

**BEYOND THE PLAYGROUND: ASSESSING
THE FUTURE OF CHURCH-STATE
RELATIONS AFTER *TRINITY LUTHERAN
CHURCH V. COMER***

I. INTRODUCTION	462
II. FACTS AND HOLDING	462
III. LEGAL BACKGROUND	465
A. THE FIGHT FOR RELIGIOUS FREEDOM: A BRIEF HISTORY OF THE FIRST AMENDMENT	465
B. THE FREE EXERCISE CLAUSE PROTECTS THE INDIVIDUAL RIGHT TO FREEDOM FROM DISCRIMINATION ON THE BASIS OF RELIGION.....	466
C. THERE IS ROOM FOR “PLAY IN THE JOINTS” BETWEEN THE TWO RELIGION CLAUSES	468
D. ARTICLE I, § 7, OF THE MISSOURI CONSTITUTION REQUIRES ABSOLUTE SEPARATION OF CHURCH AND STATE	471
IV. THE COURT’S DECISION	472
A. THE MAJORITY OPINION.....	473
B. JUSTICE THOMAS, JUSTICE GORSUCH, AND JUSTICE BREYER’S CONCURRENCES.....	474
C. JUSTICE SOTOMAYOR’S DISSENT.....	475
V. ANALYSIS	477
A. THE FIRST AMENDMENT REQUIRES SEPARATION OF CHURCH AND STATE, NOT MANDATORY EQUALITY, FOR RELIGIOUS ENTITIES.....	478
B. PAYING TO RESURFACE A CHURCH PLAYGROUND IMPERMISSIBLY ADVANCES RELIGION.....	479
C. <i>TRINITY LUTHERAN</i> MAY REQUIRE STATES TO PAY FOR STUDENTS TO ATTEND PRIVATE RELIGIOUS SCHOOLS	479
D. <i>TRINITY LUTHERAN</i> WILL EXPAND CHURCHES’ ACCESS TO PUBLIC FUNDS	480
VI. CONCLUSION	482

I. INTRODUCTION

“Separation of church and state” is a familiar phrase in every American household. Although the First Amendment protects rights that are essential to a democratic society, the Religion Clauses in particular have been the subject of much contentious litigation throughout the country’s history. While the Religion Clauses have been reinterpreted many times, the core protection for religious liberty has always remained—the government cannot support religion with taxpayer money.¹ For the first time, the United States Supreme Court has jeopardized this core protection by requiring a state to provide direct financial aid to a church.²

This Note proposes that the Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* threatens to crumble the wall of separation between church and state, opening the door to government interference in a multitude of areas, including education, public policy, and morality. Section II of this Note discusses the facts of the case, the procedural history, and the Supreme Court’s holding. Section III provides a brief history of the relevant constitutional provisions and case law. Section IV discusses the majority’s reasoning behind its decision, as well as Justices Thomas, Gorsuch, and Breyer’s concurrences, and Justice Sotomayor’s dissent. Finally, Section V discusses the potential impact of the Court’s ruling on school voucher cases, the inevitable governmental entanglement with religion, and the implicit support for religion which follows.

II. FACTS AND HOLDING

The Missouri Department of Natural Resources (the Department) runs a state grant program which reimburses qualifying nonprofit organizations for purchasing playground surfaces made from recycled scrap tires.³ The Department competitively awards grants based on several criteria, including, notably, the award recipient’s plan to garner media exposure for their participation in the program.⁴ The Trinity Lutheran

1. *Everson v. Bd. of Ed.*, 330 U.S. 1, 16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”).

2. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

3. *Id.* at 2017.

4. Brief for Petitioner at 14a, *Trinity Lutheran Church of Columbia, Inc. v.*

Church Child Learning Center (the Learning Center) is a Missouri daycare and preschool center operated by the Trinity Lutheran Church⁵ (Trinity Lutheran) and located on church property.⁶ The Learning Center includes a playground, used both by students and the local community, which is primarily covered in rough pea gravel.⁷ In 2012, the Learning Center sought to participate in the Department's Scrap Tire Program⁸ to replace the playground's coarse gravel surface with a safer rubber surface.⁹ Although the Learning Center was ranked highly—fifth out of forty-four applicants—its application was denied solely because it is operated by a church.¹⁰ The Department based its rejection of the Learning Center's application on article I, § 7, of the Missouri Constitution, which provides as follows:

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.

Trinity Lutheran brought suit in federal district court alleging that the Department's categorical exclusion of churches from the Scrap Tire Grant Program violated, among other things, the Free Exercise Clause of the First Amendment to the United States Constitution.¹¹ The Church sought declaration that the Department's actions were unconstitutional and an injunction prohibiting the Department from excluding Trinity Lutheran from future participation in the program on that basis.¹² The

Pauley, 136 S. Ct. 891 (2016) (No. 15-577), 2016 WL 1496879, at *15a.

