
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 73 | ISSUE 4 SUMMER 2021

# *ESPINOZA* AND THE MISUSES OF STATE CONSTITUTIONS

*G. Alan Tarr*[*]

TABLE OF CONTENTS



## I. INTRODUCTION

In 2018, the Montana Supreme Court struck down a state law granting taxpayers a dollar-for-dollar tax credit for contributions to organizations that fund tuition scholarships for students attending private schools, whether secular or religious.[1] The Montana justices held that this program violated article X, section 6 of the Montana Constitution, adopted in 1972, which prohibits the use of public funds for "any sectarian purpose" or their distribution to educational institutions

* Board of Governors Professor Emeritus, Department of Political Science, Rutgers University-Camden. B.A., 1968, College of the Holy Cross; M.A., 1970, University of Chicago; Ph.D., 1976, Political Science, University of Chicago.

1. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 605–06 (Mont. 2018).

"controlled in whole or in part by any church, sect, or denomination."[2] The Montana Department of Revenue, which had been charged with devising rules to implement the law, sought to avoid constitutional problems by restricting the scholarships to students attending secular private schools.[3] But the Montana Supreme Court held that this program exceeded the Department's powers, and it ruled the entire aid program unconstitutional.[4] In *Espinoza v. Montana Department of Revenue*, the United States Supreme Court, by a five to four vote, reversed, holding that Montana's exclusion of church-related schools from the program violated the Free Exercise Clause of the First Amendment, thereby apparently reinstating the program as originally adopted by the Montana legislature.[5] But the Supreme Court reached its conclusion only by misconstruing the facts of the case and improperly intervening in a dispute that had been settled under state law. Equally important, the Court mischaracterized Montana's constitutional provision, hinting at its illegitimacy, and implied that the analogous provisions found in thirty-seven other state constitutions might likewise be illegitimate.[6] The Court did so based on a one-sided misunderstanding of the origins and history of these provisions and on a problematic account of the states' distinctive experience in addressing church-state issues, particularly as it affects education.[7]

2. *Id.* at 615; MONT. CONST. art. X, § 6(1). "The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school . . . or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." *Id.* This provision mirrors the no-aid provision that appeared in the Montana Constitution of 1889, the state's initial constitution, at article XI, section 8. MONT. CONST. of 1889, art. XI, § 8.

3. *Espinoza*, 435 P.3d at 605–06.

4. *Id.* at 615. Although the Montana Supreme Court divided five to two on the constitutionality of the aid program, the Montana justices were unanimous in holding that the Department of Revenue had exceeded its authority in promulgating the rule excluding religious schools from the aid program. *Id.* at 625 (Baker & Rice, JJ., dissenting); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2253 (2020).

5. 140 S. Ct. 2246, 2262–63 (2020). The dissenting justices insisted that the program was "defunct," and that the Court's ruling had no effect on students attending private schools because the Montana Supreme Court had already "invalidated the program on state-law grounds." *Id.* at 2292, 2296 (Sotomayor, J., dissenting). The Court majority seemed to believe that the ruling in *Espinoza* restored the program as it was enacted by the Montana legislature. *See id.* at 2262 n.4 (majority opinion).

6. *See id.* at 2268–69 (Alito, J., concurring) (explaining how after the Blaine Amendment, containing a no-aid provision, narrowly failed at the federal level, many states adopted provisions similar to it and thirty-eight states still retain the provision today).

7. *Id.* at 2259 (majority opinion) ("The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly shameful pedigree." (quoting Mitchell v. Helms, 530 U.S. 793, 828–29 (2000)).

*Espinoza* might seem a minor case affecting only a modest aid program in a single state. But if it were, presumably the Supreme Court would not have chosen to hear the case.[8] Proponents of "school choice" immediately recognized *Espinoza*'s potential implications.[9] President Donald Trump described the "SCOTUS ruling [as] a historic win for families who want SCHOOL CHOICE NOW!"[10] Although Chief Justice Roberts only hinted at the illegitimacy of the no-aid provisions found in most state constitutions,[11] Education Secretary Betsy DeVos proclaimed that, as a result of *Espinoza*, "your bigoted Blaine Amendments and other restrictions like them are unconstitutional, dead, and buried."[12] Institute for Justice Senior Attorney Erica Smith, who served as co-counsel on *Espinoza*, said the ruling would "allow states across the country to enact educational choice programs."[13]

Beyond its implications for school-choice programs, the majority opinion of the Court, together with the separate concurrences of Justices Thomas, Alito, and Gorsuch, raise serious questions about states' authority to regulate church-state relations and about the Court's adherence to the doctrine of adequate and independent state grounds, at

8. On how the justices decide what cases to hear, see generally H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

9. "School choice" is an educational system that "allows public education funds to follow students to the schools or services that best fit their needs" whether it be a public, private, charter, or home learning environment. *What is School Choice? The Definition*, EDCHOICE, https://www.edchoice.org/school-choice/what-is-school-choice/ (last visited May 25, 2021).

10. Morgan Phillips, *Trump Calls Supreme Court Ruling a 'Historic Win for Families Who Want School Choice'*, FOX NEWS (June 30, 2020), www.foxnews.com/politics/trump-supreme-court-ruling-historic-win-school-choice.

11. *Espinoza*, 140 S. Ct. at 2253.

12. Press Release, Betsy DeVos, U.S. Sec'y of Educ., Dep't of Educ., Secretary DeVos on Espinoza: Religious Discrimination is Dead (June 30, 2020), https://www.ed.gov/news/press-releases/secretary-devos-espinoza-religious-discrimination-dead. There may be some basis for this conclusion. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the U.S. Supreme Court ruled that the Free Exercise Clause prohibited the exclusion of a church, "solely because it [was] a church," from a public-benefit program that provided grants to refurbish playgrounds with recycled tires. 137 S. Ct. 2012, 2017, 2025 (2017). However, the Court in a footnote deferred consideration of aid programs that might have involved state support for religious instruction: "We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3. Thus, *Espinoza* may be a further incremental step toward constitutionalizing the right of religious organizations to participate in public aid programs, regardless of the purposes to which the aid is put. It is noteworthy that two of the justices who joined the opinion of the Court in *Trinity Lutheran*, Justices Breyer and Kagan, refused to take that step, dissenting in *Espinoza*. *Espinoza*, 140 S. Ct. at 2281 (Breyer, J., dissenting).

13. Press Release, John Kramer, Vice President of Commc'ns, Inst. for Just., Landmark Victory for Parents in U.S. Supreme Court School Choice Case (June 30, 2020), ij.org/press-release/landmark-victory-for-parents-in-u-s-supreme-court-school-choice-case.

least in the religious context.[14] Moreover, given the similarity between Montana's no-aid provision and the no-aid provisions in other states' constitutions, the Court's ruling is likely to encourage challenges to those prohibitions as well. Thus, a close examination of *Espinoza* and its implications for state constitutional law appears warranted.

## II. THE FACTS OF *ESPINOZA*

Speaking for the Court, Chief Justice Roberts framed the issue in *Espinoza* as "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."[15] According to Chief Justice Roberts, "the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school."[16] This would have been true had the Montana Court endorsed the Department of Revenue's rule excluding religious schools from the program. But it did not. Instead, it struck down the program as a whole.[17] As a result, students attending religious private schools were treated no differently than students attending secular private schools—neither would receive tuition assistance.

The Montana Court's approach was hardly unusual. When a state policy unconstitutionally extends a benefit to members of one group while denying it to members of another group, there are two options for remedying the situation. The state can equalize up, extending the benefit to members of the previously excluded group, or it can equalize down, withdrawing the benefit from the previously advantaged group and thereby treating members of both groups in the same way. The Montana Court concluded that the state constitution required it to choose the latter course, and so it eliminated the tuition-assistance program.

The Chief Justice had to misrepresent the facts of the case because otherwise there was no constitutional violation—as he admitted, "[a] State need not subsidize private education."[18] As Justice Sotomayor noted in her dissent, the Montana Court's ruling had rendered the program "defunct," so there was no current discrimination based on religion.[19] At one point Chief Justice Roberts seemed to acknowledge this,

14. *See infra* at Part III.
15. *Espinoza*, 140 S. Ct. at 2254.
16. *Id.* at 2260.
17. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 615 (Mont. 2018).
18. *Espinoza*, 140 S. Ct. at 2261.
19. *Id.* at 2292–96 (Sotomayor, J., dissenting). In her dissenting opinion, Justice Ginsburg made the same point: "the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Petitioners may still send their children to a

noting that "the tax credit is no longer available to support scholarships at either religious or secular private schools."[20] However, he refused to accept the implications of that conclusion, insisting that "the Legislature never chose to end [the program]" but that it "was eliminated by a court, and not based on some innocuous principle of state law."[21] This dubious imputation of illegitimacy to the Montana Supreme Court's exercise of judicial review is crucial to Chief Justice Roberts's opinion.

## III. *ESPINOZA* AND ADEQUATE AND INDEPENDENT STATE GROUNDS

Chief Justice Roberts claimed that "the elimination of the [tuition-aid] program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law."[22] But this too seems incorrect. The Montana justices in *Espinoza* had no occasion to address federal law at all because state law—specifically, the no-aid provision of the Montana Constitution—sufficed to resolve the case, eliminating the alleged discrimination by invalidating the entire program under which it occurred.[23]

In looking first as to whether state law provided a basis for deciding the case, the Montana justices were on solid ground. As the old saw about not making a federal case out of something suggests, it is good judicial practice to decide cases on the narrowest possible grounds—statutory law rather than constitutional law, state law rather than federal law.[24] Beyond such prudential considerations, as the celebrated Justice Hans Linde of the Oregon Supreme Court persuasively argued, the logic of the Federal Constitution demands a state-law-first approach.[25] The prohibitions of the Bill of Rights do not apply to the states directly, but rather do so through the Due Process Clause of the Fourteenth Amendment.[26] This establishes a "state-failure" framework under which federal intervention is justified "only if a state fails to meet its

religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise." *Id.* at 2279 (Ginsburg, J., dissenting).

20. *Id.* at 2253 (majority opinion).

21. *Id.* at 2262.

22. *Id.*

23. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 615 (Mont. 2018).

24. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991).

25. *See* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133–34, 182 (1970). Judge Jeffrey Sutton concurs, noting that "[a] state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 179 (2018).

26. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 4–5 (1964).

constitutional responsibilities."[27] "This entails not only the action of the state legislature or [state] executive but also judicial review of the legitimacy of that action under the state constitution."[28]

> A federal court cannot rule that a state has violated federal constitutional rights and denied due process under the Federal Constitution until the state has completed its action, and this does not occur until a state court has considered whether the state's action is valid under state law. Only if a state's action is compatible with state law but nonetheless violates the Bill of Rights is there a federal constitutional violation. Thus, having decided *Espinoza* on what judicial doctrine refers to as "**adequate and independent state grounds**," the Montana Court had no [occasion] to consider the federal Free Exercise Clause. This is crucial because if a state court decides a case involving two state citizens solely on the basis of state law . . . federal courts lack jurisdiction to review the court's ruling.[29]

To avoid this outcome and assert jurisdiction, Chief Justice Roberts pointed to the Montana Supreme Court's passing acknowledgement, after it had decided *Espinoza*, that a case could arise "where 'prohibiting the aid would violate the Free Exercise Clause' [but that] 'this is not one of those cases.'"[30] Presumably, the Montana Court was referring to the fact that its ruling did not treat secular private schools differently from religious private schools. This statement, Chief Justice Roberts argued, sufficed to make *Espinoza* a federal-law case over which the Supreme Court could exercise jurisdiction.[31] This is at best debatable.

By now it is a commonplace that "[s]tate constitutions are not simply miniature versions of the United States Constitution; rather, they differ from their federal counterpart in their language, basic character, generating history, place in the state's constitutional history, and underlying political philosophy."[32] Whereas the Federal Constitution

27. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 184 (1998) [hereinafter UNDERSTANDING STATE CONSTITUTIONS].

28. *Id.*

29. G. Alan Tarr, *Federalism, State Constitutionalism, and School Choice in the Supreme Court*, STARTING POINTS (Aug. 6, 2020), https://startingpointsjournal.com/federalism-state-constitutionalism-and-school-choice-in-the-supreme-court-tarr/ (emphasis added).

30. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2253 (2020) (quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mont. 2018)).

31. *Id.* at 2262.

32. G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 8 (2011).

grants powers and secures rights, state constitutions in addition impose responsibilities on state governments. In the context of *Espinoza*, it is important to note that state constitutions have, since the eighteenth century, imposed responsibilities in the educational realm.[33] For example, the New Jersey Constitution mandates that "[t]he Legislature shall provide for the . . . support of a thorough and efficient system of free public schools,"[34] and the Texas Constitution says that "it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[35] These duties and the alleged failure of state governments to meet their responsibilities can provide a basis for litigation quite different in character from that found under the Federal Constitution. In Montana, for example, the Montana Supreme Court has heard challenges based on state obligations to ensure "equality of educational opportunity," to "provide a basic system of free quality public . . . schools[,]"[36] and to "maintain and improve a clean and healthful environment."[37]

Given the distinctive history and character of state constitutions, it is not surprising that the U.S. Supreme Court has recognized that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."[38] Such a division of labor shows respect for state courts and also conserves scarce federal judicial resources.[39] In addition, it frees federal judges from having "to interpret

33. Some commentators prefer to frame these responsibilities as a recognition of positive rights. *See, e.g.*, Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 813–14 (2002); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 67 (2013) (tracing the states' acceptance of the responsibility for providing public education as "Education: A Long Tradition of Positive Rights in America"). However one frames it, the important point is that "the movements on behalf of positive rights at the state level sought to weave a social safety net of heartier stuff than mere statutes" by constitutionalizing these responsibilities. *Id.* at 11. The U.S. Supreme Court has long recognized the states' crucial role in education. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973) ("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . . .").

34. N.J. CONST. art. VIII, § 4, ¶ 1.

35. TEX. CONST. art. VII, § 1.

36. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 689–90 (Mont. 1989).

37. Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1243 (Mont. 1999) (emphasis omitted).

38. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

39. *Id.* at 1039–40.

state laws with which [they] are generally unfamiliar" and accords with American federalism.[40]

The recognition that state courts could independently interpret their constitutions fueled the development of what was initially known as the "new judicial federalism": the interpretation by state judges of their bills of rights to afford greater protection than was available under the Federal Bill of Rights.[41] Typically, state judges justified their rulings by insisting that state bills of rights imposed more exacting requirements on state governments, did not have a federal analogue, had distinctive language in which state guarantees were couched, or had a distinctive history of their creation.[42] In the literature of the new judicial federalism, the Federal Bill of Rights was often portrayed as providing a floor of basic rights, with states free to add to these rights' protections in their own bills of rights.[43] This account has some currency even today. As Justice Kavanaugh recently observed, "the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution."[44]

Yet, this is not altogether correct. For one thing, state constitutions may protect fewer rights than are protected by the Federal Bill of Rights, although in such cases a litigant will still enjoy the protection of the Federal Constitution, so the idea of a federal floor operates in practice, if

40. *Id.* at 1039. On the unique issues involved in interpreting state constitutions, see ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 313–56 (2009). On the importance of state constitutionalism for American federalism, see SUTTON, *supra* note 25, at 179.

41. The literature on this development is enormous. For an authoritative overview, see WILLIAMS, *supra* note 40, at 113–34.

42. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 385–87 (1984). These justifications were transformed by some judges into criteria that had to be met before a state court could validly interpret its state bills of rights differently than the U.S. Supreme Court interpreted analogous guarantees in the Federal Bill of Rights. *See id.* at 356–58. For a persuasive critique of this criteria approach, see generally *id.*

43. This perspective is reflected in a widely cited article by Supreme Court Justice William J. Brennan and in an influential early survey in the Harvard Law Review. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1408–11 (1982) (discussing the "floor" of basic rights established by the Federal Constitution). Much of the early literature on the new judicial federalism viewed it as a way to "get around" the conservative Burger Court. *See* G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS: J. FEDERALISM 63, 63 (1994).

44. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring).

not in theory.[45] More importantly for present purposes, the Federal Constitution may impose a ceiling as well as a floor for state rights' protections.[46] That is, there may be a point at which a state's expansive interpretation of rights protected by its constitution will collide with the Federal Constitution's protection of other rights.[47]

This issue arises with particular force under the First Amendment's religion clauses. The Free Exercise Clause safeguards the liberty of individuals to choose and practice their religious faith and the liberty of religious institutions to be free of unwarranted governmental interference.[48] The Establishment Clause requires a degree of separation between church and state and governmental neutrality among religions[49]—and perhaps between religion and non-religion as well. At least as interpreted by the Supreme Court, there is a tension between the Free Exercise Clause and the Establishment Clause.[50] The "pairing presents a constitutional strategy that appears nowhere else in the Bill of Rights[,]. . . [the clauses] create both a floor under and a ceiling over the formulation of religion policy by the states."[51] Just as the Court must

45. *See* Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 235 (2008). This may occur in the church-state realm. *See, e.g.*, Resnick v. East Brunswick Twp. Bd. of Educ., 389 A.2d 944 (N.J. 1978).

46. *See Developments in the Law*, *supra* note 43, at 1411–12.

47. For example, appellants argued in *PruneYard Shopping Center v. Robins* that the right to protest within a private shopping center, guaranteed by the California Bill of Rights, amounted to a "taking" of property in violation of the Fifth Amendment. 447 U.S. 74, 82 (1980). However, a unanimous Supreme Court rejected the claim. *Id.* at 83.

48. U.S. CONST. amend. I.

49. *Id.*

50. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263–64 (2020). In *Espinoza*, the justices themselves acknowledged the tension, though they differed as to its causes. *Id.* at 2263–2264, 2281. Justice Thomas, in his concurring opinion, argued that the tension arises not from the Constitution itself but from the Court's misinterpretation of the Establishment Clause insofar as it applies to the states. *Id.* at 2263–64 (Thomas, J., concurring). Justice Breyer, in his dissenting opinion, acknowledged that the "Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose." *Id.* at 2281 (Breyer, J., dissenting). Chief Justice Rehnquist made this explicit in his opinion for the Court in *Locke v. Davey*, stating: "[t]hese two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension." 540 U.S. 712, 718 (2004). Off the bench, Douglas Laycock has traced the inconsistencies in the Court's jurisprudence to its endorsement of two competing principles in *Everson v. Board of Education of Ewing Township*: no aid to religious activities and institutions and no discrimination against religious adherents or institutions. 330 U.S. 1, 511–12 (1947); Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 137–38 (2017). Laycock argues that a shift from emphasizing the former to emphasizing the latter began in 1986. Laylock, *supra* note 50, at 139–40.

51. Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 21–22 (2006).

seek to reconcile the sometimes conflicting claims under the Establishment and Free Exercise Clauses, so too must it ensure that state efforts to provide greater protection against establishment do not collide with the Federal Free Exercise Clause and that state efforts to provide for greater religious liberty do not transgress the Federal Establishment Clause.[52] Thus there are limits—a ceiling—to state efforts that go beyond the Federal Bill of Rights in the religion sphere.

That said, it is also clear that the First Amendment, in the words of the Supreme Court, leaves "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[53] States have room to make their own decisions regarding the funding of religious institutions due to the "play in the joints" space that exists between the Free Exercise and Establishment Clauses.[54] Moreover, in upholding a provision in the Washington Constitution similar to that at issue in *Espinoza*, the Court recognized that "[e]ven though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel."[55] States, then, have a limited but real "space" to develop constitutional protections between the federal floor and ceiling. This is precisely what Montana has done and, as we shall show, what other states have too.

## IV. CHURCH AND STATE—THE STATE CONSTITUTIONAL EXPERIENCE

Chief Justice Roberts did not forthrightly strike down Montana's no-aid provision as inconsistent with the First Amendment's Free Exercise Clause. He might have been reluctant to do so because the constitutions of thirty-seven other states have analogous provisions.[56] But he broadly

52. For analyses of the differences between federal and state protections, see G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 78–89 (1989) [hereinafter *Church and State in the States*]. *See also* Hon. Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353 (2004).

53. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

54. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970). The Court has repeatedly referred to this "play in the joints" space in recent cases. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); *Locke*, 540 U.S. at 718.

55. *Locke*, 540 U.S. at 722.

