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ESSAY

ESPINOZA, GOVERNMENT FUNDING, AND RELIGIOUS CHOICE

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ABSTRACT

The U.S. Supreme Court's decision in *Espinoza v. Montana Department of Revenue*, holding that religious schools cannot be excluded from a state program of financial aid to private schools, is another incremental step in the Court's long-running project to reform the constitutional law of financial aid to religious institutions. There was nothing surprising about the decision, and it changed little; it was the inevitable next link in a long chain of decisions. To those observers still attached to the most expansive rhetoric of no-aid separationism, it is the world turned upside down. But the Court has been steadily marching away from that rhetoric for thirty-five years now. The more recent decisions, including *Espinoza*, do a far better job than no-aid separationism of separating the religious choices and commitments of the American people from the coercive power of the government. And that is the separation that is and should be the ultimate concern of the Religion Clauses—to minimize the government's interference with or influence on religion, and to leave each American free to exercise or reject religion in his or her own way, neither encouraged by the government nor discouraged or penalized by the government.

KEYWORDS: government funding of religion, free exercise of religion, neutrality toward religion, religious choices, establishment of religion, religious schools, school vouchers, religious exemptions, substantive neutrality, formal neutrality, incentive neutrality, category neutrality, neutral incentives, neutral categories

The Supreme Court's decision in *Espinoza v. Montana Department of Revenue*,[1] holding that religious schools cannot be excluded from a state program of financial aid to private schools, is another incremental step in the Court's long-running project to reform the constitutional law of financial aid to religious institutions. There was nothing surprising about the decision, and it changed little; it was the inevitable next link in a long chain of decisions. To those observers still attached to the most expansive rhetoric of no-aid separationism, it is the world turned upside down. But the Court has been steadily marching away from that rhetoric for thirty-five years now.

1 Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).

The more recent decisions, including *Espinoza*, do a far better job than no-aid separationism of separating the religious choices and commitments of the American people from the coercive power of the government. And *that* is the separation that is and should be the ultimate concern of the Religion Clauses—to minimize the government's interference with or influence on religion, and to leave each American free to exercise or reject religion in his or her own way, neither encouraged by the government nor discouraged or penalized by the government.

THE FACTS OF *ESPINOZA*

The Montana legislature enacted a program to subsidize, modestly and indirectly, private education at the K-12 level. Montanans could claim a credit of up to $150 against their state income tax, in effect reimbursing any contribution they made, up to $150, to a "student scholarship organization."[2] Such scholarship organizations use the donations they receive to award scholarships to students attending private schools.[3] The legislation provided that neither the donors nor the scholarship organizations could restrict awards to particular private schools or categories of private schools.[4] The ultimate choice of school belonged solely to the families receiving scholarships.

The Montana Supreme Court held the program unconstitutional because it included religiously affiliated schools.[5] Including religious schools violated a provision of the Montana constitution that prohibits "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."[6]

The Montana court invalidated the entire program, barring aid to religious and secular schools alike.[7] This part of the decision appeared to be an effort to eliminate any discrimination and thereby avoid review by the U.S. Supreme Court. The Supreme Court reviewed the decision anyway; and it held that the Montana constitutional provision, and the state court's reliance on that provision to invalidate the program, discriminated against religious schools and against scholarship families who chose to send their children to such schools, in violation of the Free Exercise Clause of the federal Constitution.[8] In rejecting the Montana court's effort to evade further judicial review, the Supreme Court ensured that such an evasive tactic is unavailable going forward. State courts that rely on discriminatory state provisions will not be able to shelter their decisions from the Court's review.[9]

2 Montana Code Annotated § 15-30-3103, 3111.

3 *Id.* §§ 15-30-3102, 3103.

4 *Id.* §§ 15-30-3103, 3111.

5 Espinoza v. Montana Department of Revenue, 435 P.3d 603 (Mont. 2018).

6 Montana Constitution art. X, § 6.

7 The court did this indirectly, or perhaps we should say in steps. It first held the inclusion of religious schools in the statutory program unconstitutional; then it invalidated, as inconsistent with the statute, an administrative rule that had barred religious schools from participation. *Espinoza*, 435 P.3d at 614–15.

8 *Espinoza*, 140 S. Ct. at 2256–57.

9 The Court reasoned that a state court "must not give effect to state laws that conflict with federal law[]" and that "[g]iven the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have 'disregard[ed]' the no-aid provision" rather than using it as the legal authority for striking down the program. *Id.* at 2262 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

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SINGLING OUT RELIGION FOR ADVERSE TREATMENT

Few observers would be surprised at a holding that express discrimination against religion violates the Free Exercise Clause. The principle of no discrimination against religion is at the heart of the Court's free-exercise doctrine as this article is written.[10] The controversy is about whether this principle applies to government funding. It does.

The Nondiscrimination Principle

The Montana program as originally enacted was neutral toward religion: any taxpayer who donated to a student scholarship organization could claim a tax credit, and any family could seek a scholarship from a student scholarship organization to attend either a secular or a religious private school. The Montana Supreme Court invalidated the program solely on the basis of the state constitution's prohibition on any "direct or indirect appropriation or payment" of public funds "to aid any church, school," or other institution "controlled in whole or in part by any church, sect, or denomination."[11] However we characterize the court's remedy for the violation it found, the constitutional provision on which it relied singled out religious schools, and the students attending them, for exclusion from generally available government benefits.

Such discrimination against religion is presumptively unconstitutional. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'"[12] Thus the government violates the Free Exercise Clause when it "den[ies] a generally available benefit solely on account of [the claimant's] religious identity" or status.[13] Indeed, the Court had said that a rule excluding religious schools and children attending them from "'the benefits common to the rest of [their] fellow-citizens'" is "odious to our Constitution."[14] And of course the Court had said long ago, in a case more commonly cited for its vigorous no-aid rhetoric, that a state "cannot exclude individual . . . members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[15]

The Court's most recent funding decision prior to *Espinoza* was *Trinity Lutheran Church v. Comer*.[16] Trinity Lutheran had been awarded a competitive grant, based on reasonably objective criteria, to fund a rubberized resurfacing of its daycare center's playground. Then, before it actually received the money, it was held ineligible because it was a church, under a state constitutional provision similar to, but less sweeping than, Montana's. The lower federal courts upheld this discrimination,[17] but the Supreme Court reversed. The Court's opinion forbade discrimination in state funding on the ground of claimants' religious "status" or "identity."[18]

10 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Employment Division v. Smith, 494 U.S. 872 (1990).

