

The Dimming of Blaine’s Legacy

By Clint Bolick*

The world brightened for school choice advocates with the U.S. Supreme Court’s decision in *Espinoza v. Montana Department of Revenue*.¹

In that decision, the Court curtailed the remarkably enduring legacy of a largely forgotten politician, U.S. Senator James G. Blaine. Blaine ran for president in 1884 against Grover Cleveland, whose Democratic Party was castigated for ostensibly supporting “rum, Romanism, and rebellion.” Though Blaine was never elected president, his anti-immigrant and anti-Catholic views were embedded in constitutional provisions in 37 or 38 states,² prohibiting public aid for “sectarian” schools. Those “Blaine amendment” provisions were used to prevent or strike down, among other things, school choice programs that included religious schools among the options.

In *Espinoza*, the Court held that a Blaine amendment, owing both to its bigoted pedigree and its discrimination on the basis of religious status, could not be applied to exclude religious schools and their patrons from a school-choice program. Such status-based discrimination, the Court ruled, violated the First Amendment guarantee of free exercise of religion.

*The author serves as a justice on the Arizona Supreme Court, a research fellow for the Hoover Institution, and an adjunct professor in constitutional law at the Arizona State University and University of Arizona law schools. Bolick cofounded and served as vice president for litigation at the Institute for Justice (1991–2004), president of the Alliance for School Choice (2004–2007), and vice president for litigation at the Goldwater Institute (2007–2016). The author thanks Emily Jordan, a second-year law student at Boston College Law School, for her outstanding research assistance.

¹ *Espinoza v. Mont. Dep’t. of Revenue*, 140 S. Ct. 2246 (2020).

² *Id.* at 2259 (the majority counts 37); *id.* at 2269 (Alito, J. concurring) (counting 38).

I. Blaine's Legacy

Supreme Court decisions rarely provide detailed history lessons, but *Espinoza* does. In fact, it even includes a historical cartoon in a concurring opinion by the justice who surely would be voted the least likely to publish a cartoon: Justice Samuel Alito.

In the Founding era and the 19th century, governments at every level provided financial support for private, secular, and religious primary and secondary schools.³ But late in the 19th century, immigration from predominantly Catholic nations, especially Ireland, alarmed nativist groups such as the Ku Klux Klan. One tactic designed to thwart Catholic influence was a proposed national constitutional amendment that would prohibit government aid to sectarian schools. The amendment was narrowly defeated, but nativists were much more successful in amending state constitutions or inserting an amendment into constitutions of newly admitted states in the west. The 1871 cartoon from *Harper's Weekly* presented in Justice Alito's concurrence depicts Catholic priests as crocodiles voraciously approaching schoolchildren while the public school crumbles in the background.⁴

Although "sectarian" today is considered synonymous with "religious," in the late 19th century it was considered a code word for Catholic, as well as Mormon, Jewish, and other denominations outside the mainstream. The campaign against funding for sectarian schools dovetailed with the common-school movement headed by Horace Mann, which was intended to inculcate mainstream Protestant values. Common-school advocates supported Blaine amendments and used them to maintain Protestant hegemony over public-school funding and to exclude Catholic schools.⁵

The language of the state Blaine amendments varies but has common denominators, such as prohibiting public funding for the "aid" or "benefit" of sectarian schools, sometimes both directly and indirectly. The Montana provision at issue in *Espinoza* is typical, stating that the state and its subdivisions "shall not make any direct or indirect appropriation . . . for any sectarian purpose or to aid any . . . school . . . controlled in whole or in part by any church,

³ *Id.* at 2258 (majority op.).

⁴ *Id.* at 2269–70 (Alito, J., concurring).

⁵ *Id.* at 2271–72.

sect, or denomination.”⁶ The prohibition would not apply to public schools, even though they were Protestant in orientation, because they were controlled by the state rather than the church. Montana did not voluntarily adopt the Blaine amendment but rather was obliged to do so as a condition of statehood.⁷

Even after the Blaine amendments were adopted in dozens of states, the anti-immigration efforts persisted. In the early 20th century, those efforts grew even more overt, taking the form of state laws backed by the Ku Klux Klan that forbade instruction in foreign languages or required students to attend public rather than private schools. The laws were struck down by the Supreme Court in a series of decisions in the 1920s. In the most famous of these, *Pierce v. Society of Sisters* in 1925, the Court held “[t]he fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”⁸ The Court declared that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁹

The showdown between parental liberty and the Blaine amendments, however, would not come for nearly another century. While the nativists were unsuccessful in eradicating the immigrants’ private schools altogether, their success in excluding them from school funding would loom large when efforts surfaced many decades later to provide public support for religious schools and those who patronize them.

