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The Supreme Court provided a new consideration to the longstanding debate about public aid to parochial schools in its June 2020 decision of *Espinoza v. Montana Department of Revenue.* In *Espinoza*, the Supreme Court injected demands of the Free Exercise Clause into a debate historically governed by Establishment Clause concerns. The Court did this by relying on precedent in *Trinity Lutheran v. Comer* (2017), which says that the Free Exercise Clause protects against laws that impose religious status discrimination unless those laws pass strict scrutiny. Applying this precedent to *Espinoza*, the Court held that the application of Montana's constitutional provision preventing public aid from arriving at parochial schools was a form of religious status discrimination that did not pass strict scrutiny; therefore, it was unconstitutional. But while that finding may affect the future of state constitutional no-aid provisions known as Blaine Amendments, it is by itself insufficient to determine in what situations public aid is constitutional.

When governments or courts determine whether it is constitutional for religious schools to receive public funding, they must consider together the demands of both the Free Exercise and Establishment Clauses, recognizing "'there is room for play in the joints' between them."[1] Analysis must not be limited to free exercise protection against religious status discrimination, as it was in *Espinoza*; it must also include Establishment Clause considerations, specifically the doctrines of neutrality and private choice. When applied to questions about public aid to parochial schools, these doctrines yield different answers for programs of direct and indirect funding.

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[1] *Locke v. Davey*, 540 U.S. 712 (2004), (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 665, 669 (1970)).

Background on *Espinoza* and Blaine Amendments

Some brief background on *Espinoza* may be helpful for understanding its implications. The case is about a program established by the Montana Legislature that provided tax credits to those who donated to private school scholarship organizations. Families of students awarded scholarships from such organizations could decide to which private schools they would apply the funds. In implementing the program, the Montana Department of Revenue promulgated a rule prohibiting families from applying scholarships to religious schools. It did so in an attempt to comply with the Montana Constitution's provision prohibiting either indirect or direct aid to religious schools.

The Montana Constitution's no-aid provision is known as a Blaine Amendment, and Montana is one of thirty-seven states to have such a provision in its constitution.[2] Blaine Amendments are so named for a failed federal constitutional amendment barring aid to sectarian schools that was introduced in 1875 by House Speaker James Blaine. When the federal amendment failed, many states adopted their own versions—sometimes as a coerced condition of admission to the Union. Despite their prevalence in state constitutions, Blaine Amendments are highly controversial for two main reasons: Anti-Catholic animus fueled the original Blaine Amendment, and Blaine Amendments demand a very strict separation of church and state that some deem unnecessary or even unconstitutional.

The question the Court ruled on in *Espinoza* was the *application* of Montana's Blaine Amendment. The Court has never ruled directly on the constitutionality of a Blaine Amendment itself, but in *Espinoza*, it came close. The majority took several occasions in its opinion to attack Montana's no-aid provision, writing that it "bars religious schools from public benefits solely

[2] "Blaine Amendments," Institute for Justice, https://ij.org/issues/school-choice/blaine-amendments/.

because of the religious character of the schools. …This is apparent from the plain text," and also, matter-of-factly, that "The Montana Constitution discriminates based on religious status." Further, the Court's holding that Montana should not have applied its no-aid provision to the very circumstance in which it seemed to be relevant suggests no-aid provisions themselves are constitutionally questionable, and at a minimum out of favor with the Court.

As a result, Blaine Amendments stand on tenuous ground. Even if it is constitutional to retain Blaine Amendments in state constitutions, could it ever be constitutional to apply them? It seems unlikely given that the textual construction of Blaine Amendments usually consists of a distinction made solely on whether or not an entity is religious—a distinction the Court would call status-based discrimination. Thus, when states with Blaine Amendments attempt to comply with *Espinoza*, they will recognize they cannot deny religious schools or those who attend them the opportunity to apply for public aid simply because they are religious. But they will still be left with the question of whether or not it is permissible to actually grant aid. Here they must turn to the Establishment Clause for guidance.

