EVISCERATING A HEALTHY CHURCH-STATE SEPARATION

ERWIN CHEMERINSKY*
BARRY P. MCDONALD**

INTRODUCTION

In its recent ruling in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[1] the U.S. Supreme Court took an extraordinary step in a remarkably facile way. For the first time in its history, the Court ruled that the United States Constitution *requires* states under certain circumstances to provide taxpayer funds to churches and other houses of worship. The Court relied on the Free Exercise Clause of the Constitution to force the State of Missouri to provide funding to a church in contravention of an anti-establishment clause contained in that State's own constitution.

Why an extraordinary step? Because deeply ingrained in the history of American religious freedom is a fight against coerced taxpayer funding of religious communities to protect rights of religious conscience and a healthy separation of church and state. This no-funding principle was reflected in many of the constitutions of the original states, in the federal Free Exercise and Establishment Clauses as they came to be understood soon after adoption, and in provisions of most state constitutions adopted later in the nineteenth century that remain in place today.[2]

Why a remarkably facile way? Because with nary a nod to these historic concerns, the Court treated the anti-establishment clause of the Missouri Constitution—which bars including religious organizations in a taxpayer-funded benefits program—as a form of invidious religious discrimination that warranted strict scrutiny under the Free Exercise Clause.[3] In other words, the Court viewed the application of Missouri's anti-establishment clause—which has been in its constitution since the nineteenth century and readopted in 1945—as being comparable to a Florida city's criminalization of a minority religious sect in *Church of Lukumi Babalu Aye, Inc. v. City of*

---

* Dean and Jesse H. Choper Distinguished Professor of Law, Berkeley Law, University of California.

** 2018–19 Straus Research Professor of Law, Pepperdine University School of Law. The authors would like to thank Professors Rick Garnett and Chris Lund for their helpful comments on this Article. In addition, the authors would like to express their gratitude to Jake Bliss, Kyler Kelly and Alyssa Thurston for their excellent research assistance on this project.

1. 137 S. Ct. 2012 (2017).
2. *See infra* notes 87–89 and accompanying text.
3. *See Trinity Lutheran*, 137 S. Ct. at 2021–25.

Hialeah.[4] Not only was the Court's dismissive attitude towards Missouri's anti-establishment choices profoundly ahistoric and hypocritical for Justices that profess in other areas to care strongly about federalism and originalism,[5] but its reliance on the federal Free Exercise Clause to force public funding of churches was particularly perverse given the early understanding of free exercise rights that developed in our country which barred such funding.

Moreover, what the Court's decision essentially means is that communities of religious worship will be entitled to participate in taxpayer-funded grant programs on a par with secular organizations—at least to the extent churches, synagogues, mosques, temples, etc. can plausibly characterize the use of the funds as being for secular purposes.[6] But as the Court has itself recognized in other cases, money is fungible and when saved in one place more money is freed up to be used in others[7]—particularly to bolster spending designed to promote a community's religious beliefs. Although some may view this as a desirable development, for a nation committed to the principle of religious freedom—including the right of taxpayers not to have their monies going to support religious beliefs and practices they do not agree with—it is a striking blow to the healthy separation of church and state.

One might attempt to defend the Court for falling into this error on at least four different grounds. First, the seemingly innocuous facts of the *Trinity Lutheran* case itself, involving as it did funding for playground

4. 508 U.S. 520 (1993).

5. *See infra* notes 17–18 and accompanying text.

6. A plurality of the Court purported to limit its decision to religious funding for secular purposes, even though Justices Thomas and Gorsuch expressly disagreed with this point. *See Trinity Lutheran*, 137 S. Ct. at 2024 n.3. As we will argue, this qualification will likely be abandoned quickly by the conservative majority of the Court, and is illusory in any event. *See infra* notes 157–69 and accompanying text. Indeed, as this Article was nearing publication, the Court declined to hear an appeal of a New Jersey Supreme Court ruling that the grant of monies to active churches from a historic building preservation fund violated a "no religious aid" provision in its state constitution, an interpretation which did not violate the federal Free Exercise Clause because the funds were being put to the religious uses of repairing churches so that they could continue to offer worship services. Tellingly, the freshman Justice Brett Kavanaugh filed a pointed statement respecting the denial of certiorari, joined by Justices Alito and Gorsuch, in which he effectively asserted that the state supreme court's ruling violated *Trinity Lutheran* (although half-heartedly defending the denial due to an ambiguous factual record and how recent the *Trinity Lutheran* ruling was). *See* Morris County v. Freedom from Religion Foundation, 586 U.S. __ (2019) (statement of Kavanaugh, J.). This statement indicates that at least three of the five conservative members of the Court are signaling lower courts that they should read *Trinity Lutheran* as prohibiting government from denying generally available funding to eligible religious societies even when the funds will be put to religious uses. This Article will argue that such an interpretation of the federal Free Exercise Clause is seriously misplaced.

7. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 37 (2010) (in upholding ban on providing support to terrorist groups that included counseling terrorist organizations in peaceful means of dispute resolution, asserting that "[m]oney is fungible . . . and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities").

resurfacing, may have played a key role in the Court's decision.[8] Second, the way the Court's more conservative justices have modernly loosened up *federal* Establishment Clause constraints on *voluntary choices* made by various government entities to include religious institutions in public spending programs. Third, the Court's incorporation of federal Establishment Clause protections against state and local government actions despite the fact that that clause was originally designed in part to bar federal interference with state establishment choices. And fourth, the surface allure of the late Justice Antonin Scalia's biting dissent in an earlier case posing an issue similar to *Trinity Lutheran*—which essentially provided the Court with a roadmap for its current decision. But none of these reasons justify the Court's holding.

As to the facts of *Trinity Lutheran*, Missouri had rolled out a grant program to help eligible non-profit organizations use recycled tires to give their playgrounds rubber surfaces—paid for by a special tax placed on tire purchasers.[9] When the daycare center of a church applied for a grant, it was denied on the basis of an anti-establishment clause in the Missouri Constitution because the center was operated as a ministry of the church.[10] Now, to deny a church's daycare center money to resurface its playground simply because it is a church, might seem harsh and unfair even though Missouri is hardly a state known for animosity towards religion. But the Court's treatment of the State's decision as being tantamount to such animosity—thus justifying the strong medicine of strict scrutiny—was wrongheaded not only because it rested on false premises but also because of the dangerous precedent the case sets. After this decision, any time a state declines to provide funding to devotional institutions when it adopts a public spending program, the state's action will likely be subject to strict scrutiny and invalidated. Such compelled public funding of churches and other worship institutions is, in important part, what free exercise and anti-establishment clauses in federal and state constitutions were historically understood to prevent.[11]

The second potential ground of defense fares no better. The Warren and

---

8. *See Trinity Lutheran*, 137 S. Ct. at 2014–15.

9. *Id.* at 2017.

10. *See id.* at 2017–18. The pertinent provision of the Missouri Constitution provides, "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." MO. CONST. art. I, § 7.

11. *See infra* notes 31–113 and accompanying text. For an incisive critique of the *Trinity Lutheran* decision that makes related points about the Court's improper casting of Missouri's actions as involving invidious discrimination, the ahistoric nature of the decision, and its inconsistency with federalism principles, see Ira C. Lupu & Robert W. Tuttle, Trinity Lutheran Church v. Comer*: Paradigm Lost?*, AM. CONST. SOC'Y SUP. CT. REV., 2016–2017, at 131.

Burger Courts generally interpreted the federal Establishment Clause to mean that voluntary public aid to religious institutions, and particularly private religious schools, could not impermissibly advance their religious objectives.[12] In other words, under the test of *Lemon v. Kurtzman*,[13] such funding had to be neutral towards religion—it had to be part of a program with a secular purpose that was generally available to secular and religious institutions alike, and could not impermissibly advance an institution's religious mission.[14] However, more conservative majorities on the Rehnquist and Roberts Courts have shifted the Establishment Clause neutrality calculus to essentially require facial neutrality only. Public funding still needs to be through a generally available secular program, but so long as it is, it becomes irrelevant to what extent the funding may disproportionately benefit religious institutions and their missions.[15] Moreover, those same majorities have tightened the rules of standing for bringing Establishment Clause claims, essentially insulating many public funding programs that benefit religious institutions from judicial review.[16] The overall result of these developments is to allow more public aid to flow to religious institutions, and particularly Roman Catholic schools, should government entities decide to make it available.

Yet it is one thing to alter federal constitutional rules to *permit* this result, but quite another to impose such norms on states through the federal Free Exercise Clause by *requiring* them to make available funding to religious institutions, whenever they make it available to secular organizations, if their own establishment clause rules prohibit it. This coerced conformance to federal Establishment Clause norms not only is profoundly disrespectful to federalism values the conservative majorities often extoll,[17] but also flies in the face of the early historical understanding of religious freedom despite the fact that the conservatives frequently emphasize the importance of such understandings to constitutional interpretation.[18]

This brings us to the third potential ground of defense—that the historical understanding of the federal Establishment Clause's purpose to in part protect state establishment choices from federal interference was jettisoned

---

12. *See infra* note 115 and accompanying text.
13. 403 U.S. 602 (1971).
14. *See infra* notes 213–14 and accompanying text.
15. *See infra* notes 215–16 and accompanying text.
16. *See infra* notes 217–18 and accompanying text.
17. *See, e.g.*, Bond v. United States, 564 U.S. 211, 221 (2011) (quoting New York v. United States, 505 U.S. 144, 181 (1992)) ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'").
18. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (more conservative members of the Court relying exclusively upon a historical analysis of the Second Amendment to determine its meaning, with more liberal members emphasizing additional methods of interpretation).

by the Court when it incorporated that clause against state and local action through the Fourteenth Amendment's Due Process Clause.[19] Justice Clarence Thomas has often inveighed against the logic of incorporating federal Establishment Clause protections against state action when it was designed in part to protect state establishment choices.[20] Yet Justice Thomas was curiously silent on this point in joining the majority opinion in *Trinity Lutheran*. Nonetheless, it is one thing to prohibit states through the federal Establishment Clause from getting too involved with religious funding or sponsorship, but quite another thing altogether to say that such incorporation affects state choices to retain *more protective* rules against establishment than the Court has interpreted the federal clause to require. It is a basic canon of constitutional law that states can choose to be more protective of constitutional rights than the federal Constitution requires.[21] Hence, forcing states, through the federal Free Exercise Clause, to effectively adhere to the conservative justices' vision of what degree of church-state separation is desirable as a matter of federal Establishment Clause principles stands this canon on its head.

This brings us to our last potential defense for the Court's ruling—Justice Scalia's reasoning in his dissent in the related case of *Locke v. Davey*,[22] which Chief Justice Roberts essentially echoed in his majority opinion in *Trinity Lutheran*. *Locke* involved a federal Free Exercise Clause challenge to a Washington State scholarship program that excluded theology degrees from those that grants could be used for due to the state constitution's establishment clause—a provision that, *inter alia*, barred the use of public funds for purposes of religious instruction.[23] Writing for the Court, Chief Justice Rehnquist rejected the challenge, adopting a balancing test that weighed the burden the restriction imposed on the plaintiff's free exercise rights against the State's interests in maintaining its desired degree of church-state separation as reflected in its establishment clause. He concluded that the "historic and substantial" anti-establishment interests of the State outweighed the "relatively minor burden" placed on the plaintiff's free exercise rights.[24]

Joined by Justice Thomas, Justice Scalia wrote a vigorous dissent arguing that the theology degree exception should have been subjected to strict scrutiny, and deemed presumptively unconstitutional, because it

19. The federal Establishment Clause was incorporated by the Court without any analysis in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

20. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

21. *See infra* note 113 and accompanying text.

22. 540 U.S. 712 (2004); *see id.* at 726 (Scalia, J., dissenting).

23. *See Locke*, 540 U.S. at 715–17 (majority opinion).

24. *See id.* at 725.

singled out religion for a special burden—invoking the *Church of Lukumi* decision to support his argument.[25] But Rehnquist rejected Scalia's reasoning, noting that unlike the *Lukumi* case where a Florida city had targeted a religious sect for suppression, in the case before him there was no evidence of animus or hostility towards religion that warranted strict review—just the State's historic interest in maintaining its constitutionally-mandated degree of church-state separation.[26]

Despite the *Locke* Court's rejection of Scalia's argument, in *Trinity Lutheran* Chief Justice Roberts essentially adopted it wholesale to invalidate Missouri's denial of the playground resurfacing grant based on the state's establishment clause. He opted to treat that denial as "odious" discrimination akin to the sect suppression in *Lukumi*, warranting the strict scrutiny review normally used when illicit government purposes are suspected.[27] In this way, Roberts avoided the balancing analysis the Court utilized in *Locke* that would have assessed the burden the denial of the playground grant placed on the church's free exercise rights against Missouri's interest in maintaining the degree of church-state separation it had historically chosen. In other words, Roberts effectively preordained the result against the State by characterizing the grant program's religious exclusion as invidious discrimination rather than a historic decision Missouri had made to protect its citizens' freedom of conscience in religious matters.[28]

And how did Roberts avoid utilizing the seemingly obvious approach the *Locke* precedent should have dictated? His principal reason was that in *Locke* the denial of the scholarship grant was because the plaintiff planned to use it for a religious purpose, whereas in the case before him the church was denied the grant solely because of its religious status. To Roberts, this appeared to suggest the latter denial was more constitutionally suspect because the church was going to use the funds for a secular purpose.[29] However, there are many flaws in this reasoning. For one, Roberts's characterization of the use of the playground grant as being secular in nature was essentially wordplay. One could just as easily characterize the use of monies to improve the facilities of a conceded religious mission of the church as being for a religious purpose. After all, the school, by its own

25. *See id.* at 726–34 (Scalia, J., dissenting).

