
COMMENTS

CHURCHES, PLAYGROUNDS, GOVERNMENT DOLLARS — AND SCHOOLS?

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If a state awards grants, on religiously neutral criteria, to create safer playground surfaces, it cannot exclude an otherwise eligible playground simply because it is owned by a church. Such discrimination against religion violates the Free Exercise Clause, and awarding the grant would not violate the Establishment Clause. This holding, in *Trinity Lutheran Church v. Comer*,¹ is an incremental step in a large and continuing evolution. It may lead to bigger steps, but *Trinity Lutheran* does not take those steps.

To the dissenters, *Trinity Lutheran* crossed an important line. Was this case about playground surfaces and the safety of children? Or was it about direct government aid to a church? It was about both, and the question was which characterization should control. *Trinity Lutheran* further erodes special rules against direct aid to the church itself or to pervasively sectarian organizations more generally. It erodes the line between direct and indirect aid. And it does all this in the course of deciding not what the state *may* fund, but what it *must* fund if it funds secular organizations engaged in the same activity.

The focus on something so secular as playgrounds and the safety of children explains why the vote was 7–2. The dissenters claimed that the playground was part of the church’s religious mission, but more fundamentally, they thought that the state may and must refuse to fund churches, no matter how secular the specific use of the money. They thought the majority overturned a principle that went back to the Founding.²

Trinity Lutheran resolves some of the deep ambiguities in the previous leading case, *Locke v. Davey*.³ *Davey* held that Washington could exclude theology majors from a generally available state scholarship program. It could be read as a case specifically about funding the training of clergy or as a case about all government funding in the private sector; *Trinity Lutheran* moves *Davey* toward the narrower reading.

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¹ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

² *Id.* at 2027 (Sotomayor, J., dissenting).

³ 540 U.S. 712 (2004).

Trinity Lutheran silently rejects the implausible assertion that *Davey* requires bad motive for any successful free exercise claim, and it rejects *Davey*'s implication that discriminatory refusals to fund are not cognizable burdens on the exercise of religion.

The bigger issue is whether *Trinity Lutheran* will apply to school choice programs. Can a state fund secular private schools without funding religious private schools? A plurality carefully reserved that issue,⁴ and the next day, the Court remanded two cases presenting variations on that issue.⁵ Five Justices signaled their view of that question in separate opinions,⁶ and we can make educated guesses about some of the others. But nothing in *Trinity Lutheran* controls the answer.

I. THE DECISION

A. *The Merits*

Missouri assesses a fee of fifty cents for each new tire sold at retail.⁷ Up to forty-five percent of the resulting funds are committed to grants to support the use of material from recycled tires.⁸ The Missouri Department of Natural Resources, which administers the grants, chose to fund playground surfaces. With one exception discussed below,⁹ the criteria for evaluating grant proposals are neutral, secular, and objective.¹⁰

An organization is ineligible if it is a “religious based organization[]” that is “owned or controlled by a church, sect or denomination of religions.”¹¹ *Trinity Lutheran’s* Child Learning Center, which offers preschool and day care, was merged into the church in 1985.¹² Had the Center maintained its separate legal existence, there might have been room to argue about whether it was “controlled by a church” and whether its activities were too religious.¹³ But the merger eliminated those issues; the Center and the playground were “owned” by a church and thus clearly ineligible.

⁴ *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality opinion).

⁵ See *infra* pp. 160–61.

⁶ See *infra* p. 136.

⁷ MO. REV. STAT. § 260.273.2 (2016).

⁸ *Id.* § 260.273.5, 260.273.6(2).

⁹ See *infra* pp. 155–56.

¹⁰ See *Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143*, MO. DEP’T OF NAT. RESOURCES (Dec. 2014) [hereinafter *Grant Application Instructions*], <http://dnr.mo.gov/pubs/pub2425.htm> [<https://perma.cc/MR7L-3PHK>].

¹¹ *Id.*

¹² *Trinity Lutheran*, 137 S. Ct. at 2017.

¹³ *Grant Application Instructions*, *supra* note 10.

The Center applied anyway, and the Department gave its application the fifth highest score in the state.¹⁴ The Department awarded fourteen grants that year, so the Center should have won a grant — except, as the Department belatedly recognized, that it was owned by a church.¹⁵ Plaintiffs' lawyers could not have set the case up any better. May an otherwise eligible organization be excluded from a grant program to protect the safety of children, where the only reason for exclusion is that the organization is a church?

The state's reason for excluding churches and the religious activities of other religious organizations was article I, section 7 of the state constitution, which prohibits taking any money "from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."¹⁶ An overlapping provision in the education article prohibits funding for any school "controlled by any religious creed, church or sectarian denomination whatever" or for any "sectarian purpose."¹⁷

The district court dismissed Trinity Lutheran's complaint,¹⁸ and the court of appeals affirmed,¹⁹ each relying heavily on *Locke v. Davey*. The court of appeals denied rehearing en banc by an equally divided vote.²⁰

The Supreme Court granted certiorari in January 2016,²¹ before Justice Scalia died. The case was fully briefed by July, but the Court did not schedule oral argument, perhaps fearing an evenly divided Court. The case was finally argued in April 2017, after Justice Gorsuch arrived. But the long delay turned out not to have been necessary. Chief Justice Roberts wrote the opinion, joined by Justices Kennedy, Thomas, Alito, Kagan, and Gorsuch.²² Justice Breyer concurred in the judgment.²³ Justice Sotomayor, joined by Justice Ginsburg, dissented vigorously.²⁴

B. The Footnote

Unlike the rest of the Court's opinion, footnote 3 was joined by only four Justices. Footnote 3 carefully limits the reach of the opinion; it reads as follows: "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."²⁵

¹⁴ *Trinity Lutheran*, 137 S. Ct. at 2018.

¹⁵ *Id.*

¹⁶ MO. CONST. art. I, § 7.

¹⁷ *Id.* art. IX, § 8.

¹⁸ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137 (W.D. Mo. 2013).

¹⁹ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015).

²⁰ *Trinity Lutheran*, 137 S. Ct. at 2019.

²¹ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 136 S. Ct. 891 (2016).

²² *Trinity Lutheran*, 137 S. Ct. at 2016.

²³ *Id.* at 2026 (Breyer, J., concurring in the judgment).

²⁴ *Id.* at 2027 (Sotomayor, J., dissenting).

²⁵ *Id.* at 2024 n.3 (plurality opinion).

Chief Justice Roberts and Justices Kennedy, Alito, and Kagan joined this footnote.²⁶ Justices Thomas and Gorsuch joined all of the opinion except this footnote.²⁷ Their concurring opinions said that it should not matter if the grant recipient puts the money to religious uses, and predicted that a line barring religious use of money would be unstable.²⁸ Justice Breyer's concurrence emphasized "the particular nature of the 'public benefit' here at issue."²⁹ He thought that a program to protect the safety of children was like police and fire protection, which everyone agrees is available to churches.³⁰ Justices Sotomayor and Ginsburg, who would not require funding of church playgrounds,³¹ almost certainly would not require funding for religious schools or for clearly religious uses of the money.

C. Mootness

In the long delay between briefing and oral argument, Missouri elected a Republican governor and attorney general who replaced their Democratic predecessors.³² Six days before oral argument, the Governor's office announced that he had "instructed" the Department of Natural Resources to allow religious organizations to compete for grants on equal terms.³³ One day before argument, the entire Attorney General's office recused itself and announced that the case would be argued by the former Solicitor General who had filed the briefs.³⁴

These developments appeared to put the plaintiffs and the state's leadership on the same side. But both sides said the case was not moot, and the Court agreed.³⁵

A long-settled doctrine controlled the mootness question; the Court's label for that doctrine is "voluntary cessation."³⁶ When a defendant voluntarily abandons its allegedly illegal conduct after litigation is

²⁶ *Id.* at 2016.

²⁷ *Id.*

²⁸ See *id.* at 2025 (Thomas, J., concurring in part); *id.* (Gorsuch, J., concurring in part).

²⁹ *Id.* at 2026 (Breyer, J., concurring in the judgment).

³⁰ *Id.* at 2027.

³¹ *Id.* at 2027–41 (Sotomayor, J., dissenting).

³² State of Missouri Official Election Results, MO. SEC'Y OF STATE, <http://enrarchives.sos.mo.gov/enrnet/default.aspx> [https://perma.cc/9Y9J-D6RH] (from the dropdown menu, select "State of Missouri - General Election, November 08, 2016" for the 2016 election returns and "General Election - November 6, 2012" for the 2012 election returns).

³³ Governor Greitens Announces New Policy to Defend Religious Freedom, OFF. OF MO. GOVERNOR ERIC GREITENS (Apr. 13, 2017), <https://governor.mo.gov/news/archive/governor-greitens-announces-new-policy-defend-religious-freedom> [https://perma.cc/A7X4-ZALA].

³⁴ Missouri Attorney General's Office Recuses from Trinity Lutheran Case, MO. ATT'Y GEN. JOSH HAWLEY (Apr. 18, 2017, 1:20 PM), <http://ago.mo.gov/home/news-archives/2017-news-archives/missouri-attorney-general-s-office-recuses-from-trinity-lutheran-case> [https://perma.cc/B2E8-QCWH].

³⁵ *Trinity Lutheran*, 137 S. Ct. at 2019 n.1.

³⁶ *Id.*

threatened, it may just be a maneuver to avoid a judicial determination. That is not what the Governor attempted in this case, but it is hard for courts to assess defendants' intentions, and the doctrine fit the facts. After certiorari was granted, and on the eve of oral argument, the state suddenly abandoned its long-held position.

The Governor did not seem likely to reverse course. But as against that political prediction, he had done nothing to implement the alleged new policy or make it difficult to revert to the old. There was only a press release; there was no executive order, regulation, or other publicly available record of any actual instruction. The state constitutional prohibition remained in effect; no governor could change that.³⁷ Anyone who had bought a tire could have sued to enforce the state constitution and reverse the Governor's instruction.³⁸ As of September 2017 — five months after the Governor's press release and three months after the Court's decision — the Department of Natural Resources website still said that applicants owned or controlled by a church were ineligible.³⁹

Such a case is not moot unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."⁴⁰ The rhetorical force of "absolutely clear" is rather diluted when applied to what could "reasonably be expected." But the rule has been enforced with considerable rigor over the years,⁴¹ and the dissenters did not dispute its application here. The Governor's voluntary cessation of allegedly unconstitutional conduct did not moot the case, especially where he did nothing to implement the announced change and had no authority to change the state-law source of the challenged policy.

II. DOCTRINAL EVOLUTION

Trinity Lutheran is part of the Court's continuing effort to work out two competing principles that it first set out in adjacent paragraphs in *Everson v. Board of Education*.⁴² "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or prac-

³⁷ See MO. CONST. art. XII (providing means of amending the constitution, none of which gives unilateral power to the governor).

³⁸ See E. Mo. Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43 (Mo. 1989) (reviewing taxpayer standing in Missouri).

³⁹ *Grant Application Instructions*, *supra* note 10. The permalink captures the website as it stood when this Comment went to press.

⁴⁰ *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

⁴¹ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203–04 (1968).

