Mainer at heart of church/state separation case

BY NOAH FELDMAN
BLOOMBERG VIEW

Is the separation of church and state unconstitutional?

You read that right. The Supreme Court said Friday that it would consider whether Missouri's constitution, which bars state aid to religious groups, violates the U.S. Constitution by discriminating against religion.

This claim sounds crazy, and to those who wrote the Missouri constitutional provision in the 1870s, it would've been. But the claim, in fact, isn't utterly absurd — if you consider the historical circumstances in which the provision was drafted. And although it's a long shot to change existing church-state law, the case has the potential to be a landmark.

Start with the very simple facts: Trinity Lutheran Church of Columbia, Missouri, applied for state funds to improve its playground. Under the U.S. Constitution as interpreted by the Supreme Court, a church may get generally available funds from the government. But under Missouri's constitution, the church isn't eligible for the funds, so it can't get the money.

The relevant state provision — Article 1, Section 7 — says "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion … and that no preference shall be given to nor any discrimination made against any church, sect, or creed."

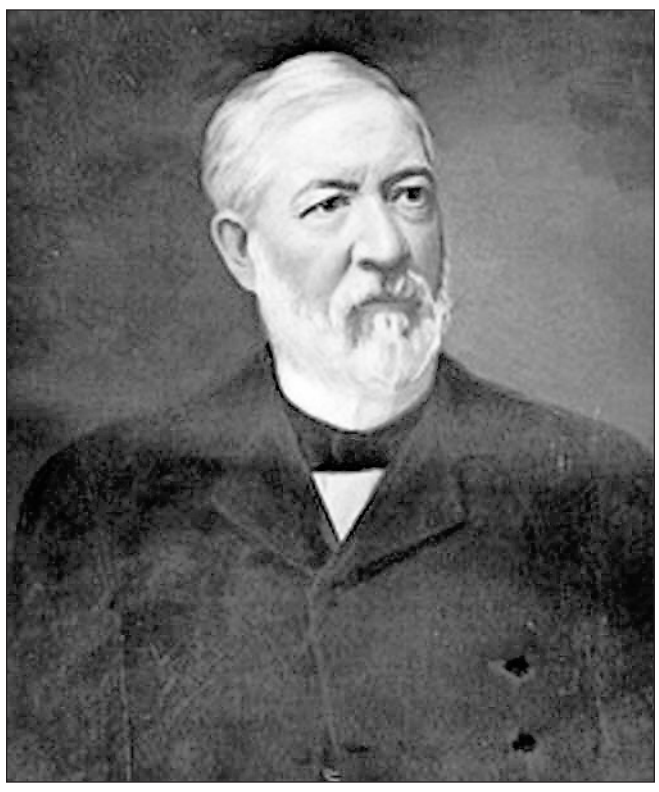
As written, this provision is framed more strongly than the Establishment Clause of the federal constitution, which never mentions money but says Congress may not enact an establishment of religion.

In a 2004 case, Locke v. Davey, the U.S. Supreme Court said that it was permissible for Washington state's constitution to bar state funding of religion to a greater extent than the Establishment Clause requires. Under that precedent, Trinity Lutheran would seem to have no case. Missouri can do what Washington does: protect the separation of church and state without violating the religious liberty of religious funding applicants.

Here's where things get complicated. The Missouri provision was adopted in 1875, in the wake of a national effort to pass a federal constitutional amendment that would have similarly enacted a ban on state funding of religious institutions. That effort was spearheaded by Maine Republican presidential candidate James G. Blaine, and the national amendment was nicknamed for him.

The Blaine Amendment was deeply politicized. At the time, it was understood by everyone to be targeted at Catholic institutions. The word "sectarian" was code for Catholic.

Republicans hoped to force Democrats into the tough political position of either supporting the amendment and alienating Catholic voters, or opposing it and letting themselves be criticized for opposing the separation of church and state. Republicans had gotten the idea from Ohio, where a brutal denominational fight over state funding of Catholic institutions had helped elect Gov. Rutherford B. Hayes.



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James G. Blaine, a Republican, represented Maine in the U.S. House from 1863 to 1876, including six years as speaker of the House. He also served in the U.S. Senate and as secretary of state on two occasions. He ran for president in 1884, losing to Democrat Grover Cleveland. Earlier in Maine, he was editor and co-owner of the Kennebec Journal and later editor of the Portland Daily Advertiser.

In congressional debates, concern for the separation of church and state was interspersed with blatant anti-Catholicism from Republicans. The federal amendment failed, but it arguably helped the Republicans reach a tie in the general election, which then led to the political deal that made Hayes president.

But numerous versions of the Blaine Amendment, or "baby Blaines," passed in other states. Missouri's provision is typical of them. In historic terms, the amendments played a meaningful role in strengthening the separation of church and state as an American ideal. They had little immediate effect in practice, since states already weren't funding Catholic institutions.

Historians of church-state relations, myself included, have pointed out the anti-Catholic origins of the state Blaine amendments. The crucial question for the U.S. Supreme Court is whether this aspect of the history should be used to render the state amendments inoperative as violations of free religious exercise of the equal protection of the law.

In Locke v. Davey, the court ducked the issue, saying it hadn't been shown that Washington state's constitutional provision, enacted more than 25 years after Missouri's, was a state Blaine.

The court could conceivably duck the issue again. Trinity Lutheran will argue that its case isn't covered by the Locke precedent because its playground-resurfacing project is different from the money at issue in that case, which prevented students from using scholarship money to major in theology. The court would then have room to say that where there isn't a strong connection to religion, states must give funding to religious institutions on equal terms with nonreligious ones. But the distinction with Locke is highly tenuous, since the court said in that case that the scholarship funding wouldn't have violated the Establishment Clause.

For Trinity Lutheran to win, it probably needs the court to go into the seedy history of the Blaine Amendment and say that state Blaine amendments violate federal equal protection laws because of the bias inherent in their adoption. Their best precedent is Romer v. Evans, a 1996 case in which the court struck down a Colorado state constitutional amendment that was inspired by anti-gay animus.

That outcome would be defensible but probably wrong. The Blaine history is certainly replete with nasty anti-Catholic bias reminiscent of today's Islamophobia. But the animus was at all times intertwined with a legitimate constitutional aim — namely, separation of church and state. And strong separation remains a plausible constitutional vision, even though the court no longer embraces it — for example, by allowing state funding of religious schools through vouchers.

Regardless of outcome, the case will be one for the history books.

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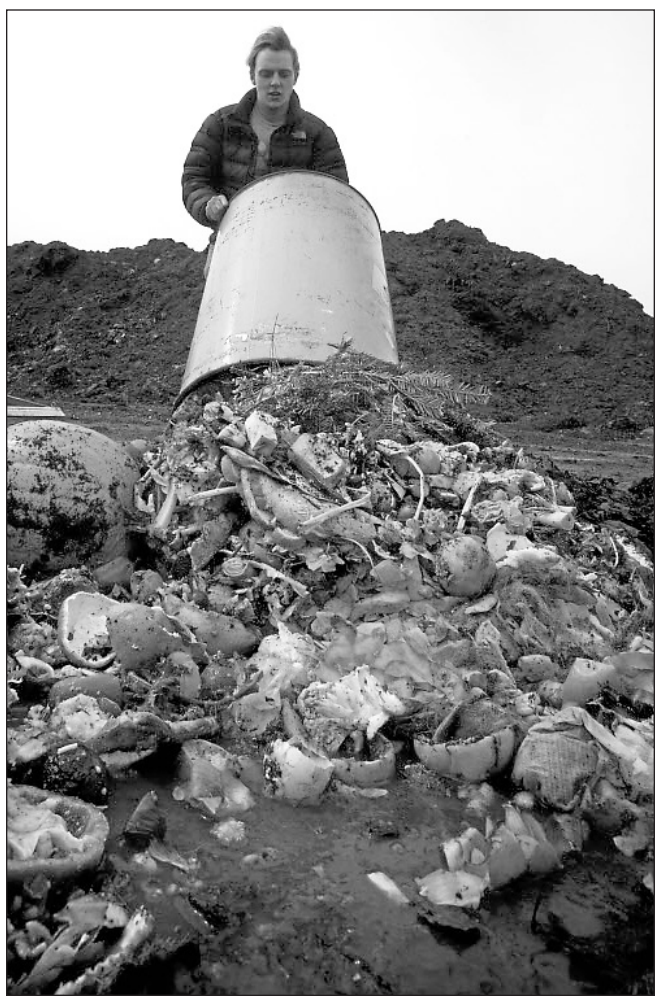
BRETT RICHARDSON

A We Compost It! truck (top) services residential clients in Portland. We Compost It!'s 100-acre composting facility (above) in Auburn. The company migrated to the Auburn location in 2015 as it expanded its organics diversion operation across southern Maine.



TROY R. BENNETT | BDN

Tyler Frank of Garbage to Garden empties a barrel of food scraps at Eddie Benson's dairy farm in Gorham, where the scraps would be turned into compost, in March 2013.

Compost

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Diversion programs often require new hauling routes in addition to existing trash and recycling routes as well as a shift in behavior in order to muster a high enough participation rate to keep a program's cost down. But adding routes or putting more trucks on the ground isn't a realistic option for ecomaine.

"Somehow we have to incorporate it in such a way that we won't need more trucks," Roche said.

ecomaine weighed two options aimed at adding the capacity to haul organics without raising costs.

One option was a pay-per-bag model in which residents buy special bags to store organics that are collected with the rest of the trash, then sorted at a processing facility. While transportation costs wouldn't rise, processing costs could unless ecomaine collected enough compost to make the extra processing effort worth it.

A second model was switching to every-other-week trash collection with weekly organics collection. It would offer residents an incentive to compost and generate less trash, since it would be collected less frequently. But the switch would involve a major change in disposal habits that could present a hurdle.

> About 43 percent of what Mainers send to landfills and incinerators is compostable, according to a 2011 study by the University of Maine School of Economics. Two-thirds of that is food.

To the north of ecomaine's service area, the 187 towns that make up the Municipal Review Committee are weighing a new solution for dealing with their solid waste. But that option — a yet-to-be-built facility in Hampden — would use organics in the waste stream to produce biogas, so towns that sign on would have limited ability to divert organics from their municipal waste.

'A steady solution'

While municipal composting has yet to take off, many residents and businesses across southern Maine have embraced composting by turning to the private sector.

Garbage to Garden collects food scraps and other organics every week from nearly 5,000 schools, businesses and households in seven Portland-area communities, charging $12.83 per month (they can get the service for free through its volunteer program). In Portland alone, about one in seven households composts food scraps with Garbage to Garden, according to founder Frank Tyler.

The Portland-based company last year diverted more than 2,200 tons of organics that would have otherwise gone to a landfill or incinerator, up from 121 tons in 2012, its first year.

"These figures are still only a fraction of the material that we can divert from the waste stream," Tyler said. "As time goes on our participation rate will continue to grow, aided by the influence of more schools and workplaces adopting composting."

Also for a monthly fee, Auburn-based We Compost It! collects compost every week from seven hospitals, 37 school cafeterias and about 100 restaurants from Lewiston-Auburn in the north to Wells in the south. In the last seven months, it has started offering curbside residential pickup in 10 communities in Cumberland and York counties.

It is even easing into municipal composting. Last year, Kennebunk gave We Compost It! a contract to offer its composting service to town residents. The town does outreach, and residents decide whether they want to pay for the service. In return, residents get a small discount (Kennebunk subscribers pay $8.26 per month, and Portland subscribers pay $8.99, for example).

"Kennebunk is the first town to take this step to get organics out of the waste stream," We Compost It! General Manager Brett Richardson said. "I hope more towns take a proactive approach like this."

About 200 households have signed up for the service since June 2015, Richardson said. He aims to grow participation to about 800 within the next year. Subscribers in Kennebunk divert about 1 ton of organics a week, he said.

Across its service area, Richardson estimates that We Compost It! subscribers diverted 4,000 tons of organics last year, up from 1,200 tons in 2012.

"It's not a fast solution but a steady solution," King, the environmental specialist, said. "As you get more and more people involved, you see big changes."

Better

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pulled away if you dare do something different. Meanwhile, the businesses that are supposed to create the traditional jobs are continually whacked with countless regulations, from the ACA to innumerable licensing and permitting requirements. It becomes a continual challenge to grow, reward personnel and provide value to customers. Perversely, this gives the vilified "big business" an advantage, as larger organizations have the scale to absorb the increased regulatory burdens.

There are two ways to correct this. First would be to eliminate government-run unemployment insurance, making it a private insurance policy like life insurance or short-term disability. That certainly is a market-driven ideal, with as much likelihood of occurring as Trump getting Mexico to pay for a wall or Sanders passing his too-good-to-be-true health plan and having it work as promised.

The second is reform of the unemployment program. But to do it correctly, it should be done comprehensively. That would require reconsidering several sacred political cows — Social Security, capital gains tax rates, unemployment, among others — in a thorough overhaul of social programs and the tax code. The lodestar of this reform should be incentivizing work agnostically, treating self-employment, entrepreneurship or work as a traditional employee equally. It could consolidate countless cash-distributing programs while eliminating double-taxation and marriage penalties.

The third option is to do nothing. And that will take us all the way to the scene of the crash. The gordian knot of benefit programs, an incoherent tax code and convoluted regulatory system will remain tied until someone provides the leadership to cut it. Hopefully someone will step forward to do so — maybe it's Paul Ryan, maybe it is someone else.

But whoever it is, let's hope they come forward soon and help get people back to work. After all, in the words of President Reagan, sharing the sentiment of Dr. King, "the best social program is a job."

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License

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for example, the Legislature passed a bill, signed into law by Gov. Paul LePage, prohibiting the use of facial recognition technology to issue ID cards.

None of the 32 bills the Legislature is considering this session concern Real ID compliance. So it's unlikely the Legislature will move to get into compliance in light of the latest deadline set by Homeland Security until next year at the earliest. On Thursday, Dunlap will brief Transportation Committee members on Real ID.

Homeland Security has given Maine until Oct. 10, 2016, to meet the remaining mandates of Real ID. While it's possible Maine could receive an additional extension, Dunlap said the federal government will no longer grant extensions after Oct. 1, 2020, setting a time limit for the state to comply.

Who will blink first?

No one knows for sure what will happen if Maine hasn't complied by 2018. Real ID originally was supposed to have taken effect in May 2008, but Homeland Security has delayed its implementation four times. With still more than half of states not in compliance, Dunlap said, it's not clear whether the department will actually stop accepting their ID cards at airport terminals.

As states pushed back against Real ID, Homeland Security has eased up on certain requirements, shortening the list of steps a state like Maine must take in order to comply. Those include requirements to implant microchips in state-issued ID cards; retain digital images of birth certificates, Social Security cards and other identity documents; and store driver's license information in a central database accessible by the federal government — the most criticized provision of the act.

By not enforcing several provisions of Real ID, Dunlap said it's unlikely any state is actually in full compliance with the law.

Even if Homeland Security holds firm to its 2018 compliance deadline and Maine legislators decide to take steps to meet the remaining provisions, it still will take some time to come into compliance. Dunlap said the facial recognition technology alone would take six years to implement and cost close to $1 million.

For now, at least, Mainers won't need to make any immediate changes to their travel plans or rush out to get a passport for that flight to Florida.