26. *See id.* at 720–25 (majority opinion).

27. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021–25 (2017).

28. Although certain litigants before the *Trinity Lutheran* Court argued that Missouri's establishment clause was a "mini-Blaine amendment" that was motivated by bias against Catholicism, and in particular by concerns about government funds going to Roman Catholic schools, the Court did not attribute any such improper purposes to that clause. This treatment seemed appropriate for, among other things, the Missouri clause was not what is typically referred to as a Blaine amendment. *See infra* notes 94–98 and accompanying text.

29. *See Trinity Lutheran*, 137 S. Ct. at 2022–24.

description, inculcated religious beliefs in its children. For another, even if the secular characterization held water, as noted earlier, grants of funds to religious institutions for secular uses in turn frees up comparable amounts of money for more obvious religious spending.

Hence, Roberts's attempt to distinguish *Locke*, and the balancing analysis that even his conservative mentor Chief Justice Rehnquist believed was more appropriate when a state's historic anti-establishment interests were at stake, was entirely unconvincing. In short, the Court's analysis seemed designed to reach a result favorable to the church at the expense of the consistent application of established principles of constitutional law.

This Article will elaborate on these themes and proceed in the following way. Part I reviews the historical understanding of free exercise rights, and anti-establishment provisions that were adopted mainly to buttress those rights. It demonstrates how both sets of protections came early on to be understood as containing a ban on the use of taxpayer funds to support churches and other houses of worship in order to safeguard, among other things, the right of individuals not to be coerced into promoting religious beliefs they could not in good conscience support. It then discusses how the Court's decision in *Trinity Lutheran* plays somersaults with this history, and substantially undermines it despite the conservatives' frequent defenses of using historical understandings to interpret the Constitution in other areas.

Part II turns to precedent and argues that the Court's application of its earlier decisions in *Trinity Lutheran* was not faithful to them. Part III then argues that despite the seemingly innocuous results in the *Trinity Lutheran* dispute itself, the Court's decision will have far-reaching and undesirable consequences for protecting freedom of religious conscience and a healthy separation of church and state in this country. Next, Part IV contends that there are compelling historical, legal and normative reasons for treating the public funding of religious institutions differently than secular ones. Lastly, Part V demonstrates how *Trinity Lutheran* is the most recent in a trend of decisions by the conservative wing of the Rehnquist and Roberts Courts to lower the church-state wall in a misguided way, one that will only be accelerated by the recent appointments of Justices Neil Gorsuch and Brett Kavanaugh to the Court—giving the conservatives a solid five-vote majority for years to come.[30]

I. TURNING SOMERSAULTS WITH HISTORY

The story of religious freedom in America is, in substantial part, one of the gradual evolution of the right of individuals and communities to, as the

30. *See supra* note 6 for a discussion of how the newly appointed Justice Kavanaugh is already attempting to influence the law in this regard.

Virginia Constitution of 1776 put it, "the free exercise of religion, according to the dictates of conscience."[31] This right came to conspicuously include protection against being compelled to fund religious communities that promoted beliefs one did not share.

The story began in colonial America. Pre-independence American colonies were ones of remarkable religious diversity (albeit predominantly a diversity of Christian sects) that had different approaches to the relationship between church and state. As Professor Michael McConnell has characterized it, there were four main approaches to that relationship during the colonial period.[32] Most of the New England colonies, consisting of Puritans and other dissenters to the established Church of England, instituted a system whereby local congregations were authorized to establish religion in accordance with their reading of God's word.[33] A central feature of those local establishments was the levying of compulsory taxes to support them.[34]

The second church-state model was exemplified by the system in Virginia, which later spread to several other colonies.[35] In Virginia, the Church of England was officially established by the Crown and used as an "instrument of social control" throughout the state.[36] One could say that the established religion in Virginia was a "top down" model, while establishments in New England were built from the bottom up. But like New England, the Virginia churches were supported by compulsory taxes and other government-provided benefits.[37] Over time, this general model spread to Maryland and the southern colonies of North Carolina, South Carolina, and Georgia.[38]

The third model that took hold in New York and New Jersey was characterized by religious pluralism and tolerance. Due to the rich amount of religious diversity in those colonies, established churches never took hold except for a few counties located in metropolitan New York that established the Anglican religion but nonetheless practiced wide religious toleration.[39] The last model arose in those colonies that, at least in their beginning stages, were founded explicitly as refuges for particular groups of religious dissenters—Rhode Island, Pennsylvania, Delaware, early Maryland, and the Carolinas (until these latter colonies later established the Church of England

31. VA. CONST. of 1776, § 16.

32. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

33. *See id.* at 1422.

34. *See id.*

35. *See id.* at 1424.

36. *See id.* at 1423.

37. *See id.*

38. *See id.* at 1424–25.

39. *See id.* at 1424.

along the lines of Virginia).[40] Perhaps not surprisingly for colonies founded by dissenters, they practiced the most deliberate and thoughtful toleration for various religious groups.[41] Indeed, it was in these colonies that free exercise of religion was first articulated as a legal principle.[42] The core element of this principle was that of liberty of religious conscience, or the right to believe as one chose without fear of official reprisal. Unsurprisingly, these colonies lacked an established religion (until Maryland and the Carolinas later trod Virginia's path).[43] Yet it was clear that whether a colony had an established religion or not, religion was a central feature of early American life.

Perhaps it is not surprising, then, that when colonies became independent American states that adopted constitutions following the issuance of the Declaration of Independence, virtually all of them contained explicit protections for the free exercise of religion.[44] The Pennsylvania Constitution of 1776, for instance, declared that:

> [A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.[45]

Plainly, Pennsylvania's understanding of free exercise included, as a key component, a bar on compelling an individual to financially support or maintain places of worship or ministries against their will. The original

40. *See id.* at 1424–25.
41. *See id.* at 1425.
42. *See id.*
43. *See id.* at 1424–25.
44. As McConnell describes:

> Eleven of the thirteen states (plus Vermont) adopted new constitutions between 1776 and 1780. Of those eleven, six (plus Vermont) included an explicit bill of rights; three more states adopted a bill of rights between 1781 and 1790. With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789, although two states confined their protections to Christians and five other states confined their protections to theists. There was no discernible difference between the free exercise provisions adopted by the states with an establishment and those without.

Id. at 1455 (footnotes omitted).

45. PA. CONST. of 1776, art. II.

Constitutions of New Jersey and Delaware contained similar bans on such compelled support,[46] as well as explicit provisions barring those States from "establish[ing] . . . any one religious sect . . . in preference to another."[47]

Of course, Pennsylvania, New Jersey, and Delaware were states that had never established religions as colonies. But after independence, even former colonies that had established religions began seeing compulsory taxes or tithing as a violation of free exercise (and as one component of a broader anti-establishment principle).[48] North Carolina's 1776 Constitution, for instance, barred compelling a person "to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right."[49] It also prohibited "establish[ing] . . . any one religious church or denomination."[50] In its Constitution of 1777, New York declared that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed."[51] In practical effect, this provision both ended compelled taxpayer funding for churches in New York and disestablished that State.[52]

Virginia's episode with establishments and compelled funding has

---

46. Article XVIII of the New Jersey Constitution of 1776 provided:

> That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; *nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform*.

N.J. CONST. of 1776, art. XVIII (emphasis supplied). Section 2 of the Delaware Declaration of Rights of 1776 provided:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that *no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent*, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

DEL. DECLARATION OF RIGHTS of 1776, § 2 (emphasis supplied).

47. DEL. CONST. of 1776, art. 29; N.J. CONST. of 1776, art. XIX.

48. Laws compelling financial support of religious sects were one possible but important component of established religions during the founding period. *See, e.g.*, Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003) ("Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.").

49. N.C. CONST. of 1776, art. XXXIV.

50. *Id.*

51. N.Y. CONST. of 1777, art. XXXVIII.

52. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1473–80 (2004).

assumed epic dimensions in the American consciousness, mainly because of the involvement of Thomas Jefferson and James Madison. As noted, Virginia's Constitution of 1776 provided that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[53] While not immediately resulting in disestablishment of the Anglican Church, Virginia promptly eliminated tithes to that church for dissenters, and shortly thereafter suspended them for all of its citizens.[54]

After the Revolutionary War ended, an attempt was made to resurrect compulsory taxes for the support of churches of a taxpayer's choice.[55] This initiative resulted in the successful efforts of Madison and Jefferson to disestablish the State completely in 1785, via Jefferson's Virginia Statute for Religious Freedom.[56] In the famous *Memorial and Remonstrance* that Madison wrote as part of these efforts, he opined that even such a liberal assessment would violate the rights of free exercise protected by the state constitution.[57] According to Madison, "the same authority, which can force a citizen to contribute three pence only of his property, for the support of any one establishment, may force him to conform to any other establishment."[58] Thomas Jefferson put the point in even stronger terms in the preamble to the Statute for Religious Freedom: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ."[59]

Maryland's experience was slightly different than that of Virginia, but that state reached the same result as to compulsory taxation. Interestingly, the Maryland Constitution of 1776 guaranteed Christians "protection in their religious liberty," and against being "compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry."[60] However, the latter provision went on to say:

> [Y]et the Legislature may, in their discretion, lay a general and equal tax for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county . . . .[61]

53. *See supra* note 31 and accompanying text.
54. *See* McConnell, *supra* note 32, at 1436.
55. *See* Everson v. Bd. of Educ., 330 U.S. 1, 36–38 (1947) (Rutledge, J., dissenting).
56. *See id.*
57. *See* MADISON, *infra* note 197.
58. *Id.* at 7.
59. *Everson*, 330 U.S. at 13.
60. MD. CONST. of 1776, art. XXXIII.
61. *Id.*

Hence, the Maryland Constitution was a bit conflicted on the question of free exercise and compelled taxation, seemingly creating middle ground by allowing taxes to go to the support of the poor instead of a church. In any event, such a tax was never levied and the State effectively disestablished in 1785 when a protracted legislative battle over levying it ended.[62] In 1810, a formal amendment to the state constitution was added that prohibited laying any taxes on "the people of this State, for the support of any religion."[63]

South Carolina had a similarly interesting experience with compelled taxation. Although its Constitution of 1778 expressly declared that the "Christian Protestant religion shall be deemed . . . the established religion of this State," it simultaneously protected "free[] tolerat[ion]" for all who believed in God and from having to "pay towards the maintenance and support of a religious worship that he does not freely join in."[64] Twelve years later, in 1790, the State adopted a new constitution that formally disestablished the state by generally guaranteeing the "free exercise . . . of religious profession and worship, without discrimination or preference."[65]

Georgia's Constitution of 1777 also made a connection between free exercise and compulsory taxation, albeit a more limited one than usual. It declared that "[a]ll persons whatever shall have the free exercise of their religion . . . and shall not, unless by consent, support any teacher or teachers except those of their own profession."[66] Hence, that State allowed for compulsory taxes to support ministers of one's own faith, but not those of other faiths. However, such taxes were never assessed.[67] Moreover, when the State adopted a new constitution in 1798, it contained a more standard free exercise clause that protected the "privilege of worshipping God in a manner agreeable to his own conscience,"[68] and protected against being obliged "to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right."[69] It also declared that "[n]o one religious society shall ever be established in this State, in preference to another."[70]

---

62. *See* Esbeck, *supra* note 52, at 1490.

63. *Id.* at 1491 & n.361 (quoting MD. CONST. of 1776, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1686, 1705 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS]).

64. S.C. CONST. of 1778, art. XXXVIII.

65. *See* Esbeck, *supra* note 52, at 1493–94, 1494 n.373 (quoting S.C. CONST. of 1790, *reprinted in* 6 CONSTITUTIONS, *supra* note 63, at 3258, 3264).

66. GA. CONST. of 1777, art. LVI.

67. *See* McConnell, *supra* note 32, at 1437.

68. GA. CONST. of 1798, art. IV, § 10.

69. *Id.*

70. *Id.*

Hence, with the exception of Maryland and Georgia, by the mid-1780s all of the middle and southern states had explicitly recognized an individual right not to be coerced into financially supporting churches or other places of worship against one's will as part of a broader free exercise right. And even Maryland and Georgia did so as a matter of practice, formalizing this understanding just a few years later. Moreover, most of the states had also buttressed the right of free exercise—either explicitly or in practice—with a ban on the establishment of one particular religious denomination by the state government. The only states in the original thirteen that had not adopted this understanding of free exercise by this time were the New England Congregationalist states of Connecticut, New Hampshire, and Massachusetts.[71]

However, it was not long before even these long-entrenched establishments yielded to arguments that compelled support of religious congregations violated free exercise rights. Connecticut eliminated such support requirements and disestablished in 1818, New Hampshire in 1819, and Massachusetts in 1833.[72] While Connecticut continued to operate under its English charter until adopting a constitution in 1818,[73] both the original Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 contained explicit protections for the free exercise of religion.[74] Yet both constitutions also authorized the state legislatures to levy taxes for the support of local congregations to promote good governance, subject to an individual's right not to have their taxes used to support any congregation but their own.[75] Interestingly, both constitutions expressly provided that "no subordination of any sect or denomination to another shall ever be established by law"[76]—evidencing an understanding among many New Englanders that, even before formal disestablishment, they did not have an establishment of religion simply because they provided for the assessment of taxes for local congregations.

