# THE SIGNIFICANCE OF TRINITY LUTHERAN

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## INTRODUCTION

The long-awaited[1] decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*[2] is a significant development. The Court (by a 7-2 margin) held that it violated the free exercise clause for the state of Missouri to discriminate against a religious entity in the administration of a public grant program. The decision may well have important ramifications in a number of areas, including school choice. The decision, though, was written in narrow terms and so many issues remain unsettled. This paper comments on the significance of the *Trinity Lutheran* decision.

## I. BACKGROUND

Trinity Lutheran Church operates a preschool and day care center (Trinity Lutheran Church Child Learning Center) on church property.[3] In 2012, the Center applied to the Missouri Department of Natural Resources for a grant to resurface the Center's playground pursuant to a state program that "offers reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires."[4] Trinity Lutheran ranked fifth among the forty-four applicants for reimbursement grants.[5] The state awarded fourteen grants but Trinity Lutheran did not receive one of the grants.[6] The State explained that it "could not provide financial assistance directly to a church."[7] This was due to a provision of the Missouri Constitution that provides:

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1. *See* Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 135 (2017) (noting the lengthy delay between the grant of certiorari and the oral argument).
2. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
3. *Id.* at 2017.
4. *Id.*
5. *Id.* at 2018.
6. *Id.*
7. *Id.*

> 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.[8]

Trinity Lutheran filed suit against the Director of the State Department of Natural Resources in the United States District Court for the Western District of Missouri. Trinity Lutheran alleged that the denial of funding violated the Free Exercise Clause of the United States Constitution. The court granted the defendant's motion to dismiss.[9] Relying on the Supreme Court's 2004 decision in *Locke v. Davey*,[10] the court "held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran."[11] By a 2-1 margin, the United States Court of Appeals for the Eighth Circuit affirmed.[12]

The United States Supreme Court reversed in an opinion by Chief Justice Roberts.[13] The Chief Justice's opinion was joined in full by Justices Kennedy, Alito, and Kagan. Justices Thomas and Gorsuch joined in all of the opinion except for footnote three.[14] Justice Breyer concurred in the judgment. Justice Sotomayor, joined by Justice Ginsburg, dissented in a lengthy opinion that was nearly twice as long as the Chief Justice's opinion.

Chief Justice Roberts noted that the parties agreed that the Establishment Clause of the First Amendment "does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."[15] The Chief Justice found that the Free Exercise Clause prohibited Missouri from excluding Trinity Lutheran from the Scrap Tire Program solely because of its religious identity. The State's policy of excluding Trinity Lutheran from a public benefit solely because of its religious character "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."[16]

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8. MO. CONST. art. I, § 7.

9. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1157 (W.D. Mo. 2013).

10. *See* Locke v. Davey, 540 U.S. 712 (2004).

11. *Comer*, 137 S. Ct. at 2018 (citing 976 F. Supp. 2d at 1151).

12. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 790 (8th Cir. 2015).

13. *Comer*, 137 S. Ct. at 2017, 2025.

14. *See infra* text accompanying note 26.

15. *Comer*, 137 S. Ct. at 2019. Despite the parties' concession, the dissent concluded that the Establishment Clause precluded including Trinity Lutheran in the program. *See infra* text accompanying note 37.

16. *Comer*, 137 S. Ct. at 2021.

Chief Justice Roberts rejected the State's argument that the Court's 2004 decision in *Locke* controlled this situation.[17] In *Locke*, the Court rejected a free exercise challenge to the state of Washington's decision to deny a college scholarship to Joshua Davey because he sought to pursue a devotional theology degree. In *Locke*, the Court's decision was strongly influenced by the historic concern to avoid state support for the education of the clergy[18] and by the "relatively minor burden"[19] placed upon Davey. In *Trinity Lutheran*, in contrast, "a program to use recycled tires to resurface playgrounds"[20] was far afield from state support for clergy education. Moreover, the denial of aid in *Locke* did not depend on Davey's status, it depended on his intended use of the money. Here, "there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple [the Chief Justice continued]: No churches need apply."[21]

Missouri's effort to justify the penalty placed upon Trinity Lutheran by relying on the Missouri Constitution was unavailing. The Court referred to this state interest as "Missouri's policy preference for skating as far as possible from religious establishment concerns . . ."[22] and held that "that interest cannot qualify as compelling."[23] Although the Court phrased its nondiscrimination principle in sweeping terms, the Court stated in footnote three: "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."[24]

Justice Thomas concurred in an opinion joined by Justice Gorsuch.[25] Justice Thomas indicated his continuing disagreement with *Locke*,[26] which the Court had distinguished. Justice Thomas also did not join in footnote three.[27]

