THE DEMISE OF THE BLAINE AMENDMENT AND A TRIUMPH FOR RELIGIOUS FREEDOM AND SCHOOL CHOICE: *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE*

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"[S]chool choice is the civil rights statement of the year, of the decade, and probably beyond, because all children have to have access to quality education."[1]

I. INTRODUCTION

In *Espinoza v. Montana Department of Revenue* ("*Espinoza*"), the Supreme Court joined the fray in the ongoing fight over school choice, addressing an issue that has attracted some judicial interest in recent years—tuition tax credits.[2] In a not unexpected five-to-four decision, authored by Chief Justice John Roberts, a divided Court handed down a stunning victory for proponents of religious freedom and school choice.[3] *Espinoza* is significant because the Court signaled its continuing support to end practices that allow state officials to deny generally available benefits to faith-based institutions and people of faith, essentially treating them as second-class citizens—solely because they are religious.[4]

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[1] Wesley Whistle, *Trump: School Choice is the Civil Rights Statement of The Year*, FORBES (Jun. 16, 2020, 10:09 PM), https://www.forbes.com/sites/wesleywhistle/2020/06/16/trump-school-choice-is-the-civil-rights-statement-of-the-year/#3811fcbe3f46 (quoting President Donald Trump's comments at a press briefing about an executive order he signed regarding police reform on June 16, 2020).

[2] *See* 140 S. Ct. 2246 (2020); *see also infra* Part III. For representative commentary on school choice, see Joseph O. Oluwolea1 & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335 (2016); JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS & AMERICA'S SCHOOLS (1990).

[3] *See generally* 140 S. Ct. 2246 (2020). The *Espinoza* judgment resulted in seven different opinions. Chief Justice Roberts delivered the opinion of the Court, in which Justice Thomas, Alito, Gorsuch, and Kavanaugh joined. *Id.* at 2551. Justice Thomas filed a concurring opinion, in which Justice Gorsuch joined. *Id.* at 2263. Justices Alito and Gorsuch filed concurring opinions. *Id.* at 2267, 2274. Justice Ginsburg filed a dissenting opinion, in which Justice Kagan joined. *Id.* at 2278. Justice Breyer filed a dissenting opinion, in which Justice Kagan joined as to Part I. *Id.* Justice Sotomayor filed a dissenting opinion. *Id.* at 2281. Academic Court-watchers have suggested that change was forthcoming. *See, e.g.*, Erwin Chemerinsky, *Symposium: The New Court and Religion*, SCOTUSBLOG (July 26, 2019, 1:33 PM), https://www.scotusblog.com/2019/07/symposium-the-new-court-and-religion/; Mark Rienzi, *Symposium: The Calm Before the Storm for Religious-Liberty Cases?*, SCOTUSBLOG (July 26, 2019, 10:42 AM), https://www.scotusblog.com/2019/07/symposium-the-calm-before-the-storm-for-religious-liberty-cases/ (suggesting that *Espinoza* will "give[] the Supreme Court an important opportunity to solidify and expand upon its decision in *Trinity Lutheran Church of Columbia Inc. v. Comer* . . . .").

[4] *See generally* 140 S. Ct. 2246 (2020). For a similar case, and one that will be discussed throughout this article, see Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

Espinoza is also noteworthy because the Supreme Court's support for school choice fits in nicely with this issue of the *University of Dayton Law Review*'s theme of the rights of children and their families. *Espinoza* thus stands out because research largely supports the finding that school choice affords parents, and their children, greater opportunities to achieve academic success.[5] Accordingly, *Espinoza* may be a boon for the educational rights of students. The importance of school choice is especially significant for minority children from economically challenged families and communities—who will now have golden opportunities to compete on more even academic footing with their peers whose socioeconomic status has afforded them greater chances to succeed.

In *Espinoza*'s wake, the remainder of this Article is divided into five sections. Part II briefly reviews the Supreme Court's modern jurisprudence on aid to faith-based schools and their students, albeit under the Establishment Clause even though the *Espinoza* Court grounded its judgment in the Free Exercise Clause. Covering this history is important both due to the overlapping relationship between these two constitutional provisions and because these cases played a substantial role in litigation leading up to *Espinoza*.[6] Next, Part III reviews earlier litigation on tuition tax credits. Part IV reviews the judicial history of *Espinoza* and the opinions of the Supreme Court Justices, while Part V reflects on *Espinoza*'s potential ramifications. The Article rounds out with a brief conclusion.

II. A BRIEF OVERVIEW OF THE SUPREME COURT'S JURISPRUDENCE ON STATE AID TO FAITH-BASED SCHOOLS AND THEIR STUDENTS PRIOR TO ESPINOZA

A. Generally

The Supreme Court's modern Establishment Clause jurisprudence on religion and public education began in *Everson v. Board of Education* ("*Everson*") wherein the Court resolved a dispute from New Jersey over transportation for students who attended faith-based schools.[7] In *Everson*,

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[5] *See infra* Part V.C.

[6] According to the Religion Clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Until 1940, the First Amendment's Religion Clauses were inapplicable to the States. However, in 1940, the Supreme Court altered the course of its jurisprudence by applying the First Amendment to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*. 310 U.S. 296, 303 (1940). In *Cantwell*, the Court invalidated the convictions of Jehovah's Witnesses for violating a statute against solicitating funds for religious, charitable, or philanthropic purposes without the prior approval of a state official because it gave too much discretion to a licensing officer to determine whether activities were for religious purposes. *See id.* at 300–02, 308. After *Cantwell*, persons have the same rights against the federal and state governments, as well as their officials, in disputes over limits placed on their rights under the Free Exercise and Establishment Clauses. *See id.* at 303–04.

[7] *See generally* 330 U.S. 1 (1947). For a relatively contemporary commentary on *Everson v. Board of Education*, see Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America's Church-*

Justice Black's opinion for the Court introduced the metaphor of the "wall of separation between church and State" to educational cases.[8] This metaphor defines the view most often associated with the Court's First Amendment jurisprudence for the better part of the past seventy-five years.[9]

Following *Everson*, the Supreme Court's Establishment Clause jurisprudence in K–12 schools, sometimes referred to as parochiaid due to its application to faith-based schools, evolved through three phases. The first began in 1947 with *Everson* and ended in 1968 with *Board of Education of Central School District No. 1 v. Allen* ("*Allen*"). In *Allen*, the Justices enunciated the Child Benefit Test—a legal construct to allow state aid to children rather than their faith-based non-public schools.[10] *Everson* and *Allen* were the outer limits of the Child Benefit Test prior to *Agostini v. Felton* ("*Agostini*") in 1997.[11]

The years between *Lemon v. Kurtzman* ("*Lemon*") in 1971 and *Aguilar v. Felton* ("*Aguilar*") in 1985, the second phase, represented the nadir of the Child Benefit Test to its supporters who reject the wall of separation metaphor as the Justices largely refused to move beyond the limits they set in *Everson* and *Allen*.[12] While the Court's 1992 ruling in *Zobrest v. Catalina Foothills School District* ("*Zobrest*") provided aid to a single student who had already graduated, it was not until *Agostini*, in 1997, that the Court fully rejuvenated the Child Benefit Test, thus beginning phase three, which extends the present.[13] Given the many cases the Court has resolved, the remainder of Part II highlights its key judgments on aid.

B. The Emergence of the Child Benefit Test

In *Everson*, the Supreme Court upheld the constitutionality of a law from New Jersey allowing local boards to reimburse parents for the cost of transporting their children to and from faith-based schools under the Child Benefit Test.[14] Following Everson, states are free to choose whether to provide publicly funded transportation to students who attend religiously affiliated non-public schools.

Later, in *Allen*, the Supreme Court upheld the constitutionality of a

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State Proposition, 23 J.L. & RELIGION 15 (2007). For an earlier case on religion and public education, see Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (upholding a statute allowing all students to receive free textbooks regardless of whether they attended public or faith-based schools).

[8] 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[9] The wall metaphor first appeared in *Reynolds v. United States. See* 98 U. S. 145, 164 (1878) (rejecting a Free Exercise Clause claim from a member of the Church of Jesus Christ of Latter-day Saints in the then Utah Territory challenging a federal polygamy statute because it forbade him from practicing his faith). *Everson* was the first time the Court used the metaphor in an educational case.

[10] 392 U.S. 236, 243–44 (1968).

[11] *See* 521 U.S. 203, 231, 239 (1997).

[12] *See* 403 U.S. 602 (1971); 473 U.S. 402, 412–14 (1985).

[13] 509 U.S. 1, 3–4 n.3, 13–14 (1993); 521 U.S. 203, 208, 222–23, 225, 235, 237 (1997).

[14] 330 U.S. 1, 18 (1947).

statute from New York directing local boards to loan textbooks to children in grades seven to twelve who attended non-public schools.[15] Rather than order the boards to loan students the same books, the law directed officials to approve titles prior to their adoption.[16] The Justices upheld the law because they viewed the loans of books as not an aid to religion or non-public schools because the primary effect of doing so was to improve the quality of education for all students.[17]

C. The Nadir of The Child Benefit Test

Lemon, and its companion case *Earley v. DiCenso*, is the Supreme Court's most significant case involving the Establishment Clause and education.[18] The *Lemon* Court invalidated a statute from Pennsylvania calling for the purchase of secular services and a law from Rhode Island designed to provide salary supplements for teachers in non-public schools.[19] At the heart of their rationale, the Justices enunciated the now seemingly ubiquitous tripartite standard known as the *Lemon* test. According to the Court: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."[20] Further commenting on entanglement and state aid to religious institutions, the Justices identified three additional factors: "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[21]

In what developed into a "catch-22" situation, programs typically passed *Lemon*'s first two prongs only to have various forms of aid to students in faith-based schools invalidated due to excessive entanglement.[22] The difficulty was exacerbated because the first two prongs of the *Lemon* test were developed in the context of prayer and Bible reading while the third emerged in in a non-school context.[23] The Supreme applied this standard widely,

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[15] 392 U.S. 236, 239 (1968).

[16] *See id.* at 239, 241.

[17] *Id.* at 244, 247.

[18] 403 U.S. 602, 625 (1971) (consolidating Lemon and DiCenso's claims). For representative commentary on *Lemon*, see Mark Strasser, *Establishment Clause Health on a Restricted, Artificial Lemon Diet*, 29 B.U. PUB. INT. L.J. 169 (2019). For an interesting, but premature, obituary for *Lemon*, see Michael Stokes Paulsen, *Religion and the Public Schools After Lee v. Weisman: Lemon is Dead*, 43 CASE W. RES. 795 (1993).

[19] 403 U.S. at 606–07, 625 (1971).

[20] *Id.* at 612–13 (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 674 (1970)).

[21] *Id.* at 615.

[22] For a case invalidating programs based solely on the *fear of excessive* entanglement, see Aguilar v. Felton, 473 U.S. 402 (1985) (emphasis added); *see also infra* notes 25–28 and accompanying text.

