Espinoza v. Montana Department of Revenue

140 S.Ct. 2246 (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.

I–A

In 2015, the Montana Legislature sought "to provide parental and student choice in education" by enacting a scholarship program for students attending private schools. The program grants a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization." The scholarship organizations then use the donations to award scholarships to children for tuition at a private school.[1]

. . . A family whose child is awarded a scholarship under the program may use it at any "qualified education provider"—that is, any private school that meets certain accreditation, testing, and safety requirements. Virtually every private school in Montana qualifies. Upon receiving a scholarship, the family designates its school of choice, and the scholarship organization sends the scholarship funds directly to the school. Neither the scholarship organization nor its donors can restrict awards to particular types of schools.

The Montana Legislature allotted $3 million annually to fund the tax credits, beginning in 2016. If the annual allotment is exhausted, it increases by 10% the following year. The program is slated to expire in 2023.

The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools. In full, that provision states:

> "**Aid prohibited to sectarian schools**. . .˜. The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary

[1] The Legislature provided the same tax credit to taxpayers who donate to public schools for the purpose of supporting innovative educational programs or curing technology deficiencies at such schools.

or scientific institution, controlled in whole or in part by any church, sect, or denomination."

Shortly after the scholarship program was created, the Montana Department of Revenue promulgated "Rule 1," over the objection of the Montana Attorney General. That administrative rule prohibited families from using scholarships at religious schools. It did so by changing the definition of "qualified education provider" to exclude any school "owned or controlled in whole or in part by any church, religious sect, or denomination." The Department explained that the Rule was needed to reconcile the scholarship program with the no-aid provision of the Montana Constitution.

The Montana Attorney General disagreed. In a letter to the Department, he advised that the Montana Constitution did not require excluding religious schools from the program, and if it did, it would "very likely" violate the United States Constitution by discriminating against the schools and their students. The Attorney General is not representing the Department in this case.

B

This suit was brought by three mothers whose children attend Stillwater Christian School in northwestern Montana. Stillwater is a private Christian school that meets the statutory criteria for "qualified education providers." It serves students in prekindergarten through 12th grade, and petitioners chose the school in large part because it "teaches the same Christian values that [they] teach at home." The child of one petitioner has already received scholarships from [a scholarship organization], and the other petitioners' children are eligible for scholarships and planned to apply. While in effect, however, Rule 1 blocked petitioners from using scholarship funds for tuition at Stillwater. To overcome that obstacle, petitioners sued the Department of Revenue in Montana state court. Petitioners claimed that Rule 1 conflicted with the statute that created the scholarship program and could not be justified on the ground that it was compelled by the Montana Constitution's no-aid provision. Petitioners further alleged that the Rule discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children.

[The trial court held that the educational tax-credit law was not an "appropriation" within the ambit of the state constitution's no-aid provision.—Editors].

In December 2018, the Montana Supreme Court reversed the trial court. The Court first addressed the scholarship program unmodified by Rule 1, holding that the program aided religious schools in violation of the no-aid provision of the Montana Constitution. In the Court's view, the no-aid provision "broadly and strictly prohibits aid to sectarian schools." The scholarship program provided such aid by using tax credits to "subsidize tuition payments" at private schools that are "religiously affiliated" or "controlled in whole or in part by churches." In that way, the scholarship program flouted the State Constitution's "guarantee to all Montanans that their government will not use state funds to aid religious schools."

The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program. The Court explained that the program provided "no mechanism" for preventing aid from flowing to religious schools, and therefore the scholarship program could not "under *any* circumstance" be construed as consistent with the no-aid provision. As a result, the tax credit is no longer available to support scholarships at either religious or secular private schools.

The Montana Supreme Court acknowledged that "an overly-broad" application of the no-aid provision "could implicate free exercise concerns" and that "there may be a case" where "prohibiting the aid would violate the Free Exercise Clause." But, the Court concluded, "this is not one of those cases." . . .

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*, 582 U.S. __, __ (2017) (quoting *Locke v. Davey*, 540 U.S. 712, 718 (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 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." *Trinity Lutheran*, at __. . . .

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." 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. 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." But the State's discriminatory policy was "odious to our Constitution all the same."

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. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. And the Montana Supreme Court explained that the provision forbids aid to any school that is "sectarian," "religiously affiliated," or "controlled in whole or in part by churches." The provision plainly excludes schools from government aid solely because of religious status.

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," 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." 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."