Judicial Interpretation of the Establishment Clause

The Establishment Clause is the companion to the Free Exercise Clause in establishing constitutional protection of religious freedom. The Establishment Clause stipulates that "Congress shall make no law respecting an establishment of religion." This prohibition also applies to state legislatures through the Fourteenth Amendment.

Unfortunately, interpretation of the Establishment Clause is notoriously complicated, making its application sometimes difficult to discern. Although the Establishment Clause is vital in maintaining a proper relationship between church and state, neither its historical, scholarly, or judicial interpretations are entirely consistent in articulating what constitutes establishment.

Despite differences in interpretation, most justices past and present have focused to some extent on questions of a policy's intent, neutrality in implementation, and resulting relationship between church and state.

These concerns underlie the landmark decision of *Lemon v. Kurtzman* (1971), which said providing public salary supplements to parochial school teachers was unconstitutional.[3] In *Lemon*, the Court built upon tests in *Walz v. Tax Commission* (1971) and *Everson v. Board of Education* (1947) to create a three-prong test to determine if an Establishment Clause violation has occurred.[4] The test asks whether a governmental action or policy:

1. Has a clear secular purpose
2. Has a primary effect of promoting or inhibiting religion
3. Results in excessive government entanglement with religion

To pass all three prongs, a governmental action or policy *must* have a clear secular purpose, *must not* have a primary effect of promoting or inhibiting religion, and *must not* result in excessive government entanglement with religion. For the first two decades of its application, the *Lemon* test resulted in a strict separation of church and state in parochial aid cases, but conservative justices later shifted the ambiguous test's analysis to be more accommodating of religious options.[5]

The *Lemon* test has been widely criticized for its prongs' ambiguity, which has resulted in inconsistent applications and outcomes. In many cases where it could have been applied, *Lemon* has been ignored. When the Court applied *Lemon* again in 1993 after evading it in other cases,

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[3] *Lemon v. Kurtzman*, 403 US 602 (1971).
[4] Richard L. Pacelle, "Lemon Test," *The First Amendment Encyclopedia,* Middle Tennessee State University, 2009, https://www.mtsu.edu/first-amendment/article/834/lemon-test#:~:text=The%20Lemon%20test%2C%20considered%20aptly,Court%20announced%20in%20Walz%20v.&text=clear%20secular%20purpose.-,The%20Court%20also%20would%20determine%20if%20the%20primary%20effect%20of,would%20advance%20or%20inhibit%20religion.
[5] Pacelle, "Lemon Test."

Justice Antonin Scalia famously wrote that "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again."[6] It has continued to "stalk" on and off since.

The Court modified the *Lemon* test in *Agostini v. Felton* (1997) by integrating prong three, the excessive entanglement prong, into prong two, the primary effect prong. The modification of the test helped to shift the Court's hardline policy of strict separation of church and state, which was typically invoked by prong three, to focus more on whether the primary effect of the policy was neutral toward religion.[7]

But even with modification, the *Lemon* test has still been widely criticized. The criticism stems more likely from the difficulty of applying the *Lemon* test than a total error in the test's considerations. Even when *Lemon* is not used, the notions underlying its prongs, such as policy purpose and neutrality of policy, tend to resurface in arguments about Establishment Clause violations.

While *Lemon* remains on the books, it is unclear exactly if or how it might be applied in future cases as a controlling precedent. The Court sharply criticized the test in its 2019 decision of *American Legion v. American Humanist Association*, but it proposed no new test.[8]

If *Lemon* is out, as some justices have indicated, then it is necessary to turn to the Court's principle-based antiestablishment approaches. Interestingly, the principles of these approaches often underlie many of the same concerns of the *Lemon* test. This is evident in Justice Stephen

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[6] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 385 (1993), (Scalia, J. concurring).
[7] W. Cole Durham, Jr., and Brett G. Scharffs, "Religion and Education," in *Law and Religion: National, International, and Comparative Perspectives* (second ed., New York: Wolters Kulwer), 2019.
[8] *American Legion v. American Humanist Association*, 588 U.S. ___ (2019), (slip op.), https://www.supremecourt.gov/opinions/18pdf/17-1717_4f14.pdf.

