

The Status of Use-Based Exclusions & Educational Choice

After *Espinoza*

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Other Views:

- Nelson Tebbe, *Five Thoughts on Espinoza*, 49 ACS EXPERT FORUM, July 1, 2020, <https://www.acslaw.org/expertforum/five-thoughts-on-espinoza/>.
- Ira C. Lupu & Robert W. Tuttle, *Espinoza v. Montana Department of Revenue – Requiem for the Establishment Clause?*, TAKE CARE BLOG, July 1, 2020, <https://takecareblog.com/blog/espinoza-v-montana-department-of-revenue-requiem-for-the-establishment-clause>.
- Holly Hollman, *Symposium: What’s “the use” of the Constitution’s distinctive treatment of religion if it is disregarded as discrimination?*, SCOTUSBLOG, July 2, 2020, <https://www.scotusblog.com/2020/07/symposium-whats-the-use-of-the-constitutions-distinctive-treatment-of-religion-if-it-is-disregarded-as-discrimination/>.

The U.S. Supreme Court’s recent decision in *Espinoza v. Montana Department of Revenue*¹ marks a watershed in America’s educational choice movement. Since the Court’s 2002 decision in *Zelman v. Simmons-Harris*,² it had been clear that educational choice programs—programs that empower parents to opt their children out of public schools and choose private, including religious, alternatives³—are perfectly permissible under the U.S. Constitution.⁴ In the wake of *Zelman*, however, opponents of educational choice retrained their legal focus to state constitutions. Even if such programs are permissible under the federal Constitution, opponents insisted, they still contravene the “Blaine Amendments” (also known as “no-aid” provisions) that are found in a large majority of state constitutions and that, generally speaking, prohibit public funding of religious schools.⁵

In *Espinoza*, the Court shut down this line of attack, holding that the application of Montana’s Blaine Amendment

1 207 L. Ed. 2d 679 (2020).

2 536 U.S. 639 (2002).

3 Educational choice programs come in a variety of forms. “Voucher” programs, which are the most commonly known, provide publicly funded scholarships to children to use at the private school of their parents’ choice. “Tax credit scholarship” programs also provide scholarships for that purpose but are funded by private donations that the state merely incentivizes with a tax credit. And educational savings account (“ESA”) programs provide deposits into a government-authorized savings account that parents can use to pay for a wide array of educational services and products—for example, tuition at a private school, tutoring, online curriculum, and special education services. ESA programs may operate on a publicly funded or tax credit incentivized basis. For an overview of the various types of programs, as well as an inventory of the many programs currently operating throughout the country, see EDCHOICE, THE ABCS OF SCHOOL CHOICE (2020 ed.), available at <https://www.edchoice.org/research/the-abc-of-school-choice/>.

4 Specifically, the Court held that so long as these programs operate on private choice (that is, parents, rather than government, select the schools their children will attend) and are neutral toward religion (meaning religious and non-religious schools alike are free to participate), they are consistent with the Establishment Clause of the First Amendment. *Zelman*, 536 U.S. at 649-53, 662-63.

5 “Although their language varies, and some interpretation is involved in classifying a provision as a Blaine Amendment, [the author] considers any provision that specifically prohibits state legislatures (and often other governmental entities) from appropriating funds to religious sects or institutions, including religious schools, to be a Blaine Amendment.” Dick Komer et al., *Answers to Frequently Asked Questions About Blaine Amendments*, <https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/> (last visited July 20, 2020). There are 37 states with such provisions: Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

to bar religious schools from an educational choice program, solely because of the schools' religious status, violated the Free Exercise Clause of the U.S. Constitution.⁶ In many ways, it was the bookend to *Zelman*: whereas *Zelman* had held that the Establishment Clause allows states to include religious schools in educational choice programs, *Espinoza* held that the Free Exercise Clause prohibits states from *excluding* them simply because of their religious character.

Espinoza was a tremendous victory for families who want to be able to choose the schools their children attend, and the opinion undoubtedly will lead to the adoption of new educational choice programs throughout the country.⁷ But it was by no means the final legal battle over educational choice in the United States. Opponents of educational choice are a determined—and powerful⁸—lot, and they will continue mounting challenges, both legal and political, in America's courthouses and statehouses.

The next battles will likely turn on the religious *uses* to which educational choice programs may be put. While *Espinoza* held that religious schools may not be excluded from such programs simply because they *are* religious, it left open the possibility that certain religious *uses* of the scholarships provided by the programs may be barred. Working within the framework of *Trinity Lutheran Church of Columbia, Inc. v. Comer*,⁹ in which it drew a distinction between discrimination based on religious status and discrimination based on religious use, the Court cabined Montana's exclusion to the former category.¹⁰ It held that Montana's Blaine Amendment barred religious schools solely because of who they were—not because of any religious uses to which scholarships might be put—and that such religious status discrimination is plainly unconstitutional under *Trinity Lutheran*.¹¹ The Court thus did not resolve whether a state may, consistent with the Free Exercise Clause, prohibit the aid provided by an educational choice program from being used to procure a religious education. In

the hours after the decision was released, commentators flagged this issue as one the Court left open—and one that might be the next legal line of attack against educational choice.¹²

While *Espinoza* left the question open, however, it points emphatically to an answer. Four aspects of the opinion indicate that the Court is prepared to either abandon the status/use distinction or apply a presumption of unconstitutionality to use-based exclusions similar to that which it applies to status-based exclusions. Either way, it seems likely that educational choice opponents will lose this next battle and that families who want alternatives to the public school system will win.

This article begins by providing a brief overview of the educational choice program at issue in *Espinoza*, followed by a discussion of the state court litigation that culminated in a Montana Supreme Court judgment invalidating the program under the state's Blaine Amendment. It then considers the U.S. Supreme Court's decision reversing that judgment, examining the majority opinion in detail and briefly surveying the three concurring and three dissenting opinions. Next, it considers some of the legal questions concerning educational choice programs that *Espinoza* did not resolve, including the question of whether religious use-based exclusions are constitutionally permissible in the educational choice context. Finally, the article highlights four facets of the *Espinoza* opinion that bear on the resolution of that question and that suggest the Court will ultimately hold such exclusions unconstitutional.

I. MONTANA'S TAX CREDIT SCHOLARSHIP PROGRAM

Espinoza concerned a modest tax credit scholarship program that the Montana legislature adopted in 2015 “to provide parental and student choice in education.”¹³ The program afforded Montana taxpayers a dollar-for-dollar, non-refundable tax credit, up to a maximum of \$150, for contributions they make to participating student scholarship organizations (“SSOs”).¹⁴ The SSOs, in turn, used these private contributions to provide scholarships to Montana schoolchildren, who could use the scholarships to attend the private school—religious or non-religious—of their parents' choice.¹⁵

Shortly after the legislature adopted the program, the Montana Department of Revenue (“Department”) promulgated a rule excluding religious schools from the program. Specifically, the rule provided that a “qualified education provider” (the operative statutory term describing a participating school) “may not be . . . owned or controlled in whole or in part by any church, religious

6 *Espinoza*, 207 L. Ed. 2d at 698.

7 Before *Espinoza*, some state courts had interpreted their states' Blaine Amendments to allow educational choice programs with religious options, reasoning that such programs aid students, not schools. *See, e.g.*, *Oliver v. Hofmeister*, 368 P.3d 1270, 1274, 1277 (Okla. 2016) (rejecting Blaine Amendment challenge to voucher program); *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) (same); *Jackson v. Benson*, 578 N.W.2d 602, 620-23 (Wis. 1998) (same); *Schwartz v. Lopez*, 382 P.3d 886, 899-900, 902 (Nev. 2016) (rejecting Blaine Amendment challenge to publicly funded ESA program, but holding program had been improperly funded); *see also Magee v. Boyd*, 175 So. 3d 79, 119-26, 131-37 (Ala. 2015) (upholding, against Blaine Amendment challenge, a program that provided parents a refundable tax credit for expenses incurred in educating their own children in private schools). Courts in other states, however, had either: (1) interpreted their states' Blaine Amendments as imposing a legal barrier to educational choice programs; or (2) not reached the issue, leaving the legality of educational choice programs an open question.

8 Legal challenges to educational choice programs are commonly filed by public school teachers' unions, as well as organizations such as Americans United for Separation of Church and State and the ACLU.

9 137 S. Ct. 2012 (2017).

10 *See infra* text accompanying notes 54-55, 58-67.

11 *See Espinoza*, 207 L. Ed. 2d at 690, 696, 697.

12 *See infra* text accompanying notes 146-51.

13 2015 Mont. Laws 2168, §7.

