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There's more to educational freedom than the *Espinoza* ruling

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School choice advocates are in pretty good moods right now. The Supreme Court ruled that if a state has a school choice program, it cannot exclude options simply because they are religious. It is a major win, but at least two more big legal steps must be taken to achieve full equality under the law.

The first step is ending the false distinction, which loomed over the *Espinoza* decision, between religious “status” and religious “use.” Basically, government cannot keep otherwise available aid from someone because they *are* religious but can do so if they intend to *use* the aid to advance religion.

Supreme Court precedent here is tricky in large part because of *Locke v. Davey*, a 2004 decision that determined Washington state could withhold college scholarship funding from someone who would use it for training to become a minister. The court found that withholding the money was constitutional because of how it would be *used*: to train someone to promote religion.

At this point, *Locke* is clearly inconsistent with the core rationale that the Supreme Court has otherwise been following when it comes to state aid programs and religion: Government must be neutral, neither favoring nor disfavoring religion.

In *Zelman v. Simmons-Harris* (2002), the Supreme Court ruled that a state-funded voucher program through which families could choose schools, including religious ones, did not violate the U.S. Constitution because the choice was freely made by parents, not the state. In *Trinity Lutheran v. Comer* (2017), the Supreme Court ruled that religious entities could not be excluded from a state playground-improvement program only because they are religious. And now, the Supreme Court has said choice programs cannot be struck down because some people may freely choose religious schools.

Locke does not fit the basic and just neutrality rationale. It is not neutral to allow aid to go to people if they choose any profession *but* one that advances religion. Neutrality is allowing aid to go to people for whatever education they choose, *including* those that advance religion.

Justice Neil Gorsuch attacked the dangerous distinction between “status” and “use” in his concurrence. Quite simply, he argued, there cannot be a constitutional distinction:

"The First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to be Muslim but he may be subject to discrimination for doing what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching

of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar?"

To fix this, the Supreme Court needs to rule in a future case that government can draw no line between religious "status" and "use." Religious "status" without "use" is dead, and discrimination is discrimination.

The second step the court needs to take to achieve true religious equality in education is to acknowledge what Justice Stephen Breyer, in his dissent, recognized, though he sees it as a bad thing: "If making scholarships available to only secular nonpublic schools exerts 'coercive' pressure on parents whose faith impels them to enroll their children in religious schools, then how is a State's decision to fund only secular public schools any less coercive?"

Breyer's logic is sound. As Corey DeAngelis and I wrote in 2018, it is indeed discriminatory to force religious people to fund secular public schools. Of course, we need public schools to be secular — government must not choose what religious beliefs are "right" or "true" — but that means public schooling must inherently treat religious people unequally to nonreligious.

How do we solve this conundrum? Simple: Enable religious families to take public education funding for their children to religious schools of their choosing.

Of course, choice should not just be available to religious families. There are myriad reasons people might want something other than their assigned public school — pursuit of higher test scores, arts-based education, escaping bullying, etc. But only devotional religious instruction is outright prohibited, constitutionally, in government schools.

Espinoza is an important step toward full educational freedom and equality under the law. But we are still not where we need to be.

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