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Trinity Lutheran v. Comer: Footnote 3, Gorsuch's Opinion and Scalia's Legacy of a Law of Rules

Tobias A. Mattei, MD*

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On June 26, 2017, the U.S Supreme Court announced its decision on *Trinity Lutheran Church of Columbia, INC. v. Comer, Director, Missouri Department of Natural Resources*.[1] Briefly summarizing, the case involved a claim by Trinity Lutheran Church regarding a denial of eligibility by the Department of Natural Resources for a Missouri State grant that would enable the installation of rubber-based surfaces made from recycled tires to the playground of the Child Learning Center operated by the Church. According to the plaintiff, such denial constituted a violation of the Free Exercise Clause of the First Amendment. The Supreme Court reversed the United States District Court for the Western District of Missouri as well as the Eighth Circuit ruling to dismiss the case, both of which had strongly based their decision on the precedent established by *Locke v. Davey*,[2] in which the Supreme Court upheld the Washington State decision not to fund degrees in devotional theology as part of a state-sponsored scholarship program.

In its final decision, the Supreme Court affirmed that the Missouri Department's policy did violate the rights of Trinity Lutheran under the Free Exercise Clause by denying the Church an otherwise general and publicly available benefit solely on account of its religious status. Justices Kennedy, Alito and Kagan joined

* Neurosurgeon at Eastern Maine Medical Center, Bangor/ME.

[1] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 US ___ (2017).

[2] Locke v. Davey, 540 U.S. 712 (2004).

the opinion in full. Justice Breyer filed a separate concurring opinion. Sotomayor and Ginsburg dissented. The other three Justices were involved in a classic judicial tango all around the controversial footnote 3, which reads: "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."[3]

Justice Roberts, who delivered the Court's opinion, concurred except as to footnote 3. The newly appointed Justice Gorsuch filed a separate opinion (in which he was joined by Justice Thomas) also concurring in part with the Court's judgment except for footnote 3. Justice Thomas filed a separate concurring opinion, in which he was joined by Justice Gorsuch.

Footnotes in U.S. Constitutional History

In addition to the grandeur of epic legal events, such as constitutional amendments, critical overrulings and even classical dissents, occasionally the center stage of American constitutional history is taken by surprise by players of supposedly minor significance, which in unpredictable and unexpected ways literally turn the judicial spectacle upside-down, leaving a decisive impact; those players are the footnotes.[4]

The classic example is footnote 4 of *United States v. Carolene Products*,[5] an ordinary and otherwise unimpressive ruling made illustrious only due to such a footnote. The case addressed the constitutionality of the Filled Milk Act, an eccentric law which reflected the socioeconomic struggles of a period in American history in which formal legislation was necessary to prevent the use of second-class milk products for primary consumption. Despite the unremarkable fate experienced by the Filled Milk Act as well as the questionable behavior it was

[3] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 US ___, n. 14 (2017).

[4] *See* David L. Hudson Jr., *Famous Footnotes' step up in important first amendment cases*, Newseum Institute (Apr 13, 2015), http://www.newseuminstitute.org/2015/04/13/famous-footnotes-step-up-in-important-first-amendment-cases/ (last visited Aug. 21, 2017).

[5] United States v. Carolene Products Company, 304 U.S. 144 (1938).

supposed to regulate, both of which wound up in the ditches of historical obliviousness, footnote 4 became forever immortalized in the canon of constitutional jurisprudence as the first instance in which the key concept of "levels of judicial scrutiny" was contemplated. Eventually, footnote 4 became the legal foundation for the application of strict scrutiny as the default standard of review in cases dealing with fundamental rights (in footnote four's original words: when "legislation appears on its face to be within a specific prohibition of the Constitution," or when it involves "prejudice against discrete and insular minorities"),[6] while reserving the rational basis test for economic legislation.

Additional examples of Supreme Court footnotes that acquired significant importance in constitutional jurisprudence, although none raise to the same level of the classic footnote 4 of *United States v. Carolene Products*, are: footnote 24 of *Virginia Pharmacy Bd. v. Virginia Consumer Council Inc*,[7] which established the distinction between commercial speech and other forms of noncommercial speech for purposes of First Amendment protection; footnote 34 of *Young v. American Mini Theatres*,[8] which first introduced the doctrine of "secondary effects" for justification of zoning restriction of adult businesses; footnote 19 of *New York Times Co. v. Sullivan*,[9] in which Justice Brennan, quoting the British utilitarian philosopher John Stuart Mill, defended that false speech may have some inherent value and, therefore, may be entitled to First Amendment protection; and footnote 15 of *First National Bank v. Bellotti*,[10] in which the Court affirmed that corporations have been considered persons within the meaning of the Fourteenth Amendment since the late nineteenth century.