14 Mont. Code Ann. §§ 15-30-3103(1), -3111(1).

15 *Id.* §§ 15-30-3102(7), -3103(1)(c). The program is similar to tax credit scholarship programs operating in eighteen other states: Alabama, Arizona, Florida, Georgia, Iowa, Illinois, Indiana, Kansas, Louisiana, New Hampshire, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, and Virginia. *See* EdChoice, *School Choice in America Dashboard*, <https://www.edchoice.org/school-choice/school-choice-in-america/> (last visited July 2, 2020). A number of other states have publicly funded (as opposed to tax credit-incentivized) voucher or ESA programs, and some states have multiple types of programs targeted at different student demographics. *See id.*; *see also supra* note 3.

sect, or denomination.”¹⁶ According to the Department, the rule was necessitated by Article X, section 6(1) of the Montana Constitution, which provides in relevant part:

The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church, sect, or denomination.¹⁷

This provision is commonly referred to as a Blaine Amendment¹⁸ or no-aid provision, and similar provisions are found in a large majority of state constitutions.¹⁹

The Department’s rule eviscerated the program. The legislature, after all, had intended the program to be religiously neutral, offering religious and non-religious options alike, thus maximizing parental choice. But the Department jettisoned all religious schools, leaving participating families with secular private options only.

II. STATE COURT PROCEEDINGS

In December 2015, three mothers with children eligible for the scholarship program challenged the Department’s rule in state court.²⁰ They asserted that by excluding religious options from the program, the Department’s rule, among other things: (1) exceeded the Department’s authority, as it conflicted with the statute that it purported to implement;²¹ and (2) contravened the Free Exercise Clause of the U.S. Constitution, because it discriminated against families who desire a religious school for their children.²²

¹⁶ Mont. Admin. R. 42.4.802(1)(a).

¹⁷ Mont. Const. art. X, § 6(1).

¹⁸ The term “Blaine Amendment” comes from a failed federal constitutional amendment proposed by then-Representative James G. Blaine of Maine in December 1875. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 301-02 (2001). Blaine’s federal amendment passed the House of Representatives handily but failed to gain the supermajority required in the Senate for referral to the states. *Id.* In time, however, many states adopted constitutional provisions inspired by Blaine’s federal proposal, *id.* at 305, and they came to be known as Blaine Amendments. The federal proposal and its state counterparts are widely acknowledged as rooted in 19th-century nativism and anti-Catholic bigotry: their object was to preserve the non-denominationally Protestant character of the era’s public schools, while denying aid to the nascent Catholic schools. See generally *id.* at 297-305; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 661-75 (1998). The language of Montana’s provision serves that end. After all, 19th-century public schools, while overtly religious, were not “controlled in whole or in part by any church, sect, or denomination,” nor was their curriculum considered “sectarian.” Mont. Const. art. X, § 6(1). Catholic schools, on the other hand, checked both boxes, bringing them squarely within the provision’s proscriptions.

¹⁹ See *supra* note 5.

²⁰ See Complaint for Declaratory & Injunctive Relief, *Espinoza v. Mont. Dep’t of Revenue*, No. DV-15-1152C (Mont. 11th Jud. Dist., Flathead Cty. Dec. 15, 2015), <https://ij.org/wp-content/uploads/2015/12/2015-12-15-Complaint-for-Declaratory-and-Injunctive-Relief.pdf>.

²¹ *Id.* ¶¶ 113-31.

²² *Id.* ¶¶ 138-44.

After preliminarily enjoining the Department’s rule,²³ the state trial court granted summary judgment in favor of the mothers.²⁴ It concluded that the Department’s justification for the rule—avoiding appropriations or expenditures of public funds for religious schools—was based on a mistake of law.²⁵ “Non-refundable tax credits,” the court held, “simply do not involve the expenditure of money that the state has in its treasury; they concern money that is not in the treasury and not subject to expenditure.”²⁶ Having concluded that the rule was based on a mistake of law, “the Court decline[d] to address the constitutionality of the Rule.”²⁷

The Department appealed, and the Montana Supreme Court, on December 12, 2018, reversed the trial court’s judgment.²⁸ The Montana Supreme Court agreed with the trial court that the Department’s rule conflicted with the statute and thus exceeded the Department’s rulemaking authority.²⁹ However, it disagreed with the trial court’s holding that Montana’s Blaine Amendment was not implicated by a program funded by private, tax credit incentivized donations rather than public money.

“The Tax Credit Program,” the Montana Supreme Court held, “permits the Legislature to indirectly pay tuition at private, religiously-affiliated schools,”³⁰ and “[w]hen the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school’s educational

²³ See *Espinoza v. Mont. Dep’t of Revenue*, No. DV-15-1152C, 2017 WL 11317587, at *3 (Mont. 11th Jud. Dist., Flathead Cty. May 23, 2017) (“Plaintiffs moved for a preliminary injunction to enjoin [the Department] from enforcing Rule 1 and Judge Ortley granted the motion on March 31, 2016.”), *rev’d*, 2018 MT 306, 435 P.3d 603, *rev’d*, 207 L. Ed. 2d 679 (2020).

²⁴ *Id.* at *1.

²⁵ *Id.* at *4.

²⁶ *Id.* For the same reason, the Court rejected the Department’s additional contention that the rule was necessitated by Article V, section 11(5) of the Montana Constitution, which provides that “[n]o appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.” Mont. Const. art. V, § 11(5). As the court held,

Since the plain language of Article V, Section 11(5) and Article X, Section 6(1) of the Montana Constitution prohibit appropriations, not tax credits, the Department’s Rule 1 is based on an incorrect interpretation of the law. The Court concludes that the term “appropriation” used in Article V, Section 11(5) and in Article X, Section 6(1) does not encompass tax credits.

Espinoza, 2017 WL 11317587, at *4.

²⁷ *Espinoza*, 2017 WL 11317587, at *4.

²⁸ *Espinoza v. Mont. Dep’t of Revenue*, 2018 MT 306, ¶ 45, 435 P.3d 603, 615, *rev’d*, 207 L. Ed. 2d 679 (2020).

²⁹ *Id.* ¶¶ 41, 43, 435 P.3d at 615 (holding that the Department’s rule “significantly narrowed the scope of the schools” eligible to participate in the scholarship program, “conflict[ed] with the Legislature’s broad definition” of “qualified education provider,” and “exceeded the Legislature’s grant of rulemaking authority”).

³⁰ *Id.* ¶ 32, 435 P.3d at 612.

program.”³¹ “That type of government subsidy in aid of sectarian schools is precisely what the Delegates intended Article X, Section 6, to prohibit,” the court added,³² and the scholarship program therefore “cannot . . . be construed as consistent with Article X, Section 6.”³³ In this light, the court invalidated the program in its entirety—even as to non-religious private schools—because there was “simply no mechanism within the Tax Credit Program itself that operate[d] to ensure” that funds would not be used at religious schools.³⁴

Finally, the Montana Supreme Court held that its invalidation of the scholarship program because of its inclusion of religious options did not discriminate against religion in contravention of the *federal* Constitution, as the plaintiffs had contended. While the court recognized that “an overly-broad analysis of Article X, Section 6, could implicate free exercise concerns,” and that “there may be a case . . . where prohibiting . . . aid” under that provision “would violate the Free Exercise Clause,” the court concluded that “this is not one of those cases.”³⁵

III. SCOTUS STEPS IN

It turns out this *was* one of those cases. The plaintiffs petitioned the U.S. Supreme Court for certiorari on the federal question presented by the Montana Supreme Court’s judgment:

Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid

program simply because the program affords students the choice of attending religious schools?³⁶

The Court granted certiorari³⁷ and, on June 30, 2020, answered that question in the affirmative. In an opinion authored by Chief Justice John Roberts and joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh, the Court held that the Montana Supreme Court’s application of the state’s Blaine Amendment to invalidate the scholarship program violated the federal Free Exercise Clause.³⁸

The Court began its analysis by noting that the Montana legislature’s decision to *include* religious options in the program was perfectly permissible under the federal Constitution. Citing its 2002 decision in *Zelman v. Simmons-Harris*,³⁹ which upheld a voucher program against an Establishment Clause challenge, the Court stressed that the Montana program was originally “neutral” toward religion (meaning religious and non-religious schools alike were allowed to participate) and operated on private choice (meaning money “ma[de] its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools”).⁴⁰ Nevertheless, the Montana Supreme Court had “held as a matter of state law that even such indirect government support qualified as ‘aid’ prohibited under the Montana Constitution.”⁴¹ That conclusion, in turn, gave rise to the federal constitutional question the U.S. Supreme Court was tasked with resolving: “[W]hether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana’s no-aid provision to bar religious schools from the scholarship program.”⁴²

31 *Id.* ¶ 34, 435 P.3d at 613. On this score, the Montana Supreme Court’s decision conflicted with those of state courts that have held that tax credit scholarship programs do not implicate Blaine Amendments because such programs do not involve appropriations of public funds. *See, e.g.,* Gaddy v. Ga. Dep’t of Revenue, 802 S.E.2d 225, 229 (Ga. 2017) (holding plaintiffs lacked standing to challenge tax credit scholarship program: “Plaintiffs also assume that the tax credits amount to an unconstitutional expenditure of public funds because these funds actually represent tax revenue, or because the revenue department bears the costs of administratively processing these credits. But these premises are false.”); *Magee*, 175 So. 3d at 126 (upholding tax credit scholarship program: “[W]e conclude that the circuit court’s construction of the term ‘appropriation’ to include the tax credits provided by [the scholarship program] is contrary to the Alabama Constitution, existing caselaw, and the commonly accepted definition of the term appropriation.”); *Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999) (upholding tax credit scholarship program: “[W]e disagree with petitioners’ characterization of this credit as public money or property within the meaning of the Arizona Constitution.”); *McCall v. Scott*, 199 So. 3d 359, 370 (Fla. Dist. Ct. App. 2016) (holding plaintiffs lacked standing to challenge tax credit scholarship program: “The plain language of the no-aid provision imposes no limitation on the Legislature’s taxing authority. And although the no-aid provision expressly limits the Legislature’s spending authority by prohibiting the appropriation of state revenues to aid any sectarian institution, Appellants identify no such appropriation connected with the [scholarship program].”); *cf. Duncan v. State*, 102 A.3d 913, 925-288 (N.H. 2014) (holding plaintiffs lacked standing to challenge tax credit scholarship program).

