"PLAY IN THE JOINTS" AND A PLAYGROUND: BUILDING A NEW TEST POST-*TRINITY LUTHERAN*

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I. INTRODUCTION

The Religion Clauses face renewed scrutiny following the "marquee church-state case"[1] of 2017 and one of the year's "most important rulings."[2] In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[3] the United States Supreme Court applied the "play in the joints" doctrine to a church playground.[4] For the first time in history, the Supreme Court held "that the Constitution requires the government to provide public funds directly to a church."[5] Historically, the Court has reasoned that "there is 'play in the joints' between what the Establishment Clause permits and what the Free Exercise Clause compels."[6] Now, applying the "strictest scrutiny,"[7] the Court found that Missouri violated the Free Exercise Clause when it denied Trinity Lutheran public funding for playground resurfacing solely because of the organization's religious status.[8] There is room for "playing" between the two Religion Clauses, but now one side outweighs the other. The seesaw is off-balance.

This Note discusses the *Trinity Lutheran* decision, responds to its criticism, and proposes a new test for similar cases undoubtedly on the horizon. Part II provides information on the Religion Clauses and *Trinity Lutheran's* facts. Part III summarizes the Court's opinion and holding. Part IV details criticism from concurring Justices, dissenting Justices, and legal scholars. To answer the criticisms, Part V proposes a new "play in the joints" test, called the "Seesaw Test," for courts to use when the government denies a public benefit based on religion. The test would likely be renamed in the future, but this name will be used for this Note. The Seesaw Test has two parts to decide for a religious party or the government. First, the court should

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[1] Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2016–2017 CATO SUP. CT. REV., 105, 105.

[2] Erwin Chemerinsky, *Waiting for Gorsuch: October Term 2016*, 20 GREEN BAG 2D 351, 352 (2017), http://www.greenbag.org/v20n4/v20n4_articles_chemerinsky.pdf.

[3] 137 S. Ct. 2012 (2017).

[4] *Id.* at 2019. For brevity, in-text this case will be referred to as *Trinity Lutheran*.

[5] *Id.* at 2027 (Sotomayor, J., dissenting); *see also id.* at 2024–25.

[6] *Id.* at 2019.

[7] *Id.* at 2021–22.

[8] *Id.* at 2024–25.

balance both sides' arguments to decide whether the public benefit was denied because of past or present religious status or because of future religious use. Second, the weight either shifts against the government or the religious party. If the denial was based on religious status, then the government must show excessive entanglement or endorsement. However, if the denial was based on religious use, then the religious party must show minimal entanglement and incidental endorsement. When this situation arises, the Seesaw Test requires an analysis of both the Free Exercise and Establishment Clauses. This evaluation is in contrast with what the Court did in *Trinity Lutheran* when it effectively ignored any Establishment Clause analysis.[9] Part VI applies the Seesaw Test to demonstrate its functionality with the *Trinity Lutheran* decision and various other issues.

II. BACKGROUND INFORMATION AND FACTS OF TRINITY LUTHERAN

A. The Religion Clauses, "Play in the Joints," and Blaine Provisions

A foundational knowledge of the Religion Clauses is necessary to understand *Trinity Lutheran*, its criticism, and the "Seesaw Test." The First Amendment has two religion clauses: the Establishment Clause and the Free Exercise Clause.[10] The narrow original understanding is that the Clauses were intended to "prevent religious persecution" and the instatement of a federally established religion.[11] The people wanted to allow "the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, [to] sit down at the common table of the national councils without any inquisition into their faith, or mode of worship."[12] Also, the people wanted "the whole power

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[9] *See id.* at 2019; *see also id.* at 2028 (Sotomayor, J., dissenting) (noting the Court's "silence" on this issue).

[10] U.S. CONST. amend. I. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion." *Id.* The Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Id.* Madison's original proposal for an amendment on religion stated: "[T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed." 1 ANNALS OF CONGRESS 434 (1789) (Joseph Gales, ed., 1834); *Madison's Notes for the Bill of Rights*, LIBRARY OF CONG., https://www.loc.gov/exhibits/religion/rel06.html (last visited Apr. 1, 2018) (quoting James Madison's notes at the First Congress).

[11] CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 112-9., at 1073 (2d Sess. 2017), https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017.pdf [hereinafter CONAN]; *see also* T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 224–25 (3d ed. 1898).

[12] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 703 (Carolina Acad. Press 1987) (1833).

over the subject of religion . . . left exclusively to the state governments, to be acted upon according to [the state's] own sense of justice, and the state constitutions."[13] Contrast this with the broader view that the Clauses were meant to erect "a wall of separation between church and state"[14] at both the state and federal levels.[15] In the 1940s, the Court extended the Religion Clauses to the states,[16] but "the Court remains sharply split on how to interpret both clauses."[17]

In *Everson v. Board of Education of the Township of Ewing*,[18] the Supreme Court held that the Establishment Clause bars the government from passing laws that "aid one religion," "prefer one religion over another," or "aid all religions."[19] Today, courts utilize three different tests to determine whether government action violates the Establishment Clause. First, there is the "coercion test," which asks whether government action directs individuals to engage in a formal religious exercise.[20] However, some Justices have criticized this test for making the

[13] *Id.* at 702–03.
[14] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
[15] *See infra* note 19 and accompanying text.
[16] Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (Establishment Clause).
[17] CONAN, *supra* note 11, at 1074.
[18] 330 U.S. 1 (1947).
[19] *Id.* at 15. "Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view." CONAN, *supra* note 11, at 1073 n.11. In more specific detail, the Court held:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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 practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Everson, 330 U.S. at 15–16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
[20] Lee v. Weisman, 505 U.S. 577, 592–93 (1992).

Establishment Clause a "virtual nullity."[21] Second, there is the "endorsement test," which looks to the context of each case to see if any reasonable observer would deem government to be endorsing religion.[22] Scholars and Justices also criticize the endorsement test for being "too amorphous to provide adequate guidance."[23] Third, there is the *Lemon* test, which "remain[s] the primary standard of Establishment Clause validity"[24] and has been used in recent Establishment Clause decisions.[25] The *Lemon* test's three prongs declare that (1) a law must have a "secular . . . purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster an excessive government entanglement with religion."[26] The first prong, a secular purpose, frequently passes the *Lemon* test, and there is little disagreement among justices and scholars on this

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[21] CONAN, *supra* note 11, at 1076–77 (quoting *Lee*, 505 U.S. at 621 (Souter, J., concurring)); *see also* Cty. of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Logically, coercing non-adherents to "support or participate in any religion or its exercise," *Cty. of Allegheny*, 492 U.S. at 659–660 (Kennedy, J., concurring in the judgment in part and dissenting in part), forces those individuals to forgo their Free Exercise right. Compelling (i.e., coercing) support for religious establishments inherently violates a citizen's ability to freely exercise their religion.

[22] *Cty. of Allegheny*, 492 U.S. at 597.

[23] CONAN, *supra* note 11, at 1076–77; *see Cty. of Allegheny*, 492 U.S. at 675–77 (Kennedy, J., concurring in the judgment in part and dissenting in part); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995) (opinion of Scalia, J.). This test relies on the Court deciding if a "reasonable observer" would view the government action as endorsement or disapproval. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *Allegheny Cty.*, 492 U.S. at 625 (1989) (O'Connor, J., concurring); Bd. of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712 (1994) (O'Connor, J., concurring). This gives too little guidance for lower courts to make decisions. *Cty. of Allegheny*, 492 U.S. at 675–77 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[24] CONAN, *supra* note 11, at 1076. The "coercion test"—whether government action directs formal religious exercise as to encourage or influence participation of those who object religiously to said exercise, *Lee*, 505 U.S. at 592–93—is criticized for making the Establishment Clause irrelevant, CONAN, *supra* note 11, at 1076–77. The "endorsement test," which looks into context to see if any reasonable observer would deem government to be endorsing religion, *Cty. of Allegheny*, 492 U.S. at 597, is criticized for being "too amorphous to provide adequate guidance," CONAN, *supra* note 11, at 1077.

