



Winter 2021

Honoring the New Mexico Constitution and Its History: New Mexico's Unique Blaine Amendment and Its Application in *Moses v. Ruszkowski*

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Recommended Citation

Kori Nau, *Honoring the New Mexico Constitution and Its History: New Mexico's Unique Blaine Amendment and Its Application in Moses v. Ruszkowski*, 51 N.M. L. Rev. 255 (2021).

Available at: <https://digitalrepository.unm.edu/nmlr/vol51/iss1/9>

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**HONORING THE NEW MEXICO CONSTITUTION
AND ITS HISTORY: NEW MEXICO'S UNIQUE
BLAINE AMENDMENT AND ITS APPLICATION IN
*MOSES V. RUSZKOWSKI***

Kori Nau*

ABSTRACT

*Over the past two decades, many scholars have taken a fresh look at state constitutional provisions that derive from the federal Blaine amendment that was proposed in 1875. The New Mexico Supreme Court was tasked with analyzing New Mexico's version of the Blaine amendment as it applied to the state's Instructional Material Law in *Moses v. Ruszkowski*. The case took a long journey through the New Mexico judiciary and was appealed to the United States Supreme Court. On remand from the U.S. Supreme Court, the New Mexico Supreme Court concluded that New Mexico's derivative of the Blaine amendment, Article XII, Section 3, of the New Mexico Constitution, was adopted with discriminatory intent based on the history of the federal Blaine amendment.*

This Note will argue that New Mexico courts should be more deferential to the state's history than to national history when they interpret the New Mexico Constitution. Giving deference to the state's history and the intentions behind the New Mexico Constitution aligns with the ideals of federalism that the United States Constitution emphasizes. This Note will then argue that, given the deference owed to New Mexico's history and the intentions of the drafters of the New Mexico constitution, Article XII, Section 3, was not adopted with discriminatory intent. Following the actual intent of the drafters to avoid any entanglement with private schools, the provisions of the Instructional Material Law that allow books to be loaned to private school students is unconstitutional under Article XII,

* University of New Mexico School of Law, Class of 2021. I would like to thank my family and friends, especially my parents, for providing unlimited support and encouragement throughout the my life and in law school. Additionally, I thank Professor Carol Suzuki, Professor J. Walker Boyd, and my colleagues on New Mexico Law Review for their valuable feedback during the writing process. I would also like to thank Professor Suzuki for her insightful guidance and mentorship over the past two years.

Section 3, of the New Mexico Constitution.

INTRODUCTION

New Mexico has a long and unique history that began far before it became part of the United States in 1912. Even as a territory of the United States New Mexico had a unique culture that, to this day, sets it apart from the rest of the country. Given the state's unique history and culture, New Mexico courts should have a unique perspective of the New Mexico Constitution. In *Moses v. Ruszkowski*, the New Mexico Supreme Court settled a long battle over the Instructional Material Law (IML)¹ and its constitutionality under the New Mexico and United States Constitution.² In light of *Trinity Lutheran Church of Columbia v. Comer*, a United States Supreme Court case that altered the application of the Free Exercise clause to apply to generally available state funding,³ the New Mexico Supreme Court held that providing state funds to private schools for a textbook loan program did not violate Article XII, Section 3, of the New Mexico Constitution.⁴ In doing so, it gave more deference to the history of Article XII, Section 3 at the federal level than it did to the history in New Mexico. This Note will argue that state courts should analyze state constitutional provisions in light of state history, then turn to the history of the constitutional provision at the federal level.

Part I will examine the history of the predecessor of Article XII, Section 3 at the federal level, the actual adoption of Article XII, Section 3, the procedural history of *Moses v. Ruszkowski* and the analysis of the New Mexico Supreme Court in the final *Moses* decision. In 1875, Representative James Blaine of Maine proposed an amendment to the federal constitution⁵ that would apply the Establishment Clause of the First Amendment to the states and prohibit public funds from being used to support sectarian schools.⁶ The amendment narrowly failed in the Senate, but Congress began forcing states seeking admission to the Union to include it in their new constitution as a condition of gaining statehood.⁷ Many scholars have concluded that the amendment was proposed due to anti-Catholic animus building in the United States.⁸

1. N.M. STAT. ANN. §§ 22-15-1 to 22-15-14 (1978).

2. See *Moses v. Ruszkowski*, 2019-NMSC-003, 458 P. 3d 406.

3. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017).

4. See *Ruszkowski*, 2019-NMSC-003, ¶ 46.

5. "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 5 Cong. Record 205 (1875) [hereinafter *Blaine amendment*] (statement of Rep. Blaine).

6. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556-57 (2003).

7. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 672-73 (1998).

8. See, e.g., *id.*; DeForrest, *supra* note 6, at 556; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38 (1992).

Part I will also explore the history of Article XII, Section 3, as the provision was adopted by the New Mexico Constitutional Convention in 1910. When Congress passed the Enabling Act that allowed New Mexico to create a constitution, form a government, and be admitted to the Union, it required the Blaine amendment to be incorporated into the state constitution.⁹ However, the drafters of the constitution made two changes to the language the Enabling Act required, including the prohibition of support for all *private* schools, not just sectarian or denominational schools.¹⁰ Then, this Note will briefly explain the Instructional Material Law and the long procedural history of *Moses v. Ruzkowski*. This includes the United States Supreme Court's decision in *Trinity Lutheran*, which set up the New Mexico Supreme Court's interpretation of Article XII, Section 3, on remand from the United States Supreme Court.

Part II will argue that state courts should analyze the intent of a state constitutional provision in light of the history and circumstances in the state at the time it was adopted. Part II starts by articulating the values of federalism and how state courts have already been interpreting other parts of the state constitution to align more with the values of federalism. Then, Part II will propose a new way to analyze whether a provision of the state constitution was adopted with discriminatory intent. If the court finds that the provision was not adopted with discriminatory intent at the state level, the court should presume that the constitutional provision was not adopted with discriminatory intent. The court may then look at the history of the constitutional provision at the federal level. If there is a strong history that illuminates discriminatory intent at the federal level, and that discriminatory intent has a significant connection to the adoption of the state constitutional provision, then the history of the provision at the federal level may rebut the presumption of non-discriminatory intent.

