

Who's Afraid of *Carson v. Makin*?

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ABSTRACT. How worried should progressives be about the Supreme Court's latest ruling in favor of publicly funded religious schools? Maybe less than we have assumed. In this Essay, I argue that *Carson v. Makin*—which struck down Maine's policy of excluding religious private schools from its publicly funded tuition-aid program—may have surprisingly limited repercussions for a cautiously hopeful reason. By enacting a statute that explicitly prohibits all private schools from discriminating against LGBTQ students, Maine's progressive lawmakers simultaneously protected a vulnerable student population, limited church/state entanglement, and preserved the state's commitment to public education. In other words, *Carson* teaches much about the Court's strident efforts to shift the law further to the right. But its most important lesson may have more to do with how progressives can best respond to a Court that has forsaken us: through smart and impactful lawmaking.

INTRODUCTION

These are dark times for progressives at the Supreme Court. With the Court's conservative supermajority lurching the law rightward across a range of crucial issues—from voting rights to reproductive autonomy and gun safety to the future of the administrative state—few progressive causes seem safe. To many, the Court's decision this Term in *Carson v. Makin*¹ represents yet another front in this seismic legal shift.²

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

2. See, e.g., Mark Joseph Stern, *The Supreme Court Just Forced Maine to Fund Religious Education. It Won't Stop There.*, SLATE (June 21, 2022, 2:04 PM), <https://slate.com/news-and-politics/2022/06/carson-makin-supreme-court-maine-religious-education.html> [https://perma.cc/R3RC-5KXE]; Ian Milhiser, *The Supreme Court Tears a New Hole in the Wall Separating Church and State*, VOX (June 21, 2022, 1:30 PM EDT), <https://www.vox.com/2022/6/21/23176893/supreme-court-carson-makin-religion-schools-vouchers-chief-justice-roberts> [https://perma.cc/5P2Y-JJZV].

Carson involved Maine's long-established Town Tuitioning Program, which provides private-school tuition aid to parents in remote parts of the state where school officials have declined to operate traditional public high schools.³ Viewing this tuition-aid program as an extension of its own system of public education rather than an alternative to it, Maine limited participation to private schools that are "nonsectarian" in the same way as its public schools.⁴ Private schools incorporating religious instruction were thus ineligible for state funds.

In a 6-3 decision along partisan lines,⁵ the Supreme Court invalidated this limitation as a violation of the Free Exercise Clause. Because "[t]he State pays tuition for certain students at private schools" but excludes religious schools from participating, Chief Justice Roberts wrote for the Court, "[t]hat is discrimination against religion."⁶

Progressive advocates have expressed great concern. Rachel Laser, the president of Americans United for Separation of Church and State, argued that *Carson* will "require[] the state to fund religious education at private schools with taxpayer dollars," supporting "schools that teach creationism instead of science, theocracy instead of democracy and discrimination instead of acceptance of difference."⁷ The Alliance for Justice raised a different yet equally compelling fear: "Requiring Maine to foot the bill for these religious private schools will take desperately-needed money away from the public schools . . ."⁸ Still others have worried that *Carson* will require states to subsidize religious private schools' discrimination against LGBTQ students.⁹

In this Essay, I challenge some—but only some—of the progressive hand-wringing over *Carson v. Makin* from an internal perspective. I, too, hold an abiding commitment to the essential values of church/state separation and educational equity. But *Carson's* impact on those values is not as dire as some have suggested. For one thing, the decision will not actually force Maine—or any

3. ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (2022).

4. *Id.* § 2951(2) (originally enacted as 1981 Me. Laws 2177).

5. *Carson*, 142 S. Ct. at 1989.

6. *Id.* at 1998.

7. Rachel Laser, Opinion, *Do Taxpayers Have to Fund Religious Education? The Supreme Court May Say Yes*, WASH. POST (Dec. 5, 2021, 8:00 AM EST), <https://www.washingtonpost.com/opinions/2021/12/05/carson-v-makin-supreme-court-religious-education> [<https://perma.cc/V36W-7AEP>] (emphasis omitted).

8. Nora Howe, *This Supreme Court Case Poses a Major Threat to Public Education*, ALL. FOR JUST. (Dec. 7, 2021), <https://www.afj.org/article/this-supreme-court-case-poses-a-major-threat-to-public-education> [<https://perma.cc/MM3V-DD5G>].

9. Nico Lang, *The U.S. Supreme Court Wants to Force Taxpayers to Fund Anti-Gay Schools*, XTRA MAG. (Dec. 10, 2021, 3:06 PM EDT), <https://xtramagazine.com/power/supreme-court-anti-gay-schools-214548> [<https://perma.cc/3YD8-8M3F>].

other state – to subsidize religious education or divert resources away from public schools. Maine remains free to eliminate its tuition-aid program and require district officials to operate public high schools for the roughly 4,500 students who currently receive aid.¹⁰ As the Court made clear just two years ago in *Espinoza v. Montana Department of Revenue* and then repeated in *Carson*, “[a] State need not subsidize private education.”¹¹ More fundamentally, even if Maine continued its tuition-aid program, there are strong arguments that providing parents this kind of subsidy would not pose an intolerable threat to church/state separation or educational equity.¹² That is the good news.

The bad news is that *Carson* does pose substantial danger to a third progressive value of equally vital significance: the right of LGBTQ students to be free from state-sponsored discrimination.¹³ The ruling creates the real prospect that state dollars intended to provide access to education will instead be used to bank-roll discrimination against the very children the program is designed to assist. For example, one set of plaintiffs in *Carson* sought to use state funds to enroll their daughter at Bangor Christian School.¹⁴ Yet that school explicitly discriminates against gay and transgender students.¹⁵ The school’s student handbook avows that “[a]ny deviation from the sexual identity that God created will not be accepted.”¹⁶ This discriminatory policy is no mere abstraction. A recent graduate of the school recounts a “terrifying” encounter with the principal over their sexual orientation.¹⁷ “I can be Christian and be gay,” the student pleaded. “No

10. See Brief of Respondent at 7, *Carson*, 142 S. Ct. 1987 (No. 20-1088) (noting that in the 2017-18 school year, 4,546 secondary students attended private schools under the state’s tuition-aid program).

11. *Carson*, 142 S. Ct. at 1997 (quoting *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020)).

12. See *infra* Sections II.A-.B.

13. See *infra* Section II.C.

14. Brief for Petitioners at 6-7, *Carson*, 142 S. Ct. 1987 (No. 20-1088).

15. See Joint Appendix at 83, *Carson*, 142 S. Ct. 1987 (No. 20-1088) (“[Bangor Christian School (BCS)] believes that a student who is homosexual or identifies as a gender other than on his or her original birth certificate would not be able to sign the agreement governing codes of conduct that BCS requires as a condition of admission.”). BCS has a similar policy of refusing to hire LGBTQ teachers. See *id.* at 89.

16. *Student Handbook*, BANGOR CHRISTIAN SCHS. 5 (Aug. 2, 2021), https://drive.google.com/file/d/1brocEBpcQIaSKYclY_xUqpS6q_DTgdda [<https://perma.cc/D9UG-9ANU>].

17. Katie Reilly & Madeleine Carlisle, *The Supreme Court Could Let Religious Schools Take Taxpayer Money. LGBTQ Alumni Say That’s a Mistake.*, TIME (Jan. 3, 2022, 6:30 AM EST), <https://time.com/6129283/bangor-christian-schools-lgbtq-carson-makin> [<https://perma.cc/6BBG-Z9WR>].

that's not right. You can't," the principal replied before leaving the student alone in a room to cry.¹⁸

Stories like these underscore why progressives are so worried about *Carson*— and why we are so angry at the Court's role in the culture wars more broadly. It is one thing for the Court to deem religious schools victims of discrimination when Maine expresses a preference to fund only nonsectarian education.¹⁹ It is quite another to do so when those same schools are engaged in rank discrimination of their own against the very children they are supposed to serve.