[25] CONAN, *supra* note 11, at 1076 n.29 ("Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the *Lemon* tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional under the *Lemon* tests, as well as under the coercion and endorsement tests, a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); Mitchell v. Helms, 530 U.S. 793 (2000) (upholding under the *Lemon* tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).").

[26] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal quotation marks omitted).

prong.[27] The second and third prongs, primary effect and excessive entanglement, have "proven much more divisive."[28] Ultimately, "shoehorning" all Establishment Clause cases into any one test may be inappropriate,[29] and instead, "different contexts may call for different approaches."[30]

In Free Exercise[31] cases, by contrast, the Court uses different levels of scrutiny[32] to review government actions that interfere with religion. In most of these cases, "formal neutrality" is the common standard.[33] Stated in *Employment Division, Oregon Department of Human Resources v. Smith*,[34] "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and *neutral* law of general applicability on the ground that the law proscribes (or prescribes) *conduct* that his religion prescribes (or proscribes).'"[35] However, the Supreme Court has been "inconsistent" when distinguishing between "belief" and "conduct."[36] In recent years, some "religiously

[27] CONAN, *supra* note 11, at 1083. "There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public-school system that would accompany the financial failure of private schools." *Id.*; *see also* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653–54 (1980); 444 U.S. at 665 (Blackmun, J., dissenting); Wolman v. Walter, 433 U.S. 229, 240 (1977) (plurality opinion); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); 413 U.S. at 805 (Burger, J., dissenting); 413 U.S. at 812–13 (Rehnquist, J., dissenting); 413 U.S. at 813 (White, J., dissenting).

[28] CONAN, *supra* note 11, at 1083.

[29] Bd. of Educ. v. Grumet, 512 U.S. 687, 719 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *see also* CONAN, *supra* note 11, at 1077.

[30] CONAN, *supra* note 11, at 1077; *see also Grumet*, 512 U.S. at 719 (O'Connor, J., concurring in part and concurring in the judgment).

[31] "The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222–23 (1963). The Clause bars "governmental regulation of religious beliefs as such." Sherbert v. Verner, 374 U.S 398, 402 (1963). The government cannot "impede the observance of one or all religions or . . . discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[32] CONAN, *supra* note 11, at 1077. For the purposes of this Note, only two standards are relevant.

[33] *Id.* "Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause." *Id.* at 1120 n.257.

[34] 494 U.S. 872 (1990).

[35] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (emphasis added). For this doctrine's lineage, see generally Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878).

[36] CONAN, *supra* note 11, at 1120. The Court "has consistently affirmed that the Free Exercise Clause protects religious beliefs, [but] protection for religiously motivated conduct has waxed and waned over the years." *Id.* at 1123.

motivated conduct" has been protected from "generally applicable prohibitions."[37] One reason for this is because intentional government discrimination against a single religion triggers strict scrutiny.[38] *Everson* held that the government "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."[39] Specifically, if a government action targets individuals, people, or groups for "special disabilities" because of "religious status,"[40] then the law must be narrowly tailored to serve a compelling interest. Overall, religious observers must be protected "against unequal treatment."[41]

There is a balancing act between the opposing Religion Clauses. Casting one clause in "absolute terms," and expanding it "to a logical extreme," would kick the second off of the seesaw.[42] The Court has avoided this absurdity.[43] In *Walz v. Tax Commission of the City of New York*,[44] the Court explicitly stated that "there is room for *play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[45] More specifically, in practice, there are some required "free-exercise-mandated accommodations" that do not violate the

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[37] CONAN, *supra* note 11, at 1120–21. Most examples involve unemployment benefits. *See generally* Frazee v. Ill. Dept. of Emp't Sec., 489 U.S. 829 (1989) (requiring unemployment benefits for a person with sincere religious beliefs who did not belong to a particular church or sect and who did not claim that refusal to work on Sunday was based upon teaching of an established religious body); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 107 (1987) (requiring unemployment benefits when job loss resulted from change in religious beliefs after employment); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (requiring unemployment benefits for religious refusal to participate in arms production); Sherbert v. Verner, 374 U.S. 398 (1963) (requiring unemployment benefits to individuals who, for religious reasons, refused to work on Saturdays). Another historically notable example concerns children's education. *See* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that an Amish parent is not required to send their children to complete compulsive education).

[38] *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). Strict scrutiny means that, to remain valid, a law must be narrowly tailored to serve a compelling interest. For two examples of this judicial standard of review, see Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963).

[39] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (emphasis in original).

[40] *See Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533.

[41] *See id.* at 542.

[42] Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

[43] *See, e.g.*, *id.* at 669; *see also* Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); Locke v. Davey, 540 U.S. 712, 718 (2004).

[44] 397 U.S. 664 (1970).

[45] *Id.* at 669 (emphasis added); *see also Cutter*, 544 U.S. at 713; *Locke*, 540 U.S. at 718.

Establishment Clause[46] and some optional religious accommodations that do not create an establishment of religion.[47] This is the "play in the joints" doctrine.[48] In principle, this concept has been well accepted by the Court,[49] but the Court has "struggled to find a neutral course between the two Religion Clauses."[50] Cases decided after *Walz* fleshed out just how much the government can play in the joints without getting hurt.[51] In short, "equal treatment is not establishment,"[52] but the government must not go "too far" when promoting Free Exercise,[53] and must not "aid one religion," "prefer one religion over another," or "aid all religions."[54]

In 1876, Senator James G. Blaine proposed an amendment to the United States Constitution, which failed in the Senate,[55] but "would have prohibited states from directing public funds or lands to the use or control of 'religious sects or denominations.'"[56] Accordingly, scholars call these provisions "Blaine Amendments" or "Baby Blaines."[57] Today, nearly forty

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[46] CONAN, *supra* note 11, at 1121. "This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987). For examples, see *supra* note 37 and accompanying text.

[47] CONAN, *supra* note 11, at 1121; *see also, e.g.*, *Walz*, 397 U.S. at 669 (holding that grants of tax exemption to religious organizations do not violate the Establishment Clause); *Cutter*, 544 U.S. at 713 (holding that, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), facilities that accept federal funds cannot deny prisoners accommodations that are necessary to engage in activities for the practice of their own religious beliefs).

[48] Although the Court does not specifically call "play in the joints" a doctrine, for the purposes of this Note, "play in the joints" will be referred to either as a doctrine or "the Doctrine."

[49] *See e.g.*, *Walz*, 397 U.S. at 669 (emphasis added); *see also Cutter*, 544 U.S. at 713; *Locke*, 540 U.S. at 718.

[50] *Walz*, 397 U.S. at 668.

[51] *See Cutter*, 544 U.S. at 713 (holding that the government can give accommodations to prisoners to practice religious beliefs); *Locke*, 540 U.S. at 715 (upholding a publicly funded scholarship program which excluded students pursuing a "degree in devotional theology").

[52] Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341 (1999).

[53] CONAN, *supra* note 11, at 1122; *see also, e.g.*, Bd. of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 706–07 (1994) ("[A]ccommodation is not a principle without limits . . . . [One limit is that] neutrality as among religions must be honored."); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (finding that state sales tax exemption for religious publications violates the Establishment Clause) (plurality opinion); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973) (holding that tuition reimbursement grants to parents of parochial school children violate Establishment Clause).

[54] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[55] Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 145 (2017).

[56] Garnett & Blais, *supra* note 1, at 108.

