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FREE EXERCISE, PEA GRAVEL, AND JAMES G. BLAINE

TRINITY LUTHERAN CHURCH OF COLUMBIA V. COMER, EXPLAINED

By Michael Q. McShane

Back in 2012, Trinity Lutheran Church in Columbia wanted to resurface the playground at its preschool. At the time, the playground stood on a layer of pea gravel, which, for those fortunate few of you who lack first-hand experience taking a header onto it, can scrape the knees and palms of young children.

Lucky for the children at Trinity, the state of Missouri operates a tire recycling program that reimburses organizations that purchase recycled tires, so that organizations with playgrounds can resurface them with a softer material. Private schools and nonprofits as well as public schools are free to apply. Trinity Lutheran applied to the program, and its application was rated by the state as the 5th best of the 44 that it received.[1] That's why it came as a surprise when their application was rejected. The cause? Religion.

The State of Missouri argued, and has continued to argue all the way to the U.S. Supreme Court, that assisting Trinity Lutheran in resurfacing its playground would violate Missouri's constitution, which explicitly bars the support of religious organizations. Trinity and the dozens of organizations that have filed

amicus briefs on its behalf argue that failing to provide the funding strictly because Trinity is a religious organization is discrimination.

This case is about more than just playgrounds. The government regularly works with religious organizations to provide needed social services to citizens. What's more, as private school choice programs proliferate around the country, they run into state constitutional amendments (called "Blaine" amendments) barring state support of religious institutions. If these amendments amount to discrimination and violate the constitution, the court could find their enforcement unlawful. Such a finding could dramatically change the landscape for school choice in Missouri.

But before we get there, we should start at the beginning. Where did these constitutional amendments that Missouri is using to bar Trinity from participating come from? Some history can help us understand the questions at issue today.

"BLAINE, BLAINE, JAMES G. BLAINE, THE CONTINENTAL LIAR FROM THE STATE OF MAINE"

Anti-Catholic bigotry has a long and ignominious history in our nation. In 1643, the Virginia Colony passed a law stating:

> *that no popish recusants should at any time hereafter exercize the place or places of secret councellors, register or comiss: surveyors or sheriffe, or any other publique place, but be utterly disabled for the same….And it is further enacted by the authoritie aforesaid that the statute in force against the popish recusants be duely executed in this government, And that it should not be lawfull under the penaltie aforesaid for any popish priest that shall hereafter arrive to remaine above five days after warning given for his departure by the Governour or comander of the place where he or they shall bee. . . .*[2]

It wasn't just Virginia. Massachusetts, now one of the most Catholic states in America, banned Catholic priests from its territory on May 26, 1647.[3] By the time of the American Revolution, overt anti-Catholic bigotry had calmed down. George Washington himself was a strong promoter of religious tolerance. With the drafting of the First Amendment to the Constitution, freedom of religion was enshrined for all Americans. Subsequent waves of Catholic immigrants, though, would cause anti-Catholicism to rear its head again.

