case. In this article, I compare Justice Roberts's majority opinion with the dissenting opinion of Justice Breyer. Although the concept of neutrality acts as an important guiding principle in resolving the underlying legal issue for both Justice Roberts and Justice Breyer, they nevertheless come to different conclusions as to the disposition of the case. I argue that the reason for their differing conclusions stems from the fact that neutrality is incapable of providing a firm benchmark for disposing of cases arising under the Religion Clauses. Instead, I make the case that neutrality functions as a moral horizon within which it is possible to make sense of and adjudicate conflicting claims.[4] I conclude that while the majority develops a conception of neutrality that is more favorable to the protection of religious rights and educational choice, its failure to account for the moral subjectivity involved in the concept of neutrality causes it to skirt important questions that will necessarily be the subject of future legal disputes.

Carson v. Makin: Decision and Dissent

Justice Roberts's majority opinion in the *Carson* case stands for the proposition that if a state offers tuition assistance for students to attend private schools, then requiring those schools to be nonsectarian violates the First Amendment's free-exercise guarantee. Beginning with the principle established in *Sherbert v. Verner*, according to which the exclusion of religious individuals from otherwise available public welfare benefits operates as a burden on the free-exercise rights of religious believers,[5] Roberts explains how this principle has been applied in recent cases. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[6] the Court found that a Missouri program that offered grants to nonprofit organizations to resurface playgrounds while excluding nonprofits that were owned or operated by a church, sect, or other religious organization violated the Free Exercise Clause. The Free Exercise Clause does not allow the State to discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Similarly, *Espinoza* concerned a provision of Montana's constitution barring government aid to schools controlled by any church or sect, which had the effect of prohibiting families from using otherwise available scholarship funds at religious schools. The Court held that this provision of Montana's constitution violated the First Amendment's Free Exercise Clause. In both

4 This article has benefited greatly from Lael Weinberger's account of the relativity of neutrality in *Carson v. Makin*. See *Carson v. Makin and the Relativity of Neutrality*, 45 HARV J.L. & PUB. POL'Y 1 (2022). I build on Weinberger's analysis, making the case that neutrality is not an objective standard, but instead functions as a moral framework within which cases can be decided. I posit some predictions concerning future litigation the Court will face due to its failure to take into account the relativity of neutrality.

5 374 U.S. 397, 404 (1963).

6 582 U.S. 449 (2017).

cases, the Court reasoned that the exclusion of religiously affiliated institutions from a general government program operated in a discriminatory manner that violated the Free Exercise Clause.

The legal issue underlying the *Carson* case is particularly similar to that of *Espinoza*. In both cases, religious observers were denied access to otherwise available public education funds on the basis of their religious beliefs. As Justice Roberts notes, under the Court's First Amendment jurisprudence, such a burden will be justified only if the State can show that it has a compelling interest, according to which the legislation must "advance 'interests of the highest order' and must be narrowly tailored" to achieve those interests.[7] In *Carson*, as in *Espinoza*, the Court found the State interest in promoting the separation of church and state to a degree beyond that required by the First Amendment to be insufficiently compelling to justify the impairment of the free exercise of religion. As Roberts notes, 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."[8] In fine, while the separation of church and state beyond that which is required by the Constitution may be a legitimate state interest, it will not serve to justify burdening believers' free-exercise rights.

On the one hand, as Justice Roberts indicates, the Court's opinion is simply the application of "the 'unremarkable' principles" espoused in *Trinity Lutheran* and *Espinoza*."[9] All three cases concern the exclusion of religious believers from a public benefit on the basis of their faith. However, as Justice Breyer's dissenting opinion perceptively points out, there are subtle differences between *Carson* and the cases of *Trinity Lutheran* and *Espinoza*. In the latter two cases, the State excluded the schools because of their religious character or status. In *Trinity Lutheran*, the State of Missouri excluded religious schools from participation in the playground resurfacing program "because of the mere fact that they were 'owned or controlled by a church, sect, or other religious entity.'"[10] Similarly, in *Espinoza*, the State's scholarship program prohibited families from using the scholarship at private schools "owned or controlled in whole or in part by any church, religious sect, or denomination."[11] In contrast, Justice Breyer points out, Maine's program excludes schools only "if it is *both* (1) 'associated with a particular faith or belief system' *and* also (2) 'promotes the faith or belief system with which it is associated and/or presents the [academic] material taught through the lens of this faith.'"[12] On

7 596 U.S., slip. op. at 9.

