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Fundamental Funds: Tax Credits and the Increasing Tension between the Free Exercise Clause and Establishment Clause—Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020)

Elizabeth Jacobson

FUNDAMENTAL FUNDS: TAX CREDITS AND THE INCREASING TENSION BETWEEN THE FREE EXERCISE CLAUSE AND ESTABLISHMENT CLAUSE—ESPINOZA V. MONTANA DEPARTMENT OF REVENUE, 140 S. CT. 2246 (2020).

Elizabeth Jacobson[♯]

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I. INTRODUCTION

Under the First Amendment, "[t]he method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse" of that used to protect general freedom of speech.[1] Unlike with speech,[2] the government generally does not participate in religious dialogue

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[1] Lee v. Weisman, 505 U.S. 577, 591 (1992).

[2] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986) (upholding a zoning ordinance prohibiting adult motion picture theaters from being within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school); R.A.V. v. City of St. Paul, 505 U.S. 377, 384–86 (1992) (holding a city ordinance prohibiting people from things like burning a cross or putting up a Nazi swastika was unconstitutional because by

or debate, as "the Framers deemed religious establishment antithetical to the freedom of all."[3] Where the Free Exercise Clause embraces freedom of conscience and worship parallel to the speech provisions of the First Amendment, the Establishment Clause specifically prohibits "state intervention in religious affairs."[4] Yet courts have long recognized that "there is room for play in the joints" between the Establishment Clause and the Free Exercise Clause.[5]

While the Supreme Court does not recognize the right to public education as a fundamental right,[6] the plaintiffs in *Espinoza v. Montana Department of Revenue* asked the Court to recognize an analogous right: a fundamental right to funding private religious education.[7] Framed as a violation of the petitioners' free exercise rights, the petitioners in *Espinoza* alleged that the Montana Department of Revenue infringed their right by excluding private religious schools from a tax credit program,[8] and the Supreme Court agreed.[9]

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regulating some fighting words more strictly than others, the government shows hostility or favoritism towards the underlying message); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (finding that the Ohio Criminal Syndicalism Act violated the First Amendment because it punished mere advocacy for a type of action without distinguishing it from incitement to imminent lawless action).

[3] *Lee*, 505 U.S. at 591.

[4] *Id.*

[5] Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970)). In *Walz*, a real estate owner sought an injunction to prevent the New York courts from granting property tax exemptions to religious organizations for religious properties used solely for religious worship. *Walz*, 397 U.S. at 666. The owner argued that the grant of an exemption to church property indirectly required him to make a contribution to religious bodies, thus violating the Establishment Clause. *Id.* at 667. The Court importantly noted the room to "play in the joints" and required value judgments under the Religion Clauses to turn on "whether particular acts in question [were] intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669. The Supreme Court determined that the tax exemption did not violate the First Amendment's Religion Clauses. *Id.* at 680.

[6] San Antonio Index. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

[7] Reply Brief for Petitioners at 23–24, Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246 (2020) (No.18-1195), 2019 WL 6726413, at *22 (explaining the history and tradition of similar No-Aid clauses and asking the Court to end the national tradition of religious discrimination).

[8] Espinoza v. Montana Dep't of Rev., 435 P.3d 603, 607–08 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019), *rev'd*, 140 S. Ct. 2246 (2020) (referencing MONT. CONST. art. X, § 6 (West, Westlaw through 2019)) ("The legislature, counties, cities, towns, school districts, and public corporations shall not make 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.").

[9] Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246, 2262–63 (2020).

This paper proposes that while Montana's scholarship tuition tax credit program[10] advances religion and would lead to excessive government entanglement with religion in violation of the Establishment Clause, the Court erred in its reasoning. The Religion Clauses of the First Amendment are not the proper precedential pathway. The Court's past decisions regarding the Free Exercise and Establishment Clause are *so* narrow and limited in scope that *Espinoza* was best decided elsewhere. Montana's scholarship program should be subject to rational basis review because there was no infringement of a fundamental right. Funds are not fundamental.

This paper begins by discussing the history of the freedom of religion, specifically the free exercise rights and anti-establishment provision of the First Amendment.[11] Next, this paper will discuss *Espinoza v. Montana Department of Revenue*.[12] Finally, this paper will argue that *Espinoza* should have been decided in favor of the Montana Department of Revenue because the fundamental right to free exercise of religion does not include a right to funding.[13]

II. HISTORY OF FREEDOM OF RELIGION

As the first portion of the First Amendment, the Establishment Clause and Free Exercise Clause share in subject literally and metaphorically.[14] Justice Rutledge noted, "'[r]eligion' appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike."[15] However, as precedent demonstrates, while these two clauses are often analyzed together, the interpretation of them, together and apart, varies. This section begins by discussing the Framers' approaches to

[10] Constitutional analysis requires examination of the relationship form "for the light that it casts on the substance." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790 (1973) (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). Here the relationship between the tax credit program and the substance is clear. The program is a tuition credit. First, individuals receive tax credits for donating to nonprofit student scholarship organizations. Brief of Respondents at 3, Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246 (2020) (No.18-1195) 2019 WL 5887033, at *3. Next, these organizations use the donations to fund scholarships for qualified education providers. *Id.* at 4. The substance is made clear by the fact that the petitioners relied on the tax credit to create financial aid to allow them to send their children to these religious private schools. Reply Brief for Petitioners, *supra* note 7, at 7.

[11] *See infra* Part II.

[12] *See infra* Part III.

[13] *See infra* Part IV.

[14] *See* U.S. CONST. amend. I. The structure of the First Amendment is that "of religion" describes both the first clause, which is that Congress may not make laws respecting establishment of religion, and the second clause. Separated by a comma and not a semi-colon, the Free Exercise Clause builds off of the Establishment Clause in sentence structure literally.

[15] Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

religion, which serves as a starting point for understanding modern precedent. Next, this section looks at key cases implicating both the Establishment Clause and Free Exercise Clause.

A. Framers' Approach to Free Exercise and the Establishment Clause

In analyzing the "play in the joints" between the Free Exercise Clause and the Establishment Clause, it makes sense to begin by assessing the schools of thought that influenced the drafters of the First Amendment.[16] There were three dominant perspectives regarding the relationship between the government and religion among the Framers: the Evangelical view, the Jeffersonian view, and the Madisonian view.[17]

The Evangelical view, championed by Roger Williams, believed that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained."[18] Those in this school of thought were concerned "that government involvement with religion would *corrupt* and undermine religion."[19]

In contrast to the Evangelical view, Jefferson believed religion "should be walled off from the state in order to safeguard secular interests . . . against ecclesiastical depredations and incursions."[20] The Jeffersonian view stands for the "fear that religion would corrupt and undermine the government."[21]

Madison landed somewhere between Williams and Jefferson.[22] The Madisonian view believed that religious and secular interests "would be advanced best by diffusing and decentralizing power so as to assure competition among sects" and avoid dominance.[23] Madison opposed "every form and degree of official relation between religion and civil authority" as "religion was a wholly private matter beyond the scope of civil power either to restrain or to support."[24]

Though differing in their reasoning, each view expresses a desire to prevent entanglement of religion with government. The Framers sought

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[16] Larry R. Thaxton, *Silence Begets Religion*: Bown v. Gwinnett County School District *and the Unconstitutionality of Moments of Silence in Public Schools*, 57 OHIO ST. L. J. 1399, 1400 (1996).

[17] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1723 (5th ed. 2015).

[18] *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-1159 (2d ed. 1988)).

[19] *Id.* (emphasis added).

[20] *Id.* (quoting TRIBE, *supra* note 18, at 1159).

[21] *Id.*

[22] *See id.* at 1723–24.

[23] *Id.* (quoting TRIBE, *supra* note 18, at 1159).

[24] Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 39–40 (1947) (Rutlegde, J., dissenting).

to separate the concerns of government from the concerns of individual religious communities. The Framers enumerated this desire in the Religion Clauses of the First Amendment. The clauses act as a double-edged sword, prohibiting establishment of religion, but protecting the free exercise thereof.[25]

B. Committee for Public Education & Religious Liberty v. Nyquist[26]

In *Nyquist*, the Supreme Court struck down two provisions of a New York statute related to aid for nonpublic schools as it violated the Establishment Clause.[27]

The New York statute established financial aid programs for nonpublic elementary and secondary schools.[28] The first section at issue provided direct monetary grants from the state to qualifying nonpublic schools for the maintenance and repair of school facilities.[29] Qualifying schools were nonpublic, nonprofit schools designated as serving a high concentration of low-income families.[30] Maintenance and repair included provision of heat, light, water, ventilation, sanitary facilities, cleaning services, snow removal, and "such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils."[31]

The second issue was a two-part program created by the New York statute: a tuition grant program and a tax benefit program.[32] First, the plan provided tuition reimbursement to parents of children attending nonpublic elementary and secondary schools if they also met the income requirement.[33] Second, the plan provided tax relief to parents of children attending nonpublic elementary and secondary schools who failed to qualify for tuition reimbursement.[34] The statute allowed parents to subtract a designated amount from their adjusted gross incomes per each dependent the parent paid at least $50 for in nonpublic school tuition.[35]

