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SUMMARY

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Evaluating Federal Financial Assistance Under the Constitution's Religion Clauses

Federal and state governments have long offered support to religious organizations in the form of tax exemptions, the provision of general services, or more targeted assistance such as lending textbooks or providing construction funds to religiously affiliated schools. And, conversely, governments concerned about the separation of church and state have imposed restrictions to prevent government funds from aiding religious entities. As the Supreme Court has recognized, however, special constitutional concerns are raised both when the government provides money to religious organizations and when it excludes religious entities from general aid programs.

Government funding and non-funding of religious institutions implicates both of the U.S. Constitution's two Religion Clauses. First, the Establishment Clause, which bars the government from making any "law respecting an establishment of religion," has been interpreted to limit the government's ability to fund religious activities. Second, the Supreme Court has held that the Free Exercise Clause, which bars the government from making a law "prohibiting the free exercise" of religion, restricts the government's ability to exclude religious entities from public programs. Between these two provisions, as the Supreme Court recognized in *Walz v. Tax Commission*, there is "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

Although the Supreme Court's Establishment Clause jurisprudence has shifted over the years, the Court has frequently analyzed cases challenging the provision of funds to religious organizations under the three-part *Lemon* test. This three-part analysis asks courts to ensure that the government has a secular purpose in offering the funds, that the primary effect of the funds neither advances nor inhibits religion, and that the program does not foster excessive government entanglement with religion. The Supreme Court has upheld direct aid programs that satisfy this test, particularly where there is no risk that public funds will be used for religious indoctrination. Applying this test, the Court has also upheld indirect aid programs such as school voucher programs that provide funds to third parties who may independently choose to direct that money to religious organizations.

But while the Court has recognized that some restrictions on public funds may be necessary to ensure that a program does not violate the Establishment Clause, in other circumstances, the Supreme Court has held that the government violates the Free Exercise Clause by excluding religious organizations from generally available programs. While the Court has allowed the government to prohibit the religious *use* of funds, the government may not discriminate based on the religious character or *status* of an organization.

A number of federal statutes and regulations govern the provision of federal funds to religious organizations. Recently, however, the executive branch has taken the position that some of these federal laws are no longer consistent with governing constitutional principles, particularly in light of more recent Supreme Court precedent such as *Trinity Lutheran Church of Columbia, Inc. v. Comer* and *Espinoza v. Montana Department of Revenue*. In *Trinity Lutheran*, the Court held that excluding religious organizations from public benefits programs can violate the Free Exercise Clause by impermissibly discriminating against religion. If Congress agreed with the executive branch, it could amend federal statutes to eliminate any problematic funding restrictions. The Supreme Court has not specifically ruled on the constitutionality of most of these federal laws, however, and its Establishment Clause cases suggest that at least some restrictions on the use of federal funds for religious activities may be constitutionally required. While Congress cannot alter the scope of the Free Exercise Clause's protections for religious entities, it can grant additional statutory protections to religious entities, so long as those protections do not rise to the level of an unconstitutional establishment. Similarly, although Congress cannot amend the scope of the Establishment Clause's restrictions on public support for religious activities, it may create statutory restrictions on the religious use of funds, so long as those restrictions do not violate the Free Exercise Clause.

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The Religion Clauses in the First Amendment of the U.S. Constitution provide that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The first provision, the Establishment Clause, bars the government from providing certain types of support for religion.[2] The government would violate the Establishment Clause by establishing an official national religion, but might also violate this provision by otherwise supporting or becoming actively involved in religious activities.[3] The Free Exercise Clause, by contrast, prohibits government hostility to religion, requiring the government to act in a way that is "neutral toward . . . religious beliefs."[4]

Providing government funds or other aid to religious institutions implicates both the Religion Clauses, as the Supreme Court explained in the foundational 1947 case *Everson v. Board of Education*.[5] The *Everson* opinion considered the constitutionality of a state program that reimbursed parents for bus fare to send their children to school, including children who attended parochial schools.[6] Ultimately, the Court held that the program did not violate the Establishment Clause even though it used "tax-raised funds" to help some children "get to church schools."[7] The Court noted a tension between the two Religion Clauses as applied to the case.[8] The Establishment Clause prohibited the state from contributing public funds to support "an institution which teaches the tenets and faith of any church," while the Free Exercise Clause prohibited the state from excluding religious individuals "from receiving the benefits of public welfare legislation" because of their faith.[9] Balancing these two principles, the Court said that in "protecting" citizens from "state-established churches," it did not want to "inadvertently prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief."[10] *Everson* provided a blueprint for much of the Court's subsequent jurisprudence on constitutional limitations on public aid.

In its cases interpreting the First Amendment, the Court has required the government to remain "neutral in its relations with groups of religious believers and non-believers," and has said that the government may neither favor nor disfavor religious entities.[11] Thus, the Supreme Court has recognized that there "is room for play in the joints" between the two Religion Clauses, allowing the government to display "a benevolent neutrality" that "will permit religious exercise to exist without sponsorship and without interference."[12] And just as the government may provide some

[1] U.S. CONST. amend. I. The text of the First Amendment actually provides that "*Congress* shall make no law," but the provision was "made applicable to the states" by the Fourteenth Amendment. Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947). Further, it has long been understood to restrict action by the executive branch as well. *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 160 (1973) (Douglas, J., concurring) (describing the First Amendment as restricting Congress, whether "acting directly or through any of its agencies such as the FCC"); *see generally* Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601 (2013).

[2] *See Everson*, 330 U.S. at 15–16.

[3] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771–72 (1973).

[4] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

[5] *Everson*, 330 U.S. at 16.

[6] *Id.* at 3.

[7] *Id.* at 16–17.

[8] *See id.* at 16.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 18; *see also, e.g.*, Agostini v. Felton, 521 U.S. 203, 231–32 (1997) (citing *Everson* and upholding a state program that allocated services "on the basis of criteria that neither favor nor disfavor religion").

[12] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

forms of support for religious entities without violating the Establishment Clause,[13] the Court has also held that the government may prohibit religious uses of generally available benefits without violating the Free Exercise Clause.[14] However, the Court has recognized that at times, its opinions have demonstrated "considerable internal inconsistency,"[15] and its interpretations of the First Amendment have shifted over the past several decades.[16]

The ambiguity created by the bare nature of the constitutional text and the Supreme Court's varying interpretations of the First Amendment can make it difficult for the government to know how to treat religious entities or activities when creating public benefits programs. The Supreme Court, however, has announced a number of guiding principles, and Congress has addressed how religious entities may participate in federally funded programs in a number of federal statutes and regulations.

This report explores the Supreme Court's rulings on the Religion Clauses and public aid, focusing primarily on the provision of government *funds* to religious institutions, rather than the provision of generally available benefits such as goods, services, or facilities. The report begins with Establishment Clause limitations on the government's ability to financially support religious entities, and then turns to Free Exercise limitations on the government's ability to exclude religious entities from generally available programs. The report ends by exploring the implications of these rulings for Congress, discussing existing federal statutes that govern the provision of federal funds to religious institutions, as well as some recent executive branch interpretations of those laws.

Establishment Clause

General Background

The First Amendment's Establishment Clause forbids the government from making any law "respecting an establishment of religion."[17] Perhaps most obviously, this provision prevents the federal government from establishing an official national religion akin to the Church of England.[18] But relying on the historical background preceding the adoption of this amendment, and looking particularly to the colonists' experiences with religious establishments, the Supreme

[13] *See Everson*, 330 U.S. at 17.

[14] *E.g.*, Locke v. Davey, 540 U.S. 712, 715 (2004) (upholding state scholarship program that excluded students pursuing degrees in devotional theology).

[15] *Walz*, 397 U.S. at 668. *Cf., e.g.*, John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 86 (1986) ("*Everson* . . . simultaneously adopted two different and incompatible conceptions of Establishment Clause neutrality—a separationist conception prohibiting aid to religion and an accommodationist conception allowing religious participation in secular governmental programs of general social benefit.").

[16] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) (describing a prior inquiry into whether government aid went to a "pervasively sectarian" activity as "not only unnecessary but also offensive"); Agostini v. Felton, 521 U.S. 203, 223, 236 (1997) (overruling two prior decisions, describing how more recent cases had "modified" the Court's review of whether government aid impermissibly advanced religion).

[17] U.S. CONST. amend. I.

[18] *See, e.g.*, *Everson*, 330 U.S. at 15; *see also, e.g.*, *History of the Church of England*, THE CHURCH OF ENGLAND, https://www.churchofengland.org/more/media-centre/church-england-glance/history-church-england (last visited Sept. 9, 2020) (noting that the Church of England is "the established Church in England").

Court has long understood the Establishment Clause to bar other types of government support that would tend to "establish" religion, as well:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[19]

In particular, the Supreme Court has observed that "a law may be one '*respecting*'" establishment even if it does not explicitly establish a religion.[20] The Court has said that for the Founders, laws respecting "the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[21] Most relevant to this report, the Court has recognized that the Establishment Clause imposes limits on when the government can provide financial assistance to religious entities.[22]

While the Supreme Court has often referred to government neutrality toward religion as its guiding principle in applying the Establishment Clause,[23] it has adopted a variety of approaches to determine whether any given action is sufficiently neutral.[24] At a theoretical level, the Court has seemed to vacillate between a separationist and an accommodationist view of the Establishment Clause.[25] The separationist view is embodied by Thomas Jefferson's statement that the First Amendment created "a wall of separation between church and State."[26] Thus, in *Everson v. Board of Education* in 1947, the Supreme Court said that this wall "must be kept high and impregnable."[27] The "separation" of church and state is intended not only to protect the government from religious influence, but also to protect religious exercise by preventing the government from intervening in religious affairs.[28] In 1971, however, in *Lemon v. Kurtzman*, the Supreme Court said that "far from being a 'wall,'" the line separating church from state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular

[19] *Everson*, 330 U.S. at 15–16.

[20] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added).