Part III will apply this analysis to Article XII, Section 3, of the New Mexico Constitution. In light of the Convention's changes to the language of the Blaine amendment to include all private schools in Article XII, Section 3, and the other protections the constitution provides to native New Mexicans, the history of the adoption of Article XII, Section 3, in the New Mexico Constitution does not reveal a discriminatory intent. Additionally, the connection between the anti-Catholic sentiment that motivated the federal Blaine amendment, the amendment's inclusion in the Enabling Act for New Mexico, and New Mexico's adoption of Article XII, Section 3, is not strong enough to overcome the non-discriminatory intent of Article XII, Section 3.

Part IV will analyze the plain language of Article XII, Section 3 and the intent of the drafters of the New Mexico constitution. The New Mexico Supreme Court's previous interpretation of the word "support" to preclude loaning textbooks to private school students by and through the schools as administrators of the program was a proper interpretation of Article XII, Section 3, based on the intent of the drafters of the New Mexico Constitution. Part IV will also articulate the dissent's position in *Moses v. Ruzkowski* and make a brief argument that *Trinity Lutheran*

9. Enabling Act for New Mexico of June 20, 1910, H.R. 18166, 61st Cong., § 8 (1910).

10. N.M. CONST. art. XII, Sec. 3.

should not have altered the New Mexico Supreme Court's initial decision that the Instructional Material Law violated Article XII, Section 3.

BACKGROUND

I. THE HISTORY OF THE BLAINE AMENDMENT, ARTICLE XII, SECTION 3, AND *MOSES V. RUSZKOWSKI*.

In *Moses v. Ruszkowski*, the New Mexico Supreme Court conducted an in-depth analysis of the history of Article XII, Section 3, and the federal Blaine amendment. In order to understand the court's conclusions and this Note's argument, a brief history of the Blaine amendment, the Enabling Act passed by Congress to allow New Mexico to form a constitution and be admitted to the Union, and the New Mexico Constitutional Convention is necessary. Additionally, this section contains a brief history of the Instructional Material Law and the procedural history of *Moses v. Ruszkowski* and the analysis of each decision leading up to when *Moses v. Ruszkowski* was decided in 2018.

A. The history of the federal Blaine amendment.

At the time the Bill of Rights was drafted, religion played a large role in the everyday life of Americans, especially in schools.¹¹ When public schools became more prominent, the American public education system allowed teachings of Protestantism in public schools,¹² despite a desire to create "a public education system that was unaffiliated with any particular religion."¹³ As the Catholic population in America increased in the middle of the Nineteenth Century, Catholic church leaders lobbied "for public funds to develop their own educational systems."¹⁴ This request was met with hostility and brutality,¹⁵ and led Protestants to campaign to "deny public funding for Catholic or any 'sectarian' institutions."¹⁶

President Ulysses Grant gave a speech supporting a constitutional amendment to prevent public funds from going to private schools "in order to gain support from the Protestants and to definitively end the debate about religion in schools."¹⁷ Representative James Blaine sponsored an amendment to that effect in December 1875.¹⁸ The amendment would have extended the Establishment Clause to states and sought to prevent state funds to support private religious schools.¹⁹

11. Viteritti, *supra* note 7, at 661, 664.

12. *Id.* at 666. Viteritti goes on to critique the supposed "secular" public schools. "The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers." *Id.*

13. Margo A. Borders, Note, *The Future of State Blaine Amendments in Light of Trinity Lutheran: Strengthening the Nondiscrimination Argument*, 93 NOTRE DAME L. REV. 2141, 2142–2143 (2017–2018).

14. Viteritti, *supra* note 7, at 669.

15. *Id.* at 669.

16. Borders, *supra* note 13, at 2143.

17. *Id.* at 2144.

18. DeForrest, *supra* note 6, at 556.

19. *Id.* at 557. At the time the amendment was proposed, the Establishment Clause had not yet been read to apply to the States. *Id.*

Although Representative Blaine was probably motivated by political ambition when he proposed the amendment,²⁰ many scholars have concluded that the amendment's "near success in Congress can be attributed to longstanding anti-Catholic bias."²¹ Although the amendment had strong support in both the House of Representative and the Senate, the amendment failed to achieve the two-thirds majority required for it to pass in the Senate by four votes, and failed as an amendment to the federal constitution.²²

The separationist movement that motivated the Blaine amendment at the federal level also gained momentum in the states.²³ By 1890, twenty-nine states incorporated provisions similar to the Blaine amendment into their state constitutions.²⁴ "Congress also began requiring territories seeking admission to the Union to adopt these separationist provisions in their original constitutions."²⁵ The Enabling Acts that divided the Dakotas, and admitted Montana, Washington, and New Mexico mandated adoption of "Blaine-like provisions" in the respective states.²⁶ Although these state provisions stem from the proposed federal Blaine amendment, they vary widely in their language, application, and interpretation.²⁷ They can be categorized as "restrictive, permissive, and uncertain in terms of restricting aid to sectarian schools."²⁸ They also vary in what kind of funding they target, as some state Blaine amendments only target education whereas others "prohibit *any* governmental aid that would support any sectarian institution."²⁹ Whether a state's Blaine amendment violates the United States Constitution depends on how the state courts interpret and apply their respective constitutional provisions.³⁰ New Mexico's version of the Blaine amendment is Article XII, Section 3, of the New Mexico Constitution, and the history of its adoption is unique to New Mexico.

B. New Mexico's adoption of Article XII, Section 3.

In 1846, United States forces took over the territory of New Mexico when the United States took advantage of a weak Mexican government and military

20. See Viteritti, *supra* note 7, at 670–71. Blaine was seeking the Republican nomination for president when he proposed the amendment. *Id.* at 670.

21. Borders, *supra* note 13, at 2144; Richard W. Garnett, *The Theology of Blaine Amendments*, 2 FIRST AMEND. L. REV. 45, 62 (2004).

22. Borders, *supra* note 13, at 2145.

23. *Id.*

24. Viteritti, *supra* note 7, at 673.

25. Borders, *supra* note 13, at 2145.

26. Viteritti, *supra* note 7, at 673.

27. Borders, *supra* note 13, at 2146.

28. *Id.*

29. *Id. Compare, e.g.,* MO. CONST. art. I, § 7 ("[N]o money shall ever be taken from the public treasury . . . in aid of any church, sect or denomination of religion . . ."), with N.M. CONST. art. XII, § 3 ("[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated . . . shall be used for the support of any sectarian, denominational or private school, college or university.").

