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Religion, Discrimination, and the Future of Public Education

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Religion, Discrimination, and the Future of Public Education

Derek W. Black*

The Supreme Court's recent decisions regarding the free exercise of religion threaten fundamental changes to public education. On their face, these decisions are relatively narrow. They prohibit states from explicitly excluding religious schools from participating in states' tuition subsidy programs, otherwise known as private school vouchers. But school choice advocates and some scholars argue that the rationale in these cases also extends to religious organizations that want to operate public charter schools.

While these changes would drain enormous resources from an already underfunded public education system, even more important interests are at stake: antidiscrimination and basic core curriculum. More specifically, the further expansion of religion into voucher and charter programs calls into question whether states can require religious organizations to comply with antidiscrimination protections and deliver non-religious educational content that is consistent with state standards.

This Article is the first to demonstrate that religious schools' right to participate in certain education programs is not a right to reset all the rules of those programs. First, states retain authority to control the curriculum that public dollars support in both charter and private schools. Second, states have an affirmative obligation under federal law to ensure that all parties participating in state education programs comply with secular and antidiscrimination standards. Thus, rather than using the Court's recent free exercise cases as an excuse to retreat from antidiscrimination and secular standards, states must reinforce those norms in a way that is consistent with newly established—but limited—free exercise rights.

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INTRODUCTION

The Supreme Court's free exercise of religion precedent is rapidly evolving, and in the process, disrupting a host of public institutions. The implications for public education may be the gravest. Two of the Court's four most recent cases involve the extent to which a state can exclude religious schools from state programs that subsidize private school tuition.¹ A third case examines the rules the state can impose on religious organizations that participate in a publicly funded program, most notably whether the state can enforce antidiscrimination standards on religious organizations.² Scholars argue—and a member of the Court warns—that the principles in these cases apply well beyond the context of state subsidies for private

1. See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022).

2. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). The fourth case is *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

school education.³ They argue these cases also require states to allow religious institutions to operate public charter schools.⁴

A marriage of religion and state power in the form of public charter schools would practically, ideologically, and constitutionally transform public education as we know it. As a practical matter, religious schools will flood states with requests to convert into charter schools and thereby shift the cost of religious instruction onto taxpayers.⁵ Given the number of interested religious organizations, the impact on state public education budgets could be catastrophic.⁶ As an ideological matter, the existence of religious charter schools would eliminate the distinct mission and values that have long defined public schools. And as a constitutional matter, the federal and state constitutional rights that students currently enjoy in public schools would vanish.⁷

The threat to public education first emerged in 2017 when the Court in *Trinity Lutheran v. Comer* held that a state policy excluding religious entities—based solely on their religious status—from receiving a grant to resurface their playgrounds violated the free exercise clause.⁸ Three years later, in 2020, in *Espinoza v. Montana Department of Revenue*, the Court held that Montana could not exclude religious schools from participating in a state program, otherwise known as a voucher program, that subsidizes private school tuition.⁹ In 2021, in *Fulton v. City of Philadelphia*, the Court held that a religious organization was exempt from the city’s antidiscrimination rules for adoption service providers.¹⁰ In 2022, the Court in *Carson v. Makin* held that a state program that pays private school tuition for students who live in remote areas where no public schools exist could not exclude religious schools. The Court stated that it could not exclude religious schools even where the program’s stated purpose was to secure an education that is equivalent to that available in public schools.¹¹

3. See, e.g., NICOLE STELLE GARNETT, RELIGIOUS CHARTER SCHOOLS: LEGALLY PERMISSIBLE? CONSTITUTIONALLY REQUIRED? 7 (2020); Evie Blad, *Church-Run Charter Schools? Supreme Court Argument Stirs the Discussion*, EDUC. WK. (Jan. 26, 2020), <https://www.edweek.org/leadership/church-run-charter-schools-supreme-court-argument-stirs-the-discussion/2020/01> [<https://perma.cc/7ZN2-4NXX>].

4. See sources cited *supra* note 3.

5. Many Catholic schools, for instance, are struggling financially and could use this option to avoid closure. See generally Tommy Beer, *Pandemic Leading to Increase in Permanent Closures of Catholic Schools*, FORBES (Mar. 24, 2021), <https://www.forbes.com/sites/tommybeer/2021/03/23/pandemic-leading-to-increase-in-permanent-closures-of-catholic-schools/?sh=537749bf1d85> [<https://perma.cc/8RU5-RHJH>]; Evie Blad, *What the Supreme Court’s Ruling on Religious Schools Means in Practice*, EDUC. WK. (June 30, 2020), <https://www.edweek.org/policy-politics/what-the-supreme-courts-ruling-on-religious-schools-means-in-practice/2020/06> [<https://perma.cc/Q43A-M9TC>].

6. Beer, *supra* note 5.

7. See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment’s protections do not apply to private actors).

8. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017).

9. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2257 (2020).

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

11. See *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1995–96 (2022) (discussing lower court finding regarding the state’s purpose).

A decade ago, these cases would have been much ado about nothing.¹² Private school voucher programs were relatively rare and charter school growth remained limited.¹³ But both sectors have dramatically expanded since then. As of 2021, twenty-seven voucher programs were operating in sixteen states and the District of Columbia.¹⁴ Legislation to establish programs in several other states is pending.¹⁵ Charter school laws have, likewise, expanded to forty-five states and the District of Columbia.¹⁶ As a result, charter school enrollment has more than doubled to 3.3 million students.¹⁷ In short, the education of several million students and religion's role in that education hangs in the balance.

States' reactions, however, are just as important as the Court's actual holdings. The tendency thus far has been to overreact.¹⁸ States are prized to drop important educational content and antidiscrimination rules that should otherwise apply to these programs.¹⁹ Doing so would be an enormous mistake.

This Article is the first to demonstrate that states retain substantial authority to limit the type of curriculum that public dollars support in both charter schools and private schools. Drawing on separate precedent and additional statutory frameworks, the Article further theorizes that the failure to enforce certain antidiscrimination standards in voucher programs and secular standards in charter schools violates federal statutes and the Establishment Clause. Thus, rather than retreating, states must take proactive steps to reinforce religious-neutral curricular content and antidiscrimination norms.

Avoiding this overreaction requires careful attention to what the Court did not hold in recent cases and why. The Court did not hold that religious entities had an affirmative right to use public funds to spread a religious message, just that they had

12. See, e.g., James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547 (2007) (discussing how a prior Supreme Court decision easing restrictions on vouchers had very little effect on real world policy).

13. See, e.g., *id.*; CTR. EDUC. REFORM, ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 8 (2010), <https://edreform.com/2010/01/annual-survey-of-americas-charter-schools-2010/> [<https://perma.cc/CBT3-W4YF>]; Erik W. Robelen, *State Picture on Charter Caps Still Mixed*, EDUC. WK. (Aug. 3, 2009), <https://www.edweek.org/policy-politics/state-picture-on-charter-caps-still-mixed/2009/08> [<https://perma.cc/69VX-YNPE>]; Jackson v. Benson, 578 N.W.2d 602, 617 (Wis. 1998).

14. See EDUC. COMM'N OF THE STATES, 50-STATE COMPARISON: PRIVATE SCHOOL CHOICE (Mar. 21, 2021) [hereinafter 50-STATE COMPARISON], <https://www.ecs.org/50-state-comparison-private-school-choice/> [<https://perma.cc/85PN-NQTE>] (cataloguing charter laws); see also Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 438 (2016) (discussing exponential growth in student enrollment and expenditures).

15. Public Funds for Public Schools maintains a database of all pending legislation regarding vouchers and analogous programs. Nationally, more than one hundred such bills were introduced in 2021 alone. See *Bill Tracker*, PUB. FUNDS FOR PUB. SCHS., <https://pfps.org/billtracker/> [<https://perma.cc/QK8E-9UPT>] (last visited Feb. 22, 2023).

16. See 50-STATE COMPARISON, *supra* note 14; NAT'L CTR. EDUC. STAT., PUBLIC CHARTER SCHOOL ENROLLMENT, <https://nces.ed.gov/programs/coe/indicator/cgb> [<https://perma.cc/Z4ZX-8836>] (May 2022).

17. See sources cited *supra* note 16.

18. See generally *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

19. Blad, *supra* note 5 (discussing the varied reactions to *Espinoza*).

the right to participate in public programs on the same terms as others.²⁰ Nor did the Court reject states' important interests in antidiscrimination and public education values or hold that individuals' free exercise of religion outweighs those interests.²¹ Thus, while these recent cases substantially altered the status quo,²² the holdings are measured in other respects. In particular, these cases hew closely to formalistic modes of judicial decision-making in other antidiscrimination frameworks.²³ A Court committed to these values suggests—though does not guarantee—that the evolution of the free exercise doctrine may be moderate in practical application.

States, no doubt, urgently need to adjust state education policies to the new status quo. But this adjustment does not require that they cede their authority or values to the marketplace or religion. School choice advocates are insisting on changes, including through litigation, that attempt to leverage Supreme Court precedent for more than it represents.²⁴ Those changes would turn public dollars and students' rights over to the whims of unregulated private actors. Those changes will also drain resources from a system of public education that is already substantially underfunded.²⁵ While opening the public coffers to religious education might alleviate the threat of additional free exercise lawsuits, it will create an even larger number of Establishment Clause and federal antidiscrimination problems.²⁶

Part I of this Article charts the policy path through the evolving status quo by identifying the central holdings and rules from the Supreme Court's recent free exercise cases and the lower courts' interpretations of them.²⁷ Part II then distills the logic embedded in those cases, situating it within the larger universe of free

20. See *Espinoza*, 140 S. Ct. at 2255 (emphasizing the disqualification based solely on religious status).

21. See *Fulton v. City of Philadelphia* 141 S. Ct. 1868, 1877 (2021) (refusing to challenge the validity of generally applicable laws and, instead, finding that a different doctrine applied).

22. Blad, *supra* note 3.

23. See *infra* notes 123–134. For the argument that the Fourteenth Amendment prohibits religious status classifications, just as it does race and sex, see Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 913 (2013).

24. See DEREK W. BLACK, NEPC REVIEW: RELIGIOUS CHARTER SCHOOLS: LEGALLY PERMISSIBLE? CONSTITUTIONALLY REQUIRED? (Feb. 2021) (identifying the analytical flaws and oversights in a report advocating for a shift in public policy regarding religious charter schools); see also Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013) (analyzing the conflicting legal positions charters have taken regarding their status to suit their immediate needs).

25. See generally Robert Kim, Gary B., *Espinoza, and the Fight for School Funding*, PHI DELTA KAPPAN (Aug. 25, 2020), <https://kappanonline.org/school-funding-gary-b-espinoza-law-kim/> [<https://perma.cc/9Z5W-3ZRH>] (discussing the implications for public funding and public schools); *LDA Expresses Concern Over Supreme Court's Espinoza Ruling and Impact on Public Funding for Public Schools*, LEARNING DISABILITIES ASS'N AM. (June 30, 2020), <https://ldaamerica.org/lda-concerned-espinoza-ruling/> [<https://perma.cc/MH6S-FXV4>]; BRUCE BAKER, MARK WEBER, AJAY SRIKANTH, ROBERT KIM & MICHAEL ATZBI, *THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOLS* 1 (2018). While their funding mechanisms vary by state, charter schools—and in many instances vouchers—operate on funds that would otherwise remain in traditional public schools. See *infra* Part IV.

26. See *infra* notes 337–365.

27. See *infra* Part I.

exercise and antidiscrimination precedent.²⁸ That logic reveals a set of internal limitations on the precedent's potential reach.²⁹

Based on that analysis, Part III contemplates the limits of states' authority and offers guidance for future policymaking regarding vouchers, including two key principles. First, states are not required to fund religious instruction simply because the state has chosen to fund some form of private education. States, however, should shift their private school tuition programs from ones that resemble open-ended financial benefits (without limits on use) to ones that resemble contractor relationships (with states specifying the details of the type of education they seek to procure).

Second, the current free exercise doctrine still firmly supports the state's ability to enforce generally applicable rules like antidiscrimination on all program participants, including when those rules conflict with participants' religious beliefs.³⁰ In fact, under certain circumstances, states have an affirmative obligation to ensure non-discrimination in their voucher and tuition programs. An overlooked set of statutory definitions and precedent stand for the proposition that private school tuition programs are sometimes part of states' education "programs."³¹ As such, some private school tuition programs are subject to a host of antidiscrimination standards, including the Civil Rights Act of 1964's ban on racial discrimination in federally funded programs³² and Title IX of the Education Amendments of 1974's ban on sex discrimination in federally funded programs.³³ In short, not only may states enforce antidiscrimination in their voucher programs, many of them must.

Part IV of the Article argues that states cannot authorize religious institutions to operate charter schools in which religion is taught as truth. Advocates who argue otherwise are misapplying the Court's recent free exercise of religion cases. Those cases are largely irrelevant. Those free exercise cases involve the state extending private benefits to private parties. The relationship between the state and charter schools is fundamentally different. Charter schools involve the state granting private parties the legal status to operate in the state's name and assist in the discharge of a constitutionally mandated government function.³⁴ The fact that private parties assist

28. See *infra* Part II.

29. See *infra* Part II.

30. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

31. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (redefining the meaning of "program"); see also *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (noting that Congress had broadened the applicability of antidiscrimination statutes); *Knight v. Alabama*, 787 F. Supp. 1030, 1364 (N.D. Ala. 1991) (explaining the application of Title VI across the entire Alabama university system).

32. See 42 U.S.C. § 2000e.

33. 20 U.S.C. §§ 1681-1688.

34. Compare *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019-20 (2017) (extending playground resurfacing grants to private nonprofit groups), with *Utah Sch. Bds. Ass'n v. Utah State Bd. Educ.*, 17 P.3d 1125, 1129-30 (Utah 2001) ("The legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. This includes any other schools and programs the legislature may designate to be included in the system."), *Wilson v. State*, 89 Cal. Rptr. 2d 745, 752-53 (Cal. Ct. App. 1999) (holding that charter

the state does not change the nature of the government function or the constitutional duty involved, much less transform charter schools into a private benefit program. Moreover, the Court has explicitly rejected the notion that states can evade the constitutional prohibition on sponsoring religion simply by involving private parties.³⁵

Confusion about charter schools' legal status too often leads commentators and lower courts to ignore the prohibition on state-sponsored religion.³⁶ The confusion arises, in part, from the ambiguity of the term "charter school." Commentators and courts regularly use "charter school" to refer to at least three different things: the state-created charter school itself, the company and people hired to run the charter school, and the employees at the charter school.³⁷ Putting aside potential variations regarding the legal status of the people running and working at a charter school, the charter school itself involves state action, particularly as to the mission, policy, and curriculum that the state approves. In these respects, state action to authorize a religious charter school is patently unconstitutional. Cases examining whether a charter school employee or charter school vendor are state actors—cases on which commentators and other courts rely—are simply beside the point.³⁸

In sum, the Court's evolving free exercise doctrine has significantly changed current and future voucher school programs. States need not create these programs at all, but once they do, they cannot exclude participants based solely on religion. That new principle, however, does not preclude states from shaping programs in ways that ensure public dollars only support publicly sanctioned goals—and religious messages need not be among those goals. As to antidiscrimination and charter schools, very little, if anything, has changed. States still cannot endorse or promote religion, and non-discrimination statutes still apply to their education programs.

schools are public schools because the legislature defined them as such), and Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359 (2018) [hereinafter Black, *Preferencing Educational Choice*] (analyzing charter schools in the context of the state constitutional duty in education).

35. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (enjoining prayers led, directed, or encouraged by school officials).

36. See, e.g., *Caviness v. Horizon Cmty. Learning Ctr. Inc.*, 590 F.3d 806, 808 (9th Cir. 2010); Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 42–58 (2017).

37. See generally Maren Hulden, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244, 1266–73 (2011) (surveying the different interpretations of charter school status and the different context in which it arises); see also *id.* at 1255–56 (discussing the variations in how states define their charters). Aaron Saiger, though not adopting the clearer cut categories this Article suggests and holding a position on charter schools at odds with this Article, emphasizes that context matters in assessing charters' legal status. Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1178–79 (2013).