5. Originally, the Learning Center was established as a nonprofit organization, but it later merged with the Church. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

6. *Id.*

7. *Id.*

8. The Scrap Tire Program provides grants to qualified nonprofit organizations to purchase recycled tires to resurface playgrounds. The program serves a dual purpose: it benefits the environment by reducing the number of scrap tires in landfills, while also improving the safety of playgrounds throughout the state. Petition for Writ of Certiorari at 3, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 136 S. Ct. 891 (2016) (No. 15-577), 2015 WL 6748934, at *3.

9. *Trinity Lutheran*, 137 S. Ct. at 2017.

10. *Id.*

11. *Id.*

12. *Id.* at 2018.

district court granted the Department's Motion to Dismiss, finding that the Free Exercise Clause did not compel the State to make a direct payment to a church because of the "longstanding and substantial concerns about direct payment of funds to sectarian schools."¹³ The court rejected Trinity Lutheran's argument that Missouri had deviated from its interest in maintaining separation of church and state in recent actions concerning schools,¹⁴ and that there was no legitimate governmental purpose that could justify the Department's categorical ban of religious organizations.¹⁵ Although it acknowledged Missouri's deviation from its stated interest, the court noted that in previous cases the religious schools were controlled by an independent board, rather than a church or religious creed.¹⁶

Trinity Lutheran appealed to the Eighth Circuit, which affirmed the district court's decision.¹⁷ The Eighth Circuit panel majority found that because there was no "break in the link" between government funds and religion, the Department was justified in its categorical exclusion of a religious organization.¹⁸ The panel majority held that granting Trinity Lutheran direct financial aid from the state, regardless of whether the funds were put to secular use, signified "another of the hallmarks of an established religion."¹⁹

Ultimately, in a 7-to-2 decision, the United States Supreme Court held that the Department's policy was subject to strict scrutiny because it imposed a penalty on Trinity Lutheran's right to free exercise of religion under the First Amendment by requiring Trinity Lutheran to choose between being a church and

13. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1151 (W.D. Mo. 2013), *aff'd*, 788 F.3d 779 (8th Cir. 2015), *rev'd and remanded sub nom.* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

14. In *St. Louis University v. Masonic Temple Ass'n*, the Missouri Supreme Court found that granting state funds to a religious college for the construction of a student arena did not violate article I, § 7 of the Missouri Constitution. *St. Louis Univ. v. Masonic Temple Ass'n*, 220 S.W.3d 721 (Mo. 2007).

15. Appellant's Initial Brief at 11, *Trinity Lutheran Church of Columbia, Inc., v. Pauley*, 778 F.3d 779 (8th Cir. 2015) (No. 14-1382), 2014 WL 1759858, at *10-11.

16. Appellant's Initial Brief, *supra* note 15, at 10-11.

17. See *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *rev'd and remanded sub nom.* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

18. *Id.* at 785.

19. *Id.*

receiving a public benefit for which it was otherwise qualified.²⁰ Applying strict scrutiny, the Court further held that the Department’s policy violated the Free Exercise Clause of the First Amendment.²¹

III. LEGAL BACKGROUND

This section analyzes the relevant constitutional provisions and case law. First, this section examines both the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution, which form the foundation for the Court’s decision in *Trinity Lutheran*. Next, this section outlines the history of religious freedom jurisprudence and analyzes the current state of the relevant law. Finally, this section provides a brief overview of the provision of the Missouri Constitution at issue in *Trinity Lutheran* and the relevant Missouri state case law.

A. THE FIGHT FOR RELIGIOUS FREEDOM: A BRIEF HISTORY OF THE FIRST AMENDMENT

The First Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment,²² provides in pertinent part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²³ This amendment was an expression of the Founding Fathers’ indignation at the religious persecution happening throughout the colonies. For example, in 1774, James Madison wrote to a friend:

That diabolical, hell-conceived principle of persecution rages among some. . . . This vexes me worse than anything whatever. There are at this time not less than five or six well-meaning men in close jail for publishing their religious sentiments I have neither patience to hear, talk or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all.²⁴

20. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

21. *Id.*

22. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).

23. U.S. CONST. amend. I.

24. *Everson v. Bd. of Ed.*, 330 U.S. 1, 11 n.9 (1947) (quoting I Writings of James Madison (1900) 18, 21).

Many of America's first settlers came to this country seeking freedom from religious persecution.²⁵ They fled Europe, where all citizens, regardless of their beliefs, were forced to attend government-established churches and pay taxes and tithes in support of same.²⁶ In Europe, persecution was rampant; men and women who failed to show complete loyalty to their government-run churches were fined, arrested, tortured, and killed.²⁷ In colonial America, the rivalry between the different religious sects was an ominous reminder of the intolerance and persecution taking place across the sea.²⁸ The Religion Clauses of the First Amendment were intended to prevent the old-world persecution from taking hold in America, to end the rivalry between the religious sects, and to guarantee religious liberty for all citizens;²⁹ the "wall of separation between Church and State" was constructed to achieve those means.³⁰

B. THE FREE EXERCISE CLAUSE PROTECTS THE INDIVIDUAL RIGHT TO FREEDOM FROM DISCRIMINATION ON THE BASIS OF RELIGION

The Free Exercise Clause of the First Amendment protects the individual's right to practice and believe in their religion of choice, regardless of whether those beliefs seem ludicrous to others.³¹ The government may not force an individual to

25. See Samuel Adams, Oration at the State-House in Philadelphia (Aug. 1, 1776) ("Driven from every other corner of the earth, freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country as their last asylum.").

