

IS THERE ANY SILVER LINING TO *TRINITY LUTHERAN CHURCH, INC. V. COMER*?

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Trinity Lutheran Church, Inc. v. Comer is a significant setback for a strong separation of church and state. Missouri denied a playground grant to Trinity Lutheran because of a state constitutional provision that bans financial aid to churches. The church sued. The Supreme Court held not only that the Establishment Clause allowed the government to give taxpayer money to Trinity Lutheran, but that the Free Exercise Clause required it.

The decision's many flaws are not the focus of this short Essay. Instead, this Essay dissects the Supreme Court's reasoning in order to apply it to current controversies in related areas of law. Part I examines the Court's analysis of the harms of express exclusion to religious exercise, deemed harmful in itself and for the coercive pressure it exerts. Part II applies that reasoning to Establishment Clause questions involving express exclusions (e.g., the parsonage exemption) or coercion (e.g., legislative prayers). Part III considers how the Trinity Lutheran Court's arguments play out in equal protection, particularly the case of denying service to LGBTQ customers. In short, this Essay is an attempt to find the silver lining of *Trinity Lutheran Church, Inc. v. Comer*.

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INTRODUCTION

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court held that the government violated the Free Exercise Clause by refusing to fund a church.¹ The case arose out of the Missouri Department of Natural Resources Tire Scrap Program, which offered grants to help resurface playgrounds using recycled tires.² Trinity Lutheran's school applied for a grant and in many ways was an excellent candidate.³ However, because the Missouri Constitution states "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church,"⁴ Missouri denied the church's application.⁵

The church sued, arguing that Missouri had violated the Free Exercise Clause.⁶ Generally, laws that are neutral and treat religion and nonreligion alike do not run afoul of the Free Exercise Clause,⁷ but Missouri's policy was not neutral.⁸ However, even laws that single out religion are still constitutional if the law does not impose a substantial burden on religious exercise or if the government offers a compelling justification for its law.⁹

For example, in *Locke v. Davey*, a Supreme Court decision cited by the lower courts in rejecting Trinity Lutheran's claims, the Court held that there was no free exercise violation when a state scholarship program denied grants to students who wanted to major in devotional theology.¹⁰ First, the *Locke* Court did not consider the failure to pay for devotional studies a substantial burden on religion.¹¹ Second, the Court recognized the historical

1. 137 S. Ct. 2012 (2017).

2. *Id.* at 2017.

3. *Id.* at 2018 (noting that the church school ranked fifth out of 44 applicants).

4. *Id.* at 2017 (quoting MO. CONST. art. I, § 7).

5. *Id.* at 2018.

6. *Id.*

7. *Emp't Div. v. Smith*, 494 U.S. 872, 879–80 (1990) (holding that laws that are neutral and generally applicable do not violate the Free Exercise Clause).

8. *Trinity Lutheran*, 137 S. Ct. at 2021.

9. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that to comply with the Free Exercise Clause, "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

10. 540 U.S. 712, 716 (2004) (explaining that theology degrees were understood to mean "degrees that are 'devotional in nature or designed to induce religious faith.'").

11. *Id.* at 720–21 ("In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. . . . The State has merely chosen not to fund a distinct category of instruction.").

Establishment Clause interest in not using taxpayer money to fund the education of clergy.¹²

The Supreme Court reached a different conclusion in *Trinity Lutheran*, finding that “denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion”¹³ Such a penalty is unconstitutional unless the state could justify it by a compelling state interest, and Missouri could not.¹⁴ The state’s establishment interest, the *Trinity Lutheran* Court held, was nothing more than “policy preference.”¹⁵ Consequently, to avoid violating the Free Exercise Clause, Missouri must give Trinity Lutheran money to improve its school’s facilities.¹⁶

There is plenty to criticize about the *Trinity Lutheran* decision. It eviscerates the Establishment Clause bar against funding religious exercise¹⁷ by not only allowing but mandating that taxpayer money go directly to a church.¹⁸ Its reasoning, such as its attempt to distinguish *Locke v. Davey* by arguing that the student was singled out “because of what he proposed to do—use the funds to prepare for the ministry[.]” while Trinity Lutheran was singled out “simply because of what it is—a church[.]”¹⁹ was unpersuasive.²⁰ After all, churches are treated differently precisely because of what they do, which is preach and practice religion. The decision also repeatedly mischaracterized precedent; for example, it suggested that the holding of

12. *Id.* at 722 (“Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an ‘established’ religion.” (citation omitted)); *see also id.* at 725 (“The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars.”).