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17. *See id.* at 2022–24.
18. Locke v. Davey, 540 U.S. 712, 721–23 (2004).
19. *Id.* at 725.
20. *Comer*, 137 S. Ct. at 2023.
21. *Id.* at 2024 (footnote omitted).
22. *Id.*
23. *Id.*
24. *Id.* at 2024 n.3.
25. *Id.* at 2025 (Thomas, J., concurring in part).
26. *See* Locke v. Davey, 540 U.S. 712, 734–35 (2004) (Thomas, J., dissenting). In *Trinity Lutheran*, Justice Thomas noted that the "Court's endorsement in Locke of even a 'mil[d] kind' of discrimination against religion remains troubling. But because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion." *Comer*, 137 S. Ct. at 2025 (Thomas, J., concurring in part) (citations omitted).
27. *Comer*, 137 S. Ct. at 2025 (Thomas, J., concurring in part) ("I do not, however, join footnote 3.").

Justice Gorsuch (in an opinion joined by Justice Thomas) concurred in part.[28] Gorsuch emphasized that the line the Court seemed to draw "between laws that discriminate on the basis of religious status and religious use . . . "[29] was unstable. Gorsuch expressed deep reservations about *Locke v. Davey*, noting that "[i]f that case can be correct and be distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here."[30] Gorsuch also refused to join footnote three in the Chief Justice's opinion. Gorsuch stated: "the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."[31]

Justice Breyer concurred in the judgment and emphasized "the particular nature of the 'public benefit' here at issue."[32] The public benefit involved was "designed to secure or to improve the health and safety of children."[33] Perhaps thinking about looming battles over school choice, Breyer noted: "[p]ublic benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day."[34]

Justice Sotomayor (joined by Justice Ginsburg) dissented.[35] The dissent sounded the separationist alarm. *Trinity Lutheran* wasn't just about playgrounds. It "is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."[36] Even though the parties had agreed that no Establishment Clause issue was present, the dissent stated: "The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission."[37] The dissent viewed the grant program as providing an

28. *Id.* at 2025–26 (Gorsuch, J. concurring in part).
29. *Id.* at 2025 (Gorsuch, J., concurring in part).
30. *Id.* at 2026 (Gorsuch, J., concurring in part).
31. *Id.*
32. *Id.* (Breyer, J., concurring in the judgment).
33. *Id.* at 2027 (Breyer, J., concurring in the judgment).
34. *Id.*
35. *Id.* at 2027–41 (Sotomayor, J., dissenting).
36. *Id.* at 2027 (Sotomayor, J., dissenting).
37. *Id.* at 2028 (Sotomayor, J., dissenting).

unconstitutional subsidy to a "house of worship,"[38] a phrase that the dissent used repeatedly.[39]

In addition, the dissent did not find a free exercise problem with the State's discrimination against a religious entity. Missouri's decision to exclude religion from public benefits, a decision embodied in Missouri's Constitution, "has deep roots on our Nation's history, [and] reflects a reasonable and constitutional judgment."[40] The dissent did acknowledge that:

> some might point out that the Scrap Tire Program as issue here does not impose an assessment specifically for religious entities but rather directs funds raised through a general taxation scheme to the Church. That distinction[, the dissent thought,] makes no difference. The debates over religious assessment laws focused not on the means of those laws but on their ends: the turning over of public funds to religious entities.[41]

The dissent did not view the Missouri program as a true public benefit program; the grant program was "a selective benefit for a few recipients each year[]"[42] and so the comparison to "generally available benefits[,]"[43] such as police or fire protection, was "inapt."[44] The dissent also expressed concern that the Court had effectively invalidated state constitutional provisions that prevent public support for religion.[45] This result, the dissent maintained, "discounts centuries of history and jeopardizes the government's ability to remain secular."[46] The Court's decision, the dissent worried, "leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment."[47]

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38. *Id.*
39. *Id.* at 2028–29, 2031–33, 2040 (Sotomayor, J., dissenting).
40. *Id.* at 2032 (Sotomayor, J., dissenting).
41. *Id.* at 2035 n.6 (Sotomayor, J., dissenting).
42. *Id.* at 2040 (Sotomayor, J., dissenting).
43. *Id.*
44. *Id.*
45. *Id.* at 2041 (Sotomayor, J., dissenting).
46. *Id.*
47. *Id.*

## II. SIGNIFICANCE

There has already been much reflection about the impact of the *Trinity Lutheran* decision.[48] Its full impact likely will not be known for many years. I will only focus here on two of the more intriguing aspects of the decision. I will focus first on what *Trinity Lutheran* tells us about the continuing influence of the privatization thesis, which not too many years ago dominated church/state jurisprudence. I will focus second on the influence *Trinity Lutheran* may have on school choice.