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[25] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 350 F. Supp. 655, 669 (S.D.N.Y. 1972), *aff'd in part*, *rev'd in part*, 413 U.S. 756 (1973).
[26] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
[27] *See id.* (finding the provisions violated the Establishment Clause because the statute's primary effect was to advance religion).
[28] *Id.* at 761–62.
[29] *Id.* at 762.
[30] *Id.* at 762–63.
[31] *Id.* at 763.
[32] *Id.* at 764.
[33] *Id.* To qualify for a tuition reimbursement the parent needed to have a taxable income under $5,000. *Id.*
[34] *Id.* at 765.
[35] *Id.* The program adjusted the amount allowed based on income. *Id.* For example, if a taxpayer's adjusted gross income was less than $9,000 that taxpayer could subtract $1,000 for

New York residents sought to enjoin the state from approving or paying any funds, or according tax benefits under the statute, arguing that the three provisions violated the Establishment Clause.[36]

The district court found the maintenance and repair grants and tuition reimbursement grants violated the Establishment Clause, but that the tax credit did not violate the Establishment Clause.[37]

As to the maintenance and repair portion, the district court accepted the intent as secular but found that the provision had the effect of advancing religion.[38] The provision involved continuing financial and political relationships and dependencies between the schools and the state.[39] The court hypothesized that if it allowed a public subsidy for janitorial services for nonpublic schools, the next step may be to supply desks, blackboards, and even a portion of the building because those items are not "religious in character."[40]

The court struck down the tuition reimbursement, noting that a "[s]tate-supported church school is simply not a part of our way of life, and the payment of tuition for its pupils makes the church school a [s]tate-supported school."[41] The court held that "a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment."[42] The state argued that its program was constitutional because it reimbursed poor parents and allowed them to exercise their constitutional right of free exercise.[43] However, the court noted that if it accepted this argument that "[i]f conditions worsen, it would be proper, under this argument, to pay the salaries of the secular teachers."[44] Thus court rejected the state's argument, as it feared that expanding the meaning of the Establishment Clause in this case may lead to a point where the state supports and controls parochial schools.[45]

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as many as three dependents. *Id.* As adjusted gross income rises, the amount deductible decreases. *Id.*

[36] *Nyquist*, 413 U.S. at 768–69.

[37] *Id.*

[38] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 350 F. Supp. 655, 667 (S.D.N.Y. 1972).

[39] *Id.* (quoting Tilton v. Richardson, 403 U.S. 672, 688 (1971)).

[40] *Id.* at 666.

[41] *Id.* at 669.

[42] *Id.* The court continued, hypothesizing that if a state may give a subsidy for religious education, that it may then be able to give a subsidy to purchase sacramental wine or a crucifix, or for a trip to a religious event, or even for a Muslim to take a pilgrimage to Mecca. *Id.*

[43] *Id.*

[44] *Id.* at 670.

[45] *Id.* (noting that "Once we embark upon such a course, we fear that the meaning of the Establishment Clause will be diluted to the point where the State will support the parochial

The court upheld the tax credit and distinguished it from the other provisions in the statute.[46] First, the court found that the tax credit was not restricted to areas containing only Catholic religiously affiliated schools.[47] The credit covered attendance at all nonprofit private schools in the state of New York.[48]

Next, the court noted that the tax credit did not involve a subsidy or monetary grant from the state treasury to the schools or the families.[49] Unlike the maintenance and repair provision and the reimbursement provision, the tax credit involved no receipt of money from the government.[50] Instead, the tax credit allowed for a decrease in taxable income for filing and tax return purposes.[51] The court found that precedent made a distinction between direct grants of public funds and tax exemptions, which are generally permitted.[52]

The court also noted that the provision recompensed citizens who bear the burden of maintaining public schools, but who, for religious or other reasons, send their children to nonpublic schools.[53] The court noted that lightening the tax burden for those who contribute to public education but derive no benefit from it is a legitimate legislative purpose, comparing it to the school tax exemption for the childless or aged.[54] Lastly, the court noted that the benefit to parochial schools was so remote that it did not involve impermissible financial aid to schools.[55] Thus, there was limited administrative entanglement with the tax credit provision.[56]

The Supreme Court began its analysis by noting that Establishment Clause precedent requires careful examination of laws to ascertain whether the law furthers "any of the evils against which that clause protects" like "sponsorship, financial support, and active involvement of the [government] in religious activity."[57]

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schools with the inevitable control by the State built into an anomalous situation. That is a condition devoutly not to be wished.").

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 670–71.

[51] *Id.* at 659.

[52] *Id.* at 671.

[53] *Id.* at 670–71.

[54] *Id.* at 673.

[55] *Id.* at 671 (noting that "the income tax exemption (which is in effect a tax *credit* since the exemption is not intended to equal the parents' outlay) is to *individuals*, not to churches or church schools, a step removed.").

[56] *Id.*

[57] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (quoting Walz v. Tax Comm'm. of the City of New York, 397 U.S. 664, 668 (1970)).

The Court accepted New York's secular legislative purpose for all three provisions.[58] The Court noted New York's interests in "preserving a healthy and safe educational environment," "promoting pluralism and diversity," and its concern for its overburdened system were sufficient secular purposes under the *Lemon* test.[59]

Next, the Court weighed each provision against the final two prongs of the *Lemon* test: primary effect and entanglement.[60] The Court found that the maintenance and repair provision failed the second prong because it effectively subsidized and advanced religion.[61] The Court noted that the payments were not restricted to upkeep of facilities used for secular purposes, adding that it may be impossible to restrict funds in that manner.[62] The Court compared the maintenance and repair provision to a funds for construction of a facility, finding that if a state may not erect buildings where religious activities may take place, the state may not maintain or renovate them either.[63]

Justice Powell's majority opinion found that the tuition reimbursement program also failed the primary effects portion of the *Lemon* test.[64] The tuition reimbursement provision did not guarantee the separation between secular and religious educational functions.[65] The Court held that the state sought to relieve the financial burdens of parents that send their children to private schools to "assure that they continue to have the option to send their children to religion-oriented schools."[66] Though aid to perpetuate pluralistic education and protect overburdened schools are

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[58] *Id.* at 773.

[59] *Id.* (discussing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)) (establishing a three-part test to determine whether the law in question passes muster under the Establishment Clause). The Court defined the three-part test, outlined in *Lemon*, as first, a secular legislative purpose, second, "a primary effect that neither advances nor inhibits religion," and third, that the statute "must avoid excessive government entanglement with religion." *Id.*

[60] *Id.* at 774.

[61] *Id.* at 779–80.

[62] *Id.* at 774.

[63] *Id.* at 776–77. The Court found *Tilton v. Richardson* to be instructive and persuasive on this issue. *Id.* at 775. In *Tilton*, the Court upheld federal grants to be used for construction of facilities for "clearly secular purposes by public and nonpublic institutions." *Id.* (reviewing Tilton v. Richardson, 403 U.S. 672 (1971)). In *Tilton*, the government was entitled, under the clause of a federal statute, to recover portions of its grants in the event the facility was used to advance religion. *See Tilton*, 403 U.S. at 682. The provision was initially set to expire at the end of a twenty-year period, but the Court struck that portion down as it would open the facility to sectarian use after that period. *See id.* at 683. The Court drew the conclusion that if funds may not be granted to build a facility that may be used for sectarian purposes in twenty years, they may not be distributed to maintain and repair facilities without limiting their use to secular purposes. *See id.*

[64] *Nyquist* at 780.

[65] *Id.* at 783.

[66] *Id.*

compelling, the Court held that "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions."[67]

The Court held the tax credit provision had the impermissible effect of advancing the sectarian activities of religious schools.[68] The tax deduction flowed primarily to the parents of children attending sectarian nonpublic schools.[69] The Court also noted that there was little difference in determining effect between the tax benefit and the tuition grant.[70] Under both the reimbursement program and tax benefit program, parents received the same form of encouragement and reward for sending their children to nonpublic schools.[71] The only difference was that one received actual payment from the state while the other reduced the sum they would otherwise be obliged to pay the state.[72] Despite the difference in form, the Court held both provisions violated the effects test for the same underlying reasons.[73]

C. Zelman v. Simmons-Harris[74]

In *Zelman v. Simmons-Harris*, the Supreme Court held that Ohio's Pilot Scholarship Program did not violate the Establishment Clause.[75] Ohio established its Pilot Project Scholarship Program to provide families in the Cleveland City School District with educational choices.[76] The Cleveland City School District failed to meet any state standards for minimal acceptable performance and more than two-thirds of the high school students dropped out or failed before graduation.[77]

Ohio's scholarship program provided two kinds of assistance. The first part of the program provided tuition aid for students that attended a public or private school of their family's choosing for kindergarten through third grade, the program subsequently expanded to include children up to the eighth grade.[78] The program allowed any private school, whether religious or not, to participate in the program and accept students if it was located in the boundaries of the district and met statewide educational standards.[79] The private schools were required to agree not to discriminate