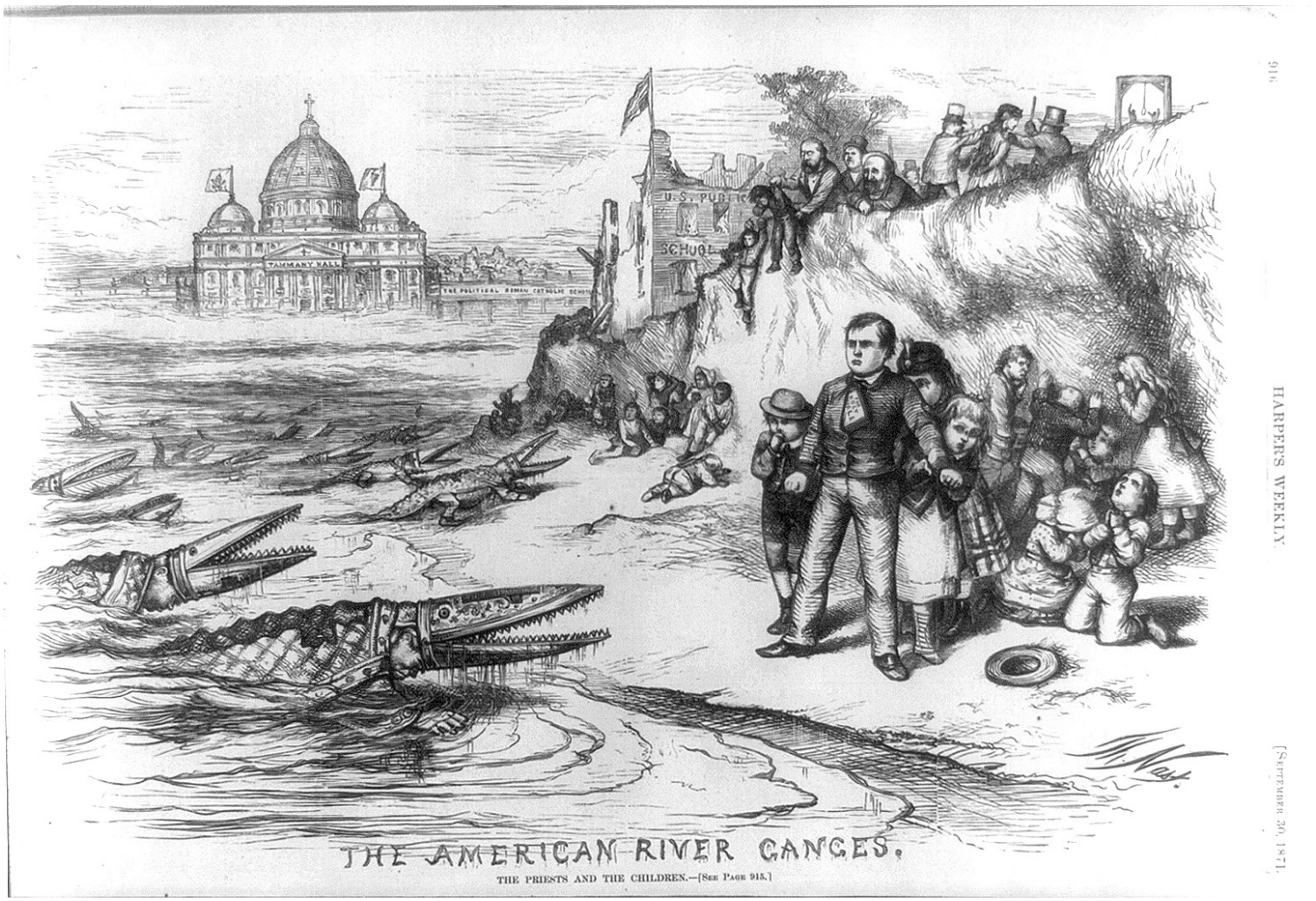
One of the most notable clashes between Catholic and anti-Catholic forces occurred in Philadelphia in 1844. At that time most "public" schools were nominally Protestant in character. Students would sing hymns, pray Christian devotionals, and read from the King James Bible. The growing (predominantly Irish) Catholic population chafed against these practices, and the Catholic Bishop, Francis Kenrick, asked the school board if Catholic students could read from the Catholic Bible instead. The board acted understandingly, allowing students both to read from their version of the Bible and to sit out of any religious instruction that conflicted with their religious teachings.

Know-Nothing forces, however, used this episode to stir up anti-Catholic sentiment, arguing that Catholics were trying to reshape the schools to fit their needs. Catholics attacked a meeting held by a nativist group, which set off days of rioting that resulted in two Catholic churches being burned to the ground.[4]

Out of this milieu rose James G. Blaine, who was Speaker of the U.S. House or Representatives from 1869 to 1875, a U.S. Senator representing Maine from 1876 to 1881, and the Republican nominee for President in the 1884 election. There is some historical debate as to whether Blaine himself was an anti-Catholic bigot, or whether he simply saw pursuing nativism as a political advantage. In any case, in 1875 he proposed a change to the First Amendment that would have it read:

> *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.*

While the language looks benign to modern eyes, using the telltale word "sect" at the time made it clear that he was talking about Catholics. The nation's leaders at the time did not have a problem funding religious schools, as



"public" schools at the time were religious in nature. They had a problem when Catholics asked to be accommodated. As Justices Thomas, Rehnquist, Scalia, and Kennedy argued in their plurality opinion in *Mitchell v. Helms* in 2000:

> *Opposition to aid to "sectarian" schools acquired prominence in the 1870s with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."*[5]

Although the amendment passed the House, it was thwarted in the Senate, but 38 states nevertheless adopted Blaine-type language into their own Constitutions. It also didn't stop nominal protestant education in public schools. In fact, prayer in schools was not ruled unconstitutional until *Engel v. Vitale* in 1962.