56. State no-aid provisions today include: ALA. CONST. art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; *id.* art. IX, §§ 8, 10; CAL. CONST. art. XVI, § 5; COLO. CONST. art. IX, § 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, ¶ VII; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3; IND. CONST. art. I, § 6; KAN. CONST. art. VI, § 6; KY. CONST. § 189; MASS. CONST. amend. art. XVIII, § 2; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. 8, § 208; MO. CONST. art. I, § 7; *id*. art. IX, § 8; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; NEV. CONST.

hinted at its illegitimacy, describing the Montana provision as "discriminat[ing] based on religious status" and no-aid provisions in general as "belong[ing] to a more checkered tradition shared with the Blaine Amendment," which was partially rooted in anti-Catholic bigotry.[57] Presumably the no-aid provisions in other states, sharing the same genealogy, would likewise be suspect.[58] In his concurring opinion, Justice Alito went further, charging that the impetus for Montana's no-aid provision and for state no-aid provisions more generally was hostility toward Catholicism.[59] The text of the provision gives no indication of this, merely forbidding the use of public funds "direct[ly] or indirect[ly]" for "any sectarian purpose" or to aid schools "controlled in whole or in part by any church, sect, or denomination."[60] But Justice Alito insisted that the ban on aid to "sectarian" institutions was merely "code" for Catholic institutions.[61]

In making this claim, Justice Alito was adopting the position urged by the most virulent critics of state no-aid provisions.[62] These critics

art. XI, § 10; N.H. CONST. art. 83; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OHIO CONST. art. VI, § 2; OKLA. CONST. art. I, § 5; *id.* art. XI, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, § 15; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3; *id.* art. VIII, § 16; TEX. CONST. art. I, § 7; *id.* art. VII, § 5; UTAH CONST. art. I, § 4; *id.* art. X, § 9; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 19; *id.* art. III, § 36. Complementing these no-funding provisions are clauses in twenty-seven state constitutions that limit public appropriations or draws from state treasuries to "public purposes," for "public uses," or to remain under "public control." ALA. CONST. art. IV, § 73; ALASKA CONST. art. IX, § 6; ARK. CONST. art. XIV, § 2; CAL. CONST. art. XVI, § 3; COLO. CONST. art. IX, § 3; CONN. CONST. art. VIII, § 4; DEL. CONST. art. X, § 4; FLA. CONST. art. IX, § 6; GA. CONST. art. VII, § 4, ¶ 1(b); HAW. CONST. art. VII, § 4; IDAHO CONST. art. IX, § 3; ILL. CONST. art. VIII, § 1; KY. CONST. § 171; MD. CONST. art. VIII, § 3; MO. CONST. art. IX, § 5; MONT. CONST. art. V, § 11(5); NEB. CONST. art. VII, § 11; N.J. CONST. art. VIII, § IV, ¶ 2; N.M. CONST. art. IV, § 31; N.C. CONST. art. IX, § 6; PA. CONST. art. III, § 30; R.I. CONST. art. XII, § 2; S.D. CONST. art. VIII, § 3; TEX. CONST. art. VII, § 5; VA. CONST. art. VIII, § 10; WASH. CONST. art. IX, § 2; WYO. CONST. art. III, § 36. Considered together, these "no-compelled support," "no-funding," and "public purpose" clauses represent a strong state commitment to the financial security of public education.

57. Espinoza v. Mont. Dep't. of Revenue, 140 S. Ct. 2246, 2257–59 (2020).

58. Dissenting three years earlier, in *Trinity*, Justice Sotomayor drew that very conclusion, suggesting that states' no-aid provisions were "all but invalidated today" by the ruling in that case. 137 S. Ct. at 2040–41 (2017) (Sotomayor, J., dissenting).

59. *Espinoza*, 140 S. Ct. at 2268–71 (Alito, J., concurring).

60. MONT. CONST. art. X, § 6.

61. *Espinoza*, 140 S. Ct. at 2270 (Alito, J., concurring).

62. Justice Alito draws his claim that "sectarian" was a code word for Catholic from the Brief for Independence Institute as Amici Curiae Supporting Petitioners at 17–26, Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195). He includes in his opinion a copy of a political cartoon by Thomas Nast depicting a supposed Catholic invasion of the United States, drawn from the Brief for Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners at 6, 8, Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195).

typically disparage the states' no-aid provisions as "little Blaine Amendments" or as "state Blaine Amendments," implying that the Blaine Amendment, a proposed amendment to the U.S. Constitution that would have blocked the flow of public money to private religious schools, provided the model for the adoption of the state provisions.[63] There is some scholarly support for the claim that the Blaine Amendment provided the model for states' no-aid provisions.[64] But ultimately the claim rests on the facile assumption that the "real" constitutional law is federal constitutional law and that state constitutional developments are best understood as a response to federal constitutional developments. This assumption is simply wrong. State constitutions are distinctive documents, each with its own history, responding to state-level political concerns and to regional imperatives far more than to federal developments.[65] Undoubtedly the Federal Constitution sometimes plays a role in state constitutional development, though influence flows from state to nation as well as from nation to state, but the agenda of state constitutionalism is largely dictated by the role that the states play in the American federal system. Not surprisingly, then, the relation between the Blaine Amendment and the states' no-aid prohibitions is more complex—and more interesting—than their detractors suggest. We begin with a consideration of the Blaine Amendment itself.

### *A. The Blaine Amendment*

In an 1875 speech before a veterans' group, President Ulysses S. Grant called for a constitutional amendment that would mandate free public schools and prohibit the distribution of public funds to sectarian schools.[66] That same year Senator James Blaine of Maine introduced the

63. *Espinoza*, 140 S. Ct. at 2268–70 (Alito, J., concurring); *see infra* Part IV, sec. B.

64. *See, e.g.*, Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 554–56, 573 (2003); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 493 (2003); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 672–75 (1998).

65. The literature documenting this is vast. *See, e.g.*, UNDERSTANDING STATE CONSTITUTIONS, *supra* note 27, at 21; PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902 12–13, 74 (2017); AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES 1–3 (2015); THE CONSTITUTIONALISM OF AMERICAN STATES (George E. Connor & Christopher W. Hammons eds., 2008).

66. J.A. Swisher, *Grant's Des Moines Speech*, 6 PALIMPEST 409, 416 (1925).

amendment in Congress, where it became known as the Blaine Amendment.[67] Blaine's proposal read in relevant part:

> [N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, 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.[68]

The amendment is often depicted as an anti-Catholic initiative, a response to the fact that the Catholic Church had set up its own system of parochial schools and was seeking state support for them.[69] Anti-Catholic groups, as well as anti-immigrant and nativist groups, were certainly prominent in support of the amendment, and the Republican Party played upon these sentiments, leading opponents of the amendment to claim it was anti-Catholic.[70] But advocates of the public schools and of secular education also rallied behind the amendment, though typically not because of a hostility to Catholicism.[71] As the leading historian of the Blaine Amendment, Stephen Green, has noted "[t]hose 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."[72] The proposed amendment easily passed in the House of Representatives, but in the Senate it failed, falling just short of the two-thirds majority required for passage.[73] Some commentators have speculated that the failure in the Senate was because the Senate version of the amendment banned aid to religious schools but expressly permitted Bible-reading in public schools.[74] Whatever the cause, the proposed amendment never again attracted widespread congressional

67. DeForrest, *supra* note 64, at 556. Two similar amendments had been introduced in the Senate in 1871 but attracted little support. *Id.* at 564.

68. H.R.J. Res. 1, 44th Cong., 4 CONG. REC. 205 (1875).

69. Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42 (1992) [hereinafter *Blaine Amendment Reconsidered*].

70. *See id.*

71. STEPHEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA 252–53 (2010) [hereinafter THE SECOND DISESTABLISHMENT].

72. Stephen K. Green, "*Blaming Blaine": Understanding the Blaine Amendment and the "No Funding" Principle*, 2 FIRST AMEND. L. REV. 107, 114 (2003).

73. DeForrest, *supra* note 64, at 573.

74. *See id.* at 567–68. On the development and fate of the Blaine Amendment in Congress, see generally *Blaine Amendment Reconsidered*, *supra* note 69 and Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 FIRST AMEND. L. REV. 85 (2003).

support following changes in the partisan composition of Congress after the election of 1876.[75]

But the issue did not die. Most opponents of funding for religious schools returned their focus to the states, where proposals for such funding or for banning it had excited controversy since the 1840s.[76] The allies of the opponents of funding in Congress meanwhile sought to block funding for religious schools in prospective states.[77] In its Enabling Act, authorizing Montana and three other territories to draft constitutions and apply for statehood, Congress required that those constitutions provide for "systems of public schools, which shall be . . . free from sectarian control."[78] Although the language of the Enabling Act recalls that of the Blaine Amendment, the statute itself was not enacted until more than a decade after the Blaine Amendment was defeated, so the composition of Congress had changed quite a bit. In *Espinoza v. Montana Department of Revenue*, the Supreme Court tied state no-aid provisions, including Montana's, to the Blaine Amendment.[79] We thus turn to whether Montana's provision is a "little Blaine Amendment" and then to whether other states' similar provisions should be characterized as "little Blaine Amendments."

### *B. Is Montana's No-Aid Provision a "Little Blaine Amendment"?*

In its 1889 Constitution, Montana banned the use of public funds "in aid of any church, or for any sectarian purpose" and prohibited public aid to any school "controlled in whole or in part by any church, sect or denomination."[80] It retained this provision in 1972 when it adopted its current constitution, the one whose prohibition was at issue in *Espinoza*.[81] Critics have charged that both constitutional provisions represent "little Blaine Amendments," sharing the same anti-Catholic animus that infected the proposed Blaine Amendment, and that they

75. Gedicks, *supra* note 74, at 85 (explaining that Congress never passed the Federal Blaine Amendment).

76. *Blaine Amendment Reconsidered*, *supra* note 69, at 42–43.

77. *Id.*

78. Enabling Act, ch. 180, 25 Stat. 676 (1889). That Congress should impose conditions on states seeking statehood was not unusual. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 179–80, 205 (2004); UNDERSTANDING STATE CONSTITUTIONS, *supra* note 27, at 39–41.

79. 140 S. Ct. 2246, 2259 (2020). The majority opinion of the Court suggests that "many of the [state] no-aid provisions belong to a more checkered tradition shared [by] the Blaine Amendment." *Id.*

80. MONT. CONST. of 1889, art. XI, § 8.

81. MONT. CONST., art. X, § 6.

should therefore be, in the words of the Becket Fund's *amicus curiae* brief, "presumptively unconstitutional."[82] However, their arguments are unpersuasive.

