The Heritage Foundation

LEGAL MEMORANDUM

No. 309 | SEPTEMBER 2, 2022

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

With *Carson v. Makin*, the Supreme Court Closed the Book on Religious Discrimination in School Choice

Sarah Parshall Perry and Jonathan Butcher

KEY TAKEAWAYS

For decades, the U.S. Supreme Court has faced questions about the use of public benefits, especially school funds, for religious organizations or individuals.

The Court's June 2022 *Carson v. Makin* decision establishes that the Constitution does not permit any government discrimination against expressions of faith.

Carson v. Makin is a victory for parents, for religious liberty, and for school choice in America.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.
>
> —Justice William J. Brennan, 1963[1]

Introduction

For nearly a century, the Supreme Court of the United States has affirmed the fundamental right of parents to direct the care, upbringing, and education of their children. As far back as 1923, in *Meyer v. Nebraska*,[2] the Court held that a state statute forbidding teaching in any language other than English impermissibly encroached on the parents' liberty interests, explaining that the Due Process Clause of the Fourteenth Amendment protects "the right to marry, establish a home, and bring up children."

Shortly thereafter, in *Pierce v. Society of Sisters* (decided in 1925),[3] the Court relied on *Meyer* to strike down Oregon's Compulsory Education Act of 1922, which required children to attend only public schools, noting that the statute interfered with the right of parents to select private or parochial schools for their children.[4]

As modern American public education continues to succumb to the influence of critical race and gender theory, and the influence of politicized teachers' unions, more and more parents are looking for educational alternatives to traditional, assigned public schools for their children. For many, religious schools provide a welcome solution but are foreclosed because of the costs to attend. State tuition assistance programs and tuition vouchers provide a welcome benefit, but in some states, their use has been limited to "non-sectarian," or non-religious, private schools.

In a line of cases culminating in last term's *Carson v. Makin*,[5] the Supreme Court has defined the parameters of parents' rights to direct the education of their children by using publicly available funding for instruction at religious schools. The outcome in *Carson* closes the book on religious discrimination within the context of school choice and affirms that the Constitution does not permit, let alone require, the government to discriminate against expressions of faith. In so doing, the Court has allowed all American parents the freedom to use their child's portion of K–12 education spending formulas to educate their children as they choose.

The First Amendment's Religion Clauses

Five opinions from the Supreme Court—all of them central to the intersection between the "establishment" of religion and the "free exercise" thereof—have significantly shaped the right of parents of school-aged children to use public funds for private education. In each case, the Court has considered whether and to what degree religious individuals or religious organizations must surrender their beliefs to participate in public programs.

The First Amendment to the Constitution describes the interests at play: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[6] The First Amendment's two religion clauses, the Establishment Clause and the Free Exercise Clause, are meant to complement one another, not to compete with one another. In its religious liberty jurisprudence, the Supreme Court has sought to strike a balance between these clauses with the aim of reinforcing constitutional neutrality with respect to the issue of religion.[7]

An establishment of religion[8] is a declaration by a government, in law, of a substantial preference for one particular religion. Such a law grants the preferred religion some substantial benefit that government alone can confer. Typically, the benefit bestowed is the privilege of receiving institutional support from public revenues.

The Supreme Court has long recognized that the First Amendment's Establishment and Free Exercise Clauses are frequently in tension with one another[9] and has identified the "room for play in the joints" between them.[10] Therefore, as Chief Justice William Rehnquist noted in *Locke v. Davey*, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[11]

No establishment of religion exists when a government treats the members of every faith equally; tolerates free, public expression of any religious faith; and enacts no law bestowing a substantial governmental benefit on one religion to the exclusion of all others. Therefore, in assessing the balance between "establishing" a religion and permitting its "free exercise"—such as taxpayer-funded scholarships for students to attend private religious schools—the application of those programs should neither advance a particular religious interest nor inhibit individuals from engaging in religious activities.[12]

As this *Legal Memorandum* will explain and *Carson v. Makin* conclusively determined, when private individuals use taxpayer monies to choose a religious K–12 school for their students—even if that school provides instruction on religious matters—those individuals are not using public money to establish a religion. Rather, they are exercising their right to choose how and where their children are educated and simply using a government benefit to do so.