[21] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[22] *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973) (ruling that the effect of a state's tuition reimbursement program was "unmistakably to provide desired financial support for nonpublic, sectarian institutions").

[23] *See, e.g.*, McCreary Cty. v. Am. Civil Liberties Union, 545 U.S. 844, 874 (2005); Wallace v. Jaffree, 472 U.S. 38, 60 (1985); *Everson*, 330 U.S. at 18.

[24] *See, e.g.*, Max Guirguis, *A Coat of Many Colors: The Religious Neutrality Doctrine from* Everson *to* Hein, 43 STETSON L. REV. 67, 68 (2013); Valauri, *supra note* 15, at 94.

[25] *See, e.g.*, Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 232 (1994).

[26] *See Everson*, 330 U.S. at 16 (quoting Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006 (internal quotation marks omitted)).

[27] *Id.* at 18. But as discussed above, the Court concluded that the state program reimbursing parents for transportation costs to religious schools had not "breached" that wall. *Id.*

[28] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962).

relationship."[29] And in a dissenting opinion in 1985, then-Associate Justice Rehnquist argued that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."[30] Over the years, the Court has trended toward a more accommodationist approach to the First Amendment, becoming more accepting of government support for religion.[31]

The Court's predominant approach to evaluating Establishment Clause challenges during much of the modern era has been an analysis known as the *Lemon* test,[32] although the Court has not always followed this approach.[33] *Lemon* involved challenges to two state programs that provided public funds to church-affiliated schools.[34] To determine whether these programs violated the Establishment Clause, the Court considered three different tests drawn from its prior decisions, stating that to be considered constitutional: (1) a government action "must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster 'an excessive government entanglement with religion.'"[35] This statement has become known as the three-part *Lemon* test, focusing on purpose, effect, and entanglement.[36] Each prong of *Lemon* is discussed in more detail below with respect to programs providing public funds.

While *Lemon* provides the prevailing analysis for Establishment Clause claims, the Court has also employed variations on the three-part *Lemon* test, and has at times refrained entirely from using this framework. For example, in *Lynch v. Donnelly*, issued in 1984, the Supreme Court applied the *Lemon* test to hold that a city did not violate the Establishment Clause by erecting a Christmas display that included a nativity scene.[37] Writing a separate concurring opinion, Justice O'Connor suggested a "clarification" of *Lemon*.[38] She argued that the Court should ask whether the city had "endorsed Christianity" by displaying the crèche, saying that the first and second prongs of the

[29] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

[30] Wallace v. Jaffree, 472 U.S. 38, 92, 106 (1985) (Rehnquist, J., dissenting). In 1986, Justice Rehnquist was elevated from Associate Justice to Chief Justice. *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 9, 2019). *See also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

[31] *See, e.g.*, Guirguis, *supra* note 24, at 89–90; Lupu, *supra* note 25, at 237; Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, 2001 BYU EDUC. & L. J. 271, 283–84 (2001).

[32] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). *See also, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring) (describing *Lemon* as "[a] central tool" in Establishment Clause analysis); Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 849 (7th Cir. 2012) (saying that *Lemon* is the prevailing test for Establishment Clause claims); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1017 (9th Cir. 2010) (same); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999) (same).

[33] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 685–86 (2005) (plurality opinion) ("Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* as providing the governing test in Establishment Clause challenges. Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as 'no more than helpful signposts.'" (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)) (citations omitted)); Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting the Court's "unwillingness to be confined to any single test or criterion in this sensitive area"). *Cf., e.g.*, Larson v. Valente, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a state law granting a *denominational preference*, our precedents demand that we treat the laws as suspect and that we apply strict scrutiny in adjudging its constitutionality." (emphasis added)).

[34] *See Lemon*, 403 U.S. at 606–07.

[35] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[36] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 218 (1997).

[37] Lynch v. Donnelly, 465 U.S. 668, 685 (1984).

[38] *Id.* at 687 (O'Connor, J., concurring).

Lemon test, relating to purpose and effect, focus on endorsement: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[39] In a later concurrence, Justice O'Connor stated that endorsement should be judged by whether a "reasonable observer" would think the government is endorsing religion.[40] The Supreme Court as a whole has sometimes used this endorsement test,[41] which has been described as a relatively more accommodationist position compared to the original *Lemon* test.[42]

In addition, the test's three prongs blend together; and specifically, Supreme Court has not always treated the entanglement prong of the *Lemon* test as a distinct inquiry. In *Agostini v. Felton*, a 1997 decision, the Supreme Court said that the inquiry into entanglement should be treated "as an aspect of the inquiry into a statute's effect."[43] Accordingly, in that case, the Court asked whether a school aid program created "an 'excessive' entanglement that advances or inhibits religion."[44] Later in the opinion, the Court ruled that the challenged program did not "run afoul of any of three primary criteria we currently use to evaluate whether government aid has the *effect* of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[45] In 2000's *Mitchell v. Helms*, a plurality of the Court considered a challenged aid program's purpose and effect, using the three criteria identified in *Agostini* to judge its effect.[46]

In addition to the Court's various attempts to clarify or reframe *Lemon*, a number of Justices have criticized *Lemon*'s attempt to articulate "a grand unified theory of the Establishment Clause."[47] Many have argued that the test is difficult to apply in a consistent way, a problem compounded by the fact that the Court has not always employed the same test.[48] Justice Scalia once described the Court's "intermittent use" of *Lemon* as creating a "strange Establishment Clause geometry of crooked lines and wavering shapes."[49] In particular, some Justices have argued that the Court should, in lieu of *Lemon*, look to "historical practices and understandings" in interpreting the

[39] *Id.* at 690.

[40] Allegheny Cty. v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

[41] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002); *Allegheny Cty.*, 492 U.S. at 592 (majority opinion).

[42] *See, e.g.*, Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 476 (1994); Lupu, *supra* note 25, at 240.

[43] Agostini v. Felton, 521 U.S. 203, 233 (1997).

[44] *Id.*

[45] *Id.* at 234 (emphasis added); see also *id.* at 234–35 ("We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here.").

[46] Mitchell v. Helms, 530 U.S. 793, 808 (2000) (plurality opinion). *See also Zelman*, 536 U.S. at 648–49 ("The Establishment Clause of the First Amendment . . . prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." (quoting *Agostini*, 521 U.S. at 222–23)).

[47] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion). *See also id.* at 2081 (noting criticism of *Lemon* by Justices, lower court judges, and "a diverse roster of scholars").

[48] *See, e.g.*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 997–1001 (2011) (Thomas, J., dissenting from denial of certiorari); Cooper v. U.S. Postal Serv., 577 F.3d 479, 494 (2d Cir. 2009); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118–20 (1992).

[49] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment).

Establishment Clause, and that any constitutional test must, at minimum, allow governments to continue to engage in practices with a long history.[50]

A focus on historical traditions has displaced *Lemon* in several discrete Establishment Clause challenges. In cases involving government-sponsored prayer before legislative sessions, the Court has upheld prayer practices so long as they fit "within the tradition long followed in Congress and the state legislatures."[51] In the 2019 case *American Legion v. American Humanist Association*, the Supreme Court considered whether to more broadly abandon *Lemon* and instead adopt a test focused on historical practice.[52] The Court was evaluating the constitutionality of a state war memorial that consisted primarily of a large Latin cross.[53] The majority opinion, authored by Justice Alito, suggested that the *Lemon* test is not well-suited to evaluating religious "monuments, symbols, or practices that were first established long ago," but stopped short of expressly holding that *Lemon* is inapplicable in such cases.[54] The majority appeared to rely heavily on history and tradition in upholding the constitutionality of the memorial, stating that in most cases, "[t]he passage of time gives rise to a strong presumption of constitutionality."[55]

However, a different majority of Justices, in various opinions, expressed a belief that the Court should more broadly abandon the *Lemon* test.[56] Justice Alito, in a portion of his *American Legion* opinion that was only joined by three other Justices, suggested that "longstanding monuments, symbols, and practices" should not be evaluated under *Lemon*,[57] but should instead be considered constitutional so long as they "follow in" a historical "tradition" of religious accommodation.[58]

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[50] Allegheny Cty. v. ACLU, 492 U.S. 573, 655, 670 (1989) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy also argued that the government must be able to engage in "any other practices" that present "no greater potential for an establishment of religion" than those historical practices. *Id.* *See also, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) ("While the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."). By contrast, Justice Thomas has argued that governmental action violates the Establishment Clause if it "shares any of the historical characteristics of an establishment of religion," which in his view would occur only if the government "attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship." *Am. Legion*, 139 S. Ct. at 2096–98 (Thomas, J., concurring in the judgment). Justice Thomas has also questioned the Court's conclusion that the Establishment Clause applies to the states, saying that instead, the Clause "resists incorporation." *Id.* at 2095. Justice Thomas reiterated this view in 2020, in a concurring opinion that was joined by Justice Gorsuch. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring).

[51] Town of Greece v. Galloway, 572 U.S. 565, 577 (2014). *See also, e.g.*, Marsh v. Chambers, 463 U.S. 783, 792 (1983) ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.").

[52] *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion). *See also* CRS Legal Sidebar LSB10315, *No More* Lemon *Law? Supreme Court Rethinks Religious Establishment Analysis*, by Valerie C. Brannon.

[53] *Am. Legion*, 139 S. Ct. at 2077 (majority opinion).

[54] *Id.* at 2082.

[55] *Id.* at 2085.

[56] *Id.* at 2081–82 (plurality opinion); *id.* at 2097 (Thomas, J., concurring in the judgment); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment).

[57] *Id.* at 2081–82 (plurality opinion); *see also id.* at 2081 ("[T]he *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations.").