First, the critics claim that the no-aid provision was included in the 1889 Montana Constitution because congressional proponents of the Blaine Amendment, having failed to secure its adoption by Congress, sought to achieve the same end piecemeal, by requiring that prospective states include "little Blaine Amendments" that forbade aid to "sectarian" schools in their constitutions.[83] Certainly Congress, in its Enabling Act authorizing the Montana territory and three other territories to draft constitutions and apply for statehood, did require that the constitutions provide for "systems of public schools, which shall be . . . free from sectarian control."[84] Yet it is not clear that Congress imposed this requirement out of opposition to Catholicism. Far from overtly expressing hostility against a particular religion, Congress mandated in the same Enabling Act that the new constitutions secure "perfect toleration of religious sentiment . . . and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship."[85] The drafters of the 1889 Montana Constitution responded to the congressional mandate to combat religious bigotry with an eloquent and expansive religious-liberty guarantee.[86]

Even if Congress—or, more likely, some members of Congress—were motivated by anti-Catholic bigotry, one should hesitate to attribute

82. Brief for Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners at 13–20, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195); Brief for Independence Institute as Amici Curiae Supporting Petitioners at 30–35, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (No. 18-1195).

83. *See* DeForrest, *supra* note 64, at 573, 601–02 (2003).

84. Enabling Act, ch. 180, 25 Stat. 676 (1889).

85. Enabling Act, ch. 180, 25 Stat. 676 (1889).

86. Thus Article III, section 4 of the Montana Constitution of 1889 reads:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed, and no person shall be denied any civil or political right or privilege on account of his opinions concerning religion, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify practices inconsistent with the good order, peace or safety of the State, or opposed to the civil authority thereof, or of the United States. No person shall be required to attend any place of worship or support any ministry, religious sect or denomination, against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.

MONT. CONST. of 1889, art. III, § 4.

Montana's no-aid provision to such animus.[87] In *Espinoza*, the Montana Supreme Court offered a different explanation: in crafting the no-aid provision, the drafters of the state's initial constitution were merely "more fiercely protect[ing]" the "basic notion of [the] separation of church and state [that] is a foundation of our Nation's federal Constitution."[88] The close textual connection between the no-aid provision and the free-exercise provision underscores the mutually reinforcing character of those principles. So too does the provision included in the 1889 Montana Constitution immediately following the no-aid provision, which guarantees access to public education in Montana without regard to religious affiliation and forbids the teaching of "sectarian tenets . . . in any public educational institution of the State."[89] So also may the delegates' inclusion of a mandate that the public school fund remain inviolate and not be diverted to other uses, a provision that was carried over to the 1972 constitution.[90]

The origins of the 1889 Montana no-aid provision also suggest that it was not a "little Blaine Amendment." For although the Montana prohibition was adopted in 1889, the language of the provision antedates the controversy over the Blaine Amendment and the passage of the Enabling Act. Montana's 1889 no-aid provision is copied word-for-word from the Colorado Constitution of 1876, as is its religious-liberty guarantee.[91] In part, this copying may have been a matter of convenience—the delegates to the 1889 Montana convention met for just over a month, and they had many more pressing concerns to address.[92] The decision to copy provisions from an existing constitution may also have reflected political prudence—the delegates' most important concern

87. The Supreme Court made this point in *Locke v. Davey*, in upholding a similar no-aid provision in the Washington Constitution that likewise was prompted by the Enabling Act of 1889. 540 U.S. 712, 715, 723 n.7 (2004). Speaking for the Court, Chief Justice Rehnquist noted that "the provision in question is not a Blaine Amendment . . . [n]either [the plaintiff] nor *amici* have established a credible connection between the Blaine Amendment and . . . the relevant constitutional provision." *Id.* at 723 n.7.

88. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 614 (Mont. 2018). In *Locke*, the U.S. Supreme Court, in upholding a similar no-aid provision in the Washington Constitution, recognized that "the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution" and that the state's desire to avoid establishment was a "historic and substantial state interest." 540 U.S. at 722, 725.

89. MONT. CONST. of 1889, art. XI, § 9.

90. *Id.* § 12; MONT. CONST. art. X, § 3.

91. MONT. CONST. of 1889, art. XI, §§ 8, 12. The sources for the Montana provisions are COLO. CONST. art. II, § 4 and art. IX, § 7.

92. Chief among these was "striking a balance between promoting economic development and controlling the adverse effects of large corporations." *See* G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 3–4 (2003).

was that Congress approve the constitution they crafted, and copying provisions that had already been approved by Congress was a way of avoiding controversy. In part too, copying from the 1876 Colorado Constitution was a way for delegates to avail themselves of the most recent constitutional thinking. But whatever the interplay among these considerations, it was not the Blaine Amendment that influenced the design of the Montana no-aid provision. Because Congress passed Colorado's Enabling Act in 1875, before the Blaine Amendment was introduced, it contained no "little Blaine Amendment" mandate, and so the Colorado model, which the Montana delegates copied, was itself unaffected by the debate over that amendment.[93]

Also, the records of the 1889 Montana Constitutional Convention reveal no anti-Catholic sentiment. The convention delegates themselves included several Catholics, which was hardly surprising because Catholics made up a sizable proportion of the population—in 1890, seventy seven percent of Montanans who identified a religious affiliation self-identified as Catholics.[94] Yet the delegates adopted the constitution's education article, which contained the ban on aid, unanimously, an unlikely outcome if its provisions were understood as anti-Catholic. An article in *The Catholic Encyclopedia* early in the twentieth century applauded the absence of religious conflict in the state: "The spirit of religious intolerance has had scant encouragement in Montana, and many Catholics have occupied prominent positions in her industrial development and political history."[95] None of this evidence is by itself conclusive, but it does suggest that the motive for including the no-aid provision was not to exclude Catholics from public benefits out of religious hostility.

Perhaps more pertinently, the records of the 1972 Montana Constitutional Convention offer no evidence of anti-Catholic sentiment.[96] The delegates were well aware of the importance of the no-aid provision. Just two years before the delegates met, the Montana Supreme Court in *State ex rel. Chambers v. School District No. 10 of the County of Deer Lodge* had interpreted the Montana provision to prohibit both direct and indirect aid to religious schools, thereby indicating that it imposed a more

93. *See* Enabling Act, ch. 139, 18 Stat. 474 (1875).

94. DEP'T OF COM. & LAB. BUREAU OF THE CENSUS, RELIGIOUS BODIES: 1906 45 (2d ed. 1910) (reporting figures for 1890). More generally, see MICHAEL P. MALONE & RICHARD B. ROEDER, MONTANA: A HISTORY OF TWO CENTURIES 269 (1976) which states that "Roman Catholicism has always been Montana's dominant religion."

95. 10 THE CATHOLIC ENCYCLOPEDIA 519 (Charles G. Herbermann et al. eds., 1913).

96. *See generally* 6 *Montana Constitutional Convention 1971–1972: Verbatim Transcript Before the Montana Legislature* (Mar. 1972) [hereinafter *Montana Constitutional Convention*].

stringent separation of church and state than was imposed by the Federal Establishment Clause.[97] The delegates thus knew how the no-aid provision would operate when they chose to retain it in the 1972 constitution. The clause was debated on the floor of the convention, with those supporting it arguing that it was essential that all public funds be devoted to the state's public schools,[98] because the constitution was for the first time expressly committing the state "to establish a system of education which will develop the full educational potential of each person."[99] However, in order to accommodate those concerned about private schools, the delegates added a section that exempted federal funds from the ban on aid to private schools.[100] This compromise satisfied the vast majority of delegates, with opposition coming almost exclusively from delegates opposed to permitting the pass-through distribution of federal funds to private schools.[101] As the leading article on the topic has concluded, the "drafters rewrote this section in 1972 to be devoid of any hostility towards religion."[102]

Given this history, which furnishes the context for understanding the language found in Montana's two constitutions, the state's no-aid provisions are not "little Blaine Amendments," motivated by hostility to religion in general or to Catholicism in particular. This does not mean that Montanans made the best choice in prohibiting the flow of public funds to religious schools. That is a policy matter on which reasonable people can disagree. But this analysis underscores the importance of examining the particularities of state constitutions and their history

97. 472 P.2d 1013, 1020 (Mont. 1970). In this case the Montana Supreme Court ruled that the no-aid clause prohibited the funding of transportation for students to religious schools. *Id.* at 1021–22. *But see* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947). The U.S. Supreme Court had ruled that the Federal Establishment Clause posed no barrier to public funding of such transportation. *Id.* at 16–17.

98. *See e.g.*, *Montana Constitutional Convention*, *supra* note 96, at 2009.

99. MONT. CONST. art. X, § 1, cl. 1. The constitution safeguarded against the diversion of public funds more generally, forbidding any appropriation for any "religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state." *Id.* art. V, § 11, cl. 5.

100. *See id.* art X, § 6, cl. 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.").

101. *See Montana Constitutional Convention*, *supra* note 96, at 2009–22 (conveying the general discussion on the federal fund exemption).

102. Michael P. Dougherty, *Montana's 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, 42 (2016). Justice Breyer noted in his dissent in *Espinoza* that, "the records of Montana's constitutional convention show that these concerns [about the political and religious divisiveness of funding religion] were among the reasons that a religiously diverse group of delegates, including faith leaders of different denominations, supported the no-aid provision." Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2287–88 (2020) (Breyer, J., dissenting).

rather than assuming that these constitutions merely reflect federal constitutional debates.[103] State constitutionalism allows for variation emerging from "differences in culture, geography, and history," [104] and this becomes even clearer as we shift focus from Montana's no-aid provision to no-aid provisions in other states.

### *C. Are Other States' No-Aid Provisions "Little Blaine Amendments"?*

Montana's ban on aid to religious schools is hardly unique. Currently thirty-eight state constitutions contain provisions that prohibit the expenditure of public funds in aid of religious institutions or religious education.[105] Detractors label these too as "little Blaine Amendments," implying that their origins are tied to the federal constitutional amendment proposed in 1875 and to the hostility to Catholics and immigrants that they believe underlay that proposal.[106] But the timing of their adoption does not support this claim.