8 *Id.* at 10.

9 *Id.* at 9.

10 *Id*. at 8 (citing 582 U.S., slip op. at 2).

11 *Id*. (citing 591 U.S., slip op. at 3).

12 *Id*. at 10 (Breyer, J., dissenting) (citing 979 F. 3d, at 38).

this understanding, the *Carson* case can be distinguished from the prior line of causes by the fact that Maine's tuition assistance program excludes sectarian schools not because of their sectarian character, but because of their religious activity.

According to Justice Breyer, the distinction between status and use, or between religious status and religious activity, has meaningful implications for the Court's First Amendment jurisprudence. The "very point of the Establishment Clause," according to Breyer, "is to prevent the government from sponsoring religious activity itself."[13] And, in support of the principle that public funds are not to be diverted for religious use, Breyer points to the case of *Locke v. Davey*, in which the Court upheld the State of Washington's decision to deny public funding to a recipient because of the religious *use* that the recipient intended to make of the public funding.[14] While the exclusion of a religious entity from the generally available program on the basis of their religious status would constitute a violation of the Free Exercise Clause, an exclusion based on the religious *use* that will be made of government resources is permissible. According to Justice Breyer, Maine does not exclude sectarian schools from its tuition assistance program because of their status, but instead "because they will use state funds to promote religious views."[15]

Justice Roberts, in turn, emphasizes that the Court's decision in *Locke v. Davey* centered on the fact that the public funds were to be used in pursuit of vocational training. On this understanding, Locke's reasoning depended on "the 'historic and substantial state interest' against using 'taxpayer funds to support church leaders,'" and *not* on the principle that the use of public funds could not be used to aid private religious schools.[16] According to Justice Roberts, the Court's opinion in *Locke* was decidedly narrow.

In any case, for Justice Breyer, the distinction between status and use is important as it has implications for the Establishment Clause concerns at issue in the case. While he concedes that *Zelman v. Simmons-Harris* stands for the proposition that the Establishment Clause may permit a state to fund a public-choice program, according to which private individuals direct public funds toward religious education, it does not *require* the state to fund such a program.[17] Instead, Justice Breyer concludes that, according to the principle established in *Walz*, the decision of whether or not to fund such a public-choice program falls squarely within the space of constitutional leeway the Court has long guaranteed to states in navigating the tensions between the Free Exercise and Establishment Clauses of the First Amendment.

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13 *Id.* at 9.

14 540 U.S. 712 (2004).

15 596 U.S., slip op. at 9 (Breyer, J., dissenting).

16 596 U.S., slip op. at 18.

17 596 U.S., slip op. at 13 (Breyer, J., dissenting).

The Role of Neutrality in the *Carson* Case

The majority and the dissent both agree, in general terms, that the purpose of the two Religion Clauses is to foster government neutrality toward religion. While Justice Breyer is straightforward in his appeal to the principle of neutrality, asserting that the Religion Clauses "attempt to chart a 'course of constitutional neutrality' with respect to government and religion,"[18] Justice Roberts is more circumspect. Nevertheless, an analysis of Justice Roberts's opinion reveals that he is no less committed to the principle of neutrality than Justice Breyer, and he appeals to the principle both to establish that Maine's tuition assistance program burdens the free exercise of religion, and to make the case that Maine's antiestablishment concerns are insufficiently compelling to justify this burden.