[58] *Id.* at 2089 (plurality opinion). While Justice Breyer joined this portion of the plurality opinion and agreed that "the Court appropriately 'looks to history for guidance,'" he emphasized in a separate opinion that he did not understand the majority "to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land" to stand regardless of the monument's "particular historical context." *Id.* at 2091 (Breyer, J., concurring) (citations omitted). Further, both Justice Breyer and Justice Kagan expressed a belief that even if the Court does not

Justices Thomas, Gorsuch, and Kavanaugh wrote separate concurrences in *American Legion* disapproving of *Lemon* more generally, appearing to reject *Lemon*'s three-pronged test even in cases concerning public funding.[59] Justice Alito's four-Justice plurality opinion appears to be the controlling opinion for future cases because it is narrower than the concurrences.[60] Consequently, in the future, when courts evaluate longstanding, government-sponsored religious "monuments, symbols, and practices," rather than applying *Lemon*, they may instead ask whether the display or practice is consistent with historical traditions.[61] But as noted, the Court did not overrule the *Lemon* test, and lower courts will likely continue to use this test in future cases until the Supreme Court says otherwise, particularly in cases involving funding, rather than legislative prayer or longstanding monuments.[62]

Assessing Public Funding of Religious Entities

Various types of public support for religious entities have been challenged as violating the Establishment Clause, including programs to lend textbooks or other educational materials to religious schools[63] as well as programs allowing religious teachers to teach religion in public schools during normal school hours.[64] The Court has said that barring religious entities from participating on an equal basis in generally available benefits programs could sometimes "lead to . . . absurd results," creating a risk that churches could not be protected by the fire department or benefit from publicly maintained sidewalks.[65] But the Supreme Court has repeatedly suggested that when the government provides *financial* aid to religious entities, as opposed to providing other types of aid, such support presents heightened Establishment Clause concerns.[66] The Court

apply *Lemon* as such, it should continue to focus on the purpose and effect of government action. *Id.* at 2091 (noting that the particular monument before the Court was erected with a "secular motive" and conveyed a secular "message of patriotism and commemoration"); *id.* at 2094 (Kagan, J., concurring) ("Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows.").

[59] *Id.* at 2097 (Thomas, J., concurring in the judgment); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment); *id.* at 2093 (Kavanaugh, J., concurring). However, Justice Thomas recognized that government *coercion* of financial support for religion might violate the Establishment Clause. *Id.* at 2096 (Thomas, J., concurring in the judgment).

[60] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when "no single rationale explaining the result [of a case] enjoys the assent of five Justices," the position representing the narrowest grounds is the Court's holding).

[61] *Am. Legion*, 139 S. Ct. at 2089 (plurality opinion). *See also, e.g.*, Freedom From Religion Found., Inc. v. City of Lehigh, 933 F.3d 275, 279 (3d Cir. 2019) (holding that in light of *American Legion*, the *Lemon* test did not guide the court's review of a county seal that contained a Latin cross, and ruling that the seal was constitutional because the record did not displace the "strong presumption" that "longstanding symbols" are constitutional).

[62] *See, e.g.*, *Freedom From Religion Found., Inc.*, 933 F.3d at 281 (noting that the Court did not overrule *Lemon* in *American Legion*); Woodring v. Jackson Cty., No. 4:18-cv-00243-TWP-DML, 2019 U.S. Dist. LEXIS 167728, at *6–7 (S.D. Ind. Sept. 30, 2019) (noting that although *American Legion* "frowns upon the *Lemon* test," it does not offer an alternative test, and using "the endorsement, coercion, and purpose tests" to evaluate the constitutionality of a nativity scene on public property); Ctr. for Inquiry, Inc. v. Warren, No. 3:18-CV-2943-B, 2019 U.S. Dist. LEXIS 138839, at *19–21 (N.D. Tex. 2019) (noting that the Court's recent Establishment Clause cases, including *American Legion*, have looked to history, but concluding that the historical approach was not dispositive in the case before the court and instead upholding under *Lemon* a state law providing that only religious officers may solemnize marriage ceremonies).

[63] *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (upholding program as constitutional).

[64] *See, e.g.*, Illinois *ex rel.* McCollum v. Bd of Educ., 333 U.S. 203, 212 (1948) (ruling that such a program violates the Establishment Clause).

[65] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

[66] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 818–19 (2000) (plurality opinion); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842, 844 (1995); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

has recognized that "financial support" of religion was squarely in the minds of those who adopted the Establishment Clause.[67]

The Supreme Court has generally evaluated such aid under the *Lemon* framework discussed above—although its financial aid cases have also reflected the varying approaches to *Lemon*. As addressed in more detail below, under *Lemon*, the Supreme Court has said that financial aid programs will be unconstitutional if they have an impermissible purpose or effect,[68] sometimes evaluating *Lemon*'s first two prongs under the endorsement framework.[69] The Supreme Court has struck down programs that violate *Lemon*'s final prong by creating an excessive entanglement, if the program requires excessive government monitoring of religious organizations.[70] However, the Court has held that *Lemon* does allow the government to provide financial aid to religious entities under certain circumstances.[71]

One central issue in modern Establishment Clause jurisprudence concerns *who* decides that aid will be provided to a religious entity. The Supreme Court has said financial aid will be especially problematic if the government is giving funds *directly* to religious entities, as opposed to giving the funds to third parties who then choose to use federal funds to support religious entities.[72] Thus, the Court has distinguished between programs "that provide aid directly to religious" entities, which are more constitutionally suspect, and so-called "programs of true private choice" that provide indirect aid.[73] The Court has said that *indirect* aid will generally be deemed permissible under *Lemon* if the "government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[74]

Purpose

The first prong of the *Lemon* test asks whether the public aid has "a secular legislative purpose"[75]—or under the endorsement test, whether the "government's actual purpose is to endorse or disapprove of religion."[76] The government acts with an impermissible purpose if it seeks to "establish[], sponsor[], or support[] religion."[77] In a number of public aid cases, the

[67] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). *Cf.*, *e.g.*, Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term 'establishment' had acquired an additional meaning—'financial support of religion generally, by public taxation[.]'" (quoting LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 8–9 (1986))).

[68] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (ruling unconstitutional a tax exemption giving preferential support only to religious publications); *id.* at 28 (Blackmun, J., concurring) (same).

[69] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002).

[70] *E.g.*, *Lemon*, 403 U.S. at 615.

[71] *E.g.*, Bowen v. Kendrick, 487 U.S. 589, 602 (1988). *Cf.* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion) ("The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity.").

[72] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 719 (2004).

[73] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002); Lemon v. Kurtzman, 403 U.S. 602, 621 (1971). *Cf.* Mitchell v. Helms, 530 U.S. 793, 818 (2000) (plurality opinion) ("Whether one chooses to label this program 'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis.").

[74] *Zelman*, 536 U.S. at 652.

[75] *Lemon*, 403 U.S. at 612.

[76] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[77] Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). *Walz* was decided prior to *Lemon*, but the Court's inquiry

Supreme Court has suggested that if a program broadly provides benefits to a large group of recipients rather than singling out religious recipients, this may show that the government is not acting with an impermissible purpose of supporting religion.[78]

Thus, for example, the Supreme Court has upheld programs where state governments were motivated by "secular" purposes such as "providing educational assistance to poor children,"[79] defraying parents' educational costs,[80] or "assuring the continued financial health of private schools, both sectarian and nonsectarian."[81] To take another example, in *Bowen v. Kendrick*, the Supreme Court held that the federal government could give funds to religious organizations as part of a broader program.[82] The program offered grants to nonprofit organizations to provide services "for the provision of care to pregnant adolescents and adolescent parents, . . . [and] for the prevention of adolescent sexual relations."[83] The Court concluded that reducing "social and economic problems caused by teenage sexuality, pregnancy, and parenthood" was "a legitimate secular purpose."[84]

There are not many cases in which the Supreme Court has concluded that a program failed the purpose prong of the *Lemon* test, particularly in the specific context of financial aid programs.[85] The Court has occasionally found an impermissible purpose in the context of programs involving other types of public aid.[86] For example, the Supreme Court ruled in two different cases that state laws restricting the teaching of evolutionary biology had the impermissible purpose of advancing certain religious views regarding the creation of humans.[87] In one of these cases, the Court rejected the state's asserted secular purpose of ensuring "academic freedom," noting that public schools were already free to teach any scientific theory, so that the law provided them "with no new authority," and emphasizing that the law offered special resources and protection to "creation scientists" and "creationism."[88] Thus, this case shows that the Court may, in special

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nonetheless focused on purpose, effect, and excessive government entanglement with religion. *See id.*

[78] *See, e.g.*, *id.* at 672–74; *Zelman*, 536 U.S. at 652.

[79] *Zelman*, 536 U.S. at 649.

[80] Mueller v. Allen, 463 U.S. 388, 395 (1983).

[81] *Id. See also, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995) ("The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the [program] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.").

[82] Bowen v. Kendrick, 487 U.S. 589, 602 (1988).

[83] *Id.* at 594.

[84] *Id.* at 602. The Court said that this secular motive was not undermined by the fact that Congress had specifically amended the statute to make clear that religious organizations were eligible to receive funds, concluding that this language was not sufficient to demonstrate an impermissible purpose of endorsing religion. *Id.* at 604–05.

[85] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (concluding that a state tax exemption for religious periodicals lacked "a secular objective that would justify this preference").

[86] *See, e.g.*, Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 226 (1948) (concluding that the "candid purpose" of a program allowing religious teachers paid by churches to teach religion classes in public schools during normal class hours "is sectarian teaching").

[87] Edwards v. Aguillard, 482 U.S. 578, 591 (1987) (holding that "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind"); Epperson v. Arkansas, 393 U.S. 97, 107–08 (1968) (noting that prior version of the challenged law expressly stated its purpose as making it unlawful to teach any theory that contradicts biblical teachings and ruling that under the circumstances, "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man").

[88] *Aguillard*, 482 U.S. at 587–88.

circumstances, look beyond a law's stated secular purpose to determine that in fact, it impermissibly seeks to advance religion.