38. See, e.g., GARNETT, *supra* note 3.

I. THE CURRENT FREE EXERCISE SHIFT

A. Trinity Lutheran: Prohibiting Status-Based Discrimination

Trinity Lutheran Church v. Comer first established the new framework for policing the boundaries between non-establishment of religion and the free exercise of religion.³⁹ The issue in *Trinity Lutheran* was whether, consistent with long-standing tradition, the government could exclude religious entities from participating in a state program that covered the cost of using recycled rubber to surface playgrounds at non-profit centers.⁴⁰ The agency running the program had rejected Trinity Lutheran's funding application based on its religious status.⁴¹ Trinity Lutheran filed suit, claiming a violation of the Free Exercise Clause.⁴²

The Court emphasized that Trinity Lutheran was distinct from most free exercise clause cases, which involve requests for a religious exemption from generally applicable laws.⁴³ For instance, a person might request an exemption from state vaccination requirements for public school students, asserting a religious objection to vaccination. Courts typically reject these claims because the laws do not target or place a special burden on religious observers.⁴⁴ To hold otherwise would afford religious observers super status and free them of the general rules and regulations that everyone else follows.⁴⁵

The Court framed *Trinity Lutheran* as different because it involved an express exclusion of religious observers from a general government benefit.⁴⁶ As such, the policy triggered the Constitution's prohibition against policies "that target the religious for 'special disabilities' based on their 'religious status.'"⁴⁷ The state defended the exclusion on the notion that *Locke v. Davey*—a case dealing with higher education scholarships—upheld the state's right to exclude certain religious observers from public benefits.⁴⁸ The Court, however, read *Locke* as upholding state authority and discretion "not to fund a distinct category of instruction," which in that case was a degree "in devotional theology," not a general state authority to exclude people based on religion.⁴⁹ Religious observers in *Locke* remained eligible to participate in the scholarship program, including at religious institutions, notwithstanding that limitation on the category of instruction.⁵⁰

39. See *Trinity Lutheran*, 137 S. Ct. 2012.

40. *Id.* at 2017.

41. *Id.*

42. *Id.* at 2018.

43. *Id.* at 2021–22.

44. *Id.* at 2020 ("[W]hen this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment."); see *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

45. See *Trinity Lutheran*, 137 S. Ct. at 2020–21 (Free exercise of religion does "not entitle the church members to a special dispensation from the general criminal laws.").

46. *Id.* at 2022.

47. *Id.* at 2019 (quoting *Lukumi*, 508 U.S. at 533).

48. *Locke v. Davey*, 540 U.S. 712, 725 (2004) ("[W]e therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.").

49. *Trinity Lutheran*, 137 S. Ct. at 2023.

50. See *Locke*, 540 U.S. 712.

The plaintiffs in *Trinity Lutheran*, the Court further explained, were “not claiming any entitlement” to funding for a type of instruction the state would rather not fund but were simply claiming the right “to compete” equally with everyone else for a benefit the state had already chosen to extend.⁵¹ By excluding Trinity Lutheran, the state was forcing it to choose “between being a church and receiving a government benefit.”⁵² According to the majority, the state excluded Trinity Lutheran for no reason other than religious status.⁵³ In all other respects, Trinity Lutheran was equally qualified to other applicants.⁵⁴ Had the state precluded applicants from putting the money to “religious use,” rather than excluding them altogether based on status, the majority hinted that the result in the case might be different.⁵⁵

B. Espinoza: Education Is Not Exempt, But Religious Use Might Be

Just how far *Trinity Lutheran*’s holding would reach was unclear. Playgrounds, after all, do not inherently involve religious values whereas education at religious schools generally does. The Court even noted that this case involved playgrounds, not “religious uses of funding or other forms of discrimination.”⁵⁶ Whatever hope public education advocates may have placed on that note was dashed in *Espinoza*. The Court in *Espinoza v. Montana* applied *Trinity Lutheran*’s basic rule on “religious status” distinctions to an education voucher program with seemingly no attention to the difference between playgrounds and educational instruction.

Montana established a program to subsidize private school tuition, but pursuant to its state constitutional provision prohibiting government aid to religious schools, it limited eligibility to students attending secular private schools.⁵⁷ The Court in *Espinoza* began its analysis by reiterating the rule from an earlier case, *Zelman v. Simmons-Harris*, that “indirect” government funding of private religious education is permissible when government funds arrive in religious coffers by virtue of private individuals’ choice, not those of the state.⁵⁸ The question in *Espinoza* was the flipside of *Zelman*: whether the government can exclude private religious schools from voucher programs.⁵⁹ The Court in *Espinoza* reasoned that *Trinity Lutheran* had all but foreclosed the issue.⁶⁰ Like the playground program in *Trinity Lutheran*, “Montana’s no-aid provision bars religious schools from public benefits solely because of the religious character of the schools.”⁶¹

51. *Trinity Lutheran*, 137 S. Ct. at 2022.

52. *Id.* at 2024.

53. *Id.* at 2021.

54. *Id.* at 2022.

55. *Id.* at 2022–23.

56. *Id.* The dissent, however, was skeptical, writing, “[i]n the end, the soundness of today’s decision may matter less than what it might enable tomorrow. The principle it establishes can be manipulated to call for a similar fate for lines drawn on the basis of religious use.” *Id.* at 2041.

57. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2251–52 (2020).

58. *Id.* at 2254.

59. *Id.* at 2251.

60. *Id.* at 2256 (indicating the exclusion was just like the one in *Trinity Lutheran*).

61. *Id.* at 2285.

Montana argued the exclusion was based on what religious groups would undoubtedly do with the money—teach religion—not status.⁶² In other words, it fell within the rule of *Locke v. Davey*, which allows the state to choose “not to fund a distinct category of instruction.”⁶³ Whatever the theoretical legitimacy of that goal, the Court emphasized that Montana’s policy “hinged solely on religious status. Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.”⁶⁴ Moreover, unlike in *Locke*, Montana did “not zero in on any particular ‘essentially religious’ course of instruction at a religious school.”⁶⁵ In short, the presence of a religious status limitation, particularly with the conspicuous absence of a focus on a type of instruction, was alone sufficient to decide the case.

Having failed to persuade the Court on the prior point, Montana sought to salvage the policy by demonstrating that a compelling interest and narrowly tailored approach justified the exclusion under strict scrutiny. Montana asserted two compelling interests: maintaining separation of church and state and preserving public funds for public education.⁶⁶ The Court flatly rejected the notion that anti-establishment goals could justify the direct targeting and exclusion of religion, but it did not foreclose the possibility that preserving funds for public education was compelling.⁶⁷ The problem was that Montana’s chosen means of preserving education funds was “fatally underinclusive” because it was already diverting resources to private secular schools.⁶⁸ Thus, the exclusion was unconstitutional.⁶⁹

C. *A Standard Abhorred by the Left and the Right*

While “religious status” served as the ideological lodestar in the majority opinions in *Trinity Lutheran* and *Espinoza*, it was ironically panned by both the concurrences and dissents for similar reasons. Concurring in *Trinity Lutheran*, Justices Gorsuch and Thomas questioned whether a meaningful “distinction might be drawn between laws that discriminate on the basis of religious status and religious use.”⁷⁰ They indignantly wrote:

Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example)

62. *See id.* at 2255.

63. *Id.* at 2257 (quoting *Locke v. Davey*, 540 U.S. 712 (2004)).

64. *Id.* at 2256.

65. *Id.* at 2257.

66. *See id.* at 2260–61.

67. *See id.* at 2260–61 (“A State’s interest ‘in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause.’” (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017))).

68. *Espinoza*, 140 S. Ct. at 2261 (“Montana’s interest in public education cannot justify a no-aid provision that requires only religious private schools to ‘bear [its] weight.’” (quoting *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993))).

69. *Id.*

70. *Trinity Lutheran*, 137 S. Ct. at 2025.

whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him).⁷¹

Even if such factual distinctions can be drawn, they argued that the First Amendment ought not to recognize them and should, instead, afford broad protection for the practical exercise of religion, not just religious affiliation or belief.⁷²

Justice Gorsuch doubled down on that argument in *Espinoza*. He conceded that one could label Montana’s policy as “status-based discrimination” given its technical language.⁷³ But the more “natural” interpretation is that the policy is intended to restrict “what religious parents and schools do—teach religion.”⁷⁴ A “discussion of religious activity, uses, and conduct—not just status—pervades this record.”⁷⁵ This, he believed, proved his point: the line between status and use is the wrong one to draw given its thinness.⁷⁶

The dissenters similarly argued that *Trinity Lutheran* and *Espinoza* cannot be reduced to simple religious status discrimination. The restriction in *Trinity Lutheran* served to ensure the state does not “fund improvements to the facilities the Church uses to practice and spread its religious views.”⁷⁷ If the Constitution prohibits states from directly funding pervasively religious entities because doing so advances their mission and exercise of religion, it naturally follows that excluding religious institutions from a grant program is not discrimination for discrimination’s sake but appropriate action to avoid funding religious exercise.⁷⁸ The attempt to disaggregate religious status from use is but a masquerade to escape the prohibition on directly funding religion.

The fact that government money would not simply defray costs for religious institutions but directly fund religious messages in *Espinoza* only accentuated the masquerade. In that context, the dissent reasoned the majority’s status-use distinction was particularly silly. “There is no dispute that religious schools seek generally to inspire religious faith and values in their students. How else could petitioners claim that barring them from using state aid to attend these schools violates their free exercise rights?”⁷⁹ Thus, at issue in *Espinoza*—unlike in *Trinity Lutheran*—was the state’s “decision not to fund the inculcation of religious truths,” a decision which *Locke* had held was within the state’s discretion.

United in disdain for the status-use distinction, the dissents and concurrences differ in how they would resolve the problem. If status-based discrimination is impermissible—per *Trinity Lutheran* and *Espinoza*, the concurrences reason that so

71. *Id.*

72. *See id.* at 2026.

73. *Espinoza*, 140 S. Ct. at 2275.

74. *Id.*

75. *Id.*

76. *See id.*

77. *Trinity Lutheran*, 137 S. Ct. at 2028.

78. *See id.*

79. *Espinoza*, 140 S. Ct. at 2285.

too must be use-based restrictions.⁸⁰ Conversely, if use-based restrictions are permissible—per the rule in *Locke* and its reiteration in *Trinity Lutheran* and *Espinoza*—the dissenters reason that status-based distinctions designed to prevent religious use must be permissible too.⁸¹ The majority opinion cautiously avoided taking sides in this precise disagreement, reasoning that the existence of status restrictions was sufficient to decide *Trinity Lutheran* and *Espinoza* and leaving the precise constitutionality of use restrictions for a later case.⁸²

D. *Fulton*: Generally Applicable Restrictions Survive

After taking two large steps to expand religious exercise in *Trinity Lutheran* and *Espinoza*, many feared the Court would take an even larger step in *Fulton v. City of Philadelphia*.⁸³ *Trinity Lutheran* and *Espinoza* may have been a mere prelude to the Court holding that non-discrimination standards, particularly those involving LGBTQ discrimination, unjustifiably infringe on free exercise when they force participants to choose between program participation and their religious beliefs.⁸⁴ *Fulton* involved the City of Philadelphia's foster care placement system and its requirement that service providers comply with the city's non-discrimination rules.⁸⁵

Catholic Social Services argued that the policy requiring providers to place foster children with unmarried couples and same-sex couples would force it to violate its religious beliefs.⁸⁶ Unlike *Trinity Lutheran* and *Espinoza*, however, Philadelphia did not exclude providers based on religious status. It simply required that anyone participating in the program comply with its generally applicable rules.⁸⁷ The Court's prior holding in *Oregon v. Smith* controlled that situation and affirmed the government's authority to enforce generally applicable rule.⁸⁸ The Court in *Smith* explained that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁸⁹ That principle had been fundamental precedent for forty years but controversial for just as long due to its sweeping protection for government rules, notwithstanding the religious burden.⁹⁰

80. See *id.* at 2276 (Gorsuch, J., concurring) ("[W]hether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way").

81. See *id.* at 2279–82.

82. See *id.* at 2257; *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

83. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

84. See Brian Gordon, *NC Religious Schools with Anti-LGBTQ Policies Receive Top Opportunity Scholarship Dollars*, USA TODAY (Aug. 27, 2020), <https://www.usatoday.com/story/news/local/2020/08/27/nc-private-school-vouchers-help-fund-anti-lgbtq-policies-face-lawsuit/3359423001/> [<https://perma.cc/5HXE-QUGA>]; Leslie Postal & Annie Martin, *Anti-LGBT Florida Schools Getting School Vouchers*, ORLANDO SENTINEL, Jan. 23, 2020.

85. See *Fulton*, 141 S. Ct. at 1875–76.

86. See *id.*

87. See *id.* at 1876.

88. See *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

89. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)).

90. See generally CAROLYN LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH (2000).

Fulton provided the vehicle to overturn *Smith* and, thereby call into question the nation’s vast statutory antidiscrimination apparatus. The decision in *Fulton*, however, arrived with a whimper rather than a bang. The Court ruled in favor of Catholic Social Services while sidestepping the tension between antidiscrimination and religion. The Court reasoned that Philadelphia’s antidiscrimination policy was not generally applicable because it provided for individualized exemptions from the policy.⁹¹ Thus, another doctrine, not *Smith*, applied.⁹² The other doctrine provides that when a system of exemptions exists, government cannot refuse religious objectors an exemption without a compelling reason.⁹³ While the Court sided with Catholic Social Services in finding Philadelphia lacked a compelling reason, more important is that *Smith* survived *Fulton*.⁹⁴ As discussed in detail below, that fact and the rationale supporting it suggests use restrictions are not hopelessly doomed.

E. Carson: The End of Use Restrictions

In 2022, the Court in *Carson v. Makin* was prized to affirm or reject the principle that states could prohibit religious uses of public funds, even if they could not restrict access to those funds because of religious status. At issue in the case was a Maine program targeted at sparsely populated communities with a population too small to support the operation of a public high school—at least at a per pupil cost comparable to other communities.⁹⁵ Recognizing the challenge, Maine has long allowed communities to pay for the cost of their students attending a public school in another district or a private school.⁹⁶ Maine, however, prohibits local communities from contracting with or paying tuition to sectarian schools.⁹⁷

Maine contended that it applied this prohibition not based on a school’s religious status but based on the substantive content of its program.⁹⁸ “Affiliation or association with a church or religious institution is [but] one potential indicator of a sectarian school” and “not dispositive.”⁹⁹ Maine’s primary inquiry is, instead, “what the school teaches through its curriculum and related activities, and how the material is presented.”¹⁰⁰ Evidence substantiated that Maine takes the distinction between religious status and use seriously, allowing religious schools that deliver a secular education to participate.¹⁰¹ Relying on *Espinoza’s* clear distinction between

91. See *Fulton*, 141 S. Ct. at 1878–79.

92. See *id.* at 1881.

93. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

94. See *Fulton*, 141 S. Ct. at 1877.

95. See generally *Vermont—Town Tuitioning Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/> [<https://perma.cc/HCX3-GZS5>] (Jan. 5, 2023).

96. See *id.*

97. See *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1994 (2022).

98. See *id.*

99. *Id.*

100. *Id.*

101. In fact, after the Court granted certiorari, it was discovered that Chief Justice Roberts’ son attended one of the private religious schools that does participate in Maine’s program. Amy Howe, *Justices Add One Religious-Rights Case to Docket but Turn Down Another*, SCOTUSBLOG (July 2, 2021, 11:04 AM), <https://www.scotusblog.com/2021/07/justices-add-one-religious-rights-case-to-docket-but-turn-down-another/> [<https://perma.cc/7C8A-Y5V9>].

“discrimination . . . based on the recipient’s [religious] affiliation” and “discrimination . . . based on the religious use to which the recipient would put” government aid,¹⁰² the First Circuit upheld Maine’s program as a legitimate attempt to prevent the use of public money for pervasively religious instruction that proselytizes and inculcates religion.¹⁰³

The Supreme Court in *Carson* reasoned that the “‘unremarkable’ principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve” the constitutionality of Maine’s program.¹⁰⁴ Based on the Court’s reading of the facts, Maine “disqualified” the plaintiff schools from accessing a “generally available” state benefit “solely because of their religious character.”¹⁰⁵ The Court emphasized that the statute in question does not address the type of education students are to receive, much less require the education to be equivalent to that in public schools, as Maine contends.¹⁰⁶ Rather, the statute simply categorically excludes all but “nonsectarian” schools from participating.¹⁰⁷ Thus, rather than attempting to secure a public school equivalent education, the Court found that Maine’s program amounts to a generally available public benefit, and Maine had singled out religion for exclusion from a benefit that was available to everyone else.¹⁰⁸

Though the Court indicated this status discrimination was sufficient to decide the case, it took the remarkable additional step of rejecting the notion that use-based restrictions might be permissible. “That premise,” the Court wrote, “misreads our precedents.”¹⁰⁹ Given what the Court argued is a nearly inextricable link between a school’s religious status and its religious activities, “any status-use distinction lacks a meaningful application not only in theory but in practice as well.”¹¹⁰ Thus, use-based restrictions are not “any less offensive to the Free Exercise Clause.”¹¹¹ The Court also seemingly narrowed its *Locke v. Davey* exception, limiting it to its facts: the choice to not fund instruction specifically designed to “prepare for the ministry.”¹¹²

The dissent lamented the opinion as eliminating the “play in the joints” between the Establishment and Free Exercise of Religion.¹¹³ States can no longer take measures “to further antiestablishment interests by withholding aid from religious institutions without violating the Constitution’s protections for the free exercise of religion.”¹¹⁴ The clauses are now “joined at the hip.”¹¹⁵ Any policy explicitly involving religion will almost invariably violate one clause or the other.

