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7-1-2020

### July 1, 2020: Originalism Is Dead

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Title: Originalism Is Dead

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7/1/2020--I write this as the Adrian Van Kaam C.S.Sp. Endowed Chair in Scholarly Excellence. My 5-year appointment began today. My thanks to Dean Barton, President Gormley and Duquesne University, my home since 1980. *Espinoza v Montana Dept. of Revenue* (2020), decided yesterday, is just the latest indication that this Court is going to protect religious believers as its core commitment. That is what following the election returns means. The decision, effectively that the no-aid provision in the Montana State Constitution is unconstitutional, means that State aid must go on an equal basis to parents of students who would use the money to attend religious schools. (the details in the case involve tax credits, but this is the new rule). This differs from *Zelman* in 2002 that held that school vouchers could be used for religious schools without violating the Establishment Clause. Now such programs must include religious schools. The decision is fine with me. But, as I have been saying since *Trinity Lutheran Church* in 2017, it means that originalism is dead. This is not what the free exercise clause meant when it was adopted. Want the law to adapt, great. Think the framers were overly concerned about religious separation, me too. Just don't call yourself an originalist.