II. The Long and Winding Road to *Espinoza*

In the 1970s, alarmed by the closure of inner-city Catholic schools, state legislators across the country devised programs to rescue them. Dubbed “parochiaid,” programs in Pennsylvania, New York, and elsewhere funneled direct grants to private schools and provided

⁶ Mont. Const. art. X, § 6(1).

⁷ *Espinoza*, 140 S. Ct. at 2268–69 (Alito, J., concurring).

⁸ 268 U.S. 510, 535 (1925).

⁹ *Id.*

tuition assistance to parents.¹⁰ These programs were challenged under the First Amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion." The Establishment Clause was applied to the states through the Fourteenth Amendment.

During the Warren Court era, in which liberals dominated the U.S. Supreme Court, the prohibition against religious establishment evolved into a more rigid separation of church and state. This evolution was reflected in a 1973 decision striking down parochial programs. In *Committee for Public Education v. Nyquist*, the Court reasoned that because the programs were limited to private schools, which were predominantly religious, they had the impermissible "primary effect" of advancing religion.¹¹ The Court struck down all forms of aid, including tuition assistance to parents and direct aid to the schools.

Nyquist appeared to kill the idea of school vouchers in its infancy. But the decision's reasoning seemed to leave the door open, if only a crack. It was grounded in a principle that would later take root in Establishment Clause jurisprudence: neutrality. The programs under review in *Nyquist* were tilted exclusively toward private schools. A footnote in the decision seemed to provide hope that a more neutral program might survive scrutiny. (A note to aspiring litigators: always read the footnotes!) In footnote 38, the Court expressly reserved the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."¹²

When my colleagues and I at the Institute for Justice began working with school-choice activists in the 1990s to develop and defend programs to assist low-income children trapped in failing public schools, our goal was to drive an entire movement through that footnote. Fortunately, a 1983 decision in a case called *Mueller v.*

¹⁰ See Clint Bolick, *Voucher Wars: Waging the Legal Battle over School Choice* 4–5 (2003). This book, published by the Cato Institute, chronicles the intense 12-year litigation battle between the enactment of the Milwaukee parental choice program in 1990 and the U.S. Supreme Court decision upholding Cleveland school vouchers in 2002.

¹¹ 413 U.S. 756 (1973).

¹² *Id.* at 782 n.38.

Allen—in which I wrote my first-ever amicus curiae (friend of the court) brief—seemed to vindicate our approach. By a 5-4 vote (the same no-margin-for-error vote that would characterize virtually every Supreme Court case involving school choice), the Court upheld a Minnesota program allowing families to deduct K-12 educational expenses, including tuition, from their state income taxes. The deduction was available to both private- and public-school families. The challengers pointed out that because public schools are free, nearly all of the deductions were claimed for private-school expenses. But the majority found that the program fit within *Nyquist's* footnote 38 exception. “The historic purposes of the [Establishment] Clause,” the Court ruled, “simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.”¹³

Those two principles—neutrality and private individual choices—would furnish the twin components of our strategy for designing and defending school-choice programs. Neutrality meant that religious schools were only one available option. The path of funding would characterize programs as either direct aid (the provision of funding or other assistance directly to religious schools) or indirect (religious schools benefit only through the independent choices of third parties). If choice programs were neutral and based on private choice, we believed, they satisfied the Establishment Clause.

The school-choice opponents, teacher unions and their allies, pursued a multibarreled approach. Their preferred strategy was to defeat school choice under the Establishment Clause. They hoped that Supreme Court appointments after *Mueller* would spell the demise for school choice. But the opponents also raised an array of state constitutional challenges, including Blaine amendments in states whose constitutions included them. This strategy gave the opponents two strategic advantages. First, they needed to win on only one of the theories they deployed to challenge the programs, whereas the defenders had to prevail on all of them. Second, they could secure a victory on “independent state grounds”: a state supreme court’s interpretation of its own constitution is the final word; if no federal

¹³ 463 U.S. 388, 400 (1983).

constitutional or statutory issue is presented, it cannot be appealed to the U.S. Supreme Court.

Even during the earliest days of defending school-choice programs in the early 1990s, we were aware that if we lost a case on Blaine amendment grounds, we would have no recourse unless we could develop a federal constitutional challenge to the amendments. But, of course, our first priority was to successfully defend the programs. In that regard, our strategy was to conflate the Blaine amendment analysis with the federal constitutional argument. Even under the Establishment Clause, we believed, it is impermissible to “aid” religious schools; but these programs didn’t aid schools, they aided children, whose families could use their funds wherever they chose. So, they satisfied not only Establishment Clause scrutiny but the Blaine amendments as well.