102. *Carson ex rel. O.C. v. Makin*, 979 F.3d 21, 38 (1st Cir. 2020), *rev.*, 142 S. Ct. 1987 (2022).

103. *See id.*

104. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1997 (2022).

105. *Id.* at 1996 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

106. *See id.* at 1998.

107. *Id.*

108. *See id.* at 1998–99.

109. *Id.* at 2001.

110. *Id.*

111. *Id.*

112. *Id.* at 2002.

113. *Id.* at 2004.

114. *Id.* at 2002.

115. *Id.* at 2005.

The majority, however, indicated that Maine was not without options to achieve its stated interests and avoid situations in which it “ ‘must’ fund religious education.”¹¹⁶ Maine can expand its public schools, facilitate transportation to them, offering remote learning, or “operate boarding schools of its own.”¹¹⁷ In dissent, Justice Sotomayor also indicated that the majority opinion would still allow state actors to “contract directly with . . . an approved private school” to provide equivalent public education and that need not include “schools that teach religion.”¹¹⁸

II. THE LOGIC AND VIABILITY OF THE NEW STATUS QUO

Trinity Lutheran and *Espinoza* changed the legal landscape so dramatically that the policy world has struggled to adjust. Lest there be any doubt, *Carson* closed the door to what would have been a relatively easy work-around, at least in the education context. Some lawmakers and commentators presume there is no need to adjust because the Court will soon move beyond status-based discrimination, use restrictions, and open public programs to religious entities on other grounds. For instance, it might require not just that voucher programs be open to religious schools but that religious schools be exempt from civil rights regulations. One step further, some observers believe the Court will extend *Espinoza*'s logic to require not only that states allow religious entities to operate secular charter schools but that they allow them to teach religion as truth.¹¹⁹ In sum, they fear or hope (depending on their perspective) that when the Court confronts additional questions like whether government can demand compliance with public norms in publicly funded programs, the Court will decide in favor of free exercise and deprive government of the ability to control its own programs. The Court's decision in *Carson* certainly moved one step further in that direction.

The Court's rejection of use restrictions in *Carson* further narrowed states' discretion. It could do the same regarding generally applicable rules in some other cases. But key language and underlying principles in its recent cases—combined with a broader perspective on the Supreme Court's institutional biases—caution against the assumption that the Court will entirely jettison states' ability, at least in education, to reserve public funding for secular purposes and enforce antidiscrimination norms on all participants. First, the largest prize in the expansion of free exercise doctrine involves overruling *Smith*. The Court explicitly refrained from that in *Fulton*, signaling a level of moderation rather than aggression. Second, the logical infrastructure that *Espinoza* articulated as barring status-based exclusions has self-imposed limits that do not extend to government regulation that may burden or limit religion but does not specifically target or exclude it. Third, various motivations explain states' limits on public funding for religious institutions and instruction. The religious bigotry that factored heavily in *Espinoza* is irrelevant in many other states. Thus, no single Supreme Court opinion can fairly decide the fate of all state policies. The following subsections detail each of these points.

116. *Id.* at 2000.

117. *Id.*

118. *Id.* at 2014.

119. See GARNETT, *supra* note 3.

A. The Larger, Moderating Free Exercise Universe

Trinity Lutheran, *Espinoza*, and *Carson* establish a context-specific sub-doctrine that exists within a larger free exercise framework, and the larger universe is more friendly to the state. Facially neutral laws, for instance, do not trigger *Trinity Lutheran*'s prohibition. As *Espinoza* itself emphasized and *Carson* reiterated, “[a] State need not subsidize private education.”¹²⁰ It is only once the state decides to subsidize private schools and additionally decides to disqualify some private schools “solely because they are religious” that *Trinity Lutheran* applies.¹²¹ Otherwise, *Oregon v. Smith* applies, presumptively blessing a state law that bars public funding for all private schools, even if the impact falls primarily on religious schools.¹²²

The Court in *Fulton* was asked to alter *Oregon v. Smith*'s constitutional line but refused to do so.¹²³ That question, moreover, openly divided the Court, including within the conservative wing. Three Justices in *Fulton* explicitly went on record in favor of overturning *Oregon v. Smith*.¹²⁴ Six other Justices, including three conservatives, rejected that position. Justices Barrett and Kavanaugh's concurrence expressed misgivings with *Smith*'s propensity to shield laws that “severely” burden religion, but they remained “skeptical about swapping *Smith*'s categorical . . . approach for an equally categorical strict scrutiny regime.”¹²⁵ They indicated that any change to *Smith* should be “more nuanced” than sweeping.¹²⁶ Their concurrence signals that change may very well come regarding generally applicable rules, but it will not be as dramatic as many forecast or fear.¹²⁷ Their moderation on generally applicable rules also has implications for the status-use distinction.

B. The Antidiscrimination Lens

The Court's hesitancy to overturn *Smith* in *Fulton* indicates toleration for some burden on religion and a concern with the possibility of judicial overreach in the service of protecting religion. Conversely, *Espinoza* and *Carson* express hyper-concern with status-based exclusions—even if the burden on individuals is minimal—and relatively little concern with the large burden that removing exclusions might impose on government. In short, multiple factors are at play in this line of cases. The assumption that the opinions are entirely ends-motivated and, thus, religion will always win moving forward is certainly possible but may be too simplistic.

An important analog to the Court's focus on status-based religious restrictions is instructive. The Court's intentional discrimination standard for race, sex, and

120. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020); *Carson*, 142 S. Ct. at 1997.

121. *Id.*

122. *See* *Bishop of Charleston v. Adams*, 538 F. Supp. 3d 608, 613 (D.S.C. 2021) (distinguishing a South Carolina law from the no-aid provision in *Espinoza*).

123. *See* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (“[plaintiffs] asked this Court to reconsider [*Smith*].”).

124. *See id.* at 1926 (Gorsuch, J., concurring) (“*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice”); *Id.* at 1924 (Alito, J., concurring) (“[T]he Court's error in *Smith* should now be corrected.”).

125. *Id.* at 1883 (Barrett, J., concurring).

126. *Id.*

127. *Id.*

other protected classifications, for instance, hinges on the entirety of the Constitution's antidiscrimination focus on motive.¹²⁸ Racial discriminatory impact is secondary at best.¹²⁹ This imbalance proceeds from the premise that racial classifications are an inherent evil to be eliminated regardless of circumstance, but enormously consequential racially disparate impacts are not problematic—regardless of their flimsy justifications—so long as they do not stem from racial motivations.¹³⁰

The point here is that formalism, not practical function, often drives the Court's thinking on crucial doctrines. The Court is willing to rely on formalistic rules that symbolically uphold constitutional values while also disregarding enormous practical breaches of constitutional values so long as those breaches do not cross a formal constitutional line. The Court's evolving free exercise doctrine similarly comes down hard on a formal distinction. There is no clear indication, yet, that the Court will move the free exercise doctrine to root out status-based exclusion and any policies that significantly impact religion. Doing so would be inconsistent with its approach to antidiscrimination. And, of course, much of the force of its current evolution of free exercise doctrine rests on the Court's ability to frame religious exclusions as a form of discrimination like any other that the Constitution prohibits.

Running counter to the foregoing is the fact that the Court's decision in *Carson* arguably moves beyond mere status-based concerns by rejecting a religious use distinction, even though such a distinction would have still allowed religious organizations to participate in government programs. In other words, if the Court's only concern was status-based discrimination, it went too far in *Carson*. Nonetheless, the Court in *Carson* articulates its opinion as following squarely within and necessitated by its prior anti-status logic in *Espinoza* and *Carson*. First, both use and status-based restrictions involve a facially explicit religious restriction. Second, notwithstanding strong arguments to the contrary, the Court concluded there was no meaningful distinction between the two; both entail religious “discrimination.”¹³¹ A fair reading of *Carson* is to acknowledge the Court's willingness to transform any facial attempt to limit the interaction of the state with religion as discrimination.¹³² Still, neither *Carson* nor its predecessors evince a clear logic to move beyond this antidiscrimination framework.

C. The Logical, Limited Infrastructure of Religious Exclusions

With the Court's prohibition on religious classifications and religious uses firmly in place, the key to applying it is to identify its precise, logical underpinnings and limits. A careful examination of the Court's terms of art and logic in *Trinity*

128. See *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

129. See *Washington*, 426 U.S. at 229; *Arlington Heights*, 429 U.S. at 252.

130. One scholar famously characterized this as the Court's perpetrator perspective, with little attention to the victim. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–53 (1978).

131. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1998 (2022).

132. See also *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (rejecting school administration's attempt to avoid religious entanglement by prohibiting a football coach from leading a prayer and concluding it violated his free exercise rights).

Lutheran, Espinoza, and *Carson* suggests the religious status and use prohibition arises from nuanced concerns rather than broad ones. Of particular importance to the outcomes in those cases is the phrase “otherwise eligible” or “otherwise available.” Though lower courts and commentators have been slow to focus on the concept, the majority opinion uses it five times in *Trinity Lutheran*, four times in *Espinoza*, and five times in *Carson*.¹³³ The repetition is a function of using it in conjunction with the Court’s framing of status-based discrimination.¹³⁴ In *Trinity Lutheran* for instance, the Court begins and ends its opinion by framing it as a problem of discrimination “against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.”¹³⁵ This persistent use means that religious discrimination cannot be understood in isolation from being otherwise qualified.

That connection, moreover, squares with other antidiscrimination frameworks, like race and sex.¹³⁶ The otherwise qualified analysis, however, can be more complicated with religion because race and sex are almost never relevant to qualifications,¹³⁷ while religion occasionally is.¹³⁸ Consider, for instance, a state university that seeks to hire a research professor to teach classes and develop a new birth control pill. Religious faith would seem entirely irrelevant to teaching qualifications, but religious conflicts could arise with birth control research. If birth control is contrary to a doctor’s religion, the doctor’s qualifications or suitability for the job would hinge on whether she is willing to forsake her religion to do the job’s required tasks (which is not to suggest the university should presume religion creates a problem for the doctor).¹³⁹

The point to observe here is that the university sets the job parameters and need not change them. It need not, for instance, ignore evidence that an applicant will be unable to perform the job, nor need it sever the teaching from the research to accommodate an applicant’s religious faith. Rather, a doctor who adheres to her religious beliefs is not “otherwise” qualified for the job and, thus, a refusal to hire her is not discrimination on the basis of religion. Conversely, if the doctor is willing to diverge from her religious beliefs, she is otherwise qualified and cannot be excluded based on religion.

133. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2248–49, 2255, 2260–61 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021, 2024 (2017); *Carson*, 142 S. Ct. at 1995–96, 2002.

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

135. *Trinity Lutheran*, 137 S. Ct. at 2021, 2025.

136. *See, e.g., Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009) (examining discrimination through the lens of similarly situatedness); *U.S. EEOC v. Republic Servs., Inc.*, 640 F. Supp. 2d 1267, 1291 (D. Nev. 2009) (rejecting argument because comparable employees were not similarly situated).

137. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications”) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

138. The Court, ironically, recognizes that religion is inherently relevant to religious employers and hence an exemption from antidiscrimination statutes. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

139. If religion is relevant when religious employers hire because of the need to ensure their mission is carried out, the same would be logically true of public employers need for individuals committed to their secular mission. *See id.*

To be clear, the possibility of this divergence highlights a flaw in relying on religious classifications. A religious classification would surely be grossly overly broad as a mechanism for assessing the research doctor's job qualifications. Data, for instance, suggests that an overwhelming majority of Catholics ignore their church's doctrine on birth control.¹⁴⁰

This type of divergence speaks to the concern that may be driving the Court: total exclusions based on assumptions that religious individuals and entities will not abide by state objectives. Even if some level of empirical truth supports the state's reservations, those reservations can bleed into stereotyping, bigotry, and religious hostility. The extent to which those things are motivating actual government policy is far from evident but the obvious solution for some members of the Court is to bar status-based religious exclusion—and now religious use restrictions that the Court interprets as the functional equivalent or a proxy. The Court's solution simply requires the state to dig deeper into qualifications rather than relying solely on questionable religious classifications. The majority's sympathies in this direction are evident in its defense of its new rule: religious institutions and individuals merely seek the opportunity “to compete with secular” individuals and institutions on an equal basis, not to receive an “entitlement” or “subsidy” for religion.¹⁴¹

This rhetoric is reminiscent of the Court's approach to sex. Even if sex correlates to some extent with certain qualifications, those correlations do not necessarily justify the burden of sex-based exclusions.¹⁴² As the Court emphasized in *United States v. Virginia*, the appropriate question is not whether most women are qualified to enroll at the Virginia Military Institute (particularly given that most men are not either).¹⁴³ The pertinent question is whether some women are.¹⁴⁴ Given that some women are, women have the right to compete with males on an individual basis for admission.¹⁴⁵

If “otherwise eligible” is the first prong of the Court's status-based logic, the nature of the benefit is the second. The precise benefit or opportunity has reciprocal implications for whether an applicant is qualified and, thus, whether the exclusion is based solely on religion. The playground funding for non-profits in *Trinity Lutheran* and tuition funding for any private school in *Espinoza* involved what the Court repeatedly termed a “generally available benefit.”¹⁴⁶

The First Circuit in *Carson* pointed out that the precise nature of the benefit is crucial. To assess whether a qualified individual has suffered discrimination, the

140. See PEW RSCH. CTR., WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION (Sept. 28, 2016), <https://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/> [<https://perma.cc/R8MD-P8G5>] (only 13% of Catholics believe contraception is morally wrong).

141. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017).

142. See *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

143. See *Virginia*, 518 U.S. at 550 (“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI's method of education suits *most men*.”).

144. See *id.*

145. See *id.*

146. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2252 (2020); *Trinity Lutheran*, 137 S. Ct. at 2019.

court had to “determine the baseline that Maine has set by the benefit that it has made available through the tuition assistance program.”¹⁴⁷ Rather than a widely available and general benefit, Maine narrowed it to communities without a public high school and limited the benefit category to “an education that is ‘roughly equivalent to . . . public schools.’”¹⁴⁸ Public education equivalency, moreover, means secular education that is “religiously neutral” and “in which religious preference is not a factor.”¹⁴⁹ In other words, the state benefit was solely a public education equivalent for those who could not otherwise get it, not a generalized statewide private school tuition program for students to unilaterally pursue their own ends. Thus, plaintiffs’ claim failed on two related bases: plaintiffs were not denied access to this public benefit and the religious schools where they sought to use the voucher were not qualified to deliver the benefit.¹⁵⁰

Although it overturned the lower court, the Supreme Court hewed closely to this logic regarding that nature of the benefit. Rather than reject the notion that nature of the benefit is crucial, the Court concluded that Maine was misconstruing the nature of the benefit that it actually afforded.¹⁵¹ Maine did not provide the students in question a public education, nor did the relevant statute require the education to be “secular.”¹⁵² Rather these were after the fact attestations and implementation strategies presumably designed to save the program from constitutional challenge. But for statutory and all practical purposes, the Court repeatedly indicated that Maine’s private school tuition subsidies were “an otherwise generally available public benefit.”¹⁵³ Again the nature of benefit dictates the analysis.

This framing, of course, overlaps with *Locke v. Davey*.¹⁵⁴ In *Locke*, Washington funded college scholarships for students to use at an institution of their choice, including at religious ones. But the state would not fund students pursuing devotional theology degrees.¹⁵⁵ The Court held that the limitation was constitutional because the state could decide where it would direct its resources.¹⁵⁶ As the Court in *Trinity Lutheran* and *Espinoza* later emphasized, Washington had “merely chosen not to fund a distinct category of instruction”: the “essentially religious endeavor” of training a minister to lead a congregation.¹⁵⁷ Thus, Davey was denied a scholarship because he proposed to spend the money on something outside the state’s choice of benefits.¹⁵⁸ Yet, after *Carson* it is relatively clear that this type of religious use restriction is limited to its facts.¹⁵⁹ That does not, however, preclude a

147. Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 41–42 (1st Cir. 2020), *rev.*, 142 S. Ct. 1987 (2022).

148. *Id.* at 42 (quoting Hallissey v. Sch. Admin. Dist. No. 77, 755 A.2d 1068, 1073 (Me. 2000)).

149. *Id.*

150. Stated differently, they sought to transform the public benefit to public education into something else that they preferred more: a “publicly funded ‘biblically-integrated’ or religiously ‘intertwined’ education.” *Id.*

151. See Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1998–2000 (2022).

152. *Id.* at 1999–2000.

153. *Id.* at 2002.

154. *Locke v. Davey*, 540 U.S. 712 (2004).

155. *Id.* at 717.

156. *Id.* at 725.

157. *Id.* at 713, 721.

158. *Id.* at 725.

159. Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1998, 2002 (2022).

state from placing a broad *religiously neutral* use restriction on funds. Such a restriction simply is not implicated, directly or indirectly, by any decision in this line of cases.

D. Distinguishing Bigotry from Legitimate Government Objectives

Governmental motives round out the analysis of status- and use-based restrictions. The “why” matters in confirming or dissuading the Court’s concern with religious hostility. One dark period in history hangs over the question of government motives regarding vouchers. In 1875, James Blaine, speaker of the United States House of Representatives, introduced a constitutional amendment to prohibit government funding for religiously affiliated or “sectarian” educational institutions.¹⁶⁰ Blaine and various supporters of the amendment offered anti-immigrant and anti-Catholic rationales for the amendment.¹⁶¹ Sectarian, according to the Court, was “code” for Catholic schools.¹⁶² The amendment passed in the House but narrowly failed in the Senate.¹⁶³

The Blaine Amendment, however, had an afterlife that factored heavily in *Espinoza* (and will surely do the same in other cases).¹⁶⁴ Notwithstanding the amendment’s failure, Congress required new states to prohibit public funding for religious schools in their constitutions.¹⁶⁵ Some other existing states also adopted similar provisions of their own volition.¹⁶⁶ The question now is the extent to which Blaine’s bigotry fully explains some, none, or all of the analogous state provisions in existence today. Some members of the Court assume the era’s bigotry was so pervasive and states’ legitimate objectives so lacking that they need not look far into the details.¹⁶⁷

In *Espinoza*, Montana conceded that bigotry infected its original constitutional provision but emphasized that the provision was later readopted for legitimate reasons, including pro-public-education interests and compliance with the Establishment Clause.¹⁶⁸ The Court acknowledged that the “historical record is ‘complex,’”¹⁶⁹ but reasoned it was insufficient compared to the historical justification invoked in *Locke*.¹⁷⁰ Other members of the majority did not even

160. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (recounting Blaine Amendment history); *Espinoza*, 140 S. Ct. at 2259 (recounting Blaine Amendment history).

161. See *Mitchell*, 530 U.S. at 828; *Espinoza*, 140 S. Ct. at 2259.

162. See *Mitchell*, 530 U.S. at 838.

163. *Espinoza*, 140 S. Ct. at 2268.

164. See *id.* at 2259, 2268–72.

165. See Enabling Act of 1889, MONT. CODE ANN. § 77-1-202 (1889).

166. See Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 327–32 (2008).

167. See *Espinoza*, 140 S. Ct. at 2259, 2271 (rejecting the notion that there are principles or traditions distinct from Blaine that the Court should credit or that Blaine bigotry can be separated from common school sentiments).

168. See *id.* at 2258–59; see also *id.* at 2273 (Alito, J., concurring) (“It emphatically does not matter whether Montana readopted the no-aid provision for benign reasons.”).

169. *Id.* at 2259. The problem was that the state’s exclusion remained targeted solely at religion. It made little sense to only exclude religious schools if the point was to preserve funds for public schools. And if the concern was with establishment of religion, the focus should be on use rather than solely status.

170. See *id.*

acknowledge the complexity. Justice Alito painted with a broad brush, writing that “most States adopted provisions like Montana’s to achieve [Blaine’s] objective at the state level, often as a condition of entering the Union. Thirty-eight States still have these ‘little Blaine Amendments’ today.”¹⁷¹

Getting this history correct, however, is crucial. First, while religious exclusions may automatically trigger strict scrutiny, a state that restricts funds in a religiously neutral way and for reasons unrelated to religion stands a better chance of evading strict scrutiny. Second, the existence of religious bigotry in a state will have spillover effects on the perceived legitimacy of any restrictions that indirectly impact religious entities’ participation in a program.

Third, the Court should not presume that religious bigotry automatically explains a government policy any more than it presumes that race or sex does. While segregated schooling motivated by racial discrimination was the national norm for a century, the Court insisted that plaintiffs prove intentional discrimination in every instance.¹⁷² It was not enough in the 1970s, for instance, to demonstrate that students of color and white students went to different schools.¹⁷³ Plaintiffs had to show the district adopted policies to intentionally produce that result.¹⁷⁴ In the 1980s, in Atlanta’s suburbs, it was not enough to show that a school district had not yet eliminated racial isolation in its schools.¹⁷⁵ Plaintiffs had to demonstrate that the isolation was causally connected to prior racial discrimination.¹⁷⁶ In other words, segregation from an earlier era did not conclusively taint segregation in a later era. Likewise, evidence that racial bias regularly played a decisive factor in the imposition of the death penalty through the state of Georgia was insufficient to create an inference that it was a factor in any individual death penalty case.¹⁷⁷ In other cases, the Court has further emphasized that consideration or awareness of race or sex in a decision is insufficient.¹⁷⁸ Plaintiffs must show that the state acted because of, not in spite of, the negative racial or sexual impact it would have.¹⁷⁹

If individualized and circumstantial evidence matters in race and sex discrimination cases—where a far more sordid and encompassing history exists—then so too must it matter with religion. It is not enough to point to the Blaine Amendment and some general connection any more than it is enough to point to Jim Crow and its general connection to racial inequity. And the evidence regarding state policies to limit funding to religious schools is different in nearly every state and far less consequential than one would expect based on *Espinoza*.

Based on comprehensive research, Steven Green concluded that “while the Blaine Amendment is historically and politically significant, it matters little for

171. *Id.* at 2269.

172. *See* *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 208 (1973); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534–35 (1979) (discussing evidence of intentional segregation).

173. *See* *Keyes*, 413 U.S. at 198 (“Plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.”).

174. *See id.* at 204.

175. *See* *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

176. *See id.*

177. *See* *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

178. *See* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

179. *See id.*

constitutional purposes.”¹⁸⁰ A few simple facts prove his general point. First, nearly half the state limits on private and religious school funding predate the Blaine Amendment, including well before “any controversy over Catholic schooling or nativist agitation.”¹⁸¹ Michigan, for instance, adopted its provision forty years before the Blaine Amendment when it had few Catholic immigrants or schools.¹⁸² Second, while “twenty-two states adopted no-funding provisions in their constitutions during the fifty years following the defeat of the Blaine Amendment,” most were modeled after earlier state constitutional provisions, not the Blaine Amendment.¹⁸³ Third, some of the state constitutions most closely linked to the Blaine Amendment still maintained independent non-discriminatory reasons for their provisions.¹⁸⁴ For instance, when Congress directed New Mexico to include a restriction on religious schools in its constitution, New Mexico prohibited funding for all private schools, rather than singling out religious schools.¹⁸⁵

Green explains that even when anti-Catholic sentiment existed, it did not completely displace important governmental interests that both preceded and followed the Blaine era.¹⁸⁶ In the mid-1880s, states “embrace[d] universal common schooling.”¹⁸⁷ Their success hinged on raising new funds to grow those schools and preventing the diversion of funds to a private system.¹⁸⁸ Prohibiting public aid to private schools—religious or otherwise—was a natural step in starting, expanding, and preserving public education.¹⁸⁹ Establishment Clause concerns later further incentivized these no-aid provisions.¹⁹⁰

None of this is to reject the reality of anti-immigrant and anti-Catholic sentiment in the late 1800s, but it indicates that bigotry was often supplementary and overlapping with legitimate state interests rather than an all-encompassing explanation. In other words, anti-Catholic animus may explain a few states’ constitutional provisions during a particular moment in time, but no single motivation can explain all no-aid provisions at any moment in time, much less across their entire history. Thus, future courts must evaluate each state’s constitutional provision on its own merits—an analysis that would lead some provisions to fall and most others to survive.

III. POLICY SOLUTIONS FOR AN EXPANDING VOUCHER WORLD

The Court’s evolving free exercise doctrine is more relevant than ever to real world education policy. When the Court decided *Zelman v. Simmons-Harris*¹⁹¹ in

180. Green, *supra* note 166, at 312.

181. *Id.*

182. MICH. CONST. of 1835, art. I, § 5.

183. Green, *supra* note 166, at 297.

184. *Id.* at 328–32.

185. Kori Nau, *Honoring the New Mexico Constitution and Its History: New Mexico’s Unique Blaine Amendment and Its Application in Moses v. Ruzkowski*, 51 N.M. L. REV. 255, 257 (2021).

186. Green, *supra* note 166, at 300–26.

187. *Id.* at 310.

188. *Id.* at 310–18.

189. *Id.*

190. *Id.* at 310–12.

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

2002, very few states had adopted or were considering voucher programs.¹⁹² Even after *Zelman* authorized states to include religious schools in voucher programs, the programs remained isolated to just a few states.¹⁹³ The number and size of voucher programs, however, grew exponentially during the Great Recession.¹⁹⁴ Pandemic-related school closures and the polarized political climate of 2021 created another opening for choice advocates to push states to pass more voucher bills.¹⁹⁵ Today twenty-seven states operate some form of private school tuition assistance,¹⁹⁶ and legislatures are pushing dozen of bills to expand them in other states.¹⁹⁷ In short, free exercise doctrine matters more than ever for education policy.

Three crucially important policy questions require answers. First, to what extent can states continue to limit public funding for religious education? Second, to what extent can states prohibit discrimination in their private tuition programs, particularly when doing so conflicts with the religious tenets of some schools? Third, to what extent do states have an affirmative obligation to ensure non-discrimination in these programs? The following subsections provide answers to each, as well as proposals for adapting existing policies to the new environment.

A. Identifying the Remaining Limits on Religious Education

Notwithstanding the Court's rejection of the status-use distinction in *Carson*, states still retain the ability to shape how public funds are spent. If exercised carefully, this discretion will, at the very least, allow states to indirectly limit religious instruction through more general prescriptions. But seizing this opportunity will require states to reconceptualize and restructure their voucher and voucher-like programs. Currently, voucher and other private tuition programs are sufficiently open-ended in their eligibility and benefits that religious groups can make out plausible discrimination claims.¹⁹⁸ That plausibility, however, will shrink if states craft their programs more carefully.

This latent state authority is best understood through simple categorical hypotheticals. Consider, for instance, a state that creates an orange procurement program. Apple farmers are in no legal position to require the state to buy apples. The problem with current voucher programs is that rather than specifying an interest in oranges (to carry the analogy), states express a general interest in buying fruit. And when they turn around and bar funding for apples in their fruit

192. Forman, *supra* note 12.

193. Black, *supra* note 14.

194. *Id.*

195. Caitlin Dewey, *School Choice Movement Celebrates Its "Best Year Ever" Amid Pandemic*, PEW STATELINE (June 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/25/school-choice-movement-celebrates-its-best-year-ever-amid-pandemic> [<https://perma.cc/LD8N-PQZ2>].

196. 50-STATE COMPARISON, *supra* note 14.

197. Dewey, *supra* note 195.

198. Montana statutes, for instance, indicated they could be used at any type of school or institution and that there should be no limitations. MONT. CODE ANN. §§ 15-30-3103(1), 3111(1) (2019).

program,¹⁹⁹ they create problems for themselves. While as a matter of legislative drafting this latter approach of simply barring what the state does not want may be simplest, courts can easily interpret this as a generally available voucher program that excludes a singular group that is otherwise qualified or eligible for the benefit.²⁰⁰

The safer route for a state is to specify those categorical things it wishes to support by affirmation rather than negation. In other words, a state can largely and indirectly exclude religion by omission. A state voucher program might precisely identify the subjects it expects students to learn and the values (consistent with the state's educational mission) it expects that curriculum to promote and prohibit the support of education programs that do not commit to those objectives or offer instruction contrary to it. The point is for the government to assume a procurement stance and dictate the specifications of the items for which it intends to award contracts, rather than the role of a bank that remains agnostic as to the products a customer purchases. This type of specification is exactly what the government does when it spends public resources on roads, prisons, buildings, and other services.²⁰¹ Government normally does not simply hand out blank checks with no guarantee that it will receive what it seeks to procure.

Placing itself in the position of procuring specific education items for students also forces broader normative questions to the fore. Does the state intend to fund equivalent public education in the private sector, ensure equal opportunity and access, improve education outcomes, or promote purely private individual ends such as choice for choice's sake, the expansion of religious instruction, and the shrinking of the public education footprint? These questions, moreover, should perform a government-constraining function when explicitly broached because some of these ends are directly at odds with states' affirmative state constitutional obligations in education.²⁰² In other words, it becomes incumbent on the government to procure things that are within and consistent with, not outside, its constitutional functions.

Given prevailing education trends, this shift would likely draw concerns with government micromanagement that stifles creativity and choice.²⁰³ Voucher specifications, however, can achieve the aforementioned goals without being overly

199. Montana statutes indicated they could be used broadly, MONT. CODE ANN. §§ 15-30-3103(1), 3111(1) (2019), but then further indicated a religious limitation. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2252 (2020).

200. An aggressive court, per the concurrence in *AH*, might find that a state cannot even subject religious groups (or apple farmers) to particularized monitoring for use violations, as doing so is another form of inequality. A state, however, presumably could subject all schools to similar monitoring regardless of their religious status.

201. See, e.g., U.S. GENERAL SERVS. ADMIN., INDEX OF FEDERAL SPECIFICATIONS, STANDARDS, AND COMMERCIAL ITEM DESCRIPTIONS, <https://www.gsa.gov/buying-selling/purchasing-programs/requisition-programs/gsa-global-supply/supply-standards/index-of-federal-specifications-standards-and-commercial-item-descriptions> [<https://perma.cc/82G7-JC9V>] (Feb. 10, 2023).

202. Black, *supra* note 34.

203. See, e.g., Dana Goldstein, *After 10 Years of Hopes and Setbacks, What Happened to the Common Core?*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2019/12/06/us/common-core.html> [<https://web.archive.org/web/20230206102407/https://www.nytimes.com/2019/12/06/us/common-core.html>] (discussing the resistance to Common Core standards).

proscriptive. It would suffice, as a first step, to identify the specific subjects voucher schools must teach and the major learning objectives of those courses. Filling the school day and year with required learning necessarily serves the function of limiting the time for other undesirable matters. The No Child Left Behind Act is a case study in this point.²⁰⁴

One step further, the state might require that the curriculum and courses adhere to certain norms, such as a science curriculum consistent with accepted scientific knowledge (e.g., evolution) or a civics curriculum consistent with existing constitutional and legal norms. More aggressively, the state might require that private schools teach core subjects from a state-approved textbook list or reading list.²⁰⁵ The point here is not for private schools to teach to a test or abandon creativity; the point is simply to articulate what the state is buying and thereby exclude certain things it does not want to buy: religion, conspiracy theory, and anti-science. Doing so is no more an inhibition of the free exercise of religion than buying oranges is an attack on apple farmers.

B. *The Continuing Viability of Non-Discrimination*

Some states may be fine with private schools teaching religion so long as they do not discriminate against students based on protected categories like race, sex, religion, ethnicity, and disability.²⁰⁶ Whatever challenges a state might face regarding religious use, existing doctrine poses no limitation on states' ability to attach non-discrimination principles as conditions to a private school's participation in a state program.²⁰⁷ On this point, *Espinoza* and *Carson* are irrelevant because non-discrimination standards do not involve a limitation based on religious status. As generally applicable rules, non-discrimination standards would fall under *Oregon v. Smith* and need only survive rational basis.²⁰⁸ Even if the Court altered *Smith's* doctrine in the future, expansive change is unlikely.²⁰⁹ Change would presumably only occur when government imposes substantial or severe burdens on religion.²¹⁰

204. See Thomas S. Dee & Brian A. Jacob, *The Impact of No Child Left Behind on Students, Teachers, and Schools*, BROOKINGS PAPERS ON ECON. ACTIVITY Fall 2010, at 149.

205. See, e.g., S.C. CODE ANN. REGS. 43-70 (2021); CAL. CODE REGS. tit. 5, §§ 9510–26 (2021).

206. While prohibitions on race discrimination are relatively common in current programs, other prohibitions are rare. See BAYLISS FIDDIMAN & JESSICA YIN, *THE DANGER PRIVATE SCHOOL VOUCHER PROGRAMS POSE TO CIVIL RIGHTS 2*, (2019), <https://www.americanprogress.org/wp-content/uploads/2019/05/Vouchers-and-Civil-Rights2.pdf> [<https://perma.cc/A68W-Q8CR>]. But see Ryan Quinn, *Some of WV's Largest Private Schools Call Homosexuality a Sin. An Advancing Bill Would Help Fund this Teaching*, CHARLESTON GAZETTE-MAIL (Feb. 16, 2021), https://www.wvgazette.com/news/education/some-of-wv-s-largest-private-schools-call-homosexuality-a-sin-an-advancing-bill-would/article_595da6f7-9be9-5462-ae78-2f72074eb281.html [<https://perma.cc/6HTS-HGWQ?type=standard>].

207. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) (“The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

208. *Smith*, 494 U.S. at 886 (calling the application of a higher standard “a constitutional anomaly.”).