11 Montana Constitution art. X, § 6.

12 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*, 508 U.S. at 533, 542) (modifications by the Court).

13 *Id.* (holding that state could not declare an organization ineligible for a grant supporting playground resurfacing on the ground that it was a church).

14 *Id.* at 2024–25 (quotation omitted).

15 Everson v. Board of Education, 330 U.S. 1, 16 (1947).

16 137 S. Ct. 2012.

17 Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779 (8th Cir. 2015).

18 *Trinity Lutheran*, 137 S. Ct. at 2019.

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Trinity Lutheran left one unresolved issue. The majority viewed improved playground safety as an entirely secular use of the funding; a plurality reserved the question whether the state could discriminate against "religious uses of funding."[19] It is reasonable to speculate that this footnote held the votes of Justices Breyer and Kagan, enabling a 7–2 decision instead of a 5–4. Funding the operations of a religious school might be thought a religious use of the money—a point that did not have to be stated in light of the long history of litigation over funding for religious schools, and a point that was emphasized the next day when the Court vacated and remanded two cases about discriminatory refusals to fund religious schools.[20] Those two cases presented the question that the plurality had reserved in its footnote.

Espinoza presented the question in the context of aid to religious schools, and the Court held the discrimination against religious schools unconstitutional. The Montana court's decision barred religious schools, and the parents who wanted to use them, "solely because of the religious character of the schools."[21] Such discrimination could be justified only by a compelling government interest, and Montana's policy preference for a more stringent separation of church and state did not suffice.[22]

Montana argued that religious schools would use the money for religious instruction, or at least that the money would go into an undifferentiated budget that included religious instruction, and thus the case fell within the question reserved in *Trinity Lutheran*: the state was discriminating not with respect to religious status but with respect to "religious uses of funding."[23] But in *Espinoza*, as in *Trinity Lutheran*, the majority held—correctly—that the discrimination rested on religious status. The Montana court had broadly forbidden any aid to schools that were "religiously affiliated" or "controlled in whole or in part by churches."[24] Indeed, "controlled in whole or in part by any church" was the language of the state constitution.[25] So once again, the majority declined to decide whether strict scrutiny also extended to discrimination against religious uses of the money.

Why the "Status-Use" Distinction Does Not Matter

A "status-use" distinction cannot be the proper constitutional line concerning discrimination against religion in student-aid programs. That distinction conflicts with the text of the Free

19 *Id.* at 2024 n.3 (plurality opinion).

20 Moses v. Skandera, 367 P.3d 838 (N.M. 2015), *vacated sub nom.* New Mexico Association of Non-Public Schools v. Moses, 137 S. Ct. 2325 (2017); Taxpayers for Public Education v. Douglas County School District, 351 P.3d 461 (Colo. 2015), *vacated*, 137 S. Ct. 2327 (2017). On remand, the New Mexico court reinterpreted the state constitution and eliminated the discrimination, at least in the textbook program before it. Moses v. Ruszkowski, 458 P.3d 406 (N.M. 2018). The Colorado case became moot when a newly elected school board repealed the school-choice program at issue. Nicholas Garcia, *Big Blow to Voucher Program: Douglas County School Board Votes to End Controversial Method of Assistance*, Denver Post, December 5, 2017 (available on Westlaw). Essentially the same article is available as Nicholas Garcia, *The New Douglas County School Board Just Ended a Controversial Voucher Program*, Colorado Independent, December 5, 2017, https://www.coloradoindependent.com/2017/12/05/douglas-county-voucher-program-school-baord-colorado/.

The plurality's footnote in *Trinity Lutheran* also reserved judgment on a second question presented by the New Mexico case: whether a facially neutral ban on aid to any private school, religious or secular, is invalid if the ban was originally motivated by anti-Catholicism.

21 Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246, 2255 (2020).

22 *Id.* at 2260.

23 *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality opinion).

24 Espinoza v. Montana Department of Revenue, 435 P.3d 603, 613 (Mont. 2018).

25 Montana Constitution art. X, § 6.

Exercise Clause and with earlier decisions of the Court, and it collapses in the context of benefits to religiously grounded education.

First, the constitutional text offers no basis for distinguishing a beneficiary's religious affiliation from its use of benefits. It is difficult to "see why the First Amendment's Free Exercise Clause should care" about a "status-use" distinction when "that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)."[26] The Clause encompasses "two concepts,—freedom to believe and freedom to act."[27] "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."[28]

The "exercise of religion" covers not just having a religious identity, but also living out that religious identity, including giving or receiving religious instruction in educational institutions. The constitutional text simply cannot support forbidding discrimination against religious affiliation but allowing discrimination against religious teachings and activities.

When citizens "use" a government benefit to support religiously grounded schools or help their children attend them, they engage in religious actions. The Court's free exercise decisions forbid discrimination and non-neutrality not only against religious affiliation, but against those who live out their religious identity in actions.[29] In *Sherbert v. Verner*, for example, South Carolina denied unemployment benefits to a woman who had been discharged from her job and refused to accept a different job in which she would be required to work on Saturday, her Sabbath. The state did not penalize Adele Sherbert because she was a Seventh-day Adventist; it penalized her because she acted in accordance with that identity and status.[30] The Court still found the denial of benefits unconstitutional.

Likewise, in *Thomas v. Review Board*, the Court held unconstitutional the state's denial of unemployment benefits to a Jehovah's Witness who had resigned from his job rather than produce armaments in violation of his beliefs. The state did not penalize Eddie Thomas for being a Jehovah's Witness; it penalized him for acting on that identity. The government violates free exercise if, absent a compelling reason, it "conditions receipt of an important benefit upon *conduct* proscribed by a religious faith, or . . . denies such a benefit because of *conduct* mandated by religious belief, thereby putting substantial pressure on an adherent to modify his *behavior* and to violate his beliefs."[31]

Moreover, *McDaniel v. Paty*,[32] which is sometimes cited as an example of the Court invalidating discrimination based on "status,"[33] actually reflects a broader rule. *McDaniel* struck down a state constitutional provision barring clergy from serving in the state legislature or a state constitutional convention. The plurality held that the state had placed an unconstitutional disability on McDaniel—

26 *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part) (emphasis in original).