⁴² 330 U.S. 1 (1947).

tice religion.”⁴³ Consider the number of absolutes in that sentence: “*no tax*,” “*any amount*,” “*any religious activities*,” “*whatever*” they are called, “*whatever form*.” But the absolutes were never true, not even in *Everson* itself.

The next paragraph said that states “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”⁴⁴ And the Court held, 5–4, that bus rides to school were a public welfare benefit, not aid to the religious school at which the students arrived.⁴⁵

Everson’s two principles are inconsistent; each can expand to cover all the cases. Every law providing for any form of neutrally distributed government funding can be understood as public welfare legislation. And any part of that funding that goes to a religious organization can be understood as support for religion. The Court has never acknowledged the conflict between these two principles, but it has struggled with that conflict for seventy years.

Opponents of government funding for religious organizations always ignored *Everson*’s nondiscrimination principle. They emphasized its absolute no-funding rhetoric and treated *Everson* as establishing their position. And the no-funding principle had a political history that was longer and stronger than its history in Supreme Court cases, although not as long and strong as the opponents of funding claimed.⁴⁶ In the Supreme Court, *Everson* upheld bus rides to religious schools, and *Board of Education v. Allen*⁴⁷ upheld free secular textbooks for religious schools.⁴⁸ And before 1971, those were all the cases.⁴⁹ Religious schools could be included in neutral funding programs.

The Court changed direction in *Lemon v. Kurtzman*,⁵⁰ striking down salary supplements for teachers of secular subjects in religious schools.⁵¹ There were many possible reasons for the shift: the amounts of money at issue were potentially much larger, some government-funded private schools offered an escape from desegregation of public schools, the issue was framed as a Catholic special-interest issue and there was lingering anti-Catholicism among the Justices, and some of them no doubt viewed

⁴³ *Id.* at 16.

⁴⁴ *Id.* (emphasis omitted).

⁴⁵ *Id.* at 17–18.

⁴⁶ See *infra* pp. 142–46.

⁴⁷ 392 U.S. 236 (1968).

⁴⁸ *Id.* at 241–49.

⁴⁹ See also *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930) (upholding free textbooks for private school students against Takings Clause challenge).

⁵⁰ 403 U.S. 602 (1971).

⁵¹ *Id.* at 611–25.

Everson and *Allen* as minor exceptions to a long political tradition of no aid.⁵² The Court characterized *Everson* and *Allen* as permitting aid in the form of “secular, neutral, or nonideological services, facilities, or materials.”⁵³ Say, for example, a playground surface.

Lemon invalidated aid for teacher salaries, but more fundamentally, it created a doctrinal Catch-22. It said that if any government money was used to support the school’s religious functions, that would have the primary effect of advancing religion, and thus would be unconstitutional.⁵⁴ The state “must be certain . . . that subsidized teachers do not inculcate religion.”⁵⁵ To achieve this certainty would require continuing government monitoring, which would be an unconstitutional entanglement of church and state.⁵⁶ Monitoring violated *Lemon*’s rule against entanglement, but not monitoring violated *Lemon*’s rule against advancing religion.

The result was a focus on the use of each government dollar. Aid had to be delivered in kind, not in cash, in a form that was secular and incapable of diversion to religious use. If diversion was impossible, then monitoring was unnecessary.

This approach dominated from 1971 to 1985. For these fourteen years, the Court struck down most forms of aid to religious schools,⁵⁷ but it upheld many others.⁵⁸ The Court’s swing voters drew fine distinctions that were widely ridiculed.⁵⁹ The high-water mark was *Aguilar v. Felton*⁶⁰ in 1985, striking down remedial courses, taught by public-school teachers, for low-income students in religious schools in

⁵² See Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It’s a Lot More than Just Republican Appointments*, 2008 BYU L. REV. 275, 279–87 (elaborating these reasons).

⁵³ *Lemon*, 403 U.S. at 616.

⁵⁴ See *id.* at 612 (stating the “primary effect” element of the Court’s test); *id.* at 618–19 (discussing the ways in which state-supported teachers in religious schools could advance religion).

⁵⁵ *Id.* at 619.

⁵⁶ *Id.*

⁵⁷ See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (stating that any “[s]ubstantial aid to the educational function of such [religious] schools . . . necessarily results in aid to the sectarian school enterprise as a whole”).

⁵⁸ See Douglas Laycock, *The Supreme Court, 2003 Term — Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 165–66 (2004) (collecting cases allowing states to provide “bus transportation, textbooks, standardized testing, diagnostic services, state income-tax deductions, and remedial instruction and therapeutic services delivered off the property of the religious school” (footnotes omitted)).

⁵⁹ See *Wallace v. Jaffree*, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (collecting and ridiculing these distinctions); Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 686–87 (2001) (collecting academic examples, and piling on).

⁶⁰ 473 U.S. 402 (1985).

low-income neighborhoods.⁶¹ These public-school employees might start teaching religion unless they were monitored.

The tide turned in 1986, and for more than thirty years now, the Court has been moving toward the view that government funding of secular services, including education, can flow to religious providers so long as it is distributed in religiously neutral ways. *Everson*'s nondiscrimination principle has increasingly come to dominate its no-aid principle. Once again, there are multiple reasons for the shift. More conservative Justices were appointed, the tradition was examined more closely, anti-Catholicism greatly declined, and most important, evangelicals and black parents switched sides and a secular free-market movement for school choice grew rapidly.⁶² The resulting broad coalition framed the issue as one of individual choice and not as a special deal for Catholics.

In 1986, the Court held unanimously that the Establishment Clause does not prevent a blind student from using his state scholarship to attend bible college and study for the ministry.⁶³ The Court evaluated the program "as a whole";⁶⁴ it did not focus just on the dollars that went to the bible college. It was the student, not the government, who directed these dollars to the bible college.⁶⁵ And only a tiny percentage of the money under this program would ever go to religious uses.⁶⁶ But five Justices in concurring opinions said or implied that the percentage of money going to religious uses was irrelevant.⁶⁷

The focus on the program as a whole and on the student's private choice would completely unravel *Lemon*'s restrictions on aid to religious schools. But first the Court took some smaller steps. In 1997, it decided that public-school employees teaching in religious schools could be trusted not to teach religion. Pervasive monitoring was no longer required,⁶⁸ and *Aguilar v. Felton* was expressly overruled.⁶⁹ In 2000, in *Mitchell v. Helms*,⁷⁰ Justice O'Connor for the fifth and sixth votes decided that employees of the religious school did not have to be closely monitored either, at least with respect to instructions not to use state-

⁶¹ *Id.* at 404–07 (describing the program); *id.* at 408–14 (invalidating the program).

⁶² See Laycock, *supra* note 52, at 287–94 (elaborating these reasons).

⁶³ *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

⁶⁴ *Id.* at 488.

⁶⁵ *Id.* at 487.

⁶⁶ *Id.* at 488.

⁶⁷ *Id.* at 490 (White, J., concurring); *id.* at 491 & n.3 (Powell, J., concurring); *id.* at 493 (O'Connor, J., concurring in part and concurring in the judgment).

⁶⁸ *Agostini v. Felton*, 521 U.S. 203, 233–34 (1997).

⁶⁹ *Id.* at 236.

⁷⁰ 530 U.S. 793 (2000).

funded equipment for religious purposes.⁷¹ With pervasive monitoring no longer required, *Lemon*'s Catch-22 evaporated.

The *Mitchell* plurality would have gone much further. They would have said that if the program distributes aid on neutral terms to religious and secular schools alike, it does not advance 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."⁷² The program as a whole was neutral, and the plurality no longer traced individual dollars into religious or secular uses. Justice O'Connor's controlling opinion imposed additional restrictions on aid delivered directly from the government to the school,⁷³ but the plurality pointed to the future.

The consolidating win for supporters of permitting aid came in *Zelman v. Simmons-Harris*⁷⁴ in 2002. *Zelman* upheld a coordinated array of subsidies that families could use to pay tuition at religious or secular private schools, to pay tutors in public schools, or to attend magnet schools or charter schools (which Ohio called "community schools").⁷⁵ Because the program "permits the participation of *all* schools within the district, religious or nonreligious," and because any dollars going to religious schools go there only as the result of the "true private choice" of individual families,⁷⁶ the program as a whole neither advanced nor inhibited religion. The *Lemon* test had not been overruled; it had been fundamentally reinterpreted. *Zelman* was a green light for unlimited state aid delivered through neutral programs of "true private choice."

All these cases presented the question whether states *may* aid religious schools, not whether they *must*. But if there is no Establishment Clause obstacle to neutrally delivered aid, and if the Free Exercise Clause is now understood as principally a prohibition on discriminating against religion,⁷⁷ then it seems to follow that the Constitution prohibits overt discrimination against churches in otherwise neutral and secular funding programs. In 1995, the Court held that discriminatory refusal to fund a religious magazine violated the Free Speech Clause.⁷⁸

⁷¹ *Id.* at 859–60 (O'Connor, J., concurring in the judgment).

⁷² *Id.* at 809 (plurality opinion).

⁷³ *Id.* at 838–44 (O'Connor, J., concurring in the judgment).

⁷⁴ 536 U.S. 639 (2002).

⁷⁵ *Id.* at 645–48 (describing the program).

⁷⁶ *Id.* at 653.

⁷⁷ See *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not protect against neutral and generally applicable laws); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (identifying many ways to show that a law is not neutral or not generally applicable); Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016) (elaborating these ways).

⁷⁸ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

In 2004, *Locke v. Davey* tested the free exercise theory. From a realist perspective, the case was filed too soon in the course of this doctrinal evolution, and certainly on unfavorable facts. *Davey* held, 7–2, that Washington did not have to award a state scholarship to an otherwise eligible student who was majoring in theology from a believing perspective and preparing for the ministry.⁷⁹ A footnote confined to narrow scope the 1995 decision that had required funding on free speech grounds.⁸⁰

Thirteen years after *Davey*, with a playground substituted for theology (and with five new Justices, personnel changes that may not have mattered), the result was 7–2 the other way. The dissenters held to the distinction between permitting funding and requiring funding, and more desperately, to Justice O’Connor’s concurring opinion in *Mitchell v. Helms*, to special rules about pervasively sectarian institutions, and to the distinction between direct and indirect aid. The Court’s opinion paid these barriers little mind, and that is a significant step. But it is hardly a surprising step in light of what the Court had already done.

III. THE DISSENT

The majority treated the case as a straightforward discrimination case and largely ignored the doctrinal barriers emphasized in the dissent. It relied on *Everson*’s second principle, that citizens do not forfeit public welfare benefits because of their faith,⁸¹ and on free exercise cases striking down regulatory laws that discriminated against religion.⁸² The significance of *Trinity Lutheran* is best viewed through the dissent, written by Justice Sotomayor and joined by Justice Ginsburg.

A. *The Appeal to the Founding*

The dissenters reviewed the familiar debates over disestablishment in the Founding and early national periods.⁸³ But they did not recognize that the dispute in *Trinity Lutheran*, and in every other modern funding case, is fundamentally different from the issue at the Founding.

The issue at the Founding was an earmarked tax to support the religious functions of churches — most commonly the salaries of clergy, and sometimes also the construction of church buildings — at a time when government funded almost nothing else in the private sector.⁸⁴

⁷⁹ *Locke v. Davey*, 540 U.S. 712 (2004).

