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Supreme Court Strikes New Direction on Participation by Churches in Public Funding

The Supreme Court of the United States held Missouri's rejection of a Lutheran Church's participation in a publicly funded program for playground resurfacing was unconstitutional, and in the process made church-state relationships in the United States more complicated. In *Trinity Lutheran Church v. Comer* (https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf),the Court dealt a blow to state actors who aimed to preclude religious institutions from accessing public funding when it found that Missouri's actions violated the Free Exercise Clause of the First Amendment. The majority opinion, penned by Chief Justice Roberts, and joined by five of his fellow justices, created a bright line against discrimination solely because of an applicant's status as a religious institution.

The First Amendment's Establishment Clause and Free Exercise Clause bookend how government must treat religious institutions – no sponsorship and no inhibition of religion. Actions are different and, to take an extreme example, it is settled that religion does not immunize one person from the civil consequences of injuring another. Between the poles of no sponsorship and no inhibition, "there is some play in the joints" where government can permit (or refuse) more interaction with religious institutions even though not required (or prohibited) under the First Amendment. States, however, often draw tighter lines than the Establishment Clause requires. The legal basis is popularly known as a "Blaine Amendment" in a state's constitution, a clause which prevents religious organizations from receiving public aid. Named for a 19th century member of Congress who had offered such an amendment to the U.S. Constitution, the Blaine Amendment failed to be adopted to the federal charter, but many states had their admission to the Union conditioned upon adopting such a provision, and there are 38 such state laws. Missouri relied on its Blaine Amendment when it denied the grant to Trinity Lutheran Church – a grant that Trinity Lutheran was otherwise qualified to receive – simply because under the state constitution it was prohibited from doing so.

Trinity Lutheran emphasizes that categorically denying religious institutions a "generally available public benefit" based on their religious status alone is discrimination based on religion that can only be justified by the highest state interest. Trinity Lutheran Church Child Learning Center – a church preschool and daycare center open to students of any religion – applied to participate in Missouri's Scrap Tire Program, which provided grants to qualified nonprofit organizations to resurface playgrounds using recycled tires. By applying for this grant, Trinity Lutheran hoped to increase safety and accessibility for all children, including those in the neighborhood who used the playground after school hours. But the preschool was a program of a church and therefore excluded. It sued,

claiming its rights as a church under the Free Exercise Clause were violated, and that the federal Free Exercise right trumped the state anti-establishment provision.

Six justices on the Supreme Court agreed. Missouri's categorical denial infringed Trinity Lutheran's free exercise rights by conditioning its receipt of a public benefit upon the surrender of its religious status. Missouri's state interest in creating a greater separation between church and state than is required by the First Amendment was insufficient to justify the exclusion of Trinity Lutheran. The majority opinion held that religious status alone cannot be used to exclude an otherwise qualified grant applicant, so long as the recipient uses the funds in the manner prescribed by the grant. The majority distinguished between "status" (of the recipient as a house of worship) and "use" (of public funds for distinctively religious purposes). The former is now generally protected under the Free Exercise Clause, while the latter may be proscribed under the Establishment Clause.

Because of the complex relationships between religious organizations and governments, *Trinity Lutheran* has broad implications. Subsequent litigation will certainly focus on sharpening the line between protecting an applicant's religious status while prohibiting its religious use of the funds received. Justice Breyer, who provided a seventh vote for Trinity Lutheran on this record, expressed concern about making this distinction hold for all the other instances sure to follow. Moreover the six justices in the majority did not to agree as to the manner of publicly available benefits that fell within the scope of this decision, with half limiting the holding to "expressed discrimination based on religious identity with respect to playground resurfacing" and the other half insisting that it should apply broadly.

For now, however, the extent to which the Free Exercise Clause applies to other types of public benefits remains unclear. The path of constitutional litigation is dotted with examples of failed efforts to capitalize on perceived new directions in the law by overzealous advocacy and lack of attention to building an adequate record. Any religious organization that has been denied a public benefit based solely on its religious status, e.g., under a state's Blaine Amendment, should now consider reapplying for those programs because a strong and decisive majority of the Supreme Court has determined that denial on those grounds "is odious to our Constitution. ..." To tread the demarcation in the decided cases will require care.

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