27 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

28 Employment Division v. Smith, 494 U.S. 872, 877 (1990).

29 *See, e.g., Lukumi*, 508 U.S. 520; Thomas v. Review Board, 450 U.S. 707 (1981); McDaniel v. Paty, 435 U.S. 618 (1978); Sherbert v. Verner, 374 U.S. 398 (1963).

30 *Sherbert*, 374 U.S. at 404.

31 *Thomas*, 450 U.S. at 717–18 (emphases added). When the Court in *Smith* reduced the scope of the Free Exercise Clause, it reaffirmed *Sherbert* and *Thomas* on the ground that, when a state's unemployment-benefits law recognizes certain reasons as "good cause" for declining available work, the state's refusal to accept a religiously based reason is non-neutral toward religious exercise. *Smith*, 494 U.S. at 884.

32 435 U.S. 618 (1978).

33 *See Trinity Lutheran*, 137 S. Ct. at 2020–21.

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ineligibility for office—because of his "status as a 'minister.'"[34] But it immediately noted that Tennessee defined ministerial status "in terms of conduct and activity."[35] Tennessee's interest in disestablishment could not justify discriminating against this religious activity.[36]

As Justice Brennan noted in his influential concurring opinion, the state had actually asserted a distinction between mere religious affiliation and something more: the state court had defended the disqualification because it rested "not [on] religious belief, but [on] the career or calling, by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect."[37]

Justice Brennan rejected that distinction for reasons that were highly relevant to *Espinoza*:

> Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.[38]

McDaniel thus illustrates that the state may not discriminate against a person's religious practice on the ground that the person pursues it seriously or pervasively. Justice Brennan continued, squarely rejecting any distinction between intense religious activity and religious status or identification:

> The provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity. Such a classification as much imposes a test for office based on religious conviction as one based on denominational preference. A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.[39]

McDaniel thus condemns placing a "unique disability" upon religious uses of a neutral educational benefit. Forbidding religious uses of such aid discriminates against those families and schools for whom the "intensity" of religious practice calls for integrating religion into the educational process. Such discrimination imposes a bar as much "based on religious conviction as one based on denominational preference" or religious affiliation.[40] The Free Exercise Clause forbids discrimination against schools (and their students) not only when it rests on mere religious affiliation, but also when it rests on the act of integrating religious content into teaching.

Even if a distinction between religious status and religious use of funds is ever valid, it collapses in the context of instruction in religious schools.[41] It collapses for two related but independent reasons.

First, religious schools typically provide instruction in the familiar range of subjects—English, history, math, science—while also teaching a religion class or conducting chapel services or, in some cases, integrating relevant religious perspectives and teachings into the secular subjects.

34 *McDaniel*, 435 U.S. at 627.
35 *Id.*
36 *Id.* at 627–29.
37 *Id.* at 630 (Brennan, J., concurring in the judgment) (brackets added, quotation omitted).
38 *Id.* at 631 (footnotes omitted).
39 *Id.* at 632.
40 *Id.*
41 *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part) (arguing that the distinction is unstable).

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The religious elements could be characterized as religious "uses." But simultaneously, religious schools "teach the full secular curriculum and satisfy the compulsory education laws."[42] Schools participating in the Montana program must satisfy the compulsory enrollment law and must teach basic subjects required in the public schools.[43] Montana clearly received full secular educational value for any aid used at religious schools. Whether or not one could ever argue that the state is not receiving full value from its aid, no such argument is possible under the Montana program, which caps the tax credit at $150 annually.

Because religious schools teach the same subjects that secular private schools teach, to bar them from an educational benefits program is to bar them because they additionally provide religious instruction. "If we consider that [state aid] is funding the secular curriculum, [the schools are] excluded because of who and what they are—exactly what *Trinity Lutheran* says is unconstitutional."[44]

There is a second way in which the status-use distinction collapses with respect to religious schools. The exclusion of religious uses of the money targets religious schools that incorporate faith into their secular instruction: those that perceive most or all aspects of life from a religious lens. But these schools' religious identity is defined by such teaching. Denying benefits to the schools (and the students who attend them) simply because they incorporate such teaching imposes a penalty on "those who take their religion seriously, who think that their religion should affect the whole of their lives."[45]

"[M]any of those who choose religious schools believe that secular knowledge cannot be rigidly separated from the religious without gravely distorting the child's education. . . . From this perspective, it is not sufficient to introduce religious education on the side."[46] To allow aid to religious schools but not to their religiously grounded teaching "singles out those religions that cannot accept such 'bracketing' of religious teaching, and penalizes them by denying them the entire state educational benefit."[47] To quote Justice Brennan again, it imposes a "unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity."[48]

Thus, the context of religious schooling validates Justice Gorsuch's prediction that the distinction between status and use cannot remain stable. "[T]he same facts can be described both ways."[49] It is untenable to prohibit a state from discriminating against schools because they are religious (status) but allow it to discriminate against schools because they add religious instruction to secular instruction (use of the money). Accordingly, whatever "play in the joints" exists between the Religion Clauses,[50] a status-use distinction cannot define the extent of that play.

Chief Justice Roberts's incrementalism leaves the status-use distinction open for some future majority seeking to limit the reach of *Espinoza*. But the distinction makes no sense, either in terms of the Court's cases or as a matter of first principle. It is inconceivable that any of the five

42 Douglas Laycock, *Comment: Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARVARD LAW REVIEW 133, 162 (2017).

43 Montana Code Annotated § 15-30-3102(7)(f); *id.* § 20-5-109(4).

44 Laycock, *supra* note 42, at 162.

45 Mitchell v. Helms, 530 U.S. 793, 827–28 (2000) (Thomas, J., for four-justice plurality).

46 Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARVARD LAW REVIEW 989, 1017–18 (1991).

47 Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 UNIVERSITY OF CINCINNATI LAW REVIEW 151, 177 (2003).

48 *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment).

49 *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part).

50 *Espinoza*, 140 S. Ct. at 2254.

