AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion

Trinity Lutheran Church v. Comer, __ U.S. __ (2017)

In 1875, the voters of the state of Missouri, like those of many other states, added a version of the Blaine Amendment to their state constitution. (The Blaine Amendment was a federal constitutional amendment proposed by Senator James Blaine that would have prohibited states from using public funds to support schools "under the control of any religious sect," i.e., the Catholic Church. The amendment did not receive enough votes in the Senate to be sent to the states for ratification.) That provision prohibits spending any public money "in aid of any church, sect or denomination of religion." Since the late 1990s, the Missouri Department of Natural Resources (DNS) has run a Scrap Tire Program as part of its effort to discourage illegal dumping of scrap tires. The program included a competitive grant, funded by a tax on the sale of new tires, to reimburse nonprofit organizations that purchase playground surfaces made from recycled tires. DNS adopted a policy that barred church-affiliated nonprofits from receiving grants.

In 1980, the Trinity Lutheran Church Child Learning Center was established with a preschool and daycare center in Boone County, Missouri. In 1985, the center merged with the Trinity Lutheran Church. The preschool admits students without regard to religion but operates on church property. In 2012, the center applied for a grant from the Scrap Tire Program to replace the gravel in their playground with a rubber surface. Their application was scored well enough to receive a grant, but DNS denied their application on the grounds that a grant would violate the Missouri constitution.

The church filed suit in federal district court against the director of DNS arguing that the policy violated the free exercise clause of the U.S. Constitution. Both the district court and a federal circuit court ruled in favor of the state, concluding that the state had discretion over whether to exclude church-affiliated nonprofits from its grant program. Just before the case was decided in the Supreme Court, Missouri announced that it would allow such nonprofits to apply for grants in the future, but the parties argued that the policy could be reinstated again in the future and might even be required by the state courts. In a 7–2 decision, the U.S. Supreme Court reversed the lower courts and held that the exclusionary policy violated the free exercise of religion. The dissenters argued that the federal establishment clause contained the same principle as Missouri's version of the Blaine Amendment.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels. *Locke v. Davey* (2004).

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." *Church of Lukumi Babalu Aye v. Hialeah* (1993). Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order."

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In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

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The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. This conclusion is unremarkable in light of our prior decisions.

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The Department attempts to get out from under the weight of our precedents by arguing that the free exercise question in this case is instead controlled by our decision in *Locke* v. *Davey*. It is not. In *Locke*, the State of Washington created a scholarship program to assist high-achieving students with the costs of postsecondary education. . . . Davey was selected for a scholarship but was denied the funds when he refused to certify that he would not use them toward a devotional degree. . . .

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Washington's restriction on the use of its scholarship funds was different. According to the Court, the State had "merely chosen not to fund a distinct category of instruction." 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.

. . . The claimant in *Locke* sought funding for an "essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit," and opposition to such funding "to support church leaders" lay at the historic core of the Religion Clauses. Here nothing of the sort can be said about a program to use recycled tires to resurface playgrounds.

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The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. 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.

Reversed.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

. . .

This Court's endorsement in *Locke* of even a "mil[d] kind," of discrimination against religion remains troubling. But because the Court today appropriately construes *Locke* narrowly, and because no party has asked us to reconsider it, I join nearly all of the Court's opinion. . . .

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

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[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). . . .

Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status). And this Court has long explained that government may not "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." Generally the government may not force people to choose between participation in a public program and their right to free exercise of religion. I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.

. . . But can it really matter whether the restriction in *Locke* was phrased in terms of use instead of status (for was it a student who wanted a vocational degree in religion? Or was it a religious student who wanted the necessary education for his chosen vocation?). If that case can be correct and distinguished, it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here.

. . . [T]he general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else.

JUSTICE BREYER, concurring.

I agree with much of what the Court says and with its result. But I find relevant, and would emphasize, the particular nature of the "public benefit" here at issue. . . .

