

Chief Justice Roberts quoted this little-known 19th-century lawmaker in siding with religious institutions in church-state decision

By **Ann E. Marimow** June 29 at 6:00 AM

When Chief Justice John G. Roberts Jr. delivered the Supreme Court's ruling this week in an important separation of church and state case, he closed with an excerpt from an 1819 speech by a little-known state lawmaker, who spoke passionately against the exclusion of Jews from public office in the early 19th-century.

The lawmaker Roberts cited was H.M. Brackenridge, a member of the Maryland House of Delegates and leading supporter of what was known as the "Jew Bill" — a measure to remove the state's requirement that elected officials swear to "a belief in the Christian religion."

The brief excerpt from Brackenridge's lengthy speech came at the end of the 15-page majority opinion in *Trinity Lutheran v. Comer*. The high court found that a preschool operated by a Missouri church should have been eligible for state funding just like other non-religious charitable organizations.

Trinity Lutheran Church in Columbia, Mo., brought the case after the Missouri government excluded the church from a grant program that pays to resurface playgrounds because the state said it could not provide financial assistance directly to a church. In the 7-2 decision, Roberts quoted Brackenridge before concluding that the exclusion of the church "solely because it is a church, is odious to our Constitution all the same, and cannot stand."

The son of a Pennsylvania Supreme Court judge, Brackenridge is hardly a household name in Maryland's political history having served just two terms representing Baltimore. Much of his career was spent in other states, including stints as a judge in Louisiana and Florida, and as a U.S. congressman from Pennsylvania in 1840.

Brackenridge's 1819 speech was part of broader effort to get rid of a measure that prevented Jews from holding office. Many states in the early nineteenth-century had religious qualifications for office.

According to the Maryland State Archives, Brackenridge argued that Maryland's requirement violated the First Amendment of the Constitution that at the time only applied to the federal government. The so-called Jew Bill did not pass during Brackenridge's tenure, when there were only about 150 Jewish people in Maryland. Jews were unable to hold elected office in Maryland until 1826, said Emily Oland Squires, director of research, education and outreach at the Maryland State Archives.

Religious history scholars said this week that Brackenridge's speech was a fascinating choice for Roberts in that he used the language of protecting religious minorities to prevent the exclusion of Christians from a state grant program. In the Trinity Lutheran opinion, Roberts quotes the following lines:

"If, on account of my religious faith, I am subjected to disqualifications, from which others are free, . . . I cannot but consider myself a persecuted man. . . . An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture."

Peter Manseau, curator of American religious history at the National Museum of American History, noted that the full text of the speech makes clear that Brackenridge was talking about minority or marginal opinion:

"If, on account of my religious faith, I am subjected to disqualifications, from which others are free, while there is no paramount reason drawn from a regard to the safety of society, why I should be thus excepted, I cannot but consider myself a persecuted man. The persecution may be but slight in its character, but still it must bear the detested name of persecution. It is true, it is not the fagot, or the wheel, but it is applied for the same reason — because my opinions do not conform to those of the more numerous, or more powerful."

Alex Luchenitser, associate legal director of Americans United for Separation of Church and State who filed a brief siding with the state of Missouri, said other parts of Brackenridge's speech are more in line with the view of the two dissenting justices in the Trinity Lutheran case. Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsberg, said the country's "longstanding commitment to separation of church and state" means "the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship."

Brackenridge's words, said Luchenitser, echo the general thinking of the Founding Fathers that religion should be supported solely by private funds. He pointed to a line in the speech that says:


"The only support of religion, should be derived from the zeal affection and faith of those who profess it."

Roberts did, however, acknowledge that the state of Missouri's denial of taxpayer funds for a playground was not equivalent to subjecting "anyone to chains or torture on account of religion," and that the state's policy was "nothing so dramatic" as the denial of public office.

Some of the religious scholars who pointed out the fuller context for Brackenridge's speech nonetheless said they were impressed that Roberts — or one of his clerks — had dug up the obscure historical reference.

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