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Justices in the majority would invoke such a distinction to permit discrimination against religious schools.

Why Davey *and State Blaine Amendments No Longer Matter*

One other loose end remains. In *Locke v. Davey*,[51] the Court permitted the state of Washington to exclude a student from a generally available scholarship because he was majoring in "devotional theology." Neither *Trinity Lutheran* nor *Espinoza* overruled *Davey*; both opinions distinguished it instead.[52]

Davey is a narrow decision that does not give the government general license to discriminate against religious uses of a benefit. The exclusion permitted in *Davey* aimed to prevent government support of the training of clergy—a goal that the Court said reflects a "historic and substantial state interest" dating back to "the founding of our country."[53] The Court characterized a post-secondary theology degree as a "distinct category of instruction," not "fungible" with "training for secular professions."[54] The Court repeated both of these points in *Espinoza*, and it added that the restriction in *Davey* was not based on the student's status, or the school's status, but on what the student "proposed *to do*—use the funds to prepare for the ministry."[55]

For the reasons already stated, we do not believe that this distinction between status and activities or uses of the money explains anything. But it served to further limit *Locke v. Davey*. And in contrast to the Court's point about a single "distinct category of instruction," most religious colleges and K-12 schools involved in student-aid cases "pursue not only religious instruction but also secular education. They train students for the same secular professions and careers that secular schools do."[56] Thus "excluding them excludes instruction that falls within the same category as secular schools"—"a pure case of discrimination against an activity solely because of its religious motivation or viewpoint."[57]

Davey also emphasized a third, overlapping point. Even with the exclusion of theology degrees, the Washington program went "a long way toward including religion in its benefits."[58] Joshua Davey could use his state scholarship to attend a pervasively religious college (so long as it was accredited) and to take courses in religion, including "devotional theology courses," or courses that integrated religion into secular subjects.[59] This point overlaps the Court's earlier points; the restriction on Davey's use of the scholarship was confined to the single "distinct category of instruction" that the state had a "historic and substantial" interest in not funding. Davey suffered only what the Court called the relatively "minor burden" of not being able to use his scholarship to major in theology.[60] Unlike the state law in *Davey,* the Montana Supreme Court's rule excluded

51 540 U.S. 712 (2004).
52 *Espinoza*, 140 S. Ct. at 2257–58; *Trinity Lutheran*, 137 S. Ct. at 2022–24.
53 *Davey*, 540 U.S. at 725, 722.
54 *Id.* at 721.
55 *Espinoza*, 140 S. Ct. at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023 (emphasis by the Court in *Trinity Lutheran*)).
56 Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 University of Tulsa Law Review 227, 248 (2004) (footnote omitted).
57 *Id.*
58 *Davey*, 540 U.S. at 724.
59 *Id.* at 724–25.
60 *Id.* at 725.

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religious schools entirely—all of their instruction and not just their devotional theology courses—from the scholarship programs encouraged by the tax credit.

The degree of burden that an exclusion of religious schooling places on religious choice can inform whether that exclusion violates the Free Exercise Clause. As then-Judge Michael McConnell observed, *Davey* "implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends."[61] *Davey* did not broadly immunize states' denial of benefits based on religious uses of funds. If *Espinoza* has not confined *Davey* to its facts, it has come close.

The Court took another important step in its treatment of *Davey*. The argument against government aid to religious schooling has always had an originalist element, citing opposition to government funding of churches in the founding era.[62] That history is real. But it was focused on earmarked taxes for the religious functions of churches, and principally for the support of the clergy. This is the history invoked in *Locke v. Davey*. But the issue of neutral funding for secular services, provided by religious and secular providers alike, was simply not debated in the founding generation.[63] And the Court finally took note of that fact. It observed that governments subsidized all sorts of private schools, many of them religious, in the early national period before the development of public-school systems.[64]

Espinoza correctly ascribed the tradition of refusing to fund religious schools not to the founding, but to the second half of the nineteenth century.[65] And it noted, for the first time in a majority opinion, how that nineteenth-century development was deeply tainted by anti-Catholicism:

> [M]any of the no-aid provisions belong to a more checkered tradition shared with the [proposed] Blaine Amendment of the 1870s. . . . The Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly "shameful pedigree."[66]

While acknowledging that "the historical record is 'complex,'"[67] the Court properly held that "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[68]

This passage should mark the end of reliance on the history of little Blaine Amendments—state constitutional provisions barring aid to religious schools—as a policy ground for interpreting the Religion Clauses. The Court has not said that all these state constitutional provisions are facially unconstitutional. But it has said that they cannot be relied on to justify discrimination against religious institutions in government funding programs.

And while *Davey* lives on as a narrow exception, its logic is now more strained than ever; it is ripe for overruling. For a state to say it will fund the study of anything except "devotional" religion is just as discriminatory as the rules that were struck down in *Trinity Lutheran* and *Espinoza*. Like

61 Colorado Christian University v. Weaver, 534 F.3d 1245, 1256 (10th Cir. 2008).

62 *See*, most famously, Everson v. Board of Education, 330 U.S. 1 (1947).

63 Laycock, *supra* note 42, at 142–48.

64 *Espinoza*, 140 S. Ct. at 2258. See also Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 University of Pennsylvania Law Review (forthcoming), part II, ms. at 34–50, https://dx.doi.org/10.2139/ssrn.3593577 (expanding on this evidence).

65 140 S. Ct. at 2259.

66 *Id.* (quoting Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion)).

67 *Id.* (quotation omitted).

68 *Id.*

the rule in *McDaniel*, it unconstitutionally singles out "those who exhibit a defined level of intensity of involvement in protected religious activity."[69] And if the unstable distinction between religious status and religious use of the funds ultimately falls, *Davey* is likely to fall with it.

Other Current Disputes over "Religious Uses"

The status-use distinction also appears in a few other contexts. Most modern funding programs fund secular services that may be provided by either religious or secular providers. In the school cases, as already noted, the religious and secular private schools and the public schools all teach the secular curriculum and satisfy the compulsory education laws.