[57] *Id.*

states (including Missouri) have constitutional provisions prohibiting or limiting public funding of religious institutions and activities.[58] Modern Blaine Provisions[59] are considered to reflect "anti-Catholicism, nativism, and nationalism of the 19th and early 20th centuries"[60] and "there is ample evidence" that rampant anti-Catholicism motivated many Blaine Provisions.[61]

B. Facts and Procedural History of Trinity Lutheran

The Missouri Department of Natural Resources offers state grants to public and private schools, nonprofit daycare centers, and other nonprofit entities.[62] The grant money is used to purchase rubber playground surfaces made from recycled tires.[63] Due to scarce resources, the Department awards a limited number of grants on a competitive basis after scoring several criteria.[64]

The Trinity Lutheran Church Child Learning Center, initially established as a nonprofit organization in 1980, merged with Trinity Lutheran Church in 1985 and operates under its supervision on church property.[65] The Center admits children from any religion.[66]

In 2012, the Center decided to participate in Missouri's Scrap Tire Program to replace a significant portion of its playground floor with a rubber surface.[67] After describing the

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[58] *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), https://s3.amazonaws.com/fedsoc-cms-public/library/doclib/20110603_KatzEngage12.1.pdf (collecting citations); Toby J. Heytens, Note*, School Choice and State Constitutions*, 86 VA. L. REV. 117, 123 n.32 (2000) (collecting various counts); *see also* Garnett & Blais, *supra* note 1, at 108.

[59] For the rest of this note, Blaine Provisions and Baby Blaines will be referred to collectively as "Blaine Provisions."

[60]Garnett & Blais, *supra* note 1, at 108; *see also* John T. McGreevy, A History of the Culture's Bias, Remarks at the Anti-Catholicism: The Last Acceptable Prejudice Conference (May 24, 2002).

[61] Laycock, *supra* note 55, at 166; *see also, e.g.*, Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion).

[62] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

[63] *Id.*

[64] *Id.* These criteria include "the poverty level of the population in the surrounding area and the applicant's plan to promote recycling." *Id.*

[65] *Id.*

[66] *Id.* The available facts make it unclear whether children from non-religious backgrounds are banned. On the Center's current website, a Parent Questionnaire asks for church affiliation, whether the child has been baptized, when such baptism occurred, and the child's other religious experiences. *See Parent Questionnaire 2017-2018*, TRINITY LUTHERAN CHILD LEARNING CTR., https://tlclckids.files.wordpress.com/2012/10/parent-questionnaire-2017-18.pdf (last visited May 4, 2018).

[67] *Trinity Lutheran,* 137 S. Ct. at 2017–18. The Center disclosed its status as a ministry of Trinity Lutheran Church and explained that "the Center's mission was 'to provide

playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project.[68] The Center ranked fifth out of forty-four in the 2012 Scrap Tire Program and was poised to receive a grant.[69]

Despite its high score, "the Center was deemed categorically ineligible to receive a grant."[70] The Department had "a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[71] The Department believed that the Missouri Constitution compelled the policy.[72] Article I, Section 7 of the Missouri Constitution provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.[73]

A rejection letter explained that "the Department could not provide financial assistance directly to a church."[74] Because Trinity Lutheran Church operated the Center, the Center could not receive a grant.[75]

Trinity Lutheran sued the Director of the Department.[76] The Church alleged that the Department's failure to approve the

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a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.'" *Id.*

[68] The benefits included "increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment by putting recycled tires to positive use." *Id.* at 2018. "The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours." *Id.*

[69] *Id.* "The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant." *Id.*

[70] *Id.*

[71] *Id.* at 2017.

[72] *Id.*

[73] MO. CONST. art. I, § 7. This language is similar to Blaine provisions throughout the United States. *See also Trinity Lutheran*, 137 S. Ct. at 2037–38 (Sotomayor, J., dissenting) (citing thirty-eight states with a similar provision).

[74] *Trinity Lutheran*, 137 S. Ct. at 2018.

[75] *Id.*

[76] *Id.*

Center's application violated the Free Exercise Clause.[77] Trinity Lutheran sought to prohibit the Department from discriminating against the Church on that basis in any future grant applications.[78] The Department filed a motion to dismiss in district court.[79] Deciding against Trinity Lutheran, the district court granted the motion and, on appeal, the Eighth Circuit affirmed.[80]

III. THE DECISION

The Supreme Court reversed the Eighth Circuit's decision and declared that Trinity Lutheran could receive the grant.[81] Chief Justice Roberts, writing for the majority, noted that the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[82] However, because the parties agreed that the Establishment Clause did not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program, the Court reasoned that there was no need to address the Establishment Clause in its opinion.[83]

Rather, the Court focused its analysis entirely on the Free Exercise Clause.[84] The Court recognized that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."[85] The Court outlined the rigorous protection provided under the Free Exercise Clause.[86]

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 2018–19. The Eight Circuit recognized that it was "rather clear" that Missouri could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause. *Id.* However, the Free Exercise Clause did not compel the state to ignore the anti-establishment principle in its state Constitution. *Id.* The court viewed a grant to a religious institution as a "hallmark[] of an established religion" and held that religious status could be used to deny an application. *Id.* Judge Gruender dissented and distinguished *Locke* narrowly because it concerned the issue of funding for religious clergy training and "did not leave states with unfettered discretion to exclude the religious from generally available public benefits." *Id.* An equally divided court denied a rehearing *en banc*. *Id.*
[81] *Id.* at 2019.
[82] U.S. CONST. amend. I.
[83] *Trinity Lutheran*,137 S. Ct. at 2019.
[84] *Id.*
[85] *Id.* (citing Locke v. Davey, 540 U.S. 712, 718 (2004)). The origin of the "play in the joints" phrase comes from *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970). In *Walz*, the Court discussed First Amendment protections and pointed out that the two guarantees are often in conflict. *Id.* Further, the Court held that it "will not tolerate either governmentally established religion or governmental interference with religion" and that "there is room for play in the joints . . . which will permit religious exercise to exist without sponsorship." *Id.* at 669.
[86] *Trinity Lutheran*, 137 S. Ct. at 2019–21.

Laws are subjected to the strictest scrutiny when they target religious observers for unequal treatment and special disabilities based on their religious status.[87] Only a state interest of the highest order can justify denying a publically available benefit, solely on account of religious identity, because it imposes a penalty on the free exercise of religion.[88] Conditioning the availability of benefits upon a recipient's willingness to surrender his or her religious status effectively penalizes the free exercise of constitutional liberties.[89] The Court acknowledged that it had rejected free exercise challenges when "the laws in question have been neutral and generally applicable without regard to religion."[90] However, the Court distinguished these laws from "those that single out the religious for disfavored treatment," such as the Department's policy.[91]

After reviewing general free exercise precedent, the Court focused a large portion of its opinion on distinguishing *Trinity Lutheran* from *Locke v. Davey*.[92] In *Locke*, the Court allowed a state to deny theology students access to a generally available college scholarship program.[93] As an example of "play in the joints," the state could have allowed theology students in its program while not violating the Establishment Clause.[94] However, despite targeting theology students for exclusion, the decision "not to fund" religious training did not offend the Free Exercise Clause.[95] The plaintiff in *Locke* "was not denied a scholarship

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[87] *Id.* at 2024 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993) (internal quotation marks omitted).
[88] *Id.* at 2019 (citing McDaniel v. Paty, 435 U.S. 618, 628, (1978) (plurality opinion)).
[89] *Id.* at 2021.
[90] *Id.* at 2020 (noting that in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449(1988), the Court held that individuals were not being "coerced by the Government's action into violating their religious beliefs" and the Government action did not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"); *see also id.* (noting that in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) the Court held that the Free Exercise Clause did not entitle the church members to not follow general criminal laws on account of their religion).
[91] *Id.* at 2020–21 (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (striking down facially neutral ordinances that outlawed certain forms of animal slaughter because, despite their facial neutrality, the ordinances had a discriminatory purpose to prohibit sacrificial rituals related to a specific religion but disagreeable to other locals)).
[92] *Trinity Lutheran*, 137 S. Ct. at 2022–24.
[93] Locke v. Davey, 540 U.S. 712 (2004).
[94] *Id.* at 720–21.
[95] *Id.* (explaining that "[t]raining someone to lead a congregation is an essentially religious endeavor"). Further, refusing to fund religious training was "far milder" than other historical restrictions on religious practices that offend the Free Exercise Clause. *Id.* (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law designed to restrict the ritual of a single minority religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law barring ministers from serving as