The most significant aspect of *Carson's* anti-LGBTQ outcome, however, is not its occurrence but its impermanence. Maine lawmakers, fully anticipating how the Court would likely rule, acted to preempt the problem of funding anti-LGBTQ schools.²⁰ By amending the state's antidiscrimination law to forbid *any* private school (whether secular or religious) that accepts public funds from discriminating based on a student's sexual orientation or gender identity, legislators ensured that taxpayer dollars would never fund anti-LGBTQ private schools like Bangor Christian School.²¹ What is more, this statutory amendment has limited church/state entanglement and alleviated concerns over the diversion of public-school funding because religious private schools in Maine have declined thus far to participate in the aid program.²² The most important thing progressives should take away from *Carson*, in other words, may have less to do with the mounting ways in which the Court is harming society and more with how we should respond to render those harms temporary: through smart and impactful lawmaking.²³

18. *Id.*

19. *Carson*, 142 S. Ct. at 1998.

20. To be sure, many other states have private-school voucher programs without Maine's LGBTQ antidiscrimination protections. A few of those states are progressive enough that a Maine-like statutory amendment is politically feasible; they should act quickly to emulate Maine's lead. See *infra* Section II.C (discussing Maryland, Nevada, and Illinois). Most of the states with voucher programs, however, are not progressive; children in these states will still be victimized by anti-LGBTQ animus. But it is important to recognize that *Carson* is not the source of that problem. Even if Maine had prevailed in that case, red-state voucher programs would have still voluntarily permitted religious schools to participate. See *infra* note 101 (listing states with voucher programs that voluntarily permit religious-school participation). The discrimination LGBTQ students suffer in these states owes not to the Supreme Court but to societal bigotry and our broken politics more broadly.

21. See ME. REV. STAT. ANN. tit. 5, § 4602(1), (5)(C) (2022).

22. See David Sharp, Associated Press, *Religious Schools Shun State Funding Despite Maine Victory*, RELIGION NEWS SERV. (Aug. 30, 2022), <https://religionnews.com/2022/08/30/religious-schools-shun-state-funding-despite-maine-victory> [<https://perma.cc/5D2H-9WAS>].

23. See Aaron Tang, Opinion, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html> [<https://perma.cc/4LEL-935Z>].

This Essay proceeds in two parts. Part I briefly recaps the Court’s unsurprising logic and outcome in *Carson v. Makin*. Part II then grapples with the three kinds of harms progressives have suggested will follow from it: erosion of church/state separation, the undermining of public education, and state-sanctioned discrimination against LGBTQ youth. I conclude by discussing *Carson*’s implications for the broader question of how progressives can respond to a Supreme Court that has forsaken us – and our most cherished values.

I. THE RULING

Carson v. Makin was perhaps the least surprising result of the 2021 Term. For starters, religious litigants routinely prevail at the Roberts Court. Professors Lee Epstein and Eric A. Posner recently found that religious plaintiffs have won an astounding eighty-three percent of cases.²⁴ *Carson* was also no ordinary case pitting religious challengers against a state. Just two years earlier, the Court ruled in favor of the religious challengers in a substantially similar free-exercise case, *Espinoza v. Montana Department of Revenue*.²⁵

Espinoza concerned a tuition-tax-credit scholarship program that Montana lawmakers enacted in 2015.²⁶ Under the Montana program, private individuals and corporations could claim a dollar-for-dollar state tax credit for donations to nonprofit organizations that awarded private-school tuition scholarships to low-income families and children with disabilities.²⁷ These programs are known as “neo-vouchers” to distinguish them from traditional voucher programs, in which states directly fund private-school tuition out of their own coffers. Both types of vouchers provide recipient families financial assistance in opting out of the traditional public-school system, but the neo-voucher approach uses tax credits rather than direct government expenditures.²⁸ After the Montana Department of Revenue issued a rule stating that only secular private schools could participate in the neo-voucher program,²⁹ a group of Christian parent plaintiffs

24. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 324.

25. 140 S. Ct. 2246 (2020).

26. *Id.* at 2251.

27. *Id.*; MONT. CODE ANN. §§ 15-30-3103(1), -3111(1) (2021).

28. See Aaron Tang, *School Vouchers, Special Education, and the Supreme Court*, 167 U. PA. L. REV. 337, 347-50 (2019) (describing voucher and neo-voucher programs).

29. The Department defended this rule as necessary to ensure compliance with the state constitution, which forbade the state or any school district to “make any direct or indirect appropriation or payment from any public fund” to aid any “school . . . controlled in whole or in part by any church, sect, or denomination.” *Espinoza*, 140 S. Ct. at 2252 (quoting MONT. CONST. art. X, § 6(1)).

filed suit alleging a Free Exercise Clause violation. The Supreme Court agreed with them. “[O]nce a state decides to [subsidize private education],” the majority held, the Free Exercise Clause forbids it to “disqualify some private schools solely because they are religious.”³⁰

Espinoza’s outcome boded ill for Maine. Much like Montana’s tuition-tax-credit scholarship, Maine’s tuition-aid program offered public funds to certain families to enroll in a private school but limited this aid to nonsectarian schools.³¹ So when a group of Christian parents challenged Maine’s religious limitation on the same free-exercise theory, the state needed to find some way to distinguish its program from the one already struck down in *Espinoza*.

In *Carson v. Makin*, Maine focused on the purpose for which it established its tuition-aid program. Unlike Montana’s recently enacted tax-credit scholarship, Maine enacted its program in 1873 to ensure access to education for students who lived in parts of the state so remote that they lacked any public school.³² Maine thus reasoned that its tuition-aid program was an extension of its own system of public education, which must be nonsectarian under the Establishment Clause.³³ When it refused to extend its particular system for providing public education to religious private schools, the state asserted, it was not discriminating against religion at all; it was simply declining to provide a benefit it had never offered (and indeed could not offer) to anyone – a religious education.

The Supreme Court was unpersuaded. Writing for the 6-3 majority, Chief Justice Roberts wrote that the benefit Maine was providing was not a public education at all but rather “*tuition* at a public *or* private school, selected by the parent, with no suggestion that the ‘private school’ must somehow provide a ‘public’ education.”³⁴

In truth, the Chief had a point: Maine law described its program as offering “tuition . . . at the public school or the approved private school of the parent’s choice,”³⁵ and the participating private schools did not have to follow a host of

30. *Id.* at 2261.

31. ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (2021).

32. See *Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022); ‘*Education Options in the States: State Programs That Provide Financial Assistance for Attendance at Private Elementary or Secondary Schools*, U.S. DEP’T OF EDUC. (Feb. 2009), https://www2.ed.gov/parents/schools/choice/education-options/report_pg15.html [<https://perma.cc/CP95-CKS8>].

33. See ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (2021) (requiring participating private schools to be “nonsectarian in accordance with the First Amendment”); Brief of Respondent, *supra* note 10, at 1-2 (“The public benefit Maine is offering is a free public education.”); *Carson*, 142 S. Ct. at 2014 (Sotomayor, J., dissenting) (“As this Court has long recognized, the Establishment Clause requires that public education be secular and neutral as to religion.”).

34. *Carson*, 142 S. Ct. at 1998-99.

35. *Id.* at 1998 (quoting ME. REV. STAT. ANN. tit. 20-A, § 5204 (4)).

rules applicable to public schools. Most significantly, unlike public schools, the private schools eligible to receive Maine tuition aid did “not have to accept all students” and were “often *not* free”—meaning they lacked the quintessential characteristics of a public education.³⁶ The primary public-school rule they did have to follow was the requirement to be nonsectarian.

The Chief’s identification of factors that make an education public or private are important because they inform the likely outcome of future disputes. In *Carson*, the fact that the state was funding private schools that were free to charge additional tuition and deny enrollment to different students suggested that the benefit Maine was offering was truly a private-school tuition-aid program, not a public education. But in a potential future case involving religious litigants who wish to receive taxpayer funds under a public *charter-school* program—a possibility the dissent explicitly flagged³⁷—the same factors should lead to the opposite conclusion. For when states delegate their state constitutional duties to provide a public education to charter schools and fund them accordingly, the benefit they are funding is indeed a public education in the most significant respects: like traditional public schools, charter schools must not only be nonsectarian; they must also be free and open to all comers.³⁸ Thus, when states provide funding to charter schools, they truly are funding the particular benefit of a *public* education—and their refusal to fund religious schools does not offend the Free Exercise Clause.³⁹

In any event, Maine advanced a second argument for distinguishing its program from Montana’s, but the majority rejected it, too. In *Espinoza*, Montana had determined that the private school at issue was ineligible to participate based on its religious *status*—that is, its affiliation with a church or some other religious

36. *Id.* at 1999.

37. *Id.* at 2006 (Breyer, J., dissenting).