[23] *Compare* Walz v. Tax Comm'n of New York City, 397 U.S. 664, 666–67 (1970) (upholding New York State's practice of allowing state property tax exemptions for church property used in worship services) *with* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205, 223 (1963) (originating in Pennsylvania and Maryland, respectively, creating a two-part test to evaluate the constitutionality of prayer

almost as a "one-size fits all" remedy in disputes about aid to non-public schools and their students.[24]

In *Aguilar*, the Court reviewed a case about the New York City Board of Education's ("NYCBOE") practice of permitting public school teachers who teach in parochial schools to provide remedial instruction under Title I of the Elementary and Secondary Education Act of 1965 ("Title I") for children who were educationally disadvantaged, on-site in their faith-based schools.[25] After a federal trial court, in an unreported opinion, refused to enjoin the program, the Second Circuit invalidated it.[26] On further review, a divided Supreme Court affirmed that the program was unconstitutional even though the NYCBOE developed safeguards to ensure that public funds were not spent for religious purposes.[27] The program passed the first two prongs of the *Lemon* test, but the Court invalidated it solely on the fear that a monitoring system might have created excessive entanglement.[28]

D. Rejuvenation of the Child Benefit Test

Zobrest signaled that change was coming in the Supreme Court's Establishment Clause jurisprudence.[29] After the Ninth Circuit affirmed that Arizona school officials could deny a Catholic school student an on-site sign-language interpreter under the Individuals with Disabilities Education Act ("IDEA") because doing so would have violated the Establishment Clause, the Court disagreed.[30] Reversing in favor of the student, who had graduated,

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and Bible reading in public schools that became the first two of *Lemon*'s three prongs; invalidating both practices). As noted in *Schempp*: "The test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 223 (internal citations omitted).

[24] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 354–59, 365–66 (1975) (upholding the loaning of textbooks in Pennsylvania but invalidating the use of periodicals, films, recordings, laboratory equipment, and equipment for recording and projecting, by interpreting the underlying statute as having the primary effect of advancing religion due to the predominantly religious character of participating schools); Wolman v. Walter, 433 U.S. 229 (1977) (allowing textbook loans to students or their parents in Ohio—rather than directly to their non-public schools—but invalidating a provision to permit loans of instructional equipment including projectors, tape recorders, record players, maps and globes, and science kits). The *Wolman* Court so reasoned in light of the fear that, because it would have been impossible to separate the secular and sectarian functions for which these items were being used, the aid supported the religious roles of the schools. *Id*. The *Wolman* Court also invalidated a law that provided transportation for field trips for students who attended faith-based schools because, insofar as the field trips were curricular in nature, they were instructional rather than non-ideological secular services (such as transportation to and from school). *Id*.

[25] Aguilar v. Felton, 473 U.S. 402, 404–06 (1985).

[26] *See* Felton v. Sec'y, U.S. Dep't of Educ., 739 F.2d 48, 52 (2d Cir. 1984), *cert. granted sub nom.* Aguilar v. Felton, 473 U.S. 402 (1985); Nat'l Coal. for Pub. Educ. & Religious Liberty v. Harris, 489 F. Supp. 1248, 1251, 1270 (S.D.N.Y. 1980) (holding that the program was not unconstitutional and refusing to order an injunction).

[27] *Aguilar*, 473 U.S. at 404–14.

[28] *Id.* at 412–14.

[29] *See generally* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[30] *See generally id.*; Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992), *rev'd* 509 U.S. 1 (1993); 20 U.S.C. §§ 1400–1450.

the Justices viewed the interpreter as providing neutral aid without offering financial benefits to his parents or school because the government did not participate in the instruction and was only a conduit effectuating classroom communications.[31] However, a 1999 change in the IDEA's regulations limited the amount public school boards must spend on services for children who attend faith-based schools, thereby essentially abrogating *Zobrest*.[32]

Four years later, in *Agostini*, the Supreme Court essentially eliminated barriers against on-site delivery of services to students who attended faith-based schools as long as safeguards were in place.[33] In so doing, the Court ushered in the current era of allowing greater aid to faith-based schools and their students by dissolving the injunction that held *Aguilar* in place. In an opinion by Justice O'Connor, who had written a scathing dissent in *Aguilar*, the Court reasoned that the Title I program did not violate any of the standards it used to consider whether state aid advanced religion absent governmental indoctrination, there were no distinctions between recipients based on religion, and there was no excessive entanglement.[34] Another aspect in *Agostini* was the Court's modification of the *Lemon* test by reviewing only its first two parts, purpose and effect, while recasting entanglement as one criterion in reviewing a law's effect.[35]

At issue in *Zelman v. Simmons-Harris* ("*Zelman*") was the constitutionality of a voucher program enacted as part of a larger plan to aid the failing school system in Cleveland, Ohio.[36] Relying on *Agostini*, the Court began by considering "whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion."[37] The Court conceded the lack of a dispute over the program's valid secular purpose in providing programming for poor children in a failing school system.[38]

The Court upheld the voucher program as constitutional because, as part of the state's far-reaching attempt to provide greater educational opportunities in a failing school system, it allocated aid based on neutral secular criteria that neither favored nor disfavored religion.[39] Also, the

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[31] *Zobrest*, 509 U.S. at 13–14; *but cf.* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (finding that the creation of a school district with boundaries contiguous to a village of Hasidic Jews failed all three parts of the *Lemon* test because state officials went too far in seeking to accommodate the group's religious needs and the local public board could have offered programs at one of its schools or at a neutral site near one of the village's religious schools).

[32] *See, e.g.*, 34 C.F.R. §§ 76.655, 300.129 (1999).

[33] *See generally* 521 U.S. 203 (1997).

[34] *Id.* at 234–35; *see also* 473 U.S. 402, 421 (1985) (O'Connor, J., dissenting).

[35] *Agostini*, 521 U.S. at 232–34.

[36] 536 U.S. 639, 643–44 (2002). For representative commentary on *Zelman*, see Charles J. Russo & Ralph D. Mawdsley, *Equal Educational Opportunities and Parental Choice: The Supreme Court Upholds the Cleveland Voucher Program*, 169 EDUC. L. REP. 485 (2002).

[37] *Zelman*, 536 U.S. at 649.

[38] *Id.*

[39] *Id*. at 653–54.

Justices were satisfied that the program neither advanced nor inhibited religion because it was available to both religious and secular beneficiaries on a nondiscriminatory basis.[40] The Justices added that it offered assistance directly to a broad class of citizens who directed the aid to religious schools based entirely on their own genuine and independent private choices.[41]

Trinity Lutheran Church of Columbia v. Comer ("*Trinity Lutheran*") began when the Church's Learning Center, a year-round faith-based preschool and day care center, applied to the State's Department of Natural Resources ("DNR") hoping to participate in its Scrap Tire Program ("STP").[42] The STP, which offered limited numbers of grants to reduce the volume of used tires in landfills and dump sites, was funded by a fee on the sale of new tires in Missouri and made reimbursement grants to qualifying nonprofit organizations for purchasing playground surfaces made from recycled tires.[43]

The Learning Center, which served "students of any sex, race, color, religion, nationality, and ethnicity" sought to participate in the STP because it wished to resurface its playground, used by its students and neighborhood children, with materials made from recycled tires so children who fell would be less likely to be injured compared to other gravel surfaces.[44] During the application process, the Learning Center ranked fifth out of the forty-four applicants but was not among the fourteen STP grant recipients due to its religious affiliation.[45]

In denying the Center's application, state officials relied on language in the State Constitution modeled after the Blaine Amendment, which would have forbidden aid to "sectarian" institutions.[46] Using similar language, Article I, Section 7 of Missouri's Constitution prohibits public assistance or any preference be given to "any church, sect or creed of religion, or any form of religious faith or worship."[47] Although there was discussion of the Blaine Amendment and similar state provisions at the oral arguments in *Trinity Lutheran*, none of the Justices mentioned it by name in their opinions, thereby setting up a confrontation about their status in a future case.[48]

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[40] *Id*. at 649–56.

[41] *Id*. at 652, 662–63.

[42] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2014–17 (2017). For representative commentaries on *Trinity Lutheran*, see Richard S. Myers, *The Significance of Trinity Lutheran*, 17 AVE MARIA L. REV. 1 (2019); Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2017 CATO SUP. CT. REV. 105 (2017); William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of Trinity Lutheran Church v. Comer*, 346 EDUC. L. REP. 1 (2017).

[43] *Trinity Lutheran*, 137 S. Ct. at 2017.

[44] Trinity Lutheran Church of Columbia v. Pauley, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013).

[45] *Id.*

[46] *Id*. at 1141–44 n.1.

[47] MO. CONST. art. I, § 7.

[48] *See generally* Transcript of Oral Argument at 21–22, Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017) (No. 15-577); Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017).

On appeal, a divided Eighth Circuit affirmed that state officials did not violate either the Federal or State Constitution against aiding faith-based institutions.[49] The court noted that the Free Exercise Clause of the Constitution did not require it to ignore the Blaine language in Missouri's Constitution.[50] The third member of the panel's partial dissent distinguished *Locke v. Davey* ("*Locke*") and Trinity Lutheran because the former addressed the narrow issue of students who pursued divinity studies.[51] Additionally, the dissent emphasized that state officials lacked "unfettered discretion to exclude the religious from generally available public benefits."[52]

After a divided Eighth Circuit denied rehearing *en banc*, church officials sought further review from the Supreme Court which granted certiorari and reversed in their favor.[53] The Court ruled that the Free Exercise Clause forbids state officials and programs from singling out faith-based institutions and/or believers in denying them generally available benefits simply because they are religious.[54] Writing for the Court, Chief Justice Roberts, in its seven-to-two judgment, was joined by Justice Kennedy, Alito, and Kagan in full; he was also joined in full by Justices Thomas and Gorsuch except as to footnote three.[55] Justice Thomas's partial concurrence was joined by Justice Gorsuch; Justice Gorsuch's partial concurrence was joined by Justice Thomas; Justice Breyer concurred in the judgment; and Justice Sotomayor, joined by Justice Ginsburg, dissented.[56]

Following his recitation of the facts, Chief Justice Roberts explained that the Establishment Clause did not prevent Missouri from allowing the Learning Center to participate in the STP.[57] Then, moving to Free Exercise Clause analysis, he examined the role of the Free Exercise Clause in relation to the Learning Center's application for an STP grant.[58] Roberts then found

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[49] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 781–86 (8th Cir. 2015).

[50] *Id.* at 783–84.

[51] *Id.* at 790–91 (Gruender, J., concurring in part and dissenting in part).

[52] *Id.* at 791.

[53] Trinity Lutheran Church of Columbia, Inc. v. Pauley, No. 14-1382, 2015 U.S. App LEXIS 14067 (8th Cir. Aug. 11, 2015) (denying *en banc* hearing); Trinity Lutheran Church of Columbia, Inc. v. Pauley, 136 S. Ct. 891; *Trinity Lutheran*, 137 S. Ct. 2012, 2019. This opinion is reviewed in some detail because of its crucial role in *Espinoza*.

[54] *See generally Trinity Lutheran*, 137 S. Ct. 2012

[55] *Id.* at 2017.

[56] *See generally id.* at 2025–27.

[57] *Id.* at 2019.