The Department points to some language in the decision below indicating that the no-aid provision has the goal or effect of ensuring that government aid does not end up being used for "sectarian education" or "religious education." The Department also contrasts what it characterizes as the "completely non-religious" benefit of playground resurfacing in *Trinity Lutheran* with the unrestricted tuition aid at issue here. General school aid, the Department stresses, could be used for religious ends by some recipients, particularly schools that believe faith should "*permeate*[ ]" everything they do.

Regardless, those considerations were not the Montana Supreme Court's basis for applying the no-aid provision to exclude religious schools; that hinged solely on religious status. Status-based discrimination remains status based

even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.

Undeterred by *Trinity Lutheran*, the Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "impose[s] special disabilities on the basis of religious status" and "condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status." *Trinity Lutheran*, at __. To be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Id.* at __. The Free Exercise Clause protects against even "indirect coercion," and a State "punishe[s] the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Trinity Lutheran*. Such status-based discrimination is subject to "the strictest scrutiny." *Id.* at __.

None of this is meant to suggest that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (. . . explaining that a law "target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases"). Some Members of the Court, moreover, have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. See *Trinity Lutheran*, at __ (GORSUCH, J., joined by THOMAS, J., concurring in part). We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

B

Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke v. Davey*, 540 U.S. 712 (2004). *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." Thus, Davey "was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Trinity Lutheran*, at __. 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. *Trinity Lutheran*, at __. 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." L. Jorgenson, The State and the Non-Public School, 1825–1925, p. 4 (1987). Local governments provided grants to private schools, including religious ones, for the education of the poor. M. McConnell, et al., Religion and the Constitution 318–319 (4th ed. 2016). Even States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provideeld 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, 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. *Id.* at 323.[3]

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

[3] JUSTICE BREYER sees "no meaningful difference" between concerns animating bans on support for clergy and bans on support for religious schools. But evidently early American governments did. JUSTICE BREYER contests particular examples but acknowledges that some bans on clergy support did not bar certain "sponsorship" of religious schools. And, central to the issue here, he certainly does not identify a consistent early tradition, of the sort invoked in *Locke*, *against* support for religious schools. Virginia's opposition to establishing university theology professorships and chartering theological seminaries do not fit the bill. JUSTICE BREYER also invokes Madison's objections to the Virginia Assessment Bill, but Madison objected in part because the Bill provided special support to certain churches and clergy, thereby "violat[ing] equality by subjecting some to peculiar burdens." It is far from clear that the same objections extend to programs that provide equal support to all private primary and secondary schools. If anything, excluding religious schools from such programs would appear to impose the "peculiar burdens" feared by Madison.

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. "[I]t was an open secret that 'sectarian' was code for 'Catholic.' " *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). 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." *Id.* at 828-829. 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," *Lukumi*, at 546. To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."

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*, at __. 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.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

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*, 530 U.S. 640, 660 (2000).

Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this 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 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*, at 546. 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.* Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to "bear [its] weight." *Id.*

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. . . .

■ JUSTICE ALITO, concurring.

[Citing Ramos v. Louisiana (2020), in which the Supreme Court found that non-unanimous jury provisions violated the Sixth Amendment due in part to the laws' racially discriminatory purposes, Justice Alito argued that the original motivations for Montana's no-aid provision should be an important factor in the Court's analysis. State constitutional no-aid provisions were inspired by House Speaker James Blaine's failed 1875 federal constitutional no-aid amendment, which was the product of ferocious anti-immigrant and anti-Catholic sentiment.—Editors]

. . . Schools were a flashpoint for nativist tension in the late nineteenth century. With an influx of new immigrants—most poor, and many Catholic—leading pedagogues like Horace Mann and his "Common school" movement aimed to promote a public-school system that "Americanized" new immigrants in a Protestant worldview. Massachusetts' public schools under Mann's leadership, for example, mandated daily readings from the King James Bible. Such curricula were anathema to many non-Protestants. Catholics and Jews began establishing their own schools to avoid the Protestant-dominated public school system. But these new private, religious schools became a key target for nativist fervor. The movement to ban state aid reached a fever pitch with Blaine's failed amendment and the state-level versions it inspired, efforts which found

key support in the Know Nothings, a political party considered a precursor to the Ku Klux Klan.

This original animus of the no-aid provisions was not cleansed, Justice Alito argues, when Montana drafted a new constitution in 1972. Convention delegates even then noted that it was a "badge of bigotry." So too does the term "sect" in the provision itself demonstrate the animus: "[a] leading definition of "sect" at the time, as during the Blaine era, was 'a dissenting religious body; *esp: one that is heretical in the eyes of other members within the same communion*.' Webster's Third New International Dictionary 2052 (1971) (emphasis added). . . .