38. See, e.g., CAL. EDUC. CODE § 47605(e)(1)-(2) (West 2020) (requiring that charter schools “shall not charge tuition” and “shall admit all pupils who wish to attend”).

39. Professor Nicole Stelle Garnett has suggested otherwise, arguing that charter schools in many states should be viewed as providing a private rather than public education largely by borrowing the state-action doctrine from the distinct context of lawsuits brought by plaintiffs alleging constitutional violations against private entities. See Nicole Stelle Garnett, *Religious Charter Schools: Legally Permissible? Constitutionally Required?*, MANHATTAN INST. 8-10 (2020), <https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf> [<https://perma.cc/D3AZ-GVSA>]. But even assuming that the question of what kind of education a charter school provides—that is, a public or private one—should be controlled by the state-action doctrine, that doctrine suggests that charter schools are indeed state actors regarding their educational offerings. See *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 122 (4th Cir. 2022) (en banc) (concluding that charter schools are state actors).

entity.⁴⁰ The Court explicitly left open the question of whether a state could justify denying tuition aid to a private school based on whether the school would *use* those funds to provide religious instruction.⁴¹ So, Maine argued that its limitation was based on religious use rather than status.⁴²

Yet again, the majority was unmoved. Even if Maine were discriminating based on use rather than status, it reasoned, that would be just as “offensive to the Free Exercise Clause”⁴³ because “[e]ducating young people in their faith . . . lie[s] at the very core of the mission of a private religious school.”⁴⁴

The majority opinion was not all bad news for Maine and supporters of church/state separation. In an important paragraph, Chief Justice Roberts explicitly argued that “[t]he State retains a number of options” if it wishes to avoid funding religious education. It could eliminate its tuition-aid program altogether and “expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or . . . operate boarding schools of its own.”⁴⁵ But given that Maine hadn’t done so and had chosen instead to fund private education, “it cannot disqualify some private schools solely because they are religious.”⁴⁶

II. THE HARMS

Progressives have asserted three kinds of harms will follow from *Carson*: religious establishment, educational inequity, and LGBTQ discrimination. All three are serious and important; as a progressive (and former public-school teacher) myself, I hold a deep commitment to opposing all of them. Yet for reasons discussed below in Sections II.A and II.B, *Carson* does not necessarily impair the wall between church and state or efforts to improve educational opportunities for low-income children and children of color. The ruling does, though, endanger LGBTQ rights. However, it does so in a way that progressive lawmakers can quickly and effectively override. Section II.C discusses how Maine officials have done exactly that and proposes that other state legislatures follow suit.

40. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2256 (“The Montana Supreme Court applied the [State’s] no-aid provision solely by reference to religious status.”).

41. *Id.* at 2257 (“We acknowledge [the distinction between discrimination based on use or conduct and that based on status] but need not examine it here . . . [because Montana] discriminates based on religious status.”).

42. Brief of Respondent, *supra* note 10, at 35.

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

44. *Id.* (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020)).

45. *Id.* at 2000.

46. *Id.* (quoting *Espinoza*, 140 S. Ct. at 2261).

A. Church/State Separation

Carson v. Makin, one progressive commentator writes, threatens to “blow a significant new hole in the wall separating church and state.”⁴⁷ Because of the Court’s ruling, states will be “required to use taxpayer dollars to supplement strands of private religious education that many Americans would find deeply offensive.”⁴⁸ Or as the nation’s leading church/state-separation advocacy group puts it, *Carson* turns “America’s foundational principle of religious freedom on its head” by “requiring the government to fund religious education.”⁴⁹ This outcome is “revolutionary,” another commentator laments, and the stakes are “sky-high.”⁵⁰ Scholars have expressed similar concerns about the future of taxpayer-funded religious education.⁵¹

I understand the human instinct to worry about worst-case scenarios. It is an instinct to which I have succumbed myself, particularly regarding the Supreme Court’s rightward trajectory.⁵² But fears that *Carson* will require every state to fund religious private education are overblown. Maine was required to open up its tuition-aid program to religious private schools only because it had chosen to offer aid to secular private schools in the first place. So moving forward, Maine – and any other state that wishes to avoid its taxpayer dollars being

47. Ian Millhiser, *The Supreme Court Appears Really Eager to Force Taxpayers to Fund Religious Education*, VOX (Dec. 8, 2021, 2:00 PM EST), <https://www.vox.com/2021/12/8/22824027/supreme-court-carson-makin-first-amendment-religion-schools-subsidize-roberts-alito-kavanaugh> [https://perma.cc/4P2B-6ZGU].

48. Kimberley Wehle, *The Sleeper SCOTUS Case That Threatens the Separation of Church and State*, ATLANTIC (Oct. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/how-carson-v-makin-could-unravel-freedom-religion/620386> [https://perma.cc/D6F9-2PXU].

49. *After Arguments in Carson v. Makin, Americans United Calls Out Hypocrisy in Taxpayer Funding of Religious Education*, AMS. UNITED FOR SEPARATION OF CHURCH AND STATE (Dec. 8, 2021), <https://www.au.org/the-latest/press/scotus-maine-carson-makin-hypocrisy> [https://perma.cc/BWC4-38PD].

50. Mark Joseph Stern, *The Supreme Court Is Poised to Turbocharge ‘Religious Liberty’ Litigation*, SLATE (Dec. 9, 2021, 3:12 PM), <https://slate.com/news-and-politics/2021/12/carson-makin-supreme-court-religious-liberty.html> [https://perma.cc/43QX-NCZ3].

51. See, e.g., Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 293-95 (criticizing votes by Justices Breyer and Kagan to “appease” conservatives in *Trinity Lutheran* because “[t]he Roberts Court is engaged in a program to slowly but significantly rework Establishment Clause doctrine surrounding government funding,” including of religious schools).

52. See, e.g., Aaron Tang, *Just One Supreme Court Case Could Blow Up Unions, Child Protection and Anti-Discrimination Law*, WASH. POST (Mar. 18, 2021, 1:25 PM EDT), <https://www.washingtonpost.com/opinions/2021/03/18/supreme-court-case-could-devastate-unions-ability-organize-thats-just-start> [https://perma.cc/WW4T-ABB8].

used to fund religious private education—can simply refrain from subsidizing private education, period.

Twenty-two states currently do exactly that: they provide no taxpayer subsidy whatsoever to families for private-school tuition.⁵³ So if Maine decided to eliminate its tuition-aid program, it would hardly become an outlier. To be sure, that policy choice would create some administrative burden. A number of rural Maine school districts that currently offer no public high school to their residents would need to establish one or enter into a regional public-school compact with neighboring towns.⁵⁴ But there are good reasons to think this burden will be neither widespread nor insurmountable. In 2017–18, the most recent year for which Maine has made data available, only 4,546 students across the entire state used publicly funded tuition aid to attend a private school.⁵⁵ And just as importantly, if private schools find it feasible to operate and serve these students notwithstanding their remote geographic location, public-school districts can plausibly do the same.

Looking ahead, there is one way in which the Supreme Court could force every state to pay for religious inculcation. It could hold that a state's choice to offer its residents a free, secular public education without also offering all residents a free, religious private-school education constitutes discrimination in violation of the Free Exercise Clause.⁵⁶ That jarring possibility came up in oral argument in *Espinoza*,⁵⁷ but the attorney for the religious plaintiffs in *Espinoza*

53. The states are Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Oregon, Tennessee, Texas, Washington, West Virginia, and Wyoming. These states were identified by cross-referencing the Education Commission of the States' fifty-state tables for state voucher and tax-credit scholarship programs. See *50-State Comparison: Vouchers*, EDUC. COMM'N OF THE STATES (Mar. 2021) [hereinafter *50-State Voucher Comparison*], <https://reports.ecs.org/comparisons/vouchers-01> [<https://perma.cc/HH3Y-NFLB>]; *50-State Comparison: Scholarship Tax Credits*, EDUC. COMM'N OF THE STATES (Mar. 2021) [hereinafter *50-State Tax-Credit Comparison*], <https://reports.ecs.org/comparisons/scholarship-tax-credits-01> [<https://perma.cc/FU88-79GH>].

54. See ME. REV. STAT. ANN. tit. 20-A, §§ 2701, 5204(3) (2022) (authorizing school districts that do not operate public high schools to “contract with another school for school privileges,” including another public school).

