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Churches and Government Funding

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In *Trinity Lutheran*, the Supreme Court ended its 2016 term with a sweeping affirmation of one of the most fundamental principles of the Religion Clause of the First Amendment: That no one can be penalized for their religion, or lack of it, by denial of a secular benefit to which they would otherwise be legally entitled. A number of legal academics leapt on the decision as an unprecedented assault on the time-honored constitutional principle of church-state separation. I will explain why that is not so. *Trinity Lutheran* offers a path forward on an issue that has bedeviled the courts for several decades.

Introduction

The Supreme Court ended its 2016 term with a sweeping affirmation of one of the most fundamental principles of the Religion Clause of the First Amendment: That no one—whether individual, group, believer, nonbeliever, church, or other organization—can be penalized for their religion, or lack of it, by denial of a secular benefit to which they would otherwise be legally entitled. As the Court put it, in an opinion by Chief Justice Roberts: "[T]he exclusion of [the petitioner] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand."[1]

The decision was nearly—but not quite—unanimous. Two justices thought it went too far;[2] three justices thought it did not go far enough.[3] A footnote confined the reach of the holding to "express discrimination based on religious identity" and declined to address "religious uses of funding."[4]

A number of legal academics, who should know better, leapt on the decision as an unprecedented assault on the time-honored constitutional principle of church-state separation.[5] I will explain why that is not so—but also address the reasons why the justices in the majority divided into two camps, and the implications of their disagreement. *Trinity Lutheran* offers a path forward on an issue that has bedeviled the courts for several decades.

The Case and the Precedents

The facts of the case are uncomplicated. The state of Missouri has a program that collects discarded automobile tires and recycles the material into a rubberized surface for playgrounds, reducing the danger of scraped knees or broken arms when kids fall from the play equipment.[6] Because there is more demand than supply, the state ranks qualifying nonprofit playgrounds according to objective criteria such as the poverty level of the children in the area.[7] Trinity Lutheran Church Child Learning Center, a church-based day-care facility, ranked fifth among the forty-four applicants,[8] but was excluded because of a provision in the Missouri Constitution stating that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[9] Trinity Lutheran challenged its exclusion under the Free Exercise Clause of the First Amendment.[10] The state defended on the ground that its state constitutional provision preserves the separation between church and state.[11]

In theory, there were three ways the case could come out: (1) that the church was constitutionally entitled to equal treatment ("neutrality"[12]); (2) that the church was constitutionally excluded from the program ("strict"[13] or "no-aid"[14] separationism); or (3) that the state was free to choose whether to include the church or not ("play in the joints"[15]).

Unfortunately, Supreme Court doctrine pertaining to the case was anything but uncomplicated, and Trinity Lutheran lost in the lower courts. In past cases going back many decades, the Supreme Court has held:

- It violates the Free Exercise Clause to discriminate against a church or other entity based on its religious character, in connection with regulatory programs.[16] (That principle did not cover *Trinity Lutheran* because the discrimination in this case was in a benefit program rather than a regulatory program.)

- It violates the Free Speech Clause to deny otherwise available public benefits to religious (or nonreligious) speakers based on the religious (or nonreligious) content of their speech.[17] (That principle did not

cover *Trinity Lutheran* because rubberized playground surfacing is not about speech.)

- It violates the Free Exercise Clause to deny individuals a generally available benefit to which they would otherwise be entitled, such as unemployment compensation, because of their exercise of religion.[18] (That principle is not squarely applicable because Trinity Lutheran is an institution, not an individual.)

- It violates the Establishment Clause for a state to provide financial benefits to religious organizations on a preferential basis.[19] (That principle does not apply because Trinity Lutheran was eligible for the program on the basis of neutral and objective criteria.)

- It violates the Establishment Clause for a state to provide resources directly to a religious institution (meaning not through intermediaries, such as in a voucher program) if those resources have or impart religious content.[20] (The current status of this principle is uncertain, but assuming it remains good law it does not apply because the resource here, rubberized playground surfacing, is inherently without religious or ideological content.)

- It does not violate the Establishment Clause for states to extend general public-benefit programs to religious (or nonreligious) organizations on a neutral basis, at least where the benefit is of a secular nature.[21] (Rubberized playground surfacing falls within this principle, which is why no party to the case argued that including Trinity Lutheran would violate the Establishment Clause.)

- States are not required to create subsidy programs of a religious nature. For example, states are not required to fund scholarships for training for the ministry, even if they fund scholarships for secular professions.[22] (The question in Trinity Lutheran was not whether the government had to create a new program, but whether it could exclude an otherwise eligible recipient because of its religious character.)