The Path to *Carson*

***Pierce v. Society of Sisters* (1925).** The Supreme Court ruled in *Pierce v. Society of Sisters*[13] that parents, as a function of their constitutional right to direct the education of their children, have a right to choose a private—rather than public—school. But the *Pierce* Court did not decide whether the use of public funding at a private, sectarian school (i.e., one providing religious instruction) was constitutionally permissible.

When faced with questions regarding the use of public funds at religious institutions, the Court had previously considered only a school's religious nature or "status" to determine its eligibility for participation in public programs and not the religious "use" to which those funds might be put

as a result of a student's attendance at the school. This "status" versus "use" distinction would ultimately form the basis of the Court's decision in *Carson v. Makin*. Before *Carson*, the Court would consider only whether the use of public benefits by religious organizations was constitutionally permissible at all.

***Zelman v. Simmons-Harris* (2002).** In what was to be the first of its religion, school, and public aid cases, the Supreme Court considered in *Zelman v. Simmons-Harris*[14] whether Ohio's Pilot Scholarship Program, which permitted parents to use a tuition-assistance voucher to send their children to a secular school, violated the Establishment Clause.

Ohio implemented the program after Cleveland inner-city public schools had failed to meet any of the 18 state educational standards for minimum acceptable performance. The program offered tuition aid for students from kindergarten up to 8th grade to attend any public or private school of the parents' choosing—whether religious or secular. In the 1999–2000 school year, 96 percent of students participating were enrolled in religiously affiliated schools.

Shortly after implementation, a group of Ohio taxpayers brought an Establishment Clause challenge. In assessing the challenge, the Court first noted that the program had been enacted for a valid secular purpose of providing educational assistance to poor children in a failing public school system and was neutral in all respects toward religion.[15] The program also provided assistance directly to a broad class of citizens who directed that aid to religious schools wholly as a function of their own independent private choice, and as such, the program did not violate the Constitution's Establishment Clause.[16]

Critically, the Court focused on who received the funds. Here, it was the parents who received the funds, and they were the ones who decided how and where to use them to educate their children, so any connection between the government funds and the religious institutions was attenuated.[17] Writing for the majority, Chief Justice Rehnquist noted that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients, not the government, whose role ends with the disbursement of benefits."[18]

Because the parents—as recipients—were simply choosing where to use their children's scholarships, public officials could not be said to be directly advancing a religious interest. Ohio could subsidize religious education without running afoul of the Establishment Clause.

***Locke v. Davey* (2004).** Parents and students had only two years to celebrate the Court's ruling in *Zelman* before the Supreme Court's decision

in *Locke v. Davey*—a decision with a very different perspective on education choice.

In that case, a college student brought a Free Exercise challenge to a Washington State statute prohibiting state aid from going to any post-secondary students who were pursuing theology degrees. While the state's Promise Scholarship Program could be used to study at any qualified institution of higher education, whether religious or secular in nature, students pursuing degrees in devotional theology instruction were explicitly excluded by the state in order to avoid an Establishment Clause violation.

The Supreme Court has long recognized the "play in the joints" required for both of the Constitution's religion clauses to work harmoniously in concert with one another, and *Locke* was a clear demonstration of this principle. In *Locke*, the Court demarcated a bright line for where space between both clauses ought to lie.

The Court ultimately rejected the challenge to the exclusion and upheld Washington's law. Because Joshua Davey sought to use state funds to become a minister, the Court noted, "We can think of few areas in which a State's antiestablishment [of religion] interests come more into play [than in forcing people to support church leaders]."[19]

Nothing in the record indicated animosity toward religion, and Davey was at no point forced to choose between exercising his religious beliefs and receiving a government benefit. Rather, the Court indicated that the state had gone a "long way"[20] toward including religion within the Promise program by permitting students both to attend "pervasively religious schools" and to take devotional theology courses.