In sum, by the time the First Congress met in 1789 to consider a federal bill of rights, there appears to have been a widely shared understanding in all of the states—except three in New England—that protection against having to pay compulsory taxes to support religious faiths a person did not believe in was a key component of a broader right to the free exercise of religion. And even those New England States recognized a qualified form of the right against compelled taxation—limiting the use of such taxes for an individual's own congregation.

71. *See* McConnell, *supra* note 32, at 1437.
72. *See* Esbeck, *supra* note 52, at 1458.
73. *See id.* at 1510, 1542.
74. MASS. CONST. of 1780, art. II; N.H. CONST. of 1784, art. V.
75. MASS. CONST. of 1780, art. III; N.H. CONST. of 1784, art. VI.
76. MASS. CONST. of 1780, art. III; *see also* N.H. CONST. of 1784, art. VI.

This understanding is important to our consideration of the *Trinity Lutheran* decision, because the Court relied on the federal Free Exercise Clause in that case to invalidate the application of Missouri's bar on the use of public funds to support religious communities. The ruling was particularly notable because the Court's conservative justices are self-professed originalists, so this history should matter enormously to them. What then did the First Congress, which drafted the Bill of Rights in 1789, intend, and, more importantly, what did the people in the various states who considered and ratified that document in 1789–91 understand the Religion Clauses of the First Amendment to mean?[77]

As has been widely chronicled, the Bill of Rights was added to the Constitution at the demand of state ratifying conventions in order to secure that charter's adoption in the face of stiff resistance.[78] The states wanted to make sure the new national government being created kept within the limits of the powers being granted to it. In the First Congress, the task of drafting a bill of rights fell to the newly elected House member from Virginia, James Madison, who had just four years earlier helped Jefferson push through the Virginia Statute for Religious Freedom and its ban on compulsory taxation to fund religious causes.[79] As Madison put pen to paper, he most likely had copies of the various state constitutions to work from, as well as a list of requested amendments from the state ratifying conventions—many of which were based on the states' own bills of rights. This is important to the original understanding of the Religion Clauses, since as McConnell has observed, the "state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states."[80]

After Madison completed his draft bill of rights, its provisions went through various revisions by committees in the House of Representatives and Senate with scant discussion or debate.[81] That is not surprising since those congressmen were preoccupied with the business of getting the new federal government up and running, and a bill of rights was primarily seen as a way to appease those states that were still agitating for a new

77. It is beyond the scope of this Article to wade into the voluminous debate over proper modes of originalist interpretation. Suffice it to say that we believe the understanding of those who voted to ratify the Bill of Rights and bring those provisions into law is key to what those provisions were intended to mean.

78. *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 12 (1999).

79. *See id.*; *supra* note 56 and accompanying text.

80. McConnell, *supra* note 32, at 1456.

81. *See* David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 854 (1994) ("Given the importance of the Bill of Rights today, there was surprisingly little recorded debate on its provisions; but it should be recalled that the First Congress had plenty of other important things to do.").

constitutional convention to address perceived defects in the Constitution.[82] Hence, all the more reason to read that document in light of how similar provisions in the state constitutions were understood. When the drafting process was complete, the document was sent to the states in September of 1789 and ratified by the required eleven states in December of 1791.[83]

And so what is the most persuasive case for what the founding generation understood the phrase "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" to mean? Considering the Free Exercise Clause first, it seems clear it was understood to prohibit the federal government from placing any burdens on a person as a consequence of his or her religious beliefs—a right that comprised the core of the similarly worded free exercise rights, or comparable liberty of conscience rights, protected by every one of the states that had a formal constitution in 1789. But was the federal clause also understood to prohibit compelled taxpayer funding of churches and other places of worship? This question is more difficult.

While the foregoing discussion demonstrates that most of the existing states would have so understood it, at least the people of Connecticut, Massachusetts, and New Hampshire likely would not have shared that understanding—except, perhaps, in the limited sense reflected in the constitutions of the latter two states.[84] In addition, in 1791, Vermont, which generally followed the New England Congregationalist model until 1807, was admitted to the union as a state and was one of the eleven states that ratified the Bill of Rights.[85] So its people would likely have shared the same understanding of free exercise as the other New England states. Interestingly, however, Connecticut and Massachusetts did not ratify the Bill of Rights until the twentieth century,[86] and so arguably the understanding of their citizens would not be relevant to the original understanding of the Free Exercise Clause. But even if so, New Hampshire and Vermont would still stand in the way of finding a uniformly shared understanding on this issue.

Nonetheless, what the early history of free exercise shows is that at the time the Free Exercise Clause was adopted, most states did understand it to preclude such compelled funding, and the few holdout Congregationalist states came around to that understanding in a relatively short period of time thereafter. Moreover, it is significant that of the twenty-two new states admitted to the Union between 1792 and the arguable application of federal

---

82. *See id.*
83. *See* LEVY, *supra* note 78, at 40, 43.
84. *See supra* notes 71–76 and accompanying text.
85. *See* LEVY, *supra* note 78, at 101.
86. *See id.* at 41.

free exercise rights to the states through the Fourteenth Amendment in 1868, fifteen, including Missouri, had a free exercise clause in their founding constitutions that virtually tracked the language in those of most of the original states barring compulsory taxation for the support of churches or other houses of worship.[87] Moreover, six of the other state constitutions had more abbreviated free exercise clauses along the lines of New York's original constitution that were likely understood to bar such compelled funding.[88] Hence, even if the original Free Exercise Clause did not yet fully encompass a ban on compulsory taxation for places of worship as a core component of that right, it seems clear that by the time the Fourteenth

---

87. KY. CONST. of 1792, art. XII, § 3 ("That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent . . . ."); TENN. CONST. of 1796, art. XI, § 3 (substantially same); OHIO CONST. of 1803, art. VIII, § 3 (substantially same); IND. CONST. of 1816, art. I, § 3 (substantially same); ILL. CONST. of 1818, art. VIII, § 3 (same); ALA. CONST. of 1819, art. I, § 3 ("No person within this state shall, upon, any pretence, be deprived of the inestimable privilege of worshipping God in the manner most agreeable to his own conscience; nor be compelled to attend any place of worship, nor shall any one ever be obliged to pay any tythes, taxes, or other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry."); MO. CONST. of 1820, art. XIII, § 4 ("That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion . . . ."); ARK. CONST. of 1836, art. II, § 3 (same as Kentucky Constitution); MICH. CONST. of 1835, art. I, § 4 ("Every person has a right to worship Almighty God according to the dictates of his own conscience; and no person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes or other rates, for the support of any minister of the gospel or teacher of religion."); TEX. CONST. of 1845, art. I, § 4 (substantially same as Kentucky Constitution); IOWA CONST. of 1846, art. II, § 3 (substantially same as Michigan Constitution in pertinent respects); WIS. CONST. of 1848, art I., § 18 (substantially same as Kentucky Constitution); MINN. CONST. of 1858, art. I, § 16 (substantially same as Kentucky Constitution); KAN. CONST. of 1861, Bill of Rights, § 7 ("The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship . . . ."); W. VA. CONST. of 1863, art. II, § 9 ("No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . .").

88. MISS. CONST. of 1817, art. I, § 3 ("The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this State . . . ."); ME. CONST. of 1819, art. I, § 3 ("All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences . . . and all religious societies in this State . . . shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."); FLA. CONST. of 1838, art. 1, § 3 ("That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; and that no preference shall ever be given by law, to any religious establishment, or mode of worship in this State."); CAL. CONST. of 1849, art. 1, § 4 (substantially same as Mississippi Constitution); OR. CONST. of 1857, art. I, §§ 2–3 ("All men shall be secure in the natural right, to worship Almighty God according to the dictates of their own consciences. . . . No law shall in any case whatever control the free exercise, and enjoyment of religeous opinions, or interfere with the rights of conscience."); NEV. CONST. of 1864, art. I, § 4 (substantially same as Mississippi Constitution). It should be noted that the twenty-second state admitted during this period, Louisiana, did not adopt a bill of rights until 1868. John Devlin, Louisiana Associated General Contractors*: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 LA. L. REV. 887, 894 (2003) ("In contrast, the Louisiana Constitution of 1868, enacted at the flood tide of radical reconstruction did, for the first time, feature a state Bill of Rights.") (footnotes omitted).

Amendment was adopted the American people so understood it to include such a ban.

The foregoing historical discussion also demonstrates that the original states gradually added anti-establishment clauses barring governmental preferences for a particular religious sect or denomination to fortify free exercise rights that all agreed were at the heart of religious freedom, whether they initially had established religions or not.[89] But since most of those clauses used wording to the effect that their respective state governments were prohibited "from establishing a religious sect in preference to others," why then did the federal Establishment Clause use the peculiar wording barring Congress from making any laws "respecting an establishment of religion"? Although there has been a vigorous debate about this, the weight of scholarly commentary appears to support the position that this wording was designed to accomplish two purposes.[90] First, it made it clear that the new federal government would have no power to interfere with the wide variety of decisions states were making as to the degree of church-state separation to maintain within their own borders. In other words, it was a federalism provision that ensured complete state autonomy over these matters. Second, and perhaps more obviously, it was understood to do at the federal level of government what the state clauses did at theirs—keep that government from preferring one religious sect to others, and particularly from making one the official church or religion of the new nation.

One principal debate about the latter purpose is whether it also encompassed a ban on federal non-preferential financial assistance for religion, similar perhaps to the general assessment schemes of the New England Congregationalist states.[91] Without wading too far into this discussion, given the differences among the states that ratified the Bill of Rights on compulsory support—with most barring it as a matter of free exercise and only New Hampshire and Vermont finding it permissible at

---

89. *See* McConnell, *supra* note 32, at 1455 ("With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789, although two states confined their protections to Christians and five other states confined their protections to theists. There was no discernible difference between the free exercise provisions adopted by the states with an establishment and those without.") (citation omitted); *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2041 (2017) (Sotomayor, J., dissenting) ("The Religion Clauses of the First Amendment contain a promise from our government and a backstop that disables our government from breaking it. The Free Exercise Clause extends the promise. We each retain our inalienable right to 'the free exercise' of religion, to choose for ourselves whether to believe and how to worship. And the Establishment Clause erects the backstop. Government cannot, through the enactment of a 'law respecting an establishment of religion,' start us down the path to the past, when this right was routinely abridged.").

90. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS 32 (1998); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1091 (1995); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 511 (2006).

91. *See, e.g.*, DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 249–58 (2010).

that time—the argument for the permissibility of non-preferentialist aid seems implausible. And the gradual crystallization of that free exercise understanding amongst most states by the time the Fourteenth Amendment was adopted—including those of New England and newly admitted ones—seems to make such a non-preferentialist understanding unlikely at the time some commentators argue the Establishment Clause may very well have been applied to the states.[92]

This conclusion is buttressed by a growing separation of church and state at the state level between 1830 and 1868 even beyond the wide adoption of a free exercise bar on compelled support for devotional communities. When Michigan became a state, its original 1835 Constitution not only contained a free exercise bar on compulsory support, but also the following provision: "No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries."[93] By the 1860s, several other states had adopted similar restrictions on state funding in their constitutions—Wisconsin in 1848, Indiana and Ohio in 1851, Minnesota in 1857, Oregon in 1857, and Kansas in 1858.[94] While it is not exactly clear what these clauses were designed to achieve, at least one leading scholar has argued they were mainly intended to prevent public funds from flowing to private religious schools that included religious indoctrination in their curricula—all as part of a broader separation of church and state trend that was emerging throughout the nineteenth century.[95]

Indeed, after the Fourteenth Amendment's adoption in 1868, this trend only accelerated. The very no-funding provision in Missouri's constitution that was at issue in *Trinity Lutheran*—adopted in October 1875 when that

---

92. *See generally, e.g.*, Lash, *supra* note 90 (arguing that to the extent the adopters of the Fourteenth Amendment intended to apply the guarantees of the Bill of Rights to the states, the Establishment Clause would have been included amongst them). Of course, as with many issues of constitutional interpretation, ascertaining historical understandings with any level of precision on religious funding is nearly impossible. Moreover, governmental actions are not always consistent with constitutional understandings even where they can be said to exist. For instance, as various commentators have pointed out, Congress occasionally directed financial aid to religious causes even in decidedly preferential ways. *See, e.g.*, DRAKEMAN, *supra* note 91, at 305–14 (describing congressional funding of efforts from the founding through the nineteenth century to convert native American Indians to Christianity).

