First Amendment — Free Exercise Clause — Government Aid to Religious Schools — Espinoza v. Montana Department of Revenue

The Religion Clauses of the Constitution have proven difficult for the Supreme Court to untangle. Critics of the Court's fractured Religion Clauses jurisprudence have argued for decades that it is "shallow, inconsistent, and nonpersuasive"[1] — even that "the net contribution of the Court's precedents toward a cohesive body of law . . . has been zero."[2] But be it ever so slowly, the Court may be inching toward a more consistent approach. Last Term, in *Espinoza v. Montana Department of Revenue*,[3] the Supreme Court held that a provision of the Montana state constitution, as applied to exclude religiously affiliated schools from a state tax credit scholarship program, violated the Free Exercise Clause. In an area of the law saturated with vague standards, *Espinoza* offers a clear, workable rule for cases involving government benefits to religion and provides a model of clarity for future Religion Clauses cases.

To incentivize taxpayers to fund educational institutions, the Montana legislature enacted a Tax Credit Program in 2015.[4] Taxpayers who donated to a qualifying scholarship organization would receive a matching tax credit for up to $150,[5] and scholarships could be used by recipients at any private "qualifying education provider" in the state.[6] Most of the qualifying education providers were religiously affiliated.[7] A no-aid provision in the Montana Constitution, however, prohibits the legislature from making "any direct or indirect appropriation or payment . . . for any sectarian purpose or to aid any . . . institution[] controlled in whole or in part by any church, sect, or denomination."[8] The Montana Department of Revenue, believing that the Tax Credit Program violated this no-aid provision, administered the program by promulgating a new rule (Rule 1).[9] Rule 1 would exclude "sectarian institution[s]," as defined by the no-aid provision, from the definition of "qualified education provider"[10] and therefore (the Department hoped) harmonize the Tax Credit Program with the state constitution.

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1 William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 243 (1994); *see also id.* at 243 n.2 (listing several critics of Religion Clauses jurisprudence).

2 Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 BYU L. REV. 337, 338. "Indeed, some would say that it has been less than zero . . . ." *Id.*

3 140 S. Ct. 2246 (2020).

4 *See* Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 606 (Mont. 2018).

5 MONT. CODE ANN. § 15-30-3111(1) (2019). The program also granted a similar tax credit for donations made to public schools. *See id.* § 15-30-3110(1).

6 *Espinoza*, 435 P.3d at 605; *see also id.* at 606–07.

7 *Id.* at 607.

8 MONT. CONST. art. X, § 6.

9 *Espinoza*, 435 P.3d at 607; *see also* MONT. ADMIN. R. 42.4.802 (2020).

10 ADMIN. 42.4.802.

Three parents of students attending Stillwater Christian School, a religiously affiliated qualified education provider[11] excluded under Rule 1, brought suit in state court.[12] They argued that Rule 1 was not only unconstitutional under the federal and state Free Exercise Clauses, but also unnecessary because the Tax Credit Program had been constitutional to begin with.[13] The trial court agreed with the second of these arguments at summary judgment.[14] Because the Tax Credit Program "concern[ed] money that is not in the treasury and not subject to expenditure," the court reasoned, it was not an appropriation or payment for the purposes of the no-aid provision.[15] Enjoining Rule 1, the court reinstated religious private schools as potential scholarship recipients.[16]

The Montana Supreme Court reversed.[17] Writing for the majority, Justice McKinnon[18] explained that Montana's no-aid provision "broadly and strictly prohibit[ed] aid to sectarian schools"[19] and "fiercely protected" the separation of church and state.[20] The Tax Credit Program clearly fell within the provision's purview by "permit[ting] the Legislature to indirectly pay tuition at private, religiously-affiliated schools."[21] Rule 1 could not save the program because the Department of Revenue exceeded its rulemaking authority in attempting to rewrite the statutory definition of qualifying education providers.[22] The court acknowledged that Montana's no-aid provision might run afoul of the federal Free Exercise Clause in some cases, but — over two dissenting votes[23] —concluded that "this [wa]s not one of those cases."[24] Because the Tax Credit Program could "not, under *any* circumstance, be construed" as constitutional under the no-aid provision,[25] the court struck it down in its entirety.[26]

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[11] *See* MONT. CODE ANN. § 15-30-3102(7) (2019).

[12] *Espinoza*, 140 S. Ct. at 2252.