Missouri is one of the states that adopted a Blaine Amendment. In fact, it has two variations of the Blaine Amendment. In Article I, Section 7, the Missouri Constitution states:

> *that no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.*

In Article 9, Section 8, it states:

> *Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.*

As one might imagine, a lot hinges on what it means for the state or a municipality to "aid" a religious organization. Does giving a student a Bright Flight scholarship to go to Saint Louis University constitute aid? What about a voucher to attend Calvary Lutheran elementary school? How about recycled tires for Trinity Lutheran's playground?

But on a deeper level, it raises the question: Does singling out religious groups for exclusion from government programs constitute discrimination? When religious organizations perform "secular" functions like feeding and clothing the homeless, or educating children, providing healthcare, can the government provide financial assistance without "establishing" a state religion or "aiding" that religion? If either is true, do Blaine Amendments violate the U.S. Constitution?

These are some of the questions at stake in *Trinity Lutheran Inc. v. Comer*.

THE CASE AT HAND

The *Trinity Lutheran* case is not the first time that Missouri's Blaine Amendment has been reviewed by the courts. In fact, at least 12 different court cases have intersected with the amendment.[6] Most prominently, in *Americans United v. Rogers* in 1976, the Missouri Supreme Court ruled that grants for higher education do not violate the state's Blaine Amendment because they promote a public purpose (higher education) and religious institutions only benefit incidentally. Also in 1976, the United States Court of Appeals for the Eighth Circuit ruled that Missouri private school students qualified for federal remedial education programs, overruling the Missouri Supreme Court in *Barrera v Wheeler*.[7]

According to legal experts, the Trinity case hinges on several issues.[8]

First, Trinity Lutheran believes that Missouri violated the free exercise clause of the United States Constitution when the state prohibited it from participating in the tire recycling program. Trinity argues that the program had nothing to do with religion, but because of its religious affiliation, Trinity Lutheran was prohibited from participating. This exclusion penalizes religious groups that simply want to participate in otherwise neutral government programs. It prevents them from being able to freely exercise their religion.

Second, Trinity Lutheran believes that Missouri violated the equal protection clause enshrined in the 14th Amendment when the state singled Trinity out because of its religious affiliation. Trinity believes that it was unfairly maligned and that the state had no compelling reason to exclude religious groups from this program.

As lawyers representing multiple Catholic groups, the Church of Jesus Christ of Latter Day Saints, the Salvation Army, and the Synod of the Reformed Church in America argue in an *amicus* brief supporting Trinity, the "overt discrimination against Trinity Lutheran based on its religious status requires Missouri to demonstrate that its exclusion of religious organizations from the Scrap Tire Program serves a compelling government interest that cannot be achieved through nondiscriminatory means."[9] They argue that the state did not meet this standard. They state that "a rubber playground surface cannot be used to advance religion," the program "would result in no government-sponsored religious indoctrination," and "allowing religious schools to participate in the program on equal terms would not result in excessive entanglement."[10]

The Institute for Justice contends in its *amicus* brief, "the Religion Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, demand neutrality—not hostility—toward religion."[11]

The lawyers representing the religious groups close their brief with perhaps the strongest argument, which is worth quoting in full. After reminding readers that religious organizations like Habitat for Humanity and a myriad of other organizations help administer the federal Temporary Assistance to Needy Families program, they write:

> *These and countless other faith-based organizations deliver essential services to marginalized and at-risk individuals and communities, while simultaneously alleviating the government's burden of delivering aid. Under the rule adopted below, however, religious institutions would have no constitutional protections against being excluded from these programs solely because of their religious status. If Missouri can deny Trinity Lutheran access to playground rubber because of its religious affiliation, then states could deny funding to Habitat for Humanity or a church-run Meals on Wheels service on the same discriminatory basis. Such a result would be untrue to our national tradition and would inflict a palpable injury on both religious institutions and the many Americans who rely on them to deliver vital social services.*[12]

And here the argument broadens. If Missouri's decision is upheld, what effect will it have on the panoply of religious organizations that provide vital services to communities all across the country?