⁸⁰ *Id.* at 720 n.3.

⁸¹ *Trinity Lutheran*, 137 S. Ct. at 2019–20.

⁸² *Id.* at 2020–21 (citing *Lukumi*, 508 U.S. at 532–33, and *McDaniel v. Paty*, 435 U.S. 618, 626–27, 634 (1978)).

⁸³ *Id.* at 2032–35 (Sotomayor, J., dissenting).

⁸⁴ See, e.g., A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 72–74 (1947) (Rutledge, J., dissenting); THOMAS J. CURRY,

The issue was “religious assessments,” which is how the dissent accurately refers to them throughout its state-by-state review.⁸⁵ The Founders “made a considered decision that civil government should not fund ministers and their houses of worship.”⁸⁶ This Founding-era debate settled the issue. Religious assessments — special funding for the religious functions of churches — are unconstitutional. They are unconstitutional whether directed to one established church or shared with all churches on some neutral basis.⁸⁷ That settlement has held; no one is proposing that kind of funding today.

What is at issue today is religiously neutral funding of some broader category of private activity — medical care, social services, education, or in *Trinity Lutheran*, playground surfaces. The organizations that receive this funding generally provide some service that may be provided either by religious or secular organizations. Usually, but not always, the funded activity or service is mostly or entirely secular even when provided by a church. Nearly always, the state gets full secular value for its money.

The dissent recognized part of this distinction, but refused to grapple with it, confining its response to a conclusory footnote:

To this, some might point out that the Scrap Tire Program at issue here does not impose an assessment specifically for religious entities but rather directs funds raised through a general taxation scheme to the Church. That distinction makes no difference. The debates over religious assessment laws focused not on the means of those laws but on their ends: the turning over of public funds to religious entities.⁸⁸

This is the dissent’s entire discussion of the issue, and it cites only an equally conclusory statement in *Locke v. Davey*.⁸⁹

The dissent’s claim about the Founding-era debates asserts a choice between two alternatives that were never posed at the Founding or in the early national period. Contra the dissent, the debate’s “focus[]” could not expand to previously unimagined ways of spending public money. The debate was “focused” on religious assessments. There were no programs in which government broadly funded some private activity that

THE FIRST FREEDOMS 136, 151, 153–56, 163–64, 179–80, 185–86, 188–89, 191 (1986) (describing church taxes proposed or collected in Virginia, North Carolina, Georgia, Maryland, Massachusetts, Connecticut, New Hampshire, and Vermont). The earmarked and religion-specific nature of colonial and early national church taxes was such an obvious feature of these taxes that few accounts make much of it; Curry’s account is no exception.

⁸⁵ *Trinity Lutheran*, 137 S. Ct. at 2033–35 (Sotomayor, J., dissenting).

⁸⁶ *Id.* at 2035.

⁸⁷ Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986) (reviewing the failed efforts to save some of the colonial establishments by expanding financial support for religious functions from one church to all churches, and refuting the claim that the Founders intended to permit such “nonpreferential” aid).

⁸⁸ *Trinity Lutheran*, 137 S. Ct. at 2035 n 6 (Sotomayor, J., dissenting).

⁸⁹ *Id.* (citing *Locke v. Davey*, 540 U.S. 712, 723 (2004)).

both churches and secular organizations engaged in. Those who proposed and ratified the Religion Clauses could not possibly have had any intention or understanding about whether churches should be included in such programs, because the possibility never occurred to them.

What evidence there is suggests — I do not say proves — that the Founders were not concerned about money that went to churches in pursuit of secular goals. The two examples that follow are important indicators of prevailing assumptions and of what was and was not at issue. But they began without significant constitutional debate, so they do not reflect a considered constitutional intention or understanding.

For more than a century, the government paid churches to run schools for American Indians.⁹⁰ Congress began phasing out funds for “sectarian” education of American Indians in 1894,⁹¹ largely at the urging of anti-Catholic organizations.⁹² Even then, the government continued to fund religious schools with money promised to tribes by treaty.⁹³

When governments began to subsidize elementary education for white children, government funds went to a great diversity of schools, many of them religious.⁹⁴ Religious schools were subsidized in the District of Columbia and in the territories without challenge under the Establishment Clause,⁹⁵ and subsidized without challenge under state constitutions in states that had disestablished their churches.⁹⁶ The later movement for “common schools” — schools run by government and available to all — naturally opposed the practice,⁹⁷ but it continued for

⁹⁰ ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* 57–80, 261–70 (1982) (collecting examples of the practice); CHARLES L. GLENN, *THE AMERICAN MODEL OF STATE AND SCHOOL* 167 (2012) (noting expansion of this practice in the Grant Administration). I cite Cord only for the facts, and not for his interpretation of the facts. I have rejected his claim that this or any other history shows that the Founders accepted government aid to religion so long as it benefits all faiths equally. Laycock, *supra* note 87, at 915.

⁹¹ See *Quick Bear v. Leupp*, 210 U.S. 50, 78–79 (1908) (describing the phaseout).

⁹² See GLENN, *supra* note 90, at 167; DONALD L. KINZER, *AN EPISODE IN ANTI-CATHOLICISM: THE AMERICAN PROTECTIVE ASSOCIATION* 74–78, 135–38, 163, 205–07 (1964). The American Protective Association was at the peak of its influence in 1894–95. *Id.* at 176.

⁹³ See *Quick Bear*, 210 U.S. at 68 n.1 (listing these expenditures for fiscal year 1906); *id.* at 80–82 (upholding these expenditures).

⁹⁴ RICHARD J. GABEL, *PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS* 180–262 (1937) (reporting state-by-state survey of government support for religious and other private schools in the early national period); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925*, at 1–19 (1987) (surveying state aid to private schools in the early years); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 166–67 (1983) (noting examples).

⁹⁵ See GABEL, *supra* note 94, at 173–79.

⁹⁶ Every state had ended its formal establishment by 1833, and most states disestablished well before that. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1449, 1458.

⁹⁷ See JORGENSEN, *supra* note 94, at 20–21; KAESTLE, *supra* note 94, at 57.

many years in some places.⁹⁸ Funding for Catholic schools briefly expanded after the Civil War before provoking a backlash.⁹⁹

The claim that funding religious schools is or should be unconstitutional did not emerge until long after the Founding, and in response to intense Protestant-Catholic conflict.¹⁰⁰ Fleeing Protestant religious exercises and instruction in the public schools,¹⁰¹ Catholics sought government money for their own religious schools.¹⁰² Protestants defended their public school religious exercises as “nonsectarian,” and they rejected any funding for “sectarian” schools.¹⁰³ In principle, “sectarian” could mean any denominationally specific school, and denominational Protestant schools did eventually lose their funding.¹⁰⁴ But it was Protestant-Catholic conflict that drove the issue, and in that conflict, “sectarian” was a pejorative aimed at Catholics.¹⁰⁵

The Blaine Amendment in 1876 would have written the Protestant position on both issues into the Federal Constitution, protecting Bible reading in the public schools and prohibiting government funding of any school that taught the beliefs of any sect or denomination.¹⁰⁶ The Blaine Amendment failed in the Senate,¹⁰⁷ but bans on funding sectarian, religious, or private schools, including the Missouri provisions at issue in *Trinity Lutheran*, were written into some forty state constitutions.¹⁰⁸ Congress generally required such provisions for states admitted after 1876.¹⁰⁹

⁹⁸ See GABEL, *supra* note 94, at 320–470 (extending his state-by-state survey of public funding for private schools through 1865).

⁹⁹ See JORGENSON, *supra* note 94, at 112–21 (describing cases in which local Catholic majorities supported public funding for Catholic schools); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 42–43 (1992) (same).

¹⁰⁰ See Zelman v. Simmons-Harris, 536 U.S. 639, 720–21 (2002) (Breyer, J., dissenting) (summarizing this conflict); JORGENSON, *supra* note 94, at 69–145 (reviewing this conflict from the 1840s forward); Laycock, *supra* note 58, at 187–91 (reviewing this conflict and collecting additional sources).

¹⁰¹ See GLENN, *supra* note 90, at 160–64; John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 298–300 (2001).

¹⁰² GLENN, *supra* note 90, at 164–73; JORGENSON, *supra* note 94, at 83–85.

¹⁰³ Jeffries & Ryan, *supra* note 101, at 300–05.

¹⁰⁴ GABEL, *supra* note 94, at 500.

¹⁰⁵ See GLENN, *supra* note 90, at 162–64; Jeffries & Ryan, *supra* note 101, at 301–04.

¹⁰⁶ The final Senate version of the amendment is set out at 4 CONG. REC. 5580 (1876).

¹⁰⁷ *Id.* at 5595.

¹⁰⁸ See Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE 111, 117 n.1 (2011), <http://www.fed-soc.org/publications/detail/the-state-of-blaine-a-closer-look-at-the-blaine-amendments-and-their-modern-application> [<https://perma.cc/M3N6-MHDP>] (collecting citations). Other scholars report smaller numbers, because of variations in wording or because they do not count provisions enacted before 1876. See Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 n.32 (2000) (collecting various counts).

¹⁰⁹ See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 673 (1998).

By the time of the Blaine Amendment, opponents of funding began to claim that funding Catholic schools would be no different than funding a Catholic church.¹¹⁰ But a Catholic school teaches the full secular curriculum; a Catholic church does not. The more secular the government-funded activity, the more implausible the equation with religious assessments.

The *Trinity Lutheran* dissent carries this equation to extreme lengths, insisting that the playground is part of Trinity Lutheran's religious mission. The daycare says that it "incorporates daily religion" into its activities.¹¹¹ The playground is part of the daycare. And therefore, in the dissenters' view, "[t]he playground surface 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."¹¹²

This assertion comes close to a doctrine of taint. If there is any connection at all between the funded activity and the religious mission, the dissenters see the funding as going to the religious mission. It seems likely that the only lessons taught on the playground are widely shared norms such as "Don't hit," and "Wait your turn." Even if the church gives religious reasons for those norms, and even if its staff occasionally mentions those religious reasons on the playground, the efficacy of those mentions does not depend on the safety of the surface or the number of skinned knees. And it is inconceivable that improving the playground surface would increase the frequency of religious instruction. A playground surface is not an altar, and rhetorically equating the two does not make the equation plausible. Justice Breyer's characterization is far more apt: this was "a general program designed to secure or to improve the health and safety of children."¹¹³

At the margin, a rubberized playground surface instead of pea gravel may occasionally influence a parent's decision to send a child to Trinity Lutheran. If the state funding were larger, and the improvement to the secular part of the program greater, this effect on enrollment would be larger. If more children attended, more would be exposed to Trinity Lutheran's religious message. This is the strongest way to claim a benefit to the religious mission, although the dissenters did not put it this way.

¹¹⁰ See 4 CONG. REC. 5585 (statement of Sen. Morton) ("The support of a school by public taxation is the same thing in principle as an established church."); *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 24 (1947) (Jackson, J., dissenting) ("[T]o render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.").

¹¹¹ *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting).

¹¹² *Id.* at 2030.

¹¹³ *Id.* at 2027 (Breyer, J., concurring in the judgment).