26. See WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA 320–22 (1942).

27. *Id.*

28. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1864–75, at 722–31 (Boston, Hilliard, Gray & Co. 1833).

29. *Id.* ("It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject.").

30. In a letter to the Danbury Baptists, Thomas Jefferson wrote:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State.

Thomas Jefferson, Letter to the Danbury Baptist Association (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html>.

31. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[R]eligious beliefs need not be acceptable, logical, consistent, or

subscribe to a certain religion, nor may it impose penalties or otherwise burden an individual's exercise of their chosen religion.³² Even so, the right of free exercise is not unlimited and cannot be invoked as an excuse for noncompliance with otherwise valid laws.³³

In *Employment Division, Department of Human Resources v. Smith*, the respondents were fired from their jobs for ingesting peyote—a hallucinogenic drug prohibited in the state of Oregon—for sacramental purposes during a religious ceremony at the Native American Church where they were members.³⁴ The respondents filed suit contesting their disqualification from Oregon's unemployment benefits program due to their religious use of peyote.³⁵ The United States Supreme Court considered whether Oregon's statute generally prohibiting the use of peyote, for religious purposes or otherwise, violated the Free Exercise Clause.³⁶ The Court held that it did not, reasoning that because Oregon's general prohibition of peyote was constitutional, the State was permitted to deny the respondents unemployment benefits because they were fired for their illegal use of the drug.³⁷ The Court further held that the *Sherbert* test, which requires a compelling governmental interest to justify a law substantially burdening religious practice, was inapplicable to free exercise challenges to "across-the-board criminal prohibition[s] on a particular form of conduct."³⁸ Importantly, the Court distinguished between neutral, generally applicable laws and those that prohibit conduct *only* when motivated by religion; the former being constitutionally acceptable, while the latter raises First Amendment concerns.³⁹

Since its decision in *Smith*, the United States Supreme Court has further articulated the requirements for a law to be considered neutral and generally applicable.⁴⁰ At a minimum, a

comprehensible to others in order to merit First Amendment protection.") (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)).

32. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

33. *Id.* at 878.

34. *Id.* at 874.

35. *Id.*

36. *Id.* at 876.

37. *Smith*, 494 U.S. at 874–75.

38. *Id.* at 884–85.

39. *Id.* at 877–79.

40. In *Lukumi*, the petitioner church and its members practiced the Santería religion, which requires animal sacrifice as part of its ancient religious rituals. After

law must be facially neutral; this requirement is not met if the language of a law has religious connotations that lack a discernable “secular meaning.”⁴¹ Further, courts will also consider the legislature’s intent, the practical effects of the law’s operation, and whether the law prohibits more religious conduct than necessary to further the government’s alleged compelling interests.⁴² For example, in *Lukumi*, the United States Supreme Court found that a series of facially neutral city ordinances violated the First Amendment because they were designed to exclusively affect persons practicing the Santería faith.⁴³ When a law restricting religious practice fails to meet the *Smith* requirements for neutrality and general applicability, it is subject to strict scrutiny; to survive, it must advance compelling governmental interests and be narrowly tailored to further those interests.⁴⁴

C. THERE IS ROOM FOR “PLAY IN THE JOINTS” BETWEEN THE TWO RELIGION CLAUSES

In *Everson v. Board of Education*, the United States Supreme Court set out the scope of the First Amendment’s Establishment Clause:

The ‘establishment of religion clause’ of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice

acquiring land in the City of Hialeah where it planned to build a new church, the petitioner learned that the City had enacted ordinances prohibiting animal sacrifice. The Court found that the ordinances violated the First Amendment because their object was to burden the practice of the Santería religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 520 (1993).

41. *Id.* at 533.

42. *Id.* at 535–38.

43. *Id.* at 535 (“The design of these laws accomplishes . . . a religious gerrymander . . . an impermissible attempt to target petitioners and their religious practices.”).

44. *Id.* at 546.

religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations and vice versa.⁴⁵

In other words, the Establishment Clause requires the government to remain neutral in its interactions with religion and religious entities. As the Court noted, “State power is no more to be used so as to handicap religions, than it is to favor them.”⁴⁶

In *McDaniel v. Paty*, the United States Supreme Court held that a Tennessee statute disqualifying ministers from holding office violated the First Amendment right to free exercise of religion.⁴⁷ The Court found that the State was impermissibly “punishing a religious profession with the privation of a right” by forcing *McDaniel* to denounce his religion in order to exercise his civil right to run for public office.⁴⁸ Thus, the government cannot prohibit a person from exercising his civil rights based on religious beliefs or religious status.⁴⁹

On the other hand, the Free Exercise Clause does not require the government to conduct its affairs in compliance with any certain individual’s religious beliefs,⁵⁰ rather, it applies to all citizens equally.⁵¹ In *Lyng v. Northwest Indian Cemetery Protective Ass’n*, the United States Forest Service planned to construct a road that would unavoidably run through a portion of land used by a group of Native American tribes for religious rituals.⁵² Although it was conceded that the construction would cause irreparable damage to sacred areas integral to the tribes’ religious practices, the United States Supreme Court held that

45. *Everson v. Bd. of Ed.*, 330 U.S. 1, 15–16 (1947).