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."[96]

By contrast, in *Trinity Lutheran*, the funds would be used to resurface a church-owned playground that is open to the public.[97] The Court held that excluding an otherwise qualified church from a government grant program—on the basis of religious status—violated the Free Exercise Clause.[98] The majority declared that "Trinity Lutheran was denied a grant simply because of what it is—a church"[99] and, applying strict scrutiny, the Court found that "Missouri's policy preference for skating as far as possible from religious establishment concerns" was not a compelling interest.[100] Only a state interest "of the highest order" would be acceptable, and the Free Exercise Clause bars seeking greater separation of church and state beyond the already existing Establishment Clause.[101] The Court quipped that the consequences of the State's discriminatory policy may have resulted in only, "in all likelihood, a few extra scraped knees,"[102] but excluding Trinity Lutheran "from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."[103]

Despite a seven-two decision for Trinity Lutheran Church, Footnote Three[104] fractured the Justices.[105] It provides: "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."[106] Footnote Three is meant to "carefully limit[] the reach" of *Trinity Lutheran*, but the Justices disagreed on its importance and influence.[107]

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constitutional convention delegates); and Sherbert v. Verner, 374 U.S. 398 (1963) (denying benefits to Sabbatarians)).

[96] *Trinity Lutheran*, 137 S. Ct. at 2023.

[97] *Id.* at 2017–19.

[98] *Id.* at 2023–25.

[99] *Id.* at 2023.

[100] *Id.* at 2024.

[101] *Id.*

[102] *Id.* at 2024–25 (comparing this to chains, torture, or denial of political office on account of religion).

[103] *Id.* at 2025.

[104] "Footnote Three" is significant to this Note and will be capitalized.

[105] Only four Justices, Chief Justice Roberts and Justices Kennedy, Alito, and Kagan, joined the Court's opinion and Footnote Three in full. *Trinity Lutheran*, 137 S. Ct. at 2016. Justices Thomas and Gorsuch joined the opinion, except for Footnote Three. *Id.* Justices Breyer, Sotomayor, and Ginsburg wrote entirely separate opinions and did not join Footnote Three. *Id.*

[106] *Id.* at 2024 n.3 (plurality opinion).

[107] *See id.* at 2025 (Thomas, J., concurring in part); *see id.* at 2025 (Gorsuch, J., concurring in part); *see also* Laycock, *supra* note 55, at 135. Recall that only four

IV. THE FRACTURING FOOTNOTE, SCATHING DISSENT, AND SCHOLARLY CRITICISM

A. The Concurrences

Three Justices concurred with the majority opinion but disagreed on the reach of Footnote Three. Justices Thomas and Gorsuch joined in each other's concurrences and advocated for a significantly broader holding.[108] They agreed that whether a grant recipient puts the money to religious use is irrelevant and predicted that "a line barring religious use of money would be unstable."[109] Justice Thomas took issue with the Court endorsing *Locke* for even a "mild kind" of discrimination against religion.[110] Justice Gorsuch leveled two criticisms at the majority opinion.[111] First, he argued that the majority erred because "the Court leaves open the possibility" that any "useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*."[112] He argued that there was effectively no line between status and use.[113] Further, the difference was irrelevant because the First Amendment allows for free exercise of religion, which includes both status and use.[114] Second, Justice Gorsuch worried that Footnote Three might lead some to read that the Court's ruling applied only to cases involving a playground "or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy."[115] He believes that Footnote Three is "entirely correct,"[116] but that the general principles, in this case, do and should apply to other instances of discrimination against religious exercise.[117] Justice Thomas agreed with Justice

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Justices joined the Court's opinion, and Footnote Three, in full. *Supra* note 105 and accompanying test.

[108] *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (Thomas, J., concurring in part); *id.* at 2025 (Gorsuch, J., concurring in part); *see also* Laycock, *supra* note 55, at 135.

[109] Laycock, *supra* note 55, at 136; *see also Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part); 137 S. Ct. at 2025 (Gorsuch, J., concurring in part).

[110] *See Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part). Nevertheless, Justice Thomas joined the majority because the Court "appropriately construe[d] *Locke* narrowly." *Id.* (Thomas, J., concurring in part).

[111] *Id.* at 2025 (Gorsuch, J., concurring in part).

[112] *Id.*

[113] *Id.*

[114] *Id.* at 2026.

[115] *Id.*

[116] This is likely based on the principle that judicial decisions are theoretically limited to the facts of the case at bar.

[117] *Trinity Lutheran*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part).

Gorsuch's criticism of Footnote Three,[118] and both Justices unmistakably desired a broader holding.[119]

Justice Breyer concurred only in the judgment and, contrasted with Justices Thomas and Gorsuch, hinted that there can be a limit to Free Exercise in this case.[120] Initially, he emphasized the Court's ruling in *Everson v. Board of Education*,[121] where the Court declared that depriving parochial schools of such "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment."[122] Justice Breyer equated Missouri's Scrap Tire program with the general government services in *Everson* that provide a "public benefit" and should not be denied.[123] However, Justice Breyer hinted that Establishment Clause concerns may arise if there is an "administrative or other reason to treat churches differently."[124] Ultimately, in this case, he thought Free Exercise was violated and the Court "need not go further" when the sole reason for different treatment is faith.[125]

B. The Dissent

Justice Sotomayor, joined by Justice Ginsburg, wrote a spirited dissent.[126] Justice Sotomayor argued that the Court "slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both."[127] She further claimed that "[t]he Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."[128]

On Establishment Clause grounds, Justice Sotomayor strongly opposed the majority and criticized the Court for ignoring the Establishment Clause portion of the analysis.[129] She provided additional facts, left out of the majority opinion, regarding the religious purpose of the Church, Center, and playground.[130] Justice Sotomayor emphasized precedent that the

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[118] *See* Laycock, *supra* note 55, at 136.
[119] *See Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part); *id.* at 2025–26 (Gorsuch, J., concurring in part).
[120] *Id.* at 2026–27 (Breyer, J., concurring).
[121] 330 U.S. 1 (1947).
[122] *Trinity Lutheran*, 137 S. Ct. at 2026 (Breyer, J., concurring).
[123] *Id.* at 2026–27.
[124] *Id.* at 2027.
[125] *Id.*
[126] *Id.* at 2027 (Sotomayor, J., dissenting).
[127] *Id.*
[128] *Id.*
[129] *Id.* at 2029–30.
[130] *Id.* at 2027–28. Specifically, she provided:

government may not directly fund religious exercise, a rule that is clearest when "funds flow directly from the public treasury to a house of worship."[131] Unlike other cases involving the funding of religious institutions, Trinity Lutheran did not "and cannot" give assurances that they would not use the money for religious activities.[132] The State now will give "direct subsidies of religious indoctrination, with all the attendant concerns that led to the Establishment Clause."[133] Lastly, Justice Sotomayor believed that this opinion would unconstitutionally lead to the government showing preference to religious groups with "a belief system that allows them to compete for public dollars" and favors "those well-organized and well-funded enough to do so successfully."[134]

Justice Sotomayor also vehemently challenged the Court's reasoning under the Free Exercise Clause.[135] She supported the "play in the joints" doctrine[136] but urged deference

> Founded in 1922, Trinity Lutheran Church (Church) operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth. . . . The Church uses preaching, teaching, worship, witness, service, and fellowship according to the Word of God to carry out its mission to make disciples. . . . The Church's religious beliefs include its desire to associat[e] with the [Trinity Church Child] Learning Center. . . . Located on Church property, the Learning Center provides daycare and preschool for about 90 children ages two to kindergarten. . . . The Learning Center serves as a ministry of the Church and incorporates daily religion and developmentally appropriate activities into ... [its] program. . . . In this way, [t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of the area. . . . These activities represent the Church's sincere religious belief . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members.

Id. (internal quotation marks and citations omitted) (alterations original).

