

**AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT
SCHOOLS**

PRESS RELEASE 826

ESPINOZA V MONTANA DEPARTMENT OF REVENUE

**WILL THE APPOINTMENT OF JUSTICE KAVANAUGH TIP THE BALANCE
AGAINST SEPARATION OF RELIGION AND THE STATE IN THE US?**

The following report on this landmark case has been posted by [Evan Gerstmann](#)ⁱ at <https://www.forbes.com/sites/evangerstmann/2020/01/24/justice-kavanaugh-says-bans-on-public-funding-for-religious-schools-are-rooted-in-grotesque-religious-bigotry-against-catholics/#24fc6fea434e>

Last Wednesday the United States Supreme Court heard oral arguments in a case of enormous importance: *Espinoza v. Montana Department of Revenue*. In this case, the Supreme Court of Montana struck down a dollar for dollar tax credit for donations to private schools including religious schools.

The state supreme court held that the program ran afoul of the state constitution's prohibition of public funding for religious education.

A number of parents who send children to religious schools in Montana want the United States Supreme Court to overturn the Montana decision and restore the program. They found a sympathetic audience in Justice Brett Kavanaugh who said the state prohibition against funding religious education is "rooted in grotesque religious bigotry against Catholics." He's referring to Republican Congressman James G. Blaine who, in 1875, tried to get Congress to pass a federal constitutional amendment banning taxpayer funding of religious schools. He failed, but quite a few states, including Montana, have similar amendments in their state constitutions.

It is true that Blaine was motivated, at least in part, by anti-Catholic beliefs, but Kavanaugh is focusing on an overly narrow slice of history. There are many valid reasons to oppose public funding of religion that have nothing to do with Blaine. One well-known opponent of public funding for religion was James Madison, who wrote of religion: "every page of it disavows dependence on the powers of this world."

In other words, if the government pays for religion, government meddling with religion isn't far behind. For this reason, President Madison vetoed a bill giving federal land to a Baptist church in Mississippi. This means that separation of church and state isn't a form of hostility to religion, it is a method of protecting it. Both Thomas Jefferson and Roger Williams argued that a wall of separation was needed to protect religion from government predation.

The program in Montana was a dollar for dollar tax credit for those who donate to private schools. So every dollar that was donated indirectly came from the public treasury. Also, the vast majority of private schools in Montana are religious. That's true in many states. Make no mistake, the program was a system of spending public dollars on religious education. So under these types of programs, Hindu taxpayers pay for teachers to tell students that those who don't accept Christ as their savior will go to hell. Jewish taxpayers will pay for instruction on how Jews killed Christ. Evan Gerstman recently [posted about a religious school that expelled a 15-year-old girl because she posted about her rainbow birthday cake](#). Gay and lesbian taxpayers would foot the bill for that too under a Montana-type program.

It is difficult to know how the Supreme Court will rule on this. Justice Kavanaugh and three of his conservative colleagues will probably vote to restore the public funding for religious schools. Some of the more liberal Judges seem interested in upholding the Montana Supreme Court on narrow technical grounds. That would be better than reversing the Montana court but it would be better if the Supreme Court rendered a clear and definitive ruling that states do not have to fund religious education just because they fund public education and private secular education.

This case largely rests on how the Court applies two of its previous decisions. The first is a 2004 case, *Locke v. Davey*. The Court held that a scholarship program in Washington State that refused to let a student use his publicly funded scholarship to major in theology did not violate his right to free exercise of religion.

The other decision is *Trinity Lutheran Church v. Pauley*. That case held that if a state gives secular schools funds to resurface their playgrounds to make them safer, it can't exclude religious schools from the funding program. These two cases are very easy to reconcile. The Trinity case involved a program that had nothing whatsoever to do with religious education. Withholding funds to avoid playground injuries would be as foolish as denying religious schools fire protection. No religious instruction took place on the playgrounds so there was a very clean line between the playground and the classroom. By contrast, Locke involved religious instruction. The Court clearly ruled that the state does not have to pay for instruction in theology even if it pays for instruction in history or chemistry.

The Montana case is much more like Locke—it uses taxpayer dollars to subsidize religious instruction. This is a recipe for religious strife. What will happen when public money goes to a school that teaches a version of Islam that is sympathetic to Jihadist viewpoints? And will it be healthy for society when Catholics, Protestants, and Jews are competing for public money?

Like so many cases this year, the decision may turn on the views of Chief Justice John Roberts. During oral argument, the cautious Roberts seemed very interested in the narrowest arguments that dismiss the case on technical grounds. The Court recently went in that direction in the “same-sex wedding cake case” where the Court ruled on grounds so narrow that it offered almost no guidance for future cases. A repeat of that approach would be a mistake. This is an important issue that has been on the Court’s radar for many years. It’s time to decide.

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ⁱ I've always been interested in how we should balance individual and minority rights with majority rule. After several years practicing law in New York city, I found my true calling as a college professor and researcher. I've written about campus free speech, same-sex equality and racial justice for Cambridge University, The

University of Chicago, and Harvard University. My latest book is "Campus Sexual Assault: Constitutional Rights and Fundamental Freedoms".