Recognizing the ongoing tension between the Constitution's religion clauses and the need to strike a balance between them, the Court carefully limited the case holding. Chief Justice Rehnquist, in writing for the majority, noted that "[t]raining someone to lead a congregation is an essentially religious endeavor" and that the "only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."[21] The Chief Justice continued:

> Given the historic and substantial state interest at issue, it cannot be concluded that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.... The State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on [the tuition program]. If any room exists between the two Religion Clauses, it must be here.[22]

Locke involved secondary vocational religious education, not a general K–12 public education of the kind the Court would ultimately examine in *Carson v. Makin*. In addition, *Locke's* Promise Scholarship was religiously neutral because all vocational religious higher education funding (whether Jewish, Christian, Muslim, or other) was prohibited.

With its opinion in *Locke v. Davey*, the Supreme Court broke from its mini-streak of encouraging decisions on religious liberty and school choice by holding that public funds could not be used in higher education programs that are designed specifically for ministry preparation. But the journey toward clarifying the Constitution's protections for parental choice in education was still far from over.[23]

***Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017).** In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a Missouri church that also operated a preschool and day care center applied for funds under a state grant program. Missouri's Scrap Tire Program offered reimbursement grants to qualifying nonprofits to use recycled tires as a surface covering for their playgrounds, but it expressly excluded any applicant that was controlled by a church or religious entity.[24] While the state admitted that Trinity Lutheran was otherwise qualified for the grant, the church's application was categorically denied because of its religious character. Trinity Lutheran then brought suit, alleging a violation of the Free Exercise Clause of the Constitution.

The trial court had found that the *Trinity Lutheran* case was "nearly indistinguishable from *Locke* [*v. Davey*]"[25] and determined that the Free Exercise clause did not require the state to make funds available under the scrap tire program to religious institutions like Trinity Lutheran. On appeal, however, the Supreme Court distinguished the case from *Locke* by noting that *Locke's* holding was narrowly limited to the religious training of clergy. It stated that the Court did not intend to give—nor had it given—states an unfettered license to exclude religious organizations from generally available public benefits.

Writing for the majority, Chief Justice John Roberts confirmed the Court's long-standing principle that denying a generally available benefit solely because of an applicant's religious identity imposes a penalty on the free exercise of religion.[26] He hearkened back to the Court's 1947 decision in *Everson v. Board of Education of Ewing*,[27] writing that:

> [A state] cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

Just as it had done in *Locke*, the Court in *Trinity Lutheran* recognized the "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause compels, with the Chief Justice writing that when the Court had rejected free exercise challenges in the past, the laws in question had been neutral and generally applicable without regard to religion.[28] By contrast, the law in *Trinity Lutheran* had singled out religion for disfavored treatment and was therefore constitutionally impermissible.[29] Forcing Trinity Lutheran to choose whether to participate in an otherwise available benefit or remain a religious institution was untenable and something the Court would not countenance.

In holding that Missouri had violated the rights of Trinity Lutheran by denying the church an otherwise available public benefit because of its religious status, the Supreme Court established a principle that would play a significant role in its reasoning in *Carson v. Makin* five years later. But while the Court in *Trinity Lutheran* definitively ruled that discrimination on the basis of religious "status" was impermissible, it left unresolved the religious "use" issue for K–12 schools, an issue left open by *Locke*. It was still unclear whether the parents of American schoolchildren could use public funds for the private, religious instruction of their children.

***Espinoza v. Montana Department of Revenue* (2020).** Prior to *Carson v. Makin*, the Supreme Court issued another significant opinion that was germane to the status versus use issue. In 2015, the Montana legislature passed a scholarship program that provided a tax credit to those who donated to private, nonprofit scholarship organizations. Similar tax credit scholarship opportunities are available in other states, including Arizona, Florida, Iowa, and Pennsylvania, but unlike the programs in those states, the Montana Department of Revenue issued a regulation prohibiting scholarship recipients from using their scholarship funds at religious schools, citing a provision of the state constitution prohibiting the "direct or indirect" public funding of religious schools. This was challenged by three mothers who wanted to send their children to a religiously affiliated school using the scholarship funds.

