PUBLIC TUITION FOR RELIGIOUS SCHOOLS

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TOPICS

When are religious schools entitled to public tuition?

Are religious schools “places of public accommodation” and therefore not allowed to discriminate against protected classes?

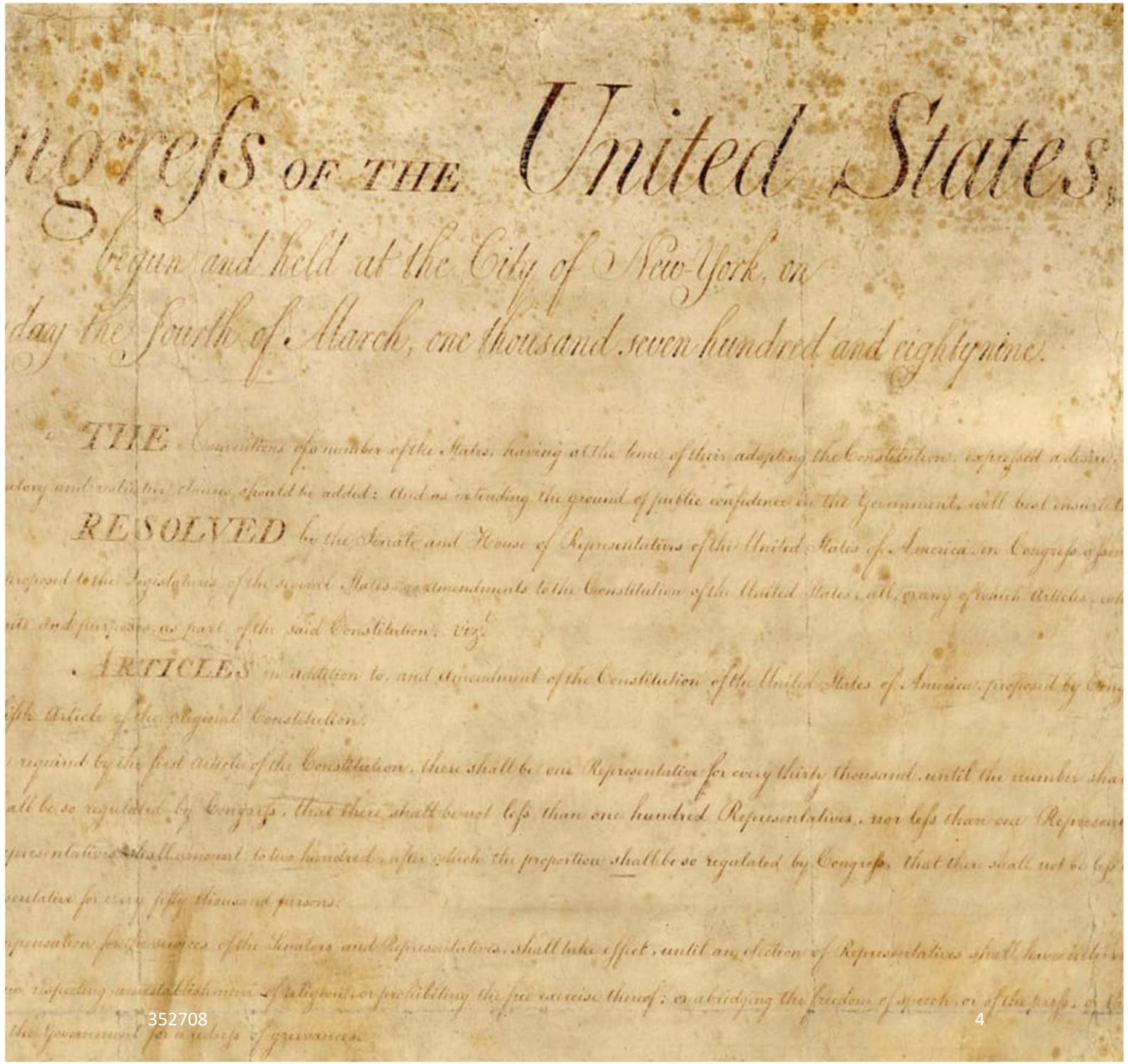
Can Vermont require that religious schools comply with anti-discrimination laws as a condition of receiving public tuition?

What about dual enrollment?

When are religious schools entitled to public tuition?

U.S. Constitution First Amendment Free Exercise Clause

"Congress shall make no law… prohibiting the free exercise [of religion]."



Espinoza v. Montana (U.S. Sup. Ct.; 2020)

- Montana provided tax benefits to individuals who donated money for private school scholarships but prohibited families from using the scholarships at religious schools.