Early in his opinion, Justice Roberts cites to *Sherbert v. Verner*, which stands for the proposition that the exclusion of religious individuals from otherwise available public benefits operates as a burden on their free exercise of religion.[19] As applied to the facts of *Carson*, this principle indicates that Maine's exclusion of sectarian schools from its tuition assistance program burdens the free exercise rights of those who sought to use the funds for religious education. Justice Roberts emphasizes that the legislature acted in a discriminatory, nonneutral manner: "there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion."[20] Because Maine excluded religious schools, and *only* religious schools, it violated the First Amendment's guarantee of neutrality.

Justice Roberts also appeals to the principle of neutrality in disposing of the Establishment Clause aspect of the case. While legislation that burdens the free exercise of religion may be justified by a sufficiently compelling state interest, Justice Roberts rejects idea that the State of Maine's antiestablishment interest in excluding religious schools from its tuition assistance program is sufficiently compelling to justify such a burden. Pointing to the Court's decision in *Zelman v. Simmons-Harris*, Justice Roberts notes that "a *neutral* benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not violate the establishment clause."[21] Maine's tuition assistance program, like the voucher program at issue in *Zelman*, was set up in such a way that it was not the State, but private citizens, selecting which private schools were to receive public funds. Since Maine's program was a "neutral benefit program," involving "independent choices" of private individuals, its antiestablishment concerns

18 *Id.* at 3.

19 374 U.S. 398, 404 (1963).

20 596 U.S., slip op. at 10.

21 *Id.* at 7.

under the First Amendment were not justified. While Justice Roberts recognized that Maine might have an interest in promoting a "stricter separation of church and state" than required by the First Amendment, this interest was insufficiently compelling to justify the burden on the free exercise of religion posed by Maine's exclusion of religious schools.[22] The principle of neutrality plays a central a role in Justice Roberts's legal reasoning. The aspect of individual choice, which mediates between the provision of State funds and the receipt of those funds by the religious schools, renders Maine's program sufficiently neutral so as not to justify antiestablishment concerns. Thus, for Justice Roberts, neutrality plays an important role both in establishing that a free-exercise violation exists and in establishing that Establishment Clause concerns are insufficiently compelling to justify that violation.

Justice Breyer's dissenting opinion emphasizes the role of neutrality in a more direct way. He expressly states that the purpose of the two Religion Clauses is "to chart a 'course of constitutional neutrality' with respect to government and religion."[23] In order to achieve the goal of creating "an American Nation free of . . . religious conflict," the framers sought to establish a "benevolent neutrality" that would "permit religious exercise to exist without sponsorship and without interference."[24] Citing to *Walz v. New York*, Justice Breyer makes the case that the "apparently absolutist nature" of each of the two Religion Clauses might, "if expanded to a logical extreme," lead to the negation of the other.[25] In light of this difficulty, he asserts that the Court has often said that "there is room for play in the joints" between the two clauses, and that the states have a level of discretion in navigating the application of these clauses. The fact that the various states have a "degree of freedom to navigate the Clauses' competing prohibitions" includes the ability not to fund religious activity, if they have "strong, establishment-related reasons for not doing so."[26] In the present case, Justice Breyer asserts that Maine's antiestablishment interests fall squarely within this area of state discretion that the Court has long recognized, and they are sufficiently strong to justify its decision to exclude religious schools from its tuition assistance program. Tying the doctrine of state discretion back to the overall purpose of the two clauses, Justice Breyer notes that "state funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent."[27] Maine's attempt

22 *Id.* at 10.

23 596 U.S., slip op. at 3 (Breyer, J., dissenting).

24 *Id*.

25 *Id.* at 2.

26 *Id*. at 4.