30. Borders, *supra* note 13, at 2147.

resistance to the war that President Polk engineered against Mexico.³¹ New Mexico became an official territory in 1850 and remained a territory through the Nineteenth and start of the Twentieth Century. One final push to gain statehood garnered enough traction for Congress to draft and pass an Enabling Act for New Mexico.³²

President Taft signed the Enabling Act for New Mexico and Arizona on June 20, 1910, which allowed New Mexico to form a Constitutional Convention and draft a new constitution to gain statehood.³³ Article XII, Section 3, was among the requirements imposed by Congress for New Mexico's constitution.³⁴ The Enabling Act required New Mexico to adopt a provision stating that no funds that come from sale of land granted to New Mexico by Congress "for educational purposes shall be used for the support of any sectarian or denominational school, college, or university."³⁵ The Enabling Act also required Congress and the President to approve the New Mexico Constitution before the state was admitted to the Union.³⁶

Once President Taft signed the Enabling Act, New Mexico had to set up and hold a Constitutional Convention to draft a new state constitution.³⁷ The Constitutional Convention was held in Santa Fe and started on October 3, 1910.³⁸ Of the one hundred delegates that attended the Convention, seventy-one were republican and twenty-nine were democrat.³⁹ Thirty-two of the one hundred delegates were Spanish speakers, who were concerned about preserving their cultures and traditions.⁴⁰ The "sizable delegation" of Spanish speakers "would doubtless be a formidable force at the convention."⁴¹

Floor speeches and deliberations were not recorded at the Constitutional Convention because the Republican majority refused to allow a verbatim record of the convention, instead only printing "the most formal actions," including reports from each committee.⁴² Therefore, the committee reports are the most useful records to analyze the intent of the Convention.

According to the record that is available, the Committee on Ordinance Compact with the United States, which was tasked with ensuring the constitution complied with the Enabling Act, recommended the convention adopt the exact language of the Blaine amendment that was inserted into the Enabling Act as part of the constitution.⁴³ The Committee on Education recommended that a slightly

31. See ROBERT W. LARSON, *NEW MEXICO'S QUEST FOR STATEHOOD, 1846-1912*, at 9-11 (2013).

32. *Id.* at 205.

33. Enabling Act for New Mexico of June 20, 1910, H.R. 18166, 61st Cong. (1910).

34. *Id.* § 8.

35. *Id.*

36. *Id.* § 4.

37. *See id.*

38. PRESS OF THE MORNING JOURNAL, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF NEW MEXICO, HELD AT SANTA FE, NEW MEXICO, OCTOBER 3RD, 1910, TO NOVEMBER 21ST, 1910, at 3 [hereinafter PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION].

39. LARSON, *supra* note 31, at 274.

40. *Id.* at 274-76.

41. *Id.* at 275-76.

42. *Id.* at 224.

43. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, *supra* note 38, at 85, 89 ("The schools, colleges and universities provided for in this act shall forever remain under exclusive control of the said state, and no part of the proceeds arising from the sale or disposal of any lands granted herein for

different version be adopted, the version that eventually became the substance of Article XII, Section 3.⁴⁴ The Committee on Education wanted to restrict the use of *all* funds collected for education, not just the funds arising from the sale or disposal of lands granted to the state by Congress.⁴⁵ It would also restrict the use of funds to support sectarian, denominational or *private* schools.⁴⁶

The Convention adopted the Education Committee's proposed provision, and what is now Article XII, Section 3, of the New Mexico Constitution restricts all funds collected for education from being used to support sectarian, denominational, or private schools.⁴⁷

C. The Instructional Material Law.

In 1929, the New Mexico Legislature enacted legislation to provide free textbooks to first and second grade students in public schools.⁴⁸ In 1933, the legislature expanded the program to provide textbooks to all children "in the Schools of the State of New Mexico" in first through eighth grade.⁴⁹ The statute was amended several more times, and in 1953 it was labeled the "Instructional Material Law" ("IML"),⁵⁰ before it was amended and recompiled in the 1978 compilations of New Mexico Statutes.⁵¹ The current version of the IML requires instructional materials to be distributed to "school districts, state institutions, or private schools," who will be responsible for distribution to eligible students.⁵²

D. The *Moses* Saga: Procedural History of *Moses v. Ruszkowski*.

In 2012, two New Mexico parents of children in New Mexico public schools filed a motion seeking declaratory judgment that the IML was unconstitutional under the New Mexico Constitution.⁵³ Several private schools,

educational purposes shall be used for the support of any sectarian or denominational school, college or university.").

44. *Id.* 113–114 ("That the schools colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from any lands granted to the state by Congress, nor any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.").

45. *Id.* at 114.

46. *Id.* at 114.

47. N.M. CONST. art. XII, § 3. ("[N]o part of the proceeds arising from the sale or disposal of *any* lands granted to the state by congress, or *any other funds* appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or *private* school, college or university.") (Emphasis added).

48. N.M. STAT. ANN. §§ 120-1701, 1702 (1929).

49. 1933 N.M. Laws, ch. 112, § 1.

50. N.M. STAT. ANN., §§ 77-13-1 to -14 (1953).

51. N.M. STAT. ANN., §§ 22-15-1 to -14 (2005).

52. N.M. STAT. ANN., § 22-1507 (2009).

53. Tara García Mathewson, *Supreme Court Considers Hearing New Mexico Textbook Case*, EDUCATIONDIVE (Aug. 30, 2016), <https://www.educationdive.com/news/supreme-court-considers-hearing-new-mexico-textbook-case/425394/> [<https://perma.cc/W4CM-V5U4>]; *Moses v. Skandera*, 2015-NMCA-036 ¶ 3, 346 P.3d 396.

individuals, and the New Mexico Association of Nonpublic Schools moved to intervene after the court stated it intended to grant the motion. The district court granted the motion to intervene, ordered additional briefing, and granted summary judgment to the defendants.⁵⁴ The plaintiffs appealed, and the New Mexico Court of Appeals affirmed the district court's decision.⁵⁵ The Court of Appeals viewed Article XII, Section 3, as coextensive with the Establishment Clause of the First Amendment of the United States Constitution.⁵⁶ United States Supreme Court opinions interpreting the Establishment Clause have held that providing aid to religious organizations did not violate the Establishment Clause if the aid was given as part of a "general program."⁵⁷ Since the Court determined that the IML was a general program, the court concluded that the IML did not violate Article XII, Section 3, of the New Mexico Constitution.⁵⁸ For the remainder of this Note, the Court of Appeals decision will be referred to as "*Moses I.*"

