



What Comes Next: Religious Freedom After The *Espinoza v. Montana* Decision

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In *Espinoza v. Montana Department of Revenue*, the Supreme Court held that if a state decides to create a private school voucher program, it must fund private religious schools along with private secular schools.

What is *Espinoza v. Montana Dept. of Revenue* about?

In 2015, the Montana legislature created a private school voucher program. Because the state constitution includes a no-aid clause that prohibits any aid to a school controlled by a “church, sect, or denomination,” the Montana Department of Revenue limited the program to secular schools. Parents who wanted to use vouchers to send their children to religious schools sued, backed by the pro-voucher group Institute for Justice. The parents claimed that limiting the program to secular schools amounted to religious discrimination. Americans United filed a friend-of-the-court brief arguing that the Supreme Court has never *required* states to fund religious education, and for good reason: States have legitimate, long-standing interests both in protecting their citizens and taxpayers from being compelled to support religious activity that isn’t their own, and in not providing government funding for the discrimination, religious and otherwise, that occurs in many private religious schools.

What is the decision in *Espinoza v. Montana Dept. of Revenue*?

Overturing decades of precedent, the U.S. Supreme Court held that if a state decides to create a private school voucher program, it must fund private religious schools along with private secular schools. The Supreme Court had never before held that states are *required* to fund religious institutions when they fund secular institutions if the money might then be put to religious uses. In fact, the Supreme Court had previously held that the U.S. Constitution does not even permit, much less require, public funds to go to religious schools in those circumstances.

The majority opinion was authored by Chief Justice Roberts. It relies on the Supreme Court’s 2017 decision in *Trinity Lutheran Church of Columbia v. Comer*, which held that religious institutions cannot be excluded from governmental aid programs solely because of their religious status. The *Espinoza* majority holds that Montana’s exclusion of religious schools from the voucher program based solely on their status as religiously affiliated was religious discrimination that violated the Free Exercise Clause of the federal First Amendment. Even though Montana has a no-aid clause in its state constitution, the majority reasoned, that clause cannot be applied in a manner that would violate the U.S. Constitution.

What is a state no-aid clause?

Thirty-eight states have constitutional provisions on the separation of religion and government that are stronger than the U.S. Constitution's Establishment Clause as interpreted by current Supreme Court precedent. These provisions protect religious freedom by ensuring that houses of worship and religious schools remain independent of the government and that no citizens are forced to fund a religion or religious instruction to which they don't subscribe.

After the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris* upheld voucher programs as constitutional under the federal Establishment Clause, the main way to challenge state voucher programs was under a state constitution's no-aid provision. In its 2004 decision in *Locke v. Davey*, the Supreme Court upheld the application of one of these constitutional clauses to prohibit a state from paying for a student's pursuit of a degree in devotional theology, because that was a quintessential religious activity.

State courts have the final say over what their state constitutions mean. In some states, the courts have interpreted their no-aid clauses strictly to prohibit voucher and similar programs. Other states have interpreted their no-aid clauses to allow these programs. And in some states, the courts have not addressed whether voucher or tax-credit programs violate the state's no-aid clause.

Does the ruling leave any room for states to continue to protect taxpayers from funding religious education or subsidizing discrimination?

This case is a huge blow to the separation of religion and government. But all is not lost.

First, the decision leaves the door open for states to restrict the use of public funds for religious activities, such as Bible class, religion class, or chapel services. In other words, while states cannot exclude religious schools from private school voucher programs solely because the schools are religious, *Espinoza* does not preclude states from restricting voucher programs to funding only secular instruction and activities at those schools.

The decision also does not address whether states may refuse to provide funding to religious schools that discriminate in admissions or employment based on protected characteristics such as race, religion, gender, sexual orientation, gender identity, disability, or pregnancy status. Many if not most religious schools discriminate in their admissions by, for example, excluding LGBTQ or disabled students or imposing a religious litmus test on students and their families. Ten of the 12 religious schools that applied to be in Montana's voucher program have discriminatory policies.