93. MICH. CONST. of 1835, art. I, § 5.

94. *See* Steven K. Green, *The "Second Disestablishment": The Evolution of Nineteenth-Century Understandings of Separation of Church and State*, *in* NO ESTABLISHMENT OF RELIGION 280, 288 (T. Jeremy Gunn & John Witte, Jr. eds., 2012).

95. *See id.* at 288–302. While some commentators have attributed such clauses to emerging anti-Catholic bigotry by Protestants, Green has argued that such arguments are overblown and it is more accurate to view them as part of an evolving trend towards a greater separation of church and state that was occurring during the nineteenth century. *See id.* at 293–302; *see also* STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION (2012); John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & ST. 15, 16, 38–40 (2006) (arguing that while state no-funding provisions were likely motivated in part by anti-Catholic bias, they were also driven by broader, legitimate church-state separation convictions).

state replaced its entire constitution—was plainly drawn from these earlier provisions of other state constitutions.[96] And as Justice Sotomayor chronicled in her *Trinity Lutheran* dissent, today thirty-eight of the fifty states have some form of counterpart to the 1875 Missouri provision—most of which were first adopted in the nineteenth or early twentieth centuries.[97] Thus, to describe, as Chief Justice Roberts did in the *Trinity Lutheran* majority opinion, Missouri's historic and widely shared anti-establishment interests in applying its no-funding provision as a mere "policy preference for skating as far as possible from religious establishment concerns,"[98]

96. MO. CONST. of 1875, art. II, § 7 ("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 . . . ."). For instance, Missouri's provision is little different in substance from that contained in Article I, Section 6 of the Indiana Constitution of 1851. IND. CONST. of 1851, art. I, § 6 ("No money shall be drawn from the treasury for the benefit of any religious or theological institution."). As Green notes, a "common practice in later state constitution drafting was for delegates to borrow language from the constitutions of other states." Green, *supra* note 94, at 287.

97. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2037 & n.10–11 (2017) (Sotomayor, J., dissenting). Of the state provisions cited by Sotomayor, approximately twenty were of the general no-funding variety similar to Missouri's Section 7, while the remaining ones were more along the lines of the traditional "no compulsory support" provisions found in the early constitutions.

98. *Id.* at 2024. As in *Locke*, the *Trinity Lutheran* plaintiff and several amici attempted to argue that Article I, Section 7 was a Blaine-type amendment motivated by anti-Catholic bias, and should have been invalidated on that basis. *See* Locke v. Davey, 540 U.S. 712, 723 n.7 (2004); Brief for Petitioner at 42–44, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577); *see also, e.g.*, Brief for Cato Institute as Amicus Curiae in Support of Petitioner, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577). At least one prominent commentator appears to have agreed with this claim. *See* Douglas Laycock, Comment, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 168 (2017). However, the fact that the Court did not address this argument perhaps indicates it reached the same conclusion it did in *Locke*—that the provision at issue in this case was not a Blaine amendment, and there was no "credible connection" between Section 7 and a true Blaine-type provision contained in Article IX, Section 8 of the Missouri Constitution. *See Locke*, 540 U.S. at 723 n.7. And that indeed appears to be the case here. Section 7 did not focus on denying public schools like Article IX, Section 8 did. Moreover, the latter provision was added to the Missouri Constitution five years before Section 7 as the result of a controversy about public aid to Catholic schools. *See* Laycock, *supra* note 98, at 167. As Laycock noted, there was nothing in the legislative record of Section 7 linking it to that dispute. *Id.* at 168. Nonetheless, Laycock argues that the "timing and language of [Section 7] suggests that it was part and parcel of the movement for Blaine provisions." *Id.* We have contended, however, that Section 7 can just as readily be viewed as part of a broader trend occurring in the nineteenth century to achieve a greater separation of church and state. *See supra* note 95 and accompanying text. After all, even if the broader no-funding provisions such as Section 7 were partially motivated by a concern that public aid received by Catholic or other religious schools would be used to support sectarian instruction in specific faiths, that does not necessarily amount to illegitimate bias. It could just as readily be characterized as a legitimate concern about public dollars being used to promote a particular version of religious truth. Nonetheless, an extensive analysis of this issue is beyond the scope of this Article—particularly since the *Trinity Lutheran* Court did not question the bona fides of Section 7 despite discounting Missouri's church-state separation interests as applied to the specific facts of the case. But it is worth noting that even if Section 7 bore a Blaine-type taint, there is a strong argument it was cleansed when the people of Missouri readopted the provision in 1945 as part of an overhaul of its constitution. As one student author who studied the circumstances under which Missouri adopted its *actual* Blaine-type provision in Article IX, Section 8 concluded,

> [e]ven if one assumes Missouri's 1875 Blaine Amendment was the bona fide product of anti-Catholic bigotry . . . [a]ny taint of anti-Catholic sentiment . . . was purged by the 1945

belittled and vastly understated the weighty interests at stake. Just as troubling (and one could say perverse) was his reliance on the federal Free Exercise Clause—a provision which, as demonstrated, early on came to be widely understood as barring compelled taxpayer funding of religious societies—to trump Missouri's anti-establishment interests.

In sum, even if one takes the position that the federal Establishment Clause has been properly incorporated against the states, there seems to be little historical support for the notion that the provision of non-preferential financial assistance to churches or other worship institutions is consistent with that clause. Hence, as Sotomayor argued, the Chief Justice's similar dismissal of the notion in *Trinity Lutheran* that the provision of such aid to the church violated the federal Establishment Clause[99] seems ahistoric as well.[100]

Moreover if, as Justice Clarence Thomas and many conservatives have argued,[101] it would have been illogical for the Fourteenth Amendment to have incorporated the Establishment Clause against the states due to its purpose of barring any federal interference with church-state decisions by the states, the *Trinity Lutheran* decision becomes even more troubling. Now the entire purpose of both Religion Clauses has been inverted—the federal Free Exercise Clause being used to invalidate an application of a state anti-establishment clause that the federal Establishment Clause was designed to protect. There is more than a little irony in the Court using a federal free exercise clause historically understood to protect against compulsory taxpayer funding of churches to invalidate a state constitutional provision designed to protect the same interests, even while purportedly being

> constitution. By 1945, any anti-Catholic hysteria existing in [Missouri] had largely dissipated, and the amendment was passed for entirely benevolent reasons, without a shred of historical evidence of illicit anti-Catholic motive.

Aaron E. Schwartz, Comment, *Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 72 MO. L. REV. 339, 376–77 (2007) (footnotes omitted).

One might also attempt to justify the Court's dismissive treatment of Missouri's anti-establishment interests in the case by noting that, some two months before that tribunal issued its decision, a recently-elected Republican governor of the state instructed Missouri's Department of Natural Resources to allow religious organizations to be eligible for the sort of grant the Trinity Lutheran Church was denied. *See* https://www.stltoday.com/news/local/crime-and-courts/greitens-instructs-dnr-to-consider-religious-organizations-for-grants/article_68b8bb5a-c6a8-56de-87d7-b6e31e2e2418.html. But one cannot view the actions of one elected official—seemingly in direct violation of Section 7—as reflecting on the anti-establishment views of the Missouri people, particularly when there was little opportunity for them or the Missouri Legislature to weigh in on the governor's action prior to the Court essentially mandating such eligibility as a matter of federal constitutional law.

99. *See Trinity Lutheran*, 137 S. Ct. at 2019 ("The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.").

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

101. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) ("Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.").

shielded against federal interference by the Establishment Clause.

And to make matters worse, the no-funding principle contained in the federal and state constitutions was theoretically designed to shield dissenting taxpayers against democratic majorities who, through their legislatures, might be tempted to violate it. But in *Trinity Lutheran*, it was the Court that decided dissenting taxpayers in Missouri, regardless of whether they might have constituted a majority or minority of the state, would be required by the federal Constitution to suffer public funds going directly to the church in that case.

All of this makes one wonder. What happened to the normal position of the conservative justices that comprised most of the *Trinity Lutheran* majority that the judiciary should exercise restraint in the face of ambiguous questions of constitutional interpretation?[102] And what happened to their usual federalism position that such restraint should especially be exercised in the face of countervailing state interests of a historic magnitude?[103] And where was Justice Thomas with his normal Establishment Clause anti-incorporation, state rights arguments,[104] or indeed all of the conservative justices when it comes to originalist modes of interpretation?[105]

Both the Chief Justice's opinion and Justice Thomas' concurrence lacked even an iota of historical analysis, with Justice Thomas going further and joining the freshman Justice Gorsuch's *seriously* ahistoric concurrence expressing the view that the public funds received by the church could be constitutionally used for religious purposes (such as to fund worship services).[106] Not only did this opinion display a surprising disregard of free exercise history for a justice that has frequently declared himself to be a "text and history" judge, but the disrespect for Missouri's anti-establishment interests inherent in Justice Gorsuch's position is striking.[107]

Perhaps the *Trinity Lutheran* majority should have been reminded that the history of free exercise in this country has predominantly been one of protecting against the government directly forcing people to act contrary to their religious beliefs, such as by forcing citizens to underwrite the religious devotions of others. It decidedly has *not* been about allowing devotional

---

102. This attitude was on full display in the various dissenting opinions of the more conservative justices in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–43 (2015), dealing with the issue of same-sex marriage.

103. *See, e.g.*, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 684–85 (1999) (Kennedy, J., dissenting) ("In the final analysis, this case is about federalism. . . . The delicacy and immense significance of teaching children about sexuality should cause the Court to act with great restraint before it displaces state and local governments.").

104. *See supra* note 101 and accompanying text.

105. *See supra* note 77 and accompanying text.

106. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring).

107. *See supra* note 6 for a discussion of how Justice Gorsuch recently seems to have reaffirmed his view that government funding may be put to religious uses.

communities to receive public funding on the theory that otherwise their free exercise rights would be indirectly burdened (much less invidiously discriminated against as Justice Roberts would have it). Government funding of religious groups is a zero-sum situation from a free exercise perspective—if the government is allowed to provide funds, the rights of dissenting taxpayers are directly infringed; if such funding is barred, arguably the free exercise rights of devotional communities are indirectly burdened. The American history of free exercise provides a clear answer as to who should triumph in this contest.

There is no doubt that when the Court inserted itself into church-state issues in *Everson* after they had been worked out at the colony and state levels for over 300 years, it departed from this historic understanding of free exercise rights. By myopically viewing the issue in that case of taxpayer monies being directed to parents of public and Catholic schoolchildren as an Establishment Clause issue, the Court lost sight of the free exercise interests at stake. Indeed, to the extent the majority even acknowledged that free exercise rights were in play, it focused exclusively on those of the Catholic parents who could be burdened by being denied bus fare reimbursements—and said nothing about those of the dissenting plaintiff taxpayers.[108] Moreover, the Court established a neutrality principle—that government must neither aid nor hinder religion—to balance the competing interests of the government and religious aid recipients in the case, striking the balance in favor of the latter.[109] It reasoned that the bus reimbursements were for a secular purpose, went to the Catholic parents rather than the parochial schools directly, and only indirectly benefited the latter institutions.[110]

In the modern era, then, the battle over government aid to religion has been waged almost exclusively on the Establishment Clause front—and mainly how to apply the *Everson* neutrality principle in a particular case. Since this principle in theory purports to restrict the government from providing non-preferential aid to religious organizations, the more conservative Rehnquist and Roberts Courts have manipulated it over time to permit greater amounts of such aid.[111] This trend is what enabled Chief Justice Roberts to casually assert in *Trinity Lutheran* that providing a public grant directly to a church for the purportedly secular purpose of resurfacing a playground would not be a federal Establishment Clause problem.[112]

In viewing religious aid cases this way, however, the Court inverted

108. *See* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).
109. *See id.* at 17–18.
110. *See id.* at 15–18.
111. *See infra* notes 215–18 and accompanying text.
112. *See supra* note 29.

years of American history where rights of conscience were the primary driver against compelled funding—and anti-establishment clauses an undergirding support. But even taking the modern Court's ahistorical approach at face value, the *Trinity Lutheran* majority's use of the federal Free Exercise Clause to override Missouri's anti-establishment clause was indefensible. It is a basic canon of constitutional law that states, under their laws, may be more protective of constitutional rights guaranteed by the federal Constitution.[113] And so even if the Court were correct to read the federal Establishment Clause as permitting direct non-preferential aid to churches in certain circumstances, this does not invalidate Missouri's choice to maintain greater protection for anti-establishment rights than exists at the federal level. For the conservative justices who routinely inveigh against federal encroachment on state rights, the *Trinity Lutheran* decision stands as a stark example of the oft-asserted criticism that federalism principles only seem important when they are convenient to the result in a particular case.

In sum, this Part I has argued that the *Trinity Lutheran* decision was contrary to free exercise and anti-establishment values that are deeply embedded in American constitutional history. In Part II, we will demonstrate that the decision is also indefensible as a matter of the Court's own precedent.

II. ABANDONING PRECEDENT

At the outset of her powerful *Trinity Lutheran* dissent, Justice Sonia Sotomayor declared: "This case 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."[114] Never before in all of American history had the Supreme Court held the government was required to provide financial aid to a religious institution. Usually cases coming to the Court concerning government aid and the Establishment Clause have involved whether particular assistance is unconstitutional.[115] Even when

113. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.") (emphasis omitted).