■ JUSTICE GORSUCH, concurring.

[Justice Gorsuch argued that the Court's distinction between discrimination based on "religious status and not religious use" is problematic. The record in Espinoza is replete with issues of both status and conduct. Ms. Espinoza desired to send her children to a Christian school based on what the school teaches, and Montana sought to proscribe aid to religious schools to not subsidize religious activity. But the distinction ultimately does not matter. The First Amendment "protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly."

Such protection makes sense, Justice Gorsuch argued, because the right to be religious is no right at all if the State can limit action inspired by that belief. "Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to bear enormous power over what people say and do. The right to be religious without the right to do religious things would hardly amount to a right at all."—Editors]

■ JUSTICE GINSBURG, with whom JUSTICE KAGAN joins, dissenting.

. . . Petitioners argue that the Montana Supreme Court's decision fails when measured against *Trinity Lutheran*. I do not see how. Past decisions in this area have entailed *differential treatment* occasioning a burden on a plaintiff 's religious exercise. *Lyng v. Northwest Indian Cemetery Protective Assn*, 485 U.S. 439, 450-451 (1988); *Trinity Lutheran*, at __. This case is missing that essential component. Recall that the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion. Put somewhat differently, petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision.

Accordingly, the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Petitioners may still send their children to a religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise. Unlike the law in *Trinity Lutheran*, the decision below puts petitioners to no "choice": Neither giving up their faith, nor declining to send their children to sectarian schools, would affect their entitlement to scholarship funding. There simply are no scholarship funds to be had.

True, petitioners expected to be eligible for scholarships under the legislature's program, and to use those scholarships at a religious school. And true, the Montana court's decision disappointed those expectations along with those of parents who send their children to secular private schools. But, as JUSTICE SOTOMAYOR observes, this Court has consistently refused to treat neutral government action as unconstitutional solely because it fails to benefit religious exercise. See *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

These considerations should be fatal to petitioners' free exercise claim, yet the Court does not confront them. Instead, the Court decides a question that, in my view, this case does not present: "[W]hether excluding religious schools and affected families from [the scholarship] program was consistent with the Federal Constitution." The Court goes on to hold that the Montana Supreme Court's application of the no-aid provision violates the Free Exercise Clause because it " 'condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status.' " As I see it, the decision below—which maintained neutrality between sectarian and nonsectarian private schools—did no such thing. . . .

Nearing the end of its opinion, the Court writes: "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." Because Montana's Supreme Court did not make such a decision—its judgment put all private school parents in the same boat—this Court had no occasion to address the matter. On that sole ground, and reaching no other issue, I dissent from the Court's judgment.

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

. . .

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. 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*, 403 U.S. 672, 678 (1971) (plurality opinion). 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. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

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. It does not deny anyone, because of their faith, the right to participate in political affairs of the community. And it does not require students to choose between their religious beliefs and receiving secular government aid such as unemployment benefits. 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.*, 461 U.S. 540, 549 (1983).

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. . . .

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*, at 678 (plurality opinion).

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. 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.

Consider some of the practical problems that may arise from the Court's holding. The States have taken advantage of the "play in the joints" between the Religion Clauses to craft programs of public aid to education that address their local needs. Many provide assistance to families with students in nonpublic schools, ranging from scholarships to tax credits and deductions that reimburse tuition expenses. Although most state constitutions today have no-aid provisions like Montana's, those provisions are only one part of a broader system of local regulation. Some States have concluded that their no-aid provisions do not bar scholarships to students at religious schools, while others without such clauses have nevertheless chosen not to fund religious education. Today's decision upends those arrangements without stopping to ask whether they might actually further the objectives of the Religion Clauses in some or even many cases.

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. 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 v. Perry*, 545 U.S. 677, 700 (2005) (opinion of BREYER, J.). 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." 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*, at 725. For these reasons, I respectfully dissent from the Court's contrary conclusion.

■ JUSTICE SOTOMAYOR, dissenting.

[Justice Sotomayor, like Justice Ginsburg, first argues that because the state court struck down the entirety of the tax credit program, for both religious and secular private schools, the plaintiffs did not face discrimination on the basis of the religious status of the schools they chose.—Editors]

II

. . . Until *Trinity Lutheran*, the right to exercise one's religion did not include a right to have the State pay for that religious practice. 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 v. Wilkinson*, 544 U.S. 709, 719 (2005). 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*, at 725. 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.