Breyer's dissent in *Espinoza* in which he raised the establishment concerns of the government's purpose—the first prong of the *Lemon* test—and effect of its policy—the second prong. However, instead of mentioning *Lemon*, he mentioned the Court's neutrality doctrine.[9] Neutrality and its related principles of avoiding coercion and endorsement are among some of the principle-based approaches the Court has used in antiestablishment jurisprudence instead of the *Lemon* test.

As this limited recitation of jurisprudence has shown, it is unclear exactly what the Establishment Clause demands. But out of the complexity of Establishment Clause jurisprudence some guiding principles have emerged, including the importance of neutrality in intent, effect, and sometimes implementation of governmental policies. Because *Lemon* is out of favor with the Court, I will discuss how two Establishment Clause doctrines—neutrality and private choice—can effectively guide determinations about public aid to religious schools.

The Establishment Clause Doctrine of Neutrality

The doctrine of neutrality has a long-established history in Establishment Clause jurisprudence. It first emerged in *Everson v. Board of Education* (1947) in which the Supreme Court upheld a New Jersey law that allowed public reimbursement of the cost of transportation to schools, including private religious schools.[10] In so holding, the *Everson* Court said that the Establishment Clause precludes the government from "prefer[ring] one religion over another" and also that it "requires the state to be neutral in its relations with groups of religious believers and nonbelievers."[11] The *Everson* Court also made clear that neutrality prohibits the government from being an "adversary" of religion, meaning that "State power is no more to be used so as to

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[9] *Espinoza v. Montana*, 591 U.S. ____ (2020), (slip op.), (Breyer, J. dissenting, at 8) https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.
[10] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[11] Everson v. Board of Education, 330 U.S. 1 (1947), https://tile.loc.gov/storage-services/service/ll/usrep/usrep330/usrep330001/usrep330001.pdf.

handicap religions than it is to favor them."[12] The New Jersey program was neutral toward religion, the Court held, because it included both nonreligious and religious private schools.

The *Everson* Court's characterization of neutrality supports the notion that government policies must have a secular purpose. This prevents the government from implementing policies that would favor religion in a general sense or certain religions in particular—policies tantamount to endorsing religion. In addition, the doctrine of neutrality articulated in *Everson* would preclude public aid from being used to coerce or endorse religious belief or behavior, or from being used to skew the marketplace of choice toward or away from religious options.

Private Choice Doctrine

The Court's private choice doctrine was born out of its neutrality doctrine. Private choice doctrine maintains that the government has remained neutral when it directs aid or benefits to a broad class of individual recipients who, by their private choices, then direct the aid to religious schools.

The private choice doctrine was first emphasized in *Mueller v. Allen* (1983). In that case, the Court dismissed an Establishment Clause challenge to an educational expense tax deduction program that included parochial schools. The Court held that the program was constitutional because the program did "not have the primary effect of advancing the sectarian aims of nonpublic schools;" rather, the program "provide[d] aid to parochial schools only as a result of decisions of individual parents."[13] Private choice doctrine gained traction in several decisions after *Mueller*, and it took on significant power in *Zelman v. Simmons-Harris* (2002). Unlike previous cases of private choice, which typically involved minimal government aid of inherently

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[12]Ibid.

[13] *Mueller v. Allen*, 463 U.S. 388 (1983), https://tile.loc.gov/storage-services/service/ll/usrep/usrep463/usrep463388/usrep463388.pdf.

secular materials or activities, *Zelman* upheld a private choice tuition voucher program that allowed individuals to apply their vouchers directly to religiously affiliated schools for religiously integrated education. The *Zelman* Court held that this was constitutional because the program was enacted for a secular purpose—providing education; the program provided assistance "to a broad class of citizen;" "true private choice" existed; and the state did not create incentives that would skew choices toward religious schools.