55. Brief of Respondent, *supra* note 10, at 7.

56. Cf. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1047 (2013) (arguing that “states discriminate on the basis of religion when they administer secular public schools that are unpalatable to religious individuals” such that states must be “constitutionally obligated to give tuition vouchers to all students that they can use, if they wish, at the private school of their choice”).

57. Transcript of Oral Argument at 33, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195) (“[D]o you think the other side’s theory leads to a situation where the

disclaimed it.⁵⁸ More to the point, all five conservative Justices in the *Espinoza* majority explicitly rejected the argument, too, holding unequivocally that “[a] State need not subsidize private education.”⁵⁹ Maine and any other state that wishes not to fund religious instruction can simply take the Court up on that promise.⁶⁰

There is another problem with the argument that *Carson*’s outcome vitiates the wall between church and state. Recall the basic structure of Maine’s tuition-aid program: qualifying parents receive a state subsidy that they then choose how to utilize. Some parents will choose to use it to enroll their children in a secular educational program. Others will choose to enroll their children in a religious school. In *Zelman v. Simmons-Harris*, the Supreme Court held that a school-voucher program with this structure does not violate the principle of church/state separation.⁶¹ “[W]here a governmental aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice,” the Court wrote, such a program “is not readily subject to challenge under the Establishment Clause.”⁶²

Of course, some progressives might disagree with *Zelman* as a matter of first principles. On that view, merely *permitting* private persons to use government aid in a religious manner amounts to an impermissible establishment even if they are also free to use the aid in a secular fashion. But recent events call into question just how strongly progressives hold this view. For if this principle were truly a progressive article of faith, progressives would not have viewed *Carson*’s rewritten version of Maine’s tuition-aid program as the most significant religious establishment brought about in recent years. That dubious honor would belong instead to the American Rescue Plan Act of 2021 (ARPA)—a law passed with progressive support in both houses of Congress and signed by President Biden.⁶³

funding that goes to public schools . . . if they prevail, wouldn’t have to go to religious schools?”) (Roberts, C.J.).

58. *Id.* at 69 (“We are not arguing that the state couldn’t just fund public schools.”).

59. *Espinoza*, 140 S. Ct. at 2261.

60. To be sure, the current Court has broken its word before, so I do not want to be naive. See *Carson*, 142 S. Ct. at 2013 (Sotomayor, J., dissenting) (“[I]n just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.”). But it would be remarkable for the Court to hold that states are suddenly constitutionally required to fund religious private education given their longstanding operation of public schools.

61. 536 U.S. 639, 648 (2002).

62. *Id.* at 652.

63. See Mariam Khan, *House Democrats Pass \$1.9 Trillion COVID-19 Relief Bill, Handing Biden Major Victory*, ABC NEWS (Mar. 10, 2021), <https://abcnews.go.com/Politics/house-democrats->

One of the ARPA's most popular provisions was its expansion of the Child Tax Credit. The law raised the credit from \$2,000 to \$3,600 for each child under the age of six and from \$2,000 to \$3,000 for children ages six to sixteen at an overall cost to the federal government of \$110 billion.⁶⁴ Even more significantly, the law made the tax credit fully refundable: parents would receive the amount of the full tax credit *even if it exceeded their federal tax burden*. The Treasury Department estimated that this change would result in a new federal subsidy being paid out to low-income parents of more than twenty-six million children.⁶⁵ In effect, the ARPA created a new, federally funded parenthood benefit that recipient parents could spend however they saw fit.

After these tax-credit checks were issued, the Center on Budget Policy and Priorities surveyed families with incomes below \$35,000 on how they utilized the new federal benefit.⁶⁶ Forty percent of respondents reported that they used it to defray the costs of education, a category that included the cost of private-school tuition.⁶⁷ These respondents were not asked to specify whether they used the tax credit to pay for tuition at a religious or secular school, but given the lower average tuition cost of religious schools,⁶⁸ it is likely that many spent the new federal benefit at religious schools.

The upshot is that some meaningful number of the millions of families who received the fully refundable tax credit probably chose to spend it on tuition at a religious private school. Just like Maine's tuition-aid program, then, the ARPA provided a government benefit directly to families, who then made independent

pass-19-trillion-covid-19-relief/story?id=76327205 [https://perma.cc/Z8R4-TSBY] (noting that the American Rescue Plan Act (ARPA) was enacted with exclusively Democratic support).

64. See MARGOT L. CRANDALL-HOLICK, CONG. RSCH. SERV., IN11613, THE CHILD TAX CREDIT: TEMPORARY EXPANSION FOR 2021 UNDER THE AMERICAN RESCUE PLAN ACT OF 2021, at 2 (2021).
65. Press Release, U.S. Dep't Treasury, Treasury and IRS Announce Families of Nearly 60 Million Children Receive \$15 Billion in First Payments of Expanded and Newly Advanceable Child Tax Credit (July 15, 2021), <https://home.treasury.gov/news/press-releases/Treasury-and-IRS-Announce-Families-of-Nearly-60-Million-Children-Receive-%2415-Billion-Dollars-in-First-Payments-of-Expanded-and-Newly-Advanceable-Child-Tax-Credit> [https://perma.cc/4DLU-GA23].
66. Claire Zippel, 9 in 10 Families With Low Incomes Are Using Child Tax Credits to Pay for Necessities, Education, CTR. ON BUDGET AND POL'Y PRIORITIES (Oct. 21, 2021, 5:00 AM), <https://www.cbpp.org/blog/9-in-10-families-with-low-incomes-are-using-child-tax-credits-to-pay-for-necessities-education> [https://perma.cc/G8ZB-EJKR].
67. *Id.*
68. See Melanie Hanson, *Average Cost of Private School*, EDUC. DATA INITIATIVE (Dec. 27, 2021), <https://educationdata.org/average-cost-of-private-school> [https://perma.cc/4FT4-FKHB] (finding that the average private-school tuition rate in the United States is \$12,350 per year but that the average Catholic-school tuition rate is \$4,840 per year).

choices as to how to spend it. Some used their taxpayer-funded aid in secular ways, others in religious ones.

Yet despite this structural similarity, I am not aware of a single progressive raising a church/state-separation objection to the fact that parents could use the new, fully refundable Child Tax Credit to pay for religious instruction.⁶⁹ Progressives instead widely *applauded* the law. Vermont Senator Bernie Sanders called the ARPA “the most significant piece of legislation to benefit working people in the modern history of this country.”⁷⁰ White House Press Secretary Jen Psaki hailed it as “the most progressive piece of legislation in history.”⁷¹ Many pointed to the Child Tax Credit specifically as a crucial achievement. House Speaker Nancy Pelosi called the credit “transformative,”⁷² and Democratic leaders touted it in major ad blitzes in battleground states.⁷³ Perhaps these reactions reflect a reasonable belief that government-aid programs that leave individual families free to choose between religious and nonreligious uses do not actually batter the wall between church and state.

To be sure, one significant difference between the ARPA’s fully refundable Child Tax Credit and Maine’s tuition-aid program is that the former authorized a wider range of permissible secular uses. Thus, recipients used a significantly greater percentage of the tax credit on nonreligious ends such as food, shelter, and clothing. But for purposes of church/state separation, it’s not clear why the *proportion* of government aid that private individuals choose to use for religious ends is more significant than the *absolute amount*. Any other conclusion would

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69. Some progressives did complain that a different aspect of the ARPA, the Paycheck Protection Program, could be used by religious organizations seeking to obtain loans. *See, e.g., PPP Loans Should Fund Small Businesses, Not Religious Activities*, INTERFAITH ALL., <https://interfaithalliance.org/ppp-loans-should-fund-small-businesses-not-religious-activities> [https://perma.cc/2HZS-93HE]. That those same groups saw no similar problem with some parents choosing to use their tax credit for religious instruction is telling.
70. Bernie Sanders (@BernieSanders), TWITTER (Mar. 6, 2021, 12:45 PM), <https://twitter.com/BernieSanders/status/1368256311549435911> [https://perma.cc/3NQ4-8MT4].
71. *Press Briefing by Press Secretary Jen Psaki, Co-Chair of the Gender Policy Council and Chief of Staff to the First Lady Julissa Reynoso, and Co-Chair and Executive Director of the Gender Policy Council Jennifer Klein*, WHITE HOUSE (Mar. 8, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/03/08/press-briefing-by-press-secretary-jen-psaki-and-co-chairs-of-the-gender-policy-council-julissa-reynoso-and-jennifer-klein-march-8-2021> [https://perma.cc/KL6K-23W7].
72. Eric Bedner, *Nancy Pelosi, Area’s Top Democrats Praise Expanded Child Tax Credit*, J. INQUIRER (Sept. 9, 2021), https://www.journalinquirer.com/politics_and_government/nancy-pelosi-area-s-top-democrats-praise-expanded-child-tax-credit/article_a727ecfo-117c-11ec-b6df-e73a28259654.html [https://perma.cc/8CNR-LUHV].
73. Ken Doyle, *Democrats Tout Child Tax Credits with Ad Blitz in Key States*, BLOOMBERG (July 15, 2021, 11:12 AM EDT), <https://www.bloomberg.com/news/articles/2021-07-15/democrats-tout-child-tax-credits-in-ad-blitz-aimed-at-key-states> [https://perma.cc/BLV7-U7MF].

suggest that a small state-aid program that provides \$100 to individuals who then spend \$60 of this amount on religious uses is more problematic than another state program that gives \$100 million to private individuals who use \$40 million for religious purposes. In my view, the better takeaway is that providing families a financial benefit that they may freely choose to spend on secular or religious purposes is not especially problematic from an establishment perspective.

