

Religious Liberty in America Remains a Playground Fight Even After the Trinity Decision

Trinity Lutheran Church is a church in Columbia, Missouri that operates a Christian preschool and daycare center offering students a playground for recess and exercise during the school day. It recently found itself in a major case before the U.S. Supreme Court.

Here's why: The state of Missouri instituted a limited-grant program intended to enable schools to purchase recycled shredded tires to make school-playground surfaces safer. Since Trinity's existing playground was composed of pea gravel, it decided to apply for a grant. The grant application was denied by the granting agency, the Missouri Department of Natural Resources—even though, according to the department's criteria, it ranked among the highest. The reason for the denial was that Trinity Lutheran was a church, and the Missouri Constitution contained a provision which forbade public funding “directly or indirectly” to any “church, sect or denomination of religion.” The church appealed through the federal courts, losing at each level until the favorable decision recently handed down by the U.S. Supreme Court.

The Supreme Court's decision is a clear win for Trinity Lutheran. The opinion by Chief Justice John Roberts contains two steps:

1. Roberts' opinion, joined in with various qualifications by six other justices, begins by stating: “The department's [Department of Natural Resources] policy expressly discriminates against otherwise eligible recipients by

disqualifying them from a public benefit solely because of their religious character... [I]t is clear that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.”

2. Recognizing Missouri’s policy of exclusion as discriminatory, the court then moved to the second step in the inquiry, namely: Can Missouri show that the policy is so “compelling” that it should be allowed to continue nevertheless?

Missouri failed in that regard. The best argument that the state could muster was that it was protecting the separation of church and state by excluding Trinity Lutheran from competing for a grant. The Roberts opinion found that unconvincing. “[T]he 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,” stated Roberts, “and cannot stand.”

Though a clear victory for Trinity Lutheran, the opinion still has court watchers puzzled. Why? Chief Justice Roberts called attention to a single footnote in his opinion, footnote three, which is unusual. The footnote says: “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.”

What does this footnote mean? It seems to be saying that this case is limited to playground resurfacing and does not necessarily cover other kinds of public-benefit cases like vouchers, tax credits or other public aid to religious schools. If that is its meaning, it is fair to surmise that footnote three may have been added in order to attract the support for Roberts’ opinion by two justices who would want it interpreted narrowly—Elena Kagan and Anthony Kennedy.

On the other hand, if one ignores this footnote, the language

of the Roberts' opinion is bold and general, referring repeatedly to any "public benefit" and insisting that such a benefit cannot be denied to religious schools.

While certain justices may have insisted on the addition of footnote three, Justice Neil Gorsuch's concurring opinion, joined by Justice Clarence Thomas, supports the Roberts' opinion but strongly rejects the narrow view of the opinion contained in footnote three. Justice Gorsuch says that he worries "that some might mistakenly read it to suggest that only 'playground resurfacing' cases or only those with some association with children's safety or health ... are governed by the legal rules recounted in and faithfully applied by the Court's opinion. ... Such a reading would be unreasonable for our cases are 'governed by general principles rather than ad hoc improvisations'... and the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."

What will happen next to the issue of public benefits for religious schools, particularly school-choice programs that are more controversial than aid for playground resurfacing? The court may be signaling the direction in which that will go. Simultaneously with rendering the decision in *Trinity Lutheran*, it sent back the appealed decisions of two state supreme courts—Colorado and New Mexico—for reconsideration by those courts in light of the *Trinity Lutheran* case. Those state courts had struck down public funding for religious schools in the form of tuition scholarships and textbook lending based upon state constitutional provisions similar to the Missouri no-aid provision.

In all likelihood, at least one of these reconsidered state court decisions will eventually be appealed and heard by the U.S. Supreme Court. If and when that happens, the court will have to directly face the issue of whether the First Amendment right to free exercise of religion overrides state no-aid amendments where public monies take the form of more direct

aid to religious schools' instructional programs.

The states will not be helped by the unsavory history of these no-aid amendments, traceable to the late 19th century U.S. Congressman James G. Blaine. Blaine sought, though unsuccessfully, a U.S. Constitutional Amendment preventing public monies from going to Catholic parochial schools. Despite the defeat of that amendment nationally, individual states quickly passed their own state constitutional amendments, dubbed "Blaine Amendments," that are the anti-Catholic predecessors of the no-aid provisions found in Missouri, Colorado, New Mexico and other states.

Trinity Lutheran moves in the right direction by regarding those who exercise their religious convictions as no different from other members of their communities when it comes to qualifying for public benefits. Whether the court will go further than the prevention of skinned knees for students attending religious schools remains to be seen. {eo}

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