[67] *Id.*
[68] *Id.* at 794.
[69] *Id.*
[70] *Id.* at 790–91.
[71] *Id.* at 791.
[72] *Id.*
[73] *Id.*
[74] 536 U.S. 639 (2002).
[75] *Id.* at 662.
[76] *Id.* at 644.
[77] *Id.*
[78] *Id.*
[79] *Id.*

based on race, religion, or ethnicity.[80] Additionally, private schools had to agree not to advocate or foster unlawful behavior and refrain from teaching hatred based on race, ethnicity, nationality, or religion.[81] Any public school located in a school district adjacent to the covered district was also eligible to participate in the program.[82]

Ohio distributed aid to parents according to financial need, giving priority to families below 200% of the poverty line.[83] These parents were "eligible to receive 90 percent of private school tuition up to $2,250."[84] Also, private schools could not charge these parents a copay greater than $250.[85]

All other parents were eligible to receive 75% of tuition up to $1,875.[86] However, these families only received tuition aid if the number of low-income children participating was less than the number of available scholarships.[87] There was no copay cap for these parents.[88]

Second, the program provided tutorial aid for students who remained enrolled in public schools.[89] Through this part of the program, parents arranged for registered tutors to assist their children and then submitted bills to Ohio for payment.[90]

The program began operating during the 1996 to 1997 school year.[91] During the 1999 to 2000 school year, fifty-six private schools participated and forty-six of them were religiously affiliated.[92] Of the students participating in the program, 96% enrolled in religiously affiliated schools.[93]

A group of Ohio taxpayers challenged the program in state court in 1996.[94] The Ohio Supreme Court rejected the federal claims and held that the enactment of the program violated procedural requirements of Ohio's Constitution.[95] Ohio's legislature cured the defects found, so only the basic provisions of the program remained intact.[96] In 1999, the same

[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 646.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 647.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 648.
[95] *Id.*
[96] *Id.*

group of Ohio taxpayers filed an action in United States district court to enjoin the reenacted program, arguing it violated the Establishment Clause.[97]

The district court granted summary judgment in favor of the Ohio taxpayers.[98] The court began its analysis by looking at the history of the Establishment Clause, noting that the Supreme Court generally holds that government may not provide scholarship assistance to students supporting religious instruction or indoctrination.[99] The district court added that scholarships are approved where the aid is part of a "program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools."[100] In those cases, there is no religious indoctrination attributable to the government; it is private choice of the aid recipient.[101]

In analyzing the parties' claims, the district court applied the *Lemon* test, as reaffirmed by the Court in *Agostini v. Felton*.[102] The district court noted that *Agostini* collapsed the *Lemon* test into two prongs and divided the second prong into three sub-parts.[103] Thus, a "challenged governmental aid passes constitutional muster if it does not: 'result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.'"[104]

The district court concluded that while *Agostini* no longer applied an absolute ban on direct aid supporting religious institutions under the Establishment Clause, the circumstances where aid is permissible still would not include *Committee for Public Education & Religious Liberty v. Nyquist*, which the court concluded was factually indistinguishable from the case at hand.[105]

The district court analyzed Ohio's program under the *Agostini* standard, and found that the program "[ran] afoul of both the indoctrination prong and the financial incentives prong of the effects test."[106] Ohio's program was not neutrally available without regard to religious-nonreligious, public-nonpublic nature of schools benefitted.[107] First, there were very few

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[97] *Id.*
[98] *Id.*
[99] Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 843 (N.D. Ohio 1999).
[100] *Id.* at 844.
[101] *Id.*
[102] *Id.* (citing Agostini v. Felton, 521 U.S. 203, 234 (1997)).
[103] *Id.*
[104] *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)).
[105] *Id.* at 859. The Ohio taxpayers argued that Ohio's Pilot Program was unconstitutional under *Nyquist* because it was factually indistinguishable from the program in *Nyquist*. *Id.* at 844. They argued that the program had the effect of advancing religion, thus failing the second prong of the *Lemon* test. *Id.* at 845. The government contended that Ohio's program was dissimilar and should be assessed in light of more recent Supreme Court cases. *Id.*
[106] *Id.* at 859.
[107] *Id.*

nonreligious options available to eligible students, so the court concluded that it was not possible to say the decision to attend a religious school was made as a result of the "genuinely independent choice of aid recipients."[108] Also, there were no limitations on how schools could use the funds, nor safeguards to ensure secular instruction.[109] Next, the court found that Ohio's program incentivized students to attend religious schools because the program required that students attend a participating school and the overwhelming majority of those schools were religiously affiliated.[110]

On appeal, a panel for the Sixth Circuit Court of Appeals affirmed the district court's decision.[111] In its analysis, the court noted that the *Lemon* test is regularly used in the context of schools and education and that cases like *Agostini* demonstrate the test's flexibility.[112]

The Sixth Circuit then compared the program in Ohio to the program in *Nyquist*, finding it to be the most persuasive and "on point with the matter at hand."[113] The court noted that, factually, Ohio's program paralleled the tuition reimbursement program in *Nyquist*.[114] Both programs provided for parents to receive government funds, either directly as payment for tuition or as reimbursement.[115] Additionally, both programs did not include provisions guaranteeing that the funds would be used exclusively for neutral and nonideological purposes.[116] Lastly, neither program restricted religious schools' use of tuition, finding that "the funds may be used for religious instruction or materials as easily as for erasers and playground equipment."[117]

The Sixth Circuit concluded that the "alleged choice afforded [to] both public and private school participants . . . [was] illusory."[118] No public schools outside of Cleveland registered in the school voucher program, and there were no spaces available for children who wished to attend suburban public schools under the program.[119] Ultimately, the appellate court held that the Establishment Clause is violated when "the government has established a program which does not permit private citizens to direct

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[108] *Id.*
[109] *Id.*
[110] *Id.* at 860.
[111] Simmons-Harris v. Zelman, 234 F.3d 945, 948 (6th Cir. 2000).
[112] *Id.* at 952–53. The court noted that *Agostini* introduced components that are aspects of the *Lemon* test, but that precedent is not limited only to those components. *Id.* at 953. The court added that other components previously utilized by the Supreme Court could be relevant in assessing a claim under the *Lemon* test. *Id.*
[113] *Id.* at 953.
[114] *Id.* at 958.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 959.
[118] *Id.*
[119] *Id.*

government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities."[120]

The Supreme Court subsequently reversed the Sixth Circuit's decision.[121] The Court noted that the first prong of the *Lemon* test was satisfied because the statute was "enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[122]

Thus, the primary question was whether the Ohio program had the effect of advancing or inhibiting religion.[123] After assessing precedent, the Court concluded that "where a government aid program is neutral with respect to religion, and provides assistance to a broad class of citizens who . . . direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the program is not subject to challenge under the Establishment Clause.[124] The Court upheld Ohio's program, holding that it was entirely neutral with respect to religion because it provided "benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district."[125]

The Supreme Court strayed from the lower court's analysis and declined to look at *Nyquist* as determinative.[126] The Court noted that the two programs are dissimilar, as the program in *Nyquist* gave benefits exclusively to private schools and parents of private school students.[127] Also, in *Nyquist*, the Court expressly reserved judgment with respect to cases involving public assistance "made available generally and without regard to sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[128]

The Supreme Court found Ohio's program to be one of "true private choice."[129] The Court noted that the program permitted participation of all schools within the Cleveland City School district, religious or nonreligious.[130] The program similarly determined eligibility on neutral terms without reference to religion, using income as the primary factor in determining eligibility.[131]

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[120] *Id.* at 960.
[121] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
[122] *Id.* at 649.
[123] *Id.*
[124] *Id.* at 652.
[125] *Id.* at 662.
[126] *Id.* at 661.
[127] *Id.*
[128] *Id.* (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782–83 (1973)).
[129] *Id.* at 653.
[130] *Id.* at 652.
[131] *Id.* at 653.