I pause here for one final caution about the limits of what I have argued. My argument is that *Carson*, on its own, does not eviscerate church/state-separation principles because it does not actually require any state to fund religious education. But *Carson* is not an outlier ruling. It is one piece of a broader movement away from mid-twentieth-century principles of church/state separation, a move Professors Richard Schragger and Micah Schwartzman have powerfully criticized as reflecting a certain form of “religious antiliberalism.”⁷⁴ I am persuaded by many of their concerns, in particular their worry about the growing “double-standard” under which an “equal treatment principle is being deployed in cases that benefit religious actors” (i.e., in cases like *Carson*) but “not where it works against them” (i.e., in the context of free-exercise claims where they seek special exemptions not available to secular actors).⁷⁵ Progressives must resist that double standard; the important question is how. To my mind, it is by treating religious groups neutrally with respect to *both* government-funding programs and generally applicable laws—which is to say, permitting them to participate on equal terms in the former but denying them preferential treatment under the latter. But if the latter half of that symmetrical bargain is taken off the table by a Court motivated to overrule *Employment Division v. Smith*—the case establishing that the Free Exercise Clause does not require exemptions from “neutral” and “generally applicable” laws⁷⁶—the first half should be off the table, too.

B. Educational Equity

Some progressives have identified a second kind of harm in *Carson*. The case is “the latest in a series of efforts to privatize education through the courts,” writes the progressive Alliance for Justice.⁷⁷ “Public money should go to public schools,” the Alliance continues, yet “[r]equiring Maine to foot the bill for these religious private schools will take desperately-needed money away from the

74. Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1343 (2020).

75. *Id.* at 1391.

76. 494 U.S. 872, 880 (1990); see also *infra* notes 109-112 (discussing *Smith*).

77. See Howe, *supra* note 8.

public schools.”⁷⁸ Leading scholars have questioned school-choice programs more generally for this very reason.⁷⁹

Just as I do with the church/state-separation claim, I wholeheartedly agree with what I take to be the core value that underlies this critique: that America must do more to ensure that all children, but especially low-income children and children of color, have access to high-quality educational opportunities. As Katy Joseph of the Interfaith Alliance puts it, “Robust funding and inclusive approaches to education are necessary to ensure that these vital institutions can meet the needs of every child that walks through their doors.”⁸⁰

The first problem with this critique, though, is that nothing about *Carson* actually jeopardizes funding for public education. As a result of the Court’s ruling, the grand total of money that will be taken away from any Maine public school and sent instead to a private school is \$0. This is true because of the particular way in which Maine’s tuition-aid program is designed: a family is only eligible to receive tuition aid *if there is no public high school in their school district*.⁸¹ To the extent Maine law disadvantages public education, it’s not through the tuition-aid program; it’s by allowing school districts to opt out of operating a public school in the first place.

I don’t want to make too big a point out of the Maine-specific response to the public-school-funding critique. Even though Maine itself does not divert resources from any public school through its tuition-aid law, other states surely do through school-choice programs. In theory, *Carson* might require some of those states to permit religious schools to receive public funds that would otherwise be channeled to the public-school system.⁸²

Even still, there is a more fundamental point for progressives when it comes to *Carson*’s educational-equity implications. The overarching progressive concern here ought to be advocating for Black and brown children and poor children to receive equitable educational opportunities vis-à-vis their white and more affluent peers. Sadly, the existing public system of K-12 education has not yet

78. *Id.*

79. See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1233 (2003) (noting the argument that “vouchers for private schools will drain needed resources and engaged families from the public school system”).

80. Press Release, Interfaith All., SCOTUS Must Affirm Public Money Is for Public Schools, Not Private, Religious Interests (Dec. 8, 2021), <http://www.interfaithalliance.org/carson-makin-oral-arguments> [https://perma.cc/PJ87-RSXR].

81. See ME. REV. STAT. ANN. tit. 20-A, § 5204(4) (2022).

82. *But see infra* notes 100-101 and accompanying text (showing that twenty-six of the twenty-nine jurisdictions with school-choice programs *voluntarily* allow religious schools to participate, independent of the Supreme Court’s rulings in *Carson* and *Espinoza*).

succeeded in providing these opportunities.⁸³ Seen in this light, the argument that *Carson* undermines educational equity by diverting funding away from public schools is deeply contingent. It is persuasive only to the extent that spending more money on public schools—rather than on private school-choice programs targeted at low-income and minority children—improves these students' educational prospects.

Progressives evaluating that question, though, often fall victim to the nirvana fallacy.⁸⁴ When we compare public schools to private schools in the context of voucher programs, we conjure up images of public schools at their best (i.e. places of inclusion that prepare all children for academic and economic success) and compare them to private schools at their worst (i.e. institutions that put profit above students' well-being).⁸⁵ No doubt there are some public schools serving disadvantaged populations that fit this idealized image just as there are some private schools for which the opposite image is accurate. But fascinatingly, progressives quickly embrace a negative—and often more realistic—picture of public schools in other contexts, such as in debates over structural racism, the school-to-prison pipeline, and the racial and economic achievement gap.⁸⁶

My point here is not that public schools are all bad or that they are all good but rather that public schools are but a means to a crucial end: equitable educational opportunities for children of color and low-income children.⁸⁷ Whether public schools are the *best* means to that end is a question of empirical fact, not a question of subjectively held values or blind assumptions. And when considered

83. See Aaron Tang, *The Radical-Incremental Change Debate, Racial Justice, and the Political Economy of Teachers' Choice*, 169 U. PA. L. REV. ONLINE 186, 188 n.8 (2021) (collecting sources).

84. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (criticizing the practice of comparing “an ideal norm and an existing ‘imperfect’ institutional arrangement” as a fallacious “nirvana approach” to policy debate (emphasis omitted)).

85. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2083 (2002) (observing that most voucher programs offer “fairly modest” amounts of tuition aid such that they are “not designed to provide poor students the opportunity to attend elite private schools”).

86. See, e.g., Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 770-71 (2017) (criticizing public schools with high percentages of students of color for relying too much on “strict security measures”); DEREK W. BLACK, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* 12-14 (2016) (criticizing racial disparities in public-school zero-tolerance policies).

87. Others have referred to this approach to educational equity as “sector agnosticism,” or the view that the means of delivering education (whether through traditional public schools, charter schools, or private schools) is less important than the educational well-being of disadvantaged children. See Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 5 (2017); ANDY SMARICK, *THE URBAN SCHOOL SYSTEM OF THE FUTURE*, at xx (2012) (describing sector agnosticism as “complete ambivalence about who runs a great school and with which sector it is associated”).

evenhandedly, the evidence does not support the anti-school-choice picture that progressives often portray.