The theology scholarships in *Davey* were an exception to that general pattern. So was the student publication in *Rosenberger v. Rector and Visitors of the University of Virginia*,[70] where the Court invalidated a discriminatory refusal to fund under the Free Speech Clause. Can churches get disaster aid on the same basis as other property owners with damaged buildings? A federal district court in the wake of Hurricane Harvey said probably not; but the Trump Administration changed the challenged policy and settled that case on appeal.[71] Houses of worship received forgivable Paycheck Protection Program loans in the wake of the coronavirus pandemic, and of course the clergy are on their payroll.[72]

These are contexts in which the state may get little or no secular value for its money. Permitting or requiring discriminatory refusals to fund if the money will be used for religious purposes would eliminate religious claims to funding in these cases. That rule is incoherent in the context of schools because of the obvious secular value they provide; but the religious use is clear, and predominant, when a worship space is rebuilt or a clergy salary is paid.

From the perspective of the program as a whole, there is secular value in equality and nondiscrimination, in promoting a diversity of viewpoints, in easing economic hardship among the

69 *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment).

70 515 U.S. 819 (1995).

71 Harvest Family Church v. Federal Emergency Management Agency, 2017 WL 6060107 (S.D. Tex. Dec. 7, 2017), *appeal dis'd as moot*, 2018 WL 386192 (5th Cir. Jan. 10, 2018).

72 *See* 15 U.S.C. § 636(a)(36)(D) (making nonprofit organizations eligible for paycheck protection loans) and § 636 (a)(36)(A)(vii) (defining "nonprofit organization" to mean an organization described in 26 U.S.C. § 501(c)(3), which includes churches). We are not here addressing or defending an administrative regulation that exempts churches from a statutory provision that precludes loans to local affiliates of large national organizations. *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Federal Register 20817, 20819–20 (Apr. 15, 2020) (interim final rule). The Trump Administration attempted to justify this exemption as necessary to avoid burdening hierarchical churches. It would indeed be troubling if congregational denominations and wholly independent houses of worship got funding and hierarchical denominations did not. And we agree that exemptions from funding conditions are sometimes the most neutral course in the sense that they remove a disincentive to an organization's religious practice (the loss of otherwise available funds) without giving the organization a benefit that others would also want. *See infra* notes 108–12 and accompanying text. But here it is also troubling that local congregations of national churches got funding and local affiliates of secular charities did not. *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down under Trump*, The Atlantic, June 29, 2020, https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498/. We have not sufficiently investigated the various structures of the affected organizations to have an informed opinion on whether there was more than one reasonably neutral solution to this conundrum. Perhaps the neutral solution, as the Schwartzman co-authors imply, is to exempt all nonprofits, religious and secular alike. This is how tax exemption works for charitable nonprofits. We believe that preferential funding for churches is unconstitutional. But as this dispute illustrates, the world is a complicated place, and it is not always obvious how a program can best be made neutral and nondiscriminatory.

citizenry and promoting a general economic recovery. But this value is different from a specific secular service provided by the religious entities receiving funding. If including religious claimants equally in these settings is to be required or at least permitted, the justification for the inclusion must rest entirely on the arguments from religious neutrality.

We think that the principles of nondiscrimination and neutrality suffice to require equal funding in these cases. Houses of worship should get nondiscriminatory disaster-relief funding along with other disaster victims similarly situated; clergy should be able to benefit, like other persons, from Paycheck Protection Program loans designed to shield them from economic calamity. To exclude religious claimants in these settings would powerfully disfavor religious activity—and correspondingly (as we discuss in the next part) discourage such activity. As the Court said that the state can surely send firefighters to save a burning church, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[73]

Nondiscriminatory funding in these cases does not threaten any sort of wholesale reversal of the founding generation's decision that government should not fund the religious functions of churches. Disaster situations are exceptional almost by definition. Public subsidies of wide-open speech as in *Rosenberger*—untethered to any policy goal—is also limited to a few settings like universities. There is no neutral secular category into which a creative administration could fit a funding program for weekly worship services, or any of the other religious functions of churches, on anything remotely approaching a regular basis. And if some administration or some state or local government tries, the courts can be alert as always for "religious gerrymanders."[74] *Espinoza* and the cases on which it relies have distinguished neutral and nondiscriminatory funding programs that include religious institutions from the earmarked taxes for core religious functions that rightly concerned the founders.

GOVERNMENT NEUTRALITY AND PRIVATE CHOICE IN MATTERS OF RELIGION

The constitutional prohibition of discrimination against religious uses—even with respect to government funding, and even in religious schools—is an application of larger principles underlying the Religion Clauses. These central principles include government neutrality toward religion and protection of private choice in matters of religion. When a tax-credit program benefits religious and nonreligious schools on neutral terms, a legal rule excluding religious beneficiaries violates these core principles:

> The ultimate goal of the Constitution's provisions on religion is religious liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people.[75]

The ultimate goal is that every American should be free to hold his or her own views on religious questions, and live the life that those views direct, with minimum government interference or

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

74 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (quotation omitted); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion); Walz v. Tax Commission of City of New York, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.).

75 Berg & Laycock, *supra* note 56, at 232.

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influence. The fundamental principle to achieve that goal is government neutrality toward religion in the "substantive" sense:

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . . This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.[76]

What we are here calling substantive neutrality has also been called "incentive neutrality,"[77] because it requires neutral government incentives with respect to religion. It is distinct from "formal neutrality,"[78] also known as "category neutrality,"[79] which requires religiously neutral categories in government programs.

In some contexts, these two versions of neutrality correspond with each other; eliminating religious categories sometimes creates religion-neutral incentives. But when the two forms of neutrality diverge, substantive neutrality—in other words, neutral incentives, voluntarism, and free religious choice—is more fundamental. The purpose of the Religion Clauses is to protect liberty with respect to religious matters—not to create a set of rules about categories for the rules' own sake. The Religion Clauses themselves do not reflect formal neutrality toward religion: they single it out as a category that government should neither prohibit nor establish. Adopting formal neutrality as the touchstone would "[p]aradoxically . . . make the Religion Clauses violate the Religion Clauses."[80] These distinctive provisions reflect a distinctive constitutional concern with preserving the autonomy of religious choices and commitments from government control.