[131] *Id.* at 2028–29; *see also* Tilton v. Richardson, 403 U.S. 672 (1971) (holding that subsidizing the construction of facilities used for non-secular purposes would advance religion, but the government may give money to religious universities if the aid is of "nonideological character" and is a one-time grant that did not require constant government surveillance).

[132] *Id.*; *see also*, *e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 875–76 (1995) (Souter, J., dissenting) (chronicling cases).

[133] *Trinity Lutheran*, 137 S. Ct. at 2031.

[134] *Id.*

[135] *Id.* at 2031–32.

[136] *Id.*

to the states as to how to apply it.[137] She reasoned that the states initially funded houses of worship but over time restricted the practice.[138] Justice Sotomayor made numerous historical and originalist arguments for allowing states to choose how to navigate the "play in the joints."[139] Returning to *Locke*, Justice Sotomayor emphasized that the reasoning for the decision in that case was primarily based on "historic and *substantial* state interest" supporting a state's decision to not give funds directly to a church.[140] She noted that "[a]lmost all of the [s]tates that ratified the Religion Clauses" had that rule, and thirty-eight states today have provisions similar to Missouri's Article I, Section 7.[141] She considered separation of church and state to be a compelling interest.[142] Justice Sotomayor agreed with Justice Breyer's concurrence in principle,[143] but disagreed that this case did not involve a true generally available public benefit because it only "selective[ly] benefits a few recipients a year."[144] For that reason, she believed the comparison to *Everson* was "inapt."[145]

Justice Sotomayor concluded that the Court "blinds itself to the outcome . . . history requires and leads us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment."[146]

C. Summary of Scholarly Criticism

Many scholars have commented on the *Trinity Lutheran* decision. Some hail the decision for expanding religious freedoms[147] and that "religious conservatives are happy" with the outcome.[148] However, some commentators disagree with *Trinity Lutheran* and decry the decision for wearing down the wall

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[137] *See id.* at 2032–33. This is in line with the original intent. *See supra* notes 12–13 and accompanying text.
[138] *Trinity Lutheran*, 137 S. Ct. at 2032–35 (Sotomayor, J., dissenting) ("The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship.").
[139] *See id.*
[140] *Id.* at 2035–36 (quoting Locke v. Davey, 540 U.S. 712, 725 (2004)) (emphasis added).
[141] *Id.* at 2037.
[142] *Id.* at 2040–41.
[143] The principle being that denying a "generally available benefit" solely on account of religious status requires strict scrutiny. *Id.* at 2040.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 2041.
[147] *E.g.*, Garnett & Blais, *supra* note 1, at 105; *id.* at 121 (calling the decision "long overdue").
[148] Jonathan F. Mitchell, *Judicial Review and the Future of Federalism*, 49 ARIZ. ST. L.J. 1091, 1101 (2017).

between church and state.[149] One scholar calls *Trinity Lutheran* "deeply disturbing" and a "dramatic change in the law."[150] Another criticizes the Court for not addressing the Establishment Clause in any substantive manner.[151] An additional writer predicts that the vague status/use distinction will be important in government programs that officially discriminate against religious entities.[152]

Almost all commentators mention Footnote Three, and some specifically note its oddity.[153] One writer believes that Footnote Three was needed to secure Justice Breyer's vote.[154] Another scholar has little faith in Footnote Three's ability to limit the *Trinity Lutheran* holding.[155] Some agree with Justice Sotomayor's point that, despite Footnote Three's limiting language, *Trinity Lutheran* eroded federalism by shifting state decision-making on religion to the Supreme Court.[156] Another scholar highlights that Footnote Three reserved deciding two main issues.[157] One issue is whether funding religious schools entails "religious *use* of funding,"[158] and the other is the general

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[149] *See e.g.*, Chemerinsky, *supra* note 2, at 360–61.
[150] *Id.* at 358.
[151] Leslie Griffin, *Symposium: Bad News from Trinity Lutheran—Only Two Justices Support the Establishment Clause,* SCOTUSBLOG (Jun. 26, 2017, 5:44 PM), http://www.scotusblog.com/2017/06/symposium-bad-news-trinity-lutheran-two-justices-support-establishment-clause/. One commentator proposes that past case law suggests this limit is inherent through precedent. Laycock, *supra* note 55, at 141.
[152] See Garnett & Blais *supra* note 1, at 105.
[153] *E.g.*, Laycock, *supra* note 55, at 160 ("But of course the holding is not limited to playground resurfacing."); Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 29 (2017) (calling it "an oddly specific limit").
[154] Metzger, *supra* note 153, at 29.
[155] Frank Ravitch, *Symposium:* Trinity Lutheran *and* Zelman*—Saved by Footnote 3 or a Dream Come True for Voucher Advocates?*, SCOTUSBLOG (Jun. 26, 2017, 10:59 PM), http://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates/.
[156] *See* Mitchell, *supra* note 148, at 1101; Metzger, *supra* note 153, at 29 (arguing that *Trinity Lutheran* continues a "siege" on the administrative state.); *see also supra* notes 135–45 and accompanying text (discussing Justice Sotomayor's view).
[157] Laycock, *supra* note 55, at 157–58.
[158] *Id.* at 161–64 (emphasis added). Before the decision was handed down this was a major concern. *See, e.g.*, Valerie Strauss, *Will the Supreme Court's Trinity Decision Lead to the Spread of School Voucher Programs?*, WASH. POST. (June 26, 2017) https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/26/will-the-supreme-courts-trinity-decision-lead-to-the-spread-of-school-voucher-programs; *see also* Brief for the National Education Association as Amicus Curiae Supporting Respondents at 1, Trinity Lutheran Church of Columbia, Inc. v. Pauley, 137 S. Ct. 2012 (2017) (No. 15-577), 2016 WL 3667053; Brief for Douglas County School District and Douglas County School Board as Amici Curiae Supporting Petitioner at 1, Trinity Lutheran Church of Columbia, Inc. v. Pauley, 137 S. Ct. 2012 (2017) (No. 15-577), 2016 WL 1639719. Some do not want the *Trinity Lutheran* holding extended to require states to allow students to use generally available school-vouchers at private religious schools. *See* William S. Koski, Trinity Lutheran Church v. Comer *Decision: What Does It Mean for School Vouchers?*, STANFORD LAW SCH. BLOGS: LEGAL

constitutionality of discriminating against religion.[159] Future Court decisions will need to address these issues.

V. CREATING A NEW TEST

A. Reflecting on Criticism

The *Trinity Lutheran* decision has generated much criticism and disagreement.[160] After *Trinity Lutheran*, at a minimum, the government is able to "limit the extent government funds can be put to religious *use*" but "cannot discriminate based on one's religious *status*."[161] Also, discriminating on religious status would unconstitutionally "put the recipient of a government benefit to the *choice* between maintaining that status or receiving a government benefit."[162] Justices and commentators in Section IV widely accept these two principles,[163] but the primary problems lay with the *Trinity Lutheran* decision and how it should be limited.[164] The three main flashpoints from the case are disregarding the Establishment Clause and federal deference to the states,[165] the utility and limits of Footnote Three,[166] and distinguishing status against use.[167]

AGGREGATE (July 4, 2017), https://law.stanford.edu/2017/07/04/trinity-lutheran-church-v-comer-decision-what-does-it-mean-for-school-vouchers/ ("[S]chool voucher advocates and opponents alike view this case as a marker for whether the Supreme Court will require states to allow parents and children to use publicly funded school vouchers for religious schools."). On the other hand, some feel the principles in *Trinity Lutheran* should be extended to allow funding for religious schools. *See, e.g.*, Laycock, *supra* note 55, at 162–63. Further, *Locke* may eventually be overruled or narrowly confined to the facts of that case. *Id.* at 169 (describing *Locke* as applicable only to barring funding for training of religious clergy at universities).