The "no aid" provision of Montana's constitution is also known as a "Blaine Amendment."[30] These amendments are named for James G. Blaine, a former Secretary of State, U.S. Senator from Maine, Speaker of the House, and presidential candidate. In the 19th century, traditional public schools educated students from a decidedly Protestant perspective, and Blaine opposed efforts by Catholics to create schools that taught a Catholic worldview. Although Blaine was unable to convince his Senate colleagues to amend the U.S. Constitution to prohibit the use of public money to support

Catholic schools (his proposed amendment passed the House by the requisite two-thirds vote), many states added this prohibition to their state constitutions, prohibiting policymakers from directing taxpayer funds to—and thereby preventing parents from using such funds to enable their children to attend—religious schools.[31]

By the mid-20th century, lawmakers in nearly 40 states had adopted such amendments.[32] As Anthony R. Picarello, Jr., testified before the U.S. Commission on Civil Rights in 2007, "In short, Blaine Amendments were not designed to implement benign concerns for the separation of church and state traceable to the founding, but instead to target for special disadvantage the faiths of immigrants, especially Catholicism."[33] These provisions are blatantly discriminatory. For decades, teachers' unions and other special-interest groups in education have cited Blaine Amendments in state constitutions when filing lawsuits to force K–12 students to attend only assigned traditional schools. For example, special-interest groups and unions cited Blaine Amendments in their attempts to block parent and student learning options in Florida in 2004 and Arizona in 2008.[34] In *Espinoza v. Montana Department of Revenue*,[35] however, the Supreme Court held that the "no aid" provision of the Montana Constitution[36] that barred any aid to a school "controlled in whole or in part by any church, sect, or denomination" violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at religious schools.

Just as the respondents had argued in *Trinity Lutheran v. Comer*, the respondents in *Espinoza* averred that *Locke v. Davey* governed this case. The Court rejected that argument, noting that the petitioner in *Locke* was denied a scholarship because of "what he proposed to do—use the funds to prepare for the ministry," something that was a quintessentially religious endeavor.[37] In contrast, the Montana "no aid" provision did not zero in on any one course of instruction, but rather barred aid to a religious school "simply because of what it is"—a religious school.[38]

The Montana Constitution had forced the school to choose between being religious or receiving government benefits while at the same time forcing families to choose between sending their children to a religious school or receiving such benefits.[39] The Supreme Court determined that the state could not prevent parents from using the scholarship funds to send their children to religious schools just because the schools were religious.[40] In writing for the majority, Chief Justice John Roberts concluded that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[41]

Justices Clarence Thomas and Neil Gorsuch criticized *Locke v. Davey* in separate concurring opinions, but the Chief Justice chose to distinguish rather than reject *Locke* in his majority opinion. While *Espinoza* was a significant victory for institutions of a religious nature, the question remained open whether a state could prohibit public funds from going to a religious school not because of its status as a religious school, but rather because of the use to which such funds would be put: namely, to provide religious instruction.

This distinction is important. Schools with a religious mission prepare students to live out the beliefs and values of their faith through the instruction that their educators deliver. Status and use are closely aligned concepts. For example, in their amicus brief for *Carson*, the Jewish Coalition for Religious Liberty wrote:

> There are no religious-in-name-only Orthodox Jewish day schools. All incorporate Jewish teaching into their curriculum and provide education "through the lens" of Judaism.... That is why Jewish parents send their children to those schools: To receive a strong education in an environment that facilitates their spiritual learning and development.[42]

Carson v. Makin: The Supreme Court Finally Clarifies Status vs. Use

Carson v. Makin[43] came to the Supreme Court by way of a constitutional challenge to Maine's tuition assistance program, which required that all participating schools be "nonsectarian." The question the Court was asked to address was:

> Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

Maine does not operate assigned public schools in every town. Particularly in the rural far northern regions of the state, few public schools are available. However, the state still requires all minors to attend K–12 schools. For 150 years, Maine families living in rural areas without an assigned, traditional public school were able to send their children to private schools outside of their local area, whether religious or secular,[44] through the state's

"town tuitioning" program.[45] This policy continued unabated until 1981, when the state changed the program to require that any school receiving tuition assistance payments must be "nonsectarian" in nature: that is, that it not engage in any "religious practice."

At the time of this new requirement's adoption—and in likely anticipation of a future constitutional challenge—the Maine State Legislature debated how it could enforce such a distinction between a school's religious status and the institution's "use" of public funds for religious instruction. A shady episode of political maneuvering ensued, as the Pioneer Institute's amicus curiae brief on behalf of the petitioners in *Carson* explains,[46] with lawmakers ultimately attempting to separate schools that were religious in name only from those that actually practiced their religion.