27 *Id*. at 9.

to walk "the line of government neutrality" is, therefore, justified by the principle of state discretion that has animated the Court's Religion Clauses jurisprudence.[28]

The Ambiguity of Neutrality

The use of the principle of neutrality as a means of adjudicating the issue of state aid to religious schools has animated the Court's Religion Clauses jurisprudence ever since the Establishment Clause was incorporated in the 1947 case of *Everson v. Board of Ed. of Ewing*.[29] As Justice Breyer points out, *Everson* stands for the proposition that "a State cannot act to 'aid one religion, aid all religions, or prefer one religion over another.'"[30] When it comes to government aid to religious schools, neutrality is at the heart of the Court's modern First Amendment jurisprudence. However, as I hope to show, the Court's commitment to the principle of neutrality as a guide to settling Religion Clause disputes makes for a somewhat mercurial jurisprudence. The reason is that neutrality, particularly within the context of aid to religious schools, is an elusive concept that cannot be identified as an absolute standpoint.

The elusive character of neutrality as a guiding principle was apparent in *Everson*. At issue in the *Everson* case was the use of state funds to reimburse the costs incurred by parents who used public transportation to send their children to school. The board of education in Ewing, New Jersey, extended this reimbursement to parents who used public transportation to send their children to public schools and to Catholic parochial schools. In his capacity as taxpayer, Arch Everson sued the school board, alleging that the board's decision violated the First Amendment prohibition on laws "respecting an establishment of religion." In deciding the case, the majority asserts that the First Amendment stands for the proposition that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[31]

However, immediately after the quotation from Jefferson regarding the "wall of separation," in what is the clear juncture of his opinion, Justice Black adopts a different tack. Despite the strictness of the separation between church and state, he asserts that the Court "must not strike [the] statute down if it is within the State's constitutional power, even though it approaches the verge

28 *Id.* at 13–14.

29 330 U.S. 1 (1947).

30 596 U.S. slip op. at 2 (Breyer, J., dissenting) (citing 330 U.S. at 15).

31 330 U.S. at 16.

of that power."[32] At this point Justice Black begins to move in a direction that emphasizes the strictures that the First Amendment places on the states' ability to *harm* religion. While acknowledging that the Ewing Board of Education's school busing program *helps* students arrive at church schools, and that it might even be the dispositive factor in the decision of some parents to send their children to parochial schools, Justice Black compares this help to the provision of state-paid policemen "detailed to protect children going to and from church schools."[33] In the same way that the presence or absence of such police protection might influence parental decisions as to whether to send their children to school, the presence or absence of bus fare remuneration might similarly impact parental decisions. Because it is "obviously not the purpose of the First Amendment" to cut off church schools from basic services, such as police protection, it is not the purpose of the First Amendment to hinder parents in transporting their children to school "safely and expeditiously."[34] Instead, the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers."[35]

Justice Black's opinion, switching as it does from emphasizing the "strict separation" required by the First Amendment to the relatively accommodating tone he adopts toward the Ewing Board of Education's policy, which undoubtedly works to the advantage of Catholic parochial schools, seems to be somewhat internally inconsistent. As Justice Jackson notes in his dissent, "[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[36] Justice Jackson recognizes that Justice Black's treatment of the "wall of separation" belies the description he provides of it as being "high and impregnable."[37]

The other dissenting opinion, penned by Justice Rutledge, also notes the discordant nature of Justice Black's opinion, and charges Justice Black with ignoring the fact that the bus fare program helps the school to "reach the child with its religious teaching."[38] By ignoring this fact, Justice Black is able to reclassify the character of the bus fare program from one that "supports" religion to one that is simply public welfare legislation. This move, argues Justice Rutledge, can be extended to *all* grants in aid for religious education, including large grants.[39] Of course, in response it might be noted that Justice Rutledge's logic can equally be extended (as Justice Black points out) to deny

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32 *Id.*

33 *Id.* at 17.

34 *Id.* at 18.

35 *Id.*

36 330 U.S. at 19 (Jackson, J., dissenting).

37 *Id.* at 18.

38 330 U.S. at 56 (Rutledge, J., dissenting).

39 *Id*. at 50.

religious believers the use of basic services and protections such as police protection, fire protection, and the use of public highways in a way that would seem to violate the Free Exercise Clause.