Differently stated, the goal of the Religion Clauses is for religion in America to flourish or decline "according to the zeal of its adherents and the appeal of its dogma."[81] This formulation restates the principles of voluntarism and private choice, as Justice Brennan summarized in *McDaniel*: "Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to 'flourish according to the zeal of its adherents and the appeal of its dogma.'"[82] Or as Justice Goldberg said in one of the school-sponsored prayer cases, "The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."[83]

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76 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul Law Review 993, 1001–02 (1990).

77 Richard A. Posner & Michael W. McConnell, *An Economic Approach to Issues of Religious Freedom*, 56 University of Chicago Law Review 1, 37–38 (1989).

78 Laycock, *supra* note 76, at 999–1000.

79 Posner & McConnell, *supra* note 77, at 37–38.

80 Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 George Washington Law Review 685, 691 (1992).

81 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

82 McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring in the judgment) (quoting *Zorach*, 343 U.S. at 313; footnote omitted).

83 School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

These principles can give coherence to Religion Clause caselaw as a whole. They explain the Court's holdings concerning government funding of religious activities—and also many of its holdings in other major areas of Religion Clause issues.

Neutrality and Funding Programs

The Court's holdings permitting religiously neutral funding programs, and prohibiting religious discrimination in such programs, are fully consistent with the underlying principles of substantive neutrality and religious choice. The Court has repeatedly ruled that neutral educational aid directed by private choice is consistent with the Establishment Clause.[84] These rulings explicitly rest on principles of voluntarism and neutral incentives. In such programs, the Court has said, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[85] A program whose terms are "neutral with respect to religion" creates no "financial incentive for parents to choose a religious school" over a nonreligious one.[86] Individuals use their benefit based on their "zeal" for, or the "appeal" they find in, a particular school's education, ideology, or religious teaching.

All these things remain true when neutral aid to religious schools is considered under the Free Exercise Clause. In the context of a government benefits program involving private choice, the Religion Clauses' core principles require that religious options be included equally with nonreligious options. Equal inclusion of religious options is "formally" neutral: it treats religious and secular schools identically, without classifications or categories based on religion. It is also "substantively" neutral: it neither discourages nor encourages individuals' religious choices. Donors to student scholarship organizations get the same $150 credit whether the funds go to a religious school or a secular school, and families benefit from these funds to the same extent, whichever school they choose. "Financial aid can be distributed in a way consistent with individual choice": "[e]ach family receiving a government voucher can choose the school that it prefers among all the options available," and whatever that range of options may be, "there are more choices with the voucher than without it."[87]

The Court's opinions have not used the phrase "substantive neutrality," but they have long emphasized neutral incentives. "[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion," "[t]here are no 'financial incentive[s]' that 'ske[w]' the program toward religious schools."[88] Because the program's terms are neutral concerning religion, they create no "financial incentive for parents to choose a religious school" over a nonreligious one.[89]

The Court's private-choice decisions hold that exclusion of religious choices is not required by the Establishment Clause, and they similarly show why such exclusion presumptively violates the Free Exercise Clause: the exclusion contravenes the fundamental principles of neutrality and

84 *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993); Witters v. Department of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

85 *Zelman*, 536 U.S. at 649; *accord Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 399–400.

86 *Zelman*, 536 U.S. at 652, 654; *accord Witters*, 474 U.S. at 487–88.

87 Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARVARD LAW REVIEW 155, 157 (2004).

88 *Zelman*, 536 U.S. at 653 (quoting *Witters*, 474 U.S. at 487–88) (alteration by the Court); *accord Zobrest*, 509 U.S. at 10.

89 *Zelman*, 536 U.S. at 654; *accord Witters*, 474 U.S. at 487–88.

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religious choice. Accordingly, most cases where a state singles out private religious choices for exclusion from generally available benefits "should not be difficult": such exclusion is invalid.[90] "Barring religious organizations because they are religious from a general . . . program [of state benefits] is pure discrimination against religion."[91] Singling out religion typically interferes with and distorts voluntary religious choice—especially, regarding educational benefits, the choice of families who wish to support religious schools or send their children to them.

In emphasizing the fact that most school-funding programs now channel aid through explicit choices by program beneficiaries, we do not mean to suggest that this is a constitutional prerequisite for the inclusion of religious providers. In *Trinity Lutheran*, the funds flowed directly to the religious institution. Including religious providers in well-designed and formally neutral direct-aid programs is typically also substantively neutral and facilitates the choices of the ultimate beneficiaries. But the caveat that direct-aid programs be well designed is important, and good design generally requires reasonably objective criteria for the award of funds. The more discretionary the criteria, the greater the risk of discrimination in the award of funds; government officials exercising discretion can favor the religions, or the secular viewpoints, that they like, and disfavor the ones they do not like.[92] The explicit element of family choice in programs like Montana's avoids this risk and makes it clear that the program promotes substantive neutrality and free private choice.

Espinoza reaffirms that states are not required to fund private schools at all.[93] Government is not constitutionally required to privatize government services, or subsidize a private option. Funding only public schools, which are subject to the Establishment Clause, has a severe disparate impact on families who want a religious education for their children; but under long-standing law, disparate impact does not make out a constitutional violation.[94] In terms of incentives, the issues are complex. Funding public schools but not religious schools powerfully discourages the choice of religious schooling; adding funding for religious schools but not secular private schools would powerfully encourage religious schooling. Public schools themselves are non-neutral in one sense—that they can teach from secular but not religious perspectives. But they also serve important interests in neutrality, precisely because they are forbidden to take positions on disputed religious questions and they thus facilitate equal participation by students from many faiths, even as that very neutrality drives away some of the most religiously committed.

These and other complexities on this issue are for another discussion, and the Court shows no sign of requiring funding of private schools. The modest point is that discrimination in funding between public and private schools presents different issues than discrimination between religious and secular schools. But once a state decides to fund private schools, it cannot discriminate between the religious and the secular. That is the holding of *Espinoza*.

There has been a constitutional green light for neutral aid to religious schools since *Zelman* in 2002.[95] Many states have enacted modest programs; few have enacted large ones. The voters are

90 Morris County Board of Chosen Freeholders v. Freedom From Religion Foundation, 139 S. Ct. 909, 910–11 (2019) (statement of Kavanaugh, J., respecting denial of certiorari).

91 *Id.* at 911.

