CARSON V. MAKIN AND THE RELATIVITY OF RELIGIOUS NEUTRALITY

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For years, religious education has produced controversies about law and religion. On the one hand, government support for or endorsement of religious education was the paradigm case for Establishment Clause violations in the mid-twentieth century.[2] On the other hand, government discrimination against religious believers on the basis of their faith has long been a paradigm case for a Free Exercise violation.[3] The Supreme Court has taken many cases in which these two principles are in apparent tension. Throughout this long line of cases, the idea of "neutrality" appears repeatedly. In the latest decision in this line, *Carson v. Makin*,[4] the majority and the dissent both claim to defend the true tradition of neutrality. But what each thinks neutrality means is quite different. The disagreement reveals the limits of neutrality as a guiding principle for Religion Clause jurisprudence.

I. THE CASE

Over the years, school funding programs have created many opportunities to test the limits of the Religion Clauses. *Carson v. Makin* presents some of those familiar issues with a twist: the necessity of a school choice was, in a sense, forced upon parents. The case arose in Maine. A large percentage of the state is rural and sparsely inhabited. This creates challenges for the state's "school administrative units."[5] Less than half of these "school administrative units" have a secondary school (high school) of their own.[6]

To help parents navigate the challenge of not having a local high school, the state of Maine offers tuition funds to parents to cover the expenses of enrolling their children in private high schools of the parents' choice.[7]

But Maine's high school funding program excluded "sectarian" schools from eligibility under the program.[8] Parents who wanted to enroll their high-school-age children in religious high

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[2] *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962) (holding that school-sponsored prayer in public schools violated the First Amendment); *School Dist. Of Abington v. Schempp*, 374 U.S. 203 (1963) (holding unconstitutional school-sponsored Bible reading before class).

[3] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[4] 142 S.Ct. 1987 (2022).

[5] *Carson*, 142 S.Ct. at 1993.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 1994.

schools couldn't receive any of the state funding—funding that would have been provided freely had the students been enrolled in nonreligious schools.

The plaintiffs in *Carson v. Makin* were two couples, both parents of high school students, who wanted to enroll their children in religious schools.[9] They sued the state, arguing that Maine was engaged in religious discrimination by refusing to make the tuition awards available to them simply on the ground that their children were attending religious schools.[10]

Presented this way, the case appeared to be an easy one. In 2017, the Supreme Court held in *Trinity Lutheran* that the Free Exercise Clause prohibited the state of Missouri from discriminating against religious schools when it made funding grants to improve school playgrounds available to private schools generally.[11] And in 2020, the Supreme Court held in *Espinoza* that the state of Montana's prohibition on using scholarship funds to pay for education at religious schools violated Free Exercise Clause.[12] Surely Maine's prohibition on using the tuition funds for religious schools of the parents' own choosing would also violate the Free Exercise Clause.

But the First Circuit thought otherwise. It looked to *Locke v. Davey*, a 2004 case in which the Supreme Court held that the government could exclude students "pursuing a degree in devotional theology" from an otherwise generally-available state scholarship program.[13] There is potential for "tension" between the Religion Clauses, the Court opined, and there is also "play in the joints" in which states could address the tension in different ways.[14] It was fine—and not a Free Exercise problem—for a state to avoid an Establishment Clause problem by excluding this kind of exclusion of religious programs.[15] The First Circuit thought that *Locke* provided the right framework for evaluating the Maine program. It noted with approval that the Maine legislature had rested its policy "on its 'interest in maintaining a religiously neutral public education system in which religious preference is not a factor.'"[16] It distinguished *Trinity Lutheran* and *Espinoza* on the ground that those cases prohibited discrimination on the basis of religious status but permitted limits on funds going to religious uses.[17] The religious school in *Trinity Lutheran* couldn't be excluded from funding because it was religious, but the government could limit funding from supporting training in ministry, as in *Locke*. The First Circuit reasoned that the Maine program was more like *Locke*.[18]

Yet for the six-justice majority at the Supreme Court, the right frame of reference was *Trinity Lutheran* and *Espinoza*. According to Chief Justice Roberts, writing for the majority, Maine was not being neutral when it singled out religion as the characteristic that would disqualify a school from being eligible to receive public funds.[19] Writing for the dissent, Justice Breyer took the opposite tack with the same concept, neutrality. The state, he argued, would be best able to

[9] *Id.*
[10] *Id.* at 1996.
[11] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[12] Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020).
[13] Locke v. Davey, 540 U.S. 712, 715 (2004).
[14] *Id.* at 718–19.
[15] *Id.* at 724.
[16] Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 42 (1st Cir. 2020).
[17] *Id.* at 33–35.
[18] *Id.* at 44–46.
[19] Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1998 (2022).

maintain a stance of neutrality, of being above or beyond the fray of religious sectarianism, if it is permitted to exclude religious educational institutions from public funding programs.[20]

Of course, each side had to do a bit of finagling the precedent, since neither urged any overruling. The majority managed to preserve *Locke* by insisting that it wasn't an exclusion from a generally applicable grant program on the basis of religion, but was just a permissible decision by the state not to fund certain vocations. The dissent tried to reconcile its analysis with prior nondiscrimination cases by insisting that the Maine program was different in that it guaranteed a public education, which was effectively the same as guaranteeing a secular education.

