PUBLIC TUITION FOR RELIGIOUS SCHOOLS

DUAL ENROLMENT

HOW FAR DOES FREE EXERCISE GO?

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U.S. Constitution

First Amendment Religion Clauses

"Congress shall make no law:

- respecting an establishment of religion [Establishment Clause], or
- prohibiting the free exercise thereof [Free Exercise Clause]."

- Applies to States through Due Process Clause of Fourteenth Amendment.

- Tension—The Supreme Court has recognized a "play in the joints between what the Establishment Clause permits and the Free Exercise Clause compels." *Locke v. Davey* (U.S. Sup. Ct., 2004; Rehnquist) (my emphasis)

  - A command, on the one hand, not to establish religion and, on the other hand, a command not to inhibit is practice.

  - A law requiring the hiring by the military of priests to minister to the troops may be viewed as a law respecting the establishment of religion, but not making priests available may interfere with the troops' free exercise of religion.

The Establishment Clause: what does it PERMIT?

Zelman v. Simmons-Harris (U.S. Sup. Ct., 2002, Rehnquist); the modern view:

- Establishment Clause challenge to an Ohio school district voucher program that allowed public taxpayer money to be used to support both secular and religious schools.

- 82% of participating schools were religious schools, and 96% of students using the vouchers attended religious schools.

- Supreme Court upheld program, on basis that if:

    - "a government aid program is neutral with respect to religion, and
    - provides assistance directly to a broad class of citizens, who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice,
    - the program is not readily subject to challenge under the establishment clause." (my emphasis)

- The Court imposed no restrictions on the use of public tuition funds by religious schools under the program—e.g., the public funds could be used for religious instruction.

The Free Exercise Clause: what does it COMPEL?

Trinity Lutheran v. Comer (U.S. Sup. Ct., 2017; Roberts)—the playground case

- Missouri created a grant program to resurface playgrounds. A church, which operated a religious daycare program, brought a Free Exercise Clause challenge to the denial of its application for grant funding.

- The denial was based on the Missouri's Constitution which provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church..."

- The Supreme Court held that this denial violated the church's Free Exercise rights:
  - "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target religion for 'special disabilities' based on their 'religious status." (internal citations omitted)
  - "Applying that principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion and can be justified only by a state interest 'of the highest order.'" (internal citations omitted) (my emphasis)
  - "Missouri's Policy preference for skating as far as possible from religious establishment concerns...cannot qualify as compelling."

- The Court distinguished *Locke*. In *Locke*, the State of Washington provided scholarship funding to assist students with the costs of postsecondary education, which could be used at secular and religious schools, but could not be used to pursue a devotional theology degree. The Court denied a Free Exercise Clause challenge brought by an individual (Davey) seeking a devotional theology degree, holding that:

  - "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*." The funding at issue in Trinity was denied based on the church's status as a religious institution.

- Gorsuch concurring opinion:

  - “the Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner?...The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.” (internal citations omitted)

The Free Exercise Clause: From Playgrounds to Tuition

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

- 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).

