AN ESTABLISHMENT CLAUSE EULOGY: THE RISE AND FALL OF THE STATUS/USE DISTINCTION

LEO O'MALLEY*

INTRODUCTION

The Establishment Clause, perhaps because of its unique role in the pantheon of Constitutional rights and protections, has been a perennial subject of legal debate, historical analysis[1], and even political acrimony[2] Efforts by Supreme Court Justices to erect a "wall of separation between church [and] state"[3] have often evoked the doom of Sisyphus[4], as their patchwork of tests and doctrines often seem to never quite reach the pinnacle of complete clarity or acceptance.[5] From the soured, and finally dead[6], *Lemon* test[7], to even the concept of a "wall" itself[8], recent decades are replete with such examples. This

* J.D. Candidate, Notre Dame Law School, 2023.

1. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

2. *See* Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763 (1993).

3. Thomas Jefferson, *To the Danbury Baptist Association*, *in* THE PAPERS OF THOMAS JEFFERSON, VOLUME 36 (Jan. 1, 1802), https://jeffersonpapers.princeton.edu/selected-documents/danbury-baptist-association-0; *but see From Thomas Jefferson to the Ursuline Nuns of New Orleans*, *Founders Online*, NAT'L ARCHIVES (July 13, 1804), https://founders.archives.gov/documents/Jefferson/01-44-02-0064.

4. *Sisyphus*, ENCYCLOPEDIA BRITANNICA (Nov. 7, 2022), https://www.britannica.com/topic/Sisyphus.

5. *See* David Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 103–04 (2004).

6. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (describing the *Lemon* test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried").

7. "Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category, just as the Court declined to apply *Lemon* in *Town of Greece* v. *Galloway*, *Van Orden* v. *Perry*, and *Marsh* v. *Chambers*. The Court's decision in this case again makes clear that the *Lemon* test does not apply to Establishment Clause cases in that category. And the Court's decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to Establishment Clause cases in any of the five categories." Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring). *See also id.* at 2098 (Thomas, J., concurring in judgment) (stating that "because the *Lemon* test is not good law, we ought to say so"); *id.* at 2101 (Gorsuch, J., concurring in judgment) (stating that "[a]s Justice Kennedy explained, *Lemon* is 'flawed in its fundamentals,' has proved 'unworkable in practice,' and is 'inconsistent with our history and our precedents'") (citing County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 655, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

8. "[I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" Wallace v.

year, in *Carson v. Makin*, the Court addressed a particularly inscrutable Establishment Clause doctrine, known as the status/use distinction, which some states have used to justify excluding religious organizations from government funding programs on the possibility that the funds might subsidize religious uses.[9] The Court's decision, substantially limiting the applicability of the status/use distinction, could have very significant ramifications for government funding programs. Indeed, the Supreme Court ruling strongly suggests that governments can no longer exclude religious organizations from indirect funding programs just because they engage in a religious activity, such as sectarian educational instruction. In Section I, this note explores the evolution of the status/use and indirect/direct funding distinctions in Establishment Clause jurisprudence. Section II evaluates the future of these principles, and Section III examines the impact of *Carson v. Makin* on indirect government funding programs as well as what such developments could portend for direct funding programs. In the latter context, Section III also proposes that the Court adapt elements of Free Speech jurisprudence to replace the *Lemon* Test with a historically informed Establishment Clause framework for government funding programs.

I. DIRECT AND INDIRECT GOVERNMENT FUNDING AND THE STATUS/USE DISTINCTION

Throughout much of the twentieth century, the Supreme Court largely focused on anti-establishment concerns when analyzing government funding programs that provided a benefit to religious activities or organizations. In *Everson v. Board of Education*, while upholding a state program that reimbursed parents for the costs of transporting the children to both religious and secular schools, the Court declared that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[10] The majority and dissenting opinions highlighted potential Establishment Clause concerns surrounding the use of taxpayers funds in supporting religious instruction or indoctrination.[11]

Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (footnote omitted) (citing Lynch v. Donnelly, 465 U.S. 668, 673 (1971); Wolman v. Walter, 433 U.S. 229, 236 (1977); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Tilton v. Richardson, 403 U.S. 672, 677–78 (1971)).

9. Petition for Writ of Certiorari at 21, *Carson v. Makin*, No. 20-1088 (2022).

10. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

11. "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." *Id.* at 17. "The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination." *Id.* at 24 (Jackson, J., dissenting). "Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay . . . for transportation to religious schools . . . . Each thus contributes to 'the propagation of opinions which he disbelieves' in so far as their religious differ, as do others who accept no creed without regard to those differences." *Id.* at 45 (Rutledge, J., dissenting).

However, for the majority, extending a generally available secular benefit to religious schools, such as the transportation assistance payments at issue[12], was sufficiently detached from the act of religious teaching.[13] Thus, since the funding program did not directly support religious instruction, it was permissible under the Establishment Clause.[14] Importantly, although the court left open the possibility that the state could have limited the program to children attending public schools, it implicitly endorsed the child benefit theory.[15] Despite this nod to accommodationist principles, *Everson*, with its invocation of a "high and impregnable"[16] wall between church and state, soon became a seminal case for the separationist movement.[17]

Everson is also of significance as it pointed to a nascent distinction between direct and indirect government funding of religious organizations. One of the central disagreements between the majority and dissents in *Everson* was how tight the nexus between the government aid (transportation assistance) and religious organization or activity (sectarian instruction at a Catholic school) needed to be in order to trigger an Establishment Clause violation. The majority did not see transportation assistance as providing direct support to the Catholic school or its religious instruction, while the dissents, particularly through the strict separationist approach articulated by Justice Rutledge, expressed grave misgivings about taxpayer funds being used to transport children to classes featuring religious "indoctrination."[18] This debate over what aid to religion is

12. Although for-profit private institutions were excluded from the program, the transportation payments were available to students at both public and parochial schools. *Id.* at 4. The majority implicitly compared these payments to other generally available government benefits, such as policeman protecting children on the way to school, fire protection, sewage disposal, and highways and sidewalks. *Id.* at 17–18.

13. *Id.* at 18.