209. See *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1882 (Barrett, J., concurring); *id.* at 1883 (Alito, J., concurring); *id.* at 1926 (Gorsuch, J., concurring).

210. *Id.*

Even then, a sufficiently important government interest could overcome the burden.²¹¹

Non-discrimination in voucher programs would not trigger this concern. First, the state's interest in ensuring equal educational access and participation would presumably be at its height in the educational context.²¹² Second, a private school only becomes subject to non-discrimination when it voluntarily seeks to participate in the program.²¹³ Unlike the criminal drug prohibition in *Smith*, which operates as an omnipresent limitation on free exercise,²¹⁴ private schools remain free to exercise religion and only forego that freedom in the narrow context of a government program in which they have no obligation to engage. In short, the notion of a severe burden is hard to articulate here. Third, antidiscrimination is not inherently antithetical to religion. Thus, any challenges to non-discrimination conditions would be “as applied” challenges rather than facial challenges—meaning that the standards should remain even if some schools could justify an exemption.²¹⁵

Finally, whatever sympathies some members of the Court have toward expanding free exercise rights, it is far from clear that a majority exists that would pit those interests against general non-discrimination standards.²¹⁶ Doing so could be one of the most status quo-altering steps the Court could take, calling into question enormous swaths of state and federal statutes. The federal government has, for instance, been attaching racial antidiscrimination standards to every federal dollar spent since 1964²¹⁷ and sex discrimination standards to education funds since 1974.²¹⁸ Almost every single institution of higher education, including roughly a thousand religious ones, has had to comply with race and sex discrimination provisions for half a century.²¹⁹ This is to say nothing of the antidiscrimination statutes that apply to businesses simply by virtue of opening their doors to the public.²²⁰ The notion that the Court is willing to unravel that system is hard to imagine. And if government can impose antidiscrimination standards on religious institutions in higher education, it would be illogical to preclude it from doing the same with elementary and secondary schools.

211. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.”).

212. In Justice Kennedy’s controlling opinion in *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007), he emphasized schools’ need to “ensur[e] all people have equal opportunity regardless of their race” and recognized the elimination of racial isolation as a compelling interest to ensure that end. *Id.* at 797–98.

213. *See Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2260–61 (2020).

214. *Emp. Div., Dep’t of Hum. Res. Of Or. V. Smith*, 494 U.S. 872, 874.

215. *See, e.g., Gonzalez v. Carhart*, 550 U.S. 124, 166–67 (2007) (discussion of as applied challenge in partial birth abortion case.); *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729–30 (2018) (examining the difference in treatment under the rules rather than the validity of the rule itself).

216. *See infra* 118. It is also worth noting that Justice Gorsuch played a huge role maintaining and expanding Title VII’s reach in regard to sex in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

217. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

218. Title IX of the Education Amendments of 1974, 20 U.S.C. §§1681–1688.

219. Jared P. Cole, CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (2019).

220. *See, e.g.,* § 42 U.S.C. 2000(a)–(f).

C. Precedent for an Antidiscrimination Obligation

Unfortunately, most states have been reluctant to engage issues of discrimination and vouchers.²²¹ Thus, the most consequential question is not whether a state *can* impose antidiscrimination standards on schools participating in tuition programs but whether a state *must*. The assumption thus far has been that states can forgo antidiscrimination standards.²²² That conclusion rests on the premise that once students leave the public school system, no state action—and hence no accountability—exists. Whatever the merits of the state action assumption, it overlooks two other legal restrictions on discrimination—the antidiscrimination standards that attach to programs in receipt of federal funds and states’ affirmative state constitutional obligations in education.²²³ Both have broad reach and neither hinges on state action.²²⁴ The need to apply these restrictions to vouchers, moreover, is critical given the real possibility that the continued further privatization of education will, as a practical matter, substantially shrink education spaces where constitutional norms still apply.²²⁵

Though yet unexplored, Supreme Court precedent strongly suggests that federal antidiscrimination law can, at least in some circumstances, apply to state-created and operated voucher programs. The principle by which to do so has been lying in plain sight but missed, presumably due to the perspective with which anti-voucher advocates have framed the programs.²²⁶ Regardless, the basic principle is that federal antidiscrimination law extends not only to those state education programs that receive federal funds, but to all education programs that the state funds that are connected to programs with direct federal funding. As a state education program, voucher programs should be subject to the same federal antidiscrimination standards as the state’s other education programs, even if they are not in direct receipt of federal funds.

The logic derives from *Grove City College v. Bell*²²⁷ and its aftermath. Sued under Title IX, Grove City College defended on the basis that it was not subject to Title IX regulation because the unit where the discrimination purportedly occurred did not rely on federal funds.²²⁸ The only unit in receipt of federal funds was the financial aid office and, even then, it only received the funds indirectly through

221. Quinn, *supra* note 206; FIDDIMAN & YIN, *supra* note 206.

222. Quinn, *supra* note 206 FIDDIMAN & YIN, *supra* note 206.

223. See, e.g., 42 U.S.C. § 2000e; Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014) (analyzing the equality norms embedded in state constitutional education clauses).

224. See, e.g., Davis *ex rel.* LaShonda v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640–41 (1999); Sheff v. O’Neill, 678 A.2d 1267, 1287–88 (Conn. 1996) (finding that racial isolation is harmful to students and is a constitutional violation even in the absence of intent).

225. See also Peltier v. Charter Day School, 37 F.4th 104 (4th Cir. 2022) (rejecting a construction of charter schools as private that would allow states to skirt constitutional accountability by delegating their constitutional duties to private actors). See generally Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

226. Meaning that they are private programs, not state programs, and thus objectionable on that ground.

227. Grove City Coll. v. Bell, 465 U.S. 555 (1984).

228. *Id.* at 563.

students.²²⁹ The Court rejected the distinction between direct and indirect funds,²³⁰ but agreed that Title IX only applied to those units that received federal funds, not the entire college.²³¹

If the story ended there, most voucher programs would be safe. But four years later, Congress nullified the Court's holding through the Civil Rights Restoration Act of 1987.²³² The Act provided that antidiscrimination provisions apply to all federal fund recipient programs so long as one program receives funds.²³³ The most important and obvious effect of the change was to make Title IX and Title VI apply "institution wide."²³⁴ The statutory language, however, was even broader than that, extending coverage to state "instrumentalit[ies]," entire "system[s]" of education and "other entit[ies]" that recipients might establish.²³⁵

This expansion covered various programs that might have otherwise been perceived as beyond Title VI's and Title IX's reach. For instance, a school district initially defended claims of discrimination in its National Honor Society chapter on the grounds that the Society was a separate or a third-party program that Title IX did not reach, but the Third Circuit squarely held that it fell within the school's program.²³⁶ Courts have similarly held that Title VI applies to athletic associations that are not a state agency or directly under the umbrella of the state because the state has designated the associations as the entity that will supervise the athletic programs of state schools.²³⁷ Likewise, the University of Alabama sought to remove itself from a state-wide segregation case on the notion that not a single one of its agents had been alleged to have violated Title VI and the remedy sought involved others institutions' discrimination.²³⁸ Even if this was factually accurate, the court explained Congress's expansion of the definition of "program" to include systems of higher education, not just individual schools, and therefore made Alabama's argument irrelevant.²³⁹ "The inescapable conclusion is that Congress intended Title VI to be given the broadest possible interpretation 'to assist in the struggle to eliminate discrimination from our society by ending federal subsidies for such discrimination.'"²⁴⁰

229. *Id.*

230. *Id.* at 564 ("[B]y its all inclusive terminology [§ 901(a)] appears to encompass all forms of federal aid to education, direct or indirect.").

231. *Id.* at 573–74.

232. See Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat 28 (1988).

233. "Term 'program or activity' and 'program' mean all of the operations of" a federal fund recipient. Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat 28 (1988) (quoting Title IX of the Education Amendments of 1974, 20 U.S.C. §§ 1681–1688). The Act reiterated Title IX's exemptions for religious institutions.

234. Sharif *ex rel.* Salahuddin v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 360 (S.D.N.Y. 1989).

235. Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat 28 (1988).

236. Pfeiffer v. Sch. Bd. for Marion Ctr. Area, 917 F.2d 779, 783 (3d Cir. 1990), *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

237. Graham v. Tenn. Secondary Sch. Athletic Ass'n, No. 95-CV-044, 1995 WL 115890, at *11 (E.D. Tenn. Feb. 20, 1995).

238. Knight v. Alabama, 787 F. Supp. 1030, 1364 (N.D. Ala. 1991), *aff'd in part, vacated in part, rev'd in part*, 14 F.3d 1534 (11th Cir. 1994).

239. *Id.*

240. *Id.*; see also Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 73 (1992) ("Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX,

The Court's understanding of the scope of federal funding recipients' responsibility for the activities that occur within their programs has also expanded.²⁴¹ Recipients can be responsible even when they do not directly engage in discrimination themselves.²⁴² In *Davis v. Monroe*, for instance, the school district argued that it was not liable for student-on-student sexual harassment because none of the school's agents or employees were the perpetrator.²⁴³ The Court chided the district as missing the point.²⁴⁴ The question was whether any student was denied equal participation in the school's programs or activity.²⁴⁵ If so and the school was deliberately indifferent to that denial, the school was subject to suit under Title IX regardless of whether it was directly involved in the discrimination.²⁴⁶

These basic principles establish the logic for extending federal antidiscrimination protections to states' voucher and tuition programs, at least under some circumstances. The extension primarily rests on a conceptual reorientation of how vouchers fit within the states' overall delivery of education. The dominant view is to frame public education and vouchers programs as entirely distinct and at odds with one another.²⁴⁷ While that framing may accurately describe the programs on many levels, it is also true that the formerly unitary state education delivery model has fractured into a "portfolio model."²⁴⁸ That model includes public schools, charters, vouchers, and neo-voucher options from which individuals may choose.²⁴⁹

Rather than conceptualizing the items in the portfolio as distinct education programs, states and courts should conceptualize them as falling within the state's overall education program.²⁵⁰ This shift would mean that federal antidiscrimination provisions attach to all the options within the state program, regardless of whether vouchers themselves directly rely on federal funds. Holding the state liable for its entire portfolio is the equivalent of its above-described liability for entire "systems."²⁵¹ The state of Alabama has a university system with several different

Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act, Congress broadened the coverage of these antidiscrimination provisions in this legislation.").

241. See generally Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 363 (2008).

242. *Id.* at 371.

243. *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

244. *Id.* at 641 ("We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for G. F.'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools.")

245. *Id.* at 640–41.

246. *Id.* at 646–47.

247. See, e.g., DEREK W. BLACK, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY* 40 (2020).

248. Daniel Kiel, *The Endangered School District: The Promise and Challenge of Redistributing Control of Public Education*, 22 B.U. PUB. INT. L.J. 341, 347–401 (2013).

249. *Id.*

250. This conceptualization concedes nothing regarding the inherent tensions between these programs, but simply acknowledges the states' responsibility—often a constitutional responsibility—for all of them. Black, *supra* note 34, at 1406.

251. See *Knight v. Alabama*, 787 F. Supp. 1030, 1364 (N.D. Ala. 1991) *aff'd in part, vacated in part, rev'd in part*, 14 F.3d 1534 (11th Cir. 1994).

campus across the state, each operating under a different name, delivering a different type of educational program, and serving a different demographic student body.²⁵² Yet, all are part of a single statewide “program” subject to Title VI.²⁵³ The acts of the individual units affect segregation and access across the whole and, thus, federal law must couple them together to achieve its antidiscrimination goals.²⁵⁴ The same is true of an elementary and secondary education portfolio that sorts the states’ students into different schools. The state cannot realistically be held responsible for equal access and antidiscrimination if those pieces are siloed into parts,²⁵⁵ some which would otherwise be beyond the law’s reach. As the Fourth Circuit recently emphasized in response to a claim that charter schools were like private schools and beyond the reach of constitutional and antidiscrimination norms, a state cannot “outsource its educational obligation to [private operators], and later ignore blatant, unconstitutional discrimination committed by those schools.”²⁵⁶

The precise way some states have structured their voucher programs demonstrates that vouchers’ integration within the state’s education program is factually grounded, not just theoretical. First, rather than structuring vouchers as entirely independent programs, some states have financed and structured vouchers within the state’s existing public education budget.²⁵⁷ Consider those states that have provided for the per pupil allotment for public schools to be removed from those budgets and redirected to a voucher for each participating student.²⁵⁸ Under this structure, public schools and vouchers operate from the same budget—a quintessential hallmark of a program or system. Another poignant example involves the state directing its department of education to administer the voucher or tuition program.²⁵⁹ Even if the voucher program does not rely on federal funds or state public education funds, the agency managing the voucher program does. In both examples, the state is operating a voucher program within the confines of or in interaction with its public education system.²⁶⁰ For purposes of federal antidiscrimination law, this should be sufficient to establish that the voucher program falls under the state’s education program.

252. *Id.* at 1061–62.

253. *Id.* at 1364.

254. *Id.* at 1364–65.

255. See generally Metzger, *supra* note 225 (analyzing the problem of eliminating constitutional accountability in various government sectors, particularly education).

256. Peltier v. Charter Day Sch., 37 F.4th 104, 118 (4th Cir. 2022).

257. Schwartz v. Lopez, 382 P.3d 886 (2016); see also Equal Opportunity Education Scholarship Account Act, S. 556, 123rd Session. (S.C. 2019), https://www.scstatehouse.gov/sess123_2019-2020/bills/556.htm [<https://perma.cc/ARM8-LV6D>].

258. Schwartz, 382 P.3d at 892. For other reasons, Florida struck down this type of arrangement. Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006). But the state is back at it. An Act Relating to School Choice, Comm. Substitute/H.B. 7045, 2021 Reg. Sess. (Fla. 2021) (enacted).

259. H.B. 2013, 2021 Reg. Sess. (W.V. 2021) (enacted).

260. It is also worth emphasizing that education money is fungible and, thus, even if the money does not move through a district or state department of education’s budget, the voucher program might still qualify as a covered program. A similar point regarding the fungibility of money was made in *Sabri v. United States*, when the Court held that Congress could impose criminal sanctions for fraudulent behavior in regard to state funds as a means of ensuring the sanctity of federal funds. 541 U.S. 600, 606 (2004). This is not to say, however, that all private tuition programs are automatically subject to antidiscrimination laws or that a state could not structure them in such a way that they do not qualify as a “program.”

This logical step, while crucial, is not necessarily as drastic as one might assume. It would not make the state automatically liable for all the discriminatory acts that occur in a private school. It would simply mean that vouchers are a covered program. A plaintiff would still need to establish a violation that is attributable to the funding recipient.²⁶¹ Discrimination solely attributable to the private school might fail. A state could concede that federal law covers its voucher program and still argue that it had not engaged in a violation itself. The situation is analogous to student-on-student harassment in public schools. The existence of harassment alone does not establish the school's liability.²⁶² Liability only follows when the school has notice of the discrimination and fails to take action to remedy or prevent it.²⁶³ Only at this point, the Court has emphasized, does the school become a cause of the discrimination and, thus, liable for its own action or inaction, not that of a third party.²⁶⁴

The same logic justifies state liability when it can be said to cause discrimination to occur or continue in its voucher program. The state is not simply a bystander to the discrimination. First, students attend the private school where discrimination may occur by virtue of state policy and financial support.²⁶⁵ While students may choose their particular private school, the choice itself, along with its scope, is a function of state policies. States typically only support students in private schools that the state formally "approves" as eligible and meeting certain standards.²⁶⁶ Thus, the state is the gatekeeper to the environments the students encounter.

Second, states are aware that discrimination is occurring in some of these schools. Individual complaints, news reports, and sometimes official school policies put the state on notice.²⁶⁷ Third, the state has the capacity to address this discrimination but willfully chooses not to.²⁶⁸ Rather than claiming that discrimination is beyond its control—as in a sexual harassment case in public schools²⁶⁹—most states have taken a position equivalent to condoning discrimination by affirmatively rejecting calls to apply antidiscrimination standards to private schools.²⁷⁰ A state may not be the direct perpetrator of discrimination occurring in private schools, but under these circumstances, it is the state's actions

261. See, e.g., *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999) (holding school liable for its own actions, not those of a third party).

262. *Id.* at 642–43.

263. *Id.*

264. *Id.* at 646–47.

265. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (vouchers "to provide educational opportunities to the children of a failed school district," including "a preference for low-income families"); Forman, *supra* note 12.

266. See generally *School Voucher Laws: State-by-State Comparison*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/education/interactive-guide-to-school-choice.aspx> [<https://perma.cc/3AWE-QRJS>] (last visited Feb. 22, 2023) (listing each state's requirements for private school participation).

267. See, e.g., Gordon, *supra* note 84; Postal & Martin, *supra* note 84; Derek Black & Rebecca Holcombe, *Could Public Money Finance Private-School Discrimination, Religion and Fake History?* USA TODAY, Apr. 12, 2021.