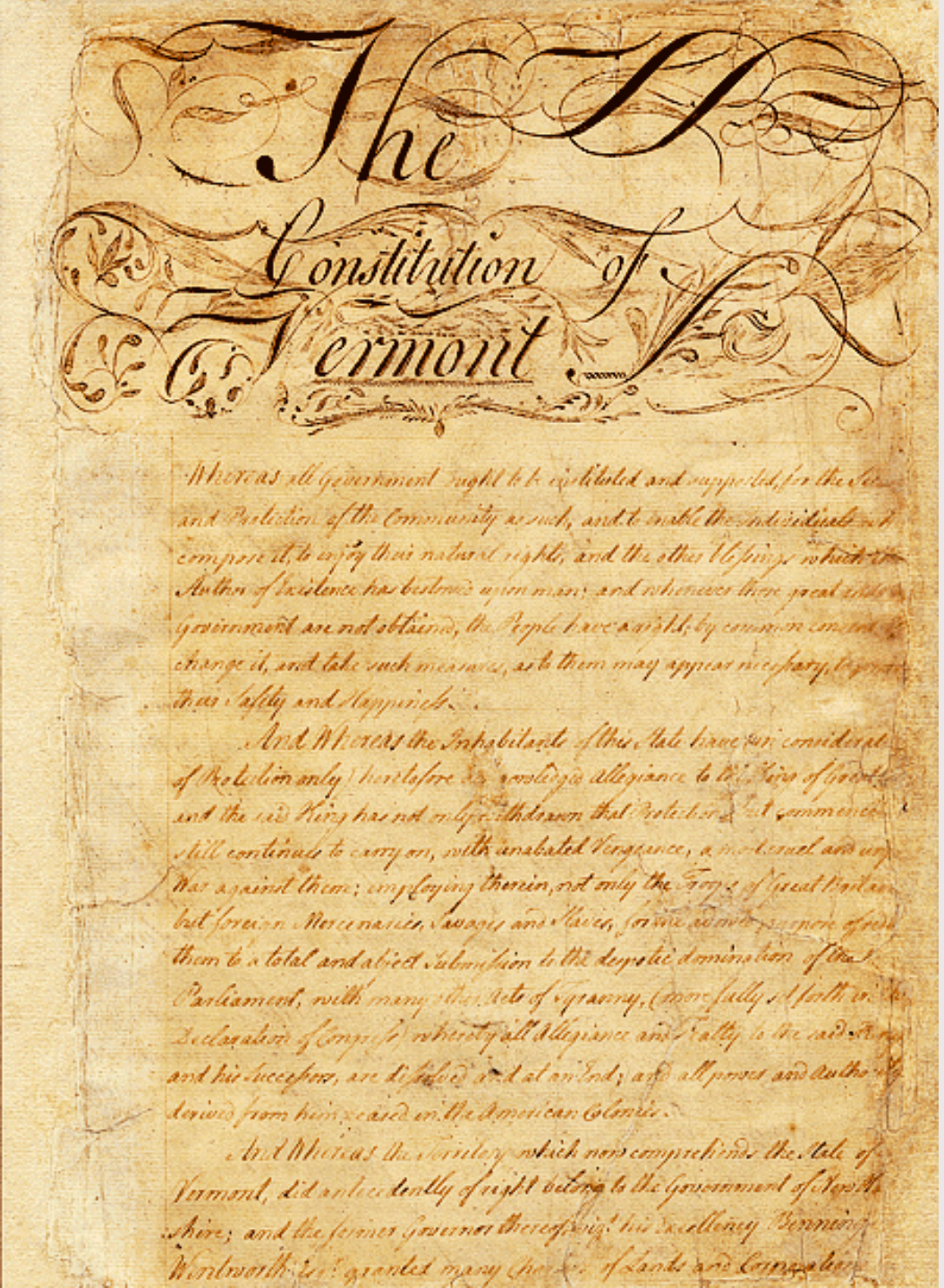
- Building on its *Trinity* decision, the Court held that Montana's no-aid provision violates the Free Exercise Clause because it bars religious schools from public benefits solely because of the religious character of its schools, i.e., religious status as opposed to religious use.

  - Roberts wrote that "[s]ome Members of the Court...have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status [citing Gorsuch concurring opinion in *Trinity*]. We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies...because Montana's no-aid provision discriminates based on religious status."

- The Court stated that the Montana Constitution's "no aid" provision, which was added to its Constitution in the second half of the 19th century when many states added similar provisions (so-called "mini Blaine" provisions), was born of bigotry against Catholics and that these provisions "hardly evince a tradition that should inform our understanding of the Free Exercise Clause."

- The Court concluded that "[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."

- Gorsuch wrote a concurring opinion in line with his concurring opinion in *Trinity*, challenging the "status" v. "use" distinction.



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..."
  - Note the difference from "no aid" state constitutional provisions (like Missouri's and Montana's)—Vermont's provision is based on use (supporting place of worship) instead of religious status.
  - Note that Vermont's provision was part of its original Constitution, and not added later as was the case with the (anti-Catholic) mini Blaine amendments.

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

- 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.

Will *Chittenden* survive *Espinosa?*

- Vermont's Compelled Support Clause, as interpreted by *Chittenden*, bars the use of public funds for religious worship/instruction; in contrast to state constitutions that bar aid to churches based on status. But does this distinction matter? Roberts is hedging, and Gorsuch is challenging.

- Vermont's Compelled Support Clause was not part of the mini Blaine amendments added to other states' constitutions that were based on bigotry, and has its own unique history.

What about 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. Following *Chittenden*, all children attending religious schools pay private tuition.

The *Rice* Case

- A group of Rice Memorial High School students sued the Agency of Education claiming Free Exercise Clause and Equal Protection Clause violations, asserting that denial of dual enrollment to Rice students is due to the religious status of the school.
- On January 15, 2021, the 2nd Circuit Court of Appeals ruled in favor of the students, holding that the denial was due to the school's religious status.
- The Court noted that in the more than twenty years since *Chittenden* was decided, Vermont has not identified adequate safeguards to ensure public funds are not used for religious instruction.
- Moreover, the Court noted that since at least 2010, AOE has frequently stated that public funds could not be used for students attending religious schools, a statement based on the school's status rather than its use of funds.

The *Rice* Case

- The Court concluded that the record on this appeal plainly evidences religious discrimination.

- The Court also said that "because our decision 'turns expressly on religious status and not religious use,' we express no view in this opinion as to whether [Chittenden's] requirement of 'adequate safeguards' could, if applied, constitute a use-based restriction that survives First Amendment scrutiny."