13. 137 S. Ct. at 2019; *see also id.* at 2024 (finding that Missouri violated the Free Exercise Clause because it “pursued its preferred policy to the point of expressly denying a qualified religious entity a benefit solely because of its religious character”).

14. *Id.* at 2024.

15. *Id.*

16. *See id.* at 2024–25.

17. *See, e.g.,* *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . .”).

18. The money is for the church’s playground, but as the dissent pointed out, “The Church’s playground surface—like a Sunday School room’s walls or the sanctuary’s pews—are integrated with and integral to its religious mission.” *Trinity Lutheran*, 137 S. Ct. at 2029 (Sotomayor, J., dissenting).

19. *Id.* at 2023 (emphasis omitted) (“Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed to *do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.” (emphasis in original)).

20. Even Justice Gorsuch’s concurrence questioned the persuasiveness of this distinction: “I harbor doubts about the stability of such a line. . . . Is it a religious group that built the playground? Or did a group build the playground so that it might be used to advance a religious mission?” *Id.* at 2025 (Gorsuch, J., concurring). Also unpersuasive, and tone deaf to boot, is the Court’s attempt to analogize the exclusion of Trinity Lutheran from playground grants to the disqualification of Jews from public office. *See id.* at 2024.

*Everson v. Board of Education of Ewing*²¹ required, rather than merely permitted, the State to reimburse parents with children in private religious schools for school transportation costs.²²

The decision's flaws, however, are not the focus of this short Essay. Instead, I want to dissect the Supreme Court's treatment of religious harm and see if it might be helpful in related areas of law. Part I examines the Court's analysis of the harms of express exclusion to religious exercise, deemed harmful in itself and for the coercive pressure it exerts. Part II applies that reasoning to Establishment Clause questions involving express exclusions (e.g., the parsonage exemption) or coercion (e.g., legislative prayers). Part III considers how the *Trinity Lutheran* Court's arguments about harm to religion plays out in equal protection, particularly the case of denying service to LGBTQ customers.

I. SUBSTANTIAL BURDEN IN TRINITY LUTHERAN

State action does not implicate the Free Exercise Clause unless it impedes someone's free exercise of religion.²³ Doctrinally, this means only laws that impose a "substantial burden" on religious exercise merit heightened scrutiny.

Trinity Lutheran never explicitly acknowledged the substantial burden requirement. In fact, it never used the phrase "substantial burden." Instead, it seemed to equate "penalty" with substantial burden on religious exercise.²⁴ Thus, a "penalty" triggers heightened scrutiny: "The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . [S]uch a policy imposes a *penalty* on the free exercise of religion that triggers the most exacting scrutiny."²⁵

How exactly is this penalty a substantial burden on religious exercise? The loss of money for its playground is not a substantial burden on the church's religious practice. That argument is unavailable because the Court characterized the playground as a secular endeavor.²⁶ Indeed, key to several Justices ruling in favor of *Trinity Lutheran* was their (contestable)²⁷

21. 330 U.S. at 17–18 (rejecting the Establishment Clause challenge). This suggestion is particularly surprising in light of the *Everson* Court's strong language opposing state funding of religion. See *Everson*, 330 U.S. at 15–16.

22. *Trinity Lutheran*, 137 S. Ct. at 2020.

23. Cf. *supra* note 9 and accompanying text.

24. See *Trinity Lutheran*, 137 S. Ct. at 2021–22.

25. *Id.* at 2021 (emphasis added).