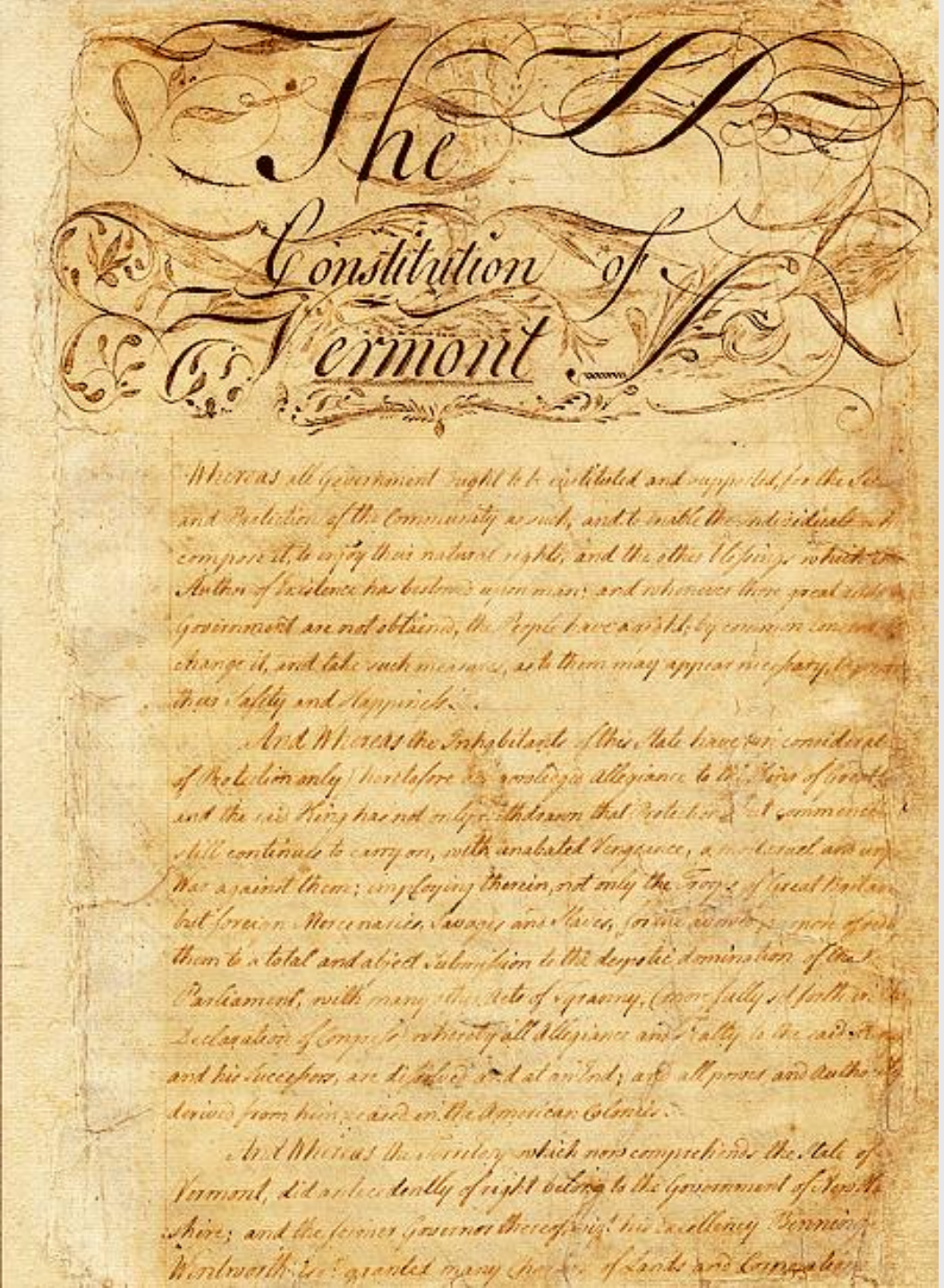
- This prohibition was based on the Montana Constitution, which bars government aid to any school controlled by any church ("no-aid" provision).

- The Supreme Court held that Montana's no-aid provision violates the Free Exercise Clause because it bars religious schools from public benefits solely because of the religious character of its schools.
  - "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."

Espinoza v. Montana

- This case stands for the proposition that a religious school cannot be denied a public benefit merely because of the school's status as a religious school, if:
  - the benefit is available broadly to others (in this case, to secular schools); and
  - the use of that benefit is directed by individuals as a result of their own genuine and independent private choice.

- The Court left open the question of whether a state could, instead of prohibiting public tuition going to a religious school, allow that funding but on the condition that the religious school ensures that public tuition is not used for religious instruction.



The Constitution of Vermont, Chapter 1, Article 3

Compelled Support Clause:

"no person...can be compelled to...support any place of worship...contrary to the dictates of conscience..."

Chittenden v. Department of Education (Vermont Supreme Court; 1999)

- In *Chittenden*, the Vermont Supreme Court held that a school district violates the Compelled Support Clause when it pays public tuition to a religious school in the absence of adequate safeguards against the use of such funds for religious worship/instruction.

- Vermont's Constitution allows public tuition to go to religious schools and therefore does not allow discrimination based on the school's religious status, but there must be safeguards to ensure the funds are not used for religious instruction.

