The 1ˢᵗ Amendment and Vermont's Town Tuition Program

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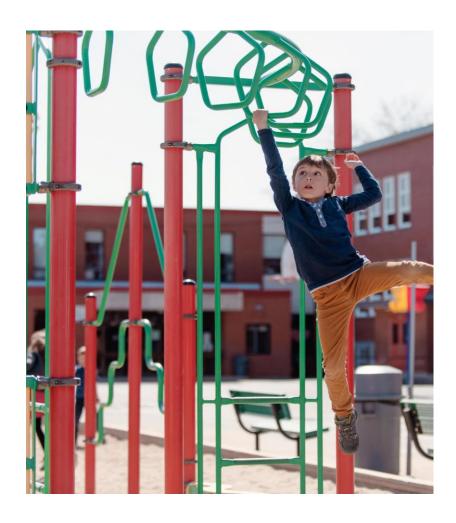
Topics

- U.S. Constitution and the 1st Amendment
  - *Trinity Lutheran Church of Columbia, Inc., v. Comer*
  - *Espinoza v. Montana Department of Revenue*
  - *Carson v. Makin*
- Vermont's Town Tuition Program
- Vermont Constitution and the Compelled Support Clause
- Legal challenges to the Town Tuition Program
- Where are we now?

U.S. Constitution—The First Amendment

- Establishment Clause: "Congress shall make no law respecting an establishment of religion…"

- Free Exercise Clause: "…or prohibiting the free exercise thereof…"

➢ Strict scrutiny: government action must be narrowly tailored to advance a compelling government interest
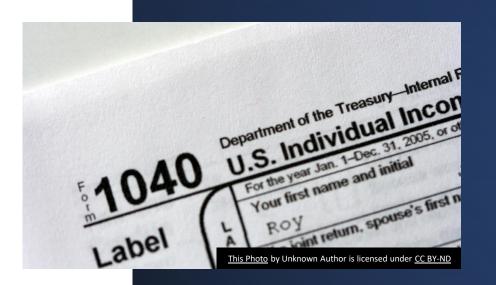
Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___, 137 S. Ct. 2021 (**2017**)

- The state of Missouri funded a program offering grants to nonprofit organizations to resurface playgrounds

- The state denied grants to religiously affiliated applicants, including Trinity Lutheran Church.

- The U.S. Supreme Court held that Missouri violated the Free Exercise rights of Trinity Lutheran Church when it denied the Church a generally available public benefit solely because of its religious **status**.

Espinoza v. Montana Department of Revenue, 591 U.S. ____, 140 S. Ct. 2246 (**2020**)

- Montana established a program that provided tax credits to people who donated money for private school scholarships. The scholarship program prohibited families from using the scholarship at private religious schools because Montana's state Constitution contains a "no-aid" provision, which prohibits government aid to any school controlled by a church.

- Just like in *Trinity Lutheran*, the U.S. Supreme Court held here that because the scholarship program is a generally available public benefit program, disqualifying otherwise eligible recipients based solely on their religious **status** or character violates the Free Exercise Clause of the First Amendment.
  - *"A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."*

- Montana made arguments that they were not actually disqualifying private religious schools because of their religious **status**, but instead because the scholarship money would be **used** for religious purposes. The Court declined to make a distinction between **status** and **use-based** discrimination in this case because it found the status-based discrimination to be so clear. It left open the question of whether there is a meaningful distinction between the two…

And then everyone debated whether there actually is a distinction between status and use-based discrimination for the next two years.

[*Carson v. Makin*](), 596 U.S. ____, 142 S. Ct. 1987 (2022).

- Maine allows school districts that do not maintain a high school to pay tuition to the private school of a family's choice.

- Maine required participating schools to be nonreligious.

- Families that wanted to use state tuition dollars to send their children to religious schools sued

- Maine argued that it would not exclude a school from receiving tuition solely based on its religious **status**, but instead on whether the money would be **used** for religious purposes.

- The U.S. Supreme Court held that Maine's nonreligious requirement violates the Free Exercise Clause of the 1st Amendment, prohibiting the bar of religious organizations from generally available public benefits based on the religious **use** of the benefit.

The Establishment Clause & compelling state interests

- In 2002, the U.S. Supreme Court held that when government benefits flow to religious organizations through the independent choice of private citizens, there is no violation of the Establishment Clause. *Zelman v. Simmons-Harris*, 536 U.S. 639

- Because all three of the previous cases involved the 1st Amendment, the Court applied strict scrutiny in its analysis.

