John: Hello I am John Ross from the Institute for Justice. And this is a special podcast we've put together just for fun because on Wednesday January 22nd, the U.S. Supreme Court is going to hear oral argument in one of our cases. It has the potential to be a blockbuster in the realm of educational choice. So we thought that our listeners would be interested in learning more. The case is *Espinoza v. the Montana Department of Revenue*.

Erica Smith: At its core, this case is about parents' ability to choose the best education for their children.

John: That's Erica Smith. She's a senior attorney at the Institute for Justice, and she's co-lead counsel the case.

Erica Smith: Public schools work great for lots of kids, but education is not one size fits all, and lots of kids are struggling in their public schools. That could be because they're getting bullied or they have special needs. Maybe they're gifted, or maybe they just learn differently from their peers and they need to go to a school with a different educational philosophy. There's lots of reasons that the public schools are not working for certain kids, and those kids deserve a choice.

John: In 2015, the Montana legislature enacted a tax credit program that allows taxpayers who donate to a scholarship fund to get a tax credit of up to $150. A private nonprofit then bundles those donations together and gives them to low-income students and students with disabilities in the form of scholarships that can be used to pay tuition at private schools.

Erica: Most of them come from families that are low income. They're living on the poverty line and sometimes below the poverty line. Other families have children with disabilities and they're using the scholarships to send their children to a school which specializes in educating children with learning and physical disabilities.

John: For Kendra Espinoza and her daughters, the scholarship program offered them hope for a brighter future.

Erica Smith: Kendra Espinoza is the lead client in this case. She's a single mom. Her husband abandoned the marriage. Her home was going into foreclosure. She was suddenly left on her own to raise her two daughters.

John: And the public schools just were not working for her daughters.

Kendra Espinoza: Both of my girls were at public school, and although they did alright they were not thriving.

John: That's Kendra. She and her daughters live in Kalispell, Montana. Population 20,000.

Kendra Espinoza: Naomi has always been very vocal in sharing her faith. And because of that she tended to get ostracized and maybe picked on a little bit and teased by some of the parents. "Oh, here comes Miss Goody Two Shoes or Miss Bible Thumper" or comments such as that. And I felt that that was unfair.

John: She was nine.

Kendra: Sarah didn't do quite as well at the public school. She's a very bubbly, lively, energetic girl, and she tends to need more of one on one attention. She gets distracted a little bit more easily, and so putting her in a private school seemed like a better option.

John: When Montana passed its tax credit program, Kendra applied for scholarships so that Naomi and Sarah could attend Stillwater Christian School, a private, nondenominational K-12 school with about 350 students.

Kendra: I love seeing my girls at Stillwater.They're having fun. They're challenged academically, which makes me very happy. They're learning to think about the kids around them and they are being more responsible at home. I see them excited to go to school. They have such a desire to be at that school and to stay at that school. They have begged me: “Can we please stay at the school, Mom. I'll do anything it takes to stay at this school.”

John: Depending on what grade a student is in, full tuition at Stillwater costs between seven and eight-and-a-half thousand dollars a year. The school offers financial aid to many of its students, but even with the aid the school provided for Naomi and Sarah, the tuition seemed insurmountable.

Kendra: We've had to make sacrifices. We don't take vacations. We don't go places that require an extensive amount of money. We don't eat out a lot. I've had to work extra jobs just to make ends meet, which I'm sure a lot of people do. But working hard, working extra jobs, being careful

what we spend our money on, being very careful with budgeting: Those are all things that we've had to do to make sure that I can keep those girls at Stillwater.

John: Kendra works full time as a book keeper at an office. And she also worked nights and weekends cleaning houses.

Kendra: There is no way that I would be able to keep my kids there without some sort of assistance. The cost would be far too great for me.

John: But last year the Montana Supreme Court struck the tax credit program down. And if Kendra does not prevail at the U.S. Supreme Court, her daughters, and many other kids in Montana, may be forced to return to schools that do not meet their needs. And, unfortunately, around the country, there are many students in public schools that are not having their needs met.