[58] *Id.* at 2019–21. In doing so, the Chief Justice relied on, and reviewed, five key Supreme Court cases. *See id.*; Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (holding that a city ordinance prohibiting the ritual slaughter of animals was unconstitutional because the Free Exercise Clause protects believers from unequal treatment); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (upholding a New Jersey law enabling a local school district to reimburse parents for the public transportation costs of sending their children to public and private schools, including parochial schools); McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating a Tennessee law barring ministers from serving as delegates to the state's constitutional convention because it penalized the plaintiff's right to free exercise by denying him the chance to participate solely due to his religion); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (rejecting a free exercise challenge because the First Amendment did not forbid the government from allowing timber harvesting and road construction in a national forest traditionally used

that the DNR's policy discriminated against Trinity Lutheran simply due to its religious nature.[59]

He next identified three reasons why the DNR and lower courts erred in relying on *Locke*. First, he acknowledged that the student in *Locke* was denied the scholarship because he wanted to use the funds to study the prohibited subject of pastoral theology while Trinity Lutheran's grant proposal was rejected because it was church.[60] The second difference Roberts addressed was that while the student in *Locke* wanted to engage in the religious activity of studying for the ministry, Trinity Lutheran sought to participate in the STP to help pay for resurfacing its playground for young children in its school and neighborhood, a secular activity.[61]

The third difference between the cases the Chief Justice highlighted was that the program in *Locke* sought to include religion by allowing faith-based institutions to participate as long as students did not use the scholarship to pursue a degree in pastoral theology.[62] Conversely, he observed, "there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply."[63] Roberts reiterated this point in the next part of his order, which invalidated the DNR's action because it failed to pass strict scrutiny, the highest level of constitutional review.[64]

Concluding the opinion of the Court, Chief Justice Roberts pithily commented that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."[65] Roberts thus reversed and remanded in favor of Trinity Lutheran.[66]

Justice Thomas, along with Justice Gorsuch, joined all of the Supreme Court's judgment but for footnote three.[67] According to this footnote, "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[68] Justice Thomas would have preferred the majority to have gone further in protecting religious

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for religious purposes by American Indian tribes in California); Emp. Div. v. Smith, 494 U.S. 872 (1990) (upholding the dismissal of drug counselors who ingested peyote as part of a sacramental ritual in the Native American Church because generally applicable, religion–neutral laws with the effect of burdening particular religious practices need not be justified by compelling government interests).

[59] *See id.* at 2021–24.
[60] *Id.* at 2023.
[61] *Id.*
[62] *Id.* at 2023–24.
[63] *Id.* at 2024 (emphasis in original).
[64] *Id.* at 2024 n.4.
[65] *Id.* at 2025.
[66] *Id.*
[67] *Id.* (Thomas, J., concurring).
[68] *Id.* at 2024 n.3. (majority opinion).

liberty.[69]

Justice Gorsuch, joined by Justice Thomas, first expressed his skepticism about whether the opinion of the Court could be read consistently as separating parties based on their religious status or religious use of property.[70] Second, while conceding the correctness of the disputed footnote, Gorsuch sought greater clarity to ensure that the outcome would not be limited to playground resurfacing.[71] Justice Breyer concurred in the judgment of the Court but penned a separate two-paragraph opinion seeking to limit the reach of the Court's judgment.[72]

Justice Sotomayor, joined by Justice Ginsburg, authored a sharply worded dissent arguing that *Trinity Lutheran* was about more than providing safe playground surfaces for children.[73] She thus disagreed with the Court over what she described as its dismantling First Amendment protections by allowing citizens to be taxed for the benefit of religious institutions.[74]

III. TUITION TAX CREDITS

A. Generally

Prior to *Espinoza*, tuition tax credits reached the Supreme Court once in *Arizona Christian School Tuition Organization v. Winn* ("*Winn*").[75] However, in *Winn*, the Justices did not address the merits of the claim as to whether allowing a tuition tax credits program violated the Establishment Clause by providing impermissible aid to parents and the faith-based schools to which they send their children.[76] Instead, the Court resolved Winn on the basis that those challenging the underlying statute lacked standing because they failed to demonstrate that they suffered an in-fact injury.[77]

To date, although there has been relatively little litigation on tuition tax credits, this issue has taken center stage in light of the Supreme Court's judgment in *Espinoza*.[78] Generally, tuition tax credits allow parents and others, such as businesses or corporations, to allocate funds annually on a tax-free basis to private nonprofit organizations.[79] The organizations then issue

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[69] *See id.* at 2025 (Thomas, J., concurring).
[70] *Id.* (Gorsuch, J., concurring).
[71] *Id.* at 2026.
[72] *See id.* at 2026–27 (Breyer, J., concurring).
[73] *Id.* at 2027 (Sotomayor, J., dissenting).
[74] *Id.* at 2041.
[75] 563 U.S. 125, 125 (2011). For a representative commentary on this case, see Tim Keller*, Arizona Christian School Tuition Organization v. Winn: Does the Government Own the Money in Your Pocket?*, 2011 CATO SUP. CT. REV. 149 (2010–11).
[76] *Winn,* 563 U.S. at 125. This Article uses the terms religious schools and faith-based schools interchangeably.
[77] *Id.* at 126.
[78] 140 S. Ct. 2246 (2020); *see infra* Part IV.
[79] *Scholarship Tax Credits*, NCSL, https://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx (last visited Mar. 31, 2021).

scholarships to student recipients to cover tuition and related educational fees, such as textbooks, for children whose parents wish to send them to non-public elementary and/or secondary schools.[80]

Supporters hail tax credits as a boon for parents whose children attend non-public schools, allowing them, and corporations, to reduce their educational costs by directing some of their state taxes to not-for-profit scholarship organizations.[81] As noted in the previous paragraph, these organizations then make the funds available to parents to pay the tuition and some other expenses at the non-public schools they wish their children to attend, thereby affording them enhanced educational choices.[82] Conversely, critics regard tax credits as both reducing funds for public education and as impermissible forms of aid to faith-based schools in violation of the Establishment Clause, as well as many state constitutions.[83]

B. Judicial History of Tuition Tax Credits

As reflected in the following brief review of ligation about tuition tax credits, some courts addressed their constitutionality under the First Amendment. Others have avoided addressing the merits of such claims, instead relying on procedural grounds such as standing, and usually under state laws, to resolve the case. As such, the next two sub-sections focus on religion and non-religion-based claims involving tuition tax credits, respectively.

1. Religion-Based Claims

Arizona's highest court rejected a challenge to a statute authorizing state tax credits of up to $500 for donations to school tuition organizations

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[80] *Id.* (reporting that at least "[seventeen] states have scholarship tax credit programs"). This page has yet to be updated after *Espinoza*. *See also* Josh Cunningham, *Fiscal Impact of School Vouchers and Scholarship Tax Credits*, NCSL (Oct. 28, 2013), http://www.ncsl.org/research/education/fiscal-impact-of-school-vouchers-and-scholarship-tax-credits.aspx.

[81] Cunningham, *supra* note 80. Tax deductions "are subtracted from gross income, reducing the net amount on which a tax is assessed" while tax credits "are taken directly from the tax as tentatively calculated." Kotterman v. Killian, 193 Ariz. 273, 279 (1999) (en banc) (citing Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen*, 31 WAYNE L. REV. 157, 172–73 (1984)); s*ee, e.g.*, Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendment*s, 43 COLUM. J.L. & SOC. PROBS. 117 (2009). For older articles, see Daniel M. McGarry, *Tuition Tax Credits: Their Advantages and Constitutionality*, 2 PUB. L. FORUM 101 (1982); Daniel Patrick Moynihan, *The Case for Tuition Tax Credits*, 60 PHI DELTA KAPPAN, 274 (1978).

[82] Bruce R. Van Baren, Note, *Tuition Tax Credits and Winn: A Constitutional Blueprint for School Choice*, 24 REGENT U. L. REV. 515, 523 (2011).

[83] *See*, *e.g.*, Amanda U. Potterton, *In Arizona, Tax Credits for Private Schools Caused Funding Inequity*. COURIER J. (last updated Mar. 12, 2019, 3:38 PM), https://www.courierjournal.com/story/opinion/2019/03/12/private-school-tax-credits-arizonas-plan-causedinequities/3126804002/; Martha McCarthy, *Espinoza v. Montana Department of Revenue: Tuition Tax Credits on Trial*, 365 EDUC. L. REP. 20 (2019). For more objective analyses of tuition tax credits, see Martin F. Lueken, *The Fiscal Effects of Tax-Credit Scholarship Programs in the United States*, 12 J. OF SCH. CHOICE, 181 (2018) and Maria M. Pirrone & Benjamin R. Silliman, *The Impact of College Tuition Tax Credits Since 1998*, 7 J. OF BUS. & ACCT. 106 (2014).

("STOs") alleging violations of the Arizona Constitution and Establishment Clause.[84] The court upheld the law because it met all three parts of the *Lemon* test, starting with a secular purpose because it provided parents with greater options to educate their children.[85] The court was satisfied that the law passed the effects test because it was one of a wide array of options available to all without regard to their religions, or lack thereof.[86] The court remarked that there was no excessive entanglement because taxpayers played a passive role insofar once they made their donations and deducted the amounts from their taxes, they had no roles in distributing or monitoring the monies.[87]

In the first of two cases from Illinois, parents unsuccessfully sought a declaratory judgment against the State Department of Revenue, alleging that the statute providing income tax credits for taxpayer expenses for the elementary school and secondary school education of their children was unconstitutional.[88] Under the program, parents who were taxpayers could take income tax credits of "up to $500 against income tax liability equal to 25% of qualified education expenses incurred on behalf of qualifying pupils."[89]

Along with positing that the program passed Establishment Clause analysis under both the state and federal constitutions, the court affirmed that it served a public purpose.[90] The court held that the program did not violate the state constitutional requirement of reasonableness and uniformity in non-property tax classifications, even though the credit applied only to expenses exceeding $250, because "[t]o the extent that certain parents do not benefit from the [c]redit, it is because they incur lower costs in educating their children than do parents who meet the statute's requirements."[91]

In the second case from Illinois, an appellate court affirmed the dismissal of a case in which a public school teacher, in conjunction with the parent of public school students, sought a declaratory judgment to invalidate the state's Education Expense Credit Act ("EECA") for allegedly violating the state Constitution.[92] More specifically, the plaintiffs alleged that the EECA allowed tax revenues to be used to support religious education while granting preferential treatment to parents who sent their children to faith-based schools.[93] The plaintiffs grounded their claim based on the fact that

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[84] *Kotterman,* 193 Ariz. at 273, 275–76 (talking primarily about religion, but still rejecting the claim that the statute at issue violated the anti-gift clause of the state constitution).

[85] *Id.* at 278–79.

[86] *Id.*

[87] *Id.* at 283.

[88] Toney v. Bower, 744 N.E.2d 351, 355 (Ill. App. Ct. 2001).

[89] *Id.* (citing ILL. INCOME TAX ACT, 35 ILL. COMP. STAT. 5/201(m) (2012)).

[90] *See id.* at 358–63 (applying all three prongs of the *Lemon* test to analysis under the state and federal constitutions).

[91] *Id.* at 363.

[92] Griffith v. Bower, 747 N.E.2d 423, 425–27 (Ill. App. Ct. 2011).

[93] *Id.* at 425.

