AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

**To:** **Interested Persons**
**Date:** **December 2020**
**From:** **A. Eric Johnston**
**Re:** **SCOTUS Upholds Tax Credit Scholarships for Religious Schools**

---

In another of the religious freedom cases decided by SCOTUS in the recent term, the constitutionality of state-provided tax credit scholarships for students to attend religious schools was upheld. The ruling in *Espinoza v. Montana Department of Revenue* applied the Free Exercise Clause, rather than the Establishment Clause, to protect these types of state laws. The four liberals on the court dissented using the usual Establishment Clause arguments.

The State of Montana passed a law allowing tax credits for scholarships for students to attend private schools, but excluded religious schools on the basis that it would violate the Establishment Clause. Writing for a five-four majority, Chief Justice Roberts held the exception unconstitutional. Alabama has a similar statute, The Alabama Accountability Act of 2013, Section §§16-6D-1 *et seq.*, 1975 *Code of Alabama*, which permits tax credits for scholarships to religious schools. Also, § 16-33A-7, *id*., prohibits Alabama Commission on Higher Education grants for use as religious schools. *Espinoza* settles the questions that some may have had about whether the former Alabama statute is constitutional and the latter is unconstitutional.

The Chief Justice pointed out that the court has "repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." In contravention of this requirement, the Montana Constitution had a no aid to religious schools provision. That provision bars religious schools from public benefits solely because of their religious character. In 2017, SCOTUS decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*, permitting playground materials to be given by the state to private schools, including religious schools. Montana argued that reasoning did not apply because *Trinity* only addressed religious status, while *Espinoza* addresses "religious education," that is, state tax credits are used to fund actual religious activities. However, the majority held that the judicial test of strict scrutiny applied which means government action, such as the denial of the tax credits, is viewed in the strictest terms. The government action must an advance interest of the highest order and must be narrowly tailored in pursuit of those interests. Montana did not meet that standard.

The burdens on the religious schools interfered with the parents' right to determine their childrens' upbringing, a choice protected by the Constitution. The court held that although the state need not subsidize private education, once it decides to do so, "it cannot disqualify some private schools solely because they are religious."

The basis of this problem are laws known as the "Blaine Amendments." These were laws passed in the late 1800s to keep Catholic schools from receiving any state benefits. In a concurring opinion, Justice Alito gave a thorough history of these laws. The wave of immigration from Ireland and Germany in the 19th Century increased the country's Catholic population. There was general opposition to the Catholic religion which was embodied in many state constitutions, including Alabama. See Alabama Constitution, Article XIV §263.. The Blaine Amendment was attempted in the U.S. Congress, but did not pass. Today, 38 states still have their Blaine Amendments.

The history of this Montana law and the analysis of this case is important to understand the struggles we have had on protecting the Free Exercise Clause. Justice Thomas concurred with the majority and provided a very good analysis. He described the Establishment Clause of having a "brooding omnipresence . . ., every ready to be used to justify the government's infringement on religious freedom." His analysis is probably the most correct analysis of the application of the Free Exercise and Establishment Clauses of the Constitution to the sister states. Thomas has consistently argued that the Establishment Clause was not incorporated by the Fourteenth Amendment against the states. He explains that the "establishment" of religion was understood at the founding to be "coercion of religion orthodoxy and of financial support by force of law and threat of penalty" to persons. "Properly understood, the Establishment Clause does not prohibit states from favoring religion." Further, ". . . the court's wayward approach to the Establishment Clause also impacts its free exercise jurisprudence, specifically, its overly expansive understanding of the former clause [Establishment] has led to a correspondingly cramped interpretation of the latter [Free Exercise]." ". . . This court has an unfortunate tendency to prefer certain constitutional rights over others . . . The Free Exercise Clause, although enshrined explicitly in the Constitution, rests on the lowest rung of the court's ladder of rights, and precariously so at that."

This sentiment is exactly the struggle in which SLI and its predecessors has been engaged since the early 1980s. We recognized at that time the dominance of the Establishment Clause virtually excluded the Free Exercise of religion in the public square. As a result of about 37 years of efforts, we have come a long way, but as Justice Thomas points out, we are not there yet. The importance of *Espinoza* is that it furthers the free exercise of religion. It does not go quite far enough, but it is, with the exception of the Title VII case decided this year, extending the religious freedom protection of this court. It is a significant step in the right direction continuing to build constitutional confidence in the Free Exercise Clause. It comes closer to Justice Thomas' argument than any case in decades. We will continue our efforts to protect religious freedom and move its importance up the court's ladder of rights.