Our strategy paid off in the first two state supreme court decisions upholding school-choice programs under both the Establishment Clause and Blaine amendment. In sustaining the Milwaukee Parental Choice Program by a 4-3 vote, the Wisconsin Supreme Court ruled that, although its Blaine amendment was more “specific” than the Establishment Clause, the program did not violate it for the same reason it did not violate the Establishment Clause: “public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties.”¹⁴

At around the same time, the Arizona Supreme Court upheld, by a 3-2 vote, a program that provides tax credits to taxpayers who contribute to private-school scholarship funds. The court ruled that, because the program allowed taxpayers to keep their own money, the state’s version of the Blaine amendment was not implicated given that the funds were never public.¹⁵ The court went on, however, to conclude that because Arizona was granted statehood after most Blaine amendments were adopted, they shared no apparent historical connection with the Arizona provision. Were such a connection established, the court declared, “we would be hard pressed to

¹⁴ Jackson v. Benson, 578 N.W.2d 602, 620–21 (Wis. 1998).

¹⁵ Kotterman v. Killian, 972 P.2d 606, 618 (Ariz. 1999).

divorce the amendment's language from the insidious discriminatory intent that prompted it."¹⁶

Meanwhile, the U.S. Supreme Court was deciding numerous cases involving direct and indirect aid to religiously affiliated entities, some of them implicating Blaine amendments. In particular, in *Mitchell v. Helms* in 1999, the Court upheld against an Establishment Clause challenge the use of federal funds to lend educational materials and equipment to both public and private schools, overruling contrary prior decisions in the process. The plurality opinion by Justice Clarence Thomas held that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."¹⁷ The plurality buttressed its opinion by tracing the history of the Blaine amendments to demonstrate that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."¹⁸ The plurality concluded, tantalizingly from the perspective of possible future challenges to Blaine amendments, that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, borne of bigotry, should be buried now."¹⁹

But that opinion received only four votes. The deciding votes were cast by Justices Sandra Day O'Connor and Stephen Breyer, concurring only in the judgment and emphasizing that a direct aid program like the one at issue is permissible only if no "public funds ever reach the coffers of religious schools" and could only be used for secular purposes.²⁰ As the usual swing vote, Justice O'Connor's divergence from the plurality cast her in doubt on the constitutionality of school choice, where public funds would ultimately enter religious school coffers, albeit only as a result of independent decisions by parents.

The suspense over which way the duo would go lasted only two years, as the Court in 2002 upheld the Cleveland school voucher program in *Zelman v. Simmons-Harris*, by a (you guessed it) 5-4 vote,

¹⁶ *Id.* at 624.

¹⁷ 530 U.S. 793, 827 (2000).

¹⁸ *Id.* at 828.

¹⁹ *Id.* at 829.

²⁰ *Id.* at 867 (O'Connor, J., concurring in the judgment).

with Justices O'Connor and Breyer parting company with each other. The program, designed to help low-income children escape a failing public-school system, was part of a broader array of school choices, including charter schools. The majority emphasized that the program involved "true private choice" and "is neutral in all respects toward religion." In particular, the program "confers educational assistance to a broad class of individuals defined without reference to religion."²¹

The dissents were histrionic. Justice David Souter echoed the views of his fellow dissenters, arguing that the Court should "ignore" the "severe educational crisis" in the Cleveland public schools, the "wide range of choices" available within the public-school system, and the "voluntary character of the private choice." Instead, he characterized the decision as "remov[ing] a brick from the wall that was designed to separate religion and government." He warned of "religious strife" akin to the Balkans, Northern Ireland, and the Middle East.²²

Although those dire predictions of social upheaval would not come to pass, the difference in perspectives between the majority and dissenters could not be more profound. Those differences still persist 18 years later and manifested themselves in *Espinoza*.

III. Blaine Moves to the Forefront

Having lost what I characterized at the time as the Super Bowl for school choice, opponents doubled down on state constitutional challenges. Even before the *Zelman* decision, Robert Chanin, then-general counsel for the National Education Association and my constant litigation adversary, declared that if they lost on the Establishment Clause, they still had plenty in their state constitution "toolbox," especially Blaine amendments.²³

The Blaine amendments were deployed not only in court but in the legislative arena. Even after *Zelman*, many school-choice opponents argued that although such programs might be permissible in other states, they would be unconstitutional in theirs because state constitutional provisions were more restrictive than the Establishment Clause.

²¹ 536 U.S. 639, 653 (2002).

²² *Id.* at 685–86 (Souter, J., dissenting).

²³ Bolick, *supra* note 10, at 156.