1,167 of the state's non-public schools are faith-based, insofar as they teach religious doctrines and practices, and that 82 of its 102 counties have no nonsectarian private schools.[94]

Under the EECA, taxpayers were eligible to take an annual "credit of up to $500 against their state income tax liability for 25% of qualified education expenses" on behalf of any child or children in grades K–12.[95] Students could then attend any state public or non-public school in compliance with Title XII of the Civil Rights Act of 1964 and the state education code.[96] An appellate panel agreed that the EECA neither violated the state constitution nor involved the appropriation of public funds because it had a valid secular purpose involving tax credits equally available to all parents, regardless of the type of schools the children attended, and that the funds were available to the schools they selected only as the result of their own private choices.[97]

In Alabama, taxpayers sued the State Commissioner of Revenue and State Comptroller challenged the legality of the Alabama Accountability Act ("AAA") on various grounds. Most notably for this Article, those grounds included that the AAA violated the state constitutional prohibition against appropriating funds to support public schools to assist sectarian or denominational schools as well as its Establishment Clause.[98] Parents who received tax credits under the AAA for the costs of transferring their children who either attended or were zoned in failing public school to nonfailing public schools or private schools intervened by filing a motion to dismiss.[99]

The Supreme Court of Alabama determined that "Section 3 of the Alabama Constitution is the counterpart of the religion clauses of the First Amendment to the United States Constitution."[100] The court was satisfied, stating:

> that the tax-credit provisions of the AAA passed constitutional scrutiny because the provisions were neutral insofar as they did not have the primary effect of advancing religion, and any moneys that may ultimately flow to a religious school as a result of those provisions will do so only as a result of the independent and private choice of students'

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[94] *Id.* 425–26.
[95] *Id.* at 425.
[96] *Id.* (citing 42 U.S.C. § 2000e and 105 ILL. COMP. STAT. 5/26–1 (2012)).
[97] *Id.* at 426.
[98] *Magee v. Boyd,* 175 So. 3d 79, 90 (Ala. 2015); *see also* ALA. CONST. art. I, § 3 ("[t]hat no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship . . ."); ALA. CODE § 16–6D–1 (2013).
[99] *Magee,* 175 So. 3d at 92–93.
[100] *Id.* at 137.

parents, as opposed to the State.[101]

2. Non-Religion-Based Claims

In a dispute from Arizona, critics challenged a statute authorizing a tuition tax credit allowing state income taxpayers who voluntarily contributed money to STOs to receive dollar-for-dollar tax credits of up to $500 of their annual tax liability.[102] In turn, the STOs created voucher programs granting scholarships to students who attended primarily non-public schools, including those with religious affiliations.[103]

After the federal trial court in Arizona rejected the case for failure to state a claim, the Ninth Circuit reversed and remanded.[104] On appeal, the Supreme Court reversed in favor of the state, upholding the constitutionality of its tuition tax credit program.[105] Without addressing the merits of the tax credits, the Court held that the opponents lacked standing because any financial injuries they might have suffered as taxpayers were speculative and not traceable to state action.[106] The Justices added that any financial benefit the religious schools might have gained was due to private parental choices with no government intervention directing how the funds were to be spent.[107] On remand, the Ninth Circuit summarily reversed its earlier order, returning the dispute to the federal trial court for further proceedings consistent with the Supreme Court's judgment.[108]

The Supreme Court of Oregon found that the draft title of a ballot initiative designed to ask voters whether to grant state income tax credits to parents of children in grades K–12 was inadequate because it failed to adequately address its goal.[109] The court rejected the title because it did not refer to the principal effect of the proposed measure—namely to provide tuition tax credits for parents whose children attended faith-based and other non-public schools.[110] The court directed the Attorney General to modify the

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[101] *Id.* at 138 (citing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)). Interestingly, the court did not cite to the *Lemon* test.

[102] Winn v. Hibbs, 361 F. Supp. 2d 1117, 1118 (D. Ariz. 2005).

[103] *See* ARIZ. REV. STAT. ANN. § 43–1089 (2005) (delineating the program details).

[104] *Winn*, 361 F. Supp. 2d at 1123; Winn v. Arizona Christian Sch. Tuition Org., 562 F.3d 1002 (9th Cir. 2009), *cert. granted sub nom.* Garriott v. Winn & Arizona Christian Sch. Tuition Org. v. Winn, 560 U.S. 924, (2010).

[105] Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146 (2011). For representative commentary on this case, see Patrick T. Gillen, *A Winn for Originalism Puts Establishment Clause Reform within Reach*, 21 WM. & MARY BILL RTS. J. 1107 (2013); *see also* Tim Keller, *Arizona Christian School Tuition Organization v. Winn: Does the Government Own the Money in Your Pocket?*, 2011 CATO SUP. CT. REV. 149 (2010-11).

[106] *Arizona Christian Sch. Tuition Org.*, 563 U.S. at 146.

[107] *Id.* at 143.

[108] *See* Winn v. Arizona Christian Sch. Tuition Org., 658 F.3d 889, 890 (9th Cir. 2011).

[109] Terhune v. Myers, 154 P.3d 1284, 1286 (Or. 2007).

[110] *Id.*

initiative before submitting it to voters.[111]

In a case from South Carolina, the Fourth Circuit affirmed a grant of summary judgment in favor of a school board after a taxpayer sought access to the school board's website to gather information to gain support for a pending law to institute tax credits for students in non-public schools, including home schools.[112] The court agreed that the taxpayer lacked the right to access the information because the board's advocacy in opposition of the pending bill was governmental speech and did not create a limited public forum, which would have required the inclusion of opposing points of view.[113]

In New Hampshire, taxpayers challenged a law which provided tax credits to business organizations and other enterprises for their contributions to scholarship organizations that provide funding for students to attend non-public or public schools outside of their home districts.[114] The plaintiffs claimed that the program violated the state constitutional provision prohibiting grants of tax dollars "for the use of the schools or institutions of any religious sect or denomination."[115]

On appeal of an order invalidating the law, the Supreme Court of New Hampshire vacated and remanded with instructions to dismiss the petition in favor of the parents who wished to have their children receive scholarship funds under the program and a non-profit organization supporting their efforts.[116] Noting that while a state law authorized taxpayer standing to challenge the program, the court invalidated the statute insofar as it granted taxpayers standing without having to prove how the law harmed their personal rights because doing so would have unconstitutionally opened the door to providing advisory opinions to private citizens.[117]

In Florida, parents of children in public schools and public-school teachers, along with community and religious leaders, challenged Florida's Tax Credit Scholarship Program alleging that it violated state constitutional provisions against using state revenues to aid churches and requiring a system of free and uniform public schools.[118] The program allowed parents to receive tax credits for contributing to scholarship funding organizations that paid for tuition and fees for children in non-public schools, transportation to public schools outside of their home districts, or to lab schools.[119] Affirming an earlier order dismissing the claim, an appellate court agreed that the plaintiffs lacked taxpayer standing because the program used voluntary private

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[111] *Id.* at 1287.
[112] Page v. Lexington Cty. Sch. Dist. No. 1, 531 F.3d 275, 277 (4th Cir. 2008).
[113] *Id.* at 283–85.
[114] Duncan v. New Hampshire, 102 A.3d 913, 917 (N.H. 2014).
[115] *Id.;* N.H. CONST. art. 83.
[116] *Duncan*, 102 A.3d at 917.
[117] *Id.* at 921–22.
[118] McCall v. Scott, 199 So. 3d 359, 361 (Fla. Dist. Ct. App. 2016).
[119] *Id.* at 362.

contributions rather than state money to fund its activities.[120]

Finally, in Georgia, four taxpayers failed when they challenged the constitutionality of the state's Qualified Education Tax Credit, under which individuals and business entities received a state income tax credit for donations to approved not-for-profit student scholarship organizations ("SSOs").[121] Under the law, state taxpayers could take a dollar-for-dollar credit against their state income tax liability for donations to SSOs of up to $1,000 per individual taxpayer or $2,500 for married taxpayers filing jointly.[122] Corporate taxpayers earned credits for the actual amounts donated or seventy-five percent of their income tax liability, whichever is less, with a total aggregate amount of tax credits to $58 million per tax year.[123]

The Supreme Court of Georgia largely affirmed in favor of the state, explaining that the "[p]laintiffs' complaint fails to show that they, or any taxpayers for that matter, are harmed by this Program."[124] The court added, "[l]ikewise, we reject plaintiffs' argument that they have standing because public funds are illegally expended to administer the Program in that state employee time is used to process the filings for tax credits."[125]

IV. ESPINOZA V. MONTANA DEPARTMENT OF REVENUE

A. Background

1. Montana Tax Credit Program

According to the 2015 statute creating the Montana Tax Credit Program ("TCP"), the purpose of a student scholarship organization is "to provide parental and student choice in education with private contributions through tax replacement programs" and to be administered in compliance with relevant provisions in the Montana Constitution.[126] The significance of being a Qualified Education Provider ("QEP") under the TCP is that, pursuant to its provisions, taxpayers were entitled to dollar-for-dollar tax credits of up to $150 per year for donations they make to an SSO, apparently only one of which participated, to fund scholarships for children who attended the non-public schools with QEP status that their parents or guardians selected.[127]

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[120] *Id.* at 372.
[121] Gaddy v. Georgia Dep't of Rev., 802 S.E.2d 225, 227, 231 (Ga. 2017).
[122] GA. CODE. ANN. § 48-7-29.16(b) (1–2) (West 2016).
[123] *Id.* § 48-7-29.16(c), (f)(1).
[124] *Gaddy*, 802 S.E.2d at 231.
[125] *Id.*
[126] MONT. CODE ANN. § 15-30-3101 (2015). The stature requires the program to be administrated consistent with "Article V, section 11(5), and Article X, section 6, of the Montana constitution." *Id.*
[127] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020); Brief of Respondents at 3, Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777 (Nov. 8, 2019) (No. 18-1195), 2019 WL 5887033, at *3–4. For an early commentary on the TCP program, see Michael P. Dougherty, *Montana's*

In order to qualify for QEP status, an education provider must be one that:

> (a) is not a public school; (b)(i) is accredited . . . ; (c) is not a home school . . . ; (d) administers a nationally recognized standardized assessment test or criterion-referenced test . . . ; (e) satisfies the health and safety requirements prescribed by law for private schools in this state; and (f) qualifies for an exemption from compulsory enrollment . . . .[128]

On its face, the definition did not exclude religious schools. Consequently, once the program was in operation, thirteen non-public schools participated in it, twelve of which were faith-based.[129]

Under the program, SSOs had to provide scholarship funds directly to QEPs selected by the parents or guardians of children who received scholarships.[130] Then, QEP officials had to immediately notify the parents or guardians that they received the funds.[131] Further, the parents or guardians could not have accepted one or more scholarships for each eligible child from an SSO if the total received exceeds "50% of the per-pupil average of total public school expenditures . . . ."[132]

The state legislature granted officials in the Montana Department of Revenue ("the Department), the agency "responsible for implementing and administering" the TCP, the authority to adopt rules necessary to do so, consistent with the 1972 No-Aid Clause in the state constitution, which included language with a stronger prohibition against any kind of aid to faith-based schools than under the First Amendment.[133] Montana thus adopted a Blaine-type amendment, becoming one of thirty-eight states with similar provisions in their constitutions placing substantial limits on the relationships between religious institutions and state governments and faith-based

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Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?, 77 MONT. L. REV. 41 (2016).

[128] MONT. CODE ANN. § 15-30-3102(7).

[129] Brief of Respondents, *supra* note 127, at 5.

[130] MONT. CODE ANN. § 15-30-3104(1).

[131] *Id.*

[132] *Id.* at § 15-30-3104(2). The next section establishes detailed reporting requirements for SSOs, declaring that "[a]n organization that fails to satisfy the conditions of this section is subject to termination as provided in 15-30-3113." *Id.* at § 15-30-3105 (3).