### A. *Privatization of Religion*

I think it is important to examine the *Trinity Lutheran* decision from a broad perspective. One perspective that I and others have used in examining the law in this area is to consider the privatization thesis.[49] According to this view, religion must be confined to the private sphere.[50] Certain decisions of the United States Supreme Court have promoted this way of thinking about the relationship between church and state. One scholar (writing in 1986) concluded that the "Court is now clearly committed to articulating and enforcing a normative scheme of 'private' religion."[51]

The privatization thesis arose in several contexts. Most of the cases involved the Establishment Clause, but the Court's decisions on issues of public morality (which are typically decided under either substantive due process or equal protection) also reveal the Justices' understanding of the relationship between religion and the legal order.[52] In the Establishment

48. *See, e.g.*, Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 16 CATO SUP. CT. REV. 105 (2016–2017), https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2017/9/2017-supreme-court-review-3.pdf; Laycock, *supra* note 1; Ira C. Lupu & Robert W. Tuttle, *Trinity Lutheran Church v. Comer: Paradigm Lost?*, ACS SUP. CT. REV. 131 (2016–2017), https://acslaw.org/sites/default/files/ACS_Supreme_Court_Review_16-17_0.pdf.

49. *E.g.*, Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 CATH. SOC. SCI. REV. 223 (2001); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 21 (1991–1992) [hereinafter Myers, *Privatization*].

50. Some years ago, Professor Stephen Carter concluded that American law treats religion as a hobby—like building model airplanes. In this view, he stated, religion is "something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND CULTURE TRIVIALIZE RELIGIOUS DEVOTION 22 (1993).

51. Gerard V. Bradley, *Dogmatomachy--A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L. J. 275, 276–277 (1985–1986).

52. Richard S. Myers, *The Privatization of Religion and Catholic Justices*, 47 J. CATH. LEGAL STUD. 157, 159 (2008).

Clause context, the Court's decisions pushed religious institutions to the margins. So with regard to an important "public" task such as education, religious institutions had to be tolerated, but they could not receive significant public support.[53] In other contexts, such as the constitutionality of the display of religious symbols, the "constitutional command of secular government" contributes to the secularization of society.[54] In cases involving public morality, the privatization thesis works in two ways.

First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute "secular" interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it [under this view] violates the Establishment Clause for "religious" views to be embodied in secular legislation.[55]

The Supreme Court decisions promoting privatization were particularly common before the mid-1980s. For many years, the issue of public funding of religious schools dominated Establishment Clause litigation.[56] The Court was, through 1985, hesitant to approve governmental assistance to religious schools. The Court's 1985 decisions in *School District of Grand Rapids v. Ball*[57] and *Aguilar v. Felton*[58] were illustrative. In *Aguilar*, for example, the Court held that it violated the Establishment Clause for public school professionals to provide remedial education to poor children on the premises of private religious schools. This ruling severely disadvantaged needy inner-city families. Poor families who decided to educate their children in religious schools were effectively penalized for that choice. "[P]arents who sent their children to religious schools were required to forfeit their statutory entitlement to the remedial services that would have been [otherwise] available to their children had they attended public schools."[59]

The denial of aid in these cases was influenced by the Court's seeming acceptance of the privatization thesis.[60] "Justice Brennan's opinion in *Grand Rapids* clearly reflected the view that religion should be confined to the

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53. *See generally* Myers, *Privatization*, *supra* note 49, at 26–43.

54. *See generally id.* at 43–51.

55. *Id.* at 23.

56. *Id.* at 26.

57. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

58. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini, 521 U.S. at 203.

59. Myers, *Privatization*, *supra* note 49, at 32.

60. *Id.* at 32–33.

private, spiritual realm."[61] The Court was suspicious about permitting religious institutions to perform "public tasks," such as education. In certain cases, the Court expressed negative views on certain religious institutions, especially those with a strong sense of religious identity (sometimes referred to as "pervasively sectarian"[62]), which were thought of as almost un-American.[63] In the *Grand Rapids* case, the Court acknowledged that religious schools have contributed to society, but Justice Brennan reaffirmed that substantial public support for these institutions could not be sanctioned because "the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."[64] The schools had to be tolerated, of course,[65] but the Court was reluctant to permit these schools to receive an equal share of public resources.[66]

This view began to change in the 1980s. The Court moved from an emphasis on strict separation to an emphasis on neutrality. By 1997, in *Agostini v. Felton*[67] the Court overruled *Aguilar*. The Court noted that the analytical foundations of *Aguilar* had been abandoned in subsequent cases. In the Court's view, the remedial aid would not create a financial incentive to undertake religious education because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[68]

The Court's 2002 decision in *Zelman v. Simmons-Harris*[69] cemented this trend. In *Zelman*, the Court upheld the constitutionality of the Ohio Pilot Project Scholarship Program, which authorized vouchers of roughly $2,000 to several thousand low-income students in the failing Cleveland School District.[70] Although most of the participating schools were religious and the

61. *Id.* at 32.