Next, the Supreme Court held that Ohio's program did not provide financial incentives to skew the program towards religious schools.[132] In fact, the Court determined that Ohio's program disincentivized religious schools.[133] Private schools received only half of the assistance given to community schools and one-third of the assistance given to magnet schools.[134] Also, parents that chose to send their children to private schools paid a portion of the school's tuition while families at public or magnet schools paid no tuition.[135]

The Court rejected the argument that Ohio's program created the public perception that Ohio endorsed religious practices or beliefs.[136] The Court concluded that any objective observer familiar with the history and context of Ohio's program would reasonably view the program as "one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."[137]

Though forty-six of the fifty-six participating private schools were religious, the Court did not find an Establishment Clause violation.[138] The Court believed the question should be whether Ohio coerced parents into sending their children to religious schools, not whether it had the effect of advancing religion.[139]

D. Locke v. Davey[140]

In *Locke v. Davey*, the Rehnquist Court held that the state of Washington's Promise Scholarship Program was constitutional despite including a provision that a scholarship recipient could not pursue a degree in devotional theology.[141]

Washington's Promise Scholarship Program assisted high-achieving students that may not otherwise have the financial ability to attend

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[132] *Id.*
[133] *Id.* at 654.
[134] *Id.* In the dissent, Justice Souter argued that the program was not neutral because participating students could not spend their scholarship vouchers at public schools. *Id.* at 690 n.3. The majority opinion rejected this reasoning because students enrolled at public schools received tutoring aid, which was almost twice as much funding as the students who chose to attend private schools. *Id.* at 654.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 655.
[138] *Id.*
[139] *Id.* at 655–56. In his dissent, Justice Souter argued that because more private religious schools participated, the program "discouraged participation of private nonreligious schools." *Id.* at 656. However, the majority opinion rejected this argument as well because the amount of religiously affiliated schools "did not arise as a result of the program," but rather, is a phenomenon common to many cities. *Id.* at 657.
[140] 540 U.S. 712 (2004).
[141] *Id.* at 715.

college.[142] Eligible students needed to meet a number of requirements. First, the student needed to graduate from a Washington high school in the top 15% of their class or obtain at least a set minimum on college admissions tests.[143] Next, the student's family income could not be more than 135% of Washington's median income.[144] Lastly, and at issue in this case, was the requirement that the student enroll at least half time at an eligible in-state postsecondary institution and not pursue a degree in devotional theology while receiving the scholarship.[145] Though not defined by the statute, the parties agreed that it codified Washington's constitutional prohibition on providing funding for students pursuing degrees "devotional in nature or designed to induce religion faith."[146]

Davey sued various Washington officials seeking to enjoin Washington from refusing to award the scholarship solely because a student pursues a devotional theology degree.[147] Davey argued Washington violated the Free Exercise, Establishment, and Free Speech Clauses by denying him the scholarship money based on his decision to pursue a devotional theology degree.[148]

However, the district court rejected Davey's constitutional claims, granting summary judgment in favor of the State.[149] As to Davey's Establishment Clause challenge, the court rejected his claim that the Establishment Clause required Washington to fund religious education.[150] Looking to Maine's Supreme Court, the district court stated that the Establishment Clause does not require government assistance to make the practice of religion more available or easier.[151]

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[142] *Id.* at 715–16.
[143] *Id.* at 716.
[144] *Id.*
[145] *Id.*
[146] *Id.* (citing WASH. CONST. art. I, § 11).
[147] *Id.* at 718.
[148] *Id.*
[149] *Id.*
[150] Order Denying Plaintiff's and Granting Defendants' Motion for Summary Judgment, Davey v. Locke, No. C00-61R, 2000 WL 35505408 at *5 (W.D. Wash. Oct. 5, 2000).
[151] *Id.* (citing Bagley v. Raymond Sch. Dep't., 728 A.2d 127, 136 (Maine 1999)). The court looked to Maine's decision in *Bagley* to address an argument made regarding the Supreme Court's interpretation of the Establishment Clause in *Agostini*. *Id.* Maine's Supreme Court noted that the Establishment Clause does not have a role in requiring government assistance to make practice of religion more available or easier. *Id.* The district court also addressed Davey's Free Exercise Clause argument. *Id.* Davey asked the court to apply the holdings of *Sherbert v. Verner* and its progeny to questions of school funding. *Id.* The court declined to apply the case holdings outside of unemployment compensation. *Id.* Ultimately, the court held there was no Free Exercise Clause violation because there is no right to have Washington fund religious instruction. *Id.*

On appeal, a panel for the Ninth Circuit Court of Appeals declared the scholarship program unconstitutional.[152] The Ninth Circuit approached precedent from a different direction, beginning with *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.[153] The court stated that non-neutral and not generally applicable laws burdening religious practice must advance compelling interests and "be narrowly tailored in pursuit of those interests."[154] In addressing Washington's scholarship program, the court found that the program lacked neutrality because free exercise encompasses the right to be a minister and Washington's program, on its face, disqualifies clergy.[155] The Ninth Circuit's panel also addressed the free speech arguments made by Davey, finding that the program was viewpoint based because it discriminates against religious ideas.[156]

After establishing that Washington's scholarship program was facially discriminatory, the court addressed the compelling interest requirement. The court did not recognize Washington's interest in achieving greater separation of church and state because that interest is already ensured under the federal Establishment Clause and the degree of separation is limited by the Free Exercise Clause.[157]

The Supreme Court approached its analysis of the case differently. While the Ninth Circuit analyzed the case within the parameters of the Free Exercise Clause alone, the Supreme Court made its decision within the "play in the joints" between the Free Exercise Clause and the Establishment Clause.[158] Rejecting the reasoning of the Ninth Circuit's panel, the Supreme Court distinguished the circumstances of *Locke* from those of *Lukumi* because Washington's scholarship program did not impose criminal or civil sanctions on any type of religious service or right;[159] it did not deny ministers the ability to participate in the political affairs of the community; and it did not require students to choose between religious beliefs and receipt of a government benefit.[160]

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[152] *Locke*, 540 U.S. at 718.
[153] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[154] Davey v. Locke, 299 F.3d 748, 753 (9th Cir. 2002) (quoting *Lukumi*, 508 U.S. at 546).
[155] *Id.*
[156] *Id.* at 756.
[157] *Id.* at 759.
[158] Locke v. Davey, 540 U.S. 712, 719 (2004).
[159] *Id.* at 720. The Ninth Circuit Court of Appeals looked to the Supreme Court's decision in *Lukumi Babalu Aye, Inc. v. Hialeah* for guidance in determining the level of scrutiny necessary. *Davey*, 299 F.3d at 753 (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)). The Ninth Circuit Court of Appeals found that *Lukumi* was implicated because the Washington state scholarship policy referred to religion on its face and thus was not neutral or generally applicable. *Id.*
[160] *Locke*, 540 U.S. at 720–21.

Next, the Rehnquist majority addressed Justice Scalia's dissent. Justice Scalia argued that by providing generally available benefits as part of a baseline, which includes training for secular professions, the State must also fund training for religious professions.[161] The majority rejected this argument, noting that religious education for ministry shares no counterpart with respect to other callings or professions, as majoring in devotional theology is not only an academic pursuit, but also a religious calling.[162]

In addressing the Washington Constitution's anti-establishment interests, the Court first looked to tradition and history.[163] The Court discussed a history of popular uprisings against use of taxpayer funds to support churches or church leaders.[164] The Court also discussed the existence of anti-establishment clauses in a number of other state constitutions, citing Georgia, Delaware, Kentucky, Vermont, Tennessee, and Ohio as examples.[165] In its analysis, the Court pointed to the fact that Washington's scholarship program included religion in its benefits by allowing students to attend religious schools and to take devotional theology classes.[166]

Thus, American history and Washington's interests adequately supported the Court's conclusion that anti-establishment clause and scholarship program did not suggest religious animus.[167] The Court held that the program was a permissible exercise of the play in the joints; "[i]f any room exists between the two Religion Clauses, it must be here."[168]

E. Trinity Lutheran Church of Columbia v. Comer[169]

In *Trinity Lutheran Church of Columbia v. Comer*, the Roberts Court found that the Missouri Department of Natural Resources' playground resurfacing program was unconstitutional for categorically disqualifying churches and other religious organizations from receiving grants.[170]

The Missouri Department of Natural Resources offered state grants to help schools, daycare centers, and nonprofit entities purchase

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[161] *Id.* at 721.
[162] *Id.*
[163] *Id.* at 722–23.
[164] *Id.*
[165] *Id.* at 723. Each cited constitution "prohibited *any* tax dollars from supporting the clergy." *Id.*
[166] *Id.* at 724–25.
[167] *Id.* at 725.
[168] *See id.*
[169] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[170] *Id.* at 2017, 2025.

rubber playground surfaces.[171] Due to limited funding, grants were awarded based on several criteria, like "poverty level of the population in the surrounding area, and the applicant's plan to promote recycling."[172] The program expressly denied grants to applicants owned or controlled by churches, religious sects, or other religious entities[173] as compelled by Missouri's Constitution, which provides that money cannot be "taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . . ."[174]

Trinity Lutheran operated a preschool and daycare center on its property that admitted students of any religion.[175] Trinity Lutheran's daycare and preschool center ranked fifth among forty-four applicants for a grant the year it applied for playground funding but was deemed "categorically ineligible" because it was operated by a church.[176]

Trinity Lutheran sued alleging that the Missouri Department of Natural Resources violated its free exercise rights by failing to approve its grant application.[177] Trinity Lutheran sought declaratory judgment and injunctive relief prohibiting the Missouri Department of Natural Resources from discrimination against Trinity Lutheran in grant applications.[178]

The district court dismissed Trinity Lutheran's complaint,[179] beginning its analysis by addressing Article 1, section 7 of the Missouri Constitution.[180] The district court concluded that section 7 "clearly prohibit[ed] public money from, directly or indirectly, going to aid a church, sect, or denomination of religions" and that the denial of Trinity Lutheran's application for a grant could not be considered discrimination.[181]

Next, the court addressed Trinity Lutheran's free exercise claim.[182] Trinity Lutheran argued that the decision to deny its application "targeted Trinity [Lutheran] for disparate treatment on the basis of religion."[183] The court then looked to *Locke*.[184] Trinity Lutheran argued that