32 *Espinoza*, 2018 MT at ¶ 34, 435 P.3d at 466.

33 *Id.* ¶ 36, 435 P.3d at 466-67.

34 *Id.* ¶ 36, 435 P.3d at 466.

35 *Id.* ¶ 40, 435 P.3d at 468.

36 Petition for Certiorari at i, *Espinoza v. Mont. Dep’t of Revenue*, No. 18-1195 (U.S. Mar. 12, 2019), https://www.supremecourt.gov/DocketPDF/18/18-1195/91749/20190312143801341_Cert%20Petition_FINAL.pdf.

37 *Espinoza v. Mont. Dep’t of Revenue*, 139 S. Ct. 2777 (mem.).

38 *Espinoza*, 207 L. Ed. 2d at 697, 698.

39 536 U.S. 639.

40 *Espinoza*, 207 L. Ed. 2d at 689.

41 *Id.* As discussed *supra* note 26 & accompanying text, the mothers challenging the Department’s rule had previously argued—and the state trial court had held—that there was no “aid” as that term is used in Montana’s Blaine Amendment because tax credits are not public funds. For this proposition, the mothers had invoked the U.S. Supreme Court’s decision in *Arizona Christian School Tuition Organization v. Winn*, which, for federal standing purposes, distinguished tax credits from public expenditures. 563 U.S. 125, 142 (2011) (“[T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. . . . When the government declines to impose a tax, . . . there is no . . . connection between dissenting taxpayer and alleged establishment.”). The Montana Supreme Court, however, rejected that interpretation of the state’s Blaine Amendment, and the U.S. Supreme Court was bound to accept that determination as a matter of state law. *Espinoza*, 207 L. Ed. 2d at 689 (“[W]e 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 . . .”).

42 *Espinoza*, 207 L. Ed. 2d at 689.

Of course, the Department had attempted to fit the case into the category of discrimination based on religious *use*, rather than status, by arguing that Montana’s Blaine Amendment “applies not because of the religious character of the recipients, but because of how the funds would be used—for ‘religious education.’”⁶² In support of its contention, the Department had “point[ed] to some language” in the Montana Supreme Court’s decision “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.’”⁶³ Relatedly, the Department had made much of the *nature* of the aid in question, arguing that unlike the “‘completely non-religious’ benefit of playground resurfacing in *Trinity Lutheran*,”⁶⁴ the “unrestricted tuition aid at issue” in *Espinoza* “could be used for religious ends by some recipients, particularly schools that believe faith should ‘permeate[]’ everything they do.”⁶⁵ But the Court roundly rejected the Department’s attempt to place the case in the use discrimination box, holding that “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.”⁶⁶ And the Court went on to stress that even if the Montana Department of Revenue or Montana Supreme Court had aimed to prevent religious *uses* of scholarship monies, the application of the Blaine Amendment still turned on the religious *status* of the schools that parents selected.⁶⁷

While the Court concluded that the Montana Supreme Court’s application of the state’s Blaine Amendment turned on religious status, rather than use, it went out of its way to make clear that it was not suggesting the outcome would have been different if discrimination based on use had been in play. “None of this is meant to suggest,” the Court stated, “that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid.”⁶⁸ In fact, pointing to Justice Gorsuch’s concurring opinion in *Trinity Lutheran*, the Court stressed that some of its members “have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based

on status.”⁶⁹ But while it “acknowledge[d] the point,” the Court determined that it did not “need [to] examine it” in *Espinoza*, “because Montana’s no-aid provision discriminates based on religious status,” and “strict scrutiny [therefore] applie[d] under *Trinity Lutheran*.”⁷⁰

C. *No Refuge in Locke*

As for *Locke*, the Court explained that it “differ[ed] from” *Espinoza* “in two critical ways.”⁷¹ First, *Locke* involved an extremely narrow exclusion that focused on the use to which a scholarship was put—not the status of the school at which it was used. As the Court explained, “Washington had ‘merely chosen not to fund a distinct category of instruction’: the ‘essentially religious endeavor’ of training a minister ‘to lead a congregation.’”⁷² The plaintiff was thus “denied a scholarship because of what he proposed to *do*—use the funds to prepare for the ministry.”⁷³ Montana’s Blaine Amendment, by contrast, “does not zero in on any particular ‘essentially religious’ course of instruction,” but rather “bars all aid to a religious school ‘simply because of what it is.’”⁷⁴

Moreover, the narrow, use-based exclusion in *Locke* was supported by a “‘historic and substantial’ state interest”—namely, in “not funding the training of clergy.”⁷⁵ Montana, on the other hand, had no comparable interest in denying scholarships to children attending religious schools.⁷⁶ In fact, the Court noted that governments often provided “financial support to private schools, including denominational ones,” during the founding era and early 19th century.⁷⁷ Thus, Montana’s hostility to religious schools was not a substantial, founding-era tradition. Rather, this “tradition *against* state support for religious schools arose in the second half of the 19th century,” resulting in the adoption of state constitutional provisions akin to Montana’s in “more than 30 States.”⁷⁸ Many of these provisions, the Court emphasized,

62 *Id.* (quoting Brief for Respondents at 38, *Espinoza v. Mont. Dep’t of Revenue*, 207 L. Ed. 2d 679 (No. 18-1195)).

63 *Espinoza*, 207 L. Ed. 2d at 691 (quoting *Espinoza*, 2018 MT 306, ¶¶ 20, 38, 435 P.3d at 609, 613-14).

64 *Id.* (quoting Transcript of Oral Argument at 31, *Espinoza v. Mont. Dep’t of Revenue*, 207 L. Ed. 2d 679 (No. 18-1195)).

65 *Id.* (alteration in original) (quoting Brief for Respondents at 39, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195)).

66 *Id.*

67 *Id.* (“Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.”).

68 *Id.* at 692 (citation omitted). In support of this statement, the Court cited *Church of the Lukumi Babalu Aye*, in which it invalidated an ordinance banning ritualistic animal slaughter and held 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.” 508 U.S. at 546.

69 *Espinoza*, 207 L. Ed. 2d at 692 (citing *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part)).

70 *Id.*

71 *Id.*

72 *Id.* (quoting *Locke*, 540 U.S. at 721).

73 *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

74 *Id.* at 693 (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

75 *Id.* (quoting *Locke*, 540 U.S. at 725).

76 *Id.* (“[N]o comparable ‘historic and substantial’ tradition supports Montana’s decision to disqualify religious schools from government aid.” (quoting *Locke*, 540 U.S. at 725)); *id.* at 695 (“[T]here is no ‘historic and substantial’ tradition against aiding [religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*.” (quoting *Locke*, 540 U.S. at 725)).

77 *Id.* at 693. “[E]arly state constitutions and statutes actively encouraged this policy,” the Court noted. *Id.* (quoting L. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL*, 1825-1925 4 (1987)). The Court also noted that during the post-bellum era, the federal government, through the Freedmen’s Bureau, provided for the education of the freedmen “by supporting denominational schools,” *id.*—a fact that “reinforce[d]” the tradition in the early states. *Id.* at 694.

78 *Id.* (citing Brief for Respondents at 40-42 & app. D, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195)).

“belong to a more checkered tradition shared with the Blaine Amendment of the 1870s”⁷⁹—a provision “born of bigotry” that “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.”⁸⁰ Such provisions, the Court held, “hardly evince a tradition that should inform our understanding of the Free Exercise Clause.”⁸¹

D. Failing Strict Scrutiny

Having concluded that the Montana Supreme Court’s application of its Blaine Amendment discriminated based on religious status—not use, as in *Locke*—the Court, in accordance with *Trinity Lutheran*, applied strict scrutiny, which, it concluded, was not satisfied.⁸² The Court addressed three asserted state interests, none of which rose to the level of compelling.