[133] Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 607, 610 (Mont. 2018) ("The Delegates adapted Article X, Section 6, of the Montana Constitution from the 1889 Constitution's broad and general no-aid provision, recognizing that it was already 'among the most stringent [no-aid clauses] in the nation.'") (quoting Montana Constitutional Convention, Verbatim Transcript, March 11, 1972). The no-aid provision forbids the state government from making "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." MONT. CONST. art. X, § 6(1). This section is inapplicable to "funds from federal sources provided to the state for the express purpose of distribution to non-public education." *Id.* at § 6(2).

schools.[134]

2. Facts and Judicial History

Espinoza began when Kendra Espinoza, the lead plaintiff for three mothers, filed suit challenging the actions of officials from the Department which excluded their children's Christian school from participating in the TCP even though it met the statutory criteria making it identifiable as a QEP.[135] A state trial court, in an unpublished opinion, granted the mothers' motion for summary judgment, essentially upholding the constitutionality of the TCP without the disputed rule that excluded faith-based schools from serving as QEPs.[136]

On appeal, the Supreme Court of Montana reversed in favor of the state on two grounds.[137] First, acknowledging that state constitutions can be more stringent in limiting aid to faith-based institutions than their federal counterpart, the court pointed out that the TCP violated a provision in Montana's Constitution forbidding state aid to "sectarian schools."[138] The court thereby invalidated the program because it indirectly allowed the state to help pay the tuition of students who attended religiously-affiliated schools.[139] The court also rejected the provision as unconstitutional because the general tuition payments the schools received may have been used to strengthen instruction in "areas heavily entrenched in religious doctrine."[140]

Second, the court thought that officials in the Department exceeded their authority in enacting the disputed rule even though it struck down the tax credit provision as unconstitutional.[141] The mothers then appealed to the Supreme Court, which agreed to hear an appeal in *Espinoza*.[142]

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[134] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2037 (2017) (Sotomayor, J., dissenting) ("thirty-eight States have a counterpart to Missouri's [Blaine Amendment]."). Former Congressman, Senator, and unsuccessful Presidential candidate, James K. Blaine of Maine introduced a constitutional amendment intended to have prevented aid to schools "under the control of any religious sect," code for Roman Catholic schools. Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2269–70 (2020). For a discussion of the Amendment and its background, see *infra* notes 201–06 and accompanying text. For a criticism of Blaine Amendment provisions, see Mitchell v. Helms, 530 U.S. 793, 829 (2000) ("This doctrine, born of bigotry, should be buried now"). For a brief commentary on *Helms*, see Charles J. Russo & Ralph D. Mawdsley, *Mitchell v. Helms: The Supreme Court Extends the Limits of State Aid to Religious Schools*, 66 SCH. BUS. AFFS., Nov. 2000, at 37, 37–40 (2000).

[135] *See Espinoza*, 140 S. Ct. at 2252.

[136] *See Espinoza*, 435 P.3d at 608; s*ee generally* Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152C, 2017 WL 11317587 (Mont. Dist. Ct. May 23, 2017).

[137] *Espinoza*, 435 P.3d at 614.

[138] *Id.* at 609.

[139] *Id.* at 612–13.

[140] *Id.* at 614.

[141] *Id.* at 614–15.

[142] *See* Espinoza v. Mont. Dep't of Revenue, 139 S. Ct. 2777, 2778 (2019).

B. At the Supreme Court

1. Opinion of the Court

In *Espinoza*, a divided Supreme Court, in a five-to-four judgment authored by Chief Justice Roberts, just as he had done in *Trinity Lutheran*, rendered another significant victory for religious liberty.[143] After reciting the facts—including a detailed review of Montana's TCP—Chief Justice Roberts acknowledged that the parties agreed that the Program did not violate the Federal Establishment Clause.[144] Because there was no Establishment Clause violation, the Court ignored *Lemon*, the test it applied in most cases involving state aid since its inception in 1971.[145]

The Chief Justice then stated that "[t]he question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."[146] Roberts conceded that the Court accepted the Supreme Court of Montana's determination that TCP was invalid under the state constitution but thought it necessary to address its status under the Free Exercise Clause.[147]

Turning to Free Exercise, Roberts cited *Trinity Lutheran* for the principle that this "Clause, which applies to the States under the Fourteenth Amendment, 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'"[148] He also briefly mentioned *Cantwell v. Connecticut*, the initial case wherein the Court applied the First Amendment to the states through the Fourteenth Amendment.[149]

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[143] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); *see also* Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779 (8th Cir. 2015). For a breakdown of how the Justices in voted, see *supra* note 3.

[144] *See Espinoza*, 140 S. Ct. at 2251–54. Chief Justice Roberts declared: "[T]he parties do not dispute that the scholarship program is permissible under the Establishment Clause." *Id.* at 2254.

[145] The Court's having ignored the seemingly ubiquitous tripartite test in *Lemon* perhaps signals the unmourned demise of its judicial life after creating a great deal of needless havoc for lower courts, judges, and academicians who struggled to divine the meanings of some of its holdings under *Lemon*. For a discussion of *Lemon* in this dispute, see *Espinoza*, 140 S. Ct. at 2265 (Thomas, J., concurring).

[146] *Espinoza*, 140 S. Ct. at 2254. Prior to the oral arguments, the Supreme Court framed the issue before it as "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?" *Question Presented*, *Espinoza v. Montana Dep't of Revenue*, SUP. CT. (June 28, 2019), https://www.supremecourt.gov/qp/18-01195qp.pdf.

[147] *Espinoza*, 140 S. Ct. at 2254.

[148] *Id.* (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

[149] *Id.* at 2254–55 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 1940)). Roberts cited other seminal cases. *See id.*; *Trinity Lutheran*, 137 S. Ct. at 2019–21 ("Those 'basic principle[s]' have long guided this Court"); Everson v. Board of Ed. of Ewing, 330 U.S. 1, 16 (1947)("a State 'cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation'"); Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 449 (1988)(holding that the Free Exercise Clause protects against laws that "penalize religious activity by

The Chief Justice continued by reviewing his own opinion from *Trinity Lutheran* wherein the Court interpreted the Free Exercise Clause as forbidding states from singling out believers or faith-based institutions from generally available public benefits simply because they are religious.[150] After a discussion largely criticizing the Supreme Court of Montana's refusal to address *Trinity Lutheran*, Roberts acknowledged that "[t]he Free Exercise Clause protects against even 'indirect coercion,' and a State 'punishe[s] the free exercise of religion' by disqualifying the religious from government aid as Montana did here."[151] He added that "[s]uch status-based discrimination is subject to 'the strictest scrutiny,'" a topic he addressed later in his order.[152]

The Chief Justice went on to reject the Department's attempted reliance on *Locke* wherein the Court rejected a Free Exercise challenge to a state policy in Washington that excluded aspiring ministers from a scholarship program.[153] As he had in *Trinity Lutheran*, Roberts distinguished *Espinoza* from *Locke*.[154]

First, Roberts pointed out that in *Locke*, the student was denied a scholarship to study to become a minister even though others who attended faith-based schools but studied secular subjects could participate in the program.[155] He noted that Montana's program did not identify any particular religious course of study but banned aid to students who sought to attend a faith-based school "simply because of what it is," thereby putting parents in the unenviable position of having the draconian choice of either not sending their children to the schools they selected and preferred or participating in the TCP.[156]

Second, the Chief Justice again rejected the Department's attempted reliance on *Locke* because Washington had an "'historic and substantial' state interest in not funding the training of clergy," as inapt insofar as such a tradition was not present in Montana.[157] In so doing, he examined the history

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denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"). For a more detailed explanation of *Cantwell* see, *supra* note 6.

[150] *Espinoza*, 140 S. Ct. at 2256 (citing *Trinity Lutheran*, 137 S. Ct. 2012, 2022 (2017)).

[151] *Id.* at 2256–57 (quoting *Trinity Lutheran*, 137 S. Ct. 2012, 2022 (2017)). A concurring member of the *Espinoza* court in Montana did briefly mention *Trinity Lutheran*, interpreting it as meaning that a taxpayer "may participate in the Tax Credit Program, but only if he or she agrees to relinquish control of where that donation is spent, with the likely result that the SSO will give those funds to a religious school." Espinoza, v. Mont. Dep't of Revenue, 435 P.3d 603, 621 (Mont. 2018) (Gustafson, J., concurring). Yet, the concurrence's perspective appears to be exactly the type of outcome the Supreme Court sought to prohibit in *Trinity Lutheran* because it seemingly would have essentially denied individuals the right to control where their contributions can be spent.

[152] *Espinoza*, 140 S. Ct. at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2202); *see also infra* notes 162–66 and accompanying text.

[153] *See Espinoza*, 140 S. Ct. at 2257–2258; 540 U.S. 712, 724–25 (2004).

[154] *Espinoza*, 140 S. Ct. at 2257–59. There were two big differences the Chief Justice made between *Espinoza* and *Locke*. In *Trinity Lutheran,* Roberts offered three differences between the cases. *See* 137 S. Ct. at 2023–24.

[155] *Espinoza*, 140 S. Ct. at 2257.

[156] *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2023).

[157] *Id.* at 2257–58 (quoting *Locke*, 540 U.S. at 725).

of denying aid based on an individual's or institution's religious status not only in Montana but in other states, concluding this part of the Court's opinion by stating that "we agree with the Department that the historical record is 'complex.'"[158] Roberts closed this section out by conceding what should have been obvious, namely that different jurisdictions took various approaches and rejected the Department's claim that it has a "historic and substantial" history prohibiting aid to faith-based schools in line with *Locke*.[159]

The Chief Justice next handily, but briefly, rebuffed the dissents of Justices Breyer and Sotomayor. He rejected their views by declaring that "[t]he protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests."[160]

Turning to strict scrutiny, Chief Justice Roberts addressed Montana's two education-based defenses. First, he reiterated that because the actions of the Department and Supreme Court of Montana discriminated against the faith-based school and mothers, they were subject to strict scrutiny.[161] He thus rebuffed the argument of Montana's high court that it had an interest in separating church and state "more fiercely" than mandated by the Federal Constitution.[162] He retorted that this "'interest cannot qualify as compelling' in the face of the infringement of free exercise" at issue.[163] In addition, he rejected the Department's argument that the no-aid provision advanced religious freedom because it not only limited the rights of faith-based schools but also those of parents who wished to send their children to them, insofar as their actions interfered with the long-standing principle that parents have the right to direct the upbringing of their children.[164]

Second, Roberts easily disposed of the Department's claim that its action advanced the state's interest in public education by not allowing funds to be diverted to private schools. However, Roberts observed that insofar as

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[158] *Id.* at 2258–59 (internal citations omitted).

[159] *Id.*

[160] *Id.* at 2260.

[161] *Id.* at 2260. When courts apply strict scrutiny, rather than the rational relations test, the burden shifts to governmental officials to demonstrate that their actions are justified by compelling state interests applied in the most narrowly tailored means possible. *See id.* When courts apply strict scrutiny, state actions are likely to fail.

[162] *Espinoza*, 140 S. Ct. at 2260.

[163] *Id.* (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024). Roberts added that "[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.'" *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981) (finding that once officials at a state university in Missouri made facilities available for activities of registered student groups, they could not prevent faith-based organizations from gathering due to the religious content of their speech)).

