Espinoza v. Montana Department of Revenue

591 U.S. ___, 140 S.Ct. 2246, 207 L.Ed.2d 679 (2020)

CHIEF JUSTICE **ROBERTS** delivered the opinion of the Court.

The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision. . . .

II

A

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have recognized a " 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." Trinity Lutheran Church of Columbia, Inc. v. Comer (2017) (quoting Locke v. Davey (2004)). Here, the parties do not dispute that the scholarship program is permissible under the Establishment Clause. Nor could they. We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs. Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools. The Montana Supreme Court, however, held as a matter of state law that even such indirect government support qualified as "aid" prohibited under the Montana Constitution.

The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana Constitution—and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution.

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status."

Most recently, *Trinity Lutheran* distilled these and other decisions to the same effect into the "unremarkable" conclusion that disqualifying otherwise eligible recipients from a public benefit

"solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." In *Trinity Lutheran*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization "owned or controlled by a church, sect, or other religious entity." *Id.* Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri's policy discriminated against the Church "simply because of what it is—a church," and so the policy was subject to the "strictest scrutiny," which it failed. *Id.* We acknowledged that the State had not "criminalized" the way in which the Church worshipped or "told the Church that it cannot subscribe to a certain view of the Gospel." *Id.* But the State's discriminatory policy was "odious to our Constitution all the same." *Id.*

Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. . . .

The Department counters that *Trinity Lutheran* does not govern here because the no-aid provision applies not because of the religious character of the recipients, but because of how the funds would be used—for "religious education." In *Trinity Lutheran*, a majority of the Court concluded that the Missouri policy violated the Free Exercise Clause because it discriminated on the basis of religious status. A plurality declined to address discrimination with respect to "religious uses of funding or other forms of discrimination." The plurality saw no need to consider such concerns because Missouri had expressly discriminated "based on religious identity," *ibid.*, which was enough to invalidate the state policy without addressing how government funds were used.

This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools." Applying this provision to the scholarship program, the Montana Supreme Court noted that most of the private schools that would benefit from the program were "religiously affiliated" and "controlled by churches," and the Court ultimately concluded that the scholarship program ran afoul of the Montana Constitution by aiding "schools controlled by churches." *Id*. The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations "owned or controlled by a church, sect, or other religious entity." . . .

B

Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke*. *Locke* also involved a scholarship program. The State of Washington provided scholarships paid out of the State's general fund to help students pursuing postsecondary education. The scholarships could be used at accredited religious and nonreligious schools alike, but Washington prohibited students from using the scholarships to pursue devotional theology degrees, which prepared students for a calling as clergy. This prohibition prevented Davey from using his scholarship to obtain a degree that would have enabled him to become a pastor. We held that Washington had not violated the Free Exercise Clause.

Locke differs from this case in two critical ways. First, *Locke* explained that Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." *Id.* Thus, Davey "was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes. By contrast, Montana's Constitution does not zero in on any particular "essentially religious" course of instruction at a religious school. Rather, as we have explained, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits.

Second, *Locke* invoked a "historic and substantial" state interest in not funding the training of clergy, explaining that "opposition to ... funding 'to support church leaders' lay at the historic core of the Religion Clauses," As evidence of that tradition, the Court in *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy.

But no comparable "historic and substantial" tradition supports Montana's decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones. "Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy." Local governments provided grants to private schools, including religious ones, for the education of the poor. M. McConnell, et al., Religion and the Constitution. Even States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools. Early federal aid (often land grants) went to religious schools. Congress provided support to denominational schools in the District of Columbia until 1848, *ibid.*, and Congress paid churches to run schools for American Indians through the end of the 19th century. After the Civil War, Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau. McConnell.

The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. Such a development, of course, cannot by itself establish an early American tradition. Justice Sotomayor questions our reliance on aid provided during the same era by the Freedmen's Bureau, but we see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one. In addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding "sectarian" schools. See Mitchell v. Helms (2000) (plurality opinion). "[I]t was an open secret that 'sectarian' was code for 'Catholic.' " *Ibid.* The Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly "shameful pedigree." *Mitchell*. The no-aid provisions of the 19th century hardly evince a tradition

that should inform our understanding of the Free Exercise Clause.

The Department argues that several States have rejected referendums to overturn or limit their no-aid provisions, and that Montana even re-adopted its own in the 1970s, for reasons unrelated to anti-Catholic bigotry. But, on the other side of the ledger, many States today—including those with no-aid provisions—provide support to religious schools through vouchers, scholarships, tax credits, and other measures. According to petitioners, 20 of 37 States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs.

All to say, we agree with the Department that the historical record is "complex." And it is true that governments over time have taken a variety of approaches to religious schools. But it is clear that there is no "historic and substantial" tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*. . . .

D

Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the "strictest scrutiny" is required. That "stringent standard," is not "watered down but really means what it says," Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993). To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Ibid.*

The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and State "more fiercely" than the Federal Constitution. But "that interest cannot qualify as compelling" in the face of the infringement of free exercise here. *Trinity Lutheran.* A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause." *Ibid*.

The Department, for its part, asserts that the no-aid provision actually *promotes* religious freedom. In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not "state experimentation in the suppression of free speech," and the same goes for the free exercise of religion. Boy Scouts of America v. Dale (2000).

Furthermore, we do not see how the no-aid provision promotes religious freedom. [T]his Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.

The Department's argument is especially unconvincing because the infringement of religious liberty here broadly affects both religious schools and adherents. Montana's no-aid provision imposes a categorical ban—"broadly and strictly" prohibiting "*any* type of aid" to religious schools. This prohibition is far more sweeping than the policy in *Trinity Lutheran*, which barred churches from one narrow program for playground resurfacing—causing "in all likelihood" only "a few extra scraped knees."