But this potential benefit does not mean the state is supporting religion, at least as the Court has long viewed the issue. If the state neutrally supports playground surfaces for religious and secular daycares alike, and for religious daycares of different faiths, it is supporting daycares, or just playgrounds, but not religion.¹¹⁴ Equal funding gives the religious daycares no advantage; funding only secular daycares would put religious daycares at a disadvantage. Even in the *Lemon* era, the Court rejected the argument that any aid to a religious school, no matter how secular, inevitably benefits the religious mission because it benefits the school as a whole.¹¹⁵ And *Everson* held it irrelevant that some students might not attend the Catholic school without free transportation.¹¹⁶

Recall *Everson*'s two competing principles: no government money to any religious activities or institutions, but no excluding anyone from public welfare legislation because of their faith.¹¹⁷ With respect to the Founding-era church taxes, these principles did not conflict. Ending the special funding for churches did not deprive any church or believer of any benefit that was available to anyone else; it did not discriminate against anybody. It ended a massive discrimination in favor of churches, or in favor of one established church. No funding and no discrimination were entirely consistent when the debate was about religious assessments for religious functions.

In our time, the two principles have become inconsistent. Either Trinity Lutheran must be eligible to compete on equal terms for playground funding, or the children of Trinity Lutheran must be excluded from a public welfare benefit because of their parents' faith. This is a choice that the Founders simply never faced. And it has nothing to do with paying the pastor or constructing worship space, the issues the Founders did address. It is about avoiding "a few extra scraped knees"¹¹⁸ and perhaps, the occasional more serious injury.

The disputes over funding religious functions at the Founding, and the hostility to funding Catholic schools in the second half of the nineteenth century, mean that prohibiting discrimination in funding was not specifically contemplated by those who framed and ratified the Free Exercise Clause or the Fourteenth Amendment. But even originalists now deny that they interpret the Constitution by such "original expected

¹¹⁴ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (applying this reasoning to uphold school choice plan).

¹¹⁵ *Hunt v. McNair*, 413 U.S. 734, 742–43 (1973).

¹¹⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947).

¹¹⁷ *Id.* at 16.

¹¹⁸ *Trinity Lutheran*, 137 S. Ct. at 2025.

applications.”¹¹⁹ *Trinity Lutheran* rests firmly on core principles of the Religion Clauses: that government should not penalize any person because of his religion, and that government should be neutral with respect to the people’s religious choices and commitments.

B. Funding the Church Itself

The dissenters also argued for “a prophylactic rule” that a “state can reasonably use status as a ‘house of worship’ as a stand-in for ‘religious activities.’”¹²⁰ That is, all government funds to churches should be barred, no matter how neutrally administered and no matter how secular the funded activity. This argument implied that perhaps the playground surface could have been funded if the daycare had been incorporated separately from the church. And the dissenters cited with approval Missouri’s funding of “other religiously affiliated institutions,”¹²¹ including Saint Louis University, a Jesuit institution that teaches Catholic Studies, theology, and preparation for the priesthood as well as secular disciplines.¹²²

The dissenters’ proposed prophylactic rule connects to two other substantial debates about government funding of religious institutions.

I. “Pervasively Sectarian” Institutions. — In the fourteen years when the Supreme Court substantially limited government funding of religious elementary and secondary schools, it distinguished religious institutions that were “pervasively sectarian” from those that were not.¹²³ “Pervasively sectarian” was never clearly defined, but in practice, it meant K-12 religious schools.¹²⁴ Presumably it included churches, but that issue never arose.

The category had roots in the use of “sectarian” as a code word for Catholic¹²⁵ and in the charge, stated most explicitly by Justices Black

¹¹⁹ See Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1209–10 (2012) (collecting sources).

¹²⁰ *Trinity Lutheran*, 137 S. Ct. at 2036 (Sotomayor, J., dissenting).

¹²¹ *Id.* at 2038 (citing Saint Louis Univ. v. Masonic Temple Ass’n of St. Louis, 220 S.W.3d 721, 726 (Mo. 2007)).

¹²² *Departments and Programs*, SAINT LOUIS UNIV. COLL. OF ARTS & SCIS., <https://www.slu.edu/arts-and-sciences/academics/index.php> [<https://perma.cc/9A39-6FH4>]; *Degrees and Programs*, SAINT LOUIS UNIV. COLL. OF PHILOSOPHY & LETTERS, <https://www.slu.edu/philosophy-and-letters/degrees/index.php> [<https://perma.cc/5CMT-KE8X>].

¹²³ See, e.g., Sch. Dist. v. Ball, 473 U.S. 373, 379, 385, 388, 397 (1985) (holding that secular courses in pervasively sectarian school had primary effect of advancing religion), overruled in part by Agostini v. Felton, 521 U.S. 203, 236 (1997); Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976) (plurality opinion) (requiring that “no state aid at all go to institutions that are so ‘pervasively sectarian’ that secular activities cannot be separated from sectarian ones” (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973))).

¹²⁴ See STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NON-PROFIT ORGANIZATIONS AND PUBLIC MONEY 36–49, 120–21 (1996) (reviewing the cases).

¹²⁵ Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion) (“Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics

and Douglas, that Catholic schools engaged in unrelenting propaganda.¹²⁶ Put in its most plausible and least bigoted form, the idea was that religious and secular functions in a pervasively sectarian institution could not be separated. “[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania’s church-related elementary and secondary schools . . .”¹²⁷ Or at least, religious and secular functions could not be separated without “comprehensive, discriminating, and continuing state surveillance,” which would be an unconstitutional entanglement of church and state.¹²⁸

Most religious colleges and universities were held *not* to be pervasively sectarian.¹²⁹ And religious hospitals and social service agencies were not pervasively sectarian; substantial government money flowed to them without significant litigation.¹³⁰

The rationale of the pervasively sectarian doctrine began to crumble as the Court became less suspicious of religious schools and quit assuming that any government aid that *could* be diverted to religious uses *would* be diverted to religious uses.¹³¹ Four Justices tried to kill the doctrine in *Mitchell v. Helms*.¹³²

Trinity Lutheran deals the doctrine another serious blow. Seven Justices did not care that the grant went to the church itself, and they

in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’ . . . This doctrine, born of bigotry, should be buried now.”).

¹²⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971) (Douglas, J., concurring) (“In the parochial schools Roman Catholic indoctrination is included in every subject. . . . The whole education of the child is filled with propaganda.” (quoting LORNA BOETTNER, ROMAN CATHOLICISM 360 (1962))); *Bd. of Educ. v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting) (“The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.”); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 23 (1947) (Jackson, J., dissenting) (stating that the Catholic Church “relies on early and indelible indoctrination”). Justice Frankfurter joined the Jackson dissent. *Id.* at 28. The Boettner book quoted by Justice Douglas is an extended anti-Catholic hate tract. For additional illustrative quotations, see Douglas Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390, 419–20 (1977).

¹²⁷ *Meek v. Pittenger*, 421 U.S. 349, 365 (1975), overruled by *Mitchell*, 530 U.S. at 835–37 (plurality and concurring opinions).

¹²⁸ *Lemon*, 403 U.S. at 619.

¹²⁹ See *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (upholding aid to religious colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (same); *Tilton v. Richardson*, 403 U.S. 672 (1971) (same).

¹³⁰ MONSMA, *supra* note 124, at 63–80 (reporting widespread government funding of religious colleges, child service agencies, and international aid agencies); see also *Lemon*, 403 U.S. at 633 (Douglas, J., concurring) (accepting government aid to religious hospitals, because “the hospital is not indulging in religious instruction or guidance or indoctrination”); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding federal appropriation for Catholic hospital).

¹³¹ See *supra* pp. 140–41.

¹³² 530 U.S. at 825–29 (plurality opinion).

did not think that comprehensive surveillance would be required to distinguish the secular playground surface from the worship and religious instruction inside the church. The dissenters invoked the substance of the doctrine, in their insistence that Missouri could use “house of worship” as a proxy for “religious activities” and that any effort to separate religious from secular activities “would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship’s activities.”¹³³ But even they did not use the phrase “pervasively sectarian.”

A playground surface is secular and incapable of diversion to religious uses; if the state had voluntarily included religious daycares in its playground funding, that aid could have been upheld even under *Lemon*’s Catch-22. It might have run afoul of *Meek v. Pittenger*,¹³⁴ which struck down a program for providing educational equipment directly to religious schools,¹³⁵ but the Court overruled *Meek* in *Mitchell v. Helms*.¹³⁶ Six Justices in *Mitchell* also held that it no longer mattered whether aid could be diverted to religious uses,¹³⁷ and no Justice mentioned divertibility in *Trinity Lutheran*.

Doctrinally, *Trinity Lutheran* adds two things. First, when a state gives secular equipment to private organizations on neutral criteria, it not only may include pervasively sectarian institutions; it must. And second, it must include not just pervasively sectarian schools, but the secular activities of the church itself. Opponents of aid equated the two when they were fighting aid to religious schools. But churches and schools are not the same, and the dissenters tried to draw a new line around the church itself. The Court was not persuaded.

2. *Separate Corporations*. — The debate over the pervasively sectarian doctrine and the special status of the church itself also drives a central part of the debate over what was originally called Charitable Choice, and more recently, the President’s Faith-Based Initiative. The original Charitable Choice provisions were enacted in 1996 and apply to just a few federal funding programs.¹³⁸ Government agencies awarding grants to service providers under these programs may not discriminate against religious providers.¹³⁹ Pervasively sectarian organizations are not excluded. And no religious organization can be required to “alter its form of internal governance” as a condition of receiving federal

¹³³ *Trinity Lutheran*, 137 S. Ct. at 2036 (Sotomayor, J., dissenting).

¹³⁴ 421 U.S. 349 (1975).

¹³⁵ *Id.* at 362–66.

¹³⁶ 530 U.S. at 835–37 (plurality and concurring opinions).

¹³⁷ *Id.* at 820–25 (plurality opinion); *id.* at 852–57 (O’Connor, J., concurring in the judgment).

¹³⁸ 42 U.S.C. § 604a (2012).

¹³⁹ *Id.* § 604a(c).

funds.¹⁴⁰ So grants can go directly to churches; a church need not create a separate corporation to conduct its charitable works.

Bills to expand the program failed as it became more controversial,¹⁴¹ but President George W. Bush issued an executive order expanding the concept to all federally funded social service programs.¹⁴² The expanded program became known as the President's Faith-Based Initiative, and President Obama continued it.¹⁴³ Despite substantial political pressure, he did not restore the requirement that churches form a separate corporation to receive the grant.¹⁴⁴

Making the church itself eligible for grants turned out to be controversial. Critics of Charitable Choice argue that a separate corporation, legally distinct from the church itself, is an essential safeguard. In part they seem to see this as a prophylactic rule that ensures segregation of funds; in part they see it as a step towards requiring that the charitable corporation secularize itself, a requirement that could never be imposed on the church itself.¹⁴⁵ The dissenters in *Trinity Lutheran* also insisted on a separate corporation,¹⁴⁶ although their other argument — that the playground was part of the religious mission — suggests that a separate corporation would not have mattered to their bottom line.