[159] Laycock, *supra* note 55, at 164–68; *see also* Erin Hawley, *Symposium: Putting Some Limits on the "Play in the Joints,"* SCOTUSBLOG (Jun. 26, 2017, 5:28 PM), http://www.scotusblog.com/2017/06/symposium-putting-limits-play-joints/ (describing Blaine provisions as being on "shaky footing" and in jeopardy). Specifically, Blaine provisions may appear facially neutral, but if they have a "bad motive," they should be struck down. Laycock, *supra* note 55, at 166–68. Another scholar argues that Blaine provisions were inherently made with animus, but wants them struck down on narrower non-discrimination grounds, like in *Trinity Lutheran*. Garnett & Blais, *supra* note 1, at 105, 125–27.

[160] See discussion *supra* Section III.

[161] CONAN, *supra* note 11, at 1123 (emphasis added).

[162] *Id.* (emphasis added).

[163] *See* discussion *supra* Section III. With the exceptions of Justices Thomas and Gorsuch, who textually believe that the government cannot limit religious use of a generally available public benefit. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (Thomas, J., concurring in part); *see id.* at 2025–26 (Gorsuch, J., concurring in part).

[164] *See id.*

[165] *See* discussion *supra* Section III.B (summarizing Justice Sotomayor's dissent).

[166] *See* discussion *supra* Section III.A (summarizing Justice Gorsuch, Justice Thomas, and scholars' criticism of Footnote Three).

[167] *See supra* notes 111–13, 118, 152, and accompanying text (summarizing Justice Gorsuch, Justice Thomas, and one scholar's discussion of the status/use distinction).

First, *Trinity Lutheran* reduced the Establishment Clause to mere ink on paper. Because the parties agreed that there is no Establishment issue, the Court washed its hands of the Clause.[168] This is fundamentally wrong.[169] "Constitutional questions are decided by [the Supreme] Court, not the parties' concessions."[170] The Court shirked its emphatic "province and duty . . . to say what the law is."[171] "If two laws conflict with each other,"[172] such as the Establishment Clause and Free Exercise Clause,[173] "the courts must decide on the operation of each."[174] Justice Sotomayor was correct that the "Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents."[175] Likewise, Justice Breyer rightfully acknowledged that the Establishment Clause limits the reach of this decision.[176] Additionally, the original intent of the Religion Clauses left the issue of religion to the states.[177] For this reason, the Court should give deference to the states for how to handle the "play in the joints" between the Establishment and Free Exercise Clauses, as the Court has historically done.[178]

Second, Footnote Three was a disservice to judicial opinion writing. It unnecessarily fractured the Court into five different opinions[179] and failed its objective of limiting the

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[168] *Trinity Lutheran*, 137 S. Ct. at 2019.
[169] *See* Griffin, *supra* note 151.
[170] *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).
[171] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[172] *Id.*
[173] *See* cases cited *supra* note 43 and accompanying text (discussing extending the Clauses to their extremes).
[174] *Marbury*, 5 U.S. at 177.
[175] *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).
[176] *Id.* at 2027 (Breyer, J., concurring in the judgment) (stating "there [is not] any administrative or other reason to treat" Trinity Lutheran different from the schools in *Everson*). Although, unlike Justice Sotomayor, he correctly allowed funding for the Center's playground resurfacing. *Compare Trinity Lutheran*, 137 S. Ct. at 2026–27 (explaining that the applicability of *Everson* and that the Scrap Tire Program is a generally available public benefit), *with Trinity Lutheran*, 137 S. Ct. at 2040 (Sotomayor, J., dissenting) (disagreeing with Justice Breyer's characterization). Justice Sotomayor's reasoning fails because inherently, any generally available benefit is a selectively available benefit, and vice versa. Any public benefit has scarce resources and requires some selective decision-making. For example, police officers prioritize what streets to patrol and how many officers need to respond to an emergency. Separately, Justice Sotomayor's church-state separation concerns are valid, but she does not give enough weight, in this case, to the penalty against Free Exercise. *See Trinity Lutheran*, 137 S. Ct. at 2027–41 (Sotomayor, J., dissenting).
[177] *See supra* notes 11–17 and accompanying text.
[178] *See supra* notes 129–42 and accompanying text (Justice Sotomayor outlining precedents and history). The Court has recognized states' "historical and substantial state interest" in a separation of church and state. Locke v. Davey, 540 U.S. 712, 725 (2004).
[179] *See* discussion *supra* Section III (discussing Footnote Three).

opinion's reach.[180] As Justice Breyer noted in his concurrence, "administrative or other reasons" (i.e. Establishment Clause problems) would allow for treating religious parties differently.[181] The Court should have addressed this issue instead of causing embarrassing scholarly criticism and a scathing dissent. Footnote Three is a farce.

Third, finding the line between religious status and religious use will be critical in future cases.[182] The status-use distinction is critical because, despite Justices Thomas's and Gorsuch's belief that the difference is irrelevant,[183] at least six other Justices will prefer to use this line-drawing in cases where a public benefit is denied to a religious party.[184] Overall, the Court needs to address these three problems in future cases where the government denies a public benefit based on religion.

B. The "Seesaw Test"

The Seesaw Test is my proposal for a new "play in the joints" test, suitable for instances where the government seeks to deny a public benefit to a religious party. Given that *Trinity Lutheran* inspired the balancing, or seesawing, nature of this test, naming it after the playground equipment is appropriate. The Seesaw Test resolves the criticisms described in detail above. This test is needed because "shoehorning" all Free Exercise and Establishment Clause cases into one test is inappropriate,[185] and instead, "different contexts . . . call for different approaches."[186] The reason is that "shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test."[187] This is what the *Trinity Lutheran* Court did[188] that led to the criticism summarized

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[180] *See* discussion *supra* Section III.C (discussing scholars ignoring the impact of the footnote and speculating on how the opinion can be applied to other forms of discrimination against religion).
[181] *See Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment).
[182] *See supra* Section III.C (discussing scholars raising issues about Blaine provisions and school funding).
[183] Laycock, *supra* note 55, at 136; *see also Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part); 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part).
[184] *See Trinity Lutheran*, 137 S. Ct. at 2017–25 (opinion of the Court); *id.* at 2026–41 (opinions of Breyer, J., concurring and Sotomayor, J., dissenting).
[185] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 719 (1994) (O'Connor, J., concurring in part and concurring in the judgment).
[186] *See* CONAN, *supra* note 11, at 1077; *see also Grumet*, 512 U.S. at 719 (1994) (O'Connor, J., concurring in part and concurring in the judgment).
[187] *Grumet*, 512 U.S. at 719 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[I]t is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.").
[188] *See Trinity Lutheran*, 137 S. Ct. at 2022.

in Section VA. Shoehorning a strict scrutiny test for when a party is denied a public benefit based on religion deforms strict scrutiny because it does not adequately address the historic, traditional, and substantial state interest of avoiding an establishment of religion.[189] In the area of "special concern" of denying funds to religious parties, the Seesaw Test provides clear guidance for lawmakers, remains within the holding of *Trinity Lutheran* by distinguishing between status and use, and addresses the concerns of the scholarly criticism and concurring and dissenting Justices.

The Seesaw Test has two parts. First, the Court should balance both sides to decide whether the public benefit was denied because of *past or present* religious status or *future* religious use.[190] Second, the weight shifts either against the government or the religious party. If the denial was based on *religious status*, then the *government* must show excessive entanglement or endorsement.[191] However, if the denial was based on *religious use*, then the *religious party* must show minimal entanglement and incidental endorsement.[192]

In short, part one is a balancing test between the two parties, and part two is a form of intermediate scrutiny against the losing party. A two-part test using modified intermediate scrutiny provides for more clarity and consensus than shoehorning this issue into an overbroad strict scrutiny analysis.[193] Some balancing will allow for deference to state interests, while modified intermediate scrutiny is a desirable middle ground between the strict scrutiny both Religion clauses demand.

In situations where the government denies a public benefit to a religious party, modified intermediate scrutiny is needed to remain consistent with other analogous constitutional conflicts. When the government has an express power delegated from the people, but using the power infringes a reserved constitutional right, then the resulting test occasionally is a

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[189] *See generally id.* at 2028–40 (Sotomayor, J., dissenting).

