An assault on separation of church and state as well as public education

US Supreme Court rules in favor of religious schools

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On Tuesday, the United States Supreme Court voted 5–4 to reverse a decision by the Montana Supreme Court that invalidated a state program allowing dollar-for-dollar tax credits for donations to private or parochial primary or secondary schools.

The reasoning and breath of the ruling in *Espinoza v. Montana* eliminate the legal barriers to government subsidies for religious education. The decision wipes out a provision in dozens of state constitutions dating back to the post-Civil War Reconstruction period and undermines the First Amendment wall of separation between church and state as well as public education.

In 2018, of the donations to Montana schools under the tax rebate program, 94 percent went to religious institutions, mostly evangelical Christian and Catholic. The scheme diverted substantial state tax revenues from public education and other uses for deposit directly into the coffers of primary and secondary schools that teach their pupils religious doctrine, perhaps along with subjects such as math, science, history and English.

The Montana high court ruled that the tax credits violated a state constitutional provision that prohibits "any direct or indirect appropriation… to aid any church, school, academy, seminary, college, university… controlled in whole or in part by any church, sect, or denomination."

This provision derived from a proposed amendment to the United States Constitution introduced by Speaker of the House James G. Blaine in 1875, intended to clear a path for the development of public education.

After passing the House of Representatives by a vote of 180–7, it fell two votes short of the two-thirds vote in the Senate required for distribution to the states for ratification. To compensate, 37 of the 50 states, including Montana, adopted "Baby Blaine" provisions in their state constitutions.

These provisions promoted the development of public education, free of religious entanglements, for families of the emancipated "freedmen" in the South, as well as the rapidly growing, heavily immigrant working class in the North and the settlers populating newly formed states such as Montana.

Because the Montana court based its decision on the state's Baby Blaine provision, not on any federal constitutional provision, adherence to the conservative principle of "states' rights" would have ended the litigation. Instead, a group of parents asserted that the state court decision interfered with their federal First Amendment right to the free exercise of religion by denying financial support to the religious schools where they wanted to send their children. They petitioned the Supreme Court for review, backed by a consortium of reactionary anti-public education activists, including the Koch Foundation and the family of Secretary of Education Betsy DeVos.

The *Espinoza* ruling itself consists of seven opinions spanning 92 pages. Chief Justice John Roberts wrote for the right-wing majority. His opinion was joined by Associate Justice Brett Kavanaugh. Justices Clarence Thomas, Samuel Alito and Neal Gorsuch filed separate concurrences. Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor filed dissents. Elena Kagan dissented without an opinion.

The First Amendment to the US Constitution begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Thomas Jefferson explained in an 1802 letter that the so-called "Establishment Clause" on religion erects "a wall of separation between Church and State." Over time, following the ratification of the post-Civil War Fourteenth Amendment, the religion clauses have been incorporated to bind state governments as well.

Roberts, who has recently oscillated between the four extremely right-wing and the four more liberal justices, brushed aside Establishment Clause concerns. "To be eligible for government aid under the Montana Constitution," Roberts wrote, "a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges inevitably deters or discourages the exercise of First

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Amendment rights… A State punishes the free exercise of religion by disqualifying the religious from government aid as Montana did here."

This reasoning turns the religion clauses upside down. According to Roberts, the Montana state law that prohibits the subsidizing of religious education, i.e., prohibits the establishment of religion, cannot be enforced because it denies certain adherents to certain religions their right to free exercise. Under this view, religious subsidies are not only constitutionally permitted, they are constitutionally mandated.

Under Roberts' reasoning, parents who want a religious education for their children can sue in federal court to fund religious schools because the free exercise clause precludes the state from providing funding only for secular public schools.

Espinoza repudiates the very foundation of the First Amendment's religion clauses, which arose from 1785's "Memorial and Remonstrance Against Religious Assessments" by James Madison, who four years later drafted the First Amendment.

Roberts writes: "Madison objected in part because the Bill provided special support to certain churches and clergy, thereby "violating equality by subjecting some to peculiar burdens."

Roberts' history is very wrong. Madison objected to the Virginia Legislature's "Assessment Bill" because it imposed a tax to support religious education, even though it gave each taxpayer the right to designate which church was to receive it, a proposal no different in substance from the Montana tax credit scheme.

Madison opposed the Assessments Bill because "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." Government sponsorship of religion violates "that equality which ought to be the basis of every law," he wrote.

True to his convictions, as the fourth US president, Madison vetoed a bill that would have allocated tax revenue in the District of Columbia to an Episcopal church for the education and care of poor children.

The Virginia Assembly rejected the Assessments Bill and passed Thomas Jefferson's "Bill for Establishing Religious Freedom," the preamble to which stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

Justice Thomas' concurrence denigrates decades of often eloquent Supreme Court jurisprudence affirming the separation of church and state championed by Jefferson and Madison as a "trendy disdain for deep religious conviction." Joined by Gorsuch, Thomas argues that the Establishment Clause, unlike other provisions of the Bill of Rights, should apply *only to* the federal government and should not be incorporated to limit direct state government support for particular religions, a recipe for a patchwork of theocratic states levying taxes to support favored churches.

Alito's concurrence paints the Blaine Amendment, proposed during Reconstruction with the support of President Ulysses S. Grant to promote public education, as solely the product of anti-Catholic bigotry, with no progressive content.

While there was undoubtedly some invidious "nativist" sentiment among forces supporting the Blaine Amendment, as noted by Stephen K. Green, an expert cited by Alito, states began prohibiting state funding for religious schools in the 1830s, before the first waves of Catholic immigration. Professor Green documents collaboration among religious leaders of different denominations, including Catholics, to support non-sectarian public education by banning public funding for religious schools.

Green recognizes that anti-Catholicism may have influenced some who supported the Blaine Amendment, but he cautions that "included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation." He adds that "those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times."

Indeed.

The justices who support religious subsidies must rewrite history because they do not accept the secular foundations of the democracy that grew out of the American Revolution of 1775–1783, nor the egalitarian impulses generated by the Union victory in the Civil War of 1861–1865.

Ironically, *Espinoza* was the final Supreme Court decision released before the Fourth of July, the celebration of the signing of the Declaration of Independence, which traditionally marks the end of the Supreme Court's annual term. In this COVID-19 year, however, more cases remain to be decided.

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