II. THE RELATIVITY OF NEUTRALITY

For decades, "neutrality" has been one of the recurring touchstones of Religion Clause jurisprudence and scholarship.[21] "In the relationship between man and religion, the State is firmly committed to a position of neutrality," the Supreme Court proclaimed in 1963.[22] But neutrality has been a protean concept, having been used both as a justification for strict separation and as a critique of religion-excluding policies.

Neutrality's protean character is on display again in *Carson*. The rhetoric of neutrality is powerful. Courts are deeply enmeshed in a tradition in which law is "neutral" in the sense of being impartial, unbiased, evenhanded, and fair. Courts are not supposed to prejudge issues. More broadly, a kind of evenhandedness is a fundamental component of rule of law norms. Laws that favor special interests are automatically suspect in the eyes of the public (even if the level of scrutiny to which they are constitutionally subjected has varied over time!). General applicability is a norm of lawmaking Constitution prohibits laws that prospectively target individuals rather than being generally applicable (e.g., bills of attainder).

In short, no position in American law benefits from being characterized as non-neutral. The position that seems to have the better claim on neutrality effectively seizes the rhetorical high ground.[23]

Both scholars and judges have argued (or at least assumed) that neutrality has special purchase in the domain of the Religion Clauses. The story told here is simple but compelling: governments have created social discord whenever they take sides in religious disputes. They have enforced conformity with a dominant religion and suppressed and persecuted dissent. In doing so, they have made religion into a point of political division, a motivation for political

[20] *Id.* at 2010 (Breyer, J., dissenting).

[21] For samples from an extensive literature and caselaw, *see, e.g.*, JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 289 (2005); Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1099–1101 (2006); R. George Wright, *Can We Make Sense of "Neutrality" in the Religion Clause Cases?: Seven Rescue Attempts and A Viable Alternative*, 65 SMU L. REV. 877, 882 (2012); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669–70 (1970); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (summarizing the First Amendment as requiring "governmental neutrality between religion and religion, and between religion and nonreligion"); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) ("the government must pursue a course of complete neutrality toward religion").

[22] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 226 (1963).

[23] For another critical account of neutrality in the Religion Clauses, *see generally* Frederick Mark Gedicks, The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence (1995).

contestation and even unrest. The Religion Clauses of the First Amendment prohibit government establishment and guarantee free exercise. In light of this assumed background to the Religion Clauses, the argument goes, the framers had decided to take religion off the table of politics, thereby sparing the American polity from the divisiveness of religion as a flashpoint of controversy.[24]

But while this narrative is rhetorically compelling, it is simplistic. For one thing, it is not at all clear that the major concern among the founders was avoiding (say) something like the European wars of religion of the sixteenth and seventeenth centuries. And even if it was, it is not at all clear how to flesh out a guarantee of government neutrality in concrete terms.

Neutrality, it turns out, is a relative term rather than an absolute term, at least when it comes to religion. Consider ideas that circulated in the early republic. Supreme Court Justice Joseph Story famously expounded the First Amendment as requiring government neutrality only among Christian sects: "The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government."[25]

Maybe Story was too narrow in his outlook. Maybe it wasn't quite right to limit the matter to Christian sects. Maybe theistic sects would have been the better frame of reference. Many state constitutions required officeholders to affirm the existence of a divine being, but only one—South Carolina—explicitly established Christianity and required officeholders to specifically affirm the validity of the Christian Bible.[26]

One group widely presumed to not have much in the way of religious liberty protection was atheists, who were subject to various disabilities because they were presumed incapable of taking oaths. The rationale was that oath-taking was necessary for certain civic responsibilities, such as serving on a jury; but an oath was only credible if the oath taker actually believed in some system of divine retribution for violations of oaths.[27]

For many in the early republic, any religious liberty guarantee of neutrality was at best a neutrality among theistic believers.