Effect

The second prong of the *Lemon* inquiry asks whether, even if the government did not act with the purpose of aiding religion, the aid nonetheless has the "principal or primary effect" of "advanc[ing]" or "inhibit[ing] religion."[89] Viewed through the lens of endorsement, the effects prong asks whether "the practice under review in fact conveys a message of endorsement or disapproval" of religion.[90]

Similar to the inquiry under the purpose prong, the Supreme Court has suggested that one relevant factor in evaluating a program's effect is whether the aid is provided to a "broad class" of recipients or whether it instead appears to be more targeted toward religious beneficiaries.[91] In the context of cases involving indirect aid or nonfinancial aid, the Court has sometimes used language suggesting that "neutrality," in the sense of making public aid available to both religious and nonreligious recipients, may be sufficient to ensure that a program does not violate *Lemon*'s effects prong.[92] By contrast, in *Texas Monthly, Inc. v. Bullock*, the Supreme Court struck down a state tax exemption for periodicals distributed "by a religious faith" that consisted "wholly" of religious "writings."[93] Justice Brennan, writing for a plurality of the Court, concluded that this exemption failed the endorsement test.[94] He said that "when government directs a subsidy *exclusively* to religious organizations that is not required by the Free Exercise Clause," that conveys an impermissible message of "state sponsorship of religious belief."[95] Justice Blackmun, joined by Justice O'Connor, agreed that the tax exemption violated the Establishment Clause because the state had "engaged in preferential support for the communication of religious messages."[96]

In *direct* aid programs, the Court has said that aid will have an impermissible effect if there is no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes."[97] In *Committee for Public Education and Religious Liberty v. Nyquist* and *Levitt v. Committee for Public Education*, the Supreme Court held that two state programs funding private schools violated the Establishment Clause because the program lacked any measures to ensure that the funds would not be used for

[89] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[90] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[91] Zelman v. Simmons-Harris, 536 U.S. 639, 652, 661 (2002).

[92] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 810 (2000) (plurality opinion) ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." (citation omitted)); *id.* at 837 (O'Connor, J., concurring) (disagreeing with "the plurality's treatment of neutrality," which "comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs"). *See generally, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) ("We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.").

[93] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion).

[94] *Id.* at 17.

[95] *Id.* at 15 (emphasis added).

[96] *Id.* at 28 (Blackmun, J., concurring). Justice Blackmun believed that this "statutory preference for the dissemination of religious ideas" could not be considered a "constitutionally permissible" accommodation of religion. *Id.*

[97] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

religious purposes.[98] In *Nyquist*, the Court was considering a state law that, among other things, offered grants to private schools for facilities maintenance and repair.[99] The law did not "restrict payments . . . to the upkeep of facilities used exclusively for secular purposes," and would have, for example, allowed schools to use the funds for "the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught."[100] Accordingly, the Court concluded that the program failed the effect prong of *Lemon* because it would "inevitably . . . subsidize and advance the religious mission of sectarian schools."[101] Similarly, in *Levitt*, the Supreme Court held that a state program reimbursing religious schools for performing certain testing and recordkeeping services violated the Establishment Clause because "the aid that [would] be devoted to secular functions [was] not identifiable and separable from aid to sectarian activities."[102] The Court noted that the tests were prepared by "teachers under the authority of religious institutions" and ruled that there was an inherent risk of the test being used for "religious indoctrination."[103]

Concurrently, the Supreme Court has upheld some programs that provide funds directly to religious entities when the programs restrict the religious use of those funds. Seven years after its decision in *Levitt*, the Court upheld a revised version of the testing-reimbursement law that it had struck down in that decision.[104] The new law did not allow reimbursement for teacher-prepared tests and allowed states to audit payments.[105] The Court ruled that these new safeguards were sufficient to ensure "that the cash reimbursements would cover only secular services."[106] In *Hunt v. McNair*, a decision issued the same day as *Nyquist* and *Levitt*, the Court rejected an Establishment Clause challenge to a state revenue bond issued to a religious college as part of a program that offered financial assistance to colleges for facilities construction and maintenance.[107] The state program specified that funds could not be used for "any facility used . . . for sectarian instruction or as a place of religious worship nor any facility which is used . . . primarily in connection with any part of the program of a school or department of divinity for any religious denomination"[108]—in short, excluding any "facilities used for religious purposes."[109] The Court concluded that absent any evidence that public funds were actually going to religious uses, this provision was sufficient to ensure that the program did "not have the primary effect of advancing or inhibiting religion."[110]

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[98] *Id.* at 779–80; Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973).

[99] *Nyquist*, 413 U.S. at 774.

[100] *Id.*

[101] *Id.* at 779–80. *Cf., e.g.*, Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 298 (6th Cir. 2009) ("'[A]ll or practically all' of the schools eligible for the grants [in *Nyquist*] were not merely religious; they also were from the same denomination, which itself suggested a forbidden purpose." (quoting *Nyquist*, 413 U.S. at 768)).

[102] *Levitt*, 413 U.S. at 480.

[103] *Id.*

[104] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657, 659 (1980).

[105] *Id.* at 652.

[106] *Id.* at 659.

[107] Hunt v. McNair, 413 U.S. 734, 736 (1973).

[108] *Id.* at 736–37 (quoting S.C. Code Ann. § 22-41.2(b) (Supp. 1971)) (internal quotation marks omitted).

[109] *Id.* at 744.

[110] *Id.* at 744–45. *See also* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 740–41 (1976) (plurality opinion) (upholding state program that gave unrestricted grants to private colleges but stated that the funds could not be used for "sectarian purposes"); Tilton v. Richardson, 403 U.S. 672, 675 (1971) (plurality opinion) (upholding federal grant program for the construction of academic facilities that excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the

But while restrictions on the religious use of funds might sometimes be *sufficient* to ensure a program does not have an impermissible effect under *Lemon*, subsequent Supreme Court precedent may suggest that contrary to some of the language in *Nyquist* and *Levitt*, such an express prohibition might not always be *necessary* for a program to be ruled constitutional.[111] The Supreme Court has since said that courts should not always assume that religiously affiliated organizations would use public funds for religious purposes.[112] For instance, in *Bowen v. Kendrick*, the Court upheld a federal grant program that did not contain any provision expressly prohibiting the use of federal funds for religious purposes.[113] The Court noted that the statute made funds available to a wide variety of organizations and stated that there was no evidence that a "significant proportion of the federal funds" would be given to religious institutions.[114] Further, the Court said that it would assume that even absent an express restriction on the religious use of funds, religious grantees could carry out the funded programs "in a lawful, secular manner."[115] Somewhat similarly, in *Agostini v. Felton*, the Supreme Court said that in assessing the effect of other types of public aid, courts should not assume that public school teachers providing ostensibly secular services at religious schools will inevitably "inculcate religion in the students" or otherwise engage in "state-sponsored indoctrination."[116]

In *indirect* aid programs, the Supreme Court has not required the government to include religious use restrictions.[117] Instead, where financial aid is provided to religious entities indirectly, the Court has generally held that such programs satisfy *Lemon*'s effects prong even if the funds do ultimately support religious activities—so long as the program is "neutral in all respects toward religion,"[118] particularly in the sense of using religiously neutral criteria to distribute aid.[119] In *Zelman v. Simmons-Harris*, for example, the Supreme Court rejected an Establishment Clause challenge to a municipal program that offered "tuition aid" to parents with financial needs who sought to enroll their children in private schools.[120] The parents could choose to use those tuition-aid checks at religious or nonreligious schools.[121] The Court said that where the government

program of a school or department of divinity" (omissions in original)).

[111] *See* Mitchell v. Helms, 530 U.S. 793, 856 (2000) (O'Connor, J., concurring) ("*Wolman* and *Levitt* were both based on the same presumption that government aid will be used in the inculcation of religion that we have chosen not to apply to textbook lending programs and that we have more generally rejected in recent decisions."); *see also* Bowen v. Kendrick, 487 U.S. 589, 634–35 (1988) (Blackmun, J., dissenting) (arguing that the majority opinion "marks a sharp departure from" the Court's precedents, including *Levitt*).

[112] Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

[113] *Id.* at 614.

[114] *Id.* at 608, 610.

[115] *Id.* at 612, 614.

[116] Agostini v. Felton, 521 U.S. 203, 223–24 (1997).

[117] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002). In fact, the Court has sometimes suggested that if the government prohibits private entities from "us[ing] their own money" to support religion, this would raise concerns under the Constitution's Free Exercise Clause. Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908) (rejecting constitutional challenge to government contract providing money from the "Sioux Treaty Fund" to a religious school on the Rosebud Indian Reservation).

[118] *See Zelman*, 536 U.S at 653.

[119] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 838–39 (2000) (O'Connor, J., concurring in the judgment).

[120] *Zelman*, 536 U.S. at 646.

[121] *Id.* at 653. In its analysis, the Court noted that there was "no evidence" that parents did not have "genuine opportunities . . . to select secular educational options for their school-age children." *Id.* at 655. Although "46 of the 56 private schools" participating in the program were religious, secular options were available and there was no evidence that the city was "coercing parents into sending their children to private schools." *Id.* at 655–56. *Cf., e.g.*, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 425 (8th Cir. 2007) ("In this case,

program aided "a broad class of citizens" who then chose to "direct government aid to religious schools wholly as a result of their own genuine and independent private choice," any support for religion was "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[122] Consequently, under the endorsement test, "no reasonable observer would think" that such a program "carries with it the imprimatur of government endorsement" of religion.[123]

The Court's indirect aid cases have frequently involved educational programs. In addition to programs that provide tuition assistance to parents or students at religious schools,[124] the Supreme Court has also approved of programs that offer financial assistance to parents for other costs related to attending private schools. For example, in *Everson v. Board of Education*, the Court ruled that a state did not violate the Establishment Clause when it reimbursed parents for the cost of bus fares to send their children to private schools.[125] In *Mueller v. Allen*, the Supreme Court concluded that a state could allow taxpayers to claim a tax deduction for tuition, textbooks, and transportation costs incurred in sending their students to a religious school.[126] Among other factors, the court stressed that the tax deduction was "available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."[127] Because the benefit was broadly available and neutral on its face with respect to religion, the Court believed that the program had a primarily secular effect and did not imply state endorsement of religion.[128]

To take one last example, the Supreme Court ruled that it did not violate the Establishment Clause for a public university to pay for the printing of a religious student publication in *Rosenberger v. Rector and Visitors of the University of Virginia*.[129] The funds came from a Student Activities Fund, which was generally available to support the extracurricular activities of approved student groups.[130] The student groups chose how to use the funds, and in the case before the court, the funds were given to the printer, rather than being paid directly to the religious student group.[131] Under the circumstances, the Court said it was not "plausible" that any religious speech supported with these funds would be attributed to the university, rather than the student group that chose how to use the funds.[132] Because the funds were available on a "religion-neutral basis" as part of

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there was no genuine and independent private choice. The inmate could direct the aid only to InnerChange [a religious program offering services to prison inmates]. The legislative appropriation could not be directed to a secular program, or to general prison programs."); Teen Ranch v. Udow, 389 F. Supp. 2d 827, 836 (W.D. Mich. 2005) (ruling that an "opt-out" provision was not enough to create true private choice where the state selected who would provide services).