26. See *id.* at 2024 n.3.

27. This claim is contestable because the avowed mission of the *Trinity Lutheran* Church school was to spread the church's faith. As Justice Sotomayor argues, "The Church has a religious mission, one that it pursues through the [school]. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's wall, glass stained

conclusion that Missouri's money would not be used for religious purposes.²⁸ Footnote 3 specifically limits the holding to government funding of nonreligious activities: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address *religious* uses of funding"²⁹ If the church playground has no religious function, then whether it gets funded or not does not affect the church's religious exercise.

Moreover, even if the playground were integral to the church's religious exercise, the failure to receive funding does not substantially burden that exercise. The government did not ban any religious practice or force the church to act contrary to any religious tenet.³⁰ Nor was the government obliged to affirmatively fund the exercise of constitutional rights. As Missouri argued: "Here the Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights."³¹

According to the Supreme Court, this line of reasoning misses the real injury: Missouri expressly and intentionally discriminated on the basis of religion.³² It is not completely clear whether this explicit discrimination on its own rendered the policy highly suspect, even without a precise impediment to religious exercise. Some language suggests that it was. For example, after conceding that the concrete harm may only amount to a few scraped knees, the Court concluded: "But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."³³

At the same time—and here is the link to religious exercise—the Supreme Court argued that this exclusion puts pressure on the church to give up its religious character and presumably its religious exercise. "It is true the Department has not criminalized the way Trinity Lutheran worships [But] the Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright

and used to form its windows, or nails used to build its altar." *Id.* at 2030 (Sotomayor, J., dissenting).

28. Justice Breyer characterizes the grant as part of "a general program designed to secure or to improve the health and safety of children." *Id.* at 2027 (Breyer, J., concurring).

29. *Id.* at 2024 n.3 (emphasis added).

30. *Id.* at 2022 ("The Department contends that merely declining to extend funds to Trinity Lutheran does not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights." (emphasis in original)).

31. *Id.* at 2022.

32. *See id.* at 2021.

33. *Id.* at 2025.

prohibitions.”³⁴ In other words, the policy was coercive, and risked discouraging the Church’s religious exercise.³⁵

Again, these arguments raise all kinds of questions. The argument that it is odious to impose special disadvantages on Trinity Lutheran because of its status as a church completely ignores the fact that Trinity Lutheran is entitled to many special advantages because of its status as a church.³⁶ Characterizing any disadvantage as odious also ignores the fact that the restrictions are not due to hostility to religion but due to the dictates of the Establishment Clause, whose ultimate goal is to encourage the flourishing of all religions.³⁷ The coercion argument also seems a bit farfetched, as it is implausible that a church would cease being a church in order to qualify for a benefit, especially one unrelated to religious exercise.

Nevertheless, the Court makes two arguments that I want to explore further in the next two Parts. First, denying a benefit, no matter how insignificant, to an entity because of its religious status is constitutionally problematic.³⁸ For the Court, the problem was not the loss of funds but the lack of equal treatment.³⁹ Second, the Court defines unconstitutional coercion broadly: indirectly pressuring an entity to forgo its religious practice was enough to trigger the strictest scrutiny.⁴⁰

II. ESTABLISHMENT CLAUSE

The Establishment Clause has long been interpreted to bar the state from preferring one or some religions over others,⁴¹ or from preferring

34. *Id.* at 2022 (internal citation omitted).

35. *Id.* (“The ‘imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourag[e] the exercise of First Amendment rights.’” (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963))).

36. Ironically, an exemption from antidiscrimination law is just one example. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (officially recognizing the ministerial exemption). *See also Trinity Lutheran*, 137 S. Ct. at 2032 (Sotomayor, J., dissenting) (describing the tax and employment benefits that churches may constitutionally receive from states).

37. *See Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (“[W]e have recognized that ‘[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment].’” (quoting *Zorach v. Claiborn*, 343 U.S. 306, 313 (1952))); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (“[The Establishment Clause’s] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”).

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

39. *Id.* at 2022 (“The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with the secular organizations for a grant.”).

40. *Id.* at 2021–22.

41. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

religion over nonreligion.⁴² Recently, however, the idea that the Establishment Clause does not prohibit favoring religion—so long as some religions are not favored over others—has been gaining traction. Thus, it has been argued that a tax benefit for clergy only, or a legislative prayer practice open to anyone who is religious but closed to anyone who is not religious, are both perfectly constitutional.⁴³ *Trinity Lutheran*, by suggesting that facial discrimination on the basis of religion is presumptively unconstitutional, potentially revitalizes the no-favoring-religion strand of Establishment Clause jurisprudence. *Trinity Lutheran*'s expansive view of coercion may also bring new life to Establishment Clause challenges to government-sponsored religious exercises.

A. Express Exclusion of Nonreligion

One of the Court's earliest Establishment Clause cases announced these two strands when it wrote that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion [or] aid all religions . . ."⁴⁴

The strand of the Establishment Clause that bars favoring religion has become less than robust, as the legislative prayer cases illustrate. Legislative prayer, which is the practice of inviting people to give invocations or prayers to solemnize the beginning of a legislative session, was ruled constitutional when the Supreme Court decided *Marsh v. Chambers* in 1983.⁴⁵ Recently, however, lower courts have upheld programs that explicitly exclude the nonreligious. For example, in 2017 a federal district court allowed the United States House of Representatives to limit guest chaplains to those who are ordained and whose prayers address a higher power.⁴⁶

The "parsonage exemption" provides another example of expressly favoring religion over nonreligion: although for most employees, housing benefits are taxable income, for "minister[s] of the gospel," they are not.⁴⁷

42. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875–76 (2005) ("[T]he government may not favor one religion over another, or religion over irreligion . . .").

43. See, e.g., Justin Butterfield et al., *The Parsonage Exemption Deserves Broad Protection*, 16 TEX. REV. L. & POL. 251, 263–64 (2012) (arguing for the constitutionality of the parsonage exemption); see also *Barker v. Conroy*, 282 F. Supp. 3d 346, 351, 364 (D.D.C. 2017) (upholding legislative prayers program that excludes atheists).

44. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

45. 463 U.S. 783 (1983).

46. *Barker*, 282 F. Supp. at 351, 364 ("This Court concludes that the refusal of the House Chaplain to invite an avowed atheist to deliver the morning 'prayer,' in the guise of a non-religious public exhortation as a 'guest chaplain,' did not violate the Establishment Clause.").

47. See 26 U.S.C.A. § 107 (2002) ("In the case of a minister of the gospel, gross income does not include (1) the rental value of a home . . . ; or (2) the rental allowance paid to him as part of his compensation . . ."); see also *Ministers' Compensation and Housing Allowance*, INTERNAL REVENUE SERV., <https://www.irs.gov/faqs/interest-dividends-other-types-of-income/ministers-compensation-housing-allowance/ministers-compensation-housing-allowance> [http://perma.cc/52Y7-K4L4].

Trinity Lutheran casts doubt on the constitutionality of both these practices. The decision emphasized again and again that explicitly singling out someone for disadvantage because of their religious status is highly suspect: “The Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’”⁴⁸ In fact, the Court described this exclusion as “odious.”⁴⁹

If it is true that “denying a generally available benefit solely on account of religious identity . . . can be justified only by a state interest ‘of the highest order,’”⁵⁰ then expressly denying a generally available benefit to nonbelievers—a religious identity—ought to also trigger the highest level of scrutiny.

Of course, the *Trinity Lutheran* Court was talking about the status of believers and not nonbelievers, but together the Free Exercise and Establishment Clause guarantee that no one is punished because of what they do or do not believe. They essentially function as the Equal Protection Clause for religion: Although religion is officially considered a suspect classification that triggers heightened scrutiny under the Equal Protection Clause,⁵¹ the Supreme Court has traditionally channeled these cases into free exercise or establishment.⁵² While the Free Exercise Clause serves as an Equal Protection Clause for believers, the Establishment Clause serves as an Equal Protection Clause for nonbelievers. Together, the two religion clauses ensure that any time the government expressly excludes someone because of their religious status, that facial discrimination is subject to strict scrutiny. In sum, just as *Trinity Lutheran* made clear that the Free Exercise Clause bars the government from penalizing someone because of their status as a religious believer, the Establishment Clause should bar it from penalizing someone because of their status as a nonbeliever.