The New Mexico Supreme Court granted the plaintiffs' petition for writ of certiorari to consider, among other issues, whether the IML violates Article XII, Section 3 of the New Mexico Constitution.⁵⁹ The Supreme Court reversed the decision of the Court of Appeals and concluded that the IML did violate Article XII, Section 3.⁶⁰ The court disagreed with the Court of Appeals' interpretation of Article XII, Section 3, as coextensive with the Establishment Clause because Article XII, Section 3, protects against more than the establishment of religion; it also prohibits support of private schools.⁶¹ The court also reasoned that "[t]he broad language of [Article XII, Section 3] and the history of its adoption and the efforts to amend it evince a clear intent to restrict both direct and indirect support to sectarian, denominational, or private schools, colleges, or universities."⁶² For the remainder of this Note, this Supreme Court decision will be referred to as "*Moses II.*"

The New Mexico Association of Nonpublic Schools filed a petition for a writ of certiorari in the United States Supreme Court to review the New Mexico Supreme Court's decision in *Moses II.*⁶³ The U.S. Supreme Court granted certiorari, vacated the New Mexico Supreme Court's decision, and remanded the case back to

54. *Moses v. Skandera*, 2015-NMCA-036, ¶ 3.

55. *Id.* ¶ 54.

56. See *Skandera*, 2015-NMSC-036, ¶ 16. The Establishment Clause prohibits Congress from making any "law respecting an establishment of religion." U.S. CONST. amend. I.

57. *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 17–18 (1947); see also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bd. Of Educ. Of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

58. *Skandera*, 2015-NMCA-036, ¶ 40.

59. *Moses v. Skandera*, 2015-NMSC-036, ¶ 11, 367 P.3d 838.

60. *Id.* ¶ 12.

61. *Id.* ¶ 16.

62. *Id.* ¶ 29. The Constitutional Convention of 1969 proposed a constitutional amendment that would incorporate the IML into the constitution and allow private school students to receive textbooks. The amendment was submitted to the voters, but it was rejected. *Id.* ¶ 31.

63. *N.M. Ass'n of Non-public Schs. v. Moses*, 137 S. Ct. 2325 (2017).

the New Mexico Supreme Court to reconsider *Moses II* in light of the U.S. Supreme Court's decision in *Trinity Lutheran Church of Columbia v. Comer*.⁶⁴

Trinity Lutheran involved a program offered by the Missouri Department of Natural Resources where public and private schools and other nonprofit entities could apply for grants to resurface playgrounds.⁶⁵ Trinity Lutheran Church applied for the grant to use for its preschool and daycare playground, but was denied the grant because the Department had a policy of "categorically disqualifying churches and other religious organizations from receiving grants" under the program.⁶⁶ The court held that the Department policy violated the Free Exercise Clause of the United States Constitution because it excluded the church from a generally available public benefit "solely because it is a church."⁶⁷

Justice Roberts clarified in Footnote 3 that *Trinity Lutheran* "involve[d] express discrimination based on religious identity with respect to playground resurfacing" and further stated that the court "decline[d] to address religious uses of funding or other forms of discrimination."⁶⁸ While a majority of the court joined Justice Roberts's opinion holding that the Department policy was unconstitutional, Footnote 3 did not receive support from a majority of the court.⁶⁹

The New Mexico Supreme Court had to reconsider the decision it made in *Moses II* in light of the U.S. Supreme Court's decision in *Trinity Lutheran*.⁷⁰

E. The New Mexico Supreme Court's decision in *Moses v. Ruskowski*: Completing the journey.

The New Mexico Supreme Court reconsidered *Moses II* in light of the United States Supreme Court's opinion in *Trinity Lutheran* and issued a new opinion in December 2018.⁷¹ The court held that its previous interpretation of Article XII, Section 3, as it applied to the IML, raises Free Exercise concerns under the United States Constitution.⁷² To avoid those concerns, the court had to adopt a different construction of Article XII, Section 3, that did not conflict with the Free Exercise Clause.⁷³

The court started its analysis with the federal history of the Blaine Amendment and the court's previous analysis of Article XII, Section 3.⁷⁴ The court reviewed its previous findings of the origins of Article XII, Section 3, and reiterated its acknowledgment that "the federal Blaine amendment originated in anti-Catholic prejudice."⁷⁵ Before the court moved on to the history of Article XII, Section 3, in

64. *Id.*

65. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2017 (2017).

66. *Id.*

67. *Id.* at 2025.

68. *Id.* at 2024 n.3.

69. *Id.* at 2017.

70. *N.M. Ass'n of Non-public Schs. v. Moses*, 137 S. Ct. 2325 (2017).

71. *Moses v. Ruskowski*, 2019-NMSC-003.

72. *Id.* ¶ 44.

73. *Id.* ¶ 45.

74. *See id.* ¶¶ 12–18.

75. *Id.* ¶ 35.

the context of New Mexico's history, it stated "[w]e therefore consider whether the history or circumstances in New Mexico that led to the adoption of Article XII, Section 3 cured the provision's anti-Catholic origins."⁷⁶

The New Mexico Supreme Court started its analysis of the history of public education in New Mexico by acknowledging that "New Mexico has a unique history and culture, and the public school debate within New Mexico took a different course than the debate at the national level."⁷⁷ Then, the court summarized the history of the state and its public education system from 1850, when New Mexico became a territory, through 1910, when the Enabling Act was signed. The court acknowledged the obstacles that New Mexico faced in its quest for statehood, including prejudice toward its Catholic population and Spanish-speaking population.⁷⁸

The court then discussed the history and circumstances surrounding the New Mexico Constitutional Convention, acknowledging that the same delegates who drafted Article XII, Section 3 also included protections for Spanish-speaking students in the constitution.⁷⁹ The court noted that "under the circumstances, it appears that the drafters of Article XII, Section 3 intended to create a provision that would be acceptable to New Mexico voters while fulfilling the mandate set forth in the New Mexico Enabling Act."⁸⁰ The court "declin[ed] to impute an impermissible motive to the constitutional delegation and New Mexico voters" for drafting Article XII, Section 3, including it in the Constitution, and ratifying the provision.⁸¹ However, in light of "the history of the federal Blaine amendment and the New Mexico Enabling Act," the court concluded that "anti-Catholic sentiment tainted" the adoption of Article XII, Section 3.⁸² Therefore, under the court's interpretation of *Trinity Lutheran*, it concluded that its "previous interpretation of Article XII, Section 3 . . . raises concerns under the Free Exercise Clause."⁸³

In order to avoid Free Exercise concerns under the U.S. Constitution, the court chose to adopt a permissive interpretation of Article XII, Section 3, interpreting the provision to allow "support" of private school students and parents, as it determined the IML did.⁸⁴ The court further concluded that the IML does not violate other provisions of the New Mexico constitution, and "reinstat[ed] the provisions of the IML that allow private school students to participate in the textbook loan program."⁸⁵ For the remainder of this Note, this New Mexico Supreme Court decision will be referred to as "*Moses III*."