Justice Rutledge, however, anticipates this argument and attempts to respond by describing police protection and fire protection to be "matters of common right" and "part of the general need for safety."[40] However, it is not entirely clear what constitutes a "matter of common right." In a footnote, Justice Rutledge seeks to provide some clarification, asserting that "the protections are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions or uses."[41] However, this distinction between provisions "specially . . . earmarked" for religious use and those that are not specially "earmarked" is purely formal, and does not provide a principled distinction between permissible and impermissible support for religion. It is easy to imagine situations in which a service that appears to be a "matter of common right" is, owing to any variety of circumstances, provided to a religious institution through an "earmark."[42]

As if in recognition that the distinction between permissible and impermissible expenditures based on earmarked appropriations is not a principled one, Justice Rutledge provides further guidance. The First Amendment, he asserts, "does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life."[43] However, this only further complicates the issue, as the distinction between incidents that are or are not accidental to community life is equally unprincipled, and is contingent upon historical circumstances. After all, the services rendered by the fire department—provided as a paradigmatic example by Justice Rutledge—were not undertaken by the State until well into the nineteenth century.[44] Thus, while Justice Rutledge accuses Justice Black of failing to provide a principled distinction as to which type of government aid violates the First Amendment, his own conception of neutrality is historically conditioned.

The historically conditioned nature of the standard of neutrality as applied to public schools is noted by Justice Jackson, who traces the emergence of the public school system. Jackson asserts,

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40 *Id.* at 60–61.

41 *Id.* at 61, n. 56.

42 See, e.g., 6 U.S.C § 609a (2022) (enhancing the funding and administration of the Nonprofit Security Grant Program provided by the Department of Homeland Security to, among other recipients, religious institutions).

43 330 U.S. at 61, n. 56 (Rutledge, J., dissenting).

44 See Annelise Graeber Anderson, *The Development of Municipal Fire Departments in the United States*, 3 *J. Libertarian Stud.* 3, 331 (1979).

> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[45]

Justice Jackson frankly admits that, having been established in the mid-nineteenth century in a generically Protestant culture, the public school system is "more consistent" with Protestantism than with "Catholic culture and . . . values." However, according to him, the public school system nevertheless understands itself as maintaining a "strict and lofty neutrality as to religion." While Justice Jackson forthrightly chooses not to enquire whether this claim to neutrality is justified, his statement concerning its congruence with Protestant values indicates that he is aware this claim to neutrality is not justified. He concludes that because the Roman Catholic Church "relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task," the State cannot fund these schools, even in an indirect manner.[46] From a vantage point that accepts the self-declared neutrality of the Protestant public school system, Justice Jackson strikes down the school busing program.

All three opinions in the *Everson* case appeal to the standard of neutrality. However, they each do so in a different way. Justice Black's majority opinion asserts that the neutrality of any state funding program can be established by ascertaining whether it is a matter of "public welfare." Ultimately, this designation will depend upon the decision of the legislature and will generally (although not always) reflect the demographic makeup of the state. Justice Rutledge tethers the neutrality of a state funding program to a matter of "common right." However, as noted, this is not an entirely principled distinction. The constitutionality of state funding will fluctuate depending on the historical determination of what is a matter of "common right." Finally, Justice Jackson identifies neutrality with the cultural hegemony of Protestantism, finding that indirect funding of Catholic schools would be incompatible with the approach that the public-school system has adopted toward religion. In sum, neutrality does not exist as an absolute standpoint

45 330 U.S. at 23–4 (Jackson, J., dissenting).

46 *Id.* at 23.

from which it is possible to determine which type or level of state funding of religious education is constitutional. Instead, neutrality is subjective, and is *established* by the members of the Court.

Competing Claims to Neutrality in *Carson*

What is the baseline of neutrality for the majority and dissenting opinions in the *Carson* case? Justice Roberts's majority opinion finds that Maine's tuition assistance program is not neutral because it excludes religious schools from participation. While Maine's tuition assistance program relies on the neutrality of public choice (i.e., it does not itself designate which private schools are to receive public funding, but instead leaves this decision to individual parents), it denies parents the ability to choose to apply Maine's tuition assistance to religious schools. In sum, Maine's decision to extend the neutrality of public choice to all private schools *except* religious schools is *not* neutral. Under Justice Roberts's understanding, neutrality is achieved through public choice, and the deviation from public choice is a violation of neutrality.