> **Philadelphia newscast**: The NBC 10 investigators surveyed hundreds of schoolteachers. **Teacher**: Aggression between students is a real issue. … **Teacher**: If the parents knew truthfully what went on in the schools there would be repercussions. … **Journalist**: Philadelphia school teachers say they're risking their jobs to talk to us.
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> **Chicago teacher:** Why I stopped being a teacher in Chicago … I realized that I cannot change this system. … the kids hate the school. The staff hates the school.

Green Bay teacher: Students and staff are physically, verbally, emotionally, mentally, and sexually abused every single day in the building … Just the other day I broke down after I witnessed an 8th grade student in the office screaming and swearing at a staff member about his cell phone being taken away. This boy was in my class in 6th grade. He had never been in any trouble, great student, polite young man, happy. But every day for the last two and half years he has lived in the chaos that we adults have allowed to exist at his school, and he sees that the only way to survive in this environment is to be aggressive. He saw my jaw drop open at his behavior. And his face crumpled and he started to cry instead of scream. Because he is not this person.

Oregon newscast: Welcome to KGW News at 6. We're dedicating the first part of our newscast to disruptive behaviors and violent incidents happening in elementary schools. … Teachers across Oregon have told us this problem is already at a crisis level.

Illinois newscast: In public schools across the state of Illinois, the use of, quote, "isolated time-out" was allowed if students allegedly posed a threat to themselves or others. They were detained in "quiet rooms." But a yearlong investigation by ProPublica Illinois and the Chicago Tribune found that this practice was regularly used for minor school incidents, sometimes on children as young as five years old. Incidents included not doing homework or spilling milk.

Michigan newscast: School district leaders I talked with here on the lake shore tell me more than ever before they're using long-term subs to fill classrooms and they're shocked by the lack of applicants for open teaching positions.

St. Louis newscast: Classrooms trashed. Children so disruptive teachers are forced to take extreme measures. It is a nationwide problem, and it's i[mpacting school districts all around the St. Louis area.

San Diego valedictorian graduation speech: To the teacher who was regularly intoxicated during class this year, [crowd gasps] thank you for using yourself as an example ….

John: Of course, many public schools are very good, but far too many kids are trapped in bad ones, and their parents have no other options. For many policy- and law-makers, an answer to this problem has been the creation of school choice programs that expand parents options beyond their neighborhood's schools. On this podcast, we're going to talk about the history of school choice and how that history influences policy today. And hopefully along the way if you are someone who is skeptical of school choice programs, we will allay some of your concerns. But before we get into the history, a word about how education is delivered around the world.

Prof. Ashley Rogers Berner: Educational pluralism is the norm among democracies.

John: That's Dr. Ashley Rogers Berner. She is an associate professor at Johns Hopkins University and the deputy director of the Institute for Education Policy at Johns Hopkins.

Prof. Ashley Rogers Berner: Educational pluralism is a different way to do public education than we're used to. It's a system in which the government funds and regulates, but doesn't necessarily deliver public education.

John: In countries around the world, families get to choose from an array of publicly funded educational options aside from their neighborhood school, and it’s not a big deal. It’s just how they do things.

Prof. Ashley Rogers Berner: Families are different and children are different. And it's important to have parents able to find a school that fits for their particular child's needs. And it may be something to do with religious belief, but it may have something to do with pedagogy or the class size or special activities. And so pluralism tries to make options for families widespread as opposed to only accessible for the wealthy.

John: In Canada, Germany, France, Sweden, Denmark, Israel and elsewhere, the government either operates or funds a wide array of educational options.

Prof. Ashley Rogers Berner: So the Netherlands, for example, funds 36 different kinds of schools on equal footing, and they hold them all accountable for academic results. In England, the Anglican church is the primary provider of elementary education, but it's possible to add all different kinds of schools that fit with parental wishes and needs in the demography of a given place. Canada, the same thing.

John: And it’s not just western democracies.

Prof. Ashley Rogers Berner: Indonesia funds Christian schools and Muslim schools and they hold them both accountable for the same academic results. If we're talking about other non Western countries, Hong Kong is probably the best example. Hong Kong, the government funds, but they don't deliver education. It's delivered by voluntary organizations that are sometimes religious and sometimes not. Liberia has had an experience recently where they forged a public private partnership and essentially have charter schools. And those charter schools have been fairly successful in closing achievement gaps.