Despite strong opposition, several states passed school-choice programs following *Zelman*, and the programs inevitably faced challenges under state constitutional provisions. Many programs were upheld. Some were invalidated on state constitutional grounds other than the Blaine amendments. The Florida Supreme Court, for instance, struck down a voucher program holding that it violated the state constitutional guarantee of uniform public schools.²⁴

Still others were struck down under Blaine amendments. The Arizona Supreme Court, which had upheld scholarship tax credits, invalidated school vouchers. But the court emphasized that Arizona's constitutional provision, unlike similar ones in other states, forbids aid to all private schools, secular and religious alike. The court considered the vouchers "aid" because private schools were the only possible destination for the money.²⁵ Likewise, the Colorado Supreme Court held in 2015 that a school district voucher program violated its Blaine amendment, writing that "this stark constitutional provision makes one thing clear: A school district may not aid religious schools."²⁶ The court rejected the district's invitation "to wade into the history of [the constitutional provision's] adoption and declare that the framers created [the provision] in a vulgar display of anti-Catholic animus,"²⁷ and held that the application of the Blaine amendment did not violate the First Amendment.

Meanwhile, at the national level, the Blaine amendment figured prominently in a Supreme Court case from Washington state. The case involved a state scholarship program that could be used at any college, public, private, or religious, and for any major—except studying for the ministry. That narrow exclusion, the state argued, was compelled by its Blaine amendment.

²⁴ *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

²⁵ *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009). Despite striking down the voucher program, the court stated that "[t]here well may be ways of providing aid to these student populations without violating the constitution." *Id.* at 1185. That suggestion helped give rise to the idea of education scholarship accounts, which place education funds at the disposal of families to use for a variety of educational purposes, including private-school tuition but public-school services as well. The Arizona Court of Appeals upheld that program under the same state constitutional provision. *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. App. 2013).

²⁶ *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 351 P.3d 461, 470 (Colo. 2015).

²⁷ *Id.* at 471.

Joshua Davey, a student pursuing a divinity degree, argued that the exclusion, among other things, violated the free exercise clause. In a 7-2 decision authored by Chief Justice William Rehnquist,²⁸ the Court upheld the exclusion of training for the ministry from the aid program in *Locke v. Davey*. The Court invoked its oft-used metaphor that there is “play in the joints” between the two First Amendment religion clauses, meaning that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”²⁹ The majority concluded that, in the context of a scholarship program “that goes a long way toward including religion in its benefits,” the narrow exclusion of theology students, by virtue of its state constitutional prohibition, did not evidence hostility toward religion.³⁰ The Court found “neither in the history or text” of Washington’s Blaine amendment was there anything “that suggests animus toward religion.” Indeed, state resources traditionally were excluded from supporting study for the ministry. Thus, the majority concluded that the state’s “interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden” on the scholarship recipients.³¹

Justice Antonin Scalia, joined by Justice Thomas, dissented. In typically caustic fashion, Scalia disdained the “play in the joints” principle, remarking that “I use the term ‘principle’ loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives.”³² Rather, the dissenters emphasized that the program discriminated on its face against religion, and argued that the supposed lightness of the burden, and the ostensible absence of religious animus, were either not true or insufficient to justify the discrimination.

²⁸ Rehnquist was reputedly a skillful and strategic chief justice. According to insider accounts, he would often vote with the majority against his own position (the chief justice votes last) in order to exercise his prerogative to assign the opinion to himself, whereupon he would write the narrowest possible decision. *Locke v. Davey* bears the hallmarks of that approach.

²⁹ 540 U.S. 712, 718–19 (2002) (quoting *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 669 (1970)).

³⁰ *Id.* at 724.

³¹ *Id.*

³² *Id.* at 728 (Scalia, J., dissenting) (emphasis in original).

Locke v. Davey gave both hope and worry to school choice supporters and opponents alike. On the one hand, two justices who had joined the plurality's veiled attack on Blaine amendments only four years earlier in *Mitchell v. Helms*, Chief Justice Rehnquist and Justice Anthony Kennedy, were now saying they saw no evidence of hostility toward religion in the text or history of Washington state's Blaine amendment. On the other hand, the majority emphasized the "relatively minor burden" on scholarship students, observing that the program otherwise included religious participants among its beneficiaries. The decision gave no clear indication of what would happen if a state invoked a Blaine amendment to exclude religious beneficiaries altogether from a neutral aid program.

It would take another 16 years to find out.

IV. False Hope

School-choice advocates attempted repeatedly to convince the Court to decide the question of a broader exclusion, unjustified by tradition, left open in *Locke v. Davey*. They thought they finally succeeded when the Court agreed to decide *Trinity Lutheran Church of Columbia, Inc. v. Comer*.