In contrast, Justice Breyer asserts that while the public-choice aspect of Maine's tuition assistance program *permits* Maine to route funds to religious schools, it does not *require* Maine to do so. Neutrality is not an "absolutely straight line."[47] Instead, in recognition of the tension that exists between the two Religion Clauses, the Court has historically granted the states some discretion for action that is "neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[48] Maine's antiestablishment interests are to be given some level of deference and, in light of the Religion Clauses' purpose in avoiding religious strife, this interest is justified. In sum, according to Justice Breyer, the State is given some latitude in ascertaining neutrality.

Which of the two approaches to achieving state neutrality is superior? On the one hand, it is possible to argue that the majority's approach will work to the advantage of religious groups with a large number of adherents. As Justice Breyer points out, "It may appear to some that the State favors a particular religion over others, or favors religion over nonreligion. Members of minority religions, with too few adherents to establish schools, may see injustice in the fact that only those belonging to more popular religions can use state money for religious education."[49] Commenting on Justice Roberts's opinion, Lael Weinberger points out that "[m]inority religions will need critical mass to be able to take advantage of these kinds of equal access policies. The result will be that the distribution of these funds will be 'lumpy' rather than an

47 596 U.S., slip op. at 13 (Breyer, J., dissenting).

48 *Id*. at 14.

49 *Id*. at 15.

even distribution across religious perspectives."[50] Thus, while a public-choice arrangement takes the decision out of State hands, it does not guarantee either neutrality or the perception of neutrality.

In contrast, Justice Breyer's commitment to neutrality would grant the states some measure of leeway to take into account "local circumstances" in their pursuit of neutrality.[51] As the conduct of Maine's legislature shows, in some states this will have the effect of excluding religious groups from otherwise available public benefits. As Justice Roberts trenchantly observes, "There is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion."[52] However, Justice Roberts's criticism misses the mark. Justice Breyer is quite candid that neutrality does not mean equal treatment. Instead, for Justice Breyer, the neutrality that animates the Religion Clauses was designed to avoid conflict and religious strife. Thus, the exclusion of religious schools may not be equal, but it nevertheless comports with the neutrality of the Religion Clauses, which were designed to avoid government interference in matters of religion. On this understanding, neutrality is best pursued not by rigid absolutes, but instead by taking into account local circumstances.

However, while Breyer claims that his approach is "sensitive to local circumstances" in light of the "basic values underlying the Religion Clauses,"[53] it is relatively light in its analysis of the particular circumstances of Maine's program. Aside from brief statements according to which both State officials and the schools agreed that they did not wish to see the State put in a position of reviewing "religious teachings" of the schools,[54] Beyer's opinion presents little analysis of the local circumstances that give rise to the case. The history of Maine's tuition assistance program reveals that it was an innocuous program, free of any recorded religious strife, until the legislature decided to exclude religious schools from the program in 1981. For over seventy years religious schools were included in Maine's tuition assistance program and, during this time, there is no record of any judicial complaint about the program's potential violation of the Establishment Clause.[55] In fact, as the majority points out, in the 1979–1980 school year more than 200 students opted to attend religious schools using funds from the program.[56] The decision to exclude religious

50 Weinberger, *supra* note 4, at 7.

51 596 U.S., slip op. at 6 (Breyer, J., dissenting).

52 596 U.S., slip op. at 10.

53 596 U.S., slip op. at 6 (Breyer, J., dissenting).

54 *Id.* at 17.

55 See U.S. Dep't. Educ., Off. Inn. & Imp., Off Non-Pub. Ed., *Education Options in the States: State Programs that Provide Financial Assistance for Attendance at Private Elementary or Secondary Schools*, at 19–20. https://www2.ed.gov/parents/schools/choice/educationoptions/educationoptions.pdf.