The factual record indicates that the driving force behind Maine's sectarian exclusion was anti-religious animus, as demonstrated by the law's text, the legislative background, legislators' demonstrably false statements on the law's secular purpose, and derogatory statements directed against its religious opponents. The Supreme Court had previously grappled repeatedly with similar factual scenarios.[47]

The practical effect of Maine's sectarian exclusion meant that a religious school could, for example, be named after a patron saint of the Catholic Church, but teachers could not teach or include concepts related to Catholicism in the school curriculum. Two families that lived in areas without an assigned secondary school sued, arguing that the requirement was a violation of, among others, the Free Exercise and Establishment Clauses of the First Amendment.

Because the Supreme Court had already decided analogous cases involving similar questions in recent years, including *Trinity Lutheran* and *Espinoza*,[48] the majority relied on the principles established in those cases to perform a straightforward resolution of this case. Writing for the majority, Chief Justice John Roberts wrote:

> [A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.... Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires.... But as we explained in both *Trinity Lutheran* and *Espinoza*, such an "interest in separating church and state 'more fiercely' than the Federal Constitution... 'cannot qualify as compelling' in the face of the infringement of free exercise."[49]

The Supreme Court noted that the state's interest in not establishing religion and in maintaining government neutrality on religion did not justify excluding parents who wanted to exercise their religious beliefs by sending their children to schools that provided religious instruction. Private individuals using taxpayer funding to choose a religious K–12 school for their children were not using public money to "establish" religion.

The Chief Justice continued:

> [T]here is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.[50]

The Supreme Court rejected Maine's argument that *Locke* should dictate the outcome of the case and that the nonsectarian requirement was related not to the religious character or "status" of a K–12 school, but rather to the religious "use" to which the state tuition assistance would be put. Instead, the Court held that in this case, any "status versus use" distinction was a distinction without a difference. The Chief Justice confined *Locke* to its narrow facts:

> Both precedents [*Trinity Lutheran* and *Espinoza*] emphasized, as did *Locke* itself, that the funding in *Locke* was intended to be used "to prepare for the ministry."... Funds could be and were used for theology courses; only pursuing a "vocational religious" *degree* was excluded.... *Locke*'s reasoning expressly turned on what it identified as the "historic and substantial state interest" against using "taxpayer funds to support church leaders."... But as we explained at length in *Espinoza*, "it is clear that there is no 'historic and substantial' tradition against aiding [private religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*."... Locke cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.[51]

In *Carson*, the Supreme Court completed its jurisprudential arc on school choice and religious liberty begun under *Zelman* and carried through *Locke*, *Trinity*, and *Espinoza*.

- In *Zelman*, the Court held that K–12 scholarship programs do not establish religion and do not violate the Constitution because such programs fund families, not schools. Parents—acting as benefit recipients who exercise their own private educational choices—are divorced from any state action on religion.

- In *Locke*, the Court held that public scholarship programs in higher education cannot further religious practices through the training of ministers—a quintessentially religious activity.

- In *Trinity*, it held that a state agency cannot discriminate against an individual or organization with a religious *status* (such as a church) that wants to participate in a generally available public program.

- In *Espinoza*, it held that the state cannot exclude a religious school that wants to participate in a K–12 private school scholarship system just because the school is religious.

- Finally, in *Carson*, the high court ruled that the state of Maine could not prevent families from using otherwise generally available tuition assistance benefits at religious (sectarian) schools simply because those schools also provide religious instruction. To do so was odious to the Constitution.

Conclusion

For decades, the Supreme Court has been plagued with questions concerning the use of public benefits by religious organizations or individuals. With *Carson v. Makin*, the Court made a clear pronouncement on the First Amendment's protection of religious expression within the context of school choice. Whether through the use of public benefits for religious instruction or through the use of public benefits for schools with a religious status, the outcome in *Carson* established that the Constitution does not permit, let alone require, the government to discriminate against expressions of faith. The Court also clarified that families may exercise their religious beliefs by using public benefits to send their children to religious schools without running afoul of the Constitution's Establishment Clause.