[190] This is meant to address the initial "play in the joints" issue and the balancing of the Free Exercise and Establishment Clauses on the fulcrum of status and use. This may also be considered the Free Exercise step.

[191] Effectively, the government needs to show that there are traditional endorsement and *Lemon* entanglement problems. This gives the government a fair chance to argue that denying based on status is necessary to avoid Establishment problems.

[192] Effectively, the religious party needs to show that there are not traditional endorsement or *Lemon* entanglement problems. This gives the religious party a fair chance to argue that the religious use does not cause Establishment problems.

[193] *See supra* note 105 and accompanying text (discussing fracturing). For example, applying rational basis to the situation in *O'Brien* would not adequately consider free speech, and strict scrutiny in *Central Hudson* would not adequately consider the state's power to regulate commerce.

middle-ground variant of intermediate scrutiny.[194] For example, in *United States v. O'Brien*,[195] the Court created a modified intermediate scrutiny test to balance whether laws regulating conduct, which fall under minimal rationality, interfere with free speech, which triggers strict scrutiny.[196] Also, in *Central Hudson Gas and Electric Corp. v. New York Public Service Commission*,[197] the Court walked back the strict scrutiny standard from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[198] Instead, the *Central Hudson* test balances whether laws regulating advertising, which is commercial activity under rational basis analysis, violates free speech, which calls for strict scrutiny. Here, the Court can walk back the *Trinity Lutheran* strict scrutiny standard as it did in *Central Hudson* after the *Virginia Board* decision.[199] Similar to the conflicts in *O'Brien* and *Central Hudson*, the Establishment Clause gives the government the power and prerogative to prevent an establishment of religion, but is countered by not being able to infringe against Free Exercise rights. Thus, modified intermediate scrutiny, recognizing states' substantial interest, is a proper test for when the government denies a public benefit to a religious party.

Multiple sections and terms within the Seesaw Test need explanation. Part one addresses the Free Exercise implication. First, a "denied public benefit" in this test involves no distinction between "generally available" and "selective" benefits.[200] Contrary to Sotomayor's attack on Breyer,[201] all government benefits use scarce resources, and deciding how to use scarce resources always involves prioritization and selection. For

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[194] For examples of modified intermediate scrutiny tests, see Central Hudson Gas & Elec. Corp. v. N.Y. Pub. Serv. Comm'n., 447 U.S. 557 (1980) (The four steps are: (1) Is the expression protected by the First Amendment, concerning a lawful activity, and not misleading? (2) Is the asserted governmental interest substantial? (3) Does the regulation directly advance the governmental interest asserted? (4) Is the regulation more extensive than is necessary to serve that interest? There must be a "reasonable fit" between the government's ends and the means for achieving those ends.); United States v. O'Brien, 391 U.S. 367 (1968) (The law in question must be within the constitutional power of the government to enact; further an important or substantial government interest; that interest must be unrelated to the suppression of speech; and prohibit no more speech than is essential to further that interest.).

[195] 391 U.S. 367 (1968) (symbolic conduct).

[196] *Id.* at 376–77.

[197] 447 U.S. 557, 561–63 (1980) (commercial speech).

[198] 425 U.S. 748, 761 (1976) ("It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.").

[199] *See Central Hudson*, 447 U.S. at 561–63 (1980) (undoing the strict scrutiny standard from *Virginia Board*).

[200] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2040–41 (2017) (Sotomayor, J., dissenting) (discussing Justice Sotomayor's comparison of the two concepts).

[201] *Id.*

example, police protection services prioritize and *select* how to distribute their "generally available" benefits. Thus, all benefits are selective and any distinction between "generally available benefits" and "selective benefits" is meaningless in the grand scheme of Free Exercise rights.

Second, "lines must be drawn,"[202] and the first line the *Trinity Lutheran* Court chose was status and use.[203] When the Court distinguished *Locke*, the crux of its reasoning had two segments. One, the religious party in *Locke* was not denied a public benefit because of who he "*was*"; he was denied the benefit because of what he "proposed *to do*—use" the benefit "to prepare for" a future religious objective.[204] Two, the Department denied Trinity Lutheran's application because "of what [Trinity Lutheran] *is*—a church."[205] "Was" and "is" imply the past and present. "Do" implies the future. If the focus for denial is based on the past or present criteria, then it is likely based on status. Alternatively, if the decision depends on future criteria, then it is likely based on use. The timing distinction gives a useful guideline for the Justices when considering the unique circumstances of each case. Temporally framing the status/use line solves Justices Gorsuch and Thomas' primary concern that no workable distinction can be made between status/use.[206]

Part two of the Seesaw Test addresses the Establishment Clause, which was entirely left out of the *Trinity Lutheran* majority opinion.[207] This part ensures that there is some accounting for both Religion Clauses and allows for the states to retain some control over the "play in the joints."[208] There are many terms of art in part two that will use the following

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[202] Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (noting the inevitability of some degree of entanglement and involvement).
[203] A distinction must be made between status and use to remain within the holdings of *Trinity Lutheran* and *Locke*. *Trinity Lutheran*, 137 S. Ct. at 2023.
[204] *Id.*
[205] *Id.* (emphasis added).
[206] *See id.* at 2025 (Thomas, J., concurring with Gorsuch, J.); *id.* at 2025–26 (Gorsuch, J., concurring in part) ("[T]he Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.") (internal citations omitted).
[207] *Id.*, 137 S. Ct. at 2029–30 (Sotomayor, J., dissenting).
[208] *See id.* at 2032–38 (Sotomayor, J., dissenting) (discussing moving decision-making over religion away from the states).

definitions. "Excessive entanglement" entails an "[i]mpermissible merging, involvement, or intermixing of the spheres of government and religion whereby state and church functions are blurred or caused to overlap."[209] This can include government intrusion "into an organization's religious administration, authority, concerns, or rights;"[210] complicated administrative involvement;[211] or potential disagreement regarding religious matters between religious parties and government agents.[212] Essentially, entanglement is the concern of "repeated governmental intrusion into the inner workings of a religious institution."[213] "Endorsement" is when government appears to "favor, prefer, or promote" a particular religion "over other beliefs."[214]

"Minimal entanglement" and "incidental endorsement" are essentially antonyms I created[215] for excessive entanglement and endorsement. Minimal entanglement is a one-time isolated interaction between the state and religion and implies that there is no excessive entanglement. Incidental endorsement is favoring a particular belief system no more than the government would favor another similarly situated belief system. This allows for the government to, as it historically has done,[216] favor organized religions with a belief system that allows for receipt of government benefits.[217]

VI. REVIEWING THE "SEESAW TEST"

A. Riding the Seesaw

Playing with the Seesaw Test highlights two major aspects of it. Part one is quick, formalistic, and text-based. Part two is slow, functionalist, and fact-based.

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[209] *Excessive Entanglement*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) (Ask "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.").
[210] *Excessive Entanglement*, *supra* note 209.
[211] *See* Lemon v. Kurtzman, 403 U.S. 602, 613–19 (1971); *Walz*, 397 U.S. at 675 (including whether impermissible "official and continuing surveillance" is required).
[212] *Waltz*, 397 U.S. at 674–75
[213] Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 551 (2013); *see also Walz*, 397 U.S. at 675.
[214] *Endorsement Test*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Allegheny Cty v. ACLU, 492 U.S. 573, 626–32 (1989) (describing the endorsement test).
[215] To my knowledge, these terms are novel creations.
[216] *See, e.g.*, *Walz*, 397 U.S. at 664 (allowing for tax-exempt status to organizations with belief systems that allow for taxation).
[217] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 (Sotomayor, J., dissenting) (discussing the problem of the government showing a preference for such belief systems over systems that do not).