The majority did not require a separate corporation. Not only could the grant go directly to the church; it was unconstitutional to refuse grants to churches.

On the specific issue of requiring a separate corporation, the majority is right, and the dissenters and critics of the Faith-Based Initiative are wrong. Government should not subsidize a safer playground surface for the separately incorporated Trinity Lutheran Daycare and refuse to subsidize a safer surface at the identical playground for the identical daycare owned by Trinity Lutheran Church. The separate corporation exists mostly on paper, in the lawyer's office and the accountant's office. If done right, it requires occasional attention to formalities of corporate governance. But it is unrelated to the real issues about religious liberty and unrelated to what happens on the playground.

¹⁴⁰ *Id.* § 604a(d)(2)(A).

¹⁴¹ See, e.g., Charitable Choice Expansion Act of 1999, S. 1113, 106th Cong. (1999) (died in committee).

¹⁴² Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

¹⁴³ Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 17, 2010).

¹⁴⁴ See *id.* § 2(c), 75 Fed. Reg. at 71,320 ("No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs." (emphasis added)).

¹⁴⁵ See, e.g., Louis H. Pollak et al., *Debate 2: Should the Government Provide Financial Support for Religious Institutions That Offer Faith-Based Social Services?*, 1 RUTGERS J.L. & RELIGION, no. 1, 1999. Compare *id.* at 17–18, 24–25, 27–28 (remarks of Douglas Laycock), with *id.* at 21, 25–26 (remarks of Erwin Chemerinsky). Internal pagination is available on the journal's website at <http://lawandreligion.com/sites/law-religion/files/Pollacketal.pdf> [<https://perma.cc/7A9Y-6PDZ>].

¹⁴⁶ See *Trinity Lutheran*, 137 S. Ct. at 2036 (Sotomayor, J., dissenting).

Government authority to audit the grant money is ample incentive to segregate funds.¹⁴⁷ More fundamentally, whether Trinity Lutheran is teaching religion on the playground has nothing to do with whether there is one corporation or two. Employees of the separately incorporated daycare can teach just as much religion as employees of the church. And employees of the church can refrain from religion on the playground just as well as employees of the separately incorporated daycare. If we are worried about cheating on any rules the state or the Court imposes, employees of the separately incorporated daycare can cheat just as much as employees of the church. Rank-and-file employees of the daycare may not even know whether there is one corporation or two. And not just the rank and file: I once had twelve seminar students interview twelve pastors, not one of whom knew how his church was legally constituted.

If playground safety is a secular function that the state can fund, should we care whether daycare employees occasionally teach religion on the playground? I think not, but whatever the answer to that question, it has no relation to whether there is one corporation or two. The law should be concerned with functional realities, not paper formalities. Government should not fund worship, religious instruction, or evangelism, no matter the entity that employs the workers engaged in these activities. And government should be free to fund secular functions, no matter the entity that employs the workers who perform those functions. Any monitoring needed to police this line should be done in the least intrusive way. But a separate corporation does not help monitor what is taught and where.

Trinity Lutheran holds that no separate corporation is required. And it implies that a requirement that a separate daycare corporation secularize itself would be unconstitutional. Grant recipients are free to “remain a religious institution,” and “Trinity Lutheran is free to continue operating as a church.”¹⁴⁸

Suppose the granting agency said that religious organizations are eligible, and that the daycare can engage in as much religious instruction as it likes without losing its eligibility. The one requirement is that either the daycare or the playground must have a separate legal existence; the playground cannot be owned by the church itself.

Such a requirement would not make much sense. And it would no doubt trip up many grant applicants who were unaware that such a formality could be crucial. But some political actors think it important, and the Court might view it as a minor inconvenience. Once the church finds a lawyer, a separate corporation can be formed with a simple filing at the Secretary of State’s office. But there is no reason to permit or

¹⁴⁷ See 42 U.S.C. § 604a(h)(2) (2012) (providing that if a grant recipient segregates funds, then only the government funds are subject to audit).

¹⁴⁸ *Trinity Lutheran*, 137 S. Ct. at 2022.

require such interference with the structure and governance of religious organizations.

C. Direct and Indirect Aid

i. The Formal Distinction. — Another line the Court has drawn, emphasized most clearly in *Zelman v. Simmons-Harris*, is between direct and indirect aid. “[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”¹⁴⁹ As the dissenters noted, *Trinity Lutheran* was a case of direct aid.¹⁵⁰ Government, not private individuals, chose the grant recipients.

This fact did not trouble the majority, which mentioned the distinction only when summarizing the state’s argument.¹⁵¹ Churches must now be equally eligible for direct aid when that aid is awarded on religiously neutral criteria to support secular functions. *Trinity Lutheran* rejects any bright-line distinction between direct and indirect aid.

This step is hardly a surprise after *Mitchell v. Helms*, where four Justices argued for permitting aid awarded on neutral criteria and the swing votes offered an incoherent distinction that persuaded almost no one. Justice O’Connor, concurring in the judgment, distinguished per capita distribution programs from programs of true private choice, such as vouchers.¹⁵² With per capita distribution, the government divides the available money among schools pro rata, based on the number of students in each school.¹⁵³ With vouchers, the state sends the school a check for each student, payable to the parents, and the parents endorse the checks over to the school.¹⁵⁴ Sending the check to the school eliminates the risk that some parents might divert the money to other uses.

The two procedures are economically equivalent; either way, each school receives X dollars for each student in the school. Justice O’Connor thought there were symbolic differences,¹⁵⁵ that these differences would matter more if direct aid were given in cash,¹⁵⁶ and that a

¹⁴⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citations omitted).

¹⁵⁰ *Trinity Lutheran*, 137 S. Ct. at 2028–29, 2029 n.2 (Sotomayor, J., dissenting).

¹⁵¹ *Id.* at 2018, 2022–23 (majority opinion).

¹⁵² *Mitchell v. Helms*, 530 U.S. 793, 842–44 (2000) (O’Connor, J., concurring in the judgment).

¹⁵³ See *id.* at 802 (plurality opinion).

¹⁵⁴ See *Zelman*, 536 U.S. at 646; *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999).

¹⁵⁵ *Mitchell*, 530 U.S. at 842–43 (O’Connor, J., concurring in the judgment).

¹⁵⁶ *Id.* at 843–44.

few parents might conceivably choose not to claim their check.¹⁵⁷ For whatever reason, Justice Breyer joined this opinion.¹⁵⁸

Justice O'Connor's opinion offered the narrowest rationale for the result in *Mitchell*; it was the controlling opinion and formally binding on the lower courts.¹⁵⁹ But no one could reasonably have expected the Supreme Court to again rely on this distinction after Justice Alito replaced Justice O'Connor. As applied to per capita funding, the distinction between direct and indirect aid was a distinction without a difference.

2. *The Functional Distinction and the Risks of Discretion.* — The distinction between direct and indirect aid is linked to another distinction that remains important. Very often, government spending programs do not have enough money for all the eligible individuals or organizations. Someone has to choose those who get funding and those who do not. If government chooses, there is a serious risk of discrimination: government might fund its political supporters and not its opponents. If religious organizations are included, government might fund relatively uncontroversial faiths and exclude minority faiths. Programs of true private choice largely avoid this problem by dispersing the choice among many private actors.¹⁶⁰

In *Trinity Lutheran*, the government chose grant recipients. If the criteria for awarding grants were discretionary, the risk of discrimination would be large. In the free speech cases, the Court has held that the risk is too great, so that standardless discretion in awarding permits to speak, solicit, or hold rallies is unconstitutional.¹⁶¹ But permit systems are constitutional if constrained by neutral and objective criteria.¹⁶²

The church described Missouri's criteria for awarding playground grants as "entirely secular and neutral."¹⁶³ The state did not dispute

¹⁵⁷ See *id.* at 842.

¹⁵⁸ *Id.* at 836.

¹⁵⁹ See *Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that when there is no majority opinion, the holding is the position of the Justices who supported the result on the narrowest grounds).

¹⁶⁰ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002); see also *Mitchell*, 530 U.S. at 810 (plurality opinion) (further elaborating the point with respect to a program with equivalent private decision making). Justice O'Connor refused to treat this program as one of "true private choice," *id.* at 842–43 (O'Connor, J., concurring in the judgment), but the principle is the same.

¹⁶¹ See, e.g., *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–33 (1992) (collecting cases and invalidating permit system for lack of "narrowly drawn, reasonable and definite standards," *id.* at 133 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951))).

¹⁶² See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 317, 323–25 (2002) (upholding permit requirement for large groups meeting in city parks, where permit could be denied only for a stated list of reasons that were "reasonably specific and objective," *id.* at 324).

¹⁶³ Brief for Petitioner at 5, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-557), 2016 WL 1496879.

that description, and the Court appeared to accept it.¹⁶⁴ And for the most part, the claim was accurate. There are fifteen criteria, worth a potential total of 230 points. Each criterion is specified in objective terms indicating what degree of compliance will earn how many points. Six criteria address the completeness of the proposal and of the planning for the project.¹⁶⁵ Others address the quality of the planned construction, the percentage of recycled material from Missouri tires, the applicant's own investment in the project, the percentage of local residents living in poverty, and the geographic distribution of grants across the state.¹⁶⁶

One criterion, worth up to ten points, addresses the applicant's willingness to promote recycling in its curriculum or its efforts at public education.¹⁶⁷ This does not lend itself to discrimination, but it does intrude into the curriculum. The curriculum thus rewarded is wholly secular, and it is difficult to imagine a church with a sincere religious objection to recycling applying for a grant to install recycled materials. And the secular portion of the curriculum in religious schools is already extensively regulated in many states, with little recent litigation and few successful challenges.¹⁶⁸

That leaves two criteria that the dissenters briefly questioned.¹⁶⁹ One awards up to ten points for the applicant's willingness to publicize the state's assistance.¹⁷⁰ This potentially affects the church's message, but again, the message rewarded with points is wholly secular and directly related to the grant. This criterion is akin to a reward for publicly saying thank you.

Finally, and most troubling, up to fifteen points are awarded for the regional agency's willingness to endorse or commit to "involvement with the project."¹⁷¹ The state is divided into twenty Solid Waste Management Districts or Regions;¹⁷² the Department appears to use the two words interchangeably. There are no publicly available criteria for the region's endorsement or participation; the region appears to have wholly unguided discretion. It is easy to imagine regional authorities

¹⁶⁴ See *Trinity Lutheran*, 137 S. Ct. at 2017.

¹⁶⁵ *Grant Application Instructions*, *supra* note 10 (Evaluation Criteria 1–3, 4c, 8–9).

¹⁶⁶ *Id.* (Evaluation Criteria 4–4b, 10–12).

¹⁶⁷ *Id.* (Evaluation Criteria 6).

¹⁶⁸ See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (suggesting "that certain studies plainly essential to good citizenship must be taught" if the state so provides); *New Life Baptist Church Acad. v. Town of East Longmeadow*, 885 F.2d 940, 942–45 (1st Cir. 1989) (Breyer, J.) (summarizing and upholding state supervision of secular curriculum in Massachusetts).

¹⁶⁹ *Trinity Lutheran*, 137 S. Ct. at 2031 n 4 (Sotomayor, J., dissenting).