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[171] *Id.* at 2017.
[172] *Id.*
[173] *Id.*
[174] MO. CONST. art. 1, § 7.
[175] *Trinity Lutheran*, 137 S. Ct. at 2017.
[176] *Id.* at 2018.
[177] *Id.*
[178] *Id.*
[179] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013).
[180] *Id.* at 1141.
[181] *Id.* at 1145.
[182] *Id.* at 1146.
[183] *Id.*
[184] *Id.* at 1147. Trinity Lutheran cited to a number of cases to support its free exercise claim, however, the district court noted that each case involved an ordinance or regulation that directly prohibited or restricted the exercise of a religious practice. *Id.* at 1146.

it was distinguishable from *Locke* because that program prohibited funding of religious training of clergy and there is "a longstanding aversion to using tax dollars to fund the ministry," which clearly invokes the state's anti-establishment interests.[185]

The district court rejected Trinity Lutheran's reasoning, finding that the same anti-establishment concerns were raised because "Trinity [Lutheran] ultimately [sought] the direct payment of government funds to a religious institution."[186] The court first noted that programs of "true private choice," where aid reaches religious schools due to "genuine and independent choices of private individuals," are permissible.[187] Next, the court added that states may not grant aid to religious schools where the aid is, in essence, "a direct subsidy to the religious school."[188]

The court distinguished Trinity Lutheran's situation from precedent because Trinity Lutheran did not claim that its playground was used "exclusively for secular purposes."[189] The district court also added that using taxpayer funds for Trinity Lutheran's playground, "no matter how innocuous, raises Establishment Clause concerns."[190]

A panel for the Eighth Circuit Court of Appeals affirmed the district court's dismissal.[191] The court began by discussing Trinity Lutheran's federal constitutional claims.[192] The court noted that Trinity Lutheran sought the "unprecedented ruling—that a state constitution violates the First Amendment and Equal Protection Clause if it bars the grant of public funds to a church."[193] As to the federal claims, the court affirmed the district court's dismissal for failure to state a claim because Missouri's Constitutional provision did not conflict with the First Amendment's Equal Protection Clause.[194]

Next, the Eighth Circuit Court of Appeals addressed Trinity Lutheran's Missouri constitutional claim that the Department of Natural Resources denial of their grant "violated the second clause of Article I, § 7,

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[185] *Id.* at 1148.
[186] *Id.*
[187] *Id.* at 1149 (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002)).
[188] *Id.* (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).
[189] *Id.* at 1150.
[190] *Id.* (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973)).
[191] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 781 (8th Cir. 2015).
[192] *Id.* at 783. The court noted that Trinity Lutheran alleged that the Department of Natural Resources violated the Free Exercise Clause by targeting religion for disparate treatment; violated the Establishment Clause because the denial was hostile to religion; and violated Equal Protection by discriminating against religious day care organizations and centers. *Id.*
[193] *Id.*
[194] *Id.* at 784–85.

which forbids" discrimination against the church.[195] The court affirmed the dismissal of the claim because the pleadings demonstrated that the grant from the Department of Natural Resources would aid Trinity Lutheran and its ministry as defined by Missouri law.[196]

On appeal, the Supreme Court took a different approach and began its analysis with the Free Exercise Clause and recent precedent.[197] The Court noted that denial of a generally available benefit solely on account of religious identity imposes a penalty that must be justified by a state interest of the highest order.[198]

Next, the Court addressed Missouri's policy, finding that "[it] expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[199]

The Court analogized Trinity Lutheran's case to *McDaniel v. Paty*, where the Court struck down a statute that disqualified ministers from serving as delegates to Tennessee's constitutional convention.[200] The Court noted that like *McDaniel*, Missouri's program gave Trinity Lutheran a choice: "participate in an otherwise available benefit program or remain a religious institution."[201] Framed this way, the Court added that the condition of the benefit in this way "punished the free exercise of religion."[202]

The Missouri Department of Natural Resources argued that it only declined funding and did not prohibit Trinity Lutheran from engaging in religious conduct or otherwise exercising their religious rights.[203] However, the Court rejected that argument because Missouri's program indirectly coerced and penalized the free exercise of religion.[204]

The Court distinguished the facts of *Trinity Lutheran* from *Locke*, because unlike *Locke*, Trinity Lutheran was denied a grant because it is a church.[205] In *Locke*, Davey was denied a scholarship not because of who he *was*, but because of what he wanted *to do*.

As to the justifications offered by Missouri's Department of Natural Resources to support the program, the Court noted that a "policy

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[195] *Id.* at 786.
[196] *Id.* at 787. The Eighth Circuit distinguished the facts of Trinity Lutheran from *Americans United v. Rogers*. *Id.* (citing Americans v. Rogers, 538 S.W.2d 711, 718 (Mo. 1976). The court noted that unlike in *Americans United*, the program at issue in Trinity Lutheran's case was not designed and implemented for the benefit of the students, but rather was the benefit of the institutions. *Id.* at 787–88.
[197] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).
[198] *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).
[199] *Id.* at 2021.
[200] *Id.* at 2020 (citing *McDaniel*, 435 U.S. at 627).
[201] *Id.* at 2021–22.
[202] *Id.* at 2022.
[203] *Id.*
[204] *Id.* (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).
[205] *Id.* at 2023–24.

preference for skating as far as possible from religious establishment concerns" could not qualify as a compelling interest.[206]

III. MONTANA'S NO-AID CLAUSE AND THE *ESPINOZA* CASE

On January 22, 2020, the Supreme Court heard oral arguments for *Espinoza v. Montana Department of Revenue*.[207] The issue was whether a state may subsidize private *secular* education and not private *religious* education.[208] Montana argued that the program's structure protected against an Establishment Clause violation. The parents argued that the structure of the program violated their Free Exercise Clause rights,[209] and the Court may find that *Espinoza* fits somewhere within the precedent discussed above. This next section discusses the decisions by the Montana state court and Montana Supreme Court.

A. History and Background

Montana's Legislature enacted a tax credit program in 2015 entitled, "Tax Credit for Qualified Education Contributions."[210] The program gave taxpayers a tax credit for either providing supplemental funding to public schools or donating to the program.[211] By donating to the program, a taxpayer would receive a dollar-for-dollar tax credit up to $150 for donating to a student scholarship organization in Montana that met three additional criteria.[212] The organization must be federal income tax-exempt; allocate no less than ninety percent of its revenue to scholarships for students to attend any qualified education provider; and provide educational scholarships to students without limiting access to a single school.[213]

Initially, the definition of qualified education providers included religious schools.[214] However, this was identified as a "constitutional deficiency" because of Article X, section 6 of Montana's Constitution, its No-Aid Clause.[215] Under Article X, section 6, aid from the legislature, counties, cities, towns, school districts, and public corporations is prohibited

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[206] *Id.* at 2024.
[207] *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG (Jan. 22, 2020), https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/ [https://perma.cc/C9B6-GWN6].
[208] Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246, 2251 (2020).
[209] *Id.* at 2251–52.
[210] Espinoza v. Montana Dep't of Rev., 435 P.3d 603, 606 (Mont. 2018) (citing MONT. CODE ANN. §§ 15-30-3101–3114 (West 2015)).
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*

to sectarian schools.[216] Thus, in implementing the tax credit program, the Montana Department of Revenue adopted Rule 1,[217] which excluded from the tax credit program any qualified education provider "controlled in whole or in part by any church, religious sect, or denomination."[218]

A group of parents whose children attended private religious school in Montana challenged Rule 1 in district court, arguing that excluding private religious schools from the definition of qualified education providers violated their free exercise rights under Montana's Constitution and the U.S. Constitution.[219] The Montana Department of Revenue argued that the tax credit program in its entirety was unconstitutional and, additionally, that the rule properly restricted the program from providing aid to sectarian schools.[220]

The district court focused its analysis on the tax credits.[221] The court concluded that the credits did not involve the expenditure of money from the treasury, so including private religious schools would not violate Article X, section 6 of Montana's Constitution.[222] The district court granted summary judgment in favor of the plaintiffs and enjoined the Montana Department of Revenue from applying or enforcing Rule 1.[223]

B. Montana Supreme Court's Decision

The Montana Supreme Court held that the tax credit program violated the Montana Constitution by providing aid to sectarian schools, and that the tax credit program, in its entirety, was unconstitutional.[224]

The Montana Supreme Court framed the issue as whether the tax credit program violated Article X, section 6 of Montana's Constitution.[225] The court considered Article X, section 6 of Montana's Constitution as existing within an even narrower "play in the joints" between the Free Exercise and Establishment Clauses because it drew a more stringent line than what is required by the U.S. Constitution.[226]

First, Montana's Supreme Court analyzed the constitutional provision at issue.[227] The court concluded that the plain language and the

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[216] MONT. CONST. art. X, § 6.
[217] MONT. CODE ANN. § 15-30-3102 (West 2015).
[218] *Espinoza*, 435 P.3d at 607 (citing MONT. CODE ANN. § 15-30-3102 (West 2015)).
[219] *Id.* at 608.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.* at 615.
[225] *Id.* at 609.
[226] *Id.* at 608–09.
[227] *Id.* at 609–11.