[13] *Espinoza*, 435 P.3d at 608.

[14] *See id.*

[15] *Id.* (alteration in original) (quoting Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152C, slip op. at 6 (Dist. Ct. Mont. May 23, 2017)).

[16] *Espinoza*, 140 S. Ct. at 2252.

[17] *Espinoza*, 435 P.3d at 615.

[18] Justice McKinnon was joined by Chief Justice McGrath and Justices Shea, Sandefur, and Gustafson.

[19] *Espinoza*, 435 P.3d at 611.

[20] *Id.* at 614.

[21] *Id.* at 612.

[22] *See id.* at 614.

[23] Justice Baker, joined by Justice Rice, argued that "[o]nly an analysis of both [the no-aid provision] and the Free Exercise Clause" could sustain the majority's conclusions. *Id.* at 630 (Baker, J., dissenting).

[24] *Id.* at 614 (majority opinion).

[25] *Id.* at 613.

[26] *See id.* at 615.

The U.S. Supreme Court reversed and remanded.[27] Writing for the majority, Chief Justice Roberts[28] held that the Montana Supreme Court's application of the state constitution's no-aid provision violated the federal Free Exercise Clause.[29] The majority viewed *Trinity Lutheran Church of Columbia, Inc. v. Comer*[30] as binding precedent because, like *Espinoza*, it "turn[ed] expressly on religious status and not religious use."[31] Building on its previous holding in *Trinity Lutheran* and rejecting the flexible balancing tests advocated by Justices Breyer and Sotomayor in dissent,[32] the Court announced a "straightforward rule" to govern its Free Exercise cases moving forward: "When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny."[33] Because the Montana Supreme Court had based its invalidation of the Tax Credit Program on state law that "expressly discriminate[d] on the basis of religious status" contrary to the First Amendment, that decision could not survive such scrutiny.[34]

Justice Thomas concurred, writing separately to address the Court's Establishment Clause jurisprudence — a "brooding omnipresence" over Free Exercise cases such as *Espinoza*.[35] Justice Thomas argued that the Court's Establishment Clause doctrine is "unmoored from the original meaning of the First Amendment."[36] In his view, the clause "does not prohibit States from favoring religion" and likely cannot be incorporated against them at all.[37] The Court's failure to recognize this had produced an "unfortunate tendency" to preference other constitutional rights above the right to free exercise of religion,[38] but a proper understanding of the Establishment Clause would encourage "robust and lively debate about the role of religion in government . . . at the state and local level"[39] and "allow[] free exercise of religion to flourish."[40]

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[27] *Espinoza*, 140 S. Ct. at 2263.

[28] Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.

[29] *See Espinoza*, 140 S. Ct. at 2262.

[30] 137 S. Ct. 2012 (2017).

[31] *Espinoza*, 140 S. Ct. at 2256.

[32] *See id.* at 2259–60.

[33] *Id.* at 2260 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

[34] *Id.* at 2262.

[35] *Id.* at 2263 (Thomas, J., concurring) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)). Justice Thomas was joined by Justice Gorsuch.

[36] *Id.*

[37] *Id.* at 2264.

[38] *Id.* at 2267.

[39] *Id.* at 2266.

[40] *Id.* at 2267.

Justice Alito concurred.[41] Pointing to the Court's recent decision in *Ramos v. Louisiana*,[42] he criticized the majority's failure to weigh the "original motivation" underlying Montana's no-aid provision in *Espinoza*.[43] No-aid provisions, often called "Blaine Amendments" after the congressman who inspired them, were originally enacted out of "virulent prejudice against immigrants, particularly Catholic immigrants."[44] While Montana had argued that its no-aid provision was "cleansed of its bigoted past because it was readopted for non-bigoted reasons" in a 1972 constitutional convention,[45] Justice Alito quoted *Ramos* in concluding that it remained "'[t]ethered' to its original 'bias'" because the state had not "'actually confront[ed]' the provision's 'tawdry past in reenacting it.'"[46]

Justice Gorsuch concurred, arguing that the Court's reliance on *Trinity Lutheran*'s status-use distinction was misguided.[47] Pointing to statements made by both parties, he noted that the Court faced a "record replete with discussion of activities, uses, and conduct" rather than simply religious status.[48] But ultimately, Justice Gorsuch explained, this did not matter. The First Amendment must protect both religious status *and* religious conduct, as the Court's previous decisions attest.[49] Only this interpretation truly guarantees the Constitution's rights to the people, for "[t]he right to *be* religious without the right to *do* religious things would hardly amount to a right at all."[50]

Justice Ginsburg dissented.[51] She rejected the Court's reliance on *Trinity Lutheran*, arguing that the crucial element of "differential treatment" was missing from the equation in *Espinoza*.[52] The state court's remedy had treated religious and nonreligious schools equally, removing any burden that might previously have hindered the petitioners' religious freedom.[53] The majority thus had erred in rejecting this remedy,

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41 *Id.* (Alito, J., concurring).