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

115. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (articulating test for when government aid violates the Establishment Clause); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (initial case considering government aid to parochial schools and holding that the government does not violate the Establishment Clause by providing bus transportation for students to and from religious schools).

finding that a particular form of assistance was permissible,[116] never did the Court suggest that it might be constitutionally *required*. That is what makes *Trinity Lutheran* so important.

In this section we argue that the Court could come to this conclusion only by disregarding precedent. Specifically, we argue that the Court's decision is inconsistent with its earlier ruling in *Locke v. Davey*,[117] and that the Court's holding adopts a position rejected by a majority of the justices in *Mitchell v. Helms*.[118] Of course, the fact that the Court is significantly departing from precedent does not, by itself, show that the ruling is undesirable. Precedent, at times, should be overruled. But understanding how *Trinity Lutheran* abandons precedent is important in recognizing its significance and helps to illuminate the broad implications of the decision.

A. The Specious Distinctions of Locke v. Davey

Locke v. Davey was the previous case where the Court had to consider whether the government was constitutionally required to provide aid to support religion. The Court, 7–2, rejected such a requirement. Chief Justice William Rehnquist, obviously no liberal, wrote the opinion for the Court; only Justices Scalia and Thomas dissented.

Locke arose from Washington's program of giving scholarships to students who qualify academically and financially and who attend college in the state.[119] Students can attend any public or private college, including a religiously affiliated college, and may study whatever they choose.[120] But there is one limit: students must not be pursuing a degree that is "devotional;" that is, the student cannot use the scholarship to study for training to become a minister.[121] Washington justified this restriction based on a provision in its state constitution which provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[122]

Joshua Davey, a recipient of a Promise Scholarship, chose to attend Northwest College, a private Christian college affiliated with the Assemblies of God denomination.[123] Davey sought to become a minister

116. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (upholding, by a 5-to-4 margin, the constitutionality of the government providing sign interpreters for parochial school students).

117. 540 U.S. 712 (2004), discussed below in text accompanying notes 119–41.

118. 530 U.S. 793 (2000), discussed below in text accompanying notes 142–56.

119. *Locke*, 540 U.S. at 715–16.

120. *Id.* at 716.

121. *Id.*

122. WASH. CONST. art. I, §11.

123. *Locke*, 540 U.S. at 717.

and had a double major in pastoral ministries and business management/administration.[124] When Davey was informed that he could not receive the Promise Scholarship if he pursued training to become a minister, he refused the aid and filed a lawsuit challenging the restriction.[125] Davey argued that Washington violated the Free Exercise Clause of the First Amendment by allowing students to receive scholarship assistance if they pursued secular, but not religious, studies.[126]

The Court rejected that contention and ruled in favor of the State of Washington.[127] At the outset, the Court emphasized that Washington could, if it wanted, allow its scholarships to be used by students studying to be clergy members.[128] In *Witters v. Washington Department of Services for the Blind*,[129] the Supreme Court had unanimously ruled that it did not violate the Establishment Clause of the First Amendment for the government to permit students receiving scholarship assistance to study for the ministry.

The Court said that "there is room for play in the joints" between the Establishment Clause and the Free Exercise Clause.[130] The Court explained, "[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[131]

The Court reasoned that denying Davey scholarship money to study to be a minister does not interfere with his free exercise of religion in any way.[132] He still can receive training to be a pastor, just without it being subsidized by the government.[133] The Court stressed that many states historically have sought to limit use of their taxpayers' money to subsidize religious institutions.[134]

Justice Scalia, in a dissent joined by Justice Thomas, argued that the denial of aid to Davey constituted hostility to religion that violated the Free Exercise Clause.[135] Chief Justice Rehnquist concluded his majority opinion by responding to and rejecting this argument:

> In short, we find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward

124. *Id.*
125. *Id.* at 717–18.
126. *Id.* at 718.
127. *Id.*
128. *Id.* at 719.
129. 474 U.S. 481 (1986).
130. *Locke*, 540 U.S. at 718 (quoting Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970)).
131. *Id.* at 719.
132. *Id.* at 720.
133. *Id.* at 720–21.
134. *Id.* at 722–23.
135. *Id.* at 726 (Scalia, J., dissenting).

> religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.
>
> Without a presumption of unconstitutionality, Davey's claim must fail. 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.[136]

Locke means that government at all levels can choose how it wants to spend taxpayers' money and the extent, if any, it wants to financially support religion. The Court recognized that the case posed an issue where there is some tension between the Establishment Clause and the Free Exercise Clause, but it concluded that it is a choice to be made by the political process and not the courts.

Under *Locke*, it should have been permissible for Missouri to make the choice to subsidize secular private schools, but not religious ones. Missouri's decision, like Washington's, was to deny aid that could have been given without violating the Establishment Clause. The Court distinguished *Locke v. Davey* on two grounds.

First, the Court said:

> Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.[137]

Second, the Court said that *Locke* involved aid for training a minister, whereas this case concerns assistance for playgrounds. Chief Justice Roberts wrote:

> The Court in *Locke* also stated that Washington's choice was in keeping with the State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy; in fact, the Court could "think of few areas in which a State's antiestablishment interests come more into play." . . . Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.[138]

Both of these distinctions are very troubling and unpersuasive. As to the

136. *Locke*, 540 U.S. at 725 (footnote omitted).
137. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017) (emphasis omitted).
138. *Id.* (quoting *Locke*, 540 U.S. at 722).

former, any time the government denies aid to parochial schools it is because of what they are: religious institutions. This would seem to make *any* denial of aid to religious schools unconstitutional when assistance is provided to secular private schools. Or for that matter, it would make it unconstitutional to deny religious institutions any aid that is provided to secular institutions. Chief Justice Roberts's distinction thus has dramatic implications: the government never would be able to deny financial assistance to religious institutions that is provided to secular ones.

For years, the government refused to provide faith-based institutions the assistance offered to secular institutions, whether for preschools or drug rehabilitation programs or other social services. Religious institutions could receive the aid, but they needed to create a secular arm to do so. The charitable choice movement has sought to allow faith-based institutions—churches, synagogues, mosques—to directly receive government assistance. There long has been debate over whether charitable choice is desirable and constitutional.[139]

The language in Chief Justice Roberts's opinion suggests that charitable choice may be a constitutional requirement. After all, the denial of aid always is because of what the institutions are: churches, synagogues, mosques.

Also, the distinction between what an institution is and what it does is inherently arbitrary. Religious institutions are different precisely because of what they do. Conversely, Joshua Davey was denied use of his scholarship because of what he was: a Christian who wanted to be ordained as a minister.

The Court's other distinction based on how the aid is used is equally troubling. As the Court often has observed, dollars are fungible. Aid provided for playgrounds frees up money for the parochial school to use for other purposes, including religious indoctrination. As Justice Sotomayor noted in her dissent:

> The government may not directly fund religious exercise. Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advanc[es] . . . religion."
>
> Nowhere is this rule more clearly implicated than when funds

139. *See, e.g.*, Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses*, 55 VAND. L. REV. 799 (2002); Andrea Pallios, *Should We Have Faith in the Faith-Based Initiative?: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 HASTINGS CONST. L.Q. 131 (2002); David J. Freedman, Note, *Wielding the Ax of Neutrality: The Constitutional Status of Charitable Choice in the Wake of* Mitchell v. Helms, 35 U. RICH. L. REV. 313 (2001); Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999).

> flow directly from the public treasury to a house of worship. A house of worship exists to foster and further religious exercise. . . . When a government funds a house of worship, it underwrites this religious exercise.[140]

Justice Sotomayor stressed that this is exactly the choice of the State of Washington in *Locke v. Davey* and of Missouri in denying religious schools aid for playgrounds:

> Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.[141]

In other words, Chief Justice Roberts's attempts to distinguish *Locke v. Davey* are unpersuasive and have broad implications. Ultimately the question in both cases was whether the government is constitutionally required to provide aid for religious instruction when it provides it for secular instruction. *Locke* says no; *Trinity Lutheran* says yes.

B. *Returning to the Approach Rejected in* Mitchell v. Helms

Actually, there is a prior Supreme Court opinion that took the approach that the government is constitutionally obligated to provide aid for religious institutions: Justice Clarence Thomas's plurality opinion in *Mitchell v. Helms*.[142] But that approach was explicitly rejected by a majority of the Court. Now, the Court in *Trinity Lutheran* seems to be embracing it.

Mitchell involved Louisiana providing instructional equipment to parochial schools. The issue was whether this violated the Establishment Clause. Justice Thomas, writing for a plurality of four, said that the aid should be allowed because it is provided equally to all schools, religious and nonreligious.[143] He said that the key question is whether the government was participating in religious indoctrination. He wrote:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range

---

140. *Trinity Lutheran*, 137 S. Ct. at 2028–29 (Sotomayor, J., dissenting) (citations and footnotes omitted) (quoting Agostini v. Felton, 521 U.S. 203, 222–23 (1997)).

141. *Id.* at 2038.

142. 530 U.S. 793 (2000).

143. *Id.* at 809.

> of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.[144]

He rejected the argument that aid is impermissible because it might be diverted to religious use because any assistance could free funds that end up being used for religious purposes.[145]

Justice Thomas emphatically rebuffed the view that the government cannot give aid that is actually used for religious education. He also sharply criticized the traditional law preventing the government from giving aid to "pervasively sectarian" institutions. He said that this phrase was born of anti-Catholic bigotry and wrote that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[146] He declared: "[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."[147] He argued that provisions in state constitutions forbidding aid to religious institutions—such as that in Missouri's—were the product of anti-Catholic sentiments and should not be allowed to prevent aid today. He wrote: "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now."[148]

If followed, Justice Thomas's approach would require the government to give aid to parochial schools any time it is assisting secular private schools. But his opinion was joined only by three other justices: Chief Justice Rehnquist and Justices Scalia and Kennedy. Four justices explicitly rejected Justice Thomas's view of the First Amendment's religion clauses.

Justice O'Connor wrote an opinion concurring in the judgment, joined by Justice Breyer, in which she sharply disagreed with Justice Thomas's approach. Justice O'Connor said that equality never had been the sole measure of whether a government action violated the Establishment Clause. She wrote: "[W]e have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid."[149] She continued, "I also disagree with the

144. *Id.*
145. *Id.* at 814–25.
146. *Id.* at 828.
147. *Id.*
148. *Id.* at 829.
149. 530 U.S. at 839 (O'Connor, J., concurring in the judgment) (emphasis omitted).

plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[150] Justice O'Connor said that the test should be whether aid actually is used for religious instruction, in which case the Establishment Clause is violated.[151] Because she found no indication here that the aid was used for religious education in more than a negligible way, she found that the Louisiana program did not violate the First Amendment.[152]

Justice Souter's dissenting opinion, joined by Justices Stevens and Ginsburg, urged the Court to adhere to its precedents and find that aid is impermissible when it is of a type, like instructional materials, that can be used for religious education.[153] Justice Souter strongly disagreed with the plurality's view that equality is the sole test for the Establishment Clause and identified a number of factors that prior cases require to be considered in determining whether aid is impermissible.[154] Justice Souter powerfully concluded his dissent by stating: "[I]n rejecting the principle of no aid to a school's religious mission the plurality is attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion. I believe that it can, and so respectfully dissent."[155] Justice Souter forcefully explained why government aid to religious institutions should be deemed to violate the Establishment Clause:

> The First Amendment's Establishment Clause prohibits Congress (and, by incorporation, the States) from making any law respecting an establishment of religion. It has been held to prohibit not only the institution of an official church, but any government act favoring religion, a particular religion, or for that matter irreligion. Thus, it bars the use of public funds for religious aid.
>
> The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.[156]

150. *Id.* at 840.
151. *Id.* at 840–41.
152. *Id.* at 866.
153. *Id.* at 867–68 (Souter, J., dissenting).
154. *Id.* at 868–69.
155. *Id.* at 913.
156. *Id.* at 867–68.

Justice Thomas and three other justices would have found that the denial of aid to religious schools violates the First Amendment when the same assistance is provided to secular private schools. Five justices could not have been more explicit in rejecting this view. But it is exactly the approach of the *Trinity Lutheran* majority.

III. IMPLICATIONS FOR THE FUTURE

As suggested in Part II, the implications of Chief Justice Roberts's approach are stunning: seemingly *Trinity Lutheran* means that the government must provide aid to religious institutions when it is giving assistance to secular ones. To address this, the majority opinion includes a footnote limiting its impact. In footnote 3, the Court says: "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."[157] Only four justices joined this footnote; Justices Thomas and Gorsuch joined the majority opinion except for this footnote. Justice Breyer wrote a separate opinion concurring in the judgment, stressing that this case is just about aid for playgrounds: "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."[158]

The central question after *Trinity Lutheran* is how far the Court will go in holding that the government is constitutionally required to provide the same aid to religious institutions that it gives to secular private institutions. At the very least, *Trinity Lutheran* is an invitation for religious institutions to bring challenges any time they are denied a benefit given to secular institutions. Courts will need to struggle with whether a particular type of aid is more like that in *Locke v. Davey*, which the government can choose to deny to religious uses, or more like *Trinity Lutheran*, where the denial of aid is unconstitutional. As explained in the prior section, this line is totally unclear and one that will be much litigated.[159]

Although we would like to see *Trinity Lutheran* limited to aid to playgrounds, that seems quite unlikely. First, the majority repeatedly says that "strict scrutiny" is to be used when the government denies aid to parochial schools that it provides to secular private schools. The Court explained that government discrimination against religious institutions must meet strict scrutiny. Chief Justice Roberts stated: "The Free Exercise Clause

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

158. *Id.* at 2027 (Breyer, J., concurring).