The private choice doctrine represents a shift from stricter no-aid holdings of the Court before *Mueller*.[14] However, it is now well entrenched in jurisprudence and appears here to stay. Even though the Court declined to address any Establishment Clause concerns in *Espinoza*, it took the time to hint its support for the private choice doctrine articulated in *Zelman*, writing that "Any Establishment Clause objection…here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools."[15] As a result, private choice doctrine, along with its parent doctrine of neutrality, should be considered in determining the Establishment Clause's implications regarding the constitutionality of public aid reaching religious schools.

The Permissibility of Direct Aid

Because the Supreme Court has made distinctions between direct and indirect aid, as have many no-aid constitutional provisions, I will consider direct and indirect aid separately, beginning with direct aid. Here, direct aid means the transferring of public aid from a governmental body directly to a religiously affiliated school. Determining how neutrality affects

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[14] W. Cole Durham, Jr., and Brett G. Scharffs, "Religion and Education," in *Law and Religion: National, International, and Comparative Perspectives*, second ed., (New York: Wolters Kulwer, 2019), 564.
[15] *Espinoza v. Montana,* 591 U.S. ____ (2020), (slip op., at 7), https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.

direct aid requires consideration of the purpose of the aid, whether the aid or its implemented purposes may result in coercion or endorsement, and whether the marketplace of choice resulting from the direct aid is neutral toward religion.

I. The purpose of the aid must be secular

The government's intention in providing direct aid is a first consideration. The aid's purpose should be secular to prevent concerns of government endorsement of one religion or religion generally. For example, suppose a state legislature allocates funds for which private and public secondary schools can apply to purchase math textbooks containing the state's newly updated curriculum standards. The purpose here is secular, and the standard of neutrality is met because the purpose of the funding is neither to advance or inhibit religion. The state, of course, can set forth requirements to apply, such as requiring schools to demonstrate financial need or meet accreditation standards. However, as long as parochial schools meet the requirements set forth by the state, which cannot be based on religious status,[16] they should be eligible to apply and ostensibly receive the benefits from the state to fulfill the state's secular purpose.

Some may be concerned that math textbooks awarded to religious schools could be used in religiously integrated curriculums and thus have the effect of advancing religion. It is true that parochial schools may incorporate religious elements into their teaching of math. However, as long as the state's secular purpose in providing textbooks—to help students learn the state's curriculum standards—will still be accomplished, the state's purpose in providing textbooks has been fulfilled. Ancillary curriculum or pedagogical techniques that incorporate religion need not concern the state.

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[16] *Espinoza v. Montana,* 591 U.S. ____ (2020), (slip op.), https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.

II. The direct aid cannot result in coercion or endorsement

A second neutrality concern that must be considered is whether the aid or implementation of the aid would coerce individuals to perform or pretend religious beliefs or acts in order to obtain a benefit, or if providing the aid would result in endorsement of one religion or religion generally. Whether or not coercion or endorsement may exist determines whether or not neutrality in implementation of public aid is required. Two examples may help to illustrate.

First, suppose the government decides to create a law that allows selected schools to establish after-school remedial math programs that serve their local communities. The remedial math programs would be open to any students in the community, not just students who attend the schools in which the programs are held. Suppose also that the government only has funds to award two schools in a large and religiously diverse community this privilege, and it decides to fund the two schools that seem to be most geographically convenient for students in the community. In choosing the two schools, the government's assumption is that students will attend the after-school program nearest to them.

If one of the schools chosen is a religious school, then the religious school would probably need to be religiously neutral in implementing the after-school program to avoid the possibility of coercion. This is because students would likely be deciding which school's program to attend based on geographic proximity, not based on the religious nature of the school holding the program. The lack of convenient alternatives to a religious option inhibits a fair choice about which program to attend. As a result, incorporating religious elements to the administration of the math program could result in participants being coerced to hold, assume, or pretend religious beliefs or acts simply to participate in the program nearest to them.