62. For discussion of the pervasively sectarian standard, *see* Laycock, *supra* note 1, at 148–150. *See also* Stephen V. Monsma, *The Pervasively Sectarian Standard in Theory and Practice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 321 (1999). *See generally* Timothy S. Burgett, Note, *Government Aid to Religious Social Service Providers: The Supreme Court's "Pervasively Sectarian" Standard*, 75 VA. L. REV. 1077 (1989).

63. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 241–242 (1963) (Brennan, J., concurring).

64. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 398 (1985) (quoting Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)) (alteration omitted).

65. Myers, *Privatization*, *supra* note 49, at 29–30.

66. *Id.* at 30.

67. Agostini v. Felton, 521 U.S. 203 (1997).

68. *Id.* at 231.

69. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

70. *Id.* at 644–46 (describing the program).

vast majority of students were educated in these religious schools, the Court upheld the constitutionality of the program. The Court emphasized that the program was not written to favor religious schools and that when one considered the government's overall role in education (which included the state's support for magnet schools and for charter schools), it was clear that the state was not trying to influence the religious choices of poor parents in the Cleveland School District.[71] *Zelman* largely eliminated the Establishment Clause from these debates, as *Trinity Lutheran* makes clear.

The Court's decisions after 1985 brought a rejection of the privatization theory.[72] Under the Court's view, which emphasized neutrality and private choice, it was entirely permissible for government aid to benefit religious institutions. This was true even if the religious institutions were "pervasively sectarian." Religious institutions were regarded as equal players and not subject to any special disadvantages.[73]

*Trinity Lutheran* reflects the Court's continuing support for neutrality and its continuing rejection of the privatization thesis. In Chief Justice Roberts's opinion, there is almost no focus on the character of the institution. The majority opinion by Chief Justice Roberts is concerned about equal treatment for religious entities and not at all about whether a portion of the money in the grant program might flow to a religious entity.

I should clarify that there is nothing in the Chief Justice's opinion that expresses any worry about the religious character of the institutions receiving aid. On the contrary, he emphasized that Trinity Lutheran claimed "a right to participate in a government benefit program without having to disavow its religious character."[74] The Court later expressed concern that Trinity Lutheran was being required by the state of Missouri "to renounce its religious character

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71. Richard S. Myers, *School Choice: The Constitutional Issues*, 8 CATH. SOC. SCI. REV. 167, at 172–173 (2003) [hereinafter Myers, *School Choice*] (discussing Zelman).

72. Myers, *The Privatization of Religion and Catholic Justices*, *supra* note 52, at 160–61.

73. The fate of the privatization thesis is less clear in the other contexts identified above. In cases involving government display of religious symbols or involving governmental prayer, the Court has not clearly rejected the privatization thesis. As recently as 2005, the Court expressed concern about the "religious" intensity of governmental displays of religious displays such as the Ten Commandments. *See* RICHARD S. MYERS, CHURCH AND STATE, IN AMERICAN LAW FROM A CATHOLIC PERSPECTIVE: THROUGH A CLEARER LENS 97–98 (Ronald J. Rychlak ed., 2015) [hereinafter Myers, *Church and State*]; Richard S. Myers, *The Ten Commandments Cases and the Future of the Religion Clauses of the First Amendment*, 11 CATH. SOC. SCI. REV. 145 (2006) (discussing these cases). In Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), however, the Court was less insistent on screening all elements of religion from prayers at a town's monthly board meetings. In the public morality context, the Court's doctrine still rejects the privatization thesis, although the situation is quite unstable. *See* Myers, *Church and State*, *supra*, at 98–99; *See also* Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54 (2016).

74. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017).

in order to participate in an otherwise generally available public benefit program, for which it is fully qualified."[75] In the end, the penalty imposed on Trinity Lutheran was viewed as "odious to our Constitution. . . ."[76]

In contrast, Justice Sotomayor's dissent is a period piece. It sounds as if it could have been written by Justices Black or Douglas.[77] For Justice Sotomayor, it didn't matter that the government grant involved recycled tires. The key thing was that the grant was going to a "house of worship,"[78] which would use its Learning Center "in conjunction with its religious mission."[79] One might think that a playground surface was secular. But not to the dissent's discerning eye—"[t]he Church's playground surface—like a Sunday School room's wall or the sanctuary's pews—are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable."[80] It would be permissible, for the dissent, if the money flowed to an institution that was religiously affiliated but not too seriously religious;[81] the problem here was that the money flowed to entities "that set and enforce religious doctrine for their adherents. These are the entities [apparently like the 'pervasively sectarian' institutions about which the Court used to be troubled] that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion."[82] Her dissent captures the privatization theory. Religious institutions are problematic and must be confined to the margins of public life. But this is in a dissent and this view hasn't been in the majority in thirty years.

