

Article

Expanding the Rights of Student Religious Groups on College and University Campuses: The Implications of *Trinity Lutheran Church v. Comer*

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Abstract: In *Trinity Lutheran Church v. Comer*, the U.S. Supreme Court established a new constitutional rule. While the exact breadth of the rule remains in doubt, the new jurisprudential principle appears to be as follows—except where such actions would violate the Establishment Clause, the Free Exercise Clause prohibits constitutional actors from conferring or denying benefits solely because of individuals’ or entities’ religious exercises. As discussed in this article, this rule has immediate, long-term ramifications for constitutional jurisprudence, particularly as applied to religious freedom. In light of the potential changes it may engender, the purpose of this three-part article is to provide an overview of *Trinity Lutheran* and its expansion of rights for student religious groups on the campuses of public college and universities.

Keywords: religious liberty; freedom of association; free speech; student groups; public higher education

1. Introduction

In *Trinity Lutheran Church v. Comer*,¹ the U.S. Supreme Court established a new constitutional rule. While the exact breadth of the rule remains in doubt, the new jurisprudential principle appears to be as follows—except where such actions would violate the Establishment Clause, the Free Exercise Clause prohibits constitutional actors from conferring or denying benefits solely because of individuals’ or entities’ religious exercises.² As discussed in this article, this rule has immediate, long-term ramifications for constitutional jurisprudence, particularly as applied to religious freedom.³

The immediate impact of *Trinity Lutheran* is an extension of the Supreme Court’s recent jurisprudence upholding religious liberty. More specifically, three times since 2012, the Justices protected religious liberty when government officials sought to restrict, starting in *Hosanna-Tabor*

¹ 137 S. Ct. 2012, 2025 (2017).

² Although four justices joined a footnote suggesting the result was limited to the context of improving playground safety, *Id.* at 2024 n.3. (Roberts, C.J., joined by Kennedy, Alito, and Kagan, J.J., announcing the judgment of the Court), two concurring justices viewed the language of the Opinion of the Court as establishing broad general principles, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in judgment), which “do not permit discrimination against religious exercise—whether on the playground or anywhere else”. *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., joined by Thomas, J., concurring).

³ Indeed, *Trinity Lutheran* may redefine the intersection of education and religion more than any case since the school prayer decisions of the early 1960s. See *Abingdon School Dist. v. Schemp*, 374 U.S. 203 (1963) (forbidding prayer and Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting the recitation of a prayer at the start of the day in public schools).

*Evangelical Lutheran Church & School v. EEOC*⁴ before doing so in *Burwell v. Hobby Lobby Stores, Inc.*⁵ and *Zubik v. Burwell*.⁶ In the long term, *Trinity Lutheran* may signal a return to the original public meaning of the Religion Clauses.⁷ Now, instead of working to maintain the “separation of church and state”, the position the Court has largely adopted with regard to public prayer and religious activity since its first judgment on point in 1948,⁸ even though this language does not appear in the text of the constitution,⁹ the Court may focus on the “freedom from a religious establishment”.¹⁰ The Justices also fairly recently upheld religious liberty, by acknowledging the right of a town governing board to open its meetings with a prayer.¹¹

Trinity Lutheran raises significant implications for any context where the secular and the sacred intersect. Even so, *Trinity Lutheran*’s effect on student religious groups at public universities is particularly profound. While previous decisions mandated the recognition and general funding of student religious groups in higher education,¹² *Trinity Lutheran* enhances the rights of student religious organizations at public colleges and universities by ensuring that they are treated the same as other organizations on campus.

⁴ 565 U.S. 171 (2012) (unanimously reasoning that Church officials, rather than the Federal Equal Employment Opportunities Commission, had the right to decide who qualified as a minister). For commentary on this case, see (Russo and McGreal 2012).

⁵ 134 S. Ct. 2751 (2014) Because closely held for-profit corporations are legal persons, they do not have to comply with regulations imposing an abortifacient mandate not part of the so-called Affordable Care Act. The Court reasoned that even if the government had a compelling interest in mandating such coverage, it substantially burdened the free exercise of the owners’ right to religious freedom in violation of the Religious Freedom Restoration Act because the regulations failed to achieve their goal in the least restrictive manner and so conflicted with the owners’ deeply held religious beliefs.

⁶ 136 S. Ct. 1557 (2016). Although *Zubik* did not express a view on the merits of the cases, the Court did vacate the lower court decisions and remand to permit further arguments below in a dispute not-for-profit religious employers filed against the Secretary of Health and Human Services and other government officials, under the Religious Freedom Restoration Act, challenging regulations offering accommodations for religious objections to their having to comply with the regulatory mandate obligating them to provide employees with health insurance coverage for contraceptives.

⁷ See (Berg 2014). However, there is some debate as to whether the original meaning of the Clause requires an exemption from generally applicable laws or is limited to those motivated by religious discrimination. *Id.* at 415.