Constitutional Convention Transcripts demonstrated that the clear objective of Article X, section 6 was to "firmly prohibit aid to sectarian schools."[228]

Next, the court addressed the argument that the tax credit program was unconstitutional.[229] The Montana Department of Revenue argued that the program violated Article X, section 6 and that Rule 1 was needed to cure that defect.[230] The court found that the program aided sectarian schools when it enacted the program because it permitted the indirect payment of tuition at private, religiously-affiliated schools.[231] The court noted that when a parent donated under the program, they received a dollar-for-dollar tax credit, so if their child also received a tuition scholarship from the organization they donated to, the amount owed in tuition to that school would decrease.[232] Thus, the legislature would indirectly pay up to $150 of a student's tuition at a private religious school by allowing the student's parents to receive a tax credit instead of paying that amount in tuition.[233]

The court then addressed Rule 1, which the Montana Department of Revenue enacted to correct the constitutional defect in the tax credit program.[234] The court noted that an administrative agency may not "transform an unconstitutional statute into a constitutional statute with an administrative rule."[235] The court explained that it is the legislature's responsibility to enact statutes that comply with Montana's Constitution.[236] The court concluded that the tax credit program was unconstitutional and that the Montana Department of Revenue exceeded the scope of its authority by enacting Rule 1.[237]

C. United States Supreme Court's Decision

In a monumental Free Exercise and Establishment Clause case, though without any religious monument, the Supreme Court held that the Montana scholarship program unlawfully discriminated against religious schools by excluding them from a tax benefit.[238] The majority's decision marks a new and dangerous chapter for separation between church and

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[228] *Id.* at 611.
[229] *Id.* at 611–14.
[230] *Id.* at 611.
[231] *Id.* at 612.
[232] *Id.*
[233] *Id.*
[234] *Id.* at 614–15.
[235] *Id.* at 615.
[236] *Id.*
[237] *Id.*
[238] Espinoza v. Montana Dep't of Rev., 140 S. Ct. 2246, 2251 (2020).

state. In *Espinoza*, the majority narrowed the "play in the joints" to a single point.[239] Though, like in *Locke*, if any room were to exist between the Religion Clauses, it *should* have been here.[240] This section begins by discussing the majority opinion. Then, this section addresses the concurrences and the dissents of this case.

1. Chief Justice Roberts and the Majority

The majority, penned by Chief Justice Roberts, began by addressing the general framework for the Religion Clauses of the First Amendment.[241] The majority noted that it has historically recognized a "play in the joints" between the two Religion Clauses, referencing *Trinity Lutheran* and *Locke*.[242] However, in continuing its analysis, the majority pivoted away from the "play in the joints" completely and placed the argument solely within the Free Exercise Clause.[243] The Court framed the issue as "whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."[244]

In determining which level of scrutiny must apply, the majority broadened the free exercise right, misinterpreting its narrow decision in *Trinity Lutheran*. The majority explained that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion.'"[245] However, this grossly simplifies the Court's past decisions. The Court then added that where a church is discriminated against simply because of what it is, there is a violation of the free exercise right.[246] Past cases involving the "play in the

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[239] Espinoza v. Montana Dep't of Rev., 435 P.3d 603, 608 (Mont. 2018) (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970)).

[240] *See id.* at 2292 (Breyer, J., dissenting) (quoting Locke v. Davey, 540 U.S. 712, 725 (2004)).

[241] *Id.* at 2254.

[242] *Id.* (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)).

[243] *Id.*

[244] *Id.*

[245] *Id.* at 2255 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)). Here, Chief Justice Roberts' statement relies heavily on *Trinity Lutheran*, a decision he also penned. Notably, the majority decision in *Trinity Lutheran* was limited by a footnote: "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.3 (2017). Perhaps Chief Justice Roberts ignored this footnote with the intention of broadening the case's holding in the future, or perhaps he simply forgot.

[246] *See Espinoza*, 140 S. Ct. at 2251 (quoting *Trinity Lutheran*, 137 S. Ct. at 2016) ("Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri's policy discriminated against the Church 'simply because of what it is—a church.'").

joints" focused on the use of funds in finding infringement.[247] The Court previously asked whether the funds were used for actual religious instruction, like the salaries of teachers, or "neutral" things like playground equipment.[248] The Court in *Espinoza* ignored those qualifications.[249] Here, the majority held that where a state subsidizes *some* private education, it must fund *all* private education.[250] Under this new precedent, it is now, arguably, an infringement of the Free Exercise Clause to offer any public benefit with religious use limitations.

Next, the majority addressed the Montana Department of Revenue's argument that *Locke v. Davey* governed the case.[251] The majority distinguished *Espinoza* from *Locke* in two ways. First, the Court noted that in *Locke* the state of Washington chose not to fund a distinct category of instruction.[252] Washington's scholarship program allowed funds to be used at religious schools, just not for certain types of religious study.[253] The Court explained that Montana's no-aid provision did not specify or exclude a type of religious course or instruction, but rather barred aid to all religious schools.[254] Again, this departs from past precedent. In *Nyquist*, the Court struck down a tax credit that flowed to parents because it furthered sectarian education.[255] Here, the majority separated religious education from a religious school. Second, the Court pointed to a "historical and substantial" state interest in not funding training of clergy.[256] The Court explained that "no comparable 'historic and substantial' tradition supports Montana's decision to disqualify religious schools from government aid."[257] The Court focused only on the early 1800s tradition of funding religious and nonreligious schools, ignoring the general tradition against state support for religious schools in the late 1800s.[258] It appears that rather than turning a blind eye to history, the Court simply looked back with a wink, opting only to see the portion of America's history that supported the majority opinion.[259]

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[247] *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2022; Locke v. Davey, 540 U.S. 712, 719 (2004).
[248] *See Trinity Lutheran*, 137 S. Ct. at 2016; *Locke*, 540 U.S. at 724; Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (holding that two statutory programs providing financial support by way of reimbursement of salaries were unconstitutional).
[249] *Espinoza*, 140 S. Ct. at 2255.
[250] *See id.* at 2261.
[251] *See id.* at 2257.
[252] *Id.* (quoting *Locke*, 540 U.S. at 715).
[253] *Id.*
[254] *Id.*
[255] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790 (1973).
[256] *Espinoza*, 140 S. Ct. at 2257.
[257] *Id.* at 2258.
[258] *Id.*
[259] *See generally id.* at 2259.

Then, the majority applied strict scrutiny to Montana's scholarship program. The Montana Department of Revenue contended that the no-aid provision promoted religious freedom, protected the religious liberty of taxpayers, and kept government out of religious operations.[260] The Supreme Court noted that advancements in religious liberty are not enough to justify the infringement of First Amendment Rights.[261] The majority also noted that the infringement affected religious schools and adherents, burdening the religious schools and the families wishing to send their children to those schools.[262] The Court stated that Montana's no-aid provision cut families off from otherwise available benefits if they chose a religious private school.[263] In applying strict scrutiny, the Court only scrutinized the arguments made by the Montana Department of Revenue and not the scholarship program itself.[264] As previously explained, the program gave taxpayers tax credit for either providing supplemental funding to public schools or donating to the program.[265] A taxpayer would receive a dollar-for-dollar tax credit up to $150 for donating to a student scholarship organization in Montana that met three additional criteria.[266]

The majority oversimplified and overcomplicated the situation. While parents may not receive a dollar-for-dollar tax credit up to $150 for their donation, a parent may still choose to send their child to a religious school.[267] In addition, by donating to a scholarship program, there is no guarantee that their child would benefit from the donation.[268] It seems, though, that the majority is treating the tax credit for a donation to a scholarship program as if it were a tax credit for tuition. This ignores the critical third party: the student scholarship organization, and wrongfully presumes that any person that donates has a child that may receive a scholarship because their parent donated.