The Court's continuing rejection of the privatization thesis is welcome and important, although not a surprise. We are worlds away, and after *Trinity Lutheran* continue to be, from the strict separation approach of the middle of the last century that sometimes amounted to a hostility towards a public role for religion.[83] Justice Sotomayor's dissent, which seems written for the last century, only attracted one other vote (Justice Ginsburg) and there seems little prospect that this view will find favor from other Justices. It is true that there

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75. *Id.* at 2024.

76. *Id.* at 2025.

77. *See* Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 105 (describing the views of Justices Black and Douglas on religion clause issues).

78. *Comer*, 137 S. Ct. at 2029 (Sotomayor, J., dissenting).

79. *Id.* at 2028 (Sotomayor, J., dissenting).

80. *Id.* at 2029 (Sotomayor, J., dissenting).

81. *Id.* at 2038 (Sotomayor, J., dissenting).

82. *Id.*

83. *See* Myers, *Privatization*, *supra* note 49, at 21. *See generally* Frederick Mark Gedicks, *Essays: Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

is increasing cultural support for the privatization thesis but there is not much support for this theory as a matter of First Amendment doctrine.[84]

B. *School Choice*

The government aid program in *Trinity Lutheran*—involving a grant for resurfacing of a playground—seems relatively unimportant. One of the reasons the case attracted so much attention is because many thought the decision would have a great impact on the debate about school choice. Much of the commentary about the *Trinity Lutheran* decision has focused on this issue.[85]

Decades ago, the major constitutional issue relating to school choice measures, such as vouchers, involved whether these programs violated the Establishment Clause of the United States Constitution. Since *Zelman*,[86] this issue has largely been settled.[87] As long as a program is neutral with regard to religion, there is no serious Establishment Clause issue presented. The Establishment Clause has largely been eliminated from these discussions. It is interesting that the only opinion in *Trinity Lutheran* discussing the Establishment Clause at any length was the anachronistic dissent written by Justice Sotomayor.[88]

The Court, though, has not clearly accepted the idea that equal treatment is required. In the area of education, the courts have not taken seriously the idea that an equitable distribution of educational dollars is mandatory.[89] The choice to allow religious institutions to participate in public benefit programs, which is now clearly permissible, has been thought of as largely discretionary.[90] And sometimes state choices to extend aid to religious schools have not been allowed due to state constitutional provisions (often referred to as mini-Blaine amendments) that prohibit providing financial assistance to religious schools.[91] The Court has not directly considered the constitutionality

84. *See* Myers, *Church and State*, *supra* note 73, at 98–99 (noting cultural pressures in favor of privatization).

85. *See, e.g.*, Garnett & Blais, *supra* note 48, at 123–25; Laycock, *supra* note 1, at 160–68.

86. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

87. *See* Myers, *School Choice*, *supra* note 71, at 172–173 (discussing the impact of *Zelman*).

88. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2028–31 (2017) (Sotomayor, J., dissenting) (discussing Establishment Clause issues).

89. Myers, *School Choice*, *supra* note 71, at 173.

90. *Id.* at 173.

91. *Id.* at 174 (noting mini-Blaine amendment issue); *see also* Garnett & Blais, *supra* note 48, at 108–09, 125–27; Laycock, *supra* note 1, at 145; Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1034–47 (2013).

of these state Blaine amendments. The issue has been litigated extensively in the state courts, with conflicting results.[92]

Now, *Trinity Lutheran*, without exploring the broader issue of the status of mini-Blaine amendments, gives strong support to the idea that excluding religious schools from voucher or charter school plans would violate the United States Constitution. This is, of course, not entirely clear, but things seem to be moving strongly in favor of interpreting the Constitution to prohibit excluding religious schools from school choice plans. We may soon learn about the impact of the *Trinity Lutheran* decision.

Cases from Colorado and New Mexico involving such state provisions were pending before the Court at the time of the *Trinity Lutheran* decision, and the cases have now been remanded to the state courts for reconsideration in light of *Trinity Lutheran*.[93] The Colorado case involved the state's Choice Scholarship Pilot Program, which awards taxpayer-funded scholarships to elementary, middle, and high school students to help them pay their tuition at private schools, including religious schools. The Colorado Supreme Court held that program unconstitutional under the Colorado Constitution, which contains a provision that prohibits financial assistance to religious schools.[94]

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92. *See generally* Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 FEDERALIST SOC'Y REV. 48 (2017).