The facts were not the normal stuff of Supreme Court decisions. The plaintiff operated a preschool and daycare center that wanted to replace its pea gravel playground surface with scrap tire rubber. The state of Missouri had a program offering reimbursement to non-profits that wanted to resurface playgrounds with recycled tires. But the state denied Trinity Lutheran's grant application because it was a church. The federal court of appeals held that although the Establishment Clause would not forbid such a grant, the Free Exercise Clause did not require the state to disregard the prohibition of aid to religious entities in its Blaine amendment.

When the Supreme Court granted review, anti-Blaine advocates were optimistic. The ruling striking down the church's exclusion from the program, by a surprising 7-2 vote, appeared at first glance to vindicate those hopes. Six members of the Court—Chief Justice John Roberts (who authored the opinion) along with Justices Kennedy, Thomas, Elena Kagan, Alito, and Neil Gorsuch—held that while programs that were neutral toward religion were upheld against free exercise challenges, "[w]e have been careful to distinguish such laws from those that single out the religious for

disfavored treatment.”³³ The state’s policy of excluding religious nonprofits, the Court observed, “puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.”³⁴ Placing a religious institution in that dilemma, the Court held, triggered strict scrutiny, requiring the state to demonstrate a compelling interest served by the narrowest possible means.

On its face, the decision seemed like a decisive victory for anti-Blaine advocates. Seven votes were cast to strike down the discriminatory policy (although Justice Breyer concurred only in the result). The dissenting opinion by Justices Sonia Sotomayor and Ruth Bader Ginsburg lamented the apparent demise, or at least narrowing, of *Locke v. Davey*.³⁵ By a clear majority, the Court seemed to clear the way for Free Exercise Clause challenges to all manner of programs, including school choice, that excluded religious options. If it all seemed for anti-Blaine advocates too good to be true . . . it was.

Although the majority opinion was written in clarion terms, four justices (Roberts, Kennedy, Alito, and Kagan) joined in footnote 3, which declared, quite remarkably: “This case involves express discrimination based on religious identity with regard to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”³⁶

So, after years of anticipation, spirited arguments by both sides, reams of friend-of-the-court court briefs, and massive media attention, the case that was thought to be about the reach of the Blaine amendment turned out to be a case about playground resurfacing, and nothing more.

In an opinion concurring in part, Justices Gorsuch and Thomas argued for a broader application of the principles underlying the case. They worried that the majority was leaving open the possibility of a “distinction between religious *status* and religious *use*,” which made no sense given that the First Amendment focuses on free *exercise* of religion.³⁷ They pointedly refused to join footnote 3, arguing that the

³³ 137 S. Ct. 2012, 2020 (2017).

³⁴ *Id.* at 2022.

³⁵ *Id.* at 2035–39 (Sotomayor, J., dissenting).

³⁶ *Id.* at 2024 n.3 (plurality op.).

³⁷ *Id.* at 2025 (Gorsuch, J., concurring in part) (emphasis in original).

neutrality principle on which the case was decided “do[es] not permit discrimination against religious exercise—whether on the playground or anywhere else.”³⁸

Resolving the question of whether states violate the Free Exercise Clause if they enforce their Blaine amendments to exclude religious choices in contexts beyond school playground resurfacing would have to await a case that squarely presented that broader question.

V. Blaine Vanquished

The tea leaves following *Trinity Lutheran* were fairly optimistic for school-choice supporters. Among the cases remanded in light of that decision was the Colorado Supreme Court ruling striking down school vouchers under the Blaine amendment.³⁹ But what were courts supposed to do given *Trinity Lutheran's* opaque language and extraordinarily narrow holding? And if the Supreme Court were to consider the Blaine amendment in a broader context, which way would the justices who joined footnote 3 go?

Following the retirement of Justice Kennedy and his replacement by Justice Brett Kavanaugh, the Court decided to revisit the issue in the school-choice context. *Espinoza* involved a Montana tax credit of up to \$150 for contributions to student scholarship organizations. By the time the Court took the case, the program had only one participating organization, Big Sky Scholarships, which provided scholarships to families with financial hardships or disabled children to attend private schools of their choice. The legislature, however, also provided that the program be administered in accordance with the state's Blaine amendment, which forbade any “direct or indirect appropriation” of public funds “to aid any . . . school . . . controlled in whole or in part by any church.”

After the program commenced, the Montana Department of Revenue, applying the no-aid provision, promulgated a rule forbidding the use of scholarship funds in religious schools. The state's attorney general disagreed with the department's action; he advised that the Blaine amendment did not require excluding religious schools from the program, and that doing so would “very likely” violate the

³⁸*Id.* at 2026.

³⁹*Douglas County Sch. Dist. v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2012 (2017).

federal Constitution by discriminating against religious schools and their students.