Even if, somehow, no student attending the remedial math program at a religious school would be coerced into religious beliefs or behavior if the curriculum was religiously integrated, the funding of one particular religious school—and the authorization for the school to implement religious elements—could raise an establishment concern. Some might consider the state to be showing a preference for a particular religion by choosing to aid that religion's school and not others. Therefore, it would probably be best for the school to be religiously neutral in implementing the program.

Consider a second example where the state establishes the same program, but this time the state can fund all accredited schools to hold their own after-school remedial math programs for their own students. In this case, integration of religion by religious schools to their after-school math programs would not be likely to result in coercion. Students at religious schools have already opted in to religiously integrated instruction by choosing to attend a religious school; therefore, a religiously integrated curriculum would not likely result in coercion of religious beliefs or behavior.

In addition, this scenario, where all schools receive direct aid, prevents the government from preferring one religion to another in its distribution of benefits, thereby alleviating concerns of government endorsement of religion. Thus, when coercion and endorsement concerns are mitigated through the structuring of government policy, a religious school need not be religiously neutral in implementing direct aid from the government.

III. Neutrality concerns the choices the direct aid creates or incentivizes

A third point of consideration, closely tied to avoiding coercion and endorsement, is the extent to which a government policy affects the availability of choices or the incentives toward religious and nonreligious choices.

In the previously mentioned example where one religious and one nonreligious school both receive direct aid, the government not only controls but limits the marketplace of choice for students hoping to participate in a remedial math program. The more the government limits the marketplace of choice, the less freedom religious schools have to incorporate religious elements when implementing the direct aid's purpose. This is because the government must be careful to avoid the real concern of coercing religious behavior or acts due to limited educational alternatives. On the other hand, leaving out religious schools, or requiring them to be neutral in implementing religious programs, can effectively coerce the choosing of nonreligious options. In navigating these difficult decisions, the government should presume it imposes a greater conscience violation by coercing religious choice than simply not providing a religiously integrated option. Still, such zero-sum policy structures, where schools compete against each other to receive direct aid, are naturally suspect as policies that may seem to favor either religion or nonreligion; likely, they will not strike a perfect balance, nor should they be expected to.

A better—though financially more challenging—way of maintaining neutrality can be accomplished by attempting to include all schools, or as many as possible, in direct aid programs. When the government does this, it does not limit or bear responsibility for the variety of choices. For instance, in the example of the government funding remedial math programs for all schools, the government does not create the school options that exist. Instead, the government seeks to be neutral in the incentives it creates by including all schools so that no school is receiving a benefit incentivizing its attendance that another school is not.

Such policy structuring is ideal because it prevents a zero-sum situation; the government does not have to choose a nonreligious school over a religious school or vice versa but rather allows all schools to participate. Therefore, the government is less likely to be accused of

favoring one type of school. When all schools are eligible for the same benefits, and when secular and religious schools are evaluated on the same grounds in determinations about aid, then the government is not skewing the marketplace of choices. Certain incentives may already exist between different schools, and the government need not attempt to correct these differences to maintain neutrality. Rather, it must avoid creating new incentives that may seem to favor or disfavor religious or nonreligious schools.

As previously mentioned, the availability of alternatives to religious options—or vice versa—may determine the likelihood of coercion and establishment. The more options the government funds with direct funding, the less likely coercion or establishment are likely to be concerns. Of course, government funds are limited and funding all options may be difficult practically. But to the best of its ability, the government should seek neither to intentionally disincentivize or incentivize religious schools by its policies, and where possible, it should seek to maximize, not minimize, the available options.

