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AFTERWORD—It seems clear that Commissions hearing similar cases in the future will avoid putting on the record statements evincing a hostility to religion. That will eliminate the free exercise claim if the baker or other provider of services is found in violation of state or local anti-discrimination provisions. When inevitably another such case arises, the Court will have to determine how best to categorize the action possessing an expressive component. When creating a cake, arranging flowers, or engaging in some other activity that has an expressive component (that is, something analogous to nude dancing or burning a draft card or an American flag), is this activity better understood as protected free speech or expression, or as a commercial act or conduct ordinarily subject to state and local anti-discrimination laws?

The issue of the proper level of generality is often an issue in free expression and free exercise cases. How should the Court determine what level of generality is the proper constitutional level?

ESPINOZA V. MONTANA DEP'T of REVENUE, 591 U.S. ___, 2020 WL 3518364 — In a 5-4 decision, the Court held unconstitutional a Montana regulatory provision prohibiting families receiving scholarship monies to use those funds to attend religiously-affiliated private schools. The Montana legislature adopted a "school choice" plan allowing its taxpayers to receive a tax credit of up to $150 for donating money to a "school scholarship organization." When a child was awarded a school scholarship, the child's family notified the scholarship organization (Big Sky Scholarships was the sole entity engaged in granting scholarships) and the organization sent the scholarship funds directly to the school. Montana funded the tax credits. The Montana Constitution and state law forbid direct aid ("no-aid") to religiously-affiliated schools. In light of this law and in administering the school choice program, the Montana Department of Revenue issued Rule 1, forbidding the school scholarship organization (Big Sky) from directing any of its scholarship funds to any school "owned or controlled in whole or in part by any church, religious sect, or denomination." Parents of schoolchildren who received scholarship funds, or who were eligible for such funds, sued, claiming Rule 1 was contrary to the school choice statute, not required by the Montana Constitution, and violative of the Free Exercise Clause. In the Supreme Court the parties agreed that the scholarship program did not violate the Nonestablishment Clause of the First Amendment. The issue was whether the no-aid provision of the state constitution and law violated the Free Exercise Clause. The Court held it did: "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools." Because this provision "plainly excludes schools from government aid solely because of religious status," it was unconstitutional. The Court cited *Trinity Lutheran* as on point. Like *Trinity Lutheran*, this case "turns expressly on religious status and not religious use." And the "Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*." The Court rejected the Department of Revenue's argument that the benefit in *Trinity Lutheran* was "completely non-religious," while the scholarship aid "could be used for religious ends by some recipients." It did so by characterizing the Montana Supreme Court's decision as applying the no-aid provision "solely on religious status."

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As was also the case in *Trinity Lutheran*, the applicability of *Locke v. Davey* was raised. The Court held *Locke* inapposite. It offered two reasons for its conclusion. First, Davey was denied the scholarship "because of what he proposed to *do*." Second, the *Locke* Court looked at a "historic and substantial" state interest lacking in the present case: opposition to funding the training of clergy, because of the American tradition opposing such state support. No such interest existed in this case: Unlike the opposition to paying for the training of clergy, many states in the late 18th and early 19th centuries "provided financial support to private schools, including denominational ones." This, of course, was in part because no public ("common") schools then existed. Further, any "tradition" of no-aid to religious organizations from the 1870s on was marked by anti-Catholic bigotry. The requirement that newly-created states adopt a "no-aid" provision in their constitutions, called state Blaine Amendments, was due largely to religious prejudice. That Montana re-adopted its no-aid provision in the 1970s, when no such bigotry existed, was not enough to equate its laws with the facts in *Locke*. Applying strict scrutiny, the no-aid provision was unconstitutional.

The concurrence of Justice Thomas, joined by Justice Gorsuch, urged a reconsideration of the Court's Nonestablishment Clause jurisprudence, which "continues to hamper free exercise rights." That reconsideration included an understanding that the Clause should not have been incorporated into the Due Process Clause of the Fourteenth Amendment, or, even if it somehow could be incorporated, was given a "far broader test than the Clause's original meaning." That reconsideration should lead the Court to overturn *Locke*, which "incorrectly interpreted the Establishment Clause and should not impact free exercise challenges." Justice Alito wrote only to provide a history of Montana's no-aid provision. The no-aid provision was "modeled on the failed Blaine Amendment," which "was prompted by virulent prejudice against immigrants, particularly Catholic immigrants." Justice Gorsuch's concurrence returned to his concurrence in *Trinity Lutheran*, arguing that the distinction between religious status and religious use was "destined to yield more questions than answers:" "Does Montana seek to prevent religious parents and schools from participating in a public benefits program (status)? Or does the State aim to bar public benefits from being employed to support religious education?" More importantly, the Free Exercise Clause itself indicated actions, not merely status, as would be the case in which the "right to conscience" rather than the right to free exercise was protected.