[122] *Zelman*, 536 U.S. at 653.

[123] *Id.* at 655. The majority opinion relied on the endorsement test. In a concurring opinion, Justice O'Connor explained that the majority opinion "focuse[d] on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases?" *Zelman*, 536 U.S. at 669 (O'Connor, J., concurring).

[124] Locke v. Davey, 540 U.S. 712, 719 (2004) (stating that a state could provide scholarships to students pursuing degrees "in devotional theology" without violating the Establishment Clause); *Zelman*, 536 U.S. at 662; Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986) (ruling that a state could provide tuition aid to a visually impaired student studying religious subjects at a religious college without violating the Establishment Clause).

[125] Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).

[126] Mueller v. Allen, 463 U.S. 388, 402–03 (1983).

[127] *Id.* at 397.

[128] *Id.*

[129] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 842 (1995).

[130] *Id.* at 823–24.

[131] *Id.* at 842.

[132] *Id.* at 841.

a program that funded "secular services" such as printing, the Court held that the school was not barred from providing these funds to the religious publication.[133]

At least one case suggests that there may be a limiting principle on the government's ability to provide financial assistance in indirect aid programs. In *Committee for Public Education and Religious Liberty v. Nyquist*, decided in 1973, the Supreme Court struck down a program that assisted only *private* schools.[134] In that case, a state offered direct grants to private schools for maintenance and repair costs—discussed above[135]—and also provided indirect aid in the form of tuition reimbursements and tax benefits to parents whose children attended private schools.[136] Unlike aid programs that the Court has upheld, the funds in *Nyquist* could be used only at private schools, rather than benefitting both public and private schools.[137] With respect to the tuition reimbursements, the Court concluded that regardless of the fact that the funds were given to parents and not directly to schools, the program was still unconstitutional because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[138] The Court ruled that the tax benefits were similarly unconstitutional, saying that "in practical terms," there was little difference between the tuition grant and the tax benefits.[139]

In *Zelman*, the Supreme Court clarified that "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion."[140] Accordingly, the Supreme Court has not expressly overruled *Nyquist*, but its ruling striking down the tuition reimbursement grants and tax credits may apply only in limited circumstances.[141] In particular, it may be open to debate whether an indirect aid program that was neutral toward religion on its face and supported both religious and secular *private* entities, but did not also aid *public* entities would raise Establishment Clause concerns.[142] A few judges after *Zelman* have concluded that indirect assistance programs are

[133] *Id.* at 843–44. The Court cautioned, however, that "if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 844. But the Court said the case before it did not present this circumstance, in part because "the student publication is not a religious institution . . . and it is not a religious organization." *Id.*

[134] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973). The Court held that a similar tuition reimbursement program violated the Establishment Clause in *Sloan v. Lemon*, concluding that *Nyquist* mandated this outcome. 413 U.S. 825, 830 (1973).

[135] *See supra* notes 99 to 101 and accompanying text.

[136] *Nyquist*, 413 U.S. at 762–67. The Court noted that "all or practically all" of the schools eligible for the direct grants were Catholic, but that religious schools from other denominations and secular private schools were eligible for aid under the other provisions. *Id.* at 768 & n.23.

[137] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 661 (2002); Mueller v. Allen, 463 U.S. 388, 398–99 (1983).

[138] *Nyquist*, 413 U.S. at 783. The Court's *Zelman* opinion could be read to suggest that the program in *Nyquist* was also motivated by an impermissible purpose: "Although the program was enacted for ostensibly secular purposes, we found that its 'function' was '*unmistakably* to provide desired financial support for nonpublic, sectarian institutions.'" *Zelman*, 536 U.S. at 661 (quoting *Nyquist*, 413 U.S. at 783) (internal citations omitted). *See also, e.g.*, Mitchell v. Helms, 530 U.S. 793, 819 n.8 (2000) (plurality opinion) (stating that *Nyquist* "involved serious concerns about whether the payments were truly neutral").

[139] *Nyquist*, 413 U.S. at 790–91. The Court distinguished *Walz v. Tax Commission*, 397 U.S. 664, 666–67 (1970), discussed *infra* notes 153 to 155 and accompanying text, by noting, as one relevant factor, that the tax exemption in *Walz* "covered all property devoted to religious, educational, or charitable purposes," while the tax benefits in *Nyquist* "flow[ed] primarily to the parents of children attending sectarian, nonpublic schools." *Nyquist*, 413 U.S. at 794.

[140] *Zelman*, 536 U.S. at 662.

[141] *Cf., e.g.*, Religious Restrictions on Capital Financing for Historically Black Colleges and Universities, slip op. at 14 (Op. O.L.C. Aug. 15, 2019), https://www.justice.gov/olc/file/1200986/download (expressing "doubt about whether *Tilton* and *Nyquist* remained good law").

[142] *See, e.g.*, Green v. Garriot, 212 P.3d 96, 117 (Ariz. Ct. App. 2009) (Kessler, J., dissenting) ("[I]t is the lack of any tax benefit to parents sending their children to public schools which further distinguishes this case from *Zelman* and

invalid even if the program is facially neutral with respect to religion, if the program assists only private schools and primarily assists religious schools.[143] However, the Supreme Court's statement in *Zelman* suggests that a program assisting only private entities might nonetheless be constitutional so long as the program is otherwise neutral toward religion,[144] and some lower courts have upheld indirect aid programs that funnel funds to both secular and religious private organizations.[145] Further, in a more recent case primarily involving a Free Exercise challenge, the Supreme Court said that an Establishment Clause challenge to a state tax benefit program indirectly assisting only private schools would be "unavailing,"[146] further suggesting that *Nyquist* likely no longer provides support for a challenge based on the fact that a state program aids only private schools.

Entanglement

Apart from *Lemon*'s purpose and effect prongs, direct financial aid to religious entities may also be unconstitutional if it violates the excessive entanglement prong. In *Lemon* itself, the Supreme Court struck down two state programs that provided money to religious schools for teachers' salaries after concluding that the programs "foster[ed] an impermissible degree of entanglement."[147] The Court expressed particular concern about the fact that one of the programs provided money directly to schools, saying that historically, programs involving "a continuing cash subsidy . . . have almost always been accompanied by varying measures of [government] control and surveillance," creating an unconstitutional "intimate and continuing relationship between church and state."[148] With respect to both programs, the Court also expressed concern about the "divisive political potential" and the relatively unprecedented nature of the programs, stating that these factors might suggest a danger of even greater government regulation of religious schools in the future.[149] Generally, the Court has expressed concern about pervasive government monitoring of religious entities.[150]

The Supreme Court has also acknowledged that it is necessary for the state to monitor the use of public funds to ensure they are being used appropriately, and the Court has approved of some systems that do not require the government to "intrude unduly in the day-to-day operation" of religious entities.[151] The Court has suggested that the types of "administrative burdens" associated

makes it more comparable to *Nyquist*.").

[143] *See, e.g.*, Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1005 (9th Cir. 2009), *rev'd on other grounds sub nom.*, 563 U.S. 125 (2011); Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 620 (Mont. 2018) (Gustafson, J., concurring), *rev'd*, 140 S. Ct. 2246 (2020); *cf., e.g.*, Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 298 (6th Cir. 2009) (ruling that *Nyquist* did not require invalidation of a program in which "[o]nly 6% of the aid distributed by the city went to reimbursement grants for religious organizations").

[144] *Zelman*, 536 U.S. at 662.

[145] *See, e.g.*, Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880, 882–83 (7th Cir. 2003) (rejecting Establishment Clause challenge to program in which the state contracted with various halfway houses, including one religious organization, but the probationer or parolee chose which halfway house program to join).

[146] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020).

[147] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

[148] *Id.* at 621–22.

[149] *Id.* at 622–24.

[150] Agostini v. Felton, 521 U.S. 203, 234 (1997).