Although it is still early to predict the ultimate impact of *Trinity Lutheran v. Comer*, it is possible that most future references

[6] United States v. Carolene Products Company, 304 U.S., n. 154 (1938).

[7] Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976).

[8] Young v. American Mini Theatres, 427 U.S. 50 (1976).

[9] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[10] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

to this decision may revolve around the pragmatic implications of what some may consider "the infamous footnote 3".

Scalia's Legacy of a Law of Rules

Although formally constituting a court of last resort, it is an undeniable fact that, due to its standard *modus operandi*, which includes the entirety of the bench deliberating for months on a single case, the U.S. Supreme Court may play a functional role which is quite different from those of the supreme courts of other countries. As a comparison, while the nine Justices who compose the U.S. Supreme Court hear roughly 70 cases out of the nearly 7,000 yearly petitions for writ of certiorari,[11] the Supreme Court of India, which may be composed at times by up to 31 judges, delivers approximately 1,000 judgments on the merit per year from the approximately 60,000 filled appeals and petitions, with the overwhelming majority of cases (approximately 87 percent) being decided by a two-judge bench.[12] As already stated by some legal scholars, for the vast majority of the cases in the U.S, the Courts of Appeals are actually the "de facto" sources of a final legal resolution.[13]

This brief comparative analysis should not per se elicit any premature value judgment regarding court efficiency, but may simply reflect a reality which has already been recognized and endorsed from time immemorial[14] — that the value of the U.S.

[11] *See* Elizabeth Slattery, *Overview of the Supreme Court's October 2016 Term*, The Heritage Foundation (Sep 20, 2016) http://www.heritage.org/courts/report/overview-the-supreme-courts-october-2016-term (last visited Aug. 21, 2017).

[12] *See* William H. J Hubbard, *Roundtable on Empirical Study of the Supreme Court of India: A Consultation with Experts*. With Aparna Chandra and Sital Kalantry. University of Chicago Center in Delhi (Jan 16, 2016).

[13] *See* Glenn Harlan Reynolds, *Looking Ahead: October Term 2016* in 2015-2016 Cato Supreme Court Review (2016).

[14] Likely since Marbury v. Madison, 5 U.S. 137 (1803), a case in which Justice Marshall was undeniably focused on his goal of establishing the general principle of judicial review by holding unconstitutional the Judiciary Act of 1789, rather than being deeply concerned about the specific question under analysis involving the writ of *mandamus* to hand over Marbury's commission.

Supreme Court lies much more in its normative role in determining how the constitution should be interpreted, therefore authoritatively shaping the corpus of constitutional law, than in its responsibility regarding error revision and lower courts' supervision. Therefore, although in every decision the U.S. Supreme Court Justices always have an objective factual scenario before them and oftentimes refuse to speculate about possible alternative settings,[15] it is of paramount importance to recognize that, in pragmatic terms, the importance of each decision far transcends the individual merits of the specific case under analysis insofar as such resolutions are expected to percolate throughout the whole national judicial system as binding authority. In order to properly achieve such an operational ideal, Supreme Court decisions would be expected to have the broadest possible degree of generalization while addressing a specific and unsettled issue in constitutional law.

As exposed by Justice Antonin Scalia in his lecture "The Rule of Law as a Law of Rules" delivered at Harvard University in 1989 and later published as an essay in The University of Chicago Law Review, in a common law environment, in which, unlike civil law systems, there is a substantial deference to legal precedents based on the classic principle of *stare decisis*, "when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself."[16] In such an environment, Scalia strongly defended a mode of legal analysis focused on broadly applicable principles that may lead to the establishment of general rules instead of interpretations myopically restricted to fact-specific content and which leave ample discretion for different decisions in future similar cases.

[15] The recent Supreme Court opinion in Ricky Henson, et al., Petitioners v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) illustrates its reluctance to speculate about alternative imaginary scenarios while interpreting the exact meaning of a specific law. In page 9, Justice Gorsuch, who delivered the opinion, pointedly states: "It is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."