There was no square holding that governs the *Trinity Lutheran* situation, but the clear import of the cases favored the claimant. From the holdings summarized above, which are well settled, it was just a small step for the Court to hold that the state violated the Free Exercise Clause by excluding Trinity Lutheran from participating in an otherwise neutral public-benefit program solely because of its religious character. Nonetheless, critics of the decision leapt on the (technically correct) statement by Justice Sonia Sotomayor in dissent that the Court had never

before held that the government is constitutionally required to provide financial assistance to a religious institution.[23] Perhaps the reason is that there are not many neutral programs of financial assistance for which religious institutions would be eligible that exclude them solely on the basis of their religious character. The decision nonetheless brought welcome clarity to an area of constitutional law that is susceptible to confusion and demagoguery. If the Court had gone the other way, it would have been open season for states that are hostile to religion (which once was unthinkable but in these days of vituperative cultural conflict is possible) to exclude religious institutions from a wide range of benefits otherwise available to nonprofit organizations, most particularly exemption from tax and eligibility for tax-deductible contributions.

The separation of church and state has never required that churches be cut off from all the benefits of tax-funded government programs. Churches can receive the protection of police and fire;[24] church-related hospitals can be funded through Medicare and Medicaid;[25] students at religious colleges and universities can use government-funded loans and scholarships.[26] The historical focus of church-state separation was on forcing taxpayers to support churches *as such*—that is, to give churches financial aid to which comparable secular organizations would not be eligible.[27] The Court's nearly unanimous decision in *Trinity Lutheran* is a welcome reminder that church-state separation is a principle of neutrality, not of hostility toward religion.

Unconstitutional Conditions

The crux of the case was whether the denial of access to a generally available benefit to which the claimant would otherwise have a legal right, on the basis of the exercise of a constitutional right, constitutes a legally cognizable burden on that right. The district court and the court of appeals in the case had held that the Free Exercise Clause prohibits the government from outlawing or restricting the exercise of a religious practice, but does not prohibit withholding an affirmative benefit on account of religion.[28] The Court majority squarely rejected that claim: Citing a handful of precedents, close but not precisely on point, the Court held that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."[29]

This should not have been controversial. Once upon a time, the Court did adhere to the strict "right-privilege" distinction[30] that underlay the lower court decision in *Trinity Lutheran*. Justice Oliver Wendell Holmes famously held, in response to a free speech claim by a policeman fired for expressing his views about an election, that he had a right to freedom of speech, but "no constitutional right to

be a policeman."[31] Similarly, Holmes held that a speaker could be prevented from giving an address on the Boston Commons on the ground that the government had just as much right to control who speaks on its property as a homeowner does.[32] Most of the federal government's censorship efforts—such as the crushing of the abolitionist movement in the South in the 1840s, the silencing of antiwar voices during World War I, the limits on distribution of sexual materials, and restraints on commercial speech—took the form of denying access to the mails.[33] As late as the 1950s, the State of California denied certain property-tax exemptions to those who would not sign a loyalty oath,[34] and through the 1960s, the Federal Communications Commission demanded political balance as the price for receiving the benefit of using the airwaves.[35]

The right-privilege distinction has long been abandoned across the full range of constitutional rights.[36] Led by the liberal constitutional icon Justice William J. Brennan, Jr., the Court came to recognize that taking away a benefit created by law is economically and legally equivalent to imposing a fine.[37] When a benefit is taken away on account of the person's exercise of a constitutional right, the denial is tantamount to a fine for exercising the right. This is now known as the "unconstitutional conditions doctrine."[38] There are literally dozens of decisions applying the doctrine. In one classic statement, the Court said almost half a century ago: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect by penalized and inhibited."[39] So far as I am aware, neither the dissenters in *Trinity Lutheran* nor the decision's academic critics have called for reconsideration of the unconstitutional conditions doctrine in other contexts.

Free exercise of religion has not been left out of the unconstitutional conditions revolution. In 1963, in an opinion by Justice Brennan, the Court held it unconstitutional for a state to exclude a Sabbath observer from eligibility for unemployment-compensation benefits because of her religiously motivated refusal to work on Saturdays.[40] The policy "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[41] That decision seems sound. When a benefit is extended to a broad class of persons on the basis of neutral secular criteria, such as having been hired for work (or scoring high on the state's priorities for a rubberized playground surface) that becomes part of the baseline of legal entitlements. To take it away because of the exercise of religion rightly triggers constitutional protections.

Outside of the field of the free exercise of religion, institutions as well as individuals have invoked the unconstitutional conditions doctrine in defense of their constitutional rights. One of the most recent cases involved nongovernmental organizations (NGOs) that were denied eligibility for federal grants

because they refused to denounce prostitution.[42] The Court, with Chief Justice Roberts writing, ruled for the NGO, affirming that "the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech even if he has no entitlement to that benefit'" and that, "[i]n some cases, a funding condition can result in an unconstitutional burden on First Amendment rights."[43] No one suggested that the status of the plaintiffs as organizations rather than natural persons would make any difference. Both of the justices who dissented in *Trinity Lutheran* joined Roberts's majority opinion.[44]

If *Sherbert* is right that the unconstitutional conditions doctrine applies to the Free Exercise Clause, and *Alliance for Open Society* is right that the unconstitutional conditions doctrine applies to institutions as well as individuals, the result in *Trinity Lutheran* seems to follow. Certainly, nothing in the dissenting opinion explains why not.