46. *Id.* at 17. In *Everson*, the state statute at issue allowed local school districts to reimburse parents for the cost of their children’s transportation to both public and parochial schools. The petitioner alleged that this was an abuse of state power in favor of religion which violated the First Amendment. Ultimately, the Court held that the First Amendment was not violated because no state funds went directly to the schools. In particular, the Court held that the Free Exercise Clause prohibited the government from excluding members of any faith, on the basis of their faith, from receiving public welfare benefits. *Id.*

47. *McDaniel v. Paty*, 435 U.S. 618 (1978).

48. *Id.* at 626.

49. *See id.*

50. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 448 (1988) (quoting *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)).

51. *Id.* at 452.

52. *Id.* at 441–42.

the Free Exercise Clause did not prohibit the government from building the road.⁵³ The Court determined that while the road may make it more difficult for the tribes to practice their religion, it did not deny them a generally available public right, nor did it place a burden or penalty on their religious beliefs.⁵⁴ The Court explained: “The crucial word . . . is ‘prohibit’: ‘For the Free Exercise clause is written in terms of what government cannot do to the individual, not in terms of what the individual can exact from the government.’”⁵⁵ Accordingly, because the government’s actions did not coerce the tribes to violate their religious beliefs, the attendant consequence of inconveniencing the tribes’ religious rituals did not violate the Free Exercise Clause.⁵⁶

In *Walz v. Tax Commission of City of New York*,⁵⁷ the United States Supreme Court acknowledged that the two Religion Clauses cannot be strictly construed without defeating the fundamental purpose of the provisions. Thus, some “play in the joints” between the two clauses must exist.

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.⁵⁸

In *Trinity Lutheran*, Justice Sotomayor’s dissent explains that this play in the joints between the Religion Clauses works in two ways. First, it allows the government some wiggle room to acknowledge the “unique status of religious entities” and to excuse them from otherwise applicable laws (i.e., tax exemption) based on their religious status.⁵⁹ On the other hand, it also allows the government to exclude religious organizations from government aid programs to avoid “historic antiestablishment

53. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441–42 (1988).

54. *Id.* at 449.

55. *Id.* at 451 (citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

56. *Id.* at 450–51.

57. *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).

58. *Id.* at 669.

59. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2031 (2017) (Sotomayor, J., dissenting).

interests.”⁶⁰ Thus, when confronted with a law that discriminates against organizations based on their religious status, the focus should not be on the mere fact that discrimination is occurring; rather, the focus is properly placed on the reasons behind the discrimination and whether there is a compelling state interest to justify it.⁶¹

In *Locke v. Davey*, the United States Supreme Court affirmed that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause”⁶² There, the Court held that the State of Washington did not violate the Free Exercise Clause when it refused to grant scholarship money to otherwise qualified students pursuing a degree in devotional theology.⁶³ The Court concluded that the state’s “historic and substantial interest” in preventing taxpayer funds from supporting church leaders justified its policy denying funding for religious instruction.⁶⁴ The Court explained: “If any room exists between the two Religion Clauses, it must be here.”⁶⁵

D. ARTICLE I, § 7, OF THE MISSOURI CONSTITUTION REQUIRES ABSOLUTE SEPARATION OF CHURCH AND STATE

Article I, § 7, of the Missouri Constitution 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.⁶⁶

Missouri’s establishment clause goes further than the federal Establishment Clause, requiring absolute separation between church and state.⁶⁷

60. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2032 (2017) (Sotomayor, J., dissenting) (internal quotation marks omitted) (quoting *Locke v. Davey*, 540 U.S. 712, 722 (2004)).

61. *Id.* at 2035 n.6.

62. *Locke v. Davey*, 540 U.S. 712, 718–19 (2004).

63. *Id.* at 725.

64. *Id.*

65. *Id.*

66. MO. CONST. art. I, § 7.

67. *See St. Louis Univ. v. Masonic Temple Ass’n*, 220 S.W.3d 721, 729 (Mo. 2007) (“Missouri’s establishment clause is more restrictive than the federal provision.”).

