Independent® Women's Forum

Trinity Lutheran: The Blockbuster in a Quiet Supreme Court Term

EXECUTIVE SUMMARY

- In a quiet term, the Supreme Court's decision in *Trinity Lutheran v. Comer* stands out.
- A 7-2 Supreme Court held that Missouri's application of its Blaine Amendment to deny a public benefit to a church because of its faith violated the Free Exercise Clause.
- The Supreme Court began by emphasizing that, at its most basic, the Free Exercise Clause "protect[s] religious observers against unequal treatment."
- Thus, a law that singles out religious adherents for "special disabilities" based solely on their "religious status" is subject to the most searching level of judicial review—strict scrutiny. Under strict scrutiny, a law may be upheld *only* if supported by a compelling state interest.
- *Trinity Lutheran* held that Missouri's alleged compelling interest in enforcing its Blaine Amendment and erecting a higher wall than required between church and state was insufficient. Such an interest was limited by the Free Exercise Clause.
- *Trinity Lutheran* plainly implicates school choice.
- A number of states have interpreted their Blaine Amendments to deny otherwise generally available public programs to religious institutions. State courts have, for example, invalidated state-funded scholarships and state-funded textbook lending programs to religious primary and secondary schools.
- *Trinity Lutheran* suggests these decisions are on shaky constitutional footing. As the Court's newest justice put it in his concurrence, "the general principles [announced in *Trinity Lutheran*] do not permit discrimination against religious exercise—whether on the playground or anywhere else."

MORE INFORMATION

Introduction

The Supreme Court has much been in the news this past year. The unexpected death of legal titan Justice Antonin Scalia, a hard-fought Presidential campaign with the Supreme Court front and center, and the confirmation of Neil Gorsuch as the 113th Justice of the United States Supreme Court all made for a blockbuster year.

Ironically, one consequence of the Supreme Court being down a Justice was a quiet term. Pundits predicted that the Court would be hesitant to take "hot button" cases—cases that might result in a 4-4 split. They were correct in so far as the Supreme Court achieved a **high degree of consensus***. Nearly 60 percent of the Court's cases were decided by a unanimous court. A whopping 86 percent of cases were decided by a lop-sided majority of 7 or more votes.

In a relatively uncontroversial batch of cases, one stands out: *Trinity Lutheran v. Comer*. This case pitted a preschool—Trinity Lutheran Church Child Learning Center—against the Missouri Department of Natural Resources. And it involved the most fundamental of constitutional rights—the right to religious freedom. The question in the case was whether the State of Missouri could discriminate against the preschool in the award of playground safety grants simply because it was religious. A 7-2 Supreme Court majority answered that question with a resounding no. The reasoning of *Trinity Lutheran* implicates matters far beyond playgrounds.

Case Background

The Missouri Department of Natural Resources administers Missouri's Scrap Tire Program. The program serves the dual purposes of promoting recycling and improving playground safety. The Department offers grants to schools to purchase rubber playground surfaces made from recycled tires. These grants are awarded based on a competitive ranking of factors such as the poverty level of the surrounding community and the school's plan to promote recycling.

In 2012, Trinity Lutheran applied to participate in the grant program. In its application, the Center described the safety hazards posed by the current coarse pea gravel surface. It also described the expected benefits of the grant: in addition to providing a safer surface under play areas, the rubber surface would be compliant with the Americans with

Disabilities Act and increase access to the playground for all children.

Trinity's application ranked high on the Department's competitive system—5th out of 44. Despite awarding 14 grants under the 2012 Scrap Tire Program, Missouri's DNR nevertheless denied Trinity Lutheran's application. The Center received a letter explaining that it did not receive a grant because it was operated by a church. At the time, DNR had a categorical policy of denying grants to any applicant owned or controlled by a church or other religious institution. DNR believed that such a policy was compelled by Missouri's Blaine Amendment which provides, in part:

> "[The] Supreme Court made it crystal clear that the Constitution does not permit a state to discriminate in the award of a generally available public benefit because an applicant is religious."