42 140 S. Ct. 1390 (2020).

43 *Espinoza*, 140 S. Ct. at 2268 (Alito, J., concurring).

44 *Id.* While the majority noted that such provisions were "born of bigotry" and shared a "shameful pedigree" of intolerance, it did not rely on that logic. *Id.* at 2259 (majority opinion) (quoting Mitchell v. Helms, 530 U.S. 793, 828–29 (2000)). For a discussion of the sordid history behind Blaine Amendments, see generally Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2003).

45 *Espinoza*, 140 S. Ct. at 2273 (Alito, J., concurring).

46 *Id.* at 2274 (alterations in original) (quoting *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring in part)).

47 *Id.* at 2275 (Gorsuch, J., concurring).

48 *Id.*

49 *See id.* at 2276.

50 *Id.* at 2277.

51 *Id.* at 2278 (Ginsburg, J., dissenting). Justice Ginsburg was joined by Justice Kagan.

52 *Id.* at 2279 (emphasis omitted).

53 *See id.*

which "maintained neutrality between sectarian and nonsectarian private schools" and "never made religious schools ineligible for an otherwise available benefit."[54] Because all private school parents were "in the same boat" once the Tax Credit Program had been struck down, the Montana Supreme Court had never violated the Free Exercise Clause.[55]

Justice Breyer dissented.[56] He faulted the majority for "barely acknowledg[ing]" the "'play in the joints[]' between 'what the Establishment Clause permits and the Free Exercise Clause compels.'"[57] Rather than applying *Trinity Lutheran*, he argued that *Locke v. Davey*[58] was the controlling precedent; *Locke* held that a state's decision to not fund "devotional degrees" was neither forbidden by the Establishment Clause nor required by the Free Exercise Clause.[59] Justice Breyer advocated for a "flexible, context-specific approach" over rigid application of strict scrutiny.[60] Because controversies surrounding religion are particularly difficult to unravel, he reasoned, courts should avoid the "entanglement" that inevitably results from rules-based jurisprudence and willingly engage in judicial balancing.[61] Consistent with his approach in past cases, Justice Breyer urged the Court to accept the reality that there is "no test-related substitute for the exercise of legal judgment."[62]

Justice Sotomayor dissented.[63] Because the Montana Supreme Court invalidated the Tax Credit Program on state law grounds, she explained, the Court should not have reached the merits at all.[64] "[O]nly by setting aside well-established judicial constraints" in violation of federalism and the separation of powers[65] could the Court "transform petitioners' as-applied challenge into a facial one" by improperly deciding a federal constitutional question.[66] The Court further erred by "reject[ing] the Religion Clauses' balanced values"[67] and "repris[ing its] error in *Trinity Lutheran*."[68] Justice Sotomayor urged the Court to grant the government "some room to recognize the unique status of religious entities and

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[54] *Id.* at 2280.

[55] *Id.* at 2281.

[56] *Id.* (Breyer, J., dissenting). Justice Breyer was joined in part by Justice Kagan.

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

[58] 540 U.S. 712 (2004).

[59] *Espinoza*, 140 S. Ct. at 2283 (Breyer, J., dissenting).

[60] *Id.* at 2288.

[61] *Id.* at 2290.

[62] *Id.* at 2291 (quoting Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment)).

[63] *Id.* at 2292 (Sotomayor, J., dissenting).

[64] *See id.*

[65] *Id.* at 2297; *see also id.* at 2294.

[66] *Id.* at 2294.

[67] *Id.* at 2297.