93. The Colorado Supreme Court opinion is Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P. 3d 461 (Colo. 2015). This decision was vacated and remanded in three separate orders. *See* Taxpayers for Pub. Educ. V. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015), *vacated sub nom.* Doyle v. Taxpayers for Pub. Educ., 137 S. Ct. 2324 (2017), *and vacated sub nom.* Colo. State. Bd. of Educ. v. Taxpayers for Pub. Educ., 137 S. Ct. 2325 (2017), *and vacated sub nom.* Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (2017). The New Mexico case is Weinbaum v. Skandera, 367 P.3d 838 (N.M. 2015). *See* Weinbaum v. Skandera, 367 P.3d 838 (N.M. 2015), *vacated sub nom.* N.M. Ass'n of Non-Pub. Sch. v. Moses, 137 S. Ct. 2325 (2017).

94. *See supra* note 93. After the remand, the Douglas County Board of Education repealed the scholarship program. On January 25, 2018, the Colorado Supreme Court then dismissed the case as moot. Taxpayers for Pub. Educ. V. Douglas Cnty. Sch. Dist., No. 2013SC233, 2018 Colo. LEXIS 195 (Jan. 25, 2018). *See also* Monte Whaley, *Douglas County School Voucher Program Now Officially Dead*, THE DENVER POST (Jan. 27, 2018, 7:46 PM) https://www.denverpost.com/2018/01/27/douglas-county-school-vouchers-end/. The Supreme Court of Montana recently invalidated a tuition tax credit program. Espinoza v. Mont. Dept. of Revenue, 2018 MT 306 (Dec. 12, 2018), *cert. granted*, 139 S. Ct. 2777 (2019). A Montana law authorized tax credits for contributions to a Student Scholarship Organization, which would then fund tuition scholarships for students who attended qualifying private schools. Based on its interpretation of a provision of Montana's Constitution that prohibits public aid to religious schools, the Montana Department of Revenue issued a rule that stated that religious schools could not be considered "qualified education providers." Parents whose children attend a religious school in Montana challenged the Departments' rule. On December 12, 2018, the Supreme Court of Montana concluded that the tax credit program was unconstitutional under Montana's Constitution. The Court based its conclusion on its view that the state program aided "sectarian schools" in violation of Montana's strict no-aid provision. The Court concluded that the state program could not be salvaged by the Department's rule. The Court also held that the Montana constitutional provision discriminating against religious schools did not violate the Free Exercise Clause of

The New Mexico case involved a state program that provided textbooks to students who attend public or private schools. The Supreme Court of New Mexico held that program unconstitutional under a state constitutional provision that prohibits public financial assistance to any private school, including religious schools.[95]

The fate of a state program excluding religious schools from a program providing financial assistance is not clear.[96] Chief Justice Roberts's opinion did not explicitly discuss the fate of state Blaine amendments. Justice Sotomayor's dissent thought that such state provisions were "all but invalidated"[97] by the majority opinion. The basis for the Court's decision—that discrimination against religious entities is impermissible—would certainly threaten the constitutionality of state Blaine amendments, or at least those (like Colorado's)[98] that discriminate against religious schools and not all private schools (which is what New Mexico's provision does).[99] Chief Justice

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the United States Constitution. *Id*. at P40. Citing *Trinity Lutheran*, two dissenters criticized the *Espinoza* majority for giving short shrift to the free exercise argument. *See id.* at P104 (Baker, J., dissenting). The Institute for Justice, which represents the parents, has stated that it will take the case to the United States Supreme Court. Andrew Wilmer, Press Release, *Montana Supreme Court Strikes Down Scholarship Tax Credit Program*, INSTITUTE FOR JUSTICE (Dec. 12, 2018), https://ij.org/press-release/montana-supreme-court-strikes-down-scholarship-tax-credit-program/.

