

The Supreme Court Considers Whether Churches Should Get Taxpayer Dollars

Trinity Lutheran Church v. Comer has the potential to shape everything from state constitutions to school-voucher policies—if it doesn't get thrown out.



Aaron Bernstein / Reuters

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After more than a year of punting, the Supreme Court will finally hear a major church-state case on Wednesday.

In 2012, Trinity Lutheran Church in Missouri applied for a state grant to fix up its pre-school playground. Under the program, Missouri would provide rubber from recycled tires to cover play areas like Trinity Lutheran's, which had a pea gravel surface that was “unforgiving if/when a child falls.” While the church's application

was ranked high by the state, Missouri declined to grant the money because of a state constitutional provision holding that “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion.”

Trinity Lutheran v. Comer asks whether Missouri can exclude religious institutions from otherwise secular and neutral aid programs under the First Amendment of the U.S. Constitution. This is the first case the court has heard in a decade and a half about providing resources to churches, and the stakes are about more than just tire scraps. The court’s decision could shape future fights over school-voucher programs. It could also speak to the constitutionality of state-level church-funding prohibitions like Missouri’s, which, some scholars say, have a dark and discriminatory past.

Trinity Lutheran is the kind of case that gets legal scholars excited. “I’ve been waiting for this issue to come up for about 22 years now,” said Rick Garnett, a professor of law and political science at Notre Dame University. Garnett wasn’t alone—groups from Southern Baptists to Jews filed amicus briefs in this seemingly anodyne case. On its surface, *Trinity Lutheran* seems like it’s just about keeping kids’ knees from getting scraped. But it raises a highly contested question: What does the law say about when and how the government can fund religious institutions?

“The American tradition is that we don’t give direct money to churches,” said Marty Lederman, an associate professor at Georgetown University Law Center.

In recent years, though, that tradition shifted somewhat. In 2000, the Supreme Court ruled in *Mitchell v. Helms* that a Louisiana parish could provide computers and library books to private schools, including the region’s many Catholic schools. The Court stopped short of saying the government could give cash to religious schools, though. Some legal scholars argue that *Trinity Lutheran* could shift that standard: If the Court were to rule that Missouri can and should provide grants to

eligible religious organizations, a whole new set of legal challenges and policy questions could open up.

In particular, the decision in *Trinity Lutheran* could influence the debate over school vouchers. “For a long time, it was thought that the federal Establishment Clause stood in the way of school-voucher programs that allowed religious institutions to participate,” said Garnett. “Over time, in the late ’80s and through the ’90s, the court’s doctrine evolved.” In the early 2000s, he said, the Supreme Court ruled that the Establishment Clause doesn’t allow the government to directly fund religious activities, but it’s not a problem if people use state-funded vouchers to attend private religious schools.

Trinity Lutheran is now arguing that Missouri is discriminating against the church, and thus violating the U.S. Constitution, by prohibiting it from receiving state grants. If the court were to rule in Trinity Lutheran’s favor, “that would open up the way, in some states, for more experimentation with school choice, whether it were tax credits or actual vouchers,” said Garnett. “That’s a big deal, policy-wise.”

“Symbolically ... it’s not a bad thing to have that history repudiated.”

Most states have constitutional provisions like Missouri’s which prohibit them from giving money to churches. The history of these measures is highly contested. Many were passed at various points in the 19th century, and scholars like Garnett argue that they were largely motivated by anti-Catholic sentiment: Legislators feared that private Catholic schools would undermine the Protestant-oriented public-education system.

In 1875, James G. Blaine, then a member of the House of Representatives, proposed a federal constitutional amendment that would bar tax dollars from going to sectarian institutions. Historians suspect Blaine hoped to capitalize on the dominant anti-Catholic sentiment of the time to help him in a presidential bid.

Blaine's U.S. constitutional amendment failed, but many states adopted their own version of the provision, which are now often referred to as Blaine amendments after 19th-century statesman. "Symbolically, to the extent that these provisions do have a history, it's not a bad thing to have that history repudiated," Garnett said.

But other scholars, like Lederman and Steven Green, a law professor at Willamette University and the former head of Americans United for the Separation of Church and State, argue that the timing of this argument is off. For example: One of the provisions in question in *Trinity Lutheran* was passed in 1820, Lederman said—years ahead of Blaine and his reaction to America's wave of Catholic immigrants.

"Some of the people who supported the Blaine amendment were clearly supporting it out of anti-Catholic animus. But that's not a complete picture of what was going on," said Green. "We can't necessarily tar all of these amendments with that legacy or narrative."

Trinity Lutheran brings all of these contentious debates over history and religion into one case—and a conveniently anodyne one at that. "From the perspective of someone like me, who was hoping to have these Blaines domesticated, if not put down—the facts of this case are really good for my side," said Garnett. "If a Blaine amendment controversy comes up in the context of some super conservative evangelical, young-earth-creationism school that's trying to get funding so they can train people to go off and build Noah's Ark camps, those are the worst facts. But when a mainstream denomination has a pre-school ... it's just great facts."

“Government funds will then be used to provide social services on a discriminatory basis.”