And the prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them. Drawing on "enduring American tradition," we have long recognized the rights of parents to direct "the religious upbringing" of their children. Wisconsin v. Yoder (1972). Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution. See Pierce v. Society of Sisters (1925). But the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason.

The Department also suggests that the no-aid provision advances Montana's interests in public education. According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools. But, under that framing, the no-aid provision is fatally underinclusive because its "proffered objectives are not pursued with respect to analogous nonreligious conduct." *Lukumi*. On the Department's view, an interest in public education is undermined by diverting government support to *any* private school, yet the no-aid provision bars aid only to *religious* ones. A law does not advance "an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (internal quotation marks and alterations omitted). Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to "bear [its] weight." *Ibid.*

A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious. . . .

* * *

The judgment of the Montana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

#JUSTICE **THOMAS**, with whom JUSTICE **GORSUCH** joins, concurring.

[I} write separately to explain how this Court's interpretation of the Establishment Clause continues to hamper free exercise rights. Until we correct course on that interpretation, individuals will continue to face needless obstacles in their attempts to vindicate their religious freedom.

I

This case involves the Free Exercise Clause, not the Establishment Clause. But as in all cases involving a state actor, the modern understanding of the Establishment Clause is a "brooding omnipresence," Southern Pacific Co. v. Jensen (1917) (Holmes, J., dissenting), ever ready to be used to justify the government's infringement on religious freedom. Under the modern, but

erroneous, view of the Establishment Clause, the government must treat all religions equally and treat religion equally to nonreligion. As this Court stated in its first case applying the Establishment Clause to the States, the government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Ed. of Ewing (1947). This "equality principle," the theory goes, prohibits the government from expressing any preference for religion—or even permitting any signs of religion in the governmental realm. Thus, when a plaintiff brings a free exercise claim, the government may defend its law, as Montana did here, on the ground that the law's restrictions are *required* to prevent it from "establishing" religion.

This understanding of the Establishment Clause is unmoored from the original meaning of the First Amendment. As I have explained in previous cases, at the founding, the Clause served only to "protec[t] States, and by extension their citizens, from the imposition of an established religion by the *Federal* Government." Under this view, the Clause resists incorporation against the States.

There is mixed historical evidence concerning whether the Establishment Clause was understood as an individual right at the time of the Fourteenth Amendment's ratification. Even assuming that the Clause creates a right and that such a right could be incorporated, however, it would only protect against an "establishment" of religion as understood at the founding, *i.e.*, " 'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.' " (quoting Lee v. Weisman (1992); see also McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion (2003); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933, 936–939 (1986).[1]

Thus, the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect. Properly understood, the Establishment Clause does not prohibit States from favoring religion. They can legislate as they wish, subject only to the limitations in the State and Federal Constitutions. See Muñoz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation (2006).

I have previously made these points in Establishment Clause cases to show that the Clause likely has no application to the States or, if it is capable of incorporation, that the Court employs a far broader test than the Clause's original meaning. But the Court's wayward approach to the Establishment Clause also impacts its free exercise jurisprudence. Specifically, its overly expansive understanding of the former Clause has led to a correspondingly cramped interpretation of the latter.

Under this Court's current approach, state and local governments may rely on the Establishment Clause to justify policies that others wish to challenge as violations of the Free Exercise Clause. Once the government demonstrates that its policy is *required* for compliance with the Constitution, any claim that the policy infringes on free exercise cannot survive. A few examples suffice to illustrate this practice.

Of most relevance to this case is *Locke*, which Montana principally relies on to justify its discriminatory law. In *Locke*, the Court held that prohibiting a student from using a generally available state scholarship to pursue a degree in devotional theology did not violate the student's

free exercise rights. This was so, the Court said, in part because it furthered the State's "antiestablishment interests" in avoiding the education of religious ministers. But no antiestablishment interests, properly understood, were at issue in *Locke*. The State neither coerced students to study devotional theology nor conscripted taxpayers into supporting any form of orthodoxy. Thus, . . . *Locke* incorrectly interpreted the Establishment Clause and should not impact free exercise challenges. Yet, as Montana's proffered justification for its law shows, governments continue to rely on *Locke*'s improper understanding of "antiestablishment interests" to defend against free exercise challenges. . . .

Finally, this Court's infamous test in Lemon v.Kurtzman (1971), has sometimes been understood to prohibit governmental practices that have the effect of endorsing religion. This, too, presupposes that the Establishment Clause prohibits the government from favoring religion or taking steps to promote it. The Establishment Clause does nothing of the sort. . . .

II

The Court's current understanding of the Establishment Clause actually thwarts, rather than promotes, equal treatment of religion. Under a proper understanding of the Establishment Clause, robust and lively debate about the role of religion in government is permitted, even encouraged, at the state and local level. The Court's distorted view of the Establishment Clause, however, removes the entire subject of religion from the realm of permissible governmental activity, instead mandating strict separation.

This interpretation of the Establishment Clause operates as a type of content-based restriction on the government. The Court has interpreted the Free Speech Clause to prohibit content-based restrictions because they "value some forms of speech over others," City of Ladue v. Gilleo (1994) (O'Connor, J., concurring), thus tending to "tilt public debate in a preferred direction," Sorrell v. IMS Health Inc. (2011). The content-based restriction imposed by this Court's Establishment Clause jurisprudence operates no differently. It communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion.