95. *See* Weinbaum v. Skandera, 367 P.3d 838, 849 (N.M. 2015). On remand, the Supreme Court of New Mexico departed from its 2015 ruling and upheld the constitutionality of the New Mexico program. Moses v. Ruszkowski, 2018 N.M. LEXIS 70 (Dec.13, 2018). In 2015, the Supreme Court of New Mexico had invalidated the state's textbook loan program due to New Mexico's constitutional provision barring public support of private schools, including private religious schools. After the *Trinity Lutheran* decision, the United States Supreme Court vacated and remanded that 2015 ruling. On remand, the Supreme Court of New Mexico reconsidered its earlier ruling. On December 13, 2018, the Court held that the textbook loan program did not violate the New Mexico Constitution. The Court's ruling was clearly influenced by the *Trinity Lutheran* decision. The New Mexico court noted that the state constitutional provision raised free exercise concerns. The Court stated: "To avoid constitutional concerns, we hold that the textbook loan program, which provides a generally available public benefit to students, does not result in the use of public funds in support of private schools as prohibited by" the state constitution. *Id*. at P2. In so holding, the New Mexico court noted that *Trinity Lutheran* had "changed the landscape of First Amendment law." *Id*. at P29. Although New Mexico's ban on aid to private schools was religiously neutral, the *Weinbaum* majority concluded that "anti-Catholic sentiment tainted . . . [the] adoption" of the constitutional provision. *Id*. at P43. Influenced by *Trinity Lutheran*'s heightened concern about discrimination against religion, the New Mexico court revised its interpretation of its Constitution and upheld the constitutionality of the aid program.

96. For commentary, *see* Laycock, *supra* note 1, at 160–64.

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

98. *See supra* notes 94–95.

99. *See* Laycock, *supra* note 1, at 164–68. State provisions preventing aid to all private schools might be unconstitutional if such provisions were adopted with discriminatory intent. *See id.* Michigan's state constitutional provision, which prevents public aid to private schools, is currently being litigated in the

Roberts did include the Delphic footnote three, which seemed to limit the reach of the opinion to "playground resurfacing."[100] The logic of his opinion, though, seems to support a much broader principle of nondiscrimination, as Justice Gorsuch's concurrence maintained. Justice Gorsuch's opinion concluded with this observation: "the general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."[101]

*Locke v. Davey*, to some extent, supports the idea that there is no constitutional obstacle to discrimination against religion. In *Locke*, the Court upheld Washington's denial of a scholarship to Joshua Davey solely because he planned to use the money to pursue a degree in devotional theology. The Court acknowledged that providing the aid was not prohibited by the Establishment Clause. The Court, relying on the "play in the joints" theory,[102] refused to conclude that the denial of aid (which was required by the Washington Constitution[103]) violated the Free Exercise Clause. The State was not discriminating against religion as such; its "disfavor . . . (if it can be called that) is of a far milder kind."[104] Washington "has merely chosen not to fund a distinct category of instruction."[105] Moreover, the interest the state sought to further (avoiding funding for clergy education) was, the Court stated, "scarcely novel."[106] The Court concluded: "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here."[107]

In *Trinity Lutheran*, the Court distinguished *Locke*.[108] Missouri's "program to use recycled tires to resurface playgrounds"[109] was far afield from state support for clergy education. Moreover, the denial of aid in *Locke* did not depend on Davey's status, it depended on his intended use of the money. In contrast, in *Trinity Lutheran*, "there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit.

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Michigan state courts. *See generally* Council of Orgs. and Others for Educ. About Parochiad v. State, 501 Mich. 1015 (2018), *perm. app. granted*, 504 Mich. 896 (2019).

100. *Comer*, 137 S. Ct. at 2024 n.3.

101. *Id.* at 2026 (Gorsuch, J., concurring in part).

102. Locke v. Davey, 540 U.S. 712, 719 (2004).

103. *Id.* at 715.

104. *Id.* at 720.

105. *Id.* at 721.

106. *Id.* at 722.

107. *Id.* at 725.

108. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022–24 (2017).

109. *Id.* at 2023.

The rule is simple [the Chief Justice continued]: No churches need apply."[110] Justice Thomas, who had dissented in *Locke*, explained his continuing rejection of that decision in a concurrence joined by Justice Gorsuch.[111] Justice Thomas said that he remained troubled by *Locke*'s endorsement of religious discrimination, but he joined most of Chief Justice Roberts's opinion "because the Court today appropriately construes *Locke* narrowly and because no party has asked us to reconsider it . . . ."[112] Justice Gorsuch also expressed his difficulties with *Locke's* reliance on a status-use distinction.[113] In addition, Justice Gorsuch stated: "If that case[, *Locke*,] can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here."[114] All in all, it seems fair to say that *Trinity Lutheran* takes us a step further away from *Locke*'s authorization of discrimination against religion.

*Trinity Lutheran* makes it clear that an important point in these debates is to carefully define the nature of the public benefit program involved. Justice Breyer made this point in his short opinion concurring in the judgment. Justice Breyer stated that "[p]ublic benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day."[115] This has long been a difficulty in cases discussing Religion Clauses. In older cases,[116] the Court erred, in my view, by narrowly focusing on the portion of state aid that benefitted religion.[117] In cases involving the state providing textbooks or bus transportation,[118] if one focuses narrowly on the assistance that flows to students who attend religious schools, it appears that the state is "subsidizing" religion. But if one examines the issue more broadly and considers the state's overall role, the refusal to provide students in religious schools the same benefit made available to all students (textbooks or bus transportation) looks more like a penalty on the exercise of

110. *Id.* at 2024.