159. *See supra* note 6 for a discussion of how such litigation has already reached the Court, and how at least three of its members are weighing in on how *Trinity Lutheran* should be read to compel government aid to religious organizations even when it will be put to religious uses. Should such a reading eventually carry the day, it will effectively overrule *Locke*.

'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.'"[160] The Court declared: "If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."[161] The Court thus explained that "the State's decision to exclude [Trinity Lutheran] for purposes of this public program must withstand the strictest scrutiny."[162] The Court concluded that Missouri's action was unconstitutional "because it cannot survive strict scrutiny in any event."[163]

As Justice Sotomayor points out in her dissent, this is a significant departure from precedent. Never before had the Court held that the denial of aid to a religious institution had to meet strict scrutiny. Justice Sotomayor explained:

> [The Court's] opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status.[164]

She concluded:

> The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. The Court's desire to avoid what it views as discrimination is understandable. But in this context, the description is particularly inappropriate. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns.[165]

Both the majority and the dissent agree that the Court now has prescribed strict scrutiny when the government denies aid to religious institutions that it provides for secular ones. The Court is prescribing this as the general test, not just for the denial of aid for playground surfaces. It is familiar in constitutional law that the government usually loses when strict scrutiny is

160. *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)).

161. *Id.* at 2021.

162. *Id.* at 2022.

163. *Id.* at 2024 n.4.

164. *Id.* at 2038–39 (Sotomayor, J., dissenting) (citations omitted).

165. *Id.* at 2039–40.

applied,[166] which means that in most instances the denial of aid to religious institutions will be deemed unconstitutional.

What would be sufficient to meet strict scrutiny? Obviously, if providing aid to the religious institution would violate the Establishment Clause, complying with the Constitution would provide a compelling government interest justifying denial of the assistance. But short of this, there likely would not be a compelling government interest for denying aid. Missouri claimed that its goal was to stay far away from violating the Establishment Clause and to limit taxpayer support for religious institutions. But the Court explicitly rejected Missouri's interest in going further than what was required by the Establishment Clause:

> Under that stringent standard, only a state interest "of the highest order" can justify the Department's discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause."
>
> The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.[167]

Under this view, any aid that is permissible for a religious institution to receive is *required* when it is provided to a secular institution. Consider the example of vouchers. Previously, in *Zelman v. Simmons-Harris*, the Court, in a 5–4 ruling, said that it was constitutionally permissible for the government to allow vouchers to be used in parochial schools.[168] The Court's decision in *Trinity Lutheran* suggests that the government *must* allow them to be used there when they can be used in secular schools. It is hard to identify what compelling interest would allow the government to deny this to parochial schools under the majority's reasoning. And it must

---

166. Over fourty-five years ago, Professor Gerald Gunther famously declared that strict scrutiny is "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

167. *Trinity Lutheran*,137 S. Ct. at 2024 (citations omitted) (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978); Widmar v. Vincent, 454 U.S. 263, 276 (1981)).

168. 536 U.S. 639 (2002).

be remembered, as the discussion of *Mitchell v. Helms* above indicates, the conservative justices on the Court reject the idea of a wall separating church and state and are quite unlikely to find government aid to religious institutions to violate the Establishment Clause.

Second, beyond the use of strict scrutiny, the Court's language indicates that this case is not just about aid for playgrounds, but likely will extend to all areas where the government is denying aid to religious institutions. The majority opinion concluded: "[T]he 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."[169]

This clearly says that this is not just about playgrounds and not even about religious schools: denying a "public benefit" to a "church" is "odious" to the Constitution and cannot stand. It is hard to imagine a clearer indication that religious institutions are constitutionally *entitled* to any aid provided to secular institutions.

Finally, as described in Part II, the Court's attempts to distinguish *Locke v. Davey* make even clearer that the government cannot discriminate against religious institutions. As described above, the Court explained that "Davey was . . . denied a scholarship because of what he proposed to do . . . . [But] there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church."[170]

This would seem to make *any* denial of aid to religious schools unconstitutional when assistance is provided to public schools. Or for that matter, it would make it unconstitutional to deny religious institutions any aid that is provided to secular institutions. After all, the denial of aid is always because of what the institutions are: churches, synagogues, mosques.

Footnote three, declaring the decision to be about playgrounds, is thus false judicial minimalism. There is no way to understand *Trinity Lutheran* except as a radical change in the law that likely will *require* government aid to religious institutions in virtually any instances where assistance is given to secular institutions, except where such aid would violate the Establishment Clause.[171]

IV. TREATING RELIGION DIFFERENTLY

Parts I–III of this Article have demonstrated why the *Trinity Lutheran* decision was wrong as a matter of history, precedent, and the unwise direction in which it is likely to move the law. In this Part, we will argue

169. 137 S. Ct. at 2025.
170. *Id.* at 2023 (emphasis omitted).
171. *See supra* note 6 for a discussion of how at least three members of the Court are already pushing a reading of *Trinity Lutheran* that would compel government aid even when it would be put to religious uses.

that the principal basis for the Court's decision—a concern that governments are using anti-establishment concerns to unfairly single out religious groups for unfavorable treatment—is misguided. Quite the contrary, when it comes to denying government aid to religious organizations—and particularly houses of worship or related organizations that actively proselytize and promote their versions of truth—we will argue that there are compelling legal and normative reasons for treating them differently.

On one reading of Chief Justice Roberts's majority opinion in *Trinity Lutheran*, he appears to be treating the case as one in which the State of Missouri is targeting a church for unfavorable treatment out of hostile or invidious motives.[172] Hence, his use of the term "odious" to describe the State's actions,[173] and his heavy reliance on the *Church of Lukumi* case where a city had attempted to prevent a church from locating there due to hostility towards its religious practices.[174] This rhetoric made it easier for Roberts to justify applying strict scrutiny to Missouri's denial of benefits to the church, which, in turn, essentially directed a judgment for the church (as the application of such scrutiny to a challenged government action typically does).[175]

But on deeper reflection, as well as a closer reading of Roberts's opinion, it seems likely that something different was going on. More plausibly, he and the other justices in the majority saw this as an unthinking and mechanical application of an antiquated anti-establishment provision of the Missouri Constitution to unfairly deny churches a secular public benefit solely on account of their religious character. Roberts himself seemed to say as much multiple times, despite his use of the rhetoric of invidious discrimination.[176]

So why did Roberts resort to such rhetoric? It seems clear he was attempting to avoid the application of the *Locke* precedent, which, as discussed earlier, would have called for a more even-handed balancing of

---

172. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2019 ("The Free Exercise Clause '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.'") (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993)).

173. *Id.* at 2025.

174. *See id.* at 2019–25.

175. *See supra* notes 27–29 and accompanying text.

176. *Trinity Lutheran*, 137 S. Ct. at 2019 ("[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.") (internal quotation marks omitted); *id.* at 2020 ("We have been careful to distinguish [general] laws from those that single out the religious for disfavored treatment."); *id.* at 2021 ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."); *id.* at 2024 ("The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character.").

the anti-establishment interests at stake in the case against the actual burden a denial of a playground grant would place on the church's ability to freely exercise its religion.[177] Indeed, *Locke* was almost directly on point to the question presented in *Trinity Lutheran*, and certainly the only precedent relied on by the majority that even came remotely close to addressing the question of whether the government was required to fund religious causes. Hence, one obvious criticism of the opinion is that it should have been more honest in its analysis, as opposed to resorting to results-oriented doctrinal manipulation.

But let's put aside this problem with the opinion and address the likely true concern of the Court: that it is unfair (and even "odious") to deny a church or other devotional institution an equal opportunity to compete for public funding merely because of its religious character (and particularly when such funding is purportedly for a secular purpose and the Court has ruled that government may voluntarily provide such benefits consistent with the federal Establishment Clause).[178] However, as benign as this concern may seem on its surface, it is subject to a number of objections.

Most obviously, the Constitution itself mandates the disparate treatment of religious communities in regards to receiving public funding. As discussed earlier, the history of free exercise is in significant part about protecting against compelled funding of religious groups, which in turn makes it dubious to assert that government may provide even non-preferential financial assistance to churches.[179] And this remains true regardless of whether the conservatives on the modern Court want to view the issue exclusively in Establishment Clause terms, and read that clause to permit such funding out of a desire to provide greater support of religion in an increasingly secular society.

Moreover, as also discussed earlier, when public funds are directed to churches or other worship institutions purportedly for secular purposes, they inevitably underwrite the devotional and proselytizing practices of those organizations.[180] Or it becomes tempting to divert those funds to religious purposes, a concern which led the Court for many years to bar such aid if there was a risk of "excessive entanglement" between government and religion in policing the uses of such monies.[181]

As discussed earlier, the solution of the conservative wing of the Court—as illustrated by the plurality opinion in the *Helms* case—is simply to let such funding be used for religious purposes.[182] And it seems to be where

177. *See supra* notes 27–29 and accompanying text.
178. *See infra* note 183 and accompanying text.
179. *See supra* notes 31–113 and accompanying text.
180. *See supra* notes 140–41 and accompanying text.
181. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
182. *See supra* notes 143–48 and accompanying text.

those justices intend the *Trinity Lutheran* decision to push the law, given the repeated assertions in the majority opinion about the unfairness of denying churches public funding while barely noting in a footnote (joined only by a plurality of justices) the significance of the fact that it was to be used in that case for purportedly secular purposes.[183] But a principle that would allow (or even worse, force) the government to directly fund the devotional practices and proselytization efforts of various religion sects, would surely alarm the generations of early Americans who came to understand free exercise and anti-establishment protections as being designed in significant part to protect against those very government actions.

Further, as intimated, even if the Court were right to read the Religion Clauses as permitting the government to voluntarily provide funding to religious groups as part of a generally available funding program,[184] it is quite another thing from a rights of conscience perspective to have unelected judges *force* the government to do so. At least in the former situation, rights of conscience have had a chance to prevail in the resulting democratic decision to include religious institutions in government funding decisions. In such instances, any violations would presumably be confined to objecting minorities. But where judges compel funding through their own ideologically-driven interpretations of the Religion Clauses, the infringement of conscience rights for objectors is potentially much more sweeping.

Lastly, even analyzing this issue on the majority's own terms, it was nothing short of ludicrous to assert that the denial of a playground resurfacing grant would significantly burden the church's free exercise of religion (much less "prohibit" it as the federal Constitution provides).[185] Despite the *Trinity Lutheran* majority's assertion that even indirect burdens imposed on religious exercise can violate free exercise rights (effectively as a *per se* matter since, according to the Court, they trigger strict scrutiny),[186]

183. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 n.3 (2017); *supra* note 6 for a discussion of how a recent case indicates that this is exactly where the conservative members of the Court intend to push the law.

184. *See infra* notes 215–16 and accompanying text.

185. *See Trinity Lutheran*, 137 S. Ct. at 2022.

186. *See, e.g.*, *id.* ("[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'") (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)). More accurately, the *Lyng* Court merely said that such indirect burdens are "subject to scrutiny under the First Amendment," without specifying what level. *Lyng*, 485 U.S. at 450. And in rejecting the free exercise claim in that case, the *Lyng* Court specifically declined to apply strict scrutiny to an alleged indirect burden imposed by a religiously-neutral government action that had "no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* It can hardly be contended that denying a church a playground resurfacing grant could coerce its members into acting contrary to their religious beliefs.

the only defense of this proposition it could muster was a reliance on a few inapposite precedents.[187] The decision on which Roberts's placed the most reliance, *McDaniel v. Paty*,[188] was decided the way it was because there a class of *individuals* (i.e., ministers) were denied a *vital* political and civil right—the ability to hold public office—based on early state anti-establishment concerns about clergy serving in government that had almost *dissipated entirely* by the time of that case.[189] The controlling plurality opinion rested principally on the dissipation rationale.[190] Moreover, it was clear the Court was also concerned about the nature and importance of the benefit being withheld, as well as the burden falling exclusively on a particular class of individuals.[191]

The situation in *Trinity Lutheran* could not have been more different. As Sotomayor noted in her dissent, most states today retain constitutional provisions barring the public funding of devotional institutions—evidencing continuing and strong free exercise and anti-establishment interests about such practices.[192] Moreover, to equate a burden placed on a minister's religious exercise by disqualifying him from running for public office with the burden placed on an entire community of believers by disqualifying them from competing for a playground grant is indefensible.