The Permissibility of Indirect Aid

The doctrine of neutrality also has implications for indirect aid, which is defined as governmental aid that is directed to an intermediary or series of intermediaries who decide to which school to apply the aid. Because there is an intermediary—usually a citizen—making a choice about where the aid goes, the private choice doctrine of the Establishment Clause applies in tandem with neutrality doctrine. Neutrality's implications for indirect aid are similar to those of direct aid in that the purpose of the aid must be secular and the government must be neutral toward religion in the marketplace of choice. However, neutrality demands little of indirect aid in terms of whether the aid is used in a religiously integrated manner. This is because the Court has

recognized as important the fact that indirect aid programs do not allow the government to choose which schools ultimately receive aid; thus, indirect aid programs alleviate most endorsement and coercion concerns.

I. The purpose of the aid must be secular

For the same reasons emphasized in relation to direct aid, the government's purpose with any indirect aid program should be secular. Secular purposes avoid policies that would constitute government endorsement of religion.

II. The private choice doctrine makes indirect aid presumptively constitutional

The Court's assertion in cases of private choice is that when public aid for secular purposes reaches religious institutions through "deliberate choices of numerous individual recipients," the government is not establishing religion.[17] The Court explicitly absolved governmental responsibility for the aid's final destination when it explained in *Zelman* that the government's role "ends with the disbursement of benefits."[18]

This is why indirect aid programs, as long as they are secular in purpose, do not raise coercion or establishment concerns. Coercion is mitigated by allowing individuals to make their own choices about which schools to apply aid. Endorsement is also mitigated because the government does not decide which institutions will receive aid. Even if private citizens choose to apply the aid mostly to religious schools, the government does not bear responsibility for this end result and thus cannot be said to endorse or establish religion.

III. The government must be neutral toward religion in the marketplace of choice

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[17] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), https://supreme.justia.com/cases/federal/us/536/639/case.pdf.
[18] Ibid.

Although neutrality does not demand an examination of the sum effect of private choices in cases of indirect aid, it does demand an examination of whether the government is neutral toward religion in the choices it provides or incentivizes. The value of private choice is hindered when choices are constricted.

For example, if a government creates a program to provide scholarships to students that attend private universities, students attending private religious universities should be as eligible to receive a scholarship as students attending private nonreligious universities. Perhaps the government may restrict the eligibility criteria to certain programs of study. Or it may exclude pastoral training as an eligible program of study so as to avoid establishment of religion—an exclusion the Supreme Court upheld in *Locke v. Davey* (2004). The government has the right to determine its criteria for scholarship eligibility. But once it does, students at religious universities who meet that criteria must be eligible for the publicly available benefit. If the government excludes religious universities, it fails to meet the demands of neutrality because it expresses disfavor toward religious options. Neutrality doctrine demands—and the private choice doctrine supports—the inclusion of religious school options when nonreligious private schools are also included in governmental policies.

Conclusion

Determining what forms of aid are constitutionally permissible is particularly challenging after *Espinoza*. Though the *Espinoza* Court did not officially declare Blaine Amendments unconstitutional in its holding, it spared no opportunity to insult their constitutionality. As state officials and courts grapple with decisions about direct and indirect aid, they will need workable Establishment Clause doctrines to accompany the Free Exercise Clause protection against religious status discrimination.

Because *Lemon* appears to be on its way out, the Court should return to its interrelated Establishment Clause doctrines of neutrality and private choice. Specifically, when neutrality is considered in cases of direct aid, it is important to consider the government's intent in providing the aid, the possibility of coercion or endorsement imposed by providing the aid, and the resulting marketplace of choice, including adequate existence of religious or nonreligious alternatives, that the government creates or affects by its policy.

In cases of indirect aid, the policies should be presumed constitutional so long as the government does not incentivize or disincentivize religious choice or constrict choices to nonreligious options. When the Establishment Clause doctrines of neutrality and private choice are considered in tandem with those of the Free Exercise Clause, policies that better appreciate the "play in the joints" between the Religion Clauses will be possible.[19]

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[19] *Walz v. Tax Commission of City of New York*, 397 U.S. 665, 669 (1970).