Constitutional Corner – Mr. Gorsuch, Tear Down This Wall![1]

In the years immediately before and especially after the Civil War, Catholics began making up an increasingly large percentage of immigrants coming to the U.S.

> "The Catholic citizens of Italy, Poland, parts of Germany, and the Eastern European kingdoms of what are now Slovakia and the Czech Republic began to cast their eyes towards America. The country had a growing world reputation for democratic ideals and work opportunity. For these peoples, as well as for French Canadian Catholics to the north of the United States and Mexican Catholics to the south, the chance for a new life free of poverty and oppression was too good to pass up. Millions of sons, fathers, and later whole families left behind their former lives and possessions and boarded crowded ships sailing for New York."[2]

In 1850, Catholics were only five percent of the U.S. population. By 1906, they made up seventeen percent (14 million out of 82 million people)—and had become the single largest religious denomination in the country.[3]

Protestantism, however, with its many denominations, was still the dominant faith and was thoroughly infused in the public schools of the time. Each school day began with prayer and bible reading, from a Protestant version of the Bible, of course. Soon, Catholics and Jews began objecting to being excluded from this decidedly Protestant activity and began forming schools of their own. It was not long before Catholics began asking for (and getting) public funding of their schools similar to that provided the "common schools."

In an 1875 speech to a veteran's meeting, President Ulysses S. Grant called for a Constitutional amendment that would mandate free public schools and prohibit the use of public money for any and all "sectarian" (i.e. Catholic or other denomination-run) schools. Grant declared that "Church and State" should be "forever separate." Religion, he said, should be left to families, churches, and private schools unsupported by public funds.[4]

In response to the President's call, Republican Congressman James Blaine of Maine (say that three times, fast) proposed Grant's amendment. It passed with a vote of 180 to 7 in the House of Representatives, but failed the 2/3 requirement by four votes in the Senate and thus was not sent to the States for ratification.

The proposed Amendment read:

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[1] With apologies to Ronald Reagan, Berlin, June 12, 1987.
[2] http://www.nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/nromcath.htm
[3] Ibid.
[4] https://en.wikipedia.org/wiki/Blaine_Amendment

> "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."

Essentially, this would have extended the First Amendment's Establishment Clause to the States[5] as well as address Grant's school funding concern.[6] Remember, this occurred prior to the 17th Amendment, when States still appointed and thus controlled their Senators. Given its overwhelming support in the House when compared with that of the Senate, pressure exerted by State legislatures on their appointed Senators seems the likely cause of the Senate-failure.

Seeing the amendment fail in Congress, States took the hint and began incorporating what would come to be called "Blaine Amendments" in their state constitutions; Missouri would do so in 1875, forming Section 7 of their Bill of Rights, which read (and reads today):

> "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."

Fast forward to the present.

One week ago, Judge Neil Gorsuch, formerly a judge on the 10th Circuit Court of Appeals in Denver, was finally confirmed by the U.S. Senate to sit on the U.S. Supreme Court. Democrats were determined to block the confirmation any way they could, partly in hope that a more liberal judge would be nominated to replace Gorsuch and partly out of hatred for having Judge Merrick Garland, President Obama's choice, blocked by Republicans using their majority position in the Senate. To prevent a filibuster from derailing the nomination, Republicans were forced to fall back on a rule change made in 2011 by then Majority Leader Harry Reid. Republicans used a parliamentary maneuver to interpret Reid's rule change to have included Supreme Court nominations and not just federal judges.

It is always interesting and somewhat amusing to see those on the Left, champions of democracy, don sackcloth and ashes when that same democracy fails them.

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[5] Notice also that the Blaine Amendment, coming as it did seven years after ratification of the 14th Amendment, clearly shows that those in Congress who passed the 14th did not understand that it should be interpreted to incorporate the Bill of Rights against the states.

[6] The Establishment Clause would not be incorporated against the States by the 14th Amendment until 1947 in *Everson v. Board of Education*.

On Monday, April 10th, Associate Justice Gorsuch took his oath (two of them to be precise) and immediately plunged into the study of the fourteen cases that remain to be settled in the Court's Fall 2016 schedule; three of them will heard on Monday the 17th.

The majority of these cases are pretty mundane. Here's an example: on April 26th the Court will hear *Amgen Inc. v. Sandoz Inc*. At Issue is: "whether a biosimilar applicant is required by Title 42 of the U.S. Code Section *somethingorother* to provide the reference product sponsor with a copy of its biologics license application and related manufacturing information, which the statute says the applicant "shall provide;" and whether, where an applicant fails to provide that required information, the sponsor's sole recourse is to commence a declaratory judgment under Title 42 Section *whocares* and/or a patent-infringement action under Title *neverheardofit* of the U.S.Code." (minor license taken with the text)

Everyone still with me? Pretty exciting stuff, eh?

But there is one case on the docket with a connection to the previous discussion. On Wednesday, April 19th the Court will hear *Trinity Lutheran Church of Columbia v. Comer*. On the docket, the issue is framed as: "Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern."

Here's what happened: A preschool and daycare affiliated with Trinity Lutheran Church of Columbia, Missouri, was denied a grant from the state of Missouri that would have provided public funds to the daycare center to purchase rubberized material (shredded used tires) with which to resurface their playground. The state's rationale for denying the grant was based on, you guessed it, Section 7 of the Missouri Bill of Rights, quoted earlier.

The Church argued that the funds would be used for a purely secular purpose, protecting the safety of the children playing on the playground, clearly not a religious purpose.

If you're interested, you can find the whole history of this case on Alliance Defending Freedom's website,[7] (they are defending the church), and you can read, at last count, thirty-eight amici briefs on the SCOTUSBlog website,[8] some in support, some arguing against the church's position.

On its face, the Missouri Constitution's provision in question is self-contradictory and blatantly discriminatory against religion – all religion in fact: "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion." Yes, but: "no… discrimination [shall be] made against any church, sect or creed of religion?"

[7] http://www.adfmedia.org/News/PRDetail/8831
[8] http://www.scotusblog.com/case-files/cases/trinity-lutheran-church-of-columbia-inc-v-pauley/

Public money will be dispensed, for clearly secular purposes, but no religious institution can avail itself of these funds simply because it is a religious institution.

Before we go further here, I should point out that some claim our public schools are decidedly religious enterprises, that they espouse the religion of secular humanism and inculcate unassuming children in that religion's tenets. If that be the case, and we wanted to apply Missouri's Blaine Amendment fairly, no public money should go to any public school. Obviously that view, while I support it, is not held by a majority of Americans, even many professing Christians.

But the question must be asked: Is everything a church does an exercise of religion? First Corinthians 10:31 proclaims "… whether you eat or drink or whatever you do*, do it all for the glory of God*."[9] Yes, everything we do should be done in such a manner that it will please God, but does that command alone make everything a religious activity? Should I brush my teeth in a manner that pleases God? Is there even a way to brush your teeth that pleases God, and a way that does not? I think that is a stretch. Brushing one's teeth is, to my view, a secular activity.[10] There is no guidance in the Bible (that I'm aware of) that instructs us in how (or even whether) to do this.

Likewise, I believe there are completely secular activities that a church performs that cannot or at least should not, be viewed as religious. Keeping their parking lots clean -- is this a religious activity? If you take 1 Corinthians 10:31 literally, I suppose it could be. But if a church allows their parking lot to be encumbered with trash, I think we would find it proper for the city to order them to clean it up. Keeping publically-accessible property clean is a completely secular, non-religious activity, subject, I think, to appropriate civil oversight. So would be maintaining a safe playground for their children. And if the playground contained hazardous or poorly maintained equipment that provoked injury to a child who used it, the church should expect to be sued, in <u>civil</u> court.

So here's the nub: if there are public funds available to assist organizations in maintaining playgrounds upon which the community's children (as well as the church's) are allowed to play, money provided by taxes to which the church's members along with the non-church public both contribute,[11] why can a church not avail itself of those funds for what is clearly a non-religious purpose?

I can understand the concern over the use of public funds to print Bibles, or pay ministers, or rent tents for an outdoor evangelistic campaign; that would clearly not be proper, those activities are fundamentally religious.

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[9] 1 Corinthians 10:31 NIV

[10] Yes, we are to "pray without ceasing," even while brushing our teeth; so I suppose the case could be made that brushing one's teeth includes religious activity.

[11] The money is collected from a fee placed on tire disposal.

I'm also cognizant of the "slippery-slope theory." If the Missouri Constitution's provision is deemed excessively hostile to religion in general (which I think it is) and some church use of public funds is to be allowed, where to you draw the line?

The Preamble to the Missouri Constitution, approved in 1821, reads:

> "We the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness, do establish this constitution for the better government of the state."[12]

This statement comports nicely with President George Washington's first Thanksgiving Proclamation, which read:

> "… it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor ..."[13]

It would appear Missourians are grateful to God, but not too keen about His churches.

At their core, Blaine Amendments were discriminatory in intent, to allow Protestantism to maintain its dominant position in public education. But thanks to the efforts of men like Horace Mann, John Dewey and others, Christianity has been successfully banished from public schools; even Christmas Carols are banned from the "winter holiday" program.[14] In this atmosphere, Blaine Amendments have been turned into a weapon in the secularists' arsenal. What began as a cudgel to beat down Catholics has become sledge to exclude any and all religions from enjoying the fruits of general taxation, and such amendments serve to feed the rising tide of hostility towards all religion in this country.[15]

But wait, isn't there to be an impenetrable wall of separation between Church and State?

The Supreme Court famously said so in 1947's Everson vs. Board of Education:

> "The 'establishment of religion' clause of the First Amendment means at least this: …[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect *'a wall of separation between Church and State*."[16]

As more eloquent commentators that I have said, an impenetrable, bi-directional wall was not what Jefferson had in mind as he penned his infamous letter to the Danbury Baptists. Space

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[12] http://www.moga.mo.gov/preamble.htm
[13] http://avalon.law.yale.edu/18th_century/gwproc01.asp
[14] http://www.huffingtonpost.com/2010/10/06/ban-on-school-christmas-c_n_751839.html
[15] http://www.frc.org/hostilityreport
[16] https://www.law.cornell.edu/supremecourt/text/330/1

doesn't permit a detailed analysis – perhaps another day. For the impatient, see here[17] and here.[18]

I believe most Americans understand the vital role that religion, Christianity particularly, played in the formation of this country. I'm convinced that without Christianity there would have been no revolution of 1776, period – end of story. "Independence was boldly preached from Scripture throughout the thirteen original States during the American Revolution."[19] "The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments of their duties and obligations."[20] Without Christianity being the dominant religion in the decades leading to 1776, I think we would be speaking today with a slightly different accent. Is there a debt owed here?

So the question before us is whether we are to have this impregnable, insurmountable wall between church and state; a wall contrived by a contorted interpretation of a single phrase found in a single letter of a single American President; or whether we are to acknowledge that churches, like individuals, contribute to the common good, pursue both secular and religious activities; and that their secular functions should be eligible to compete for public funds on an equal footing with secular non-profit organizations.

I propose we make a statement that *all* children should enjoy safe playgrounds and that we the taxpayers should help make it so.

There are those who will argue (and have) that the Supreme Court should never have taken this case; they should have called this is a state issue to be worked out at that level. But are "Blaine Amendments" constitutional? Do they conflict with the spirit and intent of the First Amendment? That is a question only the high Court can decide.

Others insist that the Scrap Tire Program is immoral: taking from one set of citizens to give to another, and that the church should abstain from participating on those grounds. That's certainly the church's choice, I would not begrudge it. While we're on the subject or government programs, I do not believe the federal government should have gotten involved in retirement planning (Social Security) or healthcare (Medicare), but I'm not turning away the benefits my payroll withholding helped create.

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[17] http://www.albatrus.org/english/goverment/church_&_state/false_separation_church_state.htm
[18] http://www.christianity.com/church/church-history/timeline/1801-1900/the-truth-about-the-wall-of-separation-11630340.html
[19] Library of Congress historian Catherine Millard in "Preachers and Pulpits of the American Revolution," found at http://christianheritagemins.org/articles/Preachers%20and%20Pulpits%20of%20the%20American%20Revolution.pdf
[20] John Adams, Letter to Hezekiah Niles, 13 February 1818.

I think Justice Gorsuch will side with me; but I don't know which side of a certain 5-4 split he will find himself on. Based on his 10th Circuit opinions in *Yellowbear v. Lampert, Hobby Lobby Stores, Inc. v. Sebelius,* and *American Atheists Inc. v. Davenport,* I think he will conclude that the Missouri Constitution's Blaine Amendment is overly hostile to religion and that granting public funds for this purpose does not create a conflict with the Constitution's Establishment Clause.

Missouri's Scrap Tire Grant Program has a secular purpose; awarding Trinity Lutheran the use of public funds for this purpose does not advance or establish their religion.

What say you, Justice Gorsuch? Should we start tearing down the wall?