In 1953, the Missouri Supreme Court recognized Missouri's interest in maintaining strict separation of church and state, and interpreted article I, § 7, to strictly prohibit state funding of religious schools:

Missouri has an unqualified policy . . . that no funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religious beliefs.⁶⁸

However, the Missouri Supreme Court does not exclude organizations from receiving state aid based on name alone; instead, the court inquires as to “whether religion so pervades the atmosphere of the [school] that it is in essence under religious control or directed by a religious denomination.”⁶⁹ In *St. Louis University*, the Missouri Supreme Court held that the University was permitted to receive state funds because, despite the school's religious affiliations, it was not controlled by a “religious creed” and operated as an independent organization.⁷⁰

The Missouri Supreme Court has also recognized a distinction between elementary schools and institutions of higher education. In *Americans United v. Rogers*, the court upheld a statute granting tuition funds to students attending college, including religious colleges.⁷¹ The Missouri Supreme Court found that university education “does not have the same religious implications or significance”⁷² as pre-college education, because, among other things, “college students are less susceptible to religious indoctrination.”⁷³

IV. THE COURT'S DECISION

In *Trinity Lutheran*, the majority primarily looked to precedent concerning discrimination against individuals on the basis of religion. Based on its analysis of the case law, the majority held that a state policy excluding qualified churches

68. Brief of Appellee at 13, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015) No. 14-1382, 2014 WL 2925942, at *13 (quoting *Berghorn v. Reorganized Sch. Dist. No. 8*, 260 S.W.2d 573, 582–83 (Mo. 1953)).

69. *St. Louis Univ. v. Masonic Temple Ass'n*, 220 S.W.3d 721, 726 (Mo. 2007).

70. *Id.* at 728.

71. *Am. United v. Rogers*, 538 S.W.2d 711, 713 (Mo. 1976).

72. *Id.* at 721.

73. *Id.* at 717.

from participating in a public grant program violates the Free Exercise Clause.⁷⁴ Chief Justice Roberts delivered the majority opinion, except as to footnote three, joined in full by Justices Kennedy, Alito, and Kagan. Justices Thomas and Gorsuch also joined the majority opinion, except as to footnote three. Concurring opinions were filed by Justice Thomas (joined by Justice Gorsuch), Justice Gorsuch (joined by Justice Thomas), and Justice Breyer. Finally, Justice Sotomayor authored a dissenting opinion in which Justice Ginsburg joined.

A. THE MAJORITY OPINION

The Court first considered the relevant case law involving denial of a public benefit solely on the basis of religious identity.⁷⁵ Notably, the Court declined to consider whether there was an Establishment Clause violation because the parties stipulated that there was no Establishment Clause issue.⁷⁶ The Court noted that recent cases rejecting free exercise challenges hinged on whether the law in question was “neutral and generally applicable” or whether it “single[d] out the religious for disfavored treatment.”⁷⁷ In this case, the Court determined that the Department’s policy singled out candidates for exclusion solely on the basis of religious identity because it required Trinity Lutheran to choose between participating in “an otherwise available benefit program or remain[ing] a religious institution.”⁷⁸

The Court distinguished the instant case from *Locke v. Davey*, which held that the State of Washington did not violate the Free Exercise Clause by refusing to grant state scholarships to students pursuing theology degrees.⁷⁹ The Court noted that in *Locke*, the students were not denied scholarships because of their status, but rather for their proposed use of the scholarship funds.⁸⁰ However, in *Trinity Lutheran*, the use of scrap tires to resurface a playground could not be described as an “essentially religious endeavor.”⁸¹ Thus, Missouri was not justified in

74. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

75. *Id.* at 2020.

76. *Id.* at 2019.

77. *Id.* at 2020.

78. *Id.* at 2021–22.

79. *Trinity Lutheran*, 137 S. Ct. at 2023.

80. *Id.*

81. *Id.* at 2023.

excluding Trinity Lutheran based on its status as a church.⁸²

Finally, the Court discussed the strict scrutiny standard for laws targeting religious beliefs, which requires a compelling state interest to survive.⁸³ The Court ultimately concluded that Missouri's interest in strict separation of church and state did not qualify as an interest "of the highest order."⁸⁴ Thus, the State was not justified in refusing to fund a church simply because of its religious character.⁸⁵ Notably, the Court did not offer any guidance or examples as to what would constitute a sufficiently compelling interest "of the highest order" to justify such a policy.⁸⁶

B. JUSTICE THOMAS, JUSTICE GORSUCH, AND JUSTICE BREYER'S CONCURRENCES

Justice Thomas' concurrence expressed disapproval of the Court's decision in *Locke*, noting that the *Locke* Court's endorsement of "even a mild kind of discrimination against religion" was concerning.⁸⁷ Nonetheless, the concurrence joined the majority opinion, except as to footnote three, because it approved of the majority's narrow reading of *Locke*, which distinguished *Locke* from the present case.⁸⁸

Justice Gorsuch's concurrence offered two qualifications on the majority opinion. First, the concurrence argued that there is no meaningful distinction to be drawn between religious *status* and religious *use*.⁸⁹ Second, the concurrence declined to join footnote three of the majority opinion and suggested that the Court's holding in *Trinity Lutheran* should not be limited to a certain category of cases.⁹⁰

The concurrence criticized the majority's reliance on the "status-use distinction" in distinguishing *Locke* from the case at

82. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023–24 (2017).

83. *Id.* at 2024.

84. *Id.* at 2024 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

85. *Id.*

86. *Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

87. *Id.* at 2025 (Thomas, J., concurring).

88. *Id.*

89. *Id.* at 2025 (Gorsuch, J., concurring).