First, the Court rejected the Montana Supreme Court’s claim that the state’s interest in “separating church and State ‘more fiercely’ than the Federal Constitution” justified its application of the Blaine Amendment.⁸³ In fact, the Court had already concluded, in *Trinity Lutheran*⁸⁴ and *Widmar v. Vincent*⁸⁵ before it, that such an interest is not compelling, because “[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.’”⁸⁶

Second, the Court rejected the Department’s claim that application of the Blaine Amendment to invalidate the scholarship program served the compelling interest of “promot[ing] religious freedom.”⁸⁷ Specifically, the Department had maintained that the state constitutional provision: (1) “protect[ed] the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations”; and (2) “safeguard[ed] the freedom of religious organizations by keeping the government out of their operations.”⁸⁸ But as the Supreme Court retorted, “[a]n infringement of First Amendment rights . . . cannot be justified by a State’s alternative view that the infringement advances

religious liberty.”⁸⁹ As for protecting religious organizations from governmental entanglement, the Court noted that a school’s participation in the scholarship program was entirely voluntary and thus that a school concerned about such entanglement could simply “decide for itself not to participate.”⁹⁰ The Court, moreover, emphasized the fact that it was not simply religious schools (or organizations) that were impacted by Montana’s Blaine Amendment; parents who would choose religious schools for their children were equally impacted,⁹¹ and these parents have a fundamental right to direct the upbringing and education of their children, including by selecting a religious school for them.⁹² Montana’s Blaine Amendment, the Court stressed, “penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one.”⁹³

Finally, the Court rejected the Department’s assertion that the Blaine Amendment served to protect Montana’s public schools by preventing the diversion of money intended for them to private schools.⁹⁴ As the Court explained, the state’s Blaine Amendment is “fatally underinclusive” to serve any such interest, because it prohibits public funding of religious schools only—not all private schools.⁹⁵

In short, none of the allegedly compelling interests identified by the Department or the Montana Supreme Court could support applying Montana’s Blaine Amendment to bar religious schools from an educational choice program. While the Court made clear that a state is not required to have such a program, “once [it] decides to do so, it cannot disqualify some private schools solely because they are religious.”⁹⁶

E. Rejecting the “No Program, Nobody Gets Hurt” Argument

Before concluding its opinion, the Court disposed of a final argument asserted by the Department: that there could be no religious status discrimination (and thus no free exercise violation) because the Montana Supreme Court had invalidated the scholarship program in its entirety—not with respect to religious private schools only.⁹⁷ While that court did eliminate the

79 *Id.*

80 *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)). For a discussion of the proposed federal amendment, see *supra* note 18.

81 *Espinoza*, 207 L. Ed. 2d at 694.

82 *Id.* at 696. Specifically, the Court required the Department to demonstrate that the application of Montana’s Blaine Amendment “advance[d] ‘interests of the highest order’” and was “narrowly tailored in pursuit of those interests.” *Id.* (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 546).

83 *Id.* (quoting *Espinoza*, 2018 Mont. 306, ¶ 39, 435 P.3d at 614).

84 137 S. Ct. at 2024.

85 454 U.S. 263, 276 (1981).

86 *Espinoza*, 207 L. Ed. 2d at 696 (omission in original) (quoting *Trinity Lutheran*, 137 S. Ct. at 2024); cf. *Widmar*, 454 U.S. at 276 (“In this constitutional context, we are unable to recognize the State’s interest as sufficiently ‘compelling’ to justify content-based discrimination against respondents’ religious speech.”).

87 *Espinoza*, 207 L. Ed. 2d at 696.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at 697 (“[T]he prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them.”).

92 *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)).

93 *Id.*

94 *Id.* (“According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools.”).

95 *Id.*; see also *id.* (“A law does not advance ‘an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 547).

96 *Id.*

97 *Id.* (“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.”).

program in its entirety, the U.S. Supreme Court noted, it did so “not based on some innocuous principle of state law,” but rather “pursuant to a state law provision that expressly discriminates on the basis of religious status.”⁹⁸ The Montana Supreme Court applied this state constitutional provision to bar religious schools from the program and only proceeded to invalidate the program in its entirety because the program contained no “mechanism” to make absolutely sure that religious schools received no aid.⁹⁹ The “error of federal law occurred at the beginning”: “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.”¹⁰⁰

F. (Lots of) Concurring Opinions

Although Chief Justice Roberts’ majority opinion was joined in full by four other Justices (Thomas, Alito, Gorsuch, and Kavanaugh), three of those four authored separate concurring opinions. Each concurrence focused on a distinct aspect of the case.

Justice Thomas, in an opinion joined by Justice Gorsuch, explained how, in his view, it is the Court’s misguided Establishment Clause jurisprudence that has allowed Free Exercise Clause violations like those suffered by the *Espinoza* plaintiffs to proliferate.¹⁰¹ In Justice Thomas’s (and Gorsuch’s) opinion, the Court’s Establishment Clause jurisprudence has taken two misguided turns: (1) the Court’s incorporation of the clause against the states contravenes the original meaning of the clause (and likely that of the Fourteenth Amendment, through which the clause was incorporated);¹⁰² and, in any event, (2) interpreting the clause to preclude government’s favoring or promotion of religion—as Justice Thomas calls it, the “separationist view”¹⁰³—contravenes the original understanding of the clause.¹⁰⁴ “[T]he Court’s wayward approach to the Establishment Clause”—that is, its “overly expansive understanding of the . . . Clause”—“has led to a correspondingly cramped interpretation of” the Free Exercise Clause.¹⁰⁵ Thus, “[r]eturning the Establishment Clause to its proper scope,” in Justice Thomas’s view, “will go a long way toward allowing free exercise of religion to flourish as the Framers intended.”¹⁰⁶

Justice Alito, meanwhile, focused on the nativist, anti-Catholic bigotry that undergirded the Blaine movement of the mid- to late-19th century and that inspired state constitutional

provisions like Montana’s. Consideration of this history, according to Justice Alito, was required by the Court’s recent decision in *Ramos v. Louisiana*,¹⁰⁷ in which the Court confronted the bigoted origins of a Louisiana state constitutional provision that allowed for less-than-unanimous jury convictions.¹⁰⁸ Justice Alito’s concurrence provides a compelling historical account of how provisions like Montana’s came to be and, in an unusual turn for a judicial opinion, includes a reproduction of a political cartoon: the infamous Thomas Nast depiction of the supposed Catholic threat to the public school system, which appeared in *Harper’s Weekly* in 1871.¹⁰⁹

Finally, Justice Gorsuch authored a concurring opinion that further developed a point he had made in his *Trinity Lutheran* concurrence, discussed above in note 55 and the text accompanying note 69: that the supposed distinction between discrimination based on religious status and discrimination based on religious use is illusory, unworkable, and ultimately irrelevant in Free Exercise Clause jurisprudence.¹¹⁰ First, Justice Gorsuch stressed that the record demonstrated how Montana’s Blaine Amendment *did* discriminate based on “religious activity, uses, and conduct.”¹¹¹ “Maybe it’s possible to describe what happened here as status-based discrimination,” Justice Gorsuch opined, “[b]ut it seems equally, and maybe more, natural to say that the State’s discrimination focused on what religious parents and schools *do*—teach religion.”¹¹² At the end of the day, however, it did not matter to Justice Gorsuch how the discrimination was described, because “it is not as if the First Amendment cares.”¹¹³ “The Constitution,” he explained, “forbids laws that prohibit the free exercise of religion,” and “[t]hat 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.”¹¹⁴ Justice Gorsuch supported his point with discussion

98 *Id.* at 697-98.

99 *Id.* at 698 (quoting *Espinoza*, 2018 Mont. 306, ¶ 36, 435 P.3d at 613).

100 *Id.*; *see also id.* (“Because the elimination of the program flowed directly from the Montana Supreme Court’s failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.”).

101 *See id.* at 699 (Thomas, J., concurring).

102 *Id.*

103 *Id.* at 702.

104 *Id.* at 700, 702-04.

105 *Id.* at 700.

106 *Id.* at 704.

107 140 S. Ct. 1390 (2020).

108 *Espinoza*, 207 L. Ed. 2d at 704 (Alito, J., concurring). *See also Ramos*, 140 S. Ct. at 1394; *id.* at 1417-18 (Kavanaugh, J., concurring in part).

109 *Espinoza*, 207 L. Ed. 2d at 706 (Alito, J., concurring). The cartoon, titled “The American River Ganges,” depicts Catholic bishops ominously approaching American shores, prostrate in the water with their mitres and copes giving them the appearance of invading crocodiles. On the shore, a building labeled “U.S. Public School” lies in ruins, with the United States flag flying upside down to signal distress. A Protestant clergyman, with Bible close to his chest, shields American public-school children on the shore from the approaching invaders, and the Vatican, from which the invaders came, looms large in the background across the sea.

110 *Id.* at 711-16 (Gorsuch, J., concurring).

111 *Id.* at 712.

112 *Id.* at 713.

113 *Id.*; *see also id.* (“So whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest, conditions absent here for reasons the Court thoroughly explains.”).