[16] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175-81 (1989).

When adopted by the Supreme Court, this mode of analysis not only fosters uniformity across lower judicial levels but also increases predictability, two factors that have been widely acknowledged as crucial determinants of the general efficiency of a legal system. Following Scalia's envisaged system of a "law of rules", Justice Gorsuch stated in his opinion:

> "Of course the footnote [referring to footnote 3] is entirely correct, but I worry that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are 'governed by general principles, rather than ad hoc improvisations.' *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 25 (2004) (Rehnquist, C. J., concurring in judgment)."[17]

Conclusions

It seems obvious that the main reason why *Trinity Lutheran v. Comer* was granted a writ of certiorari by the Supreme Court was neither an overwhelming public interest on playground surfaces managed by religious institutions nor a deep national concern about the specifics of Missouri's policies on its scrap tire recycling program, but because it presented a *sui generis* opportunity for further clarification of the constitutional jurisprudence on the First Amendment Free Exercise Clause.

Historically, *Sherbert v. Verner*[18] established that a compelling government interest was required for the justification of any law that placed a substantial burden on religious activities. However, in *Employment Division v. Smith*,[19] Justice Scalia, writing for the majority, affirmed that laws that are neutral and of

[17] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 US ___ (2017) (Gorsuch J., concurring in part).

[18] Sherbert v. Verner, 374 U.S. 398 (1963).

[19] Employment Division v. Smith, 494 U.S. 872 (1990).

general applicability are presumptively constitutional regardless of their harmful effects on religion.

Recently, in *Locke v. Davey*,[20] the court stated that in some occasions, a balancing interest between Establishment and Free Exercise clause concerns may justify some types of discrimination against religious institutions, especially in grants involving public funds. However, even after *Locke v. Davey,* it was still unclear if such discrimination would be appropriate only in those cases in which public funds are directly employed for primarily religious purposes or if it would be up to the discretion of the legislation to decide on the appropriateness of excluding religious institutions from public grants regardless of the specific destination of the financial resources. It could be easily argued, for example, that even if public funds may not be directly employed for activities of indisputably religious nature, they could nonetheless still be considered as a special form of public subsidy to religion, as they would ultimately free other resources that may, on their turn, be used for religious goals.

Based on the overall layout of its decision, it was expected that *Trinity Lutheran v. Comer* would provide a final answer to such a question by consolidating the same criteria which had previously been applied to the Free Exercise clause in *Employment Division v Smith*,[21] establishing the same neutrality/generality paradigm to Establishment clause cases — that there is no violation of the Establishment clause when public financial support that is neutral and general in its scope ends up incidentally benefiting a religious institution, regardless of its possible secondary religious consequences.

Both constitutional law experts as well as lower courts had great expectations regarding the *Trinity Lutheran v. Comer* decision as there is still a non-negligible lack of clear guidance on how to properly exercise such "balance" between Free Exercise and Establishment clause concerns in specific situations.[22]

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[20] Locke v. Davey, 540 U.S. 712 (2004).

[21] A criterion which established that neutral laws of general applicability do not violate the Free Exercise Clause of the First Amendment.

[22] *See* Sean J. Young, *The Rise and Fall of the Centrality Concern in Free Exercise Jurisprudence*, Student Scholarship Papers, Paper 23 (2006), *available at* http://digitalcommons.law.yale.edu/student_papers/23. In page 15 (Section III) of this article, the author describes several instances in the past decades in

However, because of footnote 3 the eagerly anticipated decision in *Trinity Lutheran v. Comer* came out in a quite prosaic and humdrum fashion. Exclusively because of footnote 3 the Court did not reach a majority opinion and, therefore, the decision cannot be considered binding authority upon lower courts. Solely because of footnote 3, the outcome of any future legal case, no matter how similar to *Trinity Lutheran v. Comer* it may be, is still uncertain.

Unfortunately, the academic community cannot relish the sharp and vociferous opinion Justice Scalia would certainly have written deploring footnote 3. However, it can be safely stated that as his immediate bench substitute, in this case Justice Gorsuch employed commendable efforts to preserve Scalia's legacy of a "law of rules".

which, when analyzing Free Exercise cases, different circuit courts have undermined the centrality concern of Employment Division v. Smith while delineating their own standards, some of them even returning to Sherbert's (Sherbert v. Verner, 374 U.S. 398 (1963)) substantial burden requirement.