76. *Id.*

77. *Id.* ¶ 36.

78. *Id.* ¶ 39.

79. *Id.* ¶ 42.

80. *Id.*

81. *Id.*

82. *Id.* ¶ 43.

83. *Id.* ¶ 44.

84. *Id.* ¶ 46.

85. *Id.* ¶ 53.

ANALYSIS

II. NEW MEXICO COURTS SHOULD BE MORE DEFERENTIAL TO NEW MEXICO'S HISTORY WHEN THEY ANALYZE STATE CONSTITUTIONAL PROVISIONS FOR DISCRIMINATORY INTENT.**A. Extending deference to New Mexico's history comports with the values of federalism.**

State courts have already been interpreting their respective state constitutions separately from federal history in the context of criminal protections. Interpreting other parts of the state constitution separate from federal history is in line with the values and ideals of federalism.

In 1977, “Justice William Brennan urged state courts to interpret their state constitutions independently, rather than simply mirror federal precedents defining rights under the United States Constitution, in order to protect and maximize individual liberties.”⁸⁶ Justice Brennan highlighted state court decisions that had already interpreted the respective state constitutions separately.⁸⁷ The broad point Justice Brennan wanted to make is that decisions of the United States Supreme Court should not dictate “decisions regarding rights guaranteed by counterpart provisions of state law.”⁸⁸ He concluded that James Madison, as a proponent of federalism, would welcome this broadening of state constitutional law because Madison believed “that ‘independent tribunals of justice will consider themselves in a peculiar manner the guardians of’” constitutional rights.⁸⁹

New Mexico “began to break with federal constitutional interpretation” starting in 1976 in *State ex rel. Serna v. Hodges*,⁹⁰ and articulated an analysis for determining when the state constitution provides more rights than the federal constitution and case law in *State v. Gomez*.⁹¹ In *Gomez*, the court adopted the “interstitial” approach to interpreting the state constitution in search-and-seizure cases, and the court has applied the analysis to other constitutional rights of criminal defendants.⁹² Under the interstitial approach, the court first determines if a right

86. Linda M. Vanzi, Andrew G Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302 (2018) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977)).

87. See Brennan, *supra* note 86, at 498–501 (1977). One interesting case is *State v. Johnson*, where the New Jersey Supreme Court held that Article I, paragraph 7 of the New Jersey Constitution, which is identical to the Fourth Amendment of the United States Constitution, requires the subject of the search to have knowledge that he has a right to refuse to consent to the search for the search to be voluntary. *See* 346 A.2d 66, 68 (N.J. 1975). This contrasts with *Schneekloth v. Bustamonte*, a United States Supreme Court case decided two years earlier where the court held that the subject of a search does not need to have knowledge that he can refuse to consent to a search. *See* 412 U.S. 218 (1973).

88. *Id.* at 502.

89. *Id.* at 504.

90. *State ex rel. Serna v. Hodges*, 1976-NMSC-033. In this case, the Supreme Court rejected the “lock-step” approach to interpretation, where courts interpret their state constitutions to conform to federal law. Vanzi et al., *supra* note 86, at 303.

91. *State v. Gomez*, 1997-NMSC-006, ¶¶ 19–20, 932 P.2d 1.

92. Vanzi et al., *supra* note 86, at 303.

exists under the federal constitution, and if it does not, the court looks to whether the right is protected under the New Mexico Constitution.⁹³ This approach is in line with the values of federalism.

Professor Chemerinsky has articulated two values of federalism that fit in with traditional ideas of federalism: providing an efficient government and advancing liberty.⁹⁴ When state courts break with federal analysis of constitutional protections to provide more protection, they achieve the value of advancing liberty. If state courts interpreted their constitutional and statutory history to determine discriminatory intent in the context of state history, they would be advancing the values of both an efficient government and advancing liberty.

Many of the powers granted to the federal government by the Constitution were granted in response to the failings of the Articles of Confederation.⁹⁵ The Framers thought the federal government would be better equipped to handle certain issues to “meet society’s needs in both the short and long terms.”⁹⁶ Those issues are spelled out in the enumerated powers of Congress, the Executive and the Judiciary in the first three articles of the Constitution.⁹⁷ However, the Framers also granted states all powers not given to the federal government or to the people in the Tenth Amendment.⁹⁸ Since states were given the power to pass a broad range of laws and include a broad range of issues in their constitutions, it is logical for the state to use its own history to interpret those constitutions and laws.

Interpreting state constitutional provisions and statutes in the context of the state’s history advances the value of creating an efficient government. Since the Framers thought granting certain powers to the states and certain powers to the federal government would allow for a more efficient government, states should also be able to interpret laws promulgated in the exercise of their powers in the context of their state history. It is illogical for states to have powers to promulgate a wide variety of laws that best fit their state then use the history of the nation to interpret those laws. If states use national history to interpret their state laws, it would be more efficient to promulgate all laws at the national level since those laws will be responsive to national history.

Interpreting state constitutional provisions and statutes in the context of the state’s history also achieves the value of advancing liberty. Chemerinsky points out that “a strong argument for local control is the autonomy that comes with permitting communities to make their own choices.”⁹⁹ Permitting communities to make their own choices in promulgating law gives them liberty to respond to the needs of the community in a way that will help the most people. Interpreting those laws in the context of the history of the community (the state) will also empower the community because the laws were promulgated in response to what the community needed at the

93. *Id.* at 303.

94. ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 117 (2008).

95. *Id.*

96. *Id.* Chemerinsky, *supra* note 94.

97. U.S. CONST., arts. I–III.

98. U.S. CONST., amend. X.

99. CHEMERINSKY, *supra* note 94, at 120.

time, and there is a good chance the community's needs were different than other communities across the country.

Tangential to the value of empowering communities is granting people liberty to live in whichever community they want. Someone may choose to live in a certain community based on the current climate and the benefits or needs that the community has. Naturally, that person wants the laws promulgated to reflect the needs, benefits, and climate of the community, or else they will be living in a place that does not reflect what they wanted. That person also would want the laws passed to be interpreted in light of the climate, benefits, and needs of the community to ensure that the determination of the law's intent comports with the climate of the community.