The Court stated in *Everson v. Board of Education* (1947) that "cutting off church schools from" such "general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment." Here, the State would cut Trinity Lutheran off from participation in a general program designed to secure or to improve the health and safety of children. I see no significant difference. The fact that the program at issue ultimately funds only a limited number of projects cannot itself justify a religious distinction. Nor is there any administrative or other reason to treat church schools differently. The sole reason advanced that explains the difference is faith. And it is that last-mentioned fact that calls the Free Exercise Clause into play. We need not go further. Public benefits come in many shapes and sizes. I would leave the application of the Free Exercise Clause to other kinds of public benefits for another day.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The 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. Its decision 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.

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The Learning Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program." . . .

The Learning Center's facilities include a playground, the unlikely source of this dispute. The Church provides the playground and other "safe, clean, and attractive" facilities "in conjunction with an education program structured to allow a child to grow spiritually, physically, socially, and cognitively." . . .

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. *Walz v. Tax Commission of City of New York* (1970). . . . The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.

The government may not directly fund religious exercise. Put in doctrinal terms, such funding violates the Establishment Clause because it impermissibly "advanc[as] . . . religion."

Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. . . .

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. . . The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. 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. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution. . . . The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar.

. . . The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, "*not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious [worship], is at issue." *Zelman v. Simmons-Harris* (2002) (Breyer, J., dissenting).

. . . "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. It may instead "spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions" and spare the government "the direct confrontations and conflicts that follow in the train of those legal processes" associated with taxation. *Walz*. . . .

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders, those "who will preach their beliefs, teach their faith, and carry out their mission." . . .

When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so.

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Those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion. The civil government, they maintained, could claim no authority over religious belief. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. . . .

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In *Locke*, this Court expressed an understanding of, and respect for, this history. *Locke* involved a provision of the State of Washington's Constitution that, like Missouri's nearly identical Article I, §7, barred the use of public funds for houses of worship or ministers. Consistent with this denial of funds to ministers, the State's college scholarship program did not allow funds to be used for devotional theology degrees. When asked whether this violated the would-be minister's free exercise rights, the Court invoked the play in the joints principle and answered no. . . .

. . . A state can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. And so while not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." . . .

As was true in *Locke*, a prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree identical to that of the provision in *Locke*. Almost all of the States that ratified the Religion Clauses operated under this rule. Seven had placed this rule in their State Constitutions.[7] Three enforced it by statute or in practice. Only one had not yet embraced the rule. Today, thirty-eight States have a counterpart to Missouri's Article I, §7. The provisions, as a general matter, date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk."

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The Court takes two steps to avoid these precedents. First, it recasts *Locke* as a case about a restriction that prohibited the would-be minister from "us[ing] the funds to prepare for the ministry." A faithful reading of *Locke* gives it a broader reach. *Locke* stands for the reasonable proposition that the government may, but need not, choose not to fund certain religious entities (there, ministers) where doing so raises "historic and substantial" establishment and free exercise concerns. Second, it suggests that this case is different because it involves "discrimination" in the form of the denial of access to a possible benefit. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. . . . If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have, with good reason, rejected that idea, and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision.

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. The Court's desire to avoid what it views as discrimination is understandable. But in this context, the description is particularly inappropriate. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not

make the State "atheistic or antireligious." It means only that the State has "establishe[d] neither atheism nor religion as its official creed." . . .

. . . To fence out religious persons or entities from a truly generally available public benefit—one provided to all, no questions asked, such as police or fire protections—would violate the Free Exercise Clause. This explains why Missouri does not apply its constitutional provision in that manner. Nor has it done so here. The Scrap Tire Program offers not a generally available benefit but a selective benefit for a few recipients each year. In this context, the comparison to truly generally available benefits is inapt.

On top of all of this, the Court's application of its new rule here is mistaken. In concluding that Missouri's Article I, §7, cannot withstand strict scrutiny, the Court describes Missouri's interest as a mere "policy preference for skating as far as possible from religious establishment concerns." The constitutional provisions of thirty-nine States—all but invalidated today—the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.

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The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others—it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment. I dissent.