14. *Id.*

15. "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists. Jews, Methodists, Non-believers, Presbyterians or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Id.* at 16 (emphasis added). The child benefit theory, an outgrowth of *Cochran v. Board of Education*, holds that a child's claim to public educational support cannot be abridged on the basis of their religious affiliation. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 128–30 (1996); *see also* Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (holding that the use of tax funds to subsidize the cost of textbooks for children at public, parochial, and private schools was permissible under the Fourteenth Amendment, regardless of the child's religious affiliation).

16. *Everson*, 330 U.S. at 18.

17. Viteritti, *supra* note 15, at 129.

18. *Everson*, 330 U.S. at 23–27, 30–31. Notably, towards the end of the century, most separationists, while ascribing to the anti-establishment principles underlying Justice Rutledge's argument, would disclaim the logical conclusion of his rhetoric, namely, government-sponsored religious discrimination. Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON IND. L. REV. 7, 11–13 (1993).

too direct has been a feature of Establishment Clause opinions for numerous decades.

In the wake of *Everson*, the Warren Court largely upheld the child benefit theory while also taking a firm stance against religious activity being allowed to creep into public schools.[19] However, in *Board of Education v. Allen*, although the Court upheld the underlying child benefit—a textbook lending program—it also attempted to establish a distinction between "religious instruction and secular education."[20] This new development suggested that the Court was willing to bifurcate between the religious and secular activities conducted by religious entities. In short, government could, in an at least somewhat direct manner, subsidize secular but not religious activities.

That being said, the *Allen* Court's bold assertion that "we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion,"[21] left much to be desired. Writing in dissent, Justice Douglas noted that a textbook "is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith."[22] This illustrated the difficulty of objectively determining which school activities are sufficiently secular and distinct to receive government support.

Furthermore, the inherent fungibility of money supports a logical conclusion that, even if government only funds certain "secular activities" of a religious organization, such support will allow a religious entity to free up funds it would have otherwise spent on those activities and shift these resources to its sectarian endeavors. On the other hand, it is not at all clear that granting religious organizations access to otherwise generally available government benefits with a legitimate secular purpose is violative of the Establishment Clause. Can a government not subsidize food at a religious secular shelter if the food has ostensibly religious themes?[23] What if the shelter workers, along with piping bowls of soup on a cold Midwestern night, hand out small cards featuring uplifting prayers or religiously themed messages? Must the government refuse to finically support dinner at a homeless shelter whose staff say a brief prayer over the residents before the evening meal?

Indeed, the assumption of the severability of secular and religious activities in religious schools, or indeed religious organizations generally, can be viewed as a progenitor of the status/use distinction.[24] Such an approach implies, contrary to the benefit theory in *Everson*, that government can and

---

19. Viteritti, *supra* note 15, at 131–32.

20. Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1968).

21. *Id.* at 248.

22. *Id.* at 257 (Douglas, J., dissenting).

23. *See generally* Gillian Feeley-Harnik, *Religion and Food: An Anthropological Perspective*, 63 J. AM. ACAD. RELIGION 565 (1995); *See also List of Foods with Religious Symbolism*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_foods_with_religious_symbolism (last visited Apr. 22, 2022).

24. *See* Section I. B.

potentially must openly discriminate against religious uses, even in generally available benefit programs. From the historical prevalence of Blain Amendments to the exclusion of schools offering sectarian instruction in *Carson v. Makin*, presented below as a case study, governments have used similar reasoning to discriminate against organizations whose identities and actions are "pervasively sectarian."

A. Direct vs. Indirect Funding is Dead, Long Live vs. Indirect Funding

After *Everson* and *Allen*, the Burger Court sought to further elucidate what types and forms of government funding to religious organization would be permissible under the Establishment Clause. The seminal, even notorious, case in this regard, *Lemon v. Kurtzman*, hardly needs any introduction. There, the Court laid out a tripartite test to evaluate potential Establishment Clause violations in government funding programs: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[25] The majority also pointed to the direct nature of the non-public school subsidies provided by the Pennsylvania program at issue as an additional problematic "defect" under the Establishment Clause.[26]

Nevertheless, over time, the second "effect" prong of *Lemon* gradually obscured the distinction between indirect and direct funding. In the past, indirect programs had been extended great deference, under the assumption that free private choices of individual citizens could permissibly direct government aid to religious organizations. In short, when citizens, and not the government, determined which school or other sectarian entity eventually received the funds, Establishment Clause concerns were significantly lessened. However, under *Lemon*, both indirect and direct funding programs were prohibited from having a primary effect of advancing or inhibiting religion. Imagine a scenario where, for example, parents overwhelmingly decided to use government tuition assistance funds at religious private schools. Such an indirect funding mechanism might very well have the "primary effect" of financially benefiting the sectarian educational institutions and thus be just as constitutionally suspect as direct government aid.

In fact, the Court confronted this very issue in *Committee for Public Education & Religious Liberty v. Nyquist*, where New York, among other non-public school assistance measures, provided tuition reimbursement for low-income elementary and secondary students and their parents.[27] Even though the program only provided indirect tuition payments to the religious schools, the Court ultimately determined that such a scheme violated the "effect" prong of *Lemon*.[28] Notably, the majority opinion specifically stated "the fact that aid is disbursed to parents rather than to the schools is only one among many factors

25. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

26. *Id.* at 621.

27. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 764 (1973).

28. *Id.* at 788.

to be considered."[29] Distinguishing *Everson* and *Allen*, the court pointed to the lack of safeguards to ensure that the *Nyquist* tuition reimbursement was not being channeled towards "religious educational functions."[30]

This insistence on adequate safeguards has been seen as creating a "Catch-22" scenario between *Lemon*'s "effect" and "entanglement" prongs: Government must ensure that public funds or platforms are not impermissibly used to advance religion, but in conducting oversight to guard against this possibility, public officials risk becoming entangled with religious entities or practices.[31] The *Nyquist* decision also illustrated a fundamental blind-spot of *Lemon*-style Establishment Clause analysis. Cases flowing from *Lemon* and *Nyquist* largely focused on determining the extent to which religious organizations or activities could be subsidized by the government.[32] Such analysis, fixated on anti-establishment concerns, ensured that the Court's Establishment Clause jurisprudence would establish an upper, rather than lower, limit of government financial support for religious activities or organizations. At the same time, these decisions left as an open question whether, and in what circumstances, government could exclude religious entities or uses from otherwise generally available government benefits.