The Logic of Unconstitutional Conditions

Aside from its precedential support in the Court's cases, why is the unconstitutional conditions doctrine good law? Why was Justice Holmes not right that the government should be as free as any private citizen to extend its largesse to whom it pleases? Why were the lower courts in *Trinity Lutheran* not right to say that the state's decision to confine its Scrap Tire Program to secular institutions does not abridge the church's constitutional rights, but is merely a permissible decision not to extend an affirmative benefit? After all, if a private person chooses to allow members of their church—but no others—to set up a lemonade stand in their front lawn, no one would say the rights of the others were in any way diminished. Free exercise and free speech give us no claim on the resources of the state, but only the right to speak or exercise religion freely without state interference. Why does Trinity Lutheran Church Child Learning Center have a constitutional right to get free stuff?

The first reason is legal in nature. Unlike a private person's decision to allow guests on his or her lawn, when the government establishes a benefit program, the program is embodied in a law, with eligibility requirements part of the law. Anyone eligible to benefit from the program who is denied access can sue. It is not largesse; it is a legal entitlement. To be sure, the legislature is free to repeal the program. In that sense, the benefits are mere privileges and not rights. But as long as the program remains in the statute books, the executive branch is legally required to administer it according to its terms, and a person wrongfully denied a benefit has a right to legal redress. If one of the provisions of the law is

unconstitutional, it is no answer to say that it is a mere "benefit." The Constitution applies to all law, not just to regulatory restraints.

Some government benefits are not of this sort. Some are purely discretionary. The executive dispenses the benefit to whomever it chooses. The government may even take the recipient's exercise of constitutional rights into consideration. For example, a public university may invite graduation speakers whose messages the administration approves, and decline to invite speakers whose messages are disapproved. This may be an abuse of power and it may be pedagogically inappropriate, but it is not unconstitutional. Disappointed would-be speakers have no legal right to sue, even if they can prove that the reason they were not chosen was the content or viewpoint of their speech. That is why a careful statement of the unconstitutional conditions doctrine limits protections of the doctrine to persons who would otherwise be legally entitled to the benefit in question—where "otherwise" means "but for their exercise of the constitutional right."

The second reason sounds in political fairness rather than law. The private persons who allow selective access to their lawns own the property in their private capacities and are entitled to use the property to advance their own private purposes and views. The government, by contrast, is a kind of trustee. "Government property" is in reality public property, and the stewards of government property may use it only for the purpose of advancing legitimate public ends. All Americans—religious as well as secular, liberal as well as conservative—have a presumptively equal right to share in the benefits of public property. When the government decides to exclude some people from their presumptively equal share on the ground that they did something they had a constitutional right to do, it is not merely "leaving them alone." It is taking something from them.

Third, if taken to its logical extreme, the right-privilege doctrine is totalitarian in its implications. Presumably, Trinity Lutheran can survive, and exercise its religious faith, without a government-funded rubberized playground surface. It might even be able to obtain such a surface from other sources, including donors. But many resources under government control are indispensable. The government controls the roads, police protection, the postal service, the airwaves, and many more vital resources. All of us have to use at least some of these services, and we can obtain them nowhere but from the government. If the government can condition access to these "benefits" on the waiver of constitutional rights, then everyone will be forced to waive, and no rights will be secure. For example, when a public university forbids a student group from meeting on campus or using campus media to advertise its presence unless it forfeits its freedom of association rights, this is no different in reality from a direct prohibition.[45] Many

other government "benefits" are so close to being indispensable that almost no one could do without them as a practical matter. A nonprofit organization, such as a church, may not require tax exemptions to survive, but once the system of tax exemptions is in place for all other nonprofits, exclusion from this "benefit" is a death sentence.

This latter point becomes more important as the government extends the scope of its activities farther and deeper into the private sphere. A watchman-state government has few benefits to condition. But when the government is funding education, health care, the arts, the sciences, adoption, the means of communication, and so forth, fair and equal access to these facilities becomes essential. In a fully socialist state, the government would have to provide buildings for churches and salaries for priests, if there were to be any freedom of religion at all. (It already does so in the mini-socialist state of the military.) Church-state separation as a theoretical construct cannot survive government take-over of the resources of private life. The viability of church-run day care centers was not threatened by the lack of state subsidies for rubberized playground surfaces in the decades before enactment of Missouri's Scrap Tire Program, but once that program (and many others like it) exists, to exclude church-run institutions puts them at a severe and potentially crippling disadvantage.