The importance of the benefit is beside the point. It is irrelevant if the government is withholding a valuable tax deduction or merely the chance to open a legislative session. As *Trinity Lutheran* emphasized, it is the right to

48. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (alteration in original); see also *id.* at 2024 (“[E]xpressly denying a qualified religious entity a public benefit solely because of its religious character . . . violates the Free Exercise Clause.” (footnote omitted)); see *supra* text accompanying note 25.

49. *Trinity Lutheran*, 137 S. Ct. at 2025 (citation omitted).

50. *Id.* at 2019.

51. *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (describing religion as an “inherently suspect” classification (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976))).

52. For example, in *Locke v. Davey*, decided under the Free Exercise Clause, the Court mentions equal protection in the footnotes, and references “*McDaniel v. Paty*, 435 U.S. 618 (1978) (reviewing religious discrimination claim under the Free Exercise Clause).” See *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); see also *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (“In so ruling [that the law there does not violate free exercise] we dispose also of appellant’s argument founded upon denial of equal protection [I]n this instance the one is but another phrasing of the other.”).

compete on an equal basis for a government benefit, and not the benefit itself, that matters.⁵³ Everyone should be able “to participate in a government benefit program without having to disavow [their] religious character.”⁵⁴

B. Pressure on Religious Practice

Trinity Lutheran’s expansive view of coercion should also have consequences in Establishment Clause jurisprudence. Although it is well established that the Establishment Clause bars the government from coercing anyone into participating in religious exercises, there is widespread disagreement as to how broadly or narrowly coercion should be defined.⁵⁵

Trinity Lutheran seemed to adopt a broad view for free exercise, arguing that the Constitution bans “indirect coercion” and not just direct coercion.⁵⁶ Although Missouri did not coerce Trinity Lutheran directly by outlawing its religious practices, Missouri coerced it indirectly by making it choose between getting benefits or continuing with its religious practices. As the Court argued, “imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights.”⁵⁷ Never mind that the odds of a church giving up its religious character in order to receive government funding for a secular playground is low to none. The very existence of the pressure was enough.⁵⁸

This approach contrasts with the more narrow one in *Town of Greece v. Galloway*, the Supreme Court’s most recent Establishment Clause challenge involving coercion.⁵⁹ In *Town of Greece*, residents complained about a legislative prayer policy that resulted in regular Christian prayers before town meetings.⁶⁰ The Court found no Establishment Clause problem, in part because it concluded no one was coerced into participating in these Christian religious exercises.⁶¹ The Court rejected the argument that

53. 137 S. Ct. at 2022 (“The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.” (citation omitted)).

54. *Id.*

55. Compare *Lee v. Weisman*, 505 U.S. 577, 594 (1992) (Kennedy, J.) (“[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.”), with *id.* at 640 (Scalia, J. dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” (emphasis in original)).

56. *Trinity Lutheran*, 137 S. Ct. at 2022 (“[T]he Free Exercise Clause protects against ‘indirect coercion . . . on the free exercise of religion, not just outright prohibitions.’”) (citation omitted).

57. *Id.* (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)).

58. See *id.*

59. 134 S. Ct. 1811 (2014). *Trinity Lutheran* was a Free Exercise Clause challenge, making *Town of Greece* the Court’s most recent Establishment Clause case.

60. *Id.* at 1816–17.

61. *Id.* at 1826. The *Town of Greece* Court also emphasized the facial neutrality of the program, which distinguishes it from prayer programs that explicitly exclude nonreligious participants. *Id.* at 1824. Although *Town of Greece* suggests that facially discriminatory policies

nonadherents who came to the meeting seeking some benefit from the (obviously pro-Christian) town government, such as a new traffic light or a zoning variance, might feel pressure to participate in the prayers. No such coercion existed, the Court held, because there was no evidence that anyone had actually been denied a benefit for refusing to participate.⁶²

The *Trinity Lutheran* Court held that a church, faced with a choice between losing a government benefit and its status as a church, will feel pressure to abandon its religious identity.⁶³ At the same time, the *Town of Greece* Court held that an individual, faced with a choice between potentially losing a government benefit and joining prayers, will not feel pressure to participate and abandon their nonreligious identity.⁶⁴ A very similar choice amounts to coercion for free exercise purposes but not establishment.