Moreover, the cases relied on in *Lyng* for the indirect burden proposition—ones that all involved indirect burdens imposed by religiously-neutral laws—were subsequently overruled or substantially undermined by the Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). This effectively left the *Trinity Lutheran* majority with one standing precedent, *McDaniel v. Paty*, 435 U.S. 618 (1978), to rely on for the proposition that indirect burdens *intentionally* imposed on religious groups trigger strict scrutiny and presumptively violate the Free Exercise Clause. And *McDaniel* was inapposite for reasons to be discussed. *See infra* notes 188–92 and accompanying text. As noted, the other main precedent relied on by the majority was one where a *direct prohibition* on a sect's religious practices was imposed via invidious government discrimination. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993). This was obviously not the situation when Missouri excluded Trinity Lutheran Church from its scrap-tire program due to anti-establishment concerns.

Now one can certainly conceive of indirect burdens that would have the effect of significantly impairing a religious organization's ability to freely exercise their religion, such as the denial of certain public benefits such as police or fire protection (or even, perhaps, the denial of a generally available grant to buy anti-terrorism barriers as Justice Alito posited in *Trinity Lutheran* oral arguments, *see* Oral Argument at 29:24, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577), https://www.oyez.org/cases/2016/15-577—provided there was a sufficient threat of terrorist activity to keep people away from worship centers without such barriers). That is why the *Locke* Court was correct to apply an analysis balancing the burden on religious exercise against the countervailing state anti-establishment interests of a given denial of benefits. But it seems clear that the denial of a playground resurfacing grant to a ministry of the Trinity Lutheran church would not significantly burden its religious exercise.

187. *See supra* note 186.

188. 435 U.S. 618.

189. *See id.* at 622–28 (plurality opinion).

190. *See id.*

191. *See id.*

192. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2037 & n.10 (2017) (Sotomayor, J., dissenting).

The former activity is an important civil and political right in our system. And while there may ordinarily be a right to compete on equal terms for a playground grant, such interests do not come near to being as weighty. Further, running for office is a "benefit" that is not fungible like money in the sense of freeing up other resources a religious institution can put to devotional and proselytizing purposes. Lastly, if an individual is denied the right to run for office, the entire burden of that action falls upon her. The denial of a playground grant to a church is a burden that can be spread among a whole community of believers who can choose to jointly fund it if they think it is important.

The failure of the *Trinity Lutheran* majority to appreciate these differences in the two cases appears to be a stark statement that the Court no longer cares about weighing the competing interests at stake in these disputes, or the reasons why religion was treated differently. It is just the mere fact that religion was treated differently that now seems to matter. This is a radical departure from the approach of Justice Roberts's mentor Chief Justice Rehnquist in *Locke*, who, as noted earlier, explicitly weighed Washington State's "substantial" anti-establishment interests against the "relatively minor burden" placed on the plaintiff's religious exercise in refusing to find a Free Exercise violation in that case.[193] And this departure is especially ironic given that it was Chief Justice Rehnquist who largely led the charge over the past few decades to permit greater *voluntary* funding of religion by the government despite Establishment Clause challenges to such practices.[194]

In addition to these historical and legal objections to the majority's "unequal treatment of religion" concern, there are compelling normative arguments for treating religious groups differently than secular organizations in regards to public funding—and particularly the use of compulsory taxation for such purposes. Many of the reasons that persuaded the founding generation that compelled taxpayer funding of churches and similar devotional or proselytizing institutions was "of a different ilk"[195] still apply today in a way that does not apply to such funding for secular institutions.

Most obviously, secular institutions do not use public money to underwrite devotional or proselytization activities, by which we mean the observance, celebration, or indoctrination of religious beliefs. But why, one may legitimately ask, is it a problem to compel funding to support such activities if a secular organization—and in particular an ideologically controversial one such as the National Rifle Association—might use a

193. *See supra* notes 130–36 and accompanying text.
194. *See infra* notes 215–16 and accompanying text.
195. Locke v. Davey, 540 U.S. 712, 723 (2004).

public grant to celebrate and convince others of its views?

The short answer is that religious belief systems differ from secular belief systems in ways that make it incumbent on the government not to force members of the public to underwrite the former even if used to foster the latter. Freedom of religious belief occupies a special place in our historical and constitutional traditions. It is the only type of belief that Americans have singled out in their basic charter for explicit protection since the founding of this country.

There are likely many reasons for this, and it is beyond the scope of this Article to survey them all.[196] But one key reason for this special treatment was explained by Madison at the beginning of his *Memorial and Remonstrance* against a proposed general tax assessment to support Christian ministers:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority; much more must every man, who becomes a member of any particular civil society, do it with a saving of his allegiance to the Universal Sovereign. We maintain, therefore, that in matters of religion, no man's right is abridged by the institution of civil society; and that Religion is wholly exempt from its cognizance.[197]

In other words, religious belief is different because it ordinarily entails the recognition of a divine sovereign to whom a person owes duties superior to the civil state.[198] Moreover, since a person's eternal salvation may depend upon the faithful performance of those duties, compulsion by the state that impedes that performance can cause serious harm to the adherent. Hence,

196. *See, e.g.*, Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017) (surveying scholarship).

197. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS 5–6 (Lincoln & Edmands 1819) (quoted in Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947) (appendix to dissenting op. of Rutledge, J.)).

198. *See, e.g.*, Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 28–29 (2000) ("The final, and perhaps the most important, argument for the freedom of religion during the formative period was that religious freedom was not merely a matter of personal autonomy, but rather, arose from the duty of each person to worship God in accordance with the dictates of conscience."); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1611 (1997) (book review) ("If God does not exist, or if God makes no claim on human conduct, there is no legitimate justification for special accommodation of religion.").

according to Madison, religious beliefs must be as free as practicable from state interference in order that individual adherents may fulfill their duties in accordance with the dictates of their own conscience.

In Madison's view, that liberty includes the right not to be coerced by the state into funding the religious beliefs or practices of others that might conflict with the truths and duties prescribed by a person's own Creator. Such forced complicity of taxpayers in supporting or promoting such beliefs could be considered a sin that might jeopardize a person's salvation. In Jefferson's words, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[199] And it is important to note that for Madison, the compelled funding principle is not limited to religious adherents. As he wrote:

> Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.[200]

Hence, whether one is a religious believer, an agnostic, or an atheist, an individual's free exercise rights protect them from funding religious beliefs against their will.

Despite the *Trinity Lutheran* majority's apparent indifference to these principles in compelling Missouri taxpayers to support the spread of Martin Luther's truths (as a matter of the *church's* free exercise rights, no less), the Court itself as recently as a few years ago recognized their force in upholding even the right of a closely-held corporation not to be coerced to fund employee contraceptive use against its owners' religious beliefs.[201] Two years later, the Court effectively deadlocked 4–4 on even whether compelling religious organizations to file a form that triggered a third-party insurance company's obligation to provide objectionable contraceptives to their employees violated the organization's free exercise rights.[202] Of course, these cases involved the application of the Religious Freedom Restoration Act enacted by Congress, rather than the Free Exercise Clause of the Constitution. Yet the free exercise principles against compelled complicity in acts violating one's religious beliefs are the same whether mandated by statute or the Constitution, and in the former case made even

199. *Everson*, 330 U.S. at 13 (quoting Virginia Bill for Religious Liberty, VA. CODE ANN. § 57-1 (1786)).

200. *Id.* at 66 (quoting MADISON, *supra* note 197, at 7) (appendix to dissenting opinion of Rutledge, J.).

201. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

202. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

more compelling by having the imprimatur of greater democratic legitimacy supporting them.

Undoubtedly, the *Trinity Lutheran* majority's "unequal treatment of religion" concern was driven in part by a view that the full participation of churches and like faith communities in American society is a public good that should be encouraged. And, indeed, few would deny that religious organizations have done much to contribute to a better and more stable society by, among other things, promoting desirable civic virtues such as service to others. It was for these very reasons that Virginia Governor Patrick Henry and other prominent statesmen opposed Jefferson and Madison, and supported the religious assessments bill.[203] Despite having such powerful advocates, however, the people of Virginia ultimately agreed that freedom of religious belief was best served not by directing public funds to churches to underwrite their religious exercise, but by protecting the voluntary choices of individuals to provide or withhold such support as their consciences dictated. This was a lesson the *Trinity Lutheran* Court failed to heed.

The "higher sovereign" explanation for the historical American solicitude towards free religious belief also provides additional reasons for treating the compelled funding of religious communities differently than secular groups. As Madison also argued,

> [T]he [general assessment] bill implies, either that the civil magistrate is a competent judge of religious truths, or that he may employ religion as an engine of civil policy. The first is an arrogant pretension, falsified by the extraordinary opinions of rulers, in all ages, and throughout the world; the second, an unhallowed perversion of the means of salvation.[204]

Madison's second point goes to what was just discussed: that individual free exercise rights should not take a back seat to the free exercise rights of churches in order to further a civil policy of facilitating their contributions to society.

But his first point is another powerful defense of why religious choices—including the funding of religion—should be completely voluntary. If free exercise is predicated on the need for humans to discover ultimate truth for themselves (including to what extent divine beings exist and what they require of us), what possible business does the state have in such choices? The state is simply incompetent to promote a particular version of such

203. *See, e.g.*, Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 75–78 (2009).

204. *See* MADISON, *supra* note 197, at 8.

truth.[205] And even if public aid is compelled on a non-preferential basis, as by directing playground improvement funding to religious groups that have competed for it pursuant to secular criteria, it is still compelling support for a particular version of religious truth (i.e., that God exists, for instance) as against taxpayers who do not believe that.

Moreover, the government impartiality that is required towards religious truth decisions can also be imperiled by the public funding of devotional institutions in more subtle and insidious ways. Such funding is almost never provided without certain strings or conditions being attached, and, as noted earlier, the risk of entangling the state with religious matters in enforcing compliance with those conditions is what gave rise to the excessive entanglement bar of the *Lemon* test.[206] While entanglement with an organization's views and objectives is also a risk when enforcing compliance with conditions on funds provided to those of a secular nature, the government's compliance decisions in the religious realm risk facilitating certain versions of religious truth.

For example, let's say the playground grant to the Trinity Lutheran Church—which was in actuality only designed to pay for two-thirds of the resurfacing project—came with the condition that it had to be used in one year or relinquished. The church, however, determined that it did not have sufficient funds of its own to do the entire project that year due to additional monies it was providing to Lutheran missionaries. Hence, it requested and received a waiver of the one-year condition (as, let's say, any organization might request for good cause shown). In this case, however, a seemingly neutral decision as to the grant actually had the effect of facilitating additional proselytizing efforts by the church. This is just one potential example of how the public funding of religious communities can put the government in unacceptable positions with respect to favoring or disfavoring different versions of religious truth. Obviously, there is no similar concern when the government funds secular organizations.

Moreover, the higher sovereign grounding for free exercise also provides a good account for why government funding of religion can be particularly

205. *See* McConnell, *supra* note 198, at 24 ("The government cannot be a competent judge of religious truth because there is no reason to believe that religious understanding has been vouchsafed to the majority, or to any governmental elite."). It should be noted, however, that a number of leading law and religion scholars have not been persuaded by the views of Madison and others that compelled taxpayer funding of religious causes violates rights of conscience. *See, e.g.,* Richard W. Garnett, Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience, 54 Vill. L. Rev. 655, 670-72 (2009). One main reason given for this view is the difficulty of justifying such conscientious objections based on religious versus non-religious beliefs. *See id.* at 671-72. While it is beyond the scope of this Article to engage this debate with the depth of treatment it deserves, for present purposes suffice it to say that we have attempted to provide some of the more salient reasons that persuade us as to why religious conscience should be treated differently in the context of compelled funding.

206. *See supra* notes 180–81 and accompanying text.

divisive and contentious in a way that comparable funding for secular organizations may not be. Religious commitments are frequently central to a serious believer's existence.[207] Obviously, an individual's perceptions of his or her duties to a supreme sovereign and how they are discharged will be extremely important in the lives of such persons. And while secular beliefs might also attain such importance, the added dimension of expected fidelity to a particular account of ultimate truth can make the use of one's taxes to support or promote different or conflicting versions that much more divisive. This may explain why the public funding of parochial schools that include instruction in particular accounts of religious truth has proven so controversial. But at least those schools principally provide instruction in secular subjects. One can expect such divisiveness to only be heightened where the funding underwrites the devotional and proselytization activities of a church or other house of worship.

Finally, it is worth noting that the *Trinity Lutheran* Court's seeming concern about the unequal treatment of religion in competing for public funding is quite incomplete. Because of the special status of free religious belief in our law and history, religion does receive certain benefits that secular organizations do not—particularly when government acts to accommodate such freedom. For instance, the Court has held religious groups may discriminate in their hiring of employees based on their religious views in a way that would be illegal for secular groups to do—even when a religious organization is engaged in secular activities.[208] As another example, the Court has recently held that religious communities are immune from laws preventing discrimination on the basis of disabilities in choosing their leaders.[209] Moreover, as noted, although the Court has recently gotten out of the business of granting religious exemptions to secular laws as a constitutional matter, Congress and many state legislatures have stepped up to grant such accommodations as a statutory matter—actions the Court has ruled are consistent with the Constitution.[210]

Such accommodation benefits are given to religious groups and individuals precisely because of the American view that there is something special and distinctive about religious belief. We have attempted to recount at least one explanation of why this is so. Yet privileges are seldom granted without corresponding responsibilities or obligations. And if what makes

---

207. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996) ("[B]eliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for.").