Funding and the Establishment Clause

As noted, the dissenters in Trinity Lutheran and their academic supporters do not appear to be calling for a repudiation of the unconstitutional conditions doctrine. Why, then, do they object to its application in this case? The answer can only be that the Religion Clause of the First Amendment—unlike the Free Speech Clause or other constitutional rights protected by the unconstitutional conditions doctrine—contains a parallel provision, the Establishment Clause, which prohibits at least some kinds of government assistance to religion. Critics of *Trinity Lutheran* claim that this principle either requires or at least permits the State of Missouri to refrain from extending financial assistance, in the form of paying for a rubberized playing surface, to a day-care facility run by a church.[46]

At first blush, this claim seems easy to counter. At least under current Supreme Court doctrine, the extension of aid on a wholly neutral basis to a broad class of beneficiaries based on secular criteria does not violate the Establishment Clause. Even under earlier precedents, during the now-abandoned doctrine of no-aid separationism, it did not violate the Establishment Clause for the government to subsidize the inherently secular activities of religious institutions, such as bus transportation,[47] school lunches,[48] or standardized tests.[49] Thus, the Scrap

Tire Program in *Trinity Lutheran* was doubly permissible: It was completely neutral, and it subsidized a wholly secular matter. Indeed, so clear was it that the Establishment Clause *permits* the state to include institutions like Trinity Lutheran in the program that no party to the case even bothered to argue otherwise.[50] It is a sign of just how divorced the dissenting opinion is from current law that the two dissenting justices took a position that even the advocates did not press.

The establishment of religion, historically understood, had nothing to do with the eligibility of religious organizations for generally available financial benefits.[51] The established church received tax dollars in its capacity as a church, for religious purposes, under laws that applied only to the church.[52] The Scrap Tire Program in Missouri bears no resemblance to a classic establishment. Trinity Lutheran would receive funding in its capacity as operator of a playground, without regard to whether it is a church. The Establishment Clause is not about exclusion of religious organizations from the benefits of neutral laws, but about favoritism toward religious organizations or a particular religious denomination.

Given the state of precedent, the defendants and lower courts did not argue that the Establishment Clause actually precludes Missouri from including Trinity Lutheran in its program.[53] Rather, they argued that the state has a compelling interest in maintaining its state constitutional policy of stricter separation between church and state than the First Amendment compels.[54] (The fact that the state's policy is embodied in the *state constitution* is of no legal significance; the Supremacy Clause explicitly states that federal constitutional principles, like the Free Exercise Clause, apply, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[55]) That argument, too, has been rejected many times—some of them involving the same Missouri policy. The first such case involved the exclusion of a university-student bible study group from being able to meet on the University of Missouri campus.[56] The university invoked the same state constitutional policy and made the same argument that the state made in *Trinity Lutheran*, and got the same reception.[57] Justices Brennan and Marshall, both devoted separationists, joined in the decision. Obviously, a state policy of stricter separation, if allowed to override First Amendment rights, could take quite a bite out of free speech and free exercise protections. Yet beyond merely invoking its constitutional policy in the abstract, the lawyers for state in *Trinity Lutheran* did not explain how or why the state's policies of church-state separation or religious freedom more generally would be advanced in any concrete way by discriminatory treatment involving playground surfaces. Whose freedom would be enhanced by that?

The majority holding is admirably clear and simple: The Establishment Clause does not require and the Free Exercise Clause does not permit the government

to "expressly [deny] a qualified religious entity a public benefit solely because of its religious character."[58] In my opinion, that holding is entirely consistent with both the historical meaning and the broad civil-libertarian purposes of the First Amendment.

Play in the Joints

Alas, the waters are murkier than this brief description of the majority opinion makes it appear. Toward the beginning of the opinion, Chief Justice Roberts introduced the question presented in this way:

> The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels.[59]

What, precisely, does this "play in the joints" entail? Of course, there are any number of policies that violate neither of the Religion Clauses, because they have nothing to do with religion or because their treatment of religion neither burdens free exercise nor coerces or favors religion. But the way the phrase is sometimes used, it seems to mean that a policy that might otherwise violate free exercise is permitted because of establishment clause concerns, or a policy that might otherwise violate nonestablishment is permitted because of free exercise concerns, and the state is free to choose which value to favor. In this case, however, once the Court concluded that the free exercise rights of Trinity Lutheran were burdened by denial of a generally available benefit, the Court summarily rejected the idea that establishment clause values, short of a constitutional violation, could serve as a compelling justification.[60] That seems to eliminate any "play in the joints," at least in this case.

The most recent "play in the joints" case—indeed, the case cited by Chief Justice Roberts in support of the "play in the joints" idea—is *Locke v. Davey*. In *Locke*, the State of Washington provided scholarships to gifted students majoring in other subjects, but declined to offer a scholarship for the student of devotional theology.[61] The Court, in an opinion by then-Chief Justice Rehnquist, held that it would not violate the Establishment Clause for a state to extend its scholarship program to this field of study, but that it likewise does not violate the Free Exercise Clause for the state to decline to do so.[62] The case was extensively cited

by opponents of Trinity Lutheran in the litigation. The *Locke* opinion is far from clear about the reach of its holding, and the *Trinity Lutheran* Court distinguished it without overruling it. The Court stated,

> Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.[63]