By the mid-twentieth century, limiting religious liberty to theists was of course out of the question. This was the time, of course, when the Supreme Court incorporated the First Amendment against the states and began developing a jurisprudence of the Religion Clauses in earnest. Now the idea gained currency that the Religion Clauses prohibited the government from favoring, not only one religion over another, but religion over irreligion.[28] Neutrality now went a step further.

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[24] *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987, 2004–05 (2022) (Breyer, J., dissenting); Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2284 (2020) (Breyer, J., dissenting).

[25] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 728 (§ 1871) (1833).

[26] South Carolina Const. Art. XXXVIII (1778). *See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436 (1990); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 639 (2006); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1491–94 (2004).

[27] *See* Jud Campbell, Testimonial Exclusions and Religious Freedom in Early America, 37 LAW & HIST. REV. 431 (2019).

[28] *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

The problem that emerged over the twentieth century was that religion, like politics, gradually became visible everywhere. The personal became political. It also became religious, in this sense: religion and religious commitments have a way of coloring virtually every area of life if one looks hard enough.[29] Americans in the founding period or early republic were not likely to look very hard. They lived in a relatively homogeneous religious setting and were able to take a lot for granted—that their society was mostly not just theistic, but protestant; that public religious expressions were commonplace, among other things. But as America's religious landscape became more diverse, less and less could be taken for granted.

For instance, most Americans at the turn of the nineteenth century were theists and found it unsurprising to have prayer in school or exhortations to religious duties in the curriculum. Noah Webster's widely used spelling book, for instance, contained admonitions in its reading lessons such as:

- "Rest in the Lord, and mind his word."[30]
- "No man may put off the law of God: My joy is in his law all the day."[31]
- "When they are at church they will sit, kneel, or stand still; and when they are at home, will read some good book, that God may bless them."[32]

Of course there were religious minorities in America even in the early nineteenth century. A number of Americans did not attend church, and some theologically orthodox Christians may have objected on theological grounds to the moralistic message that (for instance) God will bless those who have proper posture at church. But the number of Americans who were offended by these exhortations was relatively small.

That number of dissenters would be larger by the mid twentieth century. Jewish Americans were still numerically a small minority, but they had become enough a part of the society's consciousness that the term "Judeo-Christian" gained currency, and sociologist Will Herberg argued for a tripartite coalition of American religion consisting of (as the title of his influential book put it) *Protestant – Catholic – Jew*.[33] The idea of public schools instructing children that *church* was normative became open to question in a way that it would not have been a generation earlier.

But one of the oddities that often was overlooked in the mid twentieth century was that religious choices besides traditional religion could still be religious choices. Instead, the assumption was that one could have a category of religion for one subset of issues in life, and another category of secularity that is separate and other from religion. Yet as the courts have recognized in some contexts, absence of traditional religious commitments is itself a religious decision.[34] Atheism (for instance) is a religious choice. Conversely, many traditional religions

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[29] *See* ROY A. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY (2d ed. 2005); David S. Caudill, *Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 109 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001); Lael D. Weinberger, *Religion Undefined: Competing Frameworks for Understanding 'Religion' in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735 (2009).

[30] NOAH WEBSTER, THE AMERICAN SPELLING BOOK 43 (rev. ed. 1820).

[31] *Id.*

[32] *Id.* at 46.

[33] Will Herberg, Protestant—Catholic—Jew: An Essay in American Religious Sociology (1955).

[34] *See, e.g.*, Wallace v. Jaffee, 472 U.S. 38, 38 (1985) (explaining that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"); United States v. Seeger, 380 U.S. 163, 166

make ethical and devotional demands on adherents throughout the day and affect adherents' views on a wide range of topics. Decisions to *not* pray publicly in the course of a day, or to *not* evaluate a public policy issue in light of a religiously-infused ethical analysis, are religiously-freighted decisions.

Religion can also affect conduct in areas less directly connected to religious devotions. In the late eighteenth century, for instance, how one defined marriage was not generally seen as an activity deeply shaped by religious commitments. In the early twenty-first century, by contrast, one might look back at the assumptions about marriage in the eighteenth century and find them deeply shaped by the broadly Christian religious culture of the time.

The more one recognizes religious diversity, and the breadth of decisions one can make about religious commitments and observances, the more one must recognize the impossibility of absolute neutrality. Indeed, some theologians and philosophers have argued that religion is virtually omnipresent in its influence and effect on the life, outlook, and conduct of individuals.[35] The more one watches for it, the more one can find religious relevance in decisions across the range of human activity—and, yes, of government activity.

The government inevitably will make decisions affecting religion when it engages in such an all-encompassing project as education.[36] Secular education is not really *neutral* as between religion and irreligion. To many religious adherents, it is an education that sides with irreligion insofar as it assumes that one can go through daily life without reference to religion.