¹⁷⁰ *Grant Application Instructions*, *supra* note 10 (Evaluation Criteria 5).

¹⁷¹ *Id.* (Evaluation Criteria 7).

¹⁷² See *Solid Waste Management District Allocations and Contacts*, MO. DEP'T OF NAT. RESOURCES (Aug. 29, 2017), <https://dnr.mo.gov/env/swmp/swmd/swmdinfo.htm> [https://perma.cc/Y42Y-QQGL].

endorsing Trinity Lutheran's playground but not a mosque's playground or a Jehovah's Witness playground. It is equally easy to imagine regional authorities refusing to endorse the project of a church whose pastor had vocally criticized local government, or refusing to endorse any religious organization's project.

In fact, Trinity Lutheran belatedly alleged that Missouri discriminated among religions. A list of past grant recipients showed that some religious applicants had received grants.¹⁷³ Both the district court and the court of appeals dismissed the claim as untimely,¹⁷⁴ so the issue was not explored. But the last grant to a religious organization was awarded in 2003.¹⁷⁵ What Trinity Lutheran discovered appears to have been a change in policy rather than religious discrimination. But the risk of discrimination is ever present, and discretionary criteria make discrimination easy.

There is a deeper conundrum here. The state understandably did not attack its own criteria, but suppose it had. Would a focus on one discretionary criterion, good for fifteen points out of 230, invalidate what would otherwise be constitutionally required? Surely states cannot avoid the Court's decision that easily.

A jurisdiction that wants to include religious organizations in funding programs can generally devise neutral, objective, and nondiscretionary criteria that minimize the risk of discrimination. But a jurisdiction that wants to exclude religious organizations might include one or more wholly discretionary criteria, and then argue that the risk of discrimination is just too great. Should the court not only order the inclusion of religious applicants, but also strike down the discretionary criteria? It would be easy to invalidate the one fifteen-point criterion in *Trinity Lutheran*. But some programs may have pervasively discretionary criteria; eliminating discretion might require completely redesigning the program. And eliminating all discretion might value what can be counted instead of what is important to the program's policy goals.

There is a third possibility. Some jurisdictions might want to include religious applicants and might also want to discriminate among them, deliberately designing discretionary criteria to enable themselves to reward their friends or recruit new friends. There were credible reports that the Bush Administration used the Faith-Based Initiative this

¹⁷³ MO. DEP'T OF NAT. RES., PRIOR RECIPIENTS OF SCRAP TIRE MATERIAL GRANTS (2017), <https://dnr.mo.gov/env/swmp/tires/docs/PriorRecipientsofScrapTireMaterialGrants.pdf> [<https://perma.cc/K3AL-H4W5>].

¹⁷⁴ *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 2:13-CV-04022, 2014 WL 11516091 (W.D. Mo. Jan. 7, 2014), *aff'd*, 788 F.3d 779, 788–90 (8th Cir. 2015).

¹⁷⁵ Each grant has a project number, and the first two digits appear to be a year. The Department of Natural Resources confirmed that these two digits indicate the year in which the application was received. E-mail from Jeff Heisler, Operations Section Chief, Solid Waste Mgmt. Program, Mo. Dep't of Nat. Res., to author (July 24, 2017, 10:54 AM EST) (on file with author).

way.¹⁷⁶ Representative Robert Scott, Democrat of Virginia, said that the House Subcommittee on the Constitution had considered an amendment to require “some objective merit” in grant proposals, “and that was rejected on a party line vote.”¹⁷⁷ If this vote occurred in a mark-up session, there would be no public record of it. But when he said this on the record at a hearing, no Republican disputed his claim.

There are issues here that remain to be worked out. Nondiscretionary direct aid is no more dangerous than indirect aid. But discretionary grants to religious organizations pose high risks of religious discrimination. Where discretionary criteria are essential to a program’s success, the need for such criteria may be a compelling government interest that justifies the risk of discrimination or even justifies excluding religious organizations from the program. Where discretionary criteria are less important, the constitutional ban on discriminating against religion may require their elimination. But courts will be reluctant to intrude so far into the workings of government funding programs.

3. *Lingering Doctrinal Distinctions.* — Direct and indirect aid continue to differ in one other way, at least for now: there are no restrictions on how religious organizations use indirect aid. A voucher must pay for some secular service, such as education, and recipients must be free to use their vouchers at secular schools as well as religious schools. Vouchers are not a way to bypass the fundamental constitutional rule against special funding for the religious functions of churches.

But once the private beneficiary endorses the voucher over to a religious organization, it becomes unrestricted money. The Court said that any advancement of the religious mission “is reasonably attributable to the individual recipient, not to the government, *whose role ends* with the disbursement of benefits.”¹⁷⁸ That is, giving the voucher to a family is state action, but passing the voucher on to a school is not state action. The money comes to the school free of government restrictions; the school can spend it on the religion class as well as the math class.

Nothing in *Trinity Lutheran* implies the same budgetary freedom with respect to direct aid. The funding has to be for some activity that falls within a neutrally funded secular category, such as playground safety, and the recipient has to use the money for its stated purpose. Footnote 3 reserves the question of religious uses, including mixed

¹⁷⁶ See DAVID KUO, TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION 199–216 (2006) (giving inside account of political uses of the program and egregiously biased evaluation of proposals); Thomas B. Edsall & Alan Cooperman, *GOP Using Faith Initiative to Woo Voters*, WASH. POST (Sept. 15, 2002), <https://www.washingtonpost.com/archive/politics/2002/09/15/gop-using-faith-initiative-to-woo-voters/a8fb7b89-37cb-4235-ad90-4e801169c166/> [https://perma.cc/294R-ZBMq]. Kuo said that the *Post* story understated the problem. KUO, *supra*, at 206–07.

¹⁷⁷ Supreme Court’s School Choice Decision and Congress’ Authority to Enact Choice Programs: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. 69 (2002).

¹⁷⁸ Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (emphasis added).

religious and secular uses. Religious schools may or may not become eligible for direct funding, and if they do, the money may or may not have to be segregated and restricted to secular uses.

IV. *LOCKE V. DAVEY*

The doctrinal evolution with respect to government funding of religious organizations mostly came in cases about whether government may include religious organizations in neutral funding programs if it chooses. *Trinity Lutheran* is about whether the state must include religious organizations when it prefers not to. The principal precedent with respect to that question was *Locke v. Davey*.

In *Davey*, Washington funded state scholarships for any major at any accredited institution, except that they could not be used to major in theology from a believing perspective.¹⁷⁹ The Ninth Circuit struck down the exclusion of theology majors as facial discrimination against religion,¹⁸⁰ but the Supreme Court reversed. *Trinity Lutheran* does not overrule *Davey*; it distinguishes *Davey*.¹⁸¹

Davey was a Rehnquist opinion, short on doctrine and deeply ambiguous.¹⁸² The Court reviewed historical restrictions on government funding of the clergy and the state's corresponding interest in not funding the training of clergy.¹⁸³ It relied on this interest first to conclude that the exclusion of theology majors was not presumptively unconstitutional,¹⁸⁴ and then relied on this same interest to justify the discrimination under an unspecified but deferential standard of review that applied in the absence of such a presumption.¹⁸⁵ The Court said that "the *only* interest at issue here is the State's interest in not funding the religious training of clergy,"¹⁸⁶ and that "[w]e need not venture further into this difficult area."¹⁸⁷ Nothing else was decided — or at least, that is what the Court said. Other language in the opinion suggests a broader holding, but first consider this narrow one.

The easiest way to distinguish *Davey* would have been to take the Court at its word: the case was about funding the training of clergy, and any broader statements were dicta. *Trinity Lutheran* does say that

¹⁷⁹ *Locke v. Davey*, 540 U.S. 712, 716, 724–25 (2004).

¹⁸⁰ *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002).

¹⁸¹ *Trinity Lutheran*, 137 S. Ct. at 2022–24.

¹⁸² See Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 228–30 (2004) (exploring the opinion's two inconsistent rationales); Laycock, *supra* note 58, at 184–87 (same, with somewhat different emphasis).

¹⁸³ *Davey*, 540 U.S. at 722–23.

¹⁸⁴ *Id.* at 720–21.

¹⁸⁵ *Id.* at 725.

¹⁸⁶ *Id.* at 722 n.5 (emphasis added).

¹⁸⁷ *Id.* at 725.

Davey relied on the state's strong interest in not funding the training of clergy and that Missouri has no similar interest with respect to playgrounds.¹⁸⁸ So it is plausible to read *Davey* as now confined to funding the training of clergy and other activities of similar religious intensity. But *Trinity Lutheran* does not say that, and it does not quote or even mention the two statements in *Davey* that appeared to limit the holding to its facts.

Other passages in *Davey* suggested a much broader holding. These passages were terse to the point of being cryptic; they have to be read in light of earlier decisions that were not cited, some of which the Court implicitly relied on and some of which it implicitly distinguished. I teased out this part of the opinion in greater detail in an earlier volume of this *Review*.¹⁸⁹

In a sentence that closely paraphrased but did not cite *Rust v. Sullivan*,¹⁹⁰ a well-known abortion funding case, the Court said that “[t]he State has merely chosen not to fund a distinct category of instruction.”¹⁹¹ This refusal to fund “places a relatively minor burden” on those eligible for scholarships.¹⁹² There might not be any “disfavor of religion” at all in the choice not to fund, but if there were, it was “of a far milder kind” than discriminatory regulation.¹⁹³ This reasoning was not confined to funding the training of clergy; it could apply to any refusal to fund.

The Court also had to distinguish cases holding that government cannot penalize the exercise of constitutional rights by withholding government benefits.¹⁹⁴ Here it said that Washington did “not require students to choose between their religious beliefs and receiving a government benefit.”¹⁹⁵ Taking refuge in *Davey*'s unusual status as a double major in theology and business administration, the Court said that he could use his state scholarship for his business administration major at a different university — thus allowing *Davey* to major in theology and also use his scholarship.¹⁹⁶ Of course the logistics of that would have been absurdly burdensome.¹⁹⁷ And by attending only to *Davey*'s double

¹⁸⁸ *Trinity Lutheran*, 137 S. Ct. at 2023.

¹⁸⁹ Laycock, *supra* note 58, at 171–83.

¹⁹⁰ 500 U.S. 173 (1991).

¹⁹¹ *Davey*, 540 U.S. at 721.

¹⁹² *Id.* at 725.

¹⁹³ *Id.* at 720.

¹⁹⁴ See Laycock, *supra* note 58, at 175–76, 178–79. For a more recent example, see *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013) (holding that grant could not be conditioned on recipient's willingness to publicly oppose prostitution).

¹⁹⁵ *Davey*, 540 U.S. at 720–21.

¹⁹⁶ *Id.* at 717, 721 n.4.

¹⁹⁷ Laycock, *supra* note 58, at 180–81.

major, the Court avoided confronting the more common penalty imposed on theology majors: because they majored in theology, they forfeited their right to use the state scholarship to pay for their secular courses.¹⁹⁸ The claim that students were not required to choose between their religious beliefs and a government benefit was simply false.