This explanation is not up to John Roberts's usual standard of clarity, but it is essentially correct. Joshua Davey was not denied a scholarship because of anything personal to him. *No one* was given a scholarship to study devotional theology. Davey was treated no differently than any other student. All had the same range of choices he had. The exclusion was analytically comparable to the decision of a public university not to have a religion or theology department. Such a decision may disadvantage students who wish to study in those fields relative to those in other fields, but it does not deny them a benefit to which they were otherwise legally entitled. By contrast, the State of Missouri has established the Scrap Tire Program, but it excludes certain otherwise eligible beneficiaries on the ground that they are religious. The Court was thus entirely correct to conclude that *Locke* and *Trinity Lutheran* presented different questions of law. The real distinction, however, is not between exclusion on the basis of what the claimant "proposed to do" versus "who the claimant was"; it is between the state's decision not to subsidize a particular activity and the state's decision to exclude otherwise eligible beneficiaries from the program based on their exercise of a constitutional right.

More significant is the majority's footnote 3, which reads in its entirety: "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."[64] The footnote inspired this rejoinder from Justice Gorsuch:

> Of course the footnote is entirely correct, but I worry 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, or perhaps some other social good we find sufficiently worthy, 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.[65]

What, then, is the significance of the footnote? Surely the majority did not intend to limit the precedent to cases involving "playground resurfacing." Justice Gorsuch is right that such a holding would be completely unprincipled. Instead, the footnote leaves open two different issues that could arise in a future case but were not implicated by the Scrap Tire program. First, the footnote leaves open discrimination that is not "express"—for example, discrimination based on disparate impact. In my opinion, the Court was wise not to address this thorny problem, which raises issues of a far higher complexity than the case itself. Second, the footnote leaves open "religious uses" of funding. This is an important category of cases, which very likely will arise. Two examples: (1) A hurricane disaster-relief program that subsidizes the reconstruction of all buildings destroyed by the storm—can it be used for the rebuilding of a house of worship? (2) A subsidy for school libraries—can the funds be used to purchase devotional textbooks? In my judgment, if the terms of the programs are sufficiently broad and neutral, the Establishment Clause would not preclude these outcomes. But does the Free Exercise Clause compel them?

This brings us back to the "play in the joints." Under one theory of neutrality, there is no play in the joints. Either the criteria for eligibility are nondiscriminatory, in which case exclusion of eligible recipients on the basis of their religious character is unconstitutional, or the criteria are skewed in favor of the religious, in which case the aid is unconstitutional. There is no room for political judgment. This may be right.

But consider the parallel to free exercise. Under *Employment Division v. Smith*, the Free Exercise Clause does not require the government to carve out an exception from neutral and generally applicable regulatory laws that conflict with the practice of particular religions[66]—just as the Establishment Clause does not require the government to make a special exclusion of religious parties from participation in neutral and generally applicable aid programs. But it is well established that the government may, in its discretion, enact religion-specific accommodations or exceptions to protect the exercise of religion from the burdens of such regulations.[67] Familiar examples include the exemption from the draft for religious conscientious objectors[68] and the exemption of religious organizations from the religious discrimination prohibitions of Title VII.[69] The discretion of governments to provide religion-specific accommodations, however, is not boundless. Lest they violate the Establishment Clause, accommodations must (1) alleviate a serious governmentally imposed burden on religious exercise, (2) not discriminate among religious denominations that are similarly situated with respect to the burden, and (3) not impose absolute or disproportionate burdens on nonbeneficiaries.[70] This is a species of "play in the joints." Within these limits,

the government may, but is not required to, make accommodations or exceptions from generally applicable laws for the purpose of protecting religious exercise.

Is there an Establishment Clause parallel to discretionary free exercise accommodations—a range of policies that advance the purposes of the Establishment Clause but are not compelled by it? That seems to be Missouri's theory, but the majority gave it no credence. Let us play out how the theory might work. Presumably, just like free exercise accommodations, the legislature would not have boundless discretion to add extra bricks to the wall of separation. If the parallel is strong, we might think that extra degrees of separation must: (1) diminish a serious government-imposed threat to church-state separation; (2) not discriminate among religious denominations; and (3) not impose absolute or disproportionate disadvantages on religious parties. It is not at all clear how the first or the third criterion would work. The first is especially thorny, because there is no consensus behind the purposes of the nonestablishment principle comparable to free exercise. The leading candidates for Establishment Clause values are noncoercion,[71] nonfavoritism,[72] nonendorsement,[73] and avoidance of government pronouncements on contested religious questions (sometimes called "nonentanglement").[74] The Scrap Tire program, inclusive of Trinity Lutheran, poses no problems of favoritism or government pronouncements about religion. That leaves noncoercion. The only possible coercive effect with which we need be concerned is the coercion of a taxpayer to fund a religious activity. As Jefferson wrote, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[75] One may quibble about whether that statement was intended to cover neutral and secular programs,[76] but for many years the Court has assumed it does.