While Maine had creatively employed an argument that the use of a state benefit for religious instruction violated the Establishment Clause, the Supreme Court found the asserted distinction between that religious

"use" of the funds and the religious "status" of a school to be unpersuasive. With that, it reinforced the right of parents to educate their children as they see fit, allowing their full participation in government school choice programs no matter what their beliefs might be.

In *Carson*, the Court rendered a victory for parents, for religious liberty, and for school choice—and clearly established that when it comes to school choice, the book on religious discrimination is finally closed.

Sarah Parshall Perry is a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. **Jonathan Butcher** is Will Skillman Fellow in Education in the Center for Education Policy at The Heritage Foundation.

Endnotes

1. Writing for the majority in Sherbert v. Verner, 374 U.S. 398, 404 (1963).
2. Meyer v. Nebraska, 262 U.S. 390 (1923).
3. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–535 (1925) ("Under the doctrine of Meyer v. Nebraska…we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control…. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations") (internal citations omitted).
4. The Supreme Court has continuously reaffirmed the fundamental right of parents to direct their children's education, as evidenced by its more recent jurisprudence on the issue. *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that the Constitution, and specifically the Due Process Clause of the Fourteenth Amendment, protects the fundamental right of parents to direct the care, upbringing, and education of their children). *See also* Troxel v. Granville, 530 U.S. 57 (2000) (affirming the fundamental right of parents to direct the care, custody, and control of their children). The U.S. House of Representatives has likewise affirmed that "the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions." House Resolution 547 (November 16, 2005).
5. Carson v. Makin, 142 S.Ct. 1987 (2022).
6. U.S. Const. amend. I.
7. The Supreme Court has occasionally been susceptible to preferencing one clause over another and within the context of religion in public schools has sometimes eschewed protecting religious expression in favor of condemning it as a religious establishment. In Engel v. Vitale, 370 U.S. 421 (1962), for example, the Supreme Court determined that voluntary participation in a group prayer in a public school represented an establishment of religion. In Wallace v. Jaffree, 472 U.S. 38 (1985), the Supreme Court found unconstitutional a state statute authorizing a daily period of silence in public schools for meditation or voluntary prayer as an endorsement of religion lacking any clearly secular purpose and thus in violation of the First Amendment.
8. For many years, the Supreme Court relied heavily on its manufactured "Lemon" test to adjudge Establishment Clause violations, as taken from Lemon v. Kurtzman, 403 U.S. 602 (1971). To survive an Establishment Clause challenge, a law had to satisfy three criteria: (1) reflect a secular (as distinct from a religious) purpose; (2) neither advance nor inhibit religion; and (3) not involve undue entanglements of government and religion. However, in last term's Kennedy v. Bremerton School District, a case involving religious expression by a public school employee, the Supreme Court effectively dispatched with Lemon as the yardstick by which all Establishment Clause violations were measured, noting that "the 'shortcomings' associated with this 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned Lemon and its endorsement test offshoot…. The Court has explained that these tests 'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." Kennedy v. Bremerton Schl. Dist., No. 21-418, 597 US ___ (2022), at 22 (internal citations omitted). Instead, the court determined that "[i]n place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'… '[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" Id. at 23, citing Town of Greece v. Galloway, 565, 576–577 (2014).
9. *See* Norwood v. Harrison, 413 U.S. 455, 469 (1973).
10. Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970).
11. Locke v. Davey, 540 U.S. 712, 719 (2004), infra, p. 4.
12. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020), discussed infra (discussing the "play in the joints between what the Establishment Clause permits and what the Free Exercise Clause compels.")
13. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, supra note 3.
14. Zelman v. Simmons Harris, 536 U.S. 639 (2002).
15. *Zelman*, 536 U.S. at 640.
16. Id.
17. Id.
18. Id.
19. Locke v. Davey, 540 U.S. 712, 722 (2004).
20. Id. at 724.
21. Id. at 721–722.
22. Id. at 725.
23. The Court did not address the issue of whether states may prevent families from choosing religious schools when participating in K–12 private school scholarship systems, and its decision was therefore by no means a "death knell" for school choice. *See* analysis of John Kramer, "Understanding *Locke v. Davey* and School Choice," Institute for Justice, March 1, 2004, https://ij.org/press-release/locke-v-davey-latest-release/.

