Why the Court's church decision was a no-brainer

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The Trinity Lutheran case, in which the Supreme Court ruled that a Missouri policy excluding church-run preschools from a particular grant program was unconstitutional, has always seemed like an easy one to me. After all, what happened here sounds awfully un-American: a church was denied a government benefit simply because it's a church. I'm not sure why a state should subsidize private institutions' playground resurfacing -- the benefit at issue here -- but if it does, it has to make such funds available to all on equal terms.

One contentious issue that does loom on the horizon, however, is that of exemptions for religious businesses -- the opposite of inclusions for churches -- from public accommodations laws. Stay tuned next term, when the Court takes up the case of a bakery that declined on religious and free speech grounds to make a cake for a same-sex ceremony. Masterpiece Cakeshop will make Trinity Lutheran look like the justices' kumbaya moment.

Today's decision makes clear that Trinity Lutheran's playground improvement is no different than the government provision of police or fire protection to houses of worship and other religious institutions. And it's quite unlike taxpayer funding of religious instruction or the parade of horribles raised by Trinity Lutheran's opponents (which no longer include the State of Missouri, whose new administration changed its policy).

And indeed, as I predicted after argument, seven justices made short work of the case, finding that the state violated the First Amendment's Free Exercise Clause in taking its action based on purely religious status. Chief Justice John Roberts' majority opinion is a mere 15 pages long and the three concurrences were two, three, and two pages, respectively. It's telling that Justice Elena Kagan -- not exactly a stalwart right-winger -- joined the decision in full, and that Justice Breyer concurred in the judgment.

Further, Chief Justice Roberts' attempt, via a curious Footnote 3, to narrow the scope of his ruling to "express discrimination based on religious identity with respect to playground resurfacing," didn't command a majority. Justices Clarence Thomas and Neil Gorsuch took issue with the distinction between religious "status" and "use." And Justice Breyer, always a pragmatist, seems to have been concerned with "a general program designed to secure or to improve the health and safety of children."

The fate of Footnote 3 will thus turn on whether lower court judges like the Trinity Lutheran result or not. It's an opportunity for mischief that the Court will have to resolve in future.

Meanwhile, Justice Sonia Sotomayor, joined in her dissenting opinion only by Justice Ruth Bader Ginsburg, seems to think that the ruling dissolves the separation of church and state altogether. One can only hope that her admonition that 31 other states' restrictions against direct government funding of religion are now in jeopardy is true in the context of school choice. Coincidentally, even before the US Supreme Court released its Trinity Lutheran decision, the Georgia Supreme Court unanimously upheld that state's tax credit scholarship program despite a provision in that state's constitution that mirrors the Missouri one at issue.

The so-called Blaine amendments that have been used to stymie these programs were created in the late 19th century not simply to preserve church-state separation, but to harm religious minorities, especially Catholics. But the Supreme Court has rejected Establishment Clause challenges to both vouchers and tax credits; today's ruling doesn't change that.

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