⁸ Beginning with *People of State of Ill. ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, Champaign Cnty.*, 333 U.S. 203 (1948), wherein it struck down a program that allowed ministers, priests, and rabbis to enter public schools to provide religious instruction to students at the request of their parents, the Supreme Court has largely maintained a “wall of separation” between religion, whether evidenced in prayers or various other activities, and public education. The Court subsequently invalidated prayer in public K–12 schools at the start of the day in *Engel v. Vitale*, 370 U.S. 421 (1962), Bible reading and the recitation of the Our Father/Lord’s Prayer in the companion cases of *Sch. Dist. of Abington Twp. v. Schempp and Murray v. Curlett*, 374 U.S. 203 (1963), at graduation ceremonies in *Lee v. Weisman*, 505 U.S. 577 (1992), and prior to the start of high school football games in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). To date, though the Court has not addressed a case on prayer in higher education. Even so, the only two federal circuit courts addressing prayer at graduation in public institutions of higher learning, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997) and *Chaudhuri v. State of Tenn.*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998), agreed it was permissible because commencement ceremonies did not involve young, impressionable students and attendance was voluntary.

⁹ The metaphor of the “wall of separation” originated with Roger Williams who coined the term more than 150 years before Jefferson used it in his letter to the Danbury Baptist Convention. Roger Williams, Mr. Cotton’s Letter Lately Printed, Examined and Answered (1644), reprinted in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (1963) (“and when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world . . .”). Jefferson popularized this term in his letter of 1 January 1802, to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 WRITINGS OF THOMAS JEFFERSON 281 (Andrew Adgate Lipscomb & Albert Ellery Bergh, eds. 1903). Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God . . . 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 and state.

The Supreme Court first used the term in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

¹⁰ See (Hamburger 2002) (arguing that the Constitution provided for a freedom from religious establishments, but a variety of events, including anti-Catholic bigotry, resulted in something very different—the separation of church and State).

¹¹ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

¹² See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

In light of the potential changes this case may engender, the purpose of this three-part article is to provide an overview of *Trinity Lutheran* and its expansion of rights for student religious groups on the campuses of public college and universities. Section 1 provides the legal and factual background of the controversy through the lower federal courts. Section 2 explores the Opinion of the Court, the three concurring opinions, and Justice Sotomayor's dissent. Section 3 examines how *Trinity Lutheran* should lead to greater funding, freedom, and autonomy for student religious groups on public college and university campuses. This article ends with a brief conclusion.

2. Background and Lower Court Decisions

2.1. Factual Background

At the center of the dispute was Trinity Lutheran Church's Learning Center, a year-around preschool and daycare center serving approximately ninety children, aged from two to five, from working families in Boone County, Missouri, and surrounding communities. One of the Church's ministries, housed on its grounds, the Learning Center, was created as a standalone not-for-profit organization in 1980 that merged with the Church in 1985.

In light of its religious affiliation, the Learning Center of Trinity Lutheran Church incorporated religious lessons in its programming based on a Christian worldview including the Gospels. The Learning Center's mission is "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively".¹³ Moreover, the Center's "policy is to admit students of any sex, race, color, religion, nationality, and ethnicity".¹⁴

Typical of many preschools and child care centers, the Learning Center included a playground equipped with rides and activities for children such as slides, swings, jungle gyms, monkey bars, and sandboxes. Because the ground was covered with "unforgiving"¹⁵ pea gravel, in 2012 Learning Center officials sought to replace the surface of its playground with softer, safer material, so children who fell would have less chance of being injured.

In an attempt to alleviate costs for replacing much of the playground surface, officials at the Learning Center, who clearly disclosed its status as a ministry of Trinity Lutheran, sought a grant from Missouri's Scrap Tire Program, operated by the State's Department of Natural Resources (DNR). Competitive in nature, the Scrap Tire Program offered limited numbers of grants due to a lack of resources, and was designed to reduce the volume of used tires in landfills and dump sites. The program, funded through a fee imposed on the sale of new tires in Missouri, provided reimbursement grants to qualifying nonprofit organizations when they purchase playground surfaces made from recycled tires.

When the Learning Center applied to participate in the Scrap Tire Program, the DNR had "a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity".¹⁶ Interestingly, while Missouri Governor Eric Greitens, announced a week before oral arguments that religious institutions could apply for DNR grants such as those at issue in *Trinity Lutheran*,¹⁷ the Supreme Court refused to treat the case as moot.¹⁸

¹³ *Trinity Lutheran*, 137 S. Ct. at 2018 (internal citations omitted).

¹⁴ *Trinity Lutheran Church of Columbia v. Pauley*, 976 F. Supp.2d 1137, 1140 (W.D. Mo. 2013).

¹⁵ *Trinity Lutheran*, 137 S. Ct. at 2017.

¹⁶ *Id.*

¹⁷ Chuck Raasch, *Missouri Playground Case Touches On Separation of Church and State*, ST. LOUIS POST-DISPATCH, 19 April 2017, 2017 WLNR 12104713, pagination unavailable online.

¹⁸ *Trinity Lutheran*, 137 S. Ct. at 2019 n. 1: "We have said that such voluntary cessation of a challenged practice does not moot a case unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur". (internal citations omitted).