Prohibitions on aid to religious schools first appear in state constitutions as early as 1835, even before substantial Catholic immigration from Europe and before widespread Catholic education in the United States.[107] In 1835, Michigan became the first state to include

103. On the usefulness of an originalist approach to the Montana Constitution, see Tyler M. Stockton, Note, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117 (2016). On state constitutional interpretation based on text and original meaning more generally, see UNDERSTANDING STATE CONSTITUTIONS, *supra* note 27, at 173–210.

104. SUTTON, *supra* note 25, at 17.

105. These constitutions include: ALA. CONST. art. I, § 3; ARK. CONST. art. 2, § 24; COLO. CONST. art. II, § 4; CONN. CONST. art. VII; DEL. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; IOWA CONST. art. I, § 3; KAN. CONST. § 7; KY. CONST. § 5; MD. CONST. art. 36; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MO. CONST. art. I, § 6; NEB. CONST. art. I, § 4; N.H. CONST. pt. I, art. 6; N.J. CONST., art. I, ¶ 3; N.M. CONST. art. II, § 11; OHIO CONST. art. I, § 7; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VT. CONST. ch. I, art. 3; VA. CONST. art. I, § 16; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18.

106. *See* DeForrest, *supra* note 64, at 556, 559, 602; *see generally* Duncan, *supra* note 64. Other scholars have countered that the Blaine name should be reserved for state provisions with some connection to the federal proposal. *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 60–62, 68–70 (2005). That is the position of the present article.

107. Steven Green, Professor of L., Willamette Univ. Coll. of L., Forum at the First Amendment Law Review Symposium, Separation of Church and States: An Examination of State Constitutional Limits on Government Funding for Religious Institutions (Mar. 28, 2003) (transcript available at https://www.pewforum.org/2003/03/28/separation-of-church-and-states-an-examination-of-state-constitutional-limits-on-government-funding-for-religious-institutions/). As of 1840, there were only about two hundred Catholic schools in the United States. ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 229 (rev. ed. 1964).

an express no-aid provision in its constitution.[108] Other states followed suit, with no-funding clauses appearing in the constitutions of Wisconsin (1848), Indiana (1851), Ohio (1851), Massachusetts (1855), Oregon (1857), and Kansas (1859), all before the Civil War.[109] As Stephen Green has noted, "all [these] states [were] without significant conflicts over parochial school funding at the time."[110]

While not specifically mentioning religious schools, the Florida Constitution of 1838 and the Kentucky Constitution of 1850 mandated that school funds should be appropriated in aid of the common—public—schools but for "no other purpose."[111] In addition, the New York and California legislatures enacted laws prohibiting the public funding of religious schools in 1843 and 1852, respectively.[112] Early constitutionalizing of a ban did not preclude continued consideration of the issue. For example, at Ohio's Third Constitutional Convention, held in 1874—and thus one year before the introduction of the Blaine Amendment—the delegates debated and rejected a proposed change to the Ohio Constitution that would have allowed public funds to go to religious schools.[113] Altogether, out of the thirty-eight no-funding provisions today, sixteen find their origins before congressional consideration of the Blaine Amendment and therefore cannot reasonably be characterized as "little Blaine Amendments."[114]

Even for those states that adopted no-aid constitutional prohibitions during the nineteenth century after the introduction of the Blaine Amendment, one cannot assume that the Blaine Amendment provided the impetus for their action. Altogether, twenty-two states adopted no-aid provisions in their constitutions in the fifty years following the defeat

108. MICH. CONST. of 1835, art. I, § 5; Richard D. Komer, Trinity Lutheran *and the Future of Educational Choice: Implications for State Blaine Amendments*, 44 Mitchell Hamline L. Rev. 551, 563 (2018).

109. WIS. CONST. art. I, § 18 (amended 1982); IND. CONST. art. I, § 6; OHIO CONST. art. VI, § 2; MASS. CONST. amend. art. XVIII, § 2 (amended 1855); OR. CONST. art. I, § 5; KAN. CONST. art. VI, § 8 (repealed 1966).

110. Stephen K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 313 (2008) [hereinafter *The Insignificance of the Blaine Amendment*].

111. FLA. CONST. of 1838, art. X, § 1; KY. CONST. of 1850, art. XI, § 1.

112. 1843 N.Y. Laws 293–94; 1852 Cal. Stat. 125.

113. Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 628–33 (2004).

114. CAL. CONST. art. IX, § 8; COLO. CONST. art. V, § 34; *id*. art. IX, § 7; FLA. CONST. of 1838, art. I, § 3; ILL. CONST. of 1870, art. X, § 3; IND. CONST. art. I, § 6; KAN. CONST. art. VI § 8; KY. CONST. of 1850, art. XI, § 1; MASS. CONST. amend. art. XVIII (amended 1855); MICH. CONST. of 1835, art. I, § 4; MINN. CONST. of 1857, art. I, § 16; *id.* art. XIII, § 2; MO. CONST. of 1875, art. I, § 7; *id*. art. IX, § 8; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 10; N.Y. CONST. art. IX, § 4; OHIO CONST. art. VI, § 2; OR. CONST. art. I, § 5; PA. CONST. of 1874, art. X, § 2; TEX. CONST. art. I, § 7; WIS. CONST. art. I, § 18.

of the Blaine Amendment.[115] However, only four states adopted their constitutional prohibitions in the decade following the failure of the amendment.[116] Moreover, the language of the state constitutional prohibitions differs considerably from state to state—which would be unlikely if each was modeled on the Blaine Amendment.[117] The Montana example, detailed above, shows that provisions adopted post-Blaine may nonetheless have borrowed their constitutional language from earlier state constitutions rather than from the Blaine Amendment.[118] Scholars have concluded that this was a widespread practice.[119]

Finally, whenever the initial no-aid provisions were incorporated in state constitutions, many current no-aid provisions were created, revised, or readopted in the twentieth century, often long after the Blaine era. Five states—Alaska (1956), Arizona (1911), Hawaii (1959), New Mexico (1911), and Oklahoma (1907)—adopted their initial constitutions in the twentieth century, and each included a no-aid provision.[120] Prior to 1960, Alabama (1901), Virginia (1902), Louisiana (1913, 1921), Georgia (1945), and Missouri (1945) adopted new constitutions—in each instance reaffirming their no-aid provisions.[121] During that same period, in 1947, New Jersey adopted a new constitution that did not include a no-aid provision but instead specifically authorized the use of state funds to

115. *The Insignificance of the Blaine Amendment*, *supra* note 110, at 297. Green concludes that "opponents of the no-funding principle have generally failed to demonstrate a connection between the Blaine Amendment and the various state provisions from legislative histories, convention records, or other historical sources." *Id.* at 298.

116. *Blaine Amendments in State Constitutions*, BALLOTPEDIA, https://ballotpedia.org/Blaine_amendments_in_state_constitutions (last visited Apr. 12, 2021). Of these four states—California, Georgia, Nevada, and New Hampshire—two, California and Georgia, reenacted their prohibitions in the twentieth century when either revising or amending their constitutions. *Id.*

117. DeForrest, *supra* note 64, at 576–601. DeForrest catalogues state no-aid provisions as "less restrictive Blaine provisions," "[m]oderate Blaine [p]rovisions," and "[m]ost [r]estrictive Blaine provisions." *Id.* In view of the substantial differences among these provisions, however, it is unclear why they should all be categorized as "Blaine provisions."

118. *See supra* note 91 and accompanying text.

119. Goldenziel, *supra* note 106, at 67. Such borrowing occurred even prior to the controversy over the Blaine Amendment. *The Insignificance of the Blaine Amendment*, *supra* note 110, at 314. "The Ohio Constitution served as the model for the no-funding provision of the Kansas Constitution, adopted in 1858, and the Indiana Constitution served as the basis for a similar provision in the 1857 Oregon Constitution." *Id.*

120. ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; *id.* art. IX, § 10; HAW. CONST. art. X, § 1; N.M. CONST. art. XII, §§ 3–4; OKLA. CONST. art. I, § 5; *id.* art. XI, § 5.

121. *See Blaine Amendments in State Constitutions*, *supra* note 116; ALA. CONST. art. XIV, § 263; VA. CONST. of 1902, art. IX, § 141; LA. CONST. of 1913, art. 53; LA. CONST. of 1921, art. IX, § 8; GA. CONST. of 1945, art. I, § 1, ¶ XIV; MO. CONST. art. 1, § 7; *id.* art. IX, § 8.

provide transportation to students regardless of whether they attended public or private schools.[122]

Since 1960, nine states have adopted new constitutions, six of which contain no-aid provisions.[123] Some states have facilitated indirect aid to religious schools. When it adopted its 1974 constitution, Louisiana eliminated the no-aid provision in its 1921 constitution and specifically provided for the provision of textbooks and other materials of instruction for all students attending schools in the state.[124] South Carolina and Utah also amended their constitutions to remove "indirect" from their no-aid provisions, thereby narrowing their reach.[125] Chief Justice Roberts points out in *Espinoza* that, "many States today—including those with no-aid provisions—provide support to religious schools through vouchers, scholarships, tax credits, and other measures. According to petitioners, 20 of 37 States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs."[126] Of course, these differences in outcomes are hardly surprising, as each state is the ultimate interpreter of its own constitution, unconstrained by the rulings in sister states, and outcomes

122. N.J. CONST. art. VIII, § 4, ¶ 3 ("The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school."). However, the New Jersey Constitution does include a prohibition, retained from its 1844 Constitution, on requiring persons to pay for the construction or maintenance of churches. N.J. CONST. of 1844, art. I, ¶ 3; N.J. CONST. art. I, ¶ 3 ("[N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches. . . ."). In *Freedom from Religion Foundation v. Morris County Board of Chosen Freeholders,* the New Jersey Supreme Court relied on that provision to uphold a ban on the use of taxpayer funds to restore and preserve the actual facilities of churches themselves. 181 A.3d 992, 994, 1006 (N.J. 2018). The county and churches petitioned the U.S. Supreme Court for a writ of certiorari, but the Supreme Court denied the petition. Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 181 A.3d 992 (N.J. 2018), *cert. denied*, 139 S. Ct. 909, 911 (2018) (mem.). In a "Statement" attached to the denial, however, Justice Kavanaugh indicated that although the record was inadequate to evaluate the New Jersey Supreme Court's ruling, the decision "is in serious tension with this Court's religious equality precedents." *Id.* at 909, 911.

