AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Establishment and Free Exercise

**Espinoza v. Montana Department of Revenue, 140 S.Ct. 2246** (2020)

*Kendra Espinoza was the parent of a child who attended Stillwater Christian School. Espinoza wished to a Big Sky Scholarship to help pay the private school tuition. Montana law encouraged the provision of such scholarship by providing substantial tax credits to persons who donate to organizations that help parents pay private school tuition. Espinoza could not, however, obtain a Big Sky scholarship for her child because Montana Department of Revenue did not give tax credits for scholarships at any school “owned or controlled in whole in part by any church, religious sect, or denomination.” This provision, the Department of Revenue maintained, was required by the Montana Constitution, which include a so-called Blaine Amendment that forbade all state aid to sectarian organizations. Espinoza filed a lawsuit claiming that the Department of Revenue Policy violated her religious freedom rights under the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local trial court agreed, but that decision was reversed by the Montana Supreme Court. The Montana Supreme Court first determined that Montana law violated the state constitution by authorizing state funds to go to religious schools and then declared that the Montana Department of Revenue had no power to issue the rule limiting state tax credits to secular schools. On that basis Montana declared the entire tax credit scheme unconstitutional. Espinoza appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote reversed the decision of the Montana Supreme Court. Chief Justice John Roberts ruled that Montana could constitutionally gave tax credits for scholarships paying tuition at sectarian schools as part of a general scholarship program and that sectarian schools could not be excluded from such a program.* Espinoza *raises difficult questions about the line between the free exercise and establishment clause. If a state law excludes religious believers from a certain benefit, that law may unconstitutionally discriminate in violation of free exercise. If the state law includes religious believers, that law may violate the establishment clause. How do each of the opinions in this case draw the line between what is required and what is permissible under the free exercise and establishment clauses? How would you draw the line? The Montana Supreme Court declared the entire scholarship program unconstitutional. As a result, when the Supreme Court decided* Espinoza, *no one in Montana was receiving tax credits for supporting student scholarships. No one was claiming a right to tax credits. Why, under these conditions, did the judicial majority reverse the decision of the Montana Supreme Court. Was this an example of the Court protecting religion or engaging in undue judicial activism?*

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8) delivered the opinion of the Court.

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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). 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.. . .

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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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&pubNum=0000506&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) 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.” . . .

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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))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.” . . . 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.” . . . The Montana Constitution discriminates based on religious status just like the Missouri policy in [*Trinity Lutheran*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&pubNum=0000506&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), which excluded organizations “owned or controlled by a church, sect, or other religious entity.”

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Undeterred by [*Trinity Lutheran*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&pubNum=0000506&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), 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.”  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.”  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.  Such status-based discrimination is subject to “the strictest scrutiny.”

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[*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*v. Davey* (2004) differs from this case in two critical ways. First, [*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))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.” . . . By contrast, Montana's Constitution does not zero in on any particular “essentially religious” course of instruction at a religious school. . . . Second, [*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))invoked a “historic and substantial” state interest in not funding the training of 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.. . .

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. . . . [M]any 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.’ ”  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.”  The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.

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For innovation, one must look to the dissents. Their “room[y]” or “flexible” approaches to discrimination against religious organizations and observers would mark a significant departure from our free exercise precedents. The protections of the Free Exercise Clause do not depend on a “judgment-by-judgment analysis” regarding whether discrimination against religious adherents would somehow serve ill-defined interests.

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. . . . 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.  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.”

 The Department . . . 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.

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.

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The Department also suggests that the no-aid provision advances Montana's interests in public education. . . . 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.” 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 Department argues that, at the end of the day, there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit.

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. . . . When the Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, “one of those cases” in which application of the no-aid provision “would violate the Free Exercise Clause,” the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8) joins, concurring.

The Court correctly concludes that Montana's no-aid provision expressly discriminates against religion in violation of the Free Exercise Clause. And it properly provides relief to Montana religious schools and the petitioners who wish to use Montana's scholarship program to send their children to such schools. 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.

. . . . 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.” . . . 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.”

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.’ ”

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.

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Historical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions. 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.”. . . 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. . . . [T]hey 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.

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Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8), concurring.

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[T]the provision's origin is relevant under the decision we issued earlier this Term in *Ramos v.* *Louisiana* (2020). The question in [*Ramos*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2050796536&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) 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. 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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2050796536&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is now precedent. If the original motivation for the laws mattered there, it certainly matters here.

. . . . 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. . . . .

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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. 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.

Catholics were considered by such groups not as citizens of the United States, but as “soldiers of the Church of Rome,” who “would attempt to subvert representative government.” 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.’ ” . . .

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.

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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.”

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. (In a country like ours, that would have been exceedingly difficult, if not impossible.) Instead the aim was to establish a system that would inculcate a form of “least-common-denominator Protestantism.” . . . . Mann's goal was to “Americanize” the incoming Catholic immigrants. . . . [H]e described the common-school movement as “ ‘laboring to elevate mankind into the upper and purer regions of civilization, Christianity, and the worship of the true God; all those who are obstructing the progress of this cause are impelling the race backwards into barbarism and idolatry.’ ” These “obstructers” were Catholic and other religious groups and families who objected to the common schools' religious programming, which, as just seen, was not neutral on matters of religion. Objections met violent response. . . . .