[68] *Id.* at 2296.

to single them out on that basis for exclusion from otherwise generally applicable laws," including benefits.[69]

The Court's ruling in *Espinoza* rejects the disjointed, aimless approach that has historically characterized Religion Clauses jurisprudence and instead offers a clear rule to be applied to future conflicts. The Court's Religion Clauses methodology has become remarkably convoluted over the years, and its byzantine analytical approach has yielded inconsistent, sometimes even contradictory, decisions. To clean up this mess, the Court could have abandoned the quest for a governing principle and decided that religion cases require judicial balancing. In *Espinoza*, however, it chose instead to solidify several past ambiguities into a simple, applicable rule: "When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny."[70] If followed consistently, this clarifying, rules-based approach to Religion Clauses jurisprudence may yield more principled and coherent decisions moving forward.

For decades, the Court's doctrinal approaches to Religion Clauses cases have grown apart — and grown more confusing. Consider its handling of the Establishment Clause. After *Everson v. Board of Education*[71] centered Establishment Clause doctrine around a metaphorical "wall between church and state,"[72] the Supreme Court began working tirelessly to strengthen that wall. But even as it did so — holding prayer in public schools,[73] criminalization of teaching evolution,[74] and state reimbursement of teachers in religious schools[75] to be unconstitutional — the Court realized that "[s]ome relationship between government and religious organizations is inevitable."[76] It therefore developed "a farrago of unstable rules, tests, standards, principles, and exceptions" to navigate this relationship.[77] The *Lemon v. Kurtzman*[78] test — requiring a government policy to have a "secular purpose," to

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[69] *Id.* (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 (2017) (Sotomayor, J., dissenting)); *see id.* at 2295–96.

[70] *Id.* at 2260 (majority opinion) (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

[71] 330 U.S. 1 (1947).

[72] *Id.* at 18; *see also* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 90 (2017) (noting that "many commentators view [*Everson*] as having initiated the modern era of Establishment Clause jurisprudence").

[73] *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).

[74] *See* Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

[75] *See* Lemon v. Kurtzman, 403 U.S. 602, 613–14 (1971).

[76] *Id.* at 614.

[77] PAUL HORWITZ, THE AGNOSTIC AGE 223 (2011) ("[T]here are no . . . debates about the shape of current Establishment Clause doctrine. In this area . . . everyone can clasp hands in a spirit of togetherness. Everyone agrees that it is awful."); *see also* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 725 (2006) ("[T]he nine Justices have articulated ten different Establishment Clause standards.").

[78] 403 U.S. 602.

neither advance nor inhibit religion, and to not "foster 'an excessive government entanglement with religion'" — is the best known of these rules.[79] Widely maligned, the *Lemon* test has proven "unworkable in practice" and has been rejected or ignored by every Justice on the current Court.[80]

The Free Exercise Clause has fared no better. The Court established early on that the clause has boundaries,[81] but it has since struggled to define them. By the mid-twentieth century, it softened its initial holding that while laws "cannot interfere with mere religious belief and opinions, they may with practices"[82] and instead began to apply strict scrutiny to decide Free Exercise cases.[83] In *Employment Division v. Smith*,[84] however, the Court pivoted again, holding that "neutral, generally applicable law[s]" are not subject to strict scrutiny[85] — an exception that "almost swallows the general rule."[86] The Court fiercely resisted an attempt to legislatively override *Smith* via the Religious Freedom Restoration Act of 1993,[87] holding that Congress does not have the "power to determine what constitutes a constitutional violation."[88] But as regards the Free Exercise Clause, the Court has bounced back and forth between exercising that power loosely and stringently, resulting in a narrow rule with a wide exception — "a free-exercise jurisprudence in tension with itself."[89]

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[79] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079 (2019) (quoting *Lemon*, 403 U.S. at 613); *see also* Gey, *supra* note 77, at 731.

[80] *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring) (quoting Cnty. of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)). The Court excoriated the *Lemon* test in *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067. *See id.* at 2080–85 (majority opinion); *The Supreme Court, 2018 Term — Leading Cases*, 133 HARV. L. REV. 242, 262 (2019) (pointing out that "all nine Justices . . . refused to apply the *Lemon* test" in *American Legion*).

[81] *See* Reynolds v. United States, 98 U.S. 145, 162–66 (1879). *Reynolds* also marked the judicial debut of the "wall of separation between church and State" that would cause similar confusion in Establishment Clause jurisprudence. *Id.* at 164.

[82] *Id.* at 166; *see also* Davis v. Beason, 133 U.S. 333, 342–43 (1890) ("However free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . . .").