For several decades, the Court struggled to draw a line between forms of aid that could constitutionally be provided to accredited elementary and secondary schools that are religiously affiliated, and forms of aid that could not.[77] On the permissible side were bus rides from home to school, secular textbooks, school lunches, speech and hearing diagnostic services, standardized test grading, one-on-one remedial assistance provided off the premises of the religious school, tax credits for educational costs, tax exemptions, computers, and secular library books. On the impermissible side were teacher salary supplements, maintenance and repair grants, instructional materials other than textbooks, speech and hearing treatment, grading of teacher-prepared tests, bus rides on field trips, maps, audio and video equipment, remedial assistance provided on premises, and tax deductions for tuition. The results seemed haphazard to almost everyone. But it would have been clear, even during this period, that rubberized playground surfaces would have been on the permissible side of the line. They have no religious or

ideological content whatsoever, and their use cannot be "diverted" (like a video projector) to religious use.[78]

The *Trinity Lutheran* dissenters argued that rubberized playground surfaces support religion because everything that contributes to education at a religious day care center supports religion, and because money is fungible. Those observations may be true, but if they were the basis for invalidation under the Establishment Clause, the result would be to eliminate every conceivable form of aid, a position that not even the most arch-separationist justices, such as Wiley Rutledge, ever advocated. Such a position would conflict with the Court's foundational precedent on school aid, *Everson v. Board of Education*.[79]

But assuming that rubberized playground surfacing would have survived scrutiny even under the heyday of strict separation, it follows that including the Trinity Lutheran day-care facility in the program posed no serious danger to the only relevant Establishment Clause value of avoiding the coercion of taxpayers to support religious activities. There could be much more difficult cases, such as the hurricane disaster relief and library book program hypothesized earlier. One might argue that although a genuinely neutral program that included benefits of this sort would not violate the Establishment Clause, a government should have the latitude to steer clear.

This is the real importance of footnote 3. Because a rubberized playground surface is so incorrigibly nonreligious that it would have been permitted even by the most separationist justices during the most separationist period of the Court's jurisprudence, *Trinity Lutheran* presented a relatively easy case. The "play in the joints" does not allow a state to exclude otherwise eligible recipients solely on the basis of their religious character when including them would pose no serious danger of coercing unwilling taxpayers to pay for religious activity. But the majority chose not to "address religious uses of funding,"[80] which would require the Court to revisit all the old cases' drawing lines. Doing so probably contributed to keeping Justice Breyer, and possibly Justice Kagan, in the majority (though Breyer concurred only in the judgment). Justices Gorsuch and Thomas may be correct that when the Court takes on the more difficult question of religious uses, it will come to the same conclusion: that it is unconstitutional to discriminate on the express basis of religion in allocating financial benefits. But the Court did not have to reach that harder question in this case. There is something to be said for judicial minimalism.

Conclusion

The near unanimity of the *Trinity Lutheran* decision is a sign that the judiciary has not become infected with the hyper-partisanship that now seems to infest the political branches. Regrettably, the freedom of religion has become a flashpoint in the political-cultural wars. The Supreme Court has been a welcome exception. In the last decade, with two exceptions,[81] every important constitutional case about religious freedom has been either unanimous or nearly so, always (with one exception[82]) protecting the freedom. Maybe the idea that the right of all Americans to the free exercise of religion remains above politics is true, after all.

Notes

1. Trinity Lutheran Church of Columbia, Missouri v. Comer, 137 S. Ct. 2012, 2025 (2017).
2. *See id.* at 2041 (Sotomayor, J., dissenting) ("The Court today … holds not just that a government may support houses of worship with taxpayer funds, but that … it must do so whenever it decides to create a funding program."). Justice Sotomayor was joined by Justice Ginsburg.
3. *Id*. at 2026 (Gorsuch, J., concurring). Justice Gorsuch was joined by Justice Thomas.
4. *Id*. at 2024 n.3.
5. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *Trinity Lutheran Church v. Comer: Paradigm Lost*, Am. Const. Soc. L. & P. Sup. Ct. Rev. (forthcoming 2017), https://goo.gl/4iGUXv; Erwin Chemerinsky, *Symposium: The Crumbling Wall Separating Church and State*, SCOTUSblog (Jun. 27, 2017, 10:18 AM), https://goo.gl/561seb; Leslie Griffin, *Symposium: Bad News from Trinity Lutheran—Only Two Justices Support the Establishment Clause*, SCOTUSblog (Jun. 26, 2017, 5:44 PM), https://goo.gl/89dv1A.
6. *Trinity Lutheran*, 137 S. Ct. at 2017.
7. *Id.*
8. *Id.* at 2018.
9. *Id.* at 2017 (quoting Mo. Const. Art. 1, § 7 (2016)).
10. *Id.* at 2018.
11. *Id.*
12. *See generally* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 Emory. L. J. 1, 20–22 (1997) (outlin-

ing the neutrality position as a theory where "the recipients of vouchers, grants, and purchase-of-service contracts are eligible to participate as providers in government social service programs without regard to their religious character").

13. *See generally* Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. Rev. 371, 378–379 (defining "strict separationism" as a theory where religion is viewed "as a private and individual phenomenon that should little influence public affairs and matters of state").