But *Trinity Lutheran* blithely accepted that claim as true, and used it to distinguish the two cases. Davey allegedly did not have to choose between his religious practice and a government benefit, but *Trinity Lutheran* did. It could be a church or get state funding for its playground, but it could not do both. It had to choose.¹⁹⁹ This is an accurate description of *Trinity Lutheran*, but it is not an accurate description of *Davey*, which leaves the distinction between the two cases unstable. This distinction left *Davey* as a mere failure to fund, but it put *Trinity Lutheran* in the line of cases holding that government cannot penalize the exercise of a constitutional right.

Putting the point about penalties on the exercise of constitutional rights somewhat differently, and more accurately, the Court said that “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.”²⁰⁰ But “Trinity Lutheran was denied a grant simply because of what it is — a church.”²⁰¹ This formulation of the distinction tied directly to footnote 3: the Court addressed “express discrimination based on religious identity” but not “religious uses of funding.”²⁰² And this of course leads back to the more basic distinction between *Trinity Lutheran* and *Davey*: only *Davey* involved a religious use of the state’s money.

V. THE SCHOOL CASES

Footnote 3 says that *Trinity Lutheran* involves discrimination “with respect to playground resurfacing.”²⁰³ But of course the holding is not limited to playground resurfacing; it has to cover other equally secular uses of money. No court acting in good faith would say that a soccer field is different from a playground, or that a crossing guard is different from a safer playground surface. The real points of footnote 3 are “express discrimination based on religious identity” and “religious uses of funding.”

The day after *Trinity Lutheran*, the Court remanded two cases raising the issues it had reserved. The Colorado case is about allegedly

¹⁹⁸ *Id.* at 180.

¹⁹⁹ *Trinity Lutheran*, 137 S. Ct. at 2024.

²⁰⁰ *Id.* at 2023.

²⁰¹ *Id.*

²⁰² *Id.* at 2024 n.3.

²⁰³ *Id.*

religious uses of funding;²⁰⁴ the New Mexico case is about alleged discrimination that is not express.²⁰⁵

A. “*Religious Uses of Funding*”

1. Douglas County.²⁰⁶ — Douglas County, Colorado, in the southern exurbs of Denver, enacted a pilot program for a local school choice plan. The program funded scholarships, \$4575 per year, for up to 500 students to attend private schools, either religious or secular.²⁰⁷ The program was one of true private choice; including religious schools complied with the federal Establishment Clause as interpreted in *Zelman v. Simmons-Harris*.²⁰⁸ But the state supreme court invalidated the inclusion of religious schools. Three justices relied on the state constitution;²⁰⁹ the fourth vote (on a seven-judge court) relied on a state statute.²¹⁰

So as in *Trinity Lutheran*, state law requires express discrimination against religious organizations. Because religious schools teach both religious and secular courses, there is longstanding disagreement about whether funding such schools entails “religious uses of funding.” Footnote 3 reserves the issue.

Preferential funding for religious uses — funding religious activities without funding some broader category that includes corresponding secular activities — would be unconstitutional. That is the one clear judgment of the Founding-era debates,²¹¹ and the principle is so well settled that the Supreme Court has never had to enforce it. It emerges only in the Court’s explanations for upholding neutral funding programs. The Court upholds funding of religious organizations, and sometimes requires it, when the funding is part of a neutral program that treats religious and secular alike.

²⁰⁴ *Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2327 (2017) (mem.); *Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2325 (2017) (mem.); *Doyle v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2324 (2017) (mem.). Each of these orders vacated and remanded the same case to the Colorado Supreme Court: *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461 (Colo. 2015).

²⁰⁵ *Moses v. Skandera*, 367 P.3d 838 (N.M. 2015), *vacated sub nom. N.M. Ass’n of Non-Public Sch. v. Moses*, 137 S. Ct. 2325 (2017).

²⁰⁶ I am on the Supreme Court briefs for the Douglas County School District. I have argued that it is unconstitutional to fund secular private schools without funding religious private schools since long before Douglas County asked for my help. See Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 87 (2007); Laycock, *supra* note 58, at 160–61; *Religious Liberty: Hearings Before the S. Comm. on the Judiciary*, 104th Cong. 117 (1995) (statement of Douglas Laycock).

²⁰⁷ *Douglas County*, 351 P.3d at 464–65.

²⁰⁸ See *supra* p. 141.

²⁰⁹ *Douglas County*, 351 P.3d at 469–75 (plurality opinion).

²¹⁰ *Id.* at 478–79 (Márquez, J., concurring in the judgment).

²¹¹ See *supra* pp. 142–43.

There are a few cases in which clearly religious uses fall within a neutral secular category (theology scholarships,²¹² a religious magazine in a forum of subsidized student publications,²¹³ disaster-relief funds for churches²¹⁴) and a much larger range of cases in which religious organizations perform both secular and religious functions and the state funds the secular function — from K-12 religious schools to religious social service agencies to religious hospitals. By far the most controversial are the school cases, illustrated by *Douglas County*.

Douglas County wants to pay for private education in secular subjects. Religious schools, in Colorado and elsewhere, teach the full secular curriculum and satisfy the compulsory education laws.²¹⁵ There is a large secular function for the County to fund.

If we consider that Douglas County is funding the secular curriculum, then religious schools were excluded because of who and what they are — exactly what *Trinity Lutheran* says is unconstitutional.²¹⁶ But the *Douglas County* plaintiffs would say that the funding ban is based on what the religious schools do: they combine secular and religious instruction in a single program. As Justice Gorsuch predicted, the line between religious identity and religious use of money is manipulable.²¹⁷

2. *Segregating Religious and Secular Functions.* — Another difference between the two cases is that *Trinity Lutheran* involved earmarked funding that could be spent only on a specific secular project. In *Douglas County*, once the money passed through the hands of the student's parents and reached the school, the school could use it for whatever it chose, including religious instruction. This difference has not mattered in the cases about what the state *may* fund; the true-private-choice cases have abandoned any requirement of tracing funds to particular secular uses. And *Trinity Lutheran* is at odds with the idea that religious and secular functions cannot be separated in pervasively sectarian institutions.

But could Colorado cling to that idea? Could the state say that it still views religious and secular education as inseparable, so that sending vouchers to religious schools would inevitably subsidize religious as well as secular education? And should or would the Court defer to such a claim in a case about what the state *must* fund? It should not, but there

²¹² *Locke v. Davey*, 540 U.S. 712 (2004).

²¹³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

²¹⁴ Complaint, *Harvest Family Church v. FEMA*, No. 4:17-cv-02662 (S.D. Tex. Sept. 4, 2017), 2017 WL 3887451.

²¹⁵ See COLO. REV. STAT. § 22-33-104(2)(b) (2016) (exempting students in any “independent or parochial school which provides a basic academic education” from requirement of attending public school, and defining “basic academic education”).

²¹⁶ *Trinity Lutheran*, 137 S. Ct. at 2023.

²¹⁷ *Id.* at 2025–26 (Gorsuch, J., concurring in part).

is reason to fear that it might. To see why requires another look at *Rust v. Sullivan* and *Locke v. Davey*.

Rust reviewed a federal regulation that required any discussion of abortion to be rigidly segregated from federally funded contraception and prenatal care. If a medical provider with federal contraception funds wanted to provide abortion services, counseling, or referrals with its own money, it had to do so with separate personnel at a separate location.²¹⁸ The Court allowed the government to require this separation to avoid any risk that federal contraception funding might indirectly subsidize the overhead for abortion services.²¹⁹

Davey upheld a similar requirement without discussion. This requirement is why Davey could use his state scholarship for a business administration major at another university but not at a university where he was also majoring in theology.²²⁰ It avoided any risk that a scholarship for business administration might subsidize the theology major. But this prophylactic rule was so burdensome that it made the scholarship effectively unusable, even for business administration.²²¹ And it implied sweeping government power to control all activities on the campus, lest a state scholarship indirectly subsidize some activity the state disapproved of.²²²

This deference to the government's prophylactic desire to segregate funded and unfunded activities was only one layer of the funding discretion recognized in *Davey*. *Davey* emphasized "play in the joints" between free exercise and disestablishment — a range of state choices that would violate neither clause.²²³ Washington could include religious activities in neutral funding programs or exclude them.²²⁴ It could include some religious activities but not others: pervasively sectarian schools but not theology, theology courses but not theology majors.²²⁵ The state could fund religious organizations, refuse to fund them, or fund them with conditions.²²⁶

The power to fund or not to fund, and the power to attach strings to funding, maximizes government power over religious organizations. Government discretion entails the risk of government discrimination, and the vast discretion recognized in *Davey* dwarfs the discretion in one of fifteen criteria for awarding playground grants in *Trinity Lutheran*.²²⁷

²¹⁸ *Rust v. Sullivan*, 500 U.S. 173, 178–81 (1991) (describing the regulations).

²¹⁹ *Id.* at 196–99.

²²⁰ *Locke v. Davey*, 540 U.S. 712, 721 n.4 (2004).

²²¹ See Laycock, *supra* note 58, at 180–81.

²²² *Id.* at 183, 197.

²²³ *Davey*, 540 U.S. at 718–19 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

²²⁴ *Id.* at 719.

²²⁵ See *id.* at 724–25.

²²⁶ See Laycock, *supra* note 58, at 195–200.

²²⁷ See *supra* pp. 154–56.

Religious liberty is best protected if government funds nothing in the private sector, or if it funds religious and secular schools alike on criteria that are religiously neutral, objective, and enforceable. The Court should not perpetuate *Davey*'s regime of funding discretion by deferring to a state's insistence that it will not include religious schools in neutral funding programs unless religious and secular education are prophylactically segregated in separate buildings with separate faculties.

Davey borrowed all this discretion from the abortion funding cases.²²⁸ This discretion is equally dangerous to liberty in both contexts. Funding live birth but not abortion penalizes the decision to choose abortion in the same way that funding secular private schools but not religious private schools penalizes a school for being religious. The two cases are factually analogous.

But they are not legally analogous under current doctrine, because the underlying rights are formulated quite differently.²²⁹ The right to religious liberty is a right to government neutrality; government is not to discriminate for or against religion.²³⁰ But the Court has never defined abortion rights in terms of neutrality. The state cannot unduly burden the right to choose abortion, but it need not be neutral with respect to the choice.²³¹ The Court relied on this distinction between religious liberty and abortion rights in the past,²³² but lost sight of it in *Locke v. Davey*. The distinction matters, because whatever one's views with respect to abortion funding, those cases should not control religious liberty cases. If Douglas County chooses to fund private schools, it should be required to fund religious and secular schools alike.

B. Discrimination — Express and Otherwise

I. *Moses v. Skandera*. — At issue in *Moses v. Skandera*²³³ is a statewide program for providing textbooks and related educational materials to students in public and private schools.²³⁴ The program complied with the federal Establishment Clause as interpreted in *Board of Education v. Allen*.²³⁵ The New Mexico Supreme Court unanimously held that including private schools in this program violates a state

²²⁸ See *supra* pp. 159, 163.

²²⁹ See Laycock, *supra* note 58, at 176–78.

²³⁰ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993) (collecting cases); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (stating basic principle that government should neither advance nor inhibit religion).

²³¹ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (summarizing doctrine); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–79 (1992) (plurality opinion) (reviewing evolution of doctrine).