Historical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions. See P. Hamburger, Separation of Church and State 391–454 (2002). And this Court's adoption of a separationist interpretation has itself sometimes bordered on religious hostility. Justice Black, well known for his role in formulating the Court's modern Establishment Clause jurisprudence, once described Catholic petitioners as "powerful sectarian religious propagandists" "looking toward complete domination and supremacy" of their "preferences and prejudices." Board of Ed. of Central School Dist. No. 1 v. Allen (1968). Other Members of the Court have characterized religions as "divisive forces." Edwards v. Aguillard (1987). And the Court once described a statute permitting employees to request accommodations to avoid work on the Sabbath as "arm[ing]" religious employees with the "absolute and unqualified right" to pursue their religion "over all other ... interests." Estate of Thornton v. Caldor, Inc. (1985). . . . In the Court's view, "[t]he 'atmosphere' of a Catholic school ha[d] such power to influence the unsuspecting mind that it may move even public school ... specialists to 'conform'—though their only contact with the school is to walk down its halls." McConnell, Religious Freedom at a Crossroads (1992).

Although such hostility may not be overtly expressed by the Court any longer, manifestations of this "trendy disdain for deep religious conviction" assuredly live on. They are evident in the fact that, unlike other constitutional rights, the mere exposure to religion can render an " 'offended observer' " sufficiently injured to bring suit against the government, even if he has not been coerced in any way to participate in a religious practice, *Lee*; Engel v. Vitale (1962).[2] . . . And they persist in the repeated denigration of those who continue to adhere to traditional moral standards, as well as laws even remotely influenced by such standards, as outmoded at best and bigoted at worst. See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n (2018); Obergefell v. Hodges (2015). So long as this hostility remains, fostered by our distorted understanding of the Establishment Clause, free exercise rights will continue to suffer.

[T]his Court has an unfortunate tendency to prefer certain constitutional rights over others. The Free Exercise Clause, although enshrined explicitly in the Constitution, rests on the lowest rung of the Court's ladder of rights, and precariously so at that. Returning the Establishment Clause to its proper scope will not completely rectify the Court's disparate treatment of constitutional rights, but it will go a long way toward allowing free exercise of religion to flourish as the Framers intended. I look forward to the day when the Court takes up this task in earnest.

#JUSTICE **ALITO**, concurring.

I join the opinion of the Court in full. The basis of the decision below was a Montana constitutional provision that, according to the Montana Supreme Court, forbids parents from participating in a publicly funded scholarship program simply because they send their children to religious schools. Regardless of the motivation for this provision or its predecessor, its application here violates the Free Exercise Clause.

Nevertheless, the provision's origin is relevant under the decision we issued earlier this Term in Ramos v. Louisiana (2020). The question in *Ramos* was whether Louisiana and Oregon laws allowing non-unanimous jury verdicts in criminal trials violated the Sixth Amendment. The Court held that they did, emphasizing that the States originally adopted those laws for racially discriminatory reasons. The role of the Ku Klux Klan was highlighted.

I argued in dissent that this original motivation, though deplorable, had no bearing on the laws' constitutionality because such laws can be adopted for non-discriminatory reasons, and "both States readopted their rules under different circumstances in later years." But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.

The origin of Montana's "no-aid" provision is emphasized in petitioners' brief and in the briefs of numerous supporting *amici*. . . .These briefs, most of which were not filed by organizations affiliated with the Catholic Church, point out that Montana's provision was modeled on the failed Blaine Amendment to the Constitution of the United States. Named after House Speaker James Blaine, the Congressman who introduced it in 1875, the amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants. In effect, the amendment would have "bar[red] any aid" to Catholic and other "sectarian" schools. Mitchell v. Helms (2000). As noted in a publication from the United States Commission on Civil Rights, a prominent supporter

of this ban was the Ku Klux Klan.

The Blaine Amendment was narrowly defeated, passing in the House but falling just short of the two-thirds majority needed in the Senate to refer the amendment to the States. Afterwards, most States adopted provisions like Montana's to achieve the same objective at the state level, often as a condition of entering the Union. Thirty-eight States still have these "little Blaine Amendments" today. . . .

A wave of immigration in the mid-19th century, spurred in part by potato blights in Ireland and Germany, significantly increased this country's Catholic population.[1] Nativist fears increased with it. An entire political party, the Know Nothings, formed in the 1850s "to decrease the political influence of immigrants and Catholics," gaining hundreds of seats in Federal and State Government.[2]

Catholics were considered by such groups not as citizens of the United States, but as "soldiers of the Church of Rome,"[3] who "would attempt to subvert representative government."[4] Catholic education was a particular concern. As one series of newspaper articles argued, " 'Popery is the natural enemy of *general* education.... If it is establishing schools, it is to make them *prisons* of the youthful intellect of the country.' " C. Glenn, The Myth of the Common School 69 (1988) (Glenn) (quoting S. Morse, Foreign Conspiracy Against the Liberties of the United States (1835)). . . .

The feelings of the day are perhaps best encapsulated by this famous cartoon, published in Harper's Weekly in 1871, which depicts Catholic priests as crocodiles slithering hungrily toward American children as a public school crumbles in the background:

