

# PUBLICATION

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## Nine Members Again, the Supreme Court Takes On Uneasy Relationship Between Church and State

Authors: Laura Elizabeth Carlisle

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On June 26, 2017, the last day of its session, the Supreme Court issued what is likely to be one of its most significant rulings this year – and possibly for years to come – in the case of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, – S. Ct.– 2017 WL 2722410. The case is notable for a number of reasons, not least of which include that it signals an evolution in the separation of church and state doctrine and is one of the first decisions to come from the Supreme Court following the confirmation of Justice Neil Gorsuch. In fact, many people speculated that the Court delayed oral argument in the case (the Court agreed to hear the case in January 2016, shortly before the death of Justice Scalia) so that the case could be decided by a nine-member Court, the fear being that the case would otherwise result in a 4-4 split. But neither the oral argument on April 19, 2017, nor the Court's ruling particularly played out that way. The Court actually decided the case in a 7-2 split: Justice Roberts, Kennedy, Alito, Kagan, Thomas, Gorsuch and Breyer ruling – in a series of concurring opinions – in favor of Trinity Lutheran Church, and reversing the Eighth Circuit Court of Appeals, with Justices Ginsberg and Sotomayor dissenting.

*Comer* began in 2012 when Trinity Lutheran Church in Columbia, Missouri, applied for state grants to purchase recycled rubber to resurface the playground of its early childhood education center. The church was among a number of nonprofit organizations that submitted an application, and the Missouri Department of Natural Resources ranked its application among those to be funded. However, Trinity Lutheran was deemed ineligible because, at the time, Missouri's state constitution prohibited the use of public money to aid "directly or indirectly . . . any church, sect or denomination of religion."

Disqualified because of its religious status, Trinity Lutheran filed suit against the State's Director of Natural Resources alleging that the provision of the state constitution rendering them ineligible violated the First and Fourteenth Amendments of the United States Constitution because it denied the church free exercise of religion and free speech (First Amendment) and equal protection under the laws (Fourteenth Amendment). The United States District Court for the Western District of Missouri dismissed the case, prompting an appeal to the Eighth Circuit Court of Appeals, which affirmed the dismissal. Trinity Lutheran then appealed to the Supreme Court.

The Supreme Court agreed to hear the case in January 2016, but oral argument did not occur until more than a year later, on April 19, 2017. In the meantime, Missouri's new Republican Governor announced that the State would consider religious institutions for public funding, effectively mooting the specifics of the case for Trinity Lutheran. Both parties nonetheless agreed to proceed with the case.

While the United States Constitution does not require states to subsidize the exercise of individual rights, including the free exercise of religion, states cannot single out a religion, or religion generally, for disfavored treatment. The former rule comes from the Establishment Clause, the latter from the Equal Protection Clause. *Comer* lies at the intersection of the two clauses. Ultimately, the Court held that Missouri violated the First Amendment's Free Exercise Clause when it prohibited Trinity Lutheran from receiving public funds for playground improvement "solely because of [its] religious character." Specifically, the majority opinion authored

by Chief Justice Roberts held that "the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment by denying the Church an otherwise available public benefit on account of its religious status." The majority, however, shied away from a broader ruling, adding in Footnote 3 to the Opinion that "[t]his 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 only four justices – Justices Roberts, Alito, Kagan and Kennedy – joined as to this footnote. As such, Footnote 3 is not the "opinion of the Court."

The recent changes in Missouri's stance on the issues that sparked *Comer* have somewhat mooted the effects of the Court's ruling for Trinity Lutheran, but the case has longer-term implications, which are far from clear at this point. Moreover, the Court's 7-2 ruling does not reflect the split characteristic of the Court in recent years, and the numerous concurring opinions suggest the justices composing the seven side of the split had different reasons for ruling the way they did and different ideas as to how far the Court's ruling should reach. Clearly, the Court's ruling has implications for things like school vouchers and other types of school choice programs, notwithstanding Justice Robert's attempt to limit the Opinion.

Finally, while *Comer* is a religious freedom and separation of church and state case, it also has potential implications for other areas, including employment law and specifically discrimination and religious-exemption-type cases. For instance, the Court has already agreed to hear the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111, a religious-exemption case that also originated in 2012 when a Colorado baker refused to create a cake for a same-sex marriage. If nothing else, cases like *Comer* and *Masterpiece Cakeshop* indicate this Court has no immediate intention of shying away from some of the more contentious battlegrounds in today's culture wars.