123. States adopting new constitutions with no-aid provisions include Florida (1968), Georgia (1976, 1982), Illinois (1970), Michigan (1963), Montana (1972), and Virginia (1970). FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, ¶ VII; ILL. CONST. art. X, § 3; MICH. CONST. art. I, § 4; MONT. CONST. art. X, § 6; VA. CONST. art. IV, § 16. States adopting new constitutions without no-aid provisions include Connecticut (1965), Louisiana (1974), and North Carolina (1970). *See generally* CONN. CONST.; LA. CONST; N.C. CONST.

124. LA. CONST. of 1921, art. IV, § 8; LA. CONST. art. VIII, § 13(a).

125. S.C. CONST. art. XI, § 4 (amended 1973); *Compare* UTAH CONST. of 1896 art. X, § 13, *with* UTAH CONST. art. X, § 9.

126. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259 (2020) (citation omitted).

may vary from state to state as a result of differences in constitutional text and constitutional history.[127]

Other states have acted to prevent aid to religious schools. For example, in 1970 Michigan voters approved a constitutional initiative strengthening the no-aid prohibition in the state.[128] Voters in other states have regularly defeated efforts to change their constitutions to repeal or modify no-aid provisions or to institute voucher plans.[129] From 1965–2012 voters rejected twenty of twenty-nine referenda that would have amended those provisions: "eighteen of these proposals addressed vouchers or other types of aid, textbooks and instructional materials, or student transportation," but only three were approved.[130] Many of these referenda were proposed in the wake of state supreme court rulings interpreting state no-aid provisions, so the outcomes of these referenda can be seen as contemporary constitutional judgments, a sort of popular constitutionalism.[131]

This political activity reveals that in recent decades there has been a lively debate occurring in a number of states over state aid to religious

127. As Jeffrey Sutton has observed, state constitutional law "respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history." SUTTON, *supra* note 25, at 17.

128. MICH. CONST. art. VIII, § 2. The Michigan Supreme Court, in *School District of Traverse City v. Kelly*, 185 N.W.2d 9, 19, 30 (Mich. 1971), held that the amendment was invalid in part, insofar as it prohibited shared time and auxiliary services, but the remaining provisions were severable and otherwise constitutional against challenges based on federal equal protection and free exercise grounds. However, the 1970 amendment has survived two initial attempts to modify it. The first was in 1978 when a school voucher proposal was included as part of a proposal to prohibit the use of property taxes for school operating expenses, and the second was in 2000 when Michigan voters were asked to approve an initiative permitting indirect support for nonpublic school students through vouchers and a variety of other programs. *Michigan Education Funds Amendment, Proposal H (1978)*, BALLOTPEDIA, https://ballotpedia.org/Michigan_Education_Funds_Amendment,_Proposal_H_(1978) (last visited Apr. 17, 2021); *Michigan Vouchers and Teacher Testing Amendment, Proposal 1 (2000)*, BALLOTPEDIA, https://ballotpedia.org/Michigan_Vouchers_and_Teacher_Testing_Amendment,_Proposal_1_(2000) (last visited Apr. 17, 2021).

129. For a comprehensive consideration of these efforts, see James N. G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2157–76 (2012).

130. *Id.* at 2161–64. In 2016, Oklahoma voters rejected a proposal to amend the state constitution's no-aid provision and facilitate aid to religious schools. *Oklahoma Public Money for Religious Purposes, State Question 790 (2016)*, BALLOTPEDIA, https://ballotpedia.org/Oklahoma_Public_Money_for_Religious_Purposes,_State_Question_790_(2016) (last visited Apr. 11, 2021).

131. On court-responsive amendments in general, see JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 109–49 (2018). On court-responsive amendments in the religious-liberty area, see *id.* at 112–17.

schools or to parents who wish to send their children to these schools. This debate is hardly surprising. In *Zelman v. Simmons-Harris*, the U.S. Supreme Court held that a tuition-voucher program did not violate the Federal Establishment Clause, even if parents used the vouchers to underwrite the cost of tuition at church-related schools.[132] The ruling did not establish a right to tuition subsidies—it permitted, but did not mandate such funding.[133] It thus pushed the issue back to the states, sparking debates about whether to establish and underwrite such programs and about whether to retain or modify state constitutional bans on aid that might impede such programs. Equally unsurprising is the fact that these debates bear little or no resemblance to the Blaine Amendment debates of a century ago. For example, if the debates then pitted Catholics against Protestants, today conservative Protestant groups have joined Catholics in seeking support for denominational schools or for parents who want their children to have a religiously based education.[134] The results of these debates also reflect contemporary constitutional and policy perspectives. Put succinctly, the current no-aid provisions in state constitutions are not "little Blaine Amendments."

### *D. State No-Aid Provisions and State Constitutional History*[135]

Yet if state no-aid provisions are not direct lineal descendants of the Blaine Amendment, the question remains as to their origins and aims. The respondents in *Espinoza* suggested that they reflect a state tradition that developed in the nineteenth century relating to religion and education.[136] But Chief Justice Roberts summarily dismissed that suggestion, insisting that "no comparable 'historic and substantial' tradition supports Montana's decision to disqualify religious schools from government aid."[137] In support of this position, Chief Justice Roberts cited the support given by states to religious schools in the early nineteenth century prior to the widespread development of public

132. 536 U.S. 639, 645–46, 662–63 (2002).

133. *Id.* at 662–63.

134. Notably, the plaintiffs in *Espinoza* were all Protestant parents who sought scholarship funds to enable their children to attend Christian schools. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020). More generally, see John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 338–52 (2001), on the shift from a rivalry between Catholics and Protestants over aid to a coalescence of Catholic and conservative Protestant forces in support of such aid.

135. This section draws on two earlier articles: *Church and State in the States*, *supra* note 52 and G. Alan Tarr, *Religion Under State Constitutions*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 65 (1988).

136. *Espinoza*, 140 S. Ct. at 2258.

137. *Id.*

education: "[e]ven States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools."[138] Noting that Montana "argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than thirty States—including Montana—adopted no-aid provisions," Chief Justice Roberts responded that "[s]uch a development, of course, cannot by itself establish an early American tradition."[139] He attributed the provisions instead to "a more checkered tradition shared with the Blaine Amendment of the 1870s,"[140] which was "born of bigotry," with which they share a similarly "shameful pedigree."[141] Thus, "[t]he no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[142] The Chief Justice concluded that "it is clear that there is no 'historic and substantial' tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*."[143]

The problems with Chief Justice Roberts's attempt to tie state no-aid provisions to the Blaine Amendment have already been discussed. There are additional difficulties as well. First, his reference to mid-nineteenth-century developments as not establishing "an early American tradition"[144] betrays a constitutional understanding rooted in the Federal Constitution. It may make sense to look for constitutional traditions rooted in the late eighteenth century if one is dealing with a single "founding" event and one largely unaffected by subsequent events and constitutional changes. But it hardly makes sense to look for a state constitutional tradition rooted in the late eighteenth century, because at that time few of the current fifty states even existed. Indeed, nineteen of the current fifty states have entered the Union since 1850.[145]

138. *Id.*

139. *Id.* at 2258–59.

140. *Id.* at 2259.

141. *Id.* at 2259 (quoting Mitchell v. Helms, 530 U.S. 793, 828–29 (2000)). In advancing this argument, the Chief Justice was building on a position set forth by Justice Thomas, speaking for a plurality of the Court in Mitchell v. Helms: "Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion).

142. *Espinoza*, 140 S. Ct. at 2259.

143. *Id.*

144. *Id.* at 2258–59.

145. *Dates of Statehood*, STATE SYMBOLS USA, https://statesymbolsusa.org/symbol-official-item/national-us/statehood-date/date-statehood (last accessed May 28, 2021).

Beyond that, most states have not had a single "founding." Only nineteen states retain their original constitutions, and many have had three or more constitutions.[146] Most states have also regularly amended their constitutions—on average, more than one amendment per year—so many state constitutional provisions have developed over time.[147] Sometimes these changes have occurred in response to specific conflicts, and their specificity and detail typically reflect their origins. Sometimes the changes have occurred because constitutional thinking has changed, and states have amended or revised their constitutions to take account of these changes. Sometimes changes in a state—political, institutional, demographic, or cultural—have led to constitutional changes recognizing those shifts. All of these appear to have played a role in state provisions dealing with church and state and in the developing state constitutional tradition relating to church and state.

More specifically, the state constitutional tradition relating to education and church-state relations developed as a result of one of the most significant developments in the states during the nineteenth century, namely, the creation of free public education.[148] The common-school movement, as it is often called, fundamentally changed the relationship between state governments and education in ways crucial to the issue of aid to non-public schools. We begin by sketching the church-state situation prior to the development of the common school movement, next examine the state constitutional consequences of that movement, then focus on the constitutional effects of the mid-nineteenth century effort to obtain public funding for Catholic schools, and conclude by considering how that conflict has impacted the issue of aid to denominational schools or to students attending those schools.

1. Bans on Aid Before the Common School Movement

The earliest no-aid provisions found in state constitutions were concerned not with education, but with the disestablishment of churches and with repudiating the most objectionable features of the colonial experience, namely, infringements on freedom of worship and taxation for the support of an established church.[149] So from the time of

146. *See* JOHN DINAN, BOOK OF THE STATES 2019, 5 tlb.1.3 (2019), http://knowledgecenter.csg.org/kc/system/files/1.3.2019.pdf.

147. *See id.* For example, in 2018 voters in the states considered 114 proposed constitutional amendments and ratified 87 of them. *Id.* at 3 tlb.1.1.

148. *See infra* pp. 126–34. Chief Justice Roberts's historical account inexplicably altogether ignores this development. *See Espinoza*, 140 S. Ct. at 2258–59.

149. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 136 (1986). For overviews of the course of

independence onward, financial support for religious institutions was understood as a fundamental feature of establishment.[150] Representative of these initial state constitutional provisions is Pennsylvania's guarantee:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or to maintain any ministry, contrary to, or against, his own free will and consent. . . .[151]

The pace and course of disestablishment varied from state to state. Some states included no-aid provisions in their initial constitutions.[152] Vermont authorized public support of churches in its 1777 constitution but banned it nine years later.[153] Nonetheless, "all of the new states, with the possible exception of Massachusetts, were moving toward more expansive understandings of disestablishment and church-state separation during the last quarter of the eighteenth century."[154] By 1800, all states outside New England, including new states, had eliminated religious assessments and religious preferences.[155] The three holdouts—Connecticut, New Hampshire, and Massachusetts—eventually succumbed to a coalition of Jeffersonian Republicans and religious dissenters, including Baptists, Unitarians, and others in 1818, 1819, and 1833.[156]

disestablishment and the growth of religious liberty, see generally *id.* and LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986). For an analysis of developments in particular states, see generally DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES 1776–1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019).