John: In Australia, most educational funding comes at the provincial level, but when research suggested that private schools were doing a good job narrowing achievement gaps between wealthy and poor students, the national government began funding access to private schools.

Prof. Ashley Rogers Berner: So the Australian government stepped up and began to fund access to these independent schools and it's having a positive effect upon outcomes. In fact, 50% of the students in independent schools now are from the lowest segment of income levels.

John: That’s all in stark contrast to the educational model in the United States.

Prof. Ashley Rogers Berner: We do have what we would call school choice in this country, but it's called having enough money to move to the suburbs or to send your child to a private school.

John: We don’t need to do things this way. Looking around the world, it is not the case that only uniform, state-sponsored schools produce good citizens. It is not the case that providing

options that respect children's pedagogical needs or their families' religious or cultural backgrounds leads to a loss of social cohesion or a lack of accountability.

Prof. Ashley Rogers Berner: Our assumption now is that public schools are the district schools. Until we start pulling back and looking at other countries, we assume that's what a public education is. So what that means is all of the departures from the norm of uniformity have to argue for their legitimacy.

John: That norm of uniformity -- that most or all kids should go to the same kind of school -- dates back to the 19th century. But prior to the rise of uniform, standardized schools we did have a pluralist educational culture in this country.

Dr. Robbie Gross: One of the most important and interesting things about the landscape of schooling before the kind of rise of public school systems, which were really starting to form and spread and 1840s and 1850s. The interesting thing about schools before then it really was a largely market driven, private model.

John: That's Dr. Robbie Gross, who is a history teacher and assistant principal at Sidwell Friends school.

Dr. Robbie Gross: So in rural areas, for example, where most Americans lived Those schools were largely market driven, meaning the community may have funded the school for a certain amount of time, a few months, say, through public tax dollars by taxing themselves. But if you wanted to send your child to that school for more time than that, say for four months or five

months. You had to pay tuition. So even in rural areas, schools were tuition dependent and responsive to supply and demand.

John: And because the schools were funded locally, they usually reflected the religious and cultural backgrounds of the area.

Robbie Gross: Up until the rise of public school systems, cities had a much more diverse kind of marketplace of schooling, but we would see them today as private.

John: There were private schools for the children of the wealthy. And there were free, charity schools for the poor usually run by churches.

Robbie Gross: So when we think of what makes a public school public in the 20th century, it's operated by the state, it's standardized with some sort of central control over the curriculum. It's governed by public officials. It's secular. None of those really applied to any school in the early 19th century or in the 18th century.

John: But then, starting in New England in the 1830s, there is a push for what were called common schools.

Robbie Gross: People like Horace Mann and Henry Barnard and others. They saw a real problem with the decentralized system. They believed it produced division and strife.

John: For common school proponents, they wanted to get as many students from different social classes and religious denominations in the same schools as possible.

Prof. Charles Glenn: Horace Mann, who's often called the father of the common school, promised that if every child in Massachusetts attended the kind of school that he was calling for, within a generation, it would be possible to close all the prisons because no one would be committing crimes anymore. There was this naive idea that you could some how create a utopia through a common schooling.

John: That's Charles Glenn, professor emeritus of educational leadership at Boston University.

Prof. Charles Glenn: And it spread. It's very powerful idea, of creating a common citizenship, a common nationality. It didn't actually function that way. Because ironically it became a source of conflict rather than a source of unity.

Robbie Gross: There was just no conception that you could operate schools that would not have a religion as a central component of teaching children to have good moral character and to be good Americans.

John: For Americans of all stripes in the 19th century, one purpose -- if not the purpose -- of education was moral development, and religion was a key part of that. And the religion that Horace Mann and others had in mind for public schools was a kind of generic Protestantism.

Robbie Gross: It was quite exclusive of non Protestant religious expression. You would start the school day, for example, with a reading from the King James Bible, the Protestant Bible.

Prof. Charles Glenn: Horace Mann was a Unitarian. And, although he insisted that the school should teach religion, he wanted them to teach what he called the pure religion of heaven, which left out things like sin and redemption and instead should just be teaching of the brotherhood of man and a pure moral uplift.

John: But at the same time that proponents of common schools had this utopian vision of schools uniting people around shared values and driving the crime rate to zero, the country was experiencing a wave of mass immigration of poor, working class people and who were predominantly Catholic.