56 596 U.S., slip op. at 3.

schools from the program was made not in response to any complaint, but instead in response to a concern raised by Maine's Attorney General that the program might violate the Establishment Clause.[57]

In fact, it is only after religious schools were excluded from the program in 1981 that the program became a source of religious strife, resulting in three separate court cases prior to *Carson v. Makin*. In *Bagley v. Raymond School Department*,[58] *Strout v. Albanese*,[59] and *Anderson v. Town of Durham*,[60] religious individuals and institutions alleged that their exclusion from Maine's tuition assistance program violated their free-exercise rights. If the basic value of the Religion Clauses is the avoidance of religious strife, as Justice Breyer claims, Maine's exclusion of religious groups seems to have undermined rather than furthered this basic value. Justice Breyer speculates that "members of minority religions" may view the program as unjust due to the practical difficulties involved in making use of it without the necessary critical mass, that "taxpayers may be upset" at funding "the propagation of religious beliefs" they do not share, or that some parents may "feel indignant" that not all families have equal access to using the program.[61] However, in the seventy years that religious schools were included in Maine's program there were no judicial complaints, while their exclusion resulted in multiple legal battles. Thus, Justice Breyer elevates hypothetical concerns regarding the potential for strife and ignores the actual legal strife engendered by Maine's decision to exclude religious schools from the tuition assistance program. In light of the actual historical record, the public-choice account of neutrality advocated by Justice Roberts seems to be more conducive to the avoidance of religious strife than the method of neutrality employed by Justice Breyer.

Two Cheers for *Carson v. Makin*

The concept of neutrality that guides the Court's Religion Clauses jurisprudence is better understood as a product of judicial construction rather than an independent, absolute standpoint. As a result, the Court's decision in *Carson* can be viewed as developing an understanding of neutrality that is more favorable to the protection of religious rights and parental choice. If states choose to adopt a tuition assistance program, voucher system, or any other similar program that relies on public choice, the Court's decision indicates that such programs will not be able to exclude religious believers or religious schools. For proponents of religious liberty and school choice, the Court's decision provides some relief in a social climate that is increasingly hostile to such beliefs and opens a broader space for the practice of religious

57 *Id.*

58 728 A.2d 127 (1999).

59 178 F. 3d 57 (1999).

60 895 A. 2d 944 (2006) (cert. denied).

61 596 U.S., slip op. at 15 (Breyer, J., dissenting).

education. However, the Court's reliance on the neutral character of public-choice programs skirts important questions and fails to deal with the fundamental problems affecting the Court's jurisprudence in the area of aid to religious schools, which concerns the character and values of childhood education in the United States. As a result, the Court's decision opens a range of questions that will have to be dealt with in future litigation.

The majority's appeal to the neutrality of public choice ensures that religious institutions cannot be excluded from otherwise available state funding programs. However, in its appeal to public choice, the Court sidesteps—and in some ways complicates—the fundamental, difficult question concerning values and education. Justice Breyer's dissenting opinion obliquely indicates the difficulties that the majority opinion raises. Both religious schools involved in the case, he notes, "would only consider accepting public funds if [they] 'did not have to make any changes in how it operates,'" including its admissions standards, hiring standards, and curriculum.[62] Justice Breyer anticipates that the acceptance of state funds by religious schools may potentially lead to friction between the state and religious schools. Many religious educational institutions have admissions policies, honor codes, or other policies that reflect their religious beliefs and, in an increasing number of states, these policies do not comport with state antidiscrimination legislation. While private institutions are not currently governed by this legislation and are free to order their policies in accordance with their sincerely held religious beliefs, the reception of state funds might present obstacles to this *laissez faire* approach.