24. Trinity Lutheran Church of Columbia v. Comer, 582 U.S. ____, 137 S.Ct. 2012 (2017).
25. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F.Supp.2d 1137, 1151 (W.D. Mo. 2013).
26. *Trinity Lutheran Church of Columbia v. Comer*, 137 S.Ct. at 2019.
27. Id. at 2020, citing Everson v. Board of Education of Ewing, 330 U.S. 1, 16 (1947).
28. Id.
29. *See also* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality op.) (noting the Supreme Court's "decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.") (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981)).
30. Institute for Justice, "Blaine Amendments," https://ij.org/issues/school-choice/blaine-amendments/.
31. U.S. Commission on Civil Rights, "School Choice: The Blaine Amendments and Anti-Catholicism," Briefing Testimonies, June 1, 2007, https://www.usccr.gov/files/pubs/docs/BlaineReport.pdf.
32. Id.
33. Id.
34. Bush v. Holmes, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004); Cain v. Horne, 218 Ariz. 301, 183 P.3d 1269 (Ariz. Ct. App. 2008).
35. *Espinoza*, 529 U.S. ____, 140 S.Ct. 2246 (2020).
36. The Court addressed the discriminatory history of so called no-aid provisions in its opinion in *Espinoza*. In writing for the majority, Chief Justice John Roberts noted that "[i]n addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding 'sectarian' schools.... '[I]t was an open secret that sectarian was code for 'Catholic.'... The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general;' many of its state counterparts have a similarly 'shameful pedigree....' The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id.* at 2259 (internal citations omitted).
37. *Espinoza*, 140 S.Ct. at 2257 (citing *Trinity Lutheran*, 582 U.S., at ____, 137 S.Ct. at 2023–2024).
38. Id. (quoting *Trinity Lutheran*, 137 S.Ct. at 2023).
39. Id. at 2257.
40. Id. at 2246.
41. Id. at 2261.
42. Brief for the U.S. Supreme Court as Amicus Curiae, Carson v. Makin, Jewish Coalition of Religious Liberty, https://www.supremecourt.gov/DocketPDF/20/20-1088/171612/20210311102944748_20-1088%20Amicus%20Brief%20of%20The%20Jewish%20Coalition%20of%20Religious%20Liberty.pdf.
43. *Carson v. Makin*, supra, p. 2.
44. Pioneer Institute, "Brief for Pioneer Institute as *Amicus Curiae* in Support of Petitioners," September 10, 2021, p. 3, https://www.supremecourt.gov/DocketPDF/20/20-1088/192035/20210910121842949_20-1088%20Amicus%20Brief%20for%20Pioneer%20Institute.pdf; Maine Department of Education, "Approval for Receipt of Public Funds by Private Schools," https://www.maine.gov/doe/funding/reports/tuition/year-end-private/eligibility.
45. Institute for Justice, Petition for Writ of Certiorari, https://ij.org/wp-content/uploads/2018/08/Petition-for-Writ-of-Certiorari.pdf.
46. Pioneer Institute, "Brief for Pioneer Institute as *Amicus Curiae* in Support of Petitioners," September 10, 2021, pp. 5–17, https://www.supremecourt.gov/DocketPDF/20/20-1088/192035/20210910121842949_20-1088%20Amicus%20Brief%20for%20Pioneer%20Institute.pdf.
47. Just as anti-religious animus, and in particular anti-Catholic animus, motivated the enactment of 19th century Blaine Amendments, the Maine Sectarian Exclusion was the product of anti-religious hostility and produced unconstitutional harms. While the Supreme Court struck down such discriminatory state action in *Espinoza*, it had also previously considered state laws similarly motivated by religious animus. *See*, *e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion of Thomas, J.) ("Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.... Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'... In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.") (internal citations omitted).
48. "The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, BCS and Temple Academy are disqualified from this generally available benefit 'solely because of their religious character.'" *Carson v. Makin*, 142 S.Ct. at 1997.

49. Id. at 1997–1998 (internal citations omitted).
50. Id. at 1998.
51. Id. at 2002 (emphasis added).