114 *Id.*

of the original public meaning of the term “exercise,”¹¹⁵ as well as the Court’s own jurisprudence, which has long protected religious “actions” and “conduct.”¹¹⁶

Justice Gorsuch also discussed the practical reason the First Amendment protects religious uses:

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.¹¹⁷

Under such a rule of law, Justice Gorsuch noted, “[t]hose apathetic about religion or passive in its practice would suffer little,” but “those with a deep faith that requires them to do things [that] passing legislative majorities might find unseemly or uncouth” would suffer greatly.¹¹⁸ And while the stakes may not be quite so great when it comes to discrimination in public benefits—a context in which “[t]he government does not put a gun to the head, [but] only a thumb on the scale”¹¹⁹—it is discrimination nonetheless. According to Justice Gorsuch, “[c]alling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.”¹²⁰

G. (Lots of) Dissenting Opinions

There were also three dissenting opinions. Justice Ruth Bader Ginsburg, joined by Justice Elena Kagan, did not see a free exercise violation in the application of Montana’s Blaine Amendment. In her view, the case was “missing th[e] essential component” of “differential treatment based on . . . religion,” because the Montana Supreme Court had invalidated the scholarship “in its entirety,” thereby rendering “secular and sectarian schools alike . . . ineligible for benefits.”¹²¹ Thus, “[t]he only question” for the Court to resolve was “whether application of” Montana’s Blaine Amendment “to bar all state-sponsored private-school funding violate[d] the Free Exercise Clause.”¹²² In her view, “it d[id] not.”¹²³

Justice Sonia Sotomayor saw things similarly, but she concluded that the Court was wrong to decide the case at all. The Montana Supreme Court, she reasoned, “remedied the only

potential harm of discriminatory treatment by striking down the program altogether” on “state-law grounds,” and it thereby “declined to resolve federal constitutional issues.”¹²⁴ Accordingly, there was no federal question for the Court to review in her eyes.¹²⁵

Finally, Justice Stephen Breyer, in an opinion joined in part by Justice Kagan, disagreed with the majority on the merits, but also with its methodology—specifically, what he called its “overly rigid application of the [Religion] Clauses.”¹²⁶ There is, Justice Breyer explained, “constitutional room, or ‘play in the joints,’ between ‘what the Establishment Clause permits and the Free Exercise Clause compels,”¹²⁷ and the states are free to act within this area.¹²⁸ Discerning the boundaries of that area—and determining “whether a particular state program falls within that space”¹²⁹—requires “the exercise of legal judgment,”¹³⁰ he explained, and “depends upon the nature of the aid at issue, considered in light of the Clauses’ objectives.”¹³¹ According to Justice Breyer, *Espinoza*, like *Locke*, fell within this play in the joints. The application of Montana’s Blaine Amendment, he maintained, simply prohibited a particular religious “use” of scholarships—“obtain[ing] a religious education”¹³²—and did not discriminate based on religious status.¹³³ That prohibition, moreover, was supported by historic and substantial interests similar to those that justified the religious exclusion in *Locke*.¹³⁴ Accordingly, he saw no violation of the Free Exercise Clause.

IV. WHAT *ESPINOZA* RESOLVES FOR EDUCATIONAL CHOICE, AND WHAT IT DOES NOT

Espinoza is a landmark decision for the educational choice movement and the millions of children whose parents want the right to choose the education that will work best for them. After *Zelman* held that educational choice programs are permissible under the federal Establishment Clause, the biggest remaining legal question was whether state Blaine Amendments would

115 See *id.* at 713.

116 See *id.* at 713-14.

117 *Id.* at 715. To illustrate his point, Justice Gorsuch offered the example of Oliver Cromwell, who promised Catholics in Ireland, “As to freedom of conscience, I meddle with no man’s conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.” *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 631 n.2 (Brennan, J., concurring in judgment)).

118 *Id.*

119 *Id.*

120 *Id.* at 716.

121 *Id.* at 717 (Ginsburg, J., dissenting).

122 *Id.* at 718.

123 *Id.* at 719.

124 *Id.* at 731, 732 (Sotomayor, J., dissenting); see also *id.* at 734 (“[T]he Montana Supreme Court remedied a state constitutional violation by invalidating a state program on state-law grounds, having expressly declined to reach any federal issue.”).

125 See *id.* at 731 (opining that “the Court [was] wrong to decide this case at all”). Even if there was a federal question warranting the Court’s review, however, Justice Sotomayor would have concluded that the alleged discrimination was supported by “‘historic and substantial’ antiestablishment concerns” and, thus, authorized by *Locke*. *Id.* at 736 (quoting *Locke*, 540 U.S. at 725).

126 *Id.* at 719 (Breyer, J., dissenting).

127 *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2019).

128 *Id.* at 731.

129 *Id.* at 719.

130 *Id.* at 731 (quoting *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment)).

131 *Id.* at 719.

132 *Id.* at 723.

133 *Id.* (“[T]his case does not involve a claim of status-based discrimination.”).

134 See *id.* at 723-27.

nevertheless force the exclusion of religious schools from them. *Espinoza* has now answered that question: A state need not adopt an educational choice program, “[b]ut once [it] decides to do so, it cannot disqualify some private schools solely because they are religious.”¹³⁵

Of course, that was not the *only* remaining legal question hanging over educational choice, and opponents have signaled that they will resort to any available argument to prevent state support for alternatives to public schools. As Robert Chanin, then chief counsel for the National Education Association, vowed after *Zelman* held that educational choice programs are permissible under the federal Constitution, choice opponents will continue their attacks under any “Mickey Mouse provisions” they can find in state constitutions.¹³⁶ That is as true today, in the wake of *Espinoza*, as it was in the wake of *Zelman* eighteen years ago.

Thus, we can expect challenges under the unique education funding provisions found in many state constitutions (and statutes), as well as state “uniformity clauses,” which require provision for a uniform system of public schools. Such challenges have previously succeeded in a handful of instances,¹³⁷ and educational choice opponents presumably will dust these provisions off in the post-*Espinoza* era.

Another expected avenue of attack will focus on allegedly discriminatory hiring or admissions practices of participating

schools. If opponents of choice cannot kill programs outright, they will attempt to neuter the programs by excluding—through litigation or legislation—schools that consider religion, sexual orientation, gender identity, or other factors in hiring or admissions. Indeed, a Christian school in Maryland is currently challenging its expulsion from that state’s voucher program for allegedly violating the program’s “nondiscrimination provision.”¹³⁸ The school maintains that its expulsion from the program (which appears to be driven by its traditional view of marriage and its understanding of sex as biologically determined) violates, among other things, its rights under the Free Exercise and Free Speech Clauses of the U.S. Constitution.¹³⁹ The extent to which nondiscrimination provisions like Maryland’s can, consistent with the federal Constitution, be used to bar or expel religious schools from educational choice programs is largely an open question,¹⁴⁰ which all but guarantees that opponents of educational choice will employ such provisions to challenge choice programs in the coming years.¹⁴¹

Espinoza has nothing to say about education funding provisions, uniformity clauses, and nondiscrimination provisions, much less how they bear on the legality of educational choice programs. But the opinion does note an unresolved issue that opponents of such programs may try to take advantage of in the coming years: Opponents will attempt to invalidate educational choice programs on the theory that they allow public funds to be put to religious uses.

As discussed above, Chief Justice Roberts’ opinion for the Court in *Espinoza* (and in *Trinity Lutheran* before it) distinguished between discrimination based on religious status and discrimination based on religious use. Those opinions make clear that religious status-based exclusions in public benefit programs are virtually per se unconstitutional. But the opinions do not resolve the constitutionality of religious use-based exclusions. *Locke*, meanwhile, provides one example of a use-based exclusion that the Court allowed.

Educational choice opponents will almost certainly try to exploit this opening in future litigation. Even if schools cannot be barred from educational choice programs because of who they

135 *Id.* at 697 (majority opinion). A few state Blaine Amendments prohibit funding of religious and non-religious private schools. *E.g.*, Alaska Const. art. VII, § 1; Ariz. Const. art. IX, § 10; Haw. Const. art. X, § 1; Mich. Const. art. VIII, § 2; N.M. Const. art. XII, § 3; S.C. Const. art. XI, § 4.1. Arizona has such a provision, and the state’s courts have interpreted it to prohibit voucher programs but allow publicly funded ESA programs, because the aid provided by the latter need not be used to pay tuition at a private school. *Compare* *Cain v. Horne*, 202 P.3d 1178, 1184-85 (Ariz. 2009) (invalidating voucher programs), *with* *Niehaus v. Huppenthal*, 310 P.3d 983, 988 (Ariz. Ct. App. 2013) (upholding ESA program). The New Mexico Supreme Court, meanwhile, has recognized that even a Blaine Amendment that is facially neutral—that is, that bars aid to religious and non-religious private school alike—can still run afoul of the Free Exercise Clause if it was adopted with anti-religious motives. *See* *Moses v. Ruszkowski*, 2019-NMSC-003 ¶¶ 34-35, 458 P.3d 406, 416-17. Because “anti-Catholic sentiment tainted . . . adoption” of that state’s Blaine Amendment, *id.* ¶ 43, 458 P.3d at 419, the court, in order to “avoid a construction that raises concerns under the federal constitution,” interpreted the provision to allow state lending of secular textbooks to students attending private schools. *Id.* ¶¶ 45, 46, 458 P.3d at 420. Such reasoning is supported by Justice Alito’s concurrence in *Espinoza* and its recognition that the “original motivation for” Blaine Amendments “matter[s].” *Espinoza*, 207 L. Ed. 2d at 704 (Alito, J., concurring).