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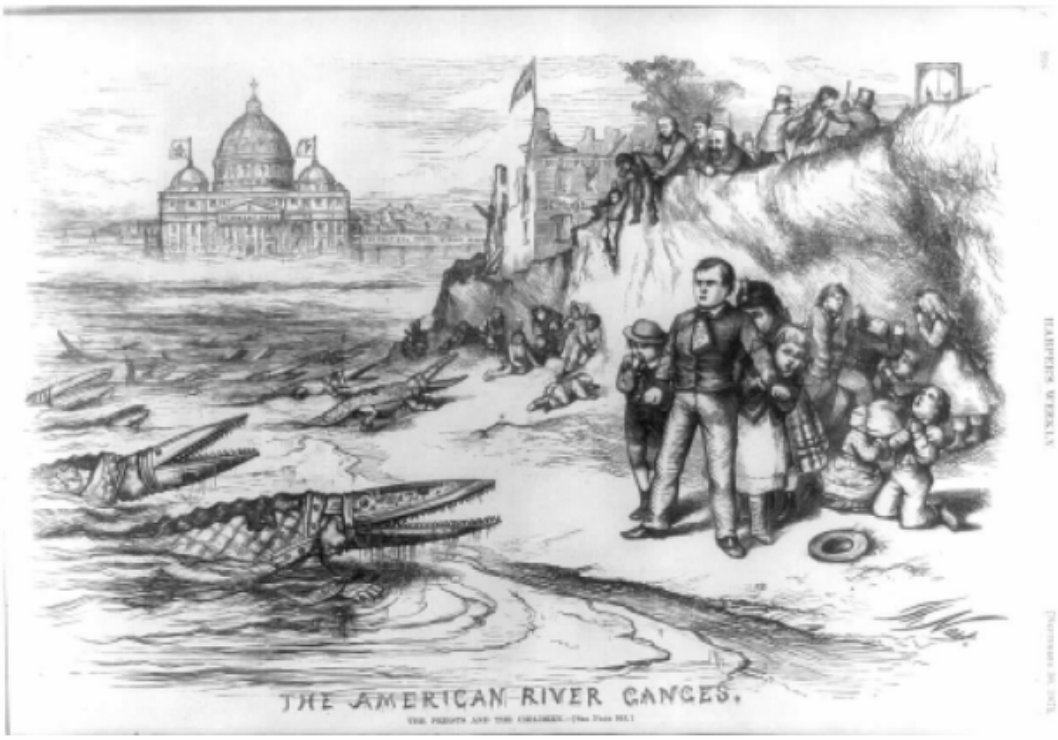
[1] See T. Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s, pp. 6–8 (1992).
[2] *Id.*, at 127–128, 135.
[3] *Id.*, at 110 (emphasis deleted).
[4] P. Hamburger, Separation of Church and State 206 (2002).



The resulting wave of state laws withholding public aid from "sectarian" schools cannot be understood outside this context. Indeed, there are stronger reasons for considering original motivations here than in *Ramos* because, unlike the neutral language of Louisiana's and Oregon's nonunanimity rules, Montana's no-aid provision retains the bigoted code language used throughout state Blaine Amendments.

The failed Blaine Amendment would have prohibited any public funds or lands devoted to schooling from "ever be[ing] under the control of any religious sect." (1875). As originally adopted, Montana's Constitution prohibited the state and local governments from "ever mak[ing,] directly or indirectly, any appropriation" for "any sectarian purpose" or "to aid in the support of any school ... controlled in whole or in part by any church, sect or denomination whatever." Mont. Const., Art. XI, § 8 (1889). At the time, "it was an open secret that 'sectarian' was code for 'Catholic.' " *Mitchell*. . . . The term was likewise used against Mormons and Jews.

Backers of the Blaine Amendment either held nativist views or capitalized on them. When Blaine introduced the amendment, The Nation reported that it was "a Constitutional amendment directed against the Catholics"—while surmising that Blaine, whose Presidential ambitions were known, sought "to use it in the campaign to catch anti-Catholic votes."[5] . . .

Montana's no-aid provision was the result of this same prejudice. When Congress allowed Montana into the Union in 1889, it still included prominent supporters of the failed Blaine Amendment. The Act enabling Montana to become a State required "[t]hat provision shall be made

[5] Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38, 54 (1992) (quoting article; internal quotation marks omitted).

for the establishment and maintenance of systems of public schools ... free from sectarian control." Act of Feb. 22, 1889. Montana thereafter adopted its constitutional rule against public funding for any school "controlled" by a "sect." (1889). There appears to have been no doubt which schools that meant. . . .

Respondents argue that Montana's no-aid provision merely reflects a state interest in "preserv[ing] funding for public schools," known as "common schools" during the Blaine era. Yet just as one cannot separate the Blaine Amendment from its context, "[o]ne cannot separate the founding of the American common school and the strong nativist movement."[6]

Spearheaded by Horace Mann, Secretary of the Massachusetts Board of Education from 1837 to 1848, the common-school movement did not aim to establish a system that was scrupulously neutral on matters of religion. Instead the aim was to establish a system that would inculcate a form of "least-common-denominator Protestantism."[7] . . . Yet it was an affront to many Christians and especially Catholics, not to mention non-Christians.[8]

Mann's goal was to "Americanize" the incoming Catholic immigrants. . . .

Catholic and Jewish schools sprang up because the common schools were not neutral on matters of religion. . . .

But schools require significant funding, and when religious organizations requested state assistance, Mann and others labeled them "sectarian"—that is, people who had separated from the prevailing orthodoxy. See, *e.g.*, Jeffries & Ryan 298, 301. The Blaine movement quickly followed.

In 1854, the Know Nothing party, in many ways a forerunner of the Ku Klux Klan,[9] took control of the legislature in Mann's State of Massachusetts and championed one of the first constitutional bans on aid to "sectarian" schools (along with attempting to limit the franchise to native-born people). See Viteritti, Blaine's Wake 669–670.

Respondents and one dissent argue that Montana's no-aid provision was cleansed of its bigoted past because it was readopted for non-bigoted reasons in Montana's 1972 constitutional convention. They emphasize that the convention included Catholics . . . . Under *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's "uncomfortable past" must still be "[e]xamined." And here, it is not so clear that the animus was scrubbed.

Delegates at Montana's constitutional convention in 1972 acknowledged that the no-aid provision

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[6] Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J. L. & Pub. Pol'y 657, 667 (1998) (Viteritti, Blaine's Wake).