WHY A RECYCLED TIRE PROGRAM MATTERS

This case is about a lot more than replacing pea gravel on a playground in Columbia. It is about all of the institutions and organizations that make up the diverse tapestry of American life. And, for my purposes as an education researcher, it intersects with the ability of religious schools to teach children.

Blaine Amendments thwart school voucher programs, which allow public funds to follow children into the school of their choice, even if that school is religious. While the U.S. Supreme Court ruled in 2005's *Zelman v. Simmons-Harris* that the Cleveland school voucher program did not violate the establishment clause because the funds went to families and not schools (and thus schools only incidentally benefited from a program that was neutral to religion in its administration) state supreme courts have invoked Blaine amendments when striking down state-level voucher programs.

The invocation of Blaine amendments is a problem because voucher programs offer more choices to students in areas where quality options are lacking. Private religious schools, and particularly Catholic schools, have a long and proud tradition in educating children and have a history of providing quality education for poor and minority students. Starting with the research of James Coleman in the early 1980s, study after study has shown a positive impact of Catholic schools on students across a variety of indicators.[13] Many of these effects seem most pronounced in students of greatest need.[14] That should be enough in and of itself, but Catholic schools also have been shown to be anchors of communities—and when they close, crime rises. In their landmark book *Lost Classroom, Lost Community,* economist Margaret Brinig and law professor Nicole Stelle Garnett document the effect of Catholic school closures in Chicago. Their findings were unambiguous: When Catholic schools close, the communities where they were formerly located see increases in disorder and crime and decreases in social cohesiveness.[15] Unfortunately, Catholic schooling has been on a steady decline in recent decades as changes in the Catholic education labor force (from religious to lay staff) have increased costs to a point that many low-income families cannot afford it.

Voucher programs can help match students to the environment that best fits their needs, whether that environment is in a religious or nonreligious setting. In nations around the world, public funding following students into schools with religious character or religious traditions is not even given a second thought. Last time I checked, neither the Netherlands nor England nor Sweden had fallen into a theocracy. In fact, quite the contrary.

Striking down Blaine Amendments would be a huge step in widening the options available to students, and for this reason everyone in the nation should be invested in the outcome of this case.

CONCLUSION

In 1925, the U.S. Supreme Court struck down the Oregon Compulsory Education Act, which required all students in the state to attend public schools. It was a law promoted by no less ignominious an organization than the Ku Klux Klan and was challenged by an order of Catholic nuns, the Society of Sisters. In the opinion of the court, Justice James Clark McReynolds (who was not personally known for his religious tolerance) wrote:

> *The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*[16]

"The child is not the mere creature of the state." Private and religious schooling had already demonstrated in 1925 a long tradition of useful and meritorious service to their communities. Families have a right to choose the school that best fits the needs of their child. All of these issues were decided nearly 100 years ago.

Yes, it is true that allowing funding to follow children into these schools is a more substantial step than the one under question in *Pierce v. Society of Sisters*. Asking for recycled tires for a playground is as well, I guess, but barely. It is not, however, out of step with the long, proud tradition in our nation of leveraging private, often religious, organizations to serve the public good. The civil society is American as football and apple pie.

Indeed, in Alexis de Tocqueville's great treatise on American democracy from 1840, he observed:

> *Americans combine to give fêtes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association. I have come across several types of association in America of which, I confess, I had not previously the slightest conception, and I have often admired the extreme skill they show in proposing a common object for the exertions of very many and in inducing them voluntarily to pursue it.*[17]

We are a people who believe in decentralized power and the division of labor among our citizens. We have joined churches and donate to nonprofits and volunteer our time to help our neighbors in need. This sense of individual duty is part of what has made and continues to make America the Shining City on a Hill.