268. See, e.g., Quinn, *supra* note 206.

269. *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999).

270. CTR AM. PROGRESS, *supra* note 206; Quinn, *supra* note 206.

that make discrimination possible and cause its continuation. And it is this, not the mere occurrence of discrimination in private schools, which federal law has held states and education agencies accountable for under other circumstances.

D. The Ultimate Decision

Should the Court reject states' authority to structure and regulate programs consistent with the foregoing sections, states will face a stark value choice. A state would either need to eliminate vouchers and voucher-like programs altogether or accept that public money will finance discrimination and religion. An open and deregulated private school voucher system is counter to the public's interest in education on many levels. The question of retaining or ending such a voucher system is ultimately a value choice. But the only choice consistent with tradition, constitutional norms, equal access, and the common good would be to eliminate vouchers.²⁷¹

IV. THE CONSTITUTIONAL INCOMPATIBILITY OF PUBLIC CHARTER SCHOOLS AND RELIGION

The free exercise contest with vouchers is just the tip of the education policy iceberg. Applying expansive free exercise concepts to charter schools poses a far greater risk to public values and coffers. Forty-five states operate charter schools, which enroll over three million students—a number that doubled over the course of a single decade.²⁷² Unlike voucher programs, charter schools are uniformly secular.²⁷³ A few states permit religious schools to convert into charter schools, but only if those schools become secular.²⁷⁴ Were *Espinoza* and *Carson*'s rationale to morph and expand into the charter sector, exponential new charter growth would surely occur, particularly if states were prohibited from imposing religious use restrictions.

Nearly six million students currently attend private school,²⁷⁵ with roughly two-thirds attending religious private schools.²⁷⁶ Those private schools with selective admissions standards and high tuition would have little interest in converting to charters, as they would lose control of their admissions standards and receive less money per pupil.²⁷⁷ The calculus for many Catholic schools, which enroll nearly forty percent of private school students, would be different.²⁷⁸ They have a very different financing structure.²⁷⁹ The church self-finances a substantial

271. Black & Holcombe, *supra* note 267.

272. 50-STATE COMPARISON, *supra* note 14; NAT'L CTR. EDUC. STAT., *supra* note 16.

273. Nicole Stelle Garnett, *supra* note 36, at 43 ("There is, however, one hard-and-fast limit on charter schools' institutional diversity—they must be secular schools.").

274. *Id.*

275. *Private School Enrollment Grows*, CAPE COUNCIL AM. PRIV. EDUC., <https://capenetwork.org/category/nces/> [<https://perma.cc/EM6A-XTJG>] (last visited Feb. 22, 2023).

276. *Id.*

277. See generally Psyche Pascual, *Public vs. Private vs. Charter Schools*, Great Schools (Dec. 3, 2012), <https://www.greatschools.org/gk/articles/public-private-charter-schools/> [<https://perma.cc/YU33-GJDM>].

278. CAPE COUNCIL AM. PRIV. EDUC., *supra* note 275.

279. *Id.*

portion of the education costs and keeps tuition very low.²⁸⁰ The Catholic school system, however, is facing enormous challenges, with closures increasing due to insufficient finances and low enrollment.²⁸¹ Some have already dropped their religious character and converted to charters.²⁸² Far more would convert under rules that would allow them to receive public funding with very little, if any, downside for themselves and their attendees.²⁸³

Shifting the cost of religious schools onto taxpayers would create enormous statewide school financing challenges. A rapid influx of new students and institutions would force states to raise education taxes, divert money from other non-educational public projects and services to charters, or divide the current education pie into smaller pieces. Past school funding trends suggest the last option would be the most likely or dominant strategy.²⁸⁴ That option would trigger wide-ranging negative systemic effects for existing public schools.²⁸⁵

While a public religious charter school sounds like a contradiction in terms, advocates aimed their sights at this outcome years ago, and commentators now believe *Espinoza* entitles them to it.²⁸⁶ Justice Breyer even forecasted the possibility in *Espinoza*,²⁸⁷ and the prior Secretary of Education took steps to make it happen.²⁸⁸ A new Manhattan Institute report lays out the logic, arguing that charter schools are not state actors subject to constitutional constraint, but rather “private schools [that] can be religious without running afoul of the Establishment Clause. And if they can be religious, states with charter schools must permit religious charter schools.”²⁸⁹ Lest one mistake this for the milder claim that religious institutions must be allowed to operate secular charters, the report emphasized that religious institutions could not only operate charters, they are entitled to “teach religion as the truth” in them.²⁹⁰ In other words, they have the right to operate charters that “are actually religious.”²⁹¹

280. *Catholic Education*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/offices/public-affairs/catholic-education> [https://perma.cc/29MW-K4EB] (last visited Feb. 22, 2023).

281. Alex Welsh, *Catholic Schools Are Losing Students at Record Rates, and Hundreds Are Closing*, WALL ST. J., May 10, 2021.

282. Arianna Prothero, *Can Converting to Charter Status Save Struggling Catholic Schools?*, EDUC. WK., Feb. 5, 2018.

283. Saiger, *supra* note 37, at 1214 (“If religious schools could easily recast themselves as charters and thereby gain access to public funding, the drain on education budgets would be both substantial and sudden.”).

284. *See generally*, Black, *supra* note 14.

285. *See id.* (describing the financial impact of charter and voucher expansion on public school finances).

286. GARNETT, *supra* note 3; T.J. D’Agostino, *Religious Charter Schools: Are They Constitutionally Permissible?*, 12 J. SCH. CHOICE 506 (2018).

287. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2291 (2020).

288. Blad, *supra* note 3; Matt Barnum, *DeVos Will Let Religious Groups Apply for Charter Grants, Opening Up New Legal Battlefield*, CHALKBEAT (Oct. 29, 2020), <https://www.chalkbeat.org/2020/10/29/21540634/devos-charter-schools-religion> [https://perma.cc/S6XB-87NT].

289. GARNETT, *supra* note 3, at 4.

290. *Id.* at 6.

291. *Id.*

More than a few commentators, including those adverse to the notion, believe such policies are coming.²⁹² The foregoing logic for religious charters rests on four major premises: (1) the “distinction between religious status and religious use” in *Espinoza* is illegitimate and “ephemeral”; (2) charter schools are private actors; (3) state funding for charter schools is “indirect”; and (4) a state’s decision to operate secular public schools is constitutionally prohibited preference for irreligion over religion.²⁹³

The underlying rationale for religious charter schools, however, is fundamentally flawed. The flaws remain, moreover, even though the Court rejected use restrictions in *Carson*. The radical reordering that *Carson* imposed on voucher and voucher-like programs only extends to charters if charters are the functional equivalent of private schools, not public schools. Even then, the state’s substantive intertwining in charter school policies and activities remains prohibitively problematic.²⁹⁴ In short, the rationale for religious charter schools is tenuous at best. The following subsections rebut all four premises for religious charter schools and further affirmatively establish the fundamental incompatibility of publicly financed and created charters with religious instruction. Thus, rather than bringing states into compliance with *Espinoza* and *Carson*, religious charter schools would breed a new set of constitutional violations.

E. The Limited Relevance of Espinoza to Charter Schools

The rationale, necessity, and likely perseverance of the distinction between religious use and status detailed in Part II need not be repeated here. The application of that distinction to charter schools, however, merits attention. On its face, prohibiting religious institutions from operating charter schools would seem to be status-based discrimination and, thus, unconstitutional per *Espinoza* and *Carson*. Two significant facts, however, distinguish this exclusion from the type at issue in those cases.

First, charter schools involve the discharge of a government function and state constitutional duty.²⁹⁵ They are not delivering a private benefit that just happens to be funded by government. The salience of this concept is embedded in state constitutional law.²⁹⁶ For instance, an important question in school financing

292. *Id.*; Andy Smarick, *Religious Charter Schools Will Test Limits of Espinoza Decision*, EDUC. NEXT (Aug. 4, 2020) <https://www.educationnext.org/religious-charter-schools-will-test-limits-epinoza-decision/> [https://perma.cc/5QKU-GLAZ]; Blad, *supra* note 3.

293. GARNETT, *supra* note 3; Aaron Saiger, *School Funding Under the Neutrality Principle: Notes on a Post-Espinoza Future*, 88 FORDHAM L. REV. ONLINE 213, 214–25 (2020).

294. *See generally* *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting) (“[O]ur history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself.”).

295. *See, e.g., Peltier v. Charter Day Sch.*, 37 F.4th 104, 119 (4th Cir. 2022). This is, in fact, the dividing line on which their constitutionality under state law rests. Were charter schools construed as being something other than an implementation of the state’s constitutional education duty, state constitutions might bar their operation—or at least their use of resources otherwise reserved to public schools. *See, e.g., Wilson v. State*, 75 Cal. App. 4th 1125, 1134–35 (1999); *Denver v. Booth*, 984 P.2d 639, 645 (Colo. 1999).

296. *See, e.g., Peltier*, 37 F.4th at 117–18.

litigation is whether the state's obligation is to the general public and overall system of education or individual students.²⁹⁷ The general answer is that the education clauses in state constitutions entail a public duty, not an individual student right.²⁹⁸ *Espinoza* and *Carson*, by contrast, address a generic private benefit to be marshalled toward individual private ends.²⁹⁹ Singling out religion in that context is irrational discrimination from the Court's perspective.³⁰⁰ A government requirement that those representing and carrying out its core functions adhere to the government's secular goals is entirely different from *Espinoza* in that the government is not denying access to a generally available benefit but rather deciding how to structure itself.³⁰¹

The Court has consistently affirmed the government's ability to speak, take positions for itself, and carry out its functions with an affirmative bias in favor of constitutional norms like equality, fairness, democracy, and religious neutrality without being charged with a violation of the First Amendment.³⁰² The Court, moreover, has precluded government from endorsing religion in these functions.³⁰³ In short, as a legitimate exercise of a secular government function, there is no obvious reason why *Espinoza* would apply in a way that authorizes, much less mandates, religious charter schools.

Second, states' motivation for excluding religion from charter schools is not animus. The Blaine Amendment and analogous provisions in state constitutions speak to the public funding of private schools, not the establishment and operation of public schools.³⁰⁴ State reasoning for precluding religious institutions from operating public charter schools reflects the fact that the state has created charters to be public, not private, schools. As such, the Federal Constitution prohibits them from being religious³⁰⁵—which is to say nothing of states' myriad interest in charter schools promoting public secular values.

A court that failed to appreciate the foregoing distinctions might presume that charter school exclusions trigger the same concerns as voucher exclusions. It might ask: if a religious entity can do the same job as a secular one and is willing to deliver purely secular education, why should the state care whether the entity is religious any more than it cares whether its public-school teachers are religious? The issue should be qualifications to do the state's work, not religious status. From this

297. See generally Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 936–44 (2016); Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 952–53 (2014).

298. Weishart, *supra* note 297, at 936–39; Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 116 (2016).

299. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017–18 (2017).

300. *Id.* at 2021, 2025.

301. See generally *Wilson v. State Bd. Educ.*, 75 Cal. App. 4th 1125, 1135–36 (1999) (analyzing the state's policy decision regarding how to best structure education); *Boulder Valley Sch. Dist. v. Colorado*, 217 P.3d 918, 925–26 (Colo. App. 2009).

302. See e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”).

303. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963); *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

304. See generally *Green*, *supra* note 166, at 310–18.

305. *Garnett*, *supra* note 36 (discussing the prevailing assumptions regarding charter schools).

perspective, exclusion based on religious status would trigger strict scrutiny with charters too.

Under strict scrutiny, justifying the exclusion of religious entities from charters would be an uphill battle but not impossible. Because the state's motivation is not animus, its situation would be analogous to defending the consideration of race to promote integration and diversity in schools.³⁰⁶ It would have good reasons for its policy; the question would be whether they were good enough and carefully executed.³⁰⁷ For now, it suffices to say the state's compelling interests would revolve around the need to ensure a public school system that promotes the state's values (such as delivering the state's educational content and meeting its educational objectives) and remains equally open to all.³⁰⁸ A substantial portion of students would understandably feel hesitant, if not precluded, from enrolling in a school that claimed to be public but delivered instruction in facilities owned by a church, housed on church grounds, and staffed by church employees.³⁰⁹ That school would most likely attract and enroll a student population that was affiliated with that church or, at least, sympathetic to its religious beliefs.³¹⁰ To be clear, these practical realities would not necessarily exist with every religious entity that operates a charter. The extent of the challenges and the feasibility of dealing with them through mechanisms other than religious status exclusion would be the final word in a strict scrutiny analysis.³¹¹

It is reasonable to project that advocates are correct that, at least in some states, a status-based prohibition on religious schools operating charter schools might be deemed unconstitutional.³¹² That principle, however, falls short of validating advocates' more aggressive position that these charter schools can teach religion as truth. Thus, no matter what a court might hold regarding status-based exclusions, states could continue to require that the charters deliver secular education. Some religious schools struggling with serious financial problems might accept this condition,³¹³ but the broader religious school community would not, preserving the status quo in charter school operations.³¹⁴ Regardless, religious

306. See generally *Parents Involved in Cmty. Schs., v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

307. *Id.*

308. See, e.g., *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 144 (4th Cir. 2022) (finding that charter schools are not a mere "alternative method of primary education," but rather "free, universal" education embedded within the state's statutory framework for delivering public education).

309. See generally *Lee v. Weisman*, 505 U.S. 577, 588 (1992) ("The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where, as we discuss below . . . subtle coercive pressures exist."); Tonya D. Callaghan, *Homophobia in the Hallways: LGBTQ People at Risk in Catholic Schools*, CONVERSATION, Jan. 16, 2019; see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002) (indicating that non-religious students enrolled in religious schools, but a larger group enrolled in magnet schools instead).

310. Other students seeking to escape struggling schools, however, may feel they have no choice but to enroll in a religious school, even if it does not reflect their personal views. See *Zelman*, 536 U.S. at 704 (two-thirds of students in religious schools enrolled for reasons unrelated to religion).

311. See generally *Parents Involved*, 551 U.S. at 701 (grappling with the question of narrow tailoring of a program intended to achieve diversity and integration).

312. See GARNETT, *supra* note 3.

313. Prothero, *supra* note 282.

314. When the Supreme Court struck down the exclusion of religious schools from Maine's private school tuitioning program, for instance, early indications were that not much would change

operators entering the charter sector would require states to take a variety of compliance and enforcement issues seriously.³¹⁵

F. Charter Schools Are State Actors for Most Purposes

1. Resisting Distracting Inquiries and Standards

As to whether states can and must allow religious entities to operate charters that teach religion as truth, *Espinoza* and *Carson* are almost entirely a distraction. The widest plausible application of those cases only extends to whether religious institutions that are willing to forego their religious instruction mission ought to be eligible to carry out secular public functions. *Espinoza* and *Carson* do not purport to require the state to allow religious entities to stand in the shoes of the government and use those shoes to carry out a religious mission. To the contrary, bedrock Establishment Clause principles dictate that the state cannot establish, coerce, directly fund, endorse, or purposely advance religion.³¹⁶ This is exactly what a religious public charter school teaching religion as truth would involve.

Seeking to sidestep that straightforward conclusion, advocates lump another distraction on top of the *Espinoza* distraction. They argue that charter schools are not state actors and, thus, not subject to Establishment Clause restrictions.³¹⁷ Charter schools, prior to the question of religious charters, began pursuing this general logic as a means of avoiding legal liability for teacher dismissals, student discipline, free speech, open records requests, sex discrimination, and more.³¹⁸ Charters have also, ironically, argued that they are public or state schools when that designation would allow them to exist and access public funds.³¹⁹ Most courts initially rejected the notion that charter schools are not state actors for constitutional liability purposes.³²⁰ That they were state actors seemed so patently obvious as to

because private religious schools did not want to comply with state regulations. See Lana Cohen, *Maine Likely Won't See Big Impact from High Court's Religious Schools Ruling*, PORTLAND PRESS HERALD (June 26, 2022), <https://www.pressherald.com/2022/06/26/maine-likely-wont-see-big-impact-from-high-courts-religious-schools-ruling/> [https://perma.cc/FV3D-KQRK].

315. See, e.g., *ACLU v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1091 (8th Cir. 2011) (litigation regarding Establishment Clause violations in charter school); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000) (evaluating but rejecting Establishment Clause violation).

316. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayer because of coercive effect); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating the mandate to teach "creation science" in public schools); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (invalidating bible reading and school prayer).

317. Garnett, *supra* note 36, at 62; Saiger, *supra* note 37, at 1190 ("I conclude that, for religion-clause purposes, charter schools are private schools and not state actors."); Green III, Baker & Oluwole, *supra* note 24.