Indeed, [JUSTICE GORSUCH's concurrence] 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. 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 and the free exercise rights of taxpayers, "denying them the chance to decide for themselves whether and how to fund religion," *Trinity Lutheran*, at __ (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*, (SOTOMAYOR, J., dissenting). 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.* at __. And as the Court's recent precedent holds, at least some teachers in religiously affiliated schools are ministers who inculcate the faith.

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*, at __ (SOTOMAYOR, J., dissenting). That is, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan*, at 549. . . .

* * *

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." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963). 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. I respectfully dissent.

■ [The concurring opinion of JUSTICE THOMAS, joined by JUSTICE GORSUCH, is omitted.]

NOTES

1. Three of the dissenting justices argued that the case did not raise the question of discrimination between religious and secular private schools. To be sure, the action of the Montana Department of Revenue so discriminated; it refused to allow families who chose religious schools to share in the benefits, but allowed families who chose secular private schools to do so. But the Montana Supreme Court rejected that approach, holding as a matter of state severability law that the entire tax-credit program had to be invalidated. With no program at all, there was no discrimination. Why, then, was there still a case? Does the U.S. Constitution actually require a state to have a tax-credit program of this sort?

2. In *Trinity Lutheran*, the majority had dropped a footnote stating: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." Justice Gorsuch, concurring, criticized that footnote, suggesting the distinction between religious status/identity and religious uses is incoherent. Did the majority in *Espinoza* retain the distinction? Did it jettison the distinction without saying so? The aid in *Trinity Lutheran* went to playground surfacing, which has no religious content. The aid in *Espinoza* went to all the operations of the school, which included religious instruction.

(In actuality, it went to the families of children to defray their tuition cost, which might have been significant under earlier jurisprudence but seems not to matter to the *Espinoza* holding.) Why did the majority still say that the basis of discrimination was religious *status*, rather than religious *use*? Was Justice Gorsuch right that the distinction is tenuous where the religious identity of a school is based on its religious teaching? After defending the distinction for several paragraphs, the majority goes on to say that "[n]one of this is meant to suggest that . . . some lesser degree of scrutiny applies to discrimination against religious uses of government aid." Has the Court gone full Gorsuch?

3. The Court purported to distinguish rather than overrule *Locke v. Davey*, a 7-2 decision from 2004 by Chief Justice Rehnquist. Can you articulate a persuasive ground for distinction? What was the actual holding of *Locke* anyway? In *Locke*, the state provided scholarships on a neutral basis, including students choosing to attend pervasively sectarian private colleges. It denied a scholarship to Joshua Davey because he majored in devotional theology in preparation for a career in the ministry, not because of the religious status of the school he attended or the religious content of the courses he took. In what sense had Washington "merely chosen not to fund a distinct category of instruction"? After all, a student not planning a career in the ministry could have used the scholarship funds to attend the same school Davey wished to attend, and take any of the religion courses Davey wished to take. What was the state's interest in Davey's choice of a major? And more important: What was the reach of the decision? What other programs did the *Locke* decision apply to? Can you articulate a persuasive ground for distinguishing *Locke* and *Espinoza*?

4. The main effect of *Espinoza* will be to side-line state constitutional limitations on the inclusion of religious schools in neutral state aid programs. In a number of states, legislatures enacted private school aid programs, only to have state courts rule that religious schools (which are the most common private schools) must be excluded under state constitutional law. *Espinoza* puts an end to that. Legislatures are free to aid private schools, or not—but if they choose to do so, they must treat secular and religious schools equally, and neither federal nor (now) state constitutional limits will get in the way. But how far does this go? Does the opinion leave any room for state legislatures to regulate the flow of public funds to religious schools? Justice Breyer raises a number of practical questions. What if a legislature desired to regulate religious school curricula to meet basic standards (e.g., implementation of the state's required science or sex-education curriculum) as a condition for receiving tax-credit scholarship funds? Could this stand muster? What about a testing regime that requires religious school students to demonstrate proficiency on state-written tests in order for schools to remain eligible for scholarship funds? Would this be an unconstitutional inhibition on religious school autonomy? Surely the state has an interest in ensuring that students supported by public funds achieve some basic standard of academic achievement. Is there a difference between requiring that eligible schools teach what the state deems necessary and insisting that they do not teach other things, such as religion?

The dissenters say that the effect is to reduce freedom of religion, because with state aid will come strings. Does that position imply that religious schools not receiving aid presently have a constitutional right to resist state regulation? Are there any "strings" the state can attach to aid that the state could not independently impose through regulatory processes, without giving aid?