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Does New York's ban on aid to religious schools survive 'Espinoza'?

By: Special to The Daily Record Jared K. Cook July 15, 2020 0

Jared K. Cook (Provided photo)

The United States Supreme Court issued three major religion decisions this term.[1] In all three cases, parties asserting religious rights prevailed, and the common theme is an increased willingness by a majority of the justices to recognize and broaden religious rights in a variety of contexts. One of these decisions, *Espinoza v. Montana Department of Revenue*,[2] held that a state constitutional provision that forbids public funding of religious schools violates the First Amendment. Many states, including New York, have just such a prohibition in their constitutions, and will now have to consider these prohibitions' continuing validity after Espinoza.

State constitutional prohibitions like this are commonly called "Blaine amendments," after a failed federal constitutional amendment proposed by Republican Representative James G. Blaine of Maine in December 1875. Though they generally approved of nondenominational displays of protestant Christianity in schools and in government, Republicans in the 19th century advocated a strong separation between religious institutions and state institutions to avoid sectarian conflict. Motivated by that idea (and bolstered by anti-Catholic bias against parochial schools),[3] Blaine's amendment would have prohibited any public funds being given to religious schools. The amendment failed in the Senate, but its supporters turned to state governments and 40 states, including New York, eventually passed such amendments to their state constitutions.[4]

'Espinoza': The First Amendment Forbids Discrimination in Funding against Religious Schools.

In *Espinoza*, the Montana legislature created a scholarship program funded by tax credits, to provide private school tuition scholarships to children, and the Montana Supreme Court held that the scholarship program violated Montana's Blaine Amendment by giving public money to religious schools.

The question for the United States Supreme Court was whether Montana's constitutional prohibition violated the First Amendment to the federal constitution. The court said yes, in a majority opinion by the chief justice. Relying on its 2017 *Trinity Lutheran* decision,[5] the court held that excluding religious schools from the scholarship program constituted discrimination on the basis of religion, thus triggering strict scrutiny, and that no compelling state interest justified the discrimination. In other words, if states offer a public benefit to private schools, they cannot exclude religious schools from such a benefit simply because they are religious schools.

Does New York's Blaine amendment survive 'Espinoza'?

New York adopted its Blaine amendment as part of the constitutional convention of 1894, though it had roots that long pre-dated Blaine's amendment.[6] For 70 years, New York courts applied the amendment literally, holding that it was unconstitutional to provide aid such as books, school supplies, or transportation to students of religious schools, under any circumstances.[7] But in its 1967 *Allen* decision, the New York Court of Appeals overruled these earlier cases and held that the amendment only prohibited "aiding religion *as such*" and did not prohibit incidental benefits to religious schools resulting from legislation that benefitted students of private schools generally.[8] In other words, the state can give students of religious schools benefits on the same terms as any other private school students; it just can't single them out.

The *Espinoza* decision doesn't facially invalidate Blaine amendments, but it does strictly limit their application. The majority opinion suggests that such funding prohibitions may still be valid if applied only when funds will be used for religious indoctrination, rather than solely because of the religious identity of the school, because preventing the use

of public funds to train ministers may be a compelling state interest that justifies such religious discrimination.[9] But Justices Thomas and Gorsuch have signaled willingness to find even such a narrow application of Blaine amendments unconstitutional.[10]

The *Espinoza* rule can't be easily reconciled with the literal text of New York's Blaine amendment, but it is consistent with the modern approach of *Allen* to read the amendment to allow incidental benefits to religious schools. *Espinoza* therefore doesn't invalidate New York's Blaine amendment, as construed by *Allen,* but it does prevent the Court of Appeals from overruling or narrowing *Allen* and returning to the more literal application of the constitutional text that it embraced for the first half of the 20th century. And if Justices Thomas and Gorsuch can persuade a majority of their colleagues, New York's Blaine amendment — even as limited by *Allen* — may not be long for this world.

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[1] *Espinoza v. Montana Department of Revenue*, No. 18-1195 (June 30, 2020); *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267 (July 8, 2020); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 19-431 (July 8, 2020).

[2] No. 18-1195 (June 30, 2020).

[3] *See generally* Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 First. Am. L. Rev. 107 (2003).

[4] New York Const., Art XI, § 3.

[5] No. 15-577 (June 26, 2017).

[6] *See Judd v Board of Ed.*, 278 N.Y. 200, 207-211 (1938).

[7] *Smith v. Donahue*, 202 S.D. 656 (3d Dept. 1922) (books and school supplies); *Judd*, 278 N.Y. 200 (transportation). *Judd* was reversed later the same year it was decided by a constitutional amendment that created an exception to expressly allow school districts to provide bussing to religious schools.

[8] *See Allen*, 20 N.Y.2d at 115-16 (emphasis added).

[9] *See Espinoza* No. 18-1195, at 12-14 (citing *Locke v. Davey*, 540 U.S. 712, 725 (2004)).

[10] *See id.* (Thomas, J. and Gorsuch, J., concurring, arguing that antiestablishment is not a compelling state interest justifying discrimination against religious schools, and that *Locke* was wrongly decided).

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