As an initial matter, the evidence is mixed as to whether the low-income and minority students who actually use school vouchers experience better academic outcomes in their private schools. Four recent studies have found statistically significant negative effects for voucher users on standardized test scores, but several earlier studies found statistically significant positive effects for Black students as a distinct subgroup.⁸⁸ Other studies have shown either no effect or a positive effect on different outcomes, such as voucher users' likelihood of obtaining a high-school diploma or enrolling in college.⁸⁹ Studies also generally find that vouchers lead to higher parental satisfaction.⁹⁰

But students who use state funds to enroll in private schools aren't the only ones affected by voucher programs. One of the core arguments that voucher opponents advance is that voucher programs drain public schools of resources, thereby reducing the quality of education that is offered to the non-voucher-using students who remain behind.⁹¹ This claim, too, is subject to empirical assessment. And on this score, the evidence may surprise many progressives: a recent meta-analysis of the literature found that “[v]irtually all of the[] studies” analyzing the impact of voucher programs on public-school performance “find that public-school achievement increases with the intensity of treatment.”⁹² The evidence about vouchers may be mixed for students who use them, but it is clear for those who don't: voucher programs exert positive competitive pressure on public schools.

All of these data lead to a broader conclusion: even if *Carson* did help divert money from public to private schools—a dubious proposition to begin with—that fact alone tells us little about the crucial progressive concern for educational equity. To the extent that school-choice programs actually positively influence public schools serving low-income and minority children, progressives would be mistaken to oppose them out of an uncritical opposition to private schools as a sector. Perhaps time and additional research will show that low-income children

88. See Tang, *supra* note 28, at 387-88 & nn.239-41.

89. *Id.* at 389 & nn.246-49.

90. *Id.* at 389 & n.250.

91. See *id.* at 356-57 (describing this argument).

92. Dennis Epple, Richard E. Romano & Miguel Urquiola, *School Vouchers: A Survey of the Economics Literature*, 55 J. ECON. LITERATURE 441, 478 (2017); see also Patrick J. Wolf, *Programs Benefit Disadvantaged Students*, EDUC. NEXT (Spring 2018), <https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice> [<https://perma.cc/LD8V-UC3E>] (finding that fifteen studies have “report[ed] consistently positive results” from voucher competition for “students remaining in public schools,” six have reported neutral to positive effects, one has reported no effect, and zero have found negative effects).

and children of color do better in the absence of any publicly funded private-school alternatives. As a graduate of Ohio public schools, a former public-school teacher, and the parent of a child enrolled in a public elementary school, that is certainly my hope. At present, though, progressives who assume that view risk hurting the very children whose educational futures we seek to improve.⁹³

C. *LGBTQ Rights*

A third kind of harm created by *Carson v. Makin* is far more troubling. Some of the religious schools that may receive public funding after *Carson* openly discriminate against LGBTQ students.⁹⁴ Bangor Christian School, discussed in the introduction, is one example.⁹⁵ Temple Academy, where a second set of plaintiffs in *Carson* sought to enroll their children,⁹⁶ is another. As Temple Academy's head of school openly admitted, "Temple Academy will not admit a student who is homosexual" or transgender.⁹⁷

Carson's net result is thus that taxpayer dollars bearing the state's imprimatur may be used to support discrimination against an already-vulnerable student population. LGBTQ children are attacked in our society, which all too often denies their right to exist on equal terms. For example, Texas Governor Greg

93. In being open to evidence that modern-day voucher programs may improve the plight of children of color and poor children, I do not mean to paper over the considerable historical evidence that these private-choice programs grew out of the desire by white segregationists to evade *Brown v. Board of Education*. See, e.g., Isabelle M. Canaan, *Original Sin: The Use and Abuse of History in Espinoza and Beyond*, 22 RUTGERS J.L. & RELIGION 314, 329 (2022) (describing this history); Steve Suits, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, S. SPACES (June 4, 2019), <https://southernspaces.org/2019/segregationists-libertarians-and-modern-school-choice-movement> [https://perma.cc/XDH4-W273] (discussing how school choice and vouchers were used as segregationist tools). We must be aware of that history so that we can avoid repeating it.

At the same time, we cannot allow history to block meaningful modern-day efforts to improve educational equity if empirical evidence comes to support it. And we should be aware of competing narratives around the history of school choice. See, e.g., James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1312-13 (2005) ("[T]he history of school choice is substantially more complicated than we have traditionally understood. Progressives have proposed a variety of school choice schemes, and this lesser-known heritage is at least as important as . . . the conservative anti-desegregation movement.").

94. To be clear, if a secular school were to discriminate against LGBTQ students, that would be every bit as offensive to Maine's overriding interest in protecting such children. However, I am unaware of any such secular school in Maine.

95. See *supra* text accompanying notes 14-18.

96. Brief for Petitioners, *supra* note 14, at 6.

97. Joint Appendix, *supra* note 15, at 95 (citing declaration of Denise LaFountain, Temple Academy's head of school).

Abbott recently called for the Texas Department of Family and Protective Services to investigate parents for child abuse if they provide gender-affirming care,⁹⁸ and Florida passed a law banning classroom discussion of sexual orientation and gender identity.⁹⁹ The Court's decision, viewed against this backdrop, is especially troubling for LGBTQ rights.

When we evaluate the Court's role in this broader problem, though, we must be clear about *Carson's* surprisingly limited scope. The point is not to minimize the rampant problem of societal discrimination against LGBTQ youth; it is to be clear about the problem's source. After all, if broader societal bigotry and our broken politics are to blame, then railing against *Carson* and the Court's conservative supermajority might distract us from the real root cause.

Twenty-eight states and Washington, D.C., currently provide some form of publicly funded aid to students to attend K-12 private schools.¹⁰⁰ Of those twenty-nine jurisdictions, twenty-six voluntarily permit religious schools to accept public funds independent of any Supreme Court ruling.¹⁰¹ The high

98. See Letter from Gov. Greg Abbott to Jaime Masters, Comm'r, Tex. Dep't of Fam. and Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> [<https://perma.cc/EP2F-A6VB>].

99. Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NAT'L PUB. RADIO (Mar. 28, 2022), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/5ZXH-Y77F>].

100. These twenty-nine jurisdictions compose all states with voucher, neovoucher, and town-tuitioning programs like Maine's. See *50-State Voucher Comparison*, *supra* note 53; *50-State Tax-Credit Comparison*, *supra* note 53.

101. See *Participating Schools*, SCHOLARSHIPS FOR KIDS, <https://alabama.eresources.ws/schools.html> [<https://perma.cc/38WM-ML2Y>] (including multiple religious schools among Alabama private schools participating in the state's school-choice program); *Approved Schools*, ARIZ. PRIV. SCH. TUITION ORG., <https://apsto.org/SchoolList> [<https://perma.cc/Z7CK-PZYP>] (same for Arizona); Div. of Elementary & Secondary Educ., *Succeed Scholarship*, ARK. DEP'T OF EDUC., <https://dese.ade.arkansas.gov/Offices/special-education/policy-regulations/succeed-scholarship> [<https://perma.cc/FN84-DDTC>] (same for Arkansas); *Participating School Directory—D.C. Opportunity Scholarship Program*, SERVING OUR CHILD. (Sept. 2021), <https://servingourchildrencdc.org/wp-content/uploads/2021/09/SDirectory-Updated-21-22-Final-Done.pdf> [<https://perma.cc/ASA8-89V4>] (same for Washington, D.C.); *Florida's Voucher Program: Data Snapshot and List of Participating Schools*, EDUC. WEEK, <https://www.edweek.org/policy-politics/floridas-voucher-program-data-snapshot-and-list-of-participating-schools> [<https://perma.cc/48MD-239E>] (same for Florida); *Participating Schools*, GA. GOAL SCHOLARSHIP PROGRAM, https://www.goalscholarship.org/participating_schools [<https://perma.cc/4HMH-7ZF2>] (same for Georgia); *School Choice in Illinois*, NAT'L SCH. CHOICE WEEK (2022), https://schoolchoiceweek.com/wp-content/uploads/2022/01/2022_IL_Snapshot.pdf [<https://perma.cc/M66A-XY2F>] (same for Illinois); *2021-22 Participating Choice Schools*, IND. DEP'T OF EDUC., <https://www.in.gov/doe/students/indiana-choice-scholarship-program/2021-2022-participating-choice-schools> [<https://perma.cc/X84S-U7LQ>] (same for Indiana); *Participating STOs*, IOWASTO.ORG, <https://www.iowasto.org/participating-stos> [<https://perma.cc/FX8P-ZLFA>] (same for