[83] *See* Emp. Div. v. Smith, 494 U.S. 872, 894–95 (1990) (O'Connor, J., concurring) (collecting cases including, inter alia, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963)). Under strict scrutiny, the government must "justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.* at 894.

[84] 494 U.S. 872.

[85] *Id.* at 881; *see also id.* at 885.

[86] Russell W. Galloway, *The Free Exercise Clause After Smith II*, 31 SANTA CLARA L. REV. 597, 600 (1991).

[87] 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated as to state and local laws by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[88] *City of Boerne*, 521 U.S. at 519.

[89] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment).

The Court's current Religion Clauses jurisprudence is thus so fractured that many cases ultimately boil down to raw interest-balancing exercises. The free exercise analysis in *Locke v. Davey*, in which the majority, the dissent, and the lower court all focused on different elements of the inquiry, is an excellent example.[90] The complex nature of the tests involved made a wide variety of outcomes feasible; the element on which each judge chose to focus might well have determined the eventual ruling. Similar problems attend the Court's recent Establishment Clause cases, where the Justices have split not only on the importance of the *Lemon* test and its attendant prongs, but also on issues such as standing, tradition, and historical practice.[91]

Having "failed to produce either coherence or consensus in [its] First Amendment jurisprudence,"[92] the Court cannot "abdicate [the] responsibility to clean up [its] mess."[93] But how should it proceed? In his *Espinoza* dissent, Justice Breyer proposed one possible solution: the abandonment of structured doctrinal approaches altogether. Because "rigid, bright-line rules . . . too often work against the underlying purposes of the Religion Clauses" and "a test that fails to advance the Clauses' purposes is . . . far worse than no test at all," Justice Breyer suggested that the Court subject difficult religious cases to a contextual balancing test.[94] Abandoning the Court's half-formed doctrines in favor of a frank balancing test holds some intuitive appeal; an unwieldy doctrinal morass creates no problem if the Court simply renounces a consistent, rules-based approach. But Justice Breyer's approach would also increase the opacity of the Court's Religion Clauses jurisprudence, offering "not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives."[95] Even more so than the current slew of ill-defined tests, such a regime would render the Court "free to reach almost any result in almost any case."[96]

Perhaps aware of this danger, the *Espinoza* majority rejected the balancing-test approach in favor of a clear, consistent rule. The Court

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[90] *Compare* Locke v. Davey, 540 U.S. 712, 725 (2004), *with id.* at 726, 731 (Scalia, J., dissenting), *and id.* at 718 (majority opinion).

[91] *Cf., e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (comprising seven separate opinions); Town of Greece v. Galloway, 572 U.S. 565 (2014) (comprising five separate opinions); Van Orden v. Perry, 545 U.S. 677 (2005) (comprising seven separate opinions); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (comprising six separate opinions).

[92] *Espinoza*, 140 S. Ct. at 2290 (Breyer, J., dissenting).

[93] Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 1008 (2011) (Thomas, J., dissenting from denial of certiorari).

[94] *Espinoza*, 140 S. Ct. at 2291 (Breyer, J., dissenting). Justice Breyer has long advocated for such an approach. *See Am. Legion*, 139 S. Ct. at 2090–91 (Breyer, J., concurring); *Town of Greece*, 572 U.S. at 615 (Breyer, J., dissenting); *Van Orden*, 545 U.S. at 698, 700 (Breyer, J., concurring in the judgment).

[95] *Locke*, 540 U.S. at 728 (Scalia, J., dissenting).

[96] Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 (1992).

initially began this process in *Trinity Lutheran*, which presented a problem similar to *Espinoza*'s: a plaintiff "deemed categorically ineligible to receive a grant" only because the plaintiff was religiously affiliated.[97] Ruling in favor of the plaintiffs, the Court held that the Free Exercise Clause prohibited categorical denial of a public benefit based only on religious status,[98] but a plurality explicitly qualified this holding with a footnote stating that the decision "involve[d] express discrimination based on religious identity with respect to playground resurfacing" and "[did] not address religious uses of funding or other forms of discrimination."[99] The plurality footnote vitiated the majority's rule, adding another knot to the tangle of Religion Clauses jurisprudence. But *Espinoza* presented a second chance. This time the Court did not equivocate, holding that the exclusion of religious entities from public benefits "solely because of their religious character" always triggers strict scrutiny.[100]