In more recent decades, Supreme Court Justices, most notably Justice O'Connor, have expressed a renewed interest in the distinction between direct and indirect government funding of religious organizations. The Court has affirmed that indirect funding programs, which allow funding recipients to exercise "true private choice" among an array of "public and private, secular and religious" options, are perfectly constitutional from an Establishment Clause perspective.[33] On the other hand, programs that restrict the use of funds exclusively to private schools, for example, may very well raise concerns that their intended "function" is "unmistakably to provide desired financial support for nonpublic, sectarian institutions."[34] Programs may also be constitutionally suspect when their benefit structure incentivizes parents to use the financial support at private religious organizations.[35]

---

29. *Id.* at 781.

30. *Id.* at 783.

31. *See* Aguilar v. Felton, 473 U.S. 402, 420–21 (1985) (Rehnquist, J., dissenting) ("In this case, the Court takes advantage of the 'Catch-22' paradox of its own creation . . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."); *see also* Penny J. Meyers, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231, 273 (1999) ("The problem with reviewing the student's presentation before it is delivered is a 'catch-22.' On the one hand, if the principal does review the remarks, there is clearly entanglement between state and religion if the remark is a prayer. On the other hand, if the principle does not review the remarks, he could be accused of 'an abdication of responsibility.'").

32. *See generally* Charles H. Wilson, *School Aid: Constitutional Issues After* Aguilar v. Felton, 31 CATH. LAW. 82 (1987).

33. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

34. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973).

35. *Id.* at 786.

That being said, despite these remaining *Nyquist* caveats and as a very general rule, indirect funding programs are currently substantially sheltered from Establishment Clause objections because of the element of private choice.[36] Even when a substantial majority of the organizations who receive benefits are religious, an indirect program is not constitutionally prohibited if its structure is neutral. In *Zelman*, the Court rejected arguments that the percentage of indirect funds being channeled to religious organizations through private choice was constitutionally significant.[37] What mattered was whether the secular and religious schools had an equal opportunity to participate. As Justice O'Connor's *Zelman* concurrence specifically noted, an indirect program is constitutional if it 1) maintains formal neutrality between secular and religious organizations seeking to participate in the program and 2) provides beneficiaries with a true private and independent choice among secular and religious options.[38] Importantly, on a practical level, this means that a government funding program can indirectly subsidize religious activities so long as it meets both of these criteria.[39] In reviewing such funding programs, the most important consideration of courts will be whether they are formally neutral and provide true private choice.

Direct government funding programs, like indirect, can financially support religious organizations. However, at least for now, such support becomes constitutionally suspect if it subsidizes religious activities. This principle is implicitly derived from Justice O'Connor's concurrence in *Mitchell*, which featured a federal program that provided funds to local education agencies for lending educational materials and equipment to public and private schools.[40] Federal assistance was limited to "secular, neutral, and nonideological services, materials, and equipment"[41] and the aid distributed to schools on a per-capita basis.[42] While concurring with the plurality in upholding the federal funding scheme, Justice O'Connor saw diversion—the use of government funds for a sectarian purpose—as constitutionally problematic.[43] In her mind, especially in an educational setting, diversion allowed government

36. Zelman v. Simmons-Harris, 536 U.S. at 652 ("[W]here a government 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 program is not readily subject to challenge under the Establishment Clause."). *See also* Joshua Edelstein, Zelman, Davey, *and the Case for Mandatory Government Funding for Religious Education*, 46 ARIZ. L. REV. 151 (2004) (arguing that, after *Zelman*, school voucher programs that indirectly provide funding to sectarian educational institutions will increasingly survive Establishment Clause scrutiny).

37. Zelman v. Simmons-Harris, 536 U.S. at 657–58.

38. *See id.* at 669 (O'Connor, J. Concurring); *see also* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

39. *See* Zelman v. Simmons-Harris, 536 U.S. at 669.

40. *See* Mitchell v. Helms, 530 U.S. 793, 841 (2000).

41. 20 U.S.C. § 7372(a)(1).

42. Mitchell v. Helms, 530 U.S. at 841.

43. *Id.* at 840–42 (O'Connor, J., concurring); *see also* Joel Bacon, *Division over Diversion:* Mitchell v. Helms, *530 U.S. 793 (2000)*, 80 NEB. L. REV. 354 (2001).

funds to be impermissibly used for religious indoctrination. Consequently, any diversion more than "*de minimis*," even through a per capita funding program, could very well violate the Establishment Clause.[44]

Conversely, the *Mitchell* plurality did not consider diversion alone to be problematic if the funding program itself had a neutral purpose. They concluded that diversion was not a relevant factor for inquiry since it was not readily attributable to government action and almost impossible to prevent, given the fungible nature of aid.[45] In addition, while rejecting the proposition that direct government aid to religious schools must be presumptively invalid, the plurality chose to focus rather on whether the government aid flowed to religious entities or uses through the operation of true private choice (i.e., whether any aid to religion could be fairly attributable to the government).[46] In other words, government funds or aid, earmarked for a neutral secular purpose, could constitutionally be "redirected" for use at a religious school by the private decisions of a parent, student, or school administrator. Effectively, the plurality decision's analysis centered on whether the government program provided aid in a neutral manner, not what a religious school would ultimately do with the government funds or aid, provided the school stayed within the program parameters.[47]

Nevertheless, the *Mitchell* plurality is just that, a plurality, and Justice O'Connor's concurrence remains key to both the history and future of Establishment Clause jurisprudence. The Justice's presumption against diversion, especially in educational contexts with the risk of government-endorsed religious indoctrination, still can be viewed as controlling in certain instances, particularly where the government aid can be characterized as direct. In addition, Justice O'Connor ensured that the distinction between indirect and

44. *Mitchell*, 530 U.S. at 867 (O'Connor, J., concurring). Significantly, Justice O'Connor viewed the per-capita scheme as akin to a direct funding mechanism: "That the amount of aid received by the school is based on the school's enrollment does not separate the government from the endorsement of the religious message. The aid formula does not—and could not—indicate to a reasonable observer that the inculcation of religion is endorsed only by the individuals attending the religious school, who each affirmatively choose to direct the secular government aid to the school and its religious mission. No such choices have been made." *Id.* at 843.