Furthermore, the *Espinoza* decision does not overturn Establishment Clause precedent that prohibits public funds from being used for religious activities when the funds are paid *directly* by the government to religious organizations. The decision addresses a private school voucher program, and the Supreme Court had already ruled that voucher programs do not violate the Establishment Clause because

families or students are the ones who choose whether the voucher money goes to secular or religious institutions.

Finally, the decision makes clear that a state need not subsidize private education at all, but instead remains free to restrict its public funds solely to public education. Because the decision requires states to fund religious schools when they fund private secular schooling, the best course is to avoid funding private education entirely. Public money should go to public schools that benefit everyone.

What are the implications for both state and federal voucher programs?

This decision could open the door to new and expanded taxpayer-funded private school voucher programs across the country. In many states, state legislatures have been deterred from passing voucher programs because of their states' no-aid clauses. In the wake of *Espinoza*, the no-aid clauses likely will not be seen as an obstacle and pro-voucher advocates will certainly feel empowered to push for new programs. It would not be surprising to see some efforts to pass new voucher programs even in states whose courts previously struck down voucher programs under their constitutions' no-aid clauses.

Although the *Espinoza* decision principally affects states, it will likely embolden President Trump and Education Secretary DeVos to push for private school vouchers across the country as part of their agenda to appeal to Trump's evangelical Christian base. Indeed, many federal voucher bills are aimed at funneling federal dollars to state voucher programs and encouraging states to adopt new or expand existing voucher programs. In particular, DeVos has been traveling the country to push her "education freedom scholarship" proposal, a federally funded tax-credit voucher that would use federal funds as incentives for states to create or expand their tax-credit voucher programs. She has so far been unsuccessful in getting this proposal passed by Congress. Similar efforts at the federal level, such as creating voucher programs for military-connected or Native American students, have also been unsuccessful.

President Trump and Secretary DeVos say that vouchers are "the civil rights issue of our time." What are the civil rights implications of vouchers, particularly those that fund religious schools?

Vouchers are a civil rights problem, not a solution.

Despite the administration's claims, private school vouchers effectively strip students of many of the rights and protections that they would have in public schools, undermining their civil rights. Private schools funded by vouchers often do not respect students' civil rights, whereas in public schools the students are protected by a host of laws, including Titles IV and VI of the Civil Rights Act, which bar discrimination against students based on religion, race, color, or national origin, and the Individuals with Disabilities Education Act and Title II of the Americans with Disabilities Act, which bar discrimination against students with disabilities. Religious schools are also exempt from Title IX of the Education Amendments of 1972, which bars schools from discriminating based on sex. And students who attend

private schools using vouchers are stripped of First Amendment, due process, and other constitutional and statutory rights guaranteed to them in public schools. In addition, voucher programs often lack state-level protections for students. Even in state programs with nondiscrimination protections, religious schools are often exempt.

It's also important to remember that vouchers were first created to allow white students to evade integration orders in the wake of *Brown v. Board of Education* and to fund segregation academies designed to keep Black and white students apart. Even today, national data show that private schools tend to be more segregated than similarly situated public schools and that they enroll higher populations of white students when compared with public schools.

Private school vouchers exacerbate inequities among students, and studies repeatedly show that they fail to improve – and often decrease – academic outcomes and educational opportunities for students.

Teachers and employees at religious schools likewise face discrimination. Under Title VII's religious exemption, private religious schools can refuse to employ anyone who is not a member of the same faith. And religious schools may claim the "ministerial exception," classifying some or all teachers as ministers to deny the teachers the protections of the civil rights laws, such as Title VII's prohibitions against employment discrimination based on race, color, national origin, religion, sex, sexual orientation, and gender identity, or the ADA's protections against employment discrimination based on disability. (A decision is imminent in another Supreme Court case, *Our Lady of Guadalupe School v. Morrissey-Berru*, which could broaden the scope of the ministerial exception. See penultimate question below.)