This argument may be less clear in the context of the Enabling Act. As discussed above, the United States Congress required New Mexico to have certain provisions in its constitution as a condition of statehood.¹⁰⁰ However, as long as the provision in the Enabling Act was included in the new state constitution, the drafters of the New Mexico constitution could add additional restrictions, as seen in Article XII, Section 3.¹⁰¹ The drafters' modification of the language of the Enabling Act to what was eventually included in the constitution was a response to the needs of the community.¹⁰² Even where Congress required a certain provision to be included in the state constitution, the state still had to respond to the needs of the state. Therefore, state courts interpreting even those parts of the Constitution that were required by the Enabling Act should give more deference to the history of the constitutional provision at the state level.

B. New Mexico courts should analyze discriminatory intent at the state level first, then analyze intent of federal analogs.

In *Moses III*, the Supreme Court determined that its prior application of Article XII, Section 3 in *Moses II* raises Free Exercise concerns under the United States Supreme Court's interpretation of the Free Exercise Clause in *Trinity Lutheran*.¹⁰³ The court determined that "the history of the federal Blaine amendment and the New Mexico Enabling Act . . . tainted" the adoption of Article XII, Section 3 of the New Mexico Constitution.¹⁰⁴ Even after the court spent a significant portion of the opinion analyzing the history and background of Article XII, Section 3,¹⁰⁵ the

100. Enabling Act for New Mexico of June 20, 1910, H.R. 18166, 61st Cong., § 8 (1910).

101. Article XII, Section 3, restricts all educational funds from being used to support sectarian, denominational, or private schools, whereas the Enabling Act only restricted the use of funds arising from the sale of lands granted to New Mexico by Congress be used to support sectarian or denominational schools. See N.M. CONST., art. XII, § 3; Enabling Act for New Mexico of June 20, 1910, H.R. 18166, 61st Cong. (1910).

102. *Moses v. Ruzskowski*, 2019-NMSC-003, ¶ 42.

103. *Id.* ¶ 44.

104. *Id.* ¶ 43.

105. *Id.* ¶¶ 36–42.

history of the Blaine Amendment at the federal level was determinative in this case.¹⁰⁶

The court analyzed whether the adoption of Article XII, Section 3 had a discriminatory intent against religion.¹⁰⁷ The court analyzed the discriminatory intent within the framework of determining “whether the history or circumstances in New Mexico that led to the adoption of Article XII, Section 3 cured the provision’s anti-Catholic origins.”¹⁰⁸ This language and the court’s ultimate analysis and conclusion indicates that the court presumed that Article XII, Section 3 was adopted with discriminatory intent based on its history at the federal level, and required that the potential non-discriminatory history of its adoption by the New Mexico constitutional convention be strong enough to overcome that presumption.

The New Mexico Supreme Court allowed national history that was different than what was happening in New Mexico to dictate what the New Mexico Constitution meant. The court acknowledged that New Mexico’s history is unique, and the state’s internal debate about public school was different than what was happening at the national level.¹⁰⁹

Being more deferential to that unique history will serve the purpose of the New Mexico Constitution better and will be more in line with the broader principle of federalism. When a state court is analyzing a statute or constitutional provision that has a federal analog, instead of analyzing the history of the federal analog and creating a presumption of discriminatory intent based on that analysis, the court should reverse the analysis. The court should analyze whether a provision of the New Mexico constitution had a discriminatory intent at the state level first. If it did, the analysis of discriminatory intent can stop there. If the court concludes that the provision did not have a discriminatory intent at the state level, the court should presume that the provision was not adopted with a discriminatory intent. The court should only find that the intent of the provision was actually discriminatory if the history of the provision at the national level presents strong evidence that it was discriminatory on the national level and that discriminatory intent had a significant connection to the adoption of the provision at the state level.

III. APPLYING DEFERENTIAL ANALYSIS TO *MOSES V. RUSZKOWSKI*.

A. History of Article XII, Section 3, in New Mexico

There is little evidence that the drafters of the New Mexico constitution had a discriminatory intent when they adopted Article XII, Section 3. If the drafters of

106. *Id.* ¶ 42 (“In the absence of sufficient proof that New Mexico adopted Article XII, Section 3 for a discriminatory purpose, we decline to impute an impermissible motive to the constitutional delegation and New Mexico voters, who approved the Constitution by an overall majority of three to one”) (internal quotation marks omitted); *id.* ¶ 43 (“Even though it appears that the people of New Mexico intended for Article XII, Section 3 to be a religiously neutral provision, the history of the federal Blaine amendment and the New Mexico Enabling Act lead us to conclude that anti-Catholic sentiment tainted its adoption.”).

107. *Id.*

108. *Id.* ¶ 35.

109. *Id.* ¶ 36.

Article XII, Section 3, had used the exact same language the Enabling Act required, the connection between the anti-Catholic animus motivating the Blaine Amendment and Article XII, Section 3, would be easier to make. However, in *Moses III*, the New Mexico Supreme Court acknowledged that by adding the public-private distinction to Article XII, Section 3 in addition to the sectarian-nonsectarian distinction required by the Enabling Act, the members of the Constitutional Convention “chose to play it safe” and “avoided drawing a line between secular and sectarian education.”¹¹⁰ This is probably due to the historical influence of Catholic schools on the New Mexico Public Education before and during the territorial period.¹¹¹

Since the republican majority at the Constitutional Convention did not allow a verbatim record of the Convention to be created,¹¹² there is little evidence from the New Mexico Constitutional Convention that sheds light on the drafters’ intentions and motivations behind adopting Article XII, Section 3. However, the overall attitudes of the drafters and the attitude of all of New Mexico in the time leading up to statehood may be of value.

New Mexico had a long, drawn out battle for statehood.¹¹³ Even after President Taft signed the Enabling Act in June 1910,¹¹⁴ there were still significant challenges New Mexico had to overcome prior to its official admission to the Union in 1912.¹¹⁵ The Enabling Act required Congress and the President to approve the New Mexico Constitution before the state was admitted to the Union.¹¹⁶ The members of the Constitutional Convention were aware of this, and the threat that statehood would be delayed if Congress or the president did not approve the Constitution seems to have been a large motivating factor behind the decisions made by the Constitutional Convention.¹¹⁷

Even in light of the state’s eagerness to gain Congressional and Presidential approval and be admitted to the Union, the drafters of the New Mexico Constitution included specific protections for its citizens that were not popular undertakings nationally.¹¹⁸ Although the Senate version of the Enabling Act (the one that President Taft favored) required teaching in public schools to be in English,¹¹⁹ the drafters of the New Mexico constitution included safeguards of the rights of native New Mexicans and Spanish-speakers, including extending the right to vote regardless of religion, race, language or color, and ensuring that children of Spanish descent are treated equally in public schools.¹²⁰

In light of the drafters’ intentional protections for Spanish-speakers in spite of the national nativist tendency, it is reasonable to conclude that changing Article

110. *Id.* ¶ 16 (quoting *Moses v. Skandera*, 2015-NMSC-036, ¶ 27, 346 P.3d 396).