45. *Id.* at 823–25 (plurality opinion).

46. *Id.* at 816 ("If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" (citation omitted)).

47. The *Mitchell* plurality specifically granted that the books, computers, and other materials provided through the government program would be diverted to some religious uses. In a footnote, the plurality described evidence that audiovisual equipment purchased with federal funds had been used extensively in a theology department. In their analysis, this was not unconstitutional as long as the government itself was not responsible for the religious uses or content. For example, requiring public school textbooks to contain religious moral lessons or providing computers with pre-existing religious content. *Id.* at 831–35.

direct government aid would continue to serve as an important factor in evaluating the "effect" prong of the *Lemon* test as retooled under *Agostini*.[48]

Despite the survival of the indirect/direct principle, a fundamental question was left unanswered after both *Zelman* and *Mitchell*. If government is generally prohibited from directly subsidizing religious activities or indoctrination, to what extent can it exclude religious organizations or activities from generally available benefit programs?[49] In response to this issue, a new principle began to emerge, which has been subsequently referred to as the status/use distinction.

B. The Birth of the Status/Use Distinction

Although the concept of government excluding religious uses from funding programs had long lurked in the background of Establishment Clause jurisprudence,[50] the Supreme Court's decision in *Locke v. Davey* brought this possibility to the fore. In that case, a student desired to use funds, which he had received based on academic merit through the Washington State Promise Scholarship Program,[51] to pursue a double major in pastoral ministries and business administration.[52] However, the scholarship guidelines, due to the Washington State Constitution, prohibited students from using scholarship funds to pursue degrees that were "'devotional in nature or designed to induce religious faith.'"[53] The student argued that this prohibition was presumptively unconstitutional since it was not "facially neutral with respect to religion."[54]

---

48. *See id.* at 842–43 (O'Connor, J., concurring); *see also infra* note 50. The indirect-direct distinction also remained significant a few years later in *Zelman*.

49. A few years before *Mitchell*, Justice O'Connor wrote the majority opinion in *Agostini v. Felton*, which overruled *Aguilar* and reduced the *Lemon* test to two prongs—the government program's purpose and effect—while focusing the effect prong on three primary criteria: whether government aid resulted in government indoctrination, defined its recipients by reference to religion, or created an excessive entanglement. *See* Agostini v. Felton, 521 U.S. 203, 234 (1997); *see also* Edelstein, *supra* note 36, at 155–56. Like *Lemon*'s three prongs, these "effect" criteria established a ceiling, but not a floor, for government funding of religion. After *Agostini*, although government aid could not discriminate between religions, it remained an open question as to whether religion as a whole could be denied a generally available direct government benefit, through the exclusion of religious organizations and activities from an educational funding program, for example.

50. Many decades ago, the Court determined that directly providing government funds to religious schools for facility upkeep or testing services without sufficient safeguards to prevent the subsidization of "religious indoctrination" failed the effect prong of *Lemon*. *See* Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779–80 (1973). However, the Court has also upheld funding programs where it was unlikely that a "significant proportion of the federal funds" would go to religious organizations. Bowen v. Kendrick, 487 U.S. 589, 608–12 (1988).

51. *Promise Scholarships*, WASH. STATE OFF. OF THE GOVERNOR (2004), https://www.digitalarchives.wa.gov/governorlocke/educate/promise.htm.

52. Locke v. Davey, 540 U.S. 712, 717 (2004).

53. *Id.* at 716.

54. *Id.* at 720 (footnote omitted). The student asked the Court to extend the rule it had enunciated in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, where a city had unconstitutionally

Nevertheless, the Court determined that, in light of a perceived "historical and substantial" state anti-establishment interest in preventing the use of "tax funds to support the ministry," the "denial of funding for vocational religious instruction alone" was not "inherently constitutionally suspect."[55]

Writing in dissent, Justice Scalia reasoned that "[w]hen the state makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured."[56] Thus, by singling out theology for exclusion, the Promise Scholarship Program unconstitutionally discriminated against religion.[57] In Justice Scalia's view, "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial."[58] Said differently, discriminating against an individual because of their religious actions should be viewed as functionally equivalent to discrimination based on an individual's religious status. In the wake of this decision, courts interpreted the majority opinion as authorizing discrimination against at least some religious uses in government funding programs. However, it would not be long before the Court once again revisited the issue of religious discrimination within such programs.

The status/use distinction reappeared in *Trinity Lutheran Church of Columbia, Inc. v. Comer* as the Court evaluated a Missouri playground resurfacing program that strictly excluded "any applicant owned or controlled by a church, sect, or other religious entity."[59] Although a religious school was ranked fifth out of all applicants to the funding program, it was denied a grant due to its religious affiliation.[60] Although the Court of Appeals, comparing these facts to those in *Locke*, determined that government could "rely on an applicant's religious status to deny its application," the Supreme Court disagreed.[61] Writing for the majority, Chief Justice Roberts distinguished *Locke*, stating that "Davey was not denied a scholarship because of who he *was* ; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[62] Thus, because of this status-based discrimination, Missouri had unconstitutionally forced Trinity to choose between maintaining its religious identity or receiving the government funding award.

---

criminalized certain types of ritualistic animal sacrifice practiced by the Santaria religion. *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 535 (1993)). The Court rejected this comparison, stating that "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits." *Id.* at 724.

55. *Id.* at 723–25.

56 *Id*. at 726 (Scalia, J., dissenting).

57. *Id.* at 733.

58. *Id.* at 731.

59. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

60. *Id.* at 2018.

61. *Id.* at 2018–2019, 2025.

62. *Id.* at 2023.