[151] Bowen v. Kendrick, 487 U.S. 589, 616 (1988). *See also* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 660 (1980) ("We agree with the District Court that '[t]he services for which the private schools would be reimbursed are discrete and clearly identifiable.' The reimbursement process, furthermore, is straightforward and susceptible to the routinization that characterizes most reimbursement schemes." (alteration in original) (quoting

with "generally applicable administrative and recordkeeping regulations" do not violate the Establishment Clause.[152] For example, in *Walz v. Tax Commission*, the Supreme Court concluded that New York could exempt churches from property taxes under a state provision that exempted property used "exclusively for religious, educational or charitable purposes."[153] The Court acknowledged that the exemption would create some degree of government entanglement with religion by giving churches "an indirect economic benefit," but stated that the exemption entailed less government involvement than either taxing the churches or giving them a direct money subsidy.[154] Ultimately, the Court ruled that the exemption created "only a minimal and remote involvement between church and state."[155]

Free Exercise Clause

General Background

The Free Exercise Clause of the First Amendment provides that the government "shall make no law . . . prohibiting the free exercise" of religion.[156] The Supreme Court has said that generally, the government may not "target[] religious beliefs as such"[157] or otherwise "base laws or regulations on hostility to a religion or religious viewpoint."[158] Further, if a law "infringe[s] upon or restrict[s] practices because of their religious motivation," it will be subject to strict scrutiny and "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[159] For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court held that a local ordinance prohibiting certain types of animal sacrifice violated the Free Exercise Clause because the purpose of the law was to suppress certain religious practices.[160] However, if the burden on free exercise is "merely the incidental effect of a generally applicable and otherwise valid provision," the Supreme Court has said that such a law will not violate the First Amendment.[161]

As discussed in more detail below, aid programs that expressly exempt religious entities are not facially neutral toward religion, and consequently, are susceptible to the charge that they unconstitutionally "single out the religious for disfavored treatment."[162] Even though a denial of a benefit is arguably less burdensome to religious exercise than, for example, completely prohibiting a religious activity, the Court has recognized that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First

Comm. for Pub. Educ. & Religious Liberty v. Levitt, 461 F. Supp. 1123, 1131 (S.D.N.Y. 1978))).

[152] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 394–95 (1990).

[153] Walz v. Tax Comm'n, 397 U.S. 664, 666–67 (1970).

[154] *Id.* at 674–75.

[155] *Id.* at 676 ("The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.").

[156] U.S. CONST. amend. I.

[157] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[158] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

[159] *Church of Lukumi Babalu Aye*, 508 U.S. at 533.

[160] *Id.* at 534.

[161] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

[162] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

Amendment."[163] But the Supreme Court has recognized that certain religious exclusions are permissible if they are justified by historically supported "antiestablishment" interests: constitutionally grounded concerns about not supporting religion.[164]

Religious Exclusions from Aid

There are three primary Supreme Court cases in which plaintiffs have challenged religion-based exclusions from generally available grant programs under the Free Exercise Clause[165]: *Locke v. Davey*, a 2004 case in which the Supreme Court upheld the exclusion;[166] and *Trinity Lutheran Church of Columbia, Inc. v. Comer*[167] in 2017 and *Espinoza v. Montana Department of Revenue*[168] in 2020, cases in which the Supreme Court held that the exclusions were unconstitutional.

First, in *Locke v. Davey*, the Court considered a Free Exercise challenge to a state scholarship program for postsecondary educational expenses.[169] While students could use the scholarship at religious schools, they could not use the scholarship to pursue a "degree in devotional theology."[170] This exclusion was based on a state constitutional provision that prohibited the state from appropriating public money for religious instruction.[171] A student who was denied the scholarship because he was seeking a "pastoral ministries" degree argued that the program was "presumptively unconstitutional because it [was] not facially neutral with respect to religion."[172]

The Supreme Court disagreed,[173] concluding that nothing "in the history or text" of the state constitution or "the operation of" the scholarship program "suggest[ed] animus toward religion."[174] As opposed to the evidence of discrimination against religion in *Church of Lukumi Babalu Aye*, the *Locke* Court viewed the program's "disfavor of religion (if it can be called that)" to be of a "far milder kind."[175] Among other factors, the Court noted that the program did not impose any sanctions on religious exercise and did not "require students to choose between their religious beliefs and receiving a government benefit."[176] To the contrary, the majority opinion

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[163] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988). *Cf., e.g.*, McDaniel v. Paty, 435 U.S. 618, 629 (1978) (holding that a state law prohibiting ministers and priests from participating in a state constitutional convention violated the Free Exercise Clause).

[164] *See* Locke v. Davey, 540 U.S. 712, 720–22 (2004); *cf., e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 837, 842 (1995) (considering but ultimately rejecting claim that Establishment Clause justified free speech violation by requiring the defendant school to prohibit religious uses of its facilities).

[165] *Cf., e.g.*, Sherbert v. Verner, 374 U.S. 398, 409 (1963) (ruling that disqualifying a Seventh-day Adventist from unemployment benefits because she would not work on Saturday unconstitutionally burdened the applicant's free exercise of religion).

[166] 540 U.S. at 724.

[167] 137 S. Ct. at 2024.

[168] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255 (2020).

[169] 540 U.S. at 715.

[170] *Id.* at 716–17.

[171] *See id.* at 715; WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . .").

[172] *Locke*, 540 U.S. at 717, 720.

[173] *Id.* at 720 ("We reject his claim of presumptive unconstitutionality . . . .").

[174] *Id.* at 724.

[175] *Id.* at 720.

[176] *Id.* at 720–21.

stated that the program went "a long way toward including religion in its benefits," given that students could use the scholarship at religious schools and for religious courses.[177]

The *Locke* Court stated that the devotional-theology exclusion was not *required* by the Establishment Clause.[178] The scholarship program was an indirect aid program: the state provided the funds to students, who could then choose how to use the funds.[179] Accordingly, it would not violate the Establishment Clause if the state did allow scholarship students to pursue devotional theology degrees.[180] But ultimately, in the Court's view, the state could permissibly *choose* not to fund religious training, "an essentially religious endeavor."[181] The state's decision to treat "religious education for the ministry" differently than "education for other callings" was "a product of" the state's historically grounded opposition to government establishment of religion, "not evidence of hostility toward religion."[182] Accordingly, the Court concluded that the "relatively minor burden" on scholarship students was acceptable in light of the state's "substantial" "interest in not funding the pursuit of devotional degrees."[183]

By contrast, in *Trinity Lutheran Church of Columbia v. Comer*, the Supreme Court held that a state grant program that excluded religious organizations from a general grant program violated the Free Exercise Clause.[184] The state program in *Trinity Lutheran* offered grants to nonprofit organizations for upgrading playground surfaces, but excluded organizations "owned or controlled by a . . . religious entity."[185] This policy was, like the *Locke* exclusion, based on a state constitutional provision prohibiting public funds from being used "directly or indirectly, in aid of any church, sect or denomination of religion."[186] Unlike the program in *Locke*, which "did not 'require students to choose between their religious beliefs and receiving a government benefit,'" the Supreme Court said that the playground grant program unconstitutionally put religious organizations "to the choice between being a church and receiving a government benefit."[187] According to the Court, the student in *Locke*, unlike the religious school applying for a playground grant, "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed to *do*—use the funds to prepare for the ministry."[188]

Consequently, because the program required an organization "to renounce its religious character in order to participate in an otherwise generally available public benefit program," the Supreme Court said that the state imposed "a penalty on the free exercise of religion that must be subjected

[177] *Id*. at 724–25.

[178] *Id*. at 719.

[179] *Id*.

[180] *Id*.

[181] *Id*. at 721.

[182] *Id*.; *see also id*. at 722–23 (discussing historical opposition to "using tax funds to support the ministry").

[183] *Id*. at 725.

[184] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

[185] *Id*. at 2017.

[186] *Id*. (quoting MO. CONST. art. I, § 7).

[187] *Id*. at 2024 (quoting *Locke*, 540 U.S. at 720–21).

[188] *Id*. at 2023. Concurring in the Court's judgment in *Trinity Lutheran*, Justice Gorsuch questioned the Court's apparent attempt to draw a distinction "between laws that discriminate on the basis of religious *status* and religious *use*." *Id*. at 2025 (Gorsuch, J., concurring). Among other objections, he noted that the First Amendment "guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Id*. at 2026. Justice Gorsuch also questioned "the stability of such a line," suggesting that it could be difficult to determine the distinction between religious status and religious activity. *Id*. at 2025.

to the 'most rigorous' scrutiny."[189] It could only be justified by "a state interest 'of the highest order.'"[190] In these circumstances, the Court held that the state's "policy preference for skating as far as possible from religious establishment concerns" did not "qualify as compelling."[191]

In a footnote that only three other Justices joined, Chief Justice Roberts, who wrote the majority opinion, described the decision as involving "express discrimination based on religious identity with respect to playground resurfacing"—raising the question of whether the opinion extended to "religious uses of funding or other forms of discrimination."[192] In the wake of *Trinity Lutheran,* legal commentators questioned whether Chief Justice Roberts's footnote limiting the decision to discrimination "with respect to playground resurfacing" was an attempt to suggest that the ruling applied only to programs with "no direct religious content" that provided only secular benefits.[193]

The Supreme Court, however, clarified *Trinity Lutheran*'s scope in *Espinoza v. Montana Department of Revenue*, holding that the nondiscrimination principle also applies to indirect aid programs that fund religious activities.[194] *Espinoza* involved a state program offering tax credits for donating to private organizations that granted scholarships to private schools, including religious schools.[195] The Montana Supreme Court had invalidated the tax credit program, holding that it violated a state constitutional provision known as the No-Aid Clause that prohibited the government from providing direct or indirect financial support to religious schools.[196] The state argued that *Trinity Lutheran* should not apply because the No-Aid Clause excluded religious schools based on how they would *use* the funds—for religious education.[197] The Supreme Court disagreed, pointing to the text of the No-Aid Clause, which singled out "sectarian" schools, and observing that the state supreme court had applied the clause "solely by reference to religious status."[198] Distinguishing *Locke*, the Court emphasized that Montana had not merely excluded any "particular 'essentially religious' course of instruction," but barred all aid to religious schools.[199] Further, unlike the "'historical and substantial' state interest in not funding the training of clergy" at issue in *Locke*, the Court stated that there was no similar historically grounded interest in wholly disqualifying religious schools from public aid.[200]

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[189] *Id*. at 2024 (majority opinion) (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993)).

[190] *Id*. (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[191] *Id*.

[192] *Id*. at 2024 n.3 (plurality opinion).

[193] Frank Ravitch, Trinity Lutheran *and* Zelman – *Saved By Footnote 3 or a Dream Come True for Voucher Advocates?*, SCOTUSBlog (June 26, 2017), https://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates.

[194] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020).

[195] *Id*. at 2251.