2.2. The Missouri State Constitutional Establishment Clause

The disputed DNR policy relied on language in the State Constitution.¹⁹ The Missouri provision arguably is a “Blaine Amendment”. “Blaine Amendments”, named after Congressman, Senator, and unsuccessful Republican Presidential candidate, James K. Blaine of Maine. After President Grant called for a constitutional amendment “forbidding the teaching [of religion in public schools] . . . and prohibiting the granting of any school funds, or school taxes or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination . . .”,²⁰ Blaine introduced a constitutional amendment in 1875 intended to prevent aid from going to schools “under the control of any religious sect”.²¹

Congress rejected the so-called Blaine Amendment in 1876. Even so, most States adopted Blaine-type constitutional provisions placing substantial limits on the relationship between religious institutions and state governments.²² In her dissent, Justice Sotomayor wrote that “[t]oday, thirty-eight States have a counterpart to Missouri’s Article I, §7”.²³ In something of a surprise, none of the opinions of the Supreme Court’s, majority, concurrences, or dissent, so much as mentioned the Blaine Amendments by name even though the topic came up during oral arguments.²⁴

As the process moved forward, the Learning Center’s application ranked fifth out of the forty-four 2012 applicants for the Scrap Tire Program. Despite being ranked so highly, program officials rejected

¹⁹ Pursuant to Article I, Section 7 of the Missouri Constitution:

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.

²⁰ 4 CONG. REC. 175 (1875) (annual message of the President of the United States). Near the end of his address Grant reiterated that “[n]o sectarian tenets shall ever be taught in any school supported in whole or in part by the State, nation, or by the proceeds of any tax levied upon any community”. *Id.* at 181.

²¹ The entire proposed Amendment read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

²² 4 CONG. REC. 205 (1875) (Blaine’s statement submitting a proposed constitutional amendment to Congress).

²³ For the foundational history of the development of Roman Catholic schools in the United States in the face of the wide-spread religious, and ethnic, discrimination they initially faced, see (Beutow 1970).

²⁴ *Trinity Lutheran*, 137 S. Ct. at 2037 (Sotomayor, J., joined by Ginsburg, J., dissenting). Later, she stated, “[t]he constitutional provisions of thirty-nine States [including Missouri]—all but invalidated today—the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside”. *Id.* at 2041.

²⁴ The following exchange occurred at the oral argument:

JUSTICE ALITO: And Mr. Cortman, I don’t . . . whether we need to get into the history of this particular amendment here. I tend to think we don’t need to, but at the beginning of the line of questioning that Justice Sotomayor just finished, she began with the suggestion that perhaps this amendment reflects an admirable historical tradition that should be respected.

Do you think that that is the proper way to analyze this question?

MR. CORTMAN: I don’t. And—and this—this particular provision that we’re discussing, they are—and this has been briefed by several amicus briefs and—and briefly by us, is a product of what we would consider to be one of the Blaine Amendments that was not found in *Locke v. Davey*. And the reason for that is, is it has that same language in the Blaine Amendment. It was adopted the same exact year, and there is much history showing about the anti-Catholic bigotry that’s behind this specific provision, and several members of this Court have opined on that before. So I think it doesn’t carry the same history as—as this general Establishment Clause . . .

JUSTICE SOTOMAYOR: There is a serious debate about that, isn’t there?

MR. CORTMAN: There is. And that’s why our argument is, is we believe it is one, but it—it doesn’t matter to the deciding of this case.

Oral Argument, *Trinity Lutheran Church of Columbia v. Comer*, No. 15-577 (U.S. 19 April 2017), at 21–22.

the Learning Center’s application from among the fourteen awards they granted solely due to its religious affiliation.

2.3. Lower Court Litigation

2.3.1. U.S. District Court

Unhappy with the rejection of its grant application, Learning Center officials sued the Director of the DNR in a federal trial court in Missouri alleging that the denial violated its rights under the Free Exercise Clause of the First Amendment.²⁵ Relying on *Locke v. Davey*,²⁶ where the Supreme Court rejected a Free Exercise Claim to Washington State policy of excluding aspiring ministers from a scholarship program, the trial court decreed that the state was not obligated to make a grant to the Learning Center.²⁷ Not surprisingly, the Learning Center appealed.

2.3.2. U.S. Court of Appeals for the Eighth Circuit

On appeal, a sharply divided U.S. Court of Appeals for the Eighth Circuit affirmed. Specifically, the majority agreed with the district court’s conclusion that Missouri officials had violated neither the federal Constitution nor the state constitutional provision against aiding faith-based institutions.²⁸ Moreover, the court was of the view that the Federal Free Exercise Clause in the Federal Constitution did not obligate it to ignore the Blaine language in Missouri’s Constitution.

The third member of the court began his partial dissent by distinguishing *Locke* from the case at bar on the grounds that the former dealt with the narrow question of aid to those who pursued divinity studies. Anticipating the Supreme Court, the dissent recognized DNR lacked “unfettered discretion to exclude the religious from generally available public benefits”.²⁹

After a sharply divided Eighth Circuit denied rehearing *en banc*,³⁰ Trinity Lutheran successfully sought further review from the Supreme Court.³¹

3. Supreme Court Opinions

The Supreme Court reversed the order of the Eighth Circuit. Chief Justice Roberts, joined by Justices Kennedy, Thomas, Alito, Kagan, and Gorsuch, delivered the Opinion of the Court, except as to footnote three.³² As to footnote three, the Chief Justice delivered an opinion joined by Justices Kennedy, Alito, and Kagan.³³ Justice Breyer concurred in the judgment, but did not join the opinion of the Court. Justice Sotomayor, joined by Justice Ginsburg, dissented.³⁴ Thus, the Opinion of the Court had a six-justice majority and the judgment had seven-justice majority.³⁵

²⁵ According to the First Amendment Religion Clauses, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”; U.S. Const. amend. I.