> [N]o 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.

Trinity Lutheran then filed suit in federal district court. The church alleged that DNR's failure to award the Center a grant because it was controlled by a church violated the Free Exercise Clause of the First Amendment.

In *Trinity Lutheran v. Comer*, the Supreme Court eventually agreed.

Trinity Lutheran v. Comer

In *Trinity Lutheran v. Comer*, a lop-sided Supreme Court made it crystal clear that the Constitution does not permit a state to discriminate in the award of a generally available public benefit because an applicant is religious.

The Court began by addressing both components of the Religion Clauses of the First Amendment. That amendment provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Under the First

Amendment, then, the States may neither "establish" a religion nor may they prohibit "free exercise."

The Supreme Court began its analysis by holding that the Establishment Clause was not violated when a state awarded a publically available benefit to a religious nonprofit. Indeed, *no one* argued that the Constitution *required* Missouri to exclude Trinity Lutheran from its recycled tire program. The question was simply whether a state *might* do so under the Free Exercise Clause. The case implicated the "play in the joints" between "what the Establishment Clause permits and the Free Exercise Clause compels."

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It has long been understood that the Constitution does not require a state to exclude a religious organization from a public benefit. In the 1940s, for example, the Supreme Court held that a state may reimburse parents for the costs of transportation to both public and parochial schools. More recently, in 2002 in ***Zelman v. Simmons-Harris***, the Supreme Court blessed school choice under the federal constitution. The Court held that the Establishment Clause is not violated when states provide funding to religious schools.

In *Zelman*, Ohio instituted a pilot program to improve student educational outcomes in Cleveland (where more than two-thirds of public school students failed or dropped out before graduation). Ohio awarded scholarships to parents who could choose to send their children to public or private schools (including religious schools). The scholarships followed the children.

The Supreme Court easily upheld the school choice program at issue in *Zelman*. The Court found that the program was enacted for a valid secular purpose: expanding educational opportunities for Cleveland's poorest students. The program, moreover, was neutral with respect to religion. Because parents chose the schools, any incidental advancement of a religious message was not attributable to the government, but to the parent's individual choice of school.

The battle over school choice then turned to the States. A number of state courts interpreted their state Blaine Amendments to provide a higher wall of separation between church and state than required by the federal government. Based on its Blaine Amendment, for example, Washington State refused to award a scholarship to a student pursuing a degree in theology.

In 2004, the Supreme Court held in ***Locke v. Davey*** that Washington State could refuse to fund religious instruction that would prepare students for ministry. Looking to the "play in the joints" of the Religion Clauses, the Court held that although Washington *could* have allowed scholarship recipients to pursue devotional theology degrees under the Establishment Clause, it did not have to fund such degrees under the Free Exercise Clause.

> **"Missouri had no compelling interest in discriminating against otherwise eligible grant recipients and disqualifying them from a public benefit solely because of their religious character."**

Trinity Lutheran is the latest from the Supreme Court on the "play in the joints." The Supreme Court began by emphasizing that, at its most basic, the Free Exercise Clause "protect[s] religious observers against unequal treatment." Thus, a law that singles out religious adherents for "special disabilities" based solely on their "religious status" is subject to the most searching level of judicial review—strict scrutiny. Under strict scrutiny, a law may be upheld *only* if supported by a compelling state interest.

Missouri argued that it had a compelling interest in enforcing its Blaine Amendment and erecting a higher-than-necessary wall between church and state in order to protect against Establishment Clause concerns. The Supreme Court found that interest to be less than compelling: "[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." Thus, Missouri had no compelling interest in discriminating against otherwise eligible grant recipients and disqualifying them from a public benefit solely because of their religious character.