Three mothers whose children attended Stillwater Christian School challenged the department's rule excluding them from participation in the program. The trial court enjoined the rule, holding (as had the Arizona Supreme Court in *Kotterman v. Killian*) that the state constitution only forbade appropriations, not tax credits. The program commenced operation and delivered scholarships to dozens of students, including several attending Stillwater Christian School.

The Montana Supreme Court reversed the trial court.⁴⁰ It held that the program allowed public funds to flow to religious schools, a result incompatible with the state's Blaine amendment. Because of the direct financial support, the court concluded that the exclusion of religious schools from the program did not violate the Free Exercise Clause. Finally, the court ruled that the department lacked authority to rewrite the statute to allow secular but not religious private schools to participate; therefore, the proper remedy was to strike down the program entirely.

Such a remedy presented school-choice supporters with a conundrum. It is not uncommon in discrimination cases for courts to invalidate a program altogether rather than to extend benefits to everyone. Given that it is ordinarily a state's prerogative not to provide financial benefits at all, one could argue that such a remedy was the judicially moderate one. With such an outcome, school-choice advocates could "win" the case but lose the remedy, for the Court could conclude that the program violated the Free Exercise Clause yet defer to the Montana Supreme Court's judgment that the entire program should be struck down. Or it could find that by virtue of the Montana Supreme Court's remedy, there was no discrimination.

The Supreme Court issued its decision on June 30, 2020, the last regularly scheduled day of the Court's 2019-2020 term (although it would continue to issue decisions in July due to delays attributable to the COVID-19 pandemic). The Court returned to its predictable 5-4 conservative/liberal split that predominates in watershed Establishment Clause cases. But although the margin was slender and the case produced seven separate opinions, the opinion of the Court—as

⁴⁰ 435 P.3d 603 (Mont. 2020).

18 years earlier in *Zelman*—spoke with a single voice. As did the chief justice (Rehnquist) in *Zelman*, so too here did the chief justice (Roberts) take the helm in *Espinoza*, with considerably less equivocation than in *Trinity Lutheran*.

The majority noted that none of the parties questioned the allowance of the scholarship tax-credit program under the Establishment Clause. They focused instead on the Free Exercise Clause, asking whether it “precluded the Montana Supreme Court from applying Montana’s no-aid provision to bar religious schools” from the program.⁴¹ The majority answered yes.

The Court’s opinion largely tracked the concurring opinion of Justices Gorsuch and Thomas in *Trinity Lutheran*. That opinion, the Court noted, distilled cases “into the ‘unremarkable’ conclusion that disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny.’”⁴² The Court concluded that Montana’s no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.⁴³ Hence, “the Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*.”⁴⁴

This focus on religious “status” as the basis for discrimination had worried Justice Gorsuch in *Trinity Lutheran*, for it seemed an artificial divide between types of government discrimination subject to the Free Exercise Clause. But the Court’s opinion cohered around it in *Espinoza*. The majority acknowledged Justice Gorsuch’s point that there is no “meaningful distinction between discrimination based on use or conduct and that based on status,” but stated that it “need not examine it here” because the “no-aid provision discriminates based on religious status.”⁴⁵

⁴¹ *Espinoza*, 140 S. Ct. at 2254 (majority op.).

⁴² *Id.* at 2255 (citation omitted).

⁴³ *Id.*

⁴⁴ *Id.* at 2256.

⁴⁵ *Id.* at 2257.

Apparently recognizing the difficulty of squaring the result in *Espinosa* with that in *Locke v. Davey*, the Court turned to that issue. It first noted that Washington state had simply refused to fund a particular course of instruction and therefore had denied Davey a scholarship based on what he proposed to do. Montana's Constitution, however, does not "zero in" on any essentially religious course of instruction but rather bars all aid to a religious school, thus putting "religious families to a choice between sending their children to a religious school or receiving such benefits."⁴⁶ Since the language of the Washington and Montana provisions was similar, the Court seems to be saying that it is the *construction* of the provisions by courts or other governmental entities, leading to particular forms of discrimination, that matters.

The Court continued by noting that there was "a 'historic and substantial' state interest in not funding the training of clergy," while no such "tradition supports Montana's decision to disqualify religious schools from government aid."⁴⁷ Citing the *Mitchell* plurality, it traced the history of the Blaine amendment to anti-Catholic bigotry (which would have been true in the Washington state context as well), and remarked that the "no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."⁴⁸

Criticizing the dissenting opinions of Justices Sotomayor and Breyer, who would have taken a more case-by-case approach, the Court said that the rule it was applying was "straightforward": "When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny."⁴⁹ Citing *Pierce v. Society of Sisters* for the proposition that parents have the right to direct the upbringing of their children, the Court ruled that the state failed to meet its burden of a compelling interest achieved through narrowly tailored means. That led to the Court's core holding: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.* at 2257–58 (citation omitted).