²⁶ 540 U.S. 712 (2004). *But see Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 235 Educ. L. Rep. 68 (10th Cir. 2008) (striking down a scholarship program for students in higher education who attended in-state non-public institutions for violating both the Establishment and Free Exercise Clauses by excluding “pervasively sectarian” schools). For representative commentary on *Locke*, see (Berg and Laycock 2004; Duncan 2006).

²⁷ *Trinity Lutheran Church of Columbia v. Pauley*, 976 F. Supp.2d 1137 (W.D. Mo. 2013).

²⁸ *Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779 (8th Cir. 2015).

²⁹ *Id.* at 791 (Gruender, J, partially dissenting and partially concurring).

³⁰ 788 F.3d 779 (8th Cir. 2015), *reh’g and reh’g en banc denied* (11 August 2015).

³¹ *Trinity Lutheran Church of Columbia v. Pauley*, 136 S. Ct. 891 (2016).

³² *Trinity Lutheran*, 137 S. Ct. at 2017.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

3.1. The Opinion of the Court

After having reviewed the facts and judicial history, Chief Justice Roberts, began his substantive analysis. Roberts opened the first two major sections of his analysis by noting that the Establishment Clause did not prevent the State of Missouri from permitting Trinity Lutheran to participate in its Scrap Tire Program. This led him to focus on the role of the Free Exercise Clause in relation to the Learning Center's having been denied a grant in the Missouri Tire Program in light of the "play between the joints"³⁶ relating to the Establishment Clause.

At the outset of this part of his rationale, the Chief Justice engaged in an historical review of five key Supreme Court judgments on the contours of the Free Exercise Clause, beginning and ending this section with the same case. Leading off by citing to *Church of Lukumi Babalu Aye v. Hialeah*,³⁷ wherein a Santeria Church in Florida successfully challenged a city ordinance about the ritual slaughter of animals, Roberts reasoned that Free Exercise "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status'".³⁸ He then reiterated how the Court has repeatedly explained that generally available benefits cannot be denied solely based on religion because doing so violates the Free Exercise Clause.

Roberts next highlighted *Everson v. Board of Education*,³⁹ typically thought of as an Establishment Clause case because in it the Supreme Court upheld a law from New Jersey authorizing local boards to reimburse parents for the cost of transporting their children to their non-public schools. Roberts cited *Everson* for the proposal that citizens cannot be denied generally available benefits because of their religious beliefs or lack thereof.

Next considering *McDaniel v. Paty*,⁴⁰ Chief Justice Roberts pointed out that at issue here was a statute from Tennessee barring ministers from serving as delegates to the state's constitutional convention. Roberts indicated that a unanimous Court invalidated the law as a violation of the Free Exercise Clause because it penalized the plaintiff by effectively barring him from serving solely because of his religion.

Before turning to review *Lyng v. Northwest Indian Cemetery Protective Association*,⁴¹ the Chief Justice observed that in recent years when the Supreme Court rejected Free Exercise challenges, the disputes typically dealt with neutral, generally applicable laws. He did emphasize that the Court carefully distinguished disputes over facially neutral laws from law singling religion out for unfavorable treatment.

In *Lyng*, Roberts reported that the Supreme Court rejected a Free Exercise challenge, holding that the First Amendment did not forbid the government from allowing timber harvesting and road construction in part of a national forest traditionally used for religious purposes by members of three American Indian tribes in northwestern California. The Chief Justice specified that the Court refused to prevent the government from acting because officials did not coerce the plaintiffs to violate their religious beliefs.

The fifth case Roberts reviewed was *Employment Division, v. Smith*,⁴² where the Supreme Court upheld the dismissal of drug counselors who violated state law by ingesting peyote, a natural hallucinogenic substance, as part of a sacramental ritual in the Native American Church. After *Smith*,

³⁶ *Trinity Lutheran*, 137 S. Ct. at 2019 (citing *Locke*, 540 U.S. at 718).

³⁷ 508 U.S. 520 (1993).

³⁸ *Trinity Lutheran*, 137 S. Ct. at 2019 (citing *Lukumi Babalu*, 508 U.S. 542).

³⁹ 330 U.S. 1 (1947).

⁴⁰ 435 U.S. 618 (1978).

⁴¹ 485 U.S. 439 (1988).

⁴² 494 U.S. 872 (1990). For representative commentary on this case, see, e.g., (Gregory and Russo 1991) (discussing the Court's denial of protection to minority religions while upholding the right of Christian prayer clubs to meet in public secondary schools); (Mawdsley 1992).

the Free Exercise Clause does not mandate religious exemptions to generally applicable, religion-neutral laws, which have the effect of burdening specific religious practices, such as the use of peyote.⁴³

Going full circle, Roberts ended this part of his opinion by returning to *Lukumi Babalu*. Roberts commented that, because the ordinance against the ritual slaughter of animals was not neutral, the city council violated the free exercise rights of church members.

Chief Justice Roberts divided the final substantive part of his opinion into three sections. Roberts started the first part by applying the cases he discussed above to *Trinity Lutheran*, pointing out that the disputed DNR policy explicitly discriminated against the Learning Center simply due to its religious nature. He asserted that, as in *McDaniel*, the DNR put the Learning Center in the untenable position of essentially denying its religious character or eschewing public benefits.