136 CLINT BOLICK, DAVID’S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 138 (2007).

137 *E.g.*, *Schwartz*, 382 P.3d at 902 (rejecting Blaine Amendment challenge to ESA program but holding that the use of funds appropriated to support public schools, in the absence of a separate appropriation for the ESA program, violated at least two clauses in the Education Article of the Nevada Constitution, Nev. Const. art. XI, §§ 2, 6); *La. Fed’n of Teachers v. State*, 2013-0120, p. 26 (La. 5/7/13), 118 So. 3d 1033, 1050-51 (holding voucher program could not be funded through a constitutional budget mechanism designed exclusively for funding public schools); *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006) (invalidating voucher program under Florida’s Uniformity Clause, Fla. Const. art. IX, § 1(a)); *but see* *Jackson v. Benson*, 578 N.W.2d 602, 627-28 (Wis. 1998) (rejecting Uniformity Clause challenge to voucher program).

138 *See* *Bethel Ministries, Inc. v. Salmon*, No. SAG-19-01853, 2020 WL 292055, at **2-3 (D. Md. Jan. 21, 2020) (order denying preliminary injunction). The school maintains that it does not discriminate in admissions on any protected ground. *See id.*

139 *Id.* at *3.

140 It is clear, however, that there is a constitutionally mandated “ministerial exception” to employment discrimination claims brought by certain employees, including certain teachers, of religious schools. *See* *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, Nos. 19-267, 19-348, 2020 WL 3808420, at *40 (U.S. July 8, 2020) (applying ministerial exception to bar claims brought by former elementary teachers at Catholic schools); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 177-78, 196 (2012) (applying ministerial exception to bar claim brought by former “called” teacher at a Lutheran school).

141 They may do so by attempting to enforce preexisting, generally applicable nondiscrimination laws against schools participating in educational choice programs or by attempting to legislatively insert nondiscrimination requirements as a sort of “poison pill” when new educational choice programs are adopted.

are, the argument will go, they may still be excluded from such programs because of what they *do*.

A textual legal hook for such challenges will likely be the Blaine Amendments. In addition to barring public funding of religious schools (in the words of Montana’s Blaine Amendment, schools “controlled in whole or in part by any church, sect, or denomination”¹⁴²), many Blaine Amendments, Montana’s included, also prohibit appropriations or payments of public funds for any “sectarian purpose.”¹⁴³ Others are more specific, providing that “[n]o public money or property shall be appropriated for or applied to any religious *worship, exercise, or instruction*.”¹⁴⁴

Educational choice opponents will likely argue that any program that allows participating schools to provide religious instruction or engage in religious worship or exercises runs afoul of such language, not because of who the schools are but because of what they do—i.e., because of the use to which they put the aid they receive. Thus, educational choice opponents will invite courts to invalidate programs (or exclude schools engaging in such activities¹⁴⁵) because (1) a state restriction on a religious

use of public benefits was upheld in *Locke* and (2) *Locke* was left undisturbed by *Espinoza*.

In fact, in the days—even hours—after the Court handed down the *Espinoza* decision, more than a few commentators—academics and advocates alike—flagged this very issue. Ron Meyer, an attorney who represented the Florida Education Association in legal challenges to educational choice programs in that state, announced that “Roberts’ opinion simply finds that because the benefits of the tax credit vouchers were being withheld solely because of the religious character of the school, it violated the free exercise clause of the First Amendment,” and that it “didn’t reach into whether those monies were used to inculcate students.”¹⁴⁶ Similarly, Professor Steven Green, who has served as both an attorney and expert witness for educational choice opponents, acknowledged that “[t]he majority opinion effectively says [Blaine Amendments] cannot be enforced, at least when they are directed at preventing aid based on the character or status of the recipient,” but he insisted that “one can interpret the language of these provisions as directed at use, not necessarily status.”¹⁴⁷ (He predicted, however, that “most lower courts will read the majority opinion otherwise.”¹⁴⁸)

Even commentators not hostile to educational choice identified the use argument as the next likely legal avenue of attack for educational choice opponents. Mark Scarberry, a law professor at Pepperdine, explained that “[Chief Justice] Roberts’s decision could be interpreted to require Montana to include religious schools in its scholarship tax credit program only to the extent of the schools’ religious status, as opposed to their conduct in providing religious education or their use of the funds for providing religious education.”¹⁴⁹ “A lower court might well seize on that ambiguity,” he predicted, “to limit *Espinoza*.”¹⁵⁰ And Andy Smarick of the Manhattan Institute predicted that “[f]uture cases could preserve the status-use distinction by requiring that faith-based groups be able to participate in public programs while permitting specific state limits on their use of

142 Mont. Const. art. X, § 6(1).

143 *Id.* (emphasis added) (prohibiting appropriations and payments of public funds for any “sectarian purpose”); *see also* Cal. Const. art. XVI, § 5 (same); Colo. Const. art. IX, § 7 (same); Ill. Const. art. X, § 3 (same); Mo. Const. art. IX, § 8 (same); Nev. Const. art. XI, § 10 (prohibiting “use[]” of public funds for “sectarian purpose”); *cf.* Idaho Const. art. IX, § 5 (prohibiting payments or appropriations “for any sectarian or religious purpose”). The use of the term “sectarian,” rather than “religious,” in modifying “purpose” seems deliberate. The public schools during the Blaine era were overtly religious, practicing a kind of generic Protestantism, but they were not “sectarian” as that term was used at the time. *See Espinoza*, 207 L. Ed. 2d at 708-10 (Alito, J., concurring). Thus, by prohibiting public appropriations for “sectarian purposes,” these provisions were not targeting religious exercises that were common in the 19th-century public schools; they were targeting the so-called “sectarian” practices common in Catholic schools. *See id.* at 707 (noting that “sectarian” was used at the time to describe dissident or heretical churches, including the Catholic Church specifically). Use of the terminology “controlled in whole or in part by any church, sect, or denomination” in describing the *schools* for which public funds could not be appropriated, *e.g.*, Mont. Const. art. X, §6(1), was equally deliberate. As noted *supra* note 18, the public schools, while religious, were not “controlled in whole or in part by any church, sect, or denomination.” Catholic schools, on the other hand, were.

144 Ariz. Const. art. II, § 12; Utah Const. art. I, § 4; Wash. Const. art. I, § 11. Another textual hook for such challenges might be the “compelled support” clauses found in many state constitutions. Generally speaking, these provisions protect persons from being compelled to attend or support any “place of worship” or “ministry.” *E.g.*, Pa. Const. art. 1, § 3 (“[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent . . .”). In fact, the Vermont Supreme Court held that allowing religious schools to participate in that state’s “tuitioning” program, through which students from towns without a public school receive money to attend another town’s public school or a private school of their choice, violated Vermont’s Compelled Support Clause because there were not “adequate safeguards against the use of such funds for religious worship.” *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 541-42 (Vt. 1999).

145 Alternatively, educational choice opponents may attempt to include “poison pill” provisions in new programs, statutorily prohibiting religious exercises, worship, instruction, etc.

146 Mary Ellen Klas, *Ruling on religious schools could steer more public money to private schools*, TAMPA BAY TIMES, July 1, 2020, <https://www.tampabay.com/florida-politics/buzz/2020/06/30/ruling-on-religious-schools-could-steer-more-public-money-to-private-schools/>.

147 Steven Green, *RIP state “Blaine Amendments”—Espinoza and the “no-aid” principle*, SCOTUSBLOG (June 30, 2020), <https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/#more-294819>.

148 *Id.*

149 Mark Scarberry, *Ambiguity in today’s Espinoza decision: status versus conduct/use*, posting to Law & Religion Issues for Law Academics listserv, religionlaw@lists.ucla.edu (June 30, 2020) (on file with author).

150 *Id.* Professor Scarberry went on to explain that “a modest application of” the status/use distinction “could allow a state to require a school somehow to segregate activities so that scholarship funds are used only for supposedly non-religious purposes.” *Id.* “A strong application,” however, “could allow a state to disqualify a religious school that does not provide a completely secular education. Functionally, that would disqualify all schools that have a religious character.” *Id.*

government funds. In the next few years, the court will almost certainly face a number of questions along these lines.”¹⁵¹

There are, to be sure, several obvious counterarguments to this expected next line of attack. First, educational choice programs do not aid schools engaging in religious activities—they aid students—and no money finds its way to any school, religious or non-religious, apart from the private and independent choices of parents. Thus, the argument goes, Blaine Amendments are not even implicated by choice programs. But the Montana Supreme Court (unlike courts in some other states) rejected that argument in *Espinoza*, holding that the program there aided schools in a way that implicated the state’s Blaine Amendment,¹⁵² and the U.S. Supreme Court was obligated to accept that determination of state law on certiorari.¹⁵³

Another possible counterargument—again, under the text of the Blaine Amendments themselves—is that the *purpose* of an educational choice program is entirely secular: to facilitate the general education of children. Any religious education that takes place is incidental to parental choice. There is, in other words, no payment or appropriation for a “sectarian purpose.”¹⁵⁴ But here again, the resolution of the question will be one of state law, and different state courts may well come to different conclusions.