In a concurrence, Justices Thomas and Gorsuch expressed their misgivings about such a distinction between status and use. They proposed the following series of hypotheticals: "Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission?"[63] Indeed, these scenarios beg the question, "[c]an the government constitutionally distinguish inward religious identity or belief from outward religious actions?"[64] In fact, when government excludes certain religious uses from generally available benefit programs, it necessarily disincentives those activities. Going one step further, it is only intuitive that when government exerts influence over individual actions, it also affects individual beliefs.

The status/use distinction, with its numerous potential implications, would soon appear again in *Espinoza v. Montana Department of Revenue*.[65] That case featured a Montana tuition-assistance program that provided a tax-credit to individuals who donated to scholarship organizations that provided financial support to students attending private schools.[66] However, families were prohibited from using these scholarship funds at any religious schools.[67] A group of three mothers, whose children attended a private Christian school, brought a suit alleging "that the Rule discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children."[68]

In response, the Montana Department of Revenue argued that this case was governed not by *Trinity Lutheran*, but by *Locke v. Davey*.[69] In its brief, the Department asserted that "like Washington's constitution, the No-Aid Clause bars funding of religious *ministry*–the ministry of religious teachers towards their students."[70] Because Montana had an anti-establishment interest in not subsidizing religious instruction, the Department's exclusion of religious schools from the scholarship program fell within the permissible "play in the joints" between the Free Exercise and Establishment Clauses.[71]

However, Chief Justice Roberts, writing once more for the Court's majority again distinguished *Locke*. He noted that, in *Locke*, the student "'was denied a scholarship because of what he proposed *to do*—use the funds to

63. *Id.* at 2025 (Gorsuch, J., concurring).

64. Leo O'Malley, Carson v. Makin*: Charting a Course Beyond the Status/Use Distinction*, FED. SOC. BLOG (Oct. 20, 2021), https://fedsoc.org/commentary/fedsoc-blog/carson-v-makin-charting-a-course-beyond-the-status-use-distinction.

65. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

66. *Id.* at 2251.

67. *Id.* at 2252.

68. *Id.*

69. *Id.* at 2257.

70. Brief of Respondents at 35, Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195).

71. *Espinoza*, 140 S. Ct. at 2254 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (citing Locke v. Davey, 540 U.S. 712, 718 (2004))).

prepare for the ministry'"[72] and that the state had a "'historic and substantial' state interest in not funding the training of clergy."[73] Conversely, the Montana Department had not identified any "particular 'essentially religious' course of instruction at a religious school" and there was no "historic and substantial" state interest in withholding government aid from religious schools.[74] Thus, the Chief Justice concluded that this exclusion of religious schools was status-based and constitutionally impermissible. Nevertheless, he was also quick to caution that "[n]one of this is meant to suggest . . . that some lesser degree of scrutiny applies to discrimination against religious uses of government aid."[75] He went on to conclude that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[76]

Just like in *Trinity Lutheran*, Justice Gorsuch once again cautioned against distinguishing between status and use:

> Does Montana seek to prevent religious parents and schools from participating in a public benefits program (status)? Or does the State aim to bar public benefits from being employed to support religious education (use)? Maybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do*—teach religion.[77]

Justice Gorsuch's insight—that status and use, particularly as found in *Espinoza*, are potentially fungible depe

nding on the context and linguistic framing—has been echoed by other scholars.[78] It is not difficult to argue that exclusion based on religious use is merely a proxy for discrimination based on religious status. Said differently, excluding an individual or organization because of what they might do with the government aid—perhaps using a scholarship for ministry studies or a government-provided computer to teach a zoom theology class—is necessarily an exclusion based on religious status. Prohibiting government aid recipients from, even incidentally, using such assistance during their religious activities incentivizes religious organizations and individuals to either 1) restrict their religious activities to receive the aid (foregoing that theology degree, for example); or 2) abandon their religious identity or status altogether. In effect, use-based exclusions, perhaps even more effectively than status-based, allow

---

72. *Id.* at 2257 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023–24 (2017) (citing Locke v. Davey, 540 U.S. 712, 721 (2004))).

73. *Id.* (quoting *Locke*, 540 U.S. at 725).

74. *Id.* at 2257–58.

75. *Id.* at 2257 (citation omitted).

76. *Id.* at 2261.

77. *Id.* at 2275.

78. Matthew Sondergard, Comment, *Blaines Beware:* Trinity Lutheran *and the Changing Landscape of State No-Funding Provisions*, 66 KAN. L. REV. 753, 781 (2018) ("The overlap between the two concepts is too broad for effective use in religious freedom cases. While a test based on religious use/religious status is a simpler test to apply, it is an overbroad distinction that courts will struggle to apply to case-specific facts.").

government to target specific religious activities, such as religious education, for disfavored treatment.

On the other hand, it is a largely uncontroversial proposition in both Establishment Clause and Free Speech jurisprudence that government has the authority to set the limits of its aid programs by establishing eligibility criteria and particular uses or content, in the free speech context, it desires to promote. The possible paths forward in this regard are discussed in Section III. However, before charting a future course, it is necessary to analyze the implications of the direct/indirect and status/use distinctions prior to the Supreme Court's decision in *Carson v. Makin*.

II. THE IMPLICATIONS AND ULTIMATE INSTABILITY OF STATUS/USE

It is of importance that Chief Justice Roberts could have easily distinguished *Locke* in *Trinity Lutheran* without alluding to a potential distinction between status and use. In the past, the Supreme Court has generally recognized constitutionally significant differences between direct and indirect government funding of religious organizations.[79] As discussed previously, indirect government funds are channeled to religious organizations through the independent choices of citizens or some other third party instead of a government policy or decision-maker. By and large, the Supreme Court has viewed the separation created by such independent choices of financial aid recipients as sufficient to "cleanse" any potential Establishment Clause concerns when government funds thus indirectly reach the coffers of religious entities or subsidize religious activities.[80]

As alluded to in Section I.B, neither *Mitchell* nor *Zelman* directly addressed the question of how much discretion the government has in excluding a religious organization from a government funding program. Central to this issue is whether, for the purposes of excluding religious organizations, the government should be given more latitude in direct vs. indirect funding programs, highlighted by the Chief Justice's use of the status/use divide to distinguish *Locke* in *Trinity Lutheran*. *Locke* had featured a state scholarship program with an indirect funding structure,[81] while *Trinity Lutheran* analyzed a government program that directly gave funds to schools for playground

79. *See* Section I.B.