The majority concluded with a Supremacy Clause argument, holding that the Montana Supreme Court violated the Supremacy Clause by striking down a program that did not align with the State Constitution when the constitutional provision was in direct conflict with the Free Exercise Clause.[269] The Court explained that the Montana Supreme Court should have started its analysis with the Free Exercise Clause, as federal law

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[260] *See id.* at 2260.
[261] *See id.*
[262] *See id.* at 2261.
[263] *See id.*
[264] *See id.* at 2260.
[265] Espinoza v. Montana Dep't of Rev., 435 P.3d 603, 606 (Mont. 2018).
[266] *See id.*
[267] *See Espinoza*, 140 S. Ct. at 2261.
[268] *See Espinoza*, 435 P.3d at 612–13.
[269] *Espinoza*, 140 S. Ct. at 2262.

is *supreme*.[270] Thus, because Montana's program violated the Free Exercise Clause, the Montana Supreme Court should have stopped its analysis of the program.[271] The Court ended by explaining that the Montana Supreme Court's elimination of the program "flowed directly from [its] failure to follow the dictates of federal law," and "[could not] be defended."[272]

2. Concurrences: (1) Justice Thomas joined by Justice Gorsuch; (2) Justice Alito; and (3) Justice Gorsuch

Justice Thomas, joined by Justice Gorsuch, concurred in the majority opinion but seized the opportunity to argue for an accommodationist interpretation of the Establishment Clause.[273] Justice Thomas explained that the Establishment Clause should only protect against the imposition of an established religion by the federal government.[274] He continues to urge the Court away from the *Lemon* test.[275]

Alternatively, Justice Alito's concurrence focused on the no-aid provision itself.[276] The majority, without ruling on the validity of no-aid clauses in general, spent a great deal of its time analyzing Montana's no-aid provision.[277] Justice Alito's concurrence focused on Blaine Amendments, their nativist viewpoint, and anti-Catholic or anti-Jewish sentiments.[278] The Blaine Amendment was a proposed amendment to the United States Constitution, introduced by House Speaker James Blaine.[279] Though the amendment was not passed at the federal level, several states adopted their own "Blaine Amendments."[280] These state constitutional provisions, similar to Montana's constitutional provision, bar the use of public funds to aid

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[270] *See id.*
[271] *See id.*
[272] *Id.*
[273] *See id.* at 2266 (Thomas, J., concurring). Accommodationists assert that the Establishment Clause permits government some latitude in recognizing and accommodating religion's central role in our society. VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10259, SUPREME COURT MAY RECONSIDER ESTABLISHMENT CLAUSE JURISPRUDENCE IN CHALLENGE TO CROSS DISPLAY: PART ONE 2 (2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10259 [https://perma.cc/679Y-6LWA].
[274] *Id.*
[275] *See id.* at 2267.
[276] *See id.* at 2268–74 (Alito, J., concurring).
[277] *Id.* at 2246 (majority opinion).
[278] *See id.* at 2269–70 (Alito, J., concurring).
[279] *See id.*
[280] Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options From School Choice Programs*, 18 FED. SOC. R. 88, 90 (2017).

sectarian institutions.[281] Justice Alito, likely, would have preferred a majority opinion striking down all Blaine Amendments.[282]

Justice Gorsuch's concurrence focused on the distinction between religious status and religious use.[283] Justice Gorsuch noted that he questioned the characterization of discrimination in *Trinity Lutheran* and in *Espinoza*.[284] He explained that the record in *Espinoza* discussed religious activity, uses, and conduct in depth.[285] He next framed the issue as two questions.[286] The first based on status, asks whether Montana sought to prevent religious parents and schools from participating.[287] The second, based on use, asks whether Montana aimed to bar public benefits from being used to support religious education.[288] However, Justice Gorsuch arrived at the same conclusion as the majority.[289] Justice Gorsuch ultimately concluded that "[c]alling it discrimination on the basis of religious status or religious activity makes no difference: [i]t is unconstitutional all the same."[290]

3. Dissents: (1) Justice Ginsburg joined by Justice Kagan; (2) Justice Breyer joined in part by Justice Kagan; and (3) Justice Sotomayor

Justice Ginsburg's dissent, joined by Justice Kagan, argued that because the Montana Supreme Court's decision did not discriminate, Petitioners' Free Exercise claim fails.[291] Justice Ginsburg found the decision neutral because the Montana Supreme Court struck down the program in its entirety, so both secular and sectarian schools were ineligible for benefits.[292] She explained that the "Court has consistently refused to treat neutral government action as unconstitutional solely because it fails to benefit religious exercise."[293]

Justice Breyer, joined by Justice Kagan in part, discussed the "play in the joints."[294] Justice Breyer wrote that he feared the majority's approach because the conclusion risked the "entanglement and conflict that the

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[281] *See id.*
[282] *Id.* at 2274 ("And even if Montana had done more to address its no-aid provision's past, that would of course do nothing to resolve the bias inherent in the Blaine Amendments among the 17 states.").
[283] *See id.* at 2275–78 (Gorsuch, J., concurring).
[284] *See id.* at 2275.
[285] *See id.*
[286] *See id.*
[287] *See id.*
[288] *See id.*
[289] *See id.* at 2278.
[290] *Id.*
[291] *See id.* (Ginsburg, J., dissenting).
[292] *See id.* at 2279.
[293] *See id.*
[294] *Id.* at 2281 (Breyer, J., dissenting).

Religion Clauses are intended to prevent."[295] Justice Breyer framed the question in *Espinoza*, not as whether the Establishment Clause forbids Montana from subsidizing religious education, but rather whether the Free Exercise Clause requires Montana to do so.[296] Placing the argument squarely within the "play in the joints," Justice Breyer would have *Locke* control the decision in *Espinoza*.[297] Justice Breyer noted that "[i]f, for 250 years, [the Court has] drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit, I do not see how we can today require Montana to adopt a different view respecting those who teach it in the classroom."[298]

Finally, Justice Sotomayor's dissenting opinion explained that the majority decision slighted precedent and weakened the separation of church and state.[299] Justice Sotomayor, similar to Justice Ginsburg, noted that the Free Exercise Clause claim was not cognizable because there was no differential treatment or coercion.[300] She then addressed the majority's Supremacy Clause argument, explaining that the majority departed from precedent in implying a federal question not raised by the parties.[301] Justice Sotomayor concluded by addressing the majority's reasoning, noting that its decision "risks reading the Establishment Clause out of the Constitution."[302]

IV. FUNDAMENTAL FUNDS

The Supreme Court's past Establishment Clause and Free Exercise Clause decisions did not pave a clear pathway—or a path at all. This section begins by comparing *Espinoza* to the cases discussed above. Next, this section advances the argument that *Espinoza* should not have been decided under Establishment Clause and Free Exercise Clause precedent, but elsewhere, because funds are simply not fundamental.

A. Where Espinoza Fits

Montana's Supreme Court took a unique approach to addressing the constitutionality of the program, analyzing it exclusively under the State's Constitution. Though the Supreme Court could have decided *Espinoza* within the narrow confines of past precedent related to scholarship

[295] *Id.*
[296] *Id.* at 2283.
[297] *Id.* at 2284.
[298] *Id.* at 2288.
[299] *See id.* at 2292 (Sotomayor, J., dissenting).
[300] *See id.* at 2293.
[301] *See id.* 2294 ("The Court typically declines to read state-court decisions as impliedly resolving federal questions, especially ones not raised by the parties.").
[302] *See id.* at 2296.

programs and religious schools, *Trinity Lutheran*'s footnote was instructive: precedent implicating government funds and religious entities is *extremely* limited in scope.[303] Given the differences between the tax credit program at issue in *Espinoza*, and the related schemes in other Religion Clause cases, it is evident that the Court should not try to make the facts fit.

The Supreme Court upheld Ohio's scholarship program,[304] but struck down New York's.[305] The Court distinguished Ohio's program from the program in New York for two reasons: (1) the New York program only provided benefits to private schools; and (2) the Court in the New York case, *Nyquist*, reserved judgment with respect to public assistance made available to both public and private schools.[306] However, even in deciding the Ohio program case, *Zelman v. Simmons-Harris*, the Court limited the reach of the decision by finding the program "neutral with respect to religion" because it "provide[d] benefits directly to a wide spectrum of individuals, defined only by financial need and residence" and "permit[ted] such individuals to exercise genuine choice among options public and private, secular and religious."[307] The Court declared the program one of "true private choice."[308] Where *Espinoza* differs is that the funds at issue were not tuition credits or reimbursement, and there was no "true private choice."

Again, in *Trinity Lutheran*, the Supreme Court drew a narrow distinction between the facts at hand and past precedent. The key differentiator was that *Trinity Lutheran* required the organization to choose whether to be a church or religiously affiliated, whereas *Locke* required Davey to choose, not whether to be religious, but what to study.[309] However, framed differently, the choice in *Trinity Lutheran* could be simpler than that. The choice is whether to have a rubber playground or not; or whether to apply for governmental funding or not. Regardless, the key seems to be the *type* of choice the individual or organization must make. Though, there may be an argument about the difference in *use* of the funds—the type of choice is sufficient enough to distinguish *Espinoza*.

In *Espinoza,* the issue is much further removed from the religious choices at issue in *Trinity* and *Locke*. The parents in *Espinoza* are not

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[303] *See supra* note 245.
[304] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).
[305] *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973).
[306] 536 U.S. at 661 (citing *Nyquist*, 413 U.S. at 782–83 n.38).
[307] *Zelman*, 536 U.S. at 662.
[308] *Id.*
[309] *Compare* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023–24 (2017), *with* Locke v. Davey, 540 U.S. 712, 724–25 (2004) (in *Locke* an individual could not receive funding while pursuing a devotional theology degree, but the individual could be *religious* and receive funding, in *Trinity Lutheran* to receive funding an organization could not be *religious* or religiously affiliated).

choosing between sending their children to religious schools or not and they are not choosing between being religious or not. The parents in *Espinoza* choose to donate or not. There is no guarantee that, if they donate, their children will receive scholarships to attend a private religious institution. In fact, the tax credit program prohibited donors from directing their contributions to a specific parent, guardian, or even school.[310]

There is no need to fit *Espinoza* within the margins of the "play in the joints" precedent. Instead, *Espinoza* should be decided within precedent established by cases involving access to *funding* as there is no fundamental right infringed.