⁴⁸ *Id.* at 2259.

⁴⁹ *Id.* at 2260.

⁵⁰ *Id.* at 2261.

That left the difficult question of remedy: expand the benefits or strike down the entire program? Here, the Court focused on the legislative details. The legislature had enacted a program that was open to all private schools and their students. Because the Montana Supreme Court had violated federal law by invalidating the program, the correct result was to restore the status quo ante, that is, restore the scholarship tax credit program.⁵¹ School-choice supporters won the legal battle and preserved their program.

Although five justices joined the majority decision in full, several had more to say. Justice Thomas concurred, noting that although the case presented free exercise issues, the Establishment Clause remains a "'brooding omnipresence,' . . . ever ready to be used to justify the government's infringement on religious freedom."⁵² Justice Thomas believes that, because the Establishment Clause does not protect individual rights, it is not incorporated against the states under the Fourteenth Amendment and therefore applies only to Congress. Thomas has made that argument in prior cases but here was joined by Justice Gorsuch. Applying that view of the Establishment Clause, Thomas took on *Locke v. Davey* and other precedents, concluding that "[r]eturning the Establishment Clause to its proper scope . . . will go a long way toward allowing free exercise of religion to flourish as the Framers intended."⁵³

Justice Alito appeared to have the most fun in his concurring opinion, not only featuring the Blaine amendment cartoon but hoisting the dissenters on their own petard. In *Ramos v. Louisiana*, a successful challenge to Louisiana's use of nonunanimous juries to convict even in capital cases,⁵⁴ Alito had objected that the original invidious motivation for adopting such laws should not lead to their invalidation—they were re-adopted under different circumstances—but lamented that in that case "I lost." Thus, he concluded, "[i]f the original motivation for the laws mattered there, it certainly matters here."⁵⁵ Alito went on to document, in meticulous detail, the invidious discrimination

⁵¹ *Id.* at 2261–63.

⁵² *Id.* at 2263 (Thomas, J., concurring) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

⁵³ *Id.* at 2267.

⁵⁴ See the article by Nicholas and Mitchell Mosvick covering the case in this volume.

⁵⁵ 140 S. Ct. at 2268 (Alito, J., concurring) (citing *Ramos v. Louisiana*, 140 S. Ct. 1390 (2019) (involving nonunanimous jury verdicts in criminal trials)).

underlying the Blaine amendments, citing a brief filed by the Cato Institute among others. He argued that even though the amendment was re-adopted in a 1972 constitution, it was not cleansed of its bigotry because the original language harking back to those origins was retained. Although public schools have evolved from those envisioned by Horace Mann, Alito wrote, “many parents of many different faiths still believe that local schools inculcate a worldview that is antithetical to what they teach at home.”⁵⁶ The Montana scholarship tax credit, he concluded, “helped parents of modest means do what more affluent parents can do: send their children to a school of their choice.”⁵⁷

In his concurring opinion, Justice Gorsuch continued to criticize what he perceives as an artificial distinction between religious status and use. Here, the state effectively told parents, “You can have school choice, but if anyone dares to send the child to an accredited religious school, the program will be shuttered.” He concluded that “[c]alling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.”⁵⁸

The Court’s opinion drew three dissenting opinions. Justice Ginsburg, joined by Justice Kagan, found that the “essential component” of differential treatment was missing: “Recall that the Montana Supreme Court remedied the state constitutional violation by striking the scholarship program in its entirety.”⁵⁹ That decision placed religious and secular private schools on an equal footing. “On that ground, and reaching no other issue,” Justice Ginsburg dissented.

But Justice Kagan also joined Justice Breyer’s dissenting opinion, in part. Breyer did not buy into the majority’s distinction between religious status and use, characterizing the Court’s opinion as holding “that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause.” That holding, he argued, risks “the kind of entanglement and conflict that the Religion Clauses are intended to prevent.”⁶⁰

⁵⁶ *Id.* at 2274.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2278 (Gorsuch, J., concurring).

⁵⁹ *Id.* at 2295 (Ginsburg, J., dissenting).

⁶⁰ *Id.* at 2281 (Breyer, J., dissenting).

