

## **How Supreme Court may redefine 'wall of separation' on religion**

*The clash over differing conceptions of religious liberty and the idea of 'a wall of separation' was on full display in Monday's Trinity Lutheran decision, and more cases are on the docket for next term.*

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For Holly Hollman, an active member in her Baptist church in Virginia and a frequent volunteer for its Sunday preschool program, religious freedom remains one of the most unique and hard-won rights in American history.

And as an attorney with the [Baptist Joint Committee for Religious Liberty](#) in Washington, D.C., Ms. Hollman, a mother of two teens, has been at the center of an issue that has sparked one of the most contentious – and deeply personal – debates in the nation over the past few years.

She has long defended what she sees as an essential part of her own religious heritage: the idea of a “wall of separation” between church and state.

“America has a really strong, vibrant, and proud history of protecting religious freedom for all,” says Hollman, whose organization submitted a brief supporting Missouri in Trinity Lutheran case. “And we’ve done that by keeping government out of religion. Separation has protected their vitality, their independence, the respect they garner in the public square as vital institutions that thrive on their own.”

Yet the “wall of separation” metaphor – which was first introduced into the American political lexicon by Roger Williams, the spiritual progenitor of the Baptist movement during the colonial era – has in many ways begun to lose its legal hold.

And it is religious conservatives who are behind the push to lower, if not dismantle, the wall, experts say. That comes amid shifting cultural beliefs on everything from LGBT rights to a diminishing number of Americans who identify as Christian.

“Increasingly, conservative evangelical Protestants tend to believe that they’ve lost, or are losing, the ‘culture wars,’ if you will,” says Dennis Goldford, chairman of the political science department at Drake University in Des Moines, Iowa. “And they see themselves now as more of a minority – which is why they tend to couch their concerns and claims in terms of the free exercise of their religion. Because when you are a religious minority, you’re concerned about carving out an area in which you’re still free to practice your faith.”

## Religious liberty vs. ‘wall of separation’

Rejected by many religious conservatives, “separation” has often been dismissed as an extra-constitutional cliché – or even a dangerous concept that could foster antireligious discrimination.

The clash over differing conceptions of religious liberty and the idea of “a wall of separation” was on full display in Monday’s [7-2 Supreme Court decision](#) that religious conservatives hailed as a victory for religious liberty.

Missouri had refused to give Trinity Lutheran Church of Columbia a grant to improve its preschool playground. The state constitution, like 37 others, forbids government from providing any public funds to “any church, sect, or denomination of religion.”

Chief Justice John Roberts said Missouri’s decision denying Trinity Lutheran Church a grant violated the free exercise clause of the First Amendment.

“The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church – solely because it is a church – to compete with secular organizations for a grant,” Justice Roberts wrote.

While the majority opinion stated the ruling should be limited to “playground resurfacing” and does “not address religious uses of funding or other forms of discrimination,” both supporters and critics of the decision believe it could open the door wider for more taxpayer funds to support religious institutions.

“The reality is,” says Lyle Denniston, a National Constitution Center reporter who has covered the high court for more than 50 years, “the court has never, never before allowed a direct payment of taxpayer funds to an activity that will in part be religious.”

## School vouchers

On Tuesday, the Supreme Court also told the state of Colorado to reconsider its ruling throwing out a controversial school voucher program. Such programs allow tax dollars to go to private schools, many of which are religious. Colorado’s Supreme Court ruled that its state constitution, with a provision similar to Missouri’s, forbids the use of public funds for religious institutions.

In general, the Supreme Court has already ruled that voucher programs and other sorts of aid do not violate the Establishment clause of the First Amendment if funding is provided to parents who can make a wide choice among public and private and religious schools. Yet, as in Colorado, courts in many of the 38 states with so-called Blaine amendments, which generally forbid funding for religious institutions, have upheld notions of separation being challenged by conservatives.

“There’s a certain brand of liberalism that suggests that we should have two different lives,” says Patrick Wolf, professor of education policy at the University of Arkansas and an expert in the ideas behind school choice programs. “We should have our private life, where religious

commitments are fine, and then we should have a public life where religious commitments are set aside or ‘bracketed.’

“But I think the courts are saying, let’s be realistic about what we do as humans,” Professor Wolf continues. “And a lot things we do as humans is, we organize activities that contribute to the good of our society, and we do them as religious people who are motivated by our faith in God and our concern for our fellow human beings.”

At the urging of many religious conservatives, President Trump promised to give churches their [“voices back”](#) in May, signing an executive order easing Internal Revenue Service restrictions that limit the political advocacy of religious groups. Those regulations are based on the fact that they enjoy special tax privileges, but some now see them as a kind of forced separation that discriminates against the full participation of religious believers in the public sphere.

Still, religious organizations, and especially houses of worship, remain special entities within the American constitutional system. They generally do not pay taxes that other organizations must, and they themselves enjoy many exemptions from certain laws. Most are free to discriminate when hiring and promoting employees, for example, and may choose its members based on the tenets of their faiths.

### **The wedding cake question**

Even as more religious conservatives say they want to be treated like any other group within the public sphere, as per the Constitution’s Establishment clause, many have tried to carve out more special protections under the free exercise of religion.

On Monday, the Supreme Court agreed to review an issue that has deeply roiled the country, as a number of religiously conservative wedding vendors have refused to participate in wedding ceremonies across the country. The nation’s high court said it would hear the [appeal of a Colorado baker](#) with religious objections to same-sex marriage, who lost a discrimination case after he refused to bake a cake for a gay couple.

But in the midst of many painful cultural upheavals, there are signs that even the country’s most religiously conservative populations have begun to shift their views on same-sex marriage – and on the freedom of wedding vendors to opt out of participating.

For the first time, within the panoply of religious groups in the US, not one now has a majority who thinks it’s OK for vendors to refuse service for religious reasons, [a Public Religion Research Institute survey found](#). That includes white Evangelical Protestants, the group most opposed to same sex marriage, researchers said. At the same time, nearly half of young white Evangelicals now say they support same sex marriage – indicating [a growing generational divide](#) over marriage equality, according to Pew Research.

For some critics, there’s an inconsistency and lack of symmetry in these differed approaches to a wall of separation.

“Does the church want to be treated like any other entity when it comes to getting public money, but then, I would bet, not want to be treated like everyone else when it comes to how they’re regulated?” says Hollman at the [Baptist Joint Committee for Religious Liberty](#).

In her Trinity Lutheran dissent, Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, complained that the majority made the idea of the separation of church and state nothing more than “a constitutional slogan, not a constitutional commitment.” And she took issue with the idea that separation amounted to discrimination: “But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination,” she wrote.

And the idea of the wall of separation, she noted, has allowed religion to flourish, in fact. “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,” she said.