111. *Id.* ¶ 36.

112. LARSON, *supra* note 31, at 224.

113. *See id.*

114. *Id.* at 218.

115. *Id.* at 244.

116. Enabling Act for New Mexico of June 20, 1910, H.R. 18166, 61st Cong., § 4 (1910).

117. *See* LARSON, *supra* note 31.

118. *Id.* at 225–26, 243.

119. S. Rep. No. 61-454, at 25 (1910).

120. LARSON, *supra* note 31, at 225.

XII, Section 3 to include all private schools was an intentional act by the drafters to remove express discrimination against its Catholic schools and still comply with the Enabling Act. Even though this connection may be weak, there is no strong evidence that the drafters' intentions in adopting Article XII, Section 3 were discriminatory. In absence of that evidence, Article XII, Section 3 was likely not adopted with discriminatory intent at the state level. This leads to the question of whether the history of the Blaine Amendment and its inclusion of the Enabling act is strong enough to overcome the presumption that Article XII, Section 3 was not adopted with discriminatory intent.

B. The weak connection between the federal Blaine amendment and Article XII, Section 3

The scholarship on New Mexico's long road to statehood and the pervasive anti-Catholic sentiment across the country suggest that a reasonable court could determine that Article XII, Section 3, was adopted with discriminatory intent under a traditional analysis.¹²¹ However, there is also a strong argument that the national history was not sufficiently connected to the adoption of Article XII, Section 3 in New Mexico. Therefore, under the analysis proposed by this Note, Article XII, Section 3 was probably not adopted with a discriminatory intent.

The court gave considerable deference to the history of the federal Blaine amendment and Congress's intentions when it included the Blaine amendment in the Enabling Act. If the court would have given more significant deference to the New Mexico's intent behind Article XII, Section 3, *Moses III* might have been decided differently.

As the dissent in *Moses III* points out, the majority opinion found that Article XII, Section 3 is "guilty by association" with the Enabling Act and the Blaine Amendment.¹²² While many scholars have established that the federal Blaine Amendment was motivated by anti-Catholic animus,¹²³ not much scholarship has focused on the variety of reasons that different states have adopted provisions similar to the Blaine amendment in their constitutions.¹²⁴ This may be due to the lack of state constitutional and legislative histories surrounding the adoption of each state's own no-funding provision, whereas the historical record surrounding the federal Blaine amendment is substantial.¹²⁵ However, if state courts use the history of the federal Blaine amendment in their analysis of their state constitution, they should also attempt to discover the history and unique circumstances surrounding their adoptions at the state level.

Even before the Blaine amendment was proposed in Congress, states were starting to include their own no-funding provisions in their state constitutions, some

121. See *Moses v. Ruskowski*, 2019-NMSC-003, ¶ 39.

122. *Id.* ¶ 70 (Nakamura, C.J., dissenting).

123. See Viteritti, *supra* note 7; DeForrest, *supra* note 6; Garnett, *supra* note 21; Ward M. McAfee, *The Historical Context of the Failed Federal Blaine Amendment of 1876*, 2 FIRST AMEND. L. REV. 1 (2004); Borders, *supra* note 13.

124. Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 329.

125. *Id.* at 329.

of which had nothing to do with nativism and anti-Catholic animus.¹²⁶ Even if the Blaine amendment was never proposed or made a national issue, many states probably would have still adopted their no-funding provisions.¹²⁷ Therefore, states should be cautious about interpreting their own versions of the Blaine amendment in light of the federal Blaine amendment.

New Mexico's adoption of Article XII, Section 3 is different from other states that adopted provisions similar to the Blaine amendment either before the Blaine amendment was proposed or of their own volition after it failed in the Senate. Congress included the Blaine amendment in the Enabling Act granting New Mexico the authority to form a constitutional convention to draft a new constitution and gain admission to the United States.¹²⁸ However, there is no obvious evidence in the legislative history of the Enabling Act that suggests Congress included the Blaine amendment for a specific reason. The original House Bill for the Enabling Act included the Blaine provision.¹²⁹ The House Report on the bill indicates that the Blaine provision was incorporated as a matter of practice, consistent with previous enabling acts.¹³⁰ Additionally, the House Report does not specifically indicate any prejudice toward Catholics in New Mexico. The report found that there were 93,894 children of school age in New Mexico when a school census was taken in 1908, and, of those children, 6,000 were enrolled in over fifty sectarian schools.¹³¹ The report went on to state, under the Section "Qualifications for Statehood," that New Mexico had "an excellent school system."¹³²

In *Moses III*, the New Mexico Supreme Court discussed the obstacles the New Mexico territory had to overcome in its drawn-out battle for statehood.¹³³ The majority highlighted the conflict between the system of Catholic schools native New Mexicans favored and the central public school system favored by Anglo-American transplants.¹³⁴ The opinion also highlighted the conclusion by Holscher that the prospects of New Mexico becoming a state depended on its education system and whether it was free from Catholic influence.¹³⁵ While there is no doubt this desire for New Mexico's school system to be free from Catholic influence affected the way New Mexico changed its schooling system to help its case for statehood, it does not explain what actually motivated Congress to include the Blaine Amendment in the Enabling Act. New Mexico had a centralized public school system in place for

126. *Id.* at 312.

127. *Id.* at 332.

128. Enabling Act for New Mexico of June 20, 1910, H.R. 18166, 61st Cong., § 8 (1910).

129. H.R. 18166, 61st Cong. (1910).

130. H.R. Rep. No. 61-159, at 1 (1910). ("The whole bill is drawn to conform as nearly as may be to the language of previous enabling acts, and contains such provisions as may in their nature be common to all.")

131. *Id.* at 7.