[7] Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 298 (2001) (Jeffries & Ryan).

[8] See Glenn 166; Lain, God, Civic Virtue, and the American Way: Reconstructing *Engel*, 67 Stan. L. Rev. 479, 487–488 (2015).

[9] See generally Myers, Know Nothing and Ku Klux Klan, 219 North American Rev. 1 (Jan. 1924).

was "a badge of bigotry," with one Catholic delegate recalling "being let out of school in the fourth grade to erase three 'Ks' on the front doors of the Catholic church in Billings."[10] Nevertheless the convention proposed, and the State adopted, a provision with the *same* material language, prohibiting public aid "for any *sectarian* purpose or to aid any ... school ... controlled in whole or in part by any church, *sect*, or denomination." . . .

Thus, the no-aid provision's terms keep it "[t]ethered" to its original "bias," and it is not clear at all that the State "actually confront[ed]" the provision's "tawdry past in reenacting it." *Ramos*.

Today's public schools are quite different from those envisioned by Horace Mann, but many parents of many different faiths still believe that their local schools inculcate a worldview that is antithetical to what they teach at home. Many have turned to religious schools, at considerable expense, or have undertaken the burden of homeschooling. The tax-credit program adopted by the Montana Legislature but overturned by the Montana Supreme Court provided necessary aid for parents who pay taxes to support the public schools but who disagree with the teaching there. The program helped parents of modest means do what more affluent parents can do: send their children to a school of their choice. The argument that the decision below treats everyone the same is reminiscent of Anatole France's sardonic remark that " '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' " J. Cournos, A Modern Plutarch 35 (1928).

#JUSTICE **GORSUCH**, concurring. . . .

#JUSTICE **GINSBURG**, with whom JUSTICE **KAGAN** joins, dissenting. . . .

#JUSTICE **BREYER**, with whom JUSTICE **KAGAN** joins as to Part I, dissenting.

The First Amendment's Free Exercise Clause guarantees the right to practice one's religion. At the same time, its Establishment Clause forbids government support for religion. Taken together, the Religion Clauses have helped our Nation avoid religiously based discord while securing liberty for those of all faiths.

This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. See, *e.g.*, Walz v. Tax Comm'n of City of New York (1970). And this potential conflict is nowhere more apparent than in cases involving state aid that serves religious purposes or institutions. In such cases, the Court has said, there must be constitutional room, or " 'play in the joints,' " between "what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran* (quoting *Locke*). Whether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clauses' objectives.

The majority barely acknowledges the play-in-the-joints doctrine here. It holds that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of

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[10] 6 Montana Constitutional Convention 1971–1972, Proceedings and Transcript, p. 2012 (Mont. Legislature and Legislative Council) (Convention Tr.) (statement of Delegate Schiltz).

government aid to private schools that is not required by the Establishment Clause. The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent. I consequently dissent.

I . . .

A

We all recognize that the First Amendment prohibits discrimination against religion. At the same time, our history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself. See, *e.g.*, Committee for Public Ed. & Religious Liberty v. Nyquist (1973). The Court has consequently made it clear that the Constitution commits the government to a "position of neutrality" in respect to religion. School Dist. of Abington Township v. Schempp (1963). . . .

It may be that, under our precedents, the Establishment Clause does not *forbid* Montana to subsidize the education of petitioners' children. But, the question here is whether the Free Exercise Clause *requires* it to do so. The majority believes that the answer to that question is "yes." It writes that "once a State decides" to support nonpublic education, "it cannot disqualify some private schools solely because they are religious." I shall explain why I disagree. . . .

C

The majority finds that the school-playground case, *Trinity Lutheran*, and not the religious-studies case, *Locke*, controls here. I disagree. In my view, the program at issue here is strikingly similar to the program we upheld in *Locke* and importantly different from the program we found unconstitutional in *Trinity Lutheran*. Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) "an essentially religious endeavor"—an education designed to " 'induce religious faith.' " *Locke*. That kind of program simply cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground.

The Court in *Locke* recognized that the study of devotional theology can be "akin to a religious calling as well as an academic pursuit." *Id.* Indeed, "the shaping, through primary education, of the next generation's minds and spirits" may be as critical as training for the ministry, which itself, after all, is but one of the activities necessary to help assure a religion's survival. Zelman v. Simmons-Harris (2002) (Breyer, J., dissenting). That is why many faith leaders emphasize the central role of schools in their religious missions. It is why at least some teachers at religious schools see their work as a form of ministry. See, *e.g.*, *Hosanna-Tabor*. And petitioners have testified that it is a "major reason" why they chose religious schools for their children.

Nothing in the Constitution discourages this type of instruction. To the contrary, the Free Exercise Clause draws upon a history that places great value upon the freedom of parents to teach their children the tenets of their faith. Cf. *Wisconsin v. Yoder* (1972). The leading figures of America's Enlightenment followed in the footsteps of those who, after the English civil wars, came to believe "with a passionate conviction that they were entitled to worship God in their own way and to teach

their children and to form their characters in the way that seemed to them calculated to impress the stamp of the God-fearing man." C. Radcliffe, The Law & Its Compass 71 (1960). But the bitter lesson of religious conflict also inspired the Establishment Clause and the state-law bans on compelled support the Court cited in *Locke*. Cf., *e.g.*, J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in Everson v. Board of Ed. of Ewing (1947) (appendix to dissent of Rutledge, J.) (recalling the "[t]orrents of blood" shed in efforts to establish state religion).