80. *See* Mueller v. Allen, 463 U.S. 388 (1983) (upholding a program granting tax deductions for certain educational expenses, including private school tuition, even though almost all the parents who benefitted under the program had decided to send their children to religious schools); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a private school voucher program, even though a high percentage of voucher recipients chose religious over secular private schools); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a vocational scholarship program even though it allowed a recipient to spend the tuition aid in studying to be a pastor). *But see* Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973). Here, the program gave benefits only to private schools, of which approximately eighty-five percent were sectarian, and the parents of students at those private schools. *Id.* at 761–68. Thus, the program was constitutionally problematic as its intended and practical effect was to "ensure a windfall to parents of children in religious schools." *Zelman*, 536 U.S. at 661 (citation omitted).

81. Locke v. Davey, 540 U.S. 712, 716 (2004).

resurfacing.[82] In *Trinity Lutheran*, the Missouri Department of Natural Resources cited *Locke* to argue that its anti-establishment interests justified the exclusion of a religious school.[83] Hypothetically, this could have been a prime opportunity for the Court to focus in on the indirect/direct funding distinction, perhaps following Justice O'Connor's *Mitchell* analysis and dismissing any state interest in preventing the "de minimis" diversion that might occur through extending playground resurfacing funds to religious schools.

By relying on status/use as the distinguishing factor between *Trinity Lutheran* and *Locke*, the Chief Justice implicitly chipped away at the underlying distinction between direct and indirect government programs. *Trinity Lutheran* fundamentally rested on whether government could bar religious schools from generally available benefits provided through a direct government funding program. Under *Mitchell*, the answer would likely have been a maybe, if diversion to religious activities was more than *de minimis*. However, by instead comparing *Trinity Lutheran* to *Locke*, Chief Justice Roberts was perhaps hinting that, in the future, the Court will evaluate both indirect and direct government programs in a similar manner, as advocated by the *Mitchell* plurality.[84] Indeed, the general rule coming out of *Trinity Lutheran* seemed equally applicable to both indirect and direct funding programs: Government may not exclude a religious organization from an otherwise generally available government benefit on the basis of the organization's religious status.[85]

Notably, contrary to any assertions otherwise, this was not an earthshattering revelation. Before *Trinity Lutheran*, the Court had already considered and, since 1985, had refused to strike down government programs that provided both direct and indirect aid to school on the basis that they were "pervasively sectarian."[86] Rather, as was highlighted by Justice O'Connor in *Mitchell*, the proper focus should center on how direct funds are put to use once they are received by a religious organization. In these terms, Justice Roberts' differentiation of status and use becomes much more understandable. His decision implicitly highlighted that government discrimination based on the "pervasively religious nature" or "sectarian status" of an organization is prohibited by the Constitution. But by leaving open the question of whether government could discriminate against particular religious uses in direct and indirect government funding programs, the Chief Justice set up a potentially seismic change in Supreme Court jurisprudence surrounding government funding programs.

The indirect/direct distinction grew out of and was informed by differing permutations of the *Lemon* test, which sought to ascertain at what point

---

82. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2013 (2017).

83. *Id.* at 2016.

84. Mitchell v. Helms, 530 U.S. 793, 823–25 (2000).

85. *Trinity Lutheran*, 137 S. Ct. at 2025 ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.").

86. *See* James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory "Pervasively Sectarian" Test*, 7 AVE MARIA L. REV. 59, 80 (2008).

government had strayed too close to the danger of creating an Establishment of Religion. Hence, Justice O'Connor's focus on the perception and effect of government funds diverted to religious activities in *Mitchell*. However, status/use shifts the legal debate into a completely different territory. Namely, what activities or aspects of a religious organization can provide the government with a constitutionally legitimate basis upon which to exclude the organization from a generally available government program? Consequently, the difference between indirect/direct and status/use analysis is, fundamentally, the difference between asking whether the government has provided an impermissible amount or form of support for a religious organization and whether the government is impermissibly discriminating against a religious organization.

While both issues can be viewed as flip sides of the same coin, they also result in very different legal conclusions. Typically, a court decision focused on indirect/direct funding will further define a ceiling that limits what government support can be provided to religion. As this form of analysis historically predominated in the wake of *Lemon*, the Supreme Court had numerous opportunities to tinker with and clarify the upper limits of government funding to religious entities. However, this resulted in a complete lack of data as to how much the government could exclude religious organizations from funding programs. In other words, the house of Establishment Clause jurisprudence had an at least somewhat clearly defined roofline, but no floor. The "play in the joints" was thus all one-sided, as government had an immense degree of discretion as to how to treat religious organizations, provided that it did not exceed the upper limits established by the Court.

On the other hand, analysis centered on status/use hinges on a court determining what, if any, kinds of discrimination against religious organizations are permissible in a government funding program. This has begun to define a floor, the outlines of which are already vaguely discernible in *Trinity Lutheran*. There, the Chief Justice's majority took a firm stance against discrimination against religious organizations just because of their religious status. Thus, government programs should not consider the religious or non-religious status of an organization in distributing generally available government benefits. Effectively, this means that religious organizations cannot be treated "worse" than their secular counterparts because of sectarian affiliation. Such an approach is similar to a "Most Favored Nation" policy where, in terms of their sectarian status, religious organizations must be treated at least as favorably as secular organizations in funding programs.[87]

87. More recently, this "Most Favored Nation" principle was featured in Tandon v. Newsom: "government 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. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citations omitted); *see also* Jim Oleske, Tandon *steals* Fulton*'s thunder: The most important free exercise decision since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

After *Trinity Lutheran*, the remaining question was how high this floor would rise. Some scholars forecast the possibility that use-based discrimination—government excluding religious organizations because they might put government funds to a religious use—could preserve a significant amount of leeway for government policymakers.[88] However, others, including a diverse array of current Supreme Court Justices, highlighted the instability of the status/use distinction as a matter of principle.[89] This raised the possibility that the status/use distinction would break down over time.