150. CURRY, *supra* note 149, at 136. Justice Breyer's dissent in *Espinoza* emphasizes this point: "If, for 250 years, we have drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit, I do not see how we can today require Montana to adopt a different view respecting those who teach it in the classroom." *Espinoza*, 140 S. Ct. at 2288 (Breyer, J., dissenting).

151. PA. CONST. of 1776, art. II (amended 1790). Although Pennsylvania radically revised its constitution in 1790, it retained the religious liberty/no-aid provision. *See* PA. CONST. of 1790, art. IX, § 3.

152. *See, e.g.*, N.J. CONST. of 1776, art. XVIII; N.C. CONST. of 1776, art. XXXIV.

153. *Compare* VT. CONST. of 1777, ch. 1, § 3, *with* VT. CONST. of 1786, ch. 1, § 3.

154. THE SECOND DISESTABLISHMENT, *supra* note 71, at 51.

155. *Id.*

156. *Id.*

The states eliminated coercion in religious matters largely out of religious faith,[157] so that every person could respond freely to what he or she regarded as the call of God's grace. The fact that the ban on aid to religious institutions often appears in the same clause as the free exercise protection testifies to an understanding that these provisions were mutually supporting, not in tension. Most early state constitutions recognized the existence of God, and many later state constitutions acknowledged the state's dependence on God's favor.[158] Some state constitutions expressly recognized religious duties. For example, the Vermont Constitution of 1786, which eliminated aid to religious institutions, nonetheless urged that "every sect or denomination of Christians ought to observe the Sabbath or Lord's day and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."[159] And Virginia's 1776 Constitution notes that "it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."[160] Furthermore, while the Federal Constitution forbids religious tests for public office,[161] several early state constitutions retained them, either prescribing beliefs to be held by officeholders or prohibiting clergymen from holding political office.[162]

2. The Common School Movement

If disputes over religious establishments supplied the initial impetus for the states to address church-state relations in their constitutions, conflicts over education provided the second.[163] These conflicts arose following the widespread development of systems of free public schools in

157. *See id.* at 27.

158. For example, in the context of *Espinoza*, it is worth noting that the preamble of the Montana Constitution of 1889 begins, "[w]e, the people of Montana, grateful to Almighty God for the blessings of liberty." MONT. CONST. of 1889, pmbl. The preamble of the Montana Constitution of 1972 states: "We the people of Montana grateful to God for the quiet beauty of our state . . . and to secure the blessings of liberty for this and future generations do ordain and establish this constitution." MONT. CONST. of 1972, pmbl. Thus, the no-aid provisions in those constitutions did not reflect a hostility to religion.

159. VT. CONST. of 1786, ch. 1, § 3.

160. VA. CONST. of 1776, Bill of Rights, § XVI.

161. U.S. CONST. art VI, cl. 3.

162. For a representative provision requiring adherence to specified doctrinal tenets, see N.C. CONST. of 1776, art. XXXII. For a representative provision banning clergy from holding public office, see S.C. CONST. of 1778, art. XXI.

163. For an authoritative overview of this conflict, see generally THE SECOND DISESTABLISHMENT, *supra* note 71. Green notes that the school question "was arguably the most important church-state issue of the nineteenth century." *Id.* at 251.

the states.[164] In the late 1770s, when the first state constitutions were adopted, the New England states—especially Massachusetts—had long-established systems of public education.[165] But New England was the exception, not the rule, and until the 1800s other states were slow to follow Massachusetts' lead.[166] Elsewhere, public education was rudimentary at best, with states and localities experimenting with a patchwork of diverse schooling arrangements including, as Chief Justice Roberts noted in his opinion in *Espinoza*, "provid[ing] financial support to private schools, including denominational ones."[167]

This changed beginning in the 1830s. Building on some tentative earlier attempts to create public school systems, educational reformers launched what came to be known as the common-school movement, seeking the establishment of free, universal public schooling that would deliver a basic education to all children.[168] This "common school" movement enjoyed tremendous success, as state after state recognized in their constitutions an obligation to provide universal, publicly supported education in institutions free from sectarian control.[169] "[B]y 1865 all the states outside the South had achieved or were on the threshold of establishing universal, tax-supported, free common schooling."[170] In the aftermath of the Civil War, both new states joining the Union and Southern states that had lagged in providing public education joined the common school movement, enshrining their commitment in their constitutions.

The dramatic success of the common school movement raised two key concerns. The first was how states could secure and safeguard the funding necessary to meet their constitutional commitment to free public education. In most states the answer was the creation in the state

164. Major works on the development of public education in the United States include FREDERICK M. BINDER, THE AGE OF THE COMMON SCHOOL: 1830–1865 (1974), LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1876 (1980), and CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860 (Eric Foner ed., 1983).

165. *See* CREMIN, *supra* note 164, at ch. 5.

166. *Id.* at 157–63. Some states' slow embrace of public education was tied to a lack of funds to support the schools. For example, the Ohio Constitution of 1803 provided for a system of free public education to be funded by donations from the federal government, which were never forthcoming. *See* OHIO CONST. of 1803, art. VIII, § 25; *Category: Education*, OHIO HISTORY CONNECTION, https://ohiohistorycentral.org/index.php?title=Category:Education&pagefrom=Wilmington+College&mobileaction=toggle_view_desktop (last accessed May 28, 2021) (explaining public schools in Ohio were not established until 1825 when the state decided to finance them with property taxes).

167. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020).

168. *See* BINDER, *supra* note 164, at 29–54.

169. *Id.* at 161.

170. *Id.*

constitution of a school fund dedicated to the maintenance and operation of public schools and protected from diversion to other uses. For example, both the Florida Constitution of 1838 and the Kentucky Constitution of 1850 provided that the school funds be appropriated in aid of common schools but for "no other purpose."[171] Similarly, the Indiana Constitution of 1851 mandated that "[t]he principal of the Common School Fund . . . shall be inviolably appropriated to the support of the Common Schools, and to no other purpose whatever."[172] Such provisions eliminated the previous state support for private schools, including denominational ones, and led to their rapid decline.[173] The provisions also led states to deny funding to schools that were not publicly controlled during the conflict over funding Catholic schools.[174] But it is important to note that most of these provisions antedate the emergence of that conflict.

The second concern involved the character and aims of public education. Of particular importance was the question of what role, if any, religion should have in the newly founded public schools. Initially public schools reflected the religious homogeneity of the populace and the Protestant cultural consensus that prevailed in America during the early nineteenth century, while ignoring differences among Protestant denominations.[175] In giving a religious orientation to the public schools, school officials were continuing practices found in the private schools that had dominated American education prior to the common-school movement.[176] They also were responding to the public's expectation that schools should undertake to inculcate morality as well as to transmit knowledge.[177] Indeed, given the religious character of the American

171. FLA. CONST. of 1838, art. X, § 1; KY. CONST. of 1850, art. XI, § 1.

172. IND. CONST. art. VIII, § 3.

173. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION 13 (2012) [hereinafter THE BIBLE, THE SCHOOL, AND THE CONSTITUTION]. "In the early days of this country, many Protestant denominations experimented with church schools, but this effort gave way to the common-school movement and the proliferation of public schools." Jeffries & Ryan, *supra* note 134, at 329.

174. LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825–1925, at 4–7 (1987).

175. Thus, the public-school curriculum has been described as reflecting a "pan-Protestant compromise." Jeffries & Ryan, *supra* note 134, at 299. Although scholars agree about the Protestant character of early public education, some also observe that its religious character declined over time. *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 69–92 (2002); *see also* THE BIBLE, THE SCHOOL, AND THE CONSTITUTION, *supra* note 173, at 11–44.

176. *See* CREMIN, *supra* note 164, at 24–34, 39–49.

177. JOHN WEBB PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK STATE HISTORY 158–59 (1967). This is made explicit in state constitutions written in the eighteenth century and early nineteenth century. *See, e.g.*, MASS. CONST. of 1780, pt. 2, ch. V, § 2; OHIO CONST. of 1803, art. VIII, Bill of Rights, § 3.

populace, the reliance on religious means to serve that purpose was consistent with widely shared beliefs about the relation between religion and morality.[178]

Yet Protestantism encompasses a variety of denominations that only partially share a common set of beliefs. The earliest public schools attempted to paper over doctrinal differences by promoting a "least-common-denominator Protestantism," reflected in daily readings from the King James version of the Bible and group recitation of the Lord's Prayer.[179] More generally, a Protestant Christian perspective permeated the curriculum, from the materials used in teaching reading to the interpretation given to religious conflicts in modern European history.[180] Initially, given the religious homogeneity of most communities, this non-denominational "Protestantizing" of public education occasioned little controversy or at least promoted acquiescence rather than protest.[181] But the situation began to change with the immigration of large numbers of Catholics to America during the 1830s and 1840s.[182] These new Americans rejected the prevailing Protestant ethos of the public schools. In particular, they objected that the religious observances in the public schools were contrary to their religious convictions, and that the allegedly one-sided history taught in the schools tended to promote hostility toward the Catholic Church and prejudice against Catholics.[183]

3. The School Controversy and Its Consequences

Beginning in the 1840s, Catholic prelates in New York and other cities with large Catholic populations, complaining that public schools were in reality tax-supported Protestant schools, demanded that Catholic schools likewise receive public funding.[184] These efforts to obtain funding

178. *See* CREMIN, *supra* note 164, at 19–100; PRATT, *supra* note 177, at 164–65.

179. Jeffries & Ryan, *supra* note 134, at 297–300.

180. *See* VINCENT P. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION: BISHOP HUGHES, GOVERNOR SEWARD, AND THE NEW YORK SCHOOL 1–5 (1968).

181. *Id.* at 4.

182. Jeffries and Ryan note: "[a]t the time of the Revolution, 30,000 Catholics lived in the new United States, barely one percent of the population. By 1830, that number had increased to 600,000. By 1850, there were 1.6 million U.S. Catholics, and twice that many ten years later." Jeffries & Ryan, *supra* note 134, at 299.