14. *See generally* Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 285, 288 n. 13 (1999) (defining "no-aid separationism" as a theory where "most forms of governmental assistance to religious organizations are prohibited by the Establishment Clause"). No-aid separationism may be distinguished from strict separationism because it applies only to government benefits and not to burdens. Genuine strict separationism goes both ways.

15. *See generally* Locke v. Davey, 540 U.S. at 718–19 (outlining "play in the joints" as a theory that accepts that the Religion Clauses are frequently in tension but nevertheless recognizes that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause").

16. *See* Church of Lukumi Bablu Age, Inc. v. City of Hialeah, 508 U.S. 520 (holding that animal-sacrifice ordinances that singled out the activities of the Santeria faith were neither neutral nor generally applicable and therefore violated the Free Exercise Clause).

17. *See*, *e.g.*, Good News Club v. Milford Central School, 533 U.S. 98, 120 (2001) (holding that a high school cannot deny an organization "access to the school's limited public forum" because of its religious viewpoint); and Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) (holding that a public university cannot exclude a student publication from eligibility for student-activity funds because of its religious viewpoint).

18. *See*, *e.g.*, Thomas v. Review Bd. Of Indiana Employment Sec. Division, 450 U.S. 707 (1981) (holding that an employee who quit his job because of his honest conviction that such work was forbidden by his religion cannot be denied unemployment compensation).

19. *See*, *e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding that a Texas statute violated the Establishment Clause by exempting only religious periodicals and books from sales and use taxes).

20. *See*, *e.g.*, Mitchell v. Helms, 530 U.S. 793, 840–41 (2000) (O'Connor, J., concurring).

21. *See*, *e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (upholding a federal program that provided educational materials and equipment—such as "library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials"—to religious schools); Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1 (1947) (upholding taxpayer funding of transportation to religious schools); and Wolman v. Walter, 433 U.S. 229 (1977) (upholding provision of textbooks, reimbursement for standardized testing, the on-site delivery of diagnostic testing, and off-site delivery of therapeutic aid to religious schools).

22. *See* Locke v. Davey, 540 U.S. 712 (2004) (holding that a state could refuse to extend its scholarship-aid program to individuals pursuing devotional theology study).

23. *Trinity Lutheran*, 137 S. Ct. at 2027.

24. *Everson*, 330 U.S. at 17–18.

25. *See* Theresa V. Gorski, *Kendrick and Beyond: Re-Establishing Establishment Clause Limits on Government Aid to Religious Social Welfare Organizations*, 23 Colum. J. L. & Soc. Probs. 171, 196 (1990) (noting that "Medicare and Medicaid[] disburse[] funds to individual[s] [] who may use them with a wide range of health care providers, including denominational hospitals").

26. Comm. For Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n. 38 (1973) (noting that educational assistance programs, such as Pell grants and the G.I. Bill, may be used at religious colleges and universities); *see also* Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), *aff'd* 434 U.S. 803 (1977) (affirming a district court ruling that upheld a student-assistance program that allowed students to choose religious schools); Smith v. Board of Gov'rs, 429 F. Supp. 871 (W.D. N.C.), *aff'd* 434 U.S. 803 (1977) (same).

27. *See generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2152–60 (2003) (cataloguing the "compulsory taxes for support of churches and ministers" in all nine of the American colonies that had established churches); Steven K. Green, *The Separation of Church and State in the United States*, Oxford Res. Encyclopedia of Am. History 1, 10 (2014), https://goo.gl/jmBVKu ("By the time of the writing of the Constitution, the belief that government assistance to religion especially in the form of taxes, violated religious liberty had a long history[.]" (internal quotation marks omitted)); *see also* James Madison, Memorial and Remonstrance Against Religious Assessments, *in* James Madison: Writings 29 (Jack N. Rakove ed., 1999).

28. *See Trinity Lutheran*, 137 S. Ct. at 2018–19.

29. *Id.* at 2019.

30. Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69, 71 (1982) (explaining that the "right-privilege" distinction "is grounded in a dichotomy between 'rights' (interests enjoyed 'as a matter of right') and mere 'privileges' (interests created by the grace of the state and dependent for their existence on the state's sufferance)").

31. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

32. Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), *aff'd* 167 U.S. 43 (1897).

33. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 Wm. Mitchell L. Rev. 773, 805–06 (2008) (discussing the South's efforts to deny abolitionists access to the mail); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 42 n. 87 (2006) (discussing federal efforts to exclude antiwar publications from the mail during World War I); James C. N. Paul & Murray L. Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214 (1957) (discussing the Postal Service's censorship of sexual materials); *see*, *e.g.*, Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 75 (striking a federal statute that prohibited drug companies from mailing advertisements).

34. *See generally* Speiser v. Randall, 357 U.S. 513, 514–17 (1958).

35. *See generally* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 369–72 (1969).

36. *See* Morrissey v. Brewer, 408 U.S. 471, 493 (1972) ("[W]e have long discarded the right-privilege distinct.") (collecting cases).