[196] *Id*. at 2253. The challengers described this provision as a "Blaine Amendment" and argued that the constitutional provision was motivated by anti-Catholic animus—an issue that the majority opinion did not address. *See id*. at 704–05 (Alito, J., concurring). *See also, e.g.*, Locke v. Davey, 540 U.S. 712, 723 n.7 (2004) (noting arguments that the state constitution "was born of religious bigotry" but stating that because the specific constitutional provision challenged in that case was *not* a Blaine Amendment, the Court would not consider this history of possible animus).

[197] *Espinoza*, 140 S. Ct. at 2255.

[198] *Id*. at 2255–56. The majority opinion in *Espinoza* acknowledged Justice Gorsuch's *Trinity Lutheran* dissent questioning "whether there is a meaningful distinction between discrimination based on use or conduct and that based on status." *Id*. at 2257. However, the Court concluded it did not need to examine this issue because the Montana program *did* discriminate based on religious status. *Id*.

[199] *Id*. at 2257.

[200] *Id*. at 2257–58.

Because the No-Aid Clause "discriminate[d] based on religious status,"[201] the Supreme Court applied strict scrutiny to analyze its application to religious schools and parents.[202] Following *Trinity Lutheran*, the Court said that the state's interest in separating church and state beyond what was required by the federal Establishment Clause was insufficiently compelling.[203] The Court also rejected Montana's arguments that the No-Aid Clause promoted religious freedom by protecting taxpayers' religious liberty and "keeping the government out of" the operations of religious organizations.[204] The Court did "not see how" denying religious organizations the option to participate in the government program promoted religious liberty.[205] And in response to Montana's claim that the No-Aid Clause advanced the state's interest in supporting public education, the Court ruled that the provision was "fatally underinclusive," as it excluded only religious private schools and still allowed public support to be diverted to nonreligious private schools.[206]

Implications for Congress

As discussed, the inclusion of religious organizations in federal aid programs can raise constitutional questions under both the Establishment and Free Exercise Clauses of the First Amendment. The Supreme Court's jurisprudence interpreting these two provisions limits both Congress's ability to include religious organizations in federal aid programs and to exclude them from such programs. While providing funds to religious organizations implicates the Establishment Clause,[207] the Court has upheld direct aid programs that prevent government funds from being used for religious indoctrination.[208] The Court has also upheld indirect aid programs that provide funds to third parties who may independently choose to direct that money to religious organizations.[209] By contrast, *excluding* religious organizations from otherwise generally available government benefits implicates the Free Exercise Clause, and categorical exclusions from direct or indirect aid programs based on religious status are likely unconstitutional.[210] More limited restrictions on religious uses of funding might not violate the Free Exercise Clause.[211]

There are a variety of federal statutes and regulations that govern the provision of funds to religious organizations that participate in specific federal programs. In addition to Supreme Court precedent interpreting the First Amendment, federal agencies and others subject to these federal laws will have to follow any applicable statutes or regulations governing the use of federal funds.

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[201] *Id.* at 2257.

[202] *Id.* at 2260. The Court did not hold that this state constitutional provision was facially unconstitutional, but concluded that the No-Aid Clause could not be applied in a way that excluded religious schools based solely on their religious status. *Id.* at 2256, 2260. However, some of the language in the opinion referred to the No-Aid Clause as a whole. *See, e.g.*, *id.* at 2257 ("Montana's no-aid provision discriminates based on religious status.").

[203] *Id.* at 2260.

[204] *Id.*

[205] *Id.* at 2261.

[206] *Id.*

[207] *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 613–14 (1971).

[208] Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in the judgment); *see also, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602 (1988).

[209] *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002).

[210] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

[211] *E.g.*, Locke v. Davey, 540 U.S. 712, 721 (2004).

Generally, federal laws such as the so-called "Charitable Choice"[212] statutes appear to track the constitutional principles outlined above, allowing religious organizations to receive federal funds on the same basis as non-religious organizations, but placing some limitations on the use of those funds to ensure they do not support certain religious activities.[213]

However, Congress may nonetheless review federal laws in light of Supreme Court precedent trending toward greater inclusion of religious organizations in public funding and requiring religious exclusions to be more narrowly tailored to historically justified interests around specific religious activities.[214] In particular, the Trump Administration has taken the position that some funding restrictions found in federal statutes and regulations are no longer constitutional in light of the Supreme Court's decision in *Trinity Lutheran*.[215] The Administration has changed some executive branch policies[216] and issued legal opinions expressing its views in favor of greater inclusion of religious organizations.[217]

For example, in January 2020, nine agencies proposed amendments to their regulations governing the provision of federal funds to religious organizations.[218] Among other changes, these agencies removed regulations requiring faith-based organizations to refer potential beneficiaries who

[212] *See, e.g.*, President George W. Bush, *Charitable Choice: The Facts*, THE WHITE HOUSE (last visited Sept. 9, 2020), https://georgewbush-whitehouse.archives.gov/government/fbci/guidance/charitable.html ("The Charitable Choice laws [enacted between 1996 and 2000] apply to four Federal programs: Temporary Assistance to Needy Families . . . and the Community Services Block Grant . . . programs . . . ; programs for substance abuse and mental health . . . ; and the Welfare-to-Work program . . . ."); *see also, e.g.*, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161 (1996) (codified at 42 U.S.C. § 604a).

[213] *Cf., e.g.*, Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799, 807–08 (2002) ("The charitable choice provision [42 U.S.C. § 604a] contains several requirements designed to ease First Amendment church-state separation concerns while simultaneously preserving the religious character of the grantees.").

[214] *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257–58 (2020).

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

[216] *See, e.g.*, News Release, *FEMA Expands Public Assistance Eligibility to Include Houses of Worship*, FEMA (Jan. 2, 2018), https://www.fema.gov/news-release/2018/01/02/fema-expands-public-assistance-eligibility-include-houses-worship (announcing policy change making "houses of worship" eligible for disaster assistance).

[217] *See, e.g.*, Religious Restrictions on Capital Financing for Historically Black Colleges and Universities, slip op. at 28 (Op. O.L.C. Aug. 15, 2019), https://www.justice.gov/olc/file/1200986/download (arguing that two statutes governing the provision of federal funds to historically black colleges and universities would be unconstitutional insofar as they could be read to exclude schools based on their religious character); Memorandum from Attorney General Sessions to All Executive Departments and Agencies, Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download (generally explaining views on constitutional issues).

[218] Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (to be codified at 2 C.F.R. pt. 3474 & 34 C.F.R. pts. 75–76, 106, 606–09); Equal Participation of Faith-Based Organizations in DHS's Programs and Activities, 85 Fed. Reg. 2889 (proposed Jan. 17, 2020) (to be codified at 6 C.F.R. pt. 19); Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs, 85 Fed. Reg. 2897 (proposed Jan. 17, 2020) (to be codified at 7 C.F.R. pt. 16); Equal Participation of Faith-Based Organizations in USAID's Programs and Activities, 85 Fed. Reg. 2916 (proposed Jan. 17, 2020) (to be codified at 22 C.F.R. pt. 205); Equal Participation of Faith-Based Organizations in HUD Programs and Activities, 85 Fed. Reg. 8215 (proposed Feb. 13, 2020) (to be codified at 24 C.F.R. pts. 5, 92, 578); Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities, 85 Fed. Reg. 2921 (proposed Jan. 17, 2020) (to be codified at 28 C.F.R. pt. 38); Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities, 85 Fed. Reg. 2929 (proposed Jan. 17, 2020) (to be codified at 29 C.F.R. pt. 2); Equal Participation of Faith-Based Organizations in Veterans Affairs Programs, 85 Fed. Reg. 2938 (proposed Jan. 17, 2020) (to be codified at 38 C.F.R. pts. 50, 61–62); Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974 (proposed Jan. 17, 2020) (to be codified at 45 C.F.R. pts. 87, 1050). These proposed amendments reflected principles set out in Executive Order No. 13,831, 83 Fed. Reg. 20,715 (May 3, 2018), which amended prior executive orders setting out the principles that should guide agencies providing federal funds to faith-based organizations.

objected to receiving religious services to alternative service providers.[219] The agencies argued that imposing additional referral burdens on faith-based service providers, but not secular providers, unconstitutionally discriminated against faith-based organizations.[220] In another example, the Small Business Administration (SBA) announced in April 2020 that faith-based organizations, including houses of worship, would be eligible to receive loans under the Coronavirus Aid, Relief, and Economic Security Act.[221] Although preexisting SBA regulations excluded certain religious entities from its loan programs, the SBA concluded that those regulations "impermissibly . . . . bar[red] the participation of a class of potential recipients based solely on their religious status," saying that the SBA would no longer enforce those regulations.[222]

While the executive branch's views on the First Amendment are not binding on Congress or the courts, congressional awareness of the Administration's positions aids understanding of how legislative schemes are being implemented and keeps Congress apprised of prevailing interpretations of the Free Exercise Clause. Congress also has an interest in ensuring that federal funds are not supporting religious activities in ways that would violate the Establishment Clause.[223]

Generally, as discussed in more detail above, financial aid programs in the form of tax exemptions and indirect grant programs are unlikely to violate the Establishment Clause unless the aid is preferentially given only to religious organizations or activities, or other evidence demonstrates an impermissible purpose to support religion.[224] Thus, for example, federal law creates a tax exemption for religious, charitable, educational, and other nonprofit organizations in 26 U.S.C. § 501(c)(3).[225] On its face, this exemption appears similar to the state tax exemption upheld by the Court in *Walz*[226]—although some plaintiffs have (unsuccessfully) attempted to argue that certain applications of this tax exemption violate the Establishment Clause by favoring

[219] *See, e.g.*, Uniform Administrative Requirements, Cost Principles, and Audit Requirements, 85 Fed. Reg. at 3193.

[220] *See, e.g.*, Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. at 2976.

[221] SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS REGARDING PARTICIPATION OF FAITH-BASED ORGANIZATIONS IN THE PAYCHECK PROTECTION PROGRAM (PPP) AND THE ECONOMIC INJURY DISASTER LOAN PROGRAM (EIDL) (2020), https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf.

