Footnote Fight

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

You've got to love a Supreme Court decision in which six justices in the majority split 4 to 2 over a footnote.

That's right: In ruling that Missouri violated the Constitution by administering a grant program in a way that discriminated against a religious-affiliated entity, the dispute boiled down to whether the justices would fully join Chief Justice Roberts' lead opinion (three did) or would join the Roberts opinion "except as to Footnote 3" (as two others did). (Justice Breyer provided a seventh vote against Missouri, but went his own way in a concurring opinion only agreeing with the outcome.)

The opinion in *Trinity Lutheran Church v. Comer* – a very-high-profile case from the Supreme Court Term ending in late June – is a perfect example of three realities confronting any person wishing a nuanced understanding of Supreme Court decisions.

First, *Trinity Lutheran* shows that sophisticated Court watchers need to look beyond the vote counts. On the surface, seven justices ruled that Missouri could not validly deny state playground-improvement funds to an otherwise worthy religious-school applicant; religious freedom wins out over a state constitutional ban on taxpayer money going "directly or indirectly" to any religious institution.

But drill down further and the seven majority justices divide into three camps:

> *First, there is the Roberts 4. This group emphasized that Trinity Lutheran day school was being discriminated against because of its *status* as a religious institution, not because of the *use* to which the school planned to put public funds. This status-versus-use distinction is at the heart of Roberts' infamous Footnote 3, which states: "This case involves express discrimination based on religious identity. We do not address religious uses of funding or other forms of discrimination."
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> *By contrast, newest Justice Gorsuch and Justice Thomas formed a duo taking a more religion-protective stance. For Gorsuch and Thomas, the status-versus-use distinction of Chief Justice Roberts is unsustainable and irrelevant to the purpose behind the constitutional provision protecting the Free Exercise of Religion. The duo thought that religious institutions should have equal access to public funds unless public monies would support core religious practices -- such as equipping houses of worship or paying to train ministers.
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> *Justice Breyer took the narrowest position – that the Constitution protected equal access to *this kind* of public grant. Breyer warned in his separate concurrence that "public benefits come in many shapes and sizes," making a broad ruling unwise.

This split among justices on the same side points to a second, related difficulty -- figuring out just what precedent a new opinion sets. Is *Trinity Lutheran* the broad clarification protecting religious Free Exercise that many observers had expected (and even hoped for)? Does the latest decision protect any believer forced to choose between following their religious beliefs and qualifying for a government benefit? Is this so only when the discrimination is based on religious *status*? Or, as Justices Gorsuch and Thomas worried, will the holding be read as even more limited, protecting only "playground resurfacing" or "perhaps some other social good we find sufficiently worthy?"

Finally, *Trinity Lutheran* serves as a warning against oversimplifying Supreme Court opinions into fights between "liberal" and "conservative" justices. This tendency – which even tempts nationally known journalists and pundits – doesn't fully explain the alignment of justices joining Chief Justice Roberts. The judicial-restraint conservative Chief's opinion was joined by a more "conservative" justice (Alito), by the Court's swing voter (Kennedy) and by one of the Court's more "liberal" believers in separation of church and state (Kagan).

This – you'll pardon the pun – "unholy" alliance reflects something more than simple ideological voting. Which is refreshing for those of us who believe that justices should be something more than politicians who wear black robes!