What, then, is the difference between *Locke* and the present case? And what is it that leads the majority to conclude that funding the study of religion is more like paying to fix up a playground (*Trinity Lutheran*) than paying for a degree in theology (*Locke*)? The majority's principal argument appears to be that, as in *Trinity Lutheran*, Montana has excluded religious schools from its program "solely because of the religious character of the schools." The majority seeks to contrast this *status*-based discrimination with the program at issue in *Locke*, which it says denied scholarships to divinity students based on the religious *use* to which they put the funds—*i.e.*, training for the ministry, as opposed to secular professions.

It is true that Montana's no-aid provision broadly bars state aid to schools based on their religious affiliation. But this case does not involve a claim of status-based discrimination. The schools do not apply or compete for scholarships, they are not parties to this litigation, and no one here purports to represent their interests. We are instead faced with a suit by *parents* who assert that *their* free exercise rights are violated by the application of the no-aid provision to prevent them from *using* taxpayer-supported scholarships to attend the schools of their choosing. In other words, the problem, as in *Locke*, is what petitioners " 'propos[e] *to do*—use the funds to' " obtain a religious education.

Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here. There is no dispute that religious schools seek generally to inspire religious faith and values in their students. How else could petitioners claim that barring them from using state aid to attend these schools violates their free exercise rights? Thus, the question in this case—unlike in *Trinity Lutheran*—boils down to what the schools would *do* with state support. And the upshot is that here, as in *Locke*, we confront a State's decision not to fund the inculcation of religious truths.

The majority next contends that there is no " 'historic and substantial' tradition against aiding" religious schools "comparable to the tradition against state-supported clergy invoked by *Locke*." But the majority ignores the reasons for the founding era bans that we relied upon in *Locke*.

"Perhaps the most famous example," *Locke*, is the 1786 defeat of a Virginia bill (often called the Assessment Bill) that would have levied a tax in support of "learned teachers" of "the Christian Religion." A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson*, (supplemental appendix to dissent of Rutledge, J.). In his Memorial and Remonstrance against that proposal, James Madison argued that compelling state sponsorship of religion in this way was "a signal of persecution" that "degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the Legislative authority." *Id.* Even among those who might benefit from such a tax, Madison warned, the bill threatened to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced among

its several sects." *Id.*

The opposition galvanized by Madison's Remonstrance not only scuttled the Assessment Bill; it spurred Virginia's Assembly to enact a very different law, the Bill for Religious Liberty drafted by Thomas Jefferson. See Brant, Madison: On the Separation of Church and State, 8 Wm. & Mary Q. 3, 11 (1951); Drakeman, Religion and the Republic: James Madison and the First Amendment, 25 J. Church & St. 427, 436 (1983); *Everson.*

Like the Remonstrance, Jefferson's bill emphasized the risk to religious liberty that state-supported religious indoctrination threatened. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," the preamble declared, "is sinful and tyrannical." A Bill for Establishing Religious Freedom (1779), in 2 The Papers of Thomas Jefferson 545 (J. Boyd ed. 1950). The statute accordingly provided "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Id.*, at 546. Similar proscriptions were included in the early constitutions of many States. See *Locke* (collecting examples).

I see no meaningful difference between the concerns that Madison and Jefferson raised and the concerns inevitably raised by taxpayer support for scholarships to religious schools. In both instances state funds are sought for those who would "instruc[t] such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge" in the tenets of religious faith. A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson.* In both cases, that would compel taxpayers "to support the propagation of opinions" on matters of religion with which they may disagree, by teachers whom they have not chosen. A Bill for Establishing Religious Freedom, *supra*, at 545. And, in both cases, the allocation of state aid to such purposes threatens to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced among its several sects." Memorial and Remonstrance, reprinted in *Everson*.

The majority argues that at least some early American governments saw no contradiction between bans on compelled support for clergy and taxpayer support for religious schools or universities. That some States appear not to have read their prohibitions on compelled support to bar this kind of sponsorship, however, does not require us to blind ourselves to the obvious contradiction between the *reasons* for prohibiting compelled support and the effect of taxpayer funding for religious education. Madison and Jefferson saw it clearly. They opposed including theological professorships in their plans for the public University of Virginia and the Commonwealth hesitated even to grant charters to religiously affiliated schools. See Buckley, After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia (1995); Brant, *supra,* at 19–20.

As for the majority's examples, it suffices to say that the record is not so simple. In Georgia, the Governor advocated for school funding legislation in terms that mirrored the language of Virginia's Assessment Bill. See R. Gabel, Public Funds for Church and Private Schools 241–242 (1937). And the general levies the majority cites from Pennsylvania and New Jersey were not adopted until after the founding. See *id.,* at 215–216; see C. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780–1860, pp. 166–167 (1983).

That is not to deny that the history of state support for denominational schools is " 'complex.' "

But founding era attitudes toward compelled support of clergy were no less complex. Many prominent members of the founding generation, including George Washington, Patrick Henry, and John Marshall, supported Virginia's Assessment Bill. See Dreisbach, George Mason's Pursuit of Religious Liberty in Revolutionary Virginia, 108 Va. Mag. Hist. & Biography 5, 31 (2000). Some who supported this kind of government aid thought it posed no threat to freedom of conscience; others denied that provisions for aid to religion amounted to an "establishment" at all. See *id.,* at 34–35; D. Drakeman, Church, State, and Original Intent 224–225 (2010). Indeed, at least one historian has persuasively argued that it is next to impossible to attribute to the Founders any uniform understanding as to what constitutes, in the Constitution's phrase, "an Establishment of religion." *Id.*

This diversity of opinion made no difference in *Locke* and it makes no difference here. For our purposes it is enough to say that, among those who gave shape to the young Republic were people, including Madison and Jefferson, who perceived a grave threat to individual liberty and communal harmony in tax support for the teaching of religious truths. These "historic and substantial" concerns have consistently guided the Court's application of the Religion Clauses since. *Locke*; see, *e.g.*, *Nyquist*; *Walz*; *Schempp*. The Court's special attention to these views should come as no surprise, for the risks the Founders saw have only become more apparent over time. In the years since the Civil War, the number of religions practiced in our country has grown to scores. And that has made it more difficult to avoid suspicions of favoritism—or worse—when government becomes entangled with religion.