It is quite possible, then, that some state courts will conclude that educational choice programs violate Blaine Amendments insofar as the programs allow public funds to be used for “sectarian purposes” or to support “religious worship, exercise, or instruction.” The question would then become whether invalidating a program (or excluding schools from a program) on that basis is permissible under the Free Exercise Clause of the U.S. Constitution. That is a question that *Espinoza* did not answer.

Of course, the Court *could have* answered that question in *Espinoza* by adopting the position set out in Justice Gorsuch’s concurring opinion. In his view, whether a Blaine Amendment “is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show [that the provision] serves some compelling and narrowly tailored governmental interest.”¹⁵⁵ But Chief Justice Roberts, famous for his incrementalist jurisprudence,¹⁵⁶ said only what he needed to say in order to

resolve the case before the Court: that the application of Montana’s Blaine Amendment in that case discriminated based on religious status, and discrimination based on religious status is prohibited by *Trinity Lutheran*.

V. WHAT *ESPINOZA* PORTENDS FOR RELIGIOUS USE-BASED ATTACKS ON EDUCATIONAL CHOICE PROGRAMS

Although *Espinoza* does not answer the religious use question, there are several indications in the Chief Justice’s opinion for the Court of how he (and a majority of the Court) might resolve the federal constitutionality of excluding schools from educational choice programs because of the religious uses to which scholarship monies might be put. And those indications strongly suggest that the Court would find such an exclusion just as constitutionally problematic as excluding a school because of its religious status.

A. Status and Use Discrimination Are Not Mutually Exclusive

First, the Court’s opinion makes clear that discrimination based on religious status and discrimination based on religious use are not mutually exclusive. While the opinion insisted that “the Montana Supreme Court’s basis for applying the no-aid provision to exclude religious schools . . . hinged solely on religious status”—not a desire to “ensur[e] that government aid does not end up being used for ‘sectarian education’ or ‘religious education’”—the Court nevertheless held that “[s]tatus-based discrimination remains status based *even if* one of its goals or effects is preventing religious organizations from putting aid to religious uses.”¹⁵⁷

This holding makes clear that the religious status versus religious use question is not the binary inquiry that *Trinity Lutheran* might have suggested it is. A regulation, in other words, can have twin goals—or twin effects—of discriminating based on religious status *and* religious use. The plaintiffs in *Espinoza* made this point in their briefing to the Court. As they noted, “many . . . families are *required* by their religious status to place their children in full-time religious schooling.”¹⁵⁸ “Catholics, for example, have a ‘duty’—set forth in canon law and stressed by the Second Vatican Council—‘of entrusting their children to Catholic schools wherever and whenever it is possible.’”¹⁵⁹ Barring such families from an educational choice program based

151 Andy Smarick, *What the Espinoza Decision Means for Other Aspects of Religious Freedom*, THE DISPATCH (July 7, 2020), <https://thedispatch.com/p/what-the-espinoza-decision-means>.

152 *Espinoza*, 2018 MT 306, ¶ 28, 435 P.3d at 612 (“We ultimately conclude the Tax Credit Program aids sectarian schools in violation of Article X, Section 6 . . .”). As noted *supra* note 7, other state courts of last resort have come to the opposite conclusion.

153 *Espinoza*, 207 L. E. 2d at 689 (“The Montana Supreme Court . . . held as a matter of state law that even such indirect government support qualified as ‘aid’ prohibited under the Montana Constitution.”).

154 The Nevada Supreme Court held as much in rejecting the claim that a publicly funded ESA program violated the state’s Blaine Amendment. See *Schwartz*, 382 P.3d at 899.

155 *Espinoza*, 207 L. Ed. 2d at 713 (Gorsuch, J., concurring).

156 See, e.g., Robert Barnes, *Roberts Court Moves Right, but with a Measured Step*, WASH. POST, Apr. 20, 2007, at A3 (“A view of incremental change is more in tune with Roberts’s stated goals of narrow decisions and more

consensus.”); Tom Curry, *Roberts’s Rule: Conservative but incremental*, NBCNEWS.COM, June 25, 2007, <http://www.nbcnews.com/id/19415777/ns/politics/t/roberts-rule-conservative-incremental/> (noting how Chief Justice Roberts has “tak[en] an incremental approach to curbing some of the court’s precedents”).

157 *Espinoza*, 207 L. Ed. 2d at 691 (emphasis added) (quoting *Espinoza*, 2018 Mont. 306, ¶¶ 8, 36, 38, 435 P.3d at 609, 613-14).

158 Brief for Petitioners at 18, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195).

159 *Id.* at 18-19 (quoting Vatican Council II, *Gravissimum educationis* (1965)); see also *Codex Iuris Canonici* 1983 c.798 (stating that “[p]arents are to entrust their children to those schools which provide a Catholic education” so long as they are able); Brief for Petitioners at 19, *Espinoza*, 207 L. Ed. 2d 679 (No. 18-1195) (“Likewise, many Orthodox Jews believe there is an obligation (mitzvah) to ensure their children receive a Jewish education, rooted in study of the Torah, which can only be fully accomplished by sending their children to full-time Orthodox Jewish schools.” (citing Brief for Agudath Israel of America as Amicus Curiae

on the religious *use* to which they would put their aid necessarily discriminates based on their religious *status*, as well. Again, status and use are not binary concepts.¹⁶⁰

The Court's recognition that the same regulation can have these twin goals or effects suggests, at a minimum, that it will examine future regulations closely to flush out status discrimination that is masked as use discrimination. Alternatively, it could indicate sympathy for Justice Gorsuch's position that status and use ultimately collapse into each other—that they are two sides of the same coin.

B. The Status/Use Distinction May Be Meaningless

Another passage in the *Espinoza* opinion suggests that a majority of the Court might be willing to go where Justice Gorsuch has already gone. Referring to Justice Gorsuch's concurrence (joined by Justice Thomas) in *Trinity Lutheran*, the Court noted that "[s]ome Members of the Court . . . have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status."¹⁶¹ The Court immediately followed that observation by stating, "We acknowledge the point but need not examine it here."¹⁶²

If there was no need for the Court to examine that point in *Espinoza*, then there was certainly no reason to flag it either. Yet the Court did flag it, and it is commonly recognized that the Court sometimes signals open questions of law that it might see the need—and have the desire—to resolve in an appropriate future case.¹⁶³ Thus, the Court's statement may evince a readiness to consider "whether there is a meaningful distinction between discrimination based on use or conduct and that based on status"¹⁶⁴—depending, of course, on how the lower courts apply *Espinoza* to status and use issues going forward.¹⁶⁵

C. Even if There Is a Distinction to Be Made Between Status and Use Discrimination, Both May Be Subject to Strict Scrutiny

But even if the Court is not prepared to abandon the status/use distinction, *Espinoza* suggests that the Court will apply the same searching scrutiny to laws that discriminate based on religious use as it does to those that discriminate based on religious status. In reviewing the latter category, the Court applies strict scrutiny,¹⁶⁶ requiring that the law be narrowly tailored to a compelling governmental interest.¹⁶⁷ And while the Court in *Espinoza* spent much time explaining exactly *how* the case involved status discrimination and thus required strict scrutiny,¹⁶⁸ it pointedly added that "[n]one 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."¹⁶⁹

This statement is significant, because in upholding the religious use-based exclusion in *Locke v. Davey*, the Court applied what many lower courts and commentators considered a standard short of strict scrutiny.¹⁷⁰ While the majority in *Locke* "refrained from stating what level of scrutiny it was applying"¹⁷¹—a point not lost on the dissent in that case¹⁷²—its description of the state's

Supporting Appellees at 1, 8, *Espinoza v. Mont. Dep't of Revenue*, 2018 Mont. 306, 435 P.3d 603 (No. 17-0492)).

160 Relatedly, in *Morrissey-Berru*, decided just a week after *Espinoza*, the Supreme Court seemed to recognize that engaging in religious conduct—specifically, "educating young people in their faith, inculcating [the church's] teachings, and training them to live their faith"—is part and parcel of *being* a religious school. 2020 WL 3808420, at *10. As the Court put it, these "are responsibilities that lie at the very core of the mission of a private religious school." *Id.*

161 *Espinoza*, 207 L. Ed. 2d at 692 (citing *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part)).

162 *Id.*

163 See VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA (2007) (arguing that the Court sends signals to litigants indicating issues that are important to a majority of the Justices, and that these signals, in turn, prompt litigants to develop cases presenting those issues to the Court).