92 *See* Laycock, *supra* note 42, at 154–57; Laycock, *supra* note 87, at 195–200.

93 Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246, 2261 (2020).

94 Washington v. Davis, 426 U.S. 229 (1976) (equal protection). In *Employment Division v. Smith*, 494 U.S. 872, 886 n.3 (1990), the Court argued that free exercise claims for religious exemptions are also disparate impact claims and rejected them on that ground. That argument ignored the fact that a generally applicable law that prohibits a person's exercise of religion directly violates the express terms of the Free Exercise Clause. The Court's error followed from its reframing of the Clause as merely an equality provision.

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

divided over such programs, and the legislative support for them comes disproportionately from Republicans, who are generally unwilling to raise tax revenue to support even the programs they favor. So the programs have generally remained small. Montana authorized only $3 million, statewide, to fund tax credits of $150 per donor.[96] *Espinoza* does nothing to change these political dynamics. But it does make clear that the principle of government neutrality toward religion applies to funding decisions, and that government cannot discriminate between religious and secular providers of education or, almost certainly, any other secular service.

Neutrality and Regulatory Exemptions

Principles of substantive neutrality and religious choice also explain why "government may (and sometimes must) accommodate religious practices" in the face of generally applicable laws and regulations.[97] It is entirely consistent to require nondiscriminatory funding programs (treating religious and secular schools alike) and also to require regulatory exemptions for the exercise of religion (treating religion as special for this purpose), because both positions result in neutral religious incentives.

Applying a general law to restrict a religiously motivated practice may be formally neutral, but it usually is not substantively neutral. Enforcing the law against religious and secular violations alike, with no religious exemptions, creates no religious categories (thus formally neutral), but it creates seriously skewed religious incentives (thus not substantively neutral). A law that significantly burdens a religious practice prevents people from exercising voluntary religious choice. The threat of civil or criminal penalties or loss of government benefits profoundly discourages the regulated religious practice. Exempting the religious practice from regulation eliminates that discouragement, and it rarely encourages the exempted practice. Nonbelievers will not suddenly start observing the Sabbath, or traveling by horse-and-buggy, or holding their children out of high school just because observant Jews or Adventists or Amish are permitted to do so. Judged by the incentives created, the exemption is by far the more neutral course; it has the smallest effect of either encouraging or discouraging religion.

Equal treatment of religious and secular schools with respect to financial aid is both formally and substantively neutral, because money has the same value for everyone. Funding secular schools but not religious schools creates a religious category, and it creates incentives to secularize religious schools—powerful incentives if the discriminatory subsidies grow large, or if a school is on the edge financially and has only a modest amount of religious programming that would have to be eliminated.

But religious exemptions do not have the same value for everybody. Most have value only for believers in some particular faith, or for participants in a particular religious practice. The exemption has no effect on those with no religious motivation to engage in the exempted practice, and it eliminates a powerful discouragement for those who do have a religious motivation to engage in the practice. So even though an exemption is a form of religious category, religious exemptions create neutral religious incentives.

Of course, there are exceptional cases. An exemption from military service, or from paying taxes, both protects conscience and confers secular benefits. Then neutral incentives are hard to

96 *Espinoza*, 140 S. Ct. at 2251.

97 Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 144 (1987).

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achieve. But in the great bulk of cases, regulatory exemptions for conscientious objectors provide far more neutral incentives than penalizing those who exercise their religion.

These principles explain why government may accommodate voluntary religious practice by exempting it from burdensome laws, even if such exemptions do not "come[] packaged with benefits to secular entities."[98] Such an exemption is constitutional when it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice."[99] Exemption preserves government "neutrality in the face of religious differences," differences that the general law in question does not take into account.[100]

Moreover, the Court has unanimously required such exemptions when a generally applicable law "interferes with the internal governance of [a] church" or other religious organization, "depriving the church of control over the selection of those who will personify its beliefs."[101] The "ministerial exception" to nondiscrimination suits, affirmed in *Hosanna-Tabor*, protects religious choice: "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[102] "The church must be free to choose those who will guide it on its way."[103]

For cases not involving religious organizations' internal governance, the Court's decision in *Employment Division v. Smith*[104] frequently treats religious exemptions as a matter of government discretion rather than a constitutional mandate. But that interpretation of the Free Exercise Clause did not stem from a rejection of the importance of religious choice. Rather, it stemmed from worries about judicial competence to decide when exemptions are appropriate and when the government has a compelling interest in refusing them: "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[105] Congress and a majority of states have rejected *Smith*'s rules, providing for religious exemptions by statute or by interpretation of state constitutions.[106] And the meaning and vitality of *Smith* itself is now being reconsidered. The Court has granted certiorari on the question of whether *Smith* should be "revisited."[107]

Whether or not *Smith*'s concerns about the judicial role should override a constitutional requirement of substantive neutrality, no such concerns were present in *Espinoza*. A prohibition on

98 Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

99 Thomas v. Review Board, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting on other grounds).

100 Sherbert v. Verner, 374 U.S. 398, 409 (1963); *see also* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

101 Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 188 (2012).

102 *Id.* at 196.

103 *Id. See also* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (again applying the exception to employees who teach a religion course to children).

104 494 U.S. 872 (1990).

105 *Id.* at 890.

106 Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2012); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (2012); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 University of Illinois Law Review 839, 844–45 & nn.22–23, n.26 (collecting state statutes and cases).

107 *See* Petition for Certiorari, Fulton v. City of Philadelphia, No. 19-123, at i (docketed July 25, 2019). This petition has been granted. Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020). *See also* Kennedy v. Bremerton School District, 139 S. Ct. 634, 637 (2019) (statement of Alito, J., for four justices, respecting denial of certiorari) (noting that *Smith* cut back on free exercise claims but that the Court "ha[d] not been asked to revisit" *Smith* in that case).