> **Governor Metcalf**: The great influx of foreigners into this country has, of late, become a matter of alarming anxiety to the people.

John: That's the governor of New Hampshire speaking in 1855. He was a member of the Know Nothing Party, which took control of several state legislatures in the 1850s by whipping up fears about Catholic immigrants.

> **Governor Metcalf**: Guided and controlled by one mind, and that mind solely directed to one object, the extension of the power of the Church of Rome. This alien element is now rapidly insinuating its wiles, maturing its schemes and extending its influence over the country.

John: So-called nativists argued that Catholic immigrants were mindless servants of the Pope who was bent on overthrowing democracy. They were worried that the newcomers would take their jobs and that they were coming in such huge numbers that they would take control of local politics. And the rhetoric was like, these Catholics are here to subjugate us, potentially with violence.

> **Governor Metcalf**: The religion which they have been taught from their birth is a religion that pronounces all creeds heresy but its own and boldly avows that it nourishes most when watered by the blood of heretics.

John: The Pope didn't necessarily help matters with some of his pronouncements.

Prof. Charles Glenn: The Pope condemned a lot of the modern ideas that underlay Republican life, including the idea that there was a right to freedom of conscience, freedom of religion and so forth.

John: But whatever the Pope was saying, that doesn't explain or justify the full-on hysteria of the nativists -- hysteria that resulted in periodic outbursts of mob violence against Catholics in cities including Boston, New York, Philadelphia, Louisville, St. Louis, Cincinnati, New Orleans, and other places. Here's a Catholic Bishop writing in New York City in 1856.

> **Bishop Hughes**: "Convents have been burned down. Catholic churches have been burned down, while whole neighborhoods have been, under the eye of public officers, reduced to

> ashes. People have been burned to death in their own dwellings, or, if they attempted to escape, have been shot down."

John: Often the violence happened at election time. But it roots were also about religion in public schools. In Philadelphia in 1844, for instance, after Catholics objected to the King James Bible being read and teachers leading students in singing Protestant hymns, nativists burned down Catholic churches, a seminary, and a school. Hundreds of people lost their homes, and dozens of people died in the fighting.

Robbie Gross: If Catholics were to complain about in a particular instance that a teacher had read from the King James Bible, anti-immigrant political parties would very quickly mobilize and draw a pretty firm line that this is a Protestant nation and it's the role of immigrants to assimilate into that.

John: But disagreements about religion aside, the idea of a uniform, common school that's acceptable to America's Protestant majority and that today we would all recognize as the precursor to modern public schools, does begin to take hold and spread.

Robbie Gross: Historians think that it was in the 1860s, 1870s, these reformers finally had succeeded in getting roughly 50% of American children into public schools.

John: And to do that, common school proponents had to overcome a number of other challenges.

Robbie Gross: One of the things that these reformers really struggled with was how do we bring in middle and upper middle class Americans to the public school system? Free education was associated with charity schools. And if you looked at the kinds of high schools that were being built, they were these magnificent buildings. They were huge investments because the belief was, if we have these shining schools at the pinnacle of our public system, then we'll be able to attract middle classes.

John: And in addition to two groups we've talked about -- the idealistic common school proponents and the anti-Catholic nativists, there is another group that emerges a few decades later that plays a prominent role disparaging pluralist education. Political economists. In the middle of the 19th century the laissez-faire economics of Adam Smith was being seriously challenged in intellectual circles by economists who wanted to see the government doing more to regulate and control the economy.

Robbie Gross: We don't think of 19th century political economy really as focusing on education. We don't think of these economists as focusing on schools. We think of them as thinking about railroads, and the role of competition in different industries and the role of government in regulating different industries. But what these economists were interested in is really puzzling over what kind of a good is a school Should schools in the United States operate like a shoe manufacturers. Everybody can start one and compete with one another. And that competition will produce the best possible outcome for the consumers. Or should schools operate more like emerging natural monopolies? Goods like railroads or municipal utilities.

John: You may have heard of John Bates Clark. There's an annual award that the American Economic Association gives to economists under the age of 40 that's named after him. He was among this group of economists who advocated for state control of education.