That's exactly what worries Trinity Lutheran's opponents. While this specific grant may seem insignificant, a Supreme Court decision in favor of the church could have broad implications, which is why so many organizations filed briefs to share their opinions. Lambda Legal, the LGBT-rights advocacy firm, argued in a brief that a

decision in favor of *Trinity Lutheran* could lead to discrimination against LGBT folks, for example. Some churches “don’t wish to serve everybody,” said Camilla Taylor, a senior counselor at the firm. If the states provide grants to churches like Trinity Lutheran, “government funds will then be used to provide social services on a discriminatory basis.”

Despite everything potentially at stake, *Trinity Lutheran* may not end up being a landmark Court decision—it could be thrown out.

The case has traveled a bumpy path to oral arguments. The justices agreed to hear the case in January 2016, but one month later, Antonin Scalia died, leaving a largely divided court of eight. The court put off scheduling the case for more than a year, and during that time, politics happened. The Democratic attorney general who had overseen the case, Chris Koster, ran for governor and lost to a Republican, Eric Greitens. The new attorney general who replaced Koster, Josh Hawley, is also a Republican. It wasn’t clear what position the new government would take in the case until just a few days before oral arguments were set to begin, when Greitens announced that he was changing the state’s policy. Religious organizations will now be eligible to receive grant money from the Missouri Department of Natural Resources, he said.

This last-minute announcement created a big question: Is *Trinity Lutheran* moot, meaning there’s no longer a live question for the Court to resolve?

Everyone involved in the case says no. Trinity Lutheran, which is being represented by the Alliance Defending Freedom, submitted a letter arguing that the court can still rule on the legality of Missouri’s exclusion policy, even though Missouri appears to have voluntarily ended that policy for now. Besides, it argued, the new policy is not permanent: Future administrations could very well reverse Greitens’s decision. Even Greitens, in announcing his new policy, said he doesn’t expect his decision to affect the case since it involves a decision from 2012.

Meanwhile, the Missouri attorney general’s office argued that the court need to rule in the case in part because Greitens’s announcement has created the possibility of a

lawsuit against the state from the other direction. In Missouri, taxpayers can sue the government for using state funds in ways that violate the state constitution, and the attorney general anticipates that a Missouri citizen **would sue** if Trinity Lutheran now starts getting money.

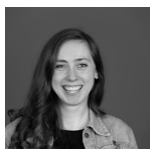
In a further twist, the entire attorney general's office recused itself from the case "out of an abundance of caution," anticipating that it may have to defend the state from taxpayers who sue over Greitens's new policy. James Layton, the former solicitor general under the Democratic administration, is now representing the Missouri Department of Natural Resources from private practice.

Even though all the parties in the case want it to keep going, significant ambiguities remain. The Missouri government now has to defend itself from two sides: It has to explain why Trinity Lutheran should be legally eligible for state money, but it also has to defend the Missouri state constitutional provision that keeps money from going to churches.

"Which is it?" said Lederman. "Is [the] view that the Missouri constitution prohibits the church's eligibility, or that it doesn't? If [the] legal view is that it does not, then I don't see why the case isn't moot. On the other hand, if [Missouri is] continuing to argue that Missouri's constitution prohibits funding ... then why is [it] letting the church get the money?" All of "this is still something of a black box," Lederman said, at least until Wednesday's oral arguments.

Meanwhile, the religion-law community will keep hoping that the case doesn't get tossed out. After all, a case this good doesn't come around the playground very often.

ABOUT THE AUTHOR



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Trinity Lutheran Church v. Comer (2017)

The following is a selection from Justice Sonia Sotomayor's dissenting opinion in the Trinity Lutheran case.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both. ...

Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice and provides:

“That no 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; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.” Art. I, §7.

Missouri's decision, which has deep roots in our Nation's history, reflects a reasonable and constitutional judgment.

This Court has consistently looked to history for guidance when applying the Constitution's Religion Clauses. Those Clauses guard against a return to the past, and so that past properly informs their meaning. This case is no different. This Nation's early experience with, and eventual rejection of, established religion—shorthand for “sponsorship, financial support, and active involvement of the sovereign in religious activity”—defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. In others establishment varied in terms of the sect (or sects) supported, the nature and extent of that support, and the uniformity of that support across the State. Where establishment did take hold, it lost its grip at different times and at different speeds. Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. Over and over, these arguments gained acceptance and led to the end of state laws exacting payment for the support of religion.

Take Virginia. After the Revolution, Virginia debated and rejected a general religious assessment. The proposed bill would have allowed taxpayers to direct payments to a Christian church of their choice to support a minister, exempted "Quakers and Menonists," and sent undirected assessments to the public treasury for "seminaries of learning." In opposing this proposal, James Madison authored his famous Memorial and Remonstrance, in which he condemned the bill as hostile to religious freedom. Believing it "proper to take alarm," despite the bill's limits, he protested "that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." Religion had "flourished, not only without the support of human laws, but in spite of every opposition from them." Compelled support for religion, he argued, would only weaken believers' "confidence in its innate excellence," strengthen others' "suspicion that its friends are too conscious of its fallacies to trust in its own merits," and harm the "purity and efficacy" of the supported religion. He ended by deeming the bill incompatible with Virginia's guarantee of "free exercise of . . . Religion according to the dictates of conscience."

Madison contributed one influential voice to a larger chorus of petitions opposed to the bill. Others included "the religious bodies of Baptists, Presbyterians, and Quakers." Their petitions raised similar points. Like Madison, many viewed the bill as a step toward a dangerous church-state relationship. These voices against the bill won out, and Virginia soon prohibited religious assessments. . . .

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.