²³² *Maher v. Roe*, 432 U.S. 464, 473–75, 474 n.8 (1977).

²³³ 367 P.3d 838 (N.M. 2015).

²³⁴ *Id.* at 839–40.

²³⁵ 392 U.S. 236 (1968).

constitutional ban on expending state funds for “the support of any sectarian, denominational or private school.”²³⁶ So there is no “express discrimination” between religious and secular private schools;²³⁷ the only express discrimination is between public schools and private schools.

There is no plausible argument that discrimination between public schools and private schools is unconstitutional as such. That is, states are not required to privatize government services. Spending thousands of state dollars per student on secular public education, and none on religious or other private education, presents a serious policy question. But it does not present a constitutional question. Litigants attacking the New Mexico decision do not argue otherwise.

Rather, the petition for certiorari argued that the ban on aid to private schools is invalid because it was originally motivated by anti-Catholicism.²³⁸ The alleged discrimination is not “express”; it is hidden in a facially neutral provision. *Trinity Lutheran*’s footnote 3 reserves the issue.

2. *Express Discrimination, With or Without Bad Motive.* — A litigant challenging a law as discriminatory may either show a facial classification or show that a facially neutral law is “a purposeful device to discriminate.”²³⁹ The discrimination in *Trinity Lutheran* was facial, or as the Court called it, “express.” Secular playgrounds were eligible for funding; church playgrounds were not.

A law that facially discriminates against a protected class or activity is often accompanied by government hostility to that class or activity, but discriminatory motive in that sense is not required. The Court did not question Missouri’s motives in *Trinity Lutheran*; words such as “motive,” “animus,” or “hostile” do not appear in the opinion. The Court accepted Missouri’s claim that it was motivated only by a strong commitment to Establishment Clause values, and it held that justification inadequate.²⁴⁰ Whatever the state’s motives, facial discrimination is unconstitutional unless justified under the appropriate standard of review — in this context, by a compelling government interest.

This principle is not new, but it is important, because at least one outspoken commentator claimed that *Locke v. Davey* confirmed a rule that every free exercise claim requires proof of bad motive.²⁴¹ That

²³⁶ *Moses*, 367 P.3d at 841–49. For the quotation, see *id.* at 842 (emphasis omitted) (quoting N.M. CONST. art. XII, § 3).

²³⁷ *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

²³⁸ Petition for a Writ of Certiorari at 15–16, N.M. Ass’n of Non-Public Sch. v. Moses, No. 15-1409, 137 S. Ct. 2325 (2017), 2016 WL 2937091.

²³⁹ *Washington v. Davis*, 426 U.S. 229, 246 (1976).

²⁴⁰ *Trinity Lutheran*, 137 S. Ct. at 2024.

²⁴¹ MARCIA A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 215–16 (2005).

claim was not a plausible reading of the opinion, either when closely parsed or when viewed in light of its facts.²⁴² *Davey* did not say that a discriminatory refusal to fund is a neutral and generally applicable law. It said that a mere refusal to fund is not a burden on free exercise, or that the discrimination was justified by the state's interest in not funding the clergy, or some combination of the two.²⁴³ *Trinity Lutheran* confirms this reading, holding facial discrimination in funding unconstitutional without regard to motive.

With respect to *Davey*'s two rationales, *Trinity Lutheran* holds that a discriminatory refusal to fund does burden free exercise. And it adopts a narrow view of the potential justifications for that burden.

3. *Facially Neutral Laws with Bad Motive.* — The other way to prove a law discriminatory is to show that a facially neutral law was adopted for the purpose of harming or disadvantaging a protected class or activity.²⁴⁴ The challenged law need not have been enacted recently; in *Hunter v. Underwood*,²⁴⁵ Justice Rehnquist wrote for a unanimous Court in 1985, invalidating a provision of the Alabama constitution because of the racially discriminatory reasons for its adoption in 1901.²⁴⁶ Many judges are too cautious about finding bad motive, but when they find it, a facially neutral law becomes unconstitutionally discriminatory.

The many state constitutional provisions restricting government funding of sectarian or religious education — Blaine provisions²⁴⁷ — come in varied forms and have somewhat varied histories. But there is ample evidence that many Blaine provisions were motivated by rampant anti-Catholicism.²⁴⁸ Defenders of these provisions respond that anti-Catholicism was only one reason for their enactment,²⁴⁹ and that clear evidence of motive often does not appear in the sketchy records of state constitutional conventions.²⁵⁰

If a state's Blaine provision results in facial discrimination between religious and secular private education, then motive should not matter

²⁴² See Laycock, *supra* note 58, at 214–18.

²⁴³ *Locke v. Davey*, 540 U.S. 712, 720, 725 (2004).

²⁴⁴ See, e.g., *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (stating that facially neutral rule is invalid if adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

²⁴⁵ 471 U.S. 222 (1985).

²⁴⁶ *Id.* at 228–29.

²⁴⁷ See *supra* pp. 145–46.

²⁴⁸ See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion); JORGENSEN, *supra* note 94, at 60–221; Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 199–208 (2003); Heytens, *supra* note 108, at 134–40; Jeffries & Ryan, *supra* note 101, at 297–303.

²⁴⁹ See, e.g., Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 299–318.

²⁵⁰ See Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 65–68 (2005).

after *Trinity Lutheran*. Such “express discrimination” is unconstitutional without regard to motive. This may reduce the stakes of the debate over motive.

But motive is critical to *Moses*, because the only facial discrimination is public-private, not religious-secular. The resulting question seems largely a matter of proof: was the facially neutral New Mexico provision adopted because of a desire to prohibit funding for Catholic education?

The Supreme Court of New Mexico put the provision squarely in the mainstream of anti-Catholic Blaine amendments.²⁵¹ The court invoked this history to justify a broad interpretation, not to cast constitutional doubt on the state’s motives, but the history does both.

Not surprisingly, there is considerable variation in the extent to which anti-Catholicism appears in the record of each Blaine provision’s adoption. Colorado’s provision was adopted in 1876, simultaneously with the debate on the federal Blaine Amendment.²⁵² It was the subject of an open political fight between Protestants and Catholics, documented in the state’s newspapers and in the records of the constitutional convention.²⁵³

The Blaine provision in Missouri’s education article was added as a constitutional amendment in 1870, after a political fight provoked by a bill to aid Catholic schools in St. Louis.²⁵⁴ It prohibited any state or local appropriation “in aid of any creed, church, or sectarian purpose” or any school “controlled by any creed, church, or sectarian denomination whatever.”²⁵⁵ With a bit of further tightening, it was carried forward in the constitution of 1875²⁵⁶ and in the current constitution.²⁵⁷ Missouri did not rely on this provision in *Trinity Lutheran*, presumably because it is too obviously a Blaine amendment.

Missouri relied instead on article I, section 7, claiming that it was just an elaboration of a provision in Missouri’s original constitution from 1820.²⁵⁸ But that claim does not fit the facts. The 1820 constitu-

²⁵¹ *Moses v. Skandera*, 367 P.3d 838, 842–45 (N.M. 2015).

²⁵² COLO. CONST. art. IX, § 7. For the dates, see GLENN, *supra* note 90, at 169–70.

²⁵³ See Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 483–86 (Colo. 2015) (Eid, J., concurring in part and dissenting in part), cert. granted, vacated, and remanded, 137 S. Ct. 2327 (2017); GLENN, *supra* note 90, at 169–73; Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 CHURCH HIST. 349, 352–56 (1961).

²⁵⁴ J. Michael Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 MO. HIST. REV. 372 (2001).

²⁵⁵ MO. CONST. of 1865, art. IX, § 10 (1870), reprinted in IV 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 2228 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE].

²⁵⁶ MO. CONST. of 1875, art. XI, § 11, reprinted in IV THORPE, *supra* note 255, at 2264.

²⁵⁷ MO. CONST. art. IX, § 8.

²⁵⁸ Brief of Respondent at 19–20, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577), 2016 WL 3548944.

tion provided “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.”²⁵⁹ This provision closely tracks religious liberty provisions from the Founding,²⁶⁰ including Thomas Jefferson’s Act for Religious Freedom.²⁶¹ It is aimed at the Founding-era issue of earmarked taxes to support the construction of churches or the salaries of ministers.²⁶² This 1820 provision was further elaborated in the constitution of 1875, but it retained its focus on compelling individuals to support churches and ministers.²⁶³

The 1875 constitutional convention added what is now article I, section 7 in a separate section. This new provision focused not on what individuals must support but on appropriations that “directly or indirectly” aid “any church, sect or denomination of religion.”²⁶⁴ The timing and language of this provision suggests that it was part and parcel of the movement for Blaine provisions, but the records of the convention reveal only a discussion of whether it would prohibit the legislature from paying chaplains.²⁶⁵ An investigation of newspapers and other secondary sources is beyond the scope of this Comment.

Proving governmental motive to the satisfaction of judges is rarely easy. As these three examples illustrate, it will be harder in some states than in others. But motive is likely to be essential only in states like New Mexico, where a facially neutral provision prohibits all aid to private education. If that provision was motivated by anti-Catholicism, it should be unconstitutional.

VI. CONCLUSION

None of the religious claimants in these cases asserts a substantive right to funding. Rather, they claim a right not to be discriminated against in funding programs that a state voluntarily enacts. Missouri does not have to fund playgrounds, Washington does not have to fund scholarships, Douglas County does not have to fund school choice, and New Mexico does not have to fund textbooks. But once one of the political branches enacts a program that includes funding for private organizations, churches and religious schools and religious students have a right not to be excluded because of religion. And they have a right not

²⁵⁹ MO. CONST. of 1820, art. XIII, § 4, *reprinted in* IV THORPE, *supra* note 255, at 2163.

²⁶⁰ See, e.g., VT. CONST. of 1777, ch. I, § III, *reprinted in* VI THORPE, *supra* note 255, at 3740 (“[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience.”).

²⁶¹ VA. CODE ANN. § 57-1 (2012) (enacted 1786) (“[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . .”).

²⁶² See *supra* pp. 142–43.

²⁶³ MO. CONST. of 1875, art. II, § 6, *reprinted in* IV THORPE, *supra* note 255, at 2230.

²⁶⁴ *Id.* art. II, § 7, *reprinted in* IV THORPE, *supra* note 255, at 2230.

²⁶⁵ IV DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 55–63 (Isidor Loeb & Floyd C. Shoemaker eds., 1938).

to have the whole program invalidated, for religious and secular schools alike, because of anti-Catholic bias in drafting the state constitution.

Trinity Lutheran resolves these questions only with respect to express discrimination and secular uses of funding. But its principles are that funding pursuant to neutral secular criteria does not violate the Establishment Clause, and that discrimination against religion does violate the Free Exercise Clause.

The logic of nondiscrimination should extend these principles to funding secular functions that are to some extent combined with religious functions, as in church-affiliated schools. The principles may also extend to clearly religious uses that fall within secular funding categories; *Davey* may eventually be overruled, or confined to activities as intensely religious as preparing for the ministry. Where sufficient evidence of motive is available, *Trinity Lutheran* should extend to cases of anti-religious discrimination shrouded in facially neutral provisions. But all those issues are for the next round of cases.