Nor can I see how it could make a difference that the Establishment Clause might *permit* the State to subsidize religious education through a program like Montana's. The tax benefit here inures to donors, who choose to support a particular scholarship organization. That organization, in turn, awards scholarships to students for the qualifying school of their choice. The majority points to cases in which we have upheld programs where, as here, state funds make their way to religious schools by means of private choices. As the Court acknowledged in *Trinity Lutheran*, however, that does not answer the question whether providing such aid is *required*.

Neither does it address related concerns that I have previously described. Private choice cannot help the taxpayer who does not want to finance the propagation of religious beliefs, whether his own or someone else's. It will not help religious minorities too few in number to support a school that teaches their beliefs. And it will not satisfy those whose religious beliefs preclude them from participating in a government-sponsored program. Some or many of the persons who fit these descriptions may well feel ignored—or worse—when public funds are channeled to religious schools. These feelings may, in turn, sow religiously inspired political conflict and division—a risk that is considerably greater where States are *required* to include religious schools in programs like the one before us here. And it is greater still where, as here, those programs benefit only a handful of a State's many religious denominations. See *ibid*.; Big Sky Scholarships, Schools (2019). . . .

II

In reaching its conclusion that the Free Exercise Clause requires Montana to allow petitioners to use taxpayer-supported scholarships to pay for their children's religious education, the majority

makes several doctrinal innovations that, in my view, are misguided and threaten adverse consequences.

Although the majority refers in passing to the "play in the joints" between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, its holding leaves that doctrine a shadow of its former self. See, *e.g.*, *Cutter*; *Walz*. Having concluded that there is no obstacle to subsidizing a religious education under our Establishment Clause precedents, the majority says little more about Montana's antiestablishment interests or the reasoning that underlies them. It does not engage with the State's concern that its funds not be used to support religious teaching. Instead, the Court holds that it need not consider how Montana's funds would be used because, in its view, all distinctions on the basis of religion—whether in respect to playground grants or devotional teaching—are similarly and presumptively unconstitutional.

Setting aside the problems with the majority's characterization of this case I think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of "strict" or "rigorous" scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue.

Experience has taught us that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Tilton v. Richardson* (1971) see also *Schempp*, (there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible"); *Walz* ("[R]igidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited"). If the Court has found it possible to walk what we have called the " 'tight rope' " between the two Religion Clauses, it is only by "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application" of those provisions. *Yoder*.

The Court proceeded in just this way in *Locke*. It considered the same precedents the majority today cites in support of its presumption of unconstitutionality. But it found that applying the presumption set forth in those cases to Washington's decision not to fund devotional degrees would "extend" them "well beyond not only their facts but their reasoning." In my view, that analysis applies equally to this case.

Montana's law does not punish religious exercise. Cf. *Locke* (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993)). It does not deny anyone, because of their faith, the right to participate in political affairs of the community. Cf. *Locke* (citing McDaniel v. Paty (1978)). And it does not require students to choose between their religious beliefs and receiving secular government aid such as unemployment benefits. Cf. *Locke* (citing *Sherbert v. Verner* (1963)); The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." Regan v. Taxation With Representation of Wash. (1983); see also Lyng v. Automobile Workers (1988).

I disagree, then, with what I see as the majority's doctrinal omission, its misplaced application of a legal presumption, and its suggestion that this presumption is appropriate in many, if not all,

cases involving government benefits. As I see the matter, our differences run deeper than a simple disagreement about the application of prior case law.

The Court's reliance in our prior cases on the notion of "play in the joints," our hesitation to apply presumptions of unconstitutionality, and our tendency to confine benefit-related holdings to the context in which they arose all reflect a recognition that great care is needed if we are to realize the Religion Clauses' basic purpose "to promote and assure the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Schempp*.

For one thing, government benefits come in many shapes and sizes. The appropriate way to approach a State's benefit-related decision may well vary depending upon the relation between the Religion Clauses and the specific benefit and restriction at issue. For another, disagreements that concern religion and its relation to a particular benefit may prove unusually difficult to resolve. They may involve small but important details of a particular benefit program. Does one detail affect one religion negatively and another positively? What about a religion that objects to the particular way in which the government seeks to enforce mandatory (say, qualification-related) provisions of a particular benefit program? Or the religious group that for religious reasons cannot accept government support? And what happens when qualification requirements mean that government money flows to one religion rather than another? Courts are ill equipped to deal with such conflicts. Yet, in a Nation with scores of different religions, many such disagreements are possible. And I have only scratched the surface.

The majority claims that giving weight to these considerations would be a departure from our precedent and give courts too much discretion to interpret the Religion Clauses. But we have long understood that the "application" of the First Amendment's mandate of neutrality "requires interpretation of a delicate sort." *Schempp*. "Each value judgment under the Religion Clauses," we have explained, must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*.

Nor does the majority's approach avoid judicial entanglement in difficult and sensitive questions. To the contrary, . . . it burdens courts with the still more complex task of untangling disputes between religious organizations and state governments, instead of giving deference to state legislators' choices to avoid such issues altogether. At the same time, it puts States in a legislative dilemma, caught between the demands of the Free Exercise and Establishment Clauses, without "breathing room" to help ameliorate the problem.