While Justice Roberts's opinion makes clear that states that choose to enact tuition assistance programs may not discriminate on the basis of either the religious status of the schools or the religious use that the schools intend to make of the public funds, the question remains to what extent religious schools will be exempt from antidiscrimination legislation. Under the standard articulated in *Employment Division v. Smith,* a free-exercise claim will not exempt an individual or entity from a general and neutrally applicable law that only incidentally impacts religion.[63] While some schools may be exempt from employment discrimination legislation as a result of the ministerial exemption identified in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* and will therefore be able to maintain their religious identity in their staff composition,[64] the impact of other types of antidiscrimination legislation on their operations is unclear. The Court's recent treatment of free-exercise exemptions has avoided any definitive pronouncement on the continued application of the *Smith* standard. Recently, in *Masterpiece Cakeshop, Ltd. v.*

62 *Id.* at 17.

63 494 U.S. 872 (1990).

64 576 U.S. 171 (2012).

Colorado Civil Rights Commission,[65] the Court decided that because the Civil Rights Commission showed "hostility" toward religion, the *Smith* standard was inapplicable.[66] A similarly narrow decision occurred in the case of *Fulton v. City of Philadelphia*, in which the Court declined to apply the *Smith* standard, without overruling it.[67] Both of these decisions make clear that the question of whether a free-exercise claim operates as a general exemption from antidiscrimination legislation remains an open one.

Justice Jackson's dissenting opinion in the *Everson* case serves to clarify what is at stake for religious schools. Speaking of the importance of childhood education to the Catholic Church, Jackson writes, "If put to the choice, [the Church], I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools."[68] While Jackson singles out the relationship between childhood education and identity formation in Catholic education, this relationship holds true for all religions and worldviews. The public school system, as Jackson noted, is not "value-free," but is formed by the Protestant heritage and inculcates its own understanding of religion. The value-laden nature of public education has become increasingly apparent as progressive understandings of the human person are mandated in secular schools by antidiscrimination legislation. By promoting values that have substantial religious implications, the application of this type of legislation to religious schools would require some of them to alter their religious teachings.

The *Carson* case prevents states from excluding religious schools from public aid programs that operate on the basis of public choice. However, by appealing to the "neutral" standard of public choice, the Court sidestepped the thorny issue of what values ought to govern childhood education. If the *Smith* standard is applied to religious schools that accept state funding, and if they are forced to alter their religious beliefs, teachings, and practices in order to receive state funding, the *Carson* case will present a Pyrrhic victory.

Of course, it might be countered that the very nature of public-choice programs is to provide individuals with the *option* to participate. On this reading, if a religious institution wishes to maintain its values and character, it can simply choose not to participate in the public-choice program. The flaw with this understanding of public-choice programs is that it fails to consider the manner in which state incentives structure choices. By providing funding for religious institutions that compromise their values and religious character

65 584 U.S. ___ (2018).

66 *Id.* slip op. at 12.

67 593 U.S. ___ (2021).

68 330 U.S. at 24 (Jackson, J., dissenting).

to secure such funding and denying it to religious institutions that do not so compromise, the state does not remain "neutral" in any sense of the term. It rewards some behaviors and signals its disapproval of others.

As the history of Maine's tuition assistance program shows, a program premised upon public choice is capable of furthering the "basic values" of the Religion Clauses. For more than seventy years the State of Maine's public-choice approach to tuition assistance resulted in a harmonious method of extending the guarantee of a free public education to all citizens of the State without acrimonious legal fights and religious conflict. However, such public-choice programs are not truly neutral. In fact, their success depends upon shared background premises and values that are decidedly not neutral. The success of supposedly neutral public-choice programs depends on a shared moral framework. To the extent that the Court's opinion in the *Carson* case shifts the realm of neutrality toward a position that is more favorable to religious schools and allows them to participate in public-choice programs, it ought to be celebrated. However, to the extent that the Court leaves fundamental issues concerning which system of values ought to inform these public-choice programs, the Court's decision is underwhelming. By failing to provide any guidance as to the shared moral norms that ought to inform public-choice programs, the Court has skirted a fundamental issue and has only raised the stakes for when that issue is decided.

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