Chief Justice Roberts may have even hinted at such a possibility in his discussion of *Locke* in *Espinoza*. There, he argued that the particular religious use at issue in *Locke*—a student using state scholarship funds to pursue a degree in religious ministry—was permissibly excluded because of a long history and tradition of government being hesitant to fund the education and living expenses of pastors and other religious ministers.[90] This suggested that other use exclusions without similar historical provenance could receive a much less receptive hearing from an increasingly originalist Supreme Court.[91] Thus, as the separation between status and use, and perhaps even indirect and direct funding programs, becomes increasingly unstable, the Court will fall back on assessing whether a particular exclusion from a government funding program is grounded in a historic government interest in preventing government funds to be impermissibly used for or by some religious endeavor.

III. CARSON V. MAKIN: A NEW GOVERNMENT FUNDING FRONTIER

Last term, the Court decided *Carson v. Makin*, which featured a Maine state program that provided tuition support for children in communities without a public school, as long as the funds were not used at a "sectarian" educational institution.[92] While this, at first glance, might seem to be a status-based

88. Ryan Snyder, Note, *A Lifeline for School Voucher Programs After* Trinity Lutheran v. Comer, 51 LOY. L.A. L. REV. 455, 473 (2018); *but see* Gabrielle Gollomp, Trinity Lutheran Church v. Comer*: Playing "in the Joints" and on the Playground*, 68 EMORY L.J. 1147, 1149 (2019) ("While the decision initially appears limited in scope due to its narrow holding about a rubberized playground surface and a cryptic footnote, the consequences for federalism are concerning. *Trinity Lutheran* significantly curtails the freedom of state governments to have and enforce their state constitutional provisions forbidding the use of public funds to aid religious institutions.") (footnote omitted).

89. *See* Section II.B; Sondergard, *supra* note 78, at 774.

90. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257–59 (2020).

91. Randy E. Barnett, *Ketanji Brown Jackson and the Triumph of Originalism*, WALL ST. J. (Mar. 24, 2022), https://www.wsj.com/articles/ketanji-brown-jackson-and-the-triumph-of-originalism-public-meaning-testimony-hearing-supreme-court-11648151063.

92. The Maine legislature has obligated itself to "'enact the laws that are necessary to assure that all school administrative units make suitable provisions for the support and maintenance of the public schools' so that every school-age child in the state has 'an opportunity to receive the benefits of a free public education.'" *See* Carson v. Makin, 979 F.3d 21, 25 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 2883 (2021) (mem.), *rev'd and remanded*, 142 S. Ct. 1987 (2022) (quoting ME. REV. STAT. ANN. tit. 20-A, § 2(1) (Westlaw through the 2022 Second Regular Sess. of the 130th Legislature)). In order to achieve this goal, Maine directs school administrative units without a K-

exclusion, the Maine Attorney General argued that the determination of whether a school is nonsectarian depended "on the sectarian nature of the educational instruction that the school will use the tuition assistance payments to provide."[93] The First Circuit agreed and held that this was use-based discrimination and thus permissible under recent precedent, including *Espinoza*.[94]

On February 4, 2021, the Supreme Court granted certiorari to consider the question: "Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or 'sectarian,' instruction?"[95] Ultimately, a majority of the Justices ruled that this exclusion violated the Free Exercise Clause. As part of its analysis, the Court directly confronted the status-use distinction as well as the historical differentiation between direct and indirect government funding schemes, portending a potentially significant evolution of Establishment Clause jurisprudence.

A. Use-Based Discrimination Generally Prohibited in Indirect Aid Programs

The Court began its evaluation of Maine's program by looking to *Everson*'s public benefit principle.[96] Writing for the majority, Chief Justice Roberts noted that "we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[97] This first step is important because it establishes a presumption that public benefits should be generally available to all comers. In other words, when government provides a benefit that is broadly available, religious exclusions are inherently suspect. Indeed, according to the Court, both *Trinity Lutheran* and *Espinoza* stand for the principle that, where an entity is

12 public school to either (1) "contract with another school for school privileges for all or a part of its resident students in those grades for a term of [two] to [ten] years" or (2) "pay the tuition . . . at the public school or the approved private school of the parent's choice at which the student [from their SAU] is accepted." *See* ME. REV. STAT. ANN. tit. 20-A, § 2701 (Westlaw through the 2022 Second Regular Sess. of the 130th Legislature); ME. REV. STAT. ANN. tit. 20-A, § 5204(3)–(4) (Westlaw through the 2022 Second Regular Sess. of the 130th Legislature). However, a private school may be approved for the receipt of public funds for tuition purposes only if it "[i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." ME. REV. STAT. ANN. tit. 20-A, § 2951(2) (Westlaw through the 2022 Second Regular Sess. of the 130th Legislature).

93. *Carson*, 979 F.3d at 38.

94. *Id.*

95. Petition for Writ of Certiorari at i, Carson v. Makin, 142 S. Ct. 1987 (2022).

96. *See* Section I. *See also* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16 (1947) (A State "cannot exclude" individuals "because of their faith, or lack of it, from receiving the benefits of public welfare legislation."); Sherbert v. Verner, 374 U.S. 398, 404–405 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.") (footnote omitted) (citations omitted).

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

denied a public benefit on the basis of its religious identity, such an exclusion "must be subjected to 'the strictest scrutiny.'"[98]

The Court went on to conclude that any potential state "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise."[99] Here, Maine's program featured an indirect funding structure, so public funds would only flow to religious educational institutions through the independent choices of parents.[100] According to the Court, since *Zelman* establishes that such a program "does not offend the Establishment Clause," Maine did not have a legitimate anti-establishment interest in excluding religious schools from the program.[101]

Maine sought to escape this chain of logic by urging the Court to hold, based on the nascent status-use distinction in *Espinoza*, that Maine's use-based restriction was not an infringement of free exercise.[102] However, this argument was definitively rejected by the Court: "*Trinity Lutheran* and *Espinoza* . . . never suggested that use-based discrimination [as compared to status-based] is any less offensive to the Free Exercise Clause."[103] In addition, Chief Justice Roberts cabined *Locke* to situations where the government possesses a "historic and substantial state interest" against public funds being used to subsidize the education of religious ministers.[104] Consequently, aside from the very limited set of circumstances directly comparable to *Locke*, use-based religious exclusions from indirect funding programs would seem to be constitutionally impermissible.