The Chief Justice further distinguished the case at bar from *Lukumi Babalu* because the DNR's policy did not prohibit the Center from engaging in religious activities because it merely denied a subsidy it had no right to obtain. Moreover, Roberts conceded that DNR did not criminalize any of the Learning Center's activities, but did engage in indirect coercion or the imposition of penalties on Trinity Lutheran's right to freedom of religion in violation of the Free Exercise in a manner similar to the type of policy approach the Court proscribed in *Lynx*.

In the last part of this section, the Chief Justice reiterated that the Learning Center sought to participate in a program of governmental benefit without having to renounce its religious character while requesting neither an entitlement nor a subsidy. Because the DNR excluded the Learning Center from Missouri's Scrap Tire Program, Roberts found that its action was subject to strict scrutiny, the highest level of constitutional review.

Chief Justice Roberts began the second major section of his analysis by acknowledging that the DNR, as did the Eighth Circuit, grounded its policy position in *Locke*. Roberts dismantled the DNR's argument by distinguishing *Locke* and the case at bar on three key points. First, he determined that the student in *Locke* was denied the scholarship because of how he wanted to use the funds while Trinity Lutheran's grant proposal was rejected because of its nature as a church.

The second difference Roberts addressed was that while the student in *Locke* wanted to study ministry, largely a religious endeavor, Trinity Lutheran Church sought to participate in the program to help pay for the resurfacing of its playground for young children. Protecting young children is a clearly secular purpose.

The third difference the Chief Justice highlighted was that although the DNR attempted to root its Washington antiestablishment interest, not unlike the disputed clause from the Missouri Constitution, the major difference is that in *Locke*, the scholarship program made significant efforts to include religion in the equation. He thus remarked that the Washington program allowed students to use their scholarships in faith based institutions; it just did not permit funds to be applied to paying for degrees in areas such as devotional theology. The Chief Justice noted "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: No churches need apply".⁴⁴

Chief Justice Roberts began the third, and final, part of this section by reiterating that Missouri's Scrap Tire Program explicitly expected Trinity Lutheran Church to renounce its religious character as the cost of participation. A burden, he explained, that can only be "subjected to the 'most rigorous' scrutiny",⁴⁵ Chief Justice Roberts ruled that DNR's refusal to allow Trinity Lutheran to participate in the Scrap Tire Program was unacceptable because it failed to demonstrate such a justification because

⁴³ Congress responded to *Smith* by passing the Religious Freedom Restoration Act, which restored the pre-*Smith* standard for Free Exercise claims. However, the Court subsequently invalidated this statute as applied to the States. *City of Boerne v. Flores*, 521 U.S. 507 (1997). For a commentary on this case, see (Mawdsley 1997).

⁴⁴ *Trinity Lutheran*, 137 S. Ct. at 2024. Footnote 3, which was joined by only four Justices, meaning that it is not part of the Opinion of the Court, was appended to the end of this sentence.

⁴⁵ *Id* at 2024. (citing *Lukumi Babalu*, 508 U.S. at 546).

it rejected Trinity Lutheran solely due to its religious character. Roberts pithily ended this section by declaring that “[u]nder our precedents, that goes too far. The Department’s policy violates the Free Exercise Clause”.⁴⁶

Rounding out his opinion in a brief, untitled conclusion, Chief Justice Roberts began by citing an almost two-hundred-year old legislative speech from Maryland about the significance of religious freedom.⁴⁷ Reasoning “the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand”,⁴⁸ Chief Justice Roberts thus reversed and remanded in favor of Trinity Lutheran.

3.2. Justice Thomas’ Opinion Concurring in the Opinion of the Court

Justice Thomas,⁴⁹ joined by Justice Gorsuch, joined all of the Supreme Court’s judgment but for footnote 3. According to this footnote, “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination”.⁵⁰ Justice Thomas would have preferred the majority to go further in protecting religious liberty, suggesting that although no one had asked the Court to do so, it should have reconsidered its order in *Locke*.

3.3. Justice Gorsuch’s Opinion Concurring in the Opinion of the Court

Justice Gorsuch,⁵¹ joined by Justice Thomas, wrote separately to apply two qualifications to the Court’s judgment. First, he was skeptical of the Court’s bifurcation as he questioned whether the majority opinion could be read consistently as distinguishing between parties based on their religious status or religious use of property. Due to his concern that this distinction blurred in terms of where the line was to be drawn between religious status and religious use, he would have preferred to have a more precise delineation of the differences. Second, while conceding that the disputed footnote from the majority opinion was correct, he wished for greater clarity in order to ensure that it would not be interpreted as limiting the holding to playground resurfacing, a reading he described as “unreasonable”.⁵²

3.4. Justice Breyer’s Opinion Concurring in the Judgment Only

Justice Breyer⁵³ concurred in the judgment of the Court but authored a separate two-paragraph opinion seeking to limit the reach of its judgment. In so doing, he focused on the nature of the benefit at issue, namely providing scrap tire pieces to cushion the areas under playground equipment for children. Justice Breyer ended his opinion by stating “[w]e need not go further. Public 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”.⁵⁴

⁴⁶ *Id.* The portion of the speech quoted by the Court stated:

If, on account of my religious faith, I am subjected to disqualifications, from which others are free, ... I cannot but consider myself a persecuted man. . . . An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture.

⁴⁷ *Id.* (quoting the Speech by H. M. Brackenridge, Dec. Sess. 1818, in (Brackenridge et al. 1829)).

⁴⁸ *Trinity Lutheran*, 137 S. Ct. at 2025.