[164] *Id.* at 2261. Here, Roberts relied on *Wisconsin v. Yoder* and *Pierce v. Society of Sisters*. *See id.*; 406 U.S. 205, 213–214 (upholding the rights of parents who were Amish to exempt their children from compulsory education after eighth grade because they received the education they needed in their home communities); 268 U.S. 510, 534–535 (1925). A key uncited passage from *Pierce* is "[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." 268 U.S. at 535.

the contested no-aid provision only applied to religious schools, "Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to 'bear [its] weight.'"[165] Rounding out this part of the Court's judgment, Roberts emphasized that "[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."[166]

Chief Justice Roberts devoted the final section of the opinion of the Court to highlight the fallaciousness of the Department's argument that it did not commit a Free Exercise violation because the Supreme Court of Montana had eliminated the TCP in its entirety, including the provision about aid to religious schools and parents.[167] The Department further contended that the parents were not denied a generally available benefit because it had been withdrawn.[168]

Roberts also addressed the fact that two of the dissenters raised similar arguments. He described, but rebuffed, Justice Ginsburg's dissent as essentially treating all parents of children in non-public schools in the same manner.[169] He summarized, but rejected, Justice Sotomayor's position that because the decision below was grounded in state law, the Free Exercise was inapplicable.[170]

The Chief Justice then identified two errors in the Department's argument, and by extension, those of the dissenters. First, he explained that insofar as the judiciary, rather than the legislature, invalidated the entire TCP, it was inaccurate to claim that it was over.[171] Second, Roberts found that the Supreme Court of Montana should have refused to review the case because its application of the no-aid provision in the state constitution violated the Federal Supremacy Clause.[172] More specifically, Roberts pointed out that in light of the conflict between the federal and state constitutions, the Supreme Court of Montana erred in intervening.[173] He reasoned that the "'*supreme* law of the land' condemns discrimination against religious schools and the families whose children attend them" because "[t]hey are 'member[s] of the community too,' and their exclusion from the scholarship program here is 'odious to our Constitution' and 'cannot stand.'"[174] The Chief justice thus

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[165] *Espinoza*, 140 S. Ct. at 2261 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993)).

[166] *Id.*

[167] *See id.* at 2261–62.

[168] *Id.*

[169] *Id.* at 2262.

[170] *Id.*

[171] *See id.*

[172] *Id.* at 2262–63. Pursuant to the Supremacy Clause, "Judges in every State shall be bound [to the Constitution], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[173] *Espinoza*, 140 S. Ct. at 2262.

[174] *Id.* at 2262–63 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023, 2025 (2017); Marbury v. Madison, 5 U.S. 137, 180 (1803)).

reversed and remanded the case for further proceedings.[175]

2. Concurrences

i. Justice Thomas

Justice Thomas, in his concurrence joined by Justice Gorsuch, agreed with the way the Court redressed the discrimination to which the three mothers and their children had been subjected, but wrote "separately to explain how this Court's interpretation of the Establishment Clause continues to hamper free exercise rights."[176] Thomas thus reviewed relevant precedent to discuss the way in which he thought the Court should recast the relationship and interactions between the Free Exercise and the Establishment Clauses.[177]

ii. Justice Alito

In his concurrence, Justice Alito provided a detailed examination of the history and background of the original Blaine Amendment, after which the contested Montana provision was modeled.[178] In so doing, he emphasized that "the [Blaine A]mendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants" and "[i]n effect . . . would have 'bar[red] any aid' to Catholic and other 'sectarian' schools.[179] Justice Alito also examined the history of Montana's provision at the heart of *Espinoza*.[180]

ii. Justice Gorsuch

Justice Gorsuch's fairly brief concurrence criticized the Supreme Court of Montana for ignoring the will of the people and the state legislature by striking down the TCP—a program designed to help parents who could not otherwise pay tuition to send their children to the non-public schools of their choice.[181] In so doing, he found that the Supreme Court of Montana disregarded the Free Exercise Clause by discriminating against the mothers and their children on the basis of religion.[182]

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[175] *Id.* at 2263.

[176] *Id.* (Thomas, J., concurring).

[177] *Id.* at 2264–65. Justice Thomas referred to *Lemon* as "this Court's infamous test." *Id.* at 2265. For more on Justice Thomas's concurrence, see *infra* notes 222–30 and accompanying text.

[178] *See Espinoza*, 140 S. Ct. at 2268–71 (Alito, J., concurring).

[179] *Id.* at 2268 (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000)). Justice Alito also noted that the Ku Klux Klan was also "a prominent supporter of this anti-Catholic ban . . . ." *Id.*

[180] *See id.* at 2268–73.

[181] *Id.* at 2274 (Gorsuch, J., concurring)

[182] *Id.* at 2274–75.

3. Dissents

i. Justice Ginsburg

In dissent, Justice Ginsburg was joined by Justice Kagan.[183] Largely ignoring *Trinity Lutheran*, Ginsburg based her opinion on a narrow ground. In a post hoc justification that Chief Justice Roberts dismantled, she argued that, insofar as the Supreme Court of Montana had invalidated the TCP, the state did not discriminate against the plaintiffs and their children in violation of the Free Exercise Clause, because at that point no one was eligible to have participated in the TCP.[184] In addition, she contended that the Court erred because officials in Montana had not violated the Free Exercise Clause.[185]

ii. Justice Breyer

Justice Breyer's dissent expressed his fear that the Court's judgment might lead to entanglement between the government and religion.[186] He was concerned that a "too-close-for-comfort" relationship might result in exactly the types of conflict that the First Amendment Religion Clauses were designed to prevent in a pluralistic nation.[187]

At the same time, Justice Breyer unpersuasively tried to compare *Locke* and *Espinoza*.[188] He posited that excluding the faith-based schools from the TCP in *Espinoza* was much closer to the denial of funds for a student for the ministry in *Locke* than it was in preventing people of faith from participating in a grant program of general availability designed to provide playground surfaces in *Trinity Lutheran*.[189]

iii. Justice Sotomayor

In dissent, Justice Sotomayor argued that, insofar as the Supreme Court of Montana had invalidated the entire TCP on state law grounds, the Justices should have respected that judgment because the TCP no longer existed by virtue of the Montana court's earlier order.[190] In so doing, she ignored Chief Justice Roberts's point that the principles in the Free Exercise Clause apply when states discriminate against people of faith and religious institutions.[191]

Justice Sotomayor then rebuked the Court for what she described as

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[183] *Id.* at 2278 (Ginsburg, J., dissenting).
[184] *Id.* at 2279.
[185] *Id.* at 2279–80.
[186] *Id.* at 2281 (Breyer, J., dissenting). Justice Breyer's dissent was the longest of the three dissents and was joined by Justice Kagan.
[187] *Id.* at 2282.
[188] *Id.* at 2284–85.
[189] *Id.* at 2285–86.
[190] *Id.* at 2292 (Sotomayor, J., dissenting).
[191] *See id.*

having granted the mothers' request "that Montana subsidize their children's religious education."[192] She paid scant attention to the fact that the state singled out only one class of schools to be deprived of participation in the TCP—those with religious affiliations. In the opening sentence of the final paragraph of her dissent, Justice Sotomayor contemptuously wrote that "[t]oday's ruling is perverse," criticizing the Court for "setting aside well-established judicial constraints."[193] Yet, she ignored *Trinity Lutheran*, another case in which she dissented, which forbids states from discriminating against faith-based organizations and/or persons simply due to their religions.

V. DISCUSSION

At a minimum, *Espinoza* stands for the proposition that if government provides funding or benefits for private secular entities, then it must also provide funding or benefits for religious entities. People of faith and their organizations will no longer be second class citizens in our constitutional republic. This rule alone makes *Espinoza* a landmark. Yet, the implications of *Espinoza* may be far broader. *Espinoz*a may signal the triumph of religious liberty over religious bigotry, a redefinition of the space between what the Free Exercise Clause requires and what the Establishment Clause prohibits, and a revolution in school choice for the benefit of marginalized communities. We explore each of these potential implications below.

A. An End of the Blaine Amendments?

Reasonable people can certainly disagree over whether Chief Justice John Roberts's forceful words, as author of the Supreme Court's opinion in *Espinoza*, was the stake through the heart of the anti-Catholic Blaine Amendments, bringing their jurisprudential reign of terror to a timely end.[194] This much is clear though: "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[195] The upshot is that if the Blaine Amendments are still viable—a dubious proposition at best—they are on life support as the Court seeks to end discrimination toward faith-based institutions and people of faith in a religiously diversified United States.[196]

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[192] *Id.* at 2293.

[193] *Id.* at 2297.

[194] Some of this analysis builds on Charles J. Russo & William E. Thro, *Born of Bigotry, Died in Religious Liberty: The Supreme Court Ends the Blaine Amendments in Empowering Parental Choice*, CANOPY F. ON THE INTERACTIONS OF L. & RELIGION (July 14, 2020), https://canopyforum.org/2020/07/14/born-of-bigotry-died-in-religious-liberty/.

[195] *Espinoza*, 140 S. Ct. at 2259 (majority opinion).

[196] For a discussion on the religious diversity of the United States, see *In U.S., Decline of Christianity Continues at Rapid Pace: An Update on America's Changing Religious Landscape*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ (reporting that 65% of American adults describe themselves as Christians, down 12% over the past decade.

Espinoza's significance far exceeds the longstanding form of legalized bigotry enshrined in Blaine-type language in state constitutions. Indeed, *Espinoza* is a major victory for both religious freedom and the rights of parents to choose where their children will be educated. In *Espinoza*, the Court essentially rejected the judicially created metaphor of the "wall of separation between Church and State," coined by Roger Williams in the 1640s, but popularized by Thomas Jefferson in 1802.[197] This is the view most often associated with the Court's First Amendment jurisprudence for the better part of the past seventy-five years.[198] Consequently, in light of *Espinoza* and *Trinity Lutheran*, the Court no longer allows states to rely on either the Establishment Clause or Blaine-type language in their state constitutions to treat religious institutions and people of faith differently from the general public.

As discussed earlier, a state trial court in Montana, in an unreported opinion, granted the three mothers' request for summary judgment, essentially upholding the constitutionality of the program without the disputed rule which excluded faith-based schools from participating.[199] However, relying largely on Blaine-type language in the Montana Constitution, which bars state aid to sectarian schools, the Supreme Court of Montana reversed in favor of the state.[200]

The religiously unaffiliated share of the population, those who describe their religious identity as atheist, agnostic, or "nothing in particular," now stands at 26%, up from 17% in 2009).

[197] *See* Roger Williams, Mr. Cotton's Letter Lately Printed, Examined and Answered (1644), *in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 313, 392 (Reuben Aldridge Guild ed., 1963) ("when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world . . . "); Thomas Jefferson's letter of January 1, 1802, to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut, *in* 16 WRITINGS OF THOMAS JEFFERSON 282 (Andrew Adgate Lipscomb & Albert Ellery Bergh, eds., 1903). Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.

Id. at 281–82.

[198] For a seminal case protecting the free exercise of religion in education, albeit under the Fourteenth, rather than First, Amendment, see Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35. (1925) (invalidating a voter-approved initiative from Oregon that not only would have required all children, other than those who today would be identified as needing special education, to attend public schools both because it would have seriously impaired, if not destroyed, the profitability of non-public schools and insofar as it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

[199] *See* Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment, Espinoza v. Mont. Dep't of Revenue, No. DV-15-1152C, 2017 WL 11317587 (Mont. Dist. Ct. May 23, 2017); Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 608 (Mont. 2018).