What are the case's implications for religious freedom?

Religious freedom means that we each get to decide for ourselves whether and how we support religion, religious institutions, and religious instruction. But the *Espinoza* decision *requires* taxpayer dollars to support religious schools in states that have enacted voucher programs and thus effectively requires those taxpayers to underwrite religious and other types of discrimination. The founders of our nation recognized that compelled taxpayer support for religion threatens alike individuals' freedom of conscience and religious institutions' independence from governmental interference. *Espinoza* flies in the face of these vital principles and hamstring states' ability to protect their citizens *and* their houses of worship.

Opposition to compulsory financial support for religion has a long pedigree in our country, so much so that it can be called a traditional American point of view. This opposition predates the adoption of the U.S. Constitution. In Virginia in 1785 – three years before the Constitution was ratified – James Madison penned the "Memorial and Remonstrance Against Religious Assessments," a broadside against state-mandated financial support for religion. Madison was echoing protests from dissenting clergy who had been speaking out since at least the 1750s against Virginia's policy of requiring support for the Anglican Church. Virginia was not unique. In colonies where certain Christian churches were legally established, members of minority faiths strongly protested and demanded separation of church

and state. The Supreme Court has now chipped away at a principle that predates not only the Court, but the Constitution itself.

What do the dissenting Justices think the majority decision got wrong?

Dissenting Justices Ginsburg, Breyer, Kagan, and Sotomayor are quite clear in their objections. Justice Sotomayor sums things up this way: “Today’s ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place. . . . Today’s Court . . . rejects the Religion Clauses’ balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints.” Justice Sotomayor also explains that it is constitutionally permissible to treat religious instruction differently from secular schooling in order to respect and protect church-state separation – “a valid choice to remain secular in the face of serious establishment and free exercise concerns.”

Justice Ginsburg, joined by Justice Kagan, explains the unprecedented nature of the majority’s ruling that a state’s choice not to subsidize religion with public money constitutes religious discrimination.

Finally, Justice Breyer, partially joined by Justice Kagan, explains that the First Amendment’s Free Exercise and Establishment Clauses were designed to work together to prevent religiously based strife, and he notes that taxpayer funding of religious education is especially likely to cause that strife.

What is the significance of there being so many concurring opinions?

Three Justices in the majority – Thomas, Alito, and Gorsuch – each wrote to explain how they would go even further in erasing legal precedent and rewriting the law to elevate their views of free exercise at the expense of the Establishment Clause’s complementary protections for religious freedom.

Justices Alito and Gorsuch each would apparently invalidate the no-aid provisions in 38 state constitutions in a stroke – Justice Alito on a misleading view of history, as explained in the answer to the question below, and Justice Gorsuch on the view that requiring government funding of private religious schools necessarily also means that government must fund their religious activities (which he favors). Justice Thomas repeats his radical views that the Establishment Clause’s requirement of church-state separation shouldn’t apply to state or local governments at all, meaning that they should be entirely free to mix religion and government as they please, and that, in all events, the Establishment Clause doesn’t bar states from preferring religion to its secular counterparts. Disturbingly, in addition to writing his own concurrence, Justice Gorsuch joined Justice Thomas’ radical opinion.

The concurring Justices would continue the current Court’s retreat from long-standing jurisprudence and the view of our nation’s founders that government should never fund religious instruction or activities because citizens should not be forced to subsidize a religion that isn’t theirs. These Justices’ aggressive approaches are hard to square with the principles of federalism and judicial restraint that the same Justices so often hold up as ideals.

Justice Alito gives a long recitation of what he terms the “anti-Catholic” history behind no-aid clauses. Is his history right?

Justice Alito cherry-picks history to give a misleading and often flatly false picture of state no-aid clauses as being born of anti-Catholic bias.