318. Green III, Baker & Oluwole, *supra* note 24; Peltier v. Charter Day Sch., Inc., 37 F.4th. 104 (4th Cir. 2022).

319. Green III, Baker & Oluwole, *supra* note 24.

320. See, e.g., *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 971 (S.D. Ohio 2002); *Irene B. v. Phila. Acad. Charter Sch.*, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003); *Matwijko v. Glob. Concepts Charter Sch.*, 2006 WL 2466868, at *1 (W.D.N.Y. Aug. 24, 2006); *Scaggs v. New York*, 2007 WL 1456221, at *1 (E.D.N.Y. May 16, 2007); *Jordan v. N. Kane Educ. Corp.*, 2009 WL 509744, at *1, *3 (N.D. Ill. Mar. 2, 2009); *Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868 (N.D. Ill. 1999); *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000).

not warrant serious analysis.³²¹ Yet, charters were undeterred and continued to raise the argument until they eventually succeeded in a few instances.³²² At this point, more than a dozen cases have opined on whether charter schools are state actors.³²³

The volume of cases, however, speaks more to charter school persistence rather than constitutional salience. The case roster and state actor inquiry has expanded as a function of courts' willingness to entertain inapplicable doctrine. The source of distraction lies in charters relying on a series of Supreme Court cases that articulate the factors for assessing whether to treat a private actor as a state actor.³²⁴ Therein lies the problem. Those cases involve plaintiffs' attempts to turn private actors into state actors for the purpose of constitutional accountability. Those cases and their doctrines are not about turning state actors into private actors so as to escape constitutional accountability. The parties at issue in those cases speak for themselves: a private school, independent and privately funded athletics associations, a private trust, a concrete company, a private park, and private nursing homes.³²⁵

If charter schools were facially and presumptively private actors that needed to be brought within the states' umbrella for constitutional accountability purposes, those cases would be instructive. But if one accepts the state statutes as enacted and state supreme courts' constitutional interpretations as written,³²⁶ the obvious conclusion is that charter schools are state actors, which explains the summary rejection of charter schools' arguments to the contrary in early cases.³²⁷ As such, Supreme Court cases assessing whether to treat private actors as state actors are of little value—and inapplicable for the purpose to which charter litigants have put them. The cases arguably are not even instructive for analogous purposes.

Unless one presupposes that charter schools are private, a simple examination of the factors from those cases reveals that the factors make little substantive sense in the context of charters. The Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* synthesized the factors for assessing whether to treat a private actor as a state actor as: (1) whether the state exercises “coercive power” over or “provides significant encouragement” to the private actor; (2) whether the private actor is a willful participant in joint activity with the state; (3) whether the

321. See, e.g., *Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 876 (N.D. Ill. 1999) (simply writing “[a]s a public school, the Foundation is a governmental body”).

322. See, e.g., *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010); *I.H. v. Oakland Sch. for the Arts*, 234 F. Supp. 3d 987 (N.D. Cal. 2017); *Sufi v. Leadership High Sch.*, 2013 WL 3339441, at *9 (N.D. Cal. July 1, 2013).

323. See *Hulden*, *supra* note 37 (cataloguing cases); *Peltier v. Charter Day Sch.*, 37 F.4th 104 (4th Cir. 2022).

324. See *supra* notes 320–321.

325. *NCAA v. Tarkanian*, 488 U.S. 179 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Brentwood Acad. V. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001); *Pennsylvania v. Bd. of Trusts*, 353 U.S. 230, 230 (1957); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Evans v. Newton*, 382 U.S. 296 (1966).

326. See, e.g., ARIZ. REV. STAT. ANN. § 15-101 (“‘Charter school’ means a public school”); GA. CODE ANN. § 20-2-2062 (West) (“‘Charter school’ means a public school that is operating under the terms of a charter.”); *Wilson v. State Bd. Educ.*, 75 Cal. App. 4th 1125, 1135–36 (1999) (“[C]harter schools are strictly creatures of statute.”); see also *Hulden*, *supra* note 37, at 1255 (finding that most state statutes have defined charters as public).

327. See, e.g., *Jones v. Sabis Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 876 (N.D. Ill. 1999).

entity in question is controlled by the state or one of its agencies; (4) whether the entity has been delegated a public function by the state; (5) whether the private actor is entwined with governmental policies; and (6) whether the government is entwined in the private entity's management or control.³²⁸ The Court has also examined the financial dependency of the private actor on government.³²⁹ One can surely mechanically and thoughtlessly ask these questions of charters, but the questions rest on a presumed context inapplicable to charters, in which the state and the private actor are completely separate entities. The issue is whether the relationship between the two entities is sufficiently close to treat the private actor as a state actor anyway.

The relationship between the state and charters does not involve this distinct separation. With charters, the state is not coercing a private actor; it is granting an entity the authority to exercise the state's coercive power.³³⁰ Likewise, the state does not reach out and regulate, entwine itself with, or act in concert with an existing private education sector through its charter laws and agencies. Rather, the state creates a new arm of its own state educational program.³³¹ One might try to pigeonhole that creation into the Supreme Court's inquiry of whether the state has delegated a function to a private actor, but that factor speaks to those instances when the state has relinquished a state function to a private actor who remains private. Charters, conversely, involve delegation of what the state understands to be a new set of state entities, not private actors, that it can dissolve, control, and manage at its discretion.³³² It did the same thing when it created public school districts, which unquestionably function as state actors.³³³

The unsuitability of these factors is potentially clearest regarding funding. To be clear, the Court has rejected the notion that state money alone, even a percentage as substantial as ninety percent, transforms a private school into a state actor.³³⁴ Charter schools have utilized this language to dismiss the relevance of their funding stream—and some courts have followed their lead.³³⁵ But again, they are using rules regarding apples to prove a point about oranges. Charters do not just rely heavily on public funds like private businesses that contract primarily or entirely with the government. Charter school funding streams are literally written into the state

328. *Brentwood*, 531 U.S. at 296.

329. *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982).

330. *Boulder Valley Sch. Dist. v. Colo. State Bd. of Educ.*, 217 P.3d 918, 922 (Colo. App. 2009) (explaining charter schools' position within the state's education system, not outside it). The exercise of state power is so complete that North Carolina, for instance, extends charter schools sovereign immunity. *See State v. Kinston Charter Acad.*, 836 S.E.2d 330, 335 (N.C. Ct. App. 2019).

331. "From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation—the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether." *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1135–36 (1999).

332. *Id.*

333. "It is well settled that public school districts are included in the definition of state actors for the purposes of § 1983 liability." *Mohammed v. Sch. Dist. of Phila.*, 355 F. Supp. 2d 779, 782 (E.D. Pa. 2005).

334. *Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982).

335. *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 815 (9th Cir. 2010).

education budget along with other public schools.³³⁶ Private schools and contractors are not. Private contractors submit bids to the government with variable and negotiated prices and terms.³³⁷ Charter schools' budgets involve none of that. Charters' precise funding levels come through a complicated state funding formula derivative of the state funding formula for traditional public schools.³³⁸ Charters and traditional public school funds and formulas are so intertwined that charter funds actually flow through local school districts in many states.³³⁹ Charter schools, moreover, receive specific appropriations for facilities, state-financed loans and bonds, and targeted per pupil allotment increases.³⁴⁰ One state has gone so far as to allow communities to levy taxes on behalf of charter schools.³⁴¹ Measures of this sort would raise a number of state constitutional problems were charters not arms of the state.³⁴² In short, judicial musings about the level of funding a private business derives from government bears no relevance to the analysis of public schools whose budgets are actually set, controlled, facilitated, and entirely funded by the state.

None of the foregoing is intended to duck the *Brentwood* factors. Even if one started with the presumption that charters are private and applied those factors, an objective analysis that takes all aspects of charter operations into account could easily meet the test.³⁴³ The en banc panel of the Fourth Circuit in *Peltier v. Charter*

336. See, e.g., *Boulder Valley Sch. Dist. v. Colo. State Bd. of Educ.*, 217 P.3d 918, 926 (Colo. App. 2009) (discussing the funding formula for charters); MD. CODE, EDUC. § 9–109; S.C. CODE ANN. § 59-40-140 (funding charters per formula in conjunction with public school districts); see also 50-STATE COMPARISON, *supra* note 14.

337. See generally 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 29:72 (3d ed. 2020); Jean M. Boylan & Barbara R. Gadbois, *Public Contracts and Competitive Bidding*, PROB. & PROP. 11, 34–35 (1997).

338. 50-STATE COMPARISON, *supra* note 14.

339. See, e.g., N.J. STAT. ANN. § 18A:36A-12; N.Y. EDUC. LAW § 2856; 24 PA. CONS. STAT. ANN. § 17-1725-A; see also Black, *Preferencing Educational Choice*, *supra* note 34 (describing the process by which districts pay charters).

340. Charter School Facility Revolving Loan Fund Program, OFF. OF S.C. STATE TREASURER, <https://treasurer.sc.gov/what-we-do/for-governments/bond-and-debt-information/charter-school-facility-revolving-loan-fund-program-csfrlf/> [https://perma.cc/JFA8-F2EN] (last visited Feb. 22, 2023); YOUSEF AWWAD, STATE OF ARIZONA, DEP'T EDUC., *FUNDING OF DISTRICTS VERSUS CHARTERS* (DEC.12,2010), <https://ade.az.gov/schoolfinance/faqs/Funding/Funding%20of%20Districts%20vs%20Charters.pdf> [http://perma.cc/DD5D-5KFE]; Black, *Preferencing Educational Choice*, *supra* note 34, at 1367–73.

341. Billy Ball, *Bill to Allow Municipal Charters Becomes Law Despite Bipartisan Opposition, Specter of Resegregation*, NC POL'Y WATCH (June 7, 2018), <http://www.ncpolicywatch.com/2018/06/07/bill-to-allow-municipal-charters-becomes-law-despite-bipartisan-opposition-specter-of-resegregation/> [https://perma.cc/3D5J-CQAQ].

342. Consider, for instance, state constitutional provisions prohibiting special legislation to benefit private parties, particular regions, and private schools. See, e.g., *Metro. Gov't of Nashville v. Tenn. Dep't Educ.*, 2020 WL 5807636, at *4–*6 (Tenn. Ct. App. Sept. 29, 2020) (analyzing the constitutional problem with a voucher program that was not a general law); NEB. CONST. art. III, § 18 (“The Legislature shall not pass local or special laws . . . granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever”); COLO. CONST. art. V, § 25 (“The general assembly shall not pass local or special laws . . . providing for the management of common schools; . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.”).

343. Of course, many of the points already raised in Part IV.B.1. speak to those factors, but more detailed arguments regarding those factors are readily available. See, e.g., Catherine LoTempio, *It's Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435 (2012).

Day School, applying the *Brentwood* factors, recently did just that and offered no hint that the case was even close.³⁴⁴ It found that charters are nothing like private schools, and that any argument to the contrary “ignores both the ‘free, universal’ nature of this education and the statutory framework chosen by the North Carolina legislature and funded with public dollars, functioning as a component in furtherance of the state’s constitutional obligation to provide free, universal elementary and secondary education to its residents.”³⁴⁵ But in the interest of quelling distraction rather than compounding it, this Section rests with the conclusion that advocates and some courts have been asking and answering the wrong questions and, thus, ignoring the basic fact that charter schools are inherently state actors. Even the Fourth Circuit implicitly acknowledged as much, writing that “we are not aware of any case in which the Supreme Court has rejected a state’s designation of an entity as a ‘public’ school under the unambiguous language of state law.”³⁴⁶

2. *Disaggregating Charter School Meanings*

Another source of confusion—which is potentially an innocent cause of distraction—is the term “charter school.”³⁴⁷ The ambiguous use of the term requires disaggregation and clarification. The phrase charter school is used to refer to at least three distinct things: the charter school itself, the company and people hired to run the charter school, and the employees at the charter school.³⁴⁸ Charter school, in the most technical and strict sense, refers to the charter³⁴⁹ that the state has extended to an entity (a nonprofit organization in most all states) to operate a school on the state’s behalf, which includes the actual institution that arises,³⁵⁰ and the board and official school policies that come into existence by virtue and authorization of that extension.³⁵¹ Distinct from the charter school are the businesses that the charter school hires to manage, staff, and supply various aspects

344. *Peltier v. Charter Day Sch.*, 37 F.4th 104 (4th Cir. 2022).

345. *Id.* at 144.

346. *Id.* at 8.

347. Though Saiger and I disagree on details, he has pointed out that charters are undefined and have a different status depending on context. Saiger, *supra* note 37, at 1178. He, however, suggests more fluidity whereas this Article suggests a taxonomy of meanings and practices. *Id.*

348. *See, e.g.*, *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 903 (W.D. Mich. 2000) (discussing the named charter school and the management company); *Scaggs v. New York*, No. 06 CV 0799 JFB VVP, 2007 WL 1456221, at *1 (E.D.N.Y. May 16, 2007) (lawsuit against the charter, its management company, its administrators, its board members, and the state department of education); *Sch. Dist. of York v. Lincoln-Edison Charter Sch.*, 772 A.2d 1045 (Pa. Commw. Ct. 2001) (distinguishing the charter school from its management company); *see also* Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 362 (2003) (discussing the difficulty with and requirement of independence between the charter, its for-profit contractors, and board).

349. *See, e.g.*, IND. CODE ANN. § 20-24-1-3. The charter belongs to the state and can be revoked. IND. CODE ANN. § 20-24-3-7.

350. *See, e.g.*, IND. CODE ANN. § 20-24-1-4 (a charter school is the “public” school that “operates under a charter.”)

351. The policies, structure, education program, and various other details are part of the proposal that the applicant submits to the state prior to receiving the charter (and becomes the terms of the charter school to be created). *See, e.g.*, IND. CODE ANN. § 20-24-3-4; ARIZ. REV. STAT. ANN. § 15-183.

of the charter school's operation.³⁵² Distinct from the management businesses are the staff that the businesses hire to work at the school, some of whom, like principals, are agents of the management business and others, like teachers, who may not always be.³⁵³

With these three aspects of the loose phrase “charter school” clarified, several crucial points regarding state actor status analysis of religious charter schools come into focus. First, the charter school, in the strictest sense, is a state actor. Notwithstanding serious charges that charter schools’ subvert various public values and norms as a practical matter,³⁵⁴ charter schools nonetheless *formally* embody the state in the same way that traditional public schools do.³⁵⁵ They are creatures of a statutory education framework, not independent creatures that come under the regulation of statutes.³⁵⁶ This includes everything from their funding and operational structure to employee benefits, teacher qualifications, student enrollment rules, and academic outputs.³⁵⁷ In short, charter schools are not simply regulated by statute (as the private actors in the state action cases are); they are created by statute.

Second, the highest-level official mission, policies, and curricular choices of the charter school necessarily involve state action (regardless of how one defines charter schools) because they are part of the agreement between the state and the charter.³⁵⁸ While the mission, policy, and curriculum in that agreement may have their genesis in third parties’ ideas, the state substantively—pursuant to statutory

352. See, e.g., *Sch. Dist. of York*, 772 A.2d at 1050 (distinguishing the charter school from its management company). The notion that the businesses are distinct does not, however, automatically sever the state actor status. The point here is simply to identify the distinct actors involved in charter schools.

353. See, e.g., IND. CODE ANN. § 20-24-6-1 (separately defining the status of charter school employees). See also Black, *supra* note 34, at 1379 (surveying the approaches states have taken regarding teacher requirements and benefits, which is an extension of their status).

354. Public school advocates do not typically claim charters are anything other than public in form; their claim is that charters are not public in substance. See, e.g., Mead, *supra* note 348, at 352 (finding it beyond question that charters change and push the boundaries of what public school means); Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 482–87 (2013) (concluding charters fall short of the substantive criteria inherent to the concept of a public school).

355. See, e.g., ARIZ. REV. STAT. ANN. § 15-101 (defining a charter as a “a public school” authorized by the state); GA. CODE ANN. § 20-2-2062 (same). Districts are just as much a creature of the state as charters. Compare IND. CODE ANN. §§ 20-23-4-1 through 45 (reorganizing state school districts or committees) with IND. CODE ANN. §§ 20-24-1-1 to 20-24-2-1 (structuring charter schools).

356. See, e.g., IND. CODE ANN. § 20-24-1-1 to § 20-24-2-1; see also Peltier v. Charter Day Sch., 37 F.4th 104, 117–18 (4th Cir. 2022).

357. IND. CODE ANN. § 20-24-5-5 (student admissions); IND. CODE ANN. § 20-24-6-5 (teacher qualifications); IND. CODE ANN. § 20-24-6-7 (teacher retirement); IND. CODE ANN. § 20-24-3-4 (required structure); IND. CODE ANN. § 20-24-2.2-8 (outcome evaluation); IND. CODE ANN. § 20-24-7-3 (funding); IND. CODE ANN. § 20-24-4-1 (performance targets). “From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation—the Legislature has plotted all aspects of their existence.” *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1135 (Cal. Ct. App. 1999); see also Peltier v. Charter Day Sch., 37 F.4th 104, 117 (4th Cir. 2022) (recounting state laws that term charters’ public, term their teachers public employees, and allocate funds through the state formula).