[222] *Id.* at 1; *see also* CRS Legal Sidebar LSB10445, *Eligibility of Religious Organizations for the CARES Act's Paycheck Protection Program*, by Valerie C. Brannon.

[223] *See generally, e.g.*, CRS Report R45442, *Congress's Authority to Influence and Control Executive Branch Agencies*, by Todd Garvey and Daniel J. Sheffner.

[224] *Compare* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (rejecting Establishment Clause challenge to indirect aid program, noting that the program was open to religious and nonreligious schools, including public schools), *and* Walz v. Tax Comm'n, 397 U.S. 664, 672–73 (1970) (rejecting Establishment Clause challenge to state tax exemption for religious, educational and charitable organizations, noting that the exemption did "not single[] out one particular church or religious group or even churches as such"), *with* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (ruling state tax exemption for *only* religious periodicals unconstitutional), *and* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973) (ruling indirect assistance unconstitutional where the benefits "flow[ed] primarily to the parents of children attending sectarian, nonpublic schools").

[225] 26 U.S.C. § 501(c)(3).

[226] *Walz*, 397 U.S. at 672–73. *See also* Fields v. United States, No. 96-317, 1998 U.S. Dist. LEXIS 5558, at *5 (D.D.C. Mar. 25, 1998) (rejecting argument that determining the tax exempt status of religious organizations violates the Establishment Clause, noting that "courts have repeatedly sanctioned the use of § 501(c)(3)").

certain religious beliefs[227] or creating an excessive entanglement with religion.[228] The Internal Revenue Service (IRS) does treat houses of worship more favorably than other § 501(c)(3) organizations in at least one respect.[229] Nonprofit organizations generally must notify the IRS that they are applying for tax-exempt status.[230] Churches, however, are not subject to this notification requirement and are instead automatically considered tax exempt by the IRS.[231] Although some plaintiffs have attempted to challenge this seemingly preferential treatment as violating the Establishment Clause, courts have so far dismissed those claims on procedural grounds.[232]

Turning to indirect aid such as voucher programs, the Supreme Court has said that programs of "genuine and independent private choice" are "not readily subject to challenge under the Establishment Clause."[233] Consistent with this distinction, federal regulations governing the participation of religious organizations in federal programs treat direct and indirect aid programs differently.[234] For example, while regulations promulgated by the Department of Health and Human Services (HHS) provide that organizations receiving "direct financial assistance . . . may not support or engage in any explicitly religious activities . . . as part of the programs or services funded with direct financial assistance," this restriction does not apply to the "use of indirect Federal financial assistance."[235]

However, the Trump Administration nonetheless concluded that at least some of these indirect-aid provisions were insufficiently accommodating of religious organizations. For instance, in January 2020, HHS proposed to amend its regulatory definition of "indirect" assistance.[236] The regulation defined assistance as indirect only if, among other factors, "[t]he beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment."[237] HHS argued that this requirement for secular options was not required by *Zelman*, which in the view of the agency, "noted the availability of secular providers" in approving the challenged voucher program, but "specifically declined to make its definition of indirect aid hinge on the 'preponderance of religiously affiliated private' providers."[238] This

[227] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (rejecting argument that denying tax exemption to religious university that discriminated on the basis of race privileged religious beliefs allowing "racial intermixing" over the university's belief that such "intermixing is forbidden," ruling instead that the IRS nondiscrimination policy had a neutral, secular basis).

[228] *See, e.g.*, Church of Scientology v. Comm'r, 83 T.C. 381, 462 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

[229] *Cf.*, *e.g.*, Am. Atheists, Inc. v. Shulman, 21 F. Supp. 3d 856, 859–61 (E.D. Ky. 2014) (identifying a number of provisions in the federal tax code that allegedly discriminate in favor of churches).

[230] 26 U.S.C. § 508(a).

[231] 26 U.S.C. § 508(c)(1)(A); IRS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 2 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf. However, the governing statute contemplates that some nonreligious organizations may also be exempt from the notification requirement. 26 U.S.C. § 508(c)(1)(B), (2) (exempting certain small organizations and authorizing the Secretary to exempt other organizations).

[232] *See* Freedom from Religion Found. v. Koskinen, 72 F. Supp. 3d 963, 964 (W.D. Wis. 2014) (dismissing claim for lack of standing); *Am. Atheists, Inc*, 21 F. Supp. 3d at 872 (ruling that although plaintiffs sufficiently alleged an Establishment Clause challenge, they lacked standing).

[233] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

[234] *See, e.g.*, 45 C.F.R. § 87.3.

[235] *Id.* § 87.3(b). HHS has proposed to delete the language prohibiting organizations receiving direct assistance from "support[ing]" explicitly religious activities. Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974, 2985 (proposed Jan. 17, 2020) (to be codified at 45 C.F.R. § 87.3(b)).

[236] Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. at 2985 (to be codified at 45 C.F.R. § 87.1(c)).

[237] 45 C.F.R. § 87.1(c).

[238] Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. at 1977 (quoting *Zelman*, 536 U.S. at 656–

reading of *Zelman* seems to implicate the open question discussed above about the continuing validity of the *Nyquist* decision, which ruled an indirect aid program subsidizing only private schools—and primarily aiding religious schools—unconstitutional.[239] The *Zelman* Court distinguished *Nyquist* in part by noting that the program in *Nyquist* supported only private schools, suggesting that programs with an impermissible purpose or effect of supporting religious schools would remain unconstitutional.[240] Accordingly, a federal indirect assistance program that only allows beneficiaries to choose religious organizations might still be subject to an Establishment Clause challenge as an unconstitutional preference for religion.[241]

Federal programs that provide money *directly* to religious organizations may present more significant constitutional problems under the Establishment Clause.[242] With respect to direct aid programs, restrictions that prevent public funds from being used for religious activities may help ensure that the program satisfies Establishment Clause scrutiny.[243] A number of program-specific federal statutes state that federal funds may not be used for religious worship or instruction.[244] Somewhat similar to the state law at issue in *Locke v. Davey*,[245] a number of federal statutes seek to ensure that federal funds will not benefit schools of divinity at higher education institutions.[246] Other statutes prohibit the use of funds to construct or maintain buildings in which religious instruction or worship occurs.[247] These construction and maintenance prohibitions seem to echo Supreme Court decisions like *Hunt v. McNair* and others that rejected Establishment Clause challenges to government programs that contained similar restrictions prohibiting public funds from being used for religious facilities.[248]

More recent Supreme Court precedent suggests that such restrictions might be unnecessary even in direct aid programs,[249] at least so long as there is no specific evidence showing that funds will be used for religious activities and there is some mechanism for the government to ensure funds are not used to advance religion.[250] And as discussed, language in more recent cases could be read to suggest that if a program is open to both religious and nonreligious groups, it will be considered neutral and will not be considered to have an impermissible effect.[251] As with tax exemptions and indirect aid programs, however, preferential aid only provided for religious

57).

[239] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 798 (1973).

[240] *Zelman*, 536 U.S. at 661 ("*Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. . . . [T]he program flatly prohibited the participation of any public school, or parent of any public school enrollee.").

[241] *Cf. id.* at 662 (noting that the program challenged in *Zelman* allowed beneficiaries "to exercise genuine choice among options public and private, secular and religious").

[242] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 818–19 (2000) (plurality opinion); *id.* at 840 (O'Connor, J., concurring).

[243] Hunt v. McNair, 413 U.S. 734, 736 (1973).

[244] *See, e.g.*, 20 U.S.C. § 1011k(c); 34 U.S.C. § 12161(b)(B)(iv); 42 U.S.C. § 290kk-2; 42 U.S.C. § 9920(c).

[245] Locke v. Davey, 540 U.S. 712, 715 (2004).

[246] *See, e.g.*, 20 U.S.C. § 1062(c); *id.* § 1103e(1). *Cf., e.g.*, 25 U.S.C. § 278a ("Funds appropriated . . . to the Secretary of the Interior for the education of Indian children shall not be used for the education of such children in elementary and secondary education programs in sectarian schools.").

[247] *See, e.g.*, 20 U.S.C. § 1087-53(b)(1)(C); 20 U.S.C. § 10004(c)(3); 25 U.S.C. § 1813(e); 29 U.S.C. § 3248.

[248] Hunt v. McNair, 413 U.S. 734, 736 (1973); *see also supra* note 110.

[249] Bowen v. Kendrick, 487 U.S. 589, 614 (1988); Agostini v. Felton, 521 U.S. 203, 224 (1997).

[250] *Bowen*, 487 U.S. at 615.

[251] *See* Mitchell v. Helms, 530 U.S. 793, 810, 818 (2000) (plurality opinion).

organizations or activities would likely violate the purpose or effect prongs of *Lemon*.[252] Further, government monitoring of direct aid programs may violate *Lemon*'s entanglement prong if a program requires the government to become involved in a religious organization's "day-to-day operation[s]"[253] or inquire into the organization's religious doctrine.[254]

In summary, Congress may consider reviewing existing law to ensure that it is consistent with recent Supreme Court cases ruling that funding restrictions discriminating against religious entities may violate the Free Exercise Clause.[255] Further, while Congress cannot alter the scope of the Free Exercise Clause's protections for religious entities, it can grant additional *statutory* protections to religious entities, so long as those protections do not rise to the level of an unconstitutional establishment.[256] Similarly, on the opposite side, although Congress cannot amend the scope of the Establishment Clause's restrictions on public support for religious activities, it may create statutory restrictions on the religious use of funds, so long as those restrictions do not violate the Free Exercise Clause.

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[252] *E.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion); *id.* at 28 (Blackmun, J., concurring).

[253] *Bowen*, 487 U.S. at 616.

[254] *See* Hernandez v. Commissioner, 490 U.S. 680, 696–97 (1989).

[255] *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

[256] *See, e.g.*, 42 U.S.C. § 2000bb-1 (Religious Freedom Restoration Act).