132. *Id.*

133. See *Moses v. Ruskowski*, 2019-NMSC-003, ¶¶ 37-40.

134. *Id.* ¶ 39 (citing KATHLEEN HOLSCHER, RELIGIOUS LESSONS: CATHOLIC SISTERS AND THE CAPTURED SCHOOLS CRISIS IN NEW MEXICO 38 (2012)).

135. *Id.* (citing HOLSCHER, *supra* note 134, at 38).

almost twenty years by the time Congress passed the Enabling Act in 1910.¹³⁶ There is no discernable evidence in the history of the Enabling Act to suggest that the Blaine Amendment was included in the Enabling Act in response to the state of the New Mexico public education system twenty years prior to the time the Enabling Act was passed.

There is not a significant connection between the history of the federal Blaine Amendment and the adoption of Article XII, Section 3 of the Constitution. Therefore, the history of the federal Blaine Amendment is not strong enough to overcome the presumption that Article XII, Section 3, was adopted without discriminatory intent in New Mexico.

IV. THE RESTRICTIVE INTERPRETATION OF “SUPPORT” IS A PROPER INTERPRETATION OF ARTICLE XII, SECTION 3.

In *Moses II*, the New Mexico Supreme Court concluded that the IML violated Article XII, Section 3.¹³⁷ The court interpreted the plain language of Article XII, Section 3, the history of its adoption, and its subsequent history.¹³⁸ It concluded that Article XII, Section 3, prohibits both direct and indirect support of private schools, adopting a restrictive interpretation of what “support” means in the context of Article XII, Section 3.¹³⁹ Indirect support included support of private school parents and students, as the court determined the IML does.¹⁴⁰ The Supreme Court concluded that a restrictive interpretation fulfilled the intent of Article XII, Section 3, to not provide any money for sectarian schools, but “did not attach any significance to the inclusion of private schools in Article XII, Section 3.”¹⁴¹

In *Moses III*, the New Mexico Supreme Court adopted a permissive interpretation instead of a restrictive interpretation of Article XII, Section 3, to avoid Free Exercise concerns as applied to the IML.¹⁴² If Article XII, Section 3 tracked the language of the federal Blaine amendment and the Enabling Act and did not encompass all private Schools, the New Mexico Supreme Court would have been correct to use a permissive interpretation of “support” to avoid Free Exercise concerns that are raised by the intent of the federal Blaine amendment based on the United States Supreme Court’s holding in *Trinity Lutheran*. However, Article XII, Section 3 encompasses all private schools, not just religious schools.¹⁴³ The intent behind Article XII, Section 3 was to avoid discriminating against certain religions and instead ensure that no private schools receive support from the state. The New Mexico Supreme Court should have honored that intent and used the restrictive approach as it did in *Moses II*.

136. *Id.* ¶ 41.

137. *Moses v. Skandera*, 2015-NMSC-036, ¶ 40, 367 P.3d 838.

138. *Id.*

139. *Id.* ¶ 30.

140. *Id.*

141. *Moses v. Ruskowski*, 2019-NMSC-003, ¶ 21, 458 P.3d 406.

142. *Id.* ¶ 46.

143. N.M. Const. art. XII, § 3.

Even if the court disagreed about the intent of Article XII, Section 3, *Trinity Lutheran* should not have altered the decision the New Mexico Supreme Court originally made in *Moses II*. As the dissent in *Moses III* points out, *Trinity Lutheran* did not address “other forms of discrimination” besides the express discrimination based on religious identity that Missouri had engaged in when it administered the playground grant program.¹⁴⁴ Since *Moses* is not a case of express discrimination, and the New Mexico Supreme Court in *Moses II* did not analyze the case as one of express discrimination, the holding in *Trinity Lutheran* should not have altered the analysis of the case.

The United States Supreme Court’s recent decision in *Espinoza v. Montana Department of Revenue*,¹⁴⁵ although more closely related to *Moses* in the facts of the case, should not alter the analysis of *Moses* as it stood after *Moses II*. In *Espinoza*, the Montana Supreme Court held that a program that provided scholarships to be used at any private school, even religious schools, violated Montana’s “no-aid” provision, which is derived from the federal Blaine amendment.¹⁴⁶ The United States Supreme Court reversed the Montana Supreme Court because the Montana Supreme Court’s interpretation of its no-aid provision violated the Free Exercise Clause.¹⁴⁷ The Court rejected Montana’s argument that the Montana Supreme Court’s decision barred religious use of the fund, and compared the Montana policy to Missouri’s policy in *Trinity Lutheran* to explain that prohibiting scholarship funds from being used at religious schools is discrimination based on religious status.¹⁴⁸ Montana’s no-aid provision only prohibits aid to institutions controlled by any church, sect, or denomination.¹⁴⁹ *Espinoza*, like *Trinity Lutheran*, addressed express discrimination, which was not alleged in *Moses II*. Even if *Moses III* had been decided after *Espinoza*, *Espinoza* should not have altered the New Mexico Supreme Court’s analysis in *Moses II*.

The New Mexico Supreme Court’s holding allows the IML to continue as it has been operating since the 1950s, so the decision will not have a large fiscal impact. However, since the New Mexico Supreme Court applied *Trinity Lutheran*’s analysis despite its limitation to *express* discrimination, private schools may look for additional funding for other programs similar to the playground resurfacing program at issue in *Trinity Lutheran*. Under the Free Exercise and Equal Protection clauses, private and religious schools should receive general services like police and fire response.¹⁵⁰ However, there is a question of whether private schools should receive funding for projects such as facilities upgrades, technology upgrades, and even playground upgrades. The court’s final decision in *Moses III* could bring up any number of challenges to New Mexico Public Education Department programs that deny these types of funding to private schools.

144. *Ruszkowski*, 2019-NMSC-003, ¶ 58 (Nakamura, C.J., dissenting).

145. 140 S. Ct. 2246 (2020).

146. *Id.* at 2253.

147. *Id.* at 2263.

148. *Id.* at 2256.

149. MONT. CONST. art. 10, § 6.

150. *See* *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947).

CONCLUSION

In *Moses v. Ruszkowski*, the New Mexico Supreme Court gave more deference to the history of a New Mexico constitutional provision at the federal level than to its history at the state level. Instead, state courts analyzing the state constitution should look at the history of a constitutional provision in light of its history in the state first, then look at history at the federal level. Being more deferential to state history when interpreting a state constitution aligns with the principles of federalism and state sovereignty. The decision in *Moses v. Ruszkowski* as it stands now could open up the door to private schools to request additional public funding for programs that are available to public schools and may support and advance the mission of the private schools.