The analogy is far from perfect, but the imperfection cuts both ways. In *Trinity Lutheran*, the benefit was actually denied, while there was only a threat of denial in *Town of Greece*.⁶⁵ At the same time, even assuming a church can feel coerced, it is very unlikely to permanently abandon its religious status for the sake of a small grant. In contrast, an individual, who definitely can feel pressure, is much more likely to temporarily abandon their religious identity for the sake of a benefit—especially an important benefit. Moreover, if the deciding question is not whether someone will actually *be* coerced but whether they will *feel* coerced, the winner is probably not the church. To start, an individual (versus an institution) is less powerful vis-à-vis the government. Moreover, that individual is especially susceptible when in the physical presence of the government's religious exercise at the very moment of petitioning. Thus, given the parallels, a strong case can be made that the expansive view of coercion in free exercise should translate into establishment.

would violate the Establishment Clause, *Trinity Lutheran* cements the problematic nature of policies that on their face discriminate based on religious identity.

62. *Id.* at 1826 (“Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined.”); *see also id.* at 1826 (“The analysis would be different if town board members . . . singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.”).

63. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021–22 (2017).

64. *Town of Greece*, 134 S. Ct. at 1826.

65. *Compare Trinity Lutheran*, 137 S. Ct. at 2018, with *Town of Greece*, 134 S. Ct. at 1826.

III. EQUAL PROTECTION

As mentioned in the previous section, the Supreme Court uses the Free Exercise Clause as the Equal Protection Clause for the religious.⁶⁶ The *Trinity Lutheran* Court does not explicitly state that the Free Exercise Clause is playing this role, but the Court has long channeled equal protection challenges based on religion into religion clause analyses.⁶⁷ Consequently, *Trinity Lutheran* may well have ramifications for equal protection cases—including current equal protection challenges involving LGBTQ discrimination.

At first glance, *Trinity Lutheran* mirrors a straightforward equal protection case. Under existing equal protection doctrine, a law that on its face discriminates against a protected classification will trigger heightened scrutiny.⁶⁸ Here, a grant program on its face excluded applicants based on religion (a protected classification)⁶⁹ and therefore triggered strict scrutiny.⁷⁰ As a doctrinal matter, there is nothing novel in this analysis, and so it has little impact on cases involving facial discrimination based on sexual orientation. As before *Trinity Lutheran*, a law after *Trinity Lutheran* that on its face discriminates against gay or lesbian Americans⁷¹ is immediately suspect and subject to heightened scrutiny.⁷²

Nonetheless, some of the reasoning in *Trinity Lutheran* may inform equal protection challenges that do not involve facial discrimination. When a law is neutral on its face, it will still trigger heightened scrutiny under the Equal Protection Clause if two conditions are met: first, the law meant to discriminate against a protected class, and second, the law in fact discriminated against that protected class.⁷³

66. See *supra* Part II.A.

67. See *supra* text accompanying note 52.

68. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“[S]tatutes are subject to strict scrutiny under the Equal Protection Clause . . . when they contain express racial classifications.”).

69. See *supra* text accompanying note 51.

70. See *Trinity Lutheran*, 137 S. Ct. at 2015 (giving laws that affect religion the “strictest scrutiny”).

71. For example, Mississippi’s Protecting Freedom of Conscience from Government Discrimination Act, 2016 Miss. Laws Ch. 334 (H.B. 1523) (codified at MISS. CODE ANN. § 11-62-3 (2016)), explicitly allows those who believe “[m]arriage is or should be recognized as the union of one man and one woman” to refuse to serve LGBT customers. See *generally* *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017).