Robbie Gross: Many of these economists were themselves largely Protestant, had come out of public schools, had real commitments to public schools. And so when they looked at public schools, they typically saw them as benefiting from the same kind of anti-competitive norms that they saw with emerging utilities. And that kind of language actually trickled down into how many other Americans thought about public schools.

John: But public schools remained Protestant institutions. And in the 1870s and 1880s, Catholics, who were still arriving to the country in large numbers, tended to be attracted to their own schools.

Robbie Gross: The vast majority of Catholic schools in the 19th century were very modest schools attached to the local parish church. They would be taught by nuns and led by a priest. And as a result of that they could charge little to almost no tuition. So they were affordable. You didn't have to employ lay teachers and the Catholic community within the parish would help subsidize the education for those that could not afford it.

John: Catholic schools also often taught in the language of the home country.

Robbie Gross: Because Catholic communities were also somewhat segregated by ethnicity, you would have a Polish parish, a Italian parish, Irish parish, Czech, German, so forth. That local

Catholic school as opposed to the public school would be able to teach children in the language of their home countries. And priests and the Catholic hierarchy in the United States had mandates to parents that they had to send their children to Catholic schools, which is not to say that all Catholics followed that instruction.

John: But probably most importantly, many Catholic parents believed that a good education was a Catholic education.

Prof. Charles Glenn: What Catholic parents wanted was schooling that was informed by a Catholic understanding of the nature of a flourishing human life.

Robbie Gross: In a public school, either there would be some sort of generic, non-denominational religious instruction or the instruction might be explicitly anti-Catholic.

John: According to Professor Ruth Miller Ellson, who did a survey of over 1,000 textbooks that were in common use in 19th century public schools, textbooks frequently claimed that the Catholic Church was a threat to the republic. Which isn't to say public schools everywhere were hostile to Catholics. In some places, public schools were willing to take the King James Bible out of schools. But that didn't solve the problem either because it sparked a backlash from Protestant parents. Anyway, even as the public school movement is growing rapidly across the country and replacing private Protestant schools, there was also an explosion of Catholic schools.

Robbie Gross: What made Catholic school so different from other private schools is that these were really mass attended institutions. Meaning in a city you could have tens of thousands of students attending these schools and these would be children of working class parents.

John: But when Catholics sought public funding for their schools, they ran into fierce resistance.

Charles Glenn: Of course, the local public schools were strongly Protestant and they received public funds, but the idea that the Catholic school should also receive public funds was anathema and became a very powerful, very powerful rallying point for the Republican party.

John: The anti-immigrant hysteria of the Know Nothing Party and other nativist groups subsided during the Civil War, but after the war it once again became good politics to stoke fears about Catholics.

Charles Glenn: After the Civil War, the Republican party, which had been very strong in support of the rights of slaves and then of freed slaves, was getting discouraged with its efforts in the South. White resistance, what became Jim Crow, was getting stronger and stronger. And Republicans were concerned that they would not be able to continue to win national elections.

John: So they went looking for a new issue.

Charles Glenn: The new issue, they decided very explicitly -- there was no apology about this -- was opposition to what they saw as the Catholic threat. The danger, the Catholics who were becoming politically active in Northern cities would somehow change the Protestant character

of the country. And so a natural focal point of that was to oppose the idea that Catholic schools should be able to receive any funding from the state for the cost of their schools.

Robbie Gross: One of the missions of the Republican party after the Civil War was to try to unite the North and the South and create politically a kind of permanent majority for the Republican party. And one of their ways of doing that was by trying to unite the Protestants of the South with the Protestants of the North around public schools. So public school systems became a real central focus of the Republican party after the Civil War.

John: And so what had essentially been local conflicts over school funding migrated into national politics.

Robbie Gross: As private schools become more and more associated with Catholicism, they would be described in anti-Catholic terms or in anti-Polish terms or in anti-German terms. Well into the 20th century, you had depictions of advocates of private schools as being not just hoping to advocate for their own school, but as seeking to undermine and destroy public schools.

John: In Harper's Weekly, one of the most prominent news outlets of the time, the iconic cartoonist Thomas Nast published vivid anti-Catholic propaganda.