B. Fundamental Rights Analysis: No Infringement

While the Supreme Court does not recognize the right to public education as a fundamental right,[311] the plaintiffs in *Espinoza* asked the court to recognize an analogous right—a fundamental right to funding private religious education.[312] Framed as a violation of the petitioners' free exercise rights, the alleged infringement was a denial of public funding to pay for private religious education.[313] This lack of access to public funds is not an infringement of the free exercise right. Thus, Montana's No-Aid Clause must be subject only to rational basis review.

Under the Free Exercise Clause there is a fundamental right to be free from unequal treatment due to religious status.[314] Therefore, in legislating between the Free Exercise Clause and Establishment Clause, a state may not support any specific church or exclude any individuals due to their religious beliefs or lack thereof.[315] Following the Madisonian view, this understanding of the fundamental free exercise right diffuses and

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[310] Espinoza v. Montana Dep't of Rev., 435 P.3d 603, 606 (Mont. 2018).

[311] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

[312] *See* Reply Brief for Petitioners, *supra* note 7, at 23–24 (explaining the history and tradition of similar no-aid clauses and asking the court to end the national tradition of religious discrimination).

[313] *See* MONT. CONST. art. X, § 6(1) (West, Westlaw through 2019) ("The legislature, counties, cities, towns, school districts, and public corporations shall not make 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.").

[314] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); Everson v. Board of Educ. of Ewing, 330 U.S. 1, 16 (1947).

[315] *See Everson*, 330 U.S. at 16.

decentralizes power to prevent dominance by any particular sect or religion.[316]

Since there is freedom to exercise religion without interference from the state, it follows that the right to free exercise includes the option of parents to choose to send their children to private religious schools. In choosing a private religious school, a parent *exercises* their religious freedom. Again, there is an important line to be drawn with regard to free exercise. The fundamental right of free exercise is absolute with regard to beliefs.[317]

However, the right to religiously motivated *conduct* is not absolute.[318] For example, the Supreme Court upheld a law forbidding polygamy in *Reynolds v. United States* stating that Congress could "reach actions which were in violation of social duties or subversive of good order."[319] In *Goldman v. Weinberger*, the Court denied the claim of a Jewish Air Force doctor who said his religion required him to wear a yarmulke in violation of the military dress code.[320] Like *Reynolds*, only the conduct in *Goldman* was being regulated.[321] In both instances, the parties were still free to exercise their own beliefs.[322]

At stake in cases regarding No-Aid Clauses and raising issues related to the Free Exercise and Establishment Clauses, are schemes providing benefits to taxpayers.[323] These schemes, like *Reynolds* and *Goldman,* concern regulation of religiously motivated conduct, not the exercise of beliefs.[324] The petitioners' contention that the No-Aid Clause violates their right to free exercise rests on the assertion that, without these funds, the petitioners would not be able to *choose* to send their children to private religious schools.[325] In *Espinoza*, the program struck down under Montana's No-Aid Clause was, in essence, a tuition credit. Individuals received tax credits for donating to nonprofit student scholarship organizations.[326] Then, these organizations used the donations to fund

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[316] *See* CHEMERINSKY, *supra* note 17, at 1723.
[317] Braunfeld v. Brown, 366 U.S. 599, 603 (1961).
[318] *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 303–04, 306 (1940)).
[319] Reynolds v. U.S., 98 U.S. 145, 164 (1878). The Court noted that polygamy had consistently been treated as an offense against society throughout history.
[320] Goldman v. Weinberger, 475 U.S. 503 (1986) (acknowledging a need to defer to the military).
[321] *See id.* at 510.
[322] *See id.*; *Reynolds*, 98 U.S. at 166.
[323] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002) (explaining the types of assistance provided to parents); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 762 (1973) (describing the financial aid programs for nonpublic elementary and secondary schools which included tuition reimbursement and grants).
[324] *See Goldman*, 475 U.S. at 503; *Reynolds*, 98 U.S. at 164.
[325] Reply Brief for Petitioners, *supra* note 7, at 7.
[326] Brief of Respondents, *supra* note 10, at 3.

scholarships for qualified education providers.[327] Despite various degrees of separation, the program operated to lessen tuition expenses for parents choosing to send their children to private religious institutions. In fact, the petitioners relied on the tax credit to create financial aid to allow them to send their children to these religious private schools.[328] Without the program, the parents in *Espinoza* could experience financial hardship in sending their children to religious private schools.

However, the Court has established that fundamental rights do not include the right to receive government funding in the exercise of that right.[329] As Justice Powell explained in *Maher v. Roe*, a fundamental right "implies no limitation on the authority of a State to make a value judgment . . . and to implement that judgment by the allocation of public funds."[330] Justice Stewart echoed Justice Powell's reasoning four years later in *Harris v. McRae*, stating that the fundamental right of abortion "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[331] In both instances, the Court found that while the ability to *finance* abortions may have become more difficult given the specific legislation, the legislation did not infringe the fundamental right to abortion.[332]

Similarly, while the Court recognizes a fundamental right to marry,[333] it has upheld the constitutionality of laws that may, in effect, discourage marriage.[334] In *Califano v. Jobst*, the Court upheld a provision of the Social Security Act that terminated benefits for disabled children (classified as wage earners' dependent) when those children got married.[335]

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[327] *Id.*

[328] Reply Brief for Petitioners, *supra* note 7, at 7.

[329] *See generally* Harris v. McRae, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."); Maher v. Roe, 432 U.S. 464, 473–74 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion' . . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."); Beal v. Doe, 432 U.S. 438, 447 (1977) (holding that the Medicaid Act did not require states to fund nontherapeutic first-trimester abortions as participants in the joint federal and state program); Poelker v. Doe, 432 U.S. 519, 521 (1977) (holding that the City of St. Louis did not violate any constitutional rights in electing to provide public financing for childbirth hospital services but not for nontherapeutic abortions).

[330] *Maher*, 432 U.S. at 473–74.

[331] *Harris*, 448 U.S. at 318.

[332] *See id.* at 318; *Maher*, 432 U.S. at 473–74.

[333] Loving v. Virginia, 87 S. Ct. 1817, 1824 (1967).

[334] *See* Bowen v. Owens, 476 U.S. 340, 350 (1986); Califano v. Jobst, 434 U.S. 47, 58 (1977).

[335] *See Califano,* 434 U.S. at 58.

The Court acknowledged that the exception could have an impact on a desire to marry, but ultimately held that the provision was constitutional.[336]

In *Bowen v. Owens*, the Court again recognized the fundamental right to marry, but allowed the denial of funds.[337] In *Owens*, widows of wage earners sued regarding a different provision of the Social Security Act: a provision denying payment of widow's benefits to a divorced widow who remarried.[338] Both cases involved the right to marry—a fundamental right—but neither provision *infringed* on that right. Instead, the provisions financially disincentivized the right, but that is neither a de facto nor de jure ban on the right to marriage.

Thus, it follows that in a case involving a No-Aid Clause, the right to free exercise of religion does not include a right to public funds to realize all the advantages of that freedom. Parents, like the parents in *Espinoza*, are able to send their children to whichever school they choose. They may exercise their religion in opting to send their children to private religious schools, or they may send their children to public schools. What the No-Aid Clause prevents is funding of that decision. The choice of states like Montana to enact No-Aid Clauses and prohibit funds for religious education is not a free exercise infringement. It is a "play in the joints" between the Free Exercise and Establishment Clauses because funds themselves are not fundamental.

V. CONCLUSION

In recognizing the petitioner's fundamental right to funds for their private religious institutions, the majority has allowed the walls of the Establishment Clause to crumble. To require a government to fund private religious education any time it funds education does not fit within any of the Framers' understandings of the relationship between government and religion.[339] In fact, under the majority's decision in *Espinoza*, upholding the Establishment Clause violates the Free Exercise Clause, except in the (rare) occasion of a federal government-sponsored religion.

The Court erred in its decision, departing entirely from precedent, and improperly broadening the Free Exercise Right. Instead, the Montana Supreme Court's decision should have been upheld, and the tax credit program should have been analyzed using rational basis review because

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[336] *Id.*

[337] *See Bowen*, 476 U.S. at 340.

[338] *See id.* at 343–44.

[339] *See* CHEMERINKSY, *supra* note 17, at 1723. Both Evangelists and Jeffersonians would be bothered by the excessive level of entanglement, with the government involved in religion and religion involved in government if funding is fundamental. Arguably, this may be a diffusion of power by requiring the funds to be given to religious institutions, but it is impossible to imagine a situation where the government allows funds to flow without attaching strings of some sort.

there was no infringement of the taxpayer's fundamental rights. Montana's No-Aid Clause and Rule 1 under the tax credit program did not infringe the parent's rights to free exercise. By excluding private religious institutions, Montana properly acted within the "play in the joints" between the Free Exercise Clause and Establishment Clause because funds themselves are not fundamental.