72. I interpret the marriage equality cases as establishing that sexual orientation is a suspect classification. Caroline Mala Corbin, *A Free Speech Tale of Two County Clerk Refusals*, 78 OHIO ST. L.J. 819, 830 (2017) (“Granted, neither *Windsor* nor *Obergefell* pinpoint what level of equal protection scrutiny applies to laws that disadvantage gays and lesbians. Nonetheless, the Supreme Court conducted some form of heightened scrutiny review. Had it been rational, the Court would have accepted rather than rejected the government’s proffered justifications.”).

73. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding facially neutral laws do not trigger heightened scrutiny without both discriminatory intent and discriminatory impact).

A. Discriminatory Intent

There is no bright line test for assessing the first requirement, discriminatory intent. More than one factor may lead a court to conclude that a facially neutral law was passed with an intent to discriminate against a protected group.⁷⁴ The legislative history may reveal hostile comments.⁷⁵ The timing may be suspicious.⁷⁶ The discriminatory impact on the protected group may be so severe the court is willing to infer a discriminatory intent.⁷⁷

Trinity Lutheran suggests another: if a law that penalizes a protected class is not mandated by a religion clause, then it may be considered motivated by animus—even if it is designed to advance constitutional goals.⁷⁸ The Court reasoned in *Trinity Lutheran* that because the Establishment Clause did not mandate the church’s exclusion, it was therefore “odious,”⁷⁹ a word that is linked to animus, especially in equal protection jurisprudence.⁸⁰ Indeed, the Court’s use of “odious” immediately followed its analogizing *Trinity Lutheran*’s exclusion to the exclusion of Jews from public office.⁸¹

If a law that penalizes a protected class is “odious” when the law is not required by the Establishment Clause despite advancing establishment values, then the reverse should also be true: if a law that penalizes a protected class is not required by the Free Exercise Clause despite advancing free exercise values, it too should be “odious” and satisfy the discriminatory intent requirement. Consequently, unless required by the Free Exercise Clause, a law that permits discrimination against the LGBT community should be considered motivated by a discriminatory intent.

A good example would be the laws in several states that exempt religiously motivated denials-of-service from antidiscrimination law, such as laws that permit adoption agencies to follow their religious conscience in

74. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993).

75. *Id.* at 540–42.

76. *Id.* at 540–41.

77. *See* *Gomillion v. Lightfoot*, 364 U.S. 339, 340–42 (1960).

78. If the differential treatment is not constitutionally required, then it amounts to a discriminatory “policy preference.” *Trinity Lutheran Church, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

79. *Id.* at 2025.

80. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 309 (2013) (“‘Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,’ and therefore ‘are contrary to our traditions and hence constitutionally suspect.’” (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954))); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“Over the years, this Court has consistently repudiated ‘(d)istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’” (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943))).

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

placing children.⁸² Although written to enable discrimination against LGBTQ households, these laws are facially neutral because the text says nothing about sexual orientation. The Free Exercise Clause does not require this religious exemption: the Free Exercise Clause is not violated by laws, like anti-discrimination laws, that do not target religion.⁸³ Under *Trinity Lutheran* reasoning, then, these religious exemptions were adopted with a discriminatory intent since they penalize a suspect class and were not mandated by the Free Exercise Clause.

Of course, it does not necessarily follow that a law voluntarily furthering free exercise values is motivated by animus⁸⁴ any more than it necessarily follows that a law voluntarily furthering establishment clause values is motivated by animus. Indeed, in earlier cases, the Supreme Court held it did not. In *Locke v. Davey*,⁸⁵ where Washington State denied scholarships to otherwise eligible students who wished to train for the clergy, the Court held that, even though not mandated by the Establishment Clause, the denial was “not evidence of hostility towards religion” but rather reflected long-standing anti-establishment interests.⁸⁶ Nevertheless, if *Trinity Lutheran* has modified the jurisprudence for laws advancing Establishment Clause values, then it should modify the jurisprudence for laws advancing Free Exercise Clause values.