90. *Id.* at 2026.

hand.⁹¹ Posing a series of hypothetical questions, the concurrence revealed the difficulty and potential arbitrariness in deciding whether a set of facts is best described as a religious *status* or a religious *use*.⁹² The concurrence went even further to suggest that the status-use distinction is irrelevant in the context of a free exercise challenge, noting that the Free Exercise Clause “guarantees the free *exercise* of religion, not just the right to inward belief (or status).”⁹³

The concurrence also criticized footnote three of the majority opinion, which reads: “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.”⁹⁴ Although the footnote was admittedly a true statement, the concurrence made clear that it should not be read to imply that the Court’s holding is limited to cases concerning “playground resurfacing.”⁹⁵ The concurrence pointed out that the majority opinion should be read generally to prohibit discrimination against religious exercise in all cases—“whether on the playground or anywhere else.”⁹⁶

Justice Breyer’s concurrence emphasized the “public benefit” nature of the program the State sought to exclude Trinity Lutheran from participating in.⁹⁷ The concurrence described the Scrap Tire Program as a public program intending to benefit “the health and safety of children.”⁹⁸ Accordingly, the concurrence reasoned that the State could not exclude Trinity Lutheran from receiving the benefits of said public program based solely on its religious character, just as the State could not deny a church school access to fire or police protection.⁹⁹

C. JUSTICE SOTOMAYOR’S DISSENT

Justice Sotomayor’s dissent found the majority opinion to be a “radical mistake.”¹⁰⁰ The dissent criticized the majority decision

91. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J., concurring).

92. *Id.* at 2025–26.

93. *Id.* at 2026.

94. *Id.*

95. *Id.*

96. *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring).

97. *Id.* at 2026 (Breyer, J., concurring).

98. *Id.* at 2027.

99. *Id.*

100. *Id.* at 2031 (Sotomayor, J., dissenting).

as an unnecessary departure from precedent threatening to crumble the wall between church and state.¹⁰¹ Spanning twenty-seven pages, the dissent provides a thorough analysis of the facts of the case, the history of the First Amendment, and the relevant jurisprudence.

The dissent's primary criticism of the majority opinion was that it failed to address the Establishment Clause concerns raised by the facts of the case.¹⁰² The dissent contended that the Establishment Clause prohibited Missouri from allowing Trinity Lutheran to participate in the Scrap Tire Program because "the government may not directly fund religious exercise,"¹⁰³ and Trinity Lutheran admittedly used the Learning Center, playground included, to further its "religious mission."¹⁰⁴ The dissent also pointed out the entanglement and endorsement issues presented by the Program's preference for candidates who pledge to advertise that they have been funded by the government.¹⁰⁵

Turning to the Free Exercise Clause challenge, the dissent found that the majority erred in suggesting that the government may not single out entities based on their "religious status."¹⁰⁶ The dissent noted that there is some play in the joints between the Religion Clauses that allows the government to draw lines based on religious status, although that action must be justified by compelling "antiestablishment interests."¹⁰⁷ Thus, according to the dissent, the majority opinion should not have focused on the fact that the Department's policy categorically excluded churches; rather, it should have focused on the reason behind that exclusion.¹⁰⁸ Likewise, the proper analysis would use a balancing test, rather than the strict scrutiny standard employed by the majority.¹⁰⁹

101. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., dissenting).

102. *Id.* at 2028 ("The Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.").

103. *Id.*

104. *Id.* at 2027 (quoting Pet. for Cert., *supra* note 8, at 101a) ("The Learning Center serves as 'a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program.'").

105. *Id.* at 2031 n.4.

106. *Trinity Lutheran*, 137 S. Ct. at 2021 (Sotomayor, J., dissenting).

107. *Id.* at 2033.

108. *Id.* at 2031–32.

109. *Id.* at 2039–40.

Conducting its own review of Missouri's interest in strict separation of church and state, the dissent looked to the nation's history and each state's individual experience with laws prohibiting public funding of religion.¹¹⁰ The dissent found *Locke* to be instructive, as both the Washington and Missouri laws forbidding religious entities from receiving public funds have identical historical roots and are supported by the same compelling antiestablishment interests.¹¹¹ The dissent maintained that while Missouri may have the option to allow religious organizations to receive public funds, the Religion Clauses prevent the State from being compelled to fund those religious entities.¹¹² Ultimately, the dissent concluded that the majority's rule would force the government to become entangled with religion, "dismantl[ing] a core protection for religious freedom" and leading us "to a place where separation of church and state is a constitutional slogan, not a constitutional commitment."¹¹³

V. ANALYSIS

The Supreme Court's ruling in *Trinity Lutheran* will have a significant impact on how the law views separation of church and state, reaching far beyond the playground. First, *Trinity Lutheran* will undoubtedly have a major influence on education law, and in particular, school choice. In light of *Trinity Lutheran*, it is likely that the Supreme Court will soon require states to include religious options in their school voucher programs. This participation in voucher programs would be required despite the fact that private religious schools operate under their own set of standards and are not subject to the same type of academic regulation as public schools. Second, *Trinity Lutheran* marks the first time that the Court has viewed a state law concerning separation of church and state as a kind of religious discrimination. Accordingly, the Court has essentially stripped the states of their power to enforce a higher degree of separation of church and state than the Establishment Clause requires—inevitably resulting in government money being spent in support of religion.

110. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2032–35 (2017) (Sotomayor, J., dissenting).

111. *Id.* at 2035.

112. *Id.* at 2032–33.

113. *Id.* at 2041.

**A. THE FIRST AMENDMENT REQUIRES SEPARATION OF CHURCH
AND STATE, NOT MANDATORY EQUALITY, FOR RELIGIOUS
ENTITIES**

The “constitutional commitment”¹¹⁴ to maintaining separation of church and state requires the government to treat religious institutions distinctively, and this distinct treatment does not always amount to discrimination. The majority opinion contended that the Free Exercise Clause required the State of Missouri to allow Trinity Lutheran to compete for a grant on “equal footing” with the secular candidates, and that the Department could not discriminate against a church simply because of its religious character.¹¹⁵ However, as Justice Sotomayor pointed out in her dissent, houses of worship have long been treated as a distinct category when considering Free Exercise challenges.¹¹⁶

For example, religious organizations are exempt from certain provisions of the Civil Rights Acts, allowing them to discriminate against employees on the basis of religion; thus, avoiding governmental interference with an organization’s “religious mission.”¹¹⁷ Likewise, the government may exclude religious organizations from government aid programs to avoid the historically condemned “use of taxpayer funds to support church leaders.”¹¹⁸ The distinct category is necessary because government interaction with religious institutions raises Establishment Clause concerns, and those concerns must be considered in conjunction with any Free Exercise challenges.

In *Trinity Lutheran*, the majority focused almost exclusively on the fact that the Department’s policy treated religious entities differently from their secular counterparts, and quickly dismissed Missouri’s asserted interest in maintaining strict separation of church and state as “nothing more . . . than [a] policy preference.”¹¹⁹ The signal to the lower courts is loud and clear:

114. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2041 (2017) (Sotomayor, J., dissenting).

115. *Id.* at 2022 (majority opinion).

116. *Id.* at 2031 (Sotomayor, J., dissenting) (“[The Court] claims that the government may not draw lines based on an entity’s religious ‘status.’ But we have repeatedly said that it can.”).

117. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

118. *Locke v. Davey*, 540 U.S. 712, 722 (2004).

119. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

equality for religious organizations is now mandatory under the First Amendment. The result of this new rule is that taxpayer money will inevitably be used to fund religious activities, and one can imagine that a new wave of litigation will be forthcoming when those taxpayers learn that they are being compelled to support religion.

B. PAYING TO RESURFACE A CHURCH PLAYGROUND IMPERMISSIBLY ADVANCES RELIGION

In *Trinity Lutheran*, there was no question about whether the Learning Center, including the playground, was used for religious purposes. On its website, the Learning Center describes itself as a “ministry of Trinity Lutheran Church” that “incorporates daily religion” and “provides opportunities for children to grow spiritually,” among other things.¹²⁰ Undeniably, a playground is an integral part of a preschool facility, and religious activities could, and most likely have, taken place outdoors on the playground as well as in the classroom. Thus, it is hard to ignore the glaring Establishment Clause concerns with providing direct financial aid to an averred house of worship, even when the funds are limited to resurfacing a playground.

Moreover, money is fluid. Any money saved on resurfacing the playground could be used by Trinity Lutheran to further its religious mission in other ways. By underwriting the church’s playground renovation expenses, the State of Missouri arguably left Trinity Lutheran with a surplus of funds to be spent however it saw fit; it could hire new ministers, initiate community outreach programs, or even build a new altar. Ultimately, because of its *status* as a religious entity, a church will *use* its money to further its religious mission. Attempting to monitor how funds are spent would be problematic at best and would most likely result in the government becoming excessively entangled in religious affairs. Thus, to avoid these concerns, it is sometimes necessary to allow the government to build a wall between church and state to prevent public funds from being spent in support of religion.

C. TRINITY LUTHERAN MAY REQUIRE STATES TO PAY FOR STUDENTS TO ATTEND PRIVATE RELIGIOUS SCHOOLS

The day after its decision in *Trinity Lutheran*, the Supreme

120. TRINITY LUTHERAN CHILD LEARNING CENTER, *Curriculum*, <https://tlclckids.com/curriculum/> (last visited Sept. 7, 2018).

Court vacated and remanded four cases in which the lower court allowed the government's exclusion of religious schools from general aid programs.¹²¹ Despite footnote three's attempt to limit the implications of the Court's decision,¹²² the Court's actions reveal a more expansive reach.

Religious schools are allowed to propagate and indoctrinate students and employees with their particular set of beliefs and claim separation of church and state as a defense. It is therefore unsustainable to claim independence from government interference, while at the same time seeking to benefit from government programs and financing. If a religious school is willing to take funding from the government, then the ethical wall between church and state cannot stand. There are no safeguards to ensure that government funds are not being used, either directly or indirectly, to advance the work of religion itself. Further, in *Trinity Lutheran*, the religion in question, Lutheranism, is well-established in American culture; however, there are many religious schools and churches which are outside of the cultural norm and whose practices might offend the normative standards of society. Despite these enormous concerns, the lower courts will likely feel pressured by the *Trinity Lutheran* decision to rule in favor of equal treatment on remand.

