

PHOTOGRAPH/MATT WEBER



Justice Gorsuch, Meet James G. Blaine

“SCARCELY ANY POLITICAL QUESTION ARISES in the United States that is not resolved, sooner or later, into a judicial question,” observed Alexis de Tocqueville in 1835. The battle over school choice in American education has been no exception.

In its 2002 decision in *Zelman v. Simons-Harris*, the U.S. Supreme Court erased all doubt as to whether the use of government funds to send children to religious schools violates the First Amendment’s ban on the “establishment of religion.” It does not, the court said in a 5–4 decision. Yet the controversy has continued to swirl, in part because many state constitutions include more-specific provisions barring aid to religious organizations. The uncertainty has left some state legislators reluctant to consider school voucher proposals and subjected the few state-authorized voucher programs in existence to a seemingly unending series of legal challenges.

The Supreme Court has a new opportunity to clarify matters in a case scheduled for oral argument on April 19, just days after Justice Neil Gorsuch’s arrival on the bench. *Trinity Lutheran Church v. Pauley* involves a Missouri church that was turned down by a state program that provides grants to nonprofits to resurface their playgrounds with rubber from recycled scrap tires. The state justified denying the benefits on language in its constitution stating that “no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.”

The question now facing the court is whether such provisions, if used to exclude organizations from aid programs based solely on the organization’s religious status, violate the federal Constitution’s guarantee of free religious exercise. If so, voucher opponents will find it harder to argue that the religion clauses of state constitutions are a barrier to the creation of school voucher programs. Indeed, while *Zelman* established that states enacting voucher programs *may* include religious schools, a decision in favor of *Trinity Lutheran* could imply that they *must*.

The court should not shy away from that conclusion. Thirty-seven states have constitutional provisions similar to Missouri’s. Known as Blaine Amendments, these provisions are named for the 19th-century presidential aspirant James G. Blaine who, as Speaker of the House, sought to exploit nativist, anti-Catholic sentiment by offering a constitutional amendment barring the government from funding religious schools. Blaine’s proposal to amend the federal Constitution narrowly failed in the Senate, but

22 states adopted similar provisions over the next half century. Missouri adopted its Blaine Amendment in 1875, one year before Congress rejected the concept.

The court passed on a similar opportunity to strike down Blaine Amendments in 2004. In *Locke v. Davey*, it upheld Washington State’s decision to prevent students pursuing theology degrees from receiving a state-funded scholarship. But it was careful to limit its decision to the narrow question of whether states can withhold funding for the training of clergy, which it noted was historically “one of the hallmarks of an ‘established’ religion.”

How will the justices rule this time? Court watchers note that they accepted the case in January 2016, which ordinarily would have led them to hear it later that year. It therefore seems likely that the justices delayed the case to avoid a 4–4 split after Antonin Scalia’s unexpected death. In short, the outcome would appear to turn on the views of its newest member—a product of Catholic schools who, as Arizona Supreme Court justice Clint Bolick explains in this issue (see “Gorsuch, the Judicious Judge,” *features*), has interpreted the establishment clause narrowly during his tenure as an appellate judge.

A decision in favor of *Trinity Lutheran* would hardly end the legal conflict over school vouchers. Depending on the breadth of the court’s ruling, critics may be able to argue that subsidizing school attendance advances religion in more significant ways than playground modernization does. And voucher opponents have been creative in identifying a wide variety of constitutional provisions, having nothing to do with religion, under which to challenge school choice programs.

Yet such a decision would bring the most persistent and pervasive aspect of that conflict nearer to a close; it is no wonder, then, that the National Education Association has filed an amicus brief in support of the state.

Furthermore, it would help stamp out the remaining legacy of one of the most infamous politicians in U.S. history. It is ironic that this prospect may depend on the thinking of a justice appointed by a president whose rise to power was fueled by nativist appeals.

A handwritten signature in black ink that reads "Martin R. West".

Martin R. West

MISSION STATEMENT In the stormy seas of school reform, this journal will steer a steady course, presenting the facts as best they can be determined, giving voice (without fear or favor) to worthy research, sound ideas, and responsible arguments. Bold change is needed in American K-12 education, but *Education Next* partakes of no program, campaign, or ideology. It goes where the evidence points.