37. Sherbert v. Verner, 374 U.S. 393, 404 (1963) (holding that forcing one to choose "between following the precepts of her religion and forfeiting benefits … puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

38. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013) (describing the "unconstitutional conditions doctrine" as the principle that "the government may not deny a benefit to a person because he exercises a constitutional right") (quoting Regan v. Taxation With Representation of Walsh, 461 US 540, 545 (1983)).

39. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

40. *Sherbert*, 374 U.S. at 408–09.

41. *Id.* at 404.

42. Agency for International Development v. Alliance for Open Society International, 133 S. Ct. 2321 (2013).

43. *Id.* at 2328 (citing Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59 [2006]).

44. *Id.* at 2324.

45. *See* Christian Legal Society v. Martinez, 561 U.S. 561 (2010).

46. *See*, *e.g.*, *id.* at 2030–31; Chemerinsky, *supra* note 5; Lupu & Tuttle, *supra* note 5, at 19; Griffin, *supra* note 5.

47. *Everson*, 330 U.S. at 17.

48. *See* Lemon v. Kurtzman, 403 U.S. 602, 616–17 (1971).

49. Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

50. *See Trinity Lutheran*, 137 S. Ct. at 2019.

51. *See*, *e.g.*, Flast v. Cohen, 392 U.S. 83, 103–104 (1968) ("The concern of [James] Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.") (citing 2 Writings of James Madison 183, 186 (Hunt ed. 1901)).

52. See McConnell, *supra* note 27, at 2146–60; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1441 (1990).

53. *Trinity Lutheran*, 137 S. Ct. at 2018–19.

54. *Id*.

55. U.S. Const. art. VI, cl. 2.

56. Widmar v. Vincent, 454 U.S. 263 (1981).

57. *Id.* at 275–76:

> [T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

58. *Trinity Lutheran*, 137 S. Ct. at 2024.

59. *Id.* at 2019.

60. *Id*.

61. 540 U.S. at 715–17.

62. *Id.* at 725.

63. *Trinity Lutheran*, 137 S. Ct. at 2016.

64. *Id.* at 2024 n.3.

65. *Id.* at 2026.

66. Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).").

67. Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 24–26 (1985) (providing and discussing examples of accommodations) [hereinafter McConnell, Accommodation of Religion I]; Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 695–713 (1992) (same) [hereinafter McConnell, Accommodation of Religion II].

68. 50 U.S.C. § 3806(j); *see* Gillette v. United States, 401 U.S. 437 (1971) (upholding the exemption).

69. 42 U.S.C. § 2000e-1; *see* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346 (1987) (upholding provision of Title VII exempting religious organizations from the prohibition against religion discrimination in employment).

70. *See* Cutter v. Wilkinson, 544 U.S. 709, 720–724 (2005); McConnell, Accommodation of Religion I, *supra* note 65, at 34–41; McConnell, Accommodation of Religion II, *supra* note 65, at 698–708.

71. See Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U. L. Rev. 37, 39 (1991); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972, 980 (2010) (Under noncoercionism, government cannot coerce or punish religious belief, but it can try to persuade its citizens on religious matters.").

72. Laycock, *supra* note 67; Lund, *supra* note 67 ("Under nonpreferentialism, government cannot favor one religion over another, but it can favor religion generally over nonbelief.").

73. See Jesse H. Choper, *The Endorsement Text: Its Status and Desirability*, 18 J.L. & Pol. 499 (2002).

74. *See* Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 89 (2002) (arguing that the "secular purpose doctrine" prohibits the government from taking official positions on matters of religious contention).

75. Abood v. Detroit Bd. of Ed., 431 U.S. 209, 235 n.31 (quoting Irving Brant, James Madison: The Nationalist 354 (1948)).

76. Jefferson never had occasion to address government financial aid to religiously affiliated schools, but in a letter to the Ursuline Sisters of New Orleans, after the Louisiana Purchase, he wrote that he expected their school to receive the "patronage" of the new government. *See* Letter from Thomas Jefferson to Ursuline Nuns of New Orleans (Sister Therese Farjon, et al.) (July 13, 2804), *in* Mark A. Beliles, The Selected Religious Letters and Papers of Thomas Jefferson, 126 (2013).

77. Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L.J. 1667, 1692–98 (2006) (discussing the *Lemon* test's development and deployment in funding cases); John Garvey, *Another Way of Looking at School Aid*, 1985 Sup. Ct. Rev. 61, 65–73 (1985) (chronicling the Court's jurisprudence).

78. See *Helms*, 530 U.S. 793, 798 (O'Connor, J., concurring) (discussing the implications of divertible materials and equipment).

79. 330 U.S. 1 (1947).

80. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

81. Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2785 (2014); Christian Legal Society Chapter v. Martinez, 561 U.S. 661, 697 (2010).

82. *Christian Legal Society Chapter*, 561 U.S. 661 (holding that a public university could deny equal access to its facilities to a student religious group if it did not agree to be led by persons not of their religion).