183. This is reflected in the pronouncements of the Catholic hierarchy. The American bishops attending the Fourth Provincial Council in 1840, for example, concluded that "[t]hey could not conscientiously permit Catholic attendance at schools which they considered a danger to the religious faith of their children." LANNIE, *supra* note 180, at 4–5.

184. Accounts of the New York school wars include LANNIE, *supra* note 180; PRATT, *supra* note 177; and DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–

for Catholic schools not infrequently prompted a strong reaction, animated in large measure by anti-Catholic and anti-immigrant sentiments and likely inflaming such sentiments.[185] Indeed, this Catholic educational separatism fueled suspicions that Catholics were disloyal—not really committed to the democratic Christian America championed by Protestant Americans. This story of this conflict has frequently been told, and so it will not be repeated in detail here.[186] But several observations are pertinent.

First, the Catholic criticism of public schools as promoting Protestantism and the consequent demand for funding of Catholic schools produced divisions that did not simply pit Protestants against Catholics. Instead, a split developed among the advocates of the common schools, one which grew wider as the nineteenth century progressed. Some champions of the common schools responded to the Catholic challenge by trying to outlaw public funding of sectarian education while retaining Bible reading and other Protestant elements in the public schools.[187] But as Steven Green observed:

> The battle lines for the second half of the century were among those who sought to retain a religious element to public schooling (for both real and symbolic reasons), those who argued that schools could no longer use religion to teach morals, and Catholics who criticized the first alternative as being too Protestant and the second as "Godless."[188] [Indeed,] "many reformers supported nonsectarian education and opposed the funding of parochial schools for legal and policy reasons unrelated to anti-Catholic animus. The same separationist impulses that prevented the funding of parochial schools also led to the gradual abolition of Protestant preferences in public schooling . . . ."[189]

Second, there was not a nationwide conflict over funding for Catholic schools, because Catholics were not evenly distributed throughout the country. In states where they were a small minority, political efforts to

1973 (1974). A short summary is provided in *Church and State in the States*, *supra* note 52, at 91–94.

185. *See* sources cited *supra* note 184.

186. *See* sources cited *supra* note 184.

187. LANNIE, *supra* note 180, at 4–5.

188. THE SECOND DISESTABLISHMENT, *supra* note 71, at 252–53.

189. *Id.* at 253.

obtain public funding for Catholic schools were bound to be futile and, thus were not pursued.[190]

Third, the absence in some states of overt political conflict between Protestants and Catholics did not prevent the adoption of no-aid provisions. Some states established bans on aid to religious schools and on religious observances in publicly funded institutions to resolve conflicts similar to the one that occurred in New York.[191] But other states, mindful of the corrosive effects of religious conflicts, adopted similar constitutional provisions in order to forestall them.[192] In some religiously homogeneous states where aid to parochial education never emerged as a serious issue, the sentiments expressed in no-aid provisions were nonetheless congenial, and so the states nonetheless borrowed the constitutional language banning such aid from sister states.[193] And as noted previously, in those states admitted to the Union after the Civil War, adoption of constitutional provisions banning aid to sectarian institutions was demanded by Congress as a condition of admission.[194]

Finally, accompanying the no-aid provisions inserted in state constitutions were often prohibitions on religious practices in schools receiving state funds, in effect addressing Catholic complaints about the Protestant character of public schools. The Montana Constitution of 1889 is representative:

> No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student: nor shall attendance be required at any religious service whatever, nor shall any sectarian tenets be taught in any public educational institution of the State.[195]

However, in many states that banned sectarian influences in state-funded schools, the constitutional guarantees did not immediately eliminate religious practices from the public school curriculum.[196] When

190. *See Church and State in the States*, *supra* note 52, at 91–94 (noting how other states subsequently followed New York's response).

191. *See, e.g.*, MASS. CONST. amend. art. XVIII, § 2, *amended* by MASS. CONST. amend. art. XLVI, CIII.

192. *See, e.g.*, NEB. CONST. art. VII, § 11.

193. *See, e.g.*, ALA. CONST. art. XIII, § 8.

194. Biber, *supra* note 78.

195. MONT. CONST. of 1889, art. XI, § 9.

196. Thus, in the 1894 constitutional convention in New York, for example, the same committee that reported an amendment prohibiting sectarianism in the public school system and forbidding the "expenditure of public funds to 'propagate denominational tenets'

constitutional challenges to the practices arose, some state courts denied that the Bible was sectarian, arguing that its "adopt[ion] by one or more denominations as authentic, or . . . inspired, cannot make it a sectarian book."[197] The same court contended that the use of a version of the Bible favored by a particular sect did not constitute governmental endorsement of or preference for a particular religion.[198] Finally, some denied that school prayer and Bible reading transformed the classroom into a place of worship, insisting that the constitutional ban on compelled attendance at a place of worship applied only to places where people met for that express purpose.[199] Nevertheless, adopting these constitutional principles, despite the continuation of practices incompatible with them, was important because it furnished a weapon for litigants who would later challenge the states' sponsorship of religious practices in public schools.[200]

## V. CONCLUSION

Until the middle of the twentieth century, the "principal responsibility for the American experiment in religious rights and liberties lay with the states."[201] The incorporation of the Establishment and Free Exercise Clauses encouraged challenges to state laws and practices in federal court, and over about the last seventy-five years, the

assured the delegates that it was not intended thereby to 'interfere with the reading of the Bible in public schools.'" PRATT, *supra* note 177, at 272.

197. *See, e.g.*, Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792, 794 (Ky. 1905).

198. *Id.*

199. *See, e.g.*, Church v. Bullock, 109 S.W. 115, 117–18 (Tex. 1908).

200. State rulings prior to the U.S. Supreme Court's ruling in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) that either struck down Bible reading in public schools or upheld laws banning it include: People *ex rel.* Ring v. Bd. of Educ. of District 24, 92 N.E. 251 (Ill. 1910); State *ex rel.* Freeman v. Scheve, 91 N.W. 846 (Neb. 1902); Bd. of Educ. of Cincinnati v. Minor, 23 Ohio St. 211 (1872); State *ex rel.* Weiss v. Dist. Bd. of Sch.–Dist. No. 8 of Edgerton, 44 N.W. 967 (Wis. 1890). Rulings upholding Bible reading in the public schools include: People *ex rel.* Vollmar v. Stanley, 255 P. 610 (Colo. 1927); Chamberlin v. Dade Cnty. Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962); Wilkerson v. City of Rome, 110 S.E. 895 (Ga. 1922); Moore v. Monroe, 20 N.W. 475 (Iowa 1884); Billard v. Bd. of Educ., 76 P. 422 (Kan. 1904); *Hackett*, 87 S.W. 792; Donahoe v. Richards, 38 Me. 376 (1854); Pfeiffer v. Bd. of Educ., 77 N.W. 250 (Mich. 1898); Kaplan v. Indep. Sch. Dist. of Virginia, 214 N.W. 18 (Minn. 1927); Doremus v. Bd. of Educ., 75 A.2d 880 (N.J. 1950); Carden v. Bland, 288 S.W.2d 718 (Tenn. 1956); *Bullock*, 109 S.W. at 115. Thus, as Monrad G. Paulsen observed in the middle of the twentieth century, "[i]nstead of maintaining a 'wall of separation' many state courts have upheld enactments benefiting religion by narrow technical readings of their state constitutions." Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

201. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 87 (2000).

Supreme Court has heard more than one hundred religion cases.[202] The rulings in these cases have not shown a great deal of consistency over time, and they have been subjected to harsh criticism both on and off the Court.[203]

The Supreme Court's jurisprudence in recent years has involved a rethinking of aid to religious schools or to those seeking to attend such schools,[204] a movement away from the strict-separationist understanding of *Lemon v. Kurtzman* and its progeny.[205] This movement has highlighted the difference between the Federal Constitution, at least as interpreted by recent Supreme Court rulings, and state constitutions that include no-aid provisions. *Espinoza* continues the movement in the Court's Establishment Clause jurisprudence. Perhaps equally importantly, it has started to undermine those barriers to aid to religious institutions found in state constitutions. If the Court aggressively reviews state rulings that are arguably based on adequate and independent state grounds, then more outcomes will depend on the Court's interpretation of the Federal Establishment and Free Exercise Clauses. If state no-aid provisions are invalidated as born of bigotry and prejudice or treated as presumptively unconstitutional, then they will no longer be a barrier to the Court's expansion of rights under the Free Exercise Clause. They will also preempt constitutional politics in the states, as proponents of school choice will no longer need to amend state constitutions to remove or modify no-aid provisions or to convince state supreme courts that the policies they favor do not violate existing no-aid provisions.[206]

202. For comprehensive treatments of the Court's rulings, see JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE, Vol. II, (2004); *Religious Liberty: Landmark Supreme Court Cases*, BILL OF RIGHTS INSTITUTE, https://billofrightsinstitute.org/e-lessons/religious-liberty (last accessed June 6, 2021); Ronald Brownstein, *The Supreme Court is Colliding with a Less-Religious America*, ATL. (Dec. 3, 2020, 12:45 PM) https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284/.

203. On the Court, *see, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2400 (2020) (Ginsburg, J., dissenting) ("Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree."). Off the Court, see John Kruzel, *Supreme Court Expands Religious Rights with Trio of Rulings*, HILL (July 8, 2020, 6:58 PM), https://thehill.com/regulation/court-battles/506486-supreme-court-expands-religious-rights-with-trio-of-rulings (quoting Columbia University Law Professor Katherine Franke) ("The majority of justices on the Supreme Court have increasingly treated religious liberty rights as of greater importance and weight than other fundamental constitutional and civil rights.").

204. As seen in the Court granting certiorari in *Espinoza*.

205. 403 U.S. 602, 612–13 (1971).

206. *See supra* Part I.

Reasonable people can of course disagree about school-choice programs. Proponents insist that they enable parents to select the school that will best serve the needs of their children. Opponents counter that school-choice programs reduce funding for public schools and public funds should not subsidize religious education. Opponents of school choice wish to maintain state constitutional bans on aid to religious schools, while proponents seek their elimination.[207] This is an important debate, but the Supreme Court's unseemly eagerness in *Espinoza* to intervene and impose a federal solution has short-circuited that debate, and it has done so unnecessarily. *Espinoza* may well be a victory for school choice. But it is not a victory for self-government or a vibrant federalism or, indeed, for proper judicial modesty.

207. *See supra* text accompanying note 10.