Iowa); *Participating Qualified Schools*, KAN. STATE DEP'T OF EDUC., <https://www.ksde.org/Agency/Fiscal-and-Administrative-Services/School-Finance/Tax-Credit-for-Low-Income-Students-Scholarship-Program> (choose “Participating Qualified Schools” under “Program Information”) (same for Kansas); *Participating Schools*, ASPIRING SCHOLARS, <https://aspiringscholarsla.org/participating-schools> [<https://perma.cc/Y6BN-GHE3>] (same for Louisiana); *Resources*, MD. BOOST SCHOLARSHIP COAL., <https://www.marylandboost.org/resources> [<https://perma.cc/4FVF-AW73>] (same for Maryland); Joint Comm. on Performance Evaluation and Expenditure Rev., *2020 Statutory Review of Mississippi's Education Scholarship Account Program*, MISS. LEG. 50-51, <https://www.peer.ms.gov/Reports/reports/rpt649.pdf> [<https://perma.cc/FNZ3-ME3X>] (same for Mississippi); *2021-2022 Registered Schools Opportunity Scholarship*, NEV. DEP'T OF EDUC. (Mar. 23, 2021), https://doe.nv.gov/uploadedFiles/ndedoenvgov/content/Private_Schools/Scholarship_Grants/RegisteredSchoolsrev1.pdf [<https://perma.cc/32XG-XRS4>] (same for Nevada); *Partner Schools*, GIVING GOING ALL., <http://givinggoingalliance.org/partner-schools> [<https://perma.cc/4RWH-MJ3M>] (same for New Hampshire); *K12 Programs: Participating Nonpublic Schools*, N.C. STATE EDUC. ASSISTANCE AUTH. (July 25, 2022), <https://myportal.ncseaa.edu/NC/NonpublicSchools.aspx> [<https://perma.cc/33G8-MGTD>] (same for North Carolina); *Cleveland Scholarship*, OHIO DEP'T OF EDUC., <https://scholarship.ode.state.oh.us/Provider> (click “Select Program” on the left; then choose “Cleveland Scholarship”); *Our Member Schools*, OPPORTUNITY SCHOLARSHIP FUND OKLA., <http://osfkids.org/list-of-schools> [<https://perma.cc/LZA7-RPX5>] (same for Oklahoma); *Opportunity School Tax Credit Program Participating Schools*, PA. DEP'T OF EDUC., <https://www.education.pa.gov/K-12/Opportunity%20Scholarship%20Tax%20Credit%20Program/Pages/OSTCPParticipatingSchools.aspx> [<https://perma.cc/F633-3DHS>] (choose any county) (same for Pennsylvania); *SGOS*, R.I. SCHOLARSHIP ALL., <https://rischolarshipalliance.org/sgos> [<https://perma.cc/J3ZT-2WZZ>] (same for Rhode Island); *Educational Credit for Exceptional Needs Children's Fund (ECENC) – Act 247*, S.C. EDUC. OVERSIGHT COMM. (May 20, 2021), <https://eoc.sc.gov/sites/default/files/Documents/ECENC%202021/Act%20247%20List%20of%20Qualifying%20Schools%20C%202021-22%20as%20of%20May%2020%20C%202021.pdf> [<https://perma.cc/T5Y9-XYQT>] (same for South Carolina); *Participating Schools*, S.D. PARTNERS IN EDUC., <https://sdpartnersinedu.org/about/schools> [<https://perma.cc/manage/create?folder=4028>] (same for South Dakota); *2022-2023 Carson Smith Eligible Private School Contact List*, UTAH STATE BD. OF EDUC., <https://www.schools.utah.gov/file/fo77fcc5-3cbe-423a-9b8f-c547e54efd6b> [<https://perma.cc/ZA9T-D9VY>] (same for Utah); Educ. Improvement Scholarships Tax Credits Program, *List of Approved Scholarship Foundations*, VA. DEP'T OF EDUC., https://www.doe.virginia.gov/school_finance/scholarships_tax_credits/approved-scholarship-foundations.docx [<https://perma.cc/62VL-7SZT>] (same for Virginia); *Participating Schools – WI*, CHOOSE YOUR SCHOOL WIS., <https://www.chooseyour-schoolwi.org/wisconsin-participating-schools> [<https://perma.cc/DBS4-5WGQ>] (same for Wisconsin).

Note that the twenty-sixth state, Kentucky, enacted a tax-credit scholarship program that permitted religious-school participation, but the program was enjoined by a state court ruling based on a state constitutional amendment preventing state tax dollars from being used at *any* private school. See Jess Clark, *Judge Rules Tax-Credit Scholarship Program Violates KY. Constitution*, WFPL NEWS, (Oct. 8, 2021), <https://wfpl.org/judge-rules-tax-credit-scholarship-program-violates-ky-constitution> [<https://perma.cc/HC4A-PXA6>]; see also KY. CONST. § 184 (requiring that state funds “shall be held inviolate for the purpose of sustaining the system of common schools”).

correlation is unsurprising; the same conservative voters who generally favor school-choice policies are also likely to favor religious-school participation.

With just two notable exceptions,¹⁰² none of these twenty-six states prohibit participating private schools from discriminating against students based on sexual orientation or transgender identity, at least through their respective antidiscrimination statutes.¹⁰³ Surprisingly, statutory protections against LGBTQ discrimination in private schools are lacking even in a handful of progressive-leaning states with school-choice programs, such as Illinois and Nevada.¹⁰⁴

The lack of legal protections for LGBTQ students is deeply concerning and deserves a progressive policy intervention. But because these twenty-six states *voluntarily* provided state funds to discriminatory private schools before *Carson*, the Supreme Court did not create the problem. Put another way, even if *Carson* had come out in Maine's favor, taxpayer funds could still be used to subsidize anti-LGBTQ discrimination in the twenty-six states. Fixing that problem has always required a state or federal legislative response, not a ruling by the Supreme Court.¹⁰⁵

That said, the Supreme Court *did* create an LGBTQ-rights problem in three other states. *Carson* itself struck down Maine's limits on public funds being sent

102. The two exceptions are Maine itself, *see infra* notes 107-108, and Maryland, which enacted a ban on gender-identity and sexual-orientation discrimination by any "nonpublic primary or secondary school that receives State funds" on May 29, 2022. *See* H. B. 850, 444th Gen. Assemb., Reg. Sess. (Md. 2022). Note that a federal district court recently held that Maryland's application of a preexisting regulation to deny voucher participation to a religious private school violated the school's right to free speech. *See Bethel Ministries, Inc. v. Salmon*, No. SAG-19-1853, 2022 WL 111164, at *5 (D. Md. Jan. 12, 2022). That ruling, however, cast no doubt on the State's ability "to prevent [voucher]-participating schools from engaging in discriminatory conduct." *Id.* The State's mistake was instead to punish the religious private school for expressing its religious views in its handbook even though such speech was consistent with its obligation not to discriminate against students based on sexual orientation or gender identity. *Id.*

103. *See* Suzanne E. Eckes, Julie Mead & Jessica Ulm, *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. EDUC. 537, 553-54 (2016).

104. Note that the Republican-controlled New Hampshire legislature voted down a similar bill last year. *See* Ethan Dewitt, *Bill to Expand Anti-Discrimination Statute to Private Schools Hits Opposition*, N.H. BULL. (Feb. 22, 2022), <https://newhampshirebulletin.com/briefs/bill-to-expand-anti-discrimination-statute-to-private-schools-hits-opposition> [<https://perma.cc/52XA-KH77>].

105. To be certain, had the Court not permitted vouchers to be used at religious schools in *Zelman v. Simmons Harris*, much of this problem would not have materialized. *See supra* notes 61-62. Even in that counterfactual world, however, state voucher funds in socially conservative states might still be used at *secular* private schools that discriminate against LGBTQ students. And more fundamentally, for the reasons described above, *see supra* Section II.A, individual families' choosing whether to spend a public benefit (like the expanded Child Tax Credit) on a secular or religious end likely does not amount to an establishment violation.

to discriminatory private schools like Bangor Christian Schools and Temple Academy. And *Espinoza* led to the same outcome in Montana and Vermont.¹⁰⁶ Because of the Court, students in these three states may now be denied enrollment in a state-funded private school because of their sexual orientation or gender identity.

That brings us to the most impactful point of this Essay: progressives can counteract this troubling development by enacting new legislation. More specifically, progressives can amend existing state antidiscrimination laws to prohibit any private school that receives state funding—whether it is secular or religious—from discriminating based on a student’s sexual orientation or gender identity.

That, it turns out, is exactly what Maine’s lawmakers did back in June 2021, even as *Carson* was pending on the Court’s docket. When the Court granted certiorari in the case, Maine’s antidiscrimination law did not afford LGBTQ youth any protections against discrimination by a religious school. While the state’s Human Rights Act (HRA) did forbid sexual-orientation discrimination by educational institutions (though not gender-identity discrimination), the HRA also exempted “any education facility owned, controlled or operated by a bona fide religious corporation, association or society” from that ban.¹⁰⁷ So progressive legislators enacted a new bill adding gender identity to the HRA’s list of protected characteristics and narrowing the exemption to only those religious schools that “do[] not receive public funding.”¹⁰⁸

The net result is that under Maine’s newly amended HRA, religious private schools that accept public funding are treated precisely the same as secular ones: *no* such school can discriminate against a student based on their sexual orientation or gender identity. This uniform approach makes sense as a matter of public policy since anti-LGBTQ discrimination is abhorrent no matter where it occurs. This approach is also sound as a matter of constitutional law because settled free-exercise doctrine provides that a neutral rule of general applicability passes muster.¹⁰⁹

That said, the Court has recently shifted its free-exercise doctrine to afford greater protection to religious claimants by embracing a narrower conception of what counts as a generally applicable law, deeming even a single instance of more

^{106.} After the Court decided *Espinoza*, the Second Circuit issued a writ of mandamus requiring Vermont school authorities to permit a religious school to participate in its town-tuition program, which is substantially similar to Maine’s. See *In re A.H.*, 999 F.3d 98, 101 (2d Cir. 2021).

^{107.} ME. REV. STAT. ANN. tit. 5, § 4602(4) (2020).

^{108.} *Id.* § 4602(5)(C) (2022).

^{109.} *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990).

favorable treatment for a secular activity sufficient to trigger strict scrutiny.¹¹⁰ However, Maine's law treats every secular private school identically to how it treats religious schools that accept public funding with zero exceptions: no such school may discriminate against LGBTQ youth under any circumstance. So, the law should be permissible under existing free-exercise doctrine. Of course, the Court may someday overturn *Smith* and grant religious institutions exemptions from even a genuinely neutral law.¹¹¹ That is a harrowing possibility and one that would deserve vehement progressive opposition.¹¹² Without such a revolution, though, Maine's amendment to its HRA is a constitutional way to eliminate *Carson's* harmful consequences for LGBTQ youth.

Maine's legislative response should serve as a powerful model to progressive lawmakers elsewhere. Vermont lawmakers considered a bill earlier this year that would have required any private school wishing to participate in its tuition-aid program to comply with state antidiscrimination law on equal terms with Vermont public schools, including a ban against discrimination based on sexual orientation or gender identity.¹¹³ The bill passed in the Vermont Senate but stalled in the House as lawmakers awaited the Court's decision in *Carson*; they should act swiftly to enact it in their next legislative session.¹¹⁴ Montana is, admittedly, a tougher slog. Its antidiscrimination law does not yet include any LGBTQ protections, and the state's political climate makes this kind of change difficult to

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110. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”).
111. Three Justices have already subscribed to this position. See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in the judgment). *But see id.* at 1882-83 (Barrett, J., joined by Kavanaugh, J., concurring) (expressing skepticism “about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime”).
112. See, e.g., Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 2020-2021 AM. CONST. SOC'Y SUP. CT. REV. 221, 224 (2021) (“If the Free Exercise Clause strenuously protects all religiously motivated practices, and if believers get to self-identify which of their practices are religiously motivated, the clause becomes a ticket to override virtually all government policy.”); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2403 (2021) (criticizing the Court's weakening of *Employment Division v. Smith* insofar as it is “in the service of a problematic political program”).
113. See S.B. 219, 2022 Gen. Assemb., Reg. Sess. § 820(a)(1)(B)(i) (Vt. 2022); 9 VT. STAT. ANN. tit. 9, § 4502(a) (2022) (forbidding discrimination based on sexual orientation or gender identity).
114. See Riley Robinson & Peter D'Auria, *The Deeper Dig: Why Vermont's 150-Year-Old School Tuition System Might Have to Change*, VTDIGGER (July 1, 2022), <https://vtdigger.org/2022/07/01/the-deeper-dig-why-vermonts-150-year-old-school-tuition-system-might-have-to-change> [<https://perma.cc/VH36-ZDLS>].

obtain—to say nothing of applying such a ban to religious schools.¹¹⁵ In that sense, then, LGBTQ youth in Montana might well be the lasting victims of the Court's decisions in *Espinoza* and *Carson*.

But progressives have already begun to make up ground elsewhere. Shortly before *Carson* was decided, Maryland lawmakers enacted a bill that, like Maine's, prohibits any “nonpublic primary or secondary school that receives state funds” from discriminating based on “sexual orientation [or] gender identity.”¹¹⁶ Progressive legislators in Nevada and Illinois, where state officials allow religious private schools to participate in existing school-choice programs, should support such legislation, too.

In other words, *Carson* may have been responsible for a modest number of additional students facing the very real—and very harmful—threat of discrimination. But there is no reason for the progressive response to be modest, too. No state (and certainly no progressive state) should allow its taxpayer funds to subsidize discrimination against LGBTQ youth, period. If *Carson* is the spark that brings about this much-needed policy reform, progressives will have won a meaningful victory in the face of a major Supreme Court defeat.

CONCLUSION

As the Supreme Court's conservative supermajority veers the law further and further to the right, it is understandable that some progressives might react with a sense of helplessness. It is also understandable why others might go in the opposite direction and assail the Court itself, perhaps to the point of calling for structural court reform.¹¹⁷

Carson v. Makin—and Maine's progressive legislative response to it—suggests another potential path forward. Sometimes, the best thing progressives can do after a Supreme Court defeat is to make the defeat irrelevant. This kind of answer is especially promising when the adverse decision at issue invalidates a progressive state law. For in such cases, progressive lawmakers can often enact other measures to protect important public interests.

115. See *Non-Discrimination Ordinances*, ACLU OF MONT., <https://www.aclumontana.org/en/non-discrimination-ordinances> [<https://perma.cc/7RKA-ZKYJ>] (describing a lack of protections against LGBTQ discrimination in state law).

116. H. B. 850, 444th Gen. Assemb., Reg. Sess. (Md. 2022).

117. I have suggested as much myself in other work. See, e.g., Aaron Tang, Opinion, (*Threaten*) to *Pack the Court*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html#tang> [<https://perma.cc/G4TT-P2SQ>].

These options won't be available in every progressive defeat, of course. When the Court emasculates federal voting-rights legislation¹¹⁸ or upholds a conservative state law undermining established constitutional rights,¹¹⁹ powerful veto gates (e.g., the Senate filibuster) and harsh state political climates (e.g., Texas) may make progressive legislative responses infinitely more difficult to enact. These, then, are the cases in which progressives should let their fury rain down upon the Court like fire.

We should distinguish between these two kinds of cases – defeats that progressives can easily mitigate through effective lawmaking and defeats they cannot. Drawing this distinction can be useful for reasons beyond mapping out a post-defeat strategy. It can also inform our intuitions about judging in the first instance, particularly in the hard cases that divide our society. For if some block-buster defeats are actually more tolerable to losing groups than others, precisely because of the availability of post-defeat options for the losing side, then perhaps that is a ground of decision the Court should rely on explicitly if it wishes to avoid all-out losers and protect its institutional legitimacy. I've argued elsewhere that the Court has done exactly that in a surprising (but sadly far from consistent) set of cases using a "least harm principle" that minimizes the harms its decisions inflict by ruling against the side with the greatest ability to protect its interests.¹²⁰

Carson is consistent with this principle: even as it ruled against progressive causes, it left ample alternatives for progressives to protect them. Progressives shouldn't be happy that the Court ruled against us, not by any means. But as Maine's lawmakers have demonstrated, neither should we let our anger blind us to productive responses. That, in the end, is *Carson's* most telling lesson. Sometimes, the best way to answer today's conservative Supreme Court is with good, old-fashioned progressive lawmaking.

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118. See, e.g., *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021) (holding that Section 2 of the Voting Rights Act did not prohibit a pair of Arizona laws that disproportionately burdened minority voters).

119. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

120. See Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4081462> [<https://perma.cc/R5MF-PUNY>]; Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1854, 1878-79 (2021).