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Which ruling would you choose?

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Your Turn
Alan Garfield
Guest columnist

Which ruling would you choose?

Ready for a pop-quiz on the Constitution and separation of church and state? Pretend you are a Supreme Court justice asked to rule on the following facts, which are taken from a case recently decided by the Court.

Montana subsidized scholarships for children attending private K-12 schools. Any family could apply for a scholarship, but the Montana State Constitution prohibits public money from being used to pay for religious schools. Consequently, children could receive scholarships to attend a private secular school but not a private religious school.

Parents who wanted to use a scholarship at a religious school sued the state claiming that the exclusion of religious schools violated the U.S. Constitution.

Which of these rulings would you choose?

The religious exclusion is constitutional: The government should not fund religious education. When the government financially supports religious institutions, it corrupts the institutions by making them dependent on government largess. It can also lead to religious divisiveness as sectarian groups compete for government funds. Religious groups should rely on voluntary contributions from their adherents, not on money from taxpayers who may have different religious beliefs or be nonbelievers. As Thomas Jefferson wrote in the Virginia Statute for Religious Freedom, which was adopted after the Virginia legislature rejected a proposed tax assessment to support clergy, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."

The religious exclusion is unconstitutional: The exclusion discriminates against schools solely because they are religious. The religious schools are not seeking to be treated better than secular schools; they merely want to be treated equally. By allowing only secular schools to participate in the scholarship program, the state is exhibiting hostility toward religion. Indeed, the Montana state constitutional provision, like similar provisions adopted in over 30 states, was enacted in the late 19th century in response to widespread prejudice against recent Catholic immigrants. It was intended to ensure that public money would not be used to support Catholic schools, even though public schools at the time had a decidedly Protestant bent.

Before focusing on your ruling, let us see what the Supreme Court did. The justices, by a narrow 5-4 margin, found Montana's exclusion of religious schools unconstitutional. Chief Justice John Roberts, writing for the majority, said Montana was discriminating against schools because of their religious character, which he decried as an act "odious to our Constitution." He acknowledged that a state need not subsidize private education, but he said that "once a state decides to do so, it cannot disqualify some private schools solely because they are religious."

Justice Breyer, in a dissenting opinion, captured the argument for upholding Montana's exclusion of religious schools. He expressed concern about "the taxpayer who does not want to finance the propagation of religious beliefs, whether his own or someone else's" and the "religiously inspired political conflict" that will result as sectarian institutions vie for government funding.

Now let us turn to how you ruled. The good news is that there is no wrong answer. The Constitution's text does not provide a clear resolution, and the historical evidence is ambiguous.

The answer, instead, depends upon a value choice: How much separation between church and state do you think is desirable?

Perhaps you think that taxpayer money should never be used for religious education. That would align you with the liberal justices. But, in 2002, a conservative majority held that families could use government vouchers, which are similar to scholarships, at religious schools. The Constitution required only that private parties, not the government, decide whether the vouchers are used at secular or religious schools.

But the Montana case went a step further. The 2002 case merely held that the government could allow scholarships to be used at religious schools. The Montana case asked whether the government must allow them to be used at religious schools if they could be used at secular schools.

Before locking in your ruling, consider these questions. Should taxpayer money, as retired Justice David Souter put it, be used for teaching Mosaic law in Jewish schools, the primary of the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation of the Prophet in Muslim schools? Should a nation confronting existential scientific challenges like the current pandemic or ongoing climate change use public resources to fund educational programs that emphasize Genesis over evolution and divine intervention over human stewardship?

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