



Narrow Opening for School Choice

But Blaine Amendments stand, for now

by JOSHUA DUNN

Supporters of school vouchers had hoped that the time was ripe for the Supreme Court to deliver a death blow to Blaine Amendments—the provisions in at least 37 state constitutions that forbid

public aid to sectarian institutions. But in ruling on *Trinity Lutheran Church v. Comer* this past June, the court declined to strike that blow. The court’s reasoning, however, does suggest that recent state-court decisions that rely on Blaine Amendments are unconstitutional because they discriminate against religious schools.

Trinity Lutheran began in 2012 when Missouri excluded the church’s preschool from the state’s scrap-tire grant program, which helps nonprofits use recycled tires to make playgrounds safer. Citing Missouri’s Blaine Amendment, the state Department of Natural Resources informed the church that it was ineligible for the program. The church sued in federal court and lost twice before the Supreme Court stepped in.

The court voted 7–2 in favor of *Trinity Lutheran*. The broad majority included four conservatives; Justice Anthony Kennedy’s swing vote; plus two liberals, Justices Stephen Breyer and Elena Kagan. In contrast, Chief Justice John Roberts’s opinion was narrow. He never mentioned Blaine Amendments and, in a footnote, explicitly limited the decision’s reach to discrimination “based on religious identity with respect to playground resurfacing.” He also distinguished between religious status and religious use, noting that Missouri discriminated against *Trinity Lutheran* simply because it was a church not because of what it proposed to do with the old tires. In a concurring opinion, Justice Neil Gorsuch contended that this distinction is unsustainable and, at any rate, should not matter under the free exercise clause: Religious people must be able to act on their beliefs; that’s what “exercise” means.

The court might soon have a chance to decide *Trinity Lutheran*’s reach. The day after announcing its decision in that case, the court vacated and remanded Blaine Amendment cases from New Mexico and Colorado, to be reconsidered in light of *Trinity Lutheran*. Applying even Roberts’s narrow reasoning should lead to different judicial outcomes and possibly more appeals to the Supreme Court.

New Mexico Association of Nonpublic Schools v. Moses involves a state textbook-lending program for public and private schools, both secular and sectarian. Lower courts upheld the program but the state supreme court struck it down, noting that the state Blaine Amendment forbids using “any” funds to support “any sectarian, denominational or private school.”

Under *Trinity Lutheran*, this position could be unconstitutional. The religious schools were singled out for exclusion simply because of their religious character not based on fears of how the textbooks (all of which are secular in nature) would be used.

Potentially more important is *Douglas County School District v. Taxpayers for Public Education*. In 2015, Colorado’s supreme court struck down Douglas County’s voucher program, saying that “a school district may not aid religious schools,” and, in the process, disparaged the program as a “recruitment tool” for

religious institutions. Once again, even Roberts’s narrow reasoning in *Trinity Lutheran* could compel Colorado’s supreme court to reverse course. Douglas County requires that sectarian schools accepting vouchers must let students opt out of religious services, making any distinction between religious status and use less relevant. More importantly, the Colorado court required discrimination

against parents simply because of their religious preferences. Parents who wanted to send their child to a religious school suffered on account of their religious status.

However, electoral politics could forestall Colorado’s supreme court from reversing itself on vouchers. Currently, Douglas County’s school board is split 4–3 in favor of the voucher program. Anti-voucher candidates won all three open board seats in 2015, and the pro-voucher members’ terms expire in November. If at least one anti-voucher candidate wins, the board will likely end the program and the case. The state supreme court would then dismiss it as moot. Colorado has seen vicious attacks on pro-reform school boards the past four years, with anti-reform advocates resorting to vulgarities, obscene gestures, and physical intimidation. Expect more of the same in Douglas County.

A final confrontation between Blaine Amendments and the First Amendment will require a live appeal of a decision that strikes down a voucher program by invoking a Blaine Amendment. If the anti-voucher forces succeed in Douglas County this November, that showdown will again be delayed. However, the substantial court majority in *Trinity Lutheran* suggests that, when such an appeal does reach the Supreme Court, there will almost certainly be four justices willing to hear it.

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