Will *Chittenden* survive *Espinoza?*

- Currently, Vermont's Constitution, as interpreted by *Chittenden*, is consistent with *Espinoza* in that they both permit public tuition to go to a religious school and do not allow discrimination based on the religious status of the school.

- However, the Vermont Constitution requires safeguards against the use of public funds for religious instruction and it is not clear that this "use" condition will survive further Supreme Court scrutiny.

Carson v. Makin, 979 F.3d 21 (1st Cir. 2020)

- Maine, like Vermont, allows towns that do not operate schools to use public funds to pay tuition to independent schools.
- According to the court in *Makin*, Maine allows public funds for religious school tuition but prohibits these funds from being used for religious instruction. This is similar to the Vermont requirement that there be safeguards against the use of public funds for religious instruction.
- The 1st Circuit Court of Appeals held that the Maine system did not violate the Free Exercise Clause and was consistent with *Espinoza* because it imposes a permissible "use" restriction.
- The Supreme Court heard the appeal in January 2022; a decision is expected this summer.

Recent Vermont cases

- A number of Vermont court cases and administrative proceedings have recently found that public tuition payments were denied to religious schools based on their religious status in violation of *Espinoza* and ordered those payments be made.

- In these cases, the evidence showed that school districts denied these tuition payments due to the schools' religious status, not based on their proposed use of these funds.

- School districts have not been provided meaningful guidance by the General Assembly, the State Board of Education, or the Agency of Education on how to make these payments in accordance with the *Chittenden* case (1999), which requires safeguards on the use of these funds.

Are religious schools “places of public accommodation” and therefore not allowed to discriminate against protected classes?

The Vermont Public Accommodations Act (9 V.S.A. Chapter 139)

- The Vermont Public Accommodation Act (VPAA) prohibits discrimination on the basis of race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity (collectively, "protected classes") in places of public accommodation.

- A place of public accommodation means "any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public." 9 V.S.A. § 4501(1) (emphasis added).

- Therefore, a religious school is prohibited from discriminating on the basis of protected classes if its services are offered to the general public.

The Vermont Public Accommodations Act

- There is no Vermont case law directly on point relating to religious schools.

- Legislative intent for the VPAA states that the VPAA is intended to "implement and be construed so as to be consistent with the Americans with Disabilities Act…with respect to persons with disabilities." The ADA specifically excludes religious organizations from its application. Therefore, the ADA case law is not particularly relevant to interpreting the VPAA in this context.

The Vermont Public Accommodations Act

- In *Human Rights Com'n v. Benevolent and Protective Order of Elks of U.S.*, 2003 VT 104, the Vermont Supreme Court found that membership in a private club like the Elks could be covered by the VPAA if it is essentially open to the public.

  - The Court noted that this would require a case-by-case, fact-based analysis of the selectivity of the organization.

  - The Court also noted it is not enough for an organization to appear selective on paper. There needs to be an analysis of both the selection criteria and its true limits (or lack thereof) on admission.

- Therefore, the determination of whether a religious school is open to the general public and subject to the VPAA is a fact-specific analysis.

Can Vermont require that religious schools comply with anti-discrimination laws as a condition of receiving public tuition?

Conditional Payment; Non-Discrimination

- *Espinoza* held that the Free Exercise Clause protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status. The Court held that requiring a school to give up its religious affiliation in order to qualify for public funds would impose special disabilities on the basis of religious status in violation of the Free Exercise Clause.

- Requiring that a religious school comply with anti-discrimination laws as a condition of receiving public tuition would mean that the school would not be able to discriminate against:

  - protected classes under the VPAA, even if the school is not subject to the VPAA; and
  - employees, which, in limited circumstances, is permitted under the Supreme Court's interpretation of the Free Exercise Clause (*Our Lady Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020)).

Conditional Payment; Non-Discrimination

- The question is whether denying the right of a religious school to discriminate in this fashion imposes special disabilities on the basis of the school's religious status.

- This imposition is less severe than a requirement that a school give up its religious affiliation in order to qualify for public tuition as was the case in *Espinoza*, but it is still a form of imposition on the degree of the school's exercise of religion, at least if these forms of discrimination are required or encouraged by the school's theology or religious mission.

- It is not clear how the Supreme Court might rule on this question, which represents friction between two constitutional protections—the free exercise of religion vs. equal protection under the law (protection from discrimination).

What about dual enrollment?

Dual Enrollment (16 V.S.A. § 944)

- Dual enrollment (taking a class for both high school and college credit) is available to public school students, approved independent school students on public tuition, and home school students.

- Dual enrollment is not available to approved independent school students on private tuition, whether attending a secular or religious school.

Dual Enrollment

- Students attending religious schools have been denied dual enrollment because they are not on public tuition.

- Therefore, the failure of school districts to make public tuition payments due to a school's religious status has also excluded them from the dual enrollment benefit.

- Some of the Vermont cases and administrative actions have also addressed this issue, since it is directly related to the question of when a religious school is entitled to public tuition.