D. TRINITY LUTHERAN WILL EXPAND CHURCHES' ACCESS TO PUBLIC FUNDS

On January 2, 2018, the Federal Emergency Management Agency (FEMA) announced that houses of worship are now eligible to receive financial assistance from the federal government for disaster relief.¹²³ This policy change applied retroactively to allow religious institutions damaged in Hurricane Harvey to receive reimbursement for their repair and rebuilding

121. *Doyle v. Taxpayers for Pub. Ed.*, 137 S. Ct. 2324 (2017) (mem.); *Douglas City School Dist. v. Taxpayers for Pub. Ed.*, 137 S. Ct. 2327 (2017) (mem.); *Col. State Bd. of Ed. v. Taxpayers for Pub. Ed.*, 137 S. Ct. 2325 (2017) (mem.); *N.M. Ass'n of Nonpublic Sch. v. Moses*, 137 S. Ct. 2325 (2017) (mem.).

122. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017) ("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.").

123. Press Release, Federal Emergency Management Agency, FEMA Expands Public Assistance Eligibility to Include Houses of Worship (Jan. 2, 2018), <https://www.fema.gov/news-release/2018/01/02/fema-expands-public-assistance-eligibility-include-houses-worship>.

costs.¹²⁴ Prior to this revision, any private non-profit used primarily for religious activities was not eligible to apply for public assistance.¹²⁵ Significantly, FEMA cited *Trinity Lutheran* as the catalyst for reconsidering its policy concerning the eligibility of religious institutions for FEMA aid.¹²⁶ The agency's conclusion that *Trinity Lutheran* requires it to grant eligibility to all houses of worship regardless of the "primarily religious use of the facility" is a troubling expansion of the Court's holding.¹²⁷

In *Trinity Lutheran*, the Court made a distinction between denial of a grant because of religious status and denial based on the proposed religious use of the funds.¹²⁸ The Court distinguished the present case from *Locke v. Davey*, wherein the claimant sought funds to pursue a theology degree—an "essentially religious endeavor"—because "opposition to such funding to support church leaders lay at the historic core of the Religion Clauses."¹²⁹ The Court noted that in *Trinity Lutheran*, "nothing of the sort can be said about a program to use recycled tires to resurface playgrounds."¹³⁰

Accordingly, it is unclear whether the *Trinity Lutheran* decision obligates FEMA to pay for repairs to facilities used primarily for religious purposes. Even if FEMA's former policy was found to impose a penalty on the free exercise of religion, the policy could have been justified by a compelling state interest. Moreover, the new policy also implicates Establishment Clause violations. The primary effect of this policy is to advance religion by directly providing funds for the restoration of houses of worship, a clear violation of the Establishment Clause as the

124. *Public Assistance Program and Policy-Guide*, FEDERAL EMERGENCY MANAGEMENT AGENCY vii (Jan. 2018), https://www.fema.gov/media-library-data/1515614675577-be7fd5e0cac814441c313882924c5c0a/PAPPG_V3_508_FINAL.pdf.

125. *Id.* ("This Third Edition incorporates the following revisions: . . . Deleting 'religious' from the sentence 'Facilities established or primarily used for political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities are not eligible' . . .").

126. *Id.* ("In light of the *Trinity Lutheran* decision, FEMA has considered its guidance on private nonprofit facility eligibility and determined that it will revise its interpretation of the aforementioned statutory and regulatory authorities so as not to exclude houses of worship from eligibility for FEMA aid on the basis of the religious character or primarily religious use of the facility.")

127. *Id.*

128. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017).

129. *Id.* at 2023 (internal quotation marks and citations omitted).

130. *Id.*

Supreme Court has pointed out on many occasions.¹³¹ It may also create the impression that religion is relevant to a person's standing in the community when religious facilities are granted funds for rebuilding but individual citizens are not—an impermissible endorsement of religion. Thus, *Trinity Lutheran* should not be interpreted so broadly as to require FEMA to provide taxpayer support for rebuilding houses of worship.

VI. CONCLUSION

The future of First Amendment law after *Trinity Lutheran* remains to be seen, and one can only speculate about the potentially expansive changes the decision will bring about. At least one brick has been removed from the wall of separation of church and state, and the 7-to-2 majority decision does not inspire much confidence that the Justices plan to stray from their path of overhauling church-state relations. For now, Missouri is required to use taxpayer money to fund improvements to a church's facilities—no matter how “odious to our Constitution” that may seem.¹³²

Miranda L. Lewis

131. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2028 (2017) (Sotomayor, J., dissenting); *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 844 (1995); *Mitchell v. Helms*, 530 U.S. 793, 843–44 (2000) (O'Connor, J., concurring).

132. *Trinity Lutheran*, 137 S. Ct. at 2025 (Sotomayor, J., dissenting).