III. LOCATING RELATIVE NEUTRALITY IN SCHOOL FUNDING POLICY

Justice Breyer's dissent in *Carson* takes the common, and understandable, position that a secular education is a religiously neutral education. He believes that by funding religious education, the government violates its neutrality. But this reflects a simplistic interpretation of what constitutes religion. A secular education is religiously neutral only if one knows that a secular education does not take a position on any issue upon which a religious adherent might disagree. But we know that there are people of faith who believe that it is religiously deficient to educate children without reference to God; to go through a day without prayer or acknowledgment of God by the educators tasked with developing young minds; or to teach about the natural world without expressing gratitude to the creator. Secular education is not neutral to these observers.[37]

Chief Justice Roberts' majority opinion can also be faulted for lacking self-awareness about the limits of neutrality. Insisting that equal funding for religious educational institutions is the

(1965) (finding that a "belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" counts as sufficiently religious for purposes of conscientious objector status); Welsh v. United States, 398 U.S. 333, 343–44 (1970) (beliefs of comparable "strength" to "more traditional religious convictions" could be sufficiently religious for conscientious objector status even where the individual specifically said the beliefs were not religious)

[35] *See, e.g.*, Weinberger, *supra* note 29, at 744–47 (collecting sources).

[36] *See, e.g.*, ROCKNE M. MCCARTHY & JAMES W. SKILLEN, DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS (1982); David G. Leitch, Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127 (1985).

[37] *See also* Gabriël A. Moens, *The Menace of Neutrality in Religion*, 2004 B.Y.U. L. REV. 535, 536 (2004).

path to neutrality is not being neutral toward those religiously committed to *not* supporting traditional religion in any form. The majority's conclusion is also bound to be non-neutral in its effects.[38] If tax dollars for scholarship grants are available only to schools in which children are enrolled, this will naturally select for religious groups that have a certain minimum number of adherents in a given community. There are more Christian schools in America than Jewish schools for the simple reason that there are more adherents to Christianity. And in many communities, there are not sufficient numbers of Jews to make it feasible to start a school. Minority religions will need critical mass to be able to take advantage of these kinds of equal-access policies. The result will be that the distribution of these funds will be "lumpy" rather than an even distribution across religious perspectives. (One way to reduce the lumpiness would be to make grants available for home education. But I suspect few judges or legal scholars would be interested in extrapolating the religious neutrality position into an argument for home education funding.)

Neither the majority nor the dissent in *Carson* is neutral in an absolute sense. Such absolute neutrality is impossible to achieve. Religious neutrality is a myth.

Yet if the courts are to use the language of neutrality—and for now they give no indication of wishing to abandon it—then the majority's position is the easiest to defend in the terms I have argued for here—that of a relative neutrality. The law of religious freedom is neutral not in an absolute sense but in a relative sense—relative to a particular set of background conditions. Here, the state has already established a secular education. The state is not neutral as between religion and irreligion in education; it already has a default setting in favor of non-religious education. But when the state gives parents grant money to fund education for their children when a public school is unavailable, the relatively religiously-neutral method of choosing who can and cannot get that money is to let the parents decide. The government's thumb on the scales in favor of a particular religious outlook is then made less strong, less intrusive. The Court's solution in *Carson* is to require the state to adopt a relatively religiously-neutral decision mechanism for allocating government funding for education. That approach can be critiqued for its effects or its lack of commitment to a secular education as such. But these are not critiques from a stable and objective point; they are themselves religiously non-neutral critiques. Allowing parental choice as the baseline condition, though, provides a kind of limited and relative neutrality.[39]

CONCLUSION

Neutrality is a temptingly simple way of talking about the relationship between the state and religion in America. But it only takes a bit of poking at this paradigm to realize that it is far from stable. For starters, religion has wide-ranging implications, and it is virtually impossible for the government to avoid taking a position on education that is not offensive to one or another

[38] *See also* Alan E. Brownstein, Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values-A Critical Analysis of "Neutrality Theory" and Charitable Choice, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 254 (1999).

[39] *See also* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 149 (1986) (arguing that the best interpretation of neutrality is one in which a regime "leave[s] decisions about religious practice to the independent judgment of the people"); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

religious perspective. In *Carson*, both majority and dissent tried to stake a claim to neutrality. But neither tried to define and delineate the meaning of religious neutrality in a rigorous way. If neutrality is to be defensible at all, it must be in a limited and relative form. And in that sense, the *Carson* majority has articulated a sensible, and *relatively neutral*, path for states funding education to follow when navigating the relationship between the Religion Clauses: let the parents choose. It may not be *absolutely neutral*, but that is unremarkable. Nothing is.