Justice Ginsburg dissented, arguing the decision of the Montana Supreme Court did not discriminate, because it abolished the school choice program in its entirety, thus affecting religious and secular public schools in the same fashion. Justice Breyer also dissented. He assumed an "inherent tension between the Establishment and Free Exercise Clauses." To remedy that tension, he would allow states to exercise "room for play in the joints." (This is from *Walz v. Tax Comm'n*, 387 U.S. 664, 669 (1970), a case in which New York's decision not to tax religious institutions was held constitutional against a Nonestablishment Clause challenge.) Some state actions would be neither forbidden by the Nonestablishment Clause nor required by the Free Exercise Clause. And this is one of those discretionary cases in which the state may choose to aid or not aid parents in sending their children to religiously affiliated schools. Justice Breyer concluded that this case was more similar to *Locke* than *Trinity Lutheran*, because the issue was closer to "an essentially religious endeavor." Justice Sotomayor's dissent first concluded that the "Court fails to heed

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Article III principles." Then she concluded the Court got the substantive answer wrong. As she dissented in *Trinity Lutheran*, she dissented in *Espinoza* for similar reasons.

AFTERWORD

The Court is divided into three, and maybe four, distinctive groups regarding the Free Exercise Clause, which has a spillover effect on the Court's interpretation of the Nonestablishment Clause. Justices Gorsuch and Thomas would interpret the Free Exercise Clause broadly, which is why they emphasize the Clause protects religious "use" or "actions," not simply being religious ("status"). In Justice Thomas's case, his interest is in massively reducing the constitutional footprint of the Nonestablishment Clause. That would in turn allow, in his view, a greater flourishing of Free Exercise Clause liberty. Justice Alito appears close to this position, although he often assesses Free Exercise Clause claims in light of history. And in this case, the specific history of the Blaine Amendment, which Congress required Western states to include in their constitutions when applying for admission to the Union, demonstrates a large anti-Catholic prejudice. That prejudice makes those state Blaine Amendments a target for constitutional challenges. A second group is led by Chief Justice Roberts. He is ready to carve out additional Free Exercise protections without making large changes in existing Religion Clause jurisprudence. The Court's opinion by Chief Justice Roberts restricts the impact of *Locke v. Davey*. It can do so first, by limiting *Locke* to a type of "use" case, as it did in *Trinity Lutheran*. Thus, when the discrimination (as occurred in both *Trinity Lutheran* and *Espinoza*) is characterized as "status" discrimination (who you are v. what you do), that makes *Locke* inapt. Second, the Court further limits *Locke* by noting the historic importance of the state's interest in not funding the training the clergy. One problem with this second limitation on *Locke* is its level of generality. Although the historical record is quite complex, it's clear that some states in the early national era wanted to be out of the business of aiding religion, not merely out of the business of aiding the training of clergy. That former level of generality is closer to the no-aid principle.

Justice Breyer is part of a third group in the Court. He prefers a relatively modest Free Exercise Clause joined by a modest Nonestablishment Clause. That would leave state governments with large swaths of discretion to allow or prohibit certain interactions with religion. That is the reason for the emphasis on the "play in the joints." Justice Kagan appears similarly inclined. Finally, Justices Ginsburg and Sotomayor want a limited Free Exercise Clause joined by a broad Nonestablishment Clause.

The Roberts Court has been able to avoid any re-assessment of *Employment Division v. Smith* (again, which applies to laws characterized as neutral and generally applicable) because it characterizes the government's actions as discriminatory (*Trinity Lutheran*, *Masterpiece Cakeshop*, and *Espinoza*) or as an exceptional (*Hosanna-Tabor* and *Our Lady of Guadalupe School* ministerial exception). As a result, the Court has not attempted any transformational changes to the Free Exercise Clause. Thus, the contours of the Clause remain substantially undefined.

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