I agree with the majority that it is preferable in some areas of the law to develop generally applicable tests. The problem, as our precedents show, is that the interaction of the Establishment and Free Exercise Clauses makes it particularly difficult to design a test that vindicates the Clauses' competing interests in all—or even most—cases. That is why, far from embracing mechanical formulas, our precedents repeatedly and frankly acknowledge the need for precisely the kind of " 'judgment-by-judgment analysis' " the majority rejects. "The standards" of our prior decisions, we have said, "should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." *Tilton* accord, *Nyquist*.

The Court's occasional efforts to declare rules in spite of this experience have failed to produce either coherence or consensus in our First Amendment jurisprudence. See *Van Orden*. The persistence of such disagreements bears out what I have said—namely, that rigid, bright-line rules like the one the Court adopts today too often work against the underlying purposes of the Religion Clauses. And a test that fails to advance the Clauses' purposes is, in my view, far worse than no test at all. . . .

And what are the limits of the Court's holding? The majority asserts that States "need not subsidize private education." But it does not explain why that is so. 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? Under the majority's reasoning, the parents in both cases are put to a choice between their beliefs and a taxpayer-sponsored education.

Accepting the majority's distinction between public and nonpublic schools does little to address the uncertainty that its holding introduces. What about charter schools? States vary widely in how they permit charter schools to be structured, funded, and controlled. See Mead, Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction (2003). How would the majority's rule distinguish between those States in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools? The majority's rule provides no guidance, even as it sharply limits the ability of courts and legislatures to balance the potentially competing interests that underlie the Free Exercise and Antiestablishment Clauses.

* * *

It is not easy to discern "the boundaries of the neutral area between" the two Religion Clauses "within which the legislature may legitimately act." *Tilton*. And it is more difficult still in cases, such as this one, where the Constitution's policy in favor of free exercise, on one hand, and against state sponsorship, on the other, are in conflict. In such cases, I believe there is "no test-related substitute for the exercise of legal judgment." *Van Orden*. That judgment "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." *Ibid.* Here, those purposes, along with the examples set by our decisions in *Locke* and *Trinity Lutheran*, lead me to believe that Montana's differential treatment of religious schools is constitutional. "If any room exists between the two Religion Clauses, it must be here." *Locke*. For these reasons, I respectfully dissent. . . .

#JUSTICE **SOTOMAYOR**, dissenting. . . .

[I]n *Trinity Lutheran*, this Court held, "for the first time, that the Constitution requires the government to provide public funds directly to a church." *Id.* Here, the Court invokes that precedent to require a State to subsidize religious schools if it enacts an education tax credit. Because this decision further "slights both our precedents and our history" and "weakens this country's longstanding commitment to a separation of church and state beneficial to both," *id.*, I respectfully dissent. . . .

Until *Trinity Lutheran*, the right to exercise one's religion did not include a right to have the State pay for that religious practice. See School Dist. of Abington Township v. Schempp (1963). That is because a contrary rule risks reading the Establishment Clause out of the Constitution. Although the Establishment Clause "permit[s] some government funding of secular functions performed by sectarian organizations," the Court's decisions "provide[d] no precedent for the use of public funds to finance religious activities." Rosenberger v. Rector and Visitors of Univ. of Va. (1995) (O'Connor, J., concurring). After all, the government must avoid "an unlawful fostering of religion." *Cutter*. Thus, to determine the constitutionality of government action that draws lines based on religion, our precedents "carefully considered whether the interests embodied in the Religion Clauses justify that line." *Trinity Lutheran* (Sotomayor, J., dissenting). The relevant question had always been not whether a State singles out religious entities, but why it did so.

Here, a State may refuse to extend certain aid programs to religious entities when doing so avoids "historic and substantial" antiestablishment concerns. *Locke*. Properly understood, this case is no different from *Locke* because petitioners seek to procure what the plaintiffs in *Locke* could not: taxpayer funds to support religious schooling.[4] Indeed, one of the concurrences lauds petitioners' spiritual pursuit, acknowledging that they seek state funds for manifestly religious purposes like "teach[ing] religion" so that petitioners may "outwardly and publicly" live out their religious tenets. (opinion of Gorsuch, J.). But those deeply religious goals confirm why Montana may properly decline to subsidize religious education. Involvement in such spiritual matters implicates both the Establishment Clause, see *Cutter*, and the free exercise rights of taxpayers, "denying them the chance to decide for themselves whether and how to fund religion," *Trinity Lutheran* (Sotomayor, J., dissenting). Previously, this Court recognized that a "prophylactic rule against the use of public funds" for "religious activities" appropriately balanced the Religion Clauses' differing but equally weighty interests. *Ibid.*

The Court maintains that this case differs from *Locke* because no pertinent " 'historic and substantial' " tradition supports Montana's decision. But the Court's historical analysis is incomplete at best. For one thing, the Court discounts anything beyond the 1850s as failing to "establish an early American tradition," while itself relying on examples from around that time. For another, although the States may have had "rich diversity of experience" at the founding, "the story relevant here is one of consistency." *Trinity Lutheran*. The common thread was that "those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship." *Id.* And as the Court's recent precedent holds, at least some teachers in religiously affiliated schools are ministers who inculcate the faith. See *Hosanna-Tabor*.

The Court further suggests that by abstaining from funding religious activity, the State is " 'suppress[ing]' " and "penaliz[ing]" religious activity. But a State's decision not to fund religious activity does not "disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns." *Trinity Lutheran* (Sotomayor, J., dissenting). That is, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." Regan v. Taxation With Representation of Wash. (1983).

Finally, it is no answer to say that this case involves "discrimination." A "decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to

discrimination." *Trinity Lutheran* (Sotomayor, J., dissenting). So too here.

* * *

Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place. We once recognized that "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *Schempp*. Today's Court, by contrast, rejects the Religion Clauses' balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints.