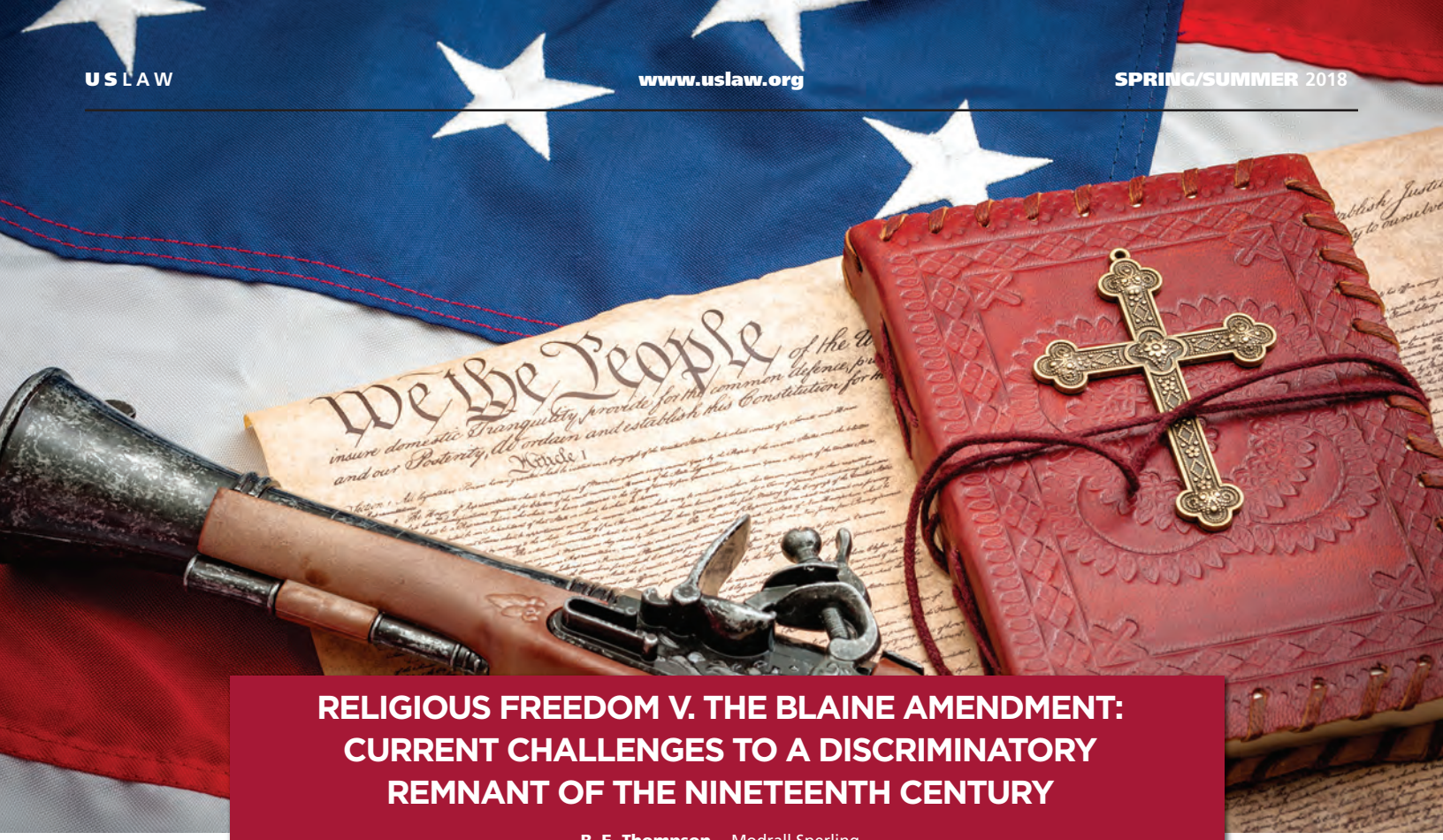


# RELIGIOUS FREEDOM V. THE BLAINE AMENDMENT: CURRENT CHALLENGES TO A DISCRIMINATORY REMNANT OF THE NINETEENTH CENTURY

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## INTRODUCTION

The two religious freedom provisions of the First Amendment to the United States Constitution – the Establishment Clause and the Free Exercise Clause – are enshrined in our legal structure and deeply woven into our pluralistic society. Religious freedom in the United States, however, has meant different things at different times. In the middle of the 19th century, the Catholic immigrant population in the United States rose significantly, and "the influx of Catholic immigrants created a demand for Catholic education." Catholics and other religious minorities challenged the Protestant influence in the public schools, and by the mid-1870s, Catholic church leaders began to lobby their state legislatures for public funds to develop their own educational system. In response to this rise in Catholic influence, a movement opposing aid to "sectarian" (an open code for Catholic) schools gained prominence.[1]

Inspired by this political environment, United States Congressman James G. Blaine of Maine sponsored a Constitutional amendment that fulfilled a promise by President Ulysses S. Grant to ensure "'that not one dollar be appropriated to support any sectarian schools.'"[2] While the amendment failed to pass the United States Senate, "new territories seeking statehood would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval."[3] New Mexico was one of them, and Congress conditioned New Mexico's statehood on its adoption of a "Blaine amendment" to its constitution.[4] The original anti-"sectarian" language imposed upon New Mexico by the federal Enabling Act and incorporated into the New Mexico Constitution was an illicit and unconstitutional law targeting "religion as such."[5]

## THE *MOSES* LITIGATION AND THE *TRINITY* OPINION

New Mexico's Blaine Amendment – Article XII, Section 3 of the New Mexico Constitution – provides that no funds "appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."[6] Under this provision, a suit was filed against the Secretary of the New Mexico Public Education Department in *Moses v. Skandera* to challenge New Mexico's Instructional Materials Law ("IML"), which makes secular textbooks and other educational materials available to all New Mexico students, regardless of where they attend school.[7] The IML has a history older than the state itself, beginning with pre-statehood efforts to raise the literacy rate across the then-Territory. The current version of the law is designed to directly assist all students at private or public schools and helps many of the poorest students gain equal access to quality educational materials.

The New Mexico Association of Non-Public Schools ("Association"), along with non-public schools and students, intervened in the suit to defend the IML, in part by asserting that the New Mexico Blaine Amendment – if construed to bar the textbook lending program – would violate the First and Fourteenth Amendments to the United States Constitution. Without addressing the First Amendment argument, the trial court granted summary judgment, finding the IML did not violate the New Mexico Constitution and upholding the textbook lending program for all New Mexico students. The New Mexico Court of Appeals affirmed, holding that the IML was designed to benefit students and did not constitute "support of parochial or private schools" under the Blaine Amendment.[8] The New Mexico Supreme Court, however, reversed, holding that the Blaine Amendment bars all educational funding, "direct or indirect," to any private schools, religious or secular.[9] The Court then found that, when students are loaned textbooks under the IML, "[p]rivate schools benefit."[10] By providing this "support to private schools," the Court concluded that "the IML violates Article XII, Section 3."[11]

The Association filed a petition for certiorari to the United States Supreme Court, on the question of whether the First and

Fourteenth Amendments to the United States Constitution prohibited application of the Blaine Amendment to invalidate the textbook lending provision of the IML. The U.S. Supreme Court held the petition pending a decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, where the Court was considering Missouri's denial of playground resurfacing funds to a church for its church-run preschool.

*Trinity Lutheran* held that application of Missouri's Blaine Amendment to deny a church access to generally available funds violated the First Amendment's Free Exercise Clause.[12] The Supreme Court emphasized that the Free Exercise Clause "protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status."[13] Applying both the Free Exercise and Equal Protection Clauses, the United States Supreme Court made clear that a law that results in a denial of a "generally available benefit" to individuals or organizations with a religious identity "can be justified only by a state interest of the highest order."[14]

Thus, in *Trinity Lutheran*, the United States Supreme Court invalidated a state policy that excluded churches and religious organizations from benefits made available to other nonprofits. The Supreme Court held that this "exclusion of [a religious organization] from a public benefit for which it is otherwise qualified … is odious to our Constitution … and cannot stand."[15] Furthermore, the United States Supreme Court affirmed that – even if a challenged law were "facially neutral" – this type of "odious" discrimination would be evident," if it arose from "a discriminatory purpose" aimed at "some or all religious beliefs" and imposed a "special disabilit[y]" for religious observers.[16]

The day after *Trinity Lutheran* was decided, the United States Supreme Court granted the Association's petition, vacated the New Mexico Supreme Court's ruling, and remanded to the New Mexico Supreme Court for further consideration. The intervenors and defendant are encouraging the New Mexico Supreme Court to reconsider its analysis and uphold the IML's provision of textbooks for all New Mexico students, regardless of where they may choose to receive their education. This corrective ruling is required by the Free Exercise and Equal Protection Clauses of the United States Constitution, and the Equal Protection Clause of the New Mexico Constitution, and is essential to protecting against the invidious religious bigotry lurking within the Blaine Amendment. A decision is expected in 2018.

## RELIGIOUS FREEDOM REQUIRES INVALIDATION OF THE NEW MEXICO BLAINE AMENDMENT

It is no mystery that Blaine Amendments are designed to discriminate. The New Mexico Supreme Court has acknowledged the anti-Catholic origins of provisions barring aid to "sectarian" institutions; they arose in response to Catholic opposition to the Protestant-run common schools, which were "'designed to function as an instrument for the acculturation of immigrant [Catholic] populations, rendering them good productive citizens in the image of the ruling [Protestant] majority.'"[17] *Trinity Lutheran* caps this analysis by affirming that laws targeting religious individuals or organizations for disfavored treatment are barred by the Free Exercise and Equal Protection Clauses of the United States Constitution. Such laws are equally "odious" whether they discriminate among religions or against religion generally. The New Mexico Blaine Amendment does both by targeting Catholic schools specifically and all religious schools generally.

In its original form, as forced upon New Mexico by the federal government, the Blaine Amendment explicitly discriminated against "sectarian," or "Catholic," organizations. Although the drafters of New Mexico's Constitution expanded the amendment to bar aid to other private schools as well, the United States Supreme Court has routinely rejected such efforts to disguise underlying invidious discrimination.[18] Because the discriminatory intent of the Blaine Amendment is well established, the plaintiffs in *Moses* cannot meet their burden to show that the expanded provision undoubtedly would have been enacted even without the anti-Catholic animus that gave rise to the original discriminatory language.[19]

*Trinity Lutheran* requires the New Mexico Supreme Court to invalidate the Blaine Amendment. The bar on aid to "sectarian" schools is plainly unconstitutional, and the prophylactic bar on aid to "private" schools is an inadequate cure. Such a provision could stand only if re-enacted independent of the bigotry that surrounded enactment of the Blaine Amendment, and without the current language that explicitly identifies "sectarian" schools for disfavored treatment. Alternatively, the Blaine Amendment could be narrowly construed by ruling that it is not implicated by aid directed to students not schools, thereby avoiding conflict with the Free Exercise and Equal Protection Clauses. This construction could be easily implemented because the IML and its predecessor statutes protecting textbooks to students have long been a part of New Mexico's law, including versions enacted around the time of New Mexico's constitutional convention. As in *Trinity Lutheran*, any benefit to religious or other private schools is purely incidental to the State's legitimate effort to benefit all students. Upholding the IML would both fit New Mexico history and honor the New Mexico Legislature's efforts to give all New Mexico children equal access to a quality education.

1 *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (stating "it was an open secret that 'sectarian' was code for 'Catholic'")
2 *Moses v. Skandera*, 2015-NMSC-036, ¶ 21, 367 P.3d 838, vacated, 137 S. Ct. 2325 (2017) (quoting Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 670 (1998)).
3 *Id.* ¶ 23 (quoting Viteritti, 21 Harv. J.L. & Pub. Pol'y at 673).
4 *Id.* ¶ 24; *see also* Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8.
5 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun, J., concurring).
6 N.M. Const. Art. XII, § 3.
7 *Moses v. Skandera*, NMSA 1978, §§ 22-15-1 to 22-15-14.
8 *Moses v. Skandera*, 2015-NMCA-036, ¶ 39, 346 P.3d 396 (2014).
9 2015-NMSC-036, ¶ 40.
10 *Id.* ¶ 40.
11 *Id.* ¶ 40.
12 137 S. Ct. 2012, 2024-25 (2017).
13 *Id.* at 2019 (quotation marks, citations, alterations omitted).
14 *Id.* (quotation marks and citations omitted).
15 *Id.* at 2025.
16 *Id.* at 2019, 2021, 2044 (quotation marks and citations omitted).
17 2015-NMSC-036, ¶ 19 (quoting Viteritti, 21 Harv. J.L. & Pub. Pol'y at 668).
18 *See, e.g., Lukumi*, 508 U.S. at 547.
19 *See Hunter v. Thompson*, 471 U.S. 222, 228 (1985).

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