111. *Id.* at 2025 (Thomas, J., concurring in part).

112. *Id.*

113. *Id.* at 2025–26 (Gorsuch, J., concurring in part).

114. *Id.* at 2026.

115. *Id.* at 2027 (Breyer, J., concurring in the judgment).

116. *See* Myers, *Privatization*, *supra* note 49, at 39–40. This error is also present in Justice Sotomayor's anachronistic dissent in *Trinity Lutheran*. *Comer*, 137 S. Ct. at 2027.

117. *See* Myers, *Privatization*, *supra* note 49, at 39–40; Myers, *School Choice*, *supra* note 71, at 174.

118. *See* Myers, *Privatization*, *supra* note 49, at 26.

a constitutionally protected choice.[119] This is sometimes described as a baseline problem.[120]

"In the education context, the general idea that the government has no obligation to subsidize constitutional rights is only normatively attractive until about 1820."[121] But once the government gets involved in a massive way, the government has an obligation to operate in an even-handed manner. Under the current situation, as Michael McConnell stated, "[t]he majority gets the schools that it wants, using tax dollars extracted from everyone; minority religious groups are forced to support the majority's school system and also to pay for their own."[122] The government should not be able to deny funds because someone is exercising a constitutional right. Or "[p]ut another way, the government should not be able to penalize those who exercise their constitutional rights to send their children to a religious school."[123] The core insight is that the government should not be permitted to exercise the power of the purse to influence religious choice.

> Yet, that is the current situation. Parents who want to exercise their constitutional[ly] [protected option] are faced with the choice of foregoing a valuable public benefit (a free public education) or violating what for some [might] be a religious obligation to choose religious schooling. I think it is fair to view this as a penalty, . . . and not merely a failure to subsidize.[124]

The Court seems to be beginning to understand this. The *Zelman* and *Trinity Lutheran* decisions are particularly encouraging. *Trinity Lutheran* provides important support for the idea that voucher or charter school plans that exclude religious schools are unconstitutional, even if those schools retain

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119. *See* Myers, *School Choice*, *supra* note 71, at 175.

120. Locke v. Daley, 540 U.S. 712, 726–27 (2009) (Scalia, J., dissenting). Justice Scalia noted this point in his dissent in *Locke*. There, he stated: "When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured, and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." *Locke*, 540 U.S. at 726–27 (Scalia. J., dissenting).

121. Myers, *School Choice*, *supra* note 71, at 175.

122. Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1043 (1991).

123. Myers, *School Choice*, *supra* note 71, at 175.

124. *Id.*; *see also* Calabresi & Salander, *supra* note 91, at 1047–72.

their religious character.[125] If that reading prevails, this would be a welcome development. But this would only be true, it seems, if the state made available a public benefit program of some sort.

I do not think the current Court would be receptive to the idea that the public school system itself creates a penalty on those who choose to opt-out of that system.[126] Equal funding for all educational options is not on the horizon. But the Court's increasing attention to the impact of the modern welfare state is encouraging. An inattention to that dynamic will contribute to the privatization of religion because large government can push religious institutions and other mediating institutions more to the sidelines.[127] The Court has largely gotten away from this sort of marginalization in certain contexts (where the government has exercised its discretion to include religious institutions as equal players),[128] but it hasn't fully appreciated the impact of large government on educational choice.[129]

## CONCLUSION

The impact of *Trinity Lutheran* is not entirely clear. The Court is, in my view, moving in the right direction. The Court has reaffirmed its move away from the privatization thesis. The Court's rejection of discrimination against religion is important. It is not clear how far the Court will extend this principle beyond the playground. The Court's decision has likely reduced the impact of state Blaine amendments even if it is not clear that these provisions have all been invalidated, as the dissent maintained. All of this means that school choice has been given an important boost, and that is good news for families. We are closer to equal funding of educational choice, although that is not assured.

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125. For an excellent discussion of Establishment Clause issues and charter schools, *see generally* Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools From Becoming Charter Schools?*, 32 J. L. & RELIGION 227 (2017).

126. Even though there is much force in that argument. *See* Myers, *School Choice*, *supra* note 71, at 175; Calabresi & Salander, *supra* note 91, at 1047–72.

127. *See* Myers, *Privatization*, *supra* note 49, at 42.

128. *See* Myers, *School Choice*, *supra* note 71, at 173.

129. *See* Calabresi & Salander, *supra* note 91, at 1047–72.