Espinoza's clear interpretation of the Free Exercise Clause is a much-needed step toward a more principled, workable Religion Clauses jurisprudence. Much of the Court's First Amendment doctrine still involves sifting through standards and factors, any one of which could be dispositive. But in the context of government benefits openly denied to religious groups, "*Espinoza* is clear as a bell."[101] The Court adopted a rule with several advantages: it reasonably interprets the sweeping language of the Free Exercise Clause; gives fair notice to the government and future litigants; and contributes to internal consistency, complementing the Court's previous support of programs "entirely neutral with respect to religion"[102] by more clearly defining neutrality. The rule also holds the potential to provide guidance for the Court in future questions regarding constitutional scrutiny of government programs.[103] If the Court truly follows the *Espinoza* rule, its current mess of multilayered standards may give way to a more streamlined, intelligible approach.

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97 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2018 (2017).

98 *See id.* at 2024.

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

100 *Espinoza*, 140 S. Ct. at 2260 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

101 Mithun Mansinghani, *Symposium: Clarity in an Era of Confusion — The Supreme Court Will Not Tolerate Hostility to Religion*, SCOTUSBLOG (July 1, 2020, 10:38 AM), https://www.scotusblog.com/2020/07/symposium-clarity-in-an-era-of-confusion-the-supreme-court-will-not-tolerate-hostility-to-religion [https://perma.cc/8Y6W-CZTY].

102 Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

103 *Cf., e.g.*, Fulton v. City of Phila., 140 S. Ct. 1104 (2020) (mem.) (granting certiorari in a case involving religious exemptions in the adoption and foster care context). The *Espinoza* rule would suggest strict scrutiny where exemptions *are* granted, but not to religious groups. *Cf.* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 367 (3d Cir. 1999) ("We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.").

Critics worry that the *Espinoza* rule, while sharply defined, is incorrect. Some have cautioned that the rule could create too much liability for state governments,[104] and Justice Gorsuch wondered if the rule's reliance on the status-use distinction is "destined to yield more questions than answers."[105] But these critiques only highlight the wisdom of adopting clear rules in the realm of the Religion Clauses. If it proves misguided, the *Espinoza* rule can be challenged and refined in a future case — by removing the status-use distinction criticized by Justice Gorsuch, for instance, or by replacing the rule altogether. But confronting such problems head-on is impossible so long as the Court is balancing atop a lurching pile of context-heavy precedents. Rules like *Espinoza*'s create a coherent constitutional jurisprudence on which to build, even when that jurisprudence is imperfect.

The Religion Clauses require the government to walk a tightrope. On one hand is the Establishment Clause's commitment to keeping the government neutral in religious matters, ensuring that each citizen is protected from state favoritism in matters of conscience; on the other is the Free Exercise Clause's commitment to preserving individual religious liberty, ensuring that each citizen is "protected in worshipping the Deity according to the dictates of his [or her] own conscience."[106] Many Americans fear that a government increasingly hostile to religion will marginalize the faithful,[107] while others believe secular interests are at risk.[108] The Supreme Court is the final arbiter of cases alleging an unconstitutional exercise of "the power of subverting the rights of conscience in matters of religion."[109] And a clearly articulated approach to First Amendment interpretation, such as that offered in *Espinoza*, can steady the Court's course moving forward and provide vital clarity in a time of intensifying clashes over the importance of religious freedom.

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[104] *See, e.g.*, Grant Sullivan, *Symposium: What "Play in the Joints" Remains After* Espinoza*?*, SCOTUSBLOG (July 1, 2020, 12:49 PM), https://www.scotusblog.com/2020/07/symposium-what-play-in-the-joints-remains-after-espinoza [https://perma.cc/6QY4-S8AR].

[105] *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring).

[106] Letter from George Washington to the United Baptist Churches of Virginia (May 1789), *in* 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 423, 424 (Dorothy Twohig ed., 1987).

[107] *See, e.g.*, David French, *Yes, American Religious Liberty Is in Peril*, WALL ST. J. (July 26, 2019, 10:54 AM), https://www.wsj.com/articles/yes-american-religious-liberty-is-in-peril-11564152873 [https://perma.cc/X27D-4S46].

[108] *See, e.g.*, Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, THE ATLANTIC (June 29, 2020), https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498 [https://perma.cc/T75X-BSMZ].

[109] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 991, at 701 (Boston, Hilliard, Gray & Co. 1833).