164 *Espinoza*, 207 L. Ed. 2d at 692.

165 If lower courts split on the question of whether there is a meaningful distinction to be made, the likelihood of the Supreme Court's resolving the question would, of course, go up significantly.

166 *Espinoza*, 207 L. Ed. 2d at 692 ("Such status-based discrimination is subject to 'the strictest scrutiny.'" (quoting *Trinity Lutheran*, 137 S. Ct. at 2022); *id.* at 695 ("When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny.") (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).

167 *See id.* at 696.

168 *Id.* at 690-91.

169 *Id.* at 692 (citation omitted). As noted *supra* note 68, the Court followed this statement with a citation to *Church of the Lukumi Babalu Aye*, in which it invalidated a law banning ritualistic animal slaughter and stated 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." 508 U.S. at 546.

170 *See, e.g.*, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1267 (10th Cir. 2008) ("*Locke v. Davey* introduces some uncertainty about the level of scrutiny applicable to discriminatory funding. The majority opinion refrained from stating what level of scrutiny it was applying to Joshua Davey's First Amendment claim, but dropped two hints that the proper level of scrutiny may be something less than strict."); Susanna Dokupil, *Function Follows Form: Locke v. Davey's Unnecessary Parsing*, 2004 CATO SUP. CT. REV. 327, 347 (stating that the Court "dispens[ed] with strict scrutiny"); Mark Strasser, *Free Exercise and Comer: Robust Entrenchment or Simply More of A Muddle?*, 52 U. RICH. L. REV. 887, 916 (2018) ("*Locke* rejected that strict scrutiny was triggered merely because a religious program was receiving less favorable treatment . . .").

171 *Colo. Christian Univ.*, 534 F.3d at 1267; *see also* Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 729 (2005) (stating that the Court "duck[ed] the issue"); Dokupil, *supra* note 170, at 346 ("[O]ne would expect the Court to apply 'strict scrutiny.' Yet the Court punts. It never squarely identifies the appropriate level of scrutiny for Davey's free exercise claims, much less applies the strict scrutiny mandated by *Lukumi*.")

172 *See Locke*, 540 U.S. at 730 (Scalia, J., dissenting) ("The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not."); *see also id.* at 730 n.2 (suggesting the Court required only a rational basis to support the exclusion, rather than a compelling interest).

interest as “historic and substantial,”¹⁷³ rather than compelling, and its dearth of discussion regarding the tailoring of the use-based exclusion to the state’s interest were commonly seen as a departure from earlier cases, such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, that had applied strict scrutiny to laws targeting religious uses or conduct for disfavored treatment. That the Court in *Espinoza* went out of its way to stress that it was not “suggest[ing]” agreement “that some lesser degree of scrutiny applies to discrimination against religious uses of government aid”¹⁷⁴ may well indicate a discomfort with *Locke* and its seeming abandonment of strict scrutiny in at least some cases where religious uses are targeted for unfavorable treatment.

But even if that is too much to read into the Court’s statement and the Court ultimately stands by *Locke*, there is another aspect of the *Espinoza* majority opinion that provides some insight into how the Court will likely apply *Locke* in future religious use discrimination cases. *Locke* had noted that the substantial interest that supported Washington’s devotional theology exclusion was also a historic interest—one dating back to the founding era.¹⁷⁵ But *Locke* did not clearly hold that this temporal characteristic of the state’s interest was *required* to sustain a law that discriminates against religious use.¹⁷⁶ *Espinoza*, on the other hand, comes close to holding precisely that. The Court rejected the Department’s attempt to justify the application of Montana’s Blaine Amendment under *Locke*, holding that “no comparable ‘historic and substantial’ tradition supports Montana’s decision to disqualify religious schools from government aid.”¹⁷⁷ And while the Department (and Justice Sotomayor, in dissent) “argue[d] that a tradition against state support for religious schools arose” a bit later—“in the second half of the 19th century,” with the adoption of the Blaine Amendments themselves—the majority held that “such evidence . . . cannot create” an “early practice” or “establish an early American tradition” as contemplated in *Locke*.¹⁷⁸

Thus, even if the Court, in future cases, concludes that a substantial, rather than compelling, interest is sufficient to justify religious use-based discrimination, it seems clear that any old substantial interest will not do. Rather, it must be an interest rooted in early American tradition—a “consistent early tradition”

at that¹⁷⁹—dating back specifically to the founding era. In that respect, this standard could be viewed as *more* demanding than strict scrutiny, which may require a weightier (i.e., compelling) governmental interest but does not require that the interest be temporally rooted in the nation’s founding.

D. In Distinguishing Between Status and Use Discrimination, Use Must Be Construed Narrowly

Finally, even if the Court is not prepared to abandon the status/use distinction, and even if it subjects use-based exclusions to a degree of scrutiny less searching than that by which it judges exclusions based on status, the majority’s opinion in *Espinoza* nevertheless suggests that the Court will look at purportedly use-based exclusions with a suspicious eye and be especially reluctant to treat broad, wholesale exclusions as use-based. The broader an exclusion, it seems, the more likely the Court will be to treat it as one targeting religious status.

In distinguishing the devotional theology exclusion in *Locke* from the wholesale exclusion of religious schools in *Espinoza*, the Court repeatedly stressed the narrowness of the exclusion in *Locke*. “Washington,” it said, “had ‘merely chosen not to fund a distinct category of instruction’: the ‘essentially religious endeavor’ of training a minister ‘to lead a congregation.’”¹⁸⁰ “Apart from that narrow restriction,” the Court explained, “Washington’s program allowed scholarships to be used at ‘pervasively religious schools’ that incorporated religious instruction throughout their classes.”¹⁸¹ “By contrast,” the Court noted, “Montana’s Constitution does not zero in on any particular ‘essentially religious’ course of instruction at a religious school.”¹⁸² Rather, the Montana Constitution “bar[red] all aid to a religious school ‘simply because of what it is.’”¹⁸³

The italicized language in the quoted sentences above suggests that, going forward, the Court will carefully examine purportedly use-based exclusions to ensure they are indeed use-based, and that only “narrow” exclusions that “zero in on” an “essentially” religious activity will qualify. In other words, if the status/use distinction survives, the Court will be quick to expose status-based discrimination that comes in use-based clothing.

VI. CONCLUSION

Espinoza is a landmark education decision, clearing the legal path for expanded educational opportunity for hundreds of thousands of schoolchildren throughout the country. The decision will prevent courts from invalidating educational choice programs simply because they include religious options, as the Montana Supreme Court had done. It will likewise prevent legislatures and agencies from affirmatively excluding schools from educational

173 *Id.* at 725 (majority opinion).

174 *Espinoza*, 207 L. Ed. 2d at 692.

175 *Locke*, 540 U.S. at 725; *see also id.* at 722 (“Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an ‘established’ religion.”); *id.* at 723 (“Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.”).

176 *See Colo. Christian Univ.*, 534 F.3d at 1255 (“[*Locke*] suggests, even if it does not hold, that the State’s latitude to discriminate against religion is confined to certain ‘historic and substantial state interest[s]’” (alteration in original) (quoting *Locke*, 540 U.S. at 725)).

177 *Espinoza*, 207 L. Ed. 2d at 693 (quoting *Locke*, 540 U.S. at 725).

178 *Id.* at 694 (emphasis omitted).

179 *Id.* at 693 n.3 (emphasis added) (noting that Justice Breyer, in dissent, had “not identifi[ed] a consistent early tradition, of the sort invoked in *Locke*, against support for religious schools”).

180 *Id.* at 692 (quoting *Locke*, 540 U.S. at 721).

181 *Id.* at 692-93 (emphasis added) (quoting *Locke*, 540 U.S. at 724-25).

182 *Id.* at 693 (emphasis added) (quoting *Locke*, 540 U.S. at 721).

183 *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

choice programs simply because of their religious status, as the Montana Department of Revenue did.

But educational choice opponents are a dogged bunch, and they will continue to attack educational choice programs—in statehouses and courthouses—on the theory that they permit public funds to be put to religious uses in violation of state Blaine Amendments. The Court could have headed off those attacks in *Espinoza*. Although it declined to do so, it did give a strong indication of how those future battles will end.

The Court may well be prepared to abandon the status/use distinction that has developed in its jurisprudence since *Trinity Lutheran* and treat all religion-based exclusions—whether targeted at status or use—as presumptively unconstitutional. But even if the Court decides to preserve the distinction, it seems clear that the Court will rigorously examine religious exclusions in educational choice and other public benefit programs, flushing out status-based discrimination that is masked as use-based. And even when dealing with a truly use-based exclusion, the Court will likely subject it to the same strict scrutiny applicable to status-based exclusions, or to some similarly demanding level of scrutiny that can only be satisfied if the exclusion is necessary to advance a narrow, specific governmental interest that is firmly rooted in a well-established, founding-era American tradition. One way or another, ostensibly use-based exclusions in educational choice programs are likely to suffer the same fate as the status-based exclusion in *Espinoza*.