Many state no-aid clauses have absolutely no hint of any religious bias, either at their origins or today. Some states’ no-aid clauses date back to the late 1700s or early 1800s and predate waves of Catholic immigration and the rise of anti-Catholic sentiment in this country. Even among the no-aid provisions that came later, after anti-Catholic sentiment became more prevalent, there was no single motive common to their proponents. Many were motivated by a desire to protect public education or church-state separation. And some no-aid clauses, such as the Montana clause that was at issue in *Espinoza*, were also subsequently re-enacted, without any anti-Catholic motives or aims. Indeed, some of the no-aid clauses were expressly *supported* by Catholic dioceses.

Is the Supreme Court expected to have more to say on religion issues this term or next?

The Supreme Court is poised to issue two more decisions in cases about religion in the coming weeks.

In a pair of consolidated cases, *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*, the Court will decide whether to expand the “ministerial exception” – a legal doctrine that exempts religious institutions from anti-discrimination laws with respect to their clergy – to bar two teachers at religious schools from bringing claims for employment discrimination under the Americans with Disabilities Act and the Age Discrimination in Employment Act. While religious institutions should be free to select their own faith leaders, they should not be free to disregard the antidiscrimination laws by which all other employers are bound, when they hire employees to carry out only secular or minimally religious functions. How expansively the Court applies the ministerial exception will be especially important after *Espinoza*, as the same schools that want taxpayer-funded vouchers are often in court arguing they can ignore all civil rights laws that could protect their teachers.

Another pair of consolidated cases, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* and *Trump v. Pennsylvania*, deals with insurance coverage for birth control. The Court will decide whether the Affordable Care Act and the Religious Freedom Restoration Act authorize sweeping Trump Administration religious exemptions from the Affordable Care Act’s mandate that health-insurance plans cover contraceptives. If allowed to take effect, the regulations would license employers, including even large, publicly traded corporations and universities, to block their employees or students from receiving contraceptive coverage.

And this fall, the Supreme Court will hear oral argument in *Fulton v. City of Philadelphia*. The Court will decide whether the City of Philadelphia violated the Free Exercise Clause when it decided not to contract with a private religious group to provide government-funded foster-care services because the

group, based on its religious beliefs, refused to follow a city ordinance barring discrimination against same-sex couples seeking to become foster parents. The city should not be required to fund and license religiously motivated discrimination in the provision of governmental services at the expense of prospective foster families and children in desperate need of loving homes.

After the *Espinoza* decision, what are the next steps for Americans United and religion-state separation?

We will continue to oppose the creation or expansion of private school voucher programs at both the state and federal levels. There are currently 56 voucher programs in 28 states. And just this year we saw 92 bills in 32 states to expand or create new voucher programs. In states without voucher programs, no-aid provisions like the one in Montana's Constitution had remained a barrier. Those states have one less barrier today.

Voucher proponents didn't even pause before pushing for the passage of new voucher programs. Secretary of Education DeVos, for example, immediately announced her call "on all states to now seize the extraordinary opportunity to expand all education options at all schools to every single student in America."

On the federal level, we will continue to oppose Secretary DeVos' Education Freedom Scholarship program and any other proposals that Members of Congress might feel emboldened to push that would divert funding to private, religious schools.

We will also continue to fight for real religious freedom and to ensure that taxpayers and religious institutions are safeguarded from public funding of religious instruction, worship, or other religious activities. And we will continue to challenge public funding of religiously motivated discrimination – whether in schools, the foster-care system, or other governmental programs.

We will also expand our outreach to the American public. Too many Americans fail to realize what is at stake for them and their families if religious privilege overcomes real religious freedom. Our fight is for the long term, to ensure that people should be free to support only the religion of their choice, or no religion at all, and to protect religion from government interference. As the Trump Administration continues its relentless attack on the rights of marginalized people under the guise of religious freedom, we will double down on our work to mobilize people of conscience to defend the separation of religion and government. From religious leaders to student activists, we will lift up the voices of the everyday Americans who know all too well what's at stake in the fight for freedom for all – no matter who you are or what you believe.