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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.’ ”

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8), concurring.

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. . . . Maybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do*—teach religion.

Most importantly, though, it is not as if the First Amendment cares. The Constitution forbids laws that prohibit the free exercise of religion. That guarantee 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. At the time of the First Amendment's adoption, the word “exercise” meant (much as it means today) some “[l]abour of the body,” a “[u]se,” as in the “actual application of any thing,” or a “[p]ractice,” as in some “outward performance.” By speaking of a right to “free exercise,” rather than a right “of conscience,” an alternative the framers considered and rejected, our Constitution “extended the broader freedom of action to all believers.” . . . .

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The First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to *be* Muslim but he may be subject to discrimination for *doing* what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar? 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.

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Montana's Supreme Court disregarded these foundational principles. Effectively, the court told the state legislature and parents of Montana like Ms. Espinoza: You can have school choice, but if anyone dares to choose to send a child to an accredited religious school, the program will be shuttered. That condition on a public benefit discriminates against the free exercise of religion. Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8), with whom Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8) joins, dissenting.

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. . . . Past decisions in this area have entailed *differential treatment* occasioning a burden on a plaintiff 's religious exercise.  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.

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. . . . In the Court's recounting, the Montana court first held that religious schools must be excluded from the scholarship program—necessarily determining that the Free Exercise Clause permitted that result—and only subsequently struck the entire program as a way of carrying out its holding. But the initial step described by this Court is imaginary. The Montana court determined that the scholarship program violated the no-aid provision because it resulted in aid to religious schools. Declining to rewrite the statute to exclude those schools, the state court struck the program in full. In doing so, the court never made religious schools ineligible for an otherwise available benefit, and it never decided that the Free Exercise Clause would allow that outcome.

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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](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8), with whom Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8) joins [in part]

. . . .

This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. 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.” . . .

. .. .

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. The Court has consequently made it clear that the Constitution commits the government to a “position of neutrality” in respect to religion.

The inherent tension between the Establishment and Free Exercise Clauses means, however, that the “course of constitutional neutrality in this area cannot be an absolutely straight line.”  Indeed, “rigidity 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.”

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As the majority acknowledges, two cases are particularly relevant: *Trinity Lutheran Church of Columbia*,*Inc.* *v.* *Comer* (2017), and *Locke v. Davey* (2004). . . . In my view, the program at issue here is strikingly similar to the program we upheld in [*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and importantly different from the program we found unconstitutional in [*Trinity Lutheran*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&pubNum=0004031&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Like the State of Washington in [*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Montana has chosen not to fund (at a distance) “an essentially religious endeavor”—an education designed to “ ‘induce religious faith.’ ” 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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))recognized that the study of devotional theology can be “akin to a religious calling as well as an academic pursuit.”  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. . . . Nothing in the Constitution discourages this type of instruction. . . . 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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

. . . . 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*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&pubNum=0004031&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—boils down to what the schools would *do*with state support. And the upshot is that here, as in [*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we confront a State's decision not to fund the inculcation of religious truths.

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. . . . In his Memorial and Remonstrance . . . , James Madison argued that compelling state sponsorship of religion . .. 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.”  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.”

. . ..

I see no meaningful difference between the concerns that Madison . . . 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.. 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. 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.”

. . . .

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.”

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? 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.

. . . .

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. . . .

. . . . And what are the limits of the Court's holding? The majority asserts that States “need not subsidize private education.” *Ante*, at ––––. 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.

 . . . .

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibe03d322bada11eab1faf5a0aee61ce8), dissenting.

. . . .

Neither differential treatment nor coercion exists here because the Montana Supreme Court invalidated the tax-credit program entirely. Because no secondary school (secular or sectarian) is eligible for benefits, the state court's ruling neither treats petitioners differently based on religion nor burdens their religious exercise. Petitioners remain free to send their children to the religious school of their choosing and to exercise their faith.

. . . .

The Court's analysis of Montana's defunct tax program reprises the error in *Trinity Lutheran Church of Columbia, Inc.* *v.* *Comer* (2017). Contra the Court's current approach, our free exercise precedents had long granted the government “some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.”

Until [*Trinity Lutheran*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041944292&pubNum=0004031&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the right to exercise one's religion did not include a right to have the State pay for that religious practice.. . . Here, a State may refuse to extend certain aid programs to religious entities when doing so avoids “historic and substantial” antiestablishment concerns.  Properly understood, this case is no different from [*Locke*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because petitioners seek to procure what the plaintiffs in [*Locke* v. *Davey* (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004158374&pubNum=0000780&originatingDoc=Ibe03d322bada11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))could not: taxpayer funds to support religious schooling. . . .

 . . . .

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.”