Blaine Amendments hail from a time and evoke memories of individuals and ideologies that wished to shade our glow and snuff our fire. They deserve their place in the ash heap of history.

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NOTES

1. Howe A; SCOTUSblog. "Introduction: More than just a playground dispute." Available at: http://www.scotusblog.com/2016/08/introduction-more-than-just-a-playground-dispute/. Accessed April 5, 2017.
2. Virtual Jamestown. "Laws and Documents relating to religion in early Virginia, 1606–1660. Available at: http://www.virtualjamestown.org/rlaws.html. Accessed April 5, 2017.
3. Bilis M; Boston Daily. "Throwback Thursday: When Catholic Priests Were Banned from Massachusetts." Available at: http://www.bostonmagazine.com/news/blog/2016/05/26/catholic-priests-banned-massachusetts/. Accessed April 5, 2017.
4. Coval J, Wilson K. "City of Unbrotherly Love: Violence in Nineteenth-Century Philadelphia." Available at: http://webcache.googleusercontent.com/search?q=cache:http://hsp.org/sites/default/files/legacy_files/migrated/thephiladelphiariotsof1844.pdf. Accessed April 5, 2017.
5. U.S. Commission on Civil Rights. "School Choice: The Blaine Amendments & Anti-Catholicism. Available at: http://www.usccr.gov/pubs/BlaineReport.pdf. Accessed April 5, 2017.
6. Komer RD, Neily C; Institute for Justice. "School Choice and State Constitutions: A Guide to Designing School Choice Programs." Available at: https://www.ij.org/images/pdf_folder/school_choice/50statereport/50stateSCreport.pdf. Accessed April 5, 2017.
7. Ibid.
8. Howe A. "Introduction: More than just a playground dispute."
9. "Brief of the United States Conference of Catholic Bishops, et al. filed," pp. 7–8. Available at: http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranMeritsAmicusUSCCB.pdf. Accessed April 5, 2017.
10. Ibid., pp. 20–21.
11. "Brief of Institute for Justice as Amicus Curiae in Support of Petitioner." Available at: http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranMeritsAmicusIJ.pdf. Accessed April 5, 2017.
12."Brief of the United States Conference of Catholic Bishops, et al. filed," pp. 28.
13. Coleman J, Hoffer T, Kilgore S. "Cognitive Outcomes in Public and Private Schools." *Sociology of Education* 55:2, 1982. Available at: http://www.jstor.org/stable/2112288?&Search=yes&term=1982%3B&term=Kilgore%2C&term=Coleman%2C&term=Hoffer%2C&list=hide&searchUri=%2Faction%2FdoBasicSearch%3Ffilter%3D%26Query%3DColeman%252C%2BHoffer%252C%2B%2526%2BKilgore%252C%2B1982%253B%2B%26x%3D0%26y%3D0%26wc%3Don%26acc%3Don&item=6&ttl=507&returnArticleService=showFullText. Accessed April 5, 2017; Bryk AS, Holland PB, Lee VE. *Catholic Schools and the Common Good*. Cambridge, MA: Harvard University Press, 1993; Grogger J, Neal DA. "Further Evidence on the Effects of Catholic Secondary Schooling." Brookings-Wharton Papers on Urban Affairs, 2000. Available at: http://muse.jhu.edu/article/35575. Accessed April 5, 2017.
14. York, D. "The academic achievement of African Americans in Catholic Schools: A review of the Literature," in *Growing Up African American in Catholic Schools*, ed. Irvine JJ, Foster M. New York: Teachers College Press, 1996; Neal DA. "Measuring Catholic School Performance." *Public Interest* 127, 1997, pp. 81. Neal DA. "The effects of catholic secondary schooling on educational achievement." *Journal of Labor Economics* 15: 1, 1997, pp. 98–123.
15. Brinig MF, Garnett NS. *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America.* Chicago: University of Chicago Press, 2014.
16. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
17. Tocqueville A. *Democracy in America*. Translated by Henry Reeve. Charlottesville, VA: University of Virginia Library, 2000.

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