- An "interest in separating church and state 'more fiercely' than the Federal Constitution…'cannot qualify as compelling' in the face of the infringement of free exercise." *Espinoza*, 591 U.S. at _____(slip op., at 18), 140 S.Ct., at 2260 (quoting *Trinity Lutheran*, 582 U.S. at ____ (slip op., at 14), 137 S.Ct., at 2024)

- The Court found that in all three of the previous cases, states were attempting to create a stricter separation of church and state than the Federal Constitution requires.
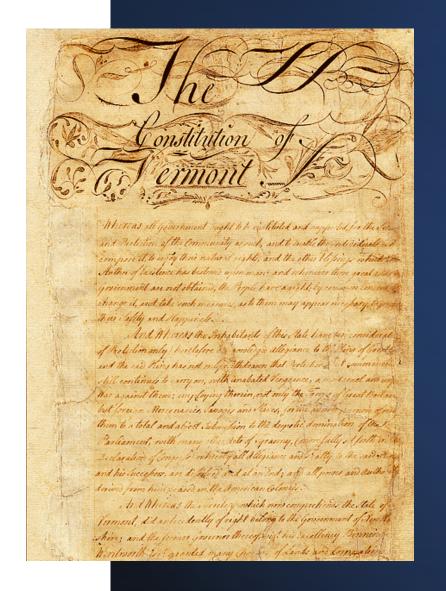
Vermont's Town Tuition Program
16 V.S.A. chapter 21

- School districts are organized to provide education for specific grade ranges.

- If the school district does not operate a school for some or all of the grades it is organized to provide education for, it still has to provide education for its resident students. To do so, a school district may pay tuition to the school of a student's choice—either:
  - Public schools in other school districts or
  - Approved independent schools

- High schools may also designate up to 3 public or approved independent schools outside of the district to serve as the public high school for the nonoperating district

- Unlike Maine, Vermont's statutory tuition program is silent towards religion.

- Tuitioning decisions are made at the individual school district level

The Vermont Constitution, Chapter 1, Article 3

The Compelled Support Clause: "…no person…can be compelled to…support any place of worship…contrary to the dictates of conscience…"

Chittenden Town School Dist. v. Department of Educ., 169 Vt. 310, 738 A.2d 539 (1999)

- Chittenden Town School District did not maintain a high school so it paid tuition for its high school students, including to religious private schools.

- In response to this, the Department of Education terminated state education aid to Chittenden, which then sued the Department.

- In analyzing Vermont's Compelled Support Clause, the Vermont Supreme Court found there was "no way to separate religious instruction from religious worship."

- The court was careful to note that the Compelled Support Clause did not create a blanket ban on public funds being used in religious schools.

- Instead, the court found that a school district violates the Compelled Support Clause when it reimburses tuition for a religious school in the absence of adequate safeguards against the **use** of such funds for religious worship.

- In the almost 24 years since *Chittenden* was decided, no branch of government has developed standards for the adequate safeguard concept.

- As of the date of this presentation, *Chittenden* remains good law

Recent litigation regarding Vermont's Town Tuition Program

Federal Litigation

- 2021—*A.M./A.H. v. French*: 2nd Circuit Court of Appeals, dual enrollment program

- 2022—*A.H. v. French:* U.S. District Court; tuition to religious schools

- 2022—*E.W. v. French*: U.S. District Court, tuition to religious schools

- 2022*—*Valente v. French*: U.S. District Court, tuition to religious schools *(still pending)*

State Litigation

- 2020*—*Vitale v. Bellows Falls Union High School*: Vermont Supreme Court, Plaintiff is arguing that the TTP violates the Common Benefits Clause of the Vermont Constitution because it is a publicly funded program that is not available equally to all Vermonters *(still pending)*

Status of Town Tuition Program Today

- As a result of the settlements in *E.W. v. French* and *A.H. v. French*, the Agency of Education issued the following guidance to school districts on September 13, 2022:

- "In light of the U.S. Supreme Court's decision in *Carson v. Makin*, we are writing to advise you of the following: School districts may not deny tuition payments to religious approved independent schools or religious independent schools that meet educational quality standards based on the Vermont Constitution's Compelled Support Clause, Vermont Constitution Chapter I, Article 3."

- School districts are tasked with making tuitioning decisions on an individual basis, taking both the *Carson v. Makin* and *Chittenden* decisions into consideration.