208. *See* Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

209. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2012).

210. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).

religious belief special is the importance of safeguarding the voluntariness of decisions regarding ultimate truth by keeping the state out of them, that principle should control regardless of whether it works to the benefit or detriment of organized religious groups. In other words, protection for religious belief should not be viewed as a one-way ratchet, because what protects those groups in some situations is precisely what may work to their disadvantage in others. Hence, to view as unfair a state's decision to exclude religious groups from competing for public funds in order to safeguard the religious liberty of all is a failure to see the complete picture with all its essential parts.

In sum, assuming, as seems sensible, the *Trinity Lutheran* decision was really about a concern the government is treating religious groups differently for insufficient but legitimate reasons (rather than, as the majority suggested, out of an illegitimate motive of hostile discrimination), that concern is understandable but misguided. As we have explained, there are compelling historical, legal, and normative reasons for treating religious communities differently than secular organizations when it comes to public funding—and particularly coercing such funding as a constitutional matter. Justice Sotomayor had it exactly right when she concluded:

> History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship.[211]

V. A DISTURBING TREND

Trinity Lutheran is the most recent in a line of decisions beginning in the Rehnquist Court and continuing through the Roberts Court that reflects a troubling trend—particularly on the part of the Court's more conservative wing—to countenance an unhealthy alliance of church and state. Even though we have little doubt this movement is well intentioned, believing it to be motivated primarily out of a concern that religion is being driven unfairly from the public square, in the end we think the Court may be throwing the proverbial baby out with the bathwater. In other words, out of a desire to forestall what the conservatives likely view as a secularization movement that is unfairly disfavoring religion, they are rendering decisions inimical to a healthy separation of church and state that most would agree

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

is vital to the wellbeing of both religious freedom and government.

This trend has occurred mainly in the area of the Court's Establishment Clause decisions, although as *Trinity Lutheran* demonstrates, it is now manifesting itself in free exercise cases as well. In the anti-establishment area, the Warren and Burger Courts mainly adhered to the neutrality principle laid down, if somewhat confusingly, by the Court in *Everson*.[212] This principle came to be embodied in the *Lemon* test, requiring that a law challenged as violating the Establishment Clause have a secular purpose, cannot have a primary effect of advancing nor hindering religion, and cannot excessively entangle the government with religious organizations.[213] Applying the neutrality principle, those Courts often invalidated government action in the three main areas of Establishment Clause conflict: public aid to religious organizations (and particularly parochial schools), government sponsorship of religious expression, and the access of religious speakers to public facilities or other resources.[214]

Under the leadership of Chief Justice William Rehnquist, however, the conservative wing of the Court made substantial headway in cutting back on the neutrality principle, and particularly its mandate that government cannot support religion generally (as opposed to favoring a particular religious sect). In the religious aid cases, the Court did this mainly by transforming the neutrality requirement from one of substance into one of form. In other words, so long as public funding or other assistance to religious institutions is provided under a purportedly secular program where it is made generally available to all similarly situated institutions, then government neutrality is satisfied even if the aid is likely to be used predominantly by the religious ones.[215] In other words, the facial neutrality of a program satisfies the "primary effects" prong of the *Lemon* test even if the aid disparately benefits religious institutions.[216]

Moreover, the Roberts Court has effectively extended this trend of allowing more public aid to flow to religious schools and other institutions. It has done this by cutting back on the eligibility of taxpayers, as a matter of standing, to challenge such programs as a violation of the Establishment Clause.[217] As discussed earlier, however, what all of these cases have missed (starting with *Everson*) is that even where such aid does not amount to a law

212. *See supra* note 115 and accompanying text.

213. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

214. *See* Barry P. McDonald, *Democracy's Religion: Religious Liberty in the Rehnquist Court and into the Roberts Court*, 2016 U. ILL. L. REV. 2179, 2193–94, 2202–05 (2016).

215. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 225–26, 230–35 (1997); *see also* McDonald, *supra* note 214, at 2196–99.

216. *See* McDonald, *supra* note 214, at 2199.

217. *See* Hein v. Freedom from Religion Found., 551 U.S. 587 (2007); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011); *see also* McDonald, *supra* note 214, at 2225–28.

respecting the establishment of religion, it is still violating the rights of conscience of dissenting taxpayers—the right that historically laid at the core of the no-funding principle and religious freedom in general.[218]

The Rehnquist and Roberts Courts have also made it easier for the government to publicly sponsor more forms of religious expression than their predecessor courts. While attempts by the government to sponsor prayer in public schools were uniformly invalidated by the Warren and Burger Courts as lacking a secular purpose (and hence violating the first prong of the *Lemon* test),[219] the Burger Court did make one exception for prayers to open or close legislative sessions.[220] It based this exception on a historical practice of such prayers extending back to the founding.[221] As to school prayer, however, the Rehnquist Court effectively jettisoned the *Lemon* test and adopted an anti-coercion test to assess its constitutionality—essentially asking whether participation in a prayer was required or psychologically coerced through peer pressure.[222] Although the Court actually found psychological coercion of students to exist in two challenges to school prayer to date, presumably that test will create increased opportunities for sponsored school prayer where it is conducted in a truly voluntary setting.[223]

The Roberts Court, moreover, recently latched onto the historical exception for legislative prayer in combination with the anti-coercion test to sanction the delivery of highly sectarian prayers at town council meetings.[224] It read the anti-coercion test rather toothlessly, since there exists a real risk that individuals appearing before a council seeking zoning waivers, etc. will feel coerced into participating for fear of incurring the displeasure of the council members.[225] This decision signals the willingness of the conservative members of the Roberts Court to sanction much more prayer in government-sponsored settings—and even prayer expressing the particular beliefs held by the delivering religious sect.[226]

This trend of sanctioning increasing government sponsorship of religious expression is also present in the area of religious displays. While the Burger Court had a mixed record on such cases—striking down the display of a Ten Commandments plaque[227] but upholding a holiday display containing a

218. *See supra* notes 153–56 and accompanying text.

219. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); *see also* McDonald, *supra* note 214, at 2202–03.

220. *See* Marsh v. Chambers, 463 U.S. 783 (1983).

221. *See* McDonald, *supra* note 214, at 2202–03.

222. *See* Lee v. Weisman, 505 U.S. 577, 587, 593–94 (1992).

223. *See* McDonald, *supra* note 214, at 2203–04.

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

225. *See* McDonald, *supra* note 214, at 2228–29.

226. *See id.* at 2229–30.

227. *See* Stone v. Graham, 449 U.S. 39 (1980).

Christmas nativity scene on the grounds that it had a predominate secular purpose[228]—the Rehnquist Court moved to the position of asserting that so long as there is a secular reason for a religious display, the government can sponsor it without discounting its religious meaning and significance.[229] The Court also suggested it may employ the anti-coercion test for assessing religious displays at some point, which would virtually give the government carte blanche to sponsor them since a person can always avert their eyes from one.[230] Finally, in more recent cases tangentially involving religious symbolism, the conservative bloc of the Roberts Court has signaled its desire to extend the Rehnquist Court precedents to permit greater government sponsorship of such displays.[231]

Lastly, drawing on one Burger Court precedent, in a series of cases the Rehnquist Court has firmly established the free speech right of religious speakers to use public property to engage in religious expression (even that amounting to prayer or worship activities), so long as such facilities are made available to secular speakers.[232] The Court discounted any Establishment Clause concerns by relying on the facial neutrality of access programs—the fact they are made generally available to secular and religious speakers—in the same way it has in the financial aid cases.[233] As a result of these cases, lower courts have been struggling with the issue of whether public facilities have to be made available to host actual religious worship services—in effect, having the government provide the actual house of worship to religious adherents.[234]

In sum, the net effect of all the foregoing Rehnquist and Roberts Court decisions is that the government will have more constitutional latitude to support or promote religion should democratic majorities in various geo-political communities choose to do so. While people will likely debate whether this is a positive or negative development, one aspect of this trend that seems particularly troubling is the *de facto* preference this can provide to majoritarian sects in a given community.

Take, for instance, the financial aid cases. There the Court made it clear that so long as public funding programs are facially neutral in terms of being generally available to religious and secular recipients, it was not going to police whether the programs end up having an effect of disparately

---

228. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

229. *See* McDonald, *supra* note 214, at 2206–07.

230. *See id.*

231. *See id.* at 2230–31.

232. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); *see also* McDonald, *supra* note 214, at 2199–202.

233. *See* McDonald, *supra* note 214, at 2201–02.

234. *See, e.g.*, Bronx Household of Faith v. Bd. of Educ., 750 F.3d 184 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1730 (2015).

benefiting religious groups generally, or even individual sects in particular.[235] Thus, for instance, in a community where private religious schools are operated predominantly by the Catholic Church, such a program might operate to disproportionately advance Catholic religious beliefs. The same *de facto* preference could occur where public facilities, such as school classrooms, are provided to civic and religious groups on a facially neutral basis. If a given community were to consist predominantly of Protestant faiths, for example, obviously the basic tenets of those faiths might be disproportionately advanced by such aid relative to minority faiths (assuming relatively equal use by various religious groups).

This reluctance to police for *de facto* preferences produced by facially neutral policies was also on full display in the recent town council prayer decision.[236] There, despite a policy that purportedly allowed leaders of all local faiths to give prayers, because the community was made up predominantly of Christian sects, the prayers ended up being highly sectarian in character for lengthy intervals of time.[237] In response to the argument that the town should have required the prayers to be more ecumenical, the Court responded that the government has no business in policing prayer content.[238] Under this reasoning, then, majoritarian faiths in given communities will undoubtedly have their sectarian beliefs disproportionately promoted in situations where the government is allowed to sponsor them pursuant to the anti-coercion test or historical exception principle.

Finally, the reluctance of the Court to police the content of sponsored religious expression for inclusion and diversity will likely result in the provision of *de facto* preferences to majoritarian sects in the area of religious displays. Whether the Court relies on the anti-coercion or secular purpose principles to permit more such sponsorship, the religious beliefs likely to be reflected in displays chosen through democratic processes in given communities will be those of the majority.[239] While minority faiths might argue for inclusion in any such displays, ultimately it would be up to the political representatives of majority communities as to whether to include them or not.[240]

This recent trend of the Rehnquist and Roberts Courts, then, of loosening

---

235. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 400–01 (1983); *see also* McDonald, *supra* note 214, at 2194–95, 2232.

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

237. *See id.* at 1815–18.

238. *See id.* at 1823–27.

239. *Cf.* Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (rejecting free speech challenge to town's decision to include a Ten Commandments monument in historical display while rejecting a monument of comparable significance to a minority religious sect).

240. *See id.*

Establishment Clause restraints on government support for religion generally, combined with the Court's refusal to ensure that such support or promotion is not flowing disparately to majoritarian sects, threatens to create a *de facto* establishment of those sects on a community-by-community basis—all to the disadvantage of minority sects located in such communities. Such sectarian preferences by the government, whether intentional or not, should be concerning to those who care about religious freedom. Certainly they run counter to the very core of what the Establishment Clause was designed to avoid. And now with the Court using the federal Free Exercise Clause to invalidate state anti-establishment provisions that might otherwise stem the tide of greater government involvement in religious matters, this trend only threatens to become worse—all to the detriment of that healthy separation of church and state, which is required to truly safeguard religious liberty.

CONCLUSION

This Article has argued that a constitutional principle that compels the government to provide funding to religious communities whenever it makes comparable aid available to secular groups runs contrary to our constitutional history, the Court's precedents, and compelling arguments for treating religion differently in this regard. When the government makes a decision not to fund religion in order to protect free exercise and anti-establishment values long embodied in our constitutional charters, this does not constitute a form of invidious discrimination as suggested by the *Trinity Lutheran* majority. Rather, such a decision is grounded in the best traditions of our country to respect the religious (or non-religious) conscience of every individual, including their decisions about which religious beliefs merit their financial support and which do not.

To belittle such considerations as a mere "policy preference for skating as far as possible from religious establishment concerns"[241] fails to appreciate the historic nature and gravity of the interests at stake in such cases. It is also arrogantly dismissive of a state's decision to maintain a greater separation of church and state than the more conservative members of the Court have modernly interpreted the Establishment Clause to provide—leaving one to wonder whether their paeans to federalism in other cases expressed serious commitments or convenient slogans.

If the Court's main concern was that churches should have the same right as other organizations to protect the knees of their playing children, then

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

perhaps its lapse in judgment in this case was understandable. But as Justice Sotomayor rightly pointed out, "[t]he stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government"[242]—that is, maintaining the proper separation of religion and the state essential to the vitality of both. If the Court's error remains confined to compelling funding for arguably secular uses, it will still be serious but an error nonetheless. If Justices Thomas and Gorsuch have their way, and the Court ends up interpreting the Free Exercise Clause to force governments to provide funds that could be used directly for the devotional or proselytization activities of religious communities, then its error will be truly grave indeed.

242. *Id.* at 2027 (Sotomayor, J., dissenting).