Part one will often be quickly dispatched because a textual provision, responsible for the government denying a public benefit to a religious party, will either allow for some aid to religion, or bar all such aid. Blanket bans on aiding religion paint with too broad a brush.[218] Consistent with *Trinity Lutheran*, if the statute, provision, or administrative policy does not allow any money to go to religions, then it inherently discriminates based on religious status. Although there is no entitlement to government public benefits for exercising a right,[219] once a public benefit is made available, the government cannot deny it solely because of religious status.[220] Additional language or actions will also be indicative of whether the discrimination focuses on past or present information versus future intent to use the aid. For example, an application for aid could not have a check-box saying, "I am/I was part of 'X' religious organization." On the other hand, the form could inquire into future intent for using the aid. An example is a government program allowing for aid to renovate historic landmarks while requiring disclosure of whether the funds will be used to renovate a church.[221] This draws from *Locke*, which stands for the principle that the government is allowed to deny aid to a theology student, not for his past or present religious beliefs, but because of his intent to use the money for a future religious purpose.

Under part two, the type and nature of the public benefit denied to the religious party will require an individualized fact-specific inquiry. The form and duration of aid will be the main factor in whether, if the denial was based on status, there will be excessive entanglement or endorsement, or whether, if the denial was based on future use, there will be only minimal entanglement and incidental endorsement. One-time cash transfers will not lead to entanglement because such transfers do not require long-term continuous surveillance or involvement into the affairs of a religion. Further, provided there are no special "plus" factors given to favor religious entities, a reasonable person would not consider the transfer an endorsement. The purpose for the aid may also be used to argue

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[218] *See Trinity Lutheran*, 137 S. Ct. at 2025 (holding that barring aid solely on account of religion is unconstitutional).

[219] *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.").

[220] *Trinity Lutheran*, 137 S. Ct. at 2025.

[221] *See id.* at 2029 (Sotomayor, J., dissenting) (conceding that funding may "[come] with assurances that public funds would not be used for religious activity, despite the religious nature of the institution").

that, although the aid is for religious use, the reason for the aid would show minimal endorsement. Some examples are disaster-relief funds for rebuilding a destroyed church,[222] fire/police protection services,[223] and playground-resurfacing.[224]

The specific example of school-vouchers fully illustrates both parts of the Seesaw Test. Under part one, the court should balance both sides to decide whether the public benefit was denied because of past or present religious status or future religious use. The language outlining how the school-vouchers may be used will be critical. If the language bars using them for any religious school or denies the voucher because of the person's religious status, then that is overbroad and results in the "status" analysis. However, if the language allows the voucher to be used for religious schools and does not deny giving the voucher to religious people, then that would likely move to the "use" analysis. Under part two, the weight either shifts against the government or the religious party. If the denial was based on religious status, then the government must show excessive entanglement or endorsement. However, if the denial was based on religious use, then the religious party must show minimal entanglement and incidental endorsement. For school-vouchers this will require significant inquiry into the available schools, pervasiveness of religion in those schools, and intent of the student or student's parents. When denied based on status, the government needs to show that excessive entanglement and endorsement of religious education will occur. When denied based on use, the religious student or parents needs to show that their use of the voucher will only cause incidental endorsement or minimal entanglement. Ultimately, the result will depend on the unique situation of the government, schools, and religious parties.

B. How States Should Play on the Seesaw

The primary beneficiaries of the Seesaw Test will be the states. In light of *Trinity Lutheran*, the Blaine Provisions of most states will need to be amended.[225] As courts do not generally write our laws, the onus will fall on state legislatures to make these changes in response to *Trinity Lutheran*. Any Blaine Provisions that entirely deny generally available public benefits

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[222] Josh Gerstein, *FEMA Broadens Churches' Access to Disaster Funds*, POLITICO (Jan. 3, 2018, 9:27 AM), https://www.politico.com/story/2018/01/03/churches-disaster-funds-fema-religion-establishment-321202.

[223] *Trinity Lutheran*, 137 S. Ct. at 2026–27 (Breyer, J., concurring).

[224] *Id.* at 2024–25.

[225] *See id.* at 2037 n.10 (Sotomayor, J., dissenting) (compiling a list of other states with Blaine provisions).

to religious groups are in severe jeopardy.[226] Blaine Provisions that are adjusted to follow the Seesaw Test will most likely remain valid because they will not deny funding solely because of "religious status."[227] The cost of not changing the provisions will be expensive litigation for the states and loss of religious freedom for the people.

Blaine Provisions must change because most of them are overbroad in not distinguishing between religious status and use. If they are not amended, they will fail under the Seesaw Test for discriminating against religions solely because of status. Likewise, they will follow the result in *Trinity Lutheran* where Missouri's Blaine Provision was overbroad.[228] Missouri wrongly denied government financial aid of any kind to a religious party.[229] As a model provision, the following modified Missouri provision will pass the Seesaw Test, *Trinity Lutheran*, and judicial scrutiny:

> That no money shall ever be taken from the public treasury, directly or indirectly, for *future religious use by* any church, sect or denomination of religion, or any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. *A party's past or present religious status shall not be used as criterion for denying aid or benefits.*[230]

The two simple edits, indicated in italics, adjust the provision to follow the language of *Trinity Lutheran* and highlight the temporal difference between status and use. The original language strikes a good balance between Free Exercise (language barring discrimination) and Establishment (barring all funds to religion), but the provision needs to include a status/use distinction and emphasize that status cannot be used for denying benefits. This change will help states avoid litigation costs, continue avoiding establishment issues, and allow for some aid to religious parties.

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[226] *See* Hawley, *supra* note 159.
[227] *Trinity Lutheran*, 137 S. Ct. at 2024.
[228] *Id.* at 2025 (striking Article I, Section 7 of the Missouri Constitution).
[229] *Id.*
[230] This is a modified version of MO. CONST. art. I, § 7. The original language is similar to Blaine provisions throughout the United States. *See Trinity Lutheran*, 137 S. Ct. at 2037–38 n.11 (Sotomayor, J., dissenting) (citing thirty-eight states with a similar provision).

C. Weaknesses of the Seesaw Test

A seesaw is a fun playground toy, but it has its disadvantages. It cannot be moved and only serves a singular purpose; the Seesaw Test has similar weaknesses. Unlike the pure *Lemon,* endorsement, coercion, or strict scrutiny tests, the Seesaw Test can only be used for one type of case: when the government denies public benefits to a religious party. The other tests are far broader and can be used in a multitude of contexts.[231] However, the Seesaw Test is tailored for a specific purpose, and it will serve that purpose better than if the courts try to shoehorn cases like *Trinity Lutheran* into the other tests. Also, the test is inapplicable in cases where the government wants to aid or otherwise accommodate religion.[232] In those cases, the courts should not use the Seesaw Test and can return to *Lemon,* endorsement, coercion, or strict scrutiny for guidance. The Seesaw Test is not a multi-tool; it is a shield for protecting religious parties from state discrimination while blocking an establishment of religion.

VII. CONCLUSION

In light of the Supreme Court's decision in *Trinity Lutheran*, the Seesaw Test is the best option moving forward. The Court in *Trinity Lutheran* failed to consider the Establishment Clause, give deference to the states, create an unfractured Court opinion, or give adequate clarity on the difference between status and use. The Seesaw Test defers to the states and gives guidance to lawmakers on distinguishing status and use while fully considering the Establishment Clause implications, which will lead to more unified opinions.[233] States should adapt their laws and policies to pass the Seesaw Test because it embraces the holding of *Trinity Lutheran* and will help states avoid expensive litigation as they try to defend overbroad Blaine Provisions and other anti-religious practices. This test allows the government to find its own "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."[234] The courts should never ignore the Establishment Clause where the government denies a public benefit to a religious party. On a seesaw, children learn the ideas of balance and weight. When finding "play in the joints" here, only the Seesaw Test can balance the weight of the Religion Clauses.

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[231] Such contexts range from school prayer, Engel v. Vitale, 370 U.S. 421 (1962), to Ten Commandment monuments, Van Orden v. Perry, 545 U.S. 677 (2005), to Christmas displays, Lynch v. Donnelly, 465 U.S. 668 (1984).
[232] *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).
[233] *See* discussion *supra* Section III (noting fractured opinions under the current test).
[234] *Trinity Lutheran*, 137 S. Ct. at 2019.