[200] *Espinoza*, 435 P.3d at 615. The relevant portion of the Montana Constitution states:

> (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or

As aptly described in Justice Alito's concurrence in *Espinoza*, former Congressman, Senator, and unsuccessful Republican candidate for President, James K. Blaine of Maine, introduced a constitutional amendment intended to deny aid to schools "under the control of any religious sect," blatantly bigoted code for Roman Catholic schools.[201] Blaine proposed this amendment after President Ulysses S. Grant's final State of the Union Address on December 7, 1875, in which he called for a constitutional amendment "forbidding the teaching [of religion in public schools] . . . and prohibiting the granting of any school funds, or school taxes, or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination . . . ."[202]

Near the end of his address Grant declared that "[n]o sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community."203 Congress rejected Blaine's proposed amendment in 1876 when it failed to gain enough votes in the Senate.[204] As evidenced in *Espinoza*, Montana was one of the majority of states to have incorporated similar provisions in their constitutions.[205] *Espinoza* is crucial because, in rejecting the bigoted Blaine Amendments, it extends the protection for religious freedom and pluralism the Supreme Court enunciated in *Trinity Lutheran*.[206]

> denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

MONT. CONST. art. X, § 6.

[201] *Espinoza*, 140 S. Ct. 2246, 2267 (2020) (Alito, J., concurring); 4 CONG. REC. 205 (1875) (constitutional amendment to Congress proposed by Rep. Blaine).

[202] 4 CONG. REC. 175 (annual message of the President of the United States).

[203] *Id.* at 181 (annual message of the President of the United States).

[204] The entire proposed Amendment read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id. at 205 (constitutional amendment to Congress proposed by Rep. Blaine). Although Congress rejected the proposed amendment, as noted, most states have incorporated similar provisions in their constitutions. *Id.* at 5595 (1876) (statement of Sen. Morton). For a good discussion of the treatment of the Blaine Amendment in Congress, see Mark Edward Deforest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J OF L. & PUB. POL'Y 551, 565–73 (2003).

[205] *See Blaine Amendments*, INST. FOR JUST. (Jan. 1, 2020), https://ij.org/issues/school-choice/blaine-amendments/. For a helpful color-coded map illustrating various permutations of state constitutional provisions, see David Hodges, *A Guide to Designing Educational Choice Programs*, INST. FOR JUST. (July 2020), https://ij.org/report/a-guide-to-designing-educational-choice-programs/. Amid disagreements on how to count such laws, Justice Sotomayor's dissent in *Trinity Lutheran* indicated that "thirty-eight States have a counterpart to Missouri's [Blaine Amendment]."137 S. Ct. 2012, 2037 (2017) (Sotomayor, J., dissenting).

[206] *See, e.g.*, Michael W. McConnell, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html; Thro & Russo, *supra* note 42.

B. Redefining the Constitutional Space Between the Establishment and Free Exercise Clauses?

Written constitutions establish the parameters of the government.[207] But they also limit the government.[208] By establishing both the parameters of the government and limits on the government, it limits, with "elegant specificity," the discretion of constitutional actors to pursue a particular end by a particular means.[209] These limitations on sovereign discretion take two forms—prohibitions and requirements.[210]

While Americans are familiar with the idea of constitutional provisions as prohibitions, they are less familiar with the notion of constitutional provisions that impose requirements on the government to act in a particular way.[211] Yet, the provisions that we often regard as prohibitions

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[207] William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, 28 REGENT UNIV. L. REV. 197, 203 (2016). The "federal and state charters are not, contrary to popular belief, about 'democracy'—a word that appears in neither document, nor in the Declaration of Independence. Our enlightened 18th- and 19th-century Founders, both federal and state, aimed higher, upended things, and brilliantly divided power to enshrine a *promise* (liberty), not merely a *process* (democracy)." Patel v. Tex. Dep't of Licensing & Reg., 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring).

[208] Afroyim v. Rusk, 387 U.S. 253, 257 (1967). The Constitution's structural and textual provisions—such as the division of sovereignty between the States and the National Government, the separation of powers between the three branches, the enumeration of legislative powers, explicit textual guarantees of rights, bicameralism, the executive veto, the advice and consent requirement for appointments, and treaty ratification process—all express a fundamental distrust of humanity and a desire to avoid concentrations of power.

[209] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 846 (2015) (Roberts, C. J., dissenting). For example, state constitutions generally require their legislatures to establish public school systems of a particular quality. William E. Thro, *Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education*, 98 KY. L.J. 717, 725–26 (2010). Absent such a state constitutional provision, state legislatures would have absolute discretion whether to pursue the end of a public-school system and to choose the means of achieving that end. *See* Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 358–59 (2011) (arguing that because state legislatures, by default, have all power not given to the federal government, they are thus constrained, not enabled, by specific grants of power in state constitutions).

[210] Thro, *supra* note 207, at 203.

[211] Some scholars regard the prohibitions as "negative rights" and the requirements as "positive rights." EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 40–41 (Princeton U. Press ed., 2013). In this paradigm, state constitutions are fountainheads of positive rights. *Id.* at 43; *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (asserting that state constitutions are built on positive rights and, therefore, courts reviewing the statute with a federal lens will do a disservice to the state legislature). On the other hand, Professor Scott Bauries argues that these requirements are "duties." Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 706, 747–48 (2012). Under this view, the judiciary must engage in a process-based review to determine if the government has violated its duty of care. Scott R. Bauries, *Perversity as Rationality in Teacher Evaluation*, 72 ARK. L. REV. 325, 358 (2019). What Bauries calls "duties" are effectively explicit textual limitations on the government's discretion to act or refrain from acting. Bauries, *The Education Duty*, *supra* at 708. Absent a textual limitation establishing a "duty," the government has absolute discretion to act or refrain from acting. *Id.* at 716–19, 730. Conversely, with the textual limitation establishing the "duty," the government must act. *Id.* at 716–19. *Compare* Abner S. Greene, *What Is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1241–42 (2013) (arguing that the Constitution creates certain duties, both positive and negative, for public officials), *with* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1008–10 (2011) (discussing how the Constitution restricts the branches of the federal and state governments).

also impose requirements.[212] The Religion Clauses illustrate the point. For example, the Free Exercise Clause prohibits government from punishing particular beliefs, but also mandates a religious exemption from otherwise applicable laws in some circumstances.[213]

When constitutional actors do something that is prohibited or fail to do what is required, the judiciary must intervene and force them to comply. Yet, in the space between what constitutions require and what constitutions prohibit, elected legislative and executive actors have absolute discretion to pursue whatever policy objectives they desire.[214] Within this constitutional space, legislative and executive actors can choose how to remedy constitutional violations.[215] Because any "ruling of unconstitutionality frustrates the intent of the elected representatives of the people," the judiciary cannot force the legislative and executive actors to choose a particular course when other courses are equally constitutional.[216]

To be sure, there will be times—particularly involving constitutional prohibitions—when the constitutional space is small or even non-existent.[217] For example, if a court finds that a local prosecutor violated the First Amendment by applying a statute to a criminal defendant, the only remedy is to say the local prosecutor may not apply the statute to the criminal

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[212] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *Id.* amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."); *Id.* amend. XX, § 2 (requiring Congress to meet at least once per year).

[213] As the Supreme Court explained:

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Emp. Div. v. Smith, 494 U.S. 872, 876–77 (1990) (quoting U.S. CONST. amend. I; Sherbert v. Verner, 374 U.S. 398, 402 (1963)). *Compare id.* at 877–78 (stating that religious conduct is not exempt from laws that apply to the general public), *with* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (holding that the ministerial exception makes federal discrimination statutes inapplicable to the employment decisions of religious organizations concerning their ministerial employees).

[214] *See* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (stating States may pursue any policy in the space between what the Establishment Clause prohibits and what the Free Exercise Clause requires).

[215] *See* Milliken v. Bradley, 433 U.S. 267, 280–81 (1977).

[216] Regan v. Time, Inc., 468 U.S. 641, 652 (1984); Horne v. Flores, 557 U.S. 443, 450 (2009). For some early observations about the impact of *Horne*, see William E. Thro, *The Many Faces of Compliance: The Supreme Court's Decision in Horne v. Flores,* 75 SCH. BUS. AFFAIRS, Oct. 2009, at 14.

[217] Conversely, there will be times—particularly involving constitutional requirements—when the constitutional space will be quite large. For example, if a court concludes an executive branch official violated the Sixth Amendment by failing to provide an attorney to an indigent criminal defendant, there are a variety of ways of fulfilling the constitutional mandate. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

defendant.[218] Similarly, if the Court finds that the legislature has violated the First Amendment by enacting a facially unconstitutional statute, then the only remedy is to prohibit the law's enforcement.[219]

Historically, the space between what the Establishment Clause prohibits and requires and what the Free Exercise Clause prohibits and requires has been quite broad. Indeed, prior to *Trinity Lutheran*, constitutional actors routinely conferred or denied a benefit solely because of an individual's or entity's religious exercise.[220] *Trinity Lutheran* narrowed the constitutional space, and *Espinoza* narrowed it further.[221]

In his concurrence in *Espinoza*, Justice Thomas, joined by Justice Gorsuch, suggested it was necessary to redefine the constitutional space between the Free Exercise and Establishment Clauses.[222] First, the "modern interpretation" of the Establishment Clause is too broad and often conflicts with the Free Exercise Clause. Constitutional actors, at all levels, frequently rely on the Establishment Clause as a purported justification for infringing on the free exercise rights of individuals and groups. For example, officials at public universities have unsuccessfully argued that the Establishment Clause compelled them to deny access or funding to student religious groups while extending these benefits to secular groups.[223] In effect, the modern view of the Establishment Clause diminishes the vitality of the Free Exercise Clause such that it becomes the "lowest rung" on the constitutional ladder.[224]

Second, Justice Thomas observed that "the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect."[225] As Justice Thomas has noted, the original public meaning of the Establishment Clause was not to create an individual right but, rather, to prevent the national government from establishing a religion or interfering with the States' efforts to maintain their own established religion at the state level.[226] In sum, under the original understanding, the

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[218] *See* Virginia v. Black, 538 U.S. 343, 363–66 (2003) (holding that although the legislature did not violate the First Amendment by enacting a statute prohibiting cross-burning with the intent to intimidate, the local Prosecutor violated the First Amendment by applying the law to a Ku Klux Klan member).

[219] *See* Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 805 (2011).

[220] *See* Thro & Russo, *supra* note 42, at 1, 17.

[221] *See* Russo & Thro, *supra* note 194.

[222] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263–65 (2020) (Thomas, J. concurring).

[223] *Id.* at 2263–64; Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995); *see also* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (ruling that university officials violated the Free Speech Clause of the First Amendment by engaging in viewpoint discrimination in denying a Christian student group funding to publish its magazine).

[224] *Espinoza*, 140 S. Ct. at 2267 (Thomas, J., concurring).

[225] *Id.* at 2264.

[226] *Id.* at 2263–64; *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2095–96 (2019) (Thomas, J., concurring). For commentary on *American Legion*, see Charles J. Russo, *American Legion v. The American Humanist Association and the Bladensburg Cross: Implications for Education*, 46 REL. & EDUC. 482 (2019).

Establishment Clause does not establish a limitation on the States.