⁴⁹ *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., joined by Gorsuch, J. concurring).

⁵⁰ *Id.*

⁵¹ *Id.* (Gorsuch, J., joined by Thomas, J., concurring).

⁵² *Id.* at 2026.

⁵³ *Id.* at 2026 (Breyer, J., concurring in the judgment).

⁵⁴ *Id.* at 2927.

3.5. Justice Sotomayor's Dissent

Justice Sotomayor,⁵⁵ joined by Justice Ginsburg, penned a sharply worded dissent almost twice as long as the Supreme Court's opinion. Fearing that *Trinity Lutheran* was about more than providing safe playground surfaces for children, she argued that "[t]oday's decision discounts centuries of history and jeopardizes the government's ability to remain secular",⁵⁶ particularly with the limits the Court has adopted as to aid available to religious institutions. Sotomayor posited that the DNR specifically, and the Missouri Constitution more generally, sought to adopt a secular stance rather than take a position that could be perceived as anti-religious.

Rounding out her dissent, Justice Sotomayor feared that the outcome in *Trinity Lutheran* is likely to lead to additional rounds on the limits of permissible aid to faith based schools and other institutions. She chided the Supreme Court that its judgment dismantled the protection for religious freedom in the First Amendment. Justice Sotomayor ended by declaring that by taxing citizens for the benefit of religious institutions, "[t]he Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment".⁵⁷

4. Expanding the Rights of Student Religious Groups

If officials at public colleges and universities choose to provide money or benefits to student secular groups,⁵⁸ then *Trinity Lutheran's* logic demands that they treat student religious groups in the same manner.⁵⁹ Put another way, following *Trinity Lutheran*, administrators at public institutions of higher education arguably cannot treat student religious groups differently from secular organizations simply because they are religious.⁶⁰

With two notable exceptions, the Supreme Court's public university student organization jurisprudence mandates equal treatment for religious groups.⁶¹ Acknowledging there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities",⁶² officials at public colleges and universities may neither favor those groups supporting the institution's views, nor may they penalize the groups with which they disagree.⁶³

⁵⁵ *Id.* at 2927 (Sotomayor, J., joined by Ginsburg, J., dissenting).

⁵⁶ *Id.* at 2040.

⁵⁷ *Id.* at 2041.

⁵⁸ While there is no obligation for officials at public colleges and universities to recognize or fund student groups, if they choose to do so, then they must treat all student groups the same. See (Kaplin and Lee 2013).

⁵⁹ See *Trinity Lutheran*, 137 S. Ct. at 2024–25.

⁶⁰ *Id.* at 2024–25.

⁶¹ See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (in both cases the Court protected religious speech in higher education as a subset of free speech).

⁶² *Widmar*, 454 U.S. at 269.

⁶³ Almost fifty years ago, the Court declared:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Healy v. James, 408 U.S. 169, 187–88 (1972).

However, institutional officials may not refuse recognition because of the viewpoints of student organizations, but may require organizations to (1) obey campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. KAPLIN & LEE, *supra* note 72, at 1245–46 (interpreting *Healy*).

As a practical matter, this means that institutional officials can impose some neutral criteria for recognition such as having a faculty advisor, a constitution, and specified numbers of members. However, institutional officials cannot deny recognition simply because they or a significant part of their campus communities dislike the organizations. Moreover, *Healy* points out that institutional officials may not deny recognition because organizational members at other campuses or in the outside of their specific communities have engaged in conduct they deem unacceptable. *Healy*, 408 U.S. at 185–86.

Similarly, officials' disagreements with the views of student organizations do not justify the organizations being denied access to campus facilities⁶⁴ or funding where secular groups receive similar funding.⁶⁵ Because "[f]reedom of association ... plainly presupposes a freedom not to associate"⁶⁶ and because "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints";⁶⁷ administrators generally allow student groups to exclude those who do not share the groups' viewpoints.⁶⁸ Although student groups, and their members—both secular and religious—may express ideas "thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed",⁶⁹ leaders at public colleges and universities must still grant student groups recognition, access to space, funding, and the ability to define their membership.⁷⁰

Nevertheless, before *Trinity Lutheran*, two significant areas stood out, insofar as administrators at public colleges and universities have treated student religious groups differently from secular religious organizations. First, officials refused to fund events that, in their judgment, are "worship activities" or proselytizing in nature while expressly they permitted funding for virtually identical activities by secular groups.⁷¹ For example, administrators might have allowed a French Club to buy bread and wine for its functions, but denied a Roman Catholic Club's request to purchase bread and wine for use at Mass. Further, officials may have subsidized the community outreach activities of political or advocacy groups while refusing to underwrite the evangelism efforts of religious organizations.⁷²

⁶⁴ *Widmar*, 454 U.S. at 267–70.

⁶⁵ *Rosenberger*, 515 U.S. at 831. If anything, requiring students to pay mandatory fees that are then distributed to student groups is permissible only if institutional officials do not favor particular viewpoints. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–34 (2000) (allowing officials at a public university to charge students an activity fee used to fund a program facilitating extracurricular student speech as long as the allocation of funding support is viewpoint neutral). The "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas". *Widmar*, 454 U.S. at 272 n.10. See also *Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate "the free and open exchange of ideas by, and among, its students"); *Rosenberger*, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

⁶⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being". *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 n. 22 (1981). See also *California Democratic Party v. Jones*, 530 U.S. 567, 574–75 (2000).