In the part of his dissent joined by Justice Kagan, Breyer likened the Montana program to the aid program in *Locke v. Davey*, an essentially religious endeavor a state could legitimately elect not to fund, rather than a church applying for a playground resurfacing grant as in *Trinity Lutheran*. So, for him, “the question in this case—unlike in *Trinity Lutheran*—boils down to what the schools would *do* with state support.”⁶¹ Because it would aid the schools’ religious endeavors, Breyer concluded the program was impermissible. Dispensing with the circuit-breaker from *Zelman* of true parental choice, Breyer drew a bright-line rule: “If, for 250 years, we have drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit,” he declared, “I do not see how we can today require Montana to adopt a different view respecting those who teach it in the classroom.”⁶² In the remaining part of his dissent not joined by Kagan (and seemingly in tension with the first part), Breyer argued for a case-by-case determination of cases within the play-in-the-joints intersection between the Free Exercise and Establishment Clauses, remarking that there is no test-related substitute for legal judgment.⁶³

Justice Sotomayor combined elements of both Ginsburg’s and Breyer’s perspectives in her solo dissent and took them a step further. No discrimination resulted from the Montana Supreme Court’s ruling, she observed, because the “tax benefits no longer exist for anyone in the State.”⁶⁴ But her key concern was that the decision weakened the country’s longstanding commitment to separation of church and state.⁶⁵ Echoing her *Trinity Lutheran* dissent, Sotomayor concluded that “it is no answer to say that this case involves ‘discrimination,’” because it is the religion clauses themselves that make such distinctions relevant.⁶⁶ “Today’s ruling is perverse,” she declared. “Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place.”⁶⁷

⁶¹ *Id.* at 2285 (emphasis in original).

⁶² *Id.* at 2288.

⁶³ *Id.* at 2291.

⁶⁴ *Id.* at 2291 (Sotomayor, J., dissenting).

⁶⁵ *Id.* at 2292.

⁶⁶ *Id.* at 2297.

⁶⁷ *Id.*

VI. Questions After *Espinoza*

As in *Zelman*, the majority and dissenters in *Espinoza* remained far apart in their constitutional worldview. Indeed, it is not clear what the four dissenters would do if faced with the question of overturning *Zelman* in a case before a differently composed Court.

The Blaine amendments remain on the books, though they are no longer permitted to achieve their intended goal of excluding state aid to religious schools if the state has elected to provide such aid to private schools in the first place. But not all Blaine amendments are worded the same, or necessarily share the same origins or subsequent evolution, so courts will have to grapple with whether such differences are consequential.

And what remains of *Locke v. Davey*? The majority distinguished the case but did not overrule it (although Justices Thomas and Gorsuch apparently would do so). Is it limited to its very narrow facts of a state excluding otherwise available state aid to studying for the ministry? Or are there other uses, supported by historical tradition, where a state permissibly may exclude aid, either by policy choice or in perceived fealty to a Blaine amendment?

Speaking of religious “uses,” Chief Justice Roberts clung tenaciously to a possible distinction between religious status and use. Like Justice Gorsuch, I find it difficult to clearly comprehend that distinction, but if the Court embraces such a distinction, lower courts will have to define it. Just as school choice advocates seized the *Nyquist* footnote to carve an exception that may have ended up swallowing the rule, so too will opponents surely seek to expand the religious use loophole, if indeed it turns out to exist.

One curious aspect of the majority holding was its use of the term “subsidize” to describe the relationship between the scholarship tax programs and the participating schools. The Court’s verbiage here is interesting. From the start, school-choice proponents argued that vouchers and tax credits were *not* subsidies to religious schools. During my school-choice litigation days, if a court concluded that a school-choice program constituted a subsidy, our goose was cooked. *Zelman* was based on the proposition that school vouchers were a form of indirect aid guided by true private choice. And as the Arizona Supreme Court ruled in *Kotterman v. Killian*, scholarship tax credits are a further step removed from direct aid because the

tax benefits go to contributors, not beneficiaries, and no state funds end up in religious school coffers. Yet the Supreme Court in *Espinoza* referred to such credits as a subsidy. Was the Court's shift in language here unintentionally loose, or was it signaling that more-direct forms of "subsidies," such as the type struck down in *Nyquist*, are permissible now?

And, of course, the remedy of extending benefits to all in *Espinoza* was a function of the specific legislative and judicial circumstances. Could a court in different circumstances find that a remedy invalidating the entire program was proper?

No sooner is the ink dry on a Supreme Court decision than creative minds begin to engage over the next one. *Espinoza*, in a very important sense, is the culmination of a long journey meant to make America safe for school choice. But Court opinions, especially those decided by a 5-4 vote, are rarely the final word unless future courts determine they are worthy of reverence. Whether *Espinoza* falls into that category is left to future judgment. But, for the moment, school-choice advocates have a victory to cherish.⁶⁸

⁶⁸ I congratulate my former Institute for Justice colleague and dear friend of 35 years, Richard Komer, who came out of retirement to argue the case and finish the job he began so many years before.