However, even if the Establishment Clause does limit the States, "it would only protect against an 'establishment' of religion as understood at the founding, *i.e.*, 'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.'"[227] Instead of focusing on maintaining a "separation of church and state," the Court may focus on the "freedom from a religious establishment."[228] For example, Justice Thomas believes that the judiciary should never rely on the Establishment Clause to reach such questions like whether a display of a creche was sufficiently secular or whether a governing body could solemnize its meetings with a prayer.[229]

If the Court were to adopt Justice Thomas's view, the constitutional space between the Establishment Clause and Free Exercise Clause would be redefined. The reach of the Establishment Clause would be scaled back. This would eliminate the tension between the Religion Clauses. It would also allow government, if it wished, to provide accommodations that are above and beyond the requirements and prohibitions of the Free Exercise Clause. The result would be a path toward greater religious freedom, a reaffirmation of a foundational purpose of early American colonization, and, most significantly, a way to achieve a "Confident Pluralism."[230]

Three points here are crucial. First, if individual rights under the Establishment Clause are limited to avoiding coercion, the government will have no possible justification for treating people of faith worse than secular citizens. Second, while America had multiple beginnings, the desire to worship God as they saw fit was vital to the origin of Maryland, Rhode Island, and Utah.[231] In fact, the Mayflower Compact among pilgrims fleeing religious persecution is a foundation of our constitutional order.[232] Third, because Americans "lack agreement about the purpose of our country, the nature of the common good, and the meaning of human flourishing," it is essential that we develop the grace to address our differences through

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[227] *Espinoza*, 140 S. Ct. at 2264 (quoting Town of Greece v. Galloway, 572 U.S. 565, 608 (2014)).

[228] *See* PHILIP HAMBURGER, SEPARATION OF CHURCH & STATE 481–83 (2002) (arguing that the Constitution provided for a freedom from religious establishments, but a variety of events, including anti-Catholic bigotry, has resulted in something very different—the separation of church and State).

[229] *See Espinoza*, 140 S. Ct. at 2265. *But see* Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing a Nativity scene to remain in a Christmas display on public property); Town of Greece v. Galloway, 572 U.S. 565 (2014) (upholding a board's practice of opening its monthly meetings with prayer even if they were explicitly religious as long as they did not praise one faith while denigrating others). For an article on religious holidays in public schools, see Charles J. Russo, *Of Baby Jesus and the Easter Bunny: Does Christianity Still Have a Place in the Educational Marketplace of Ideas in the United States?* 16 EDUC. & L. J. 61 (2006).

[230] *See* JOHN D. INAZU, CONFIDENT PLURALISM 125–26(2016).

[231] *See* JEFFERY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17 (2018); COLIN WOODARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN REGIONAL CULTURES OF NORTH AMERICA 57, 245 (2011).

[232] ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 8–10 (7th ed. 1991).

humility, patience, and tolerance.[233]

The opinion of the Court establishes a broad principle of equality between the religious and secular organizations. Even so, the Thomas concurrence points the way toward a society where all people of faith and people of no faith can thrive.

C. A School Choice

Clearly, *Espinoza* is a victory for religious freedom because it prevents states and public officials from discriminating against religiously affiliated schools and people of faith. At the same time, *Espinoza* is a major boost to proponents of school choice. Accordingly, given the importance of education as "perhaps the most important function of state and local governments," a convincing argument can be made that "school choice is the civil rights statement of the year, of the decade, and probably beyond, because all children have to have access to quality education."[234]

School choice is essential because at a time when American students continue to lag behind their international peers, it is essential to remember 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."[235] Put another way, insofar as Americans support the notion of "choice" in a variety of other arenas, seemingly as long as it does not involve religion, it is perplexing why critics, such as teachers' unions, balk at deferring to parents who wish to exercise their right to choose where their children are to be educated.[236] It is, then, essential to afford parents greater, potentially life-changing opportunities to have their children educated in the schools of their choice, presumably because their values are consistent with those modeled and taught in the schools they select.[237]

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[233] TIMOTHY KELLER & JOHN INAZU, UNCOMMON GROUND: LIVING FAITHFULLY IN A WORLD OF DIFFERENCE xv (2020).

[234] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Whistle, *supra* note 1.

[235] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); *see also* Dana Goldstein, '*It Just Isn't Working': PISA Test Scores Cast Doubt on U.S. Education Efforts*, N.Y. TIMES (Dec. 5, 2019), https://www.nytimes.com/2019/12/03/us/us-students-international-test-scores.html; Valerie Strauss, *'A Nation at Risk' Demanded Education Reform 35 Years Ago. Here's How It's Been Bungled Ever Since*. WASH. POST. (Apr. 26, 2018, 6:00 AM), https://www.washingtonpost.com/news/answer-sheet/wp/2018/04/26/the-landmark-a-nation-at-risk-called-for-education-reform-35-years-ago-heres-how-it-was-bungled/.

[236] *See* Jeffrey Dorfman, *Teachers Unions, Faulty Economics, and School Choice*, FORBES (Nov. 13, 2016, 12:05 PM), https://www.forbes.com/sites/jeffreydorfman/2016/11/13/teachers-unions-faulty-economics-and-school-choice/#671d6ec07c73 ("[m]ost liberals, who get significant funding from public school teachers unions, line up against any form of school choice"). For a discussion of how religion is often ignored in society, see Charles J. Russo, *Is Religion the Lost Diversity in Education in an Era of 'Militant Secularists?'*, 21 UNIV. OF NOTRE DAME AUST. L. REV. 1 (2019).

[237] For Kendra Espinoza's post-judgment statement reflecting such sentiment, see Press Release, John Kramer, Inst. of Justice, Landmark Victory for Parents in U.S. Supreme Court School Choice Case, (Jun.

School choice also offers a possible path toward closing the persistent achievement gap between poor, disproportionately minority children and their wealthy, disproportionately White peers.[238] Simply put, not every child thrives in the centralized secular approach offered in many public schools. Indeed, a strong argument can be made that current educational policies have actually harmed, not helped, Black children in particular.[239] While teachers' unions and most liberal progressives oppose school choice, the reality is that large, even overwhelming, majorities of Blacks and Latinos favor school choice.[240]

Aware of the potential benefits of school choice, especially for students from minority groups, allowing parents to select the schools their children will attend is crucial to the success of their young. School choice is particularly important because research bears out that when parents are free to act as they deem appropriate for their children, their increased involvement typically enhances student academic success.[241] Student academic success is especially evident in non-public schools which ordinarily have more stringent academic standards.[242] Researchers have described this resulting beneficial relationship between and among parents, educators in the schools their young attend, and their children as a form of social capital that strengthens the

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30, 2020), https://ij.org/press-release/landmark-victory-for-parents-in-u-s-supreme-court-school-choice-case/.

> I am thrilled that the courts ruled in favor of the Constitution and maintained a parent's right to choose where their children go to school. . . . For our family, this means we can continue to receive assistance that is a lifeline to our ability to stay at Stillwater [Christian School]. For so many other families across America, this will potentially mean changing lives and positively altering the future of thousands of children nationwide. What a wonderful victory.

Id. (quoting statement of Kendra Espinoza).

[238] *See generally* WILLIAM JEYNES, ELIMINATING THE ACHIEVEMENT GAP (2019); MICHELE WAGES, THE ACHIEVEMENT GAP: A POVERTY CRISIS, NOT AN EDUCATION CRISIS (2018).

[239] *See generally* JASON L. RILEY, PLEASE STOP HELPING US: HOW LIBERALS MAKE IT HARDER FOR BLACKS TO SUCCEED (2014); NARROWING THE ACHIEVEMENT GAP: STRATEGIES FOR EDUCATING LATINO, BLACK, AND ASIAN STUDENTS (Susan J. Paik & Herbert J. Walberg, eds., 2007).

[240] Tommy Schultz, *American Federation for Children Releases 6th Annual National School Choice Poll*, AM. FED'N FOR CHILDREN (Jan. 24, 2020), https://www.federationforchildren.org/afc-6th-annual-national-school-choice-poll-release/ (reporting that 83% of both African Americans and Hispanics support school choice in the form of a federal tax credit scholarship program); Laura Meckler, *As Pandemic Tests Public Schools, Betsy DeVos Pushes School Choice: Education Secretary Pitches Choices Outside Traditional Schooling and Sends Federal Dollars to Private Schools*, WASH. POST. (Jun. 15, 2020, 10:22 AM) (reporting that "[t]eachers unions and many Democrats oppose school choice plans . . . ."); Randi Weingarten, *School Choice—Past and Present*, AM. FED'N TCHRS. (July 23, 2017), https://www.aft.org/column/school-choice-past-and-present (speaking as President of the American Federation of Teachers and in opposition to school choice); Neal McClusky, *African Americans Speak for Themselves: Most Want School Choice*, CATO AT LIBERTY (July 25, 2017, 4:09PM), https://www.cato.org/blog/african-americans-speak-themselves-most-want-school-choice.

[241] *See*, *e.g.*, GARRY HORNBY, PARENTAL INVOLVEMENT IN CHILDHOOD EDUCATION: BUILDING EFFECTIVE SCHOOL-FAMILY PARTNERSHIPS (2011); Sira Park & Susan Holloway, *Parental Involvement in Adolescents' Education: An Examination of the Interplay Among School Factors, Parental Role Construction, and Family Income*, 28 SCH. CMTY. J. 9, 10 (2018).

[242] *See* Cindy Currence, *A `Catholic Schools Effect' is Reaffirmed By Its Champions, Coleman and Greeley*, EDU. WEEK (Nov. 14, 1984), https://www.edweek.org/education/a-catholic-schools-effect-is-reaffirmed-by-its-champions-coleman-and-greeley/1984/11.

quality of schooling and, ultimately, the nation.[243]

D. Espinoza's Significance

In sum, *Espinoza* accomplished three significant ends. First, the Court recognized that religious bigotry, however fashionable in the late nineteenth century, is incompatible with a Republic conceived in liberty.[244] Second, at least in the view of Justices Thomas and Gorsuch, it is clear that the inalienable right to practice one's faith is not subordinate to other constitutional values. Third, and most significantly from a policy standpoint, *Espinoza* has removed unnecessary roadblocks to school choice. In so doing, *Espinoza* offers a golden opportunity for parents who previously lacked the full financial resources to pay to have their children educated in the schools of their choice by affording them—rather than government bureaucrats—opportunities to exercise their rights to select the schools their children will attend.

VI. CONCLUSION

Espinoza has the potential to play a major role in helping to end what former President George W. Bush described as the "soft bigotry of low expectations."[245] This "soft bigotry" condemns many children, especially those from economically deprived backgrounds, to attending low-performing schools from which they have little, if any, chance of succeeding academically and beyond, denying them, their parents, and families opportunities to participate in the seemingly elusive "American Dream."

Espinoza thus represents a significant step toward achieving the as of yet unfulfilled promise of *Brown v. Board of Education*'s equal educational opportunities for all of America's children and their families, regardless of their races, creeds, ethnicities, genders, socioeconomic or immigration statuses, or (dis)abilities.[246] *Brown*'s goal of equal educational opportunities for all children and their families is one well worth pursuing, perhaps now more than ever before in the nation's history.

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[243] For background on parental involvement and social capital, see JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES (1987); Andrew M. Greeley, *Community as Social Capital: James S. Coleman on Catholic Schools*, AMERICA, Sept. 5, 1987, at 110, 110–112; James Coleman, *Social Capital in the Creation of Human Capital,* 94 AM. J. OF SOCIO. 95 (1998).

[244] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259, 2262 (2020); *see also* President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

[245] Sam Dillon, *Democrats Make Bush School Act an Election Issue*, N.Y. TIMES (Dec. 23, 2007), http://www.nytimes.com/2007/12/23/us/politics/23child.html.

[246] *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Derrick A. Bell, *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1055 (2005); Peter C. LaGreca, *Separate and Unequal: The American Dream Unfulfilled*, 16 RUTGERS RACE & L. REV. 183 (2015).