⁶⁷ *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (finding that app New Jersey's public accommodations law requiring the Boy Scouts to admit the plaintiff, who publicly declared that he was gay, violated the Scouts' First Amendment right of expressive association).

⁶⁸ To do otherwise is to invite constitutional conflict: "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed". *Roberts*, 468 U.S. at 622. "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas". *Dale*, 530 U.S. at 647–48. "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect". *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 68 (2006) (ruling that in order for a law school and its university to receive federal funding, officials in the former had to offer military recruiters the same access to their campus and students that they provided to the nonmilitary recruiters receiving the most favorable access). This freedom of association "is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private". *Dale*, 530 U.S. at 630.

⁶⁹ University of Chicago, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015).

⁷⁰ To be sure, this constitutional mandate does not mean university officials must compromise their own viewpoints. Instead, while institutional officials must accommodate the viewpoints of all student groups, "students and faculty are free to associate to voice their disapproval of the [student organization's] message". *Rumsfeld*, 547 U.S. at 69–70.

⁷¹ See *Roman Catholic Found., UIW-Madison, Inc. v. Regents of Univ. of Wis. Sys.*, 578 F. Supp. 2d 1121, 1134–36 (W.D. Wis. 2008), *aff'd sub nom. Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010) (invalidating the actions of officials at a state university refusing to fund such activities as reimbursing the expenses of religious speaker who visited the campus on behalf of a faith-based group and supporting a four-day summer retreat for leadership training during which three Masses were celebrated and four communal prayer sessions occurred).

⁷² Drawing such distinctions is problematic. As a federal trial court in Wisconsin observed:

the issue in the present case is not whether activities that could reasonably be labeled worship, proselytizing, or sectarian religious instruction serve the forum's limited purposes, but whether the specific activities that RCF actually engaged in serve such purposes. The labels affixed to an activity are not necessarily dispositive of

Second, leadership of public institutions may have allowed secular student groups to exclude those who disagree with their views, but required religious organizations to refrain from what they described as religious discrimination as they sought to preserve their faith-based identities.⁷³ For example, the Young Democrats may have excluded Republicans, but Evangelical Christian Clubs could not have denied membership to atheists.⁷⁴ Although there may be sound constitutional reasons for allowing student groups to exclude those who disagree with their objectives, officials at some universities have insisted that *all* student groups—both secular and religious—refrain from discriminating for any reason. Under this “all-comers policy”, the Young Democrats would have had to allow Republicans to join; the Vegetarian Society had to include carnivores; and the Chess Club to admit members who preferred to play checkers.

In *Christian Legal Society v. Martinez*,⁷⁵ a sharply divided Supreme Court upheld—as a matter of federal constitutional law—policies at public institutions requiring student groups to admit “all comers”. Under this precedent, as a condition of becoming recognized student organizations, a status affording them such benefits as access to campus facilities and some funding, religious groups must admit “all comers”, including those who disagree with their deeply held religious beliefs and values.⁷⁶

Put another way, in *Christian Legal Society*, the Supreme Court declared that the government, through university officials, could force faith-based groups to choose between compromising their religious values and receiving benefits that other student groups receive as a matter of constitutional right. While one can hope that governmental officials “surely could not demand that all Christian groups admit members who believe that Jesus was merely human”, they “may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints”.⁷⁷

whether the activity serves the forum’s purposes, especially when the labels are broad, as are labels such as worship, proselytizing, inculcation, dialogue, discussion and debate. Rather than relying on highly abstract labels, the University must examine the specific content of each disputed activity in light of the forum’s purposes. Further, worship, proselytizing and sectarian religious instruction, and dialogue, discussion and debate, are not mutually exclusive. An activity can integrate elements of worship and discussion, proselytizing and debate, and instruction and dialogue. An activity that includes some worship cannot be excluded on the ground that it is not “dialogue, discussion or debate” if that activity in fact includes some dialogue, discussion, or debate . . .

Proselytizing is essentially advocacy from a religious viewpoint. If the University excluded all advocacy from the forum, perhaps it could also exclude religious proselytizing. But so long as it funds political, environmental and other advocacy, it is hard to see a viewpoint neutral reason for excluding religious advocacy, although I do not foreclose the possibility that one exists.

Roman Catholic Found., 578 F. Supp. 2d at 1134–36.

⁷³ See *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011) (upholding a policy allowing secular groups to exclude students who disagreed with their objectives, but expressly prohibiting religious groups from doing the same on the basis that this constituted discrimination).

⁷⁴ In describing one state university’s policy, the Ninth Circuit observed:

Indeed, San Diego State stipulates that some officially recognized student groups at the university restrict membership to those who believe in the group’s purpose, or “agree with the particular ideology, belief, or philosophy the group seeks to promote”. For example, the Immigrant Rights Coalition requires members to “hold the same values regarding immigrant rights as the organization”. The San Diego Socialists at San Diego State require students to be in “agreement with our purpose”. The Hispanic Business Student Association opens membership to those “who support the goals and objectives” of the organization. Plaintiffs argue that San Diego State is discriminating against their viewpoint by allowing these secular groups to discriminate on the basis of belief, while prohibiting Plaintiffs from doing so on the basis of their religious beliefs.

Id. at 800–1.