By a 7-2 margin, the Supreme Court found that Missouri's application of its Blaine Amendment violated the Free Exercise Clause because it put Trinity Lutheran to the choice of remaining a church or participating in a generally available public program. The Court's impatience with the State's discrimination was apparent:

> The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

Broader Implications

Though closely watched and somewhat controversial, *Trinity Lutheran* was actually an easy case. To discriminate against a church simply because of its faith strikes at the core of what Free Exercise protects—thus the lopsided nature of the decision.

The Supreme Court left to another day the more difficult question as to whether state Blaine Amendments may be used to discriminate against private religious schools in the award of grants and scholarships. This question is critical for improving educational outcomes for low-income students in Missouri and other states. Indeed, several dozen states have Blaine Amendments, and a number of state courts have found them to foreclose public programs that might result in funds being awarded to religious institutions.

"*Trinity Lutheran* signals a Supreme Court that is increasingly hostile to the argument that a state may discriminate against a religious organization to protect a higher-than-necessary wall between church and state."

That day may be fast approaching—and *Trinity Lutheran* signals a Supreme Court that is increasingly hostile to the argument that a state may discriminate against a religious organization to protect a higher-than-necessary wall between church and state. Indeed,

the day after *Trinity Lutheran* was decided, the Supreme Court granted two school choice cases, vacated the decisions of the lower courts, and returned the cases for reconsideration in light of *Trinity Lutheran*.

The returned cases relied on state Blaine Amendments to exclude religious schools from otherwise generally available public benefits. In one case, the Colorado Supreme Court struck down a state-funded scholarship program for students who chose to attend private elementary, middle, and high schools. This program was illegal, the Colorado court said, because it included private religious schools. Similarly, in the second case, the New Mexico Supreme Court held that a "no aid" to religion clause in its constitution required the State to exclude religious schools from a secular textbook lending program.

In *Trinity Lutheran*, we see where the play in the joints stops. The Free Exercise Clause limits a state's ability to deny generally available public benefits on religious grounds. A state must be neutral as to religion. A state's attempt to justify discrimination against a religious institution because of an interest in erecting a higher-than-necessary wall between church and state no longer passes muster after *Trinity Lutheran*. And *Locke v. Davey* may be limited to its facts: A state may deny otherwise generally available public benefits on the basis of faith for programs akin to the training of ministers, but a number of Blaine Amendment cases, like those above, seem to be on shaky footing.

> **"...the general principles [announced in Trinity Lutheran] do not permit discrimination against religious exercise—whether on the playground or anywhere else."**

Seeing the likely implications for the collision of Blaine Amendments and school choice, and most likely in an effort to achieve greater consensus, the Court's majority sought to narrow its opinion to playgrounds. In footnote 3, the Chief Justice, speaking for four Justices wrote: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."

But the whole point of having a high court is to issue precedential decisions. Supreme Court opinions are not ad-hoc opinions good for one day and one decision only. The Free Exercise clause is not limited to playgrounds—and neither is the reasoning in *Trinity Lutheran*. Far from it. The reasoning in that case suggests that a State may not prevent families from choosing a religious education under a generally available scholarship or tuition grant program. As Justice Gorsuch points out in his concurrence, "the general principles [announced in *Trinity Lutheran*] do not permit discrimination against religious exercise—whether on the playground or anywhere else."

CONCLUSION

In an otherwise quiet term, the Supreme Court's decision in *Trinity Lutheran* stands out. In that case, a lop-sided Supreme Court held that the Constitution does not permit a state to discriminate in the award of a generally available public benefit because of an applicant's faith. The case addressed the "play in the joints" between what the Establishment Clause allows and the Free Exercise Clause requires. Trinity Lutheran has broad implications for school choice. It signals that the Supreme Court may have little patience with the Blaine Amendment argument that a state may discriminate against a religious organization in order to erect a higher-than-necessary wall between church and state.

* Cases with eight or fewer votes are counted as if they were decided by the full court. For 8-0, 7-1, and 6-2 decisions, it is assumed that the recused or absent justice would have joined the majority.