However, the *Carson* majority did not directly address whether use-based restrictions might still be appropriate in certain direct funding schemes. At least for now, this leaves open the possibility that government could exclude religious entities from direct funding programs, particularly where their inclusion might risk the diversion of public funds to religious indoctrination.[105] As discussed previously, Justice O'Connor's *Helms* concurrence could still theoretically support an anti-establishment interest in excluding certain religious uses from direct funding programs.

If the Court's dalliance with status-use has signaled a shift away from the traditional doctrines surrounding indirect and direct funding programs, prohibiting all use-based discrimination could force governments to open up previously closed direct funding programs to religious participants. But this would require some justification for the potential diversion of funds to religious

98. *Id.* at 1997 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020)).

99. *Id.* at 1998 (quoting *Espinoza*, 140 S. Ct. at 2260).

100. *Id.* at 1993.

101. *Id.* at 1997–98.

102. Brief of Respondent at 35, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

103. *Carson*, 142 S. Ct. at 2001.

104. *Id.* at 2002 (quoting Locke v. Davey, 540 U.S. 712, 722 (2004)).

105. *See* Section IA; *see also* Leo O'Malley, *The Rise of the Undead Blaine Amendment*, FEDERALIST SOC'Y BLOG (Sept. 19, 2022), https://fedsoc.org/commentary/fedsoc-blog/the-rise-of-the-undead-blaine-amendment-1.

activities that so concerned Justice O'Connor in *Mitchell*. The Court could ultimately side with the plurality in *Mitchell*, and determine that diversion itself, without more, does not violate the Establishment Clause. As a future alternative to the prohibition against diversion, the Court could also more closely scrutinize the purpose of government funding programs to determine whether or not there exists a neutral and legitimate secular justification for the financial support provided to religious organizations. Thus, government funds that incidentally end up supporting certain religious activities would be acceptable under the First Amendment.

B. But What About Direct Aid Programs? A Path Forward . . .

Establishment Clause jurisprudence may well hinge on whether in a future sequel to *Carson*, the Supreme Court disclaims use-based exclusion in not just indirect, but also direct funding programs. Whenever the Court decides to tackle the, admittedly much more difficult, landscape of direct funding programs, it would be well-served to jettison the status-use distinction and consider employing Free Speech doctrine surrounding limited public forums and government-funding schemes. Concretely, a potential test for direct funding programs could combine some scrutiny of governmental purpose, a prohibition against viewpoint discrimination in direct government funding,[106] and a healthy skepticism of government leveraging direct funding programs to influence the activities, speech, or expression of religious or secular organizations.[107]

Analysis under this framework could proceed as follows. First, a court would need to scrutinize the stated government purpose for a program to ensure that it had an appropriate secular justification. For the sake of discussion, let's consider a hypothetical situation posed by the Chief Justice during oral arguments in *Carson*.[108] Imagine that the government decided to provide direct building refurbishment grants for structures of historical significance in the community, including those of a religious nature. A court would first need to consider the purpose and contours of the program. The inquiry here would be

106. This would extend the reasoning of *Rosenberger v. Rector* to generally available government benefit programs, which can be analogized to a limited public forum. Thus, government would have to define the parameters without reference to religion (i.e., it would be impermissible to refuse a building grant to organizations who might refurbish a religious building that expressed belief "in or about a deity or an ultimate reality."). Rosenberger v. Rector, 515 U.S. 819, 823 (1995). Importantly, as in free speech jurisprudence, government would retain the ability to discriminate based on religious viewpoint or activity when speaking on its own behalf. For example, if a government directly contracted with third parties to provide some service on the government's behalf, the government would have greater leeway to discriminate against religious activities, with some limitations as delineated in *Fulton*. *See* Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

107. Even where the government contracts with a third party, it cannot leverage program funds to affect the activities of the organization outside the scope of the program. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).

108. *See* Transcript of Oral Argument at 15, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

a slightly more detailed analysis than in the now defunct[109] *Lemon* test. The government would need to demonstrate that the program possessed a legitimate underlying secular reason, and that the program's eligibility contours did not discriminate for or against religion (i.e., the benefit must be truly generally available). The building refurbishment grant in our hypothetical could fail this test if, for example, it included size restrictions that excluded most historical structures except for churches. This could lead to an inference that the program was gerrymandered to provide exclusive support for religious communities.

Next, the court would consider whether any potential exclusions from the program were based on the viewpoint associated with the building to be renovated. Just like in *Rosenberger v. Rector*, the government could not exclude buildings associated with a belief "in or about a deity or an ultimate reality."[110] Finally, government could not put conditions on the receipt of the generally available benefit that would be of a pro-religious or anti-religious character. For example, requiring that all buildings refurbished with the funds be decorated with a religious symbol or, conversely, prohibiting funds from being used to refurbish overtly religious architecture. In addition, leveraging program funds to affect the behavior of organizations outside the legitimate scope of the program would be impermissible for both generally available benefits and in situations where the government was contracting with a third party.

Such an approach, in my opinion, would strike a, heretofore elusive, balance between the Establishment and Free Exercise clauses. It would ensure that generally available benefits—both indirect and direct—are dispensed without taint of pro-religious or anti-religious discrimination. At the same time, it would bring the Establishment Clause into conformity with already developed free speech doctrine while honoring the central concerns articulated by the Supreme Court throughout Establishment Clause precedent.

IV. CONCLUSION

In conclusion, *Carson*'s prohibition on use-based discrimination against religious organizations has the potential to transform our understanding of the Establishment Clause. Given the contemporary collapse of *Lemon*, the jurisprudential doors are wide open for a new test to emerge in the context of direct funding programs. The Court would be well advised to consider utilizing its free speech jurisprudence surrounding limited public forums and government funding programs to structure a new Establishment Clause analysis rooted in history and tradition.

190. *Kennedy v. Bremerton*, 142 S. Ct. 2407, 2427–28 (2022).

110. *Rosenberger*, 515 U.S. at 823.