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religious discrimination in funding programs requires no such case-by-case judgments; discrimination toward religious choices in programs of student aid should be presumed unconstitutional. Refusing religious exemptions from a regulatory law can at least be said to further the policy of that law. But religious discrimination in a funding program furthers no policy except a view of disestablishment that the Court has repeatedly rejected. It is discrimination for the sake of discriminating, justified only by a commitment to no-aid for its own sake even when that requires repudiation of religious neutrality and private religious choice. The Court in *Espinoza* understandably gave Montana's compelling-interest argument short shrift.[108]

The funding cases and the exemption cases intersect in an issue now pending before the Court: can a religious believer, or a religious organization, be required to surrender its religious practices as a condition of receiving government funding? Philadelphia is insisting that Catholic Charities certify same-sex families as appropriate foster parents if it wants to be licensed to place foster children with any families and be paid for making such placements.[109] Because an entity cannot place foster children at all except through a contract with the City, the issues in the case concern licensure to perform an activity, not simply funding to support the activity. But the City and its amici of course emphasize the funding aspect of the case, and we discuss it here.

The Court has long been deferential to government strings attached to funding, and fear of such strings has been one reason for religious opposition to government funding of religious institutions. But government cannot be allowed to use the power of the purse to coerce the surrender of constitutional rights.

Loss of government funding to which one is otherwise entitled is a powerful disincentive to religious faith and practice. That was the holding in *Sherbert v. Verner*.[110] The Court said that forcing believers to choose between surrendering conscience or surrendering unemployment benefits "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[111]

The Court continued this theme in *Trinity Lutheran* and in *Espinoza*. "[D]isqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'"[112] It is one more step from invalidating the withholding of funds from a recipient because of its "religious character" to invalidating the withholding of funds because of its religious behavior—but that step was taken in *Sherbert*. If *Smith*'s total deference to generally applicable laws is overruled, or if the Religious Freedom Restoration Act is applied, then *Espinoza*'s holding will apply when government withholds benefits because of a recipient's protected religious practice.

We can put the point differently. Basic access to funding is a matter on which nondiscrimination serves religious choice, but conditions on funding share features of regulation: even when formally religion-neutral, such conditions discourage adherence to a religious practice by making loss of funds the price of that adherence. And with many such conditions, as with many burdensome regulations, exemptions create little or no incentive for anyone not already inclined to engage in the practice on religious grounds. It is hard to imagine a secular foster-care agency seeking to discriminate against same-sex families and adopting or feigning a religious belief in order to claim an exemption. True, some conditions have essentially the same effects on religious and secular

108 Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246, 2260–61 (2020).

109 Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

110 374 U.S. 398 (1963).

111 *Id.* at 404.

112 *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

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providers—particularly conditions that impose only financial or administrative costs, with no religious significance to the burden. For those conditions, equal treatment of religious and secular providers should be the norm and should at least be permitted. But in *Fulton*, exempting religious agencies from the nondiscrimination condition would serve the goals of incentive neutrality and religious choice.

Protection from religiously burdensome funding conditions is essential to religious liberty in the modern state. Governments spend enormous amounts of money; they would have extraordinary power to buy up constitutional rights if they were allowed to withhold government contracts or social-welfare benefits from those who persist in exercising their religion.

Neutrality and Government-Sponsored Religious Speech

A final important category of cases applying the Religion Clauses involves the constitutionality of government-sponsored religious speech, such as prayers or symbolic displays, under the Establishment Clause. The rules in this category have long been shaped by the principle of voluntarism, and by the principle of neutrality in the sense that government should not take sides on disputed religious questions or encourage one religious view at the expense of others. These rules were never absolute, and cannot be, and the Court is now in the process of substantially rolling these rules back. This rollback has already gone too far and is likely to go further. But voluntarism and private religious choice are still protected at least by the basic Establishment Clause principle "that government may not coerce anyone to support or participate in religion or its exercise."[113] On that ground the Court prohibited officially sponsored prayers at public school graduation ceremonies, although it declined (wrongly in our view) to apply the principle to officially sponsored prayers before city council meetings.[114]

Noncoercive exercises or displays are more likely to be upheld than coercive ones. Substantive neutrality would require that government not endorse religion or particular religious viewpoints even when it does so noncoercively. To endorse religion, or evangelical Christianity, is to promote and encourage it; to oppose religion, or evangelical Christianity, is to discourage it. The no-endorsement rule is not formally neutral; government endorses or opposes all sorts of secular viewpoints. But it is substantively neutral, and it is far more neutral than government taking sides in religious disagreements.

The Court's majority has been rapidly backing away from the endorsement rule, but even now, the principle of government neutrality and noninvolvement in religious disputes continues to play a role. Most recently, the Court, in upholding a 95-year-old cross displayed as a war memorial, relied on its view that such "longstanding monuments, symbols, and practices" tend to develop secular purposes and meanings alongside their religious roots.[115] The majority carefully refrained from suggesting that government could erect new displays today with the purpose of promoting its favored religious view as against others.[116] Indeed, one reason the Court gave for presuming the constitutionality of a long-standing monument or practice is that when such a feature develops "familiarity and historical significance, *removing* it may no longer appear neutral" but rather may "strike many as aggressively hostile to religion."[117] And the Court indicated that it would

113 Lee v. Weisman, 505 U.S. 577, 587 (1992) (rule against coercion is "beyond dispute").

114 *Cf. id. with* Town of Greece v. Galloway, 572 U.S. 565, 586–91 (2014).

115 American Legion v. American Humanist Association, 139 S. Ct. 2067, 2082–83 (2019).

116 *Id.* at 2085 ("retaining established" religious displays "is quite different from erecting or adopting new ones").

117 *Id.* at 2084–85 (emphasis added).

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not approve monuments or displays with designs that "deliberately disrespected" other faiths.[118] These passages preserve important strains of substantive neutrality while also permitting some government involvement. But the Court cannot go much further in approving government-sponsored religious symbols without eliminating these strains of substantive neutrality.

CONCLUSION

We think that the principle of substantive or incentive neutrality—requiring government to minimize the extent to which it either encourages or discourages religious belief or practice—can unite the three major areas of Religion Clause litigation, and that this principle does in fact unite much of what the Court has done in these three areas. Minimizing government influence on religious choices and commitments maximizes religious liberty for all Americans. It maximizes voluntarism in religion. The fundamental rule against government generally funding the religious functions of churches remains important, but it was and is a means to an end. It should not have metastasized to require, or even to permit, open discrimination against churches and believers in neutral programs funding private delivery of secular services. And the line of cases culminating in *Espinoza* sets that error straight.

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118 *Id.* at 2089.