358. See, e.g., IND. CODE ANN. § 20-24-3-4; ARIZ. REV. STAT. ANN. § 15-183.

standards—assesses and chooses from the ideas that third parties submit.³⁵⁹ That choice is a state act and the ideas it selects are stamped with state approval, becoming those of the state itself.³⁶⁰ None of this, moreover, even remotely resembles the detached relationship the state maintains with students and private schools in voucher programs.

Third, the cases in which courts have found state action missing with charter schools have been decided on narrow grounds and do not stand for the broad proposition that a charter school, in the strict technical sense discussed above, is not a state actor.³⁶¹ The lead case rejecting state actor status involved an employment dispute.³⁶² It only held the charter and its executive director “were not functioning as state actors *in these circumstances*.”³⁶³ As scholars and courts have observed, the cases, on the whole, represent the notion that charters may be state actors for some purposes and private actors for others, with the employee context often falling in the latter.³⁶⁴ That context-dependent analysis, however, still too often remains burdened by an imprecise conceptualization of “charter school,” though in many instances reaches conclusions that are consistent with this Article’s more precise delineation. But regardless of how one disaggregates the cases, they do generally establish that charter schools are state actors.

Fourth, the question of whether states can authorize charter schools that explicitly teach religion as truth involves charter schools in the strict technical sense, not some other loose iteration of charter schools. The creation of such a charter school would necessarily involve a proposal to establish an explicitly religious charter school and teach religion as truth in it.³⁶⁵ As noted above, extending a charter to such an entity would entail a government decision in which the state affirmatively chooses a religious application and adopts or incorporates its policies as the state’s own.³⁶⁶ Moreover, upon selecting such a proposal, the state initiates a

359. See, e.g., IND. CODE ANN. § 20-24-3-4.5 (standards for evaluating and granting charter); CONN. GEN. STAT. ANN. § 10-66bb (detailing submission and review of applications).

360. The Fourth Circuit articulated North Carolina charters as “exercise[ing] power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law.” *Peltier*, 37 F.4th at 118. Even a softer reading of the relationship described above the line will lead to the conclusion that the state has formally endorsed the ideas.

361. *I.H. v. Oakland Sch. for Arts*, 234 F. Supp. 3d 987, 993 (N.D. Cal. 2017) (“The complaint does not distinguish between the various roles that defendants OSA or OUSD played in the challenged actions, nor does the complaint clarify what defendants’ roles are vis-à-vis each other.”); *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808, 814 (9th Cir. 2010) (limiting case to employment); *Sufi v. Leadership High Sch.*, 2013 WL 3339441, at *5 (N.D. Cal. July 1, 2013) (addressing employment).

362. *Caviness*, 590 F.3d at 808.

363. *Id.* (emphasis added).

364. Hulden, *supra* note 37; Saiger, *supra* note 37, at 1178; *Peltier*, 37 F.4th at 115–16 (distinguishing *Caviness*).

365. See, e.g., IND. CODE ANN. § 20-24-3-4 (requiring “[e]ducational mission goals” and “[c]urriculum and instructional methods”); ARIZ. REV. STAT. ANN. § 15-183 (requiring a detailed education plan); CONN. GEN. STAT. ANN. § 10-66bb (mandating “the mission, purpose and any specialized focus of the proposed charter school”).

366. See, e.g., CONN. GEN. STAT. ANN. § 10-66bb (requiring the local school board to vote on and approve the proposed charter and for the state board of education to then do the same). In fact, the precise power of the different levels of government—the state or the local district—to make the

direct funding stream between the state and its charter.³⁶⁷ The funds do not *indirectly* arrive at the school or in church coffers merely as a result of private individuals' independent decisions—a distinction necessary to sever the establishment link in *Zelman v. Simmons-Harris*.³⁶⁸ Rather, state funds would *directly* reach religious charter schools and church coffers by virtue of the decisions the state made to establish a relationship by which the charter exercises state power.³⁶⁹ There quite simply would be no religious charter for a student to consider were it not for the state.

3. *The Salience of State Policy*

The foregoing analysis is also consistent with a more instructive line of precedent: the Court's standards for determining when states are liable for constitutional violations. State liability does not flow from the simple fact that an injury resembling a constitutional deprivation has occurred in a state program. Instead, the Court explained in *Monell v. City of New York*, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible" for the constitutional violation.³⁷⁰ In later cases, the Court indicated that conduct or activity is "under color of state law" when the alleged deprivation of rights is "fairly attributable to the State," which occurs when the individual who caused the injury "exercise[d] . . . some right or privilege created by the State."³⁷¹

The authorization of religious charters would easily cross this line. Per the state action discussion above, the state's own policies and choices are directly at play in this authorization and, thus, would meet *Monell*.³⁷² But so too would many of the operations of the charter schools when they involve the exercise of a state-created power over a student, for instance.³⁷³ Likewise, while a decision by a management company to not hire a teacher or contract with a vendor might theoretically not involve state power in all instances, the policy decision to deliver religious instruction, subsequent acts that force students to learn and confirm it, and the

choice has been the subject of constitutional litigation. *Denver v. Booth*, 984 P.2d 639, 645 (Colo. 1999).

367. See *supra* note 329 for a discussion of charter school funding.

368. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 662 (2002).

369. See *Peltier*, 37 F.4th at 118 (emphasizing that North Carolina charters are "clothed with the authority of the state" and operate on "per-pupil funding allotments" that come directly from the state based on a statutory funding scheme for public schools).

370. *Monell v. City of New York*, 436 U.S. 658, 694 (1978).

371. *West v. Atkins*, 487 U.S. 42, 49 (1988).

372. Though in the context of applying the *Brentwood* factors, the Fourth Circuit correctly emphasized that a charter school is "clothed with the authority of state law" and can "only operate under the authority granted to them by their charters with the state." *Peltier*, 37 F.4th at 118.

373. Charter schools, for instance, exercise enormous discipline power over students. See, e.g., *Patrick v. Success Acad.*, 354 F. Supp. 3d 185, 196 (E.D.N.Y. 2018); *Flores v. Victory Preparatory Acad.*, 411 F. Supp. 3d 1149, 1154 (D. Colo. 2019) (holding that a charter, just like a public school, was subject to the First Amendment in its exercise of power). *But see* *Scott B. v. Orange Cnty.*, 217 Cal. App. 4th 117, 124 (Cal. Ct. App. 2013) (finding that suspension from charter school did not involve a deprivation that triggers due process).

withholding of a state-authorized diploma when they do not, would be pursuant to state law and custom.³⁷⁴

The foregoing sections are not meant as an all-encompassing theory of liability for all three levels or uses of the phrase charter school. The purpose was to establish that charter schools, in the strictest sense, involve state action and that a religious school falls within that core action. State action could and should reach various levels of charter school management and activities (even if not all) when those management decisions and employee actions amount to the charter's—and thus the state's—action.³⁷⁵ That line would be governed with principles similar to liability for traditional public schools.

Consider, for instance, that traditional public schools do not automatically bear legal responsibility for all discrimination and injuries that happen to occur in school, such as when a student makes a racist comment to another.³⁷⁶ Instead, schools are liable for their own actions in ignoring, perpetuating, and causing discrimination in their programs, such as when it does nothing to prevent continued racist comments of which it is aware.³⁷⁷ When this occurs, it does not matter whether the discrimination originated with a teacher, a student, or, for that matter, a third party entirely unrelated to the school.³⁷⁸ The same logic follows with charter schools. The state should always be liable for its decision and action to establish a religious charter school. When and whether it might be liable for lower-level situations involving putative private actors is beside the point for this Article. The important question is not liability for the aberrant behaviors of individual teachers, but the policy-level decision to teach religion.

G. States' Authority and Obligation to Promote Common Secular Schools

A persistent claim by voucher and religious charter proponents is that public schooling amounts to an unconstitutional governmental preference for irreligion over religion.³⁷⁹ More specifically, they charge the political majority with using legislation to create a monopoly for public education and impose their secular values, under the guise of common values, on everyone else.³⁸⁰ In this respect, they argue secular common schools are not neutral.³⁸¹ Neutrality dictates that the government caters to individual consumer preferences not the majority's common preferences.³⁸² The solution does not require the elimination of public schools, just

374. See, e.g., *Flores*, 411 F. Supp. 3d at 1157–59 (finding that charter school attempt to compel the pledge of allegiance would violate the First Amendment); *ACLU v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1091 (8th Cir. 2011) (holding that a charter school had violated the Establishment clause).

375. See, e.g., *Peltier*, 37 F.4th at 120 (noting that charter employees are states employees in North Carolina).

376. See Part III.C.

377. See generally *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); see also *Black*, *supra* note 241, at 365–66 (explaining the factors justifying the broader imposition of liability in Title IX cases).

378. See, e.g., *Davis*, 526 U.S. at 629.

379. Saiger, *supra* note 293, at 214–15; Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, 43 *NOMOS* 87,104–06 (2002).

380. Saiger, *supra* note 293, at 214, 219; McConnell, *supra* note 379.

381. Saiger, *supra* note 293, at 219.

382. *Id.* at 219.

ending their monopoly over public resources by making those resources more freely available for individual consumers to use through vouchers and charters.³⁸³

This argument is more rhetorical than constitutional. And the rhetoric derives its force from equating governmental values and personal values, with the inference being that they rest on the same First Amendment plane. The problem is that government “values” are actually constitutional norms and mandates. As such, they are not subject to evenhanded balancing with private values. The Constitution and our system of representative democracy have already decided certain matters that are no longer subject to political dispute or balancing. A state policy eliminating single-sex colleges, for instance, is not susceptible to claims that it infringes on the free exercise of religion because it deprives religious observers of publicly financed single-sex opportunities that their faith might require.³⁸⁴

Supreme Court precedent demonstrates that secular common schools, rather than raising First Amendment problems, are central to reinforcing the citizenship and norms that lie at the heart of the nation’s democratic project. As such, pursuing these values is not subject to normal First Amendment concerns. First, public education is unlike anything else the government does. As *Brown v. Board* emphasized, “education is perhaps the most important function of state and local governments.”³⁸⁵ Its importance arises from the way in which public education is interwoven with the operation of our system of “representative government.”³⁸⁶ That system, as theorized at the nation’s founding, will not function properly without an educated populace.³⁸⁷ As the Court has reiterated, education is the “foundation” by which individuals acquire the ability to protect their own personal rights and discharge the “most basic public responsibilities” of citizenship.³⁸⁸ Thus, it is not simply incumbent on individuals to acquire education; it is government’s duty to provide it. “Public education, like the police function, ‘fulfills a most fundamental obligation of government to its constituency.’”³⁸⁹

Second, the Court has expressly recognized that communicating or “inculcating” certain values is part of the government’s education function.³⁹⁰ In *Brown*, the Court explained education “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”³⁹¹ Equally important, the Court

383. *Id.*

384. *See generally* *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia must admit women to its all-male military school and that its interests in maintaining the school as single sex failed under equal protection).

385. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

386. *Ambach v. Norwick*, 441 U.S. 68, 75–76 (1979).

387. *See, e.g.*, George Washington, *Eighth Annual Message*, AVALON PROJECT (Dec. 7, 1796), https://avalon.law.yale.edu/18th_century/washs08.asp [<https://perma.cc/UHS9-99ZY>]; Benjamin Rush, *Of the Mode of Education Proper in a Republic, 1798*, in 1 THE FOUNDERS’ CONSTITUTION: SELECTED WRITINGS 87–89, 92, 94–96 (2000); JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776).

388. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Brown*, 347 U.S. at 493.

389. *Ambach*, 441 U.S. at 75–76 (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

390. *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982); *Bethel v. Fraser*, 478 U.S. 675, 681 (1986); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 7–11 (1992).

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

has emphasized how public schools support and preserve democracy itself.³⁹² “As the primary vehicle for transmitting ‘the values on which our society rests,’”³⁹³ public schools bring “diverse and conflicting elements in our society . . . together on a broad but common ground.”³⁹⁴ They also “influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities.”³⁹⁵ These socializing and democratizing functions are so fundamental to self-government that the Court has expressly recognized constitutional exemptions from generally applicable doctrine to allow schools to pursue those ends.³⁹⁶

As to the First Amendment itself, the Court has indicated that it is only when the state forces students to personally adopt its secular values that it crosses the constitutional line. In *West Virginia v. Barnette*,³⁹⁷ the pledge of allegiance case, the Court did not question the state’s authority to lead a pledge of allegiance every day, with all the symbolism and messaging it entails, in hopes that every student will participate.³⁹⁸ The state, no doubt, expresses subtle coercive forces on students in doing so. It is only when the state *requires* that a student participate in the pledge (and thereby adhere to its ideas) that the state violates the First Amendment.³⁹⁹ Elsewhere, the Court has explicitly recognized that “legitimacy of the State’s interest in furthering [its democracy reinforcing] goals . . . is undoubted.”⁴⁰⁰ This deference derives from the notion that government is “preserv[ing] . . . a democratic system of government” and freedom through public education, not repressing it.⁴⁰¹ Reflecting on this First Amendment inculcative precedent, commentators have gone so far as to call “the American system of public education the fourth democratic institution in our system of checks and balances.”⁴⁰² In short, the First Amendment allows the state breathing room to affirmatively promote its civic and constitutional norms.

In light of this precedent, the notion that government cannot promote civic and secular values through public education is akin to constitutional sacrilege. But it is also inconsistent with *Oregon v. Smith*’s holding that government can erect generally applicable structures and rules notwithstanding their indirect effects on religion.⁴⁰³ Even a more watered-down future version of *Smith* does not lead to the conclusion that the Free Exercise Clause places the entirety of legitimate government choices under its thumb.⁴⁰⁴ First Amendment neutrality operates within and is consistent with our constitutional structure and values, not as a censor of government itself. The First Amendment would otherwise leave government

392. *Abington v. Schempp*, 374 U.S. 203, 230 (1963) (“[T]he public schools [are] a most vital civic institution for the preservation of a democratic system of government.”).

393. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

394. *Ambach*, 441 U.S. 68, 77 (1979).

395. *Id.* at 79.

396. *Id.* at 80.

397. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

398. *See id.* at 631–32 (distinguishing between school activities that compel a belief and those that merely involving teaching and inspiration).

399. *Id.* at 642.

400. *Ambach*, 441 U.S. at 80.

401. *Abington v. Schempp*, 374 U.S. 203, 230 (1963).

402. *Brown*, *supra* note 390, at 7.

403. *Oregon v. Smith*, 494 U.S. 872, 885 (1990).

404. *See* Part III.

impotent to do its job in a variety of health, safety, and welfare contexts. Schools could not, for instance, teach evolution without also teaching creationism (a premise which the Court has explicitly rejected)⁴⁰⁵ or compel school attendance (which the Court has acknowledged it can).⁴⁰⁶ In short, the Court has recognized and carved out space for public schooling and its values for the past century. Nothing in recent cases would even hint at a retreat.

CONCLUSION

Religion and public values stand in direct opposition in the context of vouchers and charter schools. States established public schools to serve the greater common good, not individual goods. That means reinforcing the nation's foremost democratic and constitutional norms—equality, fairness, and civic participation—and avoiding the establishment, endorsement, coercion, or promotion of religion. States, likewise, established vouchers purportedly to create equal educational opportunities for disadvantaged students, not to subsidize religious instruction.

This is not to say government is precluded from creating generally applicable benefits that individuals might use to achieve religious ends. The reading skills that public schools teach every day, for instance, are the gateway to millions of students reading their Bibles, Qurans, Sutras, Vedas, and other sacred texts. And if states broadly define their voucher programs as subsidizing tuition at private schools, students can use those benefits toward religious education.

Choice advocates, however, demand far more than this. In direct contests between religious values and public values, they insist religious values must prevail. The constitutional, statutory, and policy response is clear. States cannot establish charter schools whose explicit mission is to teach religion without establishing religious education in the place of public education. States, likewise, cannot forsake the requirement that all schools that participate in a voucher program—including religious schools—abide by antidiscrimination standards without accepting that unequal access and treatment will occur. Conceding these values for religious charter schools is tantamount to abandoning the concept of public education itself. Making these concessions for vouchers is contrary to the arguments that initially justified their creation. The state simply cannot claim to provide equal opportunity through charters or vouchers when it funds programs with inherently exclusionary missions.

The premise that voucher and charter programs involve purely private activity cannot resolve this tension. No doubt, more private actors are involved in charter schools than public schools, and private actors dominate voucher programs. But the presence of private actors does not eliminate the role of government policy and action in these programs. It is that role for which government remains responsible. Charters are creatures of state policy, exercise state power, and remain under the

405. *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987) (“The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.”).

406. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534 (1925).

state's thumb. Vouchers are an educational "program" of the state and, thus, the state must ensure equal access in those aspects it controls.