AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

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The American Establishment Clause Compromised
Will the Supreme Court's Ruling in Trinity Lutheran v Comer threaten to obliterate the divide between church and state in America?

According to the Supreme court's 7–2 ruling in *Trinity Lutheran v. Comer*, in the last week, when a state makes a funding program available to the public, it cannot deny funds to a church because of its status as a religious organization. This sets a dangerous precedent, one that betrays the court's historical commitment to true religious freedom and threatens to obliterate the divide between church and state.

The facts of the case are simple. Trinity Lutheran Church owns a "Learning Center" that is used "to teach the Gospel to children." The learning center's facilities include a playground that is, in the church's words, part of "an education program structured to allow a child to grow spiritually, physically, socially, and cognitively." In 2012, the church applied for a grant through Missouri's Scrap Tire Grant Program to help pay for playground resurfacing. The state rejected its application, citing a provision of the Missouri Constitution that bars the use of taxpayer money "in aid of any church, sect, or denomination of religion." Trinity Lutheran sued, alleging a violation of its Free Exercise rights under the First Amendment.

In his opinion for the court, Chief Justice John Roberts held that Missouri had run afoul of the Free Exercise Clause by denying Trinity Lutheran a "public benefit solely because of [its] religious character." According to Roberts, the Missouri rule "puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution." This "clear infringement on free exercise," he asserted, "is odious to our Constitution." Thus, Trinity Lutheran must be allowed to compete in the scrap tire program.

To limit his holding, Roberts drew a distinction between religious *status* and religious *use*: Missouri, he explained, had discriminated against Trinity Lutheran "simply because of what it is—a church," not because it feared the grant money would fund religious exercise itself. He also noted in a footnote that the 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." This stipulation is meant to strike a tone of compromise. But it doesn't change the fact that, at a minimum, *Trinity Lutheran* opens the public funding floodgates for houses of worship and religious schools.

Still, Roberts' caveat exasperated Justices Clarence Thomas and Neil Gorsuch, both of whom refused to join this key footnote and wrote separately to air their grievances with Roberts' opinion.

Gorsuch's concurrence is especially telling. The newest justice rejected Roberts' distinction between religious status and religious use, writing that the line between the two is constitutionally irrelevant. He also fretted that the court's decision "might mistakenly [be] read to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy." Not so, Gorsuch explained: "The general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."

Put simply, Gorsuch and Thomas see *Trinity Lutheran* as an opportunity to expand the place of religion in public life by creating a one-way ratchet that allows churches ever-increasing access to public funds while giving religious exercise primacy over laws of general applicability.

Dissent:

In her forceful dissent, Justice Sonia Sotomayor gave her colleagues a necessary reality check. (Sotomayor was joined only by Justice Ruth Bader Ginsburg. Justices Elena Kagan and Stephen Breyer both voted in favor of Trinity Lutheran; Breyer wrote that a public benefit designed "to improve the health and safety of children" is akin to "ordinary police and fire protection" and, as such, cannot be denied on the basis of "faith.")

"Properly understood," Sotomayor wrote, "this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views." In fact, Sotomayor explained, Missouri *must* decline to fund these improvements under the Establishment Clause of the First Amendment, which forbids states from using public funds to underwrite religious exercise.

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"By the church's own avowed description," Sotomayor wrote, the learning center's facilities "are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission." Therefore, funding the learning center through the scrap tire program "would impermissibly advance religion" in violation of the Establishment Clause.

Sotomayor's dispute with Roberts is, in many ways, a factual one. Roberts believes that Trinity Lutheran's playground is divorced from its religious mission; Sotomayor argues that it "cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar." Put differently, the two disagree about why Missouri turned away Trinity Lutheran: Roberts thinks it's because of the church's status as a house of worship; Sotomayor thinks it's because the church would put its grant to religious use.

Gorsuch and Thomas don't care about this debate: They don't think it matters whether taxpayer money is given to a religious institution for a secular purpose or a sectarian one. To their minds, the government must always offer public benefits to houses of worship, even if those benefits will directly subsidize religion. This view, if adopted by the court, would effectively demolish the wall of separation between church and state. A state offering a weatherizing grant couldn't bar churches from applying for money to improve their stained-glass windows. A state offering a construction

grant couldn’t bar synagogues from applying to build a new mikvah or mosques from asking for money to repair a minaret. Could a state seeking to fund educational institutions prioritize public schools over parochial ones? Not under Gorsuch and Thomas’ theory, since that would constitute “discrimination against religious exercise.”

See Perry Grossman and Mark Joseph Stern at http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/trinity_lutheran_threatens_to_obliterate_the_divide_between_church_and_state.html

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