B. Discriminatory Impact

What counts as a discriminatory impact, the second requirement to make a facially neutral law suspect, is also not cut and dry. In particular, it is uncertain whether discriminatory harm must be a material harm or whether a dignitary harm suffices. A material harm is concrete, like the denial of a grant or the denial of service. A dignitary harm is the insult to dignity caused by unequal treatment. For example, state-sanctioned racial segregation inflicted both harms: it denied African-Americans access to higher quality schools and facilities and it stigmatized African-Americans as unworthy of equal respect.⁸⁷

What amounts to discriminatory impact may prove dispositive in LGBTQ discrimination cases. Some argue that the material harm caused by laws allowing religious refusals is minimal when the rejected customer can

82. Several states have passed laws allowing religious adoption agencies to abide by their religious strictures in placing children, which essentially means they may discriminate against same-sex couples. See, e.g., Alabama Child Placing Agency Inclusion Act of 2017, 26 ALA. CODE § 26-10D (2017).

83. A law that is neutral and generally applicable does not violate the Free Exercise Clause. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990).

84. Though of course, it can. As stated at the start, multiple factors may point to a discriminatory intent. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993).

85. 540 U.S. 712 (2004).

86. *Davey*, 540 U.S. at 721.

87. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

get the benefit elsewhere without too much inconvenience⁸⁸: if a law allows a bakery to refuse to bake a wedding cake or an adoption agency to decline to place a child with you, you can just go the baker or the adoption agency down the block. Thus, the argument continues, the facially neutral laws that allow these religious refusals lack sufficient discriminatory impact to merit heightened scrutiny under equal protection.⁸⁹ But even if the ready availability of alternatives renders the material harm slight, it does not address the significant dignitary harm of creating a “separate but equal” regime for gays and lesbians. Is this harm enough?

Although the Supreme Court has recognized dignitary harm in both the race and LGBTQ context,⁹⁰ it is an open question whether dignitary harm alone, without accompanying material harm, satisfies the discriminatory impact requirement.⁹¹ Language in the marriage equality cases points to an affirmative answer.⁹² Language in *Trinity Lutheran* further bolsters it. The Court emphasizes that the harm of Missouri’s grant program was not the tangible loss of money. Rather, it was the intangible harm of unequal treatment: “[T]he ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.”⁹³ Indeed, the Court laments, “Trinity Lutheran is a member of the community too, and the State’s decision to exclude it . . . must withstand the strictest scrutiny.”⁹⁴ Surely that same lament applies to LGBT exclusions: LGBT Americans are

88. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012); see also Brief of the Nat’l Jewish Comm’n on Law & Pub. Affairs as Amicus Curiae supporting Petitioners, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111), 2017 WL 4005661 at *9.

89. *Id.*

90. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking antiscegenation laws that applied to blacks and whites as “designed to maintain White Supremacy”); *Brown*, 347 U.S. at 494 (“To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 2608 (2015); *United States v. Windsor*, 570 U.S. 744, 770 (2013).

91. *Palmer v. Thompson*, 403 U.S. 217 (1971), does not answer the question because the Court declined to recognize the dignitary harm of choosing to shutter public pools rather than desegregate them. Instead, it merely focused on the material harm—loss of public pools—and argued that black and white swimmers were equally deprived. *Id.* at 220.

92. *Obergefell*, 135 S. Ct. at 2604, 2608 (striking down marriage bans because they “disrespect and subordinate” and deny the “equal dignity” of same-sex couples); see also *Windsor*, 570 U.S. at 770 (“The avowed purpose and practical effect of [the Defense of Marriage Act] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages . . .”).

93. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

94. *Id.*

members of the community too, and a State's decision to allow their exclusion must withstand heightened scrutiny.

Ultimately, *Trinity Lutheran* is not controlling for facially neutral equal protection challenges because it does not rule on a facially neutral law, or one without material harms for that matter. Nonetheless, a Supreme Court decision does not need to be directly on point in order to be influential or at least suggestive.

CONCLUSION

This Essay is an attempt to find a silver lining in *Trinity Lutheran*. *Trinity Lutheran*'s conclusion—that the religion clauses not only permit but require funding churches—is a huge setback for the Establishment Clause. But perhaps some of *Trinity Lutheran*'s reasoning may be mined to strengthen other strands of Establishment Clause jurisprudence as well as equal protection jurisprudence.