⁷⁵ 561 U.S. 661 (2010), *on remand*, 626 F.3d 483 (9th Cir. 2010) (rejecting the remaining claims of organizational leaders that university officials violated their rights to religious freedom on the basis that they failed to preserve their argument that officials selectively applied the disputed policy).

⁷⁶ *Id.* at 668.

⁷⁷ *Id.* at 731 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, J.J., dissenting). For commentary on *Christian Legal Society*, see (Russo 2015; Russo and Thro 2011; Thro and Russo 2010).

Of course, *Christian Legal Society* remains controlling constitutional precedent unless, or until, it is explicitly overruled.⁷⁸ Even so, two subsequent Supreme Court decisions, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,⁷⁹ and *Agency for International Development v. Alliance for Open Society International*,⁸⁰ collectively undermine the result in *Christian Legal Society*.⁸¹

First, *Hosanna-Tabor* establishes the principle that religious groups have a right of religious autonomy—absolute discretion to select their leaders. While *Hosanna-Tabor* involved an incorporated church rather than an unincorporated student religious group, there is no reason to think that the rights of church members or student group members depend upon the organizational form. Logically, if organizations can restrict their leadership to those who adhere to their faiths, then they ought to be able to establish similar requirements for membership. This is the opposite result of *Christian Legal Society*.

Second, in *Alliance for Open Society*, the Supreme Court revived and redefined the unconstitutional conditions doctrine permitting the government to impose conditions defining programs, but may not impose conditions reaching outside of the programs. Assuming that the reasoning of *Alliance for Open Society* extends to a public university official's decisions on funding student groups, then university officials cannot force faith-based groups to surrender their rights to religious autonomy as a condition of receiving governmental subsidies or benefits—such as university recognition or access to student activity funds and campus facilities. This outcome also stands in direct opposition to *Christian Legal Society*.

Because *Trinity Lutheran* prohibits governmental officials from focusing on the religious identity of student organizations,⁸² arguably policies and/or practices treating them differently than their secular counterparts must cease. To be sure, there may be instances when the Establishment Clause requires withholding a benefit for religious organizations and there may be instances where the special solicitude of the Religion Clauses requires the conferral of an additional benefit. Simply put, in the wake of *Trinity Lutheran*, in assessing the validity of membership policies, officials at public institutions cannot apply different standards to student religious groups.⁸³ As Robert George observed, “the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one’s conscience leads”.⁸⁴

⁷⁸ *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). For a commentary on this case, see (Osborne and Russo 1997).

⁷⁹ 565 U.S. 171 (2012). For a commentary on this case, see (Mawdsley and Osborne 2012); see also *supra* note 4 for another commentary on this case.

⁸⁰ 133 S. Ct. 2321 (2013). For a commentary on this case, see (McBride 2013).

⁸¹ See (Thro 2014, 2013).

⁸² *Trinity Lutheran*, 137 S. Ct. at 2024–25.

⁸³ This analysis is limited to discrimination based on belief and does not apply to discrimination based on race or sex. If a policy at a public institution required all student organizations to refrain from race or sex discrimination, then, under the reasoning of *Christian Legal Society*, it would not violate the federal constitution.

However, if a religious group’s belief system required it to engage in sex discrimination, state law might protect such practices. Moreover, state courts may interpret the Free Exercise Clauses in their State Constitutions as allowing groups to engage in racial or sex discrimination. Indeed, after the U.S. Supreme Court diminished religious freedom in *Smith*, an array of state courts held that the State Constitutions provided greater protection for religious freedom. See (Laycock 2004) (discussing cases). Similarly, state Religious Freedom Restoration Acts prohibit state governments from imposing substantial burdens on the free exercise of religion absent compelling governmental interest that are pursued through the least restrictive means. See (Lund 2011; Wright 2010).

To date, more than twenty states have adopted religious freedom acts. See, e.g., ARIZ. REV. STAT. ANN. §§ 41-1493 to-1493.02; ARK. CODE ANN. § 16-123-491; CONN. GEN. STAT. § 52-571b; FLA. STAT. §§ 761.01-05; IDAHO CODE §§ 73-401 to-404; 775 ILL. COMP. STAT. 35/1-99; IND. CODE 34-13-9-1 *et seq.*; KY. REV. STAT. ANN. § 466; MO. REV. STAT. §§ 1.302-307; N.M. STAT. ANN. §§ 28-22-1 To 28-22-5; OKLA. STAT. Tit. 51, §§ 251-258; 71 PA. CONS. STAT. §§ 2401-2407; R.I. GEN. LAWS §§ 42-80.1-1 To-4; S.C. CODE ANN. §§ 1-32-10 To-60; TENN. CODE § 4-1-407; TEX. CIV. PRAC. & REM. CODE §§ 110.001-012; UTAH CODE ANN. §§ 63 L-5-101 To-403; VA. CODE ANN. §§ 57-1 to-2.02.

⁸⁴ See (George 2013).

5. Conclusions

Trinity Lutheran seems to represent a sea change in the Supreme Court's Religion Clauses jurisprudence. While *Trinity Lutheran's* implications are significant for all people of faith, it is particularly important for student religious groups on public college and university campuses. *Trinity Lutheran* reaffirms existing precedent regarding recognition and general funding, but expands the ability of groups to exclude non-believers and to obtain funding for worship activities, thereby upholding perhaps the most cherished of all first amendment rights, religious liberty.

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