Robbie Gross: Many of the iconic images of the horrors of slavery and the horrors of post-Civil War attempts by white southerners to redeem their States, quote unquote, from the control of the Republican party and the control of African Americans. Many of those images depicting that

struggle were drawn by Nast. But Nast was also, like many Republicans, anti-Catholic and had a deep suspicion of Catholic schools and of private schools.

John: In one cartoon, Nast drew Roman Catholic clergy as crocodiles invading America's shores and devouring schoolchildren. And in the background, there are the ruins of a public school with an American flag flying upside down. In another famous cartoon, he showed Catholics firing a cannon at a public school labeled Fort Sumter.

Robbie Gross: Nast saw Catholic schools in exactly the same light as he saw what the South did to ignite the Civil War -- that what Catholics and Catholic schools were really trying to do was drive a wedge in the country and undermine Republican government.

John: And it wasn't just cartoonists. President Ulysses S. Grant was stirring people up with the idea that the country was on the brink of another war.

Charles Glenn: At a reunion of the veterans of the army of the Tennessee, one of the Northern armies, Grant spoke and said that we might be facing a more terrible civil war than the one we had just come through. And that would be a civil war created by the demands of Catholic immigrants to reshape the nature of our country. There was that kind of rhetoric going on.

Robbie Gross: As Catholic school systems began to proliferate in the 1870s and 1880s, the impulse among public school officials was, we need to shut these down. So you saw various attempts to prohibit Americans from going to private schools, passing compulsory attendance

laws that made it incredibly difficult for Americans to attend Catholic schools, removing ~~a~~ Catholic schools tax exempt status.

John: And one of the most pernicious regulations that emerged from that era is one that the Montana Supreme Court relied on in 2018 to strike down the tax credit scholarship program. Blaine Amendments. In 1875, President Grant proposed an amendment to the U.S. Constitution, which was sponsored in the House by James G. Blaine, a Congressman and former Speaker of the U.S. House of Representatives from Maine.

Erica Smith: The federal Blaine Amendment would have banned public funding for quote "sectarian" schools, which meant Catholic schools.

John: That's my colleague Erica again.

Erica Smith: It was plainly a discriminatory measure meant to protect the status quo, which was Protestant public schools.

John: Today, the word sectarian has lost most of its bite, but at the time, according to Robert Natelson, a retired professor of law at the University of Montana, sectarian was an insult. It was quote, "a word of opprobrium." You would never refer to your own faith as a sect or sectarian; the word referred to someone's else different and suspect beliefs. Depending on the context, it could be applied to Mormons or Jews or Muslims. But mostly, it meant Catholic. To quote Professor Natelson again: "clinging to an unpopular religion in a way incomprehensible to the

majority rendered a person *sectarian*." Fortunately, the Blaine Amendment never made it into the U.S. Constitution.

Erica: The federal Blaine amendment passed in the house, but it fell just a few votes short in the Senate and was not sent to the States for ratification. But Republicans in Congress were powerful enough to pass legislation requiring new States like Montana to include Blaine amendments in their state constitutions as a condition of statehood and other States adopted Blaine amendments even though they were not required to do so.

John: Ultimately, 37 states added Blaine Amendments in their state constitutions that are still there today.

Charles Glenn: In state after state, they were able to pass amendments to state constitutions forbidding funding to Catholic schools on the grounds that Catholic schools would not meet the need that the common school was designed to meet, which was to eliminate the differences among Americans and make them all the same. Lately of course, we've come to see that pluralism is a good thing. That it's just fine that we're not all the same as long as we agree how we can live together and treat each other with respect.

John: Which brings us back to *Espinoza v. Montana*.

Erica: The reason Montana's scholarship program is in jeopardy is because of the Blaine amendment.

John: It's 2020, and the word sectarian generally no longer refers just to Catholics or minority religious groups. So opponents of school choice argue that Blaine Amendments should now be interpreted to ban public funding of *all* religious schools. In many of IJ's school choice cases, we have successfully argued that that's not so. But in Montana, the state supreme court sided with school choice opponents.

Erica: What the Montana Supreme court said is that the state's Blaine amendment does not allow religious schools in a school choice program. And so it struck down the entire program as unconstitutional.

John: Unconstitutional under the state constitution. What the U.S. Supreme court will decide is whether the Montana Supreme Court's ruling conflicts with the federal constitution.

Erica: We're arguing that interpreting the Blaine amendment to bar religious schools flatly violates the free exercise clause. It's singling out religion for unequal treatment.

John: In a previous case litigated by the Institute for Justice called *Zelman v. Simmons-Harris* from 2002, the U.S. Supreme Court ruled that it is okay to include religious options in a school choice program. In that case, the state of Ohio was funding vouchers for low-income students in Cleveland, and of the 56 private schools that participated, 46 were religious.

Erica: In Zelman, opponents of school choice challenged the scholarship program as violating the establishment clause. They argued that because so many of the families were using their scholarships at religious schools, that the government was essentially advancing religion. But

the Supreme court flatly rejected that argument. They said, no, not a dime of money is going to a religious school absent the free and independent choice of parents. What the Constitution is concerned about is whether the government is favoring religion or if it's inhibiting religion. And here the way this program was designed, it's not. The government is completely neutral.

John: It's not establishing a religion by favoring one religion over others. It's not promoting religious schools over non-religious schools. It's giving families options. And after Zelman, we knew that school choice programs could include religious options.

Erica: The question in our case today is whether once you have a school choice program, if it *has* to include religious options.

John: Of course, if we win that doesn't mean states will be required to enact school choice programs. Rather, it means that when states do enact choice their programs will have to include religious schools. Now, if you're a supporter of school choice, that's a result to be excited about. But what if you're on the fence and worried about the broader social impact of funding parents who choose to send their children to religious schools? Here's Charles Glenn again.

Charles Glenn: There's a very important ongoing research study being done by the Cardis Foundation, which is a Canadian foundation, which looks at a database of adults in the United States and also separately in Canada, on which there's extensive information about how these adults are involved in their communities, whether they give to charity, whether they volunteer, whether they went to a selective higher education institution and a whole range of issues.

John: The research takes measures of civic engagement and success in professional and personal life and tracks it back to what kind of high schools those adults attended.

Charles Glenn: Catholic, evangelical, private non-religious, public or homeschooling. And the results are really striking.

John: Holding constant people's backgrounds, their upbringing, whether their parents went to college, you can get an idea of the effects of going to different kinds of schools.

Charles Glenn: One of the striking results is that those who went to Catholic high schools are significantly more likely than those who went to public high schools to have attended selective colleges, to have graduate degrees and to have been successful in terms of their careers, holding constant, their background growing up.

John: Evangelical schools produced somewhat different results.

Charles Glenn: Those who would go to evangelical high schools. We're strongly more committed to community, more likely to volunteer in their community, not just for religious things, but also for non religious community things. More likely to give money less likely to have gone to selective higher education institutions-more likely to report themselves contented with their lives. Again, holding constant, all those background factors. So there's no indication that that attending evangelical schools has the result of leaving you cocooned off from the wider society. There is no good evidence, no research that I'm aware of has been able to show. That the effect of attending Catholic schools is in any sense to make students less open, more

bigoted, less committed to pluralism, less committed to community than attending ~~a~~ public schools.

John: So just like non-religious schools, religious schools can and do contribute to civic life and produce good citizens. They can be a lifeline to students who are struggling in traditional public schools.

Charles Glenn: I've done a lot of work over the last 10 years or so about the question of Islam in Europe and the US. I argue that Europeans ought to learn from the Catholic experience in America how to deal with their Islamic minority group. That what Catholics learned in America and then taught to the Catholic church worldwide was how to operate as part of a pluralistic society and not as a dominating group. American Catholic leaders had enormous influence in helping the Catholic church worldwide to adopt its new posture, which is very positive toward pluralism, positive toward the rights of parents. It used to be the Catholic church asserted the rights of the church to educate every child who had been baptized. Now, the Catholic Church asserts the right of parents to decide if they want the children to have a Catholic education. That's a fundamental switch. So that has been a change, a very positive change, which the Catholic church in the United States, and I add, I'm not Catholic, has been a real leader in. And which I think can show us the way forward in relation to Muslims in the West as well.

John: Today, like in the 19th century, we have people who speak different languages coming to this country, and they will need and want to go to schools that respect their heritage. And the lesson from the past is that we can avoid a lot of conflict by allowing for pluralist educational options and get good results.

Charles Glenn: With a team of my doctoral students from Boston university, we studied seven Islamic high schools across the United States. Over the course of several years, going out, observing, having focus groups with kids, interviewing parents, interviewing staff, of course. And then on the basis of this wrote a book about the ways in which those schools were seeking to help their students to become citizens of the United States on the basis of a Muslim identity and beliefs. I expected as we began this study to find that the students and their parents perceived a major clash between what they were trying to stand for and American life. And we found much less of that than we expected. We found that the kids we interviewed were very much committed to being American. They had no question about that. They saw themselves as being examples that would teach America that they need not be anxious about Muslims, that Muslims could fit in and play a positive role within American life.

John: But let's say you approach this issue from a progressive perspective. Does that perspective demand that you oppose school choice? I asked that question to Joseph Viteritti, who is a professor of public policy at Hunter College and who was an expert in the Zelman case.

Prof. Joseph Viteritti: I consider myself a progressive in the Bernie Sanders, Elizabeth Warren kind of context. And I work with the choice programs in New York City. And I've met the parents who've sent their kids to those schools, and they really feel that they kids had new opportunities in life that's very hard to ignore. How do you tell a parent whose kid is stuck in a lousy school who's not getting educated and says I want out of here -- you don't know what's best for your kids?

John: Supporting pluralism and school choice doesn't mean abandoning public schools. It just means more options.

Prof. Joseph Viteritti: I'm a supporter of public schools and I was never one to say, let's have choice programs, but let's not spend money on public education because I am very supportive of public education, but it's not an either or thing. The fact of the matter is there are too many children disproportionately racial minorities and people at the lower end of the economic ladder, who would just not being served well in education. It's been going on for many years and it hasn't improved very much. In fact, the last NAEP scores show that we're losing ground again. And so you can't say you're interested in public education and ignore those facts.

John: I asked Professor Viteritti if some parents might do a bad job of choosing a school for their children. And he told me a story:

Prof. Joseph Viteritti: I remember when we were first having a conversation about charter schools in New York. I was invited to people who had been on the radical side of politics in New York City for years in Harlem, and there was a woman who was involved in school boycotts who was organizing it, and she said we're trying to figure out this charter school thing. Can you come up and talk to us? And so I went up and it was a room full of parents from Harlem. And there was this gentleman in the front row who was a pretty well known education writer who was very much against charter schools and choice. And he got up and gave a speech about how when we have choice and the Nazis want to run a school in Harlem and the Ku Klux Klan is going to run a school in Harlem. And the audience just looked at him and one woman got up and said, you know, I am not worried about the Ku Klux Klan opening a school in Harlem, because if they

opened a school in Harlem we not going to go. She says, what I'm worried about is the school down the block there. That's a public school now where kids can't read and write. And so you oughta to take your concern somewhere else. And I've seen that happen time and again.

John: This podcast is not meant to be a complete defense to every argument against school choice that's out there, but I do want to say that briefly that the empirical evidence of school choice's benefits is very encouraging. More than two decades worth of empirical evidence demonstrates that education choice programs tend to improve outcomes not only for students who head to private schools but also for students who remain in public schools. If you want to learn more about the social science, we have a ton of resources online at IJ.org and at our case page for Espinoza v. Montana.

Erica Smith: Blaine amendments started out by discriminating against Catholics and Catholic schooling, but today they're used to discriminate against all religious schooling and as a result, they are the biggest legal barrier to school choice programs. There are multiple state legislatures right now that would love to pass a school choice program, but they can't because these Blaine amendments are standing in the way. If we win this case, that is going to change.

John: When we go in front of the U.S. Supreme Court next week, we intend to secure a ruling for families everywhere that will declare, in no uncertain terms, that families have the right to guide the education of their children and that the state may not exclude religious families from participating in school choice programs on equal footing with families who prefer a nonreligious education. That result will open up a lot more educational opportunities for children all over the country. It's far past time for the ghost of James Blaine to get out of their way.

Credits: This podcast is a production of the Institute for Justice's Center